Attn. Ministry of Commerce, People's Republic of China

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Joint Comments by Industrial Associations of the United States, Europe and Japan on China's Export Control Law Draft

As industrial associations of the United States, Europe and Japan, and their member companies, we greatly welcome China's work to develop an export control law system from the viewpoint of seeking to fulfill international obligations under international cooperation. We applaud the Government's decision to establish a legal foundation for the administration of export controls, not only to ensure that they can be strengthened, but also to give confidence to industry that the export control regulations and related measures will be predictably administered in accordance with this legal foundation and consistently applied on a national basis.

Companies in the United States, Europe and Japan have greatly expanded trade and investment in China under the Chinese economic development policy of utilizing foreign capital and promoting foreign trade for many years. China will continue to aim for further development under international cooperation, and industries from other countries including the United States, Europe and Japan also intend to further strengthen trade and investment activities with China.

We also believe that the roles of foreign companies and foreigners will continue to be significant for the development of products and technologies in the high-tech sector listed in the national plan such as "China Manufacturing 2025," and for the investment in China and the trade with China.

In that context, the current China's Export Control Law Draft has raised some concerns in terms of the following points and we hope that the China's Export Control Law Draft may be further developed to address such concerns.

1. Consistency with international trade rules administered by the World Trade Organization (WTO) and multilateral export control regimes (e.g. The Wassenaar Arrangement)
2. The unclear differentiation between "dual-use" items and conventional arms and munitions which has the possibility of inhibiting trade and investment commercial mass-market products and technology.
3. Significant impact on a large number of corporate activities in a wide range of industries.
4. Implementation that promotes cooperation with private industry to work together to achieve common objectives and does not put at risk protections for confidential business information and that assures ongoing input and comments

and sufficient time periods for enactment.

We understand that various industrial associations of the United States, Europe and Japan have submitted their own comments so far. In this case, we have decided to submit these joint comments regarding especially important and common concerns on the basis of discussions in a cross-sector manner, and thereby ask for your consideration to address these concerns.

We would like to express our opinions below from the viewpoint of common interest to further promote trade and investment between China and other countries.

1. Necessity of systems and operations in accordance with WTO and international export control regimes

In terms of export control policy and regulations, the principal purpose of these controls has been centered on the non-proliferation of arms and dual-use goods and technologies. Thus, bolstering international and domestic peace and security, and from these common objectives, many countries have developed export control regimes that conform to the international export control regimes, such as the Wassenaar Arrangement, Missile Technology Control Regime (MTCR), and Australia Group. However, the following points which are articulated in the draft Export Control Law of the People's Republic of China are considered as diverging and inconsistent from the underlying purpose of multilateral export controls. There is also concern that discrepancies may arise in relation to international trade rules administered by the WTO, which are focused on the multilateral trading system. We would like to ask for discreet consultation on a government basis to prevent parties from being dissuaded to pursue further trade and investment.

(1) "International Competitiveness," "Supply to International Markets" and "Equal Principles"

The following points are considered to be elements in industrial promotion and trade policy, which are inconsistent with the objectives of multi-lateral export control regimes. As a result, we recommend the deletion of all references to export controls which are administered for economic and competition policy interests, the areas of the draft law include:

(i) Export Control restrictions and licensing requirements which take into account factors such as "impact on competitiveness of trade and industry",

"supply in international market", and "development of technology." Rather, processes should focus on "national security" and "international obligation" for the formulation of controlled items list (Article 16, 18, and 22)

(ii)The provision of "Equality Principles" that establishes appropriate measures for countries that have implemented discriminatory export restrictions on China (Article 9).

(2) Scope of Application, Including "Protection of Important Strategic Rare Materials"

Properly developed and administered export control system only focus on those items that have strategic significance to national and international security interest. Globally, a very small fraction of goods and technology are subject to export control because the commercial mass market dwarfs the goods and technology with significant, strategic security interests. The proposed system should not attempt to restrict commercial mass market items that by volume or distribution are not susceptible to control. Export controls should not be imposed in the face of foreign availability or capability except for those items with the most strategic significance to security interests.

In addition, from the discussion in the Draft explanation regarding the need for drafting this law, we fully understand and welcome the items that came up in putting together the export control system such as protecting national security, strengthening investigative authority, implementing international obligations, and strengthening international cooperation.

However, with respect to protecting important strategic rare materials, there are no other examples of subject materials in security export controls. Furthermore, even a research report from the Chinese Academy of International Trade and Economic Cooperation (CAITEC) written during the process speaks of the need to include rare materials in security export control regulations as a means of coping with the issue of international litigation. From here, we get the impression that the draft utilizes the export control law on security to justify the rare mineral resource export restrictions.

From such a viewpoint, if rare materials such as rare earth, rare metals and the like are to be comprehensively controlled as regulated goods, we have serious concerns that it may cause the disorder that occurred several years ago in relation to the WTO.

2. Reexamination of Systems That Could Become Major Hindrances to the Trade and Investment Environment

While it is necessary to develop an export control system, it is also important to improve the environment to further promote trade and investment. Corporate activities are being developed globally, and China also has a large share of its activity base. The proposed system should not attempt to restrict commercial mass market items and technology that by volume or distribution are not susceptible to control. Under such circumstances, if systems and operations in China were to differ from those that are internationally common, the burden for handling such inconsistent systems becomes burdensome.

In principle, it is expected that export controls will operate under a common system, based on agreement in the international export control regime such as the Wassenaar Arrangement for dual-use items. We appreciate the commitment to "carry out export control cooperation" with other countries. (Article 10). From such a point of viewpoint, we are concerned that the Chinese Export Control Law Draft may create disadvantage for foreign companies operating in China, which could greatly impede China's trade and investment environment. Similarly, language in Article 9 focusing on principles of reciprocity or retaliation rather than cooperation and common non-proliferation and global security objectives, is very concerning as export control decisions based upon reciprocity would be contrary to WTO principles and inappropriate for an export control regime based on security interests.

In this respect, we also have concern with the unclear definition and regulatory scope of re-export controls and deemed export controls contained within the Chinese Export Control Law Draft. While these controls are not administered at the multilateral level, there are domestic export control regimes around the world which administer controls in these areas. We recommend that controls in these areas be developed and implemented in a manner which is consistent to international best practices and procedures as to not negatively impact global value chains which rely on imports and exports of commodities and technology from all over the world, including international employee resources.

(1) Reexamination of reexport regulation

Article 64 stipulates the following 2 types of reexport controls: (i) reexport controls from a non-Chinese country of items of Chinese origin; and (ii) reexport controls from a

non-Chinese country of items containing Chinese-origin content where the value percentage of the Chinese contents exceeds certain levels.

Concerns with this provision include:

(i) Reexport controls have extra-territorial effects, which should be eliminated or highly limited. If any extra-territorial application is considered, licensing should be considered.
(ii) As mentioned above, reexport controls are not best practices among international export control regimes.
(iii) If the export destination from China is already implementing effective export restrictions by participating in the international regime, the Chinese government should not need to establish and implement reexport controls.

These significant side effects and disadvantages could also cause adverse impact to the China based global value chain to China

In addition to the above, reexport controls would have significant side effects and disadvantages that could cause great damage to China. If the Chinese government's permission is required when re-exporting from the importing country (a) products imported from China or (b) products using more than a certain percentage of parts imported from China, the use of Chinese products would be associated with a tremendous compliance burden and risks. These would create a strong incentive in industrial sectors in foreign countries to avoid using them for the following reasons.

(i) Difficulty in guaranteeing effectiveness

Calculations based on complex formulas will impose tremendous compliance burdens and difficulty, specifically in determining “origin” for intangible commodities. Furthermore, it would be difficult for the relevant parties to determine whether a product that has been supplied through a global and diverse of supply chains as being Chines in “origin”, thus subject to reexport controls.,

(ii) Possibility of avoidance of procuring from China due to increase of compliance burdens and legal risks

If the reexport controls would be implemented, the compliance burden on the importer side and the legal risks would increase. This would create a risk that

multinational companies would seek suppliers and investors outside China to avoid such burdens and risks. We urge that consultation with industry occurs if re-export controls are being considered.

(2) Reexamination of deemed export controls

Article 3 stipulates deemed export controls. Namely, it regulates the supply of commodities, technologies, and services to foreign national persons (i.e., persons of non-Chinese nationality) within China and, if the commodities, technologies, or services would be controlled, a license would be required.

Such deemed export controls would raise concerns that they might impose tremendous constraints on the activities of foreign affiliated companies in China.

Furthermore, Article 3 seems to regulate internal dealings with foreign national employees within a company. If so, it would produce a great deal of concern that the technical briefings/discussions/consultation/e-mail transmission that take place a regular basis with foreign executives and employees who have been dispatched from overseas headquarters/offices could not be undertaken smoothly, along with activities such as accessing an in-house database.

In the Chinese Export Control Law Draft, it is not clear whether the supply to foreign origin companies within China would be subject to deemed export controls. In the United States, Europe and Japan, because foreign origin companies in their own countries are regarded as domestic companies, there are no restrictions for such supply to foreign origin companies within their own countries. If the supply of commodities, technologies or services to foreign origin companies within China would be subject to deemed export controls, it would cause a tremendous impediment to overall business in China. Therefore, we think it necessary to clarify the draft export control law does not have such a restriction.

Based on the above, we respectfully request that revisions to Article 3 be considered along the following lines and that the Government engage in further consultation with industry.

(i) We recommend China not develop nor implement a deemed export regulation. In case a deemed export controls rule is considered, the regulation should apply only in limited circumstances to foreign nationals who are not full-time employees of the organization, institution, or company transferring the technology (e.g., foreign

students, contractors, non-affiliated researchers, etc.).

(ii) Deemed export controls should apply only in case of supplying technologies and software source code with the technology and software specifically enumerated in an internationally consistent export control list (e.g., following the ECCN nomenclature of the Wassenaar Arrangement).

(iii) It is necessary to develop comprehensive license systems and license exceptions which cover all technology and software subject to the export control regulation so that deemed export controls would not unduly impair normal corporate activities, research activities, etc. For example, encrypted transfers of controlled technology for the purpose of data storage ("cloud" computing") should be excluded as should encrypted transfers of controlled technology to employees of the same company located in other countries. Similarly, it is important to permit a *de minimis* content level for foreign products containing Chinese regulated items.

(3) Formulating a Controlled Items List Conforming to International Export Control Regimes

In the Draft explanation, executing international obligations and international cooperation were identified as the aims that form its central pillar. A tremendous burden is created when the items and technologies subject to controls differ from those of international regimes (e.g., Wassenaar Arrangement Control Lists[1]). The Draft explanation states that it seeks to promote links with international statutes and strengthen international cooperation. Accordingly, we respectfully request that the list of controlled items related to conventional arms be brought into conformance with the control list established under the Wassenaar Arrangement (WA).

(4) Curbing Unreasonable Demands for Technological Disclosure in Export Inspections

While large numbers of advanced industrial products such as information technology and telecommunications devices are manufactured in and exported from China, there are more than a few instances of commercial devices and technologies that are imported to China from foreign countries. They also include products that are exported to China after they have already in compliance with the export control laws of an exporting country. If China's export control authorities were to demand technological disclosure, such as source code, design and development technology of commercial

[1] http://www.wassenaar.org/control-lists/

devices and technologies that have already been properly classified and approved for export once, it would be unreasonable from the perspective of implementing regulations that conform to international export control regimes. The industrial sector would no longer be able to procure in a timely manner commercial mass-market devices and technologies from foreign countries. As a result, it would make it difficult to export cutting-edge industrial products from China. Therefore, we would suggest that the submission of technical materials is made unnecessary by fact of having obtained an export license or if the export is otherwise in compliance with the export control regulations of the exporting country.

(5) Reexamination of Methods and Conditions for On-site Investigations Regarding End Users and Uses

Article 28 of the Draft stipulates on-site verification of an item's end users and uses after it has been exported. We understand the need for follow up depending on the case regarding how it is being used after export. However, we recommend that this provision be narrowed in scope (e.g. only applicable for item exported under a military license) or moved to the military section of the proposed rule.

In addition, stipulating the power to conduct on-site inspections in the export destination by law would give that Law the character of an extraterritorial application . Under the international export control regimes and international agreements, the end-user inspection method is generally limited to particularly sensitive items for which there are concerns of being diverted for use related to WMDs. When obtaining an export license, an end user generally has to file a report in the form of a promissory letter on end use that lays out how an item is being used, and when re-exporting the item under the license, they usually need to request approval from the export control authorities. Even when on-site verifications are required, we understand they are done in cooperation with the government of the country where the end user is located and using a method that strikes a balance with the requirements of international law. We recommend publishing onsite inspection operation details.

From that perspective, we believe careful reexamination is necessary with respect to the methods and conditions for end-user investigations.

3. Need for sufficient consideration for smooth implementation

(1) Adequate publicity regarding work of drafting legislation and insuring opportunities

for exchange of views with domestic and foreign industrial sectors

Dual use commodities and technologies related to conventional arms are very different from those related to weapons of mass destruction (WMDs), and an extremely far-reaching range of civil use products and technologies will become regulated. Aside from the fact that these include numerous products produced and exported by domestic and foreign companies operating in China, it could also target products and the like including those in new technological domains in which start-up companies are planning to conduct research and development, manufacturing, and export activities in China.

Furthermore, in the event that work goes forward on crafting and enacting this legislation without ensuring the concerned parties fully understand and are prepared for the possibilities that this state of affairs may produce, it is likely that widespread confusion could arise in the industrial sector across all industries.

For these reasons, we request that information be released once again about the existence of the Public Draft and its contents, and that opportunities be guaranteed for a broad and continued exchange of comments. Furthermore, we also request that meetings and venues be arranged for receiving an explanation of the plans and enforcement methods for the Draft including its intent, its content, the formulation of its detailed rules and guidelines, its enforcement, and plans for putting it into practice.

(2) Securing an Adequate Extension after Detailed Information Made Available and Stepwise Implementation of Regulations

Regarding regulations, the industrial sectors involved cannot make preparations without not only the law itself but also the details of how it will operate being made clear.

Once these points are clarified, the industrial sectors can study the impact on their supply chains related to China and take the necessary steps to comply. In particular, the regulations regarding dual use items related to conventional arms target a wide range of products and technologies. Companies that have actually advanced into China still comprise an enormous group and range in size from major concerns to SMEs. Furthermore, they have supply chains that are spread out all through China and elsewhere in the world.

For example, even an SME that manufactures components in Japan and supplies

them to a Japanese product manufacturing company may not fully understand Japan's export regulations. In order to achieve an understanding of the regulations' content that includes these companies and ensures they take appropriate measures, we believe that in some cases the preparations will require an appreciable amount of time in units of years. Given this reality, we request that an adequate grace period be guaranteed after the details have been settled, and also request that consideration be given to introducing these regulations in a stepwise fashion rather than all at once.

(3) Promoting Implementation that Encourages and Builds on Internal Compliance Mechanisms

As the law and processes for implementation are further developed, we also recommend that the export control system seek to incentivize the development of internal control systems, through licensing procedures and license exceptions which can be broadly applied to minimize licensing transactions, especially for high-volume exporters. General licenses should allow the export of multiple items to multiple customers. Bonded-to-bonded transactions within China should be eligible for a license exception since the transaction occurs entirely within the same customs territory. Intercompany transactions should enjoy a license exception if the exporter has an internal control system in place. Exporting to destinations where similar export control regulations are in place should also be exempted from individual licensing requirements (e.g. China to Singapore).

In this regard as well, several portions of the draft law should be modified to reduce unnecessary burdens, such as the Article 35 six-month report on the extension of an exception from licensing. Rather than create a new burdensome report, this provision would more appropriately require internal record-keeping that could be audited by the Government. As well, Article 33 identifies the lists of documents that must be submitted for dual-use items. Unless an exception from licensing is granted under, for example, a blanket authorization, this type of certificate should not be a requirement for each individual approval unless special circumstances, such as the sensitivity of the item or of the country of destination, would make it necessary.

In cases of investigations under Article 46(6), we encourage the Government to provide a process under law providing legal recourse on the part of the exporter before an operators' bank account can be frozen.

(4) Protecting confidential business information

We also seek the inclusion of robust protections for confidential business information provided to the government pursuant to any aspect of this law. Without such protections, industry compliance and government implementation would be reduced, with negative effects on the proper operation of this law.