

Updates

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China's Draft of the Export Control Law

China is in the process of drafting a new comprehensive Export Control Law, following the June 2017 release of an initial draft for comment (Draft Export Control Law) by the Ministry of Commerce of the People's Republic of China (MOFCOM). The Export Control Law is already in the National People's Congress (NPC) 2019 legislative plan.

The Chinese government has regularly been criticized for failing to prevent Chinese entities from illegally exporting controlled technologies to developing countries. The discussion of the enactment of the Export Control Law is being considered in order to fulfill China's international obligations as a permanent member of the UN Security Council and as party to a number of international treaties that control trade in nuclear, biological, and conventional weapons. In addition, in the drafting notes, MOFCOM highlighted three reasons to enact the Export Control Law now:

1. The existing regulations have weaker legal authority as departmental regulations
2. The most recent export control regulation was promulgated a decade ago and has not been updated on a regular basis
3. The current system is unable to support enforcement actions in practice

Scope of the Draft Export Control Law

The Draft Export Control Law regulates the export of dual-use items, military products, nuclear materials and equipment and other goods, technologies, and services related to national security.^[1] Export activities that are subject to the Draft Export Control Law shall include transfer of controlled items (including from special zones under customs surveillance and bonded facilities under surveillance) from inside to outside of China, provision of controlled items to foreign individuals or entities (including those in Taiwan, Hong Kong, and Macao), re-export, and transit and transshipment of controlled items.

Export Control Lists and Licensing System Under the Draft Export Control Law

The export control system under the Draft Export Control Law includes implementation of relevant export control lists and a licensing system. There are mainly control lists for dual-use items and military products. The export control list for dual-use items refers to the *Catalogue of Import and Export Licenses for Dual-Use Items and Technologies* (Dual-use Items Export Catalogue) which includes nuclear items, nuclear dual-use items, biological dual-use items, monitored chemicals, relevant chemicals, missiles, precursor chemicals, partial dual-use items, and special civil-use items. The military products list refers to the *Export Control List for Military Products* with the inclusion of light weapons, launching equipment, explosives, military vehicles, engineering equipment, vessels, aircraft, electronics, training devices, rockets, missiles and satellites, propellant, protective devices against nuclear, biological and chemical weapons, and logistics equipment.

Licenses must be obtained for exporting the items on these lists. A license for the export of dual-use items requires the submission of such documents as the contract, technical instructions or test reports on the items to be exported, and an end-user/end-use certificate. Approval for export proposals and the contract must be obtained before exporting military products. Also, the licensing formalities shall be performed for the items that are not included in the export control lists if the exporter knows, should know, or receives notice from the

government that the export may endanger national security, involves the risk of proliferation, or could be used for terrorism purposes. The government may implement temporary control, not to exceed two years, on items not covered by the export control lists.

International Cooperation

The Draft Export Control Law authorizes competent Chinese government agencies responsible for export control to cooperate with counterparts in other countries/regions and international organizations in accordance with international treaties or principles of equality and mutual benefit.^[2] If the information to be provided to a foreign entity by a Chinese citizen or entity due to export control matters involves national security, a national security assessment shall be carried out in advance by such a Chinese citizen or entity. The draft law provides no details on the requirements for a "national security assessment", although further details may be outlined in forthcoming implementing regulations.

Other Obligations Under the Draft Export Control Law

Additional obligations are required of an exporter/importer under the Draft Export Control Law. Certificates of end users and end use issued by the government authority or military of the importing country may be required based on the sensitivity of the controlled items and the end users. Also, the exporter shall review the end users and end use when executing the export contract and shall report to relevant government authority once it discovers that the end user or end use has changed. The importer is required to make a commitment that it will not change the end use of the product or transfer the product to a third party rather than the original end users without permission from the export control authority. The export control authority may conduct a risk assessment on the end users and end use declared by the exporter and an on-site verification may be conducted as necessary.

Enforcement and Penalties

The Draft Export Control Law confers the right of enforcement and investigation on the export control authority. Specifically, the export control authority may do the following:

1. Enter the business premises for inspection
2. Make inquiries
3. Review and make copies of relevant documents
4. Inspect vehicles
5. Stop the loading of suspicious items
6. Order the return of illegal export items
7. Seal up or seize relevant suspicious items
8. Access or freeze bank account of the operator when making the investigation

The Draft Export Control Law also has a stringent penalty system. An exporter in violation of the Draft Export Control Law will look at fines from RMB30,000 to RMB500,000 and suspension or cancellation of the special export license. In addition, the penalty for an exporter and its responsible individual will be disclosed to the public via the National Enterprise Credit Information Publicity System as well as financial credit information databases. Any application for export license filed by such exporter within three years will not be accepted by the relevant authority. Foreign importers and end users who violate their end-user and end-use commitment with a potential harm on national security will be blacklisted. Relevant control measures, such as embargo and

cancellation of export licensing facilitating policies, will be implemented after the law is effective.

Comments and Concerns on the Draft Export Control Law

A number of parties, including various U.S. technology industries, commented on the Draft Export Control Law as initially released in late 2017, raising certain concerns about transparency, definitions and scope. Some of the prime concerns expressed include:

1. **Scope of Controls:** The proposed export control system should focus on only those items that have strategic significance to security interests. The proposed system should not attempt to restrict commercial mass market items that do not raise genuine security interests and that by volume or distribution are not susceptible to control.
2. **Notice and Transition:** Given that the development and imposition of a comprehensive export control system affects a wide range of industries and a large part of the Chinese economy, a lengthy, transparent and orderly transition with clear rules is essential.
3. **Definitions and Licensing:** Regulations implementing the new Export Control Law should be issued with sufficiently detailed definitions and instructions so that exporters are aware of the restrictions placed on various technologies and items. All definitions should be harmonized with international standards.
4. **Alignment with International Control Lists:** The draft's emphasis on "aligning with international rules" is important, as such alignment would provide a more predictable and standardized global approach to protecting national and international security. The new law and implementing regulations, to the greatest extent possible, should utilize internationally accepted practices, standards and metrics when creating technical thresholds and other detailed aspects of the proposed control system.

Whether and to what extent the final version of China's Export Control Law addresses these concerns remains to be seen.

ENDNOTES

[1] According to Article 3 of the Draft Export Control Law, "dual-use items" mean items with both civil and military applications, or with the potential to improve the military capacities, especially, the goods, technologies, services and items that may be used for the design, development, production or use of weapons of mass destruction.

[2] The Law of the People's Republic of China on International Criminal Judicial Assistance (ICJA Law), enacted on October 26, 2018, provides details on cooperation between the Chinese government and foreign governments on criminal enforcement matters. The ICJA Law defines "international criminal judicial assistance" means to obtain assistance and evidence in criminal matters outside of China, including service of documents; evidence collection; witness testimony; freezing, seizure, and confiscation of assets; and transfer of convicted persons. According to the ICJA Law, all such assistance in criminal proceedings should be routed through a "competent authority" (currently five agencies in China are so designated).

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