

SECRET/SENSITIVE/EYES ONLY

February 11, 1972

MEMORANDUM FOR

Mr. Theodore Eliot
Executive Secretary
Department of State

SUBJECT: Relaxation of Restrictions on Trade
with People's Republic of China

Enclosed is the draft press release, together with draft Qs and As which have been prepared for Monday's announcement which I discussed with you telephonically.

On a most close hold basis, would you please give us your comments on both the Qs and As and the draft press release, to include any recommendations for modification.

Alexander M. Haig, Jr.
Brigadier General, U.S. Army
Deputy Assistant to the President
for National Security Affairs

Enclosures

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Proposed Press Release

Following a full review of a report by the Under Secretaries Committee on U.S. trade with the People's Republic of China, the President today announced his decision to place the People's Republic of China in Country Group Y of the Commodity Control List. The effect of this decision is to make available under general license to the People's Republic of China all commodities now available under general license to the countries of Eastern Europe, including the Soviet Union. Poland, Romania, and Yugoslavia are in a separate category. This also moves controls on the export to the PRC of foreign products made with U. S. technical data to the same level as those governing such exports to Eastern Europe, except those countries noted above.

In addition, the President has decided to modify remaining Foreign Assets Control Regulations pertaining to the People's Republic of China. He has directed removal of the requirement that U. S. controlled firms in countries (including Western Europe, Canada, and Japan) which are members of COCOM -- the international coordinating committee on strategic trade with Communist countries -- obtain a Treasury license in addition to a host country license for the export of strategic goods to the People's Republic of China. He has also directed elimination of the requirement that U.S. controlled firms abroad obtain prior Treasury licensing for the export of foreign technology to the People's Republic of China.

THE WHITE HOUSE
WASHINGTON

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MEMORANDUM

NATIONAL SECURITY COUNCIL

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ACTION

February 10, 1972

MEMORANDUM FOR: DR. KISSINGER

FROM: ROBERT HORMATS *RH*

SUBJECT: Relaxation of Restrictions on Trade
with People's Republic of China

In response to the President's decisions on this subject, attached at Tab A is a NSDM communicating these decisions to the bureaucracy, and at Tab B is a proposed press release. I will coordinate further with Ziegler's office prior to the release of this decision.

RECOMMENDATION:

That you sign the NSDM at Tab A and approve the press release at Tab B.

Concurrence: J. H. Holdridge *JH*
Dick Kennedy

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Q: What are the principal effects of moving the People's Republic of China to Country Group Y of the Commodity Control List?

A: The principal effects of this action are to make available under general license for export to the People's Republic of China the same commodities under general license to the Soviet Union and other nations of Eastern Europe (excluding Romania and Poland which are treated more liberally). Among the additional commodities which will be available under general license to the PRC as a result of this action are locomotives, construction equipment, a variety of industrial chemicals, internal combustion engines, and rolling mills. Also, this action makes available to the PRC under general license the same products made abroad with U.S. technical data as are available to the Soviet Union and Eastern Europe.

Q: Why liberalize further on trade to the PRC at this time?

A: In announcing, on June 10 of last year, the President's decisions to permit the free export to China of a range of non-strategic U.S. products, I indicated that we would consider the possibility of further steps. A thorough interagency review has been conducted by the NSC Under Secretaries Committee chaired by the Department of State. Based on the report and recommendations of that Committee, the President decided at this time to take the steps which I have announced. The President felt that it would be a good idea to announce this decision prior to his departure for China.

Q: How much trade will result from this?

A: This is very hard for us to estimate since it depends so much on

Chinese interest. The important thing is that the door to trade has been opened wider.

Q: What will the PRC think about this move?

A: We would hope that they would welcome this additional step forward in opening up opportunities for trade.

Q: Aren't a number of products which will become available under general license of strategic advantage to the People's Republic of China?

A: That issue was certainly one addressed in the Under Secretaries Committee study. It was decided that the decontrol of these items was consistent with the interests of the United States and not detrimental to our security.

Q: What about items which are not on the general list for the PRC?

A: Items not on the general list for the PRC require a specific license for export to that country. We are prepared to receive and consider applications for specific licenses on their merits.

Q: Before this action, what was the difference in the number of commodities on the general license list for the Soviet Union and Eastern Europe as compared to the number of commodities on the China list?

A: The general list for China had been at a level of roughly 75 to 80 percent of that for the Soviet Union and Eastern Europe.

Q: What about the sale of U.S. aircraft to the PRC? There seems to have been a good deal of interest in this.

A: (Note: If you wish, you can refer this and other questions involving specific products or licensing problems to the Department of Commerce, Office of Investment Control.) All aircraft are under export control to Eastern Europe and the PRC. License applications indicating a concrete proposed transaction have not yet been received by the Department of Commerce.

Q: What will be the effect of the decision to remove the requirement that U.S. controlled firms in the countries of Western Europe, Canada and Japan, which are members of COCOM, obtain a Treasury license in addition to a host country license for the export of strategic goods to the People's Republic of China?

A: The effect of this will be to eliminate the necessity of an American controlled firm in a COCOM country obtaining two licenses -- one from Treasury and another from COCOM -- for the export of ~~strategic~~ goods *which might be considered strategic* to the People's Republic of China. The U.S. has a strong voice in the COCOM and believes that this is sufficient to regulate the export of such products to the PRC. (This is the practice used with regard to the export of strategic goods to the Soviet Union and Eastern Europe.)

Q: What products will be affected by this?

A: All strategic products under COCOM control being produced by U.S. controlled firms in countries which are members of COCOM. (For American controlled firms in non-COCOM countries, a Treasury license for the export of strategic goods will still be necessary.)

Q: What is the effect of eliminating the requirement that subsidiaries of U.S. firms abroad obtain prior Treasury licensing for the export of foreign technology to the PRC?

A: Heretofore American subsidiaries operating abroad had to obtain a Treasury license in addition to COCOM and/or host country approval to export foreign technology to the PRC. Foreign controlled firms in the same country had only to receive COCOM and/or host country approval. Removal of this requirement will put American firms on the same footing as foreign firms. (This is the practice used with regard to the export by U.S. subsidiaries of foreign technology to the USSR and other Eastern European countries.)

Q: Does this do anything to change the status of blocked assets, and will the President discuss this in Peking?

A: Today's announcement deals only with trade measures. The whole question of blocked assets is a complicated subject, and it would be premature to discuss it at this time. With regard to whether the President will discuss this in Peking, I do not want to comment on what the President

Q: When will these decisions go into effect?

A: Within the week.

Q: Are any further steps planned?

A: The general license list is under constant review and additions are made periodically. With regard to other steps, no decisions have been made at this time.



DEPARTMENT OF STATE

Washington, D.C. 20520

413

NSC UNDER SECRETARIES COMMITTEE

CONFIDENTIAL

NSC-U/DM 60D ADDENDUM

February 4, 1972

TO : The Deputy Secretary of Defense
The Assistant to the President for
National Security Affairs
The Director of Central Intelligence
The Chairman of the Joint Chiefs of Staff
The Under Secretary of the Treasury
The Deputy Attorney General
The Under Secretary of Agriculture
The Under Secretary of Commerce
The Under Secretary of Labor
The Under Secretary of Transportation
The Assistant to the President for Inter-
national Economic Affairs
The Director, United States Information Agency
Mr. W. D. Eberle, Special Trade Representative

SUBJECT: Travel and Trade with the People's Republic
of China - Chairman's Report

The attached memorandum, "Actions Against the PRC in U.S. Courts", has been prepared in connection with the NSC Under Secretaries Committee memorandum to the President of January 13, 1972 and should be considered as Addendum No. 2 to Annex A of that memorandum. This section follows Addendum 1 (pages 37 through 39).

A. A. Hartman
Arthur A. Hartman
Staff Director

Attachment:
As stated.

CONFIDENTIAL

Cyrus Guim. For Davis, Holmes, Kennedy + A' 7-227 2/8/72

Actions Against the PRC in U.S. Courts

2-4-72

Summary

As trade and travel between the United States and the People's Republic of China (PRC) are normalized, PRC vessels, aircraft, commodities and other property or assets may come within the territory of the United States. United States nationals and others with claims against the PRC may seek the attachment of such property by United States courts to satisfy their claims against the PRC arising out of the nationalization or other taking of property by the PRC since 1949.^{1/} This memorandum considers the probable significance of such individual court actions in the absence of a U.S.-PRC claims settlement which effectively barred such actions.^{2/} The principal issues discussed, and the conclusions reached, may be summarized as follows:

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- 1/ There is \$196,471,059.33 (plus interest) in private claims against the PRC adjudicated by the Foreign Claims Settlement Commission under the Chinese Claims Act of 1966 (22 U.S.C. 1643). These claims are for losses arising since October 1, 1949, resulting from the nationalization, expropriation, interventions, or other taking of, or special measures directed against property or rights and interests therein.
- 2/ It is believe that the validation of a claim by the Commission under the Chinese Claims Act does not constitute a judgment upon which execution may be obtained in a U.S. court. However, this issue has not been decided by the courts. Neither the submission of a claim to the Commission nor its validation by the Commission bars the claimant from seeking other remedies.

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1. Department of State Practice Re Sovereign Immunity.

a. Since 1952 the Department of State has followed the restrictive theory of sovereign immunity and recognized a foreign state's immunity from suit in courts in the U.S. with respect to its governmental or public acts but not with respect to commercial or private acts. No case has yet arisen involving the question whether a Department of State suggestion of immunity should be made on behalf of an unrecognized regime. (It is assumed for purposes of discussion that the U.S. will continue to recognize and maintain diplomatic relations with the ROC, and will not have extended recognition to the PRC at the time court actions are instituted against the PRC.) The absence of recognition of the PRC need not constitute a barrier to a Department suggestion of immunity -- provided that the Department was otherwise satisfied that the requirements for a suggestion of immunity were met. However, it would be difficult to explain the consistency of continued non-recognition with a suggestion of immunity.

b. Whether claims against the PRC arising out of the nationalization or other taking of property by the PRC since 1949 should be considered to rest upon governmental or commercial transactions would depend upon a careful analysis of each claim. The Department of State has in the past suggested immunity where the case involved a foreign government nationalization.

c. Under the restrictive theory the Department has suggested the immunity from attachment of property if the activity forming the basis of the complaint was governmental in nature or if the property attached was being used for governmental purposes. Where, however, a foreign government's property is attached for the purpose of executing a judgment (and not for the purpose of obtaining jurisdiction), the Department has suggested immunity even when the property was used for commercial purposes.

2. Sovereign Immunity in the Courts.

The courts have generally acted in accordance with Department suggestions of immunity. However, the procedures involved before the court dismissed a suit and released any property that may have been attached could take a considerable period of time. Because of the novel and complex legal issues that would be involved in any suit against the PRC arising out of the nationalization or other taking of property by the PRC since 1949, it is difficult to predict the outcome of such litigation. Some claimants might decide it was in their interest to bring suit -- even if only for purposes of harassment -- to bring pressure on the USG and PRC to conclude an acceptable claims settlement. A series of harassing suits against the PRC could present significant problems and constitute a barrier to normal trade relations between the United States and the PRC. Each suit would involve either the tying up of whatever property may have been attached or the posting of a substantial bond by the PRC in order to gain an earlier release of the property. Also involved, of course, would be the trouble and expense to the PRC of defending in each suit.

3. The Act of State Doctrine.

Under this doctrine the courts would not examine the validity of a taking of property within its own territory by a recognized foreign government, even if a complaint alleged that the taking violated international law. The doctrine normally would be available to a foreign government as a defense in a suit where nationalization or other takings of property formed the basis of the plaintiff's cause of action. Since recognition is a prerequisite for applying the act of state doctrine, the PRC would not be able to protect its takings of property from the scrutiny of courts in the U.S. as long as the U.S. did not recognize its government. It should be noted, however, that an act which constituted an act of state would in all probability also constitute a governmental act under the restrictive theory of sovereign immunity. If the PRC prevailed on the issue of sovereign immunity, the court would not reach the issue of the act of state doctrine.

Discussion

Department of State Practice Re Sovereign Immunity

Since 1952 the Department of State has followed the restrictive theory of sovereign immunity and recognized a foreign state's immunity from suit in courts in the U.S. with respect to its governmental or public acts but not with respect to commercial or private acts. ("Tate Letter", 26 Department of State Bulletin 984). Although not all states follow the restrictive theory of sovereign immunity, that theory is now generally accepted as entirely consistent with international law.

No case has yet arisen involving the question whether a Department of State suggestion of immunity should be made on behalf of an unrecognized regime. Since it appears that a claim of immunity as a foreign sovereign should be available to the PRC in U.S. courts even though it is not recognized by the U.S. (for reasons discussed more fully below), the absence of recognition need not constitute a barrier to a Department suggestion of immunity -- provided that the Department was otherwise satisfied that the requirements for a suggestion of immunity were met. However, it would be difficult to explain the consistency of continued non-recognition with a suggestion of immunity.

Whether claims against the PRC arising out of the nationalization or other taking of property by the PRC since 1949 should be considered to rest upon governmental or commercial transactions would depend upon a careful analysis of each claim. The Department of State has in the past suggested immunity where the case involved a foreign government nationalization (Chemical Natural Resources, Inc. and Venezuelan Sulphur Corporation, C.A. v. Republic of Venezuela, 215 A. 2d 846 (Sup. Ct. Pa. 1966)), and the courts have considered nationalizations to be governmental acts (Victory Transport, Inc. v. Comisaria General, 336 F. 2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965)).

The most likely manner in which a claimant might attempt to assert a claim against the PRC as a defendant would be through a quasi-in-rem procedure, whereby the claimant-plaintiff would attach a ship, bank account

or other property of the PRC found within the court's jurisdiction.^{3/} Under the restrictive theory the Department has suggested the immunity from attachment of the property if the activity forming the basis of the complaint was governmental in nature or if the property attached was being used for governmental purposes.^{4/} Thus, if the complaint is based on activity which is part of a commercial transaction and the property attached is used for commercial purposes,^{5/} a suggestion of immunity from attachment would not be appropriate.

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- 3/ Special considerations, not relevant here, would apply to an in rem action against a vessel based on a claim arising out of the activities of the vessel, such as the purchase of provisions or a collision. In either an in rem or quasi-in-rem action any ensuing judgment would be limited to the value of the property attached.
- 4/ Recognizing claims of immunity in specific cases where these criteria were not met -- while possible -- might subject the Department to strong criticism by the legal community and by business interests.
- 5/ The Department would probably consider that PRC merchant vessels calling on U.S. ports in the conduct of normal trade relations were involved in a commercial, and not governmental, activity. Difficulties may arise where property sought to be attached, such as money, is used for a variety of purposes.

The Department further distinguishes between attachment for the purpose of obtaining jurisdiction, as discussed above, and attachment for the purpose of executing a judgment (sale of the asset to satisfy a judgment). The restrictive theory of the "Tate Letter" is not applied to the latter. Therefore, the Department has in the past suggested immunity of foreign government property from execution in cases in which property was used for commercial purposes as well as cases in which the property was used for governmental purposes. So, even if a judgment could be obtained by a claimant against the PRC, it would be consistent with past practice for the Department to suggest the immunity of PRC property from attachment for the purpose of satisfying such a judgment.^{6/} (See Weilaman v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. 1959).)

The Department of State has established informal procedures for considering requests from foreign governments for assistance in asserting claims of sovereign immunity in litigation in United States courts, including cases where property owned by such governments has been attached either for the purpose of establishing jurisdiction or satisfying a judgment. The foreign government's Embassy is expected to address a communication to the Secretary of State setting forth the name of the case and the extent of the immunity claimed, accompanied by a memorandum setting forth the relevant facts and laws. Upon receipt of such a communication, the Department would notify the plaintiff in the litigation of the receipt

6/ Certain limitations on this broad rule of immunity of government-owned property from execution have been urged by several commentators and considered by the Department in the context of draft legislation on sovereign immunity.

We have no information whether judgments have been rendered by U.S. or foreign courts upon which claimants might seek execution in U.S. courts.

of the request and would send a copy of the foreign government's memorandum supporting its views if the plaintiff so desired. Should either party request an opportunity to make an oral presentation, the Department would schedule an informal hearing which representatives of both parties may attend. Upon the conclusion of these procedures the Department makes a determination regarding the foreign government's request and communicates the determination to the Embassy and to the plaintiff's representative. If the Department concludes that there is a basis for a claim of immunity, the Department certifies to the Attorney General that it recognizes and allows that claim.

Sovereign Immunity in the Courts

The courts have generally acted in accordance with Department suggestions of immunity.^{7/} The above procedures, including the time required before the court dismissed the suit and release any property that may have been attached, would -- under the best of circumstances -- require at least two weeks. However, these

^{7/} In a recent Second Circuit decision the Court stated that "once the State Department has ruled in a matter of this nature, the judiciary will not interfere" (citing the Supreme Court decision in Republic of Mexico v. Hoffman, 324 U.S. 30, at p. 35 (1945)), and that "we have no alternative but to accept the recommendation of the State Department." Isbrandtsen Tankers, Inc. v. President of India, Represented by the Director General of the India Supply Mission, 446 F. 2d 1198 (2d Cir. 1971), cert. denied ____ (1971). However, the state courts in New York have indicated an inclination to make their own determinations as to the availability of immunity when suggested by the executive branch in situations involving such questions as the party for whom assets are held by a bank (see Stephen v. Zivnostenska Banka, National Corp., 15 A.D. 2d 111, 222 N.Y.S. 2d 128 (Sup. Ct. (1961), aff'd 12 N.Y.S. 2d 781, 235 N.Y.S. 2d 1, 186 N.E. 2d 676 (1962)).