

WHITE PAPER

The Export Control Law: Explained

By John Ebert

- What is the Export Control Law (ECL)?
- How does ECL affect US industry?
- Which key pieces of legislation do North American companies need to pay attention to?
- What is the outlook for ECL, going forward?

This White Paper will explain the nature and purpose of the Export Control Law as a legal policy to weaponize trade. We will delve into the most critical parts of the legislation and their implications for US trade. Lastly, we will draw some conclusions on the long-term consequences for the wielder of ECL and its intended targets.

What is the Export Control Law?

The Export Control Law (or ECL) was enacted on Dec. 01, 2020. It was the first official attempt at a comprehensive legislation to govern China's export control practices. Up to this point, no laws existed per se that formally (and legally) stated China's official rules and regulations governing its export practices or the control of its exports within the international arena. All previous actions by the Chinese regime concerning export control activities had been completely arbitrary, without the support of legal precedents or policy of law. Then again, why does a legal policy matter in sovereign matters of commerce?



Most sovereign nations in the world have enacted some form of legislation that governs export controls and practices. However meagre the national legal policy may appear, almost all nations ultimately yield to International Trade law, which provides a set of laws and agreements that govern the commerce between countries and businesses across national borders.

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The World Trade Organization (WTO) founded in 1994, establishes the prima facie international trade laws. These international trade laws are also federal laws that grant the US government absolute authority over state laws in international commerce. International trade law also offers a tool for a nation's government to take corrective actions against trade perceived to be illegal or in contradiction to accepted trading agreements or practices.

Why a Legal policy matters

In the historical perspective, China has often reacted haphazardly and unilaterally in trading disputes with other nations. In most of these disputes, its responses or actions were seen as ranging from arbitrary to illegal, with the WTO, more often than not, ruling against China on legal grounds, on the basis of established International Trade law.

The most recent case involved Japan. On Sept 22nd, 2020, China placed an export embargo against Japan. This was in retaliation to the detention of a Chinese fishing trawler caught in the disputed waters off Japan's Senkaku Islands (named Diaoyu in China). Repeated incursions by Chinese fishing vessels over many years into the disputed region of the East China Sea, fueled an escalation in tensions between the second- and third- largest world economies. The eventual detention of the Chinese trawler by the Japanese Coast Guard on Sept 16th, 2020, precipitated an export embargo by the Chinese authorities.



Political Trigger: Japanese Coast Guard detain Chinese trawler



Trade Response: China imposes Rare Earth embargo

However, the deployment of a trade response to a political issue was roundly condemned worldwide, as an illegal trade action, under International Trade law. Mounting world pressure led to the Chinese side to make official denials there was ever an export embargo. China, without legal precedent in its defence, eventually lifted the "non-embargo" action, only one week later. For China, this was an unredeemable loss of face that demanded a legal remedy.

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President Trump's tariff war, launched in 2018, clearly demonstrated to China that they needed to align their export control policies with the US, to provide itself legal grounds to apply trade tactics in its economic war with the US, and a growing armada of nations, disenchanted with China's trade practices.

Hence, it comes as no surprise that China's ECL is modelled closely after the USA's own export control laws. In many ways, closely mirroring the US policy model, lends even greater credence and legitimacy to the ECL's eventual implementation as a retaliatory measure for weaponizing trade.



Legal Response: Export Control Law 2020



Political Trigger: President Trump's 2018 Tariff War

What Matters in ECL

What is immediately noticeable about ECL is the expansive scope. The language of ECL is deliberately broad and vague. Its non-specificity allows for numerous interpretations, unlike International Trade law. Nevertheless, we can compartmentalize the ECL into key sections, based on a repurposing of the US version into specific functionalities:

1. Lists and Catalogues: ECL Article 8.2 contains multiple levels of export controls, according to the destination countries and their associated risks (to China). ECL Article 9 contains a list of controlled items for export. ECL Article 18 holds the defined list of authorized importers and end-users. China has always possessed such lists and catalogues, but in the past, these were often disparate and disorganized, without clearly-defined purposes.
2. Tool for retaliation: Written into the protection of "National security and interests", ECL Article 48, officially and formally permits (and encourages) the use of export controls as a legal weapon against other countries' export restrictions against Chinese exports. A legal tit-for-tat, is embedded into the National security policy.



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3. Unreliable Entity List: ECL grants government agencies, unprecedented jurisdiction over organizations and individuals *outside* China. Such organizations or individuals can be included on an Unreliable Entity List under ECL Articles 2.2 and 7.
4. Export Permit requirement: ECL contains a catch-all provision under Article 12.2, which can arbitrarily force any exporter to apply for export permits even for *unlisted* items, not covered by the key Articles pertaining to Lists and Catalogues (Articles 8.2, 9, 18, among others).

The consequences of weaponizing ECL

Long before the first salvos were fired in the US tariff war, China's questionable trade practices to propel China's economy forward at any cost, had earned itself derision as a bully and disenchantment by its closest trading partners. The deployment of ECL as a retaliatory tactic, may well peg China as an unreliable trading partner and sourcing country. This reduced reliance on Chinese sourcing will necessarily force the relocation of supply chains to "friendly" sourcing nations.

China's tit-for-tat approach of weaponizing trade, has merely forced many developed nations, including the US, into the pursuit of self-reliance and independence of critical materials from China. However, the journey into self-reliance may not be so simple, in the short run. Many countries can readily engage in mining for critical materials, such as rare earth minerals. However, China still performs most of the refining of concentrates, with processes that are highly undesirable for being unsustainable, carbonizing and in many cases, toxic.

It is often said: "Pride cometh before the fall." And: "O, how the mighty have fallen!". Will China's new-found economy have the resilience to absorb the inevitable job losses and increased competition? The impact this will have on China's continued economic growth and job market security, has yet to be enumerated.

We tend to forget how young and immature China's modern economy really is. They have not experienced the Great Depression or survived multiple waves of recessions. As major Chinese corporations, particularly State-Owned Enterprises, lose major investments globally, China's dwindling cash reserves will be insufficient to prop up an artificial economy, not based on the laws of demand and supply, but market manipulation. In the long-term, China's short-term, knee-jerk response with ECL, will likely be replaced by a willingness to adjust its trade practices and heal old wounds. It may come down to reconciliation or bust.



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