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SOVIET-AMERICAN TRADE IN A LEGAL PERSPECTIVE:

PROCEEDINGS OF A CONFERENCE OF SOVIET AND AMERICAN LEGAL SCHOLARS

EDITED BY HAROLD J. BERMAN

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Editor's Foreword

The five-day Conference whose proceedings are reported in this book was held in January 1974 in the afterglow of the 1972 U.S.-U.S.S.R. Trade Agreement and in the preliminary shadows of the so-called Jackson (or Jackson-Vanik) Amendment. Both of these were the subject of much discussion at the Conference, and in view of subsequent events a few introductory words must be said about them.

In the 1972 Trade Agreement the executive branch of the United States government committed itself to the elimination or substantial reduction of a great many of the American restrictions on trade with the Soviet Union which had accumulated during the period of acute tension that followed World War II. By its own terms, however, the Trade Agreement could not take effect until the U.S. Congress took legislative action to grant most-favored-nation treatment to imports of Soviet products, that is, to accord to such imports tariff rates as favorable as those accorded to imports from any other country. In 1972 and 1973 the Administration proposed a new Trade Act which, among other things, would repeal the 1951 law subjecting imports from Communist countries (Yugoslavia was excepted from the beginning and Poland since 1957) to the very high rates of the 1930 Tariff Act or, to put it otherwise, denying them the benefit of the very substantial tariff reductions which have been made periodically under bilateral and multilateral trade agreements since 1934 and which are applicable to all other countries. However, a proposed amendment to the Trade Act, sponsored by Senator Henry M. Jackson in the Senate and Representative Charles Vanik (among others) in the House of Representatives, set a condition: in order for a "non-market economy" to receive most-favored-nation treatment it would have to show to the satisfaction of the Congress that it permitted free emigration of its citizens.

In January 1974 it seemed likely, though not certain, that the Jackson Amendment would eventually be enacted into law. No one knew, however, what effect its enactment would have on Soviet-

American trade relations. Perhaps the Soviet leadership would be able to live with it. In October 1974 that hope was raised by a statement of Senator Jackson in which he read a letter addressed to him by Secretary of State Kissinger reporting certain assurances which Mr. Kissinger had received concerning Soviet intentions with regard to citizens desiring to emigrate.[1] However, after Congress on January 3, 1975 finally passed the Trade Act of 1974 containing the Jackson Amendment,[2] the Soviet government denounced it as an interference in Soviet internal affairs and declared further that it would not accept a trade status that is discriminatory and it would therefore not put the 1972 Trade Agreement into force.[3] At this point it was supposed by many that the efforts of more than three years to

1. See the report of Senator Jackson's press conference of October 18, 1974. The letter from the Secretary of State to Senator Jackson stated that in "discussions" with Soviet representatives the United States government had been "assured" that: the Soviet government considered punitive actions against individuals seeking to emigrate to be in violation of Soviet law and would not tolerate such practices; unreasonable impediments would not be placed in the way of persons seeking to emigrate; applications for emigration would be processed in order of receipt on a nondiscriminatory basis; hardship cases would be processed sympathetically; a special tax on emigration, based on reimbursement of the Soviet government for the education it had provided to the emigrant, which had earlier been introduced and later suspended, would not be reintroduced; and the United States would be permitted to bring to the attention of the Soviet government indications that the above listed criteria and practices were not being applied, such representations to receive "sympathetic consideration and response."

Senator Jackson announced his satisfaction with the "understanding," and saw in it a justification for including in the Trade Reform Act another amendment which would permit the President to waive for eighteen months the requirements of the Jackson Amendment. He added, however, that he would consider the release of 60,000 emigrants per annum to be a minimum "benchmark" of Soviet compliance, and unless this quota were reached, he would oppose extension of MFN status beyond eighteen months. The President and the State Department had no comment on Senator Jackson's announcement, except that the Secretary of State strongly reiterated that the understanding with the Soviet Union did not specify any minimum number of emigrants.

It was widely anticipated in the United States that the "assurances" received by the Secretary of State signified that the Soviet government would accept the conditions set forth in the Jackson Amendment and would seek to comply with them. In the light of subsequent Soviet actions, it is more likely that the Soviet government had hoped that its assurances given to the Secretary of State would lead to a withdrawal of the Jackson Amendment or at least to a more substantial modification than that which Senator Jackson made.

2. Trade Act of 1974, Title IV, Pub. L. No. 93-618 (Jan. 3, 1975).

3. See Tass Statement, Pravda, Dec. 19, 1974, containing the letter of Soviet Foreign Minister Andrei Gromyko of October 26, 1974, concerning the Jackson press conference, *supra* note 1; U.S. Department of State Press Release 13 dated Jan. 14, 1975, 72 DEP'T STATE BULL. 139 (1975), containing Secretary of State Kissinger's news conference of January 14 announcing Soviet intentions with respect to the 1972 Trade Agreement.

revive Soviet-American trade had been wholly frustrated and that the two countries were about to revert to the situation that existed from 1948 to 1971 when trade between them was virtually moribund.[4]

Yet this prediction, too, has thus far proved to be wrong. In fact, the 1972 Trade Agreement, which technically never took effect at all, has served as an actual framework for many aspects of trade relations between the two countries from the time it was signed in August 1972 until the time of this writing (September 1975). It is true that the Soviet government is not obliged to make further payments on its World War II "lend-lease" obligations; such payments had been bargained for most-favored-nation treatment.[5] It is also true that, in addition to the Jackson Amendment to the Trade Act, an amendment to the Export-Import Bank Act, enacted at about the same time, made extension to the U.S.S.R. of large U.S. government credits likewise conditional upon changes in Soviet emigration policy.[6] Some observers at the time were of the opinion that the credit restrictions were even more offensive to the Soviet government and constituted an even greater barrier to expansion of Soviet-American trade than discriminatory tariff treatment. Nevertheless, trade between the two countries, which rose dramatically in 1972-74, did not decline significantly in 1975, although it was undoubtedly hampered somewhat by the American restrictions and by the Soviet response to them.[7] Meanwhile, the President has indicated his firm intention to

4. In 1971 trade turnover between the United States and the Soviet Union was approximately $200 million. This represented .2 per cent of total U.S. trade and .8 per cent of total U.S.S.R. trade. In 1972 trade turnover between the two countries was approximately $650 million. In 1973 it was approximately $1.4 billion. In 1974 it was approximately $960 million.

5. Under the Lend-Lease Settlement of October 18, 1972, the Soviets were to pay to the United States $722 million over a period ending July 1, 2001. $12 million was paid on October 18, 1972, and $24 million was to be paid on July 1, 1973, and $12 million on July 1, 1975. In addition, 28 equal annual installments of approximately $24 million were to commence in 1974 or 1975 after most-favored-nation treatment was granted to the Soviet Union. See U.S. DEPARTMENT OF COMMERCE, U.S.-U.S.S.R. COMMERCIAL AGREEMENTS 1972: TEXTS, SUMMARIES, AND SUPPORTING PAPERS 103 (1973). The installments of July 1, 1973, and July 1, 1975, were paid. The Soviets have not denied that they owe the United States for certain materials delivered under the World War II agreements, especially materials delivered after the end of the war. However, they have always insisted that the wartime agreements contemplated repayment in the context of the establishment of normal trade relations between the two countries after the war, and that such normal trade relations require the granting of reciprocal most-favored-nation treatment.

6. See Export-Import Bank Act of 1945, 1975 Amendments, 12 U.S.C. § § 635-635n.

7. U.S.-U.S.S.R. trade turnover in the first six months of 1975 totalled $659 million. If this figure is projected on a twelve-month basis, it exceeds that of 1974 and that of 1973. On the other hand, the total trade of each of the two countries was substantially larger in 1975 than in 1974. In addition the increase of Soviet trade with

put before the Congress proposals to repeal the credit and tariff restrictions enacted in December 1974 and January 1975.

It has been necessary to recount this dramatic if dismal story in order to provide a proper setting for the reports presented here. It might otherwise be erroneously assumed that since they were written a year before the enactment of the Jackson Amendment they are now—to the extent that they are concerned with that Amendment—only of historical interest. On the contrary, they are as timely as ever, for the conditions that existed in 1973 when the Jackson Amendment was first under serious discussion are still in existence in 1975, namely, there are special tariff barriers erected against imports into the United States from the Soviet Union and most other Communist countries[8] and the Administration, supported by a combination of business interests and academic groups, is exerting strong pressure to remove those barriers in the near future.

However, the reader should not expect to find in this book an impartial presentation of both sides of this critical question. It hardly needs to be said that the American participants in the Conference opposed Soviet restrictions on emigration. However, none of them favored the use of tariff or credit restrictions as a means of attempting to induce the Soviet government to remove those restrictions.

It should be added that a look at the Table of Contents will show that much else is discussed in the book besides the Jackson Amendment.

The chief organizers of the Conference were, on the Soviet side, V.N. Kudriavtsev, Director of the Institute of State and Law of the Academy of Sciences of the U.S.S.R. since 1973, and his predecessor in that post, V.M. Chkhikvadze, and on the American side, William D. Rogers, a Washington lawyer, who in 1973-74 was President of the American Society of International Law, and Professor John N. Hazard of Columbia University, who was then one of the vice-presidents of the Society. They were greatly assisted by Charles W. Maynes of the Carnegie Endowment for International Peace, which provided the financial support for the Conference. Columbia Law School served as host.

In addition to the seven Soviet and five American reporters whose contributions are presented in these pages, three other Ameri-

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Japan, West Germany, and other industrial countries was proportionately greater than that of Soviet trade with the United States.

8. In August 1975 Romania acceded to the requirements of Title IV of the Trade Act of 1974 and obtained Congressional approval of the grant of most-favored-nation treatment. It thus joins Poland as a "non-market economy" entitled to receive the benefits of U.S. tariff reductions made since the enactment of the first Reciprocal Trade Agreements Act in 1934. (Poland is saved by a "grandfather clause" in Title IV, as is Yugoslavia, if Yugoslavia can be considered to be a "non-market economy.")

cans—Martin Domke, Donald Straus, and Isaac Shapiro—presented excellent supplementary papers and participated in the discussions. Mr. Rogers and Professor Hazard also participated in the discussions. John R. Connor, Jr., a vice-president of the U.S.-U.S.S.R. Trade and Economic Council, took part in two of the sessions. On the Soviet side, E.A. Vorankova of the U.S.S.R. Ministry of Foreign Trade also participated in the Conference although she did not present a report.

The discussions of the reports were lively and interesting, but they did not lend themselves to lengthy reproduction. Instead, highly abbreviated summaries have been inserted at several points in the text.

For the participants, the Conference—the first to be held between Soviet and American legal scholars[9]—provided an important opportunity for an open and friendly exchange of professional opinions. The justification for publishing this book, however, is not the need to have a record of the proceedings but rather the hope that its readers will find it interesting, informative, and useful in analyzing and evaluating legal and institutional aspects of Soviet-American trade.

Harold J. Berman

9. A conference of Soviet and American legal scholars was scheduled to be held in 1965, sponsored by the Association of American Law Schools and the Institute of State and Law of the U.S.S.R. Academy of Sciences, but the Soviet side withdrew because of United States bombing of North Vietnam. The American reports were published by the Association of American Law Schools under the title THE LAW OF U.S.-U.S.S.R. TRADE: PAPERS PREPARED FOR A CONFERENCE OF SOVIET AND AMERICAN LEGAL SCHOLARS (1965).

Preface

The essays published in this collection were contributed by the participants in a conference of American and Soviet legal scholars and practitioners, which took place in New York January 7-11, 1974. The conference was organized as the first of a series by the American Society of International Law and the Institute of State and Law of the Academy of Sciences of the U.S.S.R. It seemed appropriate that the series should open with a discussion of legal aspects of trade between the United States and the Soviet Union.

International trade has several different aspects. It presents itself first in its economic aspect; the fundamental trends, volume, conditions, and prospects of trade relations between countries reflect their various economic interests in an efficient division of labor, in specialization and cooperation of different sectors of the economy, and in the raising of the standard of living and prosperity of their populations.

No less important is the political aspect of trade relations. International trade cannot be severed from international politics. Political relations between states not only can promote the development of economic ties, but also can prevent such development. The conference for which these essays were prepared was organized in the belief that the improvement of political relations between the United States and the U.S.S.R., resulting from the conclusion of a series of important political agreements between the two countries in 1972 and 1973, will undoubtedly promote the further development of Soviet-American trade. At the same time, international trade, by strengthening business contacts between countries, affects their political relations. In particular, it can help to create a firm basis for the realization of the principle of peaceful coexistence of states of different socio-political systems.

Finally, the economics and politics of Soviet-American trade influence, and are also influenced by, the legal institutions—that is, the legal concepts, rules, and procedures—through which trade is carried out. It is with these legal institutions that the reports of the Soviet and American lawyers in this collection are mainly concerned. Legal principles of nondiscrimination and most-favored-nation treatment, rules of contract law relating to delivery of goods and methods of payment, procedures for the settlement of possible disputes, the legal status of state trading organizations and private firms participating in trade transactions—these and many other matters of a legal nature have great significance for the development of international trade relations. Accordingly, there has arisen an urgent need for a thorough knowledge of the legal systems and the legislation of countries which

engage in trade with each other, and for a deep understanding of the principles and concepts by which the legal thought of those countries is governed.

We believe that the New York conference of January 7-11, 1974, helped to foster mutual understanding of these matters among the American and Soviet participants. We hope that the publication of their reports, and of a summary of their discussion, will have a similar value for all persons who are interested in the further development of trade relations between our two countries.

William D. Rogers
PRESIDENT OF THE AMERICAN SOCIETY
OF INTERNATIONAL LAW
V. N. Kudriavtsev
DIRECTOR OF THE INSTITUTE OF STATE
and Law of THE U.S.S.R. ACADEMY OF
SCIENCES
MAY 1, 1974

The Development of Soviet-American Trade in the Interests of Peace and International Cooperation

V.N. KUDRIAVTSEV*

The historic changes taking place in the contemporary world have had a beneficial effect on the general international climate. The important political events that have occurred are indicative of the strengthening of positive trends in international relations. The signing of the agreement on the termination of hostilities in Vietnam has eased international tension. The political climate in Europe has improved. Present-day international relations are characterized by the existence of favorable prospects for the promotion of equal cooperation between countries.

Universally recognized principles and norms of international law oblige countries to settle all their disputes and disagreements solely by peaceful means. But modern international law does not confine itself to the requirement that peaceful relations should be preserved. The U.N. Charter declares that the aim of that organization is not only to "maintain international peace and security" but also to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination" (Article 1). In the Declaration on the Strengthening of International Peace and Security, adopted by the General Assembly on December 16, 1970[1] it is stated that it is the duty of countries to cooperate with one another in accordance with the U.N. Charter. Peaceful coexistence signifies not only peace but also cooperation. This interpretation of peaceful coexistence meets with the interests of all nations.

The development of relations among countries in the direction of cooperation is fully consistent with the aims and principles of Soviet foreign policy. Vladimir Lenin, founder of the Soviet state, repeatedly spoke of the possibility of friendly relations between socialist and capitalist countries, and of unlimited business relations between them. For more than half a century Soviet foreign policy has been guided by the principles evolved by Lenin.

Peaceful coexistence does not and cannot remove the contradictions that divide the world into two systems. The leaders of the Soviet Union have time and again emphasized that they do not regard

* Vladimir Nikolaevich Kudriavtsev, Doctor of Legal Sciences; Director, Institute of State and Law of the Academy of Sciences of the U.S.S.R. Author, OBSHCHAIA TEORIIA KVALIFIKATSII PRESTUPLENII (GENERAL THEORY OF THE CHARACTERIZATION OF CRIMES) Iuridicheskaia literatura [publishing house] (Moscow 1972).

1. G.A. Res. 2734, 25 U.N. GAOR Supp. 28, at 22, U.N. Doc. A/8028 (1970).

peaceful coexistence as the smoothing out of ideological contradictions. But even with the existence of contradictions there is a sufficiently broad basis for understanding, for coordinating efforts on a wide range of issues affecting the interests of both the socialist and the capitalist countries.

In the Basic Principles of Relations Between the U.S.S.R. and the United States signed on May 29, 1972, it is noted that differences in ideology and in the social systems "are not obstacles to the bilateral relations based on the principles of sovereignty, equality, noninterference in internal affairs, and mutual advantage."[2] In his report on the 50th anniversary of the U.S.S.R., L. I. Brezhnev, General-Secretary of the C.P.S.U. Central Committee, emphasized that the implementation of the economic agreements signed by the U.S.S.R. and the United States "can create the foundation for large-scale and long-term cooperation in that area."

Present-day international relations provide more and more examples of fruitful cooperation among countries. There has been a considerable expansion of economic, trade, scientific and technical relations between countries of the two systems. This has found expression in the signing of a series of government-to-government agreements on scientific and technical cooperation. A major role in promoting long-term cooperation is played by the agreements between American firms and ministries and departments of the U.S.S.R. in the area of science and technology.

There has been a distinct trend towards the creation of a stable and lasting foundation for cooperation between the U.S.S.R. and the United States in many areas. The progress that has been achieved in this direction is eloquent evidence of the reality of this objective. Today we have every reason for drawing the conclusion that the soil for the further promotion of cooperation between the U.S.S.R. and the United States, including cooperation in trade, has been prepared to a large extent by the agreements between the two countries on the limitation of strategic arms and cooperation in such areas as the exploration and use of outer space for peaceful purposes, medical science and public health, and environmental protection. This realistic policy of international cooperation is exercising a beneficial influence on the development of trade.

The normalization of trade relations plays an increasingly important role in the overall advancement of cooperation between the U.S.S.R. and the United States.

Since time immemorial, trade has been a catalyst of cooperation

2. Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, May 29, 1972, 66 DEP'T STATE BULL. 898 (1972).

between states. It plays the same role to this day. Its importance in relations between the U.S.S.R. and the United States is enhanced by the fact that these two countries to a large extent determine the destiny of peace on our planet. That is what attaches immense significance to a constructive settlement of all questions concerning businesslike cooperation between these two countries.

Relations between the U.S.S.R. and the United States, which are the two largest powers in the world, range far beyond the framework of bilateral relations. The development of the political situation in the world as a whole in many ways depends upon the state of these relations. It may be said confidently that the promotion of economic relations is one of the factors that can stabilize relations between our countries for a long period and improve the situation as a whole.

Although the Soviet Union has extremely rich and varied natural resources, a huge economic, scientific, and technical potential, and a large and steadily growing internal market, we reject the policy of autarchy as being prejudicial to the economy, and as harmful politically. Economists consider that foreign trade fulfils its role by utilizing the advantages of the international division of labor, which presupposes a certain specialization of countries in the output of products for which they have the most favorable conditions.

In recent years the Soviet Union's trade and economic relations with many Western countries have grown broader and more diversified. Trade with the West is expanding rapidly. Suffice it to say that in 1972 the Soviet Union's trade with the Federal Republic of Germany and Japan—then our biggest trading partners among the industrialized states—exceeded $1 billion with each of them. The Soviet Union is successfully promoting trade with France, Finland, Sweden, Italy, Austria, and other West European countries. With almost all of these countries trade is based on long-term agreements.

Against the background of the Soviet Union's expanding trade with the industrialized countries of the West, the state of U.S.S.R.-U.S. trade until very recently has been anachronistic. This will be appreciated much more if it is borne in mind that it concerns trade relations between countries that have the world's largest economic, scientific, and technical potential and occupy leading positions in international trade.

The attitude of the two countries toward the question of trade and economic relations between them was first officially recorded in 1972 in the historic Basic Principles of Relations Between the U.S.S.R. and the United States. Article 7 of that document declares that "the U.S.S.R. and the United States regard commercial and economic ties as an important and necessary element in the strengthening of their bilateral relations and thus will actively promote the

growth of such ties. They will facilitate cooperation between the relevant organizations and enterprises of the two countries and the conclusion of appropriate agreements and contracts, including long-term ones."[3]

The promotion of commercial and economic ties also received considerable attention during the visit of L.I. Brezhnev, Secretary-General of the C.P.S.U. Central Committee, to the United States in June 1973. It will be recalled that the summit talks in June resulted in the settlement of a number of concrete issues in that area and the creation of a new impetus to the further development of these relations on a stable and mutually beneficial basis.

In the joint U.S.S.R.-U.S. Communique, signed on June 24, 1973, note was taken of the progress achieved during the preceding year in the normalization and promotion of trade and economic relations between the two countries. Indeed, in the period following the summit meeting in Moscow in May, 1972, the two countries covered more ground in the promotion of trade than throughout the entire history of their economic relations. The objective was set of increasing trade to $2-3 billion within the next three years.

The considerable work conducted by the governments of the two countries to create favorable conditions for the promotion of commercial and economic ties has already yielded the first concrete results. Suffice it to mention that in 1972 trade between our countries nearly trebled and amounted to over $700 million.

According to preliminary figures, during the past year trade has reached the level of almost $1,500 million. This is consistent with the planned level of $2-3 billion envisaged for a three year period during the summit talks.

Facts and figures show more eloquently than words the dynamic character of the changes that have taken place.

In view of the definite prospect for the expansion of economic relations between the U.S.S.R. and the United States, it is imperative to settle a number of specific questions, including questions of a legal nature. In international trade no country can count on any considerable growth of the sale of its goods to another country without creating normal conditions of access for its trading partner's goods to its own market. It would obviously be irrational for the Soviet Union to systematically finance its purchases in the United States with its currency revenues from exports to other countries.

We Soviet jurists and scientists view favorably the relaxation of U.S. government bans on the sale of goods to the U.S.S.R., but we

3. *Id.* at 899.

cannot consider normal the fact that the lifting of restrictions on U.S. exports to the U.S.S.R. has proceeded faster than the removal of obstacles to imports from the Soviet Union.

Legally, the trade agreement between our two countries, which accords to the Soviet Union most-favored-nation treatment, has not yet come into force. It is obvious that without giving Soviet goods most-favored-nation treatment the export of these goods to the United States will remain limited and this, naturally, cannot help but affect Soviet imports from the United States. Everyone knows that trade is a bilateral process and that it is founded on mutual benefit.

It is our contention that the development of U.S.-U.S.S.R. trade must be founded on mutual respect, non-interference in internal affairs, consistent observance of the principle of equality and the implementation of agreements.

With events moving in the direction of detente, the possibility has arisen of progressing toward new forms of mutually beneficial relations, in particular, to agreements between Soviet organizations and foreign firms on cooperation in the development of the Soviet Union's natural resources and also in the building of industrial enterprises on Soviet territory. Agreements of this kind have been concluded with a number of West European countries. A beginning for such cooperation has already been made with regard to some firms in the United States.

Here it should be borne in mind that these forms of cooperation do not provide for the joint ownership or the joint management of such enterprises, as that would run counter to our principles of economic management.

In order to raise the commercial and economic ties between our countries to the level of large-scale and long-term cooperation, it is necessary to use forms of economic relations that are acceptable to the socio-economic systems of both the U.S.S.R. and the United States and that do not clash with the principles underlying their political and economic lives.

The understanding that has been achieved of the attitudes of the two countries and the good legal foundation that has been created for trade, scientific, and technical cooperation by the signing of the trade and economic agreements, in combination with the interest displayed by business circles in the two countries, will lead to a considerable expansion and strengthening of ties in these areas, and to a broad development of cooperation on many questions of mutual interest. Of course, there is a large field here for jurists.

In conclusion I should like to note once more that considerations of mutual benefit from economic ties are not the only factors that we should take into account. Cooperation in trade may prove to be extremely useful and fruitful not only because it is dictated by mutual interests but also because it is consistent with the times. It will unquestionably promote the strengthening of mutual trust between the Soviet and American peoples, further the improvement of our relations, and contribute to the strengthening of world peace. From this angle, too, the meeting of Soviet and American jurists is extremely useful.

The Interaction of Law and Politics in Trade Relations Between the United States and the Soviet Union

HAROLD J. BERMAN*

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).

Discussion

A wide variety of views were expressed on the broad question of whether foreign trade should be an integral part of a state's political relations with other states, or whether trade should be insulated from political influences and decisions affecting it made on the basis of purely economic considerations.

One of the Soviet participants expressed the view that trade is so inseparable from politics that it is even useless to speak of linking trade decisions to long-term rather than short-term policies. He stated, in effect, that politics is a two-directional process. Either it leads toward peaceful coexistence, which creates the proper conditions for trade to flourish, or it leads toward war, in which case trade would be out of the question.

Another Soviet participant attributed the slow development of U.S.-U.S.S.R. trade to the late recognition of the U.S.S.R. by the United States, citing this as an example of the inseparability of trade from politics.

An American participant expressed the view that even if it were desirable, it would be impossible to separate trade from politics. He noted that businessmen are deterred from trading with certain countries by hostile public opinion, even in the absence of governmental prohibitions, so that the same public opinion which determines political developments also determines trade patterns.

In responding to these comments, Mr. Berman agreed that businessmen react to politics, and added that insofar as government agencies control trade they, too, are necessarily responsive to government policies. However, he expressed the opinion that the institutionalization of basic trade policies can transform them into a force shielding trade from fluctuating political factors. He noted the irony that in the United States, where most trade is carried on not by government agencies but by private companies, it has been much more closely tied to short-range political factors than in the Soviet Union, where all trading organizations are an integral part of the government. Nevertheless, he felt that the United States has a greater potential than the Soviet Union for developing an autonomous sphere of foreign trade.

Another Soviet participant agreed in general with the thesis that trade should be insulated from politics. However, he expressed the opinion that politics has some positive influences on trade, and only the negative aspects of linkage should be eliminated. He felt that insulation of trade from politics can best be effected by the development of principles which would protect trade from arbitrary unilat-

eral practices. The two key principles would be non-interference in the internal affairs of other governments and non-discriminatory treatment under the most-favored-nation standard.

Another American participant expressed the view that the institutions which would best protect international trade from the pressures of short-term political considerations were international organizations such as the International Monetary Fund. Thus the answer to the problem of political distortion of East-West trade would not be found in bilateral agreements between countries, but rather in the wider participation of the socialist countries in multilateral arrangements, and especially in world financial institutions such as the International Monetary Fund and the World Bank.

Most-Favored-Nation Treatment in Soviet-American Trade Relations

E.T. USENKO*

In the practice of international relations a number of legal principles and norms have been worked out, which constitute a legal regime for the promotion of trade and other economic relations between countries. Prominent among these principles and norms is the most-favored-nation principle. Its application to a definite sphere of economic (and sometimes other) relations among countries creates the system of legal rules and legal conditions called the most-favored-nation treatment. The significance of this treatment in international trade is so great that without its establishment and observance normal relations cannot exist between the countries concerned.

This is strikingly demonstrated by Soviet-American trade during the entire period after World War II, when the United States, in spite of the 1937 agreement on most-favored-nation treatment, instituted a number of discriminatory measures in its trade with the Soviet Union[1] and thereby denounced the agreement itself. For many years Soviet-American trade was close to the zero level.[2] Even in recent years, despite the relaxation of discriminatory measures, trade between the two countries could not develop normally in view of the fact that it was not based on most-favored-nation treatment. In 1971, for instance, trade between the U.S.S.R. and the United States was only one-quarter of the volume of the trade between the U.S.S.R. and Japan, or that between the U.S.S.R. and the Federal Republic of Germany, although the economic potential and resources of the United States and the U.S.S.R. are incomparably greater than that of Japan or Germany.

This situation brought the leaders of the U.S.S.R. and the United States to the conclusion that it was necessary to raise the level of the economic links between the two countries. They came to an understanding that these links should develop on the basis of mutual

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1. U.S. government agencies began to implement such meaures in 1948.

2. For instance, trade between the U.S.S.R. and the United States amounted to only 22 million rubles in 1955. 50 LET SOVETSKOI VNESHNEI TORGOVLI (50 YEARS OF SOVIET FOREIGN TRADE) 219 (P.N. Kumykin ed. 1967).

benefit and in accordance with accepted international practice.[3] The logical outcome of this understanding was the Trade Agreement of October 18, 1972, whose main purpose is to establish the most-favored-nation treatment. Together with the other documents signed at that time, this Agreement, to quote U.S. Secretary of Commerce Peterson's pronouncement at a press conference on October 19, 1972, will put an end to the abnormal trade relations that existed between the U.S.S.R. and the United States during the past 25 years.[4]

Since one can find various definitions of the most-favored-nation principle, it would be expedient to give from the very beginning what we feel is the most clear-cut definition of that principle. The most-favored-nation principle means that international treaties contain a clause under which each signatory country pledges to accord the other signatory country, in areas of their relations delineated in the treaty, the rights, privileges, advantages, and benefits that it accords or will in the future accord to any third country. The formula "what it accords or will in the future accord to any third country" embraces the treatment enjoyed by a third country regardless of whether it is based on an international treaty, a national law, or actual practice.[5]

Moreover, from the very outset it must be stressed that most-favored-nation treatment should not be confused or identified with non-discrimination. The principles underlying these concepts are different. The substance of the principle of non-discrimination is the right to demand similar conditions as those enjoyed by all countries, i.e., conditions common to all. On the other hand, the substance of the most-favored-nation principle is the right to demand the most favorable, beneficial, and privileged conditions. Most-favored-nation treatment thus presupposes non-discriminatory treatment but is not reduced to it.

Further, the principle of non-discrimination is the general outcome of the sovereign equality of countries. It has the character of a mandatory, common legal norm and therefore does not require treaty recognition. However, as an *international-legal norm* the most-favored-nation principle is of a treaty character. With regard to non-discrimination, the U.N. International Law Commission stated quite clearly on one occasion that it is a general rule stemming from the equality of states,[6] and on another occasion that it is a general rule

3. Joint Soviet-American Communique on Trade and Commercial Relations, Pravda, May 31, 1972, at 1, col. 3; 66 DEP'T STATE BULL. 899, 900 (1972).

4. Pravda, Oct. 20, 1972, at 4, col. 1.

5. Ustor, *(Third) Report on the Most-Favored-Nation Clause*, U.N. Doc. A/C.N. 4/257 (1972).

6. Commentary to Article 44, in Sandstrom, *Draft Articles on Diplomatic Intercourse and Immunities*, [1958] 2 Y.B. INT'L L. COMM'N 89, 105, U.N. Doc. A/CN. 4/116 Add. 1, 2.

stemming from the *sovereign* equality of states.[7]

In Soviet trade treaty practice the most-favored-nation clause is applied unconditionally. Prior to World War I the United States adhered to the principle of conditional most-favored-nation treatment, under which the benefits received by a third country applied to a signatory country only if it accorded the other signatory country the same rights and privileges that the latter received from the aforesaid third country (the principle of equivalence or compensation). After World War I (for the first time in the trade treaty with Germany in 1923) the United States began to implement the principle of unconditional most-favored-nation treatment.[8] However, with some countries the old treaties founded on the principle of reciprocity are still in force. In this connection it is important to note that under Article I of the Soviet-American Trade Agreement of 1972 the parties accorded each other "unconditional," i.e., absolute most-favored-nation treatment. This means that in according the other signatory country the privileges it accords to any third country, each party to the agreement cannot demand an "equivalence" or "compensation" on the grounds that such an "equivalence" or "compensation" is received by it from a third country.

The basic object of the most-favored-nation clause is the definition of its scope or, in other words, the areas of its application. Under Article 1 of the Soviet-American Agreement the most-favored-nation clause must be applied by each of the parties to goods imported from the other country or exported to the other country in all questions relating to:

> a) all customs tariffs levied on imports or exports or in connection with imports or exports, including the method of levying such tariffs;
>
> b) internal taxes, marketing, distribution, storage, and use;
>
> c) dues on international remittances of payments for imports or exports;
>
> d) rules and formalities linked with imports and exports.

It must be noted that in many of the treaties signed by the U.S.S.R. and the United States with third countries, the area of operation of the most-favored-nation clause is considerably wider. In the Soviet Union's treaties with some countries provision is made, for example, for the application of the most-favored-nation clause to all

7. Commentary to Article 70 of the Draft Articles on Consular Intercourse and Immunities, in *Int'l L. Comm'n Report*, [1961] 2 Y.B. INT'L L. COMM'N 88, 128, U.N. Doc. A/4843.

8. Leites, *O sisteme naibol'shogo blagopriatsvovania (The Most-Favored-Nation System)*, [1915] 42 VESTNIK FINANSOV, PROMISHLENNOSTI I TORGOVLI 218; 2 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1504 (2d ed. 1951); SNYDER, THE MOST-FAVORED-NATION CLAUSE: AN ANALYSIS WITH PARTICULAR REFERENCE TO RECENT TREATY PRACTICE AND TARIFFS 243 (1948).

questions of trade and shipping.[9] Moreover, in treaties with a number of countries use is made of the all-embracing formula "in all questions related to trade and shipping, as well as other forms of economic relations between the two countries."[10]

Thus, in areas not covered by the Soviet-American agreement, commercial relations may prove to be under less favorable conditions than the conditions enjoyed by some other countries in their economic relations with the U.S.S.R. or, correspondingly, with the United States. For that reason it is not to be ruled out that as the commercial links between them expand the two countries may be confronted with the need for enlarging the area of operation of the most-favored-nation principle.

The question of exceptions to the principle is of immense significance for the effective operation of the most-favored-nation mechanism. Inasmuch as most-favored-nation treatment is a treaty clause, the contracting parties must define its scope. Consequently, the exceptions established by the parties which narrow the scope of most-favored-nation treatment, or exclude various relations from its operation, are quite consistent with the nature of the agreement.

The matter is more complicated when exceptions are made with reference to third countries to which a contracting party accords various benefits and privileges. In principle, such exceptions run counter to the idea of most-favored-nation treatment. For that reason allowance for them is made only where it is necessitated by custom or by the specific status of the country to which such privileges are accorded.

Among the exceptions provided for in paragraph 3 of Article 1 of the Soviet-American Trade Agreement the most notable is the exclusion of the privileges accorded to "neighboring countries with the object of facilitating border trade." This exception is quite common in trade treaties because it would be inappropriate to apply to all areas of foreign trade the privileges established for border trade, which are quite specific. Also consistent with treaty practice is the provision in Article 8 of the Agreement that most-favored-nation treatment would not limit the right of each of the parties to take any action to safeguard its security.

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9. Soviet-French Agreement on Trade Relations and on the Status of the Trade Mission of the U.S.S.R. in France of September 3, 1951, art. 1 in SBORNIK TORGOVYKH DOGOVOROV, TORGOVYKH I PLATEZHNYKH SOGLASHENII I DOLGOAROCHNYKH TORGOVYKH SOGLASHENII S.S.S.R. S INOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF TRADE TREATIES, TRADE AND PAYMENTS AGREEMENTS AND LONG-TERM TRADE AGREEMENTS BETWEEN THE U.S.S.R. AND FOREIGN STATES) 736 (2d ed. 1965) [hereinafter cited as TRADE TREATIES].

10. *See, e.g.*, Treaty on Trade and Shipping of September 27, 1957 between the U.S.S.R. and the German Democratic Republic, art. 2, TRADE TREATIES 200.

By virtue of paragraph 3 (ii) of Article 1 of the Agreement the most-favored-nation clause does not cover any of the preferences that each of the signatory countries accords through its recognition of Resolution 21 (II), adopted by UNCTAD on March 26, 1968, which recognizes the need for the speediest introduction of a system of general preferences in favor of the developing countries without reciprocity and without discrimination. This resolution was adopted by UNCTAD in view of the acute need for creating favorable trade and political conditions that could accelerate the economic advancement of the developing countries.

All these exceptions are quite clear. However, certain special restrictions established by the Soviet-American Agreement merit a more detailed examination.

Paragraph 3 (iii) of Article 1 of the Agreement exempts from the requirement of most-favored-nation treatment any action by either government which is permitted under a multilateral trade agreement of which it is a signatory at the time of the signing of the Agreement, with respect to the products originating in or exported to a country which is a signatory of the multilateral agreement. It must be underscored that paragraph 3 (iii) of Article 1 provides for the possibility of extending to the other country rights and privileges granted to a co-signatory of a multilateral trade agreement insofar as the multilateral agreements would permit such extensions.

This provision is evidently a reference to the General Agreement on Tariffs and Trade, of which the United States is a signatory. That agreement, which is based on the most-favored-nation principle and on mutual tariff concessions, allows for certain exceptions to this principle. We feel that for Soviet-American trade relations real significance may attach to the right, envisaged by GATT, that, in order to ensure its external financial position and balance of payments, any signatory may limit the quantity or price of imported goods provided it observes certain conditions that protect the interests of the other signatories.

From what we have said regarding paragraph 3 (iii) of Article 1 we may draw the following conclusions:

> 1. The U.S.S.R. and the United States act on the general rule that the most-favored-nation treatment established by the Agreement signed by them covers the corresponding advantages and privileges that have been or may be established by any multilateral international agreement. This must be emphasized in view of the fact that in scholarly literature[11] we sometimes encounter the misguided opinion that the privileges established by a multilateral agreement allegedly do not come under the operation of the most-favored-nation clause in treaties between signatories and

11. STRUPP-SCHLOCHAUER, 2 WOERTERBUCH DES VOLKERRECHTS 501-502 (1961).

non-signatories of a multilateral agreement.

2. The privileges established by a multilateral trade agreement for its signatories may be excluded from the most-favored-nation treatment only if the multilateral agreement was *in operation* on the day the Soviet-American Trade Agreement was signed. As any other exception to a general rule, this provision cannot be applied extensively. It means, in particular, that it may not be proliferated to other multilateral agreements that may be signed after that date.

3. Inasmuch as the paragraph in question in fact implies GATT and, more specifically, its provisions on the right of signatory countries to introduce restrictions in order to ensure their external financial position and balance of payments, it must be noted that this exception is frequently encountered in trade treaty practice. We may cite, for example, Article 7 of the Soviet-Japanese Trade Treaty of December 6, 1957.[12]

4. In accordance with paragraph 1 (iii) of Article 1 of the Soviet-American Agreement, and in accordance with general treaty practice, restrictive actions are subject to the principle of non-discrimination.

The provisions of paragraph 2 of Article 1, which concern quantitative restrictions, must evidently be included among the special exceptions to the most-favored-nation clause. Under that paragraph each of the parties pledges that in the event it applies quantitative restrictions on exports or imports with regard to third countries it will accord the goods of the other party treatment that is equitable in relation to the treatment it accords to third countries.

A comparison between this rule and the rule established in paragraph 3 (iii) of Article 1 allows us to draw the conclusion that the former applies to cases where restrictions are applied in general to third countries, i.e., in principle to all third countries, while the latter can be applied in instances provided for by multilateral agreements to a limited number of countries. Inasmuch as paragraph 2 of Article 1 has in mind the restrictions applied in principle to all third countries, "equitable" treatment in the spirit of the Soviet-American Trade Agreement must imply at least common non-discriminatory treatment in the given matter. If in such a case any country or countries were given privileged treatment, then most-favored-nation treatment would be "equitable" treatment.

The exceptions to the most-favored-nation principle envisaged in Article 3 of the Agreement are quite specific. Under that Article each of the parties may take such steps as it considers necessary to ensure that goods from the other side are not imported in such a quantity or on such terms as would call forth or intensify the dislocation of the internal market or create a threat of such dislocation. Essentially, this is an anti-dumping clause, which is unusual in Soviet trade treaty practice. This clause is not included in treaties signed by the U.S.S.R. because dumping, a weapon in trade war, is alien to the

12. TRADE TREATIES 869.

Soviet Union, which pursues a policy of promoting normal trade with all countries, with the result that the U.S.S.R.'s trade partners have no grounds for fearing dumping by the U.S.S.R. Equally, the Soviet Union has no grounds for fearing dumping by its foreign partners, for it is adequately protected against this by the state monopoly of foreign trade.

We therefore feel that in Soviet-American commercial relations the reservation in Article 3 will not and cannot have any practical significance. Its presence in the Soviet-American Trade Agreement is probably due to the U.S. practice of treaty relations with third countries. In this aspect it has a formal significance: the countries whose treaties with the United States contain that reservation will thus be unable to assert that in this respect the Soviet Union has been accorded more favorable treatment.

In assessing the provisions on most-favored-nation treatment in the Soviet-American Trade Agreement it must be said that by and large they conform to accepted international practice. We stress this point particularly because in the Joint Soviet-American Communique accepted practice is indicated as a standard for the trade relations between the two countries.[13] We regard this Communique and the "Principles of Relations Between the U.S.S.R. and the U.S.A."[14] as fundamental documents for understanding and interpreting all the supplementing treaties and the norms stated in these treaties.

The unswerving observance of the most-favored-nation principle, as well as of more general principles of international relations such as sovereignty, equality, non-interference in internal affairs, and mutual benefit, will create legal guarantees for the stable development of commercial relations between the U.S.S.R. and the United States.

At the same time, we must pinpoint the obligation of the two countries, stated in Article 2 of the Agreement, to take, in accordance with the laws and regulations in operation in each country, appropriate measures to encourage and facilitate exchanges of goods and services on the basis of mutual benefit and in accordance with the provisions of the Agreement. On the basis of such joint efforts by the two countries it is expected that Soviet-American trade will show very high rates of growth, as envisaged in the Agreement (an increase of at least 200 percent as compared with the period 1968-1971).

The change that has taken place in the climate of Soviet-American relations following the Moscow talks between Soviet lead-

13. Joint Soviet-American Communique, *supra* note 3.

14. Basic Principles of Relations Between the United States and the Union of Soviet Socialist Republics, May 29, 1972, 66 DEP'T STATE BULL. 898 (1972).

ers and the U.S. President led to a perceptible activation of trade even in 1972; it almost doubled to reach the sum of half a billion rubles.[15] However, it was still far short of the potentialities of the two countries. In 1972 its volume did not reach the level even of Soviet-Finnish trade. The years 1973 and 1974 witnessed a further expansion of Soviet-American trade. However, in 1972, as in 1973 and 1974, Soviet-American trade grew chiefly through Soviet purchases. But, as N.S. Patolichev, the Soviet Minister of Foreign Trade, told a TASS correspondent, Soviet-American trade must develop in both directions "for without this, trade can have no prospects."[16] Only the speediest introduction of most-favored-nation treatment can open broad prospects for the growth of mutually beneficial trade between the Soviet Union and the United States.

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15. Patolichev, *Sovetskaia vneshniaia torgovlia: rol' i perspektivy (Soviet Foreign Trade: Role and Prospects),* Pravda, Mar. 9, 1973, at 4, col. 1.

16. Pravda, Oct. 21, 1972, at 4, col. 4.

Most-Favored-Nation Treatment of Imports to the United States from the U.S.S.R.

STANLEY D. METZGER*

No aspect of international trade between the United States and the Soviet Union has received more attention in recent years than the question of most-favored-nation treatment of Soviet imports to the United States. Most-favored-nation (MFN) treatment of imports means that goods imported from a country enjoying such treatment cannot be subjected to customs duties or other charges in connection with importation, or rules and formalities, less favorable than those which are imposed upon imported goods originating in any other country. It is a rule, whether established by domestic law or by international agreement or both, against discriminatory treatment of imports based upon their place of origin.

Since 1951, Soviet imports to the United States have not enjoyed most-favored-nation treatment;[1] they are subjected to the duties specified in the Smoot-Hawley Tariff Act of 1930, not to those duties as they have been reduced in trade agreements concluded since the 1934 Trade Agreements Act.[2] In 1972, in conjunction with the conclusion of a Lend-Lease Settlement Agreement, the executive authorities of the United States and the Soviet Union negotiated a Trade Agreement which provides for most-favored-nation treatment of Soviet imports with respect to customs duties, their internal taxation or distribution in the United States, any charges upon transfers of payments for their importation, and any rules or formalities in connection with their importation.[3] The Trade Agreement also provides, however, that it will not enter into force until written notices of acceptance are exchanged,[4] and this cannot take place until the U.S. Congress changes domestic law to conform to the agreement. Payments to the United States of installments on the lend-lease obligation are deferred, following the initial payments, until the Trade Agreement enters into force.[5] As of this writing MFN treatment is

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1. Trade Agreements Extension Act of 1951, § 5, 65 Stat. 73; 19 U.S.C. § 1362 (1952).

2. *Id.*

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

4. *Id.*, art. 9, para. 1.

5. Agreement between the United States and the Union of Soviet Socialist Republics Regarding Settlement of Lend-Lease, Reciprocal Aid and Claims *done* Oct. 18, 1972, art. 4(b)(1)(i), 23 U.S.T. 2910, T.I.A.S. No 7878 (1972).

still not accorded to Soviet imports.

This paper outlines the origins and status of the present discriminatory legal regime,[5] and the likely economic consequences of adoption of an MFN system. Also touched upon are some of the problems which appear to beset efforts to effectuate such a change.

I. THE LEGAL REGIME

MFN treatment was accorded to Soviet imports to the United States between 1937 and 1951.[6] Under the Trade Agreements Act of 1934, as amended and extended until 1951, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under the Trade Agreements program was required as a matter of law to be applied to products of "all foreign countries, whether imported directly or indirectly."[7] This meant that tariff reductions negotiated with other countries were applied in like situations to imports from the U.S.S.R. While MFN treatment could be suspended whenever a country discriminated against American goods, such suspensions occurred infrequently, and not with respect to U.S.S.R. imports.[8]

The Trade Agreements Extension Act of 1951, which was considered and enacted during the active hostilities of the Korean War, required the President to withdraw the application of MFN treatment from products of the U.S.S.R. and certain other countries under its "domination or control." The Administration had not proposed this amendment of the 1934 Act. It was first proposed by the minority of the Ways and Means Committee of the United States House of Representatives during the Committee's consideration of the extension bill, but only in respect of future tariff restrictions; it was rejected by the majority of the Committee, and then voted into the bill by the full House. When the bill reached the Senate Finance Committee, Secretary of State Acheson testified against it.[9] The "effects of this amendment would be virtually nil," he pointed out, for it "would have little effect upon the salability of dutiable Soviet products," and "would not affect the salability of their duty-free products at all."[10] The Senate nonetheless rejected his position and even extended the House prohibition to all trade concessions, past or future; the resulting Act reflected the Senate position. At the same time the

6. MFN treatment was extended to the Soviet Union by Executive Agreement on Aug. 4, 1937, 50 Stat. 619; E.A.S. No. 105. It was last extended in 1942, 56 Stat. 1500; E.A.S. No. 253.

7. Trade Agreements Act of 1934, § 350(a)(2), 48 Stat. 944.

8. *See* T.D. 47600, 68 Treas. Dec. 470 (1935) (Germany); T.D. 48947, 71 Treas. Dec. 707 (1937) (Australia).

9. *Hearings on H.R. 1612 before the Senate Comm. on Finance,* 82d Cong., 1st Sess., 3-10 (1951).

10. *Id.* at 8.

Senate adopted an amendment prohibiting imports of Soviet mink, sable, and other fur skins, again over Administration opposition. This too found its way into the Act.

There is no doubt that the reason for the 1951 Congressional action denying MFN treatment to Soviet imports was "political," as Secretary Kissinger characterized it in testimony to the Senate Finance Committee in March 1974.[11] Congress was taking an opportunity at hand, the consideration of a trade bill, to indicate its strong disapproval of Soviet support for North Korea, then in combat with American armed forces, despite its awareness of the extremely limited economic effect of its action. Indeed, this is but one of many examples in the area of controls over East-West trade during the past twenty-five years in which the Congress has taken a position far more restrictive than that of the Administration.[12] In more general terms, they represent a familiar occurrence in American politics. Substantial domestic public opinion concerning an international matter which differs markedly from dominant official opinion relating thereto is reflected by Congressional opposition to administration policy.

The statutory denial of MFN treatment of Soviet imports was reiterated in the 1962 Trade Expansion Act,[13] and thus has continued for the past twenty-three years. Successive administrations have sought for ways to restore it, though with varying degrees of intensity. The Eisenhower Administration indicated, in 1959-60 discussions with the U.S.S.R. concerning a Lend-Lease settlement (one of a number held from time to time without result until 1972), that an atmosphere favorable to such a change could be created if a reasonable settlement could be negotiated. A bill proposed in the mid-1960s by the Johnson Administration which would have authorized restoration of MFN treatment, based on similar conditions, failed to secure sufficient Congressional support to be reported out of committee.

Finally, in 1973, following the 1972 negotiations of a Trade Agreement, a Lend-Lease settlement, and related agreements reflecting "detente" in Soviet-American relations, the Nixon Administration sought similar authority in order to effectuate these agreements. As in 1951, however, political considerations have proved to be a formidable obstacle to the Administration's proposal, in this instance primarily considerations relating to Soviet restrictions upon Jewish

11. *2 Hearings on H.R. 10710 before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 455 (1974).

12. One of the rare contrary examples took place in 1969 when the Administration opposed Senators Muskie and Mondale in their successful effort to loosen controls over U.S. exports to the Soviet Union and certain other countries. The Administration wished to "link" this relaxation to other matters affecting Soviet-American relations.

13. Trade Expansion Act of 1962, § 231, 76 Stat. 876, 19 U.S.C. § 1861.

emigration. While these restrictions are more closely connected with internal affairs than was Soviet support of North Korean hostilities in 1951, they cannot be considered to be wholly internal. They are affected with an international concern, the right to emigrate having been one of the human rights [Article 13(2)] proclaimed by the General Assembly of the United Nations in 1948 as a "common standard of achievement for all peoples and all nations."[14]

On October 3, 1973, the House Ways and Means Committee reported out H.R. 10710, the "Trade Reform Act of 1973," with changes in Title IV (relating to MFN treatment for Soviet imports) which would have imposed added conditions upon the authority of the President to accord MFN status to Soviet imports.[15] Under the bill, MFN treatment cannot be provided to the products of any "nonmarket economy" country that 1) denies its citizens the right or opportunity to emigrate, 2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever, or 3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice. MFN treatment can be accorded only after the President submits a report to the Congress "indicating that such country is not in violation of" points one, two, or three above.[16]

The House of Representatives acted favorably upon H.R. 10710 on December 11, 1973, following two days of debate. However, before doing so it adopted by a vote of 319 to 80 an amendment to Title IV—the so-called Vanik Amendment. In addition to the denial of MFN treatment to certain countries restricting emigration, the Vanik Amendment would deny the participation by any such country "in any program of the government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly."[17]

In March 1974, when hearings upon the House-passed bill began before the Senate Finance Committee, Secretary of State Kissinger strongly opposed the Vanik Amendment (in the Senate it is also known as the Jackson Amendment), as well as the denial of MFN treatment written into H.R. 10710 by the House Ways and Means Committee.[18] As of the present (April 1974), Senate hearings are in

14. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948).

15. 119 CONG. REC. H8601-8603 (1973).

16. *Id.* at H8602.

17. *Id.* at H11027. *See* especially H11052-11064.

18. *2 Hearings on H.R. 10710 before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 454 (1974).

progress, and the outcome is in doubt.[19]

II. THE ECONOMIC CONSEQUENCES

Various estimates of the possible growth of U.S.-U.S.S.R. trade have been made on the basis of diverse hypotheses. Given the development of economic relations in a setting of political rapprochement, Ray Cline, the former Director of the State Department's Bureau of Intelligence and Research, posited a theoretical calculation of growth of U.S. exports to the U.S.S.R. to be about $2 billion annually, with Soviet imports amounting to $1.7 billion.[20] According to Cline, the achievement of such a volume of trade would "take quite a few years," however, and the "creation of a more systematic division of labor between the two countries."

What role does MFN status play in this kind of projection? A study by the staff of the U.S. Tariff Commission[21] has indicated that while tariff discrimination has "generally constituted less of a handicap to U.S.S.R. trade than is commonly supposed," it nonetheless adversely affected about 10 percent (based on value) of Soviet imports in 1970. The study pointed out, however, that the traditional trade pattern between the U.S.S.R. and the United States and "probably the deliberate actions of U.S. importers and Soviet foreign-trade corporations, lead to a concentration in imports of the items which avoid the full rates." And it further noted that there were a number of Soviet products which might well experience growth in exportation to the United States if MFN status were accorded, i.e.: plywood; manganese ore; ferrovanadium; steel wire rods, plates, sheets, and other shapes; metalworking equipment; hydrofoil boats; electrical-generation equipment; cotton and man-made fibers; and apparel.[22]

Mere granting of MFN treatment would work no magic. Quality goods, "reliable and fast installation and repair service,"[23] and effective merchandising are necessary to lasting trade gains. Nonetheless, it seems clear that continued denial of MFN treatment to Soviet imports will impede the growth of Soviet-American trade. Conversely, MFN status for Soviet imports will assist the growth of U.S.-U.S.S.R. trade in practical and in psychological ways. Denial of credits and guarantees would exacerbate substantially such negative impact upon Soviet-American trade relations.

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19. For background on the Jackson-Vanik amendment, see *supra* Editor's Foreword, note 1.

20. Cline, *Prospects for U.S.-Soviet Economic Relations*, 69 DEP'T STATE BULL. 328, 334 (1973). For a generally more conservative assessment see: N. Y. Times, Nov. 5, 1973, at 61, col. 1.

21. Malish, *United States Eastern European Trade*, in 4 U.S. TARIFF COMMISSION STAFF STUDIES (1972).

22 *Id.* at 44.

23. Cline, *supra* note 20, at 335.

It is, of course, idle to expect that political considerations will fail to affect decisions concerning the economic relations between the United States and the U.S.S.R. What may be hoped is that the future will represent an improvement over the past, to the benefit of the peoples of both countries and of others. Such an improvement can result to the extent that political considerations can be minimized, and the development of trade relationships can proceed on the basis of non-discrimination and comparative advantage in the production and distribution of goods and services.

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Discussion

There was considerable disagreement among the American participants concerning the degree to which the Executive Branch has supported most-favored-nation treatment for imports from the Soviet Union at various times since the late 1940's. There was universal agreement, however, that most-favored-nation treatment had been withdrawn from the Soviet Union on the initiative of Congress and that Congressional opposition was the primary obstacle to renewal of most-favored-nation treatment in the early 1970's. It was also generally agreed that this state of affairs was caused by the linkage of trade policy with general foreign policy considerations in the minds of U.S. policy makers.

Mr. Metzger expressed the opinion that the linkage of trade policy with general foreign policy considerations was so close that it was useless to expect Congress to extend most-favored-nation treatment to the Soviet Union in the absence of significant improvement in the general political climate. However, he was also of the opinion that the obstacles which would be removed by most-favored-nation treatment of Soviet imports were not serious barriers to Soviet-American trade. Parenthetically, he expressed the opinion that Soviet exporters could manipulate their prices to overcome the effect of tariff barriers. In addition, he felt that the key to the future development of Soviet-American trade was the extension of U.S. government credits for exports to the Soviet Union. Since such credits were controlled by the Administration, and thus beyond the influence of a hostile Congress or public opinion, and since the business community generally favored extension of trade with the Soviet Union, trade would increase even without most-favored-nation treatment.

Another American participant agreed that the presence or absence of most-favored-nation treatment was not objectively a major factor, but stated that it was nevertheless a major psychological problem. However, still another American participant contended that there is no way of knowing the extent to which Soviet producers could compete for U.S. imports if discriminatory tariff barriers were removed.

There was also strong disagreement among the American participants concerning the extent to which "liberals" in the United States are to blame for failure to work actively to change public attitudes toward trade with the Soviet Union.

Mr. Usenko agreed with Mr. Metzger that a favorable rate of interest on credits for U.S. exports is the most rational way of expanding Soviet-American trade. However, he disagreed with the contention that most-favored-nation treatment is not an important fac-

tor in such trade. First, he pointed out, Soviet manufacturing enterprises are autonomous units operating under principles of economic accountability, and thus cannot manipulate their prices to overcome high tariff barriers. Second, the tariff discrimination involved in a denial of most-favored-nation treatment has had a material effect on Soviet exports. Mr. Usenko pointed out examples involving airplanes, electric generators, and fibers in which the applicable tariff rates range from thirty to forty percent, as opposed to six to seven percent for imports from countries enjoying most-favored-nation status. The result, he noted, is a qualitative as well as a quantitative distortion in trade patterns; only one-third of the Soviet exports to the United States are finished products while two-thirds consist of raw materials. This guarantees a balance of trade which will always be strongly in favor of the United States, and poses problems to future development. Moreover, Mr. Usenko stated, international trade is best served not by special favors, but by the uniform application of the non-discriminatory most-favored-nation standard, which, he felt, had become an international customary norm.

Mr. Metzger disagreed with Mr. Usenko's contention that there is an international customary norm requiring the establishment of most-favored-nation or any other non-discriminatory tariff regime. He contended that a country is free to discriminate or not, as it wishes, without violating any international agreement. Further, he noted, the use of the term "equitable treatment" in the 1972 Soviet-American Trade Agreement indicates that the two governments contemplated disparity of treatment among goods of various countries, at least in the case of quantitative restrictions on imports.

Mr. Usenko agreed that most-favored-nation treatment is not a requirement of international law. However, he said, non-discrimination *is* a requirement of international law, and therefore discriminatory refusal to grant most-favored-nation treatment is a violation of international law. Further, he stated, the term "equitable treatment" does not mean in the Soviet text of the Soviet-American Trade Agreement what Mr. Metzger asserted that it means in the U.S. text. The meaning assigned to the term by Mr. Metzger would be meaningless, since the Soviet Union does not have quantitative restrictions on imports. To the Soviet Union, the term "equitable treatment" signifies that the goods of each party will receive fair, that is, non-discriminatory, treatment by the other.

Further discussion disclosed that there is a significant difference between the Russian and English meanings of the word "equitable."

It was also suggested by an American participant that, in the eyes of Soviet jurists, as well as of jurists from many other countries,

but not of the United States, widespread application of a practice transforms it into a customary norm of international law. Still another American participant suggested that the basic concept from which the Soviet jurists start is that a "right to trade" exists in international law.

Mr. Usenko reiterated that non-discrimination is an established norm of international law, and he cited various authorities, including statements of the International Law Commission, for this conclusion.

The Legal Status of Soviet Trade Representations Abroad[1]

V.S. POZDNIAKOV*

The Trade Agreement signed by the Soviet Union and the United States on October 18, 1972 provided for the establishment of a Soviet Trade Representation in Washington and a U.S. Commercial Bureau in Moscow. These agencies began functioning at the close of 1973.[2] Inasmuch as hitherto no Soviet trade representation had existed in the United States, the brief review of the legal status of Soviet trade representations abroad given in this paper may be of interest to Americans, particularly those who have established or plan to establish business relations with Soviet foreign trade organizations.

I. SOURCES OF THE LAW

A Soviet trade representation abroad is an organ of state administration based on the state monopoly of foreign trade. As an organ of state administration the trade representation's competence is determined by Soviet law, since only the state itself has the right to define the powers accorded to that organ. Soviet law resolves questions such as the establishment of the governing bodies of the trade representation and their competence, the procedure for appointing and recalling them, the internal structure of the trade representation, and the material basis of its functions.

In determining the competence of its representation abroad, a

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1. For further information on the status of Soviet trade representations see: V.I. LISOVSKII, TORGOVYE PREDSTAVITEL'STVA ZA GRANITSEI (SOVIET TRADE REPRESENTATION ABROAD) (1947); Preobrazhenskaia, *Torgpredstva S.S.S.R. za granitsei—vydaiushchiisia vklad Sovetskogo gosudarstva v mezhdunarodnoe pravo (Soviet Trade Representations Abroad—An Outstanding Contribution of the Soviet Union to International Law*, 36 UCHENYE ZAPISKI LVOVSKOGO GOSUDARSTENNOGO UNIVERSITETA, SERIA IURIDICHESKAIA, No. 3, 33-36 (1955); M.M. BOGUSLAVSKII, IMMUNITET GOSUDARSTVA (STATE IMMUNITY) 136-179 (1962) [hereinafter cited as BOGUSLAVSKII]; E.T. USENKO, FORMY REGULIROVANIIA SOTSIALISTICHESKOGO MEZHDUNARODNOGO RAZDELENIIA TRUDA (FORMS OF REGULATION OF THE SOCIALIST INTERNATIONAL DIVISION OF LABOR) 261-71 (1965) [hereinafter cited as FORMY]; V.S. POZDNIAKOV, GOSUDARSTVENNAIA MONOPOLIA VNESHNEI TORGOVLI V S.S.S.R. (THE STATE MONOPOLY OF FOREIGN TRADE IN THE U.S.S.R.) (1969).

2. Arrangements for the opening of these offices were finalized in an exchange of letters between the Ministry of Foreign Trade of the U.S.S.R. and the U.S. Department of the Treasury. *See* [1974] 1 VNESH. TORG. 33.

state must observe international law and refrain from interfering in the sovereign rights of the country on whose territory the trade representation functions. Thus, in determining the competence of its trade representations, the Soviet Union takes into account international law. The treaties signed by the U.S.S.R. with foreign countries on the legal status of trade representations usually reproduce the pertinent provisions of Soviet law.

The privileges and immunities of a trade representation abroad spring from the general principles of international law relating to missions of foreign countries. Usually, they are recorded in bilateral international agreements, but a trade representation has the right to enjoy them even if they are not recorded. By an international agreement it is possible only to establish certain exceptions to the general principles of international law. For instance, exceptions to the principle of immunity may either broaden or restrict the application of that concept. Also, in countries which, like the U.S.S.R., are signatories of the 1961 Vienna Convention on Diplomatic Relations,[3] Soviet trade missions enjoy the privileges and immunities recorded in that convention.

As has been shown by M.M. Boguslavskii,[4] the view has been widely expressed in French legal literature that international treaties are the source of the immunity of a trade representation. The proponents of that view have contended that immunity is accorded to a trade mission only if expressly provided for in an international treaty. This question was discussed in French legal literature in connection with a number of cases examined by French courts, whose decisions denied immunity to Soviet trade representations prior to the signing of the first Soviet-French Trade Agreement on January 11, 1934.

In this connection it must be pointed out that in the Soviet Union's trade treaties and agreements with foreign countries, two groups of norms must be distinguished. The first group records either the provisions of Soviet law on trade representations or universally accepted norms of international law that are applicable to them. In this area the trade treaties do not establish any new norms but only note what exists independently of the trade treaty. One of the basic provisions of this group is the immunity of trade representations as organs of state administration.

The second group of provisions relating to the legal status of trade representations states the exceptions to the generally accepted norms of international law concerning immunity, or regulates questions for which there are no provisions either in Soviet law or in

3. [1964] 18(1209) Ved. Verkh. Sov. S.S.S.R. 335.

4. BOGUSLAVSKII, *supra* note 1, at 155.

international law (for instance, the number or location of offices or the maximum number of personnel at a trade representation). This section of the trade treaty must be regarded as an independent source for determining the legal status of Soviet trade missions.

The first Soviet trade missions were created in 1920-1921. Their legal status was determined gradually, and during the initial years differed in various countries. Their names also differed: "trade missions" in Estonia, Turkey, Germany, Sweden and other countries, "Mission of the People's Commissariat for Foreign Trade" in Lithuania, "Russian trade delegations" in Britain and Italy, and so forth. But their essence was the same—they represented the Soviet Union in trade with the countries of their location.

By 1921 an act had been published which laid the foundation for the legal status of Soviet trade missions in foreign countries and their relationship with other Soviet bodies and organizations. This was the decree of the Council of People's Commissars of the Russian Soviet Federated Socialist Republic (R.S.F.S.R.) of May 26, 1921, published under the heading "General Provision on Soviet Agencies Abroad."[5] In accordance with that decree the permanent bodies representing the Soviet government in a foreign country, provided relations were normal, were: a) plenipotentiary embassies, b) consulates, and c) trade missions. The representatives of all other departments and all Soviet organizations on the territory of the given foreign country were subordinated "in a general administrative respect" to the plenipotentiary representative and were subject to his control.

The functions of the trade missions were: a) to study the markets, economic situation and trade of foreign countries, communicate the pertinent information to the People's Commissariat for Foreign Trade, and acquaint foreign governmental and industrial circles with the economic and trade situation in the Soviet Union, b) to supervise trade and commodity exchanges between the R.S.F.S.R. and foreign countries, and c) to handle all import and export operations, all storage, inspection and accounting operations relating to goods, supervise the transportation of goods, and carry out all financial, settlement, and insurance operations connected with trade.

By a decision of the All-Russia Central Executive Committee and the Council of People's Commissars of October 16, 1922, trade missions began to be regarded as an "indispensable part of a plenipotentiary embassy in each given country," which, as will be seen later, meant that the status enjoyed by a diplomatic mission covered the trade mission.

With the formation of the U.S.S.R., the trade missions of the

5. [1926] 49 Svod ukazov Item 261.

individual Soviet republics were reorganized into trade missions of the U.S.S.R., while their legal status was defined by Articles 23-28 of the Regulations of the People's Commissariat for Foreign Trade of the U.S.S.R. of November 12, 1923.[6]

The Regulations reaffirmed the formerly established ruling that a trade mission was an organ of the People's Commissariat for Foreign Trade and, at the same time, a component of the corresponding plenipotentiary embassy. Trade representatives were appointed and recalled by decision of the Council of People's Commissars on the recommendation of the People's Commissariat for Foreign Trade and with the agreement of the People's Commissariat for Foreign Affairs. The Union Republics—with the agreement of the People's Commissariat for Foreign Trade—had the right to send their representatives to the trade missions of the U.S.S.R. in individual countries. The trade missions included representatives of various state offices and enterprises and also the authorized representatives of the Higher Council of the National Economy. With the permission of the People's Commissariat for Foreign Trade the trade missions could include authorized representatives of the People's Commissariat for Foreign Trade at the Councils of People's Commissars of the Union Republics.

Organizationally, the trade missions consisted of two divisions: supervisory and commercial. The functions of the supervisory division included:

> a) elucidation of the overall economic situation in the country of their location;
>
> b) study of the local market and economic data;
>
> c) supervision of the work of mixed companies abroad;
>
> d) observation of the fulfilment of the trade treaties and agreements existing between the Soviet Union and the given country and participation in the drawing up of new treaties and agreements;
>
> e) supervision of the commercial activity of all agencies, offices and citizens of the U.S.S.R., including the commercial division of the trade missions, in the given country (Regulations, art. 27).

The functions of the commercial division of the trade missions included "the fulfilment of the plan assignments of the People's Commissariat for Foreign Trade and other organs of the U.S.S.R., and also trade and commission operations on instructions from the commercial agencies of the People's Commissariat for Foreign Trade, state offices and enterprises, cooperatives, public and private enterprises and individuals permitted to engage in export and import operations" (Regulations, art. 28).

On the basis of the 1923 Rules, the People's Commissariat for

6. [1923] 10 Vest. TsIK SNK i STO S.S.S.R. Item 302.

Foreign Trade, on March 11, 1924, approved the Regulations on Trade Missions of the U.S.S.R. Abroad,[7] which mirrored the legislation on trade missions in operation at the time. The normative act defining the present legal status of the Soviet trade missions abroad is the Rules on Trade Missions and Trade Agencies of the U.S.S.R. Abroad approved by a decision of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. of September 12, 1933.[8]

Prior to the establishment of the socialist system in a number of other countries, all of the international agreements signed by the U.S.S.R. on trade missions were one-sided in the sense that they made no provision for the opening of foreign trade missions in the Soviet Union. This was due to the distinctions in the social system of the U.S.S.R., on the one hand, and of the capitalist countries, on the other. In this case there could be no reciprocity (one of the fundamentals of international law) since the foreign trade of capitalist countries, as distinguished from that of socialist countries, is in the hands of private entrepreneurs; and thus, the objective conditions necessary for the emergence in socialist countries of the functions inherent in foreign trade under capitalism do not exist.[9]

Nevertheless, soon after the establishment of Soviet power, the capitalist countries time and again raised the question of opening trade missions in the U.S.S.R. This desire was mirrored in some international treaties.[10] However, even in those cases where the Soviet Union agreed to include the terms for trade missions of capitalist countries in the U.S.S.R., these missions were not opened. The agreements with capitalist countries on trade missions remain one-sided to this day.

The Soviet-American Trade Agreement is no exception in this respect. The U.S. Commercial Bureau opened in Moscow is not a trade mission because its functions, as contrasted with the Soviet Trade Mission, do not include representing the interests of its country.

The picture is different in the Soviet Union's relations with other

7. [1924] 1 SBORNIK DEISTVUIUCHIKH DEKRETOV I POSTANOVLENNII PO VNESHEI TORGOVLI S.S.S.R. Item 40.

8. [1933] SOBRANIE ZAKONOV I RASPORIAZHENNII RABOCHE-KRESTIAN'SKOGO PRAVITEL'STVA S.S.S.R. Item 354.

9. FORMY, *supra* note 1, at 262-63.

10. For instance, in Article 8 of Section II of the Treaty of October 12, 1924 between the U.S.S.R. and Germany it is stated: "If the German Government shall establish a Trade Mission in the U.S.S.R., it and its Staff shall be accorded the same rights, privileges and immunities by the Government of the U.S.S.R." 8 DOKUMENTY VNESHNEI POLITIKI S.S.S.R. (SOVIET FOREIGN POLICY DOCUMENTS) 590 (1963) [hereinafter cited as DOKUMENTY].

socialist countries, where, as in the U.S.S.R., foreign trade is a state monopoly. From 1957 onwards bilateral trade agreements on trade missions began to be signed with these countries. The provisions of these agreements are applied equally to Soviet trade missions and to the trade missions of the corresponding countries in the U.S.S.R.

Far-reaching socio-economic changes are taking place in countries which after World War II shook off colonial or semi-colonial oppression and took the road of strengthening and consolidating their national independence. One of these changes is the considerable expansion of the public sector in the economy, including foreign trade, which is increasingly carried on by state organizations. Some countries have passed laws establishing a state monopoly of foreign trade. Thus, the objective conditions are taking shape for the establishment by these countries of trade missions abroad. The Soviet Union has concluded bilateral agreements on trade missions with a number of developing states (Singapore, Malaysia, Colombia, and Ecuador, for example).

The content of the bilateral agreements on the legal status of trade missions is basically the same. Certain distinctions, which in the future will be removed, are due to the specifics of trade with given countries, to the unique aspects of these countries themselves and to some other circumstances.

II. THE OPENING OF A TRADE MISSION

The decision to open a trade mission in a foreign country is made by the government of the U.S.S.R. However, the implementation of such a decision requires the consent of the foreign country concerned. Usually this consent is given soon after diplomatic relations are established and is marked by the signing of a trade treaty or agreement or by an exchange of notes on this question. However, the establishment of diplomatic relations is not a necessary condition for the opening of a trade mission. A mission may be instituted even when such relations are absent.[11]

International agreements usually specify the location of a trade mission. As a rule this location is the capital of the given country. The agreements with some countries, for instance, with Japan, state the exact address of the trade mission and any move to new premises at some other address requires the permission of the government of the country concerned.

11. Prior to the establishment of diplomatic relations the Soviet Union signed agreements on a trade mission in the Kingdom of Yugoslavia (May 11, 1940), on a temporary trade mission in the Republic of Cuba (February 20, 1960), on a temporary trade mission in the Federal Republic of Cameroun (September 24, 1962) and a bilateral agreement on trade missions with the Republic of Singapore (April 2, 1966).

III. FUNCTIONS OF A TRADE MISSION

As has already been pointed out, the functions of a trade mission as a state organ of administration may be defined only by the Soviet government. This is stated directly in a number of international agreements. For instance, in the convention signed with Sweden in 1927 it is stated that the "Government of Sweden accords the Trade Mission the possibility of performing on Swedish territory the *function delegated to it by the Government of the U.S.S.R.*"[12] (emphasis added).

In Article 1 of the Regulations on Trade Missions it is stated that they carry out the following functions:

> a) represent the interests of the U.S.S.R. in foreign trade and promote trade and other economic relations between the U.S.S.R. and the country where the trade mission is located;
>
> b) supervise the trade of the U.S.S.R. with the country where the trade mission is located;
>
> c) conduct the trade of the U.S.S.R. with the country in which the trade mission is located.

Most of the agreements signed by the U.S.S.R., in effect, reproduce Soviet law on this point.[13] However, some do not list all the functions provided for in the Regulations on Trade Missions. For example, the agreement with the Federal Republic of Germany[14] makes no provision for the supervisory functions of the trade mission. Similarly, no provision is made for such functions in the trade agreement with the United States. This omission was evidently caused by the feeling that the supervisory functions of the trade mission do not touch on the interests of the foreign country, in connection with which it was found that it was superfluous to include them in the agreement. The omission provided for in the exchange of notes with the Moroccan Foreign Ministry of June 5 to June 15, 1959[15] is of a different character. It states that "trade activities are excluded from the functions of the Trade Mission." A similar exception is made in

12. SBORNIK TORGOVYKH DOGOVOROV, TORGOVYKH I PLATEZHNYKH SOGLASHENII I DOLGOSROCHNYKH TORGOVYKH SOGLASHENII S.S.S.R. C INOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF TRADE TREATIES, TRADE AND PAYMENTS AGREEMENTS AND LONG-TERM TRADE AGREEMENTS BETWEEN THE U.S.S.R. AND FOREIGN STATES) (2d ed. 1965) [hereinafter cited as TRADE TREATIES].

13. There are, however, some differences in phrasing, as for example, in the supplement *On the Legal Status of the Trade Mission of the U.S.S.R. in Japan* to the Soviet-Japanese Trade Treaty of December 6, 1957. One of the functions of the trade mission is "the adoption of measures required by the government of the U.S.S.R. relative to trade operations between the U.S.S.R. and Japan," which, in effect, reproduces Article 1, paragraph B of the regulation on trade missions. *See* TRADE TREATIES, *supra* note 12, at 873.

14. TRADE TREATIES, *supra* note 12, at 694.

15. *Id.* at 487-88.

Article 5 of the trade agreement with the United States. In this case the agreement limits the functions delegated to a trade mission by Soviet law.

Article 3 of the Regulations on Trade Missions states the rights and duties of the mission, the implementation of which is vital to the performance of the functions mentioned above. These rights and duties mainly concern the supervisory functions of a trade mission and, to some extent, its function of promoting Soviet economic relations with the country of the mission's location. This section of the Regulations is not reproduced in international agreements.

In view of the foregoing and of the changes that have been introduced in the organization of Soviet foreign trade following the publication of the Regulations, the functions of the trade missions may be summarized as follows:

1. *To represent the interests of the U.S.S.R. in foreign trade.*

This is the most important function inasmuch as it manifests the representative character of the trade mission as an organ of administration of a foreign country. In view of the fact that this function is stated in both Soviet law and international agreements, the corresponding trade and political acts of a trade mission entail the creation of definite rights and duties for the Soviet government itself.

2. *To supervise trade with the country of its location.*

The rights and duties of a trade mission in the supervision of trade with the country of its location are stated, in particular, in Article 3 of the Regulations on Trade Missions. On the basis of the state monopoly of foreign trade, a trade mission supervises and controls the trade activities of Soviet organizations permitted to have independent dealings in the external market and also all individual foreign trade transactions by Soviet organizations and citizens who have the requisite permission. They issue permits for the import of goods to the U.S.S.R., certificates testifying to the origin of goods, permission for the transit of goods across the U.S.S.R., and other documents. In the country of its location the trade mission supervises the observance by Soviet organizations and citizens of Soviet laws and the instructions of appropriate governmental bodies.

In carrying out this function the trade mission acts as an organ of the Soviet government with the duty of ensuring that in the country of its location all Soviet organizations abide by the state monopoly of foreign trade. In this respect it guarantees that only those Soviet organizations which have proceeded in accordance with Soviet law will enter into direct transactions with foreign official agencies and contractors.

The fulfilment by a trade mission of its supervisory functions is not an obstacle to direct commercial contacts between authorized Soviet organizations and foreign contractors. This is stated unequivocally in many international agreements. For instance, in the supplement to the trade treaty with Japan it is stated:

> The establishment of a Trade Mission by no means affects the rights of juristic persons and individual citizens of Japan to maintain direct relations with Soviet foreign trade organizations for the purpose of concluding and executing trade transactions.[16]

Approximately the same wording is to be found in Article 5 of the Soviet-American Trade Agreement.

In fulfilling its supervisory and other functions, a trade mission does not have the right to violate the laws of the country of its location, for that would mean infringing on the sovereign rights of that country. This is underscored in a number of statements by the Soviet government[17] and in some international agreements. For instance, in the Trade and Shipping Treaty with Norway it is stated that:

> The Trade Mission . . . shall regulate foreign trade and goods exchanges between the U.S.S.R. and Norway . . . in accordance with the laws of the U.S.S.R. insofar as these laws do not come into conflict with Norwegian law.[18]

3. To handle foreign trade operations on behalf of the government of the U.S.S.R.

The competence of a trade mission includes the direct handling of foreign trade operations if no other provision (as in the Soviet-American Trade Agreement, for example), is made in the international agreement.

4. To promote the development of trade relations.

In carrying out the three functions mentioned above, the trade mission helps to promote trade relations with the country of its location. It is not accidental, therefore, that in many international agreements signed in recent years it is listed as the first of the functions of a trade mission.

A trade mission's function of promoting trade is not limited to the four tasks enumerated above. In countries with which there are trade agreements, the trade missions help to fulfil these agreements. A similar function is manifested in the study of the markets in the country of location and the corresponding information regarding interested Soviet organizations and foreign organizations, companies

16. *Id.* at 875.

17. *See*, for example, the Note of the Soviet Ambassador to France, L. B. Krasin, to the Chairman of the Council of Ministers and the Minister for Foreign Affairs of France of January 12, 1965. 8 DOKUMENTY, *supra* note 10, at 52-53.

18. TRADE TREATIES, *supra* note 12, at 523.

and enterprises. The trade missions help Soviet foreign trade organizations that independently engage in foreign trade operations to conclude and execute individual transactions.

Also, many members of a mission's staff help Soviet foreign trade organizations by negotiating transactions on behalf of and on instructions from these organizations on the basis of powers-of-attorney. This has become a widespread practice and is due to the obvious convenience of this practice for Soviet organizations and their foreign contractors. Needless to say, the principal in a contract signed by a trade mission staff member on the basis of a power-of-attorney is not the trade mission, but the organization that has issued the power-of-attorney.

Owing to a number of circumstances, which we need not dwell upon in this paper, the trade agreement signed by the U.S.S.R. and the United States envisages material exceptions to this practice. As stated in Article 5 of the agreement, the staff members of the Soviet Trade Mission in the United States do not take a direct part in concluding, signing and executing trade transactions or conducting trade in any other way. However, the Trade Mission has the right to place its offices at the disposal of staff members or representatives of Soviet foreign trade organizations who are not members of the trade mission's staff.

IV. PRIVILEGES AND IMMUNITIES OF A TRADE MISSION

With regard to this question, the Regulations of Trade Missions merely state that "in foreign countries the Trade Missions of the U.S.S.R. are organs of the U.S.S.R. implementing the Soviet Union's rights abroad in its monopoly of foreign trade." Article 2 of the Regulations reads: "Being part of the corresponding plenipotentiary missions of the U.S.S.R. abroad and enjoying the latter's privileges, the trade missions are, at the same time, subordinated to the People's Commissariat for Foreign Trade." As a representative of a foreign country, a trade mission has the right to enjoy all the privileges and immunities that, under international law, are granted to such representatives. As was pointed out by L.B. Krasin, a Soviet trade mission holds all the threads of the trade of the Soviet Union as a whole, and for that reason it requires extraterritorial rights at least in the same volume as the diplomatic representatives of the Soviet Union.[19] In its note of May 17, 1927 to Great Britain, the U.S.S.R. pointed out that

> the Soviet government is aware that . . . considerable importance is attached to the protection of commercial secrets in the relations between private commercial firms . . . . [I]n view of the state monopoly of foreign trade, the government organs that concentrate in their hands all the

19. L.B. KRASIN, VOPROSY VNESHNEI TORGOVLI (QUESTIONS OF FOREIGN TRADE) 311-12 (1st ed. 1928).

> import and export operations of the entire country . . . must strongly insist on an iron-clad guarantee of the inviolability of the state documents, instructions, circulars, orders and so forth sent [abroad] by these organs . . . . The Soviet government has . . . always unequivocally demanded complete immunity and inviolability for its trade agencies abroad.[20]

As an organ of a sovereign state, a trade mission enjoys all forms of state immunity: immunity from the operation of the law of another state, immunity of state property, tax immunity, and immunity from legal process. In international law, state immunity is understood mostly as immunity from legal process, the content of which has been formulated as follows by M.M. Boguslavskii:

> 1. No state may compel another state to be a defendant in its courts.
> 2. A foreign state comes within the competence of the courts of another state only if it expresses the requisite consent.
> 3. Actions performed by one state on the territory of another with the consent of the latter (purchase of real estate, the conduct of trade operations, and so on) do not signify subordination to the jurisdiction of the courts of that other country in cases arising from these actions.
> 4. The consent of one country to the hearing of a case in the court of another does not presuppose consent to the enforcement of the court decision or of measures of compulsion relative to the foreign state.[21]

In most international agreements, including the Soviet-American Trade Agreement, provision is made for some privileges and immunities for trade representatives and for persons directing their work. The premises occupied by a trade mission are regarded as extraterritorial. A trade mission has the right to use a code. Although, as a rule, a trade mission may engage in trade, it is not, as a representative agency of a foreign state, subject to entry in a trade register. It should be noted, however, that in individual cases linked with the conclusion of foreign trade transactions by Soviet trade missions abroad, the Soviet Union may give its consent to certain exceptions to the immunity enjoyed by it.

In firmly upholding the principle of state immunity, in particular the immunity of Soviet trade missions abroad, the Soviet Union accords the corresponding immunities to foreign states. In Article 61 of the Fundamentals of Civil Court Procedure of the U.S.S.R. and the Union Republics it is stated: "A court action against a foreign state, . . . and the infliction of a penalty on the property of a foreign state in the U.S.S.R. may be allowed only with the consent of the competent authorities of the state concerned."

Certain advantages and privileges are also enjoyed by the Soviet personnel of trade missions abroad. They do not come under the jurisdiction of domestic courts in questions arising from their official

20. 10 DOKUMENTY 213-14.
21. BOGUSLAVSKII, *supra* note 1, at 17-18.

duties and are exempt from all personal and material duties, as well as from local taxes on the incomes received by them for their work. Moreover, under the Soviet-American Trade Agreement the personnel of a trade mission enjoy the privileges and immunities enjoyed by the corresponding category of personnel at the Soviet Embassy in Washington.

V. BRANCHES OF A TRADE MISSION

Under the Regulations on Trade Missions, in some areas of its work a trade mission may open a branch headed by an authorized trade representative appointed by the Ministry of Foreign Trade. The authorized trade representative carries out his functions on the basis of a power-of-attorney issued by the relevant trade mission.

The consent of the country concerned must be received for the opening of a branch. For instance, in the supplement to the trade treaty with Japan,[22] it is stated that the "Trade Mission may open in other cities of Japan its branches with the preliminary agreement of the government of Japan." The agreements with many other countries state, in addition to consenting to the opening of branches, the cities where such branches may be opened.

The functions of branch offices include part of the functions of the trade mission itself in a limited geographical area or functions of the trade mission relative to the entire territory of the country of its location. Within the stated limits the work of branch offices does not differ in character from the work of the trade missions themselves as representatives of a foreign country, and for that reason, in accordance with international law, a branch office must enjoy all the privileges and immunities enjoyed by a trade mission. Fully in accordance with this, the treaties and agreements with Bulgaria,[23] Hungary,[24] China,[25] Finland[26] and some other countries state that the premises occupied by branch offices of trade missions enjoy extraterritorial rights.

With some countries, agreements have been signed that impose restrictions on the branch offices of trade missions. For instance, in the agreement with Turkey, extraterritorial rights are accorded to only one of seven of the branch offices agreed upon by the signatory countries.[27]

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22. TRADE TREATIES, *supra* note 12, at 873.

23. *Id.* at 108.

24. *Id.* at 169.

25. *Id.* at 416.

26. *Id.* at 709.

27. *Id.* at 658-60. Actually, two branch offices of the Soviet Trade Mission operate in Turkey.

The Legal Status of Foreigners in the U.S.S.R.

V.S. SHEVTSOV*

The expansion of mutually beneficial and equal trade and other relations between the U.S.S.R. and the United States is directly linked to the sojourn of their citizens in each other's territory. This makes it important to ascertain the question of the principles underlying the legal status of foreigners, including citizens of the United States, on Soviet territory.

First and foremost, it must be noted that the legal status of foreigners in the U.S.S.R. and of Soviet citizens abroad is determined not only by their legal link with their own country but, to a certain extent, also by the internal laws of the country of residence in conjunction with the pertinent international agreements.

In the U.S.S.R. foreigners usually come under the same laws that are applicable to Soviet nationals, i.e., foreigners are accorded "national treatment." National treatment usually affords foreigners the full range of civil and procedural rights and duties guaranteed to citizens by internal (national) legislation.

Strictly speaking, the terms of national treatment do not necessitate the establishment of special norms relating to the rights and duties of foreigners on the territory of a given country. In practice, reference is usually made to prevailing laws and other normative acts.

However, this by no means signifies that Soviet internal legislation contains no norms directly relating to the legal status of foreigners. Under the Constitution of the U.S.S.R. legislation on the rights of foreigners comes within the jurisdiction of the Union of Soviet Socialist Republics rather than of the individual republics.[1]

Legislative norms regulating the legal status of foreigners are contained in the laws of the Supreme Soviet of the U.S.S.R., in the edicts of the Presidium of the Supreme Soviet, in the decrees of the Council of Ministers of the U.S.S.R., and in other legal acts. In confirmation of this, Article 122 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics provides: "In the U.S.S.R. foreigners enjoy civil legal capacity on an equal footing with Soviet citizens. Individual exceptions may be established by the law of the

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1. Constitution, art. 14, para. v. (U.S.S.R.).

U.S.S.R."[2] Article 8 of the Fundamentals of Civil Legislation defines civil legal capacity as the capacity to have civil rights and duties.

The purpose of national treatment as a universal norm of international law is precisely to serve as a legal guarantee of civil law and civil procedure rights and duties of foreigners on the territory of countries granting such treatment.

As a rule, Soviet laws do not stipulate that foreigners are granted national treatment on the basis of reciprocity. However, if in the Soviet Union a foreigner enjoys national treatment, Soviet citizens, naturally, should be granted national treatment in the foreigner's country.

National treatment grants foreigners only those civil law rights and freedoms that are guaranteed to the citizens of the given country, and imposes on foreigners the same civil duties that are imposed on its own citizens, taking due account, however, of the limitations established for foreigners in each concrete case in order to protect public order and state security.

Civil law rights include:

> (1) the right, in accordance with the law, to own personal property; Article 25 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics states: "Citizens may own property designated for the satisfaction of their material and cultural requirements. Each citizen may own earned income and savings, a house (or part of a house) and ancillary household facilities, objects of household use, personal use and convenience. Property owned by citizens cannot be used for the extraction of unearned income."[3]
>
> (2) the right to use dwelling premises and other property;
>
> (3) the right to inherit and bequeath property;
>
> (4) the right to choose an occupation and place of residence;
>
> (5) copyright in works of science, literature and art; the right to discovery, inventions, and rationalization suggestions. Thus, according to Article 7 of the Statute on Discoveries, Inventions, and Rationalization Suggestions of August 21, 1973, foreign authors of inventions and rationalization suggestions and their heirs (including legal entities) enjoy the rights envisaged in the Rules and other acts on an equal footing with citizens (or legal entities) of the U.S.S.R.
>
> Regarding scientific dicoveries foreigners enjoy the same rights as citizens of the U.S.S.R. provided the discovery was made in cooperation with a Soviet citizen or in fulfilment of work at a factory, organization, or office in the U.S.S.R.[4]

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2. Fundamentals of the Civil Legislation of the U.S.S.R. and the Union Republics, art. 122, [1961] 50 (1085) Vedomosti Verkhovnogo Soveta S.S.S.R. 1272, 1305 [hereinafter cited as Ved. Verkh. Sov. S.S.S.R.].

3. *Id.*, art. 25 at 1281.

4. [1973] 19 SOBRANIE POSTANOVLENII PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (COLLECTED DECREES OF THE GOVERNMENT OF THE U.S.S.R.) Item 109 [hereinafter cited as S.P.-S.S.S.R.].

(6) the right to have other property and personal non-property rights.

Foreign citizens have the right to enter into all civil law relations and transactions in which Soviet citizens may take part (purchase-sale, gift, hire, and so on).

On the basis of national treatment foreigners in the U.S.S.R. also enjoy *socio-economic rights* namely, the right to work, the right to rest and leisure, the right to material security in old age and also in the event of illness or loss of capacity of work, and the right to education (Articles 118, 119, and 120 of the Constitution of the U.S.S.R.).

These socio-economic rights are enjoyed by foreigners permanently residing or working in the U.S.S.R. The granting of these rights may be provided also by international agreements.

All foreigners in the U.S.S.R. whether on a short stay or residing over a long period or permanently, enjoy the *civil freedoms* envisaged in Articles 124, 127, and 128 of the Constitution of the U.S.S.R. These freedoms are also encompassed in the national treatment of foreigners. They include:

(1) freedom of speech if it is not used against the public order or the state security of the U.S.S.R.;

(2) freedom of conscience, which embraces freedom of religious worship;

(3) inviolability of the person, by virtue of which no person may be placed under arrest except by decision of a court or with the sanction of a procurator;[5]

(4) inviolability of homes and privacy of correspondence are protected by law.

Foreigners may not claim rights that they enjoy in their own countries which are inconsistent with the fundamental principles of

5. Under established procedure, in all cases in which a foreigner is arrested or detained, the diplomatic or consular representative of the state of which the foreigner is a citizen is notified. Representatives of the embassy or the consulate may visit the person arrested or sentenced to imprisonment. They must apply to the Ministry of Foreign Affairs of the U.S.S.R. or to the Diplomatic Service of that Ministry within 48 hours for permission to visit the detainee to provide him with legal assistance. Permission is denied if the detainee does not desire a meeting with his country's diplomatic or consular representatives; in that case they may correspond with him. In particular, in accordance with Article 12 of the Consular Convention between the Government of the U.S.S.R. and the Government of the United States of June 1, 1964 and the Protocol to that convention, notification of a consular official of the arrest or other form of detention of a citizen of the presenting state shall be carried out in the course of 13 days from the moment of arrest or detention, depending on the conditions of communication. A consular official may visit or communicate with a citizen of the presenting state who is under arrest or otherwise detained in the course of 2-4 days after arrest and detention, depending on the place of residence of such citizen. The rights of a consular official to visit and communicate with a citizen who is under arrest or otherwise detained or who is serving a term of imprisonment shall be granted on a periodic basis. Consular Convention with the U.S.S.R., June 1, 1964, [1968] 19 U.S.T. 5018, T.I.A.S. No. 6503.

Soviet law and order. For instance, the transportation of weapons and drugs is forbidden in the U.S.S.R. and, consequently, there is no right to own weapons or drugs. Further, Soviet legislation does not recognize certain limits placed on the rights of foreigners by the laws of their own countries (for instance, the limitation of the legal capacity of married women, illegitimate or adopted children, and so on).

In accordance with universally recognized norms of international law and on the basis of international treaties and agreements signed by the Soviet Union, foreigners may enjoy privileges and immunities not envisaged by Soviet legislation. Thus, Article 129 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics provides: "If an international treaty or international agreement signed by the U.S.S.R. establishes rules other than those contained in Soviet civil legislation, the rules of the international treaty or the international agreement shall be applied." [6]

The granting of national treatment to foreigners presupposes the possibility of safeguarding the granted rights. In the U.S.S.R., civil rights are safeguarded by the court or arbitration tribunal in cases, in the procedure established by law, and also by comrade courts, trade unions, and other social organizations. In cases specified by law, civil rights are protected administratively (Article 6 of the Fundamentals of Civil Legislation). Further, the Fundamentals of Civil Legal Procedure of the U.S.S.R. state that "foreign citizens have the right to litigation in the courts of the U.S.S.R. and enjoy civil procedure rights on an equal footing with Soviet citizens."[7]

In addition, foreign citizens have the same rights as Soviet citizens to use the services of state notary offices and other organizations with the powers of a notary. The right to use the services of state notary offices and consular institutes of the U.S.S.R. is enjoyed also by foreign enterprises and organizations.[8]

National treatment signifies not only that foreigners receive the same civil law rights as Soviet citizens but also that they have duties springing from Soviet civil legislation. The obligatory duties of foreigners include:

> (1) non-interference in the U.S.S.R.'s internal affairs in any form for any motivation;
>
> (2) respect for national customs and for the rules of socialist community life;
>
> (3) observance of laws and public order. For illegal actions on Soviet territory foreigners bear civil, administrative or penal responsibility.

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6. Fundamentals of the Civil Legislation of the U.S.S.R. and the Union Republics, art. 129, [1961] 50(1085) Ved. Verkh. Sov. S.S.S.R. 1306.

7. Fundamentals of Civil Procedure of the U.S.S.R. and the Union Republics, art. 59, [1961] 50(1085) Ved. Verkh. Sov. S.S.S.R. 1307, 1322.

8. U.S.S.R. Statute on the State Notary's Office, art. 26, at 19 (1973).

Under the Statute on Diplomatic and Consular Representatives of Foreign States in the U.S.S.R., the head of the diplomatic mission and members of the mission's diplomatic staff enjoy immunity from the criminal, civil, and administrative jurisdiction of the U.S.S.R. and the Union Republics. Moreover, they enjoy personal immunity and cannot be detained or placed under arrest. However, these persons may be subject to the jurisdiction of the U.S.S.R. and the Union Republics in the event of a clearly expressed consent to this by the accrediting state.[9]

Immunity from the civil and administrative jurisdiction of the U.S.S.R. and the Union Republics is established on the basis of reciprocity covering the performance of duties by the administrative and technical personnel of diplomatic missions, provided they are not Soviet citizens or persons permanently residing in the U.S.S.R. Proceeding from the principle of reciprocity, the other privileges and immunities enjoyed by the diplomatic staff may cover administrative and technical personnel on the basis of a special agreement. Examples are the agreements of the U.S.S.R. with the United States and also with Great Britain, the Federal Republic of Germany and Canada on the reciprocal granting of all diplomatic privileges and immunities to the administrative, technical, and service staffs of the diplomatic missions of these countries.

The consular conventions signed by the U.S.S.R. with the United States, Great Britain, Finland, and Sweden provide for special privileges and advantages for the personnel of the consulates of these countries, who are thereby equated to the personnel of diplomatic missions. The consular staffs of these countries receive the privileges and immunities of diplomatic personnel; the administrative and technical staffs of consulates enjoy the same privileges and immunities as the administrative and technical personnel of diplomatic missions, while the service staffs of consulates enjoy the same rights as the service staff of diplomatic missions.

Fully in keeping with the Statute on Diplomatic and Consular Representatives, the Fundamentals of Criminal Legislation of the U.S.S.R. and the Union Republics (Article 4, Part 2) states: "Questions relating to the criminal responsibility of diplomatic representa-

9. Statute on Diplomatic and Consular Representatives of Foreign States on the Territory of the U.S.S.R., arts. 12-13, [1966] 22(1316) Ved. Verkh. Sov. S.S.S.R. 397, 400-401. One of these rules is that immunity from civil jurisdiction cannot be invoked when the head of the diplomatic mission or members of the mission's staff enter into civil-law relations as private persons in connection with claims to real property owned by them in the U.S.S.R., inheritance or other activities lying outside their official functions (art. 13, *supra*, at 401). On the basis of reciprocity, the head of a diplomatic mission and members of the mission staff are exempted from all taxes and personal duties (art. 14, *supra*, at 401).

tives of foreign countries and other citizens, who, according to prevailing laws and international agreements, do not come under jurisdiction of the courts in the event they commit crimes on the territory of the U.S.S.R., shall be settled through diplomatic channels."

The principle of reciprocity operates with regard to some of the rights granted to foreigners. For instance, the trademarks of foreign legal entities and foreign citizens are registered in the U.S.S.R. provided that "Soviet enterprises and organizations are, on the basis of reciprocity, granted the right to register trademarks in the country of the applicant."[10] Similarly, money inherited by foreigners is remitted from the U.S.S.R. to a foreign country without hindrance provided that there is reciprocity on the part of the given foreign country.[11] Questions linked with the recognition of marriages contracted between foreigners at foreign embassies or consulates in the U.S.S.R. are settled in a similar manner.[12]

In some cases recognition of certain rights enjoyed by foreigners is made dependent upon permanent residence in the U.S.S.R. For example, under Article 12 of the Fundamentals of Legislation of the U.S.S.R. and the Union Republics on Public Health, only those foreign citizens who are permanent residents in the U.S.S.R. and have received special training and the appropriate degree at a higher or secondary special institution of learning in the U.S.S.R. may engage in medical or pharmaceutical work in the U.S.S.R. in accordance with the special training and degree received by them.[13] The same provision (Article 32) provides that foreign citizens permanently residing in the U.S.S.R. enjoy the right to receive medical services on an equal footing with citizens of the U.S.S.R.[14]

As we have already noted, in some cases foreigners residing in the U.S.S.R. may enjoy rights on the basis of special agreements. For instance, on the basis of government-to-government agreements and plans for cultural, scientific, and technical cooperation between the U.S.S.R. and certain countries, foreign citizens are enrolled as students or scientific trainees at higher or secondary special institutions of learning and scientific establishments in the U.S.S.R.

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10. Decree of May 15, 1962, Trademark Rights of Foreign Citizens and Businesses, art. 8, [1962] 7 S.P.-S.S.S.R. Item 59 (Council of Ministers of the U.S.S.R.).

11. Decree of April 21, 1955, [1959] 11 SBORNIK PRIKAZOV I INSTRUKTSII PO FINANSOVOKHOZIAISTVENNYM VOPROSAM (COLLECTED DECREES AND INSTRUCTIONS ON FINANCIAL-ECONOMIC QUESTIONS) 31 (Council of Ministers of the U.S.S.R., Decree No. 781).

12. Fundamentals of Legislation of the U.S.S.R. and the Union Republics on Marriage and Family, art. 31, [1968] 27(1425) Ved. Verkh. Sov. S.S.S.R. 400, 404.

13. Fundamentals of Legislation of the U.S.S.R. and the Union Republics on Public Health of 1970, art. 12, [1969] 52(1502) Ved. Verkh. Sov. S.S.S.R. 709, 715.

14. *Id.*, art. 32 at 721.

It has been pointed out that in accordance with Article 122 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics "individual exceptions" may be made with regard to foreigners in the U.S.S.R. What are these individual exceptions? Among them are restrictions on the political rights of foreigners. It is a generally accepted rule that foreigners do not enjoy suffrage and other political rights, which in their entirety are the privilege of the citizens of a country and thereby determine the qualitative character of the status of citizenship. Further, Soviet law specifically provides that non-Soviet citizens in the U.S.S.R. do not enjoy the right to elect or be elected to the Supreme Soviet of the U.S.S.R.[15]

Other political rights such as freedom of the press, freedom of assembly and meeting, and freedom of street processions and demonstrations, which are guaranteed to citizens of the U.S.S.R. by the Constitution, may be enjoyed by foreigners only with the permission of the appropriate administrative authorities. For example, foreigners require special permission from the government of the U.S.S.R. to distribute foreign printed matter in the Soviet Union. Also, foreigners need the permission of the Ministry of Internal Affairs to hold rallies and meetings. Applications for a rally or a meeting must be made beforehand to the agencies and other organizations receiving and serving foreigners. In a similar manner foreigners must receive permission for street processions and demonstrations.

There are, in addition, some restrictions on the rights of foreigners in the practice of professions and in fishing and hunting. Among them are:

(1) the crews of Soviet merchant ships must consist exclusively of citizens of the U.S.S.R.;[16]

(2) the crews of aircraft entered into the State Register of the U.S.S.R. must consist exclusively of citizens of the U.S.S.R.;[17]

(3) the staffs of Soviet diplomatic missions and also of Soviet trade missions in foreign countries must consist exclusively of citizens of the U.S.S.R.;[18]

(4) some commercial pursuits must be engaged in exclusively by citizens of the U.S.S.R.: fishing, marine mammal hunting, plant gathering, the development of minerals and the use of the continental shelf in Soviet waters.[19] These pursuits may be engaged in by foreigners if so

15. Law of January 9, 1950, Statute on Elections to the Supreme Soviet of the U.S.S.R., art. 9, [1950] 2 Ved. Verkh. Sov. S.S.S.R.

16. Merchant Shipping Code of the U.S.S.R., art. 41, (1968).

17. Air Code of the U.S.S.R. 19 (1961).

18. Vienna Convention on Diplomatic Relations, art. 8, *done* Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

19. Law of September 15, 1958, Statute on the Conservation of Fish Reserves and on the Regulation of Fishing in the U.S.S.R., art. 7, [1958] 16 S.P.-S.S.S.R. 127. In this statute it is stated that aliens are forbidden to engage in commercial fishing, commercial hunting of marine mammals, and the harvesting of plants in reservoirs of

provided by international agreements signed between foreign countries and the Soviet Union.

Lastly, there are a number of cities and regions in the U.S.S.R. that are closed to visits by foreigners. Foreign citizens do not have the right to visit these cities and regions. Any violation of this rule is punishable by administrative measures or in a court of law.

In the application of national treatment, foreigners in the U.S.S.R. enjoy rights which in many capitalist countries are not recognized: equal pay for men and women, paid leaves, and so on. In turn, this enables the Soviet government, through its diplomatic and consular representatives in the capitalist countries, to protect the civil rights, freedoms, and interests of Soviet citizens accorded by foreign national treatment that provides for rights which have been abolished in the U.S.S.R., e.g., private property in land, right to free enterprise, and so on.

Inasmuch as the content and scope of civil rights and freedoms and also of the duties of foreigners are dissimilar and sometimes quite distinctive in different countries, the need arises for supplementing national treatment with most-favored-nation treatment by means of international agreements. Such agreements usually do not indicate the specific scope of the rights and duties of foreigners but only record the principle that foreign citizens enjoy the same rights and have the same duties as nationals. The equalization of the rights and duties of foreigners on the basis of most-favored-nation treatment is incompatible with any privileges, conditions, or reservations of a discriminatory character. This is the very foundation of the legal significance of that treatment. In the U.S.S.R., citizens of countries with which the U.S.S.R. has agreements according most-favored-nation treatment are entitled to the same civil law rights and are subject to the same duties as citizens of other countries accorded most-favored-nation treatment.

In addition to national and most-favored-nation treatment, international cooperation has given rise to special treatment of foreigners engaged in carriage of persons or goods by air or sea. Thus under Soviet bilateral agreements with foreign countries on direct air com-

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the U.S.S.R. However this right has been granted, under certain conditions, by treaty to citizens of Finland, [1959] 14 (946) Ved. Verkh. Sov. S.S.S.R. 255, Norway, [1962] 34(1121) Ved. Verkh. Sov. S.S.S.R. 362, and Japan. *Cf.* agreement between the U.S.S.R. and Finland of June 13, 1969, 26 SBORNIK DEISTVUIUSHCHIKH DOGOVOROV, SOGLASHENII I KONVENTSII, ZAKLIUCHENNYKH S.S.S.R. S INOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF PREVAILING TREATIES, AGREEMENTS, AND CONVENTIONS CONCLUDED BY THE U.S.S.R. WITH FOREIGN STATES) 307-314 (1973). *See also:* Mining Rules of the U.S.S.R., art. 6, [1927] 68 SOBRANIE ZAKONOV I RAZPORIAZHENII RABOCHE-KREST'IANSKOGO PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK 688.

munication it is provided: that visas for the flight crew and personnel of an airliner operated on treaty airlines are issued beforehand for a term of at least six months and are valid for any number of flights in the course of their term of validity; that crews employed on treaty airlines may stop overnight and spend their leisure time in the capitals that have aerodromes, provided they leave on the same aircraft on which they arrived or on their next regularly scheduled flight;[20] that each of the signatory countries gives the other signatory country the right to maintain on its territory a definite number of technical and commercial personnel needed for the operation of the treaty airlines.

In merchant shipping it is a universally recognized custom that on a reciprocal basis merchant ships have the right freely to enter the open ports of any country so long as they inform the port authorities of the purpose of such entry. The crews of foreign merchant ships have the right to go ashore and, as long as their ships stay in the port, to go to the territory of the port and the port city by passes issued at a check-point upon the presentation of their identity cards which must be valid and have the photograph of the owner.

These conventional rules are universally accepted. However, when discriminatory measures are taken against the U.S.S.R. the Soviet authorities are compelled to take retaliatory measures. For instance, at the close of 1967 the United States unilaterally instituted a number of discriminatory restrictions on the free entry of Soviet merchant vessels into the open ports of the United States. In retaliation the Soviet Government was compelled, as of January 1, 1968, to take analogous steps with regard to U.S. merchant ships. In accordance with an understanding reached in 1973 the right of Soviet and U.S. merchant ships to enter the free ports of the U.S.S.R. and the United States was restored.

The Soviet Union is a signatory of the Geneva Convention on Territorial Waters and the Adjoining Zone of April 29, 1958.[21] In

20. Under Soviet law, "a flight into or out of the U.S.S.R. without permission, the non-observance of the route stated in the permission . . . or any other violation of international flight rules shall be punished by imprisonment for a term of one to ten years or by a fine of up to 10,000 rubles with or without the confiscation of the aircraft." Law of December 25, 1958, Law on Penal Responsibility for State Crimes, art. 21, [1959] 1(933) Ved. Verkh. Sov. S.S.S.R. 40.

21. Decree of the President of the Supreme Soviet of the U.S.S.R. on the Ratification of the Convention of the Law of the Sea, [1960] 42(1026) Ved. Verkh. Sov. S.S.S.R. 40. Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. In signing this convention, the Soviet Union made the following reservation to Article 23: "The Government of the U.S.S.R. considers that a coastal state has the right to institute a procedure requiring the issuance of permission for the passage of foreign warships across its territorial waters." VOENNO-MORSKOI MEZHDUNARODNO-PRAVOVOI SPRAVOCHNIK (NAVAL INTERNATIONAL LAW REPORTER) 88 (1966).

accordance with this convention foreign non-military vessels have the right of peaceful passage across Soviet territorial waters. During this passage across Soviet territorial waters foreign ships and their crews must observe the laws, decisions and rules of the coastal state concerning: the shipping regime in territorial waters; the procedure for using radio communication, radar and so on; the procedure of using the services of pilots in hazardous areas; roadsteads and regions closed to shipping; the procedure for enforcing penal jurisdiction on board a foreign vessel in the territorial waters of a coastal state; and so on. The authorities of a coastal state exercise penal jurisdiction when a crime committed on a ship affects the coastal states or violates the legal order in the territorial watersn and also when the captain of the vessel or the consul of the country whose flag is flown by the vessel requests assistance. The authorities do not exercise their jurisdiction in the event the crime has been committed on the ship before it enters the territorial waters of the coastal state with the exception of crimes listed in international agreements designed to combat crime.

The Legal Status of Soviet Foreign Trade Organizations

V.V. LAPTEV*

In the Soviet Union the means of production have been socialized and are socialist property. Socialist property is the economic foundation of the U.S.S.R. and takes the form of state property, cooperative property, or property of social organizations. State property, i.e., property owned by the entire people in the person of the state, is the leading form of socialist property.

In the U.S.S.R. economic activity is pursued by socialist enterprises and organizations: state, cooperative, and social. They function on the basis of the state plan for economic development which embraces the country's entire economic life.

Foreign trade is organized on the basis of state monopoly. State foreign trade organizations have been set up to handle particular areas of foreign trade. The concept "foreign trade organization" includes only those organizations that directly engage in foreign trade and does not cover the foreign trade administration agencies. In this sense the Ministry for Foreign Trade of the U.S.S.R. and the State Committee of the Council of Ministers of the U.S.S.R. for Foreign Economic Relations, which direct foreign trade and external economic relations, are not foreign trade organizations.[1]

The all-union foreign trade associations[2] are the most typical foreign trade organizations. As a rule, they are organized along the commodity principle; in other words, they export or import a specific range of goods. Some are strictly export and others are strictly import associations. In individual cases their activity is confined to a specific

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1. For details see, V.S. POZDNIAKOV, GOSUDARSTVENNAIA MONOPOLIA VNESHNEI TORGOVLI (THE STATE MONOPOLY OF FOREIGN TRADE) (1969).

2. The Russian word ob"edinenie, which literally means "combination" or "union" and used to be commonly translated as "combine," is generally translated as "organization" in the phrase "Foreign Trade Organization" by American sources. Mr. Laptev prefers the use of the English word "association," and of the phrase "Foreign Trade Association." The same word is invariably translated as "association" when referring to the Soviet industrial associations created by the legislation of 1973-1974 to unite previously separate domestic economic enterprises and institutions. However, the common American abbreviation "FTO" for the Soviet foreign trade entities will probably preserve the use of the phrase "Foreign Trade Organizations" by American writers. (Editor's note)

territory,[3] but as a general rule they may conduct their activities in any territory, both in the U.S.S.R. and abroad.

Foreign trade associations are economic organizations that function on the basis of economic accountability and enjoy the rights of a juristic person. This definition is in the rules of all the foreign trade associations set up in the Soviet Union.

One characteristic of a foreign trade association is that it directly conducts foreign trade transactions on the basis of economic accountability. "Economic accountability" (*khozraschot*) is the method of socialist economic management founded on the application of the objective economic laws of socialism. It is characterized by the following basic principles or elements: property independence, operational economic independence, the payment of the cost of economic activity from its own incomes and the achievement of profitability, material incentives, and responsibility for the results of economic activity. Economic accountability is the general principle of the organization of economic activity in all spheres of the Soviet economy. It has been fostered particularly during the economic reform enforced in the Soviet Union in recent years.[4]

Foreign trade associations are state organizations. They operate under the guidance of a higher organ of state administration. Usually this organ is the Ministry for Foreign Trade of the U.S.S.R., while some associations are subordinated to the State Committee of the Council of Ministers of the U.S.S.R. for Foreign Economic Relations. In individual cases foreign trade associations are set up along the lines of other organs of economic leadership.[5]

A foreign trade association, as a state organization, is formed on the basis of an administrative act of the competent organ of state administration, which in most cases is the Ministry for Foreign Trade

3. For example, Vostokintorg conducts foreign trade operations in a wide range of goods in a number of Asian countries. Lenfintorg is set up for trade with Finland, Dalintorg for trade with Japan.

4. For details on economic accountability see S.K. TATUR, KHOZIAISTVENNY RASCHET V PROMYSHLENNOSTI S.S.S.R. (ECONOMIC ACCOUNTABILITY IN SOVIET INDUSTRY) (1970); D.A. ALLAKHVERDIAN, KHOZRASCHET I UPRAVLENIE (TEORIIA, OPYT, PERSPEKTIVY) (ECONOMIC ACCOUNTABILITY—THEORY, PRACTICE, AND PROSPECTS) (1970); A.D. SMIRNOV, OSNOVY KHOZIAISTVENNOGO RASCHETA (OCHERKI TEORII) (PRINCIPLES OF ECONOMIC ACCOUNTABILITY—OUTLINE OF THEORY) (1969); V.V. LAPTEV, LEGAL PRINCIPLES OF ECONOMIC ACCOUNTABILITY AT AN ENTERPRISE OR FACTORY DEPARTMENT (1970).

5. These organs of economic leadership include the State Committees of the Council of Ministers of the U.S.S.R. for Cinematography and the Publishing, Printing and Book Trade; the Ministry of Merchant Marine of the U.S.S.R.; and the Central Administration for Foreign Tourism attached to the Council of Ministers of the U.S.S.R. Subject to these are Soveksportfilm, Sovinfilm, Vneshtorgizdat, Sovfracht and Intourist.

of the U.S.S.R. This follows the general procedure of forming state enterprises and organizations established by the decision of the Council of Ministers of the U.S.S.R. of November 16, 1964.[6]

The same procedure covers the reorganization or liquidation of foreign trade associations. Soviet law provides for the following methods of reorganizing state enterprises and organizations: merger, amalgamation, division, separation. Foreign trade organizations are usually dissolved by reorganization. An association is entirely liquidated only in rare cases.

The establishment of foreign trade associations by organs of state administration and their subordinated character do not imply that an association may be identified with the state as such, or with the Ministry for Foreign Trade or any other organ of state administration. A foreign trade association also functions as an independent subject of the law. It concludes transactions in its own name and not in the name of the state. But acts of the state, for instance, a ban on exports or imports, are binding upon it.

Each foreign trade association has its own charter, which is issued by the Ministry for Foreign Trade of the U.S.S.R. or some other higher organ to which it is subordinated. These charters are published in *Vneshniaia torgovlia*, the official journal of the Ministry for Foreign Trade of the U.S.S.R. However, the publication of a charter does not have constitutive significance; the charter comes into force as soon as it is issued.

The charter defines the basic characteristics of a foreign trade organization as a subject of the law. The charter is also important in that it determines the date of a foreign trade association's establishment.

In order to conduct foreign trade activity an association is provided with appropriate funds, which are usually called chartered capital.[7] (With regard to other state organizations the term "chartered fund" is usually used instead of "chartered capital.") Chartered capital is firmly secured to the association but is not owned by it. Under

6. [1964] 25 SOBRANIE POSTANOVLENII PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (COLLECTED DECREES OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS) Item 145 [hereinafter cited as S.P.-S.S.S.R.].

7. Genkin, *Sub'ekty vneshnetorgovykh sdelok (Subjects of Foreign Trade Transactions)*, in PRAVOVOE REGULIROVANIE VNESHNEI TORGOVLI S.S.S.R. (LEGAL REGULATION OF THE FOREIGN TRADE OF THE U.S.S.R.) 43, 52 (D.M. Genkin ed. 1961) [hereinafter cited as PRAV. REG. VNESHTORG]; EKSPORTNO-IMPORTNYE OPERATSII— PRAVOVOE REGULIROVANIE (EXPORT-IMPORT OPERATIONS—LEGAL REGULATION) (V.S. Pozdniakov ed. 1970) [hereinafter cited as EXIM. Op.]; D.F. RAMZAITSEV, PRAVOVYE VOPROSY VNESHNEI TORGOVLI S.S.S.R. (LEGAL PROBLEMS OF THE FOREIGN TRADE OF THE U.S.S.R.) 43 (1954).

Soviet law the state is the owner of all state property. Like other state organizations, the association has the right of possession, use and disposal of the property secured to it. The aggregate of these rights is characterized in Soviet law as the right of operational management.[8]

A foreign trade association's right of operational management covers the rights enjoyed by the owner of property. However this right is dependent on the state's right of ownership. At the same time, property is secured to an association so firmly that it cannot be dispossessed of it except in cases directly stated in the law. This is of great importance because it creates the basis of an association's activity founded on economic accountability. Moreover, the property secured to an association is the foundation for the legal responsibility for an association's obligations. An association answers its obligations with the property secured to it, in accordance with the laws operating in the U.S.S.R.

An association's property is subdivided into definite categories or funds, for which there are different legal regimes in accordance with their purpose. Such funds are fixed assets, circulating assets and special funds. The fixed assets include buildings, structures, equipment and other durable means of labor. The circulating assets are designated for the day-to-day operation of the association. For a more precise delineation between these two categories of property, Soviet law prescribes formal attributes: fixed assets cover property worth over 50 rubles and used for a period of over one year, while property that is of little value (costing under 50 rubles) and wears quickly (used for less than one year) is classified as circulating assets. Money designated for operational activity and deposited in the association's account at a bank likewise constitutes circulating assets.

Goods sold by the association under export transactions are classified among its circulating assets. The case is different with goods imported by the association. In this case the association acts as an agent, in its own name but on instructions from the Soviet organization for which goods are purchased abroad. The association concludes a contract of commission with the given organization, under which at the purchase of goods the right of operational management in the property is acquired by the principal and not by the foreign trade association, which is the agent (Articles 401 and 407 of the Civil Code of the R.S.F.S.R.). Consequently, the property purchased under an import transaction is not subject to claims on the obligations of the

8. Osnovy grazhdanskogo zakonodatel'stva S.S.S.R. i Soiuznikh Respublik (Fundamentals of the Civil Legislation of the U.S.S.R. and the Union Republics), art. 21 [1961] 50(1085) Ved. Verkh. Sov. S.S.S.R. 1273, 1280 [hereinafter cited as Ved.-S.S.S.R.].

association because the given property belongs by right of operational management not to the association but to the Soviet principal.[9]

The export of goods from the Soviet Union involves two transactions. Two purchase and sales contracts are signed: one between the foreign trade association and a Soviet manufacturer, and the other between the foreign trade association and a foreign firm. In both export and import operations foreign firms sign contracts with the foreign trade associations and not directly with the Soviet manufacturer. This derives directly from the monopoly of foreign trade in the U.S.S.R. However, foreign firms may have direct contact with Soviet industrial enterprises and organizations when negotiating the terms of the contract and in the fulfilment of the contract. This is particularly important in the manufacture of sophisticated equipment and the implementation of scientific and technical cooperation.

A foreign trade association signs contracts and conducts transactions in its own name. It is an independent subject of the law and enjoys the rights of a legal entity. According to Article 11 of the Fundamentals of Civil Law of the U.S.S.R. and the Union Republics, organizations that have their own property, may acquire property and personal non-property rights, undertake obligations, and can be plaintiffs or defendants in a court of law or an arbitration tribunal, are recognized as legal entities. Thus, a legal entity is characterized by organizational unity, property independence, and the possibility of participating independently, in its own name, in relations regulated by civil law.

Each legal entity has legal capacity, i.e., the possibility of acquiring rights and undertaking obligations. According to Article 12 of the Fundamentals of Civil Law the legal capacity of a legal entity is not general but specific. This means that a legal entity may engage only in such activity as conforms to the object or purpose of its activity. The object (purpose) of the activity of a legal entity is defined in its charter.[10]

These provisions concern foreign trade associations in general. The specific legal capacity of a foreign trade association is defined in its charter. The functions of the association concerned, that is to say, the purposes for which it may conduct legal actions, are usually listed exhaustively in the charter. For instance, in the Charter of

9. V.S. POZDNIAKOV, *supra* note 1, at 118; M.G. ROZENBERG, PRAVOVOE REGULIROVANIE OTNOSHENII MEZHDU VSESOIUZNYMI VNESHNETORGOVYMI OB"EDINENIIAMI I SOVIETSKIMI ORGANIZATSIIAMI ZAKAZCHIKAMI IMPORTNYKH TOVAROV (LEGAL REGULATION OF THE RELATIONS BETWEEN ALL-UNION FOREIGN TRADE ASSOCIATIONS AND SOVIET ORGANIZATIONS WHICH ARE CUSTOMERS FOR IMPORTED GOODS) 70 (1966); EXIM. OP., *supra* note 7, at 142.

10. For details on legal entities see S.N. BRATUS, SUB"EKTY GRAZHDANSKOGO PRAVA (SUBJECTS OF THE CIVIL LAW) (1950).

Soyuzpromexport, the association for export of industrial products, functions are defined as follows. In accordance with Paragraph 6 of its Charter, this association:

> a) conducts operations for the export from the U.S.S.R. and the import into the U.S.S.R. of solid mineral fuel, ores, ferrous metals, mineral fertilizers, asbestos and articles made from it, non-ore minerals, and some forms of finished manufactured goods;
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> b) takes part in planning and conducting measures to expand the export of the goods within its nomenclature and to improve the quality of these goods;
>
> c) studies the situation in foreign markets in the line of the goods within its nomenclature;
>
> d) organizes and holds thematic exhibitions and also takes part in exhibitions and fairs in the U.S.S.R. and abroad involving goods exported by it;
>
> e) takes part in drawing up, according to established procedures, the standards and technical requirements for the goods within its nomenclature;
>
> f) organizes the advertising of the goods within its nomenclature.[11]

To carry out these functions Soyuzpromexport enjoys the following rights as stated in Article 7 of its Charter:

> a) to sign contracts in the U.S.S.R. and abroad, conduct all kinds of transactions and other legal acts including credit, promissory note and banking operations with institutions, enterprises, organizations, societies, companies, and individuals, and to claim and answer in a court of law or an arbitration tribunal;
>
> b) to build, purchase, alienate, hire, and rent in the U.S.S.R. and abroad subsidiary enterprises for its activities;
>
> c) to purchase, alienate, hire, or rent in the U.S.S.R. and abroad all kinds of movable and real property;
>
> d) to set up branches, offices, permanent representatives, and agencies in the U.S.S.R. and abroad in accordance with operating laws, and also to take part in all kinds of societies and organizations whose activities conform to the purposes of the association.[12]

The association's organs or representatives act legally on its behalf. The organs are the chairman and vice-chairmen of the association. They are appointed by the higher body to which the association is subordinated. The duties of the chairman and his deputies are established by the chairman. Accordingly, the chairman and the vice-chairmen head offices, departments, and other structural subdivisions of the association.

The chairman directs all the affairs and has charge of the property of the association, conducts transactions and other legal acts linked with the activity of the association and conducts the business of the association with institutions, enterprises, organizations and

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11. [1970] 10 VNESH. TORG. 63.

12. The functions and powers of Tekhmasheksport are defined in similar detail in the charter of that organization, published in [1969] 11 VNESH. TORG. 63.

individuals in the U.S.S.R. and abroad.

The representatives of an association are persons authorized to act on behalf of the chairman. The power-of-attorney for concluding foreign trade transactions on behalf of the association is issued in each separate case with the permission of the Ministry for Foreign Trade of the U.S.S.R. Persons receiving such a power-of-attorney may act on behalf of the association only after their powers-of-attorney may have published in the journal *Vneshniaia torgovlia.*

A special procedure has been established by Soviet law for the signing of foreign trade transactions.[13] Under this procedure foreign trade transactions must in all cases be signed by two persons. Promissory notes and other monetary obligations in foreign trade issued by an association in Moscow must be signed by the chairman or his deputy (first signature) and by the association's chief bookkeeper (second signature). All foreign trade transactions, including promissory notes and other monetary obligations, concluded by the association outside Moscow (in the U.S.S.R. and abroad) must be signed by the chairman of the association or his deputy (first signature) and the person acting on a power-of-attorney (second signature), or by two persons, each of whom has received a power-of-attorney to sign transactions on behalf of the association with rights of first and second signature respectively.

The procedure of signing foreign trade transactions differs from the procedure of signing contracts between Soviet state enterprises and organizations. These are signed by one person—the chairman of the enterprise or organization. A common feature is the mandatory requirement that all foreign trade contracts and other transactions be in writing and be signed by authorized persons.

The implementation of property responsibility for the obligations undertaken by foreign trade associations is of great importance.[14] This responsibility is governed by the general rule on the

13. Decree of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. of October 13, 1930, [1930] 56(583) SOBRANIE ZAKONOV I RAZPORIAZHENII RABOCHE-KREST'IANSKOGO PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK 1083 [hereinafter cited as S.Z.-S.S.S.R.]; Decree of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. of December 26, 1935, [1936] 3 S.Z.-S.S.S.R. 3.

14. *See* Genkin, *Pravovoe polozhenie sovietskikh eksportnykh i importnykh ob"edineii za granitsei (The Legal Status of Soviet Export and Import Associations Abroad)* in PROBLEMY MEZHDUNARODNOGO CHASTNOGO PRAVA (PROBLEMS OF PRIVATE INTERNATIONAL LAW) 3, 14 (L.A. Lunts ed, 1960); *See also,* I.S. PERETERSKII & S.B. KRYLOV, MEZHDUNARODNOE CHASTNOE PRAVO (PRIVATE INTERNATIONAL LAW) 92 (1959); L.A. LUNTS, MEZHDUNARODNOE CHASTNOE PRAVO OSOBENNAIA CHAST' (PRIVATE INTERNATIONAL LAW—SPECIAL PART) 49 (1963); M.M. BOGUSLAVSKII, IMMUNITET GOSUDARSTVA (STATE IMMUNITY) 180 (1962).

responsibility of juristic persons established in Article 13 of the Fundamentals of Civil Law and is usually reproduced in the charters of the foreign trade associations. According to these, an association is answerable for its obligations with that property against which a claim may be made under Soviet law. This means, in particular, that a claim cannot be made to the fixed capital of the association. Neither the state nor other state organizations bear the responsibility for an association's obligations. For its part, the association likewise bears no responsibility for claims made against the state or other state organizations. An association's independent property responsibility for its obligations springs directly from its property independence, by the fact that a certain part of state property is secured to the association, and that it has the right of operational management of this property.

In the implementation of responsibility, a claim may be made only against an association's circulating assets, ordinarily its cash funds in its bank account. Circulating assets are firmly secured to the association within limits of the established norm. The circulating assets within the limits of the norm cannot be taken from the association by a higher organ. Only circulating assets over and above the norm may be taken in individual cases envisaged by law. This procedure not only gives a sound financial basis for the business activities of an association but also ensures the possibility of exacting the corresponding sums in fulfilment of the association's responsibility for its obligations.

Soviet foreign trade associations are legal entities created under Soviet law and, as such, their responsibilities are determined by Soviet law. Thus, no matter what criteria of international law may be applied (the criterion of the place of its office or the criterion of its whereabouts), it will be found that in all cases Soviet law is the association's private law.[15]

In some cases all-union export and import agencies are set up for the conduct of export and import operations instead of all-union foreign trade associations. The functions, rights and duties of these export and import agencies are similar to those of the foreign trade associations.[16] However, these agencies must be distinguished from the agencies set up in the foreign trade associations as structural subdivisions. The latter do not enjoy the rights of legal entities and they enter into legal relations only on behalf of the corresponding association.

15. For details see Genkin, *supra* note 14, at 3; L.A. LUNTS, *supra* note 14, at 183; L.A. LUNTS, VNESHNETORGOVAIA KUPLIA-PRODAZHA (PURCHASES AND SALES IN FOREIGN TRADE) 91 (1972).

16. See, for example, the charter of Tekhsnabeksport, [1963] 12 VNESH. TORG. 54.

In addition to state foreign trade organizations the right to conduct foreign trade transactions is enjoyed by Tsentrosoyuz, the central union of the consumers' cooperatives. Tsentrosoyuz is a union of consumers' cooperative organizations whose main purpose is to conduct trade in order to supply consumer goods to the population. It has a foreign trade association, Soyuzkoopvneshtorg, which conducts export and import operations.[17]

In individual cases Soviet organizations taking part in foreign trade operations are set up in the form of joint-stock companies. One of these is Vneshtorgbank of the U.S.S.R., the bank for foreign trade. Vneshtorgbank provides, among other services, credits for foreign trade and conducts settlements on the export and import of goods.[18] Vneshtorgbank enjoys the rights of a legal entity. It has a joint-stock capital, a reserve capital and also special funds. Its joint-stock capital is established at 300 million rubles divided into 6,000 shares (of 50,000 rubles each), which are paid in full by the shareholders. Shares in Vneshtorgbank may be owned by Soviet state organizations, institutions and enterprises, and also by cooperative organizations. Only inscribed shares are valid. The administration of Vneshtorgbank consists of the general meeting of shareholders, the council, the board and the auditing commission.[19]

Lawyers play an important role in the activities of foreign trade organizations. These organizations have legal departments (or bureaux), while the Ministry for Foreign Trade of the U.S.S.R. has a treaties and legal department. The general rules on legal work in the national economy apply to the organization and work of the legal service in foreign trade. These rules were established by a decree of the C.P.S.U. Central Committee and the Council of Ministers of December 23, 1970 entitled, "On Improving Legal Work in the National Economy,"[20] and by a decree of the Council of Ministers of the U.S.S.R. of June 22, 1972, issuing the "General Statute on Legal Consultation Offices."[21]

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17. *See*, the charter of Soiuzkoopvneshtorg, [1963] 1 VNESH. TORG. 52.

18. For details on the activities of Vneshtorgbank, see Al'tshuler, *Mezhdunarodnoe raschetnye i kreditnye pravootnosheniia (International Legal Payment and Credit Relations)*, in PRAV. REG. VNESHTORG 377; Shishov, *Raschetnye i kreditnye otnosheniia vneshnetorgovykh ob"edinenii c drugimi sovetskimi organizatsiiami (Payment and Credit Relations between Foreign Trade Associations and other Soviet Organizations)*, in PRAV. REG. VNESHTORG 423; VALIUTNYE OTNOSHENIIA VO VNESHNEI TORGOVLI S.S.S.R. (CURRENCY RELATIONS IN THE FOREIGN TRADE OF THE U.S.S.R.) (A. B. Al'tshuler ed. 1968).

19. *See* the charter of the Bank for Foreign Trade of the U.S.S.R. issued by decree of the Council of Ministers on August 22, 1962, [1963] 3 VNESH. TORG. 45.

20. [1971] 1 S.P.-S.S.S.R., Item 1.

21. [1972] 13 S.P.-S.S.S.R., Item 70.

These decrees define the functions, rights and duties of lawyers. They are founded on the premise that the significance of the work of lawyers is growing in view of the extension of the rights of enterprises and organizations under the economic reforms being put into effect in the Soviet Union. Questions concerning business activity must be decided by the enterprises and organizations themselves within the limits of their competence and in strict conformity with the law. The principle of legality must be strictly observed in business relations. It is the task of the legal service to ensure legality in the activities of enterprises and organizations. In addition, workers of the legal service protect the rights and lawful interests of enterprises and organizations. Moreover, they use legal means to improve the economic indices of business activity, safeguard socialist property, and ensure the fulfilment of contract obligations.

As a general rule provisions on structural subdivisions are approved by the enterprises and organizations themselves. The General Statute on Legal Departments stresses the considerable importance of the work of these departments in ensuring legality in the activities of enterprises and organizations. The status of the legal consultant of an enterprise or organization is reinforced by the fact that the head of the legal department may be appointed and dismissed only by a higher organization. The legal consultant is subordinated to the director of the enterprise or organization but he controls the actions of the director from the standpoint of legality. All the legal documents signed by the director must be scrutinized and approved beforehand by the legal department (the legal consultant). If, in spite of the legal department's (legal consultant's) conclusion that a document is illegal, it is signed by the director, the legal department is required to inform the higher organization. These rules ensure the observance of legality in the work of enterprises and organizations.

In small enterprises, where the volume of legal work does not warrant the employment of staff legal consultants, legal services are provided by lawyers from the organized bar ("college of advocates"), which provides legal services to citizens and organizations. Members of the Soviet bar conduct cases in court and in arbitration tribunals and provide legal assistance through consultation. The bar is run on money received from clients. Iniurcollegia is a special organization of lawyers set up to serve foreign citizens and legal entities in the U.S.S.R. and to serve Soviet citizens and organizations abroad.

Methodological guidance of legal work in the national economy is provided by the Ministry of Justice of the U.S.S.R. This ensures the uniform and correct application of law and the strict observance of legality in business relations.

Discussion

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.

Legal Forms of the Use of Works of Literature, Science, and Technology in Soviet-American Relations

M.M. BOGUSLAVSKII

I. INTRODUCTION

In keeping with the general principle underlying its foreign policy, namely, the principle of peaceful coexistence, the Soviet Union is promoting constructive relations in the fields of science, technology and culture with all countries, regardless of their socio-economic systems.

In promoting scientific, technical and cultural cooperation, the U.S.S.R. is successfully giving effect to the Peace Program approved at the 24th Congress of the Communist Party of the Soviet Union.

The scientific, technical and cultural relations between the Soviet Union and the United States have their own history. The first agreements on technical assistance were signed as early as the 1920's by a number of American firms (Ford, among others). Under these agreements Soviet organizations were given the right to use patents belonging to those firms. At the close of the 1920's, individual agreements, as for example, the agreement with the Radio Corporation of America, began to include terms for the exchange of technical know-how.[1] In that same period the Soviet State Publishing House signed an agreement for the publication of the works of Theodore Dreiser in the U.S.S.R.[2] After the Second World War the signing of an agreement with Dresser Industries on the purchase of licenses for Soviet turbodrills laid the beginning for trade in licenses between the U.S.S.R. and the United States.

Today, in pursuance of its policy of promoting scientific, technical and cultural relations with other countries, the Soviet Union has

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1. *See* 2 ISTORIIA SOVETSKOGO GOSUDARSTVA I PRAVA (SOVETSKOE GOSUDARSTVO I PRAVO V PERIOD STROITEL'STVA SOTSIALIZMA, 1921-1935GG.) (HISTORY OF THE SOVIET STATE AND LAW—SOVIET STATE AND LAW IN THE PERIOD OF THE BUILDING OF SOCIALISM, 1921-1935) 368 (1968); M.M. BOGUSLAVSKII, PRAVOVOE VOPROSY TEKHNICHESKOI POMOSHCHI S.S.S.R. INOSTRANNYM GOSUDARSTVAM I LITSENZIONNYE DOGOVORY) (LEGAL QUESTIONS OF SOVIET TECHNOLOGICAL ASSISTANCE TO FOREIGN COUNTRIES AND LICENSE AGREEMENTS) 6-10 (1963).

2. E. DREISER, MAIA ZHIZN C DREISEROM (MY LIFE WITH DREISER) 151-152 (1953).

signed a number of agreements safeguarding various forms of intellectual property. In 1965, it signed a basic multilateral international agreement on questions of invention, the Paris Convention on the Protection of Industrial Property,[3] and in 1973 it acceded to a basic multilateral agreement on copyright law, the Universal Copyright Convention.[4]

The Soviet Union's accession to agreements that have been signed by the United States creates favorable conditions for the promotion of relations between Soviet and American organizations and firms in the mutual utilization of the scientific, technical and cultural achievements of the two countries.

II. PROTECTION OF RIGHTS TO INVENTIONS

In relations between the U.S.S.R. and the United States, scientific and technical achievements of one country may be used by the other in the following basic forms: 1) rights of use of inventions or know-how may be granted under a general contract for the delivery of complete sets of equipment, or under a designing contract, or engineering contract, etc.; 2) rights of use of scientific or technical achievements may be granted in the course of joint elaboration and implementation of various programs and projects in fundamental and applied sciences, e.g., through joint patenting of inventions; 3) such rights may be granted by purchase and sale or exchange of licenses.

Under all these forms it is of exceptionally great importance that legal protection be provided both for the inventor and for the user of the invention. A Soviet decree of August 21, 1973 entitled Rules on Discoveries, Inventions and Rationalization Suggestions gives to foreign inventors (including legal entities) and their heirs the rights envisaged in these regulations and in other acts of the U.S.S.R. and the Union Republics, thus effectively putting foreign inventors on an equal legal footing with citizens (including legal entities) of the Soviet Union.[5]

Accession to the Paris Convention facilitates the reciprocal patenting of the inventions of Soviet and U.S. organizations and firms and, in particular, makes it possible to apply the rules on convention priority. Like all other rules in the Convention, the rule of convention priority is based on reciprocity. This means that the same priority

3. Paris Convention for the Protection of Industrial Property, *done* June 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923.

4. Universal Copyright Convention, *done* Sept. 6, 1952, 6 U.S.T. 273, T.I.A.S. No. 3324, 216 U.N.T.S. 132.

5. [1973] 19 SOBRANIE POSTANOVLENII PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (COLLECTED DECREES OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS) [hereinafter cited as S.P.-S.S.S.R.] 109, art. 7; [1973] 10 VOP. IZOB. 58-79.

privileges are accorded in the U.S.S.R. to all applicants from foreign countries that have signed the Convention. In this connection, priority for foreign inventions is established, in accordance with the Paris Convention, by the date of the priority of the first correctly executed application submitted in a country that has also signed this agreement, provided the application is submitted in the U.S.S.R. within twelve months of that date.

Persons who, on the basis of an international treaty or agreement signed by the U.S.S.R., claim priority of an application submitted earlier must in their application to the State Committee of the Council of Ministers of the U.S.S.R. for Inventions and Discoveries name the country in which the invention was first registered, and give the date on which their application was submitted in that country.

The Committee determines what documents must be submitted by the applicant in order to establish the date of priority of the given invention and the deadline for submitting these documents if no other provision is made in international treaties or agreements (Article 52 of the 1973 Rules).

Further, the Rules provide that a decision to issue a certificate of invention or patent may be annulled (entirely or partially) or reconsidered upon the receipt of an application enjoying earlier priority on the basis of an international treaty or agreement signed by the U.S.S.R. (Article 60 of the Rules).

American firms may ensure legal protection of inventions in the Soviet Union by receiving a patent or a certificate of invention. In the event of the receipt of a patent, the holder of the patent enjoys exclusive rights to the invention for 15 years. No one has the right to use the invention without the consent of the patent holder. The receipt of a certificate of invention means that the state has the exclusive rights to the invention.

Inventions protected by certificates of invention are used by state enterprises and organizations.[6] The 1973 Rules state that no special permission is required for this use of an invention protected by an author's certificate. "The use of such inventions by other organ-

6. On the legal nature of a certificate of invention, see: PRAVOVYE VOPROSY NAUCHNO-TEKHNICHESKOGO PROGRESSA V S.S.S.R. (LEGAL QUESTIONS OF SCIENTIFIC AND TECHNOLOGICAL PROGRESS IN THE U.S.S.R.) 238-48 (M.M. Boguslavskii ed. 1967); V.A. DOZORTSEV, OKHRANA IZOBRETATEL'STVA V S.S.S.R. (PROTECTION OF INVENTIONS IN THE U.S.S.R.) (1967); V.A. DOZORTSEV, PRAVOVOI REZHIM AVTORSKOGO SVIDETEL'STVA V USLOVIIAKH NOVOI SISTEMY PLANIROVANIIA I EKONOMICHESKOGO STIMULIROVANIIA (THE LEGAL SYSTEM OF INVENTORS' CERTIFICATES IN THE FRAMEWORK OF THE NEW SYSTEM OF PLANNING AND ECONOMIC INCENTIVES) (1969); V.R. SKRIPKO, OKHRANA PRAV IZOBRETATELEI I RATSIONALIZATOROV V S.S.S.R. (PROTECTION OF THE RIGHTS OF INVENTORS AND RATIONALIZERS IN THE U.S.S.R.) (1972).

izations and persons for the purpose of manufacture is allowed only with the permission of the State Committee of the Council of the U.S.S.R. for Inventions and Discoveries" (Article 27).

The freedom of choice between these two legal forms is limited by the fact that only certificates of invention are issued for substances obtained chemically, medicines, foods and cosmetics, for substances obtained by nuclear fission, and devices or methods for the generation or use of atomic energy.

In the Soviet Union, American firms usually receive patents, although in some cases applications have also been submitted for certificates of invention. Naturally the question that arises concerns the significance of a certificate of invention to a foreign inventor. First, like his Soviet counterpart, the foreign holder of a certificate of invention has the right to receive remuneration (up to 20,000 rubles). Second, certain consequences may ensue for foreign trade and other analogous operations. Inasmuch as a certificate leaves the exclusive right to the use of an invention in the Soviet state, this right cannot be violated in the U.S.S.R. by a foreign firm. The pertinent Soviet literature has drawn attention to the following: a) in the event a foreign citizen or legal entity puts on display at an exhibition in the U.S.S.R., articles in which use has been made of an invention protected by a Soviet certificate of invention a claim may be made to the exhibitor; b) when foreign trade transactions are concluded for the sale to the U.S.S.R. of articles in which use has been made of inventions protected by Soviet certificates of invention, the Soviet foreign trade organization concerned may, in accordance with established international practice, ask for a price reduction (as a sort of license remuneration for the use of a Soviet invention).[7]

This does not mean that the issuance of a certificate of invention in the U.S.S.R. gives grounds for banning the import of the corresponding articles to the Soviet Union.

Attention must be drawn also to the fact that under Soviet legislation remuneration for the use of an invention is paid if the invention has been used in imports from foreign countries (Part III of the 1973 Rules). Hence, we would draw the conclusion that a foreigner who receives a certificate of invention in the U.S.S.R. has the right to remuneration for the use of his invention in the Soviet Union if it has been used as a result of a contract signed with a foreign firm for the purchase of equipment and if this equipment is used in the U.S.S.R. (if no other terms are specified in the contract).

The receipt of a certificate of invention by a foreigner in the U.S.S.R. does not mean that the Soviet State receives the right to

7. See V.A. DOZORTSEV, *supra* note 5, at 46-47.

patent that invention in other countries or that Soviet foreign trade organizations receive sole rights to the export of the corresponding articles to other countries. If a patent has been issued in a foreign country that right belongs to the holder of the patent and not to the Soviet State.

III. PURCHASE AND SALE OF LICENSES

Licenses for Soviet inventions and know-how have been sold to American firms in recent years. At the same time, Soviet organizations have been purchasing licenses from American firms. The agreements for the sale of licenses usually name the Soviet organizations that own the patents or have submitted patent applications, and declare that Litsenzintorg has empowered them to conduct negotiations for the granting of licenses on its behalf. It must be remembered that in foreign countries Soviet inventions are patented on behalf of the organizations (industrial enterprises or institutes) where the invention has been developed or on behalf of the actual inventors. The sole right to the invention therefore belongs to such an organization or individual, not to the foreign trade organization. For this reason, although all Soviet foreign trade is conducted by special foreign trade organizations, and all foreign trade in licenses is conducted by the foreign trade organization Litsenzintorg, a direct part in the negotiations on the sale of licenses at all stages, beginning with the preliminary talks to ascertain the possibility of a sale and the terms of the agreement, is usually taken by representatives of the enterprise or inventor, who usually act as consultants of Litsenzintorg on all technical matters arising in the course of the talks. Thus, the enterprise and other organizations play an active role in the negotiations on the sale of licenses and in the fulfilment of the terms of the agreement (drawing up technical documents, rendering technical aid in mastering the object of the license, sending experts, and so on). The actual relations between the foreign firm and the Soviet enterprise or institute are put into effect in the long-term relations arising from the fulfilment of the agreement.

In accordance with the foreign trade system in the U.S.S.R., when licenses are purchased, a foreign trade organization, usually Litsenzintorg, acts as one of the parties to the contract.[8] A license is purchased on a commission basis, and the enterprise or organization for which the license is purchased acts as the party entitled to the commission.

All Soviet enterprises (manufacturers of the corresponding articles) may be interested in the use of the object of a license (invention, know-how). For that reason a contract may provide for the right to

8. Charter of Litsenzintorg, in [1962] 11 VNESH. TORG. 52-53.

use the given design or method and also the right to manufacture the given article at enterprises throughout the Soviet Union. This may be done by including in the contract a clause stating that all the rights granted by the licensor to the licensee are automatically extended to the enterprises in the country of the licensee.

Thus, if an American company has a patent in the Soviet Union, the license may be granted only for the organization on whose behalf and instructions the license agreement is signed, if, of course, no other provision is made in the agreement. In Soviet literature it has been noted that cases are known where foreign sellers of licenses demanded that the enterprise concerned should indicate in the license agreement where the license would be used. When the need for using the same license arose at some other enterprises, this became the subject of an additional agreement between the parties.[9]

Thus, the question of determining the circle of enterprises where the license is to be used, the question of granting the right to export the article manufactured under a foreign license, and so on, are settled by agreement between the parties. In Soviet license practice the signing of agreements on terms of exclusive license rights is the most widespread in both the purchase and sale of licenses.

It is usually stipulated that the seller of a license grants the purchaser of the license sole rights to the use of the invention, technical achievement, or production secret, on the terms defined in the contract. The license rights and the territory where the object of the license may be used are specified in the contract in accordance with the usual terms of international trade in licenses.

It must be noted that the standard license agreements used by Soviet organizations do not contain any special provision. They state the usual conditions applied in trade in licenses. In this area the rules of standard agreements can only facilitate the drawing up of specific terms but they can under no circumstances replace such terms. The specifics of the license trade are much too extensive and the objects of agreements are much too varied, ranging from pharmaceutical goods to electronics. For this reason no license agreement is absolutely identical with another.

As we have pointed out, in Soviet practice when licenses are sold the agreements are, in most cases, signed on terms of exclusive rights to the licenses. In these agreements the territory where the right accorded by them may be used is usually narrowed down as far as possible. This makes it possible to conclude with the firms of other countries outside the territory defined in the agreement other license

9. M.L. GORODISSKII, LITSENZII V SOVETSKOI VNESHNEI TORGOVLI (LICENSES IN SOVIET FOREIGN TRADE) 59 (1972).

agreements regarding the use of the same object of the license.

Legal problems relating to patents are the most complex of all the problems that arise in license agreements. They are settled individually in each separate contract.[10] When a license is purchased, Soviet foreign trade organizations usually strive to obtain a guarantee that the seller has the necessary volume of rights to the use of the given invention, know-how, and so on, having in mind that in the fulfilment of the agreement the rights of third parties will not be affected. This condition is of practical importance, particularly in cases where the seller of the license is not the owner of all the patents concerned.

For that reason, license agreements usually contain the provision that the seller (licensor) accords the buyer (licensee) the full volume of rights in accordance with the patents listed in the supplement to the agreement.

This concerns the patents belonging to the seller and the patents belonging to third parties. If the seller is unable to receive from the owner of the patent permission for its use, the minimum provision usually made is that the seller must find another settlement ensuring production under the license.

As a rule, agreements on the purchase of licenses and agreements on the sale of licenses provide for the rendering of technical assistance in the manufacture of "articles under the license." Further, it must be noted that the term of the operation of the agreement on the purchase of a license is usually fixed at from five to ten years.

Regarding license remuneration, the practice in the Soviet Union is that an initial payment is usually made when the agreement is signed or comes into force and is followed by the annual payment of royalties.

IV. COPYRIGHT

The participation of the Soviet Union and the United States in one and the same international agreement, the 1952 Universal Copyright Convention, creates a sound legal basis for the mutual use of the works of literature, science, music and art by authors of the two countries. The Universal Copyright Convention came into force in the U.S.S.R. on May 27, 1973.[11] From that date onward the copyright situation in the relations between our two countries has changed

10. *Id.*

11. [1973] 24 S.P.-S.S.S.R. 139. For details of the U.S.S.R.'s accession to the Universal Copyright Convention *see*: Boguslavskii, *Novoe v sovetskom avtorskom prave (New Developments in Soviet Copyright Law)*, [1973] 7 SOV. GOS. PRAV. 56; M.M. BOGUSLAVSKII, VOPROSY AVTORSKOGO PRAVA V MEZHDUNARODNYKH OTNOSHENIIAKH (QUESTIONS OF COPYRIGHT LAW IN INTERNATIONAL RELATIONS) (1973).

fundamentally. Earlier, as was repeatedly pointed out in various publications in the United States, due to the absence of an international copyright agreement between our countries, a publisher in the United States could not receive exclusive rights to the translation of a Soviet work in the United States. Moreover, there was always the possibility of a parallel publication of a book of a Soviet author in an English language translation not only in the United States, but also in Canada, Britain, and other English-speaking countries. This circumstance was not conducive to the expansion of the publication and performance of Soviet works in the United States and restricted the volume of the publication chiefly of Soviet scientific and technical literature.

Both in the Soviet Union and the United States the works of American and Soviet authors respectively could be published and used without the signing of agreements and without the payment of the corresponding royalties. In the U.S.S.R. the volume of the publication of works by American authors has always been large. Suffice it to mention that in the period from 1918 to 1972 the works of American fiction published in the U.S.S.R. totalled 3,633 printings with 157 million copies in 55 languages. In 1972 alone there were 76 printings with 4.8 million copies.

Under the terms of the Universal Convention the U.S.S.R. and the United States will henceforth grant "national treatment" to authors of the other country; that is, an American author whose work is published for the first time in the Soviet Union will be granted the same rights as a Soviet author, and a Soviet author whose work is published in the United States will be granted the same rights as an American author. Each country will afford the same protection to the works of citizens of the other country as it gives to the works of its own citizens published for the first time in its territory (Article II of the Convention).

What rules of Soviet legislation are applicable in the use of works by American authors in the U.S.S.R.? Rules on questions of copyright are contained in the Fundamentals of Civil Law of the U.S.S.R. and the Union Republics and in the civil codes of the Union Republics.[12]

12. On Soviet copyright law *see:* V.I. SEREBROVSKII, VOPROSY SOVETSKOGO AVTORSKOGO PRAVA (QUESTIONS OF SOVIET COPYRIGHT LAW) (1956); M.V. GORDON, SOVETSKOE AVTORSKOE PRAVO (SOVIET COPYRIGHT LAW) (1955); B.S. ANTIMONOV, AVTORSKOE PRAVO (COPYRIGHT LAW) (1957); O.S. IOFFE, OSNOVY AVTORSKOGO PRAVA (PRINCIPLES OF COPYRIGHT LAW) (1969); Zilbershtein, *Avtorskoe pravo na muzikalnye proizvedeniia (Copyright for Musical Works)*, in SOVETSKII KOMPOZITOR (THE SOVIET COMPOSER) (1960); A.IU. VAKSBERG, AVTOR V KINO (THE AUTHOR IN FILMS) (1961); U.K. IKHSANOV, PRAVA AVTOROV PROIZVEDENII IZOBRAZITEL'NOGO ISKUSSTVA (RIGHTS OF AUTHORS OF WORKS OF FINE ART) (1966).

Let us draw attention first to the amendment of Article 102 of the Fundamentals of Civil Law introduced by decree of the Presidium of the Supreme Soviet of the U.S.S.R. on February 21, 1973. This amendment states:

> A work may be translated into another language for publication only with the consent of the author or his heirs.
>
> The competent organs of the U.S.S.R. may, in accordance with the procedure established by legislation in the U.S.S.R., permit the translation of a work into another language and its publication with the observance in appropriate cases of the terms of international treaties or the international agreements signed by the U.S.S.R.
>
> The translator owns the copyright to his translation.[13]

In a supplement to Article 101 of the Fundamentals it is stated that the work of an author (including a translation into a foreign language) may be used by other persons on the basis of an agreement with the author or his heirs except in cases stipulated by law.

Hence, it follows that the works of an American author may be translated and published in the U.S.S.R. on the basis of an agreement with the holder of the copyright. The agreement must be concluded with the Soviet organization authorized to sign agreements of this kind. In Soviet legal literature the viewpoint has been expressed that such an agreement with a foreign contractor concerning the publication or use of a work in the U.S.S.R. has the character of a foreign trade transaction, although it also has some specific features of its own.[14] Under Article 124 of the Fundamentals of Civil Law foreign enterprises and organizations may only conclude foreign trade transactions in the U.S.S.R. "with Soviet foreign trade and other Soviet organizations which exercise the right to conclude such transactions."

Under the 1973 legislation, all foreign trade transactions involving publications must be concluded with the mandatory participation of a new Soviet organization, the All-Union Copyright Agency. Naturally, the rules of Soviet law will be taken into account in the signing of such agreements. Agreements of this kind usually stipulate that in translations, all changes (for example, abridgements) shall be made with the consent of the author or his heirs.

Heirs of American authors will receive in the U.S.S.R. royalties for the use of works in the course of 25 years after the death of the author, counting from January 1 of the year subsequent to the year of the author's death.

With regard to the use of works of American authors in Soviet

13. [1973] 9(1667) Ved. Verkh. Sov. S.S.S.R. 131.

14. *See* PRAVOVOE REGULIROVANIE VNESHNEI TORGOVLI S.S.S.R. (LEGAL REGULATION OF THE FOREIGN TRADE OF THE U.S.S.R.) 359 (D. M. Genkin ed. 1961).

films, the rule of national treatment requires that such use be made in agreement with the holder of the copyright and with the payment of royalties in the following cases: a) works written specially for use in a film; b) works rewritten into a film script; c) use in a film of works that formerly had not been published in translation in the U.S.S.R.

For countries that have signed the Convention, its rules do not have retroactive force. Hence, Soviet organizations that have used the works of American authors in the past are not obliged to pay royalties for such use of works published in the United States before the Convention came into force for the U.S.S.R., i.e., before May 27, 1973.

Some provisions of the decree of February 21, 1973 evoked animated comments in the press of different countries, including the United States. For instance, on May 22, 1973 the journal *World* carried an article devoted to the Soviet Union's accession to the Convention. It stated that the Soviet Union had excluded from the operation of the Convention all works of scientific and educational literature. This does not conform to reality. In the U.S.S.R. works of scientific and educational literature are protected by copyright as are all other works. The decree of February 21 speaks of the possibility of "reproducing" in the U.S.S.R. printed works for purposes of science, study, and education without the extraction of profits. This rule covers the copying of works by photographic or other methods in limited numbers and not for the purpose of sale. It may cover, for example, the copying of an article from a scientific journal or individual pages or sections of a scientific monograph. Copies are not sold and payment may be taken only for the making of the copy. For instance, a public library may pay for a photographic copy of an article from a scientific journal.

This method of using foreign scientific works is not excluded from the practice of Soviet scientific institutions. The same practice is observed in many countries. In Britain, Sweden, Finland and other countries, it is expressly provided for in national legislation.

As regards royalties for publications, public performances, or other forms of using the works of foreign authors, the principle of national treatment should be regarded as basic in determining the size of such royalties.

Under Article 98 of the Fundamentals of Civil Law the foreign holder of the copyright on works protected in the U.S.S.R. has the right to receive royalties not only when these works are translated but also in other cases (for instance, when they are published in the original language). Royalties for a work published in the U.S.S.R. in the original language would be paid in the size and order established in the U.S.S.R. for the payment of royalties for the republication of

works of Soviet authors.

Similarly, the amount of royalties paid to foreigners is equated to the royalties paid to Soviet authors for use in television, radio and films of translations of works that have not been published earlier in translations in the given language, for the issue of works in recordings, gramophone records, tape recordings, and so on; for the public performance of plays, operas, light operas, ballets, and so on; for the public performance of literary and musical works in concert and other programs; for the use of works of fine art, and so on.

Royalties to foreign authors (or their heirs) for the use of their works in the U.S.S.R. are paid in the currency of the country of the author's (or his heirs') permanent residence or, if so desired by the author (or his heirs), in Soviet currency with the provision that it is to be used in the U.S.S.R.

Royalties paid to foreign authors or their heirs for the use of works in the territory of the U.S.S.R. (regardless of the place of payment or the currency in which the royalties are paid) are subjected to an income tax. The decree of the Presidium of the Supreme Soviet of the U.S.S.R. of September 4, 1973, states that the size of this tax and the procedure by which it is paid are the same as for the tax on royalties paid by Soviet authors or their heirs for the use of works in the U.S.S.R. However, if in the country of the receiver a higher or lower tax is levied on the royalties paid to Soviet authors or their heirs, this higher or lower tax rate is applied to royalties paid to the foreign receiver for the use of works in the U.S.S.R.[15]

The income tax on the royalties paid to foreign authors or their heirs may be decreased or abolished on terms of reciprocity by the signing of the appropriate international agreements or treaties between the U.S.S.R. and other countries. An example of such a treaty is the Convention on Taxes signed by the U.S.S.R. and the United States in Washington on June 20, 1973.[16] This Convention stipulates the following categories of incomes, received from sources in the territory of one of the contracting countries by a person residing permanently in the other contracting country, that are taxable only in that other contracting country:

> Payment for use, royalties, and also other sums paid as remuneration for the use of literary, art and scientific works, or for the use of author's

15. [1973] 37(1695) Ved. Verkh. Sov. S.S.S.R. 587.

16. The Council of Ministers of the U.S.S.R. approved this Convention and submitted it for ratification to the Presidium of the Supreme Soviet of the U.S.S.R. Izvestia, November 13, 1973. The convention had not come into force as of January 1, 1974. The text has been published in the U.S.S.R. [1973] 8 S.SH.A.: EKONOMIKA, POLITIKA, IDEOLOGIIA 118-123; Convention on Matters of Taxation, *done* June 20, 1973, 69 DEP'T STATE BULL. 169 (1973).

rights to such works, and also rights to inventions (patents, certificates of invention), industrial samples, processes and formulas, computer programs, trademarks, service marks, and other similar property or rights, or payment for the use of industrial, trade or scientific equipment, or knowledge, experience or known-how (Article III).

V. CONCLUSION: POSSIBLE PROSPECTS FOR THE PROMOTION OF COOPERATION

The mutual patenting of inventions is of considerable importance for the further expansion of economic, scientific and technical cooperation between the U.S.S.R. and the United States. The volume of such patenting is still not large and during the process of patenting substantial amounts of work and money are spent on the examination of the same inventions. Both the Soviet Union and the United States have signed the Treaty on International Patent Cooperation[17] adopted at a conference in Washington in 1970. The enforcement of that treaty would, in our opinion, help to promote the mutual patenting of inventions and to reduce the outlay of labor and means for the compilation of applications and for the examination of inventions.

Today it would be hard to overestimate the importance of the development of license trade and the reciprocal transfer of technical information. I should like to note that the participation of the U.S.S.R. and the United States in multilateral agreements by no means exhausts the possibility for creating more favorable conditions than those obtaining today for exchanges of technical achievements on a mutually beneficial basis. As everyone knows, in the U.S.S.R. there are no rules imposing discriminatory restrictions. In the Export Control Regulations of the United States, technical information and documentation are specified as any information that may be used for the design, production, manufacture, or remaking of objects or materials. The same Regulations define the export of technical information and documentation as the sending overseas of such information, in any form, from the United States. An example would be the utilization in other countries of the technical know-how and experience acquired in the United States. The annulment of all discriminatory rules of both a general and special character would undoubtedly help to promote license trade. Moreover, it would be extremely useful if the above-mentioned tax convention came into force because it envisions the reciprocal lifting of taxes on license payments.

The summit talks of 1972 created favorable conditions for the successful development of scientific and technical cooperation. An agreement on cooperation in science and technology was signed by

17. Treaty on Patent Cooperation, *done* June 19, 1970, 63 DEP'T STATE BULL. 45 (1970).

the U.S.S.R. and the United States in Moscow on May 24, 1972.[18] Cooperation under common programs, for instance, for the development of generators and for the designing of a gas turbine needed by both countries (it is planned to use this turbine in power systems during peak load periods) has been started within the framework of that agreement.

In the process of scientific and technical cooperation in various areas Soviet and American organizations and firms may develop new techniques on the level of inventions. For the time being we speak of inventions developed in each organization independently; of inventions that will belong to the organization in which they are developed. It is quite natural that an American research center would strive to ensure the legal protection of such inventions not only in the United States but also in the Soviet Union, while its Soviet counterpart would seek the same protection in its own country and in the United States. Similarly, a firm exporting goods to the Soviet Union will be interested in the legal protection of the inventions incorporated in these goods inasmuch as such protection will reliably safeguard the firm's rights in the U.S.S.R.

In addition, we believe that as cooperation develops it will be necessary to settle legal problems arising from joint inventions, i.e., chiefly inventions that may be produced jointly by citizens of the U.S.S.R. and the United States. With the expansion of various forms of production, cooperation, and the joint development of new technological processes and equipment, it would be desirable to apply basic principles determining the patenting of inventions and the conditions for their legal protection and use.

Broad prospects are opening up in the reciprocal utilization of copyrights. Soviet-American cultural cooperation can develop successfully provided it is based on respect for the sovereignty, laws and customs of each country, helps to promote mutual cultural enrichment and trust, and fosters the consolidation of peace and neighborly relations.

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18. Agreement on Cooperation in the Fields of Science and Technology, *done* May 24, 1972, 23 U.S.T. 856, T.I.A.S. No. 7346.

Legal Problems of Patents, Industrial Designs, Technical Data, Trademarks and Copyrights in Soviet-American Trade

PETER B. MAGGS*

I. INTRODUCTION

Soviet-American trade in the area of industrial and intellectual property operates under the legal framework of the Paris Convention for the Protection of Industrial Property[1] and the Universal Copyright Convention.[2] These conventions generally provide for application of a national treatment standard, but in certain instances provide for a minimum international standard of protection. Legal and commercial relations in the area of patents, trademarks and technical data have enjoyed a steady and satisfactory growth since Soviet accession to the Paris Convention. It is to be hoped that Soviet accession to the Universal Copyright Convention will mark the beginning of a similar stage of development of healthy copyright relations.

Nevertheless, because of the differences between the economic and legal systems of the Soviet Union and the United States, a number of actual and potential problems remain which could hinder the full development of trade relations. This paper will concentrate on these problems on the assumption that the audience for which it is intended is familiar with the general legal principles of American, Soviet and international law in the area under discussion, as explicated in the extensive and excellent literature on the subject.

This paper deals with the law of patents, industrial designs, technical data, trademarks and copyrights. Because the legal principles and practical problems in each of these areas are quite different, each area will be treated separately in the discussion which follows.

II. PATENTS

Soviet-American patent relations operate within the general framework of the Paris Convention for the Protection of Industrial Property which guarantees national treatment and certain grace periods to foreign patent applicants.[3]

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1. Paris Convention for the Protection of Industrial Property, *done* June 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923.

2. Universal Copyright Convention, *done* Sept. 6, 1952, 6 U.S.T. 273, T.I.A.S. No. 3324, 216 U.N.T.S. 132.

3. Maggs & Jerz, *The Significance of Soviet Accession to the Paris Convention for the Protection of Industrial Property*, 48 J. PAT. OFF. SOC'Y 242 (1966).

The basic problems of Soviet-American patent relations are the high costs of obtaining patents and negotiating licenses. These high costs have meant that only a relatively small fraction of the inventions developed in one country are patented and licensed in the other.[4] These high costs are to a large extent the result of problems of a legal nature. These problems include duplication of effort in patent searching, failure of Americans to apply for inventor's certificates, and incompatibility of American and Soviet approaches to patent licensing. Each of these problems will be discussed in turn.

It is expensive to obtain and maintain either a Soviet or a United States patent. Soviet government charges for the issuance of a patent and for maintaining it in force are substantial.[5] Legal fees involved in the issuance of an American patent are always substantial and may become astronomical if the validity of the patent becomes involved in litigation.[6] Such costs are inevitable in a system based upon novelty. It is in fact expensive to search the immense body of world technical literature and to evaluate the novelty of an invention, and this cost must be borne by someone. What is not inevitable is that the search for a given invention should be duplicated in the Soviet Union and the United States, or that a major portion of the costs of the search should be borne by the owners of the inventions involved.

The best hope for the avoidance of duplication of searches would be rapid development for means of sharing search labor and search results between the patent offices involved along the lines of the Patent Cooperation Treaty,[7] by bilateral arrangement between the respective patent offices, or by cooperation similar to that envisioned for the Council for Mutual Economic Assistance (CMEA).[8] Hopefully

4. In 1970, for example, U.S. nationals or residents filed 76,195 applications for patents in the United States but only 512 applications for patents and 2 for inventor's certificates in the Soviet Union. In 1970, Soviet nationals or residents filed 110,501 applications for inventor's certificates and 7 applications for patents in the Soviet Union but only 403 applications for United States patents. 10 INDUSTRIAL PROPERTY Annex (1971).

5. The fees for obtaining a Soviet patent and maintaining it in force for fifteen years would come to over $2,000. Decree of the Council of Ministers of the U.S.S.R. of October 27, 1967, No. 983, Fees for Patenting Inventions and Industrial Designs and Registering Trademarks, [1967] 26 SOBRANIE POSTANOVLENII PRAVITEL'STVA SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (COLLECTED DECREES OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS) [hereinafter cited as S.P.-S.S.S.R.] Item 184; [1968] 2 VOP. IZOB. 52.

6. In addition to the patent office charges which may typically amount to $300 (for details of the fee schedule, see 35 U.S.C. § 41 (1965)), lawyers' fees for prosecution of a patent application typically amount to hundreds of dollars. If interference proceedings develop, lawyers' and expert witnesses' fees may amount to many thousands of dollars.

7. 9 INDUSTRIAL PROPERTY 259 (1970).

8. Dorkin, *Problemy integratsii pravovoi okhrany izobretenii v ramkakh SEV*

some of the savings could be passed on in the form of reduced fees to the owners of the inventions involved as an incentive to the development of patent relations. It would be interesting to have Soviet thoughts on the most appropriate means of cooperation in patent searching.

Both the American and Soviet governments regard their systems for the encouragement and protection of inventions as being in the public interest; both subsidize the operation of this system. Unfortunately, owners of American inventions have generally failed to take advantage of the main type of Soviet subsidy for the protection of inventions, namely the inventor's certificate, which is issued without the high fees charged for Soviet patents.[9] This failure may be explained partly by some of the limitations upon the incentives offered by the inventor's certificate, but would also appear to result from doubts of American patent attorneys as to the legal effects of inventor's certificates.

The first problem is connected with the fact that many of the privileges offered by the inventor's certificates cannot realistically be enjoyed by foreign owners of such certificates. These include such privileges as better housing and better working conditions which may be extremely effective as incentives for invention within the U.S.S.R., but cannot meaningfully be offered to foreign inventors.

The second problem is connected with the exact legal effect of the inventor's certificate. Many American patent attorneys are uncertain as to the amount and convertibility of compensation which might be paid for a typical American invention. More seriously, the attorneys are unsure as to the exact nature of the rights conferred upon the Soviet state by the acceptance of an inventor's certificate. Clearly the state receives a royalty-free license to practice the invention within its boundaries. Does it also receive the right to exclude products produced outside the Soviet Union under license of the original inventor? Does it receive the right to export the invention to other countries where the inventor has a patent? Clarification of the answers to these questions could lead to the development of sizeable American participation in what is the main form of encouragement of inventions in the Soviet Union.

Differences in patent licensing practices present problems for the owner of an American invention seeking to sell it in the Soviet Union. Of course if he elected to receive an inventor's certificate, there would

(Problems of the Integration of Legal Protection of Inventors within the Framework of the Council for Mutual Economic Assistance), [1973] 5 VOP. IZOB. 3.

9. Lightman, *Inventors' Certificates and Industrial Property Rights*, 11 IDEA 133 (1967). For statistics see note 4, *supra*.

be no licensing problems, since such a certificate involves the issuance of a general license for the Soviet Union in return for a fair payment as computed by Soviet authorities. However, for reasons already mentioned, the owner of the American invention will almost certainly seek a Soviet patent rather than an inventor's certificate. Difficulties then arise because of the American practice of negotiating individual licenses with individual users as compared to the Soviet practice of centralizing license negotiations in a foreign trade organization in Moscow. If the Soviet proposals tend to involve the issuance of a general license for the whole country as a starting point, they tend to take the nature of a major international, political and economic negotiation rather than those of a simple commercial deal. The result is a sharp escalation of the costs of negotiating which may discourage the American owner of an invention from seeking to sell it in the Soviet Union. It would appear that American owners of inventions would be particularly interested in possibilities which might be developed by the most recent Soviet economic reforms, which grant powers to Soviet production associations to negotiate patent licenses directly with American firms, or at least to participate informally in license negotiations.

III. INDUSTRIAL DESIGNS

Legal relations in the area of protection of industrial designs between the United States and the Soviet Union are almost nonexistent. Statistics for 1971 show 2 American applications in the Soviet Union and 2 such applications granted; 10 Soviet applications in the United States and 1 such application granted.[10] These statistics may be somewhat misleading on the American side, for they do not reflect the protection of industrial designs through trademark or copyright law in the United States. (Such protection has become a common practice because American courts frequently hold contested design patents invalid for want of novelty.)

Since the protection of designs in American law is likely to continue to remain weak, there probably will be few incentives for the Soviet Union to expand its applications in this area.

IV. TECHNICAL DATA

The exchange of technical data is one of the fastest growing and most promising areas of Soviet-American trade. However, this growth is hampered by the cumbersome United States technical data export controls and by American doubts as to the protection offered by Soviet law to various forms of technical data.

The discussion below focuses upon questions that potential

10. 10 INDUSTRIAL PROPERTY Annex (1971).

American exporters of technical data might have with respect to Soviet law.

Again this is an area of great difference between Soviet and American law. Under Soviet law, Soviet enterprises are expected to cooperate with one another in the sharing of technical data for the good of the economy as a whole. Under American law on the other hand, competition is seen as the key to the health of the economy, and the legal protection of technical data in the form of trade secrets serves to encourage competition in the production of new technology.[11] The American exporter is naturally worried as to the extent to which a contract under which the Soviet licensee is to maintain the secrecy of technical data will be enforceable under Soviet law. An important related question is raised by the most recent Soviet economic reforms, namely the question of the legality of a contract to license the use of technical data to a single Soviet production association with the understanding that such data will not be released to other Soviet production associations.

A question of particular interest to the author of the present paper, but also one which should be of growing economic importance, is that of the form of legal protection to be granted to computer programs and to data in machine-readable form. This question is far from completely resolved in American law.[12] An extensive search has disclosed only limited discussion of the problem in writings by Soviet authors.[13] Yet it seems inevitable that within the next few years data and programs for computers will become one of the largest items in the American gross national product and in American exports and imports. Trade in such materials, however, can flourish only upon a clear and adequate legal basis.

V. TRADEMARKS AND SERVICE MARKS

Registration of American trademarks in the Soviet Union has been growing at a rapid rate, while registration of Soviet trademarks

11. The recent case of Kewanee Oil Company v. Bicron, 416 U.S. 470 (1974), has affirmed the legality of contracts for the protection of trade secrets under U.S. law.

12. A recent United States Supreme Court decision, Gottschalk v. Benson, 409 U.S. 63 (1972), was interpreted by some to mean that patents should not be granted on computer programs. However, the U.S. Court of Customs and Patent Appeals has interpreted the case quite narrowly, and has continued to protect programs by allowing patent claims on programmed computers. *In re* Knowlton, 178 U.S.P.Q. 486 (C.C.P.A. 1973); *In re* Comstock v. Gilmer, 178 U.S.P.Q. 616 (C.C.P.A. 1973). The Register of Copyrights will accept computer programs for copyright registration. It should be noted, however, that the protection provided by a copyright on a computer program is doubtful and in any event limited. Note, *New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. REV. 931 (1968).

13. Mamiofa, *Ob okhranosposobnosti matematicheskikh reshenii tekhnicheskikh zadach (On the Protectability of Mathematical Solutions to Technical Problems)*, [1973] 5 VOP. IZOB. 21.

in the United States has been proceeding more slowly.[14] This difference may be partially explained by the fact that the Soviet Union, like many other countries, follows a system where registration of the trademark precedes its use,[15] while the United States follows a system where use must precede registration.[16]

Despite the relative simplicity of the trademark registration process as compared to the patent application process, the vast majority of United States trademarks are not registered in the Soviet Union and the vast majority of Soviet trademarks are not registered in the United States. The main reason for this situation is the high cumulative cost of country-by-country, worldwide trademark registration. Perhaps this situation can be remedied if the Soviet Union and the United States, along with other nations, choose to accept the Trademark Cooperation Treaty recently drafted under the auspices of the World Intellectual Property Organization.[17]

For the American manufacturer, registration in the Soviet Union is a simple and wise precaution. However, as every lawyer knows, no business always takes the simplest and wisest course. If an American firm has failed to register its trademark promptly in the Soviet Union, by the time it wishes to register its trademark and sell its products in the Soviet Union or to display them at an international fair in the Soviet Union, it may find that another person, a competitor, or a frivolous applicant has already filed an identical trademark in the Soviet registry. In such a situation, the Soviet Union has the obligation under Article 6 bis of the Paris Convention for the Protection of Industrial Property to allow the cancellation of such a competing mark within five years at the request of the owner of a "well known" mark. It is unclear to this author, however, exactly how this obligation is implemented in Soviet law.

The greatest value of a trademark is in advertising and competi-

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14. In 1970, for instance, U.S. applications in the United States totaled 30,273, while U.S. applications in the U.S.S.R. totaled 164. Soviet applications in the U.S.S.R. totaled 1715, while Soviet applications in the United States totaled 0. 10 INDUSTRIAL PROPERTY Annex (1971).

15. Boguslavskii, *Legal Protection of Trademarks in the U.S.S.R.*, 52 J. PAT. OFF. SOC'Y 44 (1970); Kekalo, *Sovetskoe zakonodatelstvo o tovarnykh znakov (Soviet Legislation on Trademarks)*, [1972] 2 VOP. IZOB. 7; Decree of the Council of Ministers of the U.S.S.R. of May 15, 1962, No. 442 on Trademarks, [1962] 7 S.P.-S.S.S.R. Item 59; Statute on Trademarks, adopted by the Committee on Matters of Inventions and Discoveries Attached to the Council of Ministers of the U.S.S.R. of June 23, 1962, NORMATIVNYE MATERIALY PO SOVETSKOMU GRAZHDANSKOMU PRAVU (NORMATIVE MATERIALS ON SOVIET CIVIL LAW) 49 (1965).

16. J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (1973); Shatrov, *Pravovaia okhrana tovarnykh znakov v S.Sh.A. (Legal Protection of Trademarks in the U.S.A.)*, [1973] 6 VOP. IZOB. 27.

17. 12 INDUSTRIAL PROPERTY 215 (1973).

tion. In the Soviet Union, such value can be realized only if the trademark can be licensed to a single enterprise that is competing with other enterprises. To the foreign observer, it appears that in those areas where consumer goods are now plentiful in the Soviet Union (black and white television sets, clothing, etc.) there is a growing amount of competition among Soviet manufacturers to satisfy customer tastes. Could American manufacturers realistically expect to license their trademark to one of the competing manufacturers in such a consumer goods industry?

VI. COPYRIGHT

The recent decision by the Soviet Union to accede to the Universal Copyright Convention[18] raises a substantial number of legal questions concerning the future development of Soviet-American copyright relations. Unlike the other areas discussed in this paper, where trade has already developed to the point where important legal problems can be distinguished from trivial ones, the absence of prior experience in the legal area makes it difficult to distinguish those legal problems which will be of practical importance from those of a purely theoretical nature. Therefore, the discussion must necessarily be of a broader and more speculative nature.

Questions involve the nature of materials subject to copyright protection, the setting of scales of royalties, and the so-called moral rights of the author to control the content of publication or to prevent it entirely. Some of the problems are purely of an economic nature; others, however, by the nature of the literary subject matter, inevitably involve the political and ideological differences between the United States and the Soviet Union.

The publishing industries in the United States and the Soviet Union operate on different bases. In the Soviet Union publishers evaluate works largely by social and political criteria, while in the United States private publishers evaluate works largely by economic criteria. In addition, the United States government and private foundations support a substantial quantity of publication of materials which are deemed socially important but whose private publication would be economically unfeasible.

In addition to acceding to the Universal Copyright Convention, the Soviet Union has adopted new copyright legislation.[19] New legis-

18. Boguslavskii, *Novoe v sovetskom avtorskom prave (New Developments in Soviet Copyright Law)*, [1973] 7 SOV. GOS. PR. 56; J. BAUMGARTEN, U.S.-U.S.S.R. COPYRIGHT RELATIONS UNDER THE UNIVERSAL COPYRIGHT CONVENTION (1973). For a fuller treatment of the problems created by the Soviet Union's accession to the Universal Copyright Convention see: Maggs, *New Directions in U.S.-U.S.S.R. Copyright Relations*, 68 AM. J. INT'L L. 391 (1974).

19. [1973] 9(1667) Ved. Verkh. Sov. S.S.S.R. 131.

lation has been introduced in the United States Senate to counteract what some Americans see as a possible abuse of American copyrights by the Soviet government.[20] The effect of these developments may be analyzed by noting how, item by item, each of the types of American materials that has been published in recent years in the Soviet Union and each of the types of Soviet materials that has been published in recent years in the United States would be affected.

First consider the publication of American works in the U.S.S.R. These have included translations of scientific textbooks and scholarly articles, reproductions of American technical journals, translations and some English language editions of leading modern and classic American writers of novels and short stories, and translations of works of some American writers (e.g., victims of McCarthyism) who for political reasons had difficulty in finding markets for their works in the United States.

Publication of translations of American works in the Soviet Union will be governed by Article V of the Universal Copyright Convention which provides that for the first seven years after publication of the original, translations may not be made without the authorization of the author. Thereafter, if no authorized translation has been published, parties to the convention may allow publication of unauthorized translations with just compensation to the copyright owner. Soviet legislation, namely Articles 101 and 102 of the Fundamentals of Civil Legislation, has been revised to conform with Article V of the Universal Copyright Convention. An important exception, however, which would affect the publication of translations of American works is incorporated in paragraph 5 of the revised Article 103 of the Soviet Fundamentals of Civil Legislation. This allows newspapers to reproduce copyrighted materials in translation without permission or payment. There is inevitably a conflict between the need to publish news rapidly and the time-consuming process of obtaining copyright clearance. The Soviet resolution of this conflict in favor of the newspapers should create no problem provided the newspapers limit themselves to reasonable use of newsworthy copyrighted items. If, however, Soviet newspapers were to begin to reproduce entire short stories or serialized novels, serious questions would arise both under the provisions of Article 5 of the Fundamentals of Civil Law of the U.S.S.R. and the Union Republics concerning abuse of rights and Article I of the Universal Copyright Convention which obliges contracting states to provide adequate and effective copyright protection.

Somewhat different problems are presented by the publication of English language editions of American works of fiction and the

20. S. 1359, 93d Cong., 1st Sess. (1973).

reproduction of American technical periodicals for use by Soviet libraries. Because the knowledge of English in the Soviet Union, particularly among the scientific intelligentsia, is much more widespread than knowledge of the languages of the peoples of the U.S.S.R. in the United States, there is a substantial demand for both literary and scientific works in English. Publication of American works in English, under revised Article 97 of the Fundamentals of Civil Legislation would require in general the consent of the copyright owner.

An exception of uncertain scope is created by paragraph 7 of revised Article 103 of the Fundamentals of Civil Legislation which allows reproduction of printed works for non-profit scientific and educational purposes without the permission of or payment to the copyright owner. This exception led some to raise serious questions in view of the Soviet practice of entering only a limited number of subscriptions to many American scientific and technical journals and then reproducing a substantial number of additional copies for distribution to libraries, educational institutions and research institutes. However, this practice apparently has been discontinued. The seriousness with which American publishers regard the issue of xerographic copying is reflected by their support of the current suit by the Williams & Wilkins Company against the United States in which the company complained that wholesale xerographic copying of articles from its journals by the United States government was a serious violation of its copyrights.[21]

American publishers have published extensive translations of Soviet scientific and scholarly books and articles, including regular cover-to-cover translations of many Soviet journals and regular translations from the Soviet press. They have published translations of novels and stories by leading writers of Imperial Russia and the Soviet Union. They have also published in both Russian and English some works by Soviet authors which were unacceptable for publication in the U.S.S.R.

Clearly, it will now in general be necessary for publishers of translations of Soviet works to obtain the permission of the copyright owner. Hopefully, this will not involve great problems. Some of the American publishers of translations of Soviet journals already have agreements with *Mezhdunarodnaia kniga,* a Soviet foreign trade organization, which allow them to obtain advance copies of the texts of the Russian journals and glossy photos of illustrations. These agreements could be renegotiated to include the necessary copyright permission. Negotiations should be relatively simple, since no political problems are involved in the cover-to-cover translation of scientific journals.

21. Williams & Wilkins v. United States, 180 U.S.P.Q. 49 (Ct. Cl. 1973).

More serious problems are posed by the publication of works by those who in the past have not sought Soviet cooperation. In most such cases the permission of the copyright owner will be necessary. While the current Soviet policy as to what materials will be protected by a copyright notice has been clearly stated,[22] it remains unclear what terms will be demanded by agencies representing Soviet copyright holders.

The new Soviet legislation has provoked a substantial reaction in the United States, based upon fear that the same criteria now used by Soviet publishers in determining what is to be published in the U.S.S.R. would be used in an attempt to control the political content of works by Soviet authors published outside the U.S.S.R.

Two possible situations may be considered. First is the situation of a journal such as the *Current Digest of the Soviet Press* which reproduces selections from Soviet newspapers and periodicals. If one compares the contents of the *Current Digest* with the contents of the Soviet newspapers and periodicals from which it draws its materials, it quickly becomes obvious that the *Current Digest* selects a much higher proportion of negative and critical articles for translation than it selects positive and laudatory articles. The editors of such a translation journal must naturally be wondering whether the Soviet government will change its present policy of not placing copyright notices on newspapers, and if so, whether the Soviet copyright proprietors will enforce their copyright in such a manner as to require the translation journal to change its selection policy or go out of business.

Even more serious problems of a political nature are faced by American publishers of works unacceptable for publication in the U.S.S.R. The extensive press discussion of their position[23] has raised

22. Instruktsiia o poriadke primeneniia znaka okhrana avtorskogo prava na proizvedeniiakh literatury, nauki i iskusstva, izdavaemykh v S.S.S.R. (Instructions on the Procedure for the Use of the Copyright Protection Symbol on Productions of Literature, Science and Art Published in the U.S.S.R.), approved by Order No. 153 of the Chairman of the State Committee on Matters of Publishing Houses, Printing and the Book Trade of March 28, 1973, [1973] 7 BIUL. NORM. MIN. VED. AKT. S.S.S.R. 44.

23. Astrachan, *Concern Voiced in U.S. at Soviet Copyright Law*, Washington Post, Mar. 23, 1973, at A14, col. 1; Astrachan, *Soviets Join Copyright System*, Washington Post, Mar. 1, 1973, at H1, col. 5; Wagner, *Authors, Publishers Deplore Soviet Moves to Curb Dissident Writers by Copyright Laws*, Publishers Weekly, Mar. 26, 1973, at 47, col. 1; Bethell, *Authors' Rights, or Authors Wronged?* The Times (London), Mar. 2, 1973, at 14, col. 1; *Moscow Amends Law on Copyright: Outflow of Dissident Writing is Apparent Target*, N.Y. Times, Mar. 18, 1973, at 5, col. 1; *A Moscow Move to Restrict Publication*, Wall Street Journal, Mar. 16, 1973, at 1, col. 3; *Reverse Copyright*, N.Y. Times, Mar. 21, 1973 at 44, col. 1; Wagner, *Russians and Copyright — A Welcome Move, But a Host of Questions Remain*, Publishers Weekly, Mar. 12, 1973, at 32, col. 1; Saxon, *U.S. Authors Ask a Bar to Soviet: Seek to Block Copyright Actions in U.S. Courts*, N.Y. Times, Mar. 25, 1975, at 17, col. 1; Shabad, *Soviet*

the following questions. Will the procedures to be established under Article 98 of the Fundamentals of Civil Procedure grant authors of such works the civil law capacity to give permission for their publication abroad? If allowed to give such permission, will the authors be reluctant to do so for fear of prosecution for anti-Soviet propaganda activities, expulsion from the Authors' Union or other sanctions? Will the Soviet government exercise its right of compulsory purchase under Article 106 of the Fundamentals of Civil Procedure and then refuse permission for the publication or translation of the work in the United States? Will American courts recognize permission given by Soviet authors in violation of Soviet law?[24]

A bill introduced into the United States Senate attempts to nullify the effects of the Soviet copyright legislation to the extent that it would allow the Soviet government to divest any Soviet author of his copyright or of the right to secure it.[25]

Finally, it would seem appropriate to close with a problem of particular interest to a number of the American participants at the conference. This is the question of publication of translations of Soviet legal materials. Materials commonly translated include excerpts from scholarly works, judicial opinions, laws and administrative regulations. The first question is the extent to which such works will be protected by the inclusion of the copyright notice in the form permitted by the Universal Copyright Convention. The second question is the extent to which such works are subject to copyright protection under American law. Clearly the answer to the first question is wholly within the discretion of the appropriate Soviet authorities. If a copyright notice is present, clearly Soviet scholarly works on legal subjects are protected by copyright.

However, it is highly doubtful that official legal materials would be subject to copyright protection under American law, even if the Soviet Union were to change its policy of not putting copyright notices on such material. It has been consistently held by American courts that neither federal nor state official legal materials such as court opinions, legislation, etc., are subject to copyright protection. Applying the basic principle of national treatment, it would appear

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Royalties for U.S. Authors, N.Y. Times, Mar. 25, 1973, at 29, col. 4; Smith, *6 Soviet Intellectuals Warn of Danger in Moscow's Acceptance of World Copyright Law*, N.Y. Times, Mar. 28, 1973, at 15, col. 2; Gamson, *Moscow's Copyright Maneuver*, 56 NEW LEADER 11 (May 14, 1973); Gruliow, *Soviet Copyright Loopholes Eyed*, Christian Science Monitor, Mar. 21, 1973, at 7, col. 1; Gruliow, *Soviets Ready Participation in World Copyright*, Christian Science Monitor, Mar. 12, 1973, at 5, col. 2.

24. See dicta in Bodley Head, Ltd. v. Flegon, [1972] 1 W.L.R. 680 (Ch.); compare the analogous problem in First National Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

25. S. 1359, 93d Cong., 1st Sess. (1973).

that foreign official legal materials would not be protected either, so that Americans could continue freely to publish translations of Soviet legal materials. However, there has never been a court test on this subject, so that American publishers may be somewhat reluctant to proceed with such publications.

VII. CONCLUSION

Soviet-American trade in industrial and intellectual property can flourish under the existing legal structure of international treaties and national legislation, given good will in eliminating bureaucratic barriers and settlement of the few political problems involved.

Discussion

In response to a question from an American participant, Mr. Boguslavskii explained that under Soviet law, priority of registration, rather than priority of use, determined the validity of trademarks.

In response to a question from Mr. Maggs, Mr. Boguslavskii explained that Soviet jurists had not yet determined whether patent or copyright protection was appropriate for computer programs. He concluded that the tendency in the Soviet Union was to protect computer programs by copyright. He was supported in this statement by another Soviet participant, who suggested that patenting would be inappropriate unless a program exhibited technological innovation. Mr. Maggs noted that both the confusion and the emerging tendencies of Soviet law on computers appeared to parallel U.S. law, and Mr. Boguslavskii agreed.

In response to another question from the American side, Mr. Boguslavskii replied that it was a violation of Soviet law for a Soviet author to authorize foreign publication of his works except through the All-Union Copyright Service. With regard to penalties for violation of this rule, however, Mr. Boguslavskii could recall only a civil law penalty which voided such transactions. Another Soviet participant suggested that currency violations would be involved if the Soviet author were to receive royalties.

Mr. Boguslavskii and Mr. Maggs reiterated their substantial agreement on the topics under discussion. Mr. Maggs stressed that the U.S. press had presented a distortedly unfavorable view of Soviet copyright practice, and that a bill presently being considered by Congress, aimed at curing anticipated abuses by the Soviet government, was ill-advised and unnecessary. He asserted that those aspects of Soviet copyright law which would be most repugnant to Americans would, in any case, be unenforceable in the United States, either because the First Amendment would prevent enforcement or because the choice of law clause of the publishing contract would eliminate them from consideration by a court.

International Trade Customs

GEORGE GINSBURGS*

With the vast expansion of Soviet commercial contacts with the outside world in recent years, the legal principles governing the U.S.S.R.'s trade relations with foreign countries are likely to gain ever increasing importance. The purpose of this paper is to survey just one corner of this domain, namely, Soviet attitudes and practices with respect to the interpretation and application of so-called international trade customs.

All Soviet specialists in the field acknowledge that, according to prevailing usage, particular questions relating to the terms of international trade contracts may be regulated by trade customs. This circumstance determines the major significance of trade customs as one of the elements which may define the nature of the rights and duties of the interested parties and the scope of their material liability in the resolution of any disputes arising out of the transaction. The trade customs employed in international trade for the most part originated as rules adopted in trade operations conducted on the territory of specific countries or even in individual localities (e.g., designated ports) and, depending on the country, applied to both domestic and foreign trade operations or to foreign trade alone or to only special areas of the latter (for example, the wheat trade). Because of numerous discrepancies, states often encountered difficulties in figuring out precisely the relevant customs observed in different countries, except where sufficient global consensus had been built up over the years so that a given practice became almost universally accepted and functioned as a generally recognized trade custom. Even here, however, inconsistencies occasionally still occur on matters of detail and care must be taken to make sure that outwardly similar formulations do indeed reflect an identity of underlying views.

Thus, several technical problems affect the possibility of resort to trade customs in any matter and especially in regard to commercial contracts concluded by Soviet trade organizations with foreign partners. To begin with, Soviet sources emphasize, trade customs cannot apply where the law which governs the execution of the contract already features a positive norm regulating the disputed issue. However, even in the absence of such a norm, the corresponding trade customs may not be mandatory for the parties concerned if they expressly chose to abide by other terms diverging from the estab-

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lished customary rules. An arrangement of this sort cannot be challenged on grounds that it runs counter to custom; instead, it is custom that is set aside in favor of the "private" formula devised by the principals. In short, the issue of applying a trade custom arises solely where neither the contract itself nor the law governing the transaction contains the solution to the contested question. It should be noted that, by emphasizing the relatively subordinate position of customary norms in the formal hierarchy of legal sources pertaining to international trade, Soviet writers do not necessarily disparage in any way the importance of customary rules of international trade as an element of legal culture in the broader sense. For, in this latter capacity, international trade customs have always played a crucial role and still continue to shape and determine the substance of many of the key concepts and principles of positive law functioning in this area.

Next, what formal criteria must a commonly used *modus operandi* satisfy in order to qualify as a *bona fide* trade custom? First, there has to be a uniform rule containing clear and concrete stipulations on the question with which it deals. For example, according to custom which operates in Soviet ports, the clause calling for the performance of a specific contract obligation "around the middle of the month" means that it must be fulfilled in the period stretching between the 11th and 20th day of the designated month. Second, the rule must be the only one recognized as a custom with respect to the subject which it governs on the territory where the rule applies. In other words, there cannot be in one and the same place two different rules dealing with the same item, both of which are considered valid customs. In a situation of this type, it must be concluded that either no custom exists at all or that just one of these rules represents a custom, measured by the usual evidentiary standards used to ascertain the nature of a customary rule. Third, the rule must be universally recognized, i.e., it must in practice serve as the effective norm and be consistently applied in the sphere of relations to which it pertains.

Since, as already mentioned, from a legal point of view customs relating to international trade consist of rules operating on a particular territory, they tend to vary from country to country. In these circumstances, the question of applying a particular custom must be decided on the basis of the legislation of that country whose law governs the pertinent foreign trade transaction. That holds true even where the chances are that the custom in issue is altogether identical in content in a number of countries and, in fact, amounts to a general custom of international trade.

I would therefore disagree with the view recently expressed by a leading Soviet writer on private international law that "to the extent

that a given type of trade custom gives rise only to questions which are uniformly resolved in different countries, to that extent and to that extent alone the given custom possesses in effect an international character which bars the inception of a conflict-of-laws question."[1] As far as I can tell, that view is not shared by a majority of the author's learned colleagues either. If the implication here is that such a "universal trade custom" would operate independently and would obviate the need first to check the relevant prescriptions of the applicable system of national legislation to ascertain how that particular customary norm is interpreted in the pertinent municipal law and whether that interpretation is really congruent with the tenor of the purported "universal custom," the soundness of this theory is open to grave doubt and meets with serious technical objections. On the contrary, I would assert that a custom pertaining to a foreign trade contract cannot contradict the stipulations of the legislation of the country whose law regulates the transaction. The issue, then, of which national legal system governs the execution of the terms of the contract can be crucial in this connection.

Soviet law lets the parties themselves, if they wish, specify the country whose law shall apply to their transaction; a similar principle appears in several Soviet treaties. Where the parties have not indicated their preference, Soviet law observes the principle of *lex loci contractus*. According to Article 126 of the 1961 Fundamentals of Civil Legislation of the U.S.S.R., and the Union Republics, "the place of conclusion of the transaction shall be determined pursuant to Soviet law," a formula described as a peremptory norm of "public order in the positive sense" which presumably applies in all instances irrespective of whether foreign or Soviet law governs the transaction as a whole.[2] With regard to contracts concluded by correspondence, Soviet practice identifies the country where the acceptance of the offer is received as the place where the contract was concluded.

Soviet spokesmen insist that in Soviet foreign trade practice the right to apply trade customs raises no doubts. Soviet legislation contains no norms prohibiting the application of trade customs to contracts concluded by Soviet organizations with foreign institutions and persons. In fact, the Merchant Shipping Code of the U.S.S.R. explicitly sanctions the use of local port customs in certain instances and some Soviet commerical treaties likewise permit supplementary resort on occasion to universally recognized international trade customs. The record of the Foreign Trade Arbitration Commission in

1. L.A. LUNTS, VNESHNETORGOVAIA KUPLIA-PRODAZHA (KOLLIZIONNYE VOPROSY) (FOREIGN TRADE PURCHASE AND SALE (CONFLICTS QUESTIONS)) 62 (1972).

2. *Id.* at 44. Likewise, L.A. LUNTS, MEZHDUNARODNOE CHASTNOE PRAVO (INTERNATIONAL PRIVATE LAW) 264-65 (1970).

Moscow further attests to Soviet willingness to allow the application of customs in situations where, due to the absence or incompleteness of the appropriate legal norm, the application of the corresponding custom derives from the content of the contract obligations in force in the relations between the parties. Thus, the contents of the four-volume set of collected decisions of the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce and Industry for the years 1934-1965 show that of the 148 cases reported, references to international trade customs are featured in 20 of them and references to customs of the port in 2 more. When the terms of a custom are in doubt, an attempt is made to establish them by checking the available evidence, such as private codifications and draft restatements, reference manuals, affidavits issued by the competent organizations (chambers of commerce, etc.), as well as depositions of suitable experts and specialists.

In addition to trade customs, trade practice also includes trade usages which consist of special rules and conditions current in certain areas of commerce. Such usages are established by chambers of commerce, stock exchanges, and the like, and are compulsory for the members of the respective organization and those businesses which observe them in their operations. They do not apply to contracts prescribing different terms.

A glimpse of the status of trade customs in the U.S.S.R. is furnished by the reported proceedings of the Foreign Trade Arbitration Commission dealing with cases in which that issue is involved. Of course, the rulings of the Commission do not have the force of legal precedent. They do, nevertheless, constitute an authoritative statement of opinion on the subject which is not apt to be treated lightly. In the majority of the instances in which the matter of trade customs arose, the issue revolved around the proper interpretation of c.i.f. and f.o.b. contract terms. Thus, a check of the contents of the four-volume set of collected decisions of the Foreign Trade Arbritation Commission for the years 1934-1965, mentioned earlier, reveals that of the 148 cases reported, the subject of c.i.f. was involved in 29 of them (5 of which expressly involved the problem of international trade customs), the subject of f.o.b. came up 18 times (7 of them expressly involved the problem of international trade customs), and one case concerned issues of c.a.f. The decisions in these cases show that the Commission in determining the content of the corresponding custom is also guided by the practice which has crystallized in the foreign trade relations between Soviet organizations and their foreign partners. Hence, the decisions of the Commission, by synthesizing the experience of applying customs, contain information on the basis of which can be fixed the various trade customs observed in the foreign trade turnover of the U.S.S.R. The following cases are typical

of the kinds of problems which the Commission has been called upon to resolve in recent years.

A claim filed by a Belgian buyer, S.A. Importbois H. and J. Van Reet, against Eksportles as seller stemmed from Eksportles' contractual duty to dispatch to the claimant standards of sawn timber c.i.f. free out of Antwerp, by one ship, without co-consignees. However, the size of the ship chartered by Eksportles prevented the ship from entering a particular basin of the port of Antwerp for discharge at the Belgian firm's moorages, resulting in the latter's sustaining extra expenditures for the discharge and delivery of the cargo to its warehouses. Eksportles denied liability for these expenditures, explaining that "the buyer wishing to specify the size of the ships and thus to ensure the discharge of these ships directly alongside certain moorages stipulates in the contract either the condition of discharge at a certain basin or the size (draft) of the ship." In support of this assertion, Eksportles submitted as evidence one of its contracts with another Belgian firm in which the size of the ship carrying the cargo was specified.

The Commission found for Eksportles, noting that the parties' contract did not specify the size of the ship and asserting that "[i]f the claimant wanted to specify the size of the ship, he ought to have done that in the contract, as is the usual practice."[3]

This same case also dealt with the issue of whether Eksportles' contract c.i.f. free out of Antwerp by one ship without co-consignees was violated by the fact that the vessel, on which the claimant's goods were shipped, first delivered three-quarters of its initial load at Amsterdam, the first port of discharge, before delivering the remainder at Antwerp to the claimant. Eksportles argued that "in international trade practice the consignee in another port is not regarded as a co-consignee, and that the notion of a co-consignee means the presence of two or more consignees in the same port of discharge." Eksportles supported this alleged international practice by referring to its own practice of performing contracts for deliveries in Belgium and the Netherlands in this manner and by submitting as evidence another contract, with terms the same as those in issue here, where two batches of cargo had been delivered by one vessel to Britain and Antwerp without any complaints lodged by the consignees.

The Commission found on this point as well that Eksportles had fulfilled its contractual obligations because it did in fact deliver the

3. S.A. Importbois H. and J. Van Reet v. V/O Eksportles, [1964] 4 ARBITRAZHNAIA PRAKTIKA (RESHENIIA VNESHNETORGOVOI ARBITRAZHNOI KOMISSII 1963-1965GG.) 95, Case 128 (1970) [hereinafter cited as ARBITRAZHNAIA PRAKTIKA], 4 COLLECTED ARBITRATION CASES (AWARDS OF THE FOREIGN TRADE ARBITRATION COMMISSION 1963-1965) 96, Case 128 (English language edition, 1973) [hereinafter cited as ARBITRATION CASES].

timber which the Belgian firm had contracted for and because, when the ship arrived in the port of Antwerp, the timber on board was exclusively for the claimant, without any other Antwerp co-consignees.

The obligations of the seller under c.i.f. terms are also discussed in an action filed against Eksportles as seller by the French corporation Comptoir de Bois. The French firm, acting as consignee for a French buyer, filed its claim on the ground that Eksportles, as the seller on c.i.f. terms, was obliged to charter a vessel fit to carry the goods sold. The claimant asserted that the vessel chartered by Eksportles was unseaworthy due to the peculiar shape of its deck, which rendered the vessel unfit to carry the sold timber for long distances, such as the trip in question, from Leningrad to Nice. After hearing the evidence, the Commission found that Eksportles' conduct in chartering the vessel was "in full conformity with [its] duties as a c.i.f. seller." This conclusion was based on the following facts: (1) the charter vessel had been classified by a first-rate classification society; (2) on many occasions the vessel had made similar voyages with Eksportles' sawn timber; and (3) the charter-party for the vessel was sent in good time by the seller to the buyer and was accepted by the latter without any objection.[4]

A claim submitted by the English company Tennison against Eksportles alleged that the Soviet exporter had failed to deliver lumber of a specific average length as required by a custom of the trade. Since the existence of such a custom was contested and the company adduced no evidence to corroborate its assertion, expert opinion was sought. The expert concluded that the "concept of 'average length' is familiar to the export practice of Soviet ports in shipping sawn lumber. However, Soviet port customs do not establish the obligation of the exporter to ship ordinary sawn lumber with the guarantee of a precise average length." In light of the fact that the company did not prove the existence of the custom to which it referred and that the findings of the expert not only did not confirm the existence of such a custom but indeed denied it altogether, the Foreign Trade Arbitration Commission, in deciding the case, found that the custom invoked by the company was not present.[5]

For our present purposes, it may be sufficient to summarize some of the other aspects of c.i.f. contracts which have come before the Commission.[6] Thus, the Commission has had occasion to rule that,

4. Comptoir de Bois v. V/O Eksportles, [1964] 4 ARBITRAZHNAIA PRAKTIKA 108, Case 131, 4 ARBITRATION CASES 108, Case 131.

5. H.T. Tennison & Co. v. V/O Eksportles, [1957] 2 ARBITRAZHNAIA PRAKTIKA 108, Case 58, 2 ARBITRATION CASES 107, Case 58.

6. Companie Europeenne de Cereal v. V/O Eksportkhleb, [1964] 4 ARBITRAZHNAIA

where the contract did not prescribe otherwise, the seller is responsible for loading the goods on a vessel chartered by him with the destination being the port designated in the contract, for insuring the goods against marine risks, and for transmitting to the purchaser the invoice, bill of lading, and insurance policy or certificate. The purchaser is required to pay the cost of the goods as stated in those documents. As concerns shipping procedure, the seller is entitled to ship the goods during the period indicated in the contract in one or several contingents. All the risks relating to the goods which arise after they are shipped, independent of their nature, pass to the purchaser from the moment they are loaded (in particular, the risks stemming from the vessel's delay en route). The seller, if the contract does not state otherwise, is responsible for the correspondence of the quality of the goods when they are loaded to the description given in the contract; changes in the quality of the goods occurring after they are loaded are not the seller's responsibility, except in situations where the changes stem from the actions of the seller (i.e., where the deterioration in the quality of the merchandise occurred through the fault of the seller). With respect to quantity, the goods are considered to have been delivered in the amounts stipulated in the bill of lading. Therefore, the seller is not responsible for quantitative shortages of goods in the port where the merchandise is unloaded as against the quantity indicated in the bill of lading.

A few illustrations of the Commission's manner of handling disputes involving f.o.b. contract terms will round out the picture. For example, the Commission has taken the position that the f.o.b. seller is liable for qualitative defects in the goods noted at the time the goods were loaded on board the vessel (as compared with the quality specified in the contract).[7] Notations on the bill of lading indicating defects in the condition of the goods may be used as valid evidence in this connection.[8] In ruling on a claim filed by a Turkish company, the Commission observed that the bill of lading, which contained notations of apparent defects in the merchandise delivered for load-

PRAKTIKA 76, Case 122; Maucesson et Cie. v. V/O Eksportles, [1960] 3 ARBITRAZHNAIA PRAKTIKA 59, Case 81; V/O Raznoeksport v. Arup and Associates Ltd., [1956] 2 ARBITRAZHNAIA PRAKTIKA 94, Case 55; Establissement Christian Veerts v. V/O Soiuzpromeksport, [1955] 2 ARBITRAZHNAIA PRAKTIKA 65, Case 48; V/O Eksportlyon v. Amtorg Trading Corp., [1951] 2 ARBITRAZHNAIA PRAKTIKA 9, Case 33; Societe d'Avance Commerciale v. V/O Soyuzpromeksport, [1940] 1 ARBITRAZHNAIA PRAKTIKA 55, Case 12; V/O Eksportles v. Patrick & Thompson Ltd., [1938] 1 ARBITRAZHNAIA PRAKTIKA 26, Case 5.

7. Ramzaitsev, *Praktika Vneshnetorgovoi arbitrazhnoi komissii po razresheniiu sporov kasaiushchikhsia tolkovaniia usloviia "fob" (The Practice of the Foreign Trade Arbitration Commission in Disputes Concerning the Interpretation of an FOB Clause)* [1955] 7 VNESH. TORG. 16.

8. *Id.*

ing, constituted a proof of non-fulfillment by the seller of his obligations regarding the quality of the merchandise.[9] In this instance, the Turkish seller transmitted to the Soviet buyer a bill of lading with the notation that the sacks in which the goods were packed were damp. The dispute involved the damp condition of the merchandise and the aforementioned notation on the bill of lading confirmed the delivery of the goods in an unsuitable condition.

In another case between the Soviet foreign trade organization Prodintorg and the Belgian company Neeton S.A., the Commission decided that where the parties had agreed to a preliminary acceptance of the goods, as regards their quality, at the port of embarkation, such an acceptance, in the absence of contrary stipulations in the contract, could not be viewed as a surrender by the purchaser of his right to file possible future claims with respect to the quality of the goods delivered.[10] Similarly, the Commission affirmed the responsibility of the seller under f.o.b. contract terms for merchandise shipped under conditions which did not prevent the possibility of its sustaining damage en route.[11]

In another case a British purchaser had deducted sums due the Soviet seller on the grounds that the seller was responsible for damages caused to the vessel chartered by the purchaser in the process of loading merchandise sold on f.o.b. terms. The Soviet party, as claimant in the default proceeding, showed there was conflicting evidence as to whether the damage to the mast was due to the fault of of the stevedores in loading the vessel or to the shipowner's failure to correct a defective condition in the ship itself. The Commission found that responsibility for damage to the mast, regardless of who was at fault, could not fall on the seller because the contracts to deliver goods f.o.b. did not provide for a duty on the part of the seller to load the goods on the ships furnished by the purchaser. On the contrary, the contract indicated that the hiring of the stevedores to load the merchandise was the duty of the owners of the vessels chartered by the purchaser, and "consequently, the seller cannot be held liable for the acts of the winchmen." In short, the Commission seemed to honor in this case an explicit allocation of risks by the parties in their contract over the customary duties associated with an f.o.b. contract.[12]

In closing, it is perhaps worth noting that Soviet scholars attrib-

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9. *Id.*

10. Nector S.A. v. V/O Prodintorg, [1957] 2 ARBITRAZHNAIA PRAKTIKA 120, Case 61, 2 ARBITRATION CASES 118, Case 61.

11. Ramzaitsev, *supra* note 7, at 17-18.

12. V/O Eksportles v. Timber Control of the Board of Trade of Great Britain, [1951] 1 ARBITRAZHNAIA PRAKTIKA 124, Case 30, 1 ARBITRATION CASES 123, Case 30.

ute the failure of all attempts so far in the "capitalist" universe to unify the body of trade customs to the persistence of profound contradictions plaguing the world capitalist market. Neither the "Warsaw-Oxford" rules nor the various editions of "Incoterms" have ever won governmental recognition as international rules and continue to operate solely at the private level.[13]

Only in foreign trade relations between socialist states, Soviet spokesmen add, has it proved possible to set down by means of intergovernmental agreements a uniform content for individual principles functioning as trade customs, a development which has found reflection in the "general conditions of deliveries" governing trade between these countries. To be sure, even the "general conditions" do not embrace all the customs used in the trade relations between the socialist states.

These "general conditions" were adopted by the Council for Mutual Economic Assistance in 1958 and were revised, up-dated, and expanded in 1968. Although they do not embrace all the customs used in trade relations among the socialist states, they represent a substantial achievement of unification.

However, the bulk of the commercial flow between the states concerned moves by rail and highway, while sea traffic represents merely short-distance haulage. Thus only a few of the conditions have much relevance for the mechanics of Soviet-American trade. The Soviet-Cuban experience could be enlightening, but, unfortunately, the corresponding protocol on general conditions of deliveries between the two countries has not yet been published and the substance of its provisions is not available for analysis. To a limited extent, the legal framework of trade between the U.S.S.R. and its Far Eastern associates, about which we know a little more, displays some comparable elements. Since local commentators explain the differences which distinguish the contents of these documents from their European counterparts as due to special geographical features peculiar to the Asian setting, parallels with the Soviet-American phenomenon readily come to mind. However, from what secondary sources reveal about the nature of these "Asian components," they turn out to be

13. Nevertheless, Soviet practice with respect to international trade customs closely parallels on most counts the formulas recommended by both the "Warsaw-Oxford" rules and "Incoterms." It is also interesting to observe that, despite the allegedly private nature of "Incoterms," the Foreign Trade Arbitration Commission tends to assign considerable weight to that document, as witness the tone of its pronouncement in the suit filed by the Hamburg company Willy Brun against Raznoeksport. Discussing some aspects of the contract of sale and delivery on c.i.f. terms, the Commission opened its analysis with the statement that, "according to the commonly accepted interpretations of 'c.i.f.' terms, which were reflected, in particular, in the 1953 'Incoterms' . . ." and proceeded from there to draw the necessary conclusions.

rather minor innovations and it would seem that, by and large, the stock formulas still dominate the scene, including most of the traditional conceptions regarding the meaning of f.o.b. and c.i.f. terms. One exception is that in transportation of goods by water, the bilateral "general conditions" with the People's Republic of China and the Democratic Republic of Vietnam foresee only deliveries on f.o.b. terms. Another is the clause in the "general conditions" concluded between the U.S.S.R. and the Korean People's Democratic Republic, the People's Republic of China, and the Democratic Republic of Vietnam which prescribes that, in the sale of goods on f.o.b. terms, the seller must load the goods on board the vessel, as well as stow them in the holds, at his own expense and furnish appropriate materials for separating the cargo. Risk passes from the seller to the purchaser not from the moment the goods are placed on board the vessel, as is envisaged in the 1958 Council for Mutual Economic Assistance's "general conditions," for instance, but from the moment the goods are stowed on board the ship.

Discussion

A Soviet participant briefly outlined the sources of the Soviet law of foreign trade: international treaties, special domestic legislation and general domestic legislation. He noted that the arrangement was hierarchical; treaty provisions superseded special domestic legislation, and so forth. He asserted that those elements of Soviet legislation which related to the duty of protecting socialist institutions and intercourse did not by their terms apply to foreigners engaged in trade with the Soviet Union. The applicable Soviet law, he asserted, was as suitable to the protection of international trade as any. He took issue with the suggestion of a Western writer to adopt a special code of East-West trade, but rather favored the creation of general conditions of delivery similar to those used in the CMEA (Council for Mutual Economic Assistance) contracts.

Mr. Ginsburgs asserted that it would be difficult to apply Soviet trade customs, since these were not adequately collected or published and practices were not codified. Mr. Ginsburgs agreed with the previous speaker that it would be desirable to work out uniform principles of trade, similar to the CMEA general conditions. However, he believed that these should be recommendatory rather than mandatory.

A U.S. participant expressed the belief that the choice of forum and of law were critical problems in trade involving the United States in view of the multiple jurisdictions in the United States in which a dispute might be resolved. He agreed with the first speaker that some sort of general conditions would be desirable, whereas a special code governing East-West trade would not. He further suggested that the Soviets reexamine their experience of the 1920's to see whether their old laws would facilitate the expansion of trading relations into joint venture arrangements.

Several U.S. participants expressed the belief that arbitration was the solution to many of the difficulties posed by domestic law. Others stated that arbitrators would face many of the same difficulties and also that, to the extent that the enforcement of arbitral awards could be challenged in court, legal problems could not be avoided.

A Soviet participant expressed the view that Mr. Ginsburgs' interpretation of the Soviet treatment of trade customs corresponded to the view of Soviet jurists.

Arbitration in Soviet-American Trade Relations

S.N. LEBEDEV*

I

The provision of firm legal safeguards for trade relations is a major condition for the successful development of mutually beneficial cooperation between countries, including countries with different social systems. In the course of such cooperation these relations are established between legal entities or individual citizens of different countries and they include provisions governing the settlement of disputes that may arise between the parties.

The general trend of international practice regarding the problem of settling disputes has long ago come out unequivocally in favor of the broadest use of arbitration in all its forms as the most expedient instrument for settling disputes in international trade. This trend has been described quite eloquently, though not without some exaggeration, by a proponent of arbitration who declared that from the viewpoint of a businessman engaged in international trade, the true dilemma is not between arbitration and judicial decision, but either effective arbitration or no legal remedy at all.[1]

Small wonder, therefore, that alongside other problems the question of arbitration has received considerable attention in the mapping out of steps aimed at normalizing and substantially expanding trade and economic relations between the Soviet Union and the United States. Favorable prospects for such trade were opened as a result of the truly historic Soviet-American summit talks and of the bilateral agreements that included a joint document entitled "Basic Principles of Relations Between the Union of Soviet Socialist Republics and the United States of America," which was signed on May 29, 1972 in Moscow.[2] As a result, appropriate instructions for negotiating the coordination of the mechanism of settling commercial disputes by arbitration were included in the mandate of the Soviet-American

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1. Cohn, *Economic Integration and International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION 26 (M. Domke ed. 1958).

2. Pravda, May 30, 1972, at 1, col. 2; 66 DEP'T STATE BULL 898 (1972).

Commission for Trade.[3] Following fruitful negotiations, Article 7 was included in the text of the Soviet-American Trade Agreement signed on October 18, 1972. The first paragraph of this Article states:

> 1. Both Governments encourage the adoption of arbitration for the settlement of disputes arising out of international commercial transactions concluded between natural and legal persons of the United States of America and foreign trade organizations of the Union of Soviet Socialist Republics, such arbitration to be provided for by agreements in contracts between such persons and organizations, or, if it has not been so provided, to be provided for in separate agreements between them in writing executed in the form required for the contract itself, such agreements:
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> (a) to provide for arbitration under the Arbitration Rules of the Economic Commission for Europe of January 20, 1966, in which case such agreements should also designate an Appointing Authority in a country other than the United States of America or the Union of Soviet Socialist Republics for the appointment of an arbitrator or arbitrators in accordance with those Rules; and
>
> (b) to specify as the place of arbitration a place in a country other than the United States of America or the Union of Soviet Socialist Republics that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such persons and organizations, however, may decide upon any other form of arbitration which they mutually prefer and agree best suits their particular needs.

In Soviet trade practice, the inclusion of a provision on arbitration in such an agreement is not something new. Recognition of the utility of settling disputes arising from trade operations between Soviet organizations and their foreign contractors by arbitration received expression in the earliest international treaties and agreements signed by the Soviet Union. In Soviet treaty practice, the stipulation that disputes between citizens and enterprises of the contracting sides would be settled by arbitration was included for the first time in the Russo-German Private Law Agreement of August 27, 1918,[4] a supplement to the Brest-Litovsk Peace Treaty that was drawn up with the active participation of V.I. Lenin. At present the Soviet Union has bilateral agreements with over 30 countries that contain provisions on arbitration, and it is also a signatory of three multilateral conventions on arbitration. These agreements provide mainly for three types of conditions relative to arbitration:

> (a) treaties and agreements whose provisions are confined to the mutual obligation of the signatory countries to recognize the agreements of the juristic persons and individual citizens of these countries on the settlement of their disputes by arbitration;

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3. Joint Communique on the Creation of the Soviet-American Commission for Trade of May 26, 1972. Pravda, May 27, 1972, at 1, col. 2; 66 DEP'T STATE BULL. 898 (1972). For the text of the Trade Agreement, see 67 DEP'T STATE BULL. 595 (1972).

4. DOKUMENTY VNESHNEI POLITIKI S.S.S.R. (FOREIGN POLICY DOCUMENTS OF THE U.S.S.R.) 692-703 (1957).

(b) treaties and agreements, which, in addition to the above-mentioned recognition of arbitration agreements, provide for the obligation of the signatory countries to carry out the awards passed on the basis of such arbitration agreements;

(c) treaties and agreements containing provisions regarding the procedure for arbitration, notably the procedure for forming an *ad hoc* arbitration tribunal, and so on.

Examples of the latter type are the Supplement to Article 14 of the Agreement on Trade and Payments with Sweden of September 7, 1940,[5] and the Special Protocol to the Soviet-Danish Agreement on Trade and Shipping of August 17, 1946.[6] Evidently, Article 7 of the Soviet-American Trade Agreement is in the same category.

II

A major landmark in the development of arbitration in the U.S.S.R. was the establishment in Moscow in the early 1930s of two standing arbitration tribunals: the Maritime Arbitration Comission (December 1930) and the Foreign Trade Arbitration Commission (June 1932).[7] The competence of the Maritime Arbitration Commission encompasses a wide range of disputes arising in the merchant marine, including international disputes, while the Foreign Trade Arbitration Commission is empowered to examine disputes arising from foreign trade transactions, especially disputes between foreign firms and Soviet commercial organizations.

Neither the Foreign Trade Arbitration Commission nor the Maritime Arbitration Commission is part of the all-union or republican system of legal, administrative, or other government organs. By their legal nature they are social organizations that consider disputes on the basis of a voluntary agreement by the disputing parties.[8] The legal procedure in the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission is defined not by the norms

5. SBORNIK TORGOVYKH DOGOVOROV, TORGOVYKH I PLATEZHNYKH SOGLASHENII I DOLGOSROCHNYKH TORGOVYKH SOGLASHENII S.S.S.R. S INNOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF TRADE TREATIES, TRADE AND PAYMENTS AGREEMENTS AND LONG-TERM TRADE AGREEMENTS BETWEEN THE U.S.S.R. AND FOREIGN STATES) 563-66 (1961).

6. *Id.* at 172-73.

7. The American Arbitration Association, which, in addition to other categories of disputes (labor, civil misdemeanors, and so on), was set up in the United States only six years before the establishment of the U.S.S.R. Arbitration Commission. According to the statistics cited at the IIIrd International Arbitration Congress in Venice by D. Straus, then President of the Association, the American Arbitration Association in 1968 handled nearly 1,700 commercial disputes, including 52 foreign trade disputes. Straus, *Cooperation Among Arbitration Organizations* in IIIRD INTERNATIONAL ARBITRATION CONGRESS 200 (1970). The Association of Maritime Umpires of New York was established in the 1960s as a specialized maritime arbitration tribunal.

8. The Arbitration Commission accepts cases also when the two parties are obliged to put their dispute before the commission under an international agreement, for instance, the 1972 CMEA Convention.

of civil legal procedure established for the usual courts but by their own legislatively approved Rules, and by the Rules of Procedure that are adopted by the Presidium of the Chamber of Commerce on the basis of the above Rules.[9]

Procedures in both the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission are very similar, although each of these bodies has certain specifics, the most important of which concerns the possibility of appealing from an arbitration award. Awards of the Foreign Trade Arbitration Commission are final and not subject to appeal, while in the case of the awards of the Maritime Arbitration Commission an appeal may be lodged within a month with the highest court in the country, the Supreme Court of the U.S.S.R.[10]

Each of these commissions consists of a definite number of arbiters (the Maritime Arbitration Commission—25; the Foreign Trade Arbitration Commission—15), who are appointed by the Presidium of the Chamber of Commerce and Industry of the U.S.S.R. for a term of one year. Each of the parties to a dispute chooses an arbiter from among them and these two arbiters choose an umpire from among the remaining members of the panel.

The arbiters of the two commissions are completely independent. No government organ or official, or any organization, including the Chamber of Commerce and Industry of the U.S.S.R., has the right to instruct them on how to decide a given dispute or to interfere in any other way in the arbitration.

The procedure for arbitration in the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, which ensures genuine equality and the protection of the legal interests of the disputing parties, and the practical activity of these commissions in settling disputes have earned them wide recognition in Soviet and foreign business circles. In the course of a period of over 40 years the two commissions have examined several thousand cases involving foreign firms from more than 60 countries, including trade, shipping, insurance, and other firms from the United States.

Representatives of foreign firms which have taken part in arbitration in Moscow and many eminent foreign arbitration experts have given a high evaluation of the organization and the work of the Maritime Arbitration Commission and the Foreign Trade Arbitration

9. Now called the Chamber of Commerce and Industry of the U.S.S.R.

10. Lack of space does not allow a description of the structure, procedure, and practice of the two commissions; these questions are dealt with at length in a number of works by Soviet authors, including works that have been published in English. A short bibliography of these works is given in the supplement to this paper.

Commission.[11] For instance, in an article on the Maritime Arbitration Commission, Professor Le Clere of France underscored the rational character of its procedure, which preserves the classical phases of arbitration but is, at the same time, conveniently simplified.[12] It would not be out of place to recall that Frances Kellor, who has at times been called the "mother of American arbitration," wrote that the Foreign Trade Arbitration Commission was one of the best arbitration organizations of its kind in the world.[13] Even those Western, including American, commentators, who have made various reservations or expressed doubts regarding the arbitration commissions in Moscow, sometimes even distorting the actual state of affairs,[14] have had to acknowledge that the actual practice of the commissions, (which is, in our opinion, the principal criterion of the work of any arbitration tribunal), "bears the imprint of fairness,"[15] "can hardly evoke objections,"[16] shows "no bias or favoritism towards the Soviet side,"[17] and so on. In a speech of welcome at the Third International Arbitration Congress in Venice in 1969, A. Fanfani, President of the Italian Senate, spoke of various arbitration institutions that are promoting the development of arbitration on the international level and made special mention, along with the Arbitration Tribunal of the International Chamber of Commerce and the American Arbitration Association, of the Foreign Trade and Maritime Arbitration Commissions in Moscow.[18]

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11. Commenting in The Times of London of September 14, 1967, at 9, col. 4, on the handling by the Foreign Trade Arbitration Commission of a dispute between the British firm, Romulus Films, Ltd., and Sovexportfilm, the director of the former wrote that it was pleasant to note that any businessman having grounds for a claim may, as his own experience had shown, confidently count on scrupulous and fair justice in Moscow.

12. Le Clere, *La Commission d'Arbitrage Maritime de l'U.R.S.S.*, 8 LE DROIT MARITIME FRANCAIS 498, 500 (1956).

13. Kellor, *Coordination of Commercial Arbitration Systems*, 1 ARB. J. 139, 140 (1946).

14. These distortions concerned, in particular, the legal status of the commissions, which have at times been described as government agencies. For example, Professor M. Domke asserts that the Foreign Trade Arbitration Commission is an agency of the Soviet government by claiming that there are no nongovernmental bodies in Moscow. PROCEEDINGS OF THE INTERNATIONAL TRADE ARBITRATION CONFERENCE OF MARCH 25, 1955 49 (1955). Professor N. Spulber has gone so far as to declare that the Arbitration Commission is a functional department of the Ministry for Foreign Trade of the U.S.S.R. Spulber, *The Soviet Bloc Foreign Trade System*, 24 LAW & CONTEMP. PROB. 420, 421 (1959).

15. ASSOCIATION INTERNATIONALE DES SCIENCES JURIDIQUES, ASPECTS JURIDIQUE DU COMMERCE AVEC LES PAYS D'ECONOMIE PLANIFIEE 231 (1961).

16. DOMKE, *International Arbitration of Commercial Disputes*, in PROCEEDINGS OF THE 1960 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 149 (1960).

17. Pisar, *The Communist System of Foreign Trade Adjudication*, 72 HARV. L. REV. 1409, 1432-3 (1959).

18. *See* Straus, *Cooperation Among Arbitration Organizations*, *supra* note 7, at 187.

III

In briefly summarizing Soviet legislation on arbitration, it is necessary to refer to Article 27 of the Civil Procedure Code of the Russian Soviet Federated Socialist Republic (R.S.F.S.R.) (and the corresponding articles of the civil procedure codes of the fourteen other Union Republics) which state that:

> In cases provided for by the law or by international agreements, disputes arising out of civil law relations may, by agreement of the parties, be referred for settlement to a court of conciliation, to the Maritime Arbitration Commission, or to the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce.

We have already described the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission. As regards the court of conciliation, which is mentioned in Article 27 of the Civil Procedure Code of the R.S.F.S.R. and which should be understood as *ad hoc* arbitration, the rules for such a tribunal are established only for disputes between individual citizens[19] and for disputes between Soviet state organizations, enterprises, cooperatives, and public organizations.[20] In the case of *ad hoc* arbitration in the U.S.S.R. of disputes between Soviet commercial organizations and their foreign contractors, internal Soviet legislation has no special rules. The pertinent provisions are to be found in some international agreements, which are specifically referred to in Article 27 of the Civil Procedure Code of the R.S.F.S.R., or they may be determined by agreement between the disputing parties themselves.

However, when we speak of international agreements we must underscore the importance of Article II of the International Convention on the Recognition and Execution of Foreign Arbitral Awards of June 10, 1958,[21] (hereinafter referred to as the 1958 Convention), which records a general rule on the recognition of a written agreement "by which the parties pledge to turn over to arbitration all or any disputes that have arisen or may arise between them in connection with some specific contractual or other legal object which may be the subject of an arbitration examination." Thus, Article II of the 1958 Convention (ratified by the Soviet Union without any reservations regarding the provisions of this Article) leaves no doubt that in each signatory country recognition of arbitration awards depends neither on the venue of the arbitration proceedings (as distinct from the arbitration awards that are recognized and executed if they are

19. See, for example, Supplement No. 3 to the R.S.F.S.R. Code of Civil Procedure.

20. INSTRUKTIVNYE UKAZANIIA GOSUDARSTVENNOGO ARBITRAZHA PRI SOVETE MINISTROV S.S.S.R. (INSTRUCTIONS FOR STATE ARBITRATION AT THE COUNCIL OF MINISTERS OF THE U.S.S.R.) 61-63 (1964).

21. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (1970).

handed down within a country that has signed the 1958 Convention)[22] nor on whether the parties in the arbitration agreement are citizens of any of the Convention's signatory states.[23] One can therefore conclude that as applied to the relations between Soviet commercial organizations and their foreign contractors, Soviet law will recognize agreements which provide that disputes shall be turned over to standing or *ad hoc* arbitration tribunals in the U.S.S.R. or a foreign country. Consequently, if in spite of such an arbitration agreement, one of the parties institutes an action in a Soviet court, the latter is obliged by the Fundamentals of Civil Procedure of the U.S.S.R. and the Union Republics to refuse to handle the case (Article 31) or to end the hearing of the case (Article 41).

The question of recognizing an agreement on foreign arbitration arose, for instance, at the hearing of an action brought in a court in Moscow by Ingosstrakh, the Soviet foreign trade insurance agency, for the payment of losses on cargo transported from the U.S.S.R. to Cuba in the vessel *Dikto*, which, in the opinion of the plaintiff, was not seaworthy. The defendant, Sovfrakht, the Soviet Foreign Trade Transport Agency, as the time-charterer of the *Dikto* opposed the suit on the merits and alternatively requested the court, in the event the suit was granted, to give the defendant a regressive recovery against the co-plaintiff, the owner of the above-mentioned vessel—the Norwegian firm of Aabis Rederi. In the opinion of the defendant, Aabis Rederi was obliged under the terms of the time-charter contract to maintain the vessel in a seaworthy condition. The representative of Aabis Rederi objected to the court's consideration of his firm's relations with Sovfrakht on the grounds that the time-charter agreement contained a clause providing that all disputes arising from the contract would be settled by "arbitration in London or some other place agreed upon by the parties."

In the verdict handed down on May 6, 1968, the Division for Civil Cases of the Moscow City Court rendered a decision against Sovfrakht but refused to consider the relations between Sovfrakht and Aabis Rederi in view of the latter's objections based on the arbitration clause, whose recognition, according to the verdict, "ensues from Soviet law (Article 27 of the Civil Procedure Code of the R.S.F.S.R.)

22. In ratifying the Convention, the Presidium of the Supreme Soviet of the U.S.S.R. and the Presidiums of the Supreme Soviets of the Ukraine and Byelorussia stated that the application of the Convention's provisions was to be made "to the arbitration awards handed down in countries that have not signed the Convention only on terms of reciprocity." [1960] 46 Ved. Verkh. Sov. S.S.S.R. 421.

23. The provisions on arbitration made in the bilateral trade treaties and agreements of the U.S.S.R. with foreign countries may be applied only to disputes between Soviet organizations and legal entities and individuals of the foreign country concerned.

and from international agreements signed by the U.S.S.R. and Norway." Further, citing Article 10 of the Soviet-Norwegian Treaty on Trade and Shipping of December 15, 1925 and also Paragraph 3 of Article II of the 1958 Convention the court noted that "the claims which Sovfrakht may have against the Norwegian firm of Aabis Rederi on the basis of the time-charter agreement . . . are subject to settlement by arbitration . . . ."[24]

Analogously, it may be concluded that Soviet law will recognize similar arbitration clauses in contracts between Soviet organizations and their American contractors, although there is no direct provision for such recognition in the 1972 Soviet-American Trade Agreement.[25]

As regards the execution of foreign arbitration awards in the U.S.S.R., Article 63 of the Fundamentals of Civil Court Procedure of the U.S.S.R. and the Union Republics declares:

> The procedure in the U.S.S.R. for executing the decisions of foreign courts and arbitration tribunals is determined by the pertinent agreements of the U.S.S.R. with foreign countries or by international conventions signed by the U.S.S.R. The decision of a foreign court may be enforced by compulsion in the U.S.S.R. in the course of three years from the date the decision comes into operation.[26]

IV

In regulating the question of arbitration, the Trade Agreement says nothing, as we have already noted, about recognition of arbitration awards or about the execution of these awards, as is done in other bilateral trade and navigation agreements signed by the Soviet Union and analogous agreements signed by the United States.[27] The two sides evidently felt that these questions are satisfactorily settled in the 1958 Convention, to which both the U.S.S.R. and the United

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24. SEKTSIIA TORGOVOGO MOREPLAVANIIA I MORSKOGO PRAVO PRI VSESOIUZNOI TORGOVOI PALATE S.S.S.R., TORGOVOE MOREPLAVANIE I MORSKOE PRAVO. SBORNIK STATEI I MATERIALOV, (SECTION OF MERCHANT SHIPPING AND MARITIME LAW OF THE U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, TRADE NAVIGATION AND MARITIME LAW, COLLECTION OF ARTICLES AND MATERIALS) 34-38 (1972).

25. A similar regime is evidently ensured for such agreements within the United States by virtue of its internal legislation (e.g., the Federal Arbitration Act of 1925; a number of decisions by the U.S. Supreme Court, such as Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967), and others; law of July 31, 1970, enforcing the 1958 Convention with its appropriate additions to Title 9 of the U.S. Code (9 U.S.C.A. § § 201-208) (1970) (Added Pub. L. 91-368, § 1, July 31, 1970, 84 Stat. 693).

26. The law bringing the 1958 Convention into force in the United States establishes a three-year period for confirmation of an arbitration award recognized under the Convention. This period, however, is counted from the moment the award is handed down. 9 U.S.C.A. § 207 (1970).

27. Since 1950, the United States has signed 18 Treaties of Friendship, Commerce and Navigation which contain provisions on arbitration. See AMERICAN ARBITRATION ASSOCIATION, NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES, 196-97 (1971).

States are signatories. This surmise is confirmed by paragraph 16 of Article 7, which states that in the arbitration agreements between Soviet and American contractors provision shall be made for the venue of arbitration in a third country that is also a signatory of the 1958 Convention. We should note, however, that according to Article 7, the arbitration agreement must be given the "form required by the contract itself" and be applicable to the disputes which arise. Thus, from the standpoint of form, the question of the validity of an arbitration award may sometimes be decided differently than paragraph 1a of Article V of the 1958 Convention provides, which refers to the law selected by the parties or the law of the country where the award is handed down.

Under Article 7 the governments of the two countries, i.e., the U.S.S.R. and the United States, "shall encourage" the adoption of arbitration for the settlement of disputes arising from foreign trade transactions between Soviet and American contractors, envisaging definite conditions for the rules of procedure and the venue of such arbitration.

It seems to us that any lawyer analyzing this document cannot help but question the legal meaning of the words "shall encourage." In this connection the question has already been raised of whether the parties are justified at all in including in their contracts terms establishing conditions for arbitration different from those to be "encouraged."[28] We feel that there are no grounds for concluding that a contract which does not contain these provisions may be found to be legally invalid, especially since paragraph 2 of Article 7 of the Trade Agreement speaks unequivocally of the right of corporations, companies, and other organizations of one country to appear in the courts of the other country as plaintiffs and defendants, without being limited to the suits emanating from or relating to transactions provided for in the Agreement.

May the sides in their contracts agree to arbitration on terms other than those provided for in paragraphs 1a and 1b of Article 7? We believe that in this respect the words in the Agreement about encouraging arbitration with regard to certain specific conditions, cannot be interpreted as meaning the invalidity (in whole or in part) of a contract which stipulates other conditions for arbitration. Moreover, in the concluding section of paragraph 1 of Article 7 a direct provision is made for the right of the parties to adopt decisions as to any other form of arbitration which they jointly prefer and agree upon as best meeting their specific aims.

28. Starr, *A New Legal Framework for Trade between the United States and the Soviet Union: The 1972 U.S.-U.S.S.R. Trade Agreement*, 67 AM. J. INT'L. L. 63, 78 (1973).

Thus, regarding each individual contract, the arbitration conditions provided for in paragraphs 1a and 1b of Article 7 cannot be regarded as being automatically included *propio vigore* in that contract. It follows from the text of this Article that the parties themselves are to conclude the pertinent agreement in which they must provide for the application of the arbitration rules of the European Economic Commission, the agency authorized to appoint arbiters and name the venue for arbitration.[29]

At a press conference devoted to the signing of the Soviet-American Trade Agreement, Mr. Peterson, who signed the Agreement on behalf of the U.S. Government, stated, in answering the question why the word "encouragement" was used in Article 7, that it was quite obvious that some of the private companies concerned might not desire arbitration. He felt that it was not possible to insist on arbitration in this case, for to do so would be presumptuous for the United States.[30] In other words, by agreeing to "encourage arbitration" on the terms of paragraphs 1a and 1b of Article 7, the American side acted in the belief that it would be impossible through provisions in an international treaty or through subsequent legislative, administrative, or other steps to oblige American companies to include arbitration clauses with these conditions in contracts with their Soviet counterparts. By virtue of the principle of reciprocity it must be considered that the obligations of the Soviet side under the Trade Agreement cannot include the unilateral adoption of steps of this kind.

In digressing from a formal legal analysis of the provisions of Article 7 of the Agreement, it must be forcefully stressed that, though recommendatory rather than imperative, these provisions in practice are called upon and are able, nonetheless, to play a decisive role in orienting Soviet and American contractors in the question of arbitration when they conclude commercial transactions. By declaring that they would encourage examination of disputes by arbitration on the

29. This differs from the 1972 CMEA Convention, under which the parties are required to turn over their disputes, which are envisaged in the Convention, to the court of arbitration at the Chamber of Commerce of the defendant's country even if no agreement has been concluded on this point by the two sides. In accordance with Article 64 of the Fundamentals of Civil Procedure of the U.S.S.R. and of the Union Republics, in the event that "an international treaty or an international agreement signed by the U.S.S.R. has established rules other than those in the Soviet civil law, the rules of the international treaty or international agreement shall be applied." Thus, on the basis of Article 64, the provisions of the 1972 CMEA Convention are applied notwithstanding the general rule of Soviet law (as, for example, the above-mentioned Article 27 of the Code of Civil Procedure), which requires the agreement of both sides for the transfer of the dispute to a court of arbitration.

30. U.S. DEPARTMENT OF COMMERCE, U.S.-SOVIET COMMERCIAL AGREEMENTS, 1972 85 (1973).

terms stated in paragraphs 1a and 1b of Article 7, the two governments thereby reaffirmed that from the viewpoint of each of them these terms are consistent with the requirements of Soviet organizations and American companies in their commercial contracts with each other.

As regards the scope of application, the provisions of paragraph 1 of Article 7 of the Trade Agreement encompass, as we have already noted, disputes arising from foreign trade transactions. Soviet practice and scientific doctrine regard the concept "foreign trade transactions" as covering a fairly wide field. Included are transactions in which at least one of the parties is a foreigner (a foreign citizen or a foreign legal entity) and transactions which themselves involve the import or export of goods, or subsidiary operations linked with the export or import of goods.[31] In other words, foreign trade transactions embrace not only purely import and export operations governed mainly by purchase and sales contracts but also other "subsidiary" operations covered by agreements on transportation, insurance, storage and forwarding, as well as operations involving the drawing up and transfer by the seller of technical instructions concerning the supplied equipment, assembly work, services, maintenance, and so on.[32]

Thus, the provisions of paragraph 1 of Article 7 of the Trade Agreement are not of an all-embracing character. *Stricto sensu,* they do not concern non-contract relations such as torts or other contract relations between American individuals or legal entities and Soviet organizations which are not engaged in foreign trade. This interpretation, however, does not rule out the possibility that the participants in such relations will agree on arbitration provisions identical or similar to those envisioned in the Trade Agreement. Such provisions, of course, will be subject to any applicable laws then prevailing.

As we have pointed out, paragraph 1 of Article 7 of the Trade Agreement presupposes that in each specific case the Soviet and American contractors adopt the pertinent arbitration agreement by including this agreement in the body of the contract or by signing it as a separate agreement. Regarding the content of such an arbitration

31. L.A. LUNTS, VNESHNETORGOVAIA KUPLIA-PRODAZHA (KOLLIZIONNYE VOPROSY) (FOREIGN TRADE PURCHASE AND SALE (CONFLICTS QUESTIONS)) 14 (1972).

32. Some Soviet authors regard as foreign trade operations those activities which are conducted outside the purchase and sale of goods, for instance, foreign exchanges of technical services (e.g., contracts for aerial surveys, geological exploration, and so on) or the temporary use of machines and equipment (rent contracts and so on). For details see, V.S. POZDNIAKOV, GOSUDARSTVENNAIA MONOPOLIIA VNESHNEI TORGOVLI V S.S.S.R. (STATE MONOPOLY OF FOREIGN TRADE IN THE U.S.S.R.) 168-73 (1969).

agreement, paragraph 1 of Article 7 provides for three basic requisites, one of which is directly specified in the Article (i.e., arbitral consideration according to the arbitration rules of the Economic Commission for Europe). The two others require the agreement of the parties themselves and the observance of certain conditions: first, the selection of an agency authorized to appoint an arbitrator or arbitrators who must be resident in a country other than the U.S.S.R. or the United States and, second, selection of an arbitration venue which must likewise be in a country other than the U.S.S.R. or the United States, but which must be a signatory of the 1958 Convention.

The arbitration rules of the Economic Commission for Europe[33] envisage what is sometimes called a "self-adjusting mechanism." In order to set this mechanism in motion, it is, in principle, sufficient for the parties to agree on the application of the ECE Rules even without naming the agency authorized (a "competent agency"), in the event of difficulties, to appoint an arbitrator or arbitrators, or to name the venue of the arbitration. According to Article 5 of the ECE Rules, if the arbitration agreement makes no provision for either a competent agency or the venue of the arbitration, the plaintiff may, at his own discretion, request (a) a competent agency of the country of the defendant,[34] or (b) the Special Committee set up in accordance with Article IV of the 1961 European Convention on Foreign Trade Arbitration to appoint an arbitrator or arbitrators. The venue is decided by the arbitrators themselves (Article 14 of the Rules).

However, it is obviously in the interests of the parties themselves to determine by mutual agreement both the competent agency and the venue of arbitration beforehand, i.e., at the signing of the arbitration agreement. This is precisely recommended in paragraph 1 of Article 7 of the Soviet-American Trade Agreement. The agency and the venue may be selected by the parties at their discretion in any country other than the U.S.S.R. or the United States, in other words, in any third country.[35] It would evidently be more expedient, at least

33. U.N. Doc. E/ECE/625/Rev.I, E/ECE/Trade/81.Rev.I, Sale No. 70.II.E/Min.14. (1967).

34. A list of such competent agencies, chiefly national chambers of commerce, that were appointed in each signatory country of the European Convention on the basis of paragraph 6 of Article X, and also almost all the other European countries that have not yet signed the Convention is given in the supplement to the ECE Arbitration Rules (see Article 2 of the Rules). In the Soviet Union, this competent agency is the Chamber of Commerce and Industry of the U.S.S.R. The United States is not a member of the European Convention.

35. The signatories of the 1958 Convention as of January 1, 1974 are: Austria, Botswana, Bulgaria, Byelorussia, Cambodia, the Central African Republic, Czechoslovakia, Denmark, Ecuador, Egypt, the Federal Republic of Germany, Finland, France, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Korea, Madagascar, Mexico, the

for technical reasons, to name the competent agency and the venue of arbitration in one and the same country, although the parties, needless to say, can decide this question in some other way, naming, for example, the Chamber of Commerce of Hungary as the competent agency and Sweden as the venue of arbitration. The country named as the venue of arbitration must be a signatory of the 1958 Convention (although paragraph 1a of Article 7 does not make this requirement relative to the country of the competent agency). This condition quite plainly has the purpose of ensuring the enforcement of the award of such arbitration in accordance with the rules of the Convention both in the U.S.S.R. and the United States.[36] However, it must be noted that from the standpoint of the "territorial" application of the Convention, decisive significance attaches not to the venue of arbitration but to the place where the arbitration award is made. Article 37 of the Rules of the Economic Commission for Europe gives arbitrators the right to hand down the award not in the country where the arbitration hearings took place but in another country. In this context it is recommended that Soviet and American contractors should state in their arbitration agreements that not only the venue but also the place where the award is to be handed down should be in the country selected by them, i.e., a country that has signed the 1958 Convention.

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Under the Rules of the Economic Commission for Europe the competent agency's functions are limited mainly to the appointment of an arbitrator or arbitrators in the event difficulties arise over such an appointment. The Rules do not state whether a case should be decided by one arbitrator, three arbitrators, or a standing arbitration organization. This question has to be agreed upon by the parties when disputes arise and the plaintiff should suggest one of the three named methods of arbitration in his notification to the defendant that he has applied for arbitration (Article 3). However, taking into account the fact that the provisions of the Rules are of a dispositive nature, i.e., they may be modified by agreement between the parties (Article 1), the latter have the right to determine this question in their arbitration agreement, namely, to stipulate, for example, that disputes between them will be examined by a panel of three arbitrators, of whom

Netherlands, Niger, Nigeria, Norway, the Philippines, Poland, Rumania, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, the Ukraine, the U.S.A., and the U.S.S.R. Treaties in Force, January 1, 1974.

36. Like the Soviet Union (see *supra* note 22), the United States declared when it signed the 1958 Convention that it would apply it on reciprocal terms in respect to the recognition and execution of only those arbitration awards that are handed down in the territory of the contracting state. Declaration of Sept. 30, 1970, 21 U.S.T. 2566 (1970).

one will be appointed by each of the parties, and that the two arbitrators thus appointed will name a third arbitrator to preside at the hearings. Agreement on this procedure beforehand is perhaps most typical in *ad hoc* arbitration and it simplifies and speeds up the procedure of forming the panel of arbitrators.

It may be thought that in most cases the parties concerned duly appoint the arbitrators desired by them, and that the latter elect the chairman. The need for firm legal security requires, however, that provision should be made for cases where one of the parties, namely the defendant, seeks to avoid appointing an arbitrator for one reason or another and thereby complicates the formation of the panel of arbitrators. Account must also be taken of a situation, which is fairly frequent in international practice, where in *ad hoc* arbitration the two arbitrators cannot agree on the appointment of the chairman. This is precisely a case where a competent agency authorized to appoint an umpire or umpires comes in. However, a question arises as to the criteria which are to serve as a guide to such an agency, in the appointment of an arbitrator or the chairman of the tribunal.[37] Article 7 of the Soviet-American Trade Agreement does not establish any restrictions regarding the nationality of the arbitrator; in other words, not only the arbitrator appointed for the defendant but also the chairman of the tribunal may, in principle, be a Soviet or an American citizen. In practice, of course, the competent agency will generally appoint the chairman from among the citizens of a third country. It may also appoint a citizen of the defendant's country as arbitrator for the defendant, especially if the plaintiff has already appointed a citizen of his own country as an arbitrator.

The task of ensuring the mutual interests of Soviet and American contractors in the area of arbitration would evidently be facilitated by a study of the question of compiling a list or lists of recommended arbitrators, or tribunal chairman, which would include Soviet and American citizens and citizens of third countries.[38] In making the choice of the tribunal chairman and of the arbitrators appointed by the parties, the competent agency could (and, in the event of agreement between the parties, should) be guided by such lists, thereby avoiding the complications which might arise in the selection of the most suitable candidate for an arbitration or tribunal chairman in each separate case.

Space does not permit a discussion of many other aspects of arbitration under the Rules of the Economic Commission for Europe.

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37. An analogous question arises in the selection of a chairman by the arbitrators appointed by the parties.

38. Straus, *Interim Observation on Arbitration Arrangements in Soviet-American Trade*, 28 ARB. J. 105, 109 (1973).

These aspects are in themselves extremely important and must be meticulously studied in order to find the best possible way of meeting the requirements of arbitration in Soviet-American trade and commercial relations.

What we have already examined shows, in our opinion, that it is necessary to work out definite recommendations that would guarantee the full equality of the sides and could be taken into account by Soviet and American contractors when they sign arbitration agreements on the terms envisaged in paragraph 1 of Article 7 of the Trade Agreement of October 18, 1972. In particular, this could concern the drawing up of a properly worded standard arbitration clause or several alternative clauses that would specify these terms (regarding the number of arbitrators, the competent agency, the venue of arbitration, the venue of the arbitration award, the compilation of lists of potential arbitrators and tribunal chairmen, and so forth).[39]

Recommendations of this kind could be worked out in several ways. Their efficacy would quite definitely depend on whether they are carried out bilaterally or unilaterally; in the latter case, obviously, the utility of such recommendations would be extremely problematic. We feel that the experience and assistance of the appropriate Soviet and American organizations that professionally engage in arbitration, namely, the arbitration commissions at the Chamber of Commerce and Industry of the U.S.S.R., the American Arbitration Association, and others, would be undoubtedly valuable in the working out of these recommendations.[40] The practice of actually using arbitration in Soviet-American trade and commercial relations and the drawing up of projects for the "other forms of arbitration" men-

39. There are a number of other points, contained particularly in the provisions of the ECE Arbitration Rules, which it would be advisable to specify beforehand in such an arbitration clause: e.g., the language to be used at the arbitration hearings, which in the absence of agreement between the parties is determined by the arbitrators (Article 26 of the Rules); the form of the arbitration award, which, by a "strange omission," is not specified at all in the Rules. *See* Cohn, *The Rules of Arbitration of the United Nations Economic Commission for Europe*, 16 INT'L & COMP. L. Q. 946, 976 (1967).

40. The U.S.S.R. Chamber of Commerce and Industry has, for instance, signed two bilateral agreements: one with the Federation of Indian Chambers of Commerce and Industry and the other with the Japanese Association of Commercial Arbitration, both of which contain a model arbitration clause recommended for inclusion in contracts between Soviet foreign trade organizations and their Indian and Japanese contractors respectively. A number of similar agreements (with the London Arbitration Tribunal, the International Chamber of Commerce, the Japanese Association of Commercial Arbitration, and others) have been signed as well by the American Arbitration Association. See, Benjamin, *Inter-Institutional Agreements Designed to Extend Existing Facilities for International Commercial Arbitration*, 8 INT'L & COMP. L. Q. 289-98 (1959).

tioned in the closing part of paragraph 1 of Article 7 of the Trade Agreement could subsequently be organized with the participation of the above-mentioned organizations.

A Short Bibliography of Works by Soviet Authors on International Arbitration

Russian Language Publications

1. M.M. Boguslavskii, *Arbitral Consideration of Disputes in Soviet Foreign Trade with the European People's Democracies* in LEGAL QUESTIONS OF SOVIET FOREIGN TRADE (Moscow 1955).

2. S.N. Bratus, *Results of the Fourth Conference of Chairmen of Foreign Trade Arbitration Commissions and Tribunals of the CMEA Countries*, [1968] 21 SBORNIK INFORMATSIONNYKH MATERIALOV, 39-43 (Moscow).

3. D.M. Genkin, *European Convention on Foreign Trade Arbitration*, [1967] 20 SBORNIK INFORMATSIONNYKH MATERIALOV 3-8 (Moscow).

4. S.A. Gureyev, *European Convention on Foreign Trade Arbitration in* SOVETSKII YEZHEGODNIK MEZHDUNARODNOGO PRAVA 1964 (Moscow 1966).

5. L.M. YEGOROV, MARITIME ARBITRATION IN BRITAIN (Moscow 1963).

6. A. A. Ishchenko, *A New Convention on the Recognition and Execution of Foreign Arbitration Verdicts*, [1958] 10 VNESHNIAIA TORGOVLIA.

7. A.D. KEILIN, *Maritime Arbitration Commission*, [1947] 11 VNESHNIAIA TORGOVLIA 1.

8. A.D. Keilin, *Relationship Between the Court and Arbitration in the Examination of Civil Law Disputes in the Capitalist Countries* in SOVETSKII YEZHEGODNIK MEZHDUNARODNOGO PRAVA 1960 278-89 (Moscow 1961).

9. A.D. Keilin, *Court Procedure and Civil Trials in Capitalist Countries* in PART III, ARBITRATION (Moscow 1961).

10. A.D. Keilin, *Maritime Arbitration in the U.S.S.R.*, [1962] 8 MORSKOI FLOT 15-17.

11. A.D. Keilin, *Maritime Arbitration in the U.S.S.R. in Recent Years*, [1962] 1 TORGOVOYE MOREPLAVANIYE I MORSKOYE PRAVO, SBORNIK STATEI I MATERIALOV 9-24 (Moscow).

12. A.S. Korolenko, *Arbitration in the Soviet Union on Ques-*

tions of the Merchant Marine, [1952] 4 VNESHNIAIA TORGOVLIA 34-36.

13. S.N. Lebedev, *Federal Arbitration Law in the U.S.A. in Its Application to Maritime Disputes (and a translation of the law itself)*, [1963] 97 MORSKOYE PRAVO I PRAKTIKA 38-59 (Leningrad).

14. S.N. Lebedev, *Recognition and Execution of Arbitration Awards in the Agreements of the U.S.S.R. with Foreign Countries*, [1961] 3 UCHENIYE ZAPISKI 229-46 (Moscow).

15. S.N. LEBEDEV, INTERNATIONAL TRADE ARBITRATION (Moscow 1965).

16. S.N. Lebedev, *Settlement of the Property Disputes of Soviet Foreign Trade Organizations* in EXPORT AND IMPORT OPERATIONS: LEGAL ADJUSTMENT 297-317 (Moscow 1970).

17. S.N. LEBEDEV, MARITIME ARBITRATION COMMISSION (ORGANIZATION AND PROCEDURE) (Moscow 1972) (booklet published by the Merchant Shipping and Maritime Law Section of the Chamber of Commerce and Industry).

18. L.A. Lunts, *Arbitration in Foreign Trade* in INTERNATIONAL CIVIL PROCEDURE 140-80 (Moscow 1966).

19. D.F. Ramzaitsev, *Legal Status of the Foreign Trade Arbitration Commission*, [1955] 3 SOVETSKOYE GOSUDARSTVO I PRAVO.

20. D.F. RAMZAITSEV, FOREIGN TRADE ARBITRATION IN THE U.S.S.R. (Moscow 1957).

21. D.F. Ramzaitsev, *Work of the Foreign Trade Arbitration Commission in Moscow in 1957* in SOVETSKII YEZHEGODNIK MEZHDUNARODNOGO PRAVA, 1958 (Moscow 1959).

22. D.F. RAMZAITSEV, ARBITRATION IN THE MERCHANT MARINE (Moscow 1960).

23. D.F. Ramzaitsev, *Work of the Foreign Trade Arbitration Commission in Moscow in 1958-1959* in SOVETSKII YEZHEGODNIK MEZHDUNARODNOGO PRAVA, 1960 (Moscow 1961).

24. D.F. Ramzaitsev, *Application of International Private Law in the Awards of the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce*, [1970] 23 SBORNIK INFORMATSIONNYKH MATERIALOV 3-20 (Moscow).

25. E.T. Usenko, *Question of 'Competence-Competence' Arbitration in the Verdicts of West German Courts*, [1961] 12 SBORNIK INFORMATSIONNYKH MATERIALOV 81-86 (Moscow).

26. A.I. Shpektorov, *Maritime Arbitration in the U.S.S.R.*, [1951] 8 SOVETSKOYE GOSUDARSTVO I PRAVO 77-80 (Moscow).

27. A.I. Shpektorov, *Soviet Maritime Arbitration*, [1970] 12 VNESHNIAIA TORGOVLIA 44-45 (Moscow).

28. U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, LAW SECTION, ARBITRATION PRACTICE (in four parts) (A.I. Shpektorov ed. Moscow 1972).

Part I: Awards of the Foreign Trade Arbitration Commission in 1934-1951.

Part II: Awards of the Foreign Trade Arbitration Commission in 1952-1958.

Part III: Awards of the Foreign Trade Arbitration Commission in 1958-1962.

Part IV: Awards of the Foreign Trade Arbitration Commission in 1963-1965.

29. U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, MERCHANT SHIPPING AND MARITIME LAW SECTION, FROM THE PRACTICE OF THE MARITIME ARBITRATION COMMISSION (1969-1971) (M.I. Maksimadji, V.F. Sidorchenko, M.Z. Deshalit, A.A. Rodionov & R.R. Oberg eds. Moscow 1972).

Reviews of practice and other material on questions of arbitration are systematically printed in the following periodicals:

a) U.S.S.R. Chamber of Commerce and Industry, Law Section, SBORNIK INFORMATSIONNYKH MATERIALOV (published since 1954).

b) U.S.S.R. Chamber of Commerce and Industry, Merchant Shipping and Maritime Law Section, TORGOVOE MOREPLAVANIYE I MORSKOYE PRAVO, SBORNIK STATEI I MATERIALOV (published since 1963).

Publications in Foreign Languages

1. S.N. Bratus, *Cooperation entre organismes d'arbitrage des Pays socialistes de l'Europe* in IIIE CONGRESS INTERNATIONAL DE L'ARBITRAGE (VENEZIA, 6-8/X, 1969) 219-29 (Milan 1970).

2. S.N. Lebedev, *Some Remarks on the Use of Arbitration in Soviet Foreign Trade,* in INTERNATIONAL SEMINAR ON COMMERCIAL ARBITRATION, 18TH AND 19TH MARCH, 1968 269-78 (New Delhi 1968).

3. S.N. Lebedev, V.S. Pozdniakov & M.G. Rozenberg, *The Law of the Union of Soviet Socialist Republics (As Applied to Relations in Foreign Trade)* in THE DIGEST OF COMMERCIAL LAWS OF THE WORLD (New York 1970).

4. S.N. Lebedev, *La Commission d'Arbitrage Maritime pres la Chambre de Commerce de L'U.R.S.S.* in BULLETIN DU COMITE FRANCAIS DE L'ARBITRAGE 137-48.

5. S.N. LEBEDEV, MARITIME ARBITRATION COMMISSION (ORGANIZATION AND PROCEDURE) (Moscow 1972) (booklet published by the U.S.S.R. Chamber of Commerce and Industry, Section of Merchant Shipping and Maritime Law, 43 pp.).

6. D.F. Ramzaitsev, *The Law Applied by Arbitration Tribunals* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE WITH SPECIAL REFERENCE TO EAST-WEST TRADE (London 1964).

7. E.T. Usenko, *International Commercial Arbitration in the U.S.S.R.* in UNION INTERNATIONAL DES AVOCATS, 2 ARBITRAGE INTERNATIONAL COMMERCIAL (Haye 1960).

8. U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, LAW SECTION, COLLECTED ARBITRATION CASES (A.I. Shpektorov ed.):

Part I, Awards of the Foreign Trade Arbitration Commission, 1934-1951 (Moscow 1972).

Part II, Awards of the Foreign Trade Arbitration Commission, 1952-1958 (Moscow 1972).

9. U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, SECTION OF MERCHANT SHIPPING AND MARITIME LAW, FROM THE PRACTICE OF THE MARITIME ARBITRATION COMMISSION 1969-1971 (M.I. Maksimadji, V.F. Sidorchenko, M.Z. Deshalit, A.A. Rodionov & R.R. Oberg, eds. Moscow 1972).

New Uses for Arbitration in Soviet-American Contracts for Industrial, Scientific, and Technical Development

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In recent years trade between the Soviet Union and the United States has become increasingly concerned with new types of business arrangements that are quite different from the relatively simple import-export transactions which have traditionally constituted the major part of international trade. These newer business transactions relate to industrial, scientific, and technical development. They include such activities as the design and construction of large industrial plants; the supply, assembly and installation of machinery; the transfer of technical knowledge and know-how; joint ventures for carrying out scientific research; and consortia for undertaking major industrial or civil engineering projects.

These transactions are reaching major size and appear to be growing rapidly. For example, Soviet-American contracts for industrial plant and equipment totalled $239 million in 1971 and rose to $465 million in 1972. These figures do not include a number of billion-dollar projects which are in negotiation including such things as large-scale development of Siberian natural gas, joint ventures for chemical production and joint development of computer facilities. In 1971 and 1972, the Soviet Union's orders to the United States for plant and equipment exceeded orders to France or West Germany, or any other Western nation.[1]

These newer transactions involve many more complex legal and engineering aspects than traditional import-export transactions. For example, some of these newer transactions require a contractor to design and build an entire factory on a "turnkey" basis. Other arrangements may require the party which is acquiring the factory to perform part of the work, such as erecting the building in which the factory will be installed, or supplying certain materials and components. A number of the most complex arrangements contemplate even greater cooperation and provide for joint research, and for the exchange of services and know-how between the parties on a continuing long-term basis. As Professor S.N. Bratus, the distinguished

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1. United States Congress, Joint Economic Committee, as reported by the N.Y. Times, Dec. 12, 1973, at 1, col. 1.

Chairman of the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce has pointed out, the contractual arrangements relating to such projects have "outgrown the framework of traditional sales transactions."[2]

The delegates at the Fourth International Congress on Arbitration held in Moscow in October 1972 adopted resolutions which recognized the emergence of these "new and diverse contractual agreements" which "often relate to projects which are complex and involve long periods of time to complete."[3] The Congress considered the fundamental question of whether arbitration is as useful in connection with disputes arising under such contracts as it is in the more traditional import-export field. The delegates, although they came from 36 different capitalist, socialist and developing countries, were unanimous in the resolution which they adopted on this point:

> The Congress unanimously and strongly affirms the great value of arbitration not only for traditional types of disputes arising in international trade, but also for new types of disputes which may arise as a result of international commercial contracts for industrial, scientific, and technical development.[4]

In addition to this general observation, the Moscow Congress explored in detail the uses of arbitration which are uniquely applicable to the newer forms of contractual arrangements relating to technological development and which are not generally applicable to traditional forms of sales contracts. For example, the Congress' resolutions noted that, unlike most import-export transactions in which arbitration is generally involved only after goods are delivered or the time for performance is past, in contracts involving industrial, scientific, and technical development, arbitration is valuable at a number of earlier stages.

Thus, for example, in long-term arrangements for technological collaboration, arbitration is a valuable way to resolve disputes which may arise during the performance of the contract due to changes in technological or economic conditions which the parties could not predict when the contract was initially concluded. Also, disputes can arise during the construction of complex industrial plants which, if not resolved quickly, could seriously interrupt the completion of the work.

Recognizing the possibilities of such disputes, the Moscow Con-

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2. Bratus, *Report on Arbitration and International Cooperation toward Industrial, Scientific and Technical Development*, 27 ARB. J. 230 (1972).

3. *Resolutions of the Fourth International Congress on Arbitration in Moscow, October 3-6, 1972*, 27 ARB. J. 225, 226 (1972) [hereinafter cited as *Resolutions*].

4. *Id.* at 225-26, Section II, subpara. 1.

gress included in its resolutions a recommendation that "[t]he value of arbitration is not limited to disputes which may arise after completion of the work under such contracts, but also that arbitration is valuable in connection with disputes which may arise while the performance of such work is in progress."[5]

Drafting and interpreting arbitration provisions relating to such matters as referred to in the two examples above present new challenges to Soviet and American lawyers who write contracts for long-term industrial development projects. The Moscow Congress recommended that these subjects are "worthy of further thorough study."[6]

In pursuance of such "further thorough study," I shall set forth some thoughts which I hope will stimulate discussion on the following two subjects: first, the value of arbitration in resolving disputes which may arise during the life of long-term contracts due to unexpected changes in conditions; and second, the roles of technical experts and arbitrators in resolving disputes under contracts for industrial, scientific, and technical development.

I. THE USE OF ARBITRATION TO RESOLVE DISPUTES WHICH MAY ARISE DURING THE LIFE OF LONG-TERM CONTRACTS DUE TO UNEXPECTED CHANGES IN CONDITIONS

The very essence of many contracts concerned with scientific, technical, and research work is that the two parties to the contract are agreeing to embark together on a journey into the unknown. I am speaking particularly of contracts in which two enterprises agree to cooperate over a long period of years in an area of development or research, to share their scientific knowledge, and to pool their technical skills, with the understanding that they will fairly divide the fruits of their joint efforts. The parties to such contracts have a general idea of what they hope to accomplish, but they cannot be sure how long the task will take, precisely how much it will cost, and exactly what unexpected problems or changes in conditions may occur in the future.

The problem is further complicated by the fact that scientific and technical projects generally require many years of effort and the parties to such contracts must therefore consider not only the uncertainties in their own program but also many types of unpredictable external changes which may occur during the long life of their contract. For example, technical advances made by others may cause the project on which the parties are working to become obsolete even before it is finished. Other unpredictable events which may occur

5. *Id.*

6. *Id.* at 226, Section II, subpara. 3.

during the life of an international scientific, research, or technical agreement include changing economic conditions and shifts in competitive conditions. Such events may require changes in royalty rates or other contractual terms.

One of the major tasks of those who write contracts, particularly lawyers, is to predict the future and, on the basis of that prediction, to draft contract provisions which will regulate the conduct of the parties upon the occurrence of future events. The task of prediction is relatively simple when the contract writers are dealing with normal commercial contracts which involve single purchase-sale transactions intended to be concluded in a short period of time. We must, however, recognize that the difficulties of prediction increase geometrically when we attempt to write contracts intended to define for many years the rights and responsibilities of parties to a scientific or technical agreement. Even the most imaginative lawyer and the most farsighted executive cannot predict all of the things which may happen during the long life of a scientific or technical contract. In such situations, the parties may fear what the future will bring; they may anticipate possible changes in circumstances, but the imponderables are so great that they cannot devise contract provisions to take care of all the possible future contingencies which may arise.

Faced with such difficulties of prediction, there is a danger that the parties may conclude that it is impossible to write a contract and they may therefore abandon their proposed collaboration. It is at this point that a knowledge of the usefulness of arbitration is of vital importance. Arbitration—and only arbitration—can bridge the gap between the precise statement of contractual rights and responsibilities required in a legal contract and the unpredictability which is an inescapable element in scientific and technical development. A properly written arbitration clause can provide that when unpredictable changes arise during the life of a contract, the parties will attempt first to agree on fair ways to solve the problem and, if they are unable to do so, the matter will then be submitted to arbitration.

The late Professor Eugenio Minoli, President of the Italian Arbitration Association, recognized the importance of this use of arbitration when he wrote in his Report to the Moscow Congress that arbitration

> may be used to settle in the future certain points in the contract where the information in possession of the parties at a given time is insufficient to make a precise agreement . . . [and] arbitration is sometimes the only way of breaking a deadlock when it is practically impossible to lay down precise and detailed contractual rules.[7]

7. E. MINOLI, ARBITRATION AND INTERNATIONAL COOPERATION TOWARD INDUSTRIAL, SCIENTIFIC AND TECHNICAL DEVELOPMENT 8 (1972).

Moreover, the provision for arbitration in a contract is important not only because it supplies an indispensable mechanism for solving possible future deadlock but, just as importantly, because the existence of arbitration is a strong incentive to the parties to avoid deadlock by reaching a mutual agreement when problems arise.

It would be most helpful to discuss whether Soviet and American lawyers share the view that arbitration may appropriately be used to resolve unexpected problems which may arise in the future. Do we agree that special provisions for this use of arbitration should be included in long-term scientific, industrial and technical contracts in Soviet-American trade? And, if such provisions are included in contracts, how should the powers of the arbitrators be defined or limited?

II. THE ROLES OF TECHNICAL EXPERTS AND ARBITRATORS IN RESOLVING DISPUTES UNDER CONTRACTS FOR INDUSTRIAL, SCIENTIFIC, AND TECHNICAL DEVELOPMENT

The disputes which may arise between the parties to contracts for industrial and technical development are most likely to result from engineering or technological difficulties. Typically, such disputes involve the question of whether or not there has been a failure to comply with the technological or engineering requirements of the contract, and, if so, who is to blame for it and what action must be taken to correct it. A highly experienced lawyer and arbitrator, Lazare Kopelmanas, reporting on this subject at the Moscow Congress, observed, "[i]t is probably not an exaggeration to say that the technical aspect predominates in all the differences which can arise between the parties on the subject of the proper performance of the contract."[8]

Clearly, the resolution of such disputes requires answers to technical or engineering questions which can only be given by qualified experts. It is for this reason that the delegates to the Moscow Congress expressly recognized "the increasingly important role of persons possessing specialized scientific and technical experience in connection with problems which may arise at various stages of projects for industrial, scientific, and technical cooperation."[9]

Moreover, when disputes arise under the types of contracts which we have been discussing, there are many advantages in having the technical or engineering questions answered by qualified experts as soon as possible. For example, it may be necessary to resolve a dispute arising out of a preliminary stage of construction before work

8. L. KOPELMANAS, ARBITRATION AND THE TECHNICAL VERIFICATION OF SATISFACTORY PERFORMANCE OF INTERNATIONAL CONTRACTS IN THE SPHERE OF INDUSTRY 3 (1972) [hereinafter cited as KOPELMANAS].

9. *Resolutions, supra* note 3, at 225-26.

can proceed on later stages of the project.

Another reason for prompt intervention by experts has been pointed out by Dr. Kopelmanas:

> The time lag between the moment when the technical difficulties between the parties arise and the experts being in a position to know of them, will often have as a consequence that the experts are in a position where they cannot discover all the elements necessary to the solution of the dispute . . . . The plant will have been in operation or brought to a stop for a long lapse of time . . . . An inspection of the site, which is an indispensable basis for a complete technical opinion, will put the experts in the presence, not of a plant exactly as it was supplied, but as it may have been affected by the action or inactivity of the party acquiring it.[10]

Dr. Kopelmanas points out that an additional reason favoring prompt use of experts is that when "experts intervene at the very moment when a controversy arises . . . they can help the parties in the search for a new technical solution capable of opening the way to a friendly and practical end of the dispute." However, this "conciliatory function of the experts will have difficulty" if it occurs at a time "too far away from the birth of the dispute."[11]

For those interested in East-West trade, it is significant to note that the opinion that technical experts should intervene early was supported at the Moscow Congress not only by Western observers but also by representatives of socialist countries. For example, Professor I. Rucureanu of Rumania, reporting on experience in the CMEA countries, emphasized that:

> . . . practice shows that in the case of disputes which are submitted to arbitration a long time after the technical difficulties appeared, such technical examinations can no longer be performed in the best conditions, and sometimes cannot be performed at all. For removing such obstacles the intervention of technical experts is recommended to be as early as possible after the appearance of the technical difficulty.[12]

For these reasons the provisions of a number of standard forms of contracts for engineering and construction work suggest the early intervention of experts to decide technical disputes while work under the contract is still in progress. For example, the desirability of intervention by technical experts when disputes arise during construction is referred to in the *Cahier des Charges General de l'Office des Nations Unies*[13] and in the *Guide for Use in Drawing up Contracts Relating to the International Transfer of Know-How in the Engineering Industry* sponsored by the United Nations Economic Commission for

10. KOPELMANAS, *supra* note 8, at 5-6.

11. *Id.*

12. I. RUCUREANU, ARBITRATION AND CONTRACTS CONCERNING PROJECTS OF INDUSTRIAL INSTALLATIONS, SUPPLY AND MOUNTINGS 9 (1972).

13. KOPELMANAS, *supra* note 8, at 8.

Europe.[14] Similarly, provisions for early intervention by technical experts will, for example, be found in the standard forms suggested by the *Federation Internationale des Ingenieurs-Conseils* (F.I.D.I.C.).[15]

Expanding on this concept, Dr. Kopelmanas has suggested the establishment of "summary procedures" which

> . . . would permit the parties or the interested party to demand, in advance of the treatment of the dispute in the juridical field, the designation of experts charged with the duty of resolving disagreements which are purely of a technical order and of resolving these immediately [as] they come to light.[16]

The early intervention of technical experts to resolve technical disputes raises a number of important questions for lawyers who write contracts and arbitrators who rule upon them. These questions arise from the fact that international contracts which provide for early intervention of experts to decide technical disputes also typically contain an arbitration clause. In such circumstances, to what extent should arbitrators who deal with a case at a later stage accept the decisions of a technical expert who has previously made decisions in connection with the matter? One of the resolutions adopted at the Moscow Congress posed the question as follows:

> What is the proper relationship between the conclusions reached, on the one hand, by engineers and technical consultants while work on a contract is proceeding, and the decisions to be reached, on the other hand, by arbitrators when one of the parties contests a consultant's conclusions?[17]

The primary questions which arise in connection with the relationship between technical experts and arbitrators are:

> (1) What disputes should be referred to technical experts and what should be referred only to the arbitrators?
> (2) Are decisions of technical experts final, or are they subject to review and revision by the arbitrators?
> (3) In cases in which arbitrators are called upon to review the decisions of technical experts, to what extent should the arbitrators accept experts' decisions?

As to the first question, lawyers who write contracts for early intervention of technical experts when technological or engineering disputes arise, should define as precisely as possible the disputes in which there is to be recourse to technical experts and the disputes to be referred only to arbitrators. Many contracts now being written

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14. U.N. Doc. TD/222/Rev. 1 (1970).

15. N. PEARSON (published as M. PIRSEN), ROLE OF ARBITRATORS AND CONSULTING ENGINEERS WITH REGARD TO CONTRACTS ON CIVIL ENGINEERING WORK 20 (1972) [hereinafter cited as PEARSON].

16. KOPELMANAS, *supra* note 8, at 17.

17. *Resolutions, supra* note 3, at 226, Section II, subpara. 3(iii).

probably fail to do this adequately. As Dr. Kopelmanas has suggested,

> . . . it is necessary that the parties should get into the habit of separating in their contracts disputes which are of a technical kind from those which are not and that they should foresee recourse to expert opinion at the very moment that unresolvable technical difficulties actually arise.[18]

As to the second question, whenever parties provide in their contract for intervention by an expert to decide certain technical disputes, the contract should also state whether the decisions of the technical expert are to be final or whether a party who objects to the decision will have the right to appeal to arbitration under the arbitration clause of the contract. A contract provision that the decision of the expert will be final has the advantage of resolving technical disputes most quickly and economically. On the other hand, when very important issues are at stake some parties may prefer to have the right of appeal to arbitration which typically insures greater procedural safeguards and a more juridical approach than are customary in the relatively informal atmosphere in which decisions are made by technical experts. The parties to each contract must weigh these relative advantages and disadvantages and determine the matter in the light of the particular circumstances of their transaction.

From the information available, it appears that most enterprises and lawyers engaged in international trade choose to provide that the decisions of technical experts will be subject to appeal to arbitration. For example, a number of standard form contracts provide that if the technical expert makes a decision which either party does not accept, the aggrieved party may have recourse to arbitration. In such cases, the arbitrators typically have the power to "open up, review and revise" the decision of the technical expert.[19] Although the *Cahier des Charges General de l'Office des Nations Unies* suggests that decisions of technical experts should be final, nevertheless Dr. Kopelmanas indicates that such provisions are so uncommon as to be considered "radical" and he expresses doubt as to whether they would "generally be accepted at the first attempt in international practice."[20]

Inasmuch as the great majority of international contracts provide that the decisions of technical experts are subject to review by arbitrators, it is important to determine to what extent the arbitrators should accept the prior decision of the technical expert and how much weight the arbitrators should give to such decisions. It appears

18. KOPELMANAS, *supra* note 8, at 7.

19. *See* F.I.D.I.C. standard form, "Part I—General Conditions," cl. 67; *see also* R.I.B.A. standard form, cl. 35. For comment on these standard forms see PEARSON, *supra* note 15, at 20-41.

20. KOPELMANAS, *supra* note 8, at 8.

that most contracts, as presently written, give little guidance in answering those questions. It therefore becomes necessary to try to develop an answer which, hopefully, could be broadly adopted by parties and arbitrators.

I will at this point venture some suggestions of my own in an attempt to propose an answer to the question of whether arbitrators who enter a dispute at a later stage should accept the decision of technical experts made at earlier stages of the matter. I welcome the opportunity to expose these thoughts with the hope that they will stimulate discussion and critical comment.

I consider these suggestions to be preliminary and subject to much refinement. I should also emphasize that these are my personal views. While I have had the benefit of discussions on this subject with colleagues at the American Arbitration Association, these suggestions have not been formally acted upon and do not represent the official views of the American Arbitration Association. In the spirit of the Moscow Congress, they are submitted for "further thorough study."

Basic to my suggestion is the concept that in major international matters the expert should be not only technically qualified, but also should be an impartial person, independent of both parties. I suggest that the decision of an impartial technical expert on questions within his field of technical expertise should be entitled to much greater weight and respect by arbitrators than, say, the evidence given by a party.

As a practical matter, if an impartial technical expert has decided a dispute within the area of his expertise, it is quite difficult for an aggrieved party to overturn that decision on appeal to arbitration. Dr. Kopelmanas has described this practical situation as follows:

> It would seem difficult for a party who had taken part in a procedure involving expert opinion to defend in the course of a trial, whether judicial or arbitral, a position contrary to the conclusions of the experts, given that all necessary precautions had been taken over the choice of qualified independent expertise. Their conclusions would of necessity be impressive, if not juridically, at least in fact.[21]

It is my contention that the weight which, as a practical matter, is usually given by arbitrators to the decisions of impartial technical experts should be expressed as a legal principle.

The principle which I suggest is: *Arbitrators should not reverse or modify a decision made by an impartial technical expert in determining a question of fact within his field of expertise, provided the expert's decision is supported by substantial evidence.*

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21. *Id.* at 8-9.

A key problem in applying the principle is the determination of what constitutes "substantial evidence" in each specific case. "Substantial evidence" may be defined as the amount of evidence which a reasonable mind would accept as adequate to support a conclusion.

In determining that there is substantial evidence, the arbitrators would only have to find that there is evidence on which they could reasonably reach the same decision reached by the technical expert. The arbitrators would not have to go on to analyze the evidence in detail in order to be able to say that, on the basis of the evidence, they reach the same conclusion as the technical expert. It is important to emphasize that this principle, while it limits arbitrators in their review of technical facts, leaves them the judges of all questions of law.

In essence, the principle which I suggest would say to arbitrators, "You should limit the scope of your review of decisions by technical experts. As arbitrators, you should defer to the expertise of the technical experts and not substitute your factual judgment for theirs. However, the 'substantial evidence' principle gives you sufficient flexibility to overrule obvious errors and glaring injustices. Moreover, you have unlimited power on all questions of law."

In arbitration cases in which this suggested principle is followed, the arbitrators would be concerned with only a limited number of questions, such as:

(1) Was the technical expert impartial?
(2) Was the expert technically qualified in the field covered by his decision?
(3) Was there substantial evidence to support the expert's decision?

If each of these questions is answered "yes" by the arbitrators, they could then concentrate on deciding questions of law and non-technical questions of fact, and on the determination of damages or other appropriate remedies.

There are several practical advantages in adopting the principle which I suggest. *First,* the arbitrators would not substitute their judgment for the judgment of the technical experts on technical questions. This makes good sense because, particularly in European practice, the arbitrators are usually lawyers and are less qualified to pass on technical matters than the experts. *Second,* under the "substantial evidence" principle, the arbitrators would only have to find that there was reasonable factual evidence sufficient to support the decision of the technical expert. Because the arbitrators' function would thus be limited, the arbitrators would be much less likely to require extensive testimony from additional experts. This would save time and money for the parties. *Third,* because the question submitted to the arbitrators would be limited, it would be somewhat easier to

predict the outcome of the case than if all the technical questions were entirely open for re-evaluation. Predictability is always a virtue in business affairs and when it exists it is a strong incentive to the friendly settlement of disputes by the parties themselves.

Given the desirability of the principle outlined above, how can it be made effective so that parties can be sure that arbitrators will follow it? The best way to effectuate the principle would be for parties to include it specifically in their contracts. Contract wording similar to the italicized statement above might be appropriate for that purpose.

In my opinion, agreement by the parties to follow the "substantial evidence" principle is enforceable in an arbitration proceeding under United States law. Maitre Ernst Mezger, a distinguished French lawyer, has expressed a similar opinion with respect to the law in most countries in western Europe. He said:

> I conclude that according to the law envisaged here—i.e., the law in force in continental Europe and particularly the original EEC countries—it would seem that if the parties have so provided with sufficient clarity and accuracy, not only will the expertise be an element of proof for the judge or arbitrator before whom the case is subsequently brought, but in fact it will even be an element which will bind him more closely than expert testimony ordered during the trial or hearing, since the latter is always subject to his evaluation of it. Thanks to their contractual freedom, the parties have the possibility of incorporating, so to speak, the expertise in their contract, which henceforth has force of law for them and also binds both judge and arbitrator. The authority of the [pre-arbitral] technical expertise does not, however, go any farther than the objects of the expert's examination.[22]

Lawyers and businessmen all over the world who are interested in contracts for industrial, scientific, and technical work are increasingly recognizing the vital role which arbitration plays in such agreements. I can think of no better way to conclude than by repeating the words of an American colleague who delivered a paper on this subject at a meeting of the American Bar Association:

> I think you will agree that arbitration has more uses than were once envisioned—and that we are merely limited in this field, as in many others, by our power of imagination.[23]

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22. E. MEZGER, PRE-ARBITRAL TECHNICAL EXPERTISE—ACCEPTABILITY AS EVIDENCE 4-5 (1973).

23. Angel, *The Use of Arbitration Clauses as a Means for the Resolution of Impasses Arising in the Negotiation of, or During the Life of, Long-Term Contractual Relationships*, 28 BUS. LAW. 589 (1973).

Discussion

Several participants, both American and Soviet, expressed the consensus of the conference that further work was needed to clarify arbitration provisions for the better development and expansion of East-West trade. They expressed the belief that the Soviet Foreign Trade Arbitration Commission and the American Arbitration Association should participate in whatever group was eventually assigned to this question, but it was generally agreed upon that the corporation of jurists from the two countries should continue.

Mr. Lebedev and a U.S. participant both questioned the feasibility of the suggestion of Mr. Holtzmann that the arbitrator participate in a dispute from the inçeption, so that performance of the contract need not be halted pending a formal resolution. Mr. Holtzmann suggested that the guidelines for such arbitral decisions be spelled out in the contract.

A U.S. participant observed that this function would call for a new type of arbitrator, more like a labor mediator than the traditional international commercial arbitrator. In response to a question from another U.S. participant, Mr. Lebedev pointed out that the rules of the Foreign Trade Arbitration Commission did not provide for such a mediator, and Soviet practice did not envisage conciliation.

A U.S. participant observed that there was a pathology of disputes in long-term contracts; that once disputes arose minor disputes escalated into progressively more serious disagreements until the contract fell apart. He asked what type of arbitration would be a good arrangement for such circumstances.

Mr. Holtzmann replied that it was in these circumstances that independent experts should be called in to diagnose the problem and suggest remedies.

A Soviet participant objected to the principle that the opinion of an expert should be superior to that of an arbitrator.

Mr. Lebedev pointed out that it was a principle of Soviet law, applied both in courts and in arbitration proceedings, that the opinion of an expert be given no greater weight than any other type of evidence. He further noted that the evidence of the original expert carries no greater weight than that of experts subsequently brought into the proceedings.

A Soviet participant traced the authority of that principle to Article 19 of the Civil Law. Mr. Holtzmann pointed out that the same principle governed the situation under general U.S. law, but that the parties could, under freedom of contract, indicate that special weight be granted to certain types of evidence. A Soviet participant, how-

ever, replied by citing arbitration cases which showed a predisposition on the part of Soviet arbitrators to minimize the importance of expert testimony by consulting additional experts of the arbitrator's choice or by averaging the difference in experts' estimates.

Mr. Lebedev concluded the discussion by stating an agreement of principle between the American and Soviet participants that Article 7 of the Soviet-American Trade Agreement of 1972 was not mandatory, and that parties were free to agree to other specifics of arbitration, such as rules and fora.