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I

Trade relations between the United States and the Soviet Union, it is submitted, should be conducted on the basis of mutual economic advantage and without regard to particular domestic or foreign policies of either country. It follows from this that the legal framework of U.S.-U.S.S.R. trade should be so constructed as to facilitate the mutual economic advantages of trade between the two countries and to help insulate such trade against the influence of shifts in their domestic or foreign policies.

Lest this argument be dismissed at the outset as a wholly unrealistic effort to divorce economics from politics, it must be emphasized that the word "should" in the first sentence—"Trade relations between the United States and the Soviet Union *should* be conducted on the basis of mutual economic advantage"—is in part a political word; it means that the political interests, *inter alia,* of both countries require that trade between the two be given a certain autonomy, a certain immunity from interference based on those same political interests. Such autonomous, politically neutral areas of international relations are, in fact, essential to the effective conduct of foreign policy on the part of all countries and to the maintenance of a stable international order. Perhaps the argument may be clearer if it is put in these terms: it will serve the *long-range* policy of both the United States and the Soviet Union to shield their trade relations from interference based on *short-range* policies.

Thus put even more cautiously, the proposition is one which, unfortunately, has not yet been widely accepted. Both opponents and proponents of expanded trade between the two countries have tended to view such trade primarily as an instrument for effectuating political goals, whether of "cold war" or of "detente."

The opponents of expanded trade have said, "Let us withhold trade until the other side changes its obnoxious policies." The proponents have said, "Let us expand such trade in order to induce the

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other side to adopt more favorable policies." Only a few have said, "Let us conduct such trade as it is economically advantageous for both sides to conduct—regardless of how good or bad our political relations may be and without the purpose of securing particular political advantages."

I have spoken of opponents and proponents of expanded trade as though both existed in both countries. Actually, on the Soviet side we have heard only from proponents, and the Soviet proponents have spoken in terms of both the economic and the political advantages which would accrue to both sides from the expansion of trade. Nevertheless, it would be a mistake to assume that there are not some people in the Soviet Union—perhaps even in high places—who would subordinate the economic considerations to the political. One may conjecture that serious questions would arise for Soviet policy-makers if, for example, the mutual economic advantage of U.S.-U.S.S.R. trade threatened to diminish substantially the proportion of Soviet foreign trade which goes to other socialist countries. One may also suppose that some persons in the Soviet Union might prefer for political reasons to strengthen commercial ties with Western Europe and Japan rather than with the United States. However, the fact that Soviet foreign trade is a monopoly of the state and is carried on solely by state agencies makes it possible to allocate exports and imports on political grounds without giving the appearance of so doing. Moreover, the Soviet government does not deny that it sometimes uses foreign trade as a means of achieving particular objectives of foreign policy. A few examples are the Soviet embargo against Yugoslavia after 1948, the expansion of Soviet trade with Cuba after 1959, and Soviet trade policies vis-a-vis Egypt and Israel from 1956 to the present time.

Nevertheless, within limits such as these, Soviet trade policy toward the industrialized non-socialist countries has been far less politically motivated than has United States trade policy toward the socialist countries. Starting in the middle 1950's, the countries of Western Europe reciprocated the Soviet desire to expand trade with them on the basis of mutual economic advantage, and as a result such trade has increased steadily and rapidly during the past 20 years. The United States, on the other hand, having erected a massive and complex set of legislative and administrative restrictions upon trade with Communist countries generally, suffered a diminution in its trade with the Soviet Union almost to the vanishing point.

Finally, in 1968, the economics of the situation began to catch up with the politics of it. For the first time, prominent American business executives began to protest that our system of export controls had only resulted in diverting substantial trade from us to West-

ern Europe and Japan. The ironies of the situation were further compounded by the fact that some of the Western European trade with Eastern Europe and the Soviet Union was being conducted by foreign subsidiaries of United States firms. In December 1968 some 2,000 representatives of leading business firms, assembled at the annual convention of the National Foreign Trade Council in New York, voted unanimously that the level of our export controls should be brought down to the level of Western European and Japanese controls. In 1969, Congress, which had hitherto been hostile to any relaxation of the restrictions on trade with Communist countries, enacted a new Export Administration Act designed to encourage the Executive branch to make our export control policy conform to that of other countries associated with us.

Nevertheless, the relaxation of our export controls and of other restrictions on trade with the Soviet Union went very slowly in 1969, 1970, and early 1971, partly because the President had not made up his mind then to favor expanded U.S.-U.S.S.R. trade. Then gradually in the latter part of 1971, and with a sudden burst in 1972 and 1973, the floodgates of U.S. export, credit, and shipping restrictions were lifted and U.S.-U.S.S.R. trade swelled from $218 million of exports and imports in 1971 to about $1.5 billion in 1973. (U.S. trade with other socialist countries also increased in the same period from $388 million to almost $2 billion, including about $1 billion with the People's Republic of China, against which country the United States prior to 1972 had raised an almost total embargo on all transactions.)

The changes in American law which made possible this sudden increase in trade with the Soviet Union were not, however, a result of any change in the American view of the relation of foreign trade to foreign policy, but rather were a result of a drastic revision of American foreign policy itself. In fact, under the new American foreign policy, the integration of trade policy with diplomatic and military policy became even greater than before. It was the Administration's view in 1972 and 1973, as in 1969 and 1970, that foreign trade, or at least foreign trade with the Communist countries, is essentially a handmaiden of foreign policy, and that the United States should only relax its restrictions against such trade as part of an entire process of relaxation of political tensions across a wide front. The Administration was not interested in normalizing trade relations with the Soviet Union until it could see the possibility of a total detente. This was part of the famous "linkage" theory of Dr. Kissinger.

One may welcome *both* the sudden expansion of U.S.-U.S.S.R. trade *and* the policy of detente without welcoming the implication of an integral connection between the two. To be sure, after a long period of acute tension between two countries, it may be necessary

that both should move slowly, by gradual steps, toward a coordinated accomodation on many different levels. In the case of U.S.-U.S.S.R. relations, however, accomodations had been reached on many matters in the 1950's and 1960's. Most of the trade restrictions of the United States were anachronisms which could have been removed independently at any time since the late 1950's. But even if this view is not accepted, there is an obvious danger in carrying a "linkage" theory beyond the point of the initial establishment of the detente which is its objective. If political relations between the United States and the Soviet Union should become less cordial, it would be tragic to go through the experience of a resumption of trade restrictions on that account. But that is exactly what is threatened at this moment. Similarly if something should go wrong with trade relations between the two countries, it would be tragic if our political relations should thereby suffer. Yet that might very well have happened in 1973 after the massive Soviet wheat purchases sent American bread prices skyrocketing.

Thus a "linkage" strategy has the danger of being only as strong as the weakest link. An alternative approach is to separate particular conflicts, or particular aspects of a general conflict, from each other and to attempt to resolve each one independently of the others. This has been called the method of "fractionating conflict"—breaking a conflict down into its component parts. It is a method which is particularly congenial to persons trained in law.

By breaking down international conflicts into their separate parts, it becomes easier to measure the value of the various alternative responses that might be made. For example, if a particular government which is host to an international sporting event does not permit athletes of certain races to play on its teams, other governments might appropriately respond by refusing to allow their teams to participate in the event. Or to take another example, if a particular government expels a diplomat of another government on grounds which the other government considers not to be valid, an appropriate response is the expulsion by the second government of one of the first government's diplomats. It is argued against such an approach that every government should have available to it the most diverse range of devices through which to express its pleasure or displeasure. There is, indeed, a superficial merit in this argument. The "eye for an eye" theory of retaliation may not always be effective. For example, the host government in the first example involving racial discrimination may be entirely content with the non-participation of athletes from other countries where racial equality is practiced. Yet it would be very risky in such a case to attempt to exert other forms of pressure, such as the withdrawal of diplomats or the restriction of trade, since

these may be taken as independent offenses which in turn invite further retaliation. Thus "linkage," which may be very useful in a period of improvement of relations, becomes very dangerous when relations begin to deteriorate at one or more particular points.

The fallacy of using trade restrictions to secure political objectives is well illustrated, in my opinion, by the current efforts within the Congress to induce the Soviet government to change its emigration policy by maintaining discriminatory tariffs against U.S. imports from the Soviet Union and by forbidding the extension of government credits or credit insurance to American exporters to the Soviet Union. These are inappropriate responses and it is therefore very doubtful that they will achieve the desired objective. Even if they should succeed, might not the Soviet government with equal justification withhold some benefit from the United States—say, an agreement to reduce armaments—until our government pardons persons who refused to fight in Vietnam and eliminates de facto segregation in public schools? Unless there are generally shared principles regulating international responses to felt grievances, there can only be chaos and opportunism in international relations. Such principles can only be based on some rule of the correspondence of the response to the grievance.

Are there no circumstances, then, in which retaliation by trade discrimination would be justified? I believe there are such circumstances, namely, where the retaliation is directed against the trade discrimination of another party. If Country A imposes discriminatory tariffs on imports from Country B, Country B is wholly justified in imposing discriminatory tariffs on imports from Country A. This has often been done. (In fact, the Soviet Union now imposes such retaliatory discriminatory tariffs upon imports from the United States. It is, apparently, only a minor annoyance to Soviet importers of American products, affecting chiefly private persons who receive gifts from abroad.) Similarly, an embargo may properly be met by an embargo. It would be proper, I believe, though probably foolhardy under the circumstances, for the United States to threaten to impose a food embargo against Arab countries which impose an oil embargo against the United States. It might even be proper for the United States to threaten to prohibit trade transactions with the Soviet Union so long as the Soviet Union supports an Arab oil embargo against the United States. The point is, trade discrimination should be met with counter-measures in the field of trade, not with counter-measures in the field of cultural exchange or diplomatic representation or military strategy. Otherwise there is a risk of violating the principle of non-discrimination which is basic to sound international relations as well as to international law. A disproportionate or an inappropriate measure of retaliation may constitute a discriminatory act. Thus the application of one schedule of tariff rates to imports of all countries

except certain countries designated as Communist countries, or as non-market economies which do not grant freedom of emigration, and the application of higher tariff rates to imports from the latter countries, violates a fundamental principle of international order.

II

To maintain the autonomy of trade relations based on mutual economic advantage it is necessary that there be a body of law which not only protects trade against shifts in national policy but also facilitates mutual economic advantage.

It is—or will be—a major step toward the facilitation of mutual economic advantage in Soviet-American trade relations to remove the various forms of discrimination against Soviet trade that have been introduced by the United States since the end of World War II. In the past, the most serious of these forms of discrimination was our system of export controls, under which goods and technical data could be obtained by the Soviet Union from companies located in Western Europe, including foreign subsidiaries of United States firms. Since approximately 1971, the Office of Export Control of the Department of Commerce has reduced controls over strategic exports to approximately the same level as that prevailing in Western Europe and Japan. A second step in the same direction has been the determination by the President that credits and credit insurance may be granted to the Soviet Union by the Export-Import Bank. Both these measures were facilitated by acts of Congress (the Export Administration Act of 1969 and the Export-Import Bank Act of 1971). The removal of tariff discrimination against imports from the Soviet Union would be a third measure of importance in facilitating trade on the basis of mutual economic advantage.

These and other similar measures permit, or would permit, private U.S. exporters and importers to trade with the Soviet Union on the same legal conditions which are applicable to their trade with other countries. In view, however, of the fact that Soviet foreign trade, unlike that of most other countries with which U.S. firms do business, is an integral part of a centrally planned economy and is wholly operated by state agencies, other kinds of measures must also be taken, both by the Soviet Union and the United States, if U.S.-U.S.S.R. trade is to materialize in the most advantageous way for both sides.

The planned character of Soviet foreign trade is designed to insure that the Soviet economy as a whole benefits from each trade transaction. The success of the individual Soviet foreign trade organizations which export and import is measured by the extent to which they fulfill plans and goals set by the Soviet state. In contrast, indi-

vidual American business firms which trade with Soviet organizations measure their success by the extent to which they fulfill their own individual plans and goals. By this system the public interest, it is assumed, is served indirectly in the long run; nevertheless, any given transaction, though profitable to the parties involved, may result in a net economic, political or military loss to the state.

Also, the bargaining power of an individual U.S. firm vis-a-vis its Soviet trading partner is affected by the fact that the Soviet foreign trade organizations exercise a monopolistic trading power within the Soviet system, and in addition, have the backing of the Soviet state.

Thus in order to protect both the national interests of the United States and the individual interests of U.S. firms, it is necessary for the U.S. government to play a much more positive role in conducting trade relations with the Soviet Union and other planned economies than it is accustomed to playing in conducting trade relations with market economies.

This fact is reflected in the 1972 U.S.-U.S.S.R. Trade Agreement, especially in Article 2 and in some of the Annexes. Article 2, paragraph 4, establishes a commitment—stated, as is customary in bilateral trade agreements between planned and market economies, in the form of an expectation—of the Soviet government that its foreign trade organizations will place substantial orders in the United States for machinery, plant and equipment, agricultural products, industrial products, and consumer goods. Also, Article 2, paragraph 3, provides that both governments "will examine various fields in which the expansion of commercial and industrial cooperation is desirable . . . and, on the basis of such examination, will promote cooperation between interested organizations and enterprises of the two countries with a view toward the realization of projects for the development of natural resources and projects in the manufacturing industries."[1] Although some U.S. officials have referred to these and similar provisions as merely "hortatory," they in fact represent the results of serious bilateral discussions of the anticipated volume and character of trade relations between the two countries over the next few years. The Trade Agreement itself was preceded by the formation of a joint U.S.-U.S.S.R. Commercial Commission, whose task was to negotiate the agreement, to study prospects for various forms of economic cooperation between the two countries, and to "[m]onitor the spectrum of U.S.-U.S.S.R. commercial relations, identifying and,

1. Agreement Between the United States of America and the Union of Soviet Socialist Republics Regarding Trade, Oct. 18, 1972, art. 2, para. 3, 67 DEP'T STATE BULL. 595, 596 (1972).

when possible, resolving issues that may be of interest to both parties such as patents and licensing."[2] The Commission has appointed Joint Working Groups to consider specific matters, such as the joint development of Soviet natural gas resources.

The establishment of this intergovernmental framework for assuring the mutual economic advantage of both countries has resulted in a significant expansion of the administrative role of the U.S. government in promoting trade with the Soviet Union. The Executive Secretary of the American Section of the Joint U.S.-U.S.S.R. Commercial Commission was appointed to head a new bureau within the Department of Commerce, the Bureau of East-West Trade, which in 1973 had a staff of over 200 persons. The Bureau cooperates with its counterpart in the Soviet Union in projecting trade between the two countries, carries out its own studies of potential trade, and approaches U.S. firms with suggestions. One official has said that these promotional activities "sometime come very close to planning." The fact that the Office of Export Control has been moved into the Bureau of East-West Trade undoubtedly facilitates the coordination of trade promotion with security controls.

The establishment of an intergovernmental agency for promoting and controlling trade between the United States and the Soviet Union, and of governmental machinery within each country for the same purpose, should help to place U.S.-U.S.S.R. trade on the basis of mutual economic advantage and to guard such trade against shocks from shifting domestic and foreign policies of each country. At the same time, it is likely that collaboration in this sphere between officials of the two governments, as well as between U. S. business firms and Soviet economic agencies, will produce considerable pressures for changes within the Soviet system of foreign trade. These changes would go in the opposite direction from the changes which the new arrangements for U.S.-U.S.S.R. trade have produced in the United States. As the tendency in the United States has been to increase the role of the central authority, and especially the U.S. Department of Commerce, so the tendency in the Soviet Union may be to increase the role of the autonomous state economic agencies that carry out trade and production activities. U.S. firms will want, for economic reasons, to deal directly with the state enterprises that are the ultimate users and producers of products. In addition, United States firms will want to convert classical arms-length export-import transactions into cooperation agreements involving co-production and, ultimately, open-ended joint ventures. These pressures will call for imaginative responses on the part of Soviet jurists, who will be

2. Communique Regarding the Joint U.S.-U.S.S.R. Commercial Commission, May 26, 1972, 66 DEP'T STATE BULL. 898 (1972).

asked to adapt their laws and regulations to types of economic activities which have not hitherto been highly developed in the Soviet Union and which in some instances are quite new.

A very simple example is provided by the problems faced by foreign firms in establishing offices in the Soviet Union. In 1955 a leading Soviet authority on the law of foreign trade wrote: "Foreign firms which intend to conduct continuous trade activity on the territory of the U.S.S.R. . . .[must] receive special permission from the Ministry of Foreign Trade. In practice such foreign firms or their representatives on the territory of the U.S.S.R. at the present time do not exist." That situation has changed dramatically in the past decade in that scores of foreign firms have been permitted to have offices in the U.S.S.R. Nevertheless, it took a very substantial negotiation between the United States and the Soviet Union to establish basic minimum rights of U.S. firms which wish to establish offices in the Soviet Union.[3] One may hope that a decade from now there will be not five or six U. S. companies with offices in Moscow but dozens of United States companies with offices in a variety of Soviet cities, with the right not only to engage in export and import transactions but also to establish joint ventures of the kind foreshadowed recently in a speech delivered in Kiev by Secretary-General Leonid Brezhnev. One may hope also that similar joint ventures will be established with Soviet agencies in the United States.

If these hopes materialize, the long-range political importance of insulating economic relations between the two countries from the shocks of short-range political considerations will be abundantly apparent.

3. See the letter of N. Patolichev to Peter G. Peterson, stating that "United States companies will receive treatment no less favorable than that accorded to business entities of any third country in all matters relating to accreditation and business facilitation." See also the Attachment to the said letter entitled "Summary of Business Facilities for Foreign Companies." Letter of N. Patolichev to P.G. Peterson, Oct. 18, 1972, 67 DEP'T STATE BULL. 600 (1972).