Commentary—Can Export Controls Win a New Cold War: A Historical Case Study

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EXECUTIVE SUMMARY

Export controls played a critical role in helping the West to prevail over the Soviet Union and its allies in the Cold War. The United States now faces a new national security challenge in the People's Republic of China. After World War II, the United States was the dominant economic power globally. It organized a coalition of countries, principally in Western Europe, to control the access of Communist states to technologies that could improve their military capabilities. Those controls were successful, but they were significantly enhanced by the fact that—by choice—the Soviet and Chinese economies were largely isolated from the West, with only limited trade. That made the job of curtailing the trade of strategic products with communist countries more manageable, particularly since the West took a strong multilateral approach through the Paris-based Coordinating Committee for Export Control (COCOM). COCOM ceased to exist in 1994. The problem facing Washington and its allies and partners today is far more complex, given China's comprehensive integration into the global economy over the last five decades. As such, unilateral controls by the US will not be enough. The United States must lead the organization of a new COCOM, with effective mechanisms for enforcement. A consensus must be built among America's European and Asian allies and partners, so that certain dual-use technologies with potential military utility are not shared with China.

America's Historical Experience with Export Controls

As Great Power rivalries continue to grow in this century, old Cold War tools, such as strategic export controls, have been dusted and brought off the shelf in a bid to counter the specter of China's rise as well as Russia's invasion of Ukraine. Export controls played a critical role in helping the West to win the Cold War against the Soviet Bloc. It is not too far of an exaggeration to say that export controls even played the key role, along with the NATO alliance, in ultimately enabling the Western democracies to prevail over Moscow, its Warsaw Pact allies, and Communist China. Anyone visiting Russia after the fall of the Berlin Wall in 1989 found a society that looked more like early 1950's America than the modern Western world at the time. While it is tempting to say that recent steps taken to rebuild a strengthened export control regime to deal with China might help achieve similar results again, what worked well half a century ago will not be as effective this time around.

Before World War II

The first modern export control statute was the Trading with the Enemy Act (TWEA), which was passed when the US entered World War I in 1917. Still in use today, it broadly empowers the President to restrict all trade with an enemy in times of war or any other national emergency (as determined by the President). The TWEA is the principal statute upon which the ongoing economic embargo against Cuba is legally based. In 1935, at the height of interwar isolationism, Congress passed the Neutrality Act. It set the legal framework for control of the export of military arms and other war materials under a Munitions Control Board chaired by the Secretary of State. In 1940, Congress passed the Export Control Act. It was used as the basis for controls against Japan before 1941, covering such strategic materials as oil, chemicals, and aircraft parts. These controls played a critical role in setting the conditions for the attack on Pearl Harbor.

The Founding of Cold War Export Controls after World War II

Following World War II, deteriorating relations between the Western democracies and the Soviet Union prompted the establishment of a new, peace time framework to contain Soviet ambitions. 1949 was a key year, as geopolitical tensions led to the passage of the Export Control Act of 1949, the foundational cornerstone for the modern export control system, as well as the creation of the Coordination Committee for Multilateral Export Controls (COCOM). COCOM was set up not by treaty or executive agreement, but rather as a gentlemen's understanding among NATO allies (except Iceland), as well as Japan and Australia to coordinate a joint export control policy to oppose the Soviet Bloc. Importantly, unanimity was required for the authorization of any export to countries behind the Iron Curtain, giving each member de facto veto power—a right exercised most often by the United States. In addition, Washington often enforced its own controls unilaterally, taking advantage of its monopoly on various strategic commodities at the time.

The Export Control Act of 1949 established the Bureau of Export Administration at the Department of Commerce as the principal vehicle for the administration and enforcement of dual-use export controls. Dual-use technologies serve both military and civilian purposes. The Bureau of Export Administration continues to operate in this role today. The 1949 Act defined three reasons for the imposition of dual-use controls: foreign policy, national security, and short supply (intended to address the control of various goods that were scarce after WWII).

For the first decades of export controls, the focus was on the Soviet Union and the Warsaw Pact, as well as the People's Republic of China (PRC). When China became involved in the Korean War, the US led the creation of another multilateral group, known as CHINCOM. It enforced "China Differential" restrictions that were even more stringent than those imposed on the USSR under COCOM. In 1957, CHICOM was rolled into COCOM. COCOM centered on the regulation of a broad array of goods and technology that could have ready military application, such as metallurgical products that could be used for artillery or to create precision machine tools.

The effectiveness of such controls during the Cold War was improved by the fact that cross-bloc trade was limited. China and the Soviet Union did not seek open trade with the West, a fundamental strategic path initiated by Josef Stalin when he declined to allow the USSR or its Warsaw Pact allies to participate in the Marshall Plan. The Iron Curtain and Chinese insularity effectively served as their own kind of export control barrier. That self-imposed isolation helped to make the Western task of enforcing strategic trade controls more manageable and effective.

Changes to Cold War Export Controls Caused by Détente

The pursuit of détente by the Nixon administration eventually led to policy changes in strategic trade controls. The system was liberalized, pulling away from what had been an almost total trade embargo with the Warsaw Pact after 1949. The passage of the Export Administration Act of 1969 (EAA) reflected growing pressure by US businesses to be allowed to pursue opportunities with the Eastern Bloc, as well as a desire by the Nixon administration to improve relations with Moscow by encouraging peaceful trade ties. The new law marked an evolution toward commercial trade, but continued to enforce controls against dual-use items.

As relations with the Soviet Bloc improved in the 1970's, Congress gradually reduced the reach of trade controls. The process culminated in a comprehensive revision of export control statutes: the Export Administration Act of 1979 (the 1979 Act)—which remains the principal law today for the administration of US controls. Licensing restrictions were tightened to focus more on dual-use technology that could make significant contributions to a potential foe's military capabilities. Importantly, for the first time, foreign availability was required to be considered as a factor in the licensing process.

The steady relaxation of controls came to a screeching halt following the Soviet invasion of Afghanistan in 1979. Evidence was found that relaxed controls had enabled the Soviet Union, both legally and illegally, to strengthen and modernize its conventional and nuclear forces. President Carter responded under the authority of the 1979 Act by suspending the sale of US grain to the USSR, as well as shelving future validated export licenses for the sale of dual-use items.

During the Reagan administration, the legal process of reducing the harshness of export controls against Iron Curtain countries resumed after General Secretary Mikhail Gorbachev put forward his "new political thinking." The Omnibus Trade and Competitiveness Act of 1988 (the 1988 Competitiveness Act), included important amendments to the 1979 Act, cutting back restrictions on exports, and confining its requirements more narrowly to technologies that could have military applications. It reduced Presidential discretion over unilateral controls, shifting back toward those agreed to under the COCOM multilateral process.

Even as export controls against Warsaw Pact countries were relaxed during the Reagan years, one major event almost derailed the process. It was discovered that a Toshiba subsidiary and Kongsberg Trading Company of Norway had sold, in violation of COCOM rules, advanced milling machines to the Soviet Union—enabling the Soviet navy to build more stealthy submarines. The discovery ignited a political firestorm against Japan in Washington. Toshiba radios were smashed with hammers on the steps of the US Capitol by angry Congressmen. As a result, the 1988 Competitiveness Act included not only export control reforms, but also sanctions against Toshiba Machine and Norway's Kongsberg. The companies were forbidden from importing any products into the United States for three years. They were also barred, along with Toshiba Corporation more broadly, from doing any business with the US government for the same period. In the end, the Toshiba affair did not entirely stop the continued relaxation of controls, but it did cause Congress to increase the penalties for violations of multilateral export rules in the future. The Attorney General was authorized to go after foreign companies to recover damages for whatever the cost was of restoring "the military preparedness of the United States." It has been estimated that the Toshiba affair alone could have cost DoD as much as $8 billion to come up with new undersea tracking capabilities that could counter the new, stealthier Soviet submarines.

By the time the Soviet Union collapsed in 1991, the 1979 Act had only become more watered down, Toshiba affair notwithstanding. In 1994, the entire statute lapsed. President Clinton was forced to invoke his authority under the International Emergency Economic Powers Act to issue an executive order to keep the controls (which had been created under that statute) going. The same did not happen with COCOM, whose multilateral controls were definitively dissolved in 1994. In theory, COCOM was replaced by the Wassenar Arrangement (Wassenar) in 1996 that covered 33 countries initially, including Russia. It now has 44 member countries, though not China. Unlike COCOM, Wassenar was not created to control the export of advanced dual-use technology, nor is it targeted at any region or bloc, per se. Wassenar calls upon members to voluntarily report any sales of military arms and related dual-use technology to designated states to one and other for transparency purposes every six months. Unlike the former COCOM, Wassenar members do not carry veto authority over other member countries' exports. In essence, Wassenar is a voluntary organization that promotes the exchange of information on weapons sales.

The Clinton administration's reform and cutbacks on the scope and reach of export controls continued into the George W. Bush and Obama administrations. Trade controls became more focused on dealing with terrorism or specific, sanctioned countries such as Sadaam Hussein's Iraq. The notion that a broad group of countries—which constitute a major national security risk to Western democracies—had to be deprived of access to advanced Western technology continued to fade along with memories of the Cold War.

Export Controls With China During and After the Cold War

During the Cold War, export controls for China were treated almost as an afterthought, reflecting its relative isolation and backwardness during most of the period. In fact, however, US controls for China during the Cold War were even tougher than those imposed against the Soviet Union and Warsaw Pact. These stricter controls were referred to as the China Differential, acting to bar almost any kind of economic relationship with the PRC. Locked in its own internal struggles, the Great Leap Forward, and the Cultural Revolution, the PRC in its first decades had minimal trade relations with free market economies. From the end of World War II until the 21st century, the PRC posed no real challenge to the United States militarily or economically, nor to American hegemony over the Pacific. While China would occasionally rattle its sword over Taiwan, e.g., the Taiwan Strait Crises of the 1950's, the US Navy was preponderant, successfully confining any Chinese Pacific ambitions to its mainland borders.

The trigger that changed everything was President Nixon's 1972 visit to China and the Shanghai Communique, when the United States acknowledged that "all Chinese on either side of the Taiwan Strait maintain there is but one China." Both Washington and Beijing agreed to commence a process of expanding economic and other contacts between the two countries, counterbalancing their respective relations with Moscow. In 1979, the United States took another giant step toward China when it derecognized the Republic of China in Taiwan and formally recognized the PRC as "the sole legal government of China." The US also "acknowledged" that Taiwan was part of China. In 1982, Washington, went even further in the US-China Communique, making it clear that it would not follow a two China policy.

These diplomatic successes set the stage for a massive expansion of economic relations between the United States and the PRC over the next five decades. A series of initiatives were pursued by a succession of presidential administrations, not only gradually relaxing strategic controls against China, but also aggressively pursuing full and open trade with the PRC. The culminating event was China's formal entry into the World Trade Organization in 2002, a membership that was fully supported by the United States.

US government policies, pursued over decades by Republican and Democratic administrations alike, enabled China to become today the largest importer of products into the United States, and the third largest market for US exports, notwithstanding the negative turn in such relations since 2016. The relaxation of trade controls that began gradually after Nixon's opening with China took on real momentum during the Reagan administration, and became more institutionalized thereafter in all presidential administrations that followed until the election of President Trump. In five decades, China went from a total pariah to one of America's most important, if not its most important trading partner.

Initially, export controls for China were viewed by the Nixon administration mainly as a diplomatic/military tool to help nurture the Sino-Soviet split, as well as an option that could exert more pressure on North Vietnam. In Henry Kissinger's words, the aim of rapprochement was to make the United States and China "tacit allies." Liberalization began slowly under an initial strategic policy of "evenhandedness," eliminating the China Differential, and instead treating China and the Soviet Union in a similar manner.

The first major turn, tilting more toward China, came following the Soviet invasion of Afghanistan. US export control policy was adjusted by the Carter administration slightly to favor Beijing over Moscow. The first step was authorization of the sale of nonlethal military equipment to the PRC. That was quickly followed by a symbolic change. Dual-use export controls administered by the Department of Commerce were amended to remove China from Country Group Y (the same Country Group as the Soviet Union). China was placed instead in its own category, Country Group P. This sent a signal that trade control policy for Beijing would no longer be considered as locked to restrictions for the Soviet Union. Still, export controls for China remained centered on strategic, military, and diplomatic considerations, not commercial factors. Controls were used as a tool in the emerging triangular relationship between Washington, Moscow, and Beijing.

A decisive relaxation of export controls on China and trade promotion came in a series of moves during the Reagan administration. The PRC was removed from the Munitions Control List, which had forbade all sales of military equipment to selected states. Instead, case-by-case approval for conventional military equipment was established. Dual-use trade controls were also relaxed. A "two times policy" was implemented: China would be entitled to receive technology and equipment at "two times" the level allowed for the Soviet Union before it invaded Afghanistan.

This opening door, which had set the stage for a new era of trade between China and the United States, swung further open in 1983 under the Reagan administration. In a move of critical strategic significance, China was identified by the Department of State as a "friendly, non-aligned country." It was placed by the Department of Commerce, for export control purposes, into Country Group V: the same designation as Western European NATO members, Japan, India, all Africa, Australia, New Zealand, and several Middle Eastern countries. Within that Country Group, however, a three-tier system was established, identified as "Green," "Yellow," and "Red Zones." While most export license applications to the Commerce Department fell within the Green Zone—including computers, semiconductor equipment, and electronic and computerized instruments—case-by-case license approval was still required for Yellow Zone technology, covering items that could pose a "clear threat" to US interests. Commodities contained in the Red Zone were classified and carried a strong presumption of denial.

The Rise of China as a Great Power Competitor

From this point forward, economic relations between the United States and China surged. In 1982 dollars, bilateral trade that year totaled $5.2 billion. By 2022, notwithstanding the recent rise of tensions over a host of issues, trade between China and the United States hit an historical high of $690.6 billion. By 2022, China was the United States' top source for imports. China was also the United States' third biggest export customer last year after Canada and Mexico. Together, China and the United States have become the two leading trading powers in the world.

The two countries today are joined at the hip economically, whether they like it or not—vastly complicating potential attempts to control trade between the countries for national security reasons. Unlike the Cold War era, when implementing multilateral export controls against the Warsaw Pact and China was basically a straightforward exercise, implementing any kind of effective export control system toward China today poses far more complex challenges.

The Reagan administration's liberalization of export controls toward China paused under George H.W. Bush's administration, following the June 4, 1989 massacre in Tiananmen Square. In the aftermath, COCOM halted the continued liberalization of controls for the PRC. At the same time, Congress also enacted sanctions against China. The Foreign Relations Authorization Act of 1990 and 1991 empowered the President to make a determination based on "national interest" to allow or forbid the export of commercial satellite technology to China.

During the H.W. Bush administration, the focus of export controls was less on constraining China and more on limiting the proliferation of weapons of mass destruction from former Soviet Bloc countries. During the course of the Clinton administration, export controls continued to be watered down. Restrictions over the export of high-tech supercomputers were relaxed for a number of counties in 1995, to include China, Russia, and India. The next year, export control regulations were comprehensively revised for the first time in 40 years. The aim was to simplify the process and promote trade. In December 1996, general enforcement of controls for encryption products were transferred from the State Department's Munitions Control List to the Department of Commerce, except for specific, military-use items. This change reflected the sentiment that a multilateral approach to encryption controls could be fostered under the Commerce Department's dual-use control framework, promoting global commerce and economic growth.

Another interruption in the march toward more relaxed export controls occurred in 1999, however, due to Chinese activities. Loral Space & Communications Ltd. and Hughes Electronics used Chinese Long March missiles to launch their satellites into space—this resulted in the loss of sensitive technical data. Following the incident, responsibility for export control over satellite technology was transferred back to the State Department's Munitions Control List from the Commerce Department with Loral and Hughes incurring millions of dollars in fines for their violation of US export controls.

Under the George W. Bush administration and in particular after 9/11, export controls continued to become more centered on terrorism and the proliferation of weapons of mass destruction. One notable event related to China was a fine imposed on Boeing in 2004 for having transferred sensor control and gyro chip technologies alongside the sale of 94 commercial jets to China. The State Department determined that the technology transferred as part of flight boxes were critical to the guidance system of the AGM-65 "Maverick" air-to-ground missile.

Upon the arrival of the Obama administration, another export control reform effort was commenced, this time with the aim of reducing the inherent complexity of the system. The effort reflected recommendations made by the National Research Council in a report titled "Beyond Fortress America." This piece characterized the US export control system as "fundamentally broken," with a structure that reflected (and was overly focused on) outdated Cold War assumptions.

The Arrival of the Trump Administration and the Paradigm Change on China

The Obama administration review was a protracted process, resulting in legislative reform reaching Congress a few months after the election of Donald Trump. The changes went into effect with the passage of the Export Control Reform Act on August 13, 2018. The statute reinstated a permanent statutory foundation for the Commerce Department's export control regime, relieving the post-1994 temporary reliance on the International

Economic International Emergency Act. The Trump administration also initiated another broad review of the entire export control regime, calling for increased focus on "emerging" and "foundational" technologies such as artificial intelligence, robotics, nanotechnology, semiconductors, advanced batteries, and other path-breaking technologies that could strategically affect US national security. Importantly, this review coincided with the Trump Administration's strategic pivot to a more confrontational stance toward China. The initial spark for the turn against China was President Trump's frustration over the balance of trade between the two countries, which led the US to impose tariffs on various Chinese products.

Along with tariffs, the administration took tough export control action against China's two largest telecommunications equipment makers, Huawei and ZTE. Both were placed on the Commerce Department's designated Entity List, because they had violated the terms of prior settlements with the Department of Justice. Sales of semiconductors made in the United States to both companies were blocked. The Commerce Department went even further by invoking the Foreign Direct Product Rule. The sale of semiconductors made *outside* the United States that used any US technology were forbidden, as well. This action caused ZTE to teeter on the brink of bankruptcy. Huawei's profits for 2022 plunged 70 percent. While these export control steps appeared tough on the surface, the reality is that they could be circumvented, as they were aimed only at two designated entities, Huawei and ZTE. In other words, sanctions against any Chinese person or company placed on an Entity List could be sidestepped by having purchases placed by persons not barred by the List.

The Trump administration significantly expanded export controls for China in 2020, when it issued a new rule focused on civilian, dual-use technology. The initiative reflected growing US alarm over "civil-military fusion," a policy of the Chinese Communist Party aimed at integrating China's military and civilian sectors. The stiffest controls cover advanced technologies such as telecommunications, semiconductors, sensors, encryption, lasers, and advanced aircraft propulsion systems. Any export license application for such items was made subject to a presumption of denial. The regulations are, however, unilateral, meaning that they apply only to US exports from the United States or by US persons. These controls were not implemented on a multilateral basis with US allies and/or partners, nor do they generally cover exports to China from other countries (even if such exports used or relied on any US sourced technology).

Export controls for China have continued to be tightened since the election of President Biden. In June 2021, President Biden expanded the Trump administration's list of Chinese companies barred from doing business with American persons from 49 to 59 firms, due to their ties with the Chinese military. On October 7, 2022, the Commerce Department's Bureau of Industry and Security announced important new export control regulations for China. They are intended to severely restrict China's access to a broad array of cutting-edge, dual-use US semiconductor technologies, goods, and software. Use of any machinery or technology that originates from America is covered by the new regulations, meaning it applies to foreign end users as well.

Future Export Control Issues With China

The export control strategy that has been developed by both the Trump and Biden administrations is different from the one followed by the United States during the years of the Cold War.

First, US controls imposed during the Cold War were not inherently unilateral. They were generally followed and enforced on a multilateral basis under COCOM with 16 other NATO allies, Japan and Australia until the organization's dissolution in 1994.

Secondly, Cold War era, COCOM export controls covered a broad spectrum of dual-use goods and technologies that could enhance military capabilities. As a result, COCOM controls substantially impaired the access of isolated Iron Curtain countries to the benefits of trade with Western free market economies.

Today, COCOM no longer exists. And, unlike the relative economic isolation of Communist countries during the Cold War, the Chinese economy is integrated into the global, free market economy. Imposing export controls against China of the kind followed by COCOM members during the Cold War would be impossible, given how intertwined Western economies have been allowed to become with China over the last few decades. Consequently, the export control strategies developed by Washington against Beijing are focusing on identifying "chokepoint" technologies, such as semiconductors, AI, and advanced satellite technology, which are all considered strategically critical for national security.

The 2022 regulations issued by the Commerce Department are, however, unilateral, meaning other allies and partners have not all joined to impose comparable, multilateral controls on China. Both the Netherlands and Japan, in particular, have technology capabilities that could capture the semiconductor-related business that the October 2022 controls now block US businesses from pursuing. American diplomats have been working with Amsterdam and Tokyo to persuade them to enforce the same kind of controls adopted by the United States. While there are signs that the Netherlands and Japan have agreed to an understanding with the United States, at the time of writing no concrete, written agreement between the three countries has been announced.

Another complicating factor is Taiwan's TSMC, the leading semiconductor manufacturer in the world, and which also has an important semiconductor business relationship with China. It controls over 90 percent of the market for the most advanced semiconductors. The Taiwanese government has signaled that it will comply with the new US controls, but again there is not yet a formal understanding with Washington. The CEO of TSMC has himself expressed skepticism over the wisdom of semiconductor controls. Without a multilateral approach, unilateral US controls can only succeed in decreasing the market share of American businesses, while failing to stop Chinese access to advanced chip technologies.

Tough new export controls will not be as effective in dealing with China as they were in denying Iron Curtain countries, including China, general access to advanced Western technology during the Cold War. China and the West are far too economically integrated, at this point, to allow such a wall to be built.

A New COCOM

What is urgently required at this point is a common understanding among Western allies about the kind of technologies and know-how that should be restricted, in order to help protect the West against a scenario where China achieves decisive military superiority. A new version of COCOM must be negotiated with Western European and Asian partners that will reflect a common understanding of where the line should be drawn on limiting trade and investment with China. Admittedly, the Cold War COCOM system was not perfect, as it had no real multilateral enforcement mechanism, leaving it to each member country to enforce the agreed-to multilateral controls. Still, there can be no doubt that COCOM was an important barrier keeping strategic technologies and know how out of the hands of the communist states of the Cold War. On this basis, it should be resurrected and adapted to address the challenge posed by China. To give COCOM more teeth when it comes to enforcement, the United States Congress should consider giving US exporters a private right of action, empowering them to sue for treble damages (similar to US antitrust laws) any person who evades or contravenes US or multilaterally agreed-to export control rules on trade with China.

While there are signs that the US's NATO allies and the European Union are becoming more cognizant of the challenge China poses, it is not obvious that they will be as willing at this point to go as far as the United States and other Asian partners to address the threat. French President Macron recently called for Europe to pursue a policy of "strategic autonomy" from the United States, suggesting that Europe ought not simply be "America's followers" on China. While the French have tried to walk back those comments, the extent to which European partners will be resistant to imposing export control restrictions as tough as the US's on China should not be underestimated. Resurrecting a new version of COCOM under the auspices of a common, multilateral vision will be a serious challenge, but nonetheless provides the only path to effective export controls on the PRC going forward.