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Coexistence and Commerce: Guidelines for Transactions Between East and West

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COEXISTENCE & COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST. By Samuel Pizar. New York: McGraw-Hill Book Co. 1970. Pp. xv, 558. \$17.50.

For all the talk in this country in recent years about improving relations between the United States and Communist nations—"building bridges" and the like—old stereotypes of West and East, Us and Them, linger on. The Cold War mentality dies hard: East-West relations remain symbolized by signs of separation and antagonism such as the Berlin Wall and the lonely bridge at Lowu where travelers cross between Hong Kong and China. Such images, and the stereotyped habits of thought associated with them, are especially dangerous in a time characterized by neither war nor peace, but by a mixture of both. Soviet-supplied automatic weapons kill Americans in Vietnam while Soviet dancers entertain in New York. American policy choices are unclear because precise alternatives are lacking and neither policy-makers nor citizens can easily muster the suppleness and subtlety which they need to confront a confused reality. In the muddle, even some fairly obvious possible adjustments in American policies remain obscured by obsolete moralizing and long-established commitment to economic welfare. A striking example of the need for change is American policy on trade with Communist nations, a subject on which Samuel Pizar's book has much to say.

The book is uneven in its approach, which is sometimes scholarly and more often journalistic. In addition, its depth often varies greatly and its purposes are not always clear. It appears to be three-pronged. It compiles much information on the institutions of East-West trade; it sets forth, to a limited extent, practical hints to Westerners on doing business with the East; and it argues cogently for Communist and non-Communist action to facilitate and expand trade. In each of its three principal aspects, the book leaves something to be desired. Most of the information is available elsewhere;¹ although the book occasionally has a how-to-do-it air, it contains relatively few practical pointers; and many of the policy suggestions are familiar to businessmen, policymakers, and observers concerned with East-West trade.² Yet the book may be more than the sum of its parts, because it brings together much useful information and lively argumentation, particularly in the much-debated area of United States policy toward East-West trade. As this is written in July 1971, Sino-American trade, hesitantly reopening after

1. See, e.g., NATIONAL COMM. ON UNITED STATES-CHINA RELATIONS, CHINA TRADE PROSPECTS AND UNITED STATES POLICY (A. Eckstein ed. 1970); Berman & Garson, *United States Export Controls*, 67 COLUM. L. REV. 791 (1967); *Hearings on S. Joint Res. 169 Before the Subcomm. on International Finance of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess., pt. 1 (1968) [hereinafter cited as *1968 Senate Hearings*]; *Hearings Before the Subcomm. on Europe of the House Comm. on Foreign Affairs*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *1968 House Hearings*].

2. On relaxing American export controls, see Berman & Garson, *supra* note 1. See generally, *1968 Senate Hearings*.

a 20-year American embargo, is much in the news.³ This Review will focus on Sino-Western and Sino-American trade, not only because they are within the general ambit of the book, but because the current reexamination of America's trade policy with China highlights some of the problems which Pizar discusses.

The American policy which cries out most strongly for reexamination and change is that of denying Communist nations goods which they need for their economic development. Many observers and participants in East-West trade have long been concerned, like Pizar, with the restraints on such trade which the United States imposes through an elaborate array of legislative and administrative rules and the complex bureaucracy which enforces them. Pizar argues convincingly for such long-overdue American policy initiatives as an increase in the number and types of American-produced goods which can be exported to Communist nations without a "validated," i.e. a special, license from the Office of Export Control of the Department of Commerce, and simplification of export control procedures. Although the long-established system of export licensing is formally centered in the Office of Export Control, it is advised by what two other commentators have described as "a three-tier hierarchy of interdepartmental committees on which are represented the Departments of Commerce, State, Defense, and Treasury, in conjunction with that amorphous body known as the 'intelligence community.'"⁴ In addition, the Department of State maintains an Office of Munitions Control, and the Treasury Department licenses commercial transactions with Communist China, Korea, Vietnam, and Cuba, and the export of strategic materials by foreign subsidiaries or affiliates of American firms to the Soviet Union and other Eastern European countries except Yugoslavia. These agencies have overlapping jurisdiction, issue overlapping regulations, engage in secret as well as public consultation to draw up "gray" as well as "black" lists of suspected violators, and supervise the licensing of thousands of products and "technical data" whose exportation is allowed or not depending on

3. Beginning in July 1969, a series of steps was taken to relax the American trade embargo. These early moves, down to July 1970, are described in Garson, *The American Trade Embargo of China: Recent Developments*, 2 J. MARITIME LAW & COMMERCE 41, 53-59 (1970). Further changes in American trade policy were signalled in early 1971 by the lifting of the Foreign Assets Controls regulations prohibiting oil-bunkering transactions between United States oil companies and Chinese-owned or Chinese chartered vessels, — Fed. Reg. —, and by amendment of the Foreign Assets Controls regulations to allow "persons subject to the jurisdiction of the United States to deal in and import into the United States on or after June 10, 1971, merchandise of mainland Chinese origin and merchandise of Chinese type." 36 Fed. Reg. 11141 (June 12, 1971).

The most decisive step was taken in June 1971, after a prior Presidential announcement [N.Y. Times, Apr. 15, 1971, at 1, col. 8], when President Nixon authorized the export of many "nonstrategic items," and also indicated that some items not exportable under general license might well be licensed for export on a case-by-case review. N.Y. Times, June 11, 1971, at 1, col. 8. For the list of goods which can be exported under general license, see 36 Fed. Reg. 11808-11811 (June 9, 1971); Export Control Bulletin, U.S. Dep't of Commerce, Office of Export Control, No. 46, at 1-10 (June 11, 1971).

4. Bernan & Garson, *supra* note 1, at 806.

which Communist nation is the ultimate destination. In addition to the welter of agencies and regulations which severely restrict trade with Communist nations, American foreign economic policy has arguably become heavily over-influenced by a narrowly military orientation.

The considerations underlying export restrictions are clear enough—"to withhold from the East the kind of goods that may help in the build-up of military and political power" (p. 65). But that argument has grown far beyond its original dimensions, and—as applied by administrators, especially those in the Pentagon—it has caused large-scale restrictions on the export of goods because of an exaggeratedly broad conception of what is "strategic." Pizar finds that

[c]aught between a mandate to promote world-wide trade in peaceful goods despite a precarious balance of payments, and an injunction from a politically sensitive and watchful Congress to make a paramount concern of the nation's security, the attitudes of responsible administrators are bound to be arbitrary, changeable and hesitant, at least in borderline cases, with error on the side of caution. (p. 121.)

Two recent transactions illustrate interagency conflict over whether particular goods are "strategic." The Defense Department opposed for months the granting of a license to General Motors to export engines to the Perlini Company of Milan, which was to install them in 20-ton dump-trucks destined for China,⁵ and the export of General Motors and Cummins engines to France, for installation in even larger dump-trucks for Peking.⁶

In the two cases mentioned above, and apparently in others, the Pentagon has taken a broader view of what is "strategic" than the Commerce and State Departments. During congressional hearings on the administration of export controls, a Treasury official stated that his agency must rely on the Defense Department and the intelligence community for expert opinions on whether a particular item is "strategic."⁷ At the same time, a rule of unanimity has grown up in interagency consultation on these matters.⁸ As a result, Defense Department objections to granting a license will control unless the State and Commerce Department units initially involved in the discussions take the matter higher up the bureaucratic ladder, which can be as high as the National Security Council.⁹

Until recently, the agencies administering the export regulation scheme were charged to deny licenses not only when the goods involved had military uses, but when they were considered to make "a significant contribution to the military or economic potential of [the Communist nation involved] which would prove detrimental to the national security and welfare of the United

5. Kwitny, *The China Trade; U.S. Concerns Export Mainland-Bound Goods as Embargo Loosens*, Wall Street Journal, Mar. 11, 1971, at 1, col. 6.

6. *Id.*; see Scheibla, *Arsenal of Communism? Bridge-Builders Channel Strategic Materials, Equipment to the Reds*, Barron's, Jan. 4, 1971, at 5, col. 1.

7. *1968 House Hearings* 124.

8. *1968 Senate Hearings* 206.

9. *Id.*; interagency disagreement on licensing the export of the dump truck-engines referred to in the text accompanying note 5 *supra* was reportedly resolved by the National Security Council. Kwitny, *supra* note 5.

States."¹⁰ The Export Administration Act of 1969¹¹ deleted the words "or economic," thereby narrowing somewhat the concept of "strategic" goods.¹² The extent to which administrative agencies have meaningfully used their discretion to curb their notion of "strategic" remains unclear.

Pisar suggests that the list of American goods which cannot be exported without a "validated" license should be shortened so that it is no longer than the Consultative Group Coordinating Committee (COCOM) list, which is agreed on and periodically revised by the NATO nations (except Iceland) and Japan, and which represents, as another commentator has put it, "the lowest common denominator of export controls."¹³ Over the years, the United States has gradually agreed to shortening the COCOM list at the insistence of Western European nations eager to trade with the East, and has had to yield on a number of occasions to requests by NATO nations for "exceptions," i.e. sales of goods technically prohibited for export. American acquiescence in the demands of her allies in these matters, however, has been reluctantly given only after dogged resistance. Moreover, the United States has occasionally used diplomatic pressure to force Western nations not to sell non-strategic goods to China.¹⁴ Consistent with his other recommendations, Pisar would have the United States curb its anti-Communist zeal in these matters.

Regardless of whether one agrees with the objectives of American policy, it would be easier to justify if it was successful; Pisar argues convincingly that it is not. Denying American goods to Communist nations has not seriously hampered their abilities to develop their military capabilities. Also, Communist nations have been able to obtain elsewhere much of what the United States refuses to sell, because Western Europe and Japan do not share, and indeed increasingly resent, restrictive American views on East-West trade, and have long allowed and encouraged more extensive trade with Communist nations than the United States. This is most clearly true in the case of China, of course.

Pisar's brief for making American export restrictions no more extensive than the COCOM list seems solidly based. In addition to the arguments mentioned immediately above, he notes that changing Communist policy toward trade fosters beneficial East-West economic relations. The Communist nations of Europe, and China as well, have abandoned their preference for dealing only with each other, and they recognize that to attain economic efficiency they must use world markets to mobilize their own resources. Apart from

10. Export Control Act of 1949, 50 U.S.C. APP. § 2023 (1964). For a discussion, see Garson, *The American Trade Embargo of China*, in NATIONAL COMM. ON UNITED STATES-CHINA RELATIONS, *supra* note 1, at 1, 90.

11. 50 U.S.C. APP. §§ 2401-13 (Supp. V, 1970).

12. See Berman, *The Export Administration Act of 1969*, AM. REV. OF EAST-WEST TRADE, Jan. 1970, at 19.

13. Garson, *supra* note 10, at 108.

14. See, e.g., *id.* at 113: "The State Department, for example, brought great pressure on the West German Government in March 1966, to abandon its decision to guarantee a \$87.5 million line of credit for a Chinese steel complex to be constructed by an all-European Consortium."

these economic reasons, political considerations are also persuasive. The Cold War has died a more complete death in Western Europe than in the United States, and Western Europeans do not regard trade with the East as having moral significance. Moreover, as trade and communications have increased, and East and West are becoming more closely integrated economically, East-West communication on political questions has benefited from enlarged trade. Yet American policy, although it has not remained absolutely fixed, has moved only glacially to foster trade. For example, although some of the language of the Export Administration Act of 1969 mutes the harshness of American policy, it did not dismantle any of the existing restrictions on American exports.¹⁵

Among the reasons, perhaps, for the slowness of progress in liberalizing East-West trade, is the endurance of considerable hostility to such trade on the part of many Americans, including quite a few members of Congress. Pisar notes the importance of these attitudes, contrasting them with quite different European ones:

While many Americans continue to look upon East-West trade in Manichean terms of good and evil, and heated controversy is a permanent feature of the debate, most Europeans consider the question as utterly devoid of moral content. Whether this view reflects acute perception born of a richer historical experience or expedient rationalization of material self-interest, has become a rather academic issue. (p. 59.)

Whether or not public statements by our Solons are exaggeratedly anti-Communist to please domestic flag-wavers, politicians' rhetoric on the subject often borders on the lurid.¹⁶

Organized expressions of public opinion against East-West trade have also hampered its development. Conservative citizens' groups have sponsored boycotts of merchants who retail goods of Communist origin, tobacco companies which blend Yugoslav tobacco into American cigaretts, and large corporations which export know-how to Communist nations; long-shoremen's unions have refused to load American wheat sold to the Soviet Union unless at least half of it was shipped in American-flag vessels; and some municipal governments have adopted ordinances intended by various means to discourage the sale of Communist-produced goods.¹⁷ The consequence of these appeals to moralistic anti-Communism, Pisar contends, is to make American companies extremely cautious about dealing with Communist nations, for fear of incurring the wrath of conservative citizens' groups, labor unions, stockholders and directors. He argues that Western government leaders must "take effective steps to familiarize the public at large with the complex economic, political and psychological ramifications of this controversial issue" (p. 483). Here he can only be faulted for understatement, be-

15. See, e.g., Berman, *supra* note 12.

16. "It is folly to promote trade with Communist nations. They will agree to trade only when it presents them with an opportunity to steal our technology or in some other way promote their pronounced goal of burying us." Scheibla, *supra* note 6 (statement attributed to Senator Fannin of Arizona).

17. See Bilder, *East-West Trade Boycotts*, 118 U. PA. L. REV. 841 (1970).

cause in the United States, unequivocal White House leadership is needed to help change long-established and often irrational attitudes.

Pisar is by no means concerned only with Western barriers to increased East-West trade. Looking closely at Communist practices and policies which burden the easy exchange of goods between sharply different political systems, he calls for extensive changes on the Communist side which would have the effect of bringing Eastern trade practices more into line with recognized international, i.e. Western, practice. For instance, he argues that Communist nations must allow Western traders considerably greater access to information about, and easier communication with, their trade partners than they now permit. At present, he notes,

[a]s a practical matter, the Western firm cannot reach the local industrial consumer by means of mail-circulated canvassing. It cannot effectively explore the market, supervise the aftersales service of its product, provide customer training or advice, ensure verifiable protection for its know-how, ascertain the level of resale prices charged for its goods, finance sales or leases with its equipment as collateral and the right of foreclosure upon default, or use tested merchandising techniques to influence demand.

Nor do foreign businesses enjoy many of the other facilities which have come to be looked upon as normal in relations among commercially active countries. Except at officially sponsored trade fairs or exhibitions, Western firms cannot conveniently display their products to potential users. By the same token they cannot, as a rule, avail themselves of local warehousing facilities, appoint Eastern individuals or organizations as trusted and fully authorized agents, offer services auxiliary to sales, perform normal banking operations, enjoy unhampered access to shipping and transshipping utilities, hire office space, or engage local technical and secretarial personnel. (p. 201).

Pisar stresses the need to allow Western sellers to ascertain and meet the needs of the ultimate end-users of their products. As is well known, Westerners negotiate exclusively with Eastern trading companies which are "neither the manufacturer of the goods they sell, nor the user of the goods they purchase," (p. 148) but intermediaries between domestic Communist enterprises and the outside world. Pisar notes that there has been an increasing tendency for end-users to participate in negotiations, and urges acceleration of this development.

Trade with China, which Pisar does not discuss separately but which this reviewer has investigated independently,¹⁸ presents the extreme case of limitations on Western traders' access to the ultimate end-users of their products. American businessmen, when and if they begin negotiating with the Chinese on the same basis as other Westerners, will find that it is extremely difficult to engage in market development. They will be limited to sending technical data and samples to the trading companies which handle all of China's trade with the rest of the world, and hoping for an expression of interest, which may come, if it does at all, many months after the first approach. In addition, American businessmen will find that they will be able to go to

18. Some of the aspects of Chinese trade practice mentioned below are discussed in greater detail in Lubinan, *Problems in China Trade*, N.Y. Times, June 6, 1971, § 3, at 3, col. 5, and in the author's testimony before the Senate Committee on Foreign Relations, June 29, 1971.

China, in most cases, only to attend the semi-annual Canton Trade Fairs at which the Chinese conclude most of their trade transactions. In Canton, they will find for the most part only negotiators representing the trading companies which in turn deal on behalf of China's domestic suppliers and end-users. There, too, like other Western traders they will find negotiations very stiff and slow.

Pisar notes that Westerners often do not pay attention to technical obstacles to East-West trade, some of which are "rooted in the very structure of a wholly planned economy" (p. 200). The difficulties which American traders will encounter due to Chinese planning and the bureaucratic problems it has created ought to be understood as technical rather than political. For example, Chinese negotiators are particularly tough and demanding on price, probably because closely planned allocations of scarce foreign exchange impose limitations on their transactions with the West. Planning also limits the type of products which they may buy: Chinese negotiators cannot buy a product unless its purchase has been approved by the end-user, its supervisory ministry, and the Ministry of Foreign Trade. Decisions defining the negotiators' "shopping list" have thus already been made before they do business in Canton. The scarcity of foreign exchange and the harsh realities of the power of a monopolistic state trader manifest themselves in Chinese attempts to play competitors off against each other, and in insistence that goods be shipped in Chinese-chartered vessels and insured by the People's Insurance Company of Peking.

Among the aspects of dealing with the East which most alarm Western traders are Eastern dispute-settlement practices. All Communist nations have special trade arbitration tribunals, whose impartiality has long been questioned. Pisar concludes that the composition of the tribunals "result[s] in invisible but nonetheless significant inequalities as between a private Western concern and a local state enterprise [which] evoke doubts concerning their acceptability as impartial arbitral institutions" (p. 403). At the same time, he states that "Eastern trade monopolies have sought to align their practices with international standards," (p. 409) and that Eastern arbitral institutions have "shown themselves to be capable of competent and fair determinations" (p. 495). He also argues, however, that Communist nations have not been enough concerned to appear to do justice, even when actually doing justice, and recommends greater tolerance in the East for neutral third-party arbitration as in Zurich or Stockholm.

The Chinese case is a special one, because although the Chinese, like the Soviets, have created a trade arbitration tribunal, and only rarely agree to a contract clause which permits arbitration of a dispute before a third-country body, they have been loath to resort to *any* arbitration, even their own. Indeed, Chinese arbitration clauses usually begin by stating that "[a]ll disputes in connection with this contract or the execution thereof shall be settled amicably by negotiation"¹⁹ Quite apart from the Chinese aver-

19. China National Chemicals Import & Export Corp., Purchase Contract, "Terms of Delivery," § 7, copy on file with the *California Law Review*.

sion to any form of dispute-settlement that resembles adjudication, other difficulties peculiar to the China trade appear in negotiations over claims. In private conversation, Western sellers have stated that although Chinese claims appear to be genuine, they are often asserted in cases in which other foreign buyers would resort to an insurer; however, since a loss would fall on the People's Insurance Company under most contracts, Chinese buyers' reluctance to inflict a loss on another Chinese entity spurs the buyers to get Western sellers to admit their fault and recognize the claim. Westerners also state that some Chinese claims could be settled amicably without an argumentative correspondence if some opportunity existed for casual conversation between representatives or agents of the parties. Other claims seem to arise because the Chinese were reluctant during the original negotiations to disclose all of the information relevant to the purchase. Traders seem to agree that disputes are settled through dogged negotiations conducted against a backdrop of ongoing further transactions, and usually result in at least partial recognition of the claim, by consenting to replace broken or allegedly substandard parts, or by allowing a partial reduction in the purchase price. The troubles of Western *buyers* who assert claims for defective performance often stem from the fact that under a standard Chinese contract clause, Chinese exports are inspected by Commodity Inspection Bureaus in each major port such as Shanghai or Canton; these surveys are supposed to be final. When a Western buyer receives goods which are damaged or which do not meet contract specifications, he usually finds the Chinese most reluctant to allow a claim in the face of a Commodity Inspection Bureau certification of the goods as proper and in good condition. It appears that only if the claim is a particularly clear one, and the Western buyer goes to elaborate lengths to document his claim, will the Chinese give quick satisfaction by allowing him to return some or all of the goods for a refund.

These difficulties in the China trade illustrate extreme examples of unique Communist trade and dispute-settlement practices which Pisar would have changed if East-West trade is to grow. He does not comment on the likelihood of change in the near future, either in the areas mentioned here or in the many more in which he argues that Communist, as well as Western, parties create unnecessary barriers to the mutually profitable exchange of goods. Perhaps this is because he is, as a recent observer noted, "something of a missionary for liberalized East-West trade."²⁰ The China case shows how imperfect the American trader may find the conditions of doing business. In the meantime, Pisar's suggested code of fair practices may provide a target towards which incremental progress is at least possible.

The current hesitant steps toward resuming Sino-American trade calls for one final cautionary comment, which is applicable to East-West trade generally. To what extent does trade ease world tensions? Pisar argues that trade "fosters cooperative attitudes among states; besides, it stimulates the East's

20. Melloan, *China Trade: A New U.S. Policy* . . . Wall Street Journal, Apr. 28, 1971, at 18, col. 3.

will and capacity to create a consumer society. A population with access to an abundance of material possessions develops a vested interest in peace" (p. 61). It would take more than Pizar's belief to prove that peace comes with washing machines and refrigerators. Moreover, such sentiments dangerously suggest a materialism which condescends to other political systems' ideologies and which implies that trade acts to help dissipate international tension by drugging a lean and hungry enemy. It is easy to see how Pizar's views could be used by less sophisticated observers to justify missionary zeal in the export of American goods. In the wake of the first Sino-American contacts, Americans must be restrained from euphoria caused either by thoughts of access to a China market of eight hundred million or by the notion that trade will cause political tension to disappear.²¹ Since the Chinese have not bought consumer goods from any other nation, it is highly doubtful that they will purchase the American consumer goods which President Nixon has stated the United States will now be willing to export. Given the determination of the present Chinese leadership to avoid dilution of the masses' commitment to the Chinese revolution, American willingness to sell consumer goods is at the least an empty gesture. Also, with regard to the much-vaunted increase in mutual understanding which increased trade is supposed to bring, it is sobering that despite an increasing volume of Sino-Western trade over the last decade, that time has contributed only very slowly to educating Western businessmen and their governments about China.

The Chinese situation is special, but even though trade practices in Eastern Europe and the Soviet Union are more familiar to Westerners than those of the Chinese, East-West trade generally has contributed only slowly to increased East-West understanding. The contributions are real, nonetheless, even if they are limited. But if the Cold War irrationally inhibited East-West trade, an increase in that trade ought not to inspire expectations of a swift political détente. *Coexistence & Commerce* suggests how much the American business community and the general public must be educated to anticipate and understand radically different Communist perceptions of East-West contact, if the thin tendrils of trade are to mature slowly into more enduring bonds.

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21. See, e.g., S.F. Daily Commercial News, Apr. 20, 1971, at 1, col. 1: "If the United States would resume trade with Red China the political tensions between the two countries will *just melt away*, according to many San Francisco-based international businessmen" (emphasis added).

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