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Throughout the 1970's, the deepening split in Sino-Soviet relations offered the United States the opportunity to exercise diplomatic leverage on the Soviet Union by selling items to China which might aid the Chinese in the modernization of their economic and military establishments while placing an embargo on the sale of those same items to other Communist nations. However, as long as an atmosphere of detente between the United States and the Soviet Union prevailed, even-handedness toward Communist nations continued to be the official U.S. trade position.

As the 1970's drew to a close, serious strains appeared in the American relationship with the Soviet Union.[1] In response, United States export control policy began an unofficial "tilt" toward China in the 1980's that has resulted in allowing China greater access to high-technology items than any other Communist country.[2] The Soviet invasion of Afghanistan had the effect of making this unofficial "tilt" the new policy — a policy that might be termed a "China Preferential."

> This latest expansion, officials said, grows out of the basic decision to sell China militarily useful equipment — though not weapons. The decision was made by President Carter early in January 1980, shortly after the Soviet invasion of Afghanistan and on the eve of Defense

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1. William Safire, "Russia's Threat to China," *N.Y. Times*, Mar. 10, 1980, at A21.

2. Indeed, President Carter set even more restrictive criteria to control high technology exports to the Soviet Union in the wake of the Soviet invasion of Afghanistan. The new guidelines imposed tighter controls in such areas as computers and software, manufacturing technology, and materials critical to the manufacture of high technology defense goods. Those added restrictions followed a series of earlier responses to the invasion of Afghanistan, which included revocations and denials of high-technology export licenses; controls on the export of grain and certain agricultural products; an embargo on the sale of phosphates for fertilizer; and severe restrictions on the sale of technology to produce equipment used in oil and gas production. *See* Press release, "President Sets Tougher Criteria on High Technology Exports to the U.S.S.R.," *U.S. Department of Commerce News*, March 19, 1980.

> Secretary Harold Brown's trip to Peking. On that trip, Brown said Washington had made it clear to Peking that the United States would consider, on a case-by-case basis, sales of technology and equipment that could have *dual use*, meaning military as well as civilian . . .[3]

With the dawning of the Reagan Administration, this policy was again publicly expressed, and was expanded in scope during Secretary of State Haig's June 1981 trip to Peking.[4]

As a result of this new "China Preferential," American exporters are faced with only a partially defined policy toward trade with China. U.S. export policy is made even more complex by the emergence of China as an informal ally of the United States in its rivalry with the Soviet Union, and the resulting American interest in modernizing China's military capabilities. In spite of this interest, American firms wishing to export to China are potentially hindered by American laws and export regulations. The purpose of this article is to aid exporters by:

(1) presenting a brief summary of the evolution of the United States export control system;
(2) explaining the various regulatory licensing procedures with which an American exporter might comply in light of the Export Administration Act of 1979 and related legislation on U.S. trade with China; and
(3) by assessing future prospects for U.S.-China trade in view of the current Reagan Administration policy.

I. THE ORIGIN AND EVOLUTION OF THE UNITED STATES EXPORT CONTROL SYSTEM

The present United States national security export control system had its origin in the controls adopted during the Second World War on the export from the United States of goods and commodities needed for the war effort. In

3. Getler, "U.S. Willing to Sell China Copters, Transport Planes," *Wash. Post*, March 19, 1980, § A, at 2 (emphasis added). *See also Wall St. J.*, Mar. 18, 1980, at 22.

4. *See* Marder, "The China Policy that Isn't," *Wash. Post*, June 14, 1981, § C, at 1, 5; Oberdorfer and Weisskopf, "U.S. Reaches Accord with China on Arms Sales," *Wash. Post*, June 17, 1981, § A, at 1; Oberdorfer and Branigin, "Haig Promises to Consult Allies on Sales to China," *Wash. Post*, June 20, 1981, § A, at 1, 10; "Secretary Haig Plays China Card in Spades," *N.Y. Times*, June 21, 1981, § 4, at 1; Lescaze, "House Panel Urges Care in Arms Sale to China, Taiwan," *Wash. Post*, June 21, 1981, § A, at 9; and Gwertzman, "Haig Rejects Moscow Criticism of New China Arms Policy," *N.Y. Times*, June 29, 1981, § A, at 3.

the immediate post-war period, these controls were continued as the United States attempted to maintain an efficient and equitable distribution of desperately needed raw materials to the war-devastated nations of Europe and Asia. By 1948, the deterioration of relations between the West and the Soviet Union had resulted in the addition of special controls on the shipment of certain strategic items to the Union of Soviet Socialist Republics (USSR) and Eastern Europe. These controls were tightened after events such as the Berlin Blockade, the Communist takeover of China and the outbreak of the Korean War.[5] In effect, virtually all American exports to what came to be known as the "Soviet Bloc" were embargoed.

Initially, national security export controls to Eastern Europe and the USSR had been imposed under the Second Decontrol Act of 1947,[6] but the need for a new law specifically aimed at national security considerations soon resulted in the passage of the Export Control Act of 1949.[7] This Act was the governing statute for United States export control efforts for all purposes (national security, short supply and foreign policy) for two decades until it was superseded by the Export Administration Act of 1969.[8]

Beginning in 1949, through the Coordinating Committee for Multilateral Export Controls (COCOM),[9] U.S. allies in Western Europe followed the

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5. For an excellent background on the U.S. trade embargo with China between 1949-1970, *see* Lee and McCobb, *United States Trade Embargo on China, 1949-1970; Legal Status and Future Prospects*, 4 J. OF INT'L LAW & POL., 1, 28 (1971).

6. Second Decontrol Act of 1947, P.L. No. 80-188, Ch. 248, 61 Stat. 321 (July 15, 1947).

7. Export Control Act of 1949, 50 U.S.C. app. §§ 2021-2032 (1951) (expired Dec. 31, 1969). For a good review of the background of the 1949 Act, *see* Comment, *Export Controls*, 58 YALE L.J. 1325 (1949).

8. Export Administration Act of 1969 (EAA), 50 U.S.C. app. §§ 2401-2413 (1976) (expired Sept. 30, 1979).

9. The Coordinating Committee for Multilateral Export Controls (COCOM) is the informal multilateral organization through which the United States and its allies attempt to coordinate the national controls they apply over the export of strategic materials and technology to the Communist world. It was conceived in postwar discussions between the United States, Britain, and France. By 1948, the United States Government had begun to enlist the cooperation of other West European allies for a coordinated embargo policy against the Communist bloc. Early negotiations on this matter were private and informal, but they were given impetus by the events of 1948-49: the proclamation 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, Technology and East-West Trade*, Office of Technology Assessment (OTA), U.S. Congress, Nov. 1979 at 153; *see also*, Adler-Karlsson, *International Economic Power: The United States Strategic Embargo*, 6 J. WORLD TRADE L. 501, 504 (1972); and Chin Kim, *The COCOM Case*, 4 J. WORLD TRADE L., 604-607 (1970).

United States' lead in imposing tight controls on exports to the "Soviet Bloc." With the end of the Korean War and the death of Stalin, however, trade restrictions to Eastern Europe and the Soviet Union were relaxed, especially by America's COCOM allies. Nevertheless, the total embargo on trade with China remained. This greater level of control on trade with China as compared to trade with other Communist nations became known as the "China Differential."

In the late 1950's, this "Differential" was abandoned by America's COCOM partners in favor of a more even-handed approach to trade with China vis-a-vis other Communist nations. While controls were still maintained on what were considered to be strategic items, COCOM nations other than the United States applied the controls equally to all nations of the "Soviet Bloc" and to Communist China. The United States, meanwhile, continued to maintain highly restrictive controls on trade with the Soviet Union and Eastern Europe, and an almost total embargo on trade with China. By 1968, the United States had become the only country still actively engaged in "economic warfare" against the Communists; it had unilaterally restricted the export of 1,100 items that were freely available to Communist countries from COCOM nations and other sources.[10] Thus, at the beginning of the Nixon Administration, the "China Differential" was still in place as the basis for U.S. export control policy toward China.

Diplomatic initiatives by the Nixon Administration opened a new era in Sino-American relations. Those initiatives resulted in the adoption of a more even-handed approach to the licensing of exports to China *vis-a-vis* other Communist nations. At the same time, the emergence of detente with the Soviet Union resulted in a reduction of controls on trade with Eastern Europe and the USSR. In 1972, the United States' controls on exports to Communist countries were cut back to a level much closer to that maintained by the other COCOM member nations. By 1981, the Reagan Administration had committed itself toward achievement of formal differentiation between China and the Warsaw Pact in the COCOM.[11]

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10. Gosain, *Export Licensing of Advanced Technology to Communist Countries: Problems and Prospects,* 1 HASTINGS INT'L. & COMP. L. REV. 305, 309 (1978).

11. The growing differentiation between the Warsaw Pact and China entailed in this new approach prompted Senate Banking Committee Chairman Jake Garn to caution that "while both the United States and the P.R.C. are opposed to the Soviet goals of world domination, the P.R.C. is a communist nation with which we have fundamental differences". In Garn's view, the United States should not sell to China process knowhow nor items susceptible to easy reverse engineering. The House Foreign Affairs Subcommittee on Asian and Pacific Affairs also cautioned President Reagan on arms sales to China stating that such a step could be seen provocatively by the Soviet Union, could cause concern among our allies in the region and, once taken, would be

II. THE EXPORT ADMINISTRATION ACT OF 1979 AND THE SCOPE OF ITS EXPORT CONTROLS

On September 29, 1979, President Carter signed into law the Export Administration Act (EAA) of 1979.[12] In addition to revising the Export Administration Act of 1969, the EAA of 1979 superseded the Mutual Defense Assistance Control Act of 1951 (the Battle Act).[13] In essence, the EAA of 1979 further defined the contour of United States export controls by eliminating some antiquated controls that had been present in U.S. law and by presenting a more flexible approach to the control of exports to Communist countries.

Prior to the EAA of 1979, government officials had encountered difficulty in determining appropriate export limitations. This difficulty was caused by national security considerations, or more specifically, by problems in determining what technology exports should be denied to Communist countries. These problems prompted Congress to revise its statutory scheme for export controls.

In the EAA of 1979,[14] Congress attempted to balance conflicting policies. The need for greater business opportunities was balanced against the need to restrict the exportation of goods and technology that would "make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the U.S."[15] To effectuate this balance and to serve national security considerations, the EAA of 1979 fixed conditions on the imposition of export controls — ostensibly for foreign policy purposes. The EAA requires that before determining what controls to impose, the President is to consider the following factors:

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very difficult to reverse. *See* "China: Control Policy Changes Outlined by Haig", BNA — Export Weekly #363, June 23, 1981, p. A-3.

12. Export Administration Act (EAA) of 1979, Pub. L. 96-72, Sept. 29, 1979, 93 Stat. 503, *codified at* 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1981).

13. Following the end of World War II, the United States commenced unilateral and multilateral trade restrictions on Communist countries. In this manner, the U.S. believed it was responding to what it perceived as an aggressive and monolithic aggregation of Communist countries and that a policy of "containment" would halt Communist expansion and create preconditions for the eventual dissolution of the communist system. Export controls thus became instrumental in the implementation of this containment policy. The Mutual Defense Assistance Control Act of 1951 (Battle Act) was the first piece of trade control legislation to deal explicitly with trade to Communist countries.

14. *See* 50 U.S.C.A. app. § 2402 (West Supp. 1981).

15. 50 U.S.C.A. app. § 2402(2)(A) (West Supp. 1981).

(1) the probability that controls will achieve their intended purpose in light of such factors as availability from other countries of items to be controlled;
(2) the compatability with overall policy toward the targeted country;
(3) the reactions of other countries;
(4) the trade effects;
(5) the enforceability; and
(6) the foreign policy consequences of not imposing controls.[16]

In addition, the President must consult with affected U.S. industries and determine that reasonable efforts have been made to achieve the purposes of the controls through negotiation or other alternative means. Finally, the President "in every possible instance" is to consult with Congress. It is improbable, however, that Congress will obstruct future trade exchanges due to the lack of a direct veto mechanism. At present, there is no legislative vehicle that can be utilized to block technology transfers other than passage of a specific bill designed to amend the Export Administration Act. It is interesting to note that although Section 36B of the Arms Export Control Act provides Congressional override on arms sales, it contains no provisions regarding technology transfer.

A. TYPES OF EXPORT LICENSES

The major types of licenses involved in trade with China are the general license (with various sub-license types),[17] the validated license,[18] and the

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16. 50 U.S.C.A. app. § 2405(b) (West Supp. 1981).

17. The general license permits export of certain commodities and technical data without filing an application with the Office of Export Administration (OEA). The two major types of general licenses are the general and specific.

(1) The general, *e.g.*, 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, *e.g.*, GLV (small value exports) authorizes the export in a single shipment of any commodity on the Commodity Control List.

18. The validated license requires a document issued by, or under the authority of, the OEA, authorizing a specific export. An application must be filed with the OEA setting forth the details of the contemplated transaction. An individual license authorizes exports of specific products or data to a specific consignee and a project license authorizes exports of products or data required for a specific activity or "project" abroad. The distribution license authorizes exports of certain products to approved consignees in specific countries who are distributors or end-users; the service supply license authorizes exports of spares and replacement parts to service U.S. equipment.

qualified general license.[19] A validated license, as its name implies, requires specific authorization whereas general licenses do not require any export license application. Whether a shipment is to be made under a validated or under a general license depends generally upon a combination of two factors — the specific commodity or technical data to be exported and its destination.[20] In other words, the world's nations are divided into various groups, and the interrelationship of the country group with the commodity intended for export determines whether or not a validated or general license is applicable.

The qualified general license is a new license category that was devised in an effort to simplify and expedite the export administration procedure. Essentially, it is a "general" license with validated license characteristics, involving both an application and a document issued by the Office of Export Administration. It authorizes multiple shipments of a given item to a particular destination.

American firms exporting a product or technology listed on the U.S. Commodity Control List (CCL)[21] to a destination which is also on the list, are

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19. MEYER, REGULATORY CONTEXT, EXPORT ADMINISTRATION ACT OF 1979: NEW DIRECTIONS IN LICENSING, RESTRICTIONS & ENFORCEMENT, at 89 (1980).

20. SURREY, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, at 61 (1963).

21. The Commodity Control List presently contains approximately 200 entries, grouped in the following ten categories:

Group 0: Metal-Working Machinery
—Forming Machines
—Other Metal-Working Machinery
Group 1: Chemical & Petroleum Equipment
—Specialized Processing Equipment
—Pumps and Valves
—Other Chemical Equipment
Group 2: Electrial & Power-Generating Equipment
Group 3: General Industrial Equipment
—Metallurgical, Mill & Foundry Equipment
—Equipment for Other Specific Industries
Group 4: Transportation Equipment
—Marine Equipment
—Aviation Equipment
—Other Equipment
Group 5: Electonics & Precision Instruments
—Radio, Radar & Other Telecommunications Apparatus
—Other Related Equipment & Parts for Radio, Radar, & Telecommunications Apparatus
—Other Electronic Apparatus & Precision Instruments
Group 6: Metals, Minerals & Their Manufactures

required by the EAA of 1979 to apply to the Department of Commerce for a "validated" export control license. These licenses are granted on a case-by-case basis and must be supported by a comprehensive explanation of the transaction, including the parties, the destination, the type and quantity of goods or technology being exported, and the end use of the export.[22]

Although other governmental offices regulate the export of some specialized commodities and data,[23] all applications for validated export

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Group 7: Chemicals, Metalloids, & Petroleum Products
—Chemicals and Metalloids
—Petroleum, Natural Gases, & Products derived therefrom
Group 8: Rubber & Rubber Products
Group 9: Miscellaneous

22. These licenses are published in the "Comprehensive Export Schedules" of the Department of Commerce, Washington, D.C. *See also* Pound, "Curbs on Technology Exports Hurt by Gaps in Enforcement," *N.Y. Times*, § A at 1, 24, October 14, 1981. The Pound article is part of an investigation by the *N.Y. Times* into the transfer abroad of advanced technology, military equipment and expertise by former United States intelligence agents and military officials. The Times series points up issues involving Federal control over such transfers, how they were made and the role of the C.I.A. in the activities of Edwin P. Wilson, a former agent. Mr. Wilson and another former agent were indicted in 1980 on charges of exporting explosives to Libya to help train terrorists.

23. *See* 15 C.F.R. § 372.4(b). Whereas the Department 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. Rather, each regulating office promulgates export regulations for the commodities and technical data under its jurisdiction. These other governmental offices and the commodities and data they regulate are as follows:

Arms, ammunition, and implements of war are regulated by the Office of Munitions Control, U.S. Department of State.

Narcotic drugs and marijuana are regulated by the Drug Enforcement Administration, U.S. Department of Justice.

Specified materials and facilities related to the production of atomic energy are regulated by the Division of State and Licensee Regulations, U.S. Energy Research and Development Agency, except that components for the facilities are regulated by the Office of Export Administration.

Watercraft owned by citizens of the United States are regulated by the U.S. Maritime Administration; but additional approval is required by the Department of State for vessels of war, as defined in the U.S. munitions list, and by the Office of Export Administration if the watercraft is to be reduced to scrap metal.

Natural gas and electric power are regulated by the Federal Power Commission.

Tobacco seeds and live tobacco plants are regulated by the Consumer Marketing Services, U.S. Department of Agriculture.

Migratory birds and endangered native fish and wildlife are protected by the Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, U.S. Department of the Interior.

licenses are submitted to the Commerce Department's Office of Export Administration (OEA).[24] Most applications are approved by the OEA without referral to other agencies.[25] However, if OEA is unable to grant the license routinely, the application is referred directly to the agencies that possess special expertise in the technologies involved in, or the issues raised by, the application.[26] One referral contemplated by this procedure is a referral to the Secretary of Defense "to review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes" (basically all Communist nations).[27] If the President

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Finally, the Treasury Department has promulgated several sets of regulations, administered by the Office of Foreign Assets Control that act as a check on the Export Administration Regulations. The Foreign Assets Control Regulations (Vietnam), the Cuban Assets Control Regulations, and the Rhodesian Sanctions Regulations require the exporter to obtain an additional Treasury Department license for exports to the respective countries. However, exports that have been licensed by the Office of Export Administration are generally licensed as a matter of course by the Treasury Department. The Transaction Control Regulations require the exporter to obtain Treasury Department authorization for export of commodities on COCOM's list of internationally embargoed strategic goods.

The Department of State is still chiefly concerned with foreign policy considerations of export control. State advises Commerce on foreign policy directions, represents the U.S. in all COCOM sessions and has primary responsibility for the development and administration of the Munitions Control List which is used to control the export of items of primarily military use. The export of such items is embargoed to Communist countries.

24. *See* Remarks of Bo Denysyk, Deputy Assistant Secretary for Export Administration Before the National Council for U.S.-China Trade, Department of State, Washington, D.C., July 8, 1981 at 4: "the Department of Commerce's Office of Export Administration will function like a service company with its customers being U.S. industry. I don't know if we will always follow the adage that 'the customer is always right,' but we will bend over backwards to provide courteous, expeditious, and consistent assistance."

25. *See* Remarks of Bo Denysyk, Deputy Assistant Secretary for Export Administration Before the National Council for U.S.-China Trade, Department of State, Washington, D.C., July 8, 1981 at 4:

> [The Reagan Administration has decided that] validated export licenses not requiring COCOM review will be processed by the Department of Commerce. By not requiring interagency review, we expect a threefold reduction in processing time for these cases. And, as you know, the majority of trade in high technology, dual use items is in this category.

See also, Comptroller General of the United States, Report to the Congress, Export Controls: Need to Clarify Policy and Simplify Administration 1 (ID-79-16) (March 1, 1979) (*hereinafter* "GAO Report on Export Controls") at 36.

26. Comptroller General of the United States, Report to Congress: Administration of U.S. Export Licensing Should be Consolidated to be More Responsive to Industry (ID-78-60) (Oct. 31, 1978) at 3-5 (*hereinafter* "GAO Report on Export Administration").

27. EAA of 1979 § 10(g), codified at 50 U.S.C.A. app. § 2409(g)(West Supp. 1979).

concurs with the Defense Secretary's recommendation that an export should be prohibited on national security grounds, no export license or other authority may be issued.[28] However, Presidential concurrence is very rarely called for.

The Operating Committee, which consists of representatives from the Departments of Commerce, Defense, Energy, and State,[29] plays a central role in this process. The Department of Treasury also has a representative on the Committee, but it seldom takes an active role. The Central Intelligence Agency regularly sends a representative, but generally does not make formal recommendations.[30] The OEA usually makes the final licensing decision only after receiving the unanimous consent of the Operating Committee members.[31]

To formulate its recommendation, each consulting agency determines whether an application should be referred for technical evaluation.[32] For example, referrals to the Department of Energy (DOE) are received by the Office of Political-Military Security Affairs.[33] It is that office's responsibility to determine whether to send applications to technicians within DOE, to resolve any differences among the technicians' recommendations and to formalize a DOE position on the application.[34] Similarly, the Department of State's Office of East-West Trade may refer applications to geographic desk officers or to a specialized office within the State Department, such as the Bureau of Human Rights and Humanitarian Affairs.[35] In the majority of

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28. EAA of 1979 § 10(g)(2), codified at 50 U.S.C.A. app. § 2409(g)(2) (West Supp. 1979).

29. GAO Report on Export Administration, *supra* note 26, at 5. The Operating Committee meets weekly, handling about fifteen applications per session.

30. GAO Report on Export Administration, *supra* note 26, at 5; GAO Report on Export Controls, *supra* note 25, at 35-36.

31. GAO Report on Export Administration, *supra* note 26, at 3; GAO Report on Export Controls, *supra* note 25, at 34.

32. GAO Report on Export Administration, *supra* note 26, at 8; GAO Report on Export Controls, *supra* note 25, at 37.

33. GAO Report on Export Administration, *supra* note 26, at 9; GAO Report on Export Controls, *supra* note 25, at 37.

34. *See* GAO Report on Export Administration, *supra* note 26, at 9; GAO Report on Export Controls, *supra* note 25, at 37.

35. Crossette, "U.S. Postpones Filling Rights Position," *N.Y. Times*, Sept. 29, 1981 at 10.

> The Bureau of Human Rights and Humanitarian Affairs was established by law in 1977, reflecting the Carter Administration's introduction of the subject as an issue in foreign policy . . . Any substantive change in the bureau's function would require Congressional action. . .
>
> The bureau's statutory functions include monitoring human rights in nations receiving U.S. economic and military aid.

cases, however, applications are not forwarded for technical review, but are decided by the office initially receiving the referral.[36]

If the OEA declines to accept a recommendation or if the recommendations are conflicting, the application may be referred to a sub-Advisory Committee on Export Policy (sub-ACEP) which consists of Deputy Assistant Secretaries from each of the cognizant departments.[37] If unanimity is not obtained at that level, the application may be referred to either the Advisory Committee on Export Policy (ACEP) at the Assistant Secretary level, or more commonly, to the Export Administration Review Board at the Cabinet level.[38] The tendency, however, is to seek and obtain unanimity at the Operating Committee level.[39] Only five referrals were received by the sub-ACEP in 1977, and no applications were forwarded to the ACEP or the Export Administration Review Board in that year.[40]

B. COUNTRY RESTRICTIONS

Until April 1980, China was listed in the regulations implementing the Export Administration Act, along with the Soviet Union and most Eastern European countries, in Country Group Y.[41] China is now in its own category,

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See also, GAO Report on Export Administration, *supra* note 26, at 9; GAO Report on Export Controls, *supra* note 25, at 37-38.

36. *See* GAO Report on Export Administration, *supra* note 26, at 8-9.

37. GAO Report on Export Administration, *supra* note 26, at 5; GAO Report on Export Controls, *supra* note 25, at 36, 37.

38. *See Export Administration Act: Agenda for Reform: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations,* 95th CONG., 2d SESS. 6-7 (1978) (*hereinafter* "Agenda for Reform Hearing") (prepared statement of Frederick W. Huszagh, Executive Director, Dean Rusk Center for International and Comparative Law, University of Georgia).

39. *See* GAO Report on Export Administration, *supra* note 26, at 8; GAO Report on Export Controls, *supra* note 25, at 37.

40. GAO Report on Export Administration, *supra* note 26, at 5.

41. *Country Group Y:*

Albania
Bulgaria
Czechoslovakia
Estonia
German Democratic Republic (including East Berlin)
Hungary
Laos
Latvia
Lithuania
Outer Mongolia
Union of Soviet Socialist Republics

U.S. Department of Commerce, Export Administration Regulations, supp. 1 at 370 (June 1, 1978).

Country Group P,[42] but this is "little more than a status symbol,"[43] since the licensing procedures remain the same. These procedures require that after an application for a license is filed with the Office of Export Administration (OEA) of the Department of Commerce, it is to be processed through the U.S. export control system. Depending upon the nature of the product and its possible military uses or technology transfer capabilities, the license will be reviewed by the Commerce Department and other government agencies — most notably, the Defense Department. If the license is approved for U.S. export and if the export is on the multilateral COCOM embargo list, the license will then be reviewed by the fourteen-nation COCOM review committee in Paris.[44] COCOM controls most of the items listed on the U.S. Commodity Control List (CCL), but usually has more stringent requirements for embargo than does the CCL.

C. TIME PARAMETERS

The process of obtaining a license has, in the past, been quite time-consuming. Critics of the old system called the *modus operandi* an "oligopoly . . . , wherein the government bureaus make bargains among themselves for their own benefit at the expense of the public."[45] It was said that for a controversial case, clearing all the phases of the export licensing process required "at the very minimum and under the most optimistic of administrative scenarios, some 80 days and, at worst, a maximum of 524 days."[46]

Mr. Robert Ramsey, Director of International Marketing for Bell Helicopter Textron, testified before the House Subcommittee on Science, Research and Technology in 1980 that although Bell Textron had received considerable assistance from the Department of Commerce export program, the time delays experienced in the licensing procedures were detrimental to business. He explained that his firm spent much time and effort after normalization of relations with China arranging for the Chinese to purchase Bell Textron helicopters. Mr. Ramsey stated that even though Bell was able

42. The announcement of the new Group P for the PRC appears in 45 Fed. Reg. 27922 (1980).

43. Interview with Dick Isadore, Office of Export Administration, U.S. Department of Commerce, Washington, D.C. May 8, 1980.

44. *See* note 9 *supra*.

45. Hearing Before the Subcommittee on International Trade and Economic Policy and Trade of the Committee on International Relations, March 14, 1979 (statement by Fredrick W. Huszagh, Executive Director, Dean Rusk Center and Professor of Law; Gary K. Bertsch, Senior Fellow, Dean Rusk Center and Professor of Political Science; John R. McIntyre, Research Fellow, Dean Rusk Center).

46. *Id.*

to secure an advantage over the French and West German competition, the delay in the company's obtaining an export license seriously affected the transfer.[47] Before the Subcommittee, Mr. Ramsey testified that:

> This delay, although very small in Government figures, cost us about a $7 to $10 million advance because we could not get U.S. Government approval to export our helicopters, although the helicopter itself was a general destination licensed piece of equipment and it did not require a validated license. There was a high frequency radio which was required by the Chinese, which was a COCOM item, and as a result we were about eight months [delayed] — we knew that we were going to get it approved but the Chinese did not know this.[48]

The Export Administration Act of 1979, in an effort to remedy this problem, has mandated specific time limits within which a license application must be approved or denied.[49] However, these so-called "guillotine" provisions have created problems for the export agencies — especially the Department of Defense. In some cases, licenses have been denied because proper evaluation could not be completed within the thirty-day time limit.[50]

D. SHORT SUPPLY

In addition to foreign policy considerations, domestic short supply issues were part of the rationale for the passage of the Export Control Act of 1949. Unlike foreign policy considerations, domestic short supply rationales have rarely been used to curtail export of goods that are in domestic scarcity for the following reasons:

(1) short supply controls have been unable to reduce prices and inflationary demand;
(2) they have had an adverse effect on foreign buyers and nations; and
(3) they have led to the appearance of inappropriate political pressure by users to obtain materials at below world market prices.[51]

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47. *Technology Transfer to China: Report of the Subcomm. on Science, Research and Technology*, 96th CONG. 2d SESS. 24 (1980).

48. *Technology Transfer to China: Hearings Before the Subcomm. on Science, Research and Technology*, 96th CONG. 1st SESS. 82 (1980) (statement of Robert Ramsey).

49. After the Secretary of Commerce passes on to the Secretary of Defense a license application to a controlled country, the Secretary of Defense must make a decision within thirty (30) days. EAA of 1979 § 10(g)(2).

50. *See* note 9 *supra*.

51. Berman & Garson, *United States Export Controls — Past, Present, and Future*, 67 COLUM. L. REV. 830 (1967).

Nevertheless, short supply controls were used in the summer of 1973 to control and monitor the export of soybeans, grains, and related agricultural products.[52]

E. MILITARY USE

Outside of domestic short supply and foreign policy considerations, the principal criterion in reviewing a "validated" license application is whether the commodity or any technology that it may embody could be put to a significant military use.[53] Items and activities controlled by the EAA of 1979 are crime control and detection equipment,[54] aircraft,[55] agricultural commodities,[56] terrorism,[57] medicine,[58] and basic human needs.[59]

III. CURRENT DEVELOPMENTS AND FUTURE PROSPECTS FOR TRADE WITH CHINA

The Carter Administration policy decision to allow the export of selected dual-use items to China signaled an important policy change which gave American exporters a strong indication that approval would soon be granted on products with military "end use" applications.[60] "Dual-use" technology encompasses items that are intended primarily for civilian use but which could have potential military applications such as transport aircraft,

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52. Stein, EAST-WEST TRADE: TRADE WITH THE SOVIET UNION AND EASTERN EUROPE; SURREY & WALLACE, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS at 153 (1977).
53. EAA of 1979 § 6(j).
54. EAA of 1979 §§ 6(i) and 17(c).
55. EAA of 1979 §§ 2(9), 3(11), and 7(g)(3).
56. EAA of 1979 § 6(i)(2).
57. EAA of 1979 § 6(f).
58. EAA of 1979 § 6(k).
59. EAA of 1979 § 6(k).
60. Oberdorfer, "Carter Calls Taiwan Obstacle to Sino-U.S. Ties," *Wash. Post*, Sept. 4, 1981 at A4.

Following the normalization of Sino-American diplomatic relations in January 1979, Chinese Vice Premier Deng Xiaoping visited Washington and toured the United States. The original plan had been for President Carter to return the visit early in 1980 and for Chinese Communist Party Chief Hua Guofeng to visit Washington and other U.S. points early this year. The taking of the U.S. hostages in Iran caused President Carter to postpone his trip to China. Now both he and Hua are out of power.

helicopters,[61] flight training equipment, aerial cameras, trucks, selected electronics, and technical data relating to these items.[62]

In early 1980, export guidelines for dual-use items had been relaxed to the point where the most sophisticated high-level computer and data processing systems could be purchased by China. In the case of computers, several Pentagon officials believe that sales will be worked out on a case-by-case basis. Computer sales will be dependent upon computer capacity, end use, diversion potential, and safeguards against conversion from civilian to military capability.[63]

Pentagon officials also forecast establishment of an *ad hoc* validated licensing review procedure to be based on whether the country is:

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61. *See* Department of State, Munitions Control Newsletter No. 81, March 1980; *see also* AVIATION WEEK AND SPACE TECHNOLOGY, March 24, 1980, at 22.

62. "Bell Hopes for Further Helicopter Sales to China," *Aviation Week and Space Technology*, Feb. 26, 1979 at 21. *See also Bell Helicopter Lifts Off,* CHINA BUS. REV., at 20-21 (Nov.-Dec. 1979). *See also* AVIATION WEEK AND SPACE TECHNOLOGY, Feb. 19, 1979 at 23. *See Business China,* Aug. 22, 1979 at 123.

63. Barney, *Export Controls: Dual Use in Focus,* CHINA BUS. REV. at 6 (Jan.-Feb. 1980).

In the area of computer technology, two recent transactions exemplify the current situation in export control regulation. In late 1973, Control Data Corporation and its main contractor, Compagnie General Geophysique of France, concluded a $69 million transaction with China. Twelve second-level 170 Series computers will be exported to China for use in seismic research. Prior to the EAA of 1979, the Department of Commerce required license applications for each item. The new law creates the qualified general category that will allow one license for several items. This procedure should help to expedite the licensing process. *See also* note 25 *supra* at 4. Bo Denysyk, Deputy Assistant Secretary for Export Administration additionally stated:

> In computers, for example, exports would be favorably considered for those systems with a processing data rate of 64 (a unit characterizing the amount of data that can be processed in a second), instead of the previously allowed processing data rate of 32. The Department of Commerce is drawing up a detailed list of commodities with the new technical parameters and will issue them as Advisory notes to the Regulations.
>
> It should be pointed out, however, that in some cases it may not be appropriate to use the factor two, since there may be no actual products at that level. For example, the next generation of certain equipment may not be twice the level of efficiency of the previous commodity, but, instead, may jump three or four levels at one time. Also, with respect to technical data, it is not clear what twice the technical level would be for, say, a specialty steel plant. Wherever possible, the Department of Commerce will issue Advisory notes and intends to use the interagency review process to establish precedential cases for those areas where the factor two is inappropriate.

(1) the Soviet Union;
(2) an Eastern Bloc country that has most-favored nation (MFN) status;
(3) an Eastern Bloc country that does not enjoy MFN; and
(4) Communist China.

The U.S.-China export control procedure was publicly announced and clarified on December 29, 1981 when general guidelines on the processing of dual-use items were promulgated.[64] In its simplest terms, the present U.S. export control policy toward China, the "China Preferential," requires that when an exporter wishes to do business with China, the government must show cause why the commodity should *not* be approved for sale to China. The approach is stricter for the Soviet Union — an exporter wishing to do business with the USSR must show cause why the sale *should* be approved. This shifting burden is an obvious illustration of the new "China Preferential."

This procedure, coupled with the United States' desire to counter Soviet aggression by expanding Sino-American political and economic ties[65] and by accommodating China's preference for United States technology,[66] sets the stage for expanded East-West trade where the economic rewards are viewed in light of political, strategic, and military considerations.[67]

The Reagan Administration believes that the U.S. policy on trade with China, or any country, must be viewed in terms of overall relations, and that the strategic and political effects of that trade must be considered along with the economic benefits.[68] In setting trade policy, it would be foolish to assume

64. Mann, *China Export Policy Takes Final Form,* AVIATION WEEK AND SPACE TECHNOLOGY, Jan. 25, 1982, at 57-58.

65. For an official account of current U.S. policy toward China, *see U.S. Relations with China,* Current Policy No. 297, U.S. Dept. of State, July 16, 1981.

66. *See also U.S. China Science and Technology Exchange,* Bureau of Public Affairs, Dept. of State, March 1981.

67. *See generally* Butterfield, *The Pragmatists Take China's Helm,* N.Y. TIMES MAGAZINE, Dec. 28, 1980. Chu, *Joint Ventures Law of the People's Republic of China: Perspectives for the the Western Legal Profession,* 7 J. LEGIS. 42, 62 (1980). Theroux, *Transfer of Technology to China: New Laws and Old Problems,* 14 J. OF INT'L LAW AND ECON. 185, 251 (1980).

68. *See* note 24 *supra* (Speech by Bo Denysyk):

In an overall policy sense, it was in our *national interest:*

One, to foster a strong and secure China which is capable of deterrring potential aggressors, a China which will contribute to peace and stability in the Asian and Pacific region.

Second, to participate in China's economic development for the benefit of China and American business. We have an interest in the success of China's modernization effort, and want to have China look to us as a trusted supplier of technology and equipment.

that the United States will ignore its trading partners' political activities, or that the United States will be acting alone. Consultation with our COCOM allies and attainment of their support for a harmonized policy toward export controls is a cornerstone of the coherent, allied approach the Reagan Administration is formulating.

Although many large projects have stalled, U.S.-China trade has continued to grow — doubling in 1980 for the third consecutive year. United States exports to China in 1981 reached $5.5 billion, and are projected to reach $6.8 billion in 1982.[69] Current projections by the U.S. Department of Commerce indicate that, by 1985, China will represent a greater market for U.S. exports than the Soviet Union and Eastern Europe combined.[70]

The following actions have already been taken by the Reagan Administration to facilitate the export of U.S. goods to China:

(1) Export controls, liberalized during the Carter Administration, have been further relaxed. The level of technology for which there is a presumption of approval is now approximately twice as high as before. Project licenses are now available for the People's Republic of China in such categories as computers and dual-use items.
(2) The blanket prohibition against selling items on the Munitions Control List to China has been eliminated.
(3) The Reagan Administration has committed itself to achievement of a formal differentiation between China and the Warsaw Pact in the COCOM.
(4) The Administration has committed itself to seeking the amendment of statutes such as the Agricultural Trade and Development Act, the

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Third, to treat China like a country whose friendship we value and whose support we seek in our global efforts to counter aggression, terrorism and expansionism; and

Fourth, to involve China in the search for solutions for the common problems of mankind, such as energy, environmental quality and arms control.

69. Wren, "U.S. to Raise Technological Level of Products the Chinese Can Buy," *N.Y. Times*, Feb. 7, 1982, § A at 1, 20 (remarks of Eugene Lawson, Deputy Assistant Secretary for East-West Trade). *See also* Sinclair, W., "Farm Trade with China Mushrooms," *Wash. Post*, Nov. 2, 1981 at A1, A2:

Five years ago, the Peking government bought $44,000 worth of onion seeds from the United States and that was it. This year, Chinese purchases of American farm products are expected to pass $2.5 billion. Prospects are for even more in the future.

China has become the largest foreign buyer of U.S. wheat ($1.1 billion last year) and cotton ($701 million) and this year it will rank with the Soviet Union as the third or fourth biggest customer, behind Japan and Mexico.

70. *Business America*, Department of Commerce, Oct. 5, 1981.

Foreign Assistance Act, and sections of the Trade Act of 1974 that restrict trade with China or treat it as a Soviet bloc country.

(5) The Administration has created a new joint U.S.-China committee chaired by Commerce Secretary Malcolm Baldrige devoted exclusively to commerce and trade between the United States and China.

(6) In May, 1981, an Export-Import Bank team negotiated a framework agreement with the Bank of China which allows the U.S. to move forward on several preliminary loan commitments the EXIM Bank has made for major U.S. projects in China. This, together with the agreement concluded by the Overseas Private Investment Corporation (OPIC) last October, means that the United States has provided a good foundation for American investment in, and the facilitation of financing for, United States exports to China.

(7) Pan American Airlines and China's National Flag Carrier have opened direct air services between New York, San Francisco, Shanghai, and Beijing. This airbridge between our two countries symbolizes the extent to which China and the United States have, over the past thirty months, become important trading partners.

The continuation of these actions, and similar future steps, should accomplish much toward the normalization of the U.S. export trade with the People's Republic of China.