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Discussion

Keywords

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A U.S. participant introduced five questions concerning the legal status of Soviet trade representations in the United States which, in his opinion, had the potential of becoming a serious problem in Soviet-American trade.

First, he questioned Soviet practice on sovereign immunity, noting that the Soviet waiver of sovereign immunity for foreign trading organizations could be withdrawn, for example, at the beginning of a suit. If such a defense were raised and contested, he noted, U.S. courts would tend to take a restrictive view of the scope of sovereign immunity, while the Soviet Union claimed broad applicability for this principle. A second and related point was the use by non-immune trading organizations of clearly immune premises belonging to Trade Delegations. This, he felt, might result in an effective immunity from legal process for the officials and documents involved in litigation. Third, he expressed concern over the ability of foreign trade organizations to satisfy adverse judgments. Fourth, he noted, an increase in Soviet imports would lead to product liability litigation in which U.S. courts would claim long-arm jurisdiction over the Soviet manufacturer. He was concerned about the amenability of the Soviet manufacturers to such suits and also about the ability of manufacturers or trading organizations to meet the large judgments sometimes handed down in such actions. It was noted that unless U.S. businessmen were convinced that their Soviet counterparts could be held accountable, they would refuse to conclude contracts with them. Finally, the fear that the activities of the Soviet trading organizations in the United States might run afoul of the antitrust laws was expressed.

Mr. Pozdniakov replied to the foregoing comments. However, it was clear from Mr. Pozdniakov's comments, and the additional comments of Mr. Laptev that the significance of several issues was not apparent to the Soviet participants. Thus, Mr. Pozdniakov stated that he did not see how the U.S. antitrust laws would be applicable to Soviet trading activities, since these were designed to foster rather than restrain trade. In the same vein, Messrs. Pozdniakov and Laptev dismissed the problem of product liability litigation, since they were of the opinion that this was a question of quality control at the point of origin. Both Mr. Pozdniakov and Mr. Laptev agreed that they failed to see the relevance of the question whether individual Soviet officials could be served with legal process, since in any case the foreign trading organization and not the official would be the defendant in the action. The issue of subpoenas for evidentiary purposes was not confronted by the Soviet speakers. However, when the U.S. participant pressed the point, a Soviet participant suggested that the

Soviet organizations would probably follow the procedure used in respect to demands for evidence in arbitration proceedings, that is, they would submit the material demanded, together with any objections on the grounds of relevance or claims that the material constituted protected trade secrets, for *in camera* inspection by the judge.

Mr. Pozdniakov pointed out that, as a practical matter, foreign trading organizations could be sued and immunity was not invoked. Messrs. Pozdniakov and Laptev agreed that the foreign trading organizations had sufficient assets and carried sufficient insurance and bank guarantees for individual transactions to cover any liability which might arise from their contractual relations.

On the subject of liability for product defects, however, the reply left the primary question unanswered. Both gentlemen agreed that a foreign trading organization was liable only for claims arising directly out of the contract. Mr. Laptev asserted that the liability of both the trading organization and the Soviet manufacturer was governed by strict privity of contract, so that neither could in any case be liable to a person not a party to the agreement. Mr. Laptev did not, however, confront the questions arising from the fact that most U.S. jurisdictions have rejected the Soviet concept of privity.

Another Soviet participant added his opinion that the liability of Soviet enterprises was governed by strict rules of privity. On the question of immunity, he emphasized that a Soviet enterprise which is a legal entity is clearly distinct from the government, and thus neither is vicariously liable for the obligations of the other. He noted that the Soviet-American trade agreement explicitly denied immunity to trading organizations. The exceptional case was where the organization was performing a governmental function on behalf of the government.

Discussion on the status of foreigners in the U.S.S.R. centered on the Soviet education tax on emigrants to non-socialist countries. Mr. Shevtsov replied that the measure was imposed to prevent a brain drain from the Soviet Union. In the case of other socialist countries, compensation was not required because of their special relationships with the Soviet Union.

Mr. Pozdniakov stressed the magnitude of the government's investment in education. He also pointed out that as among socialist countries the emigration tax was reciprocally waived by bilateral agreements and no such agreements existed as between the Soviet Union and non-socialist countries.

The discussion turned to the question of direct contact between U.S. companies and Soviet producing enterprises. The Soviet view, as expressed by Mr. Pozdniakov, was that direct contact was inappro-

priate in a planned economy. A U.S. participant objected that in transactions involving extensive cooperation over long periods of time, the use of a commercial agent such as a trading organization was inappropriate. A Soviet participant, however, expressed the opinion that the system was sufficiently flexible to allow extensive participation by the producing enterprise during the negotiation phase as far as working out the details of technical cooperation, but that only the trading organizations had the experience in drawing contracts with Western firms which would be necessary for such complex transactions.

