Attn. Legal Working Committee of National People's Congress (NPC) Standing Committee, People's Republic of China

From: Confederation of European Business (BusinessEurope)
Syndicat des Industries Exportatrices de Produits Stratégiques (SIEPS), France
The Export Group for Aerospace, Defence and Dual-Use (EGADD), United Kingdom
Network Against Proliferation (NAP)
Center for Information on Security Trade Control (CISTEC), Japan
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)
Communications and Information Network Association of Japan（CIAJ）
Japan Chemical Exporters and Importers Association（JCEIA）
Japan Chemical Industry Association（JCIA）

Date: January 21, 2020

Joint Comments by Industrial Associations of Europe and Japan
on China's Revised Draft Export Control Law

In response to the call for public comment on China's draft Export Control Law released by the Chinese Ministry of Commerce in June 2017 (hereafter called "Original Draft"), we submitted our joint comments by nine major industrial associations in Japan in December 2017 and our joint comments by 14 major industrial associations in the US, Europe and Japan in February 2018.

Public comment on China's Revised Draft Export Control Law (hereafter called "Revised Draft") was solicited after deliberation at the 15th meeting of the 13th National People's Congress Standing Committee. We have therefore decided to submit new joint comments on the Revised Draft designed to eliminate concerns held by overseas industry and to use this information as a basis for improving the Revised Draft.

The following joint comments, like those submitted previously, are based on the common interests of both parties in promoting trade and investment between China and other countries, and as such, it is hoped that appropriate attention can be given to these comments.

Matters pointed out and requested in the previous joint comments submitted by industrial associations from the US, Europe and Japan were as follows:

* The text of the previous joint comments can also be found on the following CISTEC website.
http://www.cistec.or.jp/service/china_law/180309-01-e.pdf

1. Consistency with international trade rules administered by the World Trade Organization (WTO) and international export control regimes
   (1) "International Competitiveness," "Supply to International Markets" and "Equal Principles" (Retaliation Clause)
   (2) Scope of Application, Including "Protection of Important Strategic Rare Materials"
2. Reexamination of Systems That Could Become Major Hindrances to the Trade and Investment Environment
   (1) Reexamination of Reexport Regulation
   (2) Reexamination of Deemed Export Controls
   (3) Formulating a Controlled Items List Conforming to International Export Control Regimes
   (4) Curbing Unreasonable Demands for Technological Disclosure in Export Inspections
   (5) Reexamination of Methods and Conditions for On-site Investigations Regarding End Users and Uses
3. Need for sufficient consideration for smooth implementation
   (1) Adequate Publicity regarding Work of Drafting Legislation and Ensuring Opportunities for Exchange of Views with Domestic and Foreign Industrial Sectors
   (2) Securing an Adequate Extension after Detailed Information Made Available and

Stepwise Implementation of Regulations
(3) Promoting Implementation that Encourages and Builds on Internal Compliance Mechanisms
(4) Protecting confidential business information

■ In the Revised Draft of the law, there are the points that reflect our previous joint comments; points from the Original Draft that were addressed in our previous joint comments; and points that are considered to have been substituted by other laws and regulations. We would like to address these points one by one as follows.

(1) Our assessment and understanding that our previous joint comments have been reflected

We understand that our opinions have been reflected in the following points for which we would like to express our sincere appreciation.

1. From the viewpoint of consistency with international export control regimes, provisions from an industrial and trade policy perspective, such as “Technological Development”, “International Competitiveness”, and “Supply to International Markets” in the formulation of controlled items and requirements for licensing (Article 16 and Article 22 (4) of the Original Draft) have been deleted (Article 13 of the Revised Draft). However, although the criteria for formulating the list of controlled items are simply referred to in Article 9 as "in accordance with export control policies", we would like to ask you to limit the criteria to a viewpoint of security-based export controls, as the temporary control provisions in Article 10 refer to "In accordance with the needs of fulfilling international obligations and maintaining national security”. In addition, from the viewpoint of "fulfilling international obligations", we would like to ask you that the specifications of controlled items list should be the same as those agreed upon by international export control regimes.

2. The article stipulating on-site verification of end-users and end-uses (the 2nd provision of Article 28 of the Original Draft) has been removed and end users’ obligation of pledge is stipulated, and thereby end-users would be listed on list of parties of concern in the event of their breach of this pledge (Article 18 and 20(1) of the Revised Draft). These are basically the same as internationally common systems. (We understand Article 30 of the Revised Draft stipulates supervision, audit and investigation of exporters.)

3. It has been stipulated that, in order to encourage internal compliance systems for companies and organizations, exporters with good operations in this respect can be given preferential treatment for licensing (Article 14 of the Revised Draft). However, specific details have been consigned to lower regulations, and so we would like to ask you to adopt the points requested in Section 3(3) of our previous joint comments (e.g.,

exceptions to export licenses for exports to group companies, and the adoption of a method that replaces the requirement of reporting every six months for common licensees, etc.).

(2) Remaining Concerns

The following are concerns that still remain and should be addressed in future drafts of the draft law. These are closely related to the trade and investment environment in China, and as such we would like to ask for your continued consideration so as to dispel any such concerns.

1. <u>"Equality Principle" (Retaliation Clause)</u>

   It is highly appreciated that the "Equality Principle" (or the retaliation clause; Article 9 of the Original Draft) has been deleted. On the other hand, however, given the following points, there is no doubt that there could still be substantial retaliatory measures.

   - General provisions of the Foreign Trade Law, the related law, have a similar "equality principle" provision (Article 7).
   - The "Unreliable Entity List", which the Chinese Ministry of Commerce is reported to soon introduce, is said to be of an adversarial nature.

   Suppose this were to lead to a chain of confrontation and retaliation, it would have a dramatic impact on corporate activities. We therefore would like to urge that potential disputes be resolved in accordance with international rules, such as the WTO, to prevent such a situation arising.

2. <u>"Protection of Important Strategic Rare Materials"</u>

   As we indicated in our previous joint comments, there are no other examples where rare mineral resources are subject to security export control regulations. We called for prudent action based on strong concerns that, in the event that rare materials become regulated, it may cause the same disorder that had previously occurred in relation to WTO rules.

   Meanwhile, Chinese media have reported that the Chinese government has been considering restricting the export of rare mineral resources such as rare metals and the like since the middle of last year, and as such we are increasingly worried that our concerns may become reality. Restrictions on such exports may encourage the development of alternative suppliers and alternative resources, which may be unfortunate for both sides. From this point of view, we would like to once again call for a cautious approach to this issue.

3. <u>Re-export controls</u>

   Regarding re-export controls, although the independent clause referring to the *de minimis* rule in the Original Draft (i.e., Article 64 of the Original Draft) has been removed, the Revised Draft stipulates that re-exports, along with other export types, will "be

implemented in accordance with relevant provisions of this law" (Article 45).

In this context, the term "re-export" in Article 45 can be taken to mean "re-export of what was exported to China from China" (i.e., reshipment). However, the interpretation provided by a Chinese law firm states that this is equivalent to what was stipulated in the above-mentioned Article 64 of the Original Draft ("re-export").

If this Revised Draft is synonymous with re-exports under Article 64 of the Original Draft, it means that our strong concerns have not been dispelled and so we would like to once again clarify these concerns.

As explained in detail in our previous joint comments, re-export controls from non-Chinese countries raise not only the question of practicality and burdens on re-exporters, but also significant side effects and disadvantages on the Chinese economy itself, which depends on the global value chain. If re-export of products that incorporate products imported from China from non-Chinese countries require the approval of the Chinese government, then the enormous burden and risks involved can create strong incentives to avoid using Chinese products, which could lead to a change in suppliers.

The general method normally used in international export control regimes (that is, for particularly sensitive products, a means to obtain approval from the exporting country authorities when transferring to a third country based on a written pledge from the end user) is also assured in the Revised Draft through the provision of "prohibition of transfer to third parties without the permission of the Chinese authorities" (Article 18). As such, we cannot understand the need to introduce re-export controls based on the *de minimis* rule beyond such a general method.

Even if the purpose of Article 45 is not to implement re-export controls immediately but to stipulate a policy to implement it in the future, such a policy itself is a strong deterrent to importing from and investing in China.

For the above reasons, we would like to request again that the introduction of the re-export controls should be removed. If "re-export" in Article 45 of the Revised Draft would mean the above-mentioned "reshipment"(i.e., re-export of what was exported to China from China), we would like to ask you to clearly stipulate this meaning.

4. Deemed export controls

Regarding deemed export controls, the provisions are basically the same as originally drafted (Article 2 of the Revised Draft) and as such it is not clear whether the concerns pointed out in Section 2(2) of our previous joint comments have been resolved.

As indicated in our previous joint comments, if it were to be uniformly controlled, including exchanges with foreign employees within a company, there is a strong concern that daily corporate activities, such as daily meetings, consultations, e-mails, and access to internal databases could not be conducted smoothly and efficiently.

In order to prevent such situations from happening, we strongly urge the following systems to be implemented as requested in our previous joint comments.

- Excluding full-time employees of companies and organizations in China from such

controls, and limiting the control to foreign students, contractors, non-affiliated researchers, etc.

- Restricting controls to cases of providing technologies and source codes controlled by international export control regimes in China.
- Developing comprehensive license systems and license exception systems.

5. Curbing unreasonable demands for technology disclosures in export reviews and protection of confidential business information

We understand that these requests in Section 2(4) and 3(4) of our previous joint comments are covered by the “Prohibition of Forced Technology Transfer by Administrative Means” clause in the separately enacted Foreign Investment Law. It is hoped that this clause will ensure the protection of intellectual property.

On the other hand, however, concerns about whether the protection of intellectual property can be properly achieved through the implementation of the National Intelligence Law, the Cyber Security Law and its lower regulations (e.g., data security management regulations, etc.) from the viewpoint of national security have not been dispelled. Concerns about these laws and regulations are being raised at government level in the US, Europe and Japan, and we would like to ask that you take measures to ensure thorough protection of intellectual property.

6. Obligation to uniformly submit documents in license applications

In Article 33 of the Original Draft, documents to be submitted at the time of license application were listed, and it was a rule that these documents needed to be submitted uniformly regardless of the content of the application. In response to this, Section 3(3) in our previous joint comments requested to the effect that, “this type of certificate (these kinds of documents as those set out in Article 33) should not be a requirement for each individual license/approval unless special circumstances, such as the sensitivity of the item or of the country of destination, would make it necessary.”

In Article 22 of the Revised Draft which corresponds to the above-mentioned Article 33 of the Original Draft, it is said to be stipulated in the lower regulations, however, we hope that our request above can be reflected.

In this regard, Article 17 of the Revised Draft states that “exporters must submit end-user and end-use certificates to the National Export Control Authorities,” which appears to be a uniform requirement regardless of the sensitivity. The wording “based on the degree of sensitivity of controlled items and end-users” in Article 25 of the Original Draft which corresponds to this part has been deleted. We are concerned about this point because, should it be required to uniformly obtain a certificate regardless of the sensitivity, then there would be a considerable burden for exporters in filing applications and lengthy amounts of time required for export. Submitting certificates uniformly in such a way is not stipulated in international export control regimes, and the requirement of the submission is limited to “particularly highly sensitive items for which there are concerns

they may be diverted to uses related to WMD." The same rule is adopted in the operation of systems in major countries. In light of these circumstances, we would like to ask that the phrase "based on the degree of sensitivity of controlled items" be inserted in Article 17 of the Revised Draft.

■ Conclusion

The Chinese government is working on further improving the trade and investment environment with the Foreign Investment Law that just came into force this January.

According to statistics from the Chinese Ministry of Commerce, the total imports and exports of foreign-invested enterprises in the period from January to October last year accounted for 41% of the national total, with 47% of the exports of foreign-invested enterprises being exports of high-tech new technology products which accounts for 64% of national high-tech new technology product exports. In this way, foreign investment companies play a major role in promoting the quantitative and qualitative development of China's foreign trade.

On the other hand, recent tensions between the United States and China are a cause for concern. While reaching the first stage of an agreement in trade talks is welcome, reaching a fundamental resolution to the conflict will unlikely be easy and unfortunately there is a high chance these tensions will continue into the future. Amid such circumstances, the ways to deal with investment and trade in China and the ways to establish a Chinese-related global supply chain will continue to be a major issue for industry.

It will be worth watching closely how the draft China Export Control Law will be enacted in such a situation. While many of the requests put forward in our previous joint comments (in particular, the removal of provisions for on-site verification of end-users and end-uses) have been adequately reflected in the Revised Draft, it is unfortunate that nothing has been included which can dispel our greatest concerns regarding re-export control and deemed export control.

In the course of there not having been any restrictions on export control of commercial mass-market goods and technologies other than items related to weapons of mass destruction up until now, overseas industries have been actively promoting investment and trade in China. Under such circumstances, from the viewpoint of fulfilling international obligations, the introduction of general export control regulations for commercial mass-market goods and technologies was seen as something to be welcomed. However, the currently proposed system is not a general system based on international export control regimes, but rather there are still a re-export control system and a deemed export control system (the deemed export control in the Revised Draft would be problematic if it would also control providing items to foreign nationals who are members of a corporation/organization), which, as we explain in detail, will be a very significant constraint on corporate activities, and as such we cannot help but feel confused about such systems. If these two systems were to be enacted in this way, it would have to be regarded as a very big negative factor in China's

investment and trade environment in comparison with other Asian countries that do not have such far-reaching systems in place.

Although the “Equality Principle” (retaliation clause), which was one of the major factors of concern, has been removed from this draft, similar clauses are stipulated in the general provisions of the Foreign Trade Law. Separate from this Export Control Law draft, the Chinese government has been strongly suggesting the introduction of perhaps a more adversarial system, such as with the “Unreliable Entity List” and “National Technological Security Management List.”

For businesses, if significant impacts and restrictions on corporate activities occur between the two governments due to the escalation of opposition and retaliation because of conflict between the two sides, it would naturally be a major factor in evaluating the investment and trade environment.

In addition to ensuring that the above-mentioned concerns of overseas industry are reviewed seriously and establishing a system consistent with international export control regimes, we hope that you will continue to carefully consider ways to further improve China’s trade and investment environment so as to avoid a system of opposition and retaliation.

(Note):
After we submit these joint comments, we might submit the additional joint comments.