Overview

On December 28, 2019, China's Standing Committee of the National People's Congress (NPC) published a new draft Export Control Law (the draft law) for public comment. Drafting of this law began in 2016 by the Chinese Ministry of Commerce (MOFCOM), at the instruction of the State Council, and an initial draft was issued by MOFCOM for public comment on June 16, 2017. The current 2019 draft embodies comments solicited through consultations with as many as 55 central government authorities, as well as local government, industry, and trade associations.[1]

As China’s first export control statute, this law is intended to unify and significantly enhance China’s existing export control framework, with reference to prevalent global practices, as well as to address certain perceived “asymmetry or imbalance with other countries with respect to the scope and means of export control”[2] It provides for “a basic systemic framework as well as rules in relation to export control policies, export control lists, control measures, supervision and administration, and other relevant aspects.”[3]

The 2019 draft consists of six chapters and 48 provisions, a substantial reduction from the 2017 draft which contained 70 provisions. While retaining the basic structure and many measures in the 2017 draft, such as blacklisting by authorities and country-specific controls, the 2019 draft leaves out certain control measures that were proposed in the 2017 draft. It also makes comprehensive textual adjustments and rolls back some wording regarding defensive or retaliatory use of export control measures. For example, the 2019 draft removes a provision from the 2017 draft stating that China can take countermeasures towards countries that have adopted discriminatory export control measures towards it. Another provision in the 2017 draft that was removed required a formal review of information that may implicate national security issues before such information could be transmitted abroad for “export control reasons.”

Background
China's early export control legal regime comprised regulations targeting specific industry areas. The PRC Nuclear Materials Control Regulations promulgated in 1987 was the first of such regulations. The current regime, consists of specific regulations covering nuclear, biological, chemical, missile, delivery systems, and defense items. It contains basic controls, such as licensing requirements and export pre-registration requirements, together with export control lists covering all of the above-mentioned areas. However, the existing regime is fragmented and piecemeal, while the new law provides for a comprehensive regime and establishes a framework for all existing rules. Undoubtedly, this fragmentation was a fundamental driver for the creation of a unified export control law. In order for the draft export control law to govern the entire export regime, it will take the form of a statute to be adopted by the National People's Congress, unlike existing regulations, which are administrative regulations formulated by the State Council of the People's Republic of China (PRC) and its functional departments, or the Central Military Commission of the Communist Party of China. This means that the forthcoming law will have a level of legal force higher than the existing legal regime. In addition, in the course of drafting the legislation, the PRC government has referred to prevalent global practices and has addressed existing rules that provided for a scope and approach of export control that were deemed as not reciprocal or balanced. It is expected that the PRC government will amend the existing regulations after the Export Control Law takes effect, establishing an efficient export control regime that operates based on principles and practical rules.

Key Points of the Draft Law  Scope of Application

The draft law broadly states that it applies to "dual use items, military items, nuclear and other goods, technology, services, and other items that are related to the fulfillment of international obligations and safeguard of national security" (Art. 2). The catch-all clause referencing international obligations and national security reflects an expansion of the existing export control framework. Dual-use items are defined as "goods, technologies and services that not only have civilian application but also military application or are conducive to the enhancement of military capacities, especially those that can be used for the design, development, production or use of weapons of mass destruction" (Art. 2).

As for covered activities, in addition to exports, transits, transshipments and go-throughs, which are subject to the existing export control framework,[4] the draft law expands its coverage to reexports (Art. 45). It is noteworthy that the definition of reexports in the 2017 draft which references a de minimis incorporation element was removed and the term "reexport" is not defined in the 2019 draft. Another notable point is that the draft law defines "export" to include not only cross-border transfers, but also "acts of citizens, legal persons and other organizations of the People's Republic of China providing controlled items to foreign natural persons, legal persons and other organizations" (Art. 2). The exact meaning of this latter provision remains unclear, as well as its potential relevance to the "deemed export" concept under US export control laws.

Competent Authorities

Consistent with the current regulatory framework, the draft law confirms that the State Council and the Central Military Commission remain the primary competent authorities with respect to export control matters (Art. 5). The draft law also provides for the establishment of a regulatory coordination mechanism, as well as an expert consultancy mechanism (Art. 5).

Control Policy

The draft law envisions an export control framework established on the basis of export control policies to be articulated by competent authorities. As a significant reform to the current control rationale, the draft law embraces country-specific control measures corresponding to particular "risks levels" associated with particular importing countries (Art. 8).

Means of Control

Exporter Pre-registration/qualification

The draft law retains the current pre-qualification requirement for military item exporters, but appears to loosen control with respect to exporters of certain other controlled items with indications that the current registration requirement will be replaced with a recordal-filing procedure, details of which have not yet been spelled out (Art. 12). In China, a recordal-filing procedure generally entails the filing of certain required documents to the government authority for record-keeping purposes, and generally government approval is not required.

Controlled Item Lists

Control lists remain a basic control measure under the draft law. The government may also exercise temporary control for no more than two years over certain items, technology or services that are not on the control lists (Art. 10).

Licensing
Generally in line with the measures currently in place, the draft law requires licensing for the export of items on the control lists as well as any other items if the exporter knows or should know or has been informed by the competent authorities that the items at issue may (i) jeopardize national security, or (ii) be used in connection with weapons of mass destruction or their delivery systems, or (iii) used for “nuclear, biological or chemical terrorism purposes” (Art. 15). Licensing considerations as set forth in the draft law include (1) international obligations and commitments; (2) national security; (3) type of export; (4) sensitivity of items; (5) countries or regions of destination; (6) end-user and end-use; (7) credit record of exporters; and (8) other circumstances as prescribed by laws and regulations (Art. 13). While the 2017 draft contained one reference to a license exception mechanism, this is not included in the 2019 draft.

**Importer and End-user Blacklisting**

The draft law introduces a blacklisting mechanism for importers and end-users who (i) fail to comply with end-user/end-use warrantees, (ii) may endanger national security, or (iii) use controlled items for terrorist purposes (Art. 20). While the other two violations are relatively specific, the ground of national security appears to pose certain unpredictability in the use of the mechanism. As a result of blacklisting, the government could adopt restrictive measures towards export transactions with blacklisted parties or deny the application of certain licensing facilitative measures that would be otherwise applicable (Art. 20).

**End-use/End-user Certificate**

End-use/end-user certificates are required for license applications under the existing export control framework. The 2017 draft provides that such certificates are to be issued by importers or the government or military authorities of the importing country. In contrast, the 2019 draft provides that such certificates shall be issued by “end-users or the national or regional government authorities where the end-users are located” (Art. 17). By granting the competent authorities power to require certificates issued by foreign government authorities in certain circumstances, the draft law could be construed to indicate that this requirement will be enhanced. Moreover, a provision from the 2017 draft which states that the competent authorities may conduct onsite inspection of end-users and end-uses has been removed in the 2019 draft.

**Company Internal Compliance Program**

While exporters of controlled items are “encouraged” to establish internal compliance programs for export control in the 2017 draft, the 2019 draft appears to step up the requirement by stating that exporters “shall” establish such programs. Consistent with the 2017 draft, the 2019 draft rewards such efforts by linking them to the granting of certain licensing facilitative benefits (Art. 14).

**Enforcement and Penalties**

Regarding enforcement for potential violations, the draft law provides for an array of investigative measures, including onsite inspections of target entities, personnel interviews, inspections and creation of copies of relevant documents and electronic data, seizure of concerned items, and inspection of relevant bank accounts (Art. 30). Exporters who are uncooperative with such inspections are subject to fines or other penalties (Art. 39).

Compared with the current export control rules, the draft law steps up punishments for export control violations, both in terms of the magnitude and available means of punishment, as well as the scope of sanctioned subjects. In addition to exporters, the draft law also punishes service providers, including “agents, logistics service providers, customs clearance providers, third party e-commerce trading platforms as well as financial service providers,” who provide such services for transactions while knowing that such transactions violate export control laws (Art. 37). Staff of exporters who have direct or supervisory responsibilities can be disqualified from engaging in export control-related activities (Art. 40). Moreover, the draft law increases the magnitude of fines for export control violations beyond current levels (Art. 35). As a recently introduced development, administrative penalty records will go into China’s social credit system (Art. 40).

**Potential Implications for Companies**

Once enacted, the new Export Control Law, with its expanded coverage and strengthened control and enforcement measures, will undoubtedly have a direct impact on multinationals operating in China that engage in or provide services related to the export of items or technologies controlled under Chinese export control laws. Whether the law will be leveraged into a larger role in the midst of current policy and international relations dynamics remains to be seen, particularly given the markedly increased role of national security in the draft law, either stated or implicit, including with respect to controlled items identification, licensing policy, country-specific control measures, and blacklisting. It also remains to be seen how this new law will coordinate with existing export control rules and regulations. Details for the new law will be fleshed out in subsequent implementing regulations to be adopted after the law has been promulgated.

The public comment period on the draft law ends on January 26, 2020 and the subsequent procedures and timeline for further review, deliberation, and final adoption remain unclear. However, given the importance of this law, many expect that it will be promulgated in 2020.

[2] Id.

[3] Id.

Pursuant to Article 100 of China’s Customs Law, the terms “transits,” “transshipments” and “go-throughs” are in relation to goods that pass through China en route to other countries. “Transits” refer to goods that pass through China from one country to another country via domestic land transportation. “Transshipments” refer to goods that are unloaded and reloaded to other transportation means at domestic customs-designated areas and pass through China via means other than land transportation. “Go-throughs” refer to goods that enter and exit China in the same vessels or aircrafts.


Practices
Export Controls

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