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United States Policy Regarding Technology Transfer to the People's Republic of China

I. INTRODUCTION

In November, 1983, the Reagan Administration publicly announced new regulations for the transfer of technology to the People's Republic of China ("China").¹ The new regulations are designed "to reflect a more liberal export control policy" by raising dramatically the volume and sophistication of technologically advanced goods developed in the United States available for licensing and export to China.² To facilitate the policy the Administration transferred China to the country group under the Export Administration Regulations³ which includes the NATO countries and other friendly non-aligned nations. The immediate effect of this recategorization appears to be that the export of most goods and technology to China will be routinely approved rather than subject to the old policy of case-by-case review.⁴ This Comment argues, however, that while the new export regulations will encourage an increase flow of advanced technology to China, the new policy may be undermined by other significant, and potentially unresolvable trade issues between the two countries.⁵

The new export control policy marks an evolutionary change in United States regulation of technology transfer to China.⁶ Reflecting significantly improved United States-China relations, the new licensing guidelines were established primarily as a means (1) to facilitate China's technological and economic modernization and integration into the world economic system, and (2) to realize the economic benefits to be obtained by United States businesses from expanded trade with China.⁷

¹ Amendments to Export Administration Regulations, 15 C.F.R. §§ 368, 370-76, 379, 385-86, 399 (1984).

² See *infra* notes 90-115 and accompanying text.

³ Amendments to Export Administration Regulations, 15 C.F.R. § 385.4(c). See *infra* notes 94-100 and accompanying text.

⁴ See *infra* notes 101-15 and accompanying text.

⁵ See *infra* notes 149-82 and accompanying text.

⁶ See *infra* notes 18-35 and accompanying text.

⁷ *Hearings Before the Subcommittee on International Economic Policy and Trade of the House*

The previous policy proved inadequate because the licensing process was both inefficient and inconsistent, and the regulations were unclear and unworkable.⁸ The new guidelines are expected to expedite the licensing process by eliminating the case-by-case review of licensing applications, and to operate more effectively according to well-defined rules. The most noticeable change in policy, however, is the governmental permission extended to United States firms to export to China substantially higher volumes of "dual use" technology—technology exported for civilian purposes but with potential for military application.⁹

Although the new regulations are applauded enthusiastically by numerous American business and political groups, they are not free from criticism. Historically, the United States export control policy has been one of the most significant and controversial issues directly affecting both economic and political relations between two countries.¹⁰ In formulating the new China export control policy, the Administration acknowledged and tried to balance two competing interests: liberalization of export controls through increased transfer of technology to promote better United States-China trade relations, and the need for limitations on government licensing of advanced "dual use" technology in order to preserve United States national security.¹¹ On the one hand, it is desirable to export sophisticated technology to aid in China's modernization effort, and to promote United States investment, by making it easier for businesses to capitalize on China's rapidly expanding market for advanced technology. On the other hand, there is concern that technology transferred to China now may be used against the United States by China or some other country in the future.¹² Success of the new guidelines in promoting United States-China relations and investment by United States firms in Chinese ventures will depend, in part, upon whether the Reagan Administration reached a proper balance between these two goals, as

*Committee on Foreign Affairs, 97th Cong., 2nd Sess. (1983) (testimony of William T. Archey, Acting Assistant Secretary of Commerce for Trade Administration) [hereinafter cited as *Hearings-testimony of W. Archey*]. For the initial articulation of President Reagan's policy rationale, see *U.S. Technology Transfer to China: Hearing Before the Special Subcommittee on U.S. Trade with China of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 3-19 (1983) (testimony of Malcolm Baldrige, Secretary of Commerce).**

⁸ See *infra* notes 127-41 and accompanying text.

⁹ Many kinds of "dual use" or "gray area" technology has military application, even if that technology is purchased initially for civilian economic projects. For a good discussion of the benefits and burdens of transferring "dual use" technology to China, see A.D. BARNETT, *CHINA'S ECONOMY IN GLOBAL PERSPECTIVE* 549-61 (1981).

¹⁰ See *infra* notes 36-65 and accompanying text.

¹¹ *Id.*

¹² *Id.*

well as the government's success in providing a workable licensing process.

This Comment will focus on the nature and likely effect of the new United States export licensing rules regulating the transfer of technology to China. Part I will address the history and development of United States export control policy to China. Part II will discuss both the ideological debate over the appropriate China technology transfer policy, and the general licensing procedures under the United States Export Administration Act. Part III will analyze the substantial changes in and practical effect of the new licensing guidelines for China, and the policy reasons behind the changes. Part IV will assess the probable impact of the new export policy on United States-China trade relations and the potential problems United States exporters are likely to face in foreign trade with China. As of January, 1984, United States exporters were very optimistic about current predictions that trade between the United States and China will reach record figures in 1984.¹³ A gradual trend toward liberalization of technology transfer controls to Communist China reflects the friendly attitude the countries are presently exhibiting toward one another, and each country's recognition that better relations are mutually beneficial. However, as United States-Soviet relations demonstrate, friendly relations can quickly turn hostile, thereby upsetting trade relations carefully negotiated over many years.¹⁴

Therefore, United States exporters should keep in mind that Sino-United States economic relations will be inextricably linked to the political climate and the economic conditions in each country.¹⁵ While the benefits of increased trade between China and the United States are potentially great for both countries, so too are the potential harms if either country's expectations for a prosperous and smooth trading relationship are disappointed.¹⁶ Moreover, the viability of the new laws regulating technology transfer to China will depend greatly on the cooperation of not only United States and Chinese officials, but also from the United States European allies directly involved in the transfer of technologically

¹³ Farnsworth, *China Cautiously Increasing Its Worldwide Investments*, N.Y. Times, Jan. 9, 1984, at A1, col. 1.

¹⁴ See *U.S. to Ease Technology Controls, Change Country Group; August Announcement Seen*, 19 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 464 (June 28, 1983) [hereinafter cited as *U.S. to Ease Technology Controls*]. For background on United States technology transfer to the Soviet Union, see generally U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY AND EAST-WEST TRADE: AN UPDATE (Apr. 1983) [hereinafter cited as OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE]; Guzzardi, *Cutting Russia's Harvest of U.S. Technology*, FORTUNE, May, 1982, at 102.

¹⁵ See *infra* notes 165-71 and accompanying text.

¹⁶ See *infra* notes 172-75 and accompanying text.

advanced exports to China.¹⁷

I. DEVELOPMENT OF UNITED STATES EXPORT CONTROL POLICIES TOWARD CHINA

A. History and Origin

The present United States export control system originates from controls adopted during World War II, as a means of retaining United States goods needed for the war effort.¹⁸ After World War II, these controls were continued in order to facilitate an efficient and equitable distribution of raw materials to the war-devastated nations of Europe and Asia. By 1948, East-West relations had deteriorated to the point where the United States imposed special controls on shipments of strategic items to the Soviet Union and Eastern Europe.¹⁹ Finally, after several political events—the Berlin Blockade, the Communist takeover of China, and the outbreak of the Korean War—the controls were tightened further, and virtually all exports to the Soviet bloc countries were embargoed.²⁰

As the Cold War escalated, the United States and her allies joined together in 1949 to establish the Coordinating Committee for Multilateral Export Controls (“COCOM”).²¹ Through COCOM, Western industrial nations followed the United States lead in imposing tight controls on exports of technology to the Soviet bloc. This policy lasted until the end of the Korean War and the death of Stalin in 1954, when trade restrictions to the Soviet bloc countries were relaxed.²² However,

¹⁷ See *infra* notes 116-26 and accompanying text.

¹⁸ For an excellent background on the development of the U.S. export control policy toward China, see Meese, *Export Controls to China: An Emerging Trend for Dual-Use Exports*, 7 INT'L TRADE L.J. 20 (1982).

¹⁹ *Id.* at 22.

²⁰ For a good review of the U.S. trade embargo against China from 1948-1970, see Lee & McCobb, *United States Trade Embargo on China, 1949-1980; Legal Status and Future Prospects*, 4 J. INT'L L. & POL'Y 1, 28 (1971).

²¹ COCOM provides an informal organization through which the allied countries can coordinate national export controls of strategic materials and technology to all Communist countries. COCOM was conceived in postwar discussions between the United States, Great Britain and France. By 1948, the United States Government began to enlist the cooperation of other Western European allies for a coordinated embargo policy against the Communist bloc. Although early negotiations on this matter were private and informal, they were stimulated by the events of 1948-49: the proclamation of the People's Republic of China, the Berlin crisis, the Tito-Stalin split, and the explosion of the Soviet atomic bomb. As East-West tensions grew, the coordination of export controls took on increasing importance. See U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGY AND EAST-WEST TRADE* 153 (Nov. 1979); see also OFFICE OF TECHNOLOGY ASSESSMENT: *AN UPDATE*, *supra* note 14, at 44; Adler-Karlsson, *International Economic Power: The Strategic Embargo*, 6 J. WORLD TRADE L. 501, 504 (1972).

²² Meese, *supra* note 18, at 23.

the total embargo on trade with China remained. During this period, COCOM's China Committee, CHINCOM, imposed more extensive restrictions on trade with China than on trade with the Soviet Union.²³ This trade discrimination became known as the "China Differential."

During the mid-1950s, the European members of COCOM reduced the restrictions on China, and in 1957, the CHINCOM list of restricted items was officially abolished.²⁴ The European allies eliminated the "China Differential" by applying the same restrictions to both China and the Soviet Union. Meanwhile, the United States continued its total embargo on China trade and unilaterally restricted the export of some 1,100 items that were freely available to Communist countries from COCOM nations and other sources.²⁵ By 1968, the United States was the only country still actively engaged in "economic warfare" against the Chinese.²⁶ Thus, United States export control policy toward China was firmly grounded in a "China Differential" policy at the outset of the Nixon Administration.

B. Recent Trend in Export Controls to China

The recently enacted change in licensing regulations for exports to China culminates an evolution that began with Nixon's historic visit to the Chinese mainland and ensuing open door policy in 1972, and spans four administrations. By 1972, the United States government, which had formerly banned all trade with China, abandoned the embargo, and embarked on a policy of "evenhandedness" in economic relations with China.²⁷ The United States terminated its "China Differential" policy in the mid-1970s and instead, placed trade with China on a similar basis as that with the Soviet Union.²⁸ Ironically, however, this evenhanded policy eroded soon thereafter in favor of a trend toward a new "China Differential"—this time discriminating in favor of China.

The policy changed dramatically when the Soviet Union launched a major invasion of Afghanistan in December, 1979.²⁹ In response to the Russian *démarche*, Washington imposed a variety of sanctions on the

²³ A.D. BARNETT, *supra* note 9, at 263.

²⁴ *Id.*

²⁵ Meese, *supra* note 18, at 23.

²⁶ *Id.*

²⁷ OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 101.

²⁸ *Id.*

²⁹ A.D. BARNETT, *supra* note 9, at 552-56. The Soviet invasion of Afghanistan prompted President Carter to end his evenhanded approach toward Russia and China. The Russian move profoundly affected the triangular relationship among Washington, Moscow, and Peking. Many U.S. officials viewed closer security ties with China as a principal way for Washington to respond to Soviet actions in Afghanistan.

Soviet Union, one of which was to halt all sales of high technology to that country.³⁰ Mounting tension between the United States and Russia, combined with a deepening Sino-United States political relationship, led to a liberalization of United States export controls to China and to a further differentiation between United States trade with the Soviet Union and China. Defense Secretary Harold Brown announced that the United States was willing to consider licensing exports of some "dual use" technology to China on a case-by-case basis,³¹ and in January, 1981, Congress approved an agreement with China to encourage trade between the two countries.³² Soon thereafter, the export regulations for China were eased to reflect the friendly Sino-United States relationship,³³ while the government encouraged tighter controls on technology transfer to the Soviet Union.³⁴

Today, the Reagan Administration is deeply committed to a formal differentiation between China and the Soviet Union, and has continued to push for relaxed export controls to China. According to the Administration, over the last few years, United States-China trade policy has reflected "our national interest to foster a strong, secure and friendly China . . . and the need for a clear trade policy lending flexibility and predictability to American businesses in trading with China, while ensuring our national security, promoting foreign policy and protecting commercial interests."³⁵ Thus, the most recent announcement establishing new licensing regulations is but one more step toward showing preferred treatment to China by facilitating increased trade relations between the two countries.

II. THE EXPORT ADMINISTRATION ACT

A. Political Considerations and Scope of the Act

Since World War II, the United States export control system has developed into an important tool of foreign economic policy. The policy has been aimed primarily at preventing the flow of strategic military and

³⁰ *Id.* at 553.

³¹ In 1980, Defense Secretary Harold Brown made a momentous trip to China for the purpose of "exchanging views" on how Americans and Chinese might facilitate cooperation on security matters. The most important result of Brown's trip was the new policy affecting sales of high technology to China. Brown announced that the United States would be receptive to Chinese requests to buy dual use high technology equipment such as computers that could have military applications. *Id.* at 553-54.

³² OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 101-02.

³³ See *infra* notes 77-82 and accompanying text.

³⁴ See OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 66.

³⁵ Notice to Export Administration Regulations, 15 C.F.R. § 385.3 (1984).

high technology products and technical data of United States origin to Communist countries.³⁶ The broad guidelines for controlling restricted exports are set by statute, and were codified most recently in the Export Administration Act of 1979.³⁷ While the Act is currently being revised again to reflect new policies towards various countries,³⁸ including China, the 1979 Act redefined the scope of the United States export regulations by eliminating some outdated controls and by trying to provide more certainty in the application of the laws.³⁹

The controversy preceding the passage of the 1979 Act reflected both disenchantment with Soviet-United States détente and a deepening concern about the security implications of trade with Communist nations, as well as pleas from United States exporters to remove restrictions on non-military trade.⁴⁰ In passing the Act, Congress attempted to balance the need for expanded foreign trade against the need to restrict the exportation of goods and technology that could "make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States."⁴¹ This dichotomy has characterized United States export control policy in general, and specifically to Communist countries, like China, since the policy originated in 1949.⁴²

The recent political controversy as to whether the United States should relax licensing restrictions on exports to China stems from the general "balancing" debate between the conflicting policy goals of the Export Administration Act. There are many arguments in favor of restricting sales to China of weapons, or dual use technology that can be easily used to improve Chinese military capabilities. Chinese interests in and policies toward many nations and regions vary significantly from those of non-Communist powers, and Chinese policy in those areas could adversely affect United States interests in those areas.⁴³ For example, military technology transferred to China by the United States could be used in such potential conflict areas as Korea, Indochina and the Taiwan

³⁶ For a good background on the development of the Export Administration Act, in general, and the Export Administration Act of 1979, in particular, see Evrard, *The Export Administration Act Of 1979: Analysis Of Its Major Provisions And Potential Impact On United States Exporters*, 12 CAL. W. INT'L L.J. 1 (1982).

³⁷ 50 U.S.C. §§ 2401-2420 (1982).

³⁸ See *infra* notes 63-65 and accompanying text.

³⁹ See Evrard, *supra* note 36, at 3-4.

⁴⁰ See OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 17-18.

⁴¹ 50 U.S.C. § 2401(8) (1982); see also OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 17.

⁴² See OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 17.

⁴³ A.D. BARNETT, *supra* note 9, at 265.

Strait.⁴⁴ In addition, sales of civilian technology with a potential for military use, or outright sales of arms, could create an impression of closer military-security ties between the exporting nations and China than in fact exists, or than either the exporter or importer desires.⁴⁵ This situation could arouse the apprehensions of China's smaller neighbors and could create anxiety even in Japan.⁴⁶ The greatest fear opponents of liberalizing export controls for China have, however, is the concern that dual use technology exported today could be used against the United States tomorrow.⁴⁷

The history of United States-Soviet relations serves as a reminder that caution should be exercised when transferring technology to a potentially hostile country. Opponents of a liberalized China export policy recall that the period of détente in the mid-1970s witnessed expanded technology transfer to the Soviet Union through liberalized licensing procedures.⁴⁸ Moreover, these commentators feel today that such Western exports merely supported a Soviet military buildup to the detriment of United States and Western security.⁴⁹ Numerous agencies and government officials have been blamed for short-sighted export policies during that period.⁵⁰ Opponents warn that policymakers may allow history to repeat itself by hastily implementing a liberal China export policy.

In formulating policies and regulations, the Reagan Administration must be aware of Soviet, as well as Chinese, anxieties. Another reason against liberalizing export policies to China is the possible adverse reaction of the Soviet Union which has shown increasing concern about

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See also Lachica, *U.S. Defense Secretary to Explore Sales of Military, Other Technology to China*, Wall St. J., Sept. 23, 1983, at 34, col. 4.

⁴⁷ Senate Banking Committee Chairman Jake Garn (R-Utah) does not support substantially reduced export controls on dual use technology to China. On September 20, 1983, Sen. Garn asked his fellow congressmen: "How do we know that with regard to the Chinese we will not repeat our experience with the Soviet Union and come to experience the use of our own technology against us?" He noted that the Soviet missile which recently destroyed the Korean Airline "was probably a copy of our own Sidewinder missile based in large part on U.S. technology." *Garn Criticizes Major Controls Change, Warns of Repeating Soviet Union Mistake*, 19 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 918 (Sept. 27, 1983). Soon after the Reagan Administration's announcement of the new policy last June 1983, Sen. Garn expressed hope:

. . . that this Administration can avoid the same errors made in the early 1970's, during the era of so-called détente, when the floodgates of technology were opened to the Soviet Union. The Soviets got what they wanted to improve their military capability but refused to change their aggressive, imperialist policies in response to our gesture of good will and friendship.

U.S. to Ease Technology Controls, *supra* note 14.

⁴⁸ *Export Administration Act: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 91-2 (1983) (statement of Senator Mattingly).

⁴⁹ *Id.* at 92.

⁵⁰ See *id.* at 91-92.

China's new relationship with the non-Communist industrial powers.⁵¹ Though the Soviets believe that China cannot soon match them economically or militarily, they do fear the emergence of a more active anti-Soviet coalition.⁵² Thus, Russia has opposed all sales of militarily useful technology to China, and has denounced any evidence of close strategic links between China and the Western industrial powers, fearing the possibility of Western involvement in any future conflicts between the Soviet Union and China.⁵³ Ironically, increases in sales of high technology to the Chinese may only result in a more vigorous Soviet drive to counter-balance the perceived danger by increasing its own defenses or by making relations between the Superpowers even more tense.⁵⁴ This could very well weaken rather than strengthen the security of China and other East Asian countries.

The arguments in favor of relaxing strategic controls on trade with China are equally strong, and in fact prevailed, as evidenced by the new export regulations.⁵⁵ Most obvious, perhaps, is the potential for commercial advantage by facilitating increased United States-China trade by making technology transfer easier.⁵⁶ Moreover, such increased trade would aid in China's modernization drive and, therefore, have the benefit of fostering stronger political ties between the two countries.⁵⁷ Proponents of a liberal export control policy for China claim that China is unlikely to pose a threat to United States security interests without a mass export of the most advanced military systems.⁵⁸ In fact, many believe that increased technology transfer may prevent any potential for instability in the region caused by a widening of the military gap between

⁵¹ A.D. BARNETT, *supra* note 9, at 266.

⁵² The Russians have warned that expanded economic, scientific and technical ties between China and the West will help China develop its military capabilities and make it a threat in the future. Most of all, Russia fears that transfers to China of high technology with obvious military applications will prove to be precursors of close U.S.-China military ties. *Id.* at 551.

⁵³ *Id.* at 265.

⁵⁴ Heightened by a fear that the United States and China may form an alliance against the Soviet Union, Moscow has stepped up their efforts to "encircle" China, politically and militarily, most notably during 1978-79, by signing a treaty with Vietnam that greatly increased their commitment to the Hanoi regime, which Moscow then backed in its invasion of Cambodia. *Id.* at 551.

⁵⁵ See *infra* notes 90-100 and accompanying text.

⁵⁶ Former President Nixon said that the United States could reach total two-way trade with China of \$25 billion by 1993 and China could prove to be one of the most important U.S. trading partners in the next century. *U.S.-China Trade Could Reach \$25 Billion by 1993, Nixon Says in Washington Speech*, 19 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 359 (June 7, 1983) [hereinafter cited as *U.S.-China Trade Could Reach \$25 Billion*].

⁵⁷ *Leadership Stability Seen as Key to Greater U.S. Trade, Modernization*, [July-Dec.] 19 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 519 (July 12, 1983).

⁵⁸ *Hearings - testimony of W. Arcey, supra* note 7; see also Anderson, *Kissinger Had a Key Role in Shift on China*, Wash. Post., Aug. 12, 1983, at C17, col. 4.

China and the Soviet Union.⁵⁹

Another consideration in favor of relaxing export controls to China is that relations between the United States and China are not the same as those between the United States and the Soviet Union. China is relatively weak economically, technologically and militarily, and there is thus less danger that it will be able to divert imported technology to military uses that could threaten United States interests.⁶⁰ Moreover, identical restrictions applied to both China and the Soviet Union may, in fact, discriminate against China because of China's economic and military weakness.⁶¹ Thus, the United States may claim, whether disingenuously or not, that it is merely trying to help China compete in the world economic system and with its neighbor.

The arguments surrounding the United States export policy for technology transfer to China echo those used in determining the appropriate trade policy for every Communist country under the Export Administration Act.⁶² The individual country regulations usually reflect United States foreign policy/security attitudes toward and relationship with that country, and the degree to which the United States desires to be a trading partner with a particular country. It is this recurring balance which must be carefully weighed when making broad guidelines under the Export Administration Act in general.

On October 14, 1983, the Export Administration Act of 1979 officially expired.⁶³ While Congress has allowed the Administration to continue to enforce the law, it is clear that the revised bills were delayed in meeting the deadline because of disagreement over, *inter alia*, the appropriate balance between national security interests and economic/business concerns.⁶⁴ Yet, while the issues involved are essentially the same now as when the Act was first promulgated, the risks today may be higher. An increasingly complex and delicate world situation poses a greater challenge to the Act's current drafters than that faced by their predecessors:

Worldwide recession and the state of the domestic economy have made the encouragement of exports, the maintenance of established trading relation-

⁵⁹ A.D. BARNETT, *supra* note 9, at 264-65.

⁶⁰ *Id.* at 264.

⁶¹ *Id.* at 264-65.

⁶² See *infra* notes 77-82 and accompanying text.

⁶³ Congress allowed the Administration to extend the Act until February 29, 1984, under certain emergency powers granted under the International Emergency Economic Powers Act. The export control law was allowed to expire, owing to Congress' failure to enact a reauthorization bill. *Congress Extends Export Control Law*, AVIATION & SPACE TECH., Nov. 28, 1982, at 29.

⁶⁴ See *Export Controls: Views Abound, Time Runs Out*, ECONOMIST, Oct. 1, 1983, at 23; Hershey, *Export Act Expiration Draws Olmer Warning*, N.Y. Times, Oct. 12, 1983, at 1, col. 5; *House Softens Bill Curbing President on Export Powers*, Wall St. J., Oct. 19, 1983, at 7, col. 1.

ships, and the development of new export markets of critical importance to the United States as well as to Europe and Japan. Meanwhile, evidence of the extent and nature of the Soviet military buildup, coupled with Soviet aggression in Afghanistan and events in Poland have intensified awareness of the importance of safeguarding U.S. national security through protecting technological leads. Ironically, it has become simultaneously more important to sell to and to withhold U.S. goods from the Communist world.⁶⁵

The drafters of the pending Export Administration Act, thus, face the task of balancing traditionally conflicting goals in the face of an increasingly sensitive foreign policy context.

C. Licensing Technology for Export Under the Export Administration Act: General Process and Procedure

The mechanics of implementing the broad guidelines contained in the Export Administration Act have been left predominantly to administrative regulatory action,⁶⁶ which allows for the flexibility needed to adapt to changing political situations. Thus, a system of export controls has emerged,⁶⁷ which details the licensing review process by the administrative departments and reflects the different treatment given by the United States to each of its foreign trading partners.⁶⁸

Most United States exports of goods and technical data are controlled by the United States Office of Export Administration ("OEA") of the Department of Commerce. The OEA derives its authority from the Export Administration Act of 1979,⁶⁹ and implements its policies through the Export Administration Regulations.⁷⁰ It is through these regulations that licenses are either issued to or withheld from United States exporters desiring to sell their products abroad.⁷¹ The regulations provide for two main types of licenses authorizing the exportation of goods. The "general license" permits export of certain commodities and technical data without filing an application with the OEA.⁷² The "validated license" requires a document issued by, or under the authority of,

⁶⁵ OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 21.

⁶⁶ 50 U.S.C. § 2403(c) (1982).

⁶⁷ Export Administration Regulations, 15 C.F.R. §§ 368-99 (1984).

⁶⁸ See *infra* notes 77-82 and accompanying text.

⁶⁹ 50 U.S.C. § 2404 (1982).

⁷⁰ 15 C.F.R. § 370.1(c) (1984).

⁷¹ 15 C.F.R. §§ 368-399.1 (1984).

⁷² 15 C.F.R. § 371.1 (1984); The two main types of general licenses are the general and specific:

- (1) The general, G-DEST (certain product exports to all destinations), authorizes the export of any commodity listed on the Commodity Control List to any destination for which a validated license is not required.
- (2) The specific, GVL (small value exports), authorizes the export in a single shipment of any commodity on the Commodity Control List.

See *infra* note 76 and accompanying text.

the OEA, which legally authorizes the specific export.⁷³ Whether a commodity is shipped under a validated or under a general license, or not at all, depends primarily upon whether the Commerce Department has listed the particular commodity on the Commodities Control List ("CCL").⁷⁴ The CCL is a complete listing of commodities subject to licensing control by the OEA based on (1) the destination of the export,⁷⁵ and (2) the type of commodity or technical data to be transferred.⁷⁶

For purposes of commodity control, the countries of the world (except Canada) are assigned to specific "country groups" in which one or more countries are placed at one of three general levels of restrictiveness.⁷⁷ China, for example, was originally placed on the most restrictive level, Country Group Z, together with Cuba, North Korea and North Vietnam.⁷⁸ Shortly after the termination of the trade embargo with

⁷³ See Comment, *The Regulation of Technical Data Under The Arms Export Control Act of 1976 and The Export Administration Act of 1979: A Matter of Executive Discretion*, 6 B.C. INT'L & COMP. L. REV. 169, 189-90 (1983). The OEA issues validated export licenses upon receipt of an export license application. The applicant must disclose to the OEA all details of the transaction, the distinction and type of technical data to be exported, the intended use of the technical data, and the foreign availability of comparable data. On a case-by-case basis, the OEA uses this information to determine whether it will grant a validated license. *Id.* at 190.

⁷⁴ *Id.* at 189.

⁷⁵ See *infra* notes 77-82 and accompanying text.

⁷⁶ 15 C.F.R. Part 399.1 (1984). The OEA maintains the CCL which includes all commodities subject to U.S. Dept. of Commerce export controls. The CCL presently contains over 200 entries grouped in the following ten categories:

- Group 0: Metal-working machinery
- Group 1: Chemical and Petroleum Equipment
- Group 2: Electrical and Power-Generating Equipment
- Group 3: General Industrial Equipment
- Group 4: Transportation Equipment
- Group 5: Electronics and Precision Instruments
- Group 6: Metals, Minerals, and their Manufactures
- Group 7: Chemical, Metalloids, and Petroleum Products
- Group 8: Rubber and Rubber Products
- Group 9: Miscellaneous

Id.

⁷⁷ See generally 15 C.F.R. § 370 Supp. 2 (1984), as amended. Today, the foreign countries of the world (except Canada) are separated into seven country groups designated by the symbols "Q", "S", "T", "V", "W", "Y", and "Z".

- Country Group Q: Romania
- Country Group S: Libya
- Country Group T: Includes most Central and South American Countries plus Greenland
- Country Group V: Includes Southern Rhodesia and all NATO countries and Japan, and recently the People's Republic of China
- Country Group W: Hungary and Poland
- Country Group Y: Includes the Soviet Union and most of the Soviet bloc countries
- Country Group Z: North Korea, Vietnam, Cuba, Kampuchea.

Id.

⁷⁸ JOINT ECONOMIC COMM., 97th CONG., 2D SESS., CHINA UNDER THE FOUR MODERIZATIONS: PART 2, 162 (Joint Comm. Print 1982). China was placed in Group Z for two decades

China in 1971, China was placed in Country Group Y at the middle level of restrictiveness, with the Warsaw Pact countries.⁷⁹ Since then, changes in the export control policy combined with the gradual improvement in United States commercial relations with China, prompted the transfer of China, as of April 25, 1980, from Group Y to its own category, Country Group P.⁸⁰ In Country Group P, China was generally left at the same level of restrictiveness, but the category provided for some preferential treatment.⁸¹ Most recently, in November, 1983, China's country group status under the Export Administration Regulations became even less restrictive when the Reagan Administration announced that China would be moved into Country Group V along with the United States NATO allies and other friendly but non-aligned countries.⁸² Thus, the country group determination reflects current United States export control policy to the various countries.

Most applications are approved by the OEA without referral to other agencies. Sometimes, however, the application is referred directly to the agency that possesses the special expertise in the technologies involved in the application.⁸³ For example, the Secretary of Defense must "review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes," which includes most Communist countries.⁸⁴ In fact, the Department of Defense and the Department of Commerce manifest the two competing interests inherent in the Export Administration Act, and the two Departments often clash as to which one should have the ultimate control over the licensing decision.⁸⁵ Once the OEA has decided to grant a validated license for a particular export, that commodity may be transferred unless it is one on COCOM's list of internationally embargoed products and therefore, subject to COCOM review.⁸⁶ Though technolog-

following the Communist takeover in 1949 during the embargo that the United States imposed on trade with the People's Republic of China after the direct involvement of the Communist Chinese in the Korean War. *Id.* at 161 n.15.

⁷⁹ *Id.* at 162

⁸⁰ 15 C.F.R. § 385.4(c) (1984).

⁸¹ See *supra* note 78.

⁸² See *infra* notes 94-100 and accompanying text.

⁸³ Whereas the Dept. of Commerce is primarily concerned with the economic and commercial implications of export control, other governmental offices administer control over commodities and data that come within their special regulatory jurisdiction. The CCL does not apply to these specialized commodities and data. Instead, the other agencies promulgate export regulations for the commodities and technical data under its jurisdiction.

⁸⁴ 50 U.S.C. § 2409(g) (1982).

⁸⁵ See *Commerce, DOD Clash Over Export Controls*, *Electronic News*, Mar. 7, 1983, at 6, col. I.

⁸⁶ See 50 U.S.C. § 2404(i) (1982). COCOM has two basic functions: to maintain a list of strategic goods and technologies which may be embargoed or monitored and to secure agreement on

ically advanced exports destined for Communist countries are subject to COCOM review,⁸⁷ the export may be transferred⁸⁸ once COCOM approves the application.⁸⁹

III. NEW EXPORT REGULATIONS FOR TRANSFERRING TECHNOLOGY TO CHINA

A. Substantive Changes in China Export Policy Under the Export Administration Regulations

After months of interagency study, the Reagan Administration announced in late November of 1983 the new export regulations for the transfer of technology to China.⁹⁰ The new technical guidelines governing exports to China cover seven areas judged by the Administration to be most important to China's modernization program. These areas include computers, computerized instruments, microcircuits, electronic instruments, recording equipment, semiconductor production equipment and oscilloscopes.⁹¹ Items in these categories will receive expeditious license review. In addition, the various Administration agencies and departments will continue to develop further technical guidelines for technology transfer in areas not listed above.⁹² The new regulations are substantially more liberal than those of the past, and are expected not only to facilitate a more efficient and effective export system to China, but also to enhance United States-China trade.⁹³

One significant feature of the more liberal export control policy toward China is the nation's removal from Country Group P, a designation previously consisting of China alone and now one that has been dropped from the regulations, to its placement in Country Group V, which includes Western Europe, India, all of Africa except Libya, the Arab countries, Australia, New Zealand and Japan.⁹⁴ The move from Country

measures designed to prevent re-export of controlled items, thus limiting the build-up of the military potential of Communist countries. Embargoed items fall into three principal categories: those used in arms production, those used in military technology, and those with military significance intended for areas in short supply.

⁸⁷ *Id.*

⁸⁸ For further discussion and analysis on COCOM, see *infra* notes 116-26 and accompanying text.

⁸⁹ COCOM must either approve or deny the application within 90 days of its receipt and notice may be given to the exporter within that period.

⁹⁰ 15 C.F.R. §§ 368.2 (1984).

⁹¹ *Hearings - testimony of W. Archey, supra* note 7.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 15 C.F.R. § 385.4(c) (1984), *supra* note 3; see generally *U.S. to Ease Technology Controls, supra* note 14; Brown, *Export Controls: The Meaning Behind China's New Status as a "Friendly" but*

Group P to Group V “is intended to emphasize that sales to China should take place on a similar basis as to most other friendly countries.”⁹⁵ For China, however, there is an important qualification to its status as a Group V country. The stipulation is that national security review will be retained for license applications to China.⁹⁶ The Department of Defense thus retains the right to place restrictions on certain products and technologies which concern United States national security.⁹⁷ Consequently, there will be a continued requirement for validated licenses in some cases,⁹⁸ and probable denial of others.⁹⁹ Nevertheless, “licenses may be approved even when the end-user or end-use [is] military. Commodities or data may be approved for export even though they may contribute to Chinese military development.”¹⁰⁰ Thus, the new regulations specifically state the legality of transferring dual use technology, although such export applications will be subject to national security review.

The Reagan Administration believes that the new regulations establish clear and predictable guidelines for technology transfer, coordinate the licensing process, and allow for the transfer of technologically advanced commodities and data to China without impairing United States national security.¹⁰¹ The new export policy will achieve these goals by classifying dual use commodities into three categories—the “green,” “intermediate” and “red” zones—reflecting increasing complexity of license approval.¹⁰² Applications for items within the green zone—those items

Non-Allied Country, CHINA BUS. REV. July-Aug. 1983, at 9; *Reagan Says China Can Buy Computers, Technology with Potential Military Uses*, WALL ST. J., at 7, col. 1; *Baldrige Raises High-Tech Hopes*, BUS. WK., June 13, 1983, at 58.

⁹⁵ *U.S. to Ease Technology Controls*, *supra* note 14, at 463 (statement by Commerce Secretary Malcolm Baldrige).

⁹⁶ *Hearings - testimony of W. Archey*, *supra* note 7.

⁹⁷ *See supra* notes 84-85.

⁹⁸ The Reagan Administration has not defined precisely in which cases a validated license will be required. For a discussion of new zone classifications, see *infra* text accompanying notes 101-10.

⁹⁹ 15 C.F.R. § 385.4(c) (1984). “There are certain commodities, data, and end-uses that may require extended review or denial. Of particular concern are exports that would make a direct and significant contribution to nuclear weapons and their delivery systems, electronic and anti-submarine warfare, intelligence gathering, power projection, and air superiority.”

¹⁰⁰ *Id.*

¹⁰¹ *Hearings - testimony of W. Archey*, *supra* note 7.

¹⁰² *Id.*; see *Reagan Administration Announces New P.R.C. Technology Transfer Guidelines*, 20 INT’L TRADE REP. U.S. EXPORT WEEKLY (BNA) 303 (Nov. 22, 1983); see generally *Most Applications Would be in Green Zone With New Technology Policy*, *Baldrige Says*, 20 INT’L TRADE REP. U.S. EXPORT WEEKLY (BNA) 9 (Oct. 4, 1983) [hereinafter cited as *Most Applications Would be in Green Zone*]; *China and America: Green for Reagan*, ECONOMIST, Oct. 1, 1982, at 29; *Talking High Tech With Weinberger*, NEWSWEEK, Oct. 3, 1983, at 68; *Green Will Mean Go on U.S. Sales of Dual-Use Items to P.R.C.*, BUSINESS CHINA, Sept. 28, 1983, at 137.

representing minimum national security risks—will generally receive routine approval.¹⁰³ Products and technology falling within this category may be approved directly by the Commerce Department without necessitating Defense Department or interagency review.¹⁰⁴ Commerce Department officials estimate that seventy-five percent of all China applications will fall within the green zone, and will be routinely approved.¹⁰⁵ The second, intermediate zone covers license applications for “very high technology and will require case-by-case review by the Defense Department and other agencies, as appropriate.”¹⁰⁶ Intermediate zone items will have a presumption of approval and will be approved unless the item involved “poses a clear threat to the United States security interest.”¹⁰⁷ The red zone includes “the most advanced technologies which would have direct applications to advanced military systems,” and therefore, would pose a clear threat to United States security.¹⁰⁸ Applications for items within this category are those “which we usually would not share even with our closest allies;” hence, red zone items will have a strong presumption for denial and the list itself will remain classified.¹⁰⁹ In order to administer effectively the new zone classifications, a senior interagency group under the direction of the National Security Council will conduct quarterly reviews of progress in implementing the new policy. In addition, it will review the three zones and make changes as

¹⁰³ *Hearings - testimony of W. Archey, supra note 7.* Archey stated that items in the green zone receiving expeditious license review will include most medium scale main frame computers with data processing rates up to 155 megabits/sec. Previously, computers with processing rates as low as 32 megabits/sec. required lengthy interagency review. Moreover, the current 14 technical parameters to be examined when computer exports are reviewed will be cut to five. In the area of microcomputers, almost all commercially available 16-Bit microcomputers will be routinely exportable to China. (Under the old policy, these would have been subject to lengthy interagency review usually resulting in routine denials of most machines). Routine approval will also apply to production equipment for large-scale integrated circuits, oscilloscopes and instruments used to measure performances of electronic equipment and circuits, and most instruments incorporating digital computers. *Id.* See also Mann, *U.S. Relaxes Rules on Exports to China*, AVIATION & SPACE TECH., Dec. 5, 1983, at 167.

¹⁰⁴ *Hearings - testimony of W. Archey supra note 7.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The specific commodities falling within this zone have not been outlined by the Commerce Department at this time. However, the details of this zone are to be articulated in 1984.

¹⁰⁷ *Id.* This change is extremely significant in that it shifts the burden of proof on the national security issue from those who wish to export to those who recommend against a particular export. Previously, nothing could be exported to China unless it clearly could be approved according to precedent or guidelines. Now, companies will be able to export anything except for goods and technology which have been prohibited or restricted for national security purposes. See *Export Controls: The Meaning Behind China's New Status as a "Friendly" But Non-Allied Country*, *supra note 94*, at 9.

¹⁰⁸ *Hearings - testimony of W. Archey, supra note 7.*

¹⁰⁹ *Most Applications Would be in Green Zone, supra note 102*, at 10.

appropriate.¹¹⁰

The immediate effect of the new licensing regulations will be to free seventy-five percent of the China applications for dual use technology from time-consuming review by the Commerce, Defense and State Departments. The products will be routinely exported as if they were destined for non-Communist countries.¹¹¹ Only the most sensitive technology, particularly that which can be incorporated into advanced weapons systems, will be denied export privileges or become subject to close scrutiny.¹¹² Moreover, the liberalized licensing standards are expected to boost the value of high technology trade to between \$1.5 - \$2 billion in 1984, compared to an estimated \$1 billion in 1983, and up from \$350 million in 1982.¹¹³ The equipment and technology to be provided under the policy, essentially raises the level of commodities and technical data available to China to the level of technology acquired by other large developing countries.¹¹⁴ Moreover, it is expected by Administration officials that not only will the high technology companies substantially benefit from the relaxed export controls, but also the oil and gas industry will be helped by the new guidelines because of the relaxed technical data rules.¹¹⁵

B. COCOM: Multilateral Control Obligations on Exports to China

Although the liberalized regulations are certain to speed up trade between the United States and China, China will still be subject to export screening rules promulgated by COCOM, the informal Coordinating Committee of the Western allies and Japan that establishes and monitors multilateral controls on exports to Communist nations.¹¹⁶ COCOM's main function is to review export license applications submitted by member countries on behalf of their domestic companies.¹¹⁷ Commerce De-

¹¹⁰ *Hearings - testimony of W. Archey, supra* note 7. The membership of the group is to include the Departments of State, Treasury, Defense, Commerce and Energy, the CIA, NSC, and various U.S. trade representatives. *P.R.C. Agreement on Reexport Assurances, Block to Policy Announcement, Seen Close*, 20 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 50 (Oct. 11, 1983).

¹¹¹ Lachica, *U.S. Outlines Technology Gear China Can Buy*, Wall St. J., Nov. 18, 1983, at 36, col. 3.

¹¹² *Id.*

¹¹³ *Hearings Before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs*, 97th Cong., 2nd Sess. (Nov. 17, 1983) (testimony of Donald M. Anderson, Acting Deputy Assistant Secretary of State for East Asian and Pacific Affairs) [hereinafter cited as *Hearings - testimony of D. Anderson*].

¹¹⁴ *Id.*

¹¹⁵ *Reagan Administration Announces New P.R.C. Technology Transfer Guidelines, supra* note 102, at 304.

¹¹⁶ See *supra* notes 86-88; for historical background, see *supra* note 21.

¹¹⁷ Western exports to China are controlled multilaterally by COCOM, whereby license applica-

partment officials have announced that the new United States export policy for China "is also being closely coordinated with our COCOM allies so that we can continue to honor our multilateral control obligations."¹¹⁸ Officials noted that consultation with COCOM countries will continue with the goal of further reducing obstacles to the transfer of increased dual use technology to China.¹¹⁹ In 1983, COCOM considered 825 United States-China cases, but it is estimated that the United States will send 3,500 cases to COCOM in 1984.¹²⁰ This may lead to a "bottle-neck" of cases in COCOM because of the Administration's new policy of expediting the license process for China applications.¹²¹ However, the Administration claims it has consulted carefully with United States allies about the policy and the technical details, and the reaction of these countries has apparently been favorable.¹²² The United States hopes to implement the speedy system in COCOM by increasing the organization's funding and staff, increasing the frequency of the courier service to COCOM from once to three times a week, and providing more telecommunications equipment to facilitate communication between COCOM and the member countries.¹²³

The obvious economic benefits to be obtained by the United States from expanded exportation to China have not been overlooked by COCOM members for they "are well aware of the competitive problems that they would encounter" from this new policy.¹²⁴ During the last two years, for example, the United States has had more requests for license approval for exports to China than all other COCOM members combined.¹²⁵ The Administration insists, however, that it has "made it clear

tions above a certain threshold technological level must be submitted by the U.S. government for COCOM review, even if the United States has first approved the export for one of its companies. See Mann, *supra* note 103.

¹¹⁸ Remarks by U.S. Secretary of Commerce, Malcolm Baldrige reported in *Green Will Mean Go On U.S. Sales of Dual-Use Items to P.R.C.*, *supra* note 102, at 138.

¹¹⁹ *Reagan Administration Announces New P.R.C. Technology Transfer Guidelines*, *supra* note 102, at 304. A recurring COCOM problem is that the member countries each have different attitudes toward the items proposed for control. There is often tension between COCOM members and the United States generated over the desire of COCOM members to make U.S. security interests secondary to their own trade interests. See Evrard, *supra* note 36, at 22 n.85.

¹²⁰ *Reagan Administration Announces New P.R.C. Technology Transfer Guidelines*, *supra* note 102, at 304.

¹²¹ Under current policy, the COCOM review takes up to 90 days. To expedite the process, the United States will ask COCOM to treat its green list items expeditiously. Mann, *supra* note 103, at 171.

¹²² *Reagan Administration Announces New P.R.C. Technology Transfer Guidelines*, *supra* note 102, at 304.

¹²³ *Id.* at 305; see *Hearings - testimony of D. Anderson* *supra* note 113.

¹²⁴ Mann, *supra* note 103, at 23.

¹²⁵ *Most Applications Would be in Green Zone*, *supra* note 102, at 11.

to our allies that we do not intend to manipulate this system in any way to take commercial advantage and we do not expect other countries to do so."¹²⁶ While COCOM may be willing to cooperate, and indeed it must in order for the new system to work properly, it is not yet clear whether allied nations will comply or whether some members may request the same treatment from the United States concerning technology trade with the Soviet Union to further their own trade interests.

C. Problems with the Previous Licensing Guidelines: Purpose and Effect of the New Changes

The Reagan Administration's China export policy has been ambiguous and inconsistent since 1981. In that year, the President announced his decision to promote "a secure, friendly and modernized China" by permitting the export to that country of equipment and technology at technical levels twice as sophisticated as that approved for the Soviet Union before its invasion of Afghanistan in December, 1979.¹²⁷ The mechanics of implementing the policy, however, were unclear and unworkable.¹²⁸ The system proved essentially to be one of optimistic rhetoric and cosmetic shifts in policy to placate the United States business community.¹²⁹ The Chinese asserted that, in practice, United States export controls did not reflect the President's supposedly more liberal policy and, in fact, the controls were usually applied arbitrarily and capriciously.¹³⁰ The standard was impractical partly because even exports below the "two-times" threshold were subject to an interagency national security review that delayed the licensing process.¹³¹ Lack of cooperation particularly between the Department of Commerce and the Department of Defense,¹³² the failure of the Administration to coordinate its policies with those of its foreign allies,¹³³ and its own unpredict-

¹²⁶ *Hearings - testimony of D. Anderson, supra* note 113.

¹²⁷ *Hearings - testimony of W. Archey, supra* note 7.

¹²⁸ See *U.S. May Block Sale of Electronic Gear to China Firm*, Wall St. J., Mar. 8, 1983, at 39, col. 2; Manning, *Softer Line on Hardware*, CHINA TRADE REP., July 1983, at 8.

¹²⁹ *Id.*

¹³⁰ *Who's in Charge Here*, FAR EASTERN ECONOMIC REVIEW, Apr. 7, 1983, at 28; see also STAFF OF HOUSE COMMITTEE ON ENERGY AND COMMERCE, 98th Cong., 1st Sess., REPORT ON UNITED STATES TRADE RELATIONS WITH CHINA AND JAPAN 8 (Comm. Print 1983) [hereinafter cited as ENERGY AND COMMERCE REPORT].

¹³¹ Mann, *supra* note 103, at 167; see also *Hearings - testimony of W. Archey, supra* note 7. The "two-times" threshold refers to the prior U.S. policy of selling to the Chinese technology two times more advanced than that sold to the Soviet Union. *Id.*

¹³² See Commerce, *DOD Clash Over Export Controls, supra* note 85; see also *U.S.-China Trade Could Reach \$25 Billion, supra* note 56, at 359.

¹³³ *Schultz Fails to Calm Troubled Waters*, BUS. WK., Feb. 21, 1983, at 49.

able policies¹³⁴ all contributed to the President's decision in 1983 to reformulate his policies and redraft the regulations.

Since 1981, the Administration has discouraged United States exporters from selling their products to China by long licensing delays despite the fact that the same goods were available from other Western countries whose licensing restrictions were not so strict.¹³⁵ This situation has caused some United States companies to lose Chinese orders to the more cooperative foreign trading partner. With this in mind, United States businesspeople have argued that the export regulations are self-defeating when the Chinese can purchase the same items produced by the United States from Western Europe or Japan without the nettlesome delays.¹³⁶ Without coordinating its policies with its allies, United States restrictions have been pointless and counterproductive. The new export regulations, however, are expected to resolve the foreign availability problem through coordination with COCOM allies.

The length of time the various departments and agencies often took to process a license application was another obstacle preventing effective trade with Communist countries, or substantially controlled nations. For many United States firms a lengthy review process can jeopardize existing contracts with China.¹³⁷ This particularly hurts small firms lacking the financial resources to endure such delays.¹³⁸ For example, where an item may be potentially licensable, a customs agent might postpone the shipment until either the Department of Commerce or Defense Department, or both, approve the item.¹³⁹ Frequent occurrences of this

¹³⁴ OFFICE OF TECHNOLOGY ASSESSMENT: AN UPDATE, *supra* note 14, at 102. For example, in June 1982, Ambassador Stroessel, speaking to the National Council on United States-China Trade, characterized China as "a friendly country with which we are not allied, but with which we share many common interests." Simultaneously, the Administration tightened its licensing policy towards China in response to intelligence reports of technology leakage to it and the Soviet Union. Then, in September 1982, the Reagan Administration licensed the sale to China of a sophisticated computer used in the United States for simulating missile flights. *Id.* See also Weisskopf, *Chinese Trade Issues Seen Snagging Schultz*, Wash. Post, Jan. 31, 1983, at A12, col. 4.

¹³⁵ Zonderman, *Policing High-Tech Exports*, N.Y. Times, Nov. 27, 1983, sec. 6, at 100; see also *High Technology Firms Seek Relaxation of Export Administration Act Strictures* [Jan.-June] 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 517 (Jan. 4, 1983); see *Schultz Fails to Calm Troubled Waters*, *supra* note 133.

¹³⁶ Zonderman, *Policing High-Tech Exports*, N.Y. Times, Nov. 27, 1983, sec. 6, at 100; see also *High Technology Firms Seek Relaxation of Export Administration Act Strictures* [Jan.-June] 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 517 (Jan. 4, 1983); see *Schultz Fails to Calm Troubled Waters*, *supra* note 133.

¹³⁷ See Jacobs, *Small Firms Upset by Efforts to Limit High-Tech Exports*, Wall St. J., Apr. 4, 1983, at 19, col. 1.

¹³⁸ *Id.*

¹³⁹ *Id.* Consider CSI Technologies, Inc., a small firm, which sold capacitors to Bombay. The shipment was delayed from a West Coast port because the custom officials did not know whether the

problem detract from the reputation of United States firms and their credibility as reliable suppliers. In addition, this situation often forces small firms to export without regard to the export regulations.¹⁴⁰ Moreover, given the thousands of items on the Commodity Control List, it is not always clear whether a product comes under its control. Thus, some smaller firms decide to forego compliance with the regulations at substantial time and expense, and accept the risk of exporting illegally.¹⁴¹ The new regulations have sought to remedy this problem by making the system clearer and more efficient for large and small firms alike.

IV. THE IMPACT OF THE NEW EXPORT POLICY ON UNITED STATES TRADE

A. China's Development Plan

The potential for marked increases in United States high technology exports to China lies not so much in the purchasing power of China's one billion consumers as it does in the needs of the Chinese government's ambitious development plan.¹⁴² Soon after the death of Mao Tse-Tung in 1976, and the purge of the Maoist Gang of Four in 1977, China's new leaders instituted a nationwide industrialization program in order "to make China a fully developed nation by the end of the century through rapid modernization of its agriculture, industry, military establishment and science and technology."¹⁴³ The "Four Modernizations" program has had far reaching effects not only on China itself, but also on its international relations. China's leaders recognized immediately that the country would need to expand foreign trade substantially and increase imports of plants, machinery equipment, management know-how, and scientific and technical knowledge, especially from the advanced capitalist nations, in order to implement their program.¹⁴⁴ This orientation contrasted sharply with that of the 1960s and 1970s, when "self-reliance" had been stressed as one of the country's fundamental principles.¹⁴⁵

product required an export license. The government review process took three months, added substantial costs to the small firm and affected its business relations with its buyer. The \$100,000 shipment was the first shipment of a \$1 million order contingent upon satisfactory delivery of the first part. *Id.*

¹⁴⁰ *Chipex Pleads Guilty in U.S. Export Case*, *Asian Wall St. J.*, Nov. 18, 1983, at p. 2, col. 3; see also *Caught in the Swinging Door of U.S. Policy on China*, *BUSINESS WK.*, Oct. 3, 1983, at 124.

¹⁴¹ See Zonderman, *supra* note 135.

¹⁴² ENERGY AND COMMERCE REPORT, *supra* note 130, at 7. For a superb insight into United States-China trade for the future, see *China Policy For The Next Decade*, REPORT OF THE ATLANTIC COUNCIL'S COMMITTEE ON CHINA POLICY, Oct., 1983.

¹⁴³ See A.D. BARNETT, *supra* note 9, at 122-49.

¹⁴⁴ *Id.*

¹⁴⁵ H. Harding, Jr., CHINA AND THE U.S. — NORMALIZATION AND BEYOND 15 (1981). During

Now the Chinese are clamoring for Western technology and, therefore, view the United States as a particularly valuable trading partner.¹⁴⁶ In turn, United States exporters are anxious to fill China's orders generated by China's modernization plan.

United States businesspeople, particularly those engaged in the computer industry, are enthusiastic about the Reagan Administration's recent decision to liberalize export controls for China because of that country's potentially large market.¹⁴⁷ Indeed, China lags years, if not decades, behind industrialized Western countries in terms of computer resources, and United States computer vendors are anxious to supply China with as much technology and technical data as China demands and the United States government will permit.¹⁴⁸ Though the United States has given a "green light" to sellers of dual use commodities previously banned from export, there is a substantial likelihood that United States exporters may face other obstacles and risks in engaging in increased levels of trade with China.

B. Potential Problem Areas in Future United States-China Trade

Perhaps the greatest potential problem area for United States exporters, now that trade restrictions have been eased, may be their ignorance of important economic, cultural and political differences between the two countries, and their inexperience in dealing with the Chinese market. United States businesspeople may encounter difficulties in understanding Chinese commercial practices and may confront problems in trying to communicate with the end-users of United States goods.¹⁴⁹ United States vendors of high technology will have to identify the end-users in China's fledgling computer sector, determine their needs and then seek out the party or parties who make the purchase decisions.¹⁵⁰ Furthermore, China's leaders, aware of their country's pressing needs to computerize, want to develop a technological infrastructure where the means of production are backward.¹⁵¹ Thus, those United States export-

the Cultural Revolution (1966-76), China's radical leaders had warned that reliance on foreign trade would be inherently corruptible and would cause China to become dependent on the West. However, after Mao's death, China's new leadership began to argue the opposite—that China could modernize only by drawing on the advanced experience and technology of other countries.

¹⁴⁶ ENERGY AND COMMERCE REPORT, *supra* note 130, at 11.

¹⁴⁷ Laberis, *New Rules Ease High-Tech Trade With China*, COMPUTERWORLD, July 4, 1983, at 51.

¹⁴⁸ *Id.*

¹⁴⁹ See ENERGY AND COMMERCE REPORT, *supra* note 130, at 5-11.

¹⁵⁰ Laberis, *Birth Pangs of U.S.-China Tech Trade Diagnosed*, COMPUTERWORLD, July 4, 1983, at 54.

¹⁵¹ *Id.*

ers selling semiconductor manufacturing and systems testing equipment will have to be particularly patient with a nation that still performs many complex industrial procedures by hand.¹⁵²

It is possible that the United States exporters may find stiff competition once they start investing in the Chinese technology market. Their European and Japanese counterparts already are firmly entrenched in the Chinese market and, therefore, are more familiar with the nuances of doing business there.¹⁵³ The Chinese may be more interested in dealing with those countries rather than with the United States if it is more efficient to do so. The Japanese, for example, have full-time trading officials in many locations throughout China.¹⁵⁴ If United States businesses expect to make serious progress and reap the rewards of developing the Chinese technology market, they will have to adopt long-term strategies rather than short-term, "quick money" goals as they have evidenced in the past.¹⁵⁵

Another possible problem area is the limited ability of the Chinese to assimilate the transferred technology.¹⁵⁶ If the technology being transferred is of an appropriate level of sophistication for Chinese technicians and it is transferred under workable terms, a United States company stands to enter the market as a pioneer in the new market area. If, however, the technology is not absorbed and applied smoothly by the Chinese partner, or if the end product is too sophisticated for the demands of the Chinese market, the company stands to lose both money and its initial market position.¹⁵⁷ The Chinese cannot, and perhaps may not desire to, assimilate the more advanced United States technology.¹⁵⁸ China currently lacks the industrial production, technology, personnel or systems to build high technology components or systems.¹⁵⁹ Thus, the Chinese market for highly advanced technology may be limited and some United States firms may become dissatisfied with their investment abroad and pull out of the market.

Another possible constraint on United States exports to China may include China's ability to pay for them.¹⁶⁰ China's credit rating is currently excellent, but this could change if the country takes on more debt

¹⁵² *Id.*

¹⁵³ ENERGY AND COMMERCE REPORT, *supra* note 130, at 10-12.

¹⁵⁴ *Id.* at 10-11.

¹⁵⁵ *Id.* at 11.

¹⁵⁶ Brown, *The ITT Story*, CHINA BUS. REV., Sept.-Oct. 1983, at 40, 42.

¹⁵⁷ *Id.*

¹⁵⁸ ENERGY AND COMMERCE REPORT, *supra* note 130, at 9.

¹⁵⁹ *Id.*

¹⁶⁰ *China Policy for the Next Decade*, *supra* note 142, at 27; *see also* Harding, *supra* note 145, at 19.

than its economy can repay.¹⁶¹ Difficulties in financing could discourage or even cancel import contracts with foreign investors. In fact, as the way opens for more technology transfer, United States companies are finding their Chinese counterparts pressing hard for joint ventures.¹⁶² The unwillingness of United States firms to share the equity and risks in the new market could sacrifice key contracts to more flexible competitors.

Potential impediments to the growth of United States-China trade also stem from policies and practices in China. A notable example is China's lack of legal protection for foreign technology.¹⁶³ Although China has recently created trademark, patent and copyright laws,¹⁶⁴ these laws are still undeveloped and, therefore, the legal rules in these areas for foreign investors are still unclear or unpredictable. This is an area that any United States firm contemplating doing business in China will have to consider before embarking on a zealous exportation of commodities to China.

Finally, the prospects for rapidly growing and smooth trading relations between the United States and China will depend greatly upon the political relations between the two countries. During his recent visit to the United States, China's Prime Minister, Zhao Ziyang, made clear that the political climate would continue to affect China's economic dealings with the United States for although "economic matters are different from political matters, . . . in the final analysis they are not absolutely separate."¹⁶⁵ The sensitivity between United States-China political and economic relations is evidenced clearly by several events of 1983—the defection of tennis star Ha Nu,¹⁶⁶ the Manchu Bonds recovery,¹⁶⁷ the ongoing textile dispute over trade arrangements,¹⁶⁸ and arms sales by the

¹⁶¹ See Farnsworth, *supra* note 13.

¹⁶² Brown, *supra* note 156, at 42.

¹⁶³ *China Policy for the Next Decade*, *supra* note 142, at 33.

¹⁶⁴ *The Trademark Law of the People's Republic of China*, CHINA LAW REP., No. 2 (Baker & McKenzie Trans. Summer 1982), at 111.

¹⁶⁵ Wren, *Chinese Premier Bids U.S. Keep Pledge on Taiwan*, N.Y. Times, Jan. 4, 1984, sec. A, at 6, col. 1; e.g., Prime Minister Zhao warned that political differences could affect China's commitment to purchase six million tons of wheat in 1984 just as they affected China's refusal to buy in 1983; see Broder, *China Defines Taiwan Policy for U.S. Talks*, Chicago Trib., Jan. 14, 1984, at 1, col. 6; see also Farnsworth, *U.S. to Sign Accord With Peking For Closer Industrial Cooperation*, N.Y. Times, Jan. 4, 1984, at A1, col. 3.

¹⁶⁶ Bennett, *China-U.S. Ties Survive Hu Na Flap*, Wall St. J., Apr. 26, 1983, at 39, col. 2.

¹⁶⁷ *China Memo Handed to Secretary Schultz Asks U.S. to Drop Manchu Bonds Judgment*, Wall St. J., Feb. 10, 1983, at 34, col. 2.

¹⁶⁸ Parks, *Threatened With Textile Duty, China Warns U.S. of Trade Repercussions*, N.Y. Times, Nov. 18, 1983, at 67, col. 3.

United States to Taiwan.¹⁶⁹ The Taiwan issue is a particularly sensitive issue between the two countries because the Chinese have struggled for centuries to reunify their country and "there is no room for China to make any concessions on the question of Taiwan."¹⁷⁰ This is extremely significant because of the trading relationship the United States has had with Taiwan for decades.¹⁷¹ While the political relationship between the United States and China will set the tone for economic relations between the two countries, China's internal political climate will also have a profound effect on the extent of United States-China trade.

Ideological vestiges of China's recent past¹⁷² are likely to remain in the minds of its people for some time to come. There are many persons within China who, while welcoming Western help in industrial development, question the cost to national pride at which it is being bought.¹⁷³ At some point in the future the Chinese may come to resent Western technological influences.¹⁷⁴ Such firmness on matters of national pride is especially prevalent during periods of internal change and shifting political sentiment, which China has been going through since the death of Mao and the institution of the "Four Modernizations" program. Moreover, China may become politically unstable again when Chinese leader, Deng Xiaoping, almost eighty years of age, passes from the scene.¹⁷⁵ Internal strife often affects external affairs.

For now though, the United States and China are both making necessary concessions toward devising a mutually beneficial and workable trade system. The United States has already eased restrictions on shipments of technology to China, settled a potentially disruptive textile dispute and worked for the admission of China to a number of international organizations.¹⁷⁶ Prime Minister Zhao, on the other hand, has agreed not to press President Reagan to halt all sales of military hardware to Taiwan, despite his earlier harsh stance on the issue.¹⁷⁷ Moreover, China is in the process of drafting new trademark, patent and copyright laws

¹⁶⁹ Bennett, *Chinese Premier, Reagan Agree in Public But Air Differences on Taiwan Privately*, Wall St. J., Jan. 12, 1984, at 32, col. 2.

¹⁷⁰ Wren, *supra* note 165.

¹⁷¹ *See id.*

¹⁷² *E.g.*, Old Maoist notions of self-reliance in modernization. *See supra* notes 145-46 and accompanying text.

¹⁷³ Bennett, *Visit to U.S. by China's Premier Zhao Indicates Change in Attitude on Reagan*, Wall St. J., Jan. 9, 1984, at 22, col. 1.

¹⁷⁴ The Chinese may object to the export of American culture—the development of consumer tastes along Western lines or the advertising for Western lifestyles that are currently unattainable.

¹⁷⁵ Bennett, *supra* note 173.

¹⁷⁶ Farnsworth, *supra* note 165.

¹⁷⁷ Wren, *supra* note 165.

for the protection of its Western investors and exporters.¹⁷⁸ Both countries currently seem determined to "create favorable conditions for strengthening industrial and technological cooperation between the two countries, in order to strive for a balance in their economic interests. . . ." ¹⁷⁹

V. CONCLUSION

In 1983, United States trade with China fell to a depressed level of \$4.4 billion due to China's calculated decreased demand for United States imports resulting from the textile dispute between the two countries.¹⁸⁰ With many bilateral issues already resolved, such as export regulation, and the remaining irritants reduced to manageable proportions, the two-way trade is, however, expected to reach between \$5.5 billion and \$6 billion in 1984.¹⁸¹ Within this figure, United States high technology sales to China are estimated to increase to as much as \$2 billion from last year's \$800 million as a result of the liberalized trade restrictions.¹⁸² While the trade prospects with China look good for United States exporters, successful ventures will depend on the successful implementation of the licensing regulations, Allied cooperation through COCOM in reviewing license applications expeditiously, sensitivity by United States vendors to China's internal development needs and commercial practices, and, of course, the acknowledgement by businesspeople of the inextricable link between the economic and political relations between the countries.

The new export regulations for the transfer of technology to China mark a giant step by the United States in establishing significant and rewarding trading relationships between the two countries. The potential for United States sellers in the high technology field to realize substantial profit from foreign investment in China is staggering. The potential investor should, however, consider the variables that make up a vast new Chinese market, and recognize that the new market will suffer growing pains in the early stages of its development. Good trade relations will therefore require mutual flexibility.

Elizabeth M. Nimmo

¹⁷⁸ See *supra* note 168 and accompanying text.

¹⁷⁹ Farnsworth, *supra* note 165.

¹⁸⁰ Lachica, *U.S.-China Trade Seen Growing 25% to 35% This Year*, Wall St. J., Jan. 13, 1984, at 1, col. 5.

¹⁸¹ *Id.*

¹⁸² See *supra* notes 111-15.