

The Export Practitioner

Timely News and Analysis of Export Regulations

MARCH
2016

VOLUME 30
NUMBER 3

In this issue

Lessons from
Japan's Export
Control System

ALSO INSIDE

Former Soldier
Pleads Guilty to
Illegal Exports

Pharma Firm
Settles China
Bribery Charges

Barclays Pays for
Violations of
Zimbabwe Rules

U.S. Will Return
to Wassenaar on
Cyber Products

Agencies Heed
Comments on
Night Vision

U.S., EU Release
Privacy Shield Text

State Defends
Stance on
Gun Blueprints



The Export Practitioner

March 2016
Volume 30
Number 3

Publisher
Martin Kalin

Managing Editor
Meredith Gilston

Associate Editor
Melissa Apter

Editor, Japanese Edition
Megumi Senda

The Export Practitioner
is published monthly by
Gilston-Kalin Communications, LLC
P.O. Box 5325,
Rockville, MD 20848-5325

Editorial
(301) 460-3060

Circulation
(301) 460-3060
FAX: (301) 460-3086

WWW.EXPORTPRAC.COM

AT A GLANCE

4 | FEATURE

Companies and government officials in the U.S. and elsewhere could learn valuable lessons from Japan's export control system, especially its internal compliance program (ICP) approach, Jason Prince and Steven Pelak write.

DEPARTMENTS

7 | FOCUS ON ENFORCEMENT

- Former Soldier Pleads Guilty to Illegal Night-Vision Exports
- Halliburton Subsidiaries Settle OFAC Cuba Charges
- Qualcomm Pays \$7.5 Million to Settle SEC Bribery Charges
- Barclays Pays \$2.5 Million to Settle Zimbabwe Sanctions
- N.C. Man Indicted for Attempted Gun Exports
- Another Pharmaceutical Firm Settles SEC Bribery Charges
- French Firm Settles OFAC Cuba Sanction Charges
- Popcorn Maker Gets Probation for Export-Import Bank Fraud
- Software Firm Pays \$28 Million to Settle Bribery Charges
- Middle East Subsidiary Gets Slap on Wrist from OFAC
- Airline CEO Settles Charges of Bribery in Union Dispute
- Dutch Telecom Firm Settles Charges of Uzbek Bribery
- Expat Businessman Pleads Guilty to Defrauding Ex-Im

14 | EXPORT CONTROLS

- House Committee Blasts Administration on Gun Transfers
- U.S. Will Renegotiate Wassenaar Cyber Controls
- BIS to Require Offset Reports for 600 Series
- Agencies Propose More Changes to Aircraft Controls
- BIS, DDTC Heed Comments on Night-Vision Transfers
- Proposed FY2017 Budget Gives BIS Increase

20 | TRADE SANCTIONS

- Treasury, State Officials Grilled on Iran Sanctions
- Verification of Iran Deal Could Pose Challenges, GAO Says
- Cuba Will Get Presidential Visit, Tractors, Scheduled Flights
- WIPO Whistleblowers Describe Illegal Technology Transfers

24 | POLICY BRIEFS

- State Defends Stance on Gun Blueprints Appeal
- U.S., EU Release Privacy Shield Framework, Texts

END NOTES: Entity List, North Korea, Trade People

Lessons from Japan's Approach to Export Controls

By Jason E. Prince and Steven W. Pelak*

Although Japan's pacifist Constitution limits the Japanese Self-Defense Force's ability to engage in military intervention abroad, Japan has long played a leadership role in another area of international peace and security: export controls. For nearly three decades, the Japanese government has focused on developing one of the Asia-Pacific's most robust legal systems for preventing foreign nations and terrorist organizations from obtaining military and dual-use items and technology.

Demonstrating Japan's current leadership role in the export control arena, the Japanese Ministry of Economy, Trade and Industry (METI), the Japanese Ministry of Foreign Affairs (MOFA), and the Tokyo-based Center for Information on Security Trade Control (CISTEC) co-hosted the 23rd Asian Export Control Seminar in Tokyo Feb. 23-25, 2016.

Participants in this invitation-only event included more than 120 representatives from roughly 20 Asian countries and administrative regions (including China, South Korea and Taiwan), the U.S., the European Union, Australia, Turkey, United Arab Emirates, Mexico, the Wassenaar Arrangement, the United Nations (UN) Security Council 1540 Committee, and the World Customs Organization. Most of the seminar participants were high-ranking government officials within their countries' respective export control agencies.

Due to North Korea's January 2016 nuclear bomb test and February 2016 long-range rocket test, this year's Asian Export Control Seminar assumed a heightened sense of urgency. Indeed, several speakers and panelists pointed to North Korea's activities as a principal reason why Asian and other countries must redouble their collective efforts to safeguard military and dual-use hardware and technology.

For example, three members of the Panel of Experts established pursuant to Resolution 1874—a 2009 UN Security Council resolution that imposed certain sanctions on North Korea—presented on the elaborate global web of intermediaries, shell companies, falsified cargo manifest documents, aliases and transshipments the North Koreans have recently used to obtain unmanned aerial vehicle components, missile transport vehicles, and weapons of mass destruction (WMD).

This article provides an overview of Japan's export control system and its role in ensuring peace and security in the Asia Pacific region. In particular, this article focuses on Japan's internal compliance program (ICP) approach to export controls, which incentivizes exporters to establish and register with METI an ICP that satisfies specified criteria. This article concludes by suggesting some lessons companies and government officials in the U.S. and elsewhere may learn from Japan's ICP approach.

Japan's internal compliance program (ICP) approach... incentivizes exporters

Overview of Japan's Export Control System

While under the Allied Occupation in 1949, the Japanese government enacted the Foreign Exchange and Foreign Trade Control Act, which essentially still serves as the country's primary export control law. At that time, Japan also formed METI, which continues to administer Japan's export control system. Three years later, in 1952, Japan joined the Coordination Committee for Multilateral Export Controls (COCOM), an organization through which the United States and other Western-bloc countries sought to maintain their military edge over the Soviet Union.

However, export controls did not become a major focus for the Japanese government until 1987. That was the year in which the U.S. revealed a Japanese company, Toshiba Machinery, and a Norwegian company, Kongsberg Vaapenfabrikk, had exported milling machines and numerical-control computers and software to the Soviet Union between 1982 and 1984. These illegal exports, which enabled the Soviet Union to manufacture quieter submarine propellers which were difficult to detect, provoked public outrage in the U.S. and in other allied nations.

In response to what is known in Japan as the "Toshiba Machinery Incident," the Japanese government enacted sweeping amendments to the Foreign Exchange and Foreign Trade Control Act in 1987. Among other things, these amendments significantly increased the penalties and fines for violating the Act's export control provisions and also called for Japanese companies to create ICPs that satisfied

certain criteria.

Two years later, in 1989, Japan's government and industry collaborated to found CISTEC, a nonprofit, non-governmental research and analysis organization geared toward serving as a bridge between government, industry and academia in the area of export controls.

Over time, Japan has developed a complicated export control regime that involves not only the Foreign Exchange and Foreign Trade Control Act, but also a complex web of cabinet orders and ministerial ordinances, notifications, and guidance.

Japan is currently a member of all of the existing international export control regimes. As a result, the fundamental components of Japan's export control system are similar to those of the United States and many other countries, consisting of export classification numbers, control lists, licenses, license exemptions, brokering controls, transshipment controls, special controls for countries of serious concern (currently Iran, North Korea and Russia), and penalties and fines for noncompliance.

One of the more noteworthy recent developments in Japanese export controls took place in April 2014 when the cabinet of Prime Minister Shinzo Abe repealed the "Three Principles on Arms Export and Their Related Policy Guidelines." These former guidelines, adopted in 1967 and supplemented in 1976, essentially prohibited Japanese companies' export of defense equipment and technology—even to Japan's allies.

Seeking primarily to counter China and North Korea's growing military presence in the Asia-Pacific region, the Abe Cabinet has eased certain post-World War II restrictions on Japan's military involvement. Accordingly, under the Abe Cabinet's new "Three Principles on Transfer of Defense Equipment and Technology," Japanese companies may now export defense equipment and technology in 11 specified cases that will contribute to global peace and serve Japan's security interests.

Japanese Internal Compliance Programs

As mentioned above, one of the cornerstones of Japan's post-1987 export control system is its emphasis on companies' implementation of internal compliance programs or ICPs. Technically, Japanese law merely encourages companies to adopt written ICPs and submit them to METI for review.

However, written ICPs became closer to mandatory when METI's new "Export Compliance Standard" took effect in April 2010. Under this Standard, each exporter of controlled goods or technology—including individuals, companies and universities—is legally obligated to establish a compliance system that includes at least the following elements:

Organization: An organizational structure that addresses export control, with clearly defined roles and responsibilities and the designation of a specific person who is ultimately responsible for ensuring compliance.

Procedures: Procedures that address the classification of items, transaction screening (e.g., end-user and end-use verification), and shipment controls (e.g., confirmation that goods match their shipping documents).

Monitoring: Ongoing export control compliance monitoring through internal audits, training of relevant personnel, appropriate recordkeeping, the prompt reporting of violations

to METI, and the adoption of remedial measures.

The elements of the Export Compliance Standard closely resemble the elements Japanese law has long encouraged exporters to include in their written ICPs. Thus, an exporter's best means to ensure compliance with the mandatory Export Compliance Standard is typically to submit a written ICP to METI for review.

If the written ICP is satisfactory, METI will register it. Exporters with registered ICPs may then choose to allow METI to publish their names on METI's website, such that the public knows their ICP has received METI's stamp of approval. According to CISTEC, METI has thus far registered roughly 1,500 ICPs, and approximately 600 companies have chosen to publish their names on METI's website.

Each year, METI also issues a compliance checklist to all exporters that have registered an ICP. Exporters answer the approximately 40 questions in the checklist to assess their ongoing compliance and then return the completed checklist to METI.

Notably, only exporters that have registered their ICP and submitted their completed annual compliance checklist to METI are eligible for "special bulk licenses" that allow multiple exports of controlled items in a streamlined fashion. In other words, METI provides exporters with an added business incentive to develop and maintain a robust ICP.

METI works closely with CISTEC to ensure each Japanese exporter has the tools and information necessary to create a tailor-made ICP. For example, CISTEC has posted on its website six different model ICPs that take into account the

Japanese companies may now export defense equipment and technology in 11 specified cases

various types of exporters (e.g., manufacturers, trading companies), enabling each exporter to select a model that best fits its organizational structure and risk profile. Moreover, Japan's recent Asian Export Control Seminar—which METI and CISTEC co-hosted—devoted an entire panel discussion to highlighting the key components and benefits of ICPs.

Considerations Arising from Japan's ICP Approach

Although it may not make sense to incorporate Japan's ICP system into the export control regimes of every country, Japan's approach provides a useful vehicle for exporters, regulators, and policy makers in the United States and elsewhere to reflect on certain key components of export controls. For example, Japan's ICP system offers at least three key considerations or lessons:

1. All exporters would be well-advised to study the basic export control compliance program elements Japan prescribes in its ICP laws and its Export Compliance Standard. These basic elements—which cover key aspects of organizational structure, control procedures and monitoring—serve as a solid starting point for the development of a compliance program that will withstand scrutiny under nearly any country's export control regime.
2. In the U.S. and certain other countries, regulators and enforcement officials typically review and provide feedback on a company's export control program only after the company has potentially violated the law and is the target of an enforcement action. At that point, the damage to national security may have already occurred.

In contrast, under Japanese law, METI can readily provide companies with such review and feedback before a violation occurs, when companies still have the chance to adjust their compliance programs in a way that might prevent certain types of violations. Moreover, by working closely with CISTEC, METI has helped to shape the six different compliance program templates CISTEC makes available to Japanese companies on its website.

Whether through a formal ICP system like Japan's or other more informal mechanisms, companies and ex-

port control regulators stand to benefit from communicating with each other about compliance program best practices in contexts other than enforcement actions or consent agreements.

3. Under any export control regime, companies have an obvious incentive to implement robust, tailor-made compliance programs. Indeed, such a compliance program is one of the most important tools for avoiding violations and the penalties, jail time and reputational damage that potentially follow.

METI can provide companies with review and feedback before a violation occurs

Yet, Japan demonstrates that export control regimes can also use such tools as streamlined licensing procedures or positive recognition on a regulator's website to incentivize companies to establish and maintain a healthy compliance program. The publica-

tion of companies' names on the regulator's website also provides a deterrence to procurement agents of adversary nations. Policy makers in the United States and elsewhere, with appropriate input from industry, should explore these sorts of positive incentives when seeking to reform existing export control laws rather than devoting inordinate time and expense to frequent revisions to control lists.

As explained above, Japan has devoted the past three decades to bolstering its own export control program and engaging in outreach to its Asia-Pacific neighbors to help them do the same. Amid growing tensions in the Asia-Pacific region fueled in part by North Korea's recent provocations, there has perhaps never been a better time to examine the state of export controls in Asia and to learn what countries like Japan are doing to keep military and dual-use items and technology out of the wrong hands.

* Jason Prince (jeprince@hollandhart.com) and Steven Pelak (swpelak@hollandhart.com) are partners in Holland & Hart LLP's International Trade Compliance Group. Mr. Prince previously served as Deputy Press Secretary to Nobuteru Ishihara, Japan's current Economy Minister, and he also attended the Japanese government's 23rd Asian Export Control Seminar as an invited observer. Mr. Pelak served as the U.S. Department of Justice's first National Coordinator of Export Control/Embargo Enforcement from 2007 until 2013.