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The Legal Framework of Soviet Foreign Trade*

Thomas W. Hoya**

I. INTRODUCTION

How can socialist internationalism be translated from an ideal into an economic reality? For the Soviet Union and Eastern Europe, answering this question has meant developing a foreign trade system suited to centrally planned economies.

This article will describe the resulting legal framework of Soviet foreign trade, first in the context of Soviet trade with the other countries of the Council for Mutual Economic Assistance (Comecon).1 Comecon foreign trade will then be contrasted with Anglo-Soviet trade, an example of intercourse between a market and a centrally planned economy that may become a model for expanded American trade with any of the Comecon countries. Probable future trends in the foreign trade legal structure of the Comecon countries will be discussed in the conclusion. In foreign trade as in their domestic economies, these countries are increasingly seeking efficiency through decentralization and are developing the law accordingly.

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** Assistant Chief Counsel for Authorizations, Office of Foreign Direct Investments, Department of Commerce, Washington, D.C. The views expressed here are the author's and do not necessarily reflect those of any government agency.

1. The Council for Mutual Economic Assistance (Comecon), sometimes translated the Council for Mutual Economic Aid, was established in 1949. Member countries are: Bulgaria, Czechoslovakia, East Germany, Hungary, Mongolia, Poland, Rumania and the Soviet Union. Albania apparently retains formal membership, but since 1962 has not participated actively in the organization. The Council for Mutual Economic Assistance is abbreviated in English language literature as CMEA, as CEMA and as Comecon. In this paper it is always ab-
The foreign trade system of Comecon's centrally planned economies is significant for other countries not only in their trade with the Comecon countries. It has meaning as well for the world's developing countries in the organization of their own foreign trade, because in many of these countries the government plays an important role in the national economy. Similarly, the experience of the Comecon countries has relevance for the developed market economy countries of the West, where the trend is toward progressively greater governmental influence over foreign trade.

II. COMECON FOREIGN TRADE

In each Comecon country, foreign trade is a government monopoly. The national means of production are owned by the government, and foreign trade and the economy as a whole are centrally planned. The government does not, however, exercise its foreign trade monopoly to the extent of conducting in its sovereign capacity the actual export and import operations. Instead, the government authorizes juridically independent state corporations to conduct these operations. Thus, in the Soviet Union actual foreign trade is conducted primarily by 52 state foreign trade corporations, each organized as an independent legal entity with capacity to enter into contracts on world markets and to sue and be sued at home and abroad.

breviated as Comecon. The paper's description of Comecon foreign trade is based essentially on the Soviet Union's participation in it. Other members' participation in Comecon trade may show variations from the Soviet model that are not indicated.

Research for the paper was done primarily with Soviet materials. Research sources include secondary written materials and conversations had by this author with jurists, economists and trade officials of the Comecon countries for matters where primary written materials do not exist.


The Comecon countries are attempting some multilateral coordination of their national economic planning and Comecon foreign trade. Nevertheless, they still found the basic legal obligations in this foreign trade on bilateral arrangements. 5 The basic operative bilateral documents are the inter-governmental long term trade agreements, the inter-governmental an-

SSSR, (The Contract of Purchase and Sale in the Foreign Trade of the USSR) 17-21 (1961) [hereinafter cited as Ramzaitsev, Contract]; V. Shevchenko & A. Svetlova-Goliakova, Vneshnetorgovalia Korrespondentsia i Dokumentatsiya (Foreign Trade Correspondence and Documentation) 165-71 (1966). Generally, each of these Soviet corporations has a monopoly over the export and import of a designated type of goods. The corporations are not producers or consumers of goods, but rather perform a middleman role of exporting goods procured from domestic state enterprises, and of buying imports from abroad for transfer to these operating enterprises.

In addition, the Soviet foreign trade system includes trade delegations, which represent the state abroad in foreign trade matters as a component of the Soviet diplomatic corps. A Soviet trade delegation, unlike a Soviet foreign trade corporation, is not an independent legal entity under Soviet law and does not enjoy the state's sovereign immunity. Consequently, it cannot sue or be sued unless subjected (as it frequently is) to the jurisdiction of local courts by a treaty with the relevant country. In recent years Soviet foreign trade has been conducted primarily by the foreign trade corporations, which normally negotiate and sign the contracts for exports and imports. The trade delegations now exercise merely a general supervisory role in Soviet trade. Lunz, Special Part, supra note 2, at 66; Ramzaitsev, Contract supra, at 17 n.1; Usenko, supra note 2, at 269.

The work of both the foreign trade corporations and the trade delegations is for the most part directed by the Soviet Ministry of Foreign Trade. For a detailed description of the Soviet administration of foreign trade, see Berman, The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example, 24 Law & Contemp. Probs. 482, 493-504 (1959), and a forthcoming book by J. Quigley, Assistant Professor of Law, College of Law, Ohio State University.

Foreign trade in the East European countries is also conducted primarily by middlemen foreign trade corporations. In several of these countries in recent years, however, operating state economic enterprises have increasingly been authorized to participate directly in foreign trade operations without the middlemen foreign trade corporations. Grzibowski, The Foreign Trade Regime in the Comecon Countries Today, 4 N.Y.U.J. Int'l L. & Politics 183, 184-90 (1971); Katona, The International Sale of Goods among Member States of the Council for Mutual Economic Assistance, 9 Colum. J. Transnat'l L. 226, 231 (1970) [hereinafter cited as Katona]. See note 119 infra.

5. Babitchev, The International Bank for Economic Cooperation, in Money and Plan: Financial Aspects of East European Economic Reforms 129, 146-47 (G. Grossman ed. 1968); Shonfield, Changing Commercial Policies in the Soviet Bloc, 44 Int'l Affairs 1, 3-4 (1968). Twenty-five bilateral long term trade agreements for 1961-65 were concluded between Comecon countries following discussions in Comecon on the coordination of member countries' national economic planning for this period. The Soviet Union was a party to seven of these
nual trade protocols, and the contracts between the foreign trade corporations of the two countries involved. In addition, the desirability of socialist international division of labor and some of the institutional framework for its attainment are expressed in 30 bilateral treaties of friendship and mutual assistance, 14 bilateral trade and navigation treaties, the Charter of Comecon, the Warsaw Pact and the 1962 multilateral declaration of Fundamental Principles of International Socialist Division of Labor.

A. TYPES OF AGREEMENTS

Chronologically, the bilateral long term trade agreement is the first of the documents creating a legal obligation actually to export and import goods between the Comecon countries. This agreement is usually negotiated and signed by the two foreign trade ministries representing their respective governments. It is normally operative for a period coinciding with the several-year national economic plan of each country, the periods of these plans normally coinciding in the Comecon states. Five year plans from 1971 through 1975 are currently in effect. Generally the Comecon governments use the trade agreements to balance their trade on a bilateral basis. They are seeking, however,
to develop a convertible currency and a multilateral balancing system.9

The trade agreement indicates which goods in what amounts are to be supplied by each side to the other, with deliveries broken down by years.10 Some standard for determining the prices of individual goods is stipulated, usually that average world market prices over a period of several years will be the basis.11 Provision is always made for periodic review of the progress of trade under the agreement by representatives of both countries.12

In advance of each year a bilateral trade protocol is signed to supplement the long term agreement.13 Normally it is executed on behalf of the governments by their foreign trade ministries. The protocol's chief purpose is to adjust the provisions of the long term agreement to current conditions, since during the period of the long term agreement the national economies of the two countries often develop foreign trade needs that were un-

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10. See generally Usenko, supra note 2, at 282-83. In a long term agreement or in an annual protocol, the goods scheduled for delivery are normally set out in a separate list that forms an integral part of the agreement or protocol.

11. For a detailed discussion, see Katona, supra note 4, at 238-42. See generally Usenko, supra note 2, at 290-93.


13. It is normally signed in about September or October, and is effective for the following calendar year.
foreseen when the agreement was adopted. Along with this adjustment function, the annual protocol specifies the foreign trade for the coming year more precisely than the provisions of the long term agreement. Usually the protocol is drafted to balance the year's bilateral trade.

Essentially the annual protocol indicates for the coming year the types and amounts of goods to be delivered. When one country during the course of the year develops an unexpected need for an import not scheduled in the current year's protocol and the country cannot wait for the following year's protocol, the two foreign trade ministries can make a special agreement for

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14. See Pozdniakov, Gosudarstvennaia Monopoliiia Vneshnei Tor-govli v SSSR i Vneshnetorgovye Sdelki Sovetskikh Khoziaistvennykh Organizatsii (The State Monopoly of Foreign Trade in the USSR and Foreign Trade Legal Acts of Soviet Economic Organizations), in Pravo-voe Regulirovanie Vneshnei Torgovli SSSR (The Legal Regulation of Foreign Trade of the USSR) 18, 34-35 (D. Genkin ed. 1961) [hereinafter cited as Pozdniakov]; USENKO, supra note 2, at 283-85. The long term agreement may directly provide that in the annual protocols the governments should try to increase the variety and quantities of goods set out in the agreement, or the agreement may state that its list of goods for delivery is simply a minimum obligation. USENKO, supra note 2, at 284.

15. Although each country generally drafts its long term agreements and its annual protocols to maintain a bilateral balance of trade with each of its Comecon partners, at the end of a year imbalances sometimes appear. Possible causes include defaults in scheduled deliveries, additional deliveries made pursuant to special mid-year agreements reached outside the protocol and variations in the actual prices specified in the contracts between the foreign trade corporations from the approximate prices used as a basis for computing the trade balances in the annual protocol and long term agreement. Pozdniakov, supra note 14, at 38; USENKO, supra note 2, at 294, 364.

In the situation of a trade imbalance, it was formerly provided by the long term agreement that the deficit country would agree to export an additional quantity of goods so as to reestablish the bilateral trade balance by April 1 of the year immediately following the deficit year. This system is still used in trade between a Comecon country and a non-Comecon socialist country. In trade between Comecon countries, it has apparently been altered since the establishment in 1963 of the Comecon International Bank for Economic Cooperation. Pozdniakov, supra note 14, at 37-38; USENKO, supra note 2, at 293-96, 364-66.

16. Sometimes delivery dates are broken down into quarters of the year, and sometimes a price standard is provided that is more specific than the standard in the long term agreement. See generally Katona, supra note 4, at 238-42; Pozdniakov, supra note 14, at 34-35; USENKO, supra note 2, at 283-85, 291. Apparently an example of one of the more precise protocol price standards would be: “in contracts for the delivery of goods in 1959 will be preserved, with a consideration of the quality and technical characteristics of the goods, the prices agreed upon between . . . organizations in contracts for the delivery of goods in 1958.” Pozdniakov, supra note 14, at 34-35; LUNZ, SPECIAL PART, supra note 2, at 109-10.
delivery of the import within the current year.\textsuperscript{17} Special agreements for such imports and for other unforeseen problems, such as delivery defaults, are frequently made.\textsuperscript{18}

The last of the three types of basic legal documents used in Comecon foreign trade is a contract for the delivery of specific goods. This contract is signed by the exporting foreign trade corporation of one country with the importing foreign trade corporation of the other. For every delivery indicated in the annual protocol, each country's foreign trade corporation responsible for that branch of foreign trade signs a contract with the corresponding foreign trade corporation of the other country.\textsuperscript{19} The contract specifies all the matters necessary for the actual delivery, such as the quantity, assortment, technical description, price and date and place of delivery.\textsuperscript{20} Since these matters are covered in the protocol only in a more general way, or not at all, the corporations have some opportunity to use their discretion and even to engage in hard bargaining with each other, especially regarding technical specifications, price and delivery dates. The corporations ultimately deliver and accept goods on the basis of their contracts.

The foreign trade corporations are independent legal entities

\textsuperscript{17} See Usenko, supra note 2, at 285; Pozdniakov, supra note 14, at 35-36. This same procedure is followed if one side unexpectedly wants to cancel an import it is scheduled to receive. Most changes during the year involve increasing or decreasing the quantity of a scheduled import. Pozdniakov, supra note 14, at 35-36.

\textsuperscript{18} Despite all the careful central planning of foreign trade, delivery defaults and other departures from the trade scheduled in the annual protocols are of significant magnitude in Comecon. G. Gavry, Money, Banking, and Credit in Eastern Europe 106-07 (1966). In the case of Hungary, for example, it has been estimated that 30\% of Hungary's actual trade with its Comecon trading partners is different from the planned trade. Shonfield, supra note 5, at 6. But see Katona, supra note 4, at 234.

\textsuperscript{19} The contracts, however, are actually often signed during the months of the year preceding the autumn protocol execution. Foreign trade between two Comecon countries generally involves some repetition from year to year of the same basic exports and imports. As a result, a pair of foreign trade corporations that annually do business with each other will develop methods enabling them to anticipate orders for the coming year in advance of the fall protocol signing. Such a pair of corporations may execute its contract, with the approval of the foreign trade ministries of both countries, in advance of the protocol's execution; and the ministries subsequently include the contract delivery in the protocol. Also, a contract for the delivery of goods requiring several years preparation has to be concluded in advance of the protocol finally specifying the delivery during the following year.

\textsuperscript{20} See Usenko, supra note 2, at 286; Pozdniakov, supra note 14, at 34.
that do not partake of the government's sovereign immunity. Their contracts create civil law relationships governed by private international law. These are the first civil law relationships in the foreign trade process, because prior to the contracts the only legal documents are the long term agreement and the annual protocol, both of which are signed in the name of sovereign governments and exist only in the area of public international law.  

B. Features and Obligations of the Inter-Governmental Agreements

The distinctive feature of the long term agreements and annual protocols is that the governments determine therein which goods will be traded in what quantities, and further undertake the obligation "to ensure the delivery of goods" thus scheduled. In commercial treaties between governments of market economy countries, the governments assume no such functions. Rather, their treaties merely provide a legal framework for possible but generally unspecified trade, the framework covering matters such as tariffs, export and import licensing, quotas and exchange control. Within this framework, foreign trade is then determined as well as conducted by the market economy enterprises. To be sure, these enterprises are influenced by the tariffs and other aspects of the inter-governmental framework. Nevertheless, the decisions determining the nature and quantity of foreign trade are made essentially by the market economy enterprises. The market economy governments do not ensure that there will be a single export or import; they simply agree to apply the treaty framework to any foreign trade that the enterprises choose to implement.

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21. See generally Lunz, Special Part, supra note 2, at 109; Pozdniakov, supra note 14, at 34.

22. The exact wording of this obligation is not the same in all of the agreements and protocols, but the meaning is essentially the same. Ramzaïtsev, Contract, supra note 4, at 9; Usenko, supra note 2, at 282-83, 287-90; Pozdniakov, supra note 14, at 34; Schmitthoff, Commercial Treaties and International Trade Transactions in East-West Trade, 20 Vand. L. Rev. 355, 365 (1967) [hereinafter cited as Schmitthoff, East-West Trade].

23. Schmitthoff, East-West Trade, supra note 22, at 355-56. Also the enterprises, through consultations with the governments, may influence them to adopt a legal framework in the treaties promoting foreign trade in some goods and inhibiting it in others.

24. See generally id. at 355-56. Thus it is said that these market economy inter-governmental treaties deal with the public law level of foreign trade, and that the trade itself is carried on at the separate and
In agreements between centrally planned economy countries, on the other hand, the governments can specify all foreign trade and ensure the scheduled deliveries. The Comecon governments, however, leave the actual trading to the juridically independent state corporations. The question therefore arises as to the real meaning of the governmental obligation to ensure scheduled deliveries.

Evidently it does not mean a legal guarantee that the foreign trade corporations will make the scheduled exports, since Soviet law provides that failure to deliver can occur without the government's incurring any legal liability. A common example is a non-delivery due to the fault of the juridically independent state foreign trade corporation that was to make the export. Liability rests not with the government on its agreement and protocol obligation, but rather with the corporation. This liability is civil, and it is based on the corporation's civil law contract with the other country's importing foreign trade corporation; it is not based on the agreement or the protocol, since the exporting corporation is a party to neither.

If the Comecon government's obligation to ensure deliveries does not consist of a guarantee, of what does it consist? Apparently it consists in part of a duty to issue administrative orders to the country's foreign trade corporations directing them to conclude contracts with the other country's corporations for the scheduled trade. Such an order creates for each recipient corporation a direct domestic administrative law duty to carry out its part of the scheduled trade. In addition, in order to ful-

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25. These governments also need to specify and to ensure fulfillment of the scheduled foreign trade, since each government has planned its domestic economy relying in part on realization of this trade, especially receipt of the scheduled imports. Usenko, supra note 2, at 282-83.

26. Nor, of course, is the importing corporation a party to either. See generally Usenko, supra note 2, at 282-83, 287-90; Katona, supra note 4, at 235-37. Pozdniakov, supra note 14, at 32-38.

27. See Usenko, supra note 2, at 288; Katona, supra note 4, at 236-37. The long term agreement and annual protocols normally indicate that the scheduled foreign trade will be conducted not by the respective governments but by their foreign trade corporations. In this connection an agreement or protocol may provide expressly that each government will take all necessary measures to ensure that its corporations conclude the relevant foreign trade contracts. Usenko, supra note 2, at 286-87; Katona, supra note 4, at 234-35; Schmitthoff, East-West Trade, supra note 22, at 363, 365.

In the Soviet Union, the foreign trade corporations are generally
fill its agreement and protocol obligation, the government evidently must make provision for the scheduled foreign trade in its national economic planning. This provision requires such things as scheduling delivery of the raw materials to the export goods producers, scheduling production of the goods in the national production plan, scheduling use of the expected imports in the national consumption plan, scheduling movement of the goods in the national transportation plan and scheduling the export and import of the agreed upon goods in the national foreign trade plan.28

If one government fails to fulfill its obligation to ensure deliveries and causes a default in deliveries by its foreign trade corporations, what remedy does the other government have? The long term agreements and annual protocols are regarded by Soviet jurists as public international law undertakings of sovereign independent governments. Therefore, any remedy would apparently have to take the form of inter-governmental negotiations and of whatever other pressures governments can exert on each other.29

C. Nature of the Corporations' Contracts

In content, a contract between two state foreign trade corporations resembles a foreign trade contract between two market economy enterprises. There is also a resemblance in a theoretical sense, since each contract represents the consensus of the contracting parties on the points covered in the contract, even though Comecon corporations are more restricted in the number of points they can determine at their own discretion.30

There exist also two important differences. First, the origin of a Comecon contract is not a profit oriented decision of under the administrative jurisdiction of the Ministry of Foreign Trade. Berman, supra note 4, at 489-90. Therefore, the Soviet Foreign Trade Minister normally issues the orders directing them to conclude the foreign trade contracts. USENKO, supra note 2, at 288. In Hungary, direct administrative orders by the government to the foreign trade corporations in this situation are being replaced by provision by the government of financial incentives to the corporations to induce them to enter into the foreign trade contracts desired by the government. Katona, supra note 4, at 236-37.

28. See USENKO, supra note 2, at 288-89; Katona, supra note 4, at 237.
30. Schmitthoff, East-West Trade, supra note 22, at 360.
each of the foreign trade corporations. Rather, it is a central economic planning decision made by the two governments as expressed in the long term agreement and annual protocol.\(^3\) Second, many of the commercial law provisions of the Comecon contract, such as the delivery terms or the nature of the seller’s guarantee, are determined not by the foreign trade corporations, but are prescribed for them by the Comecon General Conditions for the Delivery of Goods.\(^3\)

These General Conditions are a multilateral Comecon agreement unifying much of the international trade law of member states.\(^3\) Applying with the force of law to every contract in Comecon foreign trade, the General Conditions require certain commercial terms for each such contract.\(^3\) The General Conditions were adopted by the Comecon governments to facilitate their foreign trade corporations’ concluding contracts to implement the inter-governmental annual protocols. The governments feared that, without such mandatory basic commercial terms, the corporations would fail to sign some of the contracts envisaged in the annual protocols because of an inability to agree on the terms.\(^3\)

Contracting Comecon foreign trade corporations may determine at their discretion matters not covered either in the

\(^{31}\) Current reforms in the domestic economies of the Comecon countries, however, tend both to shift more elements of the contract decisions from the central governments to the corporations, and also to give profit factors more weight in the thinking of the central governments and the corporations alike. This same tendency is beginning to appear in the foreign trade field.

\(^{32}\) For an extended discussion of these General Conditions, see Hoya, The Comecon General Conditions—A Socialist Unification of International Trade Law, 70 COLUM. L. REV. 253 (1970). For a good comprehensive treatment of the General Conditions by a leading East European jurist, published a year after this COLUMBIA LAW REVIEW article and discussing many of the issues raised therein, see Katona, supra note 4, at 242–82. The first General Conditions were implemented by Comecon in 1958, and a new version was adopted in 1968. For a translation into English of the 1958 General Conditions, see Berman, Unification of Contract Clauses in Trade Between Member-Countries of the Council for Mutual Economic Aid, 7 INT’L & COMP. L.Q. 659 (1958). For a translation into English of the 1968 General Conditions, see Hoya & Quigley, Comecon 1968 General Conditions for the Delivery of Goods, 31 OSMO ST. L.J. 1 (1970).

\(^{33}\) Hoya, supra note 32, at 279–300.

\(^{34}\) Id. at 260–68.

\(^{35}\) Id. at 260–62; Katona, supra note 4, at 237–38. Wholly aside from this mandatory aspect, the General Conditions have significantly aided contract drafting in Comecon foreign trade simply by providing the contracting corporations with a reasonably comprehensive unification of international trade law. Hoya, supra note 32, at 300–01.
annual protocol or in the General Conditions. Even where matters are so covered, the corporations on occasion draft different provisions in their contract, but such departures from the protocol or from the General Conditions can create problems. The General Conditions themselves specify the circumstances under which there can be a departure from their commercial norms. An unauthorized departure is without legal effect and the General Conditions' norms are in such a case still controlling. In the event of a departure from the annual protocol provision stipulating the delivery of goods that is the subject of the particular contract, the status of the departure is less clear. Such a departure by the contracting corporations is not automatically invalid. Instead, when a provision of the contract departs from a provision of the protocol, the provision that is to control is apparently determined on a case by case basis. Soviet jurists stress two conflicting values in resolving the issue. Allowing the protocol provision to control preserves both the protocol's integrity as a higher source of law and the central planning embodied in it. On the other hand, invalidating a contractual provision to which the two foreign trade corporations have agreed introduces undesirable uncertainty into their relations. The trend is increasingly to uphold the contractual provision.

36. Farago, Decisions of the Hungarian Chamber of Commerce in "Comecon" Arbitrations, 14 Int'l & Comp. L.Q. 1124-25 (1985); Hoya, supra note 32, at 264-68. Such a ruling will be made by an arbitration tribunal in a proceeding between the two parties. Farago, supra.

37. The departure may occur especially with respect to the type, quantity or price of the goods. For example, the protocol may specify that all goods to be delivered during the coming year are subject to a frequently used price formula involving the average world market price over a past several-year period. During the formula years the world market price for a particular type of goods may, however, have begun a sharp rise or decline continuing up to the time of the contract signing. In this situation the corporation benefited by the trend may insist on a contract price reflecting the trend rather than a price based on the average over the formula years. Sometimes the other corporation agrees, and the contract price then deviates from the protocol's formula.

38. See generally LUNZ, SPECIAL PART, supra note 2, at 109-10. Apparently the issue arises in the form of an arbitration proceeding between the two corporations.

39. See generally Usenko, supra note 2, at 284-85.

40. See LUNZ, SPECIAL PART, supra note 2, at 109-10. The question whether the protocol or the contract provision controls is usually resolved through arbitration when one corporation seeks to have the contractual provision declared invalid for the reason that it varies from the protocol. The question may first arise when the foreign trade ministry of one of the countries refuses to issue the necessary export or import license unless its corporation obtains revision of the contract to bring it
Another problem related to the foreign trade corporations' contracts may occur earlier. After the signing of the annual protocol, there still exist no civil law relations between the foreign trade corporations of the two signing countries. At this point the only legal obligation of a foreign trade corporation is a domestic administrative law duty owed to its superior administrative organ. This organ, following the protocol execution, presumably has directed the corporation to conclude a contract with a corporation of the other country for a delivery of goods specified in the protocol. But neither corporation has any civil law duty owed to the other corporation. Consequently, if in their ensuing negotiations the two foreign trade corporations fail to agree on a contract, neither has any civil law right to conclusion of a contract that can be enforced against the other. Instead, the disagreement normally has to be resolved at the level of public international law by negotiations between the two foreign trade ministries. 41

Once a contract between two foreign trade corporations is signed, however, a civil law relationship is created between them with reciprocal rights and duties. Any further disputes are civil law matters that can be resolved at the level of private international law in foreign trade arbitration tribunals that operate in each of the Comecon countries. In each Comecon country, foreign trade civil law litigation is adjudicated not by the judicial court system, but by a permanent foreign trade arbitration tribunal similar to a specialized state economic court. 42

more into line with the protocol. Or the importing corporation on its own initiative may resist paying an agreed contract price that is higher than that provided by the protocol formula, or, having paid, may sue in arbitration for a refund of the excess payment.

41. See generally Pozdniakov, supra note 14, at 34. This situation contrasts with that existing domestically in the Soviet Union. There, after issuance of the annual national economic plan, either of two Soviet enterprises directed to conclude a contract with each other can take any pre-contract dispute to state arbitration for a mandatory solution. J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM pt. 2, at 89 (1982). In Comecon foreign trade, when two corporations' pre-contract disagreement concerns price, although neither has the right to bring any action against the other in any forum, they sometimes voluntarily agree to refer the matter to an ad hoc commission or to an arbitration tribunal for resolution. USENKO, supra note 2, at 292-93; Bystricky & Landa, The Unification of Laws of International Sale, 1959 Rev. CONTEMP. L. No. 1, 67, 81; Katona, supra note 4, at 239-42.

42. See Hoya, supra note 32, at 278-79.

D. The Two Legal Levels of Foreign Trade

Comecon foreign trade is thus conducted, at least in legal terms, on two levels: public international law, through the governments' long term agreements and annual protocols; and civil law relations and private international law, through the state foreign trade corporations' contracts. Is there really any difference between these two legal levels? This question naturally presents itself in view of the state monopoly of foreign trade existing in each Comecon country.

The difference between the two legal levels might seem merely nominal. In the Soviet Union, for example, the Ministry of Foreign Trade, which generally negotiates and signs the agreements and protocols for the government, also exercises direct administrative supervision over most of the Soviet foreign trade corporations. On the other hand, the distinction between the two legal levels is clear in theory, and is carefully maintained in Soviet literature on the subject.\(^4\) Also, the inter-governmental agreements and protocols certainly exist in practice as an independent level of public international law.

What is not clear is how separate, in practice, from the public international law level is the civil law level of the foreign trade corporations' contracts. Whether these contracts operate on a meaningfully independent level of law has proved a troublesome question in the practice of Comecon foreign trade.

As already indicated, two foreign trade corporations have some latitude in negotiating the terms of a contract for a delivery scheduled in the annual protocol between their two countries, and they have no civil law rights and duties running between them until they execute their contract.\(^5\) What is significant, however, is the level at which these rights and duties are enforced. This question comes to a head in the common situation of a delivery default by a foreign trade corporation. The exporting corporation in default owes a civil law duty to the importing foreign trade corporation of the other country on the basis of their contract. The resulting liability could be resolved at either the

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44. See generally Lunz, Special Part, supra note 2, at 107-11; Usenko, supra note 2, at 124-32; Boguslavsky, Pravovye Formy Obezpechenii Mezhgosudarstvennoi Spetsializatsii i Kooperirovania Proizvodstva Stran-Chlenov SEV (The Legal Forms of Backing Interstate Specialization and Coordination of Production of CMEA Countries) 1966 Sovetskoe Gosudarstvo i Prawo No. 8, at 3, 10-11 [translation of title stated in the periodical].

45. See text accompanying notes 19-20 and 41-43 supra.
civil law or at the public international law level. That is, it could be resolved by the corporations according to the civil law rules existing in the Comecon countries, or by the foreign trade ministries through the inter-governmental protocols.

Following a calendar year, the foreign trade ministries of two Comecon countries normally meet to determine which of the goods scheduled for delivery during that year by the annual protocol were in fact delivered and which were not. The results of this determination are usually reflected in a special protocol executed by the two foreign trade ministries. For any goods scheduled but not delivered, this special protocol often cancels the delivery provision in the expired year's annual protocol and, if the delivery is still desired, includes it in the annual protocol for the year just beginning.46

The question thereby raised is the effect of this special protocol cancellation and partial rescheduling of deliveries on the civil law liability of a foreign trade corporation that has defaulted on a scheduled delivery during the year just concluded. The answer depends on how independent the contracts of the foreign trade corporations are from the protocols of the foreign trade ministries. At one extreme, the contracts could be viewed as merely subordinate adjuncts of the protocols. Then a cancellation of the concluded year's protocol provision on which the defaulted delivery contract had been based would automatically cancel the civil law liability of the defaulting corporation for not having made the now cancelled delivery. At the opposite extreme, the corporations' contracts could be deemed to represent a genuinely distinct level of foreign trade. Then a defaulting corporation's civil law liability should ordinarily remain unaffected by any protocol adjustment made after the corporation had signed its contract.

In actual practice Comecon foreign trade has moved from the first answer to the second.47 In the 1950's, when the Comecon economies were still recovering from the war, the main trade objective was to exchange at least enough goods so that each country was provided with the basic minimum its economy had to import. Hence delivery defaults were usually resolved through the protocols, because they focus directly on the physical flow of trade. By the 1960's, however, the Comecon economies

46. See generally Katona, supra note 4, at 234.
47. Comecon foreign trade practice has not, however, always described these answers in terms of the independence of the contracts from the protocols.
had improved to the point where the desired minimum trade flow was reasonably assured, so the primary concern became not so much achieving this minimum flow as achieving it efficiently. Consequently, delivery defaults came to be resolved more through the civil law rules, which determine the corporation responsible for the default and require it to compensate the injured corporation.

As long as achieving a minimum trade flow was the major concern, resolving delivery defaults through the protocols had an evident attractiveness. What appeared paramount, especially to the foreign trade ministries, was to decide which of the prior year's unfulfilled deliveries were still desired, to arrange fulfillment of those deliveries during the year just beginning and to forget the unfulfilled deliveries no longer wanted. Any determination of civil law liability of corporations in default on deliveries probably seemed unimportant.

Indeed, for the foreign trade ministries or the corporations to take the time and energy in the case of each default on delivery to make a precise determination of civil law liability probably seemed wastefully legalistic. It doubtless appeared that such effort would be more fruitfully used in solving the physical production problem. At the exporting corporation the economic difficulty that caused the delivery default needed curing, and at the importing corporation the nondelivered goods had to be obtained from some other source or done without, either permanently or until a rescheduled delivery could be obtained from the original exporter. To focus instead on determining the liability in every case under civil law rules by each corporation's insisting on its strict legal rights against the other in the manner of plaintiff and defendant would have seemed an undesirably antagonistic adversary approach. Socialist internationalism might seem instead to require a mutually helpful joint effort at problem solving by the parties involved.\footnote{This opposition to an adversary approach in resolving delivery defaults is similar to the thinking that prevailed in the Soviet Union in...}

Concentrating only on the physical volume of trade, however, led to neglecting the efficiency with which this volume was attained. Therefore, once the Comecon countries had a minimum trade flow that was reasonably secure, they turned their attention to the efficiency problem. To stimulate the foreign trade corporations to greater efficiency, the corporations' performance
came to be judged not only on the physical volume of their trade, but also on their profitability. So that their profitability would be determined accurately, it became necessary in delivery defaults to require the corporation at fault to compensate the injured corporation. For this purpose, resolution of delivery defaults by the foreign trade corporations under the civil law rules of liability was clearly more effective than resolution by the foreign trade ministries through the special protocols summing up the past year's results.

The special protocols usually did not address themselves to the liability issue, but usually just canceled defaulted deliveries and rescheduled deliveries still desired. Also, as long as a foreign trade corporation was judged primarily on fulfillment of physical trade targets, it had little incentive to press a monetary claim even when another foreign trade corporation had defaulted on a delivery to it. When a foreign trade corporation did sue in arbitration on a default, the arbitration tribunal often held that the cancellation by the special protocol of the past year's protocol provision for that delivery canceled as well the defaulting corporation's liability for the nondelivery.\footnote{State Arbitration in the early 1930s. See J. Hazard & I. Shapiro, supra note 41, at 98-99.}

\footnote{49. Some arbitration decisions held that the defaulting corporation was excused from civil liability beginning with the effective date of the special protocol cancelling the delivery provision in the expired year's annual protocol. That way the corporation was liable at least for its non-delivery from the contract delivery date up to the special protocol's effective date. Other decisions, however, excused the defaulting corporation from all liability before the special protocol's effective date as well. Sometimes the special protocols would state expressly whether a cancellation was made as of the effective date of the special protocol or as of the date of the foreign trade corporations' contract. Katona, supra note 4, at 269.}

For a discussion of the arbitral decisions generally, see Lunz, Special Part, supra note 2, at 110-11; S. Pisar, Coexistence and Commerce 290-93 (1970); Kojouharoff, Chronique de Jurisprudence de la Cour arbitrale pres la Chambre de commerce bulgare (Journal of Proceedings of the Arbitration Court of the Bulgarian Chamber of Commerce), 94 Journal du Droit International 152, 180-84 (1987); Ramzatsiev, Contract, supra note 4, at 9-11; Fargo, Zu einigen Entscheidungen des Schiedsgerichts der Ungarischen Handelskammer (Several Decisions of the Arbitration Court of the Hungarian Chamber of Commerce), Recht im Ausenhandel No. 1, at 4 (1961) (published as a supplement to Der Ausenhandel No. 2 (1961)); Genkin, O Rabote Vneshnetorgovoi Arbitrazhnoi Komissii pri Vsesoiuznoi Torgovoi Palate za 1957-59 gg. (On the Work of the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce for the years 1957-59) [hereinafter cited as Genkin, Arbitration] in 11 Sektsiya Prava Vsesoiuznoi Torgovoi Palaty (Section of Law of the All-Union Chamber of Commerce), Sbornik Informatsionnyku Materialov (Collection of Informational Materials) 3,
Once the foreign trade corporations came to be judged in part on the profitability of their operation, however, they became more interested in pressing civil law claims in an adversary manner when the other party to their contracts defaulted. The defaulting corporation could pay voluntarily the claimed civil law penalty or damages or both to the injured corporation or, in the event of dispute, the matter could be decided by an arbitration tribunal. The tribunals came to award penalties and damages according to whether the defaulting corporation was at fault under the relevant civil law rules. The foreign trade ministries generally continued to make their special protocol cancelations and reschedulings for delivery defaults. But the arbitration tribunals gradually came to hold that these protocol adjustments had no effect on the arbitral determination, under civil law rules, of whether the defaulting corporation had to compensate the injured corporation. This resolution of delivery defaults entirely according to civil law rules began to provide an incentive for the corporations to fulfill their contractual obligations promptly.

In the Soviet Union, for example, foreign trade corporations, like state economic enterprises generally, operate according to economic accountability (khozraschët). By this principle, each corporation, as an independent legal entity, is responsible only for its own obligations. It is not responsible for the obligations of the state or of any other state organization, and neither the state nor any other state organization answers for the corporation's obligations. Each corporation maintains a record of its

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9-10 (1961) [complete work hereinafter cited as COLLECTION]; Pozdniakov, supra note 14, at 36-38; Ramzaitsev, Deiatel'nost' Vneshtorgovoi Arbitrazhnoi Komissii v Moskve v 1957 g. (Activity of the Foreign Trade Arbitration Commission in 1957) [translation of the title stated in the publication], in SOVETSKII EZHEgodnik MEZHDUNARODNOVO PRAVA-1958 (SOVIET YEAR-BOOK OF INTERNATIONAL LAW-1958) at 463, 465-66 (1959) [translation of title stated in the publication]; Szaszy, supra note 3, at 426.

50. See generally the authorities for arbitral decisions cited in note 49 supra.

51. S. PISAR, COEXISTENCE AND COMMERCE 262-68 (1970); Grzybowska, supra note 4, at 191-94; Lunz, Conflict of Laws in International Sale: Theory and Practice of Socialist Countries, 114 RECUEIL DES COURS 1, 45-47 (1985) [hereinafter cited as Lunz, Conflicts]; PISAR, SOVIET CONFLICT OF LAWS IN INTERNATIONAL COMMERCIAL TRANSACTIONS, 70 HARV. L. REV. 593, 642-45 (1957) [hereinafter cited as PISAR, SOVIET CONFLICTS]. The legally separate personality of Soviet state economic enterprises is illustrated by two Soviet arbitration cases involving Soviet contacts with non-Comecon countries. In In re the Motorship "King Edgar" (1932), Vseso-
individual costs and receipts, and the corporation's profit or loss as reflected in a comparison of its costs and receipts is one measure of its performance. Whether there is a profit, and the amount of the profit, influence the income and advancement of the corporation's personnel. Thus economic accountability promotes efficient performance. The principle operates similarly in the other Comecon countries.

Therefore, within Comecon it is increasingly recognized as desirable to hold a foreign trade corporation defaulting on a delivery to its full liability according to civil law rules. Excusing any part of this liability because of a protocol adjustment un-

IUZNAIA TORGOSVAIA PALATA (ALL UNION CHAMBER OF COMMERCE), SBORNIK RESH. MOR. ARB. KOM. (COLLECTION OF DECISIONS OF THE MARITIME ARBITRATION COMMISSION) 9 (1934), the plaintiff Soviet merchant fleet corporation sued the defendants, British owners of the ship “King Edgar,” for compensation for assistance rendered the ship while it was aground in Soviet territorial waters. Defendants pleaded negligence of plaintiff, the buoys in the Soviet territorial waters allegedly having been misleadingly placed. The Soviet Maritime Arbitration Commission rejected this defense as irrelevant. Supervision of the buoys was the responsibility not of plaintiff but of the Soviet People’s Commissariat for War and Maritime Affairs, the Commission said, and plaintiff as an independent legal entity did not answer for acts or omissions of the Soviet state or of other state organizations. See also Lunz, General Part, supra note 29, at 164-66; S. Pisar, Coexistence and Commerce 267 (1970); Lunz, Conflicts, supra at 46; Pisar, Soviet Conflicts, supra, at 644-45.

In Jordan Investment Ltd. (Israeli corporation) v. V/O Sovunnefteksport (Soviet corporation) (1958), reported in Domke, The Israeli-Soviet Oil Arbitration, 53 AM. J. INT’L L. 787 (1959), after the 1956 Israeli–Egyptian war had broken out, the Soviet Foreign Trade Ministry had refused to grant an export license to defendant Soviet seller to deliver oil to plaintiff Israeli buyer on a contract made before the war. In plaintiff’s subsequent suit for damages for nonperformance, defendant pleaded force majeure. Plaintiff argued, inter alia, that the connection between defendant and the Soviet Foreign Trade Ministry was so close that the latter’s denial of the export license could not qualify as a supervening impossibility under the force majeure clause of the contract. The Soviet Foreign Trade Arbitration Commission rejected this argument of plaintiff by confirming defendant’s status as an independent legal entity separate from the state and from other state organizations. See also Berman, supra note 4, at 494 n.35; Lunz, Conflicts, supra, at 46-47.

For a discussion by a Hungarian jurist of the status of the Comecon countries’ state foreign trade corporations as independent legal entities, see F. Madl, Foreign Trade Monopoly—Private International Law 41-45 (1967).

52. See generally J. Hazard & I. Shapiro, supra note 41, at 80-81; Ramzanov, Contract, supra note 4, at 17-21; S. Pisar, Coexistence and Commerce 265-66 (1970); Berman, supra note 4, at 487-88; Pisar, Soviet Conflicts, supra note 51, at 642-45.

53. Grzybowski, supra note 4, at 190-95; Katona, supra note 4, at 227.
dermines economic accountability; determining and enforcing the liability strictly according to the civil law supports it. In simplest terms, a foreign trade corporation that functions poorly is now repeatedly required to pay a penalty and damages and to render specific performance, while a well run corporation is relatively free of such liability and, when appropriate, receives the benefit of collecting such payments. In this way the financial statements of each corporation reflect the quality of its management and personnel. To the management and personnel of the corporation with good financial statements go larger bonuses and career advancement. Experience has shown that this economic accountability stimulates corporate efficiency without damaging socialist internationalism.

Thus the civil law contracts of the foreign trade corporations are becoming a level of law meaningfully independent of the inter-governmental agreements and protocols at the public international law level. When a corporation has defaulted on a delivery, using the protocol adjustment to excuse a defaulting corporation's civil law liability has advantages—simplicity, speed and an appearance of selfless cooperation—but it disrupts economic accountability. And economic accountability, the key to efficient performance by the corporations, is now seen as the higher value.

54. An additional problem when the liability of a foreign trade corporation in default is excused on the basis of a protocol adjustment is the disturbance of economic accountability within the countries of the exporting and importing foreign trade corporations. Thus the importing corporation is normally a middleman trading corporation and has a contract to sell the imported goods to an operating domestic enterprise (see note 4 supra). Unless the importing foreign trade corporation can obtain the goods from some other foreign source, it will be forced to default on its domestic contract. By thus defaulting it incurs a civil liability to the domestic enterprise. But it cannot fairly be required to pay this liability because it has not collected compensation from the defaulting exporting corporation of the other country. Consequently, by law or by administrative order, the domestic civil liability of the importing foreign trade corporation has to be cancelled. But the domestic enterprise that expected the imported goods from the importing corporation may in turn be forced to default on a domestic contract with a second domestic enterprise to whom the imported goods were to be sold after processing by the first domestic enterprise. Since this first enterprise was prevented from collecting compensation from the importing corporation, out of fairness this enterprise must be excused from civil law liability for its default to the second enterprise. The second enterprise may in turn incur a civil law liability to a third enterprise that has to be excused, so that the liability adjustment process may involve several enterprises and become quite complex before it is finally settled.

A similar chain reaction can take place in the country of the ex-
When economic accountability is allowed to operate properly, the situation bears some similarity to that in a market economy. In the usual large market economy corporation control is separated from ownership, and corporate management is rewarded (at least in theory) in significant measure on the basis of the corporation's financial performance. The concept of economic accountability is an attempt to utilize this market economy incentive method within the confines of a centrally planned economy. That a Comecon economy is centrally planned means, of course, that the management of a foreign trade corporation has far less authority to exercise and to be held accountable for than the management of a market economy corporation.

In general, the purpose of the Comecon foreign trade legal structure is to distribute goods in foreign trade according to a bilaterally determined inter-governmental plan. To realize this goal, the Comecon legal system works on two levels. At the public international law level, the system assigns to the central governments an active role in determining and fulfilling trade commitments. In market economies, at this level, the governments only provide a framework within which any trade is determined and fulfilled by the market economy enterprises.

At the private international law level, on the other hand, the Comecon legal system increasingly seeks efficient performance through economic accountability by providing and enforcing civil law rights and duties for the contracting parties. Comecon foreign trade corporations are thereby led to view fulfillment of contractual obligations much as do market economy enterprises. These enterprises, of course, because they decide what contractual obligations they will undertake, not only implement but also determine trade in the market economy system.

III. ANGLO-SOVIET TRADE

The differences between the foreign trade legal structures of centrally planned economies and of market economies have already been described. What then is the structure of trade be-

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tween a country of each type, as in Anglo-Soviet trade? The answer, as supplied by the Anglo-Soviet Trade Agreements of 1959, 1964 and 1969, is that this East-West trade uses primarily the market economy trade legal structure. Thus, each of these Anglo-Soviet Trade Agreements does not determine what amount of trade in which types of goods will take place, nor does it place upon either government any obligation to ensure any deliveries. Rather, the Agreement simply provides a legal framework within which British firms and Soviet foreign trade corporations can trade if they conclude contracts. The framework is designed merely to facilitate such trade.

In general, this framework consists of two parts. One part, covering a wide range of goods, contains no quantity limits of any kind. Thus, for example, Soviet goods entering Britain under this part of the Agreement do not require an import license. Neither government has any affirmative obligation under this part of the Agreement, and the volume of trade in goods to which it applies is set by whatever the British firms and Soviet corporations agree to sell to each other. Over 90% of Anglo-Soviet trade takes place under this part of the Agreement. British exports here consist mostly of capital goods and manufactured materials.

A second part of the framework applies to consumer and certain other goods. Under the authority of the Agreement the two governments establish annual maximum quotas for these goods. Trade in these goods amounts to less than 10% of total Anglo-Soviet trade. After the quotas have been set, apparently each government has the obligation to satisfy applications for any necessary import licenses up to the agreed quotas; but there will


57. This article discusses only Anglo-Soviet trade as an instance of market economy-centrally planned economy trade. Other instances of trade between countries of each type may use a legal structure different from that of the Anglo-Soviet model.

In countries with market economies, the government does, of course, play a role in the economy. The nature and extent of this role varies among the Western industrialized countries. The roles of the British and American governments are more similar to each other in this respect than either is to the role of the government in most of the other Western industrialized countries.

58. See Schmitthoff, East-West Trade, supra note 22, at 366-68.

59. See id.
in fact be trade in these goods subject to quotas only if the British
firms and Soviet corporations actually contract for such trade.
With regard to the practical operation of the quotas, the govern-
ments have often arranged authorization for imports into the
Soviet Union in excess of the annual quotas and occasionally for
such excess imports into Britain.69

The Agreements resemble the Comecon system in that each
is for a set number of years—the 1959 and 1964 Agreements for
five years and the 1969 Agreement for six and one-half.61 Each
Agreement also provides for representatives of both countries to
meet at least annually to review trade operations under the
Agreement. But in sum, the substance of the Anglo-Soviet Trade
Agreement—a framework within which actual trade is deter-
mined by the British firms and Soviet corporations—is no dif-
f erent from the commercial treaties used between market econ-
omy countries. Those aspects of the Agreement resembling the
Comecon system—the set number of years each Agreement runs
and the annual review of the Agreement's operation—relate es-
tially only to form.62

A. MOST-FAVORED-NATION TREATMENT

A crucial element of Anglo-Soviet trade is most-favored-na-
tion treatment (MFN) which each side substantially accords to
the other. MFN is not mentioned in the 1959, 1964 or 1969 An-
glo-Soviet Trade Agreement, but is granted reciprocally in a

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60. For those years under the Agreement prior to 1970, annual
quotas were established for imports both into the Soviet Union and
into Britain, but beginning with 1970, annual quotas were established
only for imports into Britain. Less than 5% of the 1970 imports into
Britain were goods coming within the quota provisions of the Agree-
ment. The Soviet government can, of course, effectively regulate im-
ports into the Soviet Union simply through its administrative control of
the import purchasing of the Soviet foreign trade corporations.

61. The 1969 Agreement runs from July 1, 1969, until December 31,
1975, and thus, unlike the 1959 and 1964 Agreements, has an ending date
that coincides with the ending of a Soviet five-year plan. After 1975,
the 1969 Agreement will be automatically extended annually unless ei-
ther government gives the prescribed notice of termination.

62. Schmitthoff, East-West Trade, supra note 22, at 367-68. In post-
World War II communications regarding possibly expanded American-
Soviet trade, the Soviet government has suggested to the American gov-
ernment an undertaking beyond the normal range of market economy
government activity. It has requested some American government as-
urance that American labor unions and other organizations would not
discriminate against American-Soviet trade. The American government
has replied that it lacks legal authority to give such an assurance.
There is a question, however, whether this 1934 agreement is still in force, so that the present reciprocal granting of MFN may be a matter of unilateral discretion on each side rather than of treaty obligation.

Between market economy countries, MFN is the very foundation of commercial treaties. There is no one universally accepted formulation of MFN. Traditionally, however, granting MFN to another country has meant according products of that country terms of trade no less favorable than those accorded by the granting country to like products of the most favored third country with which the granting country trades. MFN's primary focus has historically been on tariffs on imported goods. Other matters may also come within the focus of MFN, such as quantitative and other restrictions and charges on exports to as well as on imports from the country receiving MFN. In addition, MFN clauses may be interpreted or drafted to apply to the rights of nationals and companies of the country receiving MFN to enter the country granting MFN to exhibit their products, ship the products in their own vessels and have access to its judicial and arbitration tribunals. In general MFN is intended to minimize governmental interference with the market forces that motivate foreign trade between market economies.

Since World War II the Soviet Union with its centrally planned economy has normally obtained reciprocal MFN in its trade agreements with market economy countries. MFN is a problem in trade between a centrally planned and a market economy country, however, because only the Soviet foreign trade corporations receive the important MFN benefits of a reasonably competitive opportunity to sell exports in the other country.

For the market economy country's exporters, receipt of MFN


in the Soviet state trading system lacks significant meaning. For example, with regard to tariffs—historically the primary subject of MFN— the Soviet central government, which determines Soviet import purchasing, essentially both pays the tariffs through the importing foreign trade corporations and simultaneously collects them through the receiving state treasury.

Other aspects of foreign trade regulation within the purview of MFN are often handled in the Soviet system at the administrative level, where any discriminatory practice may be difficult for the market economy exporter to prove.

For these reasons, market economy countries have directed attention to what they might obtain as a reasonable quid pro quo for giving the Soviet Union MFN. One solution, tried mainly before World War II, is a commitment by the Soviet government to import annually a specified quantity of goods from the market economy country. In the postwar period the Soviet govern-

67. Domke & Hazard, supra note 65, at 55.
68. Consequently, when a market economy country's exports become saleable in the Soviet Union at a lower price because MFN has reduced import duties, they do not thereby become any more attractive for Soviet purchase. The gain from the lowered price to the Soviet government ultimately financing the purchase is exactly offset by the loss to the government from the reduced tariff collection. By contrast, in Britain or the United States, Soviet exports becoming saleable at a lower price by virtue of MFN's reducing the applicable British or American tariff do become more attractive for purchase. The market economy enterprises making the purchases benefit fully from the lowered price because these enterprises have no connection with the governmental tariff collections.

MFN clauses appear in the bilateral trade and navigation treaties between the Comecon countries, but MFN would not seem to have much significance in the trade between centrally planned economies. See Useko, supra note 2, at 226-51.
69. See S. Pisar, Coexistence and Commerce 207 (1970); Pisar, Soviet Conflicts, supra note 51, at 645-47.
ment generally has refused to undertake such a purchase commitment unless the market economy government does likewise, which the latter cannot because it is powerless to commit its importers. 71 Another attempted solution is the "commercial considerations" clause, by which a centrally planned economy country promises to determine its foreign trade solely on the basis of commercial and financial considerations. 72 Market economy country experience with this clause, however, has been unsatisfactory because there is no reliable way of knowing whether the centrally planned economy country is actually abiding by it. 73

More recently, Poland proposed a new formula in connection with its application for membership in the General Agreement on Tariffs and Trade (GATT). Poland offered to include in its central plans a foreign trade quota corresponding to a certain proportion of growth in its domestic market and to use the increased export revenue earned through receiving MFN in market economy countries to pay for increased imports. 74 Poland was finally accepted as a GATT member in 1967 under an arrangement whereby Poland promised to buy from all the other GATT countries together a total of goods each year equal to the total of such purchases by Poland during the previous year plus a seven percent increase at minimum. 75 Various other solutions to the

71. Even were the Soviet Union alone to undertake a purchase commitment, the resulting system of bilateralism would not be as consistent with the principle of comparative advantage as the multilateral trade system sought by market economy countries through the General Agreement on Tariffs and Trade (GATT). The draftsmen of the proposed International Trade Organization Charter following World War II tried to resolve this problem. They attempted to frame some annual global purchase commitment that would be undertaken by all centrally planned economy countries together for all their purchases from all market economy countries in return for the centrally planned economy countries' receiving MFN for their exports. This attempt, however, failed in the drafting stage. Domke & Hazard, supra note 65, at 59-60.


73. Domke & Hazard, supra note 65, at 67-68.

74. COMMITTEE FOR ECONOMIC DEVELOPMENT, EAST-WEST TRADE 24 (1965).

75. J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 14.9 (1969). On February 5, 1971, Poland's arrangement with GATT was revised so that, in general terms, the seven percent annual increase may now be calculated by averaging the actual increase over a several-year
Evidently the current British solution is to consider its granting of MFN to the Soviet Union to be a matter of unilateral discretion. Thus the British government can withdraw the MFN any time it believes British exporters are not receiving fair consideration from the Soviet side. Similarly, in the United States the Johnson Administration's proposed "East-West Trade Relations Act" would not have directly granted MFN to Communist countries by statute for an indefinite period, as is done for non-Communist countries. Instead, the proposed Act would have empowered the President to conclude commercial agreements with individual Communist countries granting them MFN for a period of up to three years, such agreements being "subject to suspension or termination at any time upon reasonable no-

76. It has been suggested, for example, that a centrally planned economy country, in return for receiving MFN, could agree to particular prices at which certain market economy exports could be sold in the centrally planned economy country's domestic market. The prices would be those at which the centrally planned economy country itself could produce and sell comparable goods, as determined by cost studies. The centrally planned economy country would then allow as much or as many of each of the designated kinds of market economy exports to be sold as its domestic market would buy. This system might be especially suitable for consumer goods.

77. For the experience of market economy countries with a terminable MFN coupled with a purchase commitment, see Domke & Hazard, supra note 65, at 57, 60, 63.

78. East-West Trade Relations Act of 1966, § 5(a). This proposed Act was published in 54 Dep't State Bull. No. 1405, 838, 843-44 (May 30, 1966), and in Dep't of State, The Battle Act Report 1966, 19th Rep. to Congress 36. It was not enacted into law by Congress.
In addition, the proposed Act suggested provisions in such agreements assuring American parties fair treatment in specific matters of importance, such as protection of industrial rights and processes, arrangements for the settlement of commercial disputes, establishment of trade and tourist promotion facilities and the application of duties and other restrictions on imports from the United States.\textsuperscript{80}

B. UNILATERAL TRADE MEASURES

In Anglo-Soviet trade, each government, of course, applies certain trade measures independent of any bilateral commitments to the other. The Soviet government completely controls what its foreign trade corporations import and export simply through its administration of the state monopoly of foreign trade. The British government, in turn, exerts some influence on exporting by British firms mainly through: prohibiting the export of certain goods;\textsuperscript{81} requiring for some others an export license that is granted only if certain conditions are satisfied;

\textsuperscript{79} East-West Trade Relations Act of 1966, § 5(b). The proposed Act would have instructed the President to suspend or terminate an agreement upon determining that the Communist country was "no longer fulfilling its obligations under the agreement" (§ 6(b)(1)) or that suspension or termination was "in the national interest" (§ 6(b)(2)). For a criticism of the three-year term and these additional provisions regarding the period of the MFN grant as "creating this second-class kind of most-favored-nation treatment," see Berman & Garson, The Road to Trade, The Nation, May 15, 1967, at 626, 628.

\textsuperscript{80} East-West Trade Relations Act of 1966, § 4. Specifically spelling out the desired fair treatment on particular matters, as opposed to generalized phrasing, would enable the agreement to serve more readily as the basis for a diplomatic protest should some situation require it. Hazard, supra note 65, at 498; Berman & Garson, supra note 70, at 281-82.

\textsuperscript{81} Britain is a member of the Consultative Group and of its permanent working committee, the Coordinating Committee (COCOM), an organizational arrangement consisting of the NATO countries excluding Iceland but including Japan. Accordingly, Britain enforces an embargo on the export in East-West trade of a list of strategic items agreed to by these countries. This British embargo is encompassed within this paper's textual discussion of unilateral trade measures in the sense that it is not part of any bilateral or multilateral obligation that the British
granting export credit insurance only if the proposed transaction meets certain commercial standards; and requiring certain trans-
actions where payment is deferred more than six months after
shipment of the goods to have an exchange control approval that
is granted only if certain conditions are met. As for imports,
the British government exerts influence chiefly through a
tariff and quota system.

C. LAW GOVERNING ANGLO-SOVET TRADE CONTRACTS

In Anglo-Soviet trade there exist neither inter-governmental
agreements specifying the trade nor inter-governmental agree-
ments providing general conditions of delivery. Therefore, a
British firm and a Soviet foreign trade corporation conclude a
contract and draft its terms at their discretion. The contract-
ning British firm and Soviet foreign trade corporation are
free to determine the applicable law and to refer possible dis-
putes to any tribunal for resolution. Soviet jurists naturally
regard the absence of an international trade law unified by the
governments as an impediment to effective contract drafting.
The contracting British and Soviet parties may, of course, use
standard contract forms and other documents formulating in-
ternational commercial custom. In practice, especially in the
government owes to the Soviet government. Therefore, with regard to
the Soviet government, it is a trade measure that the British govern-
ment undertakes unilaterally.

82. See text accompanying notes 56-62 supra.
83. The Soviet foreign trade corporation, of course, may be oper-
ing under certain directions from the Soviet Foreign Trade Ministry.
84. For aid in obtaining the information used in this and other sec-
tions of the paper regarding the actual practice of Anglo-Soviet trade,
the author is indebted to Mr. David Winter, a solicitor of the Supreme
Court, London, and Visiting Lecturer in Soviet Law at the University
of Surrey, Guildford, England. Mr. Winter's expert and generous assist-
ance is herewith appreciatively acknowledged.
85. Neither English nor Soviet law requires that the law chosen
by the parties have a real connection with the contract. Schmitthoff,
The Law of International Trade, its Growth, Formulation and Operation,
in Sources of Law, supra note 3, at 3, 30. For one Soviet limitation on
the parties' choice of law for one aspect of the contract, see notes 90-97
and accompanying text infra.
86. In practice, when adjudication in a neutral third country is de-
sired, arbitration is often referred to the Arbitration Institute of the
Stockholm Chamber of Commerce or to the International Chamber of
Commerce in Paris. The London Chamber of Commerce, Memorandum
on Contracts for the Export of Engineering Products to the Soviet
Union 18 (1965); Winter, The Licensing of Know-How to the Soviet
Union, 1 J. World Trade L. 162, 174-75 (1967).
87. Some of these standard contracts and documents are enumer-
ated in East European Trade Council, Contracts with Eastern
Soviet conflict of laws or Soviet substantive law or both may apply to a contract in Anglo-Soviet trade. Such application may result from the parties’ choice of law or of adjudicative tribunal, or from their silence in the contract about choice of law or of tribunal. One possible problem is created by Soviet private international law. This body of law provides: first, that a contract is governed by the law of the place of contracting; and second, that a contract made outside the Soviet Union will not be considered invalid due to noncompliance with the foreign law if there has been compliance with Soviet law. The distinct-

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The RSFSR is the one out of the 15 constituent Soviet Republics that includes Moscow, where most foreign trade transactions concluded in the country are signed. Genkin, Znachenia Grazhdanskogo Kodeka RSFSR v Regulirovanii Otnoshenii po Vneshnei Torgovle (The Role of the RSFSR Civil Code in the Regulation of Foreign Trade) 1965 SovetskoE Gosudarstvo i Pravo No. 2, at 51, 55 [translation stated in the periodical]. The RSFSR also includes Leningrad. On the infrequent occasion when the law of another of the Soviet Republics would be applicable, the relevant portions of that Republic’s civil code would probably be the same as the corresponding portions of the RSFSR Civil Code. Id.; Genkin, Nekotorye Pravovye Voprosy Obshchikh Uslovii Postavok Tovarov SEV 1958 g. (Certain Legal Questions of the Comecon 1958 General Conditions for the Delivery of Goods), in 18 Collection, supra note 49, at 3, 13.

The basis of each of the Republic’s civil codes is found in Osnovy Grazhdanskogo Zakonodatel’stva SSSR i Sotsial’nogo Respublik (Fundamental Principles of Civil Legislation of the USSR and of the Union Republics), translated into English in 14 Current Dig. Soviet Press No. 4, Feb. 21, 1982, at 3, 20 [hereinafter cited as Fundamental Principles]. The RSFSR Civil Code, however, serves as a unified source of general civil legislation in the RSFSR applicable to foreign trade, because the RSFSR Civil Code essentially reproduces as well as elaborates upon the Fundamental Principles. Genkin, The Role of the RSFSR Civil Code in the Regulation of Foreign Trade, supra, at 55; Genkin, Certain Legal Questions of the Comecon 1958 General Conditions for the Delivery of Goods, supra, at 13.

89. R.S.F.S.R. 1964 Grazh. Kod. (Civil Code), art. 565; Fundamental
five feature of Soviet private international law, however, is the further rule that both the form of a contract concluded by a Soviet corporation or any other Soviet organization in connection with foreign trade, and the procedure for the Soviet organization’s signing, are governed by Soviet law regardless of where the contract is concluded; noncompliance with Soviet law renders the contract invalid.90

By this rule, Soviet law governs the form and procedure of a Soviet corporation’s conclusion of a foreign trade contract purely because a Soviet corporation is a party to the contract. Even though all other elements of the contract—place of contracting, place of performance, etc.—have no connection with the Soviet Union, Soviet law governs. No Western country, nor any other East European country, has a similar requirement for application of its own law to form and procedure.91

This Soviet conflicts rule is considered by Soviet jurists to be binding on foreign as well as on Soviet courts. As theoretical justification for this universal applicability, Soviet jurists assert that, because Soviet foreign trade is a state monopoly, its conduct through the various Soviet state foreign trade corporations is a sovereign state function, entitled to the respect abroad due a sovereign state function.92

90. FUNDAMENTAL PRINCIPLES, supra note 88, arts. 125, 14; R.S.F.S.R. 1964 GRAZ. KOD. (Civil Code), arts. 565, 45. This rule applies only to the form of a legal act and the procedure of a Soviet organization’s signing; the rights and obligations of a Soviet organization may, by Soviet conflicts principles, be governed by foreign law without restriction. FUNDAMENTAL PRINCIPLES, supra note 88, art. 126; R.S.F.S.R. 1964 GRAZ. KOD. (Civil Code), art. 566.
91. For the relevant East European law, see S. PisA, COEXISTENCE AND COMMERCE 453 (1970).
92. LUNZ, SPECIAL PART, supra note 2, at 157-62; LUNZ, GENERAL PART, supra note 29, at 173-75; D. RAMZAITSEV, CONTRACT, supra note 4, at 23; D. RAMZAITSEV, VNESHNETORGHOVY ARBITRAZH v SSSR (FOREIGN TRADE ARBITRATION IN THE USSR) 49-52 (1957) [hereinafter cited as RAMZAITSEV, ARBITRATION (1957)]; Genkin, Arbitration, supra note 49, at 10; LUNZ, Conflicts, supra note 51, at 43-45; Ramzaitsev, The Law Applied by Arbitration Tribunals—I, in SOURCES OF LAW, supra note 3, at 138, 142-43. Thus, in Soviet Foreign Trade Arbitration Commission decisions, the basis given for applying this rule is not that it is some kind of statute of frauds applicable in the Commission as part of the procedural law of the forum. Rather, it is held to be a rule universally applicable to Soviet foreign trade contracts.

It has been pointed out by an American jurist that, with regard to Soviet foreign trade corporations, Soviet theory here is inconsistent. On the one hand, the Soviet Union claims that these corporations are so separate from the state that each is liable only for its own individual
The practical reason for this conflicts rule is that it enables the Soviet central government to control Soviet foreign trade operations more closely. Thus Soviet special foreign trade legislation requires all foreign trade contracts entered into by foreign trade corporations to be in writing and signed by specified Soviet officials.93 If the form and procedure for the execution of obligations and not for those of the state or of the other state corporations, and that neither the state nor the other state corporations have any liability for its obligations. But, on the other hand, the Soviet Union claims these corporations are so closely tied to the state that this Soviet contract execution rule deserves the respect accorded a sovereign state function. S. Pisar, Coexistence and Commerce 452 (1970); Pisar, Soviet Conflicts, supra note 51, at 654.

93. In general, two signatures are required. For foreign trade contracts concluded by a Soviet foreign trade corporation in Moscow, one signature must be by the president of the corporation or his deputy, and the other by a person authorized to sign foreign trade contracts under a power of attorney given by the president. A bill of exchange or any other monetary obligation in foreign trade issued or assumed by a Soviet foreign trade corporation in Moscow must be signed by either the corporation's president or his deputy and also by the corporation's accountant general. If a contractor or bill of exchange or other monetary obligation in foreign trade is entered into by a Soviet foreign trade corporation outside Moscow, whether in the Soviet Union or in a foreign country, the document must bear the signatures of two persons authorized to sign by a power of attorney given by the president of the corporation. Procedure for Signing Contracts and Issuing Powers of Attorney for the Execution of Operations in Foreign Trade (a decree of the Central Executive Committee and the Council of People's Commissars USSR), SOBRANIE ZAKONOV I RASPORIAZHENII SSSR (COLLECTION OF LAWS AND REGULATIONS OF THE USSR), Oct. 13, 1930, [1930] No. 56, item 583, as amended March 17, 1932, [1932] No. 20, item 119, as amended April 27, 1934, [1934] No. 23, item 178, as amended Dec. 26, 1935, [1936] No. 1, item 3, as amended December 8, 1936, [1936] No. 62, item 459. See also 1 V. Gsovski, Soviet Civil Law 470-71 (1948); Lunz, Special Part, supra note 2, at 158-59.

Similar regulations govern foreign trade contract signing by Soviet trade delegations. See note 4 supra. In recent years, however, it is normally a foreign trade corporation rather than a trade delegation that is the Soviet party to a contract or other civil law obligation in foreign trade. Lunz, Special Part, supra note 2, at 66; Ramzaitsev, Contract, supra note 4, at 17 n.1; Userko, supra note 2, at 269. If, in foreign trade, a Soviet trade delegation or one of its divisions in a foreign country enters into a contract, bill of exchange, any other type of monetary obligation, or power of attorney, the document must have two signatures. One must be by either the trade representative or by his deputy or, with the authorization of the trade representative, by the head of a division of the foreign trade delegation, and the other must be by a member of the trade delegation whose name appears on a special list approved by the Ministry of Foreign Trade and submitted to the USSR Council of Ministers. Exceptions to the normal two signature requirement are that a trade representative can sign alone a contract involving not more than 40,000 (new) rubles, and a contract involving more than that amount if he has prior permission in each instance from the Minister of Foreign Trade or his Deputy. The names of all persons
Soviet foreign trade contracts were subject to a foreign law as the law of the place of contracting or as the proper law of the contract, Soviet central control could be upset. Foreign law might, for example, validate an oral contract or contract signed by an official possessing merely apparent or ostensible authority. Consequently, the negligent or deliberately dishonest act of a Soviet foreign trade corporation official could commit the Soviet economy to a significant undesired obligation. It is to preclude such interference by its own trade officials with its carefully drafted foreign trade plan that the Soviet Union has established its conflicts rule. The protection provided by the rule is the subjection of every Soviet foreign trade contract to the Soviet requirements of a written form ordinarily bearing the signatures of two authorized officials.94

This Soviet conflicts rule has on occasion, however, presented a problem in Soviet trade with market economy countries. A number of Soviet Foreign Trade Arbitration Commission cases have dealt with the matter. Each has involved a foreign trade able to sign a legal obligation on behalf of a trade delegation or one of its divisions are required to be given to the government to which the delegation or division is accredited and to be published in an appropriate press organ of that country. Procedure for Signing Contracts and Issuing Powers of Attorney for the Execution of Operations in Foreign Trade (a decree of the Central Executive Committee and the Council of People's Commissars USSR), Sobranie Zakonov i Raspriazhenii SSSR (Collection of Laws and Regulations of the USSR), Oct. 13, 1930, [1930] No. 56, item 583, as amended March 17, 1932, [1932] No. 20, item 119, as amended April 27, 1934, [1934] No. 23, item 178, as amended Dec. 26, 1935, [1936] No. 1, item 3, as amended Dec. 8, 1936, [1936] No. 62, item 459. See also I. V. Gsovski, Soviet Civil Law 470-71 (1948); Lunz, Special Part, supra note 2, at 158-59.

A further publication provision is that the names of all persons empowered to sign foreign trade obligations for a trade delegation or a division of a delegation or for a foreign trade corporation must be published in the official journal of the Foreign Trade Ministry. At the present time this journal is Vneshtia Torgovla (the spelling of the title used in the journal's English language edition). A person's power to sign does not arise until such publication. Foreign Trade Ministry, Vneshtia Torgovla.


94. See S. Pisar, COEXISTENCE AND COMMERCE 452 (1970); Pisar, Soviet Conflicts, supra note 51, at 655.
contract allegedly agreed to by a Soviet corporation but not executed in full compliance with the Soviet form and procedure requirements. In every relevant case the Commission has declared that Soviet law governed the Soviet corporation's foreign trade contract execution (regardless of other factors, such as the place of execution) and has held invalid any contract violating the Soviet requirements.

The issue in these reported cases was either whether an exchange of oral or written communications between the parties established any contractual relationship, or whether a basic contract acknowledged by both parties as binding was to be interpreted or supplemented by additional communications. In all the cases any oral communications were held powerless to establish or modify any foreign trade contract, because Soviet law requires a writing. Any written communications were held to create or supplement a valid contractual relationship only when signed by the duly authorized Soviet foreign trade corporation representatives.

Thus, by Soviet doctrine, not only the original foreign trade contract, but also any alleged amendment must satisfy the Soviet form and procedure requirements. If the Soviet corporation's execution of a foreign trade contract or amendment fails to satisfy these requirements, the resulting invalidity cannot be

95. Ishchenko & Zatsepin, Dogovor Vneshnetorgovoi Kupli-Prodazhi (Contract of Foreign Trade Purchase and Sale), in The Legal Regulation of Foreign Trade of the USSR 104, 110 (D. Genkin ed. 1961). As to the existence of any contractual relationship at all, in Hoffman (Swiss merchant) v. V/O Machinoimport (Soviet corporation) (1956), described in Ramzaitev, supra note 92, at 143-44, in Ramzaitev, Arbitration (1957), supra note 92, at 55, and in Lunz, Special Part, supra note 2, at 161, plaintiff Swiss merchant claimed a valid contract with defendant Soviet foreign trade corporation. Plaintiff lost because the basis of the alleged contract—oral negotiations and written proposals by plaintiff that had not been confirmed in writing by defendant—did not satisfy the Soviet requirements of a writing signed by the proper Soviet corporation officials. But in Fanto Petroleum Maatschappij (Dutch firm) v. V/O Sovuznefteksport (Soviet corporation) (1940), described in note 97 and accompanying text infra, the Dutch plaintiff successfully established a contract based on an exchange of written communications between the parties.

With regard to the interpretation of an acknowledged valid contract, both the Canadian plaintiff in a 1938 case and the Soviet defendant in a 1937 case lost on their claim that the contract should be interpreted in accordance with oral negotiations occurring at the time of concluding the contract. A & P Import Co. (Canadian firm) v. V/O Raznoeksport (Soviet corporation) (1938), in Lunz, Special Part, supra note 2, at 161, and in D. Ramzaitev, Vneshnetorgovyi Arbitrazh v SSSR (Foreign Trade Arbitration in the USSR) 33 (1952) [hereinafter cited as Ram-
cured by any subsequent actions of the corporation indicating an acceptance of the agreement for fulfillment except by subsequent proper written execution of the contract or amendment.96

Three other plaintiffs failed in attempts to supplement an acknowledged valid contractual relationship with alleged additional contractual agreements, because the alleged additional agreements lacked compliance with the Soviet form and procedure requirements. In Schenker and Co. (French company) v. V/O Raznoimport (Soviet corporation) (1937), described in Lunz, Conflicts, supra note 51, at 44-45, and in RAMZAITSEV, ARBITRATION (1952), supra, at 33.

In the second case, V/O Soiuznefteksport (Soviet corporation) v. Degviela (joint stock company—nationality not stated) (1940), described in RAMZAITSEV, ARBITRATION (1957), supra note 92, at 54-55, plaintiff Soviet seller claimed that, after it had shipped the merchandise sold, the parties made an additional agreement that defendant buyer was to return the merchandise to the port of loading. Plaintiff's claim failed because it was based on an exchange of telegrams and letters which, on plaintiff's side, had not been signed by the appropriate Soviet corporation officials according to Soviet law. For the same reason plaintiff Belgian buyer in Maurice Dever (Belgian firm) v. V/O Eksportles (Soviet corporation) (1951), described in RAMZAITSEV, ARBITRATION (1957), supra note 92, at 55, lost on its claim. The quantity of merchandise to be delivered, plaintiff argued unsuccessfully, was to be determined by certain communications between the parties in addition to an original contract together with a supplementary agreement. But the additional communications failed to have this claimed legal effect because by Soviet law they had not been properly executed by the Soviet defendant.

However, V/O Eksportkhleb (Soviet corporation) v. Romano Pianti Fratelli (Italian firm) (1952), 15 Collection, supra note 48, at 58-59 (1964), represents a departure from the Soviet Foreign Trade Arbitration Commission's reliance on the universal applicability of the Soviet form and procedure requirements. In that case defendant Italian buyer, after having accepted part of a contractual shipment of oats, refused to accept further shipments. Defendant alleged that the parties, after the part performance, had orally agreed in Rome to cancel the remainder of the contract. Plaintiff Soviet seller denied any such oral agreement and sued for losses resulting from defendant's refusal to accept further shipments. The Soviet Arbitration Commission, deciding in favor of plaintiff, concluded that no valid agreement canceling the contract had been reached. But the Commission based its conclusion wholly on a clause in the original contract requiring that any change be executed in written form and signed by duly authorized representatives; the Commission said nothing about the Soviet form and procedure requirements.

96. RAMZAITSEV, CONTRACT, supra note 4, at 23-24; Genkin, Arbitration, supra note 49, at 10. Similarly, the Soviet Foreign Trade Arbitration Commission considers the form and procedure of execution of a foreign trade contract by a foreign organization to be governed by the
The Soviet form and procedure requirements can, however, be met by any writing containing the essential contractual terms, provided that the document committing the Soviet corporation is signed by authorized officials. The writing can consist of one or several separate documents. In one case the Soviet Foreign Trade Arbitration Commission held that an exchange of correspondence between a Soviet foreign trade corporation and a foreign firm constituted a valid contract. The Soviet corporation had objected that the correspondence was merely preparation for a possible subsequent contract conclusion, but the Commission over-

domestic law of that foreign organization's country. Therefore, concludes the Commission, if the foreign country's law does not contain a special imperative rule controlling the execution of foreign trade contracts by that country's organizations, legal acceptance of a foreign trade contract by such an organization can be deduced from its actions recognizing the contract as binding. Genkin, Arbitration, supra note 49, at 10-11.

Thus, in V/O Sotuznefteksport (Soviet corporation) v. A. Moroni i A. Keller (Italian company) (1960), 11 Collection, supra note 49, at 41 (1961), plaintiff Soviet seller sued defendant Italian buyer for breach of two contracts. Defendant pleaded invalidity of the contracts, alleging they had been signed for defendant by a person without authority to bind the Italian company, and force majeure. The Soviet Arbitration Commission found that the contracts had in fact been signed for defendant by an unauthorized official of the company. But the Commission concluded that defendant buyer had nevertheless subsequently obligated itself to the contracts through acceptance of partial shipments made by plaintiff seller on both contracts and through a letter to plaintiff signed by defendant Italian company's president. In this letter the president, who was authorized to conclude the contracts at issue, recognized non-performance by defendant of contractual obligations but pleaded force majeure.

Apparently the Commission believed it could hold defendant to the contracts, through the acceptance of partial shipments and the letter, on the basis of general principles of civil law. Evidently the Commission thought such general principles applied because of the apparent absence in Italian law of any contrary rule restricting the manner in which an Italian company could become bound to a contract. See Genkin, Arbitration, supra note 49, at 10-11. (The Commission also rejected defendant's force majeure plea.)

It is the type of acceptance of an invalidly executed contract as in the Moroni i Keller case that, by the Soviet view, could never be charged to a Soviet foreign trade corporation. Soviet law would apply, by the Soviet view, and it recognizes no foreign trade contract acceptance by the Soviet party other than through the formally prescribed written execution. Ramzaitsev, Contract, supra note 4, at 23-24; Genkin, Arbitration, supra note 49, at 10. Ramzaitsev, however, interpreted the Moroni i Keller case differently from the above summary in this note, relying heavily on facts not contained in the above cited Collection's account of the Soviet Arbitration Commission decision. Ramzaitsev, Contract, supra note 4, at 34-37; Ramzaitsev, supra note 92, at 146; Ramzaitsev, The Application of Private International Law in Soviet Foreign Trade Practice, 1961 J. Bus. L. 343, 346-47.
ruled the objection because the correspondence as a whole expressed agreement on the essential terms of a contract and the letter sent by the Soviet corporation confirming the agreement had been signed by the officials authorized to sign foreign trade contracts. In making its decision the Commission chose Soviet law as the controlling law.\footnote{Fanto Petroleum Maatschappij (Dutch firm) v. V/O Soiuznefteeksport (Soviet corporation) (1940), in Lunz, Conflicts, supra note 51, at 45, in Ramzaitsev, supra note 92, at 143, in Ramzaitsev, Arbitration (1952), supra note 92, at 53-54, and in Ramzaitsev, Arbitration (1952), supra note 95, at 33-34. In this case defendant Soviet seller had offered by telegram to sell paraffin to plaintiff Dutch buyer, having indicated in the telegram the time and conditions of delivery and the price. Plaintiff had accepted the offer by a telegram and letter. Defendant had then by letter suggested additional conditions and had confirmed the sale based on plaintiff's acceptance of these additional conditions. Plaintiff had accepted the additional conditions, and subsequently brought suit to enforce the agreement thus arrived at. Defendant contended that the exchange of correspondence was simply preparation for a contract signing. The Soviet Arbitration Commission rejected this defense and held the alleged agreement legally established. The parties' correspondence indicated a consensus on the essential points of the contract, the Commission said, and the letter from defendant confirming the sale based on plaintiff's acceptance of the proposed additional conditions had been signed by the officials authorized to bind defendant Soviet corporation to foreign trade contracts.}

What would happen if a case involving an alleged foreign trade contract agreed to orally by Soviet officials who were authorized under Soviet law to commit their corporation only in writing\footnote{Other kinds of noncompliance with the Soviet foreign trade contract execution law are possible. For example, a contract might be signed for a Soviet foreign trade corporation by Soviet officials possessing only apparent or ostensible authority.} were to be litigated before an English tribunal?\footnote{The comments on English conflict law in the text following this note were written with the help of Mr. Peter Z. Rona, U. of Pa. (B.A.); Oxford (B.A. in Law). The author is gratefully indebted to Mr. Rona for his assistance.} The outcome would be uncertain.\footnote{Schmitthoff, The Law of International Trade, its Growth, Formulation and Operation, in Sources of Law, supra note 3, at 3, 9-10. No English cases directly on point could be found.} Under Soviet doctrine, the English tribunal should apply Soviet foreign trade contract execution law because foreign trade is a function of the sovereign Soviet state. According to this law, the contract orally agreed to by the Soviet side would be invalid.

The English tribunal, however, regardless of Soviet doctrine, might characterize the issue of the contract's validity as relating to formal validity. Then the alleged contract would be held valid under English conflicts law if it satisfied the requirements
either of the law of the country where it was made or of the proper law of the contract.\textsuperscript{101} Either law could easily be other than Soviet law. If for example, one were English law, an oral contract could be held valid notwithstanding the different requirements of the Soviet law and its claimed universal applicability.\textsuperscript{102}

The English tribunal might well, on the other hand, characterize the issue as relating to the capacity of the relevant Soviet officials to bind the Soviet corporation.\textsuperscript{103} Then by English conflicts law the alleged contract would be governed both by its proper law and by the charter of the corporation.\textsuperscript{104} The Soviet corporation's charter would probably provide that the corporation's foreign trade contracts must be signed by two particular officials.\textsuperscript{105} Consequently, the English tribunal might enforce that restriction, refuse to allow the authority of these officials to be enlarged by the proper law of the contract and hold that the officials did not have even apparent or ostensible authority to commit their corporation by oral agreement.\textsuperscript{106}

The decision could thus turn on the English tribunal's characterization of the issue: is it a matter of formal validity, or of the capacity of the Soviet corporation officials? By what law the English tribunal would make this characterization is not clear.\textsuperscript{107} If the English tribunal referred to Soviet law for the characterization as formal validity or capacity, just what the characterization would be by Soviet law is also not clear.\textsuperscript{108}

\begin{enumerate}
\item Schmitthoff, supra note 100, at 10.
\item Id. at 9-10.
\item A. Dicey & J. Morris, supra note 101, at 484-87; G. Cheshire, supra note 101, at 179-82. In a Bulgarian-Swiss arbitration conducted apparently in the early 1960's under the auspices of the International Chamber of Commerce, it was evidently held that the state foreign trade corporation was not bound by the alleged contract because its manager had lacked the authority to bind it orally. Lagergren, Formation of Contract, in Unification of Law, supra note 93, at 55, 71.
\item A. Dicey & J. Morris, supra note 101, at 19-33; G. Cheshire, supra note 101, at 40-45.
\item That the Soviet characterization would be formal validity is suggested by the language of the Soviet statutory provisions (Fundamental Principles, supra note 88, arts. 125, 14; R.S.F.S.R. 1964 Grazh.
\end{enumerate}
If the English tribunal ultimately characterized the issue as relating to capacity and enforced the restriction in the Soviet corporate charter, this restriction would probably be enforced as an application of English conflicts law. It would probably not be enforced as an English acceptance of the Soviet-claimed universal applicability of its foreign trade contract execution law. The reason for not accepting the Soviet claim is the additional burden it would place on British businessmen in Anglo-Soviet trade. At present they must be familiar with the proper law of the contract and possibly with the law of the country where the contract is made, neither of which might be Soviet law, as well as with the charter of the Soviet corporation. Acceptance of the principle that Soviet law would apply other than as the proper law of the contract or as the law of the country where the contract is made would force British businessmen to be familiar with Soviet law in every case.

If the non-Soviet party wants to comply with the Soviet requirement that a foreign trade contract be in written form with certain authorized signatures, however, the further problem of ascertaining what individuals may sign is not difficult. There are only 52 Soviet foreign trade corporations, and the names of the individuals authorized to bind these corporations are published in Vneshnia Torgovlia, the English language edition of the Soviet Foreign Trade Ministry’s journal. In practice, the Soviet special foreign trade contract execution law does not seem to have created particular difficulties for British firms.

Kod. (Civil Code), arts. 565, 45) and by Soviet legal writings such as Ramzaitsev, supra note 92, at 142-45. That the Soviet characterization would not be an either-or choice between formal validity and capacity, but rather would be a kind of procedural validity that subsumes Anglo-American concepts of both formal validity and capacity, is suggested by Soviet legal writings such as LUNZ, SPECIAL PART, supra note 2, at 157-62. The procedural validity view is probably the better statement of the Soviet position.

109. The number of these corporations has been increasing steadily during the postwar period.

110. See generally S. Pisar, COEXISTENCE AND COMMERCE 452-53 (1970); Pisar, Soviet Conflicts, supra note 51, at 655. The spelling in the text is that used by the journal for the title of its English language edition. Soviet special foreign trade legislation requires publication in the Foreign Trade Ministry’s journal of the names of all persons authorized to sign for the foreign trade corporations and the trade delegations, and a person’s authority to sign does not arise until such publication. See note 93 supra. This requirement, however, since it is a provision of Soviet internal law could be unilaterally changed by the Soviet Union at any time.

In the everyday conduct of Anglo-Soviet trade, a contract for a Soviet foreign trade corporation is sometimes signed by Soviet officials
D. COMPARISON WITH COMECON TRADE

As a whole, the legal structure of Anglo-Soviet trade is similar to market economy rather than to Comecon foreign trade. At the inter-governmental level, the British and Soviet governments undertake no responsibility to specify or ensure what trade will take place. Similarly, the British and Soviet governments have established no unified general conditions of delivery determining commercial terms of contracts between British firms and Soviet corporations. In the event of defaults or disputes in these contractual relations the governments make no intercession through their foreign trade ministries to resolve them.

Anglo-Soviet trade is also similar to market economy trade at the level of the contracting parties. From the standpoint of a British firm, contracting with a Soviet foreign trade corporation as a strictly legal matter is substantially like contracting with an enterprise of a market economy. For the British firm the juridical status of the Soviet foreign trade corporation as an independent legal entity separate from the Soviet central government—however close the administrative connection may be—has an important advantage: in the event of commercial dispute the British firm can press judicial suit or arbitration free of sovereign immunity questions. In practice, in Anglo-Soviet trade litigation is rare because the Soviet corporations are known for faithful observance of their contracts and for amicable settle-

prior to publication of their names in VNE SHNIA TORG OVL A. In such a circumstance, a written power of attorney may subsequently be issued on behalf of the president of the corporation confirming that the officials had authority to sign for the corporation prior to or as of the date of the contract execution. The power of attorney may also confirm that the names of the officials will be published in due course in VNE SH NIA TORG OVL A. In any of these various situations, whatever the strict legal effect under Soviet law, the Soviet corporation scrupulously honors its contract, in keeping with the high reputation of Soviet corporations for honoring their foreign trade contracts. But see S. PISAR, COEXISTENCE AND COMMERCE 285 (1970).

The Anglo-Soviet Commercial Agreement of Feb. 16, 1934, art. 5(5), [1934] Gr. Brit. T.S. No. 11 (Cmd. 4587), 149 L.N.T.S. 445, 452, provides for publication in the Board of Trade Journal of the names of those authorized to sign for the Soviet Trade Delegation. This provision, however, has little value today, because the Soviet party to a foreign trade contract now is normally not the Trade Delegation but a foreign trade corporation. See note 4 supra. LUNZ, SPECIAL PART, supra note 2, at 68; RAMZAITSEV, CONTRACT, supra note 4, at 17 n.1; USENKO, supra note 2, at 269.

111. See Berman, supra note 105, at 490, 494 n.35; Pisar, Soviet Conflicts, supra note 51, at 643.
ment of the infrequent disputes without resort to suit or arbitration.\textsuperscript{112}

The Soviet foreign trade corporation's financial independence of the Soviet state treasury makes the corporation in this respect comparable to a market economy enterprise. That each Soviet corporation is alone liable for its obligations out of the limited assets entrusted to it by the central government and that the Soviet state treasury bears no responsibility for the corporation's obligations is not a significant problem for the British firm; Anglo-Soviet trade experience has demonstrated that Soviet corporations meet their payment obligations punctually.\textsuperscript{113} One purpose, of course, of Soviet central planning of foreign trade and the especially close Soviet central control over all foreign exchange transactions is to assure availability of the foreign exchange necessary to meet the corporations' foreign obligations. The Soviet government is aware that a default by one Soviet corporation would reflect sharply on the credit standing of all.\textsuperscript{114}

From the standpoint of a Soviet foreign trade corporation, contracting with a British firm as a strictly legal matter differs significantly from contracting with a corporation of a Comecon country. The absence of any inter-governmental long term agreement or protocol between administrative superiors that envisions conclusion of a contract creates uncertainty as to whether any contract will ever be agreed to by the negotiating Soviet corporation and British firm. Further, the absence of any unified general conditions of delivery requires the contracting parties themselves to draft the commercial terms of any contract, and any dispute must be resolved without governmental intervention.

IV. FUTURE TRENDS

A. COMECON FOREIGN TRADE

The distinguishing feature of centrally planned economy foreign trade—that the central government determines what trade

\begin{itemize}
  \item \textsuperscript{112} See generally S. Pisar, Coexistence and Commerce 283-87 (1970).
  \item \textsuperscript{113} See id.; East European Trade Council, Contracts with Eastern Europe 61 (1968); Pisar, Soviet Conflicts, supra note 51, at 643-44. But see S. Pisar, Coexistence and Commerce 266-67, 492 (1970).
\end{itemize}
will take place and promises to ensure fulfillment of this trade\textsuperscript{115}—is undergoing some modification in Comecon. The motive behind the change is the desire for more efficiency. As in the current domestic economic reforms in the Comecon countries, greater efficiency is being sought through permitting state corporations to exercise authority reserved formerly for the central government.

In the case of foreign trade, this development means especially that the inter-governmental long term trade agreements and annual protocols no longer always specify in detail all the types of goods to be exchanged. Instead, they sometimes specify the goods only by broad categories, allowing the foreign trade corporations to fill in the details. An annual protocol, for example, may now indicate only that a certain value of machine tools is to be sold by one country to the other. What kinds of machine tools will be sold, and the amount of each kind, are determined by the two foreign trade corporations.\textsuperscript{116} It was formerly the central governments through the foreign trade ministries that normally made these decisions as to kinds by spelling them out in the agreements and protocols.

In the system of central government decision making for all details, certain problems have arisen. A basic difficulty is the foreign trade ministry's slowness and remoteness from actual trade. The ministry cannot possibly keep abreast of all the current developments regarding each of the many exports and imports handled by the foreign trade corporations. These fast-changing events can be followed adequately only by the foreign trade corporation specializing in the particular goods involved. Further, even insofar as the ministry is able to keep track of current happenings, it can utilize this knowledge in arranging the country's foreign trade only through the trade agreements and protocols. This process makes it impossible to react quickly to developments because the protocol for each year has to be drafted well in advance of the year and is usually signed in the preceding autumn. The annual protocol can be, and often is, amended during the year of its operation, but this procedure is cumbersome and fails to provide enough flexibility.\textsuperscript{117}

Authorizing the foreign trade corporations to determine through their contracts the particular kinds of goods that will

\textsuperscript{115} See text accompanying notes 22-25 supra.
\textsuperscript{116} See Katona, supra note 4, at 230 n.10.
\textsuperscript{117} See text accompanying notes 13-18 supra.
be traded within each broad category improves this situation. Each corporation is a specialist in certain goods and can decide which contracts to enter into and which to reject on short notice, and the contracts are executed less in advance of actual deliveries than the protocol. Each corporation is motivated to negotiate commercially advantageous contracts because the corporation is now judged partly on the profitability of its operation.118

The role of the foreign trade corporations is growing in other ways as well.119 They are being increasingly consulted by the foreign trade ministry as to what goods should be included in the inter-governmental agreements. When the corporations draft a contract deviating on some point from a provision in the annual trade protocol, there is increasing validation of the contractual provision as against the protocol provision.120 In the event of nondelivery on a contract, the civil liability issue is now normally resolved by the corporations and not by the foreign trade ministries.121 When two corporations cannot agree on a contract for a delivery designated in the annual protocol, resolution of this problem may still, however, have to come through the foreign trade ministries.122

One long range development that would greatly enlarge the role of the foreign trade corporations would be for the inter-governmental agreements to omit specifying the value of each category of goods to be exchanged. Instead, the total value for each category as well as the kinds of goods within it could be left to the foreign trade corporations. At present the Comecon governments roughly balance their Comecon trade on a bilateral basis by normally specifying in each inter-governmental agreement a value for each category of goods listed. They are working to develop a multilateral balancing system.123

If the Comecon governments were to leave the value of trade

118. See text accompanying notes 48-53 supra.
119. At the same time that the foreign trade corporations are gaining some authority reserved formerly for the central government, they are, however, sometimes losing authority to domestic operating enterprises. As an additional move to give more authority to the organization closest to the matter at issue, in Eastern Europe some of these larger operating enterprises are being empowered to export and import directly rather than only through the middlemen foreign trade corporations, as was required in the past. See note 4 supra.
120. See text accompanying notes 37-40 supra.
121. See text accompanying notes 44-55 supra.
122. See text accompanying note 41 supra.
123. See notes 9 and 15 and accompanying text supra.
in the bilateral arrangements to determination by the foreign trade corporations, a government could still influence the trade through export and import licensing, foreign exchange controls and tariffs. In addition, the government would always retain the ultimate control of administrative supervision. Thus the government could at any time control a corporation's exporting or importing in any given case simply by issuing a direct (and possibly secret) administrative order.

The present modification of the Comecon foreign trade system to enlarge the role of the foreign trade corporations is proceeding at a different pace in the different Comecon countries. The modification is most advanced in Hungary, with Poland and Czechoslovakia coming next. In the Soviet Union change is coming more slowly, partly because the domestic economic reform is less advanced there, and partly because foreign trade is less important to the Soviet economy, so that obtaining maximum efficiency in foreign trade receives less attention. Strict central government control over foreign trade also has deep historical roots in the Soviet Union. At the very outset of the Soviet era, Lenin saw this control as the only sure way to protect the Soviet economy from domination by the then more powerful market economy countries. Protection of the Soviet domestic economy through the traditional method of tariffs, as advocated by Bukharin, was condemned by Lenin as totally inadequate.

Although Soviet industry has developed mightily since those early years, the determination of the Soviet central government to plan and control foreign trade directly is softening very slowly.

In the Soviet Union as well as in Eastern Europe, however, the present movement is clearly toward reducing the authority

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124. If, for example, a foreign trade corporation were authorized to decide from which Comecon country to import certain goods, were to seek these imports where the cost was least in order to maximize corporate profitability and were to receive no credit for the central government's tariff collections, tariffs could affect the corporation's import buying decisions. Thereby MFN could acquire meaning in a Comecon country. See text accompanying notes 63-80 supra.


126. 27 V. LENIN, COLLECTED WORKS 252 (1965); 33 V. LENIN, COLLECTED WORKS 455-59 (1966); Hazard, State Trading in History and Theory, 24 Law & Contemp. Prob. 243, 245-46 (1959).

127. 33 V. LENIN, COLLECTED WORKS 455-59 (1966); Hazard, supra note 126, at 245. For one difficulty recently encountered by Yugoslavia in moving from a centrally planned toward a market economy in foreign trade, see The Economist, June 8, 1968, at 42. The difficulty there described is alleged "dumping" by Comecon countries.
of the central government and enlarging the authority of the for-
ign trade corporations. This change moves the legal structure of
Comecon foreign trade in the direction of the legal structure used
by market economies, although the differences remain signifi-
cant.

B. Market Economy Foreign Trade and
Anglo-Soviet Trade

The market economy foreign trade legal structure is moving
slightly toward the centrally planned economy example. In
Comecon foreign trade the role of the central government is de-
creasing; in market economy foreign trade, it is increasing. With-
in the twentieth century, first World War I, then the depres-
sion of the 1930's, then World War II and balance of payments
and monetary problems have led to a growing responsibility
for the market economy government.\textsuperscript{128} Decisions of which
goods in what quantities will be traded are still basically the
domain of the market economy enterprises, with the government's
providing only the legal framework within which these deci-
sions are made. But the typical market economy government
has circumscribed somewhat the enterprises' domain in order,
for example, that the net national result of all the enterprises'
individual decisions will have certain balance of payments char-
acteristics.

In Anglo-Soviet trade the Soviet Union accepts what is es-
sentially the treaty framework used between market economy
countries.\textsuperscript{129} This situation will probably continue. From the
British standpoint, the gradual easing of Cold War tensions less-
sens any need for the British government to make an exception
for East-West trade to its traditional policy of allowing British
enterprises to determine their own foreign trade. From the
Soviet standpoint, the present arrangement is workable. The ab-
sence of any inter-governmental commitments as to what and
how much trade there will be makes the central planning of
foreign trade less precise. Less precision, however, though to a
much smaller degree, is coming to characterize the central plan-
ing of trade between two Comecon countries as well.

\textsuperscript{128} See generally Hazard, supra note 126, at 243-55.
\textsuperscript{129} See text accompanying notes 56-62 supra.