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Opinion Brief Regarding China's Export Control Act (Draft)

Title: Opinion Submitted Regarding Export Control Act (publicly released draft)

Destination: Department of Treaty and Law, Ministry of Commerce

CISTEC Asia Export Control Laws and Regulations Study Group
Leader: S.Kushima

The Center for Information on Security Trade Controls (CISTEC) is a private Japanese organization founded in April 1989. CISTEC aims to contribute to the establishment and maintenance of international peace and security and to promote international harmonization of laws and regulations related to export controls.

We welcome having been given the opportunity to submit our opinion about the publicly released draft of the "Export Control Act (publicly released draft)" (hereafter, "the present bill") released by the Department of Treaty and Law, Ministry of Commerce, and present our opinions below.

With outbreaks of terrorism among other phenomena around the world, the importance of security export controls only continues to rise. We welcome this initiative by the government of the People's Republic of China (PRC) to establish a system for security export controls for global peace and stability, and as representatives of Japanese industrial circles intend to support and closely cooperate with this initiative.

We approve of the point raised in Article 8 of the present bill set down regarding "must be something that protects mutual agreement over safety and economic development." The PRC is playing a leading role in the development of the global economy. In order to protect mutual agreements regarding safety and economic development in international society, we believe mutual agreement about each country's export control systems to be important. We also believe that initiatives related to each country's export controls will become effective and efficient based on mutual agreements over export control systems.

Additionally, the present Export Control Act contains significant accommodations that can be regarded highly, including (1) inquiries to the National Export Control Department about the classification, (2) putting a premium on the Internal Compliance Program (ICP), and (3) efforts to mitigate punishments based on voluntary self-disclosure.

With these perspectives in mind, we present below our opinions, questions, and requests regarding the present bill.

1. General Statement

(1) Regarding Drawing Up a List of Controlled Items

The present bill has not set down a specific list of controlled items. The documents and procedures required for an export license application have also not been laid out. We imagine that these will be forthcoming from the relevant departments of the Chinese government, and we ask that when drafting the list of controlled items as well as the particulars of the present bill that you again solicit opinions as you are now from industrial circles in China and abroad and take those opinions into consideration.

(2) Regarding Consistency with International Rules

Chinese companies in rising numbers are active internationally, and their activities are being constantly watched. These companies as well as their foreign counterparts to date have abided by the export control systems of various nations as they have gone about their business. Most countries that have adopted an export control system use the control lists set down under the Wassenaar Arrangement (WA). Accordingly, most international corporations have experience with managing export items and technologies based on the WA. For this reason, we would like to see the control list based on the present bill brought into consistency with the WA control lists. We would also like to see them conform with the General Technology Note and Software Note that provide for cases that are exceptions to the controls under the WA.

In the event that the list of controlled items based on the present bill differs from the WA

control list, these corporations will be obliged to apply a second set of controls separate from the export controls based on the WA.

There are concerns that if a significant amount of worker-hours are imposed for handling controls based on the present bill, these corporations will have no choice but to search for production sites outside of China.

- (3) With regard to the required materials for license applications, if manufacturers and similar have certification documents that hand down decisions on the pertinent items then we would like having the submission of technical materials such as blueprints to be deemed unnecessary.

In cases where the exporter is not a manufacturer, when they are being screened for an export license there are concerns that when they receive a request for disclosure about a sensitive technology they will not be able to get technical materials from the manufacturer out of confidentiality concerns.

- (4) When screening is undertaken of export license applications for the retransfer of pertinent items that have been brought into China from a foreign country, we would like to see the screening done by the relevant Chinese authorities to be based on the submission of information about the licenses obtained from the original exporting country in place of a submission of technical materials.

Many advanced industrial products including telecommunications equipment are manufactured in China, and they are exported to many countries. Meanwhile, there are instances of the key devices and technologies needed to manufacture these products being imported from foreign countries. Among those are items that have been exported to China after having obtained an export license based on the export control laws of the export country of origin. It is possible that the technical information regarding these items falls within the purview of the export control laws of the export country of origin, and when a Chinese exporter applies to the Chinese government for an export license it would create the need for that exporter to once again obtain an export license in the export country of origin for purposes of information disclosure to the Chinese government. Procedures of this sort would require large amount of labor hours and time, and for this reason we would like the submission of technical materials to be made unnecessary by fact of having obtained an export license from the export country of origin.

Furthermore, to make these sorts of operations more manageable, we again ask that the control list based on the present bill brought into consistency with the WA.

- (5) As for those controlled items deemed to be less sensitive, we request that you adopt a limited-value exception system under which an export license would be unnecessary in cases where the value of the items falls under a certain amount of money.
- (6) We would like to see a returns exception system introduced under which obtaining an export license would be unnecessary when a pertinent controlled item imported from a foreign country is returned for repairs and similar purposes.
- (7) We would like to see an exception system introduced under which obtaining an export license would be unnecessary when the transactions of relevant controlled items and technologies are between a parent company and its subsidiaries.

2. Regarding Respective Articles

- (8) Regarding Article 3

Should we understand “foreign citizen” to mean a citizen living in a foreign country (i.e., country other than China)?

If this is meant to include persons of foreign nationalities who reside in China, then based on the definitions of Articles 2 and 3 the acts of selling, supplying, and transferring to foreign nationals within China any controlled goods and technologies are themselves subject to control. Controls of this sort would create an enormous burden for Chinese companies, and so we ask that it be revised to be a control directed toward citizens living in foreign countries. For example, the case of a Chinese company not engaged in exports that is subcontracted by a foreign company to manufacture goods that are subject to control and hands over ownership rights of those goods when manufacturing is complete (at “line-out”) to the foreign company that subcontracted the production would be subject to control under the present bill. For a Chinese company that does not normally engage in exports, having to understand these controls and file an export license application beforehand would create an enormous burden.

- (9) Regarding Article 9

These are issues that should be resolved individual in political talks. We have concerns that systematizing retaliatory enforcement of laws would invite further retaliatory acts. For this reason, we would like to see Article 9 expunged from the present bill.

- (10) Regarding Article 64

Regarding re-export controls, they would compel excessive control on companies around the world. Accordingly, we would like to see Article 64 expunged from the present bill. There are concerns that if re-export controls were introduced it would lead also to foreign companies avoiding the use of Chinese-made devices, modules, and technologies, and it would be create disadvantages for Chinese companies as well as foreign companies that have plants in China.

Furthermore, while the U.S. for example has re-export controls in place, we are also opposed to those and have urged that they do away with these controls. We ask the Chinese government to likewise shelve their introduction.