

To: Department of Treaties and Laws, Ministry of Commerce,
People's Republic of China

From: Center for Information on Security Trade Control (CISTEC)
Japan Business Federation (KEIDANREN)
The Japan Chamber of Commerce and Industry (JCCI)
Japan Machinery Center for Trade and Investment (JMC)
Japan Foreign Trade Council, Inc. (JFTC)
Japan Electronics and Information Technology Industries Association (JEITA)
Japan Business Machine and Information System Industries Association (JBMIA)
Japan Chemical Exporters and Importers Association (JCEIA)
Communications and Information Network Association of Japan (CIAJ)
Japan Chemical Industry Association (JCIA)

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**Joint Comments on the “Draft Export Control Regulations for Dual-Use Items”
based on China’s Export Control Law
(English Translation)**

Since 2017, industrial associations in the United States, Europe and Japan have submitted the following joint comments regarding China’s Export Control Law, namely with respect to the draft law released by the Chinese Ministry of Commerce and the first and second draft laws released by the Standing Committee of the National People’s Congress (NPC), from the perspective of mutual common interests in the areas of trade and investment between China and other countries.

©Joint Comments by Industrial Associations of the United States and Japan and of Europe and Japan on China’s Draft Export Control Law (Second Review Draft by the Standing Committee of the National People’s Congress) (August 2020)

https://www.cistec.or.jp/service/china_law/20200811-us-chinese.pdf

https://www.cistec.or.jp/service/china_law/20200811-eu-chinese.pdf

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https://www.cistec.or.jp/service/china_law/180309-01-e.pdf

In the above-mentioned joint comments, we have respectfully requested an opportunity to present our views on the subordinate regulations and other specifics of the Export Control Law. Thus, we appreciate your giving us this opportunity to submit our joint comments on the Draft Export Control Regulations for Dual-Use Items (herein referred to as the "Draft Regulations").

The concerns of the industrial sectors in the United States, Europe and Japan concerning China's Export Control Law are as we have expressed on repeated occasions in the above-mentioned joint comments. We wish to take this occasion to re-request your consideration particularly with regard to re-export control and deemed export control, which constitute our greatest concerns.

1. Re-export Control

Article 58 of the Draft Regulations stipulate that "...re-export...shall be enforced in accordance with the relevant provisions of the Export Control Law and these Regulations."

However, it is unclear where these "relevant provisions" concerning re-export can be found in the Export Control Law and Draft Regulations. From the beginning, we have noted that our greatest concern lies in whether or not the concept of "re-export" under China's Export Control Law falls within the same framework as the "re-export" defined by the U.S. Export Administration Regulations (EAR).

Re-export control is not a part of international export control regimes and, moreover, it represents "extraterritorial application by long-arm jurisdiction," which the Chinese government itself has strongly criticized. Furthermore, the Ministry of Commerce has enacted the "Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures" in January 2021. With the U.S. re-export control in mind, it imposes penalties in situations where transaction activities of Chinese firms are restricted by foreign laws and measures that violate international laws and the basic principles of international relations.

Within this context, we find it difficult to conceive that the Chinese government would put in place a system that closely resembles the very U.S. re-export control it has long criticized, within the framework of its Export Control Law.

Additionally, in the export control information website that was launched by the Ministry of Commerce in December 2021, a video verbally explain that “re-export’ should be understood as the exporting of controlled items that have already been exported, from one foreign country to another.” We are deeply concerned about whether this explanation means that China’s re-export control is basically equivalent to that of the U.S.

We ask for your understanding of our concerns as outlined above, and wish to re-request a clarification of what “re-export control” specifically means under China’s Export Control Law and Draft Regulations.

2. Deemed Export Control

With regard to deemed export control as well, the Draft Regulations merely provide the same definition as the Export Control Law, and the specific framework of the control system remains unclear.

In the export control information website launched by the Ministry of Commerce, a video verbally explains that “although the expression ‘deemed export’ is not found within China’s Export Control Law, ‘the act of providing controlled items to foreign organizations and individuals’ falls within the scope of ‘export,’ and goods, technologies and services are included among such controlled items.”

Internationally, it is generally understood “deemed export control” applies to only technologies and software. Therefore, if China’s Export Control Law also includes goods and services within the scope of “deemed export control,” China would have a system like no other.

Additionally, if receivers of “deemed exports” include board members and employees of foreign nationalities in a same company, as we have heretofore indicated, there is the concern that the system would impose large constraints on the daily operations of foreign companies in China. Furthermore, if the provision of goods and services within a company were to also be subject to control, it is almost impossible to envision what the flow of operations would be like, and our concerns would be amplified.

We ask for your understanding of our concerns as outlined above, and wish to re-request a clarification of what “deemed export control” specifically means under China’s Export Control Law and Draft Regulations.

3. Control List

Article 13 of the Draft Regulations stipulates that feedback shall be solicited by appropriate methods on formulating and adjusting the export-control list.

We assume preparations are presently being made toward formulating the list, but as we have requested thus far, we wish to once again request that the list comprise items that have been agreed on by international export control regimes.

The Draft Regulations also stipulate that “a control number will be assigned to each item on the list.” By all means, we request that this numbering system conform to the EU control number system that is the international de facto standard. Just as Hong Kong has adopted the EU system and now enjoys smooth international trade, we strongly wish to see China also adopt the same system.

4. Relationship between the Application of the Export Control Law and Draft Regulations on Network Data Security Management with regard to data transfers

Article 57 of the Draft Regulations stipulates that “Those who violate the relevant dual-use item export control management provisions of the Export Control Law and these Regulations, and harm national security and interests, in addition to being punished in accordance with the provisions of the Export Control Law and these Regulations, shall also be dealt with and punished in accordance with the provisions of relevant laws and administrative regulations.” With regard to this stipulation, we ask for a clarification specifically of what type of restrictions will be imposed pursuant to which laws and administrative regulations.

For instance, Article 2 of the Export Control Law provides that “controlled items include data such as technical information and other information related to such items,” and Article 25 of the Data Security Law that came into force last September stipulates that the export control of data related to export-controlled items “shall be implemented in accordance of law.”

Combining these two provisions, we have been of the understanding that data related to export-controlled items would be integrally managed by the Export Control Law.

However, in the “Regulations on Network Data Security Management (Draft for Feedback)” announced last November by the Cyberspace Administration of China (CAC) as a subordinate regulation of the Data Security Law, “important data,” the cross-border transfer of which would require CAC approval, is defined as including export-controlled

data and data such as of core technologies related to export-controlled items.

This raises the concern that exporters seeking to transfer data overseas will be burdened with double control, in which they must obtain license from two separate authorities in accordance with the Export Control Law and Data Security Law, respectively, for the same data.

With regard to this issue, we request that considerations be made to reduce exporters' burden through a coordination between the Ministry of Commerce and the Cyberspace Administration of China.

At the same time, we ask that Chinese domestic laws on data transfers be operated in consistency with the provisions for the "free cross-border transfer of data" that are set forth in the Regional Comprehensive Economic Partnership Agreement (RCEP).

5. Temporary Control

Article 14 of the Draft Regulations on temporary control distinguishes items according to whether or not their inclusion in the dual-use item export control list is appropriate. We ask for a clarification of what this distinction is based on.

We also request for clarifying what types of items would be subject to temporary control even if their inclusion in the dual-use item export control list is not appropriate, and in what kinds of situations they would be subject to temporary control.

We are inquiring about this, because the framework of the temporary control system appears to be separate from the common frameworks of international export control, such as list control, catch-all control and export bans, and it is thus difficult to envision what items would fall under the scope of temporary control.

For proper understanding of the Draft Regulations, we ask that you provide as specific examples as possible. Thank you.