

COMMENTS

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WHAT TO EXPECT WHEN TRADING WITH THE U.S.S.R.: THE PROBLEMS CONFRONTING THE AMERICAN EXPORTER

INTRODUCTION

The Trade Agreement,¹ signed in October 1972, contemplates a threefold increase in U.S.-Soviet trade to take place over the next three years. The minimum aggregate amount of this trade is expected to be about \$1.5 billion. Some American corporations have already negotiated and secured contracts with Soviet foreign trade organizations, while others have made initial contacts with the Soviets and are discussing future projects.

This article is designed to prepare the American exporter for what he will encounter in dealings with the Russians. United States foreign trade legislation is discussed briefly. The specific provisions that apply in each particular case are complex, and are beyond the scope of this article. The Soviet framework for conducting foreign trade is outlined, with emphasis placed on the foreign trade organizations. Policy considerations are also discussed because the Soviet Union conducts foreign trade in order to achieve goals different from the customary goals of a free market economy.

Finally, the problems that often arise in trading with the Russians are discussed from the viewpoint of the American as the seller. This section is especially important because the key to securing a profitable agreement is preparation by the American firm. Relevant to this section is the current status of the Trade Reform Bill (H.R. 10710). Two "anti-Soviet" amendments have been attached to the bill by the House of Representatives. Senate passage of the legislation, with amendments identical to those added by the House, could lead to the demise of U.S.-Soviet trade.² Special emphasis is also given to the problems that may arise in the course of negotiating a contract with the Russians.

I. UNITED STATES LEGISLATION AND POLICY

United States regulations on trade with the Soviet Union are both

1. *Agreement with the Government of the Union of Soviet Socialist Republics Regarding Trade*, Oct. 18, 1972, in U.S.-SOVIET COMMERCIAL AGREEMENTS 1972 88-91 (1973) [hereinafter cited as *Trade Agreement*]. For a summary of the Trade Agreement, see *Office of the White House Press Secretary, "Fact Sheet—Trade Agreement, Lend Lease Settlement, Reciprocal Credit Arrangements Joint U.S.-U.S.S.R. Commercial Commission"*, Oct. 18, 1972, in U.S.-SOVIET COMMERCIAL AGREEMENTS 1972 75-87 (1973) [hereinafter cited as *COMMERCIAL AGREEMENTS*].

2. See notes 122-27 *infra* and accompanying text.

voluminous and complex. It is possible that there will be major changes in U.S. foreign trade legislation prior to the end of 1974.³ Nonetheless, this section examines and analyzes the current legislation. The American businessman is cautioned, however, to make a complete investigation of the statutes that affect his particular commodity prior to negotiating with the Soviet Union.

United States export legislation regulating U.S.-Soviet trade can be divided into two general categories: Export Controls and Credit Controls.

A. *Export Controls*

Prior to 1969, the Export Control Act of 1949⁴ regulated exports. In 1969, however, the Export Administration Act⁵ superseded the older Act, although only minor changes were made. Under both the Export Control Act and the current Export Administration Act every export of commodities or technical information from the United States to any other country of the world (with the general exception of Canada⁶) requires an export license.⁷

The purposes of the 1969 enactment are essentially the same as its predecessor's.⁸ Congress declared that:

It is the policy of the United States to use export controls (A) to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of abnormal foreign demand, (B) to the extent necessary to further

3. See notes 127-30 *infra* and accompanying text.

4. Act of Feb. 26, 1949, ch. 11, 63 Stat. 7, as amended, 76 Stat. 127 (1962), and 79 Stat. 209 (1965).

5. Export Administration Act of Dec. 30, 1969, 50 U.S.C.A. App. §§ 2401-13 (Supp. 1970-71).

6. S. PISAR, COEXISTENCE & COMMERCE 120 (1970) [hereinafter cited as PISAR].

7. See generally 15 C.F.R. §§ 368-99 (1973). Other rules besides the Export Control Regulations govern the export of specialized goods and data such as: arms, ammunition, implements of war and related technical data; nuclear source materials, facilities, and related technology; gold; narcotics and marijuana; certain agricultural commodities; vessels; and natural gas and electric energy. For the specific provisions governing the export of these items, see Hoya, *The Changing U.S. Regulation of East-West Trade*, 12 COLUM. J. TRANSNAT'L L. 3, 6-7 n.30 (1973) [hereinafter cited as Hoya].

8. The definition of policy in the 1969 Act differs from the policy stated in the 1949 Act in two respects. First, Congress declared as U.S. policy the encouragement of trade with all countries with which the United States has diplomatic or trading relations. Second, the policy of the 1949 Act was to deny an export license for exportation of any commodity or technical data to any European or Soviet country that would contribute significantly to their military or economic potential in a way that would be detrimental to the security or welfare of the United States. The current Act removes the "economic potential" restriction. J. GIFFEN, *THE LEGAL AND PRACTICAL ASPECTS OF TRADE WITH THE SOVIET UNION* 102-03 (1971) [hereinafter cited as GIFFEN].

significantly the foreign policy of the United States and to fulfill its international responsibilities, and (C) to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States.⁹

The export controls also apply to all goods and technology that could make a significant contribution to the military potential of any other nation.¹⁰ It is clear that national security is the motivating factor in the restriction of exports.

The Act vests the organizational power to implement these controls in the Secretary of Commerce.¹¹ In order to effectively regulate exports, a licensing system was established. There are two types of export licenses: a general license and a validated license. The availability of an export license for a particular item depends on both the type of goods to be exported and the country of destination.

1. GENERAL LICENSE

A great number of goods on the United States Commodity Control List may be exported to Eastern Europe without the filing of an application by the exporter or the issuance of a license document by the Commerce Department.¹² These commodities are exported under what is termed the "general license." Although the general license is really no license at all, the Commerce Department has perpetuated this fiction in order to impress upon exporters the fact that exporting is a privilege that may be revoked or suspended pursuant to the regulations and decisions promulgated by the Department.¹³ Currently there are fourteen classes of general licenses.¹⁴

In addition to commodity controls, there are licenses for "technical data."¹⁵ The regulations establish two broad classes of technical information. The first is unclassified, scientific, and educational technical data, defined as all that information not directly or significantly related

9. 50 U.S.C.A. § 2402(2) (Supp. 1972).

10. *Id.* § 2402(1)(B) (Supp. 1972).

11. *Id.* § 2403 (Supp. 1972).

12. Hoya, *supra* note 7, at 7; McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters*, 3 *LAW & POL. INT'L BUS.* 42, 76 (1971) [hereinafter cited as McQuade].

13. GIVEN, *supra* note 8, at 18.

14. 15 C.F.R. §§ 371.7-.20 (1973).

15. Technical data is defined by the regulations as: information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical service.

16 C.F.R. § 379.1(a) (1973).

to design, production or utilization in industrial processes or instruction in academic institutions or laboratories.¹⁶ A general license designated GTDA is used for such information and can be obtained for export to the Soviet Union. If the information does not come within the definition set out above, another license must be sought. Although there are two general licenses available for "other" information, only one is available for exports to the U.S.S.R. If the information is in published form,¹⁷ the general license GTDR may be available. If the information does not fit into one of the categories of "published" data, a validated license¹⁸ must be obtained.

2. VALIDATED LICENSE

If a particular item is not exportable to the Soviet Union under a general license, a validated license must be obtained. A validated license differs from a general license in one major respect: where the general license was a mere right not represented by any tangible instrument, the validated license is a right coupled with, and incorporated within a written instrument.¹⁹ There are currently six classifications of validated licenses.²⁰

With certain exceptions, such as for short-supply controls,²¹ the requirement for a validated license is intended to cover only those categories of goods or technology with enough potential for military or strategic use to warrant Government review before export.²²

Technical data are controlled in substantially the same manner as commodities. Any technical information not exportable under a general license requires a validated license.²³

There are a variety of other regulations and requirements applicable to the export of commodities and technical data. The potential exporter should consult the Department of Commerce Export Regulations and Commodity Control List to determine exactly how they apply to each particular situation.²⁴

16. *Id.* §§ 379(3)(a), (b) (1973).

17. *Id.*

18. See notes 19-24 *infra* and accompanying text.

19. 15 C.F.R. § 372.2(a) (1973).

20. *Id.* §§ 372.2(b)(1)-(6) (1973).

21. *Id.* § 377 (1973).

22. McQuade, *supra* note 12, at 77; Hoya, *supra* note 7, at 7. The main categories of items restricted to exportation under a validated license are: some metals and alloys and specialized manufactures thereof; specified groups of chemicals, plastics, petroleum products, synthetic rubbers, and manufactures; some highly specialized kinds of machines and machinery, scientific and control instruments, photographic and optical goods; aircraft; some military types of vehicles, and railway cars; and a few items used in the production of arms and ammunition.

23. 15 C.F.R. §§ 379.4-.6 (1973).

24. General Export Regulations are found in 15 C.F.R. §§ 368-399 (1973). The Com-

3. CRITERIA USED IN DETERMINATION OF LICENSE APPLICATIONS

Although the Export Administration Act liberalized trade restrictions applying to the Soviet Union, there remain certain strategic goods that cannot be exported.²⁵ Obviously for any denial of strategic exports to Communist countries to be effective, there must be a concerted effort on behalf of all Western industrialized countries to prohibit the trade of certain commodities. To this end, a multilateral organization was established in 1949 known as COCOM.²⁶ Today, COCOM includes all the NATO countries except Iceland, plus Japan.²⁷ The COCOM countries agree to embargo the export of specific strategic items to all European and Asian countries (except Yugoslavia) under Communist control. The controls of COCOM apply to the export of about 550 categories of goods and products including: arms, ammunition and implements of war, atomic materials and facilities, and other strategic goods.²⁸ COCOM controls are minimum restraints, and goods are periodically added to or subtracted from the list of restricted items. Because participation in COCOM is voluntary, and the restraints are minimal, countries are free to embargo additional items on an individual basis. In fact, the United States list of restricted goods is longer than COCOM's.

There are several relevant factors in the determination of how a commodity should be regulated under the U.S. export controls. Some of the questions asked are:

1. Is the commodity designed for, principally used for, intended for, or could it be applied to, a significant military use?
2. Does it contain unique or advanced technology that is extractable?
3. Would it promote the military-industrial base of the country of destination?
4. Would it contribute to the economy of the Communist countries to the detriment of our own security?
5. Are there adequate supplies of good substitutes available elsewhere that would make control by the United States futile?
6. Are the quantities and types of equipment normal for the proposed use?
7. Is the equipment an integral part of a larger package (such as the Fiat plant built in the U.S.S.R.), and therefore, unlikely to be used for other than the stated purposes?²⁹

modity Control List is in 15 C.F.R. § 399 (1973).

25. See notes 26-39 *infra* and accompanying text.

26. The Mutual Defense Assistance Control Act of 1951 (Battle Act), § 301, as amended, 22 U.S.C. §§ 1611-13d (1964) authorizes United States participation in the International Coordinating Committee (COCOM). See also McQuade, *supra* note 12, at 72 n.111; Hoya, *supra* note 7, at 8-9.

27. McQuade, *supra* note 12, at 52 n.38.

28. *Id.* at 72.

29. *Hearings on East-West Trade Before the Subcomm. on Int'l Finance of the Sen-*

The foreign availability of an item "is one of the more important facts taken into account in a licensing judgment."³⁰ In practice, the foreign availability test is difficult to apply, because of problems originating with basic interpretation.³¹

Another problem of the foreign availability criterion is that reliable facts are sometimes difficult to accumulate. Intelligence sources can often supply the information from non-Communist sources who may have sold or produced the product/technology in question. Sometimes, however, the only reliable information is held by the Eastern countries, and this presents both a difficult and potentially embarrassing situation for information gatherers.³²

There are arguments both in favor of and in opposition to a more liberal United States trade policy.³³ During 1970-71 the Administration eased the licensing requirements for over 1700 commodities.³⁴ Nonetheless, the fact that the government frustrated attempts by the Soviets to purchase an automobile factory to be constructed in the U.S.S.R. by Ford Motor Co. indicates that national security retains vitality in the final determination of an export application.³⁵

B. Credit Controls

One of the greatest problems in U.S.-Soviet trade, prior to 1972, was credit. Because the Soviets do not have vast foreign currency reserves,³⁶

ate Banking and Currency Comm., 90th Cong., 2d Sess. 223-24 (1968) (testimony of Lawrence McQuade, then Assistant Secretary for Domestic and International Business of the Department of Commerce).

30. *Id.* at 223. Until 1967, an application to export a particular good might have been rejected because of its potential contribution to the general economy of an Eastern country. This criterion was dropped, however, as the more liberal Export Administration Act replaced the old legislation.

31. The following example is taken from McQuade, *supra* note 12, at 89-90. For example, does the term "foreign availability" mean that comparable items *might be* purchased or *actually have been* purchased? Another dilemma exists when limited quantities of an item deemed strategic by the United States are available from other non-Communist sources. Still another question arises in regard to products or technology available to the Soviet Union from other sources which will produce similar, but not exactly the same, results as an American product or technology deemed strategic by the United States, but the foreign item is more expensive, less reliable, less efficient, possesses potentially troublesome side-effects, or is generally less sophisticated.

32. For a more detailed discussion, see McQuade, *supra* note 12, at 90-91.

33. See Hoya, *supra* note 7, at 9-11; McQuade, *supra* note 12, at 91-3.

34. Hoya, *supra* note 7, at 10.

35. N.Y. Times, May 15, 1970, at 1, col. 2.

36. The inadequacy of Soviet foreign currency reserves necessitated their selling \$250 million in gold on the gold market in order to pay for the wheat purchased from the United States in 1972. See Farrell, *Soviet Payments Problems in Trade with the West*, in *SOVIET ECONOMIC PROSPECTS FOR THE SEVENTIES—A COMPENDIUM OF PAPERS SUBMITTED TO THE*

and the ruble is not convertible,³⁷ they prefer to include provisions for long-term credit extensions in most of their foreign trade agreements, especially those involving long-term, expensive projects (such as turn-key plants³⁸). Until recently the United States corporations were severely limited in their negotiations with the Soviets because the government would not allow the extension of long-term credits to Communist countries.³⁹

The Export-Import Bank is the primary source of credit for United States international trade. From 1968 to August 1971, the Export-Import Bank was precluded from financing exports to all Communist countries except Yugoslavia.⁴⁰ Not subject to exception by Presidential determination, this blanket prohibition applied to any country whose government supplied goods or assistance to a country engaged in armed conflict with United States armed forces.⁴¹ Congress repealed this prohibition in 1971,⁴² however, thereby reinstating an earlier prohibition against Export-Import Bank participation in transactions involving Communist countries.⁴³ This restriction is vastly different from the one repealed, in that a Presidential determination that the extension of credit is in the national interest waives the ban. This relaxation of credit control by Congress paved the way for President Nixon to make the determination that trade with the Soviet Union is in the national interest. This was done on October 18, 1972,⁴⁴ coincidentally the date of the signing of the U.S.-Soviet Trade Agreement.⁴⁵

Regulations concerning the Export-Import Bank are not the only credit limitations on U.S.-Soviet trade. The Johnson Debt Default Act

JOINT ECONOMIC COMMITTEE, 93d Cong., 1st Sess. 690, 694 (1973) [hereinafter cited as SOVIET ECONOMIC PROSPECTS]. It is important to note, however, that the U.S.S.R. maintains vast reserves of platinum and gold, both of which can be converted to hard currency on the foreign exchange markets.

37. The Soviet government maintains a policy of not allowing the ruble to be traded on international money markets. Thus, it has no value outside the Soviet Union.

38. The phrase "turn-key plant" is used to refer to Soviet importation of an entire technology—including physical plant, machinery, parts, technical "know-how" and training. See note 160 *infra* and accompanying text.

39. Export-Import Bank Act of 1945 § 2(b)(3), Pub. L. No. 90-267, § 1(c), 82 Stat. 47 (1968), as amended, 12 U.S.C.A. § 635(b)(2) (1957), as amended, (Supp. 1972).

40. Hoya, *supra* note 7, at 11.

41. Export-Import Bank Act of 1945 § 2(b)(3), Pub. L. No. 90-267, § 1(c), 82 Stat. 47 (1968), as amended, 12 U.S.C.A. § 635(b)(2) (1957), as amended, (Supp. 1972).

42. Export Expansion Finance Act of 1971 § 1(b)(5), Pub. L. No. 92-126, 85 Stat. 345 (1971), amending Export-Import Bank Act of 1945, § 2(b)(3), 12 U.S.C. § 635(b)(3) (1970) (codified at 12 U.S.C.A. § 635(b)(3) (1957), as amended, Supp. 1972).

43. Export-Import Bank Act of 1945 § 2(b)(2), 12 U.S.C. § 631(b)(2) (1957), as amended, (Supp. 1972).

44. Presidential Determination, Oct. 18, 1972, on file at the Export-Import Bank.

45. See *Trade Agreement, supra* note 1.

of 1934⁴⁶ also restricts credits issued to the U.S.S.R. by private parties. The Act, as amended, provides, in part:

Whoever, within the United States . . . makes any loan to such foreign government, political subdivision, organization or association . . . while such government . . . is in default in the payment of its obligations, or any part thereof, to the United States, shall be fined

This section is applicable to individuals, partnerships, corporations, or associations other than public corporations created by or pursuant to special authorizations of Congress. . . . While any foreign government is a member both of the International Monetary Fund and of the International Bank for Reconstruction and Development, this section shall not apply⁴⁷

Because the U.S.S.R. is neither a member of the International Monetary Fund (IMF) nor a member of the International Bank for Reconstruction and Development (World Bank), the Act applies. Furthermore, the U.S.S.R. owes the United States on both czarist and lend-lease debts.⁴⁸

The situation is not as bad as it might appear, however, for two reasons. First, provision has been made for the Soviet Union to repay the lend-lease debt.⁴⁹ Second, the Johnson Act has been liberally construed as not covering an extension of normal commercial credit as part of a specific export transaction.⁵⁰

Whereas the Johnson Debt Default Act has not served as a deterrent to U.S.-Soviet trade, shipping restrictions that required fifty percent of all wheat and cereal grains exported to the Soviet Union to be carried on U.S. flag ocean carriers⁵¹ did have a significant effect because the cost of shipping in American vessels was substantially higher than in foreign ships.⁵² The Maritime Agreement signed in 1972 solves this problem by specifying that one-third of the trade will be carried by American vessels, one-third by Soviet ships, and one-third by third country carriers.⁵³

46. Ch. 112, 48 Stat. 574 (1934), as amended, 18 U.S.C. § 955 (1970).

47. 18 U.S.C. § 955 (1970).

48. See COMMERCIAL AGREEMENTS, *supra* note 1, at 82-83. The Czarist debts were assumed by the provisional government that took over power following the Russian Revolution. Although international law requires the current government to repay these debts, the Soviet regime refuses to accept this responsibility.

49. *Agreement With the Government of the Union of Soviet Socialist Republics Regarding Settlement of Lend Lease, Reciprocal Aid and Claims*, in U.S.-SOVIET COMMERCIAL AGREEMENTS 1972 105-07 (1973) [hereinafter cited as *Lend-Lease*].

50. McQuade, *supra* note 12, at 65; Hoya, *supra* note 7, at 13.

51. 15 C.F.R. § 376.3 (1973). See also, Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 873-78 (1970).

52. N.Y. Times, June 11, 1971, at 1, col. 8; J. OF COM., June 11, 1971, at 1, cols. 6-8; Wall St. J., June 11, 1971, at 3, col. 1; Washington Post, June 11, 1971, at A1, col. 6.

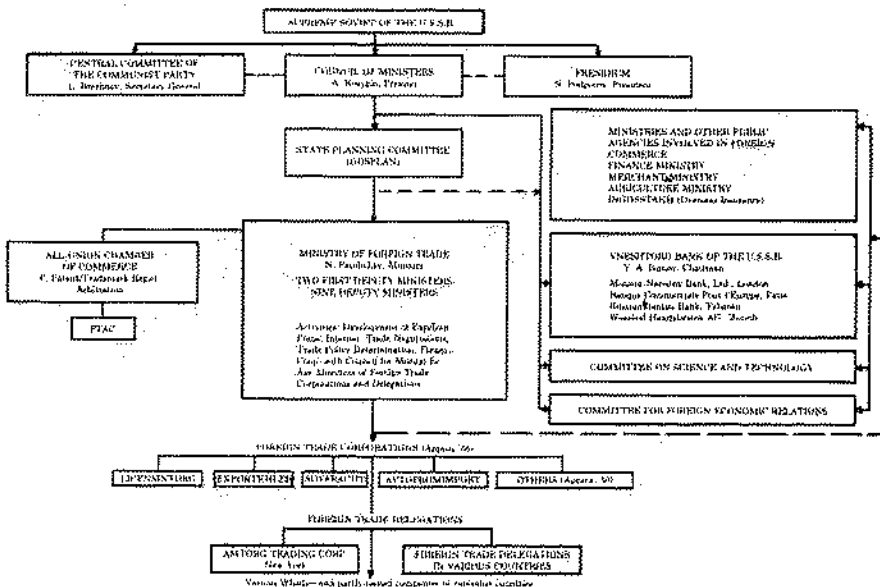
53. *Agreement with the Government of the Union of Soviet Socialist Republics Re-*

II. SOVIET STRUCTURE AND POLICY

Any American businessman contemplating trade with the Soviet Union must also be familiar with the structure of the State-trading organizations with which he will be dealing. A thorough understanding of the internal Soviet framework for conducting international trade will place the American seller in a better position to identify and cope with the problems that invariably arise prior to the consummation of a contract.⁵⁴ Moreover, this understanding will enable the American negotiator to comprehend the policy considerations which form the basis for the ultimate Soviet decision to enter (or not to enter) into a business agreement.

A. Internal Organization

There is a fundamental conceptual difference between the organizations that carry on trade in the United States and the Soviet Union. Whereas private commercial activity dominates United States trade, all Soviet ventures into foreign markets are made under the auspices of the State.⁵⁵ In the Soviet Union, the State decides what merchandise will be bought, sold, bartered or dumped abroad.⁵⁶ The diagram below depicts the extent of control exerted by the State.⁵⁷



arding Certain Maritime Matters, Annex III, in U.S.-SOVIET COMMERCIAL AGREEMENTS 1972-75 (1973).

54. See notes 131-166 *infra* and accompanying text.

55. PISAR, *supra* note 6, at 142; Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 L. & CONTEMP. PROB. 482 (1958) [hereinafter cited as Berman].

56. PISAR, *supra* note 6, at 142.

57. Copyright 1972. Reprinted from the November 1972 issue of *The Business Law-*

Although this diagram appears, at first blush, to be extremely complex, this is not the case. The top half of the diagram (those blocks above the Ministry of Foreign Trade) is primarily illustrative. The blocks representing the Supreme Soviet, the Central Committee, the Council of Ministers, the Presidium and GOSPLAN, are included in the diagram to illustrate the three principal characteristics that distinguish the Soviet system of foreign trade from that of most other countries: first, that Soviet foreign trade is operated and administered by State agencies; second, that integrated national economic planning (organized by GOSPLAN) serves as the foundation on which all trade is conducted; and third, that the Communist Party heads the government which directs the economic planning.⁵⁸ The bottom of the chart, the core of which is the Ministry of Foreign Trade, is of more concern to the prospective American seller. The parties with whom the American will have the most contact are represented in this part of the diagram.

The Ministry of Foreign Trade, aided by other interested ministries,⁵⁹ state committees,⁶⁰ and the Soviet State Bank,⁶¹ prepares the final export-import plan which must correspond with the goals established by GOSPLAN.⁶² The Ministry of Foreign Trade has the administrative responsibility of putting the resultant plan into effect,⁶³ and to that end is divided up into a number of geographic and functional departments that deal with the entire range of commercial relations with both Capitalist and Communist nations.⁶⁴

As the chart indicates, the Ministry of Foreign Trade has direct control over each Foreign Trade Organization (FTO) and Foreign Trade Delegation. Each of these State agencies plays a distinct role in the furtherance of Soviet trade in foreign markets. The trade delegations appear on foreign markets as representatives of the Soviet State, and

yer, with permission of the American Bar Association and its Section of Corporation, Banking and Business Law. It was originally contained in Nehemkis & Schollhammer, *International Business Transactions with the Soviet Union and Mainland China: Prospects and Hazards*, 28 *BUS. LAW.* 17, 40 (1972) [hereinafter cited as Nehemkis & Schollhammer].

58. Berman, *supra* note 55, at 483. See notes 86-92 *infra* and accompanying text.

59. *E.g.*, ministries of Finance, Merchant Marine, and Agriculture.

60. *E.g.*, state committees for Science and Technology, Foreign Economic Relations, and State Security (K.G.B.).

61. Nehemkis & Schollhammer, *supra* note 57, at 26.

62. *Id.*

63. Berman, *supra* note 55, at 486.

64. PISAR, *supra* note 6, at 143; Nehemkis & Schollhammer, *supra* note 57, at 26. Some of the more important functions of the departments within the Ministry are: negotiation of commercial treaties with other countries; regulation and administration of tariffs; issuance of export and import licenses; and direction of official trade delegations and corporate instrumentalities authorized to engage in international commerce. See PISAR, *supra* note 6, at 143, for a more detailed list of these functions.

they serve as a component part of the diplomatic corps of the Soviet Union abroad.⁶⁵ Under Soviet law, the trade delegations are not legal entities, and therefore, cannot sue or be sued. Further, they are not responsible for their debts.⁶⁶ Because the trade delegations can, and often do, invoke the doctrine of sovereign immunity, the United States, with one exception, has forbidden them from entering American territory.⁶⁷

Because there is only one trade delegation in existence in the United States, its utility is severely limited. This is one reason why United States corporations have been slow to enter the Soviet market. Without access to reliable information on Soviet markets, American corporations are unable to adequately determine the needs of their potential purchasers.⁶⁸

The problem of sovereign immunity is unique to the Soviet trade delegations and does not exist when American corporations deal with a Soviet FTO.⁶⁹ A Soviet FTO is a judicial person, and consequently acquires rights in property in its own name, incurs obligations, and sues (and may be sued) in its own right.⁷⁰ The FTO receives a charter enumerating its powers and the amount of its chartered capital.⁷¹ There are approximately 55 trade organizations, each one possessing a monopoly of foreign trade transactions in a particular sphere of the economy.⁷² Not all trade organizations are empowered to engage in both the import and export of commodities; some are limited by their charter

65. Berman, *supra* note 55, at 486.

66. *Id.*

67. *Id.* See also PISAR, *supra* note 6, at 96; Nehemkis & Schollhammer, *supra* note 57, at 27. The sole exception to the American exclusion of the trade delegations is the Amtorg Trading Corporation. Amtorg is organized under the laws of the State of New York. Having its principal place of business in New York, Amtorg acts as an agent on behalf of Soviet enterprises. The basic functions of Amtorg are similar to those of the trade delegations established in other countries, and include: the issuance of import licenses, granting of permits for the transit of goods through Soviet territory, the delivery of certificates of origin, and the inducement of compliance with Soviet foreign trade regulations. Another important function of the trade delegations, in general, is to study local economic conditions, report on sales possibilities and aid local businesses by providing information relating to market potential within the Soviet Union. PISAR, *supra*, at 152.

Although not foreign trade delegations *per se*, the trade representatives in Washington serve the same purpose. See note 132 *infra* and accompanying text. The Kama River Purchasing Commission located in New York, deals exclusively with materials related to the Kama River project, and would be more akin to an FTO. See notes 69-72 *infra* and accompanying text.

68. One solution to this problem would be the alteration of the trade delegation's right to claim sovereign immunity. For example, sovereign immunity could be made available as a defense only in limited situations.

69. Berman, *supra* note 55, at 487; PISAR, *supra* note 6, at 147.

70. Berman, *supra* note 55, at 487 n.14.

71. *Id.* at 487 n.16.

72. *Id.* at 488.

to import goods only; others to export only. Still other FTO's may be chartered to deal in a wide range of products, but are confined to a specific geographic area.⁷³

The American businessman must not lose sight of the fact that the FTO, although appearing to be autonomous, forms an integral part of the State monopoly of foreign trade.⁷⁴ In addition to the fact that some FTO's are housed in the same building that contains both the Ministry of Foreign Trade and the Ministry of Foreign Affairs,⁷⁵ the Minister of Foreign Trade appoints both the president and the vice-president of the trading organization. Thus, the chief executives of these State organs are subordinate to the Minister of Foreign Trade and are subject to disciplinary action taken by him.⁷⁶

Another significant fact is that the trade organization, with whom the U.S. businessman is negotiating, is neither the manufacturer of the goods it sells, nor the user of the goods it purchases.⁷⁷ The FTO is the middleman between the Soviet user and the foreign supplier. The FTOs are bona fide principals, having the power to enter into binding contracts.⁷⁸ The Soviet Union is not responsible for the FTO's debts, however, and as noted above, the FTO is not entitled to claim sovereign immunity. In the course of negotiations between the American businessman and the FTO, the Soviet domestic enterprise which will use the commodities being discussed may assist in the negotiation of a particular contract, but nonetheless does not qualify as a party to it.⁷⁹

The FTO is the entity with which the American businessman will deal. Each organization negotiates commercial transactions and makes purchases on the traditional criteria of price, quality, delivery terms, etc., and frequently attempts to arrange payment in the form of goods rather than foreign currency.⁸⁰

The Soviet Union has made, and continues to make, attempts to adapt its internal structure to foreign trade. The existence of the All-Union Chamber of Commerce represents one such attempt. It is similar to the chambers of commerce established by private traders in market economies. The primary responsibility of the Chamber of Commerce is to promote and facilitate international trade.⁸¹

73. A list of the FTO's is available from the Department of Commerce.

74. PISAR, *supra* note 6, at 148; Berman, *supra* note 55, at 489; Nehemkis & Schollhammer, *supra* note 57, at 29.

75. Nehemkis & Schollhammer, *supra* note 57, at 29.

76. Berman, *supra* note 55, at 489.

77. PISAR, *supra* note 6, at 148; Nehemkis & Schollhammer, *supra* note 57, at 29.

78. *Id.*

79. PISAR, *supra* note 6, at 148.

80. McQuade, *supra* note 12, at 53. See notes 155-64 *infra* and accompanying text.

81. See generally PISAR, *supra* note 6, at 145-47; Berman, *supra* note 55, at 492-96.

There are certain functions of the chambers that distinguish them from American chambers of commerce. In the U.S.S.R. the chambers also control the administration of the foreign patent and trademark registration system.⁸² More important than this, however, is the fact that the All-Union Chamber of Commerce controls the machinery used in the arbitration of international trade and maritime disputes.⁸³ Although under the jurisdiction of the Ministry of Foreign Trade,⁸⁴ the Soviet tribunals have acquired a reputation for fairness and impartiality,⁸⁵ and the Commissions' decisions indicate a thorough familiarity with the commercial law and customs of many countries.

B. Foreign Trade Planning and the Policy Involved

It is common knowledge that the Soviet Union is a highly structured state, with all levers of power in the hands of a select group of Party and government leaders. Over the years an intricate apparatus has been developed to control all activities designated to be in the public interest. The natural result of such a complex organization has been to reduce every aspect of national endeavor, both internal and external, to an integrated "plan,"⁸⁶ which reflects the priorities prescribed by the governmental leaders.

The national economic plan is developed by GOSPLAN, based on a list of priorities handed down from the upper echelons of the government. This concept of a centrally-planned, command economy is considered superior to the spontaneous, "aimless" nature of a pure market economy.⁸⁷ A national economic plan is the only viable way to achieve the ultimate goals of:

The All-Union Chamber of Commerce is also a juridical person, with the right to acquire, alienate, and lease both movable and immovable property. The Chamber of Commerce is free to enter into binding contracts, and thus sue and be sued, but it is limited by its charter in respect to those activities it may pursue.

In addition, the specific functions of the chambers include: establishment of permanent relations with comparable foreign organizations; sponsorship of trade and industry fairs, at home and abroad; furnishing of marketing information; issuance of certificates of origin on exported goods; and certification of quality after examination of products; and promotion of joint ventures between local and alien firms.

82. Berman, *supra* note 55, at 492; PISAR, *supra* note 6, at 145-46. Basically the chambers serve as the foreign party's "agent" or representative in registering the patent or trademark with the State Committee on Inventions and Discoveries which actually administers the patent and trademark registration system.

83. Two specialized tribunals, the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission, are maintained for the specific purpose of adjudicating disputes.

84. Berman, *supra* note 55, at 492-93.

85. *Id.*

86. See generally PISAR, *supra* note 6, at 154-60.

87. *Id.* at 155; Berman, *supra* note 55, at 496.

a) guaranteeing the independence of the development of the national economy, b) the victory . . . of the socialist system of economy and the gradual transition to communism, c) the rejection of disproportions in the national economy and the creation of necessary reserves for the struggle against such disproportions.⁸⁸

With these long range goals in mind, the Soviet Union looks to the world market to fulfill three major goals. First, the world market is a supplementary source of supply to overcome deficiencies in current operative State plans in production or over-all planning.⁸⁹ Second, the world market affords an opportunity to acquire capital goods. This takes the form of importation of sophisticated technology, and lessens the amount of investment needed to develop similar technology.⁹⁰ Third, the foreign markets allow the Soviet Union to obtain foreign currency through the exportation of its own products. This currency build-up facilitates the importation of commodities which can only be obtained on a cash-sale basis. The fact that the ruble is not a convertible currency makes it even more imperative that the Soviet Union acquire foreign currency.

These policies and concepts are clearly reflected in the foreign trade plans. The process begins with general instructions (enunciating the broad annual goals to be attained) from GOSPLAN to the Ministry of Foreign Trade.⁹¹ In the case of the import plan, GOSPLAN surveys the needs of the Soviet economy for foreign goods, paying particular attention to productive equipment and technology. To facilitate this process, domestic manufacturers and consumer enterprises submit applications to GOSPLAN, requesting certain items. A further investigation of existing domestic production levels is conducted, the results being incorporated into a balance sheet showing the estimated output and anticipated need for each major product. An attempt is made to compare domestic production costs with importation costs.⁹² Once this process is completed, a provisional import plan is drafted. The Ministry of Foreign Trade then prepares its own schedules and consults with the various trade enterprises under its jurisdiction. Eventually, a revised plan is submitted to GOSPLAN and the Council of Ministers for ratification.⁹³ It is on the basis of this plan that the trade organizations seek suppliers in order to fulfill their obligations.

88. A.M. SMIRNOV AND N.N. LUBIMOV (eds.), *VNESHNIAIA TORGOVLIA SSSR FOREIGN TRADE OF THE U.S.S.R.* 9, 17, 18 (1964).

89. Nehemkis & Schollhammer, *supra* note 57, at 25. The wheat deals of 1963 and 1972 are prime examples.

90. *Id.* See also Berman, *supra* note 55, at 497.

91. See PISAR, *supra* note 6, at 156-60.

92. This is made difficult because the Soviet pricing system is artificial, and the foreign currency markets are in a constant state of flux.

93. PISAR, *supra* note 6, at 157.

C. *The Attraction of the United States as a Trading Partner*

The long standing Soviet policy of rejecting trade with the West as antithetical to the Communist ideology is gradually being laid to rest. According to the Directives of the 23rd Congress of the Communist Party of the Soviet Union, the trading agencies should strive toward

improving the import structure of Soviet trade by selecting for procurement such types of raw materials, commodities and finished goods as involve higher current costs and capital investments when produced within the country.⁹⁴

In fact, from 1965 to 1971, Soviet imports from Western countries⁹⁵ increased from \$1.6 billion to \$2.86 billion. Likewise, Soviet exports to the West rose from \$1.438 billion to \$2.71 billion during the same period.⁹⁶ Whereas Great Britain and Finland had ranked as the Soviet Union's foremost Western trading partners prior to 1970, Japan has assumed that position since 1970.

The two main objectives of Soviet trade, to fill the numerous bare patches on the industrial horizon, and to catch up with the scale of output already achieved by the major economies of the West,⁹⁷ obviously limit the countries with which the Soviet Union can trade effectively. This is reflected in the fact that since 1968 about forty percent of all Soviet imports from the West have fallen in the category of "machinery and equipment."⁹⁸

The forms of industrial cooperation through which the Soviet Union attains its foreign trade goals vary. Key factors include: political considerations, the amount of trade conducted in the past, and the type of venture contemplated. The first step in the approach toward Western markets has generally taken the form of an intergovernmental agreement. These intergovernmental agreements cover economic, scientific and technological cooperation, and lay the basic framework within which to increase collaboration and set the stage for detailed agreements.⁹⁹ The Agreement on the Establishment of the Joint U.S.-Soviet Commercial Commission, the Trade Agreement, and the Agreement on the Establishment of a U.S.-U.S.S.R. Joint Commission on Scientific and Technological Cooperation,¹⁰⁰ all signed in 1972, are examples of

94. *Izvestia*, April 10, 1966 (in Russian).

95. P. PETERSON, *U.S.-SOVIET COMMERCIAL RELATIONS IN A NEW ERA* 75 (1972) [hereinafter cited as PETERSON]. Those countries considered Western are: Japan, United Kingdom, West Germany, Finland, Italy, France, United States, and Canada.

96. *Id.* at 74.

97. PISAR, *supra* note 6, at 34.

98. PETERSON, *supra* note 95, at 76.

99. Yalowitz, *U.S.S.R.-Western Industrial Cooperation*, in *SOVIET ECONOMIC PROSPECTS* 712, 713 (1973).

100. See *COMMERCIAL AGREEMENTS*, *supra* note 1, at 1; *SOVIET ECONOMIC PROSPECTS*,

this form of intergovernmental agreement.

A slight variant on this approach is the formation of cooperation agreements between major American businesses and the U.S.S.R. State Committee for Science and Technology.¹⁰¹ An agreement of this kind calls for the exchange of specialists and information, joint research programs, purchases of equipment and technology and licenses for production processes. Several United States firms have concluded agreements of this kind in the past two years.¹⁰²

A more conventional form of cooperation is the conclusion of licensing agreements and the importation of whole factories or processes.¹⁰³ Often incorporated into this type of agreement is a provision for the marketing of the end product, to be conducted by the Western firm.¹⁰⁴

Another method of industrial cooperation is specifically designed to facilitate exports to Western markets, in addition to bolstering the U.S.S.R.'s industrial capacity. One way to achieve this is the formation of joint or wholly owned companies outside the U.S.S.R. Although there are approximately thirty of these companies in various countries around the world,¹⁰⁵ there are no such enterprises within the United States. Production-sharing is a variation on this approach which involves partial manufacturing or assembly in the Soviet Union, and marketing by a Western trading partner.¹⁰⁶

Another form of agreement utilized by the Soviet Union is one where the United States trading partner provides equipment and technology on credit for an industrial plant in the U.S.S.R., but no equity or supervisory rights are retained by the U.S. corporation.¹⁰⁷ Repayment of principal and interest is in products from the installation at pre-arranged prices. The prices would be set so as to guarantee a profit for the U.S. partner on the original investment.¹⁰⁸

Probably the best known and potentially most significant form of industrial cooperation relates to natural resources development projects in Siberia and the Far East.¹⁰⁹ Ordinarily the Western firm supplies technology and equipment on credit. Repayment is in product "at pre-arranged prices" deferred until the project is completed and in produc-

supra note 99, at 714.

101. SOVIET ECONOMIC PROSPECTS, *supra* note 99, at 714.

102. Several American firms, including General Electric, American Can and Occidental Petroleum, have concluded such agreements.

103. See note 160 *infra* and accompanying text.

104. SOVIET ECONOMIC PROSPECTS, *supra* note 99, at 714.

105. *Id.*

106. *Id.*

107. *Id.*; Nehemkis & Schollhammer, *supra* note 57, at 20.

108. SOVIET ECONOMIC PROSPECTS, *supra* note 99, at 714-15.

109. *Id.*

tion. Sometimes supply contracts are negotiated following the repayment of the original credit extension. The immensity of these projects is remarkable, with deals ranging in value from \$190 million¹¹⁰ to \$1.2 billion¹¹¹ already in progress.

With the knowledge of the forms of industrial cooperation preferred by the Soviet Union, it is possible to predict what the Soviets will request at the negotiating table. Generally the U.S.S.R. expects the Western firm to supply the capital, technology, engineering, marketing, and management training, all without any ownership rights, in return for cash and payment in kind when the installation (a turn-key plant, for example) is in operation. In addition, the U.S.S.R. contributes labor, raw materials, basic plant facilities, and various other locally available elements.¹¹² Under this kind of arrangement the Western partner can purchase finished goods at a price well below what would have been its own cost of manufacture. Similarly, payment in kind involves less depletion of foreign currency reserves held by the Soviet Union. In addition, the U.S.S.R. is assured of access to markets which might not have been available otherwise.¹¹³

An examination of both the Soviet and U.S. economies provides an insight into the kinds of deals that are more readily negotiable.¹¹⁴ While the Soviet Union has maintained an average, real growth rate (in terms of GNP) of approximately 5.8 percent since 1950, as compared to about 3.8 percent for the United States,¹¹⁵ the Gross National Product of the Soviet Union is only one-half that of the United States.¹¹⁶ This figure is more startling when it is considered that although 33 percent of the Russian GNP is investment, the level of technological development in the U.S.S.R. is only about 45 percent, relative to the United States.¹¹⁷

Irrespective of the fact that the Soviet economy has certain weaknesses, the most notable being consumer goods, the Soviet Union has certain strengths upon which the United States can draw. Metal production in the Soviet Union, including titanium, chromite, manganese ore, iron ore, nickel, and bauxite,¹¹⁸ far surpasses that of the United States. In addition, the Soviet Union has vast natural gas resources that

110. Japan is supplying \$190 million in timber-production equipment in return for timber and wood chips.

111. Western European nations are supplying large diameter steel pipe in return for long-term natural gas deliveries.

112. PISAR, *supra* note 6, at 39; Nehemkis & Schollhammer, *supra* note 57, at 20-21.

113. PISAR, *supra* note 6, at 39.

114. For a more detailed discussion, see PETERSON, *supra* note 95.

115. *Id.* at 28.

116. *Id.* at 30.

117. *Id.* at 58.

118. *Id.* at 60.

have been untapped until very recently. Platinum, needed in U.S. production of automobile emission controls, is in short supply in the U.S., but plentiful in the Soviet Union. Gem diamonds and timber are also commodities that are marketable in the West.¹¹⁹ The United States, on the other hand, is strong in the general areas of chemicals, agricultural production, consumer goods, and technology.¹²⁰

Possibly the most important aspect of the problem is the fact that because the United States is more advanced, in a technological sense, the U.S. corporations have a superior bargaining position, not only in relation to the Soviets, but also in relation to the rest of the developed West. This lever can be used effectively since the Soviets are now realizing that to maintain their great power status in the world, where indices of power are increasingly economic, they must implant large amounts of foreign technology directly into their economy. This can be accomplished through one-time, know-how arrangements and one-time, turn-key plants, in addition to long-term joint projects. However, complex technology is constantly changing—new means of achieving the end result at less cost are found all the time. Advanced technology takes time to be developed.¹²¹ It is in the joint, long-term research and development projects that both the U.S.S.R. and the American corporation can profit. The Soviets do not want to purchase equipment that will be outdated in a few years. Likewise, the American corporation will find that the Soviets have the ability to develop and apply sophisticated techniques, given the proper foundation. It is with these realizations in mind that the American corporation will discover the U.S.S.R. to be both a compatible and profitable trading partner in the future.

III. CURRENT PROBLEMS CONFRONTING AMERICAN SELLERS

The first two sections of this article outlined the general framework through which the United States and the Soviet Union conduct their foreign trade. The existence of trade contracts between United States corporations and the Soviet Union reflects the fact that the differences in the two governments' policies are reconcilable. In order to facilitate the negotiation of future deals, and in a spirit of mutual cooperation, the Trade Agreement of 1972 was signed by then Secretary of Commerce Peterson and N.S. Patolichev, the Soviet Minister of Foreign Trade.

The Trade Agreement, and the Lend-Lease Settlement signed on the same date, do not represent a solution to all of the problems that arise in U.S.-Soviet trade. In fact, new problems, not contemplated at the time the agreements were negotiated, have arisen that could sub-

119. *Id.* See also *id.* at 76, 77.

120. *Id.* at 76.

121. *Id.* at 10.

stantially impair Soviet-American trade in the future. In addition to the legislative problems, however, the American businessman must also be equipped to cope with those issues that arise during actual contract negotiations. Both dilemmas are explored in this section.

A. Problems Posed by Congress

The signing of both the Trade Agreement and the Lend-Lease Settlement in October, 1972, represented a bona fide effort on the part of both countries to encourage Soviet-American trade. This form of bilateral agreement is usually the first step taken by the Soviets in widening trade relations with foreign countries. For President Nixon it was a marked reversal of his anti-Communist attitude of the fifties. Nonetheless Congress seized upon the Agreement, and the promises contained therein, in an attempt to alter Soviet emigration laws.

Article I of the Trade Agreement specifies that:

Each country shall accord unconditionally to products originating in or exported to the other country treatment no less favorable than that accorded to like products originating in or exported to any third country in all matters. . . .¹²²

In other words, most-favored-nation (MFN) treatment was pledged to the Soviets. This pledge is important for two reasons. First, it is contemplated that the Trade Amendment, to run for three years unless extended by mutual agreement, will not enter into force until the MFN legislation is passed.¹²³ Second, and equally important, is the fact that \$674 million (out of a total amount due of \$722 million) to be repaid under the Lend-Lease Settlement will not be due until the MFN legislation is passed.¹²⁴ Thus, the granting of most-favored-nation treatment forms an integral part of both U.S.-Soviet agreements.

At the time of the signing of the agreements neither side contemplated any problems relating to MFN. The Congress, however, appears to be on the verge of rendering both agreements meaningless. The House of Representatives, in passing H.R. 10710 (Trade Reform Bill), attached two amendments proposed by Charles A. Vanik (D. Ohio). The first amendment to the Bill, passed by a 319-80 vote, forbids government-

122. *Trade Agreement*, *supra* note 1, arts. 1, 2. Technically, the Trade Agreement will not enter into force until an exchange of written notice of acceptance takes place. The exchange of notices, of course, will not occur until MFN is granted.

123. *COMMERCIAL AGREEMENTS*, *supra* note 1, at 76. The author would like to express his thanks to Daniel D. Stein, Bureau of East-West Trade, Department of Commerce, for his aid in conceptualizing the problems presented in Part III of this paper. The views presented herein do not represent Mr. Stein's, nor are they a reflection of the Department of Commerce position.

124. *Lend-Lease*, *supra* note 49, at 4(b)(ii).

backed trade credits to the Soviet Union unless the Soviet government eases its restrictive emigration policies.¹²⁵ In fact, no Government-backed, *i.e.*, Export-Import Bank, credits could be extended to a Communist nation if the President found that its government denied the right to emigrate or imposed more than nominal fees or taxes on citizens who wished to emigrate.¹²⁶ The second amendment would deny most-favored-nation status for trade to any Communist nation not allowing free emigration.¹²⁷ It is a well-known fact, of course, that the Soviet Union does not allow free emigration. Although this legislation has to go to the Senate for passage before becoming law (the President has made clear his intention to sign the bill into law regardless of the anti-Soviet amendments), the Vanik proposals seem certain to win approval in the Senate, where a majority of Senators have endorsed a similar set of amendments introduced by Senator Henry M. Jackson (D. Wash.).¹²⁸

There is still hope, however, that the Senate version will be different enough to send the bill back to conference, where a compromise could be worked out on the Soviet trade provisions. A possible solution would be to allow the President to make a determination that a Communist government was "making progress" in its efforts to allow free emigration.¹²⁹ Congress would probably reserve the power to revoke any loosening of current restraints on U.S.-Soviet trade, if it disagreed with the President's determination on the easing of emigration restrictions.¹³⁰

125. CONGRESSIONAL Q., WEEKLY REP., vol. xxxi, No. 50, at 3256 (Dec. 15, 1973).

126. *Id.* at 3320.

127. *Id.*

128. *Id.* at 3256.

129. *Id.* at 3257.

130. The issue of most-favored-nation treatment for the Soviet Union has elicited many arguments both for and against the expansion of U.S.-Soviet trade. Those favoring the expansion of U.S.-Soviet trade maintain that the United States would benefit economically on the basis of comparative advantage principles. More important is the argument that history shows that trading with each other improves the relations between the peoples of different countries. PISAR, *supra* note 6, emphasizes this point throughout his book. On the other hand, American opponents of U.S.-Soviet trade take a more emotional approach. They argue that American security will be seriously threatened by exporting technology to the "enemy." For support of this proposition, they cite the Vietnam War, the Middle East, and other hot spots around the world.

A second argument offered by the restrictionists is that Communism is a "moral evil," and that as a matter of principle the United States should not deal with Communist countries.

While the expansionists generally agree that national security must be protected, they argue that the crucial issue is what effect America's extending or withholding trade will have on Communist policy. Framing the issue in this way, expansionists maintain that encouraging trade in nonstrategic goods will stimulate the Communist desire for a peaceful world and diminish any appetite for military confrontation. An American embargo would be ineffective. The Soviets have already indicated that they will go to other markets to find goods they need if the United States will not deal with them; and they will be

B. Problems Confronting the Businessman During Negotiations

In the United States, domestic commerce is conducted against a background of private ownership and freedom of contract. Management is always responsible for profits, the *sine qua non* of private commercial activity. This basic environment does not exist when deals are made with the Soviet Union. There is no private ownership in the U.S.S.R. Furthermore, only a limited number of organizations are empowered by the State to negotiate and conclude contracts with foreign enterprises.¹³¹ In effect, American corporations are trading with the Soviet State. This unfamiliar situation poses many unique problems for the American businessman. To bargain effectively with the Soviets, the American negotiator, either corporate executive or corporate counsel, must understand these problems and be prepared to cope with them when they arise.

1. ACCESS TO THE MARKETS

One of the first problems that an American businessman contemplating trade with the Soviets encounters is a lack of information. It is difficult for the American exporter to determine the exact needs of his potential buyer. Whereas the American businessman can promote his product and create a market for it in the United States, normal commercial promotion is virtually non-existent in the Soviet Union. Nevertheless opportunities do exist for Western firms to display their products to potential buyers. Until just recently the officially sponsored trade fairs and exhibitions provided the only opportunity for Americans to advertise their products. The Trade Agreement, however, provides that the United States may establish a governmentally-sponsored Commercial Office in Moscow, operated through the United States Embassy located there.¹³² Likewise, the Soviets have opened a trade office in Washington. Despite the fact that the Trade Agreement is not officially in force, the provision relating to Commercial Offices has become effective *de facto*. The U.S. office in Moscow will provide the U.S. business

successful. When Ford Motor Co. was precluded by the Nixon Administration from building a car manufacturing plant in the U.S.S.R., the Soviets asked Fiat to build it for them. The plant, built at Togliatti, is now in full production.

The restrictionists respond that any contribution to the Soviet economy will help their military capabilities. This is not true. The Soviet Union develops and maintains its military capability with domestic resources that are totally independent of Soviet foreign trade. A study of the Soviet economy clearly indicates that heavy industry, vital to military development, has always been the top priority of Soviet planning. The remaining resources are then allocated to the nonmilitary sectors of the economy.

See also, Hoya, *supra* note 7, at 32-36; McQuade, *supra* note 12, at 44-51.

131. See notes 69-80 *supra* and accompanying text.

132. *Trade Agreement*, *supra* note 1, art. 5.

community with current information on Soviet markets and facilitate introductions of American businessmen to the appropriate Soviet ministries. In addition, bilingual stenographers, communications and expert advice will be available through this office.

As important as the formation of a Commercial Office is the fact that business firms may have a greater opportunity to open permanent offices in Moscow to represent them in their Soviet transactions.¹³³ Before such a branch office may be opened, however, Soviet accreditation must be obtained. The U.S.S.R. has promised that accreditation of U.S. firms will be considered on a basis no less favorable than that accorded firms of any third country. Once accredited, the branch office receives many privileges. It may: employ local personnel; acquire office space and accompanying facilities (such as telephones, telex equipment); import equipment from the U.S. such as typewriters, calculators, dictation and copying equipment; receive housing (with the right to import such necessities as furniture and appliances, automobiles and other personal items).

The assurances of facilities represent a solution to part of the access problem. But, a major barrier to U.S.-Soviet trade still exists in that most foreign companies are sealed off from direct contact with Soviet domestic producers and distributors. As noted above,¹³⁴ all sales or purchases are handled by foreign trade organizations, intermediate State agencies. Consequently, the Western firms find it difficult to determine and meet the real needs of the potential end-user. Similarly, the Eastern manufacturer has at his disposal only incomplete knowledge of the variety of available capital goods or special engineering which the United States producer can provide in order to satisfy particular requirements. The Soviet PTO does not possess the requisite technical knowledge to make the complex decisions relevant to the purchase of a sophisticated product that may have to be used in conjunction with domestic parts.¹³⁵

Because of the complex bureaucracy of the Soviet system the requirements specified by the end user, when the original request is made to the Ministry of Foreign Trade, are often changed by the time the final order is placed with the foreign enterprise. Until further decentralization of the Soviet economy occurs, this problem will persist.¹³⁶

133. COMMERCIAL AGREEMENTS, *supra* note 1, at 76-77.

134. See notes 69-80 *supra* and accompanying text.

135. PISAR, *supra* note 6, at 202-03. This is true because the trade organization is as much concerned with the questions of price and national balance of payments as with the technical refinements specified by the local customer.

136. There are indications that such a decentralization is taking place. PISAR, *supra* note 6, at 203.

2. LANGUAGE

Language can be a barrier to effective communication. Although what someone said may be clear, what was meant may be something altogether different. Businessmen use a myriad of signs, gestures and expressions which convey meanings as clearly as the spoken word.¹³⁷ One American engineering company executive expressed his frustration in dealing with the Russians: "At home you can read the face of your customer, but the Russians were inscrutable."¹³⁸

Language also poses a problem in the process of drafting and translating a contract. The standard contract used by "Stankoimport," an exporter-importer of metal cutting machine-tools and related products, contains a penalty clause (agreed and liquidated damages). The clause provides:

In the event of any delay in delivery against the dates stipulated in the Contract, the Sellers pay the Buyers penalty (agreed and liquidated damages) at the rate of 0.5 percent of the value of the equipment over due for every started week within the first four weeks and 1 percent for every following started week thereafter. However, the total amount of penalty for delay is not to exceed 10 percent of the value of the equipment not delivered in due time.

If a delay in delivery occurs, the penalties in this clause may be applied. The language in this provision, however, poses difficult problems of interpretation.

The Russian contract contains three basic price terms. The Russian *summa* means "total amount of the contract," calculated by adding the prices for all items ordered. *Tsena* means "price for each individual item." *Stoimost'* is used to denote the "total value of the equipment." Although *tsena* and *summa* are clearly specified in dollar amounts in the contract, the *stoimost'* is not defined anywhere in the agreement. The American negotiator must demand that a precise, specified term be used in the penalty clause.¹³⁹

137. Nehemkis & Schollhammer, *supra* note 57, at 30.

138. Donald J. Morfee, *Bus. WEEK*, Jan. 1, 1972, at 30.

139. Consider, for example, the following hypothetical: Firm A, a United States manufacturer, is selling Stankoimport a turn-key factory. The factory is near completion when a shipment of vital machinery is delayed for some unexcused reason. The question then becomes: what is the value (in the Russian contract a term different than "price" or "amount") of the equipment? Perhaps, the value is the total price of the individual parts as yet undelivered. If so, then why wasn't the Russian *tsena* used? On the other hand, perhaps the damages will be based on the total amount of the contract, for the delivered parts of the contract are of no use without the vital machinery as yet undelivered. But, if this interpretation was intended, the Russian *summa* would have been used. If the damages are not to be determined on the basis of the prices of the goods missing or on the total value of the contract, then what exactly does "value of the equipment" mean? If it

There is one other language problem worthy of mention. Should a dispute that cannot be settled by the parties themselves arise, they will undoubtedly submit to arbitration. Yet, in some agreements, no mention is made of which contract, the English or Russian version, will be official. The best solution to this problem might be to authorize translation of the contract into some mutually agreeable third language, and then designate it as the official version.¹⁴⁰

3. FORM OF NEGOTIATIONS

Business negotiations with the Soviets are often lengthy, complex and arduous.¹⁴¹ Because the Soviets prefer to shop around before committing themselves to a binding contract, the American negotiators must persevere and be patient.

The monolithic character of the Soviet trading partner vests him with virtually unparalleled bargaining power. As noted above,¹⁴² each export-import enterprise handles practically all of its country's trade in particular product lines. This power often manifests itself in the culmination of huge one-shot deals involving very large sums of money and resources.¹⁴³ This bargaining power can also be utilized to exert subtle pressures on American negotiators. Other departments of the government can aid in delaying a final signing of a contract by such means as visa denial and travel restrictions. Pressures of this nature can be counterproductive, however, and are used only when necessary as a last resort.¹⁴⁴

Although the bargaining disparity can be more easily resisted by larger American firms, there are certain negotiating pressures that cannot be avoided. The Soviets are notorious for playing competing firms off against one another in an effort to obtain the best over-all terms in an agreement. It should come as no surprise, for example, if the Soviets attempt to attach certain conditions that purchases or sales be insured by Soviet insurers and cleared through Soviet banks. Likewise, the Soviets seek certain concessions from a Western trading partner when a sizable purchase is involved. These may take the form of a discounted price as a show of "good will" or the request for a compensatory purchase of local goods.

means the losses suffered by the Soviet Union because of non-delivery, it is possible that not only the losses suffered by the particular Russian user would be included, but also, the losses suffered by Russian manufacturers who were expecting delivery of this product so as to incorporate them into their own production process.

140. Problems of interpretation will remain, but they will be the same for both sides.

141. See PISAR, *supra* note 6, at 210; GUFFIN, *supra* note 8, at 160-64.

142. See notes 69-80 *supra* and accompanying text.

143. See notes 110 and 111 *supra* and accompanying text.

144. PISAR, *supra* note 6, at 210. These pressures vary from denial of visa or travel restrictions to delaying the signing of a contract.

The attitude of the American negotiator is an important factor throughout the negotiations.¹⁴⁵ American lawyers and businessmen are generally reputed to be "breach-minded." In the past, American negotiators have concentrated on securing a contract that adequately protects them in the event that one or both of the parties to the contract fails to perform. This attitude is reflected in American preoccupation with rights and remedies of the parties upon breach of the contract.

The American attitude can be contrasted with that of the Soviet negotiator, who is generally "performance-minded." That is, the Soviets prefer contracts that virtually guarantee performance by both parties. This stark difference in approach can cause problems at the negotiating table. The Soviets feel that when an American businessman sits down to negotiate with foreign trade organization officials, he should adopt the attitude of the Soviets and attempt to draw a contract which unequivocally spells out the future performance of both parties. Little should be left for future determination.

Once a contract is signed, the Soviet reputation for performance is impeccable.¹⁴⁶ They can be expected to perform to the letter of the contract; and they expect Americans to do the same. In view of this faithfully scrupulous Soviet approach to contract performance, the American negotiator should be absolutely certain that both parties have the same interpretation of all the terms and conditions of the contract.¹⁴⁷

4. DELIVERY TERMS AND QUALITY CONTROL

Soviet contracts for the purchase and sale of goods contain a number of clauses relating to delivery. These generally include: shipping instructions and notification of shipment; delivery dates; penalty (agreed and liquidated damages); inspection and test; guarantee; and packing and marking clauses. Most of these clauses are straightforward, detailed procedural instructions. Some problems do arise in relation to delivery, however, and the American businessman should be aware of them prior to performing the contract.

When delivery via sea transportation is specified, the goods are generally FOB or FAS Great Lakes Ports. If air transport is contemplated, the delivery term will ordinarily be FOB New York.¹⁴⁸ Transportation costs may vary, depending on the method of delivery. Likewise, the passing of title and risk of accidental loss must be stipulated at the time the contract is negotiated.¹⁴⁹ Provisions for early delivery must also

145. GEFEN, *supra* note 8, at 163-64.

146. *Id.* at 164.

147. See notes 137-40 *supra* and accompanying text.

148. See sample contracts on file at Department of Commerce.

149. For example, a clause might read:

All equipment outlined in this proposal will be delivered to U.S.A. port for

be made to insure against the goods sitting at port for two or three months, waiting to be transported to the final destination point. Similarly, United States sellers should be certain to notify the FTO of shipment within twenty-four hours of the time the goods were shipped. Confirmation by letter is a highly recommended procedure.

Incorrect marking or wrong addressing can lead to additional transportation and storage charges, for which the seller will ordinarily be responsible. All contracts call for specific markings to be made on all sides of the packages containing the goods. Sample labels are often attached to or included in the contract itself. Especially important in this regard is the fact that the sanctions for late delivery can be quite severe.

All contracts for the sale of goods to the Soviet Union specify that the buyers will have the right to inspect and test the goods to be sent to the U.S.S.R. on the seller's premises at the seller's expense. The goods are inspected and tested, at a time specified by the seller, usually after they have been manufactured and are ready to be transported to the Soviet Union. If defects are discovered, the seller must eliminate them at his own expense, and notify the buyer when they are ready to be inspected and tested again. Once the goods are transported to the U.S.S.R., they are tested again when the entire project is constructed and ready to begin operation. It is at the final testing point that acceptance or rejection of the goods takes place.

The guarantee clause is one of the most important provisions of the contract. General guarantees relating to the quality of materials and workmanship are incorporated in this section of the contract. Often the Soviets will insert a clause specifying that any improvements in technology or technological innovations occurring during manufacture of the product must be turned over to the Russians so that they can make any alterations they deem important. This information is often sought free of charge.¹⁵⁶ If the seller offers to supply any relevant information that

shipment within 9 months after receipt of signed proposal, ____ shall bear no responsibility for any distribution, supply, or transportation delay of any kind or any interference with or impairment of this contract as a result thereof where such delays occur after said FAS delivery, nor shall ____ bear any responsibility for any damage of any kind arising from any early delivery.

150. *Compare*

This proposal covers technical know-how only as it exists at the time of acceptance of the proposal and does not encompass equipment or process changes that may occur in the future. Such future processes and equipment, should they be desired, would be subject to separate and additional agreements.

with

If during the manufacture of the equipment the Sellers become aware of any technical improvements and/or technical innovations the Sellers shall inform the Buyers and hand over to them free of charge the complete technical docu-

can improve the product after it has been placed in operation, then he may be able to obtain some concession on another point in the contract. Furthermore, this type of information may be invaluable in establishing a long-term, profitable relationship.

The guarantee clause also contains provisions relating to non-conformity of the goods. As long as the American manufacturer has adhered strictly to the contractual specifications, no problems will arise here. If the supplier has deviated from the conditions of the contract, however, severe penalties, including possible cancellation of the entire agreement, are imposed on the seller.

5. ARBITRATION

Arbitration is generally a last resort, to be used only if the parties to the contract cannot settle a dispute by other reasonable means. In the past, most U.S.-Soviet contracts specified that the parties would submit to arbitration before

the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce and Industry in Moscow for settlement in compliance with the rules of procedure of the said Commission.

Although the Soviet Foreign Trade Arbitration Commission (FTAC) has a reputation for fairness and impartiality,¹⁵¹ the fact that it is under the control of the Soviet government cannot be overlooked.

If the foreign party would not agree to arbitrate in Moscow, the Soviets preferred to arbitrate in Stockholm.¹⁵² The problem with this compromise is that most American negotiators are not familiar with the Swedish procedural rules of arbitration or Swedish substantive law.¹⁵³ Moreover, Swedish opinions are not published, thereby adding a degree of uncertainty to the entire proposition.

This problem has been partially remedied by the Trade Agreement.

mentation if available to the Sellers, so that the Buyers could decide on expediency of making necessary alterations to the technical specifications. The differences between these two clauses can be important if the seller is on the verge of a technological breakthrough.

151. Berman, *supra* note 55, at 493.

152. The American negotiator might prefer, Geneva, however:

In case the parties are unable to arrive at an amicable settlement, all disputes are to be submitted without application to the Arbitration Commission of the Chamber of Commerce of Switzerland in Geneva, in accordance with the Rules of Procedure of the said Commission.

153. If Swedish "choice of law" rules govern, for example, it is important to know if the laws of the country where the contract was signed apply. Americans might try to include the following clause in the contract:

It is the intention of the parties that the laws of the State of California, U.S.A. should govern the validity of this agreement, the construction of its terms, and the interpretation of the rights and duties of the parties.

The Trade Agreement encourages settlement of commercial disputes by arbitration under the Arbitration Rules of the Economic Commission for Europe, a United Nations agency, in a country other than the Soviet Union and the United States, with arbitrators appointed by an authority of some third country. The parties to the contract, however, are free to decide on any other means of arbitration "which they mutually prefer and agree best suits their personal needs."¹⁵⁴

6. FORCE MAJEURE

The force majeure clauses included in most U.S.-Soviet contracts are the same. They provide for postponement of the delivery dates, but only

if this non-fulfillment [of the contractual liabilities] was caused by the circumstances of Force Majeure, and namely, fire, flood, earthquake and war, provided these circumstances have directly affected the execution of the present contract.

Americans have unsuccessfully attempted to include provisions for labor strikes and civil disturbances in the force majeure clauses.¹⁵⁵ The Soviets have rejected these inclusions because they are so antithetical to their basic ideology.

The force majeure clauses also require notification and proof that the circumstances making it impossible to perform have actually occurred.

7. PRICE TERMS

Reaching an agreement on price and credit terms is undoubtedly the most difficult task of the negotiating process. There are essentially three methods of payment in sales transactions: cash, credit, or barter. The principal method of payment in U.S.-Soviet short-term trade transactions has been by credit.¹⁵⁶ However, the Soviets are not opposed to, and often prefer, barter transactions.

Conventional banking and financing techniques are widely used in East-West trade. The Soviet desire to borrow is limited by concern over the trade balance and the ability to meet payment obligations at matu-

154. *Trade Agreement, supra* note 1, art. 7.

155. For example:

The parties are released from responsibility for partial or complete non-fulfillment of their liabilities under the present contract, if this non-fulfillment was caused by the circumstances of Force Majeure, and namely, fire, flood, earthquake, labor strikes, civil disturbances, war or other similar events, provided these circumstances have directly affected the execution of the present contract. In this case, the time of fulfillment of the contract obligations is extended for the period equal to that during which such circumstances last.

156. GIFFEN, *supra* note 8, at 211.

riety. The Soviet Union, however, enjoys one of the world's finest credit ratings.

Letters of credit are probably the most important device used in short-term credit transactions.¹⁵⁷ Confirmed letters of credit, backed up by two banks, are the most acceptable kind of credit, and should be sought in the negotiation process. The type of draft to be drawn is extremely important—either a sight draft or a time draft. Finally, the letter of credit will contain a list of the agreed-upon documents that the American party (as the seller) must present to the bank with his draft. Among the documents that might be requested are: detailed commercial invoices, original bills of lading, original airway bills, clean dock receipts in the name of the FTO or its agent, packing lists, quality guarantee letters, test and inspection sheets, a copy of the U.S. validated export license (if required), marine insurance policy, and a statement by the American trader that an original bill of lading has been mailed to any intermediate consignees.¹⁵⁸ The businessman must be thoroughly familiar with each of these documents prior to entering the negotiation process.

The negotiator need not preoccupy himself with lengthy negotiations over the types of documents that are necessary to obtain payment. Rather, the negotiator should bear in mind the fact that both the buyer and the State Bank guaranteeing payment are government owned. Thus, the State itself stands behind the entire contract. This factor tends to minimize the credit risk involved.

Barter, the simple swapping of two commodities against an agreed monetary norm or standard of value, has become a standard device in East-West trade. This method of payment is necessary for the U.S.S.R. to maintain its hard currency reserves. Pure barter transactions are probably of little importance to the American businessman. In general, the commodity offered by the Soviets is an item that is of little interest

157. Pisau, *supra* note 6, at 214.

158. For example:

Net lump sum price of U.S. \$____, such sum to be paid in the form of an irrevocable divisible letter of credit, opened by the Ministry of Land Improvement & Water Resources, on the signing of this proposal, and payable to _____ through _____.

Three partial payments:

- (1) Upon signing
- (2) Delivery of equipment to harbor (U.S.) upon presentation of:
 - (a) Bill of Lading
 - (b) Packing List
 - (c) Original Invoices
 - (d) Copy of USA Export Licenses
- (3) To be Paid upon completion of initial training or not later than 1 year after receipt of equipment in Russia, whichever is sooner.

in our developed economy.¹⁵⁹

However, the barter device can be extremely useful to American firms that negotiate "licensing agreements" with the Soviets. Licensing agreements are used to transfer to the Soviets "without the right of return the exclusive and unlimited right to use the technology, technical documentation and 'know-how' relating to the production of" a particular commodity.

V/O Licensintorg, an FTO, was created in 1962 for the express purpose of buying and selling technical information in foreign markets.¹⁶⁰ Thus, any American corporation engaged to sell technical information and "know-how" will deal with Licensintorg. There are a number of methods available for financing licensing agreements: cash, cash plus royalty, and cash plus product in kind. Pure cash payment for a license is usually not desirable from the American point of view. Should the licensee become a competitor of the licensor, or open new markets in an as yet undeveloped market, the licensor will lose future monies that could have been provided for by a royalty provision. This problem can be resolved in the license agreement, at the negotiation stage.

If the firm opts for a cash payment and remuneration for future sales by the licensee, the problem of whether to choose cash royalties or a percentage of the future output of the factory arises. The decision must be made depending on the future needs of the licensor. If the supplier feels that payment in kind would be useful, then he should reject a cash/royalty plan. In the case of a corporation supplying technology needed to extract a natural resource, such as natural gas, the payment in kind provision, accompanied by an escalating price provision, is more useful. A manufacturer selling the technology used in the production of a particular consumer good would probably prefer payment in terms of a cash royalty.

The problem of the future will be the extension of credit without the aid of the Export-Import Bank.¹⁶¹ Although the Johnson Debt Default Act will not deter normal extension of credits,¹⁶² few, if any, American corporations have the necessary capital available to extend long-term credits of the magnitude required by the large deals. Furthermore, American banks will probably not tie up such large sums of money for long periods of time at the low interest rates that are a standard part of long-term contracts.¹⁶³

159. PISAR, *supra* note 6, at 216-17.

160. See CAPPEN, *supra* note 8, at 237, 354-66 (specimen licensing agreement).

161. See notes 122-30 *supra* and accompanying text.

162. See notes 46-50 *supra* and accompanying text.

163. The natural gas deal, for example, would involve three American firms, and the total amount of the deal could run between \$8 billion and \$10 billion. Most of the other deals have already been concluded involving amounts ranging from \$6 million to \$45 million.

Compounding this problem even further is the fact that the Export-Import Bank has a total credit exposure of only \$16.5 billion, the largest credit to one country being \$1.3 billion.¹⁶⁴ If the Export-Import Bank is allowed to continue extending credit to the Soviet Union, then its policies may have to be changed to allow for the massive credits that will be needed. In the alternative new sources of credit will have to be developed to accommodate the long-term East-West transactions.¹⁶⁵

8. OTHER PROBLEMS

Soviet foreign trade is so intimately related to the government's political objectives that the American businessman sometimes encounters problems over which he has no control. The Soviets have tended to restrict foreign trade with those countries which discriminate against Soviet products. This foreign country's "incorrect attitude" may be reflected in high tariff rates on Soviet manufacturers or by administrative regulations, administrative and judicial practice or established exchange restrictions that tend to create unfavorable conditions for the foreign trade of the U.S.S.R.¹⁶⁶ The fact that the Trade Agreement was signed would have served to insure against this type of Soviet retaliatory action. But the subsequent passage by the House of H.R. 10710, with the "anti-Soviet" amendments, might lead the Soviets to retaliate in some way. The Soviet Government is continuing to negotiate and deal with American businessmen, at least until the Senate acts on the proposed legislation. What action the Soviets will take if the Senate does not alter the House bill is unclear.

CONCLUSION

Negotiating a contract with the Russians is an arduous task. It takes patience and perseverance on the part of the American businessman. The end result, however, can be extremely profitable. The key to achieving a profitable agreement is preparation. The American businessman must familiarize himself with the legislation and ideologies of both the United States and the Soviet Union. With this knowledge as a foundation, the American negotiator can cope with the myriad of problems that are encountered in dealing with the Russians. The most profitable agreements will be negotiated by the American businessman who

For example, in the oil industry, TRW, Inc. holds a \$20 million contract from Machinimport, for petroleum-pumping systems. Borg-Warner Corporation has a \$6 million order for oil-well pumps from the same FTO. U.S. NEWS & WORLD REPORT, Feb. 19, 1973, at 88.

¹⁶⁴ PETERSON, *supra* note 95, at 20.

¹⁶⁵ A U.S. corporation may negotiate a contract through a foreign subsidiary, thereby gaining the benefit of loans backed by the foreign government.

¹⁶⁶ Berman, *supra* note 55, at 502-03.

has a thorough understanding of the problems involved in dealing with the Russians, and has developed solutions to those problems prior to entering into negotiations. This approach will also lead to a mutually beneficial, long-term relationship.

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