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The 1983 Amendment to the Export Administration Regulations: The Status of Export Controls to the People's Republic of China

I. INTRODUCTION

In the next five years, trade between the United States and the People's Republic of China (PRC) could more than double.¹ Trade between these two nations reached \$4.94 billion for the first ten months of 1984, an increase of forty-three percent from the same period in 1983.² Moreover, in recent years, the PRC has sought to modernize itself with high technology imports. In response, the United States Commerce Department has promulgated an amendment to the Export Administration Regulations. This recent amendment was designed specifically to relax export controls to the PRC in order to facilitate increase in trade.³ It represents the bright future of the Sino-American trade relationship.⁴

The trade relationship between the United States and China⁵ has undergone numerous changes since the first trade between the two countries in 1784.⁶ The United States and China entered their first formal trade treaty in 1844.⁷ Since then, three Congressional Acts have governed the export policies of the United States towards China.⁸ In Febru-

¹ Saikowski, *Era of Economic Opportunity Begins*, CHRISTIAN SCIENCE MONITOR, May 1, 1984, at 1, col. 2.

² Asian Wall St. J., Dec. 24, 1984, at 16, col. 1.

³ See *infra* note 83.

⁴ Commenting on the recent amendment to the Export Administration Regulations that was designed to relax export controls to the PRC, Christopher Phillips, the president of the National Council for U.S.-China Trade, stated, "In ten years of dealing with [U.S.-China trade], I've never been more encouraged." N.Y. Times, May 14, 1984, at D14, col. 3.

⁵ China, here, refers to mainland China before the Communist Revolution of 1949 and the People's Republic of China after the Revolution.

⁶ On February 22, 1784, the *Empress of China* set sail for the Orient from New York. It traded tea for ginseng. *Exports to China: A Review on the 200th Anniversary of U.S.-China Trade, 1984: Hearing Before the Special Subcommittee on the U.S. Trade With China of the House Committee on Energy and Commerce*, 98th Cong., 2d Sess. 1 (1984) (statement of Mr. Al Shift, Chairman of the Special Subcomm.) [hereinafter cited as Hearing].

⁷ See *infra* note 13.

⁸ These are the three major acts governing the United States export policy. Congress has also

ary of 1949, just prior to the birth of the PRC, Congress promulgated the Export Controls Act of 1949.⁹ It was the first United States peacetime export controls act. Twenty years later, the Export Administration Act of 1969¹⁰ superseded the 1949 Act. Finally, the Export Administration Act of 1979,¹¹ in turn, superseded the 1969 Act.¹² The executive branch's regulations that implement these acts have reflected the attitude of the United States towards China (and the PRC after its birth in 1949) throughout the tumultuous relationship between these two nations.

This Comment will, first, briefly sketch the history of the United States export policies towards China. Second, it will analyze the current controls over exports to the PRC in light of the 1983 amendment to the export regulations. Third, it will discuss the historical impact of the new amendment on the Sino-American relationship. Lastly, it will conclude that the 1983 Amendment establishes an appropriate and prudent export policy towards the PRC at this time, although in order to accomplish the ultimate goal of significantly increasing exports to the PRC, the United States must take further measures.

II. THE HISTORY OF UNITED STATES EXPORT POLICIES TOWARDS THE PEOPLE'S REPUBLIC OF CHINA

A. Opening the Door

The United States and China entered their first trade agreement in

enacted numerous amendments to the three Acts and legislation that affect export policy. Most recently, Congress promulgated the Export Administration Amendments Act of 1985. Pub. L. No. 99-64, 99 Stat. 120 (1985). After the expiration of the Export Administration Act of 1979, an executive order extended the authority of the Act past its expiration date. The 98th Congress failed to promulgate a new act to govern export policy. In 1985, the 99th Congress finally reauthorized the 1979 Act, amended by the 1985 Amendments Act. *Infra* note 12 and accompanying text.

⁹ See *infra* note 21.

¹⁰ See *infra* note 44.

¹¹ See *infra* note 59.

¹² The 1979 Act expired on March 30, 1984. 50 U.S.C.A. App. § 2419 (West Supp. 1981). On that expiration date, however, President Reagan extended the authority of the 1979 Act, and the regulations implemented thereunder, for one more year. Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984). Even with President Reagan's extension, Congress was unable to promulgate a new act or reauthorize the 1979 Act. See *Congress Clears Bill to Renew Main Law Regulating Exports*, 43 Cong. Q. 1302 (1985). On March 28, 1985, President Reagan ordered Executive Order No. 12,470 to continue past its expiration date because of Congress' failure to promulgate a new export control act. Notice of President of March 28, 1984, 50 Fed. Reg. 12,513 (1985). Finally, on July 12, 1985, Congress promulgated the Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985). Although the 1985 Act amends the 1979 Act to a degree, it essentially reauthorizes the 1979 Act. *Id.* More specifically, the 1985 Act reauthorizes the President and the Secretary of Commerce to "issue such regulations as are necessary to carry out the provisions of [the 1985] Act." *Id.* at § 116. Therefore, the focus of this comment—the 1983 Amendment to the Export Administration Regulations—is not affected by the 1985 Act.

the Treaty of Wanghia in 1844.¹³ The treaty established a favorable trade relationship between the two nations.¹⁴ At the time, the volume of trade between the two nations was insubstantial to the United States, although it loomed large to China.¹⁵

By the turn of the century, the United States maintained an open-door policy towards China. The United States perceived China with an almost paternalistic attitude. In no small part, the United States missionaries reinforced such an attitude.¹⁶ Furthermore, the Nationalist Revolution of 1911 endeared the United States to the Chinese.¹⁷ Sun Yat-Sen and, subsequently, Chiang Kai-Shek led a "democratic" revolution that made significant social and economic progress. Although it ultimately failed on the mainland and was exiled to the Island of Taiwan, the Nationalist Revolution was a commendable fight for democracy from the United States viewpoint.¹⁸

As a result of this auspicious beginning of Sino-American trade relationship, the United States became China's dominant trading partner. Despite formidable competition from the Japanese,¹⁹ the United States maintained its strong relationship with China until the Communist Revolution of 1949 and the birth of the PRC.²⁰

B. Closing the Door

After World War II, Congress promulgated the first United States peacetime Export Controls Act in 1949.²¹ This Act delegated the power to regulate exports to the executive branch. Thus, the President was

¹³ Treaty With China, Jul. 3, 1844, United States-Ta Tsing Empire, 8 Stat. 592, T.S. No. 45.

¹⁴ "The Treaty of Wanghia," modeled after the Sino-British Treaty of Nanking, which concluded the "Opium War" conferred most-favored-nation treatment on the United States and enabled its citizens to trade in five treaty ports in China." Lee and McCobb, *United States Trade Embargo on China, 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U.J. INT'L L. & POL. 1, 1-2 (1971) [hereinafter cited as Lee and McCobb].

¹⁵ *Id.* at 2.

¹⁶ Jenkins, *Dealing With the Chinese*, 5 INT'L TRADE L.J. 27 (1979-80) [hereinafter cited as Jenkins].

¹⁷ *Id.* at 28.

¹⁸ The fall of the Nationalist Revolution resulted from a number of factors. First, the Sino-Japanese war had fragmented the vast mainland. Second, the fragmentation ultimately led to civil wars. Third, the lack of national unity produced an ineffective government that could not control disastrous inflation. Finally, the Communist Revolution led by Mao Tse-Tung gained strength by promising national dignity after China's 100 years of ignominy. *Id.*

¹⁹ The Japanese surpassed the United States in exporting to China only after conquering China's coastal provinces in 1938. Even then, Japan trailed the United States in importing from China. After World War II and Japan's surrender, the United States again emerged as China's dominant trading partner. See Lee and McCobb, *supra* note 14, at 2.

²⁰ *Id.*; see Jenkins, *supra* note 16, at 28-29.

²¹ 63 Stat. 7 (1949), as amended by 50 U.S.C. app. §§ 2021-2032 (1964).

given the discretion to implement the 1949 Act by controlling exports "as he may deem appropriate."²² Such export controls seek to serve two ostensibly conflicting goals of protecting national security and promoting international trade.²³ To those ends, three important factors guide the President's discretion in controlling exports. First, export controls must not endanger national security; second, they must promote the United States foreign policies; and third, they must restrict exportation of scarce, domestic materials.²⁴

Pursuant to the Act of 1949, the Commerce Department, which administers the export regulations, implemented the validated license requirement for exports to the PRC.²⁵ To export under a validated license, the exporter must obtain approval of the Commerce Department before exporting certain strategic items.²⁶ The Commerce Department decides to approve or disapprove a license application based on commerce, foreign policy and national security considerations. Reacting to the Communist Revolution in China, the Commerce Department imposed restrictive export policies towards China and, subsequently, the PRC. The United States, in effect, placed the PRC in the same category as the Soviet Union and other "Soviet Bloc" countries.²⁷

In 1949, the United States also joined forces with its European allies in an attempt to multilaterally control exports to the "Soviet Bloc" countries. To this end, a coordinating committee (COCOM) was created.²⁸ In order to control exports to the "Soviet Bloc" countries, COCOM utilizes three methods. First, it establishes an embargo list; second, it reviews individual exceptions to the list; and third, it reviews the list multilaterally.²⁹ In 1950, the United States succeeded in persuading COCOM to adopt the United States controls on exports to the PRC.³⁰ Thus, the identical treatment of the PRC and the "Soviet Bloc" countries became official in 1950.

In 1952, the United States and its allies created a separate commit-

²² Dvorin, *The Export Administration Act of 1979: An Examination of Foreign Availability of Controlled Goods and Technologies*, 2 *Nw. J. INT'L L. & B.* 179, 182 (1980) [hereinafter cited as Dvorin].

²³ *Id.* at 179.

²⁴ *See supra* note 21, at § 2022.

²⁵ *See Lee and McCobb, supra* note 14, at 3-4.

²⁶ These items are listed in the Commodity Control List of the Regulations. *See, e.g.*, 15 C.F.R. § 399 (1985).

²⁷ *See Lee and McCobb, supra* note 14, at 4.

²⁸ *Id.*

²⁹ *See Dvorin, supra* note 22, at 190.

³⁰ *See Lee and McCobb, supra* note 14, at 4.

tee (CHINCOM) to multilaterally control exports to the PRC.³¹ Export controls by CHINCOM were considerably more restrictive than controls by COCOM. This became known as the "China Differential."³² In 1957, however, the United States allies formally incorporated CHINCOM into COCOM,³³ thereby abandoning the "China Differential." The United States, nevertheless, maintained its "China Differential" policy into the 1970s.

The shift in the United States attitude towards China came as a result of the Chinese Civil War and the subsequent birth of the PRC in 1949. This Communist Revolution prompted the United States to first apply COCOM export controls and, subsequently, CHINCOM export controls to the PRC. The United States was justified in doing so because Chairman Mao had unequivocally announced Communist China's "lean to one side"; that is, the lean to the Soviet Union.³⁴ The outbreak of the Korean War in 1950 further aggravated the Sino-American relationship.

As a result of these events, the United States revoked all validated licenses to the PRC that had already been approved. The Commerce Department also began to require validated licensing for all goods, including nonstrategic goods, to the PRC. Consequently, by the end of 1950, the United States had all but completely shut the door to the PRC.³⁵

The door to the PRC remained shut throughout the 1950s and 1960s. In the 1950s, the United States experienced a rash of "McCarthyism." The paranoia of the McCarthy era prevented the United States from making any attempts at opening the door to the PRC.³⁶ In the 1960s, the PRC experienced its own version of "McCarthyism." Partly because of the United States policies towards Taiwan and Vietnam, the PRC strictly maintained its policy of "anti-imperialism."³⁷

C. Reopening the Door

Two important factors propelled the Sino-American relationship from the "closed door" period into a new era. First, the United States began to experience internal pressure from the business community.³⁸ In

³¹ See *id.* at 8.

³² Meese, *Export Controls to China: An Emerging Trend for Dual-Use Exports*, 7 INT'L TRADE L.J. 20, 23 (1981-82) [hereinafter cited as Meese].

³³ *Id.*

³⁴ See Jenkins, *supra* note 16, at 28.

³⁵ See Lee and McCobb, *supra* note 14, at 5.

³⁶ See Jenkins, *supra* note 16, at 30.

³⁷ *Id.*

³⁸ The business community sought to bring the United States export controls to the PRC in line

the 1960s, the United States allies increased their trade with the PRC under the less restrictive COCOM standards. Meanwhile, the United States maintained its strict policy of the "China Differential." Many commodities not exportable under the United States controls were exportable under COCOM controls. The PRC simply acquired commodities that it could not acquire from the United States from other COCOM nations. The "China Differential" policy was effective in its early days, because after World War II, the United States enjoyed clear technological and economic superiority over the rest of the world. By the 1960s, however, the United States no longer enjoyed that superiority.³⁹ Foreign availability of goods not exportable from the United States subverted many of the United States objectives in implementing export controls to the PRC. The export controls damaged United States businesses by preventing them from exporting certain commodities to the PRC. The controls also failed to serve national security because of foreign availability of those commodities.⁴⁰ The changing conditions since World War II had rendered the United States export controls to the PRC anachronistic.

The second important factor that relaxed the Sino-American relationship was the actions of the Soviet Union. In the 1960s, the Soviet Union began to consider possible "surgical operations" to remove Chinese nuclear installations. It also built up massive military forces along the Sino-Soviet border and invaded Czechoslovakia.⁴¹ Such political factors involving the Soviet Union paved the way for the Export Administration Act of 1969 and the Nixon Administration's detente efforts.⁴² The Nixon Administration's diplomatic initiatives opened a new era for the Sino-American relationship in the early 1970s.⁴³

Responding to political pressures and pressures from the business community, Congress promulgated the Export Administration Act of 1969⁴⁴ which superseded the 1949 Act. While continuing to give wide discretion to the President on export controls, the 1969 Act changed the United States policy from "strategic embargo" to "qualified promotion of

with the less restrictive COCOM controls. The "China Differential" policy and the 1949 Act seemed outdated. Bertsch, *U.S. Export Controls: The 1970's and Beyond*, 15 J. WORLD TRADE L. 67, 69 (1981) [hereinafter cited as Bertsch].

³⁹ The resurgence of the European and Japanese economies had largely eroded the technological and economic superiority which the United States enjoyed after World War II. *Id.*

⁴⁰ The change in global economy since World War II had, for the first time, made foreign availability a significant factor in the United States export policies. *Id.*

⁴¹ See Jenkins, *supra* note 16, at 30.

⁴² *Id.*

⁴³ See *id.* at 33.

⁴⁴ 50 U.S.C. app. §§ 2401-2413 (1976) (expired Sept. 30, 1979).

exports."⁴⁵ Like the 1949 Act, the new Act sought to balance several interests: national security, foreign policy, control over domestic short supplies, and promotion of foreign trade.⁴⁶ Generally, the Act retained the prohibition of exporting goods that would contribute to the military potential of countries that are hostile to the United States. The 1969 Act, however, lifted the prohibition of exporting goods that would contribute to the economic potential of foreign countries.⁴⁷ In promulgating the 1969 Act, Congress found that the "unwarranted restriction of exports from [the United States] has a serious adverse effect on [the United States] balance of payments, particularly when export restrictions applied by the United States are more extensive than export restrictions imposed by countries with which [the United States] has defense treaty commitments."⁴⁸ Thus, with the 1969 Act, Congress updated the United States export policies.

Meanwhile, the Nixon Administration made significant diplomatic efforts to reopen the door to the PRC.⁴⁹ By the early 1970s, the PRC had officially concluded its Cultural Revolution⁵⁰ and begun a new era of "turning outward." These events led to relaxation of the United States export controls to the PRC. Consequently, the status of the PRC became similar to that of the "Soviet Bloc" countries.⁵¹ Despite the 1969 Act and the diplomatic endeavors of the Nixon Administration, however, the "China Differential" was not completely eradicated.

The 1969 Act suffered from two major flaws. First, notwithstanding Congress' recognition of the "foreign availability" problem, the Act continued to confer wide discretion to the President in controlling exports. The executive branch exercised its discretion regardless of foreign availability of commodities controlled by the United States.⁵² Indeed, the Defense Department had substantially blocked exports of "strategic" goods

⁴⁵ See Bertsch, *supra* note 38, at 69.

⁴⁶ *Id.*

⁴⁷ Branting, *Reconciliation of Conflicting Goals in the Export Administration Act of 1979—A Delicate Balance*, 12 L. & POL. INT'L. BUS. 415, 419 (1980) [hereinafter cited as Branting].

⁴⁸ *Supra*, note 44, at § 2401(3).

⁴⁹ See Jenkins, *supra* note 16, at 30.

⁵⁰ The Cultural Revolution spanned between 1966 and 1968. Led by Mao Tse-Tung, the PRC sought to "revitalize revolutionary values." The reconstruction era followed the Cultural Revolution that restructured the PRC politically. In October, 1968, Mao Tse-Tung announced the end of an era of "turning inward" and the beginning of a new phase. The United States and the PRC immediately initiated diplomatic relations. *Encyclopaedia Britannica*, p. 394, 397-99 (William Benton pub. 15th ed. 1974).

⁵¹ See Meese, *supra* note 32, at 23; see generally Lee and McCobb, *supra* note 14, at 10-15.

⁵² See Dvorin, *supra* note 22, at 183.

to the PRC despite foreign availability of those same goods.⁵³ Moreover, the Act did not solve the problem of lack of uniformity in interpreting export standards among the COCOM nations.⁵⁴ What was not exportable by one nation was exportable by another. Despite the detente efforts, the "China Differential" persisted.

Second, the 1969 Act continued to place excessive procedural burdens on the United States exporters. The bureaucratic difficulties in obtaining export licenses created a powerful disincentive to export.⁵⁵ For example, an export license application first went to the Office of Export Administration (OEA). If the application was not routinely approved there, the OEA had the power to refer it to the Advisory Committee on Export Policy (ACEP). The OEA might also refer it to any other government agencies it deemed appropriate. The Operating Committee of ACEP, which consisted of representatives from the Departments of Commerce, Defense, Energy and State, reviewed the referrals.⁵⁶ If the OEA declined to accept recommendations from ACEP, it had the power to refer the application to a Sub-Advisory Committee on Export Policy (Sub-ACEP).⁵⁷ If no unanimous decision was reached at the Sub-ACEP level, the application was referred to either the assistant secretary level or to the Export Administration Review Board at the Cabinet level.⁵⁸ This application procedure created burdens in paperwork and delays. Therefore, the bureaucratic difficulties in obtaining export licenses to the PRC placed the United States business at a competitive disadvantage to its COCOM counterparts.

D. Keeping the Door Open

The flaws of the 1969 Act necessitated changes in export controls. In September of 1979, Congress promulgated the Export Administration Act of 1979⁵⁹ which superseded the 1969 Act. Implementing the 1979

⁵³ See Gosain, *Export Licensing of Advanced Technology to Communist Countries: Problems and Prospects*, 1 HASTINGS INT'L. & COMP. L. REV., 305, 316 (Winter, 1978).

⁵⁴ *Id.*

⁵⁵ See Bertsch, *supra* note 38, at 73.

⁵⁶ This review may be very time-consuming. The OEA usually makes a decision after receiving a unanimous consent from ACEP. If the departments represented in the ACEP disagree, a delay will result. In many cases, such delays are tantamount to denials because the United States exporter may be competing against a foreign exporter who is not subject to such procedural delays. See generally Branting, *supra* note 47, at 425.

⁵⁷ This committee consists of Deputy Assistant Secretaries from the Departments of Commerce, Defense, Energy and State. See *id.* at 426.

⁵⁸ The described procedure is from the Export Administration Act of 1979. The 1969 Act, however, contained the same license application procedures. See *id.* at 423.

⁵⁹ 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1981).

Act, the Export Administration Regulations placed the PRC in the same group⁶⁰ as the Soviet Union and other Communist countries. Hence, the licensing procedures and controls for the PRC became identical to that for the "Soviet Bloc" countries.⁶¹ The United States finally abandoned the "China Differential" policy with the 1979 Act.

The 1979 Act, which was designed to alleviate the flaws of the 1969 Act, recognized certain factors. First, although the Act still permitted Presidential discretion, the President no longer exercised limitless discretion. The President was required to consult affected United States industries and the Congress, as well as to consider alternative means in order to implement appropriate export controls.⁶² Second, the Act recognized the competitive nature of the world market.⁶³ The United States export controls mechanism became more sensitive to foreign availability of restricted goods controlled by the United States.⁶⁴ Furthermore, Congress recognized the need for more cooperation with the COCOM allies in order to effectively control exports to hostile nations.⁶⁵

The 1979 Act also took measures to resolve the problem of bureaucratic difficulties in the licensing procedure. The Act established time limitations for license application reviews. All reviews of applications, from the initial screening and inter-agency referrals to the COCOM review, had to be performed within a limited time.⁶⁶

Moreover, the 1979 Act created the Qualified General License⁶⁷ which is a hybrid between the validated license and the general license.

⁶⁰ For export control purposes, countries are placed in various groups. The scope of the export controls depends on the country group to which the destination country belongs. For example, export controls to country group Z, which contains North Korea, Vietnam, Kampuchea and Cuba, would be much more restrictive than controls to country group T, which contains Mexico, Bermuda and Brazil, among other nations. See 15 C.F.R. § 370 (1984).

⁶¹ See Meese, *supra* note 32, at 30.

⁶² See *id.* at 25.

⁶³ The Congress realized that consideration of foreign availability and increased cooperation among treaty partners are crucial factors in protecting the United States business in the world marketplace. Babinski, *The Export Administration Act of 1979*, 4 SUFFOLK TRANSNAT'L L.J. 361, 367 (1980) [hereinafter cited as Babinski].

⁶⁴ See Dvorin, *supra* note 22, at 194-96.

⁶⁵ See Babinski, *supra* note 63, at 367.

⁶⁶ See 50 U.S.C.A. app. § 2409 (1979); The initial screening process within the Commerce Department must take place within 10 days. If the applications are not referred to other agencies, the Commerce Department must completely process them within 90 days. Conversely, if the applications are referred to other agencies, then the Commerce Department has 150 days to completely process the applications. If COCOM review is necessary, the Commerce Department is governed by a basic guideline of 210 days. There are, however, exceptions to these guidelines. See Elliott, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. OF TRANSNAT'L L. 255, 275 (1984) [hereinafter cited as Elliott].

⁶⁷ See, 15 C.F.R. § 373.4 (1984).

Like the validated license, this new license grants authorization from the Commerce Department to export certain commodities. But, it also has characteristics of the general license. Once obtained, the exporter may make multiple shipments without reapplying for individual validated licenses.⁶⁸ In creating the Qualified General License, the Commerce Department intended to reduce the paperwork and expenses involved in exporting.⁶⁹

The 1979 Act, like its predecessors, represents an attempt at balancing the conflicting interests of promoting national security and encouraging foreign trade.⁷⁰ Each export controls act has sought to confer discretionary powers to the President while establishing criteria, albeit nebulous, to guide the President. The 1979 Act is, hence, a statutory framework within which the executive branch may control exports to serve national interest. It is not a comprehensive answer to the questions raised by these conflicting interests.⁷¹ Indeed, the effect of the 1979 Act depends greatly on the executive branch's implementation of the Act through regulations, as was the case with the earlier Acts.

In 1980, the Commerce Department amended the Export Administration Regulations by removing the PRC from the "Soviet Bloc" group to a new country group specifically designed to distinguish the PRC from other Communist countries.⁷² The licensing procedure for exports to the PRC, however, seemed to remain unchanged. Therefore, the removal of the PRC from the "Soviet Bloc" to another country group was ostensibly nothing more than symbolic.⁷³

Nevertheless, the new status of the PRC did prove to be of some significance. The Carter Administration relaxed export guidelines to the PRC to the point of allowing exportation of civilian goods with potential military applications, unless the government could show cause why such

⁶⁸ *Id.*

⁶⁹ Elliott, *supra* note 66, at 268.

⁷⁰ See Babinski, *supra* note 63, at 366.

⁷¹ See Elliott, *supra* note 66, at 256; ". . . Congress has remained reluctant to circumscribe too closely Executive discretion in fleshing out those considerations and responding to them. But the new [1979] Act, at the same time, constitutes a noteworthy, if by no means revolutionary, step in the continuing saga of Congressional attempts to force the export controls bureaucracy to pay greater heed to balance of trade considerations, multilateral coordination, the right of exporters, and congressional oversight." *Id.*

⁷² Effective April 25, 1980, the PRC was removed from country group Y to country group P. The PRC was the only country in the newly created country group P. 45 Fed. Reg. 27,922 (1980).

⁷³ Even after the removal of the PRC to another country group, applications for export to the PRC were processed through the United States export control system for group Y countries. The Commerce Department and other government agencies (most notably, the Defense Department), as well as COCOM, reviewed the applications as before. See Meese, *supra* note 32, at 31.

exports should not be allowed.⁷⁴ This relaxation of export guidelines to the PRC, while maintaining strict export controls to the "Soviet Bloc," became known as the "China Preferential."⁷⁵

The "China Preferential" policy seems to have continued with the Reagan Administration. In November of 1983, the Commerce Department again amended the Export Administration Regulations by grouping the PRC with the non-Communist countries.⁷⁶ Currently, the PRC is in the same country group as the western European countries and non-Communist Asian countries.⁷⁷ The 1983 Amendment does, however, provide several significant exceptions that distinguish the PRC from the non-Communist countries within the same group.⁷⁸

On July 12, 1985, Congress promulgated the Export Administration Amendments Act of 1985.⁷⁹ Although the 1985 Act amends the 1979 Act to a degree,⁸⁰ it essentially reauthorizes the 1979 Act.⁸¹ The new Act does not affect the Commerce Secretary's power to issue regulations to govern export controls nor any regulations that had been issued under the 1979 Act.⁸²

III. THE 1983 AMENDMENT TO THE EXPORT ADMINISTRATION REGULATIONS

In 1983, the Commerce Department amended the Export Administration Regulations that implement the Export Administration Act of 1979.⁸³ The 1983 Amendment implements substantially liberalized ex-

⁷⁴ See *id.* at 35.

⁷⁵ George, Biallo, Stein, *Trade With the People's Republic of China: Current Status and Future Prospects*, 3 NW. J. INT'L L. & B. 21, 26 (1981).

⁷⁶ 48 Fed. Reg. 53,064 (1983).

⁷⁷ Currently, the countries are grouped thus:

Canada

Country Group T: North and South America and nations of the Caribbean excluding Cuba

Country Group V: Western Europe, the Middle East, Africa, non-Communist Asia, Australia, New Zealand, and the PRC

Country Group Q: Romania

Country Group S: Libya

Country Group W: Poland and Hungary

Country Group Y: Soviet Union, the Communist countries of Eastern Europe, Laos, Mongolia

Country Group Z: Cuba, Kampuchea, North Korea, Vietnam

See, McKenzie, *China and U.S. Trade: Recent Export Regulations*, 18 INT'L LAW. 455, 464 (1984) [hereinafter cited as McKenzie]; 15 C.F.R. § 370 (1984).

⁷⁸ McKenzie, *supra* note 77, at 455.

⁷⁹ Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985).

⁸⁰ Most notably, the 1985 Act eases licensing and procedural restrictions, and it limits the President's power to impose embargoes unilaterally. See *Export Controls*, 43 Cong. Q. 1597 (1985).

⁸¹ *Supra* note 79.

⁸² See *supra* note 12 and accompanying text.

⁸³ 48 Fed. Reg. 53,064 (1983).

port controls to the PRC. By placing the PRC in a country group that consists of the United States allies,⁸⁴ the 1983 Amendment opens the door wider for exportation to the PRC. Yet, the PRC is not quite treated as an ally of the United States. The 1983 Amendment provides significant exceptions to distinguish the PRC from the other countries in the country group to which the PRC now belongs.⁸⁵

Under the 1979 Act, three types of export licenses may be utilized to export to the PRC. First, an exporter may use a validated license which is a document issued by the Commerce Department authorizing a specific export.⁸⁶ Second, the exporter may use a general license which covers categories of exports that do not require specific licensing.⁸⁷ Finally, special licensing procedures are used in appropriate cases in lieu of individual validated licenses.⁸⁸

While maintaining tight control over the use of general and special licenses for exports to the PRC, the 1983 Amendment significantly relaxes the use of validated licenses for exports to the PRC. By reviewing validated license applications for exports to the PRC on a flexible case-by-case basis, the Commerce Department can promote a friendly attitude towards the PRC and also maintain a cautious "wait-and-see" approach.

A. General License

Unless the export regulations specify that export of a certain commodity requires validated or special licensing, the exporter may ship the commodity under a general license. Under this license, the exporter may export, up to a specified limit, without applications or documents.⁸⁹

Notwithstanding the 1983 Amendment, many restrictions on the use of the General License for export to the PRC remain. For example, requirements for using General Licenses a) GIT, b) Ship Stores, c) Plane Stores, and d) GFT-U.S. remain unchanged by the Amendment.⁹⁰ The General License "GIT" governs the United States exports of commodities that originate in a foreign country. Therefore, rules governing export of foreign commodities moving in transit through the United States to

⁸⁴ *Id.*

⁸⁵ See McKenzie, *supra* note 77, at 455.

⁸⁶ U.S. Department of Commerce, Export Administration Annual Report FY 1981, 1, 2 (Feb., 1982) [hereinafter cited as Annual Report].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 1979 Act, 50 U.S.C.A. App. §§ 2401-2420, 2403(a)(3) (West Supp. 1981); see also Babinski, *supra* note 63, at 363.

⁹⁰ See, 15 C.F.R. §§ 371.4, .9-.10, .15 (1985).

the PRC remain unchanged despite the 1983 Amendment.⁹¹

The General Licenses "Ship Stores" and "Plane Stores" govern exports of commodities to be used on vessels and airplanes respectively.⁹² The 1983 Amendment also did not change the use of these licenses for exports to the PRC. The same holds true for rules governing the General License "GFT-U.S.," which authorizes exports of goods imported into the United States for display at an exhibition or trade fair.⁹³

In general, an exporter may not export strategic commodities to the PRC under the various general licenses. The same restrictions, however, do not apply to the non-Communist countries in country group V to which the PRC now belongs. Thus, the 1983 Amendment did not change the status of the PRC at all with respect to exports under the aforementioned licenses.

Yet, the Amendment did bring the status of the PRC in line with those of the non-Communist countries in using the General License "GLR."⁹⁴ This general license authorizes the reexportation of previously validated exports that have been returned to the United States for replacement of defective parts. Before the Amendment, the regulations governing this license distinguished exports to the PRC from exports to the non-Communist countries.⁹⁵ The 1983 Amendment has eliminated that distinction.

In some instances, the 1983 Amendment modifies the status of the PRC without completely bringing it in line with the status of the non-Communist countries. For example, general licenses authorizing temporary exports to the PRC and personal baggage for trips to the PRC have been liberalized to allow exportation of certain non-strategic goods.⁹⁶ Nevertheless, limitations on the use of these licenses distinguish between exports to the PRC and exports to the non-Communist countries.

Before the 1983 Amendment, regulations prohibited exports of items that are designated with commodity codes "A," "B," "C," or "M"⁹⁷ to the PRC and other Communist countries under the General License "Baggage." The 1983 Amendment leaves unchanged restricted

⁹¹ 15 C.F.R. § 371.4 (1985).

⁹² See 15 C.F.R. §§ 371.9-.10 (1985).

⁹³ See 15 C.F.R. § 371.15 (1985).

⁹⁴ See 15 C.F.R. § 371.17 (1985).

⁹⁵ Before the Amendment, the Commerce Department imposed additional requirements for exporting under this license to the PRC. See 15 C.F.R. § 371.17(a)(3) (1985).

⁹⁶ The General License "Baggage" authorizes export of personal baggage for the purposes of a trip. The General License GTE authorizes temporary exports. The 1983 Amendment allows export to the PRC under these licenses except commodities designated as A or M on the Commodities Control List. 48 Fed. Reg. 53,064, 53,065 (1983).

⁹⁷ These commodity codes listed on the Commodities Control List indicate the level of control

use of General License "Baggage" for exports to the Communist countries other than the PRC. Restrictions for exports to the PRC, however, remain only for commodities with codes "A" and "M." Significantly, for non-Communist countries, there are no restrictions for using this license other than general restrictions.⁹⁸

Likewise, before the 1983 Amendment, regulations prohibited exports of items that are designated with commodity codes "A," "B," or "M"⁹⁹ to the PRC and other Communist countries under the General License "GTE." The 1983 Amendment does not change the restricted use of General License GTE for exports to the communist countries other than the PRC. Restrictions for exports to the PRC, however, remain only for commodities with codes "A" and "M." For non-Communist countries, there are no restrictions for using this license other than general restrictions.¹⁰⁰

The Amendment also modifies the application of General License "GLV."¹⁰¹ The General License "GLV" allows single shipments of commodities up to a certain amount to most non-Communist countries. The GLV value limit sets the allowable amount of export under this license to a given destination.¹⁰² Although the 1983 Amendment places the PRC in a group with non-Communist countries, it makes exceptions that effectively distinguish the PRC from other countries in the group. For most strategic commodities, the GLV value limit to non-Communist

for exports. They indicate the requirement of validated licensing for exports to the various country groups. The letters in the commodity codes and the respective country groups are:

Code letters	Country groups for which validated license is required
A	QSTVWYX (Multilaterally controlled to all destinations.)
B	QSTVWYZ (Unilaterally controlled to all destinations.)
C	QSWYZ and certain other countries.
D	QSWYZ only.
E	SWYZ.
F	SZ and certain other countries.
G	SZ only.
I	None.
M	Various (Country Group control level is governed by another entry on the commodity control list).

15 C.F.R. § 399.1(f)(2) (1985); for a listing of the country groups, *see supra* note 77.

⁹⁸ *See* 15 C.F.R. § 371.6 (1985).

⁹⁹ *See supra* note 97.

¹⁰⁰ *See* 15 C.F.R. § 371.22 (1985).

¹⁰¹ *See* 15 C.F.R. § 371.5 (1985).

¹⁰² The Commodities Control List states the GLV value limit for each commodity and for each country group. *See, e.g.*, 15 C.F.R. § 399 (1985).

countries is \$1,000; for the same items, the GLV value limit to the PRC is \$0.¹⁰³ The Amendment does, however, authorize export of many non-strategic commodities to the PRC under this license.

B. Validated License

The Validated License authorizes specific exports.¹⁰⁴ The Commerce Department decides whether or not to grant a validated license upon receiving an application indicating a "particular shipment to a specific consignee for an identified end use."¹⁰⁵ Before the 1983 Amendment, the United States export policy towards the PRC was one of great caution.¹⁰⁶ In September, 1983, the Commerce Department revealed its plans to relax export controls to the PRC.¹⁰⁷

According to Malcolm Baldrige, the Secretary of Commerce, the Commerce Department separates the validated licensing applications for technological commodities into three "zones." The "green zone" represents exports with minimal national security risks.¹⁰⁸ The Commerce Department routinely approves green zone applications without inter-agency review.¹⁰⁹

The "yellow zone" represents exports of high technology that can potentially affect the national security of the United States. The Commerce Department reviews the "yellow zone" applications on a case-by-case basis. The "red zone" represents exports of the most advanced technology available to the United States. If a commodity falls within the "red zone," exporters may not export this commodity even to the closest allies of the United States. Moreover, the list of "red zone" commodities

¹⁰³ For example, commodities such as machinery for manufacturing engines and airplanes, strategic chemicals, radars, and other communication equipment have GLV value limits of \$1,000 to country groups T and V (*See supra* note 77, for the listing of country groups). Although the PRC is in country group V, the GLV value limit for those same items to the PRC is \$0. For a complete listing of different GLV value limits for the same items assigned to country group V and the PRC, see 48 Fed. Reg. 53,068, 53,069 (1983).

¹⁰⁴ 15 C.F.R. § 372.2(a) (1985).

¹⁰⁵ *See* Babinski, *supra* note 63, at 363.

¹⁰⁶ The United States treated the PRC essentially the same as it treated the Soviet Union and other "Soviet Bloc" countries. *See* Meese, *supra* note 32, at 30.

¹⁰⁷ *China*, 20 U.S. EXPORT WEEKLY 9, 10 (Oct. 4, 1983).

¹⁰⁸ *Id.*

¹⁰⁹ Interagency review occurs when the export in question is sensitive enough to trigger a review by a government agency other than the Commerce Department. For example, the Defense Department would typically perform an interagency review. *See* Elliott, *supra* note 66, at 274. Historically, there has been tension in the interagency review process between the Commerce Department and the Defense Department. While the Commerce Department has sought to liberalize export controls to the PRC, the Defense Department has sought to strictly control exports to the Communist countries, including the PRC. *See* Wash. Post, Jan. 10, 1984, at D9, col. 2.

is classified and unavailable to the public.¹¹⁰

The 1983 Amendment, which places the PRC in the non-Communist country classification group, has dramatically relaxed the standard for reviewing validated license applications to the PRC.¹¹¹ According to Secretary Baldrige, seventy-five percent of exports to the PRC fall within the "green zone" as a result of the new policy implemented in 1983.¹¹² The general export policy towards the PRC is to approve the validated license applications, unless there is a significant risk that approval would subvert objectives of the United States export controls program.¹¹³ The Commerce Department may approve exports that may contribute to the military development of the PRC.¹¹⁴ In reviewing the applications, the Commerce Department no longer applies the standard of whether the proposed export may make significant contributions to the military potential of the PRC. Rather, the new standard is whether there is a significant risk that the proposed export will be diverted from the PRC to a nation that is hostile to the United States.¹¹⁵ For example, the Commerce Department would be concerned about the possible diversion of proposed high technology exports from the PRC to North Korea.

As part of the new export policy towards the PRC, the 1983 Amendment lists commodities that are likely to be approved for validated licensing.¹¹⁶ These items probably will not require any interagency reviews.¹¹⁷ High performance items, however, which will fall within the "yellow zone," will be reviewed on a case-by-case basis. Moreover, the Commerce Department will generally deny licensing for any commodity with "direct" military applications. For example, it will deny licensing for exports of nuclear weapons and intelligence-gathering equipment.¹¹⁸

Overall, the 1983 Amendment drastically changes the validated licensing procedure for exports to the PRC. This is especially true with high technology commodities.¹¹⁹ In the first quarter of 1984 alone, the Commerce Department approved 1,163 applications for exportation of

¹¹⁰ *Supra* note 107.

¹¹¹ *See* Hearing, *supra* note 6, at 5-6 (statement of Mr. Malcolm Baldrige, Secretary of Commerce).

¹¹² *Id.*

¹¹³ *See* 15 C.F.R. § 385.4 (1985).

¹¹⁴ *Id.*

¹¹⁵ *See* McKenzie, *supra* note 77, at 456.

¹¹⁶ *See* 48 Fed. Reg. 53,069-71 (1983).

¹¹⁷ 15 C.F.R. § 385-4(c) (1985).

¹¹⁸ *Id.*

¹¹⁹ *See* Hearing, *supra* note 6, at 3 (statement of Mr. Malcolm Baldrige, Secretary of Commerce).

technological commodities to the PRC.¹²⁰ These approved applications amounted to a value of \$315 million. In the first quarter of 1983, the Commerce Department approved 555 applications for technology exports to the PRC with a value of \$61 million.¹²¹ The 1983 Amendment has had a tremendous impact on approvals of technology exports to the PRC. The figure of \$315 million from the first quarter of 1984 is roughly five times the figure of \$61 million from 1983.

C. Special License

The 1979 Act provides five types of special licenses.¹²² The 1983 Amendment affects four of the five special licenses.¹²³ First, the Distribution License authorizes exports for a period of one year to a foreign consignee who may distribute or use the goods. Exports to most countries in the country group to which the PRC now belongs are eligible for this license. The Amendment does, however, except exports to the PRC under this license.¹²⁴

Second, prior to the 1983 Amendment, the Qualified General License (QGL) authorized multiple shipments for one year to approved consignees who used the shipments only for approved purposes.¹²⁵ Before the Amendment, the Communist countries, including the PRC, were eligible destination countries for this license.¹²⁶ The 1983 Amendment excepts the use of the QGL for exports to the PRC.¹²⁷ Exports to the other communist countries remain eligible for use of the QGL. This change by the Amendment represents the new liberalized policy towards the PRC because it represents a clear distinction between the PRC and other Communist countries. The commodities that were exportable to the PRC under the QGL prior to the Amendment are probably exportable under the General License today.

Third, the Service Supply License (SL) authorizes servicing of already exported equipment, provided that certain conditions are met.¹²⁸ These conditions, in effect, allow minimum service that is necessary for the normal function of the equipment. The requirements for using this

¹²⁰ The Wall Street Journal, May 10, 1984, § 2, at 38, col. 4.

¹²¹ *Id.*

¹²² See 15 C.F.R. § 373 (1985); the five licenses are project license, distribution license, qualified general license, service supply license, and aircraft and vessel station procedure license. See also Annual Report, *supra* note 86, at 2-3.

¹²³ See 48 Fed. Reg. 53,065-66 (1983).

¹²⁴ 15 C.F.R. § 373.3 (1985).

¹²⁵ See Annual Report, *supra* note 86, at 3.

¹²⁶ 15 C.F.R. § 373.4(a) (1983).

¹²⁷ 15 C.F.R. § 373.4(a) (1985).

¹²⁸ 15 C.F.R. § 373.7 (1985).

license for exports to the PRC remain unchanged after the 1983 Amendment. Therefore, the distinction between the PRC and the non-Communist countries remain despite the Amendment. The United States export policy towards the PRC seems to distinguish the PRC from both the Communist countries and the non-Communist countries.¹²⁹

Fourth, the Aircraft and Vessel Repair Station Procedure (AVRP) provides a procedure for exporting aircraft and vessel repair parts.¹³⁰ Prior to the 1983 Amendment, parts originating from the United States that would be used to repair airplanes or vessels of the PRC were not exportable. The Amendment has changed the use of AVRP for exports to the PRC, but with a condition. Parts originating from the United States that are for repair of airplanes or vessels belonging to the PRC may be exported, provided that documents show the location of the service to be performed and the type of aircraft or vessel to be serviced.¹³¹

The changes in the Special Licensing for exports to the PRC are mixed. The 1983 Amendment leaves the requirements for Distribution License¹³² exports and Service Supply License¹³³ exports to the PRC unchanged notwithstanding the new status of the PRC. The Amendment excepts the PRC from the scope of the Qualified General License, thereby grouping the PRC with the non-Communist countries.¹³⁴ Finally, the Amendment modifies the Aircraft and Vessel Repair Station Procedure to confer more favorable status on the PRC, but not quite in line with the status of the non-Communist countries.¹³⁵

D. Technical Data

The General Licenses GTDA and GTDR authorize exportation of technical data¹³⁶ to various country groups.¹³⁷ The General License

¹²⁹ The United States seems to view the PRC as neither a close ally nor an enemy. The 1983 Amendment makes significant exceptions to distinguish the PRC from the allies of the United States. See McKenzie, *supra* note 77, at 455. Yet the United States takes care also to distinguish the PRC from the Soviet Union. See *Capitalism in China*, BUSINESS WEEK, Jan. 14, 1985, at 56.

¹³⁰ 15 C.F.R. § 373.8 (1985).

¹³¹ 15 C.F.R. § 373.8(c) (1985).

¹³² See 15 C.F.R. § 373.4 (1985).

¹³³ See 15 C.F.R. § 373.7 (1985).

¹³⁴ See 15 C.F.R. § 373.4(a) (1985).

¹³⁵ See 15 C.F.R. § 373.8 (1985).

¹³⁶ The regulations define "technical data" thus:

. . . information of any kind that can be used, or adopted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual, or they may take an intangible form such as technical service.

¹³⁷ 15 C.F.R. § 379.1(a) (1985).

¹³⁷ 15 C.F.R. §§ 379.3-4 (1985).

GTDA covers technical data available to all destinations.¹³⁸ Conversely, the General License GTDR covers technical data that are restricted.¹³⁹ Before the 1983 Amendment, United States exporters were seldom permitted to use the General License GTDR for export to the PRC.¹⁴⁰ The 1983 Amendment provides for exportation of more technical data to the PRC. The Amendment does, however, establish limitations. In addition to restrictions applicable to the non-Communist countries, exports to the PRC under this license must meet special requirements. United States exporters may not export technical data to the PRC relating to commodities that are controlled for purposes of national security, nuclear-non-proliferation, or crime control.¹⁴¹ Thus, there remains a distinction between the PRC and the non-Communist countries in exporting under this license.

The reporting requirements for exports of technical data under Validated Licenses further reveal the current attitude of the United States towards the PRC. Upon expiration, suspension, or revocation of the license, the exporter must return validated technical data licenses to the Commerce Department.¹⁴² Moreover, the returned licenses must contain certain reports. Prior to the 1983 Amendment, the regulations required that export licenses to the non-Communist countries be returned with reports on the time of the export and whether the export was complete or partial.¹⁴³ However, regulations governing exports to the PRC or the "Soviet Bloc" countries required that licenses be returned with reports on the nature of the transaction, the nature of the payments received, and whether the price was actual or estimated.¹⁴⁴ In addition, the reports of technical data exports to the PRC, or to the "Soviet Bloc," had to fulfill the reporting requirements of technical data exports to the non-Communist countries.¹⁴⁵

The 1983 Amendment modified the reporting requirements. Reporting requirements for validated technical data licenses to the non-communist countries and the "Soviet Bloc" countries remain unchanged. As a result of the 1983 Amendment, however, exporters to the PRC are required only to report the nature of the transaction in addition to reporting required information for technical data exports to the non-Com-

¹³⁸ 15 C.F.R. § 379.3 (1985).

¹³⁹ 15 C.F.R. § 379.4 (1985).

¹⁴⁰ 15 C.F.R. § 379.4(b) (1983).

¹⁴¹ 48 Fed. Reg. 53,066 (1983).

¹⁴² 15 C.F.R. § 3790.6(a)(2) (1985).

¹⁴³ 15 C.F.R. § 379.6(b) (1983).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

munist countries.¹⁴⁶ This change is probably not significant. Nevertheless, it represents one example of many modifications in the 1983 Amendment that places the PRC on the continuum between the Communist countries and the allies of the United States.

IV. THE HISTORICAL IMPACT OF THE 1983 AMENDMENT

A. The Attitude of the United States Towards the PRC

The history of trade relations between the United States and China has closely paralleled the attitude of the two nations towards each other. For approximately a century, from the mid-19th Century to the mid-20th Century, they enjoyed a favorable trade relationship.¹⁴⁷ This open-door policy gave way to the political winds that spawned the closed-door policy for twenty years between 1949 and 1969.¹⁴⁸ The Chinese Civil War, the birth of the PRC, the Korean Conflict, and the extremist, paranoid periods in both countries perpetuated this era of extreme caution, if not complete distrust.

The closed-door policy of the twenty years between 1949 and 1969, again, changed to cautious detente policies in the 1970s.¹⁴⁹ Since the late 1960s, internal economic pressures in the United States in light of a more interdependent world economy and both governments' recognition of a common foe in the Soviet Union have triggered a period of reopening the door, albeit cautiously. Diplomatic initiatives of the Nixon Administration, as well as diplomacy of the subsequent administrations, have resulted in the current policy of the "China Preferential."¹⁵⁰

The Reagan Administration seems to have further relaxed export controls to the PRC. The Commerce Department's 1983 Amendment to the Export Administration Regulations accurately portrays the current status of the Sino-American trade relationship and the more relaxed attitudes of the two nations towards each other. The 1983 Amendment changed the status of the PRC to that of a non-Communist country. Although significant exceptions remain, this change in status represents a symbolic and substantive change in the attitude of the United States towards the PRC. The future prospects of trade relations between the two countries seem bright. Statistics are already beginning to show the effect of the 1983 Amendment. In the first eleven months of 1984, the United States exported high technology to the PRC valued at \$2.8 billion. In all

¹⁴⁶ 15 C.F.R. § 379.6(b)(1)(iii) (1985).

¹⁴⁷ See Lee and McCobb, *supra* note 14, at 1-3.

¹⁴⁸ See generally *id.* at 3-10.

¹⁴⁹ See *supra* note 16.

¹⁵⁰ See *supra* note 75.

of 1983, the United States exported \$1.1 billion in high technology to the PRC.¹⁵¹

Notwithstanding the Communist philosophy of the PRC, the United States no longer considers the PRC to be a hostile nation. On the other hand, the PRC is certainly not an ally of the United States.¹⁵² The 1983 Amendment treats the PRC as a cautious friend. The amendment is flexible enough to accommodate further improved relations with the PRC. Yet, it maintains safeguards to protect the United States security interests.

Despite the change in the status of the PRC, the 1983 Amendment does maintain great control over general and special licensing for exports to the PRC. The policy behind controlling validated licensing, however, has changed radically. Under the current Export Administration Regulations, the United States seems to perceive the PRC as a hybrid between an ally and a Communist country. The 1983 Amendment clearly indicates a trend towards treating the PRC more as friend than foe. Thus, the Amendment points to a bright future for the Sino-American relationship.

Although the 1983 Amendment represents a significant liberalization of the United States export policy towards the PRC, both the PRC and the United States business community have urged the Commerce Department to further relax export controls to the PRC.¹⁵³ Such a measure, however, would not be prudent at this time. Although Sino-American relations have improved greatly in recent years, the seemingly irreconcilable differences between the two countries loom large.¹⁵⁴

Moreover, the PRC is a highly volatile country at the moment. Despite its government's commitment to modernize the country, there is great resistance against modernization within the PRC.¹⁵⁵ The resistance is strongest where the commitment to modernize entails experimentation with capitalism. The philosophy of Mao Tse-Tung seems to be

¹⁵¹ Mark, *Western Red Tape Mires U.S. Sales of High-Tech to China*, Asian Wall St. J. Dec. 31, 1984, at 1, col. 3.

¹⁵² Conine, *Striking Terror in Soviet Hearts*, L.A. Times, May 7, 1984, § II, at 7, col. 1.

¹⁵³ On a recent trip to the United States, for example, Chen Muhua, Foreign Trade Minister of the PRC, urged the United States to end *all* restrictions on the movement of goods between the PRC and the United States [emphasis added]. Wash. Post, May 10, 1984, at D5, col. 2.

¹⁵⁴ THE ATLANTIC COUNCIL OF THE UNITED STATES, CHINA POLICY FOR THE NEXT DECADE 18 (1983) [hereinafter cited as CHINA POLICY].

¹⁵⁵ For the PRC, modernization means cooperation with the Western powers. Although the Chinese realize this necessity of dealing with the likes of the United States and Japan, there is a "deeply ingrained fear of foreign exploitation and concern that Western capitalism will undercut Chinese socialism." Parks, *Doing Business With China: Big Potential, But It Requires an Act of Faith*, L.A. Times, Apr. 2, 1984, § IV, at 3, col. 1.

deeply imbedded in the Chinese mind. Total eradication of that philosophy is highly unlikely in the foreseeable future. In fact, reversion back to the days of ideological insularity is not at all inconceivable.

Therefore, the liberalization approach taken by the 1983 Amendment is prudent and appropriate at this time. It encourages a friendly export policy towards the PRC while maintaining flexibility and caution. It seems to be an accurate manifestation of the Atlantic Council's friendly but cautious approach towards the PRC. In *China Policy for the Next Decade*, the Atlantic Council offered its balanced policy of encouraging friendship and "wait-and-see" caution.¹⁵⁶

The Committee stresses the importance of recognizing and encouraging the current convergence of common Sino-American interests, while openly acknowledging specific areas of different or conflicting interests, and leaving substantial room for modified relations as future world events unfold and expose common threats and opportunities.

B. The Problem of the COCOM Review

Although the 1983 Amendment is, in itself, an appropriate export policy towards the PRC, it does not, by itself, accomplish the ultimate goal of significantly increasing exports to the PRC. The United States export regulations no longer obstruct exports of high technology to the PRC. It does not follow, however, that exports of high technology make their way to the Chinese ports. In addition to clearing the United States regulations, exports to the PRC must also clear multilateral controls conducted by allies of the United States.¹⁵⁷ This multilateral review body has been heretofore reluctant to adopt relaxed export controls to the PRC. Thus, this multilateral review remains a major impediment against opening the export door to the PRC wider.¹⁵⁸ If the United States is to accomplish the ultimate goals of the 1983 Amendment, it must take further measures to eliminate this obstacle.

In the first quarter of 1984, the Commerce Department approved 1,163 export applications to the PRC compared to the 555 approved applications in the first quarter of 1983.¹⁵⁹ Such statistics of approved applications for export to the PRC, however, can be highly misleading. For most high technology commodities, COCOM must also approve the proposed export before actual shipping can take place. Despite the tremendous increase in the number of approved applications by the Commerce Department, the United States exports to the PRC increased only ten

¹⁵⁶ See *CHINA POLICY*, *supra* note 154, at 23.

¹⁵⁷ See *supra* note 27.

¹⁵⁸ See Mark, *supra* note 151, at 1, col. 3.

¹⁵⁹ See *supra* notes 120-21.

percent in the first half of 1984.¹⁶⁰ The 1983 Amendment has not solved the difficulties and delays in clearing the COCOM review.¹⁶¹ In fact, when more applications pass through the Commerce Department to COCOM, the backlog at COCOM grows even more. This results in a logjam and further delays.¹⁶² Currently, COCOM has more pending "PRC" applications than all other applications put together.

Several problems exist in the COCOM process. First, COCOM is a multilateral review committee whose members possess divergent interests. France, for example, has greater interests in trading with the Soviet Union than the United States. France has argued that the *guid pro quo* for France's preferential treatment of exports to the PRC in the COCOM review process should be preferential treatment of its exports to the Soviet Union by the United States.¹⁶³ This, of course, is politically unacceptable from the United States standpoint.

The second problem in the COCOM review process is the abuse of this process for commercial gain by the participating countries. United States businesses have argued that "American contracts are delayed in COCOM to give commercial advantage to companies from competing countries."¹⁶⁴

The third problem lies in the fact that the rate of technological progress has outdated the COCOM guidelines. Many high technology commodities that are reviewable by COCOM today should not be reviewed at all. The rate of technological progress renders the COCOM guidelines anachronistic. The purpose of COCOM review is to protect the security interests of the Western Allies by controlling exports of strategic items to hostile nations, not to create another bureaucratic obstacle that hinders free trade of nonstrategic goods.

Some possible solutions to the problems raised by the COCOM review process include overhauling the COCOM machinery or placing more United States staff on the committee in order to protect its interests within COCOM. The COCOM problem is, however, beyond the reach of the 1983 Amendment or any other regulation implemented by the Commerce Department.

¹⁶⁰ N.Y. Times, Aug. 22, 1984, at D5, col. 5.

¹⁶¹ For an example of the difficulties stemming from the dual control system—the Commerce Department's regulations and COCOM's regulations—see *Export Controls on Strategic Sales to China—The ITT Case*, 7 E. Asian Exec. R. 24-25 (1985); the ITT is experiencing great difficulty selling a production plant to the PRC, because of the dual control system. The plant would produce 300,000 digital switch telephone lines per year. *Id.*

¹⁶² See *supra* note 151.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

In summary, the 1983 Amendment, itself, is highly significant and is an appropriate policy for controlling exports to the PRC today. Notwithstanding the problems stemming from the COCOM review process, the 1983 Amendment has had a noticeable impact on exports to the PRC. It has opened the export door to the PRC wider. Yet, it has maintained a flexible case-by-case review of highly sensitive exports that may endanger the security of the United States. Most significantly, however, the 1983 Amendment embodies a symbolic attempt to befriend a potential superpower that plays a key role in balancing world power.

IV. CONCLUSION

Reflecting the current United States attitude towards the PRC, the 1983 Amendment strikes a prudent balance. On the one hand, it substantially relaxes export controls—especially controls over high technology—to the PRC, thereby promoting a better relationship between the two nations. On the other hand, it also espouses a “wait-and-see” approach that indicates a cautious attitude towards the PRC.¹⁶⁵ The ambivalence of the United States towards the PRC is certainly understandable, and for now, more desirable than the alternatives of completely closing or opening the door to the PRC. Given the United States incentives of entering the huge, untapped Chinese market and seeking to balance world power, the 1983 Amendment appropriately promotes a friendly approach towards the PRC. By the same token, given the fundamentally different philosophy of the PRC and the volatile nature of its politics, the 1983 Amendment prudently adopts a “wait-and-see” approach. In short, the 1983 Amendment establishes an appropriate and prudent policy for the United States to pursue in controlling exports to the PRC at this time.

If the United States is to accomplish the ultimate goal of significantly increasing actual exports to the PRC, it must eliminate the impediment of the COCOM review. If such a drastic step is politically unfeasible, the United States must at least modify the COCOM review process to bring it in line with the United States Commerce Department review process. Without such further measures, the COCOM review process will continue to function as a bottleneck to liberalizing export

¹⁶⁵ This cautious attitude is certainly understandable. After all, a major impetus for the United States to befriend the PRC is the global threat of the Soviet military and its policy of hegemonism. The Sino-American friendship is a product, not of deeply shared philosophies, but of a shared recognition of the Soviet threat. To a degree, the friendship rests on the notion that “the enemy of my enemy is my friend.” See *CHINA POLICY*, *supra* note 154, at 23.

policy towards the PRC and frustrate the ultimate objective of the 1983
Amendment.

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