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Paul Carlson

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# U.S. TRADE POLICY AND THE HONG KONG AGREEMENT\*

## INTRODUCTION

On December 19, 1984, the People's Republic of China and Great Britain signed an accord<sup>1</sup> which provides for the reversion of Hong Kong to Chinese administration on July 1, 1997. Under the terms of the Agreement, Hong Kong will have substantial political and economic autonomy despite the transfer of control. In particular, the Agreement provides that during the fifty year period commencing on July 1, 1997, "Hong Kong's previous capitalist system and life-style shall remain unchanged. . . ."<sup>2</sup> Whether this promise will be kept by the People's Republic of China is the subject of much speculation.

Negotiations concerning the Agreement were conducted exclusively between China and Great Britain although resolution of the Hong Kong question has much wider international ramifications than this arrangement would suggest. The United States in particular has far-reaching interests in both Hong Kong and China despite its "low posture toward the Hong Kong question. . . ."<sup>3</sup> Although the level of Sino-U.S. trade has fluctuated over the years, the importance of United States' exports to China's modernization underscores the potential influence the United States can have on China's treatment of Hong Kong.<sup>4</sup> The United States can utilize existing legislation—in particular, the Export Administration Act of 1979<sup>5</sup> and the Export Administration Amendments Act of 1985<sup>6</sup>—to enhance Hong Kong's future. It is the policy of the United States, as stated in the Act of 1979, to utilize export controls as an instrument of foreign policy.<sup>7</sup> Liberalization of U.S. trade policy towards China, with a view to preserving Hong Kong's socio-economic system, is fully consonant with this policy.

Part I of this note provides a brief history of the Sino-British treaties that led to the Agreement, the incentives for China to adhere to the Agreement, and some reasons why China may wish to derogate from its arrangement with Great Britain. China's declared policy on Hong Kong is discussed with an analysis of

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1. The accord provides, for example, that Hong Kong will have executive, legislative and independent judicial power as well as religious freedom and status as a free port and separate customs territory. *A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the People's Republic of China on the Future of Hong Kong*, 23 I.L.M. 1366, 1371-1372 (1985) [hereinafter cited as *Agreement*].
2. *Id.* at 1373.
3. Chiu, *The Hong Kong Agreement and American Foreign Policy*, 3 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES 1, 3 (1986).
4. Since President Nixon's trip to China in 1972, bilateral trade has grown from virtually nothing to more than U.S. \$8 billion in 1985. Address by Ambassador Lord, National Council on U.S.-China Trade (May 28, 1986) reprinted in DEP'T ST. BULL. Sept. 1986, at 48.
5. 50 U.S.C. app. §§ 2401-2420 (1982), amended by 50 U.S.C. app. §§ 2401-2419 (Supp. III 1985).
6. 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985).
7. 50 U.S.C. app. § 2402(2)(B) (1982).

the Sino-U.S. trade implications of the Agreement and the influence the U.S. may wield on Hong Kong's behalf. Finally, this note proposes a stable and reasoned liberalization of trade with China as a means of ensuring the preservation of Hong Kong's status quo.

### I. CHINESE AND BRITISH VIEWS ON THE SINO-BRITISH TREATIES OF THE LATE 1800's

During the nineteenth century, China and Great Britain concluded three treaties concerning Hong Kong and the surrounding region. This was a period in which China lacked the military strength to resist western imperialism. Thus, China had little choice but to accept the terms dictated by the British. Under the Treaty of Nanking,<sup>8</sup> signed at the end of the Opium War in 1843, China ceded the island of Hong Kong to Britain in perpetuity. This was followed in 1860 by the Convention of Peking<sup>9</sup> which ceded the southern portion of the Kowloon peninsula and Stonecutters Island to England, also in perpetuity. The third treaty, the Convention of 1898,<sup>10</sup> leased the New Territories<sup>11</sup> to Britain for ninety-nine years.<sup>12</sup>

The Chinese government has long maintained that despite the purported transfer of sovereignty to Great Britain, all of Hong Kong is, and always has been, Chinese territory.<sup>13</sup> China contends that its unequal bargaining power at the time the treaties were made renders the treaties null and void ab initio.<sup>14</sup> China's claim is contrary to the traditional western view of international law prior to the League of Nations and article 2(4) of the U.N. Charter,<sup>15</sup> which, contrary to contemporary law, held "that duress does not invalidate a treaty."<sup>16</sup>

8. *Agreement, supra* note 1, at 1367.

9. *Id.*

10. *Id.*

11. *Id.* The New Territories, the area surrounding Kowloon, constitute "92 per cent of the total land area of the territory" commonly referred to as Hong Kong. *Id.* Thus, China purportedly relinquished sovereignty over only a small fraction of Hong Kong, with Britain being a mere tenant in the remainder of the region.

12. *Id.* "[T]he fixed expiry date [of the lease-June 30, 1997] . . . lay behind the [British] . . . decision . . . to enter negotiations with . . . the People's Republic of China . . . on Hong Kong's future." *Id.*

13. *Id.* See also 1 J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 382-83 (1974) (the Chinese made it clear that under no circumstances would the British be allowed to maintain control over Hong Kong beyond the expiration of the New Territories lease).

14. Note, *The Reversion of Hong Kong to China: Legal and Practical Questions*, 21 WILLAMETTE L. REV. 327, 330-31 (1985).

15. "All Members shall refrain in their international relations from the use or threat of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

16. 1 H. LAUTERPACHT, *INTERNATIONAL LAW* 352-53 (E. Lauterpacht ed. 1970). Lauterpacht states that "Freedom of consent . . . is of the very essence of the notion of contract . . . [but i]nternational law . . . has disregarded this obvious general principle of law [.]". Compare Lauterpacht's statement with the current state of international law as contained in Article 52 of the Vienna Convention on the Law of Treaties which states that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679, 698 (entered into force January 27, 1980).

The Chinese adhere to classic Marxism-Leninism which classifies treaties as being equal or unequal.<sup>17</sup>

The British, on the other hand, follow the unqualified principle of *pacta sunt servanda* which means treaties must be observed. From this fundamental difference of perspective, one can see the basis of a Chinese refusal to honor the Agreement. China could, consistent with its view of international law, deny the validity of the Agreement since, to the Chinese way of thinking, it is founded upon three unequal, and thus void, treaties.<sup>18</sup> This stance causes concern among many that China may not live up to the terms of the Agreement, declaring it void *ab initio* like the treaties it is based upon.<sup>19</sup>

Both China and Great Britain sought to allay such concerns during the course of the negotiations. The Chinese and the British had as their "common aim . . . maintaining the stability and prosperity of Hong Kong."<sup>20</sup> Although Deng Xiaoping, while leader of the Chinese Communist Party, stated that Hong Kong's economic system will not be altered during the life of the Agreement,<sup>21</sup> there is a palpable fear that political opposition to Deng's modernization plans for China may bring about a resurgence of Communist fundamentalism which will ruin the Agreement's chances of success. For the time being, however, the opposition to economic reform in China has apparently been neutralized. Deng Xiaoping stepped down from the leadership of the Communist Party at the 13th Party Congress and was succeeded by his protegee Zhao Ziyang.<sup>22</sup> Zhao had held that position on an interim basis since Hu Yaobang was ousted in January, 1987.<sup>23</sup> Deng retired from the Central Committee, but retained his position as chairman of the powerful central Military Commission.<sup>24</sup> Nearly all of the opponents to Deng's economic reforms also retired from the Central Committee, thus, Zhao, with guidance from his political mentor, will have a fresh set of younger leaders to help him lead China into the twenty-first century.<sup>25</sup>

Zhao, while party chief of Sichuan province in the late 1970's, overhauled that region's agricultural and economic systems to permit market forces to play a strong role in the Sichuan economy.<sup>26</sup> Since being brought onto the Politburo by Deng in 1980, Zhao has remained an integral part of Deng's plans to modernize China. Zhao's record indicates that he will carry on the work begun by his predecessor.<sup>27</sup>

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17. 2 J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* at 1119 (1974). The Chinese view is best summed up as: "Equal treaties should be strictly observed [but u]nequal treaties are in violation of international law and without legal validity." *Id.*

18. Note, *supra* note 14, at 329.

19. This fear is most acute among the residents of Hong Kong who do not want to see their way of life vanish under Communist rule. *N.Y. Times*, Apr. 26, 1987, at 21, col. 1.

20. *Supra* note 1, at 1367.

21. "A Significant Concept," *Beijing Review*, no. 44, Oct. 29, 1984, *reprinted in* 2 *THE PEOPLE'S REPUBLIC OF CHINA: A DOCUMENTARY STUDY* 746 (H. Hinton ed. 1986).

22. *N.Y. Times*, Nov. 2, 1987, at 1, col. 6.

23. *N.Y. Times*, Nov. 3, 1987, at 8, col. 1.

24. *N.Y. Times*, Nov 3, 1987, at 1, col. 4.

25. "[V]irtually all the party leaders who played major roles in the revolution . . . [and] founding of the Communist state in . . . 1949 have retired." *N.Y. Times*, Nov. 2, 1987, at 1, col. 6.

26. *Supra* note 23.

27. A subtle, but important, hint of the direction Zhao's leadership will take was given at his first appearance before the international press as a member of the Politburo. Zhao and the other new Politburo members were dressed in western style business suits, the Mao jacket apparently is no longer in vogue with China's leaders. *N.Y. Times*, Nov. 4, 1987, at 1, col. 1.

The future of Sino-U.S. relations, and, thus, American influence on Chinese policy making, depends to a great extent on Zhao's ability to marshal China's Communist Party behind him. Some of the questions about the future of Chinese ideology have been answered for the time being by Zhao's ascendance to the Party's helm. But even handing over the reigns to his handpicked successor will not assure Deng, or the world, that his policies will survive him.<sup>28</sup> A significant event that occurred at the Congress was the selection of a new Central Committee, membership on which is practically a requirement for elevation to the Politburo and its Standing Committee. These latter two bodies hold the real decision-making power in China and will determine whether China abides by its agreement with Great Britain.<sup>29</sup>

## II. AN OVERVIEW OF THE SINO-BRITISH AGREEMENT ON HONG KONG

The Agreement is made up of an Introduction, a Joint Declaration with three Annexes, an Exchange of Memoranda and Explanatory Notes.<sup>30</sup> The Introduction covers the background of the Agreement and the negotiations which produced it. Expiration of the New Territories lease<sup>31</sup> is noted as the major factor influencing Britain's decision to negotiate with China over the future of Hong Kong after 1997.<sup>32</sup>

The basic policies of the People's Republic of China regarding Hong Kong are stated in the Joint Declaration.<sup>33</sup> Annex I to the Joint Declaration is an elaboration of the policies set forth in paragraph three of the Joint Declaration.<sup>34</sup>

28. While it is "doubt[ful] that China will ever experience a resurgence of radical xenophobia on the scale of the Cultural Revolution . . . the cyclical pattern of engagement and isolation that characterized the first thirty years of the People's Republic is likely to continue, but to be dampened." Harding, *China's Changing Roles in the Contemporary World*, in *CHINA'S FOREIGN RELATIONS IN THE 1980s*, at 215 (H. Harding ed. 1984).

29. *Supra* note 24.

30. *Agreement, supra* note 1.

31. *Id.* at 1367.

32. *Id.* at 1370. The Introduction states that without the New Territories "the remainder of Hong Kong . . . would not be viable alone . . . The choice is therefore between reversion of Hong Kong to China under agreed, legally binding international arrangements or reversion to China without such arrangements."

33. China's declared policy on Hong Kong includes:

(1) Establishment of Hong Kong as a Special Administrative Region (SAR), pursuant to Article 31 of the Constitution of the People's Republic of China, which will "enjoy a high degree of autonomy, except in foreign and defence affairs." *Id.* at 1371.

(2) A Hong Kong SAR government composed of local residents with the chief executive appointed by the Central People's Government. This government will have authority to make "relevant" international agreements. *Id.* at 1371-72.

(3) Hong Kong will retain its current social and economic systems and its status as "a free port and a separate customs territory." *Id.* at 1372.

(4) The basic policies stated in the Joint Declaration will be embodied in a Basic Law for the Hong Kong SAR promulgated by the National People's Congress. *Id.* at 1372.

34. *Id.* at 1373-78. Annex I of the Joint Declaration contains fourteen subsections which endeavor to reduce the interpretational ambiguities inherent in the stated basic policies. For example, subsection XI of Annex I states that "[s]ubject to the principle that foreign affairs are the responsibility of the Central People's Government," Hong Kong representatives may participate in diplomatic level talks, as members of the People's Republic of China delegation, in talks "directly affecting the Hong Kong Special Administrative Region[.]" *Id.* at 1376. This subsection further provides that "[t]he application to . . . Hong Kong . . . of international agreements to which . . . China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of . . . Hong Kong . . . and after seeking the views of the Hong Kong . . . Government." *Id.* at 1377.

Annex II establishes a Sino-British Joint Liaison Group to further "their common aim and . . . to ensure a smooth transfer of government in 1997."<sup>35</sup>

Land leases are covered in Annex III by a scheme devised to preserve investor confidence in the Hong Kong real estate market. China agreed to recognize and protect all existing leases which extend beyond 1997.<sup>36</sup> The Exchange of Memoranda consists of a United Kingdom Memorandum and a Chinese Memorandum.<sup>37</sup> The British document states that anyone who is a British Dependent Territories citizen (BDTC) on June 30, 1997, due to a connection with Hong Kong, shall lose such status on July 1, 1997.<sup>38</sup> However, these people will retain the right to use British passports, with no right of abode in Great Britain, if they hold or are included in a British passport issued prior to July 1, 1997.<sup>39</sup> The Chinese Memorandum complements the United Kingdom Memorandum by stating that "[u]nder. . . [Chinese law], all Hong Kong Chinese compatriots, whether they are holders of the [BDTC] Passport or not, are Chinese Nationals."<sup>40</sup>

35. *Id.* at 1379.

[The Joint Liaison Group will have no] power . . . [and will] play no part in the administration of Hong Kong . . . [n]or . . . have any supervisory role over [the Hong Kong government. Its functions shall be to]

§ (a) . . . conduct consultations on the implementation of the Joint Declaration;

§ (b) . . . discuss matters relating to the smooth transfer of government in 1997; [and]

§ (c) . . . exchange information and conduct consultations on such subjects as may be agreed by the two sides.

*Id.*

Annex II also provides that the Joint Liaison Group will function from the entry into force of the Joint Declaration . . . [and] continue its work until 1 January 2000." *Id.* at 1379.

36. *Id.* at 1380. "All leases of land . . . and all rights in relation to such leases shall continue to be recognised and protected under the law of the Hong Kong Special Administrative Region." *Id.* Additionally, long-term leases which expire before June 30, 1997, not containing the right to renew may be extended by the lessee up to June 30, 2047. No additional premium is required to exercise this right and the annual rent is limited to three percent of the property's rateable value during the term of the extension. *Id.*

37. *Id.* at 1381.

38. *Id.* The Agreement states:

Since Hong Kong will no longer be a British dependent territory after 30 June 1997, it will not be appropriate for those who are British Dependent Territories citizens by virtue of a connection with Hong Kong to be described as such after that date. The United Kingdom Government will seek Parliamentary approval for legislation which will give such British Dependent Territories citizens the right to a new status, with an appropriate title. This status will not give them the right of abode in the United Kingdom, which they do not possess at present, but it will carry benefits similar to those enjoyed by British Dependent Territories citizens at present, including the entitlement to use British passports and to receive British consular services and protection in third countries. The status will not, however, be transmissible by descent. The United Kingdom Government will do all they can to secure for holders of these British passports the same access to other countries as that enjoyed at present by holders of British Dependent Territories citizen passports.

*Id.* at 1387.

39. *Id.* at 1381. These passports may be renewed and replaced at British consulates worldwide and may be issued to persons born before July 1, 1997, who were previously included in such a passport issued to their parent. Holders of these passports are "entitled to receive . . . British consular services and protection when in third countries." *Id.*

40. *Id.* The Chinese Memorandum recognizes the right of former BDTCs to use British passports to travel outside Hong Kong and the People's Republic of China. It also implicitly recognizes their right to utilize British consulates abroad by declaring that such "Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding . . . British travel documents."

### III. U.S. TRADE POLICY TOWARDS CHINA

A brief history of U.S. trade policy regarding China is necessary to put present U.S. policy in perspective. A particularly apt description of the Sino-U.S. relationship during the post World War II era likens it to a dark tunnel which "represents two decades of rigid hostility and prohibition of commerce between China and the United States."<sup>41</sup> One of the first steps taken in this stalemate was passage of the Export Control Act of 1949.<sup>42</sup> The Act of 1949 authorized 'the President [to] . . . prohibit or curtail the exportation from the United States, its Territories, and possessions, of any articles, materials, or supplies . . .'<sup>43</sup> in order to carry out the policies of the Act including the "exercise . . . [of] vigilance over exports from the standpoint of their significance to the national security."<sup>44</sup>

The United States instituted an embargo of American exports of strategic items to China following the outbreak of the Korean War. The U.S. persuaded the United Nations to adopt a resolution in May 1951, calling for an embargo of "war materials and militarily strategic goods against China."<sup>45</sup> Although support for the embargo waned after the Korean Armistice halted hostilities, the United States clung to the embargo until President Nixon began the process of normalizing Sino-U.S. relations.<sup>46</sup>

The practice of using export controls as an instrument of foreign policy is still prominent today in U.S. trade regulation. Section 3 of the Act of 1979<sup>47</sup> declares that it is United States policy to utilize export controls to foster national security<sup>48</sup> and to further the aims of foreign policy.<sup>49</sup> The Act of 1979 gives the President discretion to limit or prohibit exports to achieve U.S. foreign policy goals or to fulfill international obligations after considering certain factors.<sup>50</sup> The President's discretion was narrowed by the Export Administration Amendments

41. H. CAHILL, *THE CHINA TRADE AND U.S. TARIFFS* 5 (1973).

42. 50 U.S.C. app. §§ 2021-2032 (1958).

43. *Id.* at § 2023(a).

44. *Id.* at § 2022(c).

45. CAHILL, *supra* note 41, at 6.

46. *Id.* at 9-10. For a concise treatment of the major events during the Sino-U.S. cold war, see generally, *Id.* at 5-11.

47. 50 U.S.C. app. §§ 2401-2420 (1982).

48. *Id.* at § 2402(2)(A).

49. *Id.* at § 2402(2)(B).

50. *Id.* at § 2405(b). This section states that:

the President shall consider—

(1) the probability that such controls will achieve the intended foreign policy purpose. . . ;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States. . . ;

(3) the reactions of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual companies and their employees and communities, including the effects of controls on existing contracts;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.

*Id.*

Act of 1985,<sup>51</sup> which modified section 6(b) of the Act of 1979 to permit the imposition, expansion or extension of export restrictions "only if the President determines that . . . [the five enumerated considerations] . . ." weigh in favor of the proposed action.<sup>52</sup> These limitations not only reduce the President's discretion, but also require that a threshold of proof be met before any action is taken.<sup>53</sup>

Additional curbs on Presidential discretion in imposing export restrictions were added by the Act of 1985. Section 6(e) of the Act of 1979 required only that the President notify Congress of any decision to impose, expand or extend export controls by a report specifying the findings and their bases.<sup>54</sup> The Act of 1985 mandates that such action be taken "only after"<sup>55</sup> Congress has been consulted and a report has been submitted to Congress detailing the conclusions regarding the criteria set forth in section 108(e) of the amendments.<sup>56</sup> Congress' intent is to have the President consult with the legislature prior to exercising the export control powers delegated to the Executive but which are vested in Congress under Article 1, section 8 of the Constitution.<sup>57</sup>

Existing contracts and licenses are also protected by the amendment of section 6 of the Act of 1979. The change requires that the President certify<sup>58</sup> to Congress that a "breaking or curtailment of a contract or contracts will be instrumental in remedying . . . [a] situation . . ."<sup>59</sup> which poses a threat to the strategic interests of the U. S. Thus, the President's ability to unilaterally restrict or prohibit exports is narrowly confined. Any such action taken will be the result

51. 50 U.S.C. app. §§ 2401-2420 (1982 & Supp. III 1985).

52. *Id.* at § 2405(b). The determinations the President is required to make are that:

(A) such controls are likely to achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls, and that foreign policy purpose cannot be achieved through negotiations or other alternative means;

(B) the proposed controls are compatible with the foreign policy objectives of the United States and with overall United States policy toward the country to which exports are to be subjected to the proposed controls;

(C) the reaction of other countries to the imposition, extension, or expansion of such export controls by the United States is not likely to render the controls ineffective in achieving the intended foreign policy purpose or to be counterproductive to United States foreign policy interests;

(D) the effect of the proposed controls on the export performance of the United States, the competitive position of the United States in the international community, the international reputation of the United States as a supplier of goods and technology, or on the economic well-being of individual United States companies and their employees and communities does not exceed the benefit to United States foreign policy objectives; and

(E) the United States has the ability to enforce the proposed controls effectively.

53. By comparison, section 6(b) of the Act of 1979 contained a looser restriction on the President's authority to utilize export controls. It simply required that "[w]hen imposing, expanding, or extending export controls under this section, the President shall consider . . ." the criteria enumerated therein. 50 U.S.C. app. § 2405(b) (1982). Thus, the President's ability to act is limited to those situations which satisfy the criteria of section 108 of the Act of 1985.

54. *Id.*, at § 2405(e).

55. 50 U.S.C. app. § 2405(f) (Supp. III 1985).

56. *Id.*

57. H.R. Con. Res. No. 180, 99th Cong., 1st Sess. 57 (1985), *reprinted in* 1985 U.S. CODE CONG. AD. NEWS 108, 119.

58. 50 U.S.C. app. § 2405(m) (1982 & Supp. III 1985).

59. This constraint is intended to help restore the credibility of American exporters and to preserve America's strategic interests. *See supra* note 57, at 120.



of Congressional review which is intended to produce a pragmatic utilization of export controls as a foreign policy tool.

The existing United States national security export control system developed from the controls established in World War II which limited American exports of goods and commodities necessary to the war effort.<sup>60</sup> Immediately following the war these controls were retained to efficiently and equitably distribute raw materials to war-ravaged European and Asian nations.<sup>61</sup> Deteriorating East-West relations in the post-war era resulted in special controls on the export of certain strategic items to the Soviet Union and the Eastern Bloc nations.<sup>62</sup> Strict enforcement of these controls were brought on by Russia's blockade of Berlin, Mao Zedong's rise to power in China and China's intervention in the Korean War.<sup>63</sup>

The United States persuaded its allies in 1949, through the Coordinating Committee for Multilateral Export Controls (COCOM),<sup>64</sup> to impose strict controls on exports to the "Soviet Bloc." These trade restrictions were relaxed following the end of the Korean War and Stalin's death. However, the embargo on exports to China was maintained, mostly by the U.S.<sup>65</sup> The tighter controls on trade with China relative to other Communist countries became known as the "China Differential."<sup>66</sup>

In the late 1950's the "Differential" was abandoned by COCOM, but not by the U.S., and China was treated in a manner similar to other Communist nations.<sup>67</sup> By the time President Nixon was elected, the United States was alone in its economic war on China and Communism.<sup>68</sup> During his administration, the prevailing export controls were largely discarded in favor of controls more in line with those endorsed by COCOM's member nations.<sup>69</sup>

U.S. trade with China today involves three types of licenses—the general license with its many sub-licenses,<sup>70</sup> the validated license<sup>71</sup> and the qualified general license.<sup>72</sup> The validated license requires authorization while the general license

60. Meese, *Export Controls to China: An Emerging Trend for Exports*, 7 INT'L TRADE L.J. 20, 21 (1982).

61. *Id.* at 22.

62. *Id.*

63. See generally, Lee & McCobb, *United States Trade Embargo on China, 1949-1970; Legal Status and Future Prospects*, 4 J. OF INT'L L. & POL., 1, 3-15 (1971) (the authors provide a concise history of the U.S. trade embargo on China).

64. The Coordinating Committee for Multilateral Export Controls (COCOM) is an informal intergovernmental organization established by the United States and its allies to control the export of strategic technology to Communist countries. COCOM evolved from post World War II talks held between the United States, Great Britain and France. The U.S. later convinced other European allies to cooperate with COCOM's goal of an effective embargo policy against the Communist countries. Representatives of member nations meet regularly to carry out the embargo policy. Since there is no underlying treaty or agreement, each member country is free to decide whether to comply with the Committee's decisions. For a comprehensive discussion of the history and role of COCOM, see Hunt, *Multilateral Cooperation in Export Controls—The Role of COCOM*, 14 U. Tol. L. Rev. 1285 (1983).

65. Meese, *supra* note 61, at 23.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 25.

71. *Id.*

72. *Id.* at 26.

does not even require an export application. Whether a validated or general license is needed generally depends upon the commodity sought to be exported and the destination of the shipment.<sup>73</sup> Goods and technology subject to export controls are specified in the Commodity Control List (CCL)<sup>74</sup> and countries fall into seven control groups.<sup>75</sup>

The qualified general license, created by the Act of 1979, "was devised in an effort to simplify and expedite the export administration procedure."<sup>76</sup> Under this license, multiple shipments of a given item may be exported to the designated destination. The Office of Export Licensing may approve most applications without review by other agencies. In some instances, the application must be referred to another agency because of jurisdictional requirements.<sup>77</sup>

The Act of 1985 authorizes the issuance of four different types of validated licenses for multiple shipments.<sup>78</sup> These allow American companies to make

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

74. U.S. Department of Commerce, Export Administration Regulations, 15 C.F.R. § 399.1 (1987).

The commodity groups are as follows:

- 0 — Metal-Working Machinery
- 1 — Chemical and Petroleum Equipment
- 2 — Electrical and Power Generating Equipment
- 3 — General Industrial Equipment
- 4 — Transportation Equipment
- 5 — Electronics and Precision Instruments
- 6 — Metals, Minerals, and Their Manufactures
- 7 — Chemicals, Metalloids, Petroleum Products and Related Materials
- 8 — Rubber and Rubber Products
- 9 — Miscellaneous

75. 15 C.F.R. § 370 (Supp. 1 1987). The country categories are as follows:

Romania Country Group Q

Libya Country Group S

Greenland, Miquelon and St. Pierre Islands, Mexico, Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Bahamas, Barbados, Bermuda, Dominican Republic, French West Indies, Haiti, Jamaica, Leeward and Windward Islands, Netherlands Antilles, Trinidad and Tobago, Colombia, French Guyana, Guyana, Surinam, Venezuela, Bolivia, Chile, Ecuador, Peru, Argentina, Brazil, Falkland Islands, Paraguay, Uruguay Country Group V

All countries not listed elsewhere (except Canada which is not included in any of the country groupings) Country Group W

Hungary, Poland Country Group Y

Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic, Laos, Latvia, Lithuania, Mongolian People's Republic, Union of Soviet Socialist Republics Country Group Z

North Korea, Vietnam, Cambodia, Cuba

76. Meese, *supra* note 60, at 26. The qualified general license is a hybrid of the general and validated licenses. It is obtained by filing an application and receiving a document issued by the Office of Export Licensing (OEL). *Id.*

77. For specific examples of commodities or technologies which are not controlled by the OEL, see 15 C.F.R. § 370.10 (1987).

78. 50 U.S.C. app. § 2403(a)(2) (1982 & Supp. III 1985). The four different licenses are: (1) a distribution license which authorizes the export of goods to friendly nations by distributors or users who have already been approved by the Secretary of Commerce; (2) a comprehensive operations license which authorizes the export and re-export of sensitive technologies from

successive shipments of identical goods to the same destination without obtaining a license for each individual shipment. The type of validated license required is dependent on the type, destination and uses of the goods sought to be exported.<sup>79</sup> The Act of 1985 permits the President to limit the availability of multiple export licenses by granting the President the authority to add or remove countries from the Commerce Department's "controlled countries" list.<sup>80</sup> The Act of 1985 also permits, without license, the export of low-technology goods and goods readily available abroad to COCOM countries.<sup>81</sup> As to non-COCOM countries, export license applications for low and high-technology goods must be reviewed in one-third less time than under the Act of 1979.<sup>82</sup>

In addition to consulting Congress before using export controls for foreign policy purposes, the President must also consult those nations that cooperate with the United States in maintaining export controls.<sup>83</sup> The Act of 1985 also calls for the Secretary of Commerce to consult with United States business representatives when their businesses will be affected by the proposed export controls.<sup>84</sup>

While the Act of 1985 may cause some management problems,<sup>85</sup> the limits placed on the President's authority to institute export controls affecting present and potential trade relationships will enhance the image of American exporters as reliable sources of goods. The new procedures implemented to expedite export licensing will further aid U.S. businesses in that they will be able to fulfill contractual obligations faster than before. The chances of undue delay caused by government "red tape" are significantly reduced. Along with this, the multiple license assures both exporter and importer that an installment delivery contract can be expected to be performed free of government interference once the license is obtained.

## VI. THE ROLE OF HONG KONG IN SINO-U.S. RELATIONS

The Sino-U.S. trade relationship has grown dramatically since the normalization of relations began in the early 1970's. One recent analysis of overall Sino-

United States firms to their foreign subsidiaries and affiliates; (3) a project license which authorizes "exports of goods or technology for a specifi[c] activity[.]" *id.*; (4) a service supply license which authorizes exports of spare or replacement parts for goods previously exported. *Id.* Additionally, U.S. export law distinguishes militarily critical goods from other high-technology goods. *See, e.g., id.*, at § 106. Militarily critical technologies are those whose acquisition by potential adversaries would be detrimental to United States national security interests. *See generally, Recent Development, Export Controls: Restrictions on the Export of Critical Technologies*, 22 HARV. INT'L L.J. 411 (1981).

79. 50 U.S.C. app. § 2403(a) (1982 & Supp. III 1985).

80. *Id.* at §§ 104(a), 2404(b).

81. *Id.* at §§ 2403(c), 2404(b)(2). High technology exports to COCOM countries require a license, but the license becomes valid and effective and the subject goods or technology may be exported under such license after fifteen working days from the application's formal filing with the Department of Commerce, unless the application has already been approved, was denied or the applicant is notified that more time is needed for review, in which case an additional fifteen days is allowed. *Id.* at § 2409(o).

82. *Id.* at § 2409(a). Depending on the type of license applied for, the processing time was reduced from 90 to 60 days, 60 to 40 days or 30 to 20 days.

83. *Id.* at § 2405(d).

84. *Id.* at § 2405(c).

85. Note, *Export Controls—Export Administration Amendments Act of 1985*, 27 HARV. INT'L L.J. 259, 264 (1986). The author cites the division of enforcement duties between the Department of Commerce and the Customs Service and the consultation requirements as potential causes of duplicative efforts and delays.

U.S. relations states that "trade between the United States and the PRC increased from . . . \$4.9 million in 1971 to about \$5.5 billion in 1984."<sup>86</sup> Concealed in this overview, however, is a \$600 million decline in Sino-U.S. trade in the two year period from 1974-76.<sup>87</sup> Thus, it is important to recognize the dynamic nature of our bilateral trade with China in order to avoid distortions caused by reliance on static analysis. Our trade relationship should be viewed as one of progression and retrenchment despite the overall increase.<sup>88</sup>

Despite the prevalent belief among American businesses that China has the potential to become a major U.S. export market, there is little data to support this conclusion. China has traditionally limited imports to 5-8% of its gross domestic product<sup>89</sup> in order to maintain its economic independence. This practice will limit the growth of foreign trade to incremental increases based on expansion of the domestic economy.<sup>90</sup> Moreover, it is estimated that in 1984 China accounted for only 1% of total U.S. foreign trade and that this figure will not rise significantly in the foreseeable future.<sup>91</sup> These factors suggest that China is not likely ever to become a major U.S. trading partner.<sup>92</sup>

A key objective of Chinese economic policy is to gain the ability to domestically manufacture the means of production rather than rely on imports of capital goods.<sup>93</sup> To achieve self-reliance<sup>94</sup> will require an infusion of technology in many areas rather than in a relative few.<sup>95</sup> Thus, there will be a substantial inflow of technology and capital equipment followed by a tapering off of these imports as the domestic industry masters the production of capital machinery previously imported. By ignoring the theory of comparative advantage<sup>96</sup> China

86. A. GREGOR, *THE CHINA CONNECTION* 193 (1986).

87. Chang, *United States-China Normalization: An Evaluation of Foreign Policy Decision Making*, 4 OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES 1, 36-37 (1986).

88. See generally, GREGOR, *supra* note 86, at 193-95 and Chang, *supra* note 87, at 36-37.

89. GREGOR, *supra* note 86, at 194.

90. *Id.* at 194-96. Gregor states that China's policy is to encourage domestic capital investment to reduce reliance on imports. "As domestic capital investment increases, the PRC will gradually reduce [imports] . . . to maintain a fairly constant ratio of imports to total domestic output." *Id.*

91. *Id.* In fact, Sino-U.S. trade has never "exceeded 2 per cent of the total foreign trade of the United States." *Id.* at 195. Moreover, "[e]ven if U.S.-PRC trade . . . triple[d] by the turn of the century (an unlikely prospect), it would still constitute only approximately 2 per cent of total U.S. foreign trade." *Id.* at 205.

92. *Id.* at 194-96, 205. Due to the trade embargo imposed against China in the 1950's, China adopted a policy of import-substitution. That is, China wanted "to develop at home industries whose output would substitute for imports." Reynolds, *China in the International Economy*, in CHINA'S FOREIGN RELATIONS IN THE 1980s, at 82 (H. Harding ed. 1984). Import substitution "[t]hrough a series of backward linkages, . . . leads a country from import-substitution in consumer goods to import-substitution in producer goods." *Id.* Referred to as self-reliance by the Chinese, this policy is also called autarky. In practice, the Chinese import the goods they need to reduce imports and export only as much as is necessary to pay for their imports. The Chinese textile industry is a good example of how this policy works. To achieve self-reliance in this area the Chinese initially imported textile production machinery. Later, China began to produce its own machinery requiring the importation of the necessary raw and processed specialty steels to support the domestic production of textile equipment. This "sequence of backward linkages[.]" *id.*, eventually led to domestic steel production.

93. *Id.*

94. *Id.*

95. *Id.*

96. "From a purely economic point of view, to maximize the gains from trade at any one point in time, China should produce according to her comparative advantage, welcoming capital-intensive imports instead of trying to produce such goods at home." *Id.* at 85.

avoids becoming part of the global economy and maintains its quest for economic independence.<sup>97</sup>

Approaching Sino-U.S. trade with these facts in mind, one can draw two conclusions about the nature of future Sino-U.S. trade. First, exports to China will consist mainly of high-technology goods and data and capital goods.<sup>98</sup> It is unlikely that this structure will change absent a fundamental shift in Chinese policy. Second, the effect and importance of China as a U.S. trading partner will remain relatively negligible despite the vastness of the Chinese market due to China's political ideology.<sup>99</sup>

Political relations between the United States and China are inextricably bound up with their trade relationship.<sup>100</sup> In 1943, the United States decided that a strong China would be necessary to fill the power vacuum created by the defeat of the Japanese and that the U.S. should help strengthen China to stabilize East Asia in the post-war period.<sup>101</sup> To this end, President Roosevelt offered his services on China's behalf in its efforts to regain Hong Kong from Great Britain.<sup>102</sup>

With the advent of Communism in China six years later, the United States adopted a "hands off" policy regarding the Hong Kong question.<sup>103</sup> This policy resulted from the belief that Hong Kong was an issue to be resolved by China and Britain; a view shared by the Chinese. The extent to which the U.S. believed that sovereignty over Hong Kong was no one's business but China's and Great Britain's was demonstrated in the United Nations in 1972. In that year, the Special Committee on Colonialism of the United Nations General Assembly placed Hong Kong and Macao<sup>104</sup> on its list of colonial territories entitled to self-determination.<sup>105</sup> The result of such classification would have been independence for the two regions, a result incompatible with China's claim of sovereignty over them. When China requested that Hong Kong and Macao be stricken from the list, the U.S. did not oppose the request<sup>106</sup> and both territories were subsequently deleted.<sup>107</sup>

The Soviet Union is often pointed to<sup>108</sup> as a unifying force in Sino-U.S. relations based on the threat it poses to the strategic interests of both nations in East Asia.<sup>109</sup> Escalating tensions on the Sino-Soviet border have resulted in numerous skirmishes while the Soviet presence in Vietnam threatens vital inter-

97. GREGOR, *supra* note 86, at 195. See the excerpted comments of then Communist Party Chairman Hu Yaobang.

98. *Id.*

99. *Id.* See also CHINA'S FOREIGN RELATIONS IN THE 1980's, *supra* note 92, at 82-86.

100. For example, the U.S. sponsored trade embargo on China was put into effect in response to China's actions in the Korean War. CAHILL, *supra* note 41, at 5.

101. Chiu, *supra* note 3, at 2.

102. Roosevelt apparently did relay Chinese messages to the British government, but they went unanswered. *Id.* at 2-3.

103. *Id.* at 8-9.

104. Macao was under the control of Portugal at that time.

105. COHEN & CHIU, *supra* note 13, at 384.

106. *Id.*

107. *Special Committee on Decolonization*, 9 U.N. MONTHLY CHRON. July 33, 36 (1972).

108. See generally, *United States-China Relations 11 Years After the Shanghai Communique: Hearing Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 3-28 (1983) (statement of Paul Wolfowitz, Assistant Secretary of State, Bureau of East Asian and Pacific Affairs).

109. See generally, GREGOR, *supra* note 86, at 98-121, 187-90.

national sea lanes.<sup>110</sup> In the euphoria surrounding China's opening up to the West many observers felt that China could be used to distract the Soviets from aggression elsewhere. Overlooked were the many areas where U.S. interests conflict with those of China.<sup>111</sup>

An important concern for the immediate future is whether Deng's successor will be able to carry out Deng's pragmatic policies for modernizing China. Ideological misgivings harbored by some Chinese officials, especially within the military, as well as disenchanting Communist party elders and Maoist-influenced students could cause a severe reversal in Chinese policy<sup>112</sup> effectively isolating China from the world again. Representative of this fear is the dismissal of former General Secretary of the Communist Party, Hu Yaobang. His downfall resulted from the discontent among party hardliners with student demonstrations demanding democracy. Prior to his ouster, Hu had been considered a likely successor to Deng.<sup>113</sup>

Although steps were taken recently to ensure that Deng's economic modernization of China will survive, it remains to be seen whether Zhao Ziyang will keep China on its present path. Deng will be able to assist him in this task through his position as chairman of the Military Commission.<sup>114</sup> The nature of U.S.-Hong Kong relations has changed significantly since the Communist takeover in China in 1949. Immediately following Mao's ascendance, the U.S. was interested in Hong Kong primarily as a base for gathering intelligence on China.<sup>115</sup> During the early 1950's, the U.S. Consulate General's Hong Kong staff grew from fewer than twelve to several hundred; the majority of the new staff was devoted to "gathering, analyzing, and translating Chinese Communist materials."<sup>116</sup> Hong Kong's value as an intelligence outpost diminished gradually over the years<sup>117</sup> and probably became obsolete as a result of President Nixon's trip to China.

During the post-embargo era, China rapidly opened her doors to the Western world. Not only did this afford the PRC an opportunity to see what had occurred in the world during her period of isolation, it also gave the U.S. an unprecedented view of life and politics in China. China's increased contacts with other countries has not reduced Hong Kong's status as an international trader, rather it continues to grow.

Hong Kong's status as a free port and Britain's laissez-faire economic policies contributed to the economic revival of Hong Kong following World War II.<sup>118</sup>

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110. *Id.* at 187.

111. For example, the United States maintains a large military presence in South Korea to counter the Chinese supported North Korean military. Vietnam and Taiwan are also past and potential sources of conflict. *Supra* note 109, at 3, 7. Aside from their conflicting interests, it has been noted that due to the deficiencies of China's People's Liberation Army, any Sino-U.S. military cooperation would have little effect on Russia's deployment of its Asia forces. GREGOR, *supra* note 86, at 187.

112. BUSINESS INTERNATIONAL ASIA/PACIFIC LTD., CRITICAL ISSUES FOR BUSINESS IN ASIA 120 (1984).

113. Lord & Hood, U.S. News World Rep., Oct. 12, 1987, at 41-42.

114. *See supra* note 24.

115. Chiu, *supra* note 3, at 3-4.

116. *Id.* at 3.

117. *Id.* at 3-6.

118. I. KELLY, HONG KONG: A POLITICAL-GEOGRAPHIC ANALYSIS 55-59 (1986).

An additional factor in Hong Kong's success was the influx of labor, entrepreneurial skills and capital from Shanghai and Canton resulting from the defeat of the Nationalist Chinese government by the Communists.<sup>119</sup> Hong Kong became an export oriented economy with the U.S. eventually becoming Hong Kong's largest market.<sup>120</sup>

Ideologically Hong Kong is valuable to the United States in its relationship with China. The maintenance of Deng's "one country—two systems" approach to Hong Kong means that China must make certain modifications in its political doctrine to avoid, or at least mitigate, the inconsistencies brought about by the integration of Hong Kong, as a capitalist enclave, into China.<sup>121</sup> It would benefit both Hong Kong and the U.S. to strengthen their political ties before 1997 as a means of ensuring the continuation of Hong Kong's status quo.

### CONCLUSION

As U.S. exports to China increase, the value of the Acts of 1979 and 1985 as a means of ensuring PRC compliance with the Agreement will rise commensurately. It is imperative that the Acts be used to reward rather than punish. By holding out the possibility of further liberalizing technology transfer to China the U.S. can do much to enhance Hong Kong's future as a capitalist component of China. On the other hand, a resort to export control tightening to show U.S. displeasure with Chinese policies and/or actions will likely be viewed as imperialistic meddling.

Given China's determination to remain independent, it would not be surprising to see an ideological backlash meet any attempt by the United States to penalize China. Thus, the United States can best serve Hong Kong's interests, and its own, through a careful and deliberate liberalization of trade policy towards the People's Republic of China.

Paul Carlson\*

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119. *Id.* at 56-57.

120. Chiu, *supra* note 3, at 5. In 1984 45% of Hong Kong's total exports, or US \$7.9 billion, went to the United States. American exports to Hong Kong totalled US \$3.1 billion in the same year.

121. Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. POL'Y 171, 183-85 (1986).

\* B.A., Baruch College of the City University of New York, 1985; J.D., Notre Dame Law School, 1988.