

Resolution of International Trade Disputes: an Analysis of the Soviet Foreign Trade Arbitration Commission's Decisions Concerning the Doctrine of Force Majeure as an Excuse to the Performance of Private International Trade Agreements

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NOTES AND COMMENTS

RESOLUTION OF INTERNATIONAL TRADE DISPUTES: AN ANALYSIS OF THE SOVIET FOREIGN TRADE ARBITRATION COMMISSION'S DECISIONS CONCERNING THE DOCTRINE OF *FORCE MAJEURE* AS AN EXCUSE TO THE PERFORMANCE OF PRIVATE INTERNATIONAL TRADE AGREEMENTS

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I. INTRODUCTION

This paper will test the proposition of several commentators that the Foreign Trade Arbitration Commission (hereinafter FTAC) of the Soviet Union has acquired a reputation for fairness and objectivity in its capacity as the primary arbitrator of international trade disputes between Soviet Foreign Trade Organizations (FTO's) and the Soviet Union's international trading partners.¹ This proposition will be ex-

1. In general, as support for the proposition, see T.W. HOYA, EAST-WEST TRADE 54 (1984); Kotlarchuk, *Has the U.S.S.R. Foreign Trade Arbitration Commission Reached the Age of Aquarius with the Newly Revised Arbitration Statute of 1975?*,

amined by means of an analysis of FTAC decisions concerning the doctrine of *force majeure* as an excuse for nonperformance of private international trade agreements. The analysis will examine all cases reported in English between 1932 and 1965 where a party before the FTAC raised a *force majeure* argument as an excuse to the performance of a contract.² This examination will focus on the general interpretation of *force majeure* by the FTAC; the relationship of that interpretation of *force majeure* to its usage in Soviet domestic law; the relationship of the Soviet interpretation of *force majeure* with the traditional understanding of the doctrine in international trade; and the consistency of FTAC decisions in applying *force majeure* principles on a case-by-case basis. Analysis of the last item is for the purpose of ascertaining whether any subjective "political" factors may influence the FTAC decision-making process to the extent that it must be considered a politicized, and therefore, an unreliable organization for resolving private international trade disputes.

II. BACKGROUND OF SOVIET FOREIGN TRADE: HISTORICAL OVERVIEW

Fundamental, of course, to any understanding of Soviet foreign trade practice, its legal system, and for that matter any aspect of the Soviet system, is the fact that the U.S.S.R. is a socialist state. Article 1 of the Soviet Constitution provides that "[t]he Union of Soviet Socialist

11 INT'L LAW. 467, 470 (1977); Berman & Bustin, *The Soviet System of Foreign Trade*, in BUSINESS TRANSACTIONS IN THE SOVIET UNION 25, 49-51 (R. Starr ed. 1975); Holtzmann, *Settlement of Disputes: The Role of Arbitration in East-West Trade*, in EAST-WEST BUSINESS TRANSACTIONS 552 (R. Starr ed. 1974); King-Smith, *Communist Foreign Trade Arbitration*, 10 HARV. INT'L L.J. 34, 39 (1969). Not surprisingly the FTAC had not received universal acclaim among Western commentators. Criticisms generally focus on the possible structural bias of the FTAC. Such criticisms are discussed in more detail in the text, *infra* at notes 71-92 and accompanying text. See generally Pizar, *The Communist System of Foreign Trade Adjudication*, 72 HARV. L. REV. 1409 (1959); Domke, *The Israeli-Soviet Oil Arbitration* 53 AMER. J. INT'L L. 787 (1959); Jeff, *The Foreign Trade Arbitration Commission of the U.S.S.R. and the West*, 24 ARB. J. 1 (1969).

2. The time frame 1932-1965 is used as it corresponds with the only systematic publication in English of FTAC decisions. Such cases were compiled by A.I. Shpektorov in Russian, and translated into English as *Collected Arbitration Awards of the U.S.S.R. Foreign Trade Commission*, in INTERNATIONAL COMMERCIAL ARBITRATION (1980). References to particular awards, *infra*, are by award number. Also, translations of specific cases can occasionally be found in English in the annual series YEARBOOK: COMMERCIAL ARBITRATION (P. Sanders ed.), INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (Kluwer 1976) and various issues of FOREIGN TRADE, a Soviet journal available in English, published in Moscow.

Republics is a socialist state of the whole people. . . .”³

From the outset of the Soviet regime, foreign trade has been an important concern for Soviet policy-makers. The Bolsheviks, in power for only six months, declared by decree on April 22, 1918, that “all foreign trade is nationalized.”⁴ The “monopolization” of foreign trade was desirable for the Bolsheviks’ “[s]trict government control over exports and imports. . . [and it] would permit them to shape the Russian economy according to their designs for socialism.”⁵ Lenin maintained that without the monopolization “we shall not be able to ‘get rid’ of foreign capital by paying ‘tribute,’” and therefore, the Bolsheviks would be constrained in their attempts to build an independent socialist economy.⁶

International trade, for the young Soviet regime, was one of the two primary goals of Soviet diplomacy in the twenties; the other being, of course, diplomatic recognition.⁷ “Economic assistance from abroad, in the form of trade, credits, loans, and concessions, was considered essential for reconstruction of Russia’s war-torn economy.”⁸ Monopolization of international trade allowed the Bolsheviks, within operational capacities, the flexibility to structure that trade in their perceived interests.⁹

The Bolsheviks, however, as with many other aspects of immediate post-revolutionary policy, found issuing decrees easier than implementing them. Apparently, “no firms were ever nationalized as [a] result of [the 1918 decree].”¹⁰ What the nationalization decree of 1918 apparently meant to the Bolsheviks was monopolization, which, in turn, was defined as “the exclusive right to conduct export and import operations.”¹¹

As the Soviet regime consolidated power and international trade expanded through the 1920s and 1930s, several interrelated trends developed in the structure of Soviet foreign trade which have continued, with some reform, to the present. Those trends include: the operational autonomy of agencies charged with foreign trade; the product specialization of these agencies; the development of trade delegations as ad-

3. Article 1 of chapter 1 of the Constitution (Fundamental Law) of the Union of the Soviet Socialist Republics (1977), excerpts printed in U.S.S.R. CONTRACT LAW 135 (V. Pozdnyakov ed. 1982).

4. J. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY* 3 (1974).

5. *Id.* at 4.

6. *Id.* at 6.

7. *Id.* at 23.

8. *Id.* at 23.

9. *Id.* at 14.

10. *Id.*

11. *Id.* at 15.

junct organizations to Soviet diplomatic missions abroad; and the system of economic accountability of each operational agency.¹²

These autonomous operational "agencies," each economically accountable in its own right and organized according to product specialization, have evolved into today's Foreign Trade Organizations (FTO's). Each is ultimately accountable to the Ministry of Foreign Trade of the U.S.S.R. which "plans and directs a worldwide trade network."¹³ Most FTO's are located in Moscow.¹⁴

Another constant throughout the evolution of the Soviet regime is its commitment to international trade as a means of promoting Soviet interests and policy, both domestically and internationally. Former Politburo member and Prime Minister, Nikolai Tikhonov, wrote in 1983, that "[t]he constructive development of international economic relations has always been the antithesis of tension and a means of building up confidence between peoples and states."¹⁵ Moreover, Tikhonov elaborates:

[t]he Soviet leaders have invariably held and continue to hold the view that progress in the field of developing international economic relations helps deepen and expand detente. The link between the equitable and mutually advantageous co-operation of all States and the problems of promoting the security of peoples, curbing the arms race and achieving disarmament is fully taken into account in the foreign-policy activities of our State.¹⁶

III. THE LEGAL STRUCTURE OF SOVIET FOREIGN TRADE

The 1977 Soviet Constitution provides at Article 73:

[t]he jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest bodies of State authority and administration, shall cover: [at paragraph 10] representation of the USSR in international relations; . . . foreign trade and other forms of external economic activity on the basis of State monopoly.¹⁷

12. *Id.* at 46-50, 64. These trends are discussed in detail *infra* at Parts III and IV.

13. *Id.* at 81.

14. For a discussion of the implications of this location, see notes 20-24 and accompanying text.

15. N.A. TIKHONOV, *SOVIET ECONOMY: ACHIEVEMENTS, PROBLEMS, PROSPECTS* 157 (1983).

16. *Id.* at 162.

17. U.S.S.R. CONTRACT LAW, *supra* note 3 at 141-42.

The highest state authority charged with exercising the state monopoly of foreign trade is the Foreign Trade Ministry.¹⁸ The Minister of Foreign Trade "direct[s] the USSR's foreign trade and . . . issue[s] orders concerning foreign trade."¹⁹

There are two principal sources of law governing Soviet foreign trade and FTO's. Article 3, paragraph 3 of the Fundamentals of Civil Legislation of the USSR and the Union Republics provides: "[r]elationships in foreign trade are determined by the special legislation of the USSR which regulates foreign trade, and by the general civil legislation of the USSR and the Union Republics."²⁰ An example of special legislation of the U.S.S.R. governing foreign trade is the 1978 Statute on FTO's issued by decree of the Council of Ministers.²¹ In addition to these sources:

Soviet law governing foreign trade may also include international agreements to which the Soviet Union is a party, international custom recognized by the Soviet Union, and Soviet judicial practice, or more significantly, practice of the Soviet [FTAC].²²

For the reasons set out below, the primary source of statutory law to be discussed in this paper is the Civil Code of the Russian Soviet Federated Socialist Republic (RSFSR Civil Code). The reason for concentrating on the RSFSR Civil Code is the practical fact that: "[t]he geographical area subject to the RSFSR Civil Code . . . includes Moscow, where most FTO's are located and where most of the Soviet foreign trade contracts concluded in the U.S.S.R. are signed."²³ Furthermore, the danger that the RSFSR Civil Code might somehow conflict with the Soviet Fundamental Principles of Civil Legislation is mitigated by

18. J. QUIGLEY, *supra* note 4, at 81. Also, such authority was recently codified in the statute on the All-Union Self-Supporting Foreign Trade Organization incorporated in the System of the Ministry of Foreign Trade by decree of the Council of Ministers of the U.S.S.R. of May 31, 1978, No. 416. (Collected Decisions of the Government of the U.S.S.R., 1978, No. 13, Art. 91) [hereinafter cited as 1978 Statute]. Excerpts printed in U.S.S.R. CONTRACT LAW, *supra* note 3, at 186-93.

19. J. QUIGLEY, *supra* note 4, at 82. Also "The minister of foreign trade . . . is appointed by the Supreme Soviet on recommendation of the chairman of the Council of Ministers." *Id.* at 81.

20. U.S.S.R. CONTRACT LAW, *supra* note 3, at 144.

21. See 1978 Statute, *supra* note 18.

22. T. W. HOYA, EAST WEST TRADE, *supra* note 1, at 287. Article 129 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics essentially provide that in the event of a conflict between an international treaty provision and a civil law provision, the international treaty controls. U.S.S.R. CONTRACT LAW, *supra* note 3, at 149.

23. T.W. HOYA, *supra* note 1, at 286.

the fact that: "[t]hese Fundamental Principles are essentially reproduced as well as elaborated upon in the RSFSR Civil Code, so that the latter serves effectively as a single source of most of the Soviet general civil legislation applicable to foreign trade."²⁴

IV. THE STRUCTURE OF FTO'S: LEGAL ORGANIZATION AND FUNCTIONS

FTO's have been described as "[b]y far the most active, or at least the most visible, of the instrumentalities of the Soviet foreign trade monopoly."²⁵ An FTO is:

created pursuant to a decree of the U.S.S.R. Council of Ministers and operates within the scope of authority defined in a charter issued by a high government authority, in most cases the Ministry of Foreign Trade.²⁶

This charter structure for FTO's has several significant legal and practical consequences. Most significant is that "from a strictly legal standpoint . . . the FTO is an independent juridical entity."²⁷ The Soviet state "is not liable under Soviet law for the obligations of the FTO, nor is the FTO liable for the obligations of the Soviet state or any state organization other than itself."²⁸ Therefore, any recovery against an FTO is limited to the capital allocated to it by its charter.²⁹

24. *Id.* at 287. In case a conflict actually develops, the Fundamental Principles of the U.S.S.R. are supreme, *per* Article 74 of the Constitution. U.S.S.R. CONTRACT LAW, *supra* note 3.

25. Berman & Bustin, *supra* note 1, at 30. The other visible instrument of Soviet foreign trade would be the trade representatives of the U.S.S.R. As Berman and Bustin discuss at page 29, these representatives "are component parts of embassies or other diplomatic corps of the Soviet Union abroad, and the full panoply of diplomatic privileges and immunities is claimed for them. Although they perform some of the same functions as FTO's (negotiate and conclude contracts) a fundamental distinction between trade representatives and FTO's is that the former are not legal entities under Soviet law, and "absen[t] a treaty provision to the contrary, [they] may — and will — invoke the doctrine of sovereign immunity to avoid the jurisdiction of foreign courts."

26. Hoya & Stein, *Drafting Contracts in U.S.-Soviet Foreign Trade*, 7 L. & POL'Y IN INT'L. BUS. 1057, 1059 (1975). *See also* notes 3 and 16.

27. Hoya & Stein, *supra* note 26, at 1059.

28. Berman & Bustin, *supra* note 1, at 31; *see also* Naryshkina, *Legal Status of All-Union Foreign Trade and Other Organizations Authorized to Conclude Foreign Trade Transactions*, in U.S.S.R. CONTRACT LAW, *supra* note 3, at 24, 28 (citing Article 13 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics and Articles 32 and 33 of the Civil Code of the Russian Soviet Federated Socialist Republic).

29. Naryshkina, *supra* note 28, at 28 (referring to Article 22 of the Fundamental

Also of significance is that, "the scope of authority of each FTO is carefully defined in its charter [and] a transaction . . . outside this authority would be invalid under Soviet law as an *ultra vires* act."³⁰ Apparently, under Soviet law the doctrine of *ultra vires* is strictly construed.³¹

An FTO's charter also has practical consequences. An FTO is chartered according to its function and such function is usually "defined in terms either of product or of geographic market or of type of service."³² One cannot imply from this statement, however, that an FTO charged with exporting a particular product actually is responsible for producing that good. Rather, "[t]he FTO functions as a middleman. What it exports, it has not produced itself but has obtained from a Soviet domestic enterprise; and what it imports, it transfers for use or consumption to a Soviet domestic enterprise."³³

This functional organization of FTO's facilitates two principal goals for Soviet decision-makers. One is to help ensure the economic accountability of each FTO.³⁴ Two, it helps to enforce the separate juridical identity of FTO's.³⁵

Several criticisms have been raised as to the structure of FTO's as exclusively middlemen in trade transactions. One such criticism "has been that FTO personnel lack technical knowledge concerning their product lines," notwithstanding the functional specialization of FTO's.³⁶ A second potential problem is that given the well-known under-capitalization of FTO's, a foreign party might have difficulties in executing a judgment or arbitral award against an FTO.³⁷ As a practical matter, however, this latter concern may be overstated as, "in practice no case is known where an award made by the FTAC . . . in favor of a foreign party has not been carried out by a Soviet debtor [FTO]

Legislation of the U.S.S.R. . . . and Article 98 of the RSFSR Civil Code).

30. Hoya & Stein, *supra* note 26, at 1059.

31. *Id.*

32. Berman & Bustin, *supra* note 1, at 31.

33. Hoya & Stein, *supra* note 26, at 1059.

34. Berman & Bustin, *supra* note 1, at 31.

35. *Id.*

36. Shillinglaw & Stein, *Doing Business in the Soviet Union*, 13 L. & POL'Y INT'L BUS. 4 (1981).

37. Berman & Bustin, *supra* note 1, at 42-43 (stating that "The amount of basic capitalization of the FTO is completely within the control of the Soviet state, and they are notoriously under-capitalized. The authorized capital of most of them has been set at about five million rubles. Five million rubles — which is now worth about six and a half million dollars at the official rate of exchange — should be measured against obligations incurred by Soviet FTOs toward individual Western firms amounting to tens and hundreds of millions of dollars.").

voluntarily."³⁸

Overall, therefore, the structure of FTO's as independent legal entities serves several functions for Soviet policy-makers. It allows for the pursuit of foreign trade goals with functionally specialized agencies economically accountable to the Soviet state.³⁹ Domestically, when FTO's enter into binding contracts with other economically accountable Soviet state enterprises, this structure can serve much the same function for the centrally planned economy.⁴⁰

A. FTO's Operating Procedures

By early 1980, there were approximately forty-five FTO's, accounting for "[a]bout 95 percent of the country's foreign trade exchange."⁴¹ These FTO's, collectively, have acquired the "reputation of being hard bargainers."⁴² Generally, at the conclusion of negotiations with a foreign party, an FTO "offers one of its own form contracts and urges its adoption."⁴³ These contracts "uniformly call for arbitration as the exclusive means of resolving disputes."⁴⁴ Furthermore, over the years, Soviet negotiators bargained hard, and usually won, agreement to arbitrate disputes before the FTAC in Moscow.⁴⁵

A second common feature of the standard FTO contract that is of interest to this paper is the "restrictive *force majeure* clause."⁴⁶ As these clauses are the subject matter of the analysis to follow, it is noted here only as a factor to be considered in any trade negotiation with FTO's.

The Soviet FTO's, although hard-bargainers, are not prohibited by Soviet law from agreeing to arbitrate disputes outside of Moscow, or for that matter, from agreeing to a non-Soviet body of contract law in any arbitration procedure. Additionally, the particulars of any *force majeure* clause are open to negotiation. Several legal and practical con-

38. Lebedev, *U.S.S.R.-National Report*, in 1 Y.B. COMM. ARB. 91, 102 (P. Sanders ed. 1976). The author here found nothing which contradicts the Soviet author's claim.

39. Berman & Bustin, *supra* note 1, at 31.

40. *Id.*

41. Naryshkina, *supra* note 28, at 24.

42. T. W. HOYA, *supra* note 1, at 286.

43. Hoya & Stein, *supra* note 26, at 1064.

44. *Id.* at 1098.

45. *Id.* at 1099. However, these commentators have noted that the Soviets have been more willing to arbitrate in neutral countries, particularly Sweden, on U.S.-Soviet trade agreements. The Soviets have exhibited this willingness ever since the writing of the never-ratified U.S. - U.S.S.R. Trade Agreement Act of 1972 which was drafted as a means of encouraging third country arbitration.

46. *Id.* at 1057.

siderations, however, collectively suggest that most trade disputes are arbitrated before the FTAC under Soviet contract law.

As a practical matter, “[b]ecause of their monopoly-like powers, [FTO’s] are often able to force their trading partner to accede to . . . submitting . . . to Soviet arbitration and Soviet law.”⁴⁷ Secondly, of legal significance, is that while Article 566, paragraph 1 of the RSFSR Civil Code permits parties to agree to a choice of law for foreign trade transactions:

[in] the absence of such agreement the rights and obligations of the parties to a foreign trade transaction are governed by the law of the place where it is concluded, *i.e.*, the principle of *lex loci contractus* is applied. The place of conclusion of the transaction is determined by Soviet law.⁴⁸

Three related Soviet laws reinforce the likelihood that most FTO contracts will be interpreted as having been concluded in Moscow, and therefore, will be controlled by Soviet law. Those three provisions are: 1) the requirement that all foreign trade contracts be in writing; 2) the requirement that all contracts be signed by two authorized individuals; and 3) the legislation which provides that the signature procedure is controlled by Soviet law regardless of where the contract is signed.⁴⁹ These factors support the conclusion that most foreign trade disputes conducted before the FTAC will be subject to Soviet state contract law. This conclusion is strengthened by the fact that most FTO’s are located in Moscow, and therefore, most contracts are signed and con-

47. Norberg, & Stein, *Arbitration of U.S.-U.S.S.R. Trade Disputes*, in BUSINESS TRANSACTIONS WITH THE U.S.S.R. 175, 177 (R. Starr ed. 1975).

48. Sadikov, *General Characteristics of the USSR Legal System*, in U.S.S.R. CONTRACT LAW, *supra* note 3, at 9, 13. *See also* Article 126 of Fundamentals of Civil Legislation of the U.S.S.R. (reprinted in U.S.S.R. CONTRACT LAW, *supra* note 3, at 147).

49. T. W. HOYA, *supra* note 1, at 289. The relevant legislation for the writing requirement is found at Article 17, chapter 1, of the 1978 Statute and Model By-laws for FTOs. For a full reference see *supra* note 18. All FTO charters must comply with these by-laws pursuant to chapter 1, article 1, paragraph 12. The relevant legislation for the signature requirements is Decree of the Council of Ministers of the U.S.S.R., Feb. 14, 1978, Sub. Pos. Pra. U.S.S.R. (1978), No. 6, item 107, para. 1. *See also* U.S.S.R. CONTRACT LAW, *supra* note 3, at 194-95. The legislation providing that Soviet law controls signature procedure is Article 125 of Fundamental Principles of Civil Legislation of the U.S.S.R. and Article 565 of the RSFSR Civil Code. The explanations offered for these rather elaborate signature and writing requirements are twofold: one offered by J. QUIGLEY, *supra* note 4, at 44, is historical — that is, early Soviet fear of Western businessmen and courts; and two, the more general need for control mechanisms in a centrally planned economy.

cluded in Moscow.

B. *Recent Legislation Affecting FTO's*

The Soviets, possibly in partial response to Western criticism concerning the lack of technical expertise of FTO negotiators, as well as the need to respond to the increasing specialization of its foreign trade, have enacted legislation to streamline FTO's.⁵⁰ This was the first legislation that adopted a specific status for FTO's.⁵¹ It formally declared that FTO's are "established by the Ministry of Foreign Trade in accordance with legislation of the USSR."⁵² Furthermore, the legislation formalized the long-standing practice, noted earlier, that "[a]ctivities of the [FTO's] are directed by the Ministry of Foreign Trade. . . ."⁵³ The legislation also formalized the interrelationship between the management of FTO's and the Foreign Trade Ministry in terms of fulfilling five year plans and specific tasks of FTO's.⁵⁴ Additionally, the legislation provided that an FTO "uses the state property allocated to it. . . [.] it has an independent balance and is a legal person."⁵⁵

Article 6 of the Model By-Laws contains the legislation's major innovation in the structure of an FTO. By Article 6, an FTO is in effect permitted to subincorporate into more specialized firms known as Foreign Trade Firms (FTF).⁵⁶ The purpose of this reorganization was "to bring the system of Soviet foreign trade into accord with various branches of the Soviet economy [as well as to facilitate further] export and import operations for definite classes of goods."⁵⁷

For Western commentators, the immediate problem created by the establishment of FTF's is that while these firms have the right to conclude foreign trade transactions in the name of FTO's, an FTF is not a

50. Shillinglaw & Stein, *supra* note 36, at 4-6.

51. Rabinovich, *The Legal Status of Soviet Foreign Trade Organizations in View of New Soviet Legislation*, 15 INT'L LAW. 233 (1981). For a full reference to the legislation, see *supra* note 18.

52. Ch. 1, art. 2, para. 1 of 1978 Statute, *reprinted in* U.S.S.R. CONTRACT LAW, *supra* note 3, at 186.

53. Ch. 1, art. 2, para. 2 of 1978 Statute, *reprinted in* U.S.S.R. CONTRACT LAW, *supra* note 3, at 186.

54. Ch. 1, articles 3 & 4 of 1978 Statute, *reprinted in* U.S.S.R. CONTRACT LAW, *supra* note 3, at 186-87.

55. Ch. 1, article 5 of 1978 Statute, *reprinted in* U.S.S.R. CONTRACT LAW, *supra* note 3, at 187. Article 23 of the RSFSR Civil Code "gives the concept of legal person to an organization which possesses separate property." Rabinovich, *supra* note 51, at 236.

56. Rabinovich, *supra* note 51, at 233.

57. *Id.* at 233-34.

legal person in its own right.⁵⁸ This somewhat hybrid organization, the FTF, renews the commentators concerns mentioned earlier, that a foreign trade transaction may be declared an *ultra vires* transaction. Article 26 of the RSFSR Civil Code provides that "a legal person is entitled to civil rights and is to be burdened with obligations only in accordance with the established purposes of its activities."⁵⁹ Unfortunately, a detailed discussion of the various opinions as to the resolution of potential *ultra vires* problems is beyond the scope of this paper. Therefore, the reader must be referred to the above-cited commentators for a discussion of the various positions on this problem.

With the general description of the Soviet foreign trade process complete, an examination of the procedures used for resolving disputes between FTO's and their non-Soviet trading partners follows.⁶⁰

V. FEDERAL TRADE ARBITRATION COMMISSION

A. *Historical Background*

The FTAC of the Soviet Union was created by a resolution of the Central Executive Committee and Council of Peoples' Commissions of the U.S.S.R. on June 17, 1932:

[f]or the settlement of disputes arising from foreign trade transactions, in particular, disputes between foreign firms and Soviet economic organizations in arbitral proceedings under the auspices of the All-Union Chamber of Commerce.⁶¹

The FTAC initially "was modelled in its organization and procedure on English and German arbitral bodies."⁶² A significant difference between the FTAC and the generally more specialized arbitral bodies in the West is that the FTAC "is open to all kinds of commercial litigation where one or two of the parties are of a foreign nationality."⁶³

The creation of the FTAC was a reflection of the somewhat contradictory goals and perceptions of early Soviet leaders. One such per-

58. Ch. 1, article 6, para. 2, of 1978 Statute, *reprinted in* U.S.S.R. CONTRACT LAW, *supra* note 3, at 187; *see generally* Rabinovich, *supra* note 51.

59. Rabinovich, *supra* note 51, at 234.

60. A dispute between an FTO and its domestic supplier or buyer would be resolved according to Soviet domestic procedures and law which again is beyond the scope of this work.

61. Norberg & Stein, *supra* note 47, at 177.

62. Leff, *The Foreign Trade Arbitration Commission of the U.S.S.R. and the West*, 24 *ARB. J.* 1, 11 (1969).

63. *Id.* at 11.

ception was the fear of Western courts and arbitral bodies as indicated in a statement by Max Litvinoff at the Hague in 1922, "that the Soviets had to refuse to submit to commercial arbitration by citizens of third states or by third states themselves."⁶⁴ Before the evolution of FTO's, however, the Soviet Union in its early years, "was compelled by its economic weakness and diplomatic isolation to conduct its trade through missions [trade representations] located in foreign countries."⁶⁵ Usually these missions "were forced . . . to submit to the jurisdiction of foreign courts."⁶⁶ When this occurred, "the restrictive theory of sovereign immunity would allow jurisdiction and execution against the Soviet state, should it lose."⁶⁷

Another goal the FTAC served for early Soviet leaders was ideological — that is, the FTAC would allow the Soviets the "freedom to move away from concepts of traditional private international law," when necessary or desirable.⁶⁸ At the same time, the Soviets fully realized that in order for the FTAC to ever be successful, Western firms had to voluntarily consent to arbitrate disputes in Moscow. To achieve that consent, "recognition had to be given to procedures and substantive law that would satisfy the expectations of the West."⁶⁹

Thus, the twin goals of avoiding dispute resolution before hostile Western courts and enhancing the international reputation of Soviet commercial and legal institutions, coupled with the increased bargaining power of Soviet trade negotiators via FTO's, provided the impetus for the creation of the FTAC.⁷⁰

B. *FTAC - Legal Structure: Relationship to Other Soviet Institutions*

The FTAC, as noted earlier, was created by resolution of the Central Executive Committee in 1932 and attached to the U.S.S.R. Chamber of Commerce. This relationship with the Chamber of Commerce has been the focus of most, if not all, of the criticism of the FTAC over the years. This structural bias is said to arise because "the U.S.S.R. Chamber of Commerce and Industry . . . is under the supervision of the U.S.S.R. Ministry of Foreign Trade to which the FTO's are also

64. Norberg & Stein, *supra* note 47, at 175.

65. King-Smith, *Communist Foreign Trade Arbitration*, 10 HARV. INT'L L. J. 34, 35 (1969).

66. *Id.* at 35.

67. *Id.*

68. Norberg & Stein, *supra* note 47, at 175.

69. *Id.* at 176.

70. Berman & Bustin, *supra* note 1, at 9.

subordinate."⁷¹ Thus, the problem is that "a Chamber of Commerce of a Communist country is a creature of public legislation and an integral arm of a monolithic foreign-trade structure, designed to promote the state interest under the express supervision of its Ministry of Foreign Trade."⁷²

It was little consolation to those inclined toward the opinion expressed above that "the Chamber of Commerce is a "social" rather than "state" institution, which means that it is a voluntary association, and the members of the arbitration panels are usually university professors and other specialists in law and economics."⁷³

Critics of the FTAC note Article 124 of the U.S.S.R. Constitution which provides that members of the Communist Party are "the leading core of all organizations, both social and state."⁷⁴ This article served to reinforce the critics' conclusions that the FTAC is "in fact [an] administrative agenc[y] of [its] respective government[s] in the guise of arbitration, and not [an] arbitration tribunal[s] . . . at all."⁷⁵

Another critic, King-Smith went further and argued that "the FTAC is not in fact an arbitration tribunal but a national court [and therefore that awards of the FTAC] should not be given effect by Western countries where the judgments of Communist courts would not ordinarily be enforced."⁷⁶

However, this criticism was effectively rendered moot with "the signing of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards by the U.S.S.R. and Western countries including the United States. [Such treaty, *inter alia*, providing] that contracting states must enforce foreign arbitral awards . . . within the scope of [the treaty] 'in accordance with the rules of procedure of the territory where the award is relied upon.' "⁷⁷

C. *FTAC Operational Structure: Jurisdiction of the FTAC and Composition of Arbitration Panels*

FTAC proceedings are currently governed by the 1975 "Statute

71. *Id.* at 50.

72. Kotlarchuk, *supra* note 1, at 468 (quoting Pizar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409, 1426 (1959)).

73. Berman & Bustin, *supra* note 1, at 51.

74. *Id.*

75. *Id.* (quoting Pizar, *Treatment of Communist Foreign Trade Arbitration in Western Courts*, in INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLDWIDE COOPERATION 106 (M. Domke ed. 1958)).

76. Kotlarchuk, *supra* note 1, at 469 (citing King-Smith, *Communist Foreign Trade Arbitration*, 10 HARV. INT'L. L. J. 34 (1969)).

77. *Id.* (quoting Article III of the 1958 Convention).

on the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, Approved by the Decree of the Presidium of the Supreme Soviet of the USSR of the 16th April 1975, No. 1351-IX [hereinafter the Statute]".⁷⁸ This ten article statute supplants the original 1932 statute. However, as the 1975 statute essentially tracks the 1932 statute with minor modifications to be discussed below, the *force majeure* analysis is not affected by the new statute.

Article 1 of the 1975 Statute defines the scope of FTAC authority. The FTAC, as a standing arbitration body:

shall settle disputes resulting from contractual and other civil-law relations arising between lay persons of different countries in the course of foreign trade and other international economic and scientific-technological contracts.⁷⁹

The two significant changes in Article 1 of the 1975 version of the Statute are that it permits arbitration of non-contractual civil law relations and that it makes explicit what has been a long-standing practice, namely that the FTAC can arbitrate "disputes arising between subjects of *various* countries."⁸⁰ In practice, the FTAC on occasion decides disputes between two non-Soviet parties, usually Eastern Bloc FTO's.

Article 2 of the Statute is also primarily jurisdictional. Significant for this paper is the provision that the FTAC:

shall entertain disputes where the parties have agreed in writing to submit to its consideration [and] . . . disputes which the parties are bound to refer to it in virtue of international agreements.⁸¹

Article 3 of the Statute provides that disputes:

78. U.S.S.R. CONTRACT LAW, *supra* note 3, at 196-97.

79. *Id.* at 196.

80. Kotlarchuk, *supra* note 1, at 472.

81. U.S.S.R. CONTRACT LAW, *supra* note 3, at 196. The most significant international agreement which would provide for arbitration before the FTAC is the Comecon General Conditions of Delivery for the sale of goods which essentially "prescribes the commercial law that regulates all of the contracts concluded by the [Eastern Block FTOs]. . . . [It provides] a unified international sale law for commercial contracts that are concluded in foreign trade within Comecon." T. W. HOYA, *supra* note 1, at 10. It was adopted in 1958 and is, obviously, of major importance in terms of promoting uniformity in private international trade law. The General Conditions of Delivery have also been adopted on a bilateral basis with such countries as Finland. Unfortunately, as this subject is much beyond the scope of this effort, the reader is referred to T. W. HOYA, EAST-WEST TRADE, *supra* note 1, at 10 for a full discussion of the subject.

shall be settled by Arbitrators designated by the Presidium of the USSR Chamber of Commerce . . . for a period of 4 years from among persons possessing the special knowledge to solve the disputes.⁸²

In Mr. Kotlarchuk's opinion, this provision is the most significant change from the earlier statute.⁸³ It may in fact be a Soviet response to the structural bias criticism of the FTAC. In summary, the old statute provided for fifteen arbitrators appointed for one year; the new statute allows for a term of four years in which members are confirmed with no restriction on the number of members.⁸⁴

According to Kotlarchuk, these changes may facilitate the appointment of non-Soviet arbitrators which would alleviate, to some extent, a constant criticism of the FTAC that, while non-Soviets have never been formally barred from the FTAC, in practice all have been Soviets.⁸⁵

It is also argued that the longer term of four years with open-ended membership and confirmation instead of appointment of members may contribute to the perception of independence on the part of arbitrators.⁸⁶ As a further reinforcement to the perception of independence of FTAC arbitrators, Article 4 of the Statute explicitly states that "[t]he arbitrators . . . [shall be] independent and impartial in fulfilling their duties."⁸⁷

Article 5 basically outlines the composition of arbitration panels for particular hearings. An arbitration panel can consist of three arbitrators or one. The election or appointment of specific arbitrators for a case is made pursuant to the FTAC Rules of Procedure.⁸⁸ Parties to a case can appear "directly or through their duly authorized representatives" pursuant to Article 6 of the Statute.⁸⁹ These representatives can be foreign citizens.

Articles 7 and 10 of the Statute provide that the FTAC can determine the amount and form of security which may be required for a claim and for the determination of arbitration fees. The fees are based on a sliding schedule proportional to the amount of the claim and sub-

82. U.S.S.R. CONTRACT LAW, *supra* note 3, at 196-97.

83. Kotlarchuk, *supra* note 1, at 474.

84. *Id.* A minimum panel of 15 arbitrators is required.

85. *Id.*

86. *Id.*

87. U.S.S.R. CONTRACT LAW, *supra* note 3, at 197.

88. *Id.* For a discussion of these Rules, see *infra* notes 93-116 and accompanying text.

89. *Id.* at 197.

ject to the approval of the Presidium of the U.S.S.R. Chamber of Commerce.⁹⁰

The Presidium of the U.S.S.R. Chamber of Commerce approves the FTAC Rules of Procedure, pursuant to Article 8 of the Statute.⁹¹ Article 9 provides that FTAC awards are final, without appeal, and that parties should voluntarily carry out those awards. In the event the award is not voluntarily enforced, it can "be enforced according to law and international agreement."⁹²

D. FTAC Rules of Procedure

The FTAC procedures are currently governed by "the Rules of Procedure in the [FTAC] at the USSR Chamber of Commerce and Industry, approved by the Decision of the Presidium of the USSR Chamber of Commerce and Industry dated the 25th June, 1975 [hereinafter FTAC Rules]."⁹³ These rules supplant the rules in effect since 1932, and track the earlier version for the most part. Moreover, as the FTAC Rules recite many of the statutory choice of law and substantive law provisions (discussed earlier in foreign trade law) as well as provisions of the FTAC statute, such provisions will not be examined here.⁹⁴

Generally, a case is instituted before the FTAC by filing a statement of claim which specifies "the claimant's demands as well as the circumstances of fact and law on which he bases his claim and evidence corroborating these circumstances."⁹⁵ A claim must also state the jurisdictional basis for the FTAC as well as the claimant's choice of arbitrator, if three are to be used.⁹⁶ Once the jurisdiction of the FTAC is established, Article 31 of the Fundamentals of Civil Procedure of the U.S.S.R. provides that "an ordinary court shall refuse to admit the statement of claim."⁹⁷

In the event a panel of three is utilized for a hearing, at the claimant's option, the claimant selects one, the respondent selects one, and

90. *Id.*

91. *Id.*

92. *Id.* If the Soviet party fails to comply with an award, section 201 of the RSFSR Civil Code provides the procedure for court enforcement. Kotlarchuk, *supra* note 1, at 479. The U.N. Convention . . . [on] Arbitral Awards discussed *supra* note 77 would provide for enforcement against foreign parties of signatory countries.

93. U.S.S.R. CONTRACT LAW, *supra* note 3, at 198.

94. See *supra* notes 78-92 and accompanying text.

95. Lebedev, *supra* note 38 at 102. See also FTAC Rules, §§ 13 & 14, U.S.S.R. CONTRACT LAW, *supra* note 3, at 203.

96. FTAC Rules 13(2)(a)(e), U.S.S.R. CONTRACT LAW, *supra* note 3, at 203.

97. Lebedev, *supra* note 38, at 95.

the two named arbitrators elect a chairman.⁹⁸ If one arbitrator is selected to hear the case, the parties can agree to the arbitrator or have one appointed by the President of the FTAC pursuant to section 18 of the FTAC Rules.⁹⁹

Other procedural provisions of general interest include: how the FTAC handles the clerical work associated with a hearing; that the hearings usually are conducted in Moscow; that any documents that are presented by a party should be in the language of the contract or Russian; and that the FTAC can order documents translated into Russian.¹⁰⁰ FTAC hearings are conducted in Russian, although translators will be appointed at the requesting party's expense; costs are determined according to a sliding fee schedule; hearings are generally public; and the FTAC will hear counterclaims related to the dispute.¹⁰¹

As noted earlier, the parties can conduct their cases directly, "or through their duly authorized representatives."¹⁰² The parties can agree to allow the FTAC to resolve a dispute based on written evidence without a hearing, but the FTAC can *sua sponte* order a hearing if it believes the written evidence is insufficient to resolve the dispute.¹⁰³

Each party bears the burden of proof for its particular claim or objection.¹⁰⁴ The FTAC can, again, *sua sponte* demand further evidence as well as appoint experts.¹⁰⁵ The parties "are allowed in the course of the hearing to put questions both to experts and to each other as well as to witnesses called for examination."¹⁰⁶ Parties can object to an arbitrator, expert, or interpreter on the ground of bias.¹⁰⁷ Arbitrators evaluate all evidence "according to their inner convictions."¹⁰⁸

The Rules at section 12 provide that the FTAC should determine disputes "the basis of the applicable rules of substantive law, being guided — if the dispute has arisen from contractual relations — by the provisions of the contract and having regard to trade usages."¹⁰⁹ Most

98. FTAC Rules § 4(3); § 13(e); § 17(3) and §18, U.S.S.R. CONTRACT LAW, *supra* note 3, at 200-04. Also, if the parties fail to name an arbitrator or the named arbitrator fails to elect a chairman, the President of the FTAC appoints one.

99. *Id.* at 206.

100. *Id.* at 200-01, FTAC Rules § 5, 6, 7.

101. *Id.* at 201-10, FTAC Rules §§ 8, 11, 23, 26, 29.

102. *Id.* at 208, FTAC Rules, § 24, para. 1.

103. *Id.*, FTAC Rules, § 25.

104. *Id.* at 209, FTAC Rules, § 27, para. 1.

105. *Id.*

106. Lebedev, *supra* note 38, at 98.

107. FTAC Rules § 22, U.S.S.R. CONTRACT LAW, *supra* note 3, at 207-08.

108. *Id.* at 209, FTAC Rules, § 27, para. 4.

109. *Id.* at 202, FTAC Rules, § 12.

often, Soviet law is the applicable substantive law.¹¹⁰

However, the explicit recognition of trade usage as a basis of law is significant. As a general matter in Soviet law, "custom is a source of law if it is recognized by the state."¹¹¹ A Soviet authority maintains, "that [there are] repeated cases of application of generally accepted trade customs when the rules of applicable law and the terms of the contract concluded by the parties did not contain the necessary provision."¹¹² Thus, international custom may be an important argument for a foreign party because "precedent and judicial practice are not considered sources of law and do not create new rules of law either before the Soviet Courts or the FTAC."¹¹³

Finally, a proceeding before the FTAC is concluded by an award.¹¹⁴ Disputes are resolved by a majority vote of the arbitrators and dissenting opinions are permitted.¹¹⁵ Each award must be in writing and include: the names of the arbitrators; the names of the parties; the subject matter of the dispute; a factual summary; the decision itself and the reasons therefor; and an allocation of the fees and expenses.¹¹⁶

With this background of the Soviet foreign trade organizations and the structure of its dispute resolution procedure complete, an examination of FTAC decisions follows in an attempt to ascertain the objectivity, or lack thereof, of FTAC arbitrators.

VI. FORCE MAJEURE

A. *Soviet Understanding of the Doctrine*

Article 235 of the RSFSR Civil Code provides that:

an obligation is terminated through impossibility of performance if it has been caused by circumstances for which the debtor is not responsible.¹¹⁷

Accordingly, the general rule for contract liability is that "a

110. See *supra* notes 47-49 and accompanying text.

111. Sadihov, *General Characteristics of the U.S.S.R. Legal System*, in U.S.S.R. CONTRACT LAW, *supra* note 3, at 14.

112. *Id.*

113. *Id.* at 13-14.

114. FTAC Rules, § 31, U.S.S.R. CONTRACT LAW, *supra* note 3, at 210-11.

115. *Id.* at 211, FTAC Rules, § 32.

116. *Id.*, FTAC Rules § 33. The fees again are based on a sliding scale based on the amount of the claim. The FTAC is funded on the basis of these fees, and, as the FTAC possesses no state property, it is not a legal person under Soviet law.

117. Kobotav, *Impossibility of Performance*, in U.S.S.R. CONTRACT LAW, *supra* note 3, at 79.

debtor is financially liable if fault is present, except in cases envisaged by law or contract."¹¹⁸ The party seeking relief "bears the burden of proving absence of his fault (intent or negligence)."¹¹⁹ A party is not at fault and will be relieved of performance and liability "in the presence of circumstances of insurmountable force (*force majeure*) preventing performance of an obligation."¹²⁰

Article 85 of the RSFSR Civil Code "defines insurmountable force as an event which is, under the circumstances, extraordinary and unavoidable."¹²¹ The Supreme Court of the RSFSR in 1925, provided the following definition:

insurmountable force is a relative concept. An obstacle preventing performance of a contract obligation becomes insurmountable not by virtue of internal qualities which are inherent in it, but depending on the correlation of a number of conditions and concrete circumstances; that which is easily surmountable in one place may become insurmountable in another place.¹²²

Furthermore, for a party to be relieved of performance on *force majeure* grounds, he must show a causal relationship between the insurmountable force and his inability to perform.¹²³

Force majeure, in Soviet literature, includes "natural phenomena but also circumstance[s] of social life such as military operations."¹²⁴ One circumstance of social life that the Soviets, somewhat understandably, will not recognize as *force majeure* is a strike, barring an FTO contract provision to the contrary. The Soviet attitude towards strikes is stated as follows, "strikes have become an everyday phenomenon in capitalist societies and therefore fail to meet the criteria established in Soviet law for insurmountable force."¹²⁵

Soviet law generally classifies *force majeure* in terms of physical, judicial or economic impossibility.¹²⁶ Physical impossibility encompasses the traditional natural disaster type occurrences — such as floods and earthquakes where the subject matter of the contract is destroyed.¹²⁷ Barring an agreement to the contrary, the occurrence of one

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 80.

123. *Id.*

124. *Id.*

125. *Id.* at 81.

126. *Id.* at 82.

127. *Id.*

of these events generally relieves a party from performing the contract.¹²⁸

Judicial impossibility is defined as "that kind of impossibility which relate[s] to various interdictions by competent authorities."¹²⁹ This variation of *force majeure* has presented problems for the Soviets, the FTAC, and Western commentators and will be discussed fully later in this paper.¹³⁰ In particular, in instances where the Soviet government denies an export license or otherwise prohibits some type of behavior, the entire structure of the Soviet monopoly of foreign trade, namely the relationship of FTO's and the FTAC to the Soviet state, is open to examination. The FTAC's resolution of this problem has been sharply criticized.¹³¹

Economic impossibility is generally defined as "impossibility of performance due to changed circumstances in the field of economy."¹³² In Western legal circles it is somewhat analogous to the doctrine of frustration of purpose.¹³³ Although the matter is disputed among Soviet legal scholars, the apparent Soviet position on economic impossibility is that "economic difficulty of performance including that connected with changed market situations is insufficient grounds [for] relie[f] of liability for non-performance."¹³⁴ This restrictive view of *force majeure* is, in the opinion of one Western commentator, the preferred one for international trade agreements.¹³⁵

According to Soviet scholars, the consequence of a successful *force majeure* argument is, as a general rule, "that a person faced with impossibility of performance is not liable for non-performance and . . . is relieved of compensation for losses."¹³⁶ Of course, FTO's are free to agree to other definitions of *force majeure* and its effect.

B. *Traditional International Trade Law Perspective Regarding Force Majeure*

Historically, "a large proportion of the leading cases on excuse

128. *Id.*

129. *Id.*

130. See *infra* note 137 and accompanying text.

131. See Israeli-Soviet Oil Arbitration discussion, *infra* at notes 173-83 and accompanying text.

132. Kabatov, *supra* note 117, at 85.

133. See discussion on traditional international views of *force majeure*, *infra* at note 137 and accompanying text.

134. Kabatov, *supra* note 117, at 85.

135. Professor Berman. See *supra* notes 138-144 and accompanying text.

136. Kabotav, *supra* note 117, at 86 (citing RSFSR Civil Code Articles 222 and 235).

have involved international trade transactions."¹³⁷ Professor Berman, in an article largely critical of post-World War II liberalization of the doctrine of *force majeure* in Western legal circles, states, "impossibility [of performance] caused by certain types of events (so-called force majeure) does constitute a cause of exoneration in most of the major legal systems of the world, although the limits of this doctrine are traditionally rather narrow."¹³⁸

Professor Berman maintains that the expansion of *force majeure*, accomplished by broadening the definition of impossibility to include economic impossibility by loosely defining the unforeseeability of certain events or by expanding the definition of excuse by means of the doctrine of frustration of purpose, is misguided.¹³⁹ These efforts are misguided for international trade transactions because "a study of actual contract practices shows the parties generally insert special clauses to cover the most varied types of extraordinary risks, and that they take it for granted that the risk of events not specifically referred to shall be borne by the obligor."¹⁴⁰

According to Professor Berman, there are several reasons for the preference for the restrictive view of *force majeure*. First, a more expansive doctrine would impose difficulties for draftsmen attempting to account for all the possible events which might occur.¹⁴¹ Second, in international trade contracts, the parties are more or less equal in bargaining power and parties assume obligations "with open eyes, for profit, at a price that reflects the risk of the undertaking; [thus] parties do not rely on judicially formulated doctrines of excuse."¹⁴² Most significant, in Berman's view, is that in international trade transactions where the parties are almost by definition from different legal systems the "sanctity of contract is their surest defense against the peculiarities of legal rules developed in particular countries."¹⁴³

Therefore, Professor Berman argues that "the basic rule for interpreting [international trade contracts] should be the rule of absolute obligation, unless the contract, interpreted in the light of trade custom, provides otherwise."¹⁴⁴ As will be seen later, the FTAC decisions concerning *force majeure* arguments generally employ this method of

137. Berman, *Excuse for Non-Performance in the Light of Contract Practices in International Trade*, 63 COL. L. REV. 1413, 1415 (1963).

138. *Id.* at 1413.

139. *Id.* at 1413-15.

140. *Id.* at 1416.

141. *Id.* at 1417.

142. *Id.*

143. *Id.* at 1420.

144. *Id.* at 1438.

analysis, that is, a general rule of absolute obligation unless the contract, an international agreement, or a trade custom provides otherwise.

VII. CASE DESCRIPTION

This analysis of FTAC decisions will examine cases reported in English between 1932-65 where a party raised a *force majeure* argument.¹⁴⁵ There are twenty-four such cases.

An overview of these cases indicates that of the twenty-one cases where a Soviet FTO appeared as a party, either as a claimant or respondent, its argument either for or against *force majeure* was at least partially successful on fourteen occasions.¹⁴⁶ The FTAC ruled against the Soviet FTO's position on seven occasions.¹⁴⁷ Three decisions involved exclusively non-Soviet parties, but of these, only one involved a non-Soviet bloc party.¹⁴⁸

A further breakdown of the twenty-one cases where a Soviet FTO was a party indicates that in seven cases where a Soviet claimant, as seller, sued for the foreign buyer's alleged breach of contract, the Soviet party was at least partially victorious on six occasions. That is, a foreign buyer's *force majeure* argument was accepted on one occasion.¹⁴⁹ Where a Soviet buyer of goods sued a non-Soviet seller who

145. See *supra* note 2. Decisions of the FTAC counterpart, the Maritime Arbitration Commission, are not discussed, although there are more recent decisions available in English, because this would entail both an examination of the Soviet Maritime Code and general admiralty law. Again, individual FTAC cases are translated into English in issues of the YEARBOOK OF COMMERCIAL ARBITRATION and FOREIGN TRADE; however, the author has assumed, that the FTAC analysis of *force majeure* has not substantially changed since 1965.

146. Reference to particular cases is by award number. These cases are published chronologically by award number in the section entitled *Collected Arbitration: Awards of the U.S.S.R. Foreign Trade Commission* found in INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 2. Partially successful refers to an FTAC conclusion which, although it may or may not have rejected a party's *force majeure* claim, decides the case or amends the award on some other ground favorable to the given party. Usually the amendments were in terms of the FTAC allowing the successful claimant less in damages than he claimed. The Soviet party was at least partially victorious in Awards 1, 4, 5, 13, 14, 18, 19, 29, 34, 47, 64, 75, 76, 87.

147. Awards 15, 41, 53, 100, 103, 126, 148, *supra* note 2.

148. Awards 54, 63, 94, *supra* note 2. Award 94 involved a Dutch buyer of Rumanian goods, the Dutch party unsuccessfully arguing that *force majeure* circumstances excused its breach of contract.

149. Awards 1, 4, 5, 19, 75, 76 for the Soviet claimant seller. Award 15 against Soviet claimant seller. *Supra* note 2. Award 5 — the award of June 2, 1938 in the case of V/O Exportles [v.] the Firm of Patrick & Thompson Ltd., is somewhat difficult to classify. In this case a Soviet exporter of wood under a c.i.f. contract sued a British firm for payment on goods which were delivered, although not the full amount specified

sought relief on the grounds of *force majeure*, the FTAC ruled for the Soviet party in all three cases.¹⁵⁰

Where a foreign party sued a Soviet FTO seller, and the FTO argued *force majeure* as an excuse to performance, the FTAC ruled for the foreign claimant on five occasions and excused the Soviet party four times.¹⁵¹ Where a foreign seller sued a Soviet FTO buyer and a *force majeure* argument was raised, the FTAC ruled once for the Soviet party and once against it.¹⁵²

For purposes of brevity, this analysis will concentrate on the eight cases where the FTAC accepted, in part, a party's *force majeure* argument in an effort to determine whether FTAC decisions follow the restrictive definition of *force majeure* it purports to follow domestically and which Professor Berman considers preferable for international trade transactions.¹⁵³ Accordingly, the eight cases include: the four cases where the FTAC accepted a Soviet respondent seller's *force majeure* argument; the case where a Soviet respondent buyer's *force majeure* argument was accepted; and the case where a foreign respondent buyer's argument was accepted.¹⁵⁴ Also included is one case involving two non-Soviet parties where the FTAC accepted, in part, a *force majeure* argument as well as one case where a foreign seller sued for the refund of monies kept by a Soviet buyer on the ground that the

in the contract. The respondent, argued *inter alia*, that it did not receive the goods *per* terms of the contract and bill of lading, e.g., full delivery. The claimant, argued *inter alia*, that the *force majeure* circumstance, "ice conditions" prevented delivery on time and claimed it had performed *per* the terms of the contract in attempting to secure charter for the goods and did in fact charter a vessel. After loading part of the goods, the vessel became ice bound and delivery was delayed. The FTAC noted in its decision for the Soviet seller that "[t]he risk of the goods being lost or delayed in transit lies with the buyer under the contract, which follows from both the nature of the contract (a c.i.f. sale) and the special contractual provision (§12) as to property rights in the goods passing to the buyers from the time the goods are loaded on board." Such a conclusion is apparently consistent with international trade custom for (c.i.f.) contracts. See Berman *supra* note 137, at 1429-30.

150. Awards 13, 18, 29, *supra* note 2. Award 29 is again difficult to classify as it involved a suit for the refund of advance payments where both parties were relieved of liability on the grounds of World War II rendering performance impossible.

151. Awards 53, 100, 103, 126, 148 for the foreign buyers; Awards 14, 34, 64, 87 for the Soviet seller.

152. Award 47, in favor of the Soviet party. Award 41, against the Soviet position. Award 47 is again somewhat difficult to classify as in effect the Soviet buyer asserted a successful counterclaim to the seller's claim and the seller's counter defense *force majeure* argument was rejected. See *supra* note 163 and accompanying text.

153. See *supra* text accompanying notes 138 and 144.

154. Awards 14, 34, 64, 87 where the Soviet respondent sellers successfully raised a *force majeure* argument; Award 47 where Soviet respondent buyer was successful; and Award 15 where a foreign respondent buyer's argument was successful.

seller's late delivery was excused by *force majeure* circumstances.¹⁵⁵ Where an FTAC decision appears inconsistent with other decisions, such cases will be noted.

Two awards where the FTAC relieved the Soviet respondent seller of liability for its breach of contract fall within the traditional narrow limits of *force majeure* circumstances. Those cases are the "Award of March 2, 1940 in the Case of . . . Van-der-Heyden (Antwerp) [v.] V/O Exportles (Award 14)" and "Award of December 21, 1960 in the Case . . . Cartwright and Company (Importers), Ltd. [v.] V/O Exportles (Award 87)."¹⁵⁶

Award 14 involved a cost insurance freight contract (c.i.f.) for the sale of certain wood goods between a Soviet seller and a Dutch buyer. The Soviet seller chartered a vessel for delivery within the contractually agreed time. After departing from the loading port, however, the first vessel was damaged in a collision and forced to return to port. The Soviet FTO, upon notification of the accident on or about September 2, 1939 and still within the contract dates, attempted to charter another vessel. The FTO argued, and the FTAC agreed from the evidence produced, that the outbreak of World War II on September 1, 1939 so disrupted the international shipping market that it constituted a *force majeure* circumstance by the terms of the contract. Therefore, the contract was cancelled and the parties relieved of performance.¹⁵⁷

Award 87 is an example of the Soviet party winning the battle, but losing the war. In this case, the Soviet seller respondent entered into a c.i.f. contract with a British firm. One clause of the contract essentially provided that in the event one of the listed *force majeure* circumstances occurred, namely, ice conditions in the port of loading, the buyer upon prompt notification to the seller could, at the buyer's option, purchase the goods, again wood, freight on board, (f.o.b.). The *force majeure* circumstances developed, as the loading port was closed due to icy conditions, and the Soviets sought to cancel.

The British claimant argued that the FTO had denied it an opportunity to exercise its f.o.b. option. The FTAC agreed and concluded that a reasonable time for the claimant to exercise its f.o.b. option extended to the next navigation season. Noting the rising market price of wood during this time, the FTAC then awarded the British firm ten percent of the f.o.b. price of the undelivered goods.¹⁵⁸

155. Awards 54 and 41, *supra* note 2.

156. Awards 14 and 87 respectively, *supra* note 2.

157. Award 14, *supra* note 2.

158. Award 87, *supra* note 2. FTO form contracts generally provide for some type of liquidated damages or penalty fee. This award also, arguably, represents by implication a rejection of economic impossibility or frustration of purpose as acceptable

The "Award of June 20, 1951 in the Case of . . . Société Anonyme Simon Frère (Paris) [v.] V/O Soyuzpushnina (Award 34)" presents the converse situation of the case above. Here the Soviet respondent seller lost the *force majeure* argument, but won the case. There was little dispute that World War II constituted a *force majeure* circumstance excusing performance of the contract. The French claimant was suing for a refund of certain advances made under the contract. The FTAC concluded that the claim was barred by the statute of limitations, determined by Soviet law as the place of the contract's conclusion.¹⁵⁹

Arguably, this award is inconsistent with the award granted in the "Case of . . . V/O Stankoimport [v.] the Joint-Stock Company Swiss Tool (Zurich) (Award 29)," decided on October 27, 1950, where the FTAC ruled in favor of a Soviet claimant buyer suing for a refund of certain advances made to a Swiss company. World War II had prevented performance of the contract. The Swiss respondent unsuccessfully raised a statute of limitations argument as a bar to the Soviet claim.¹⁶⁰ In fairness to the FTAC, and possibly as the only way to distinguish the cases, the FTAC in Award 34 listed three alternative dates at which *force majeure* circumstances would have tolled the running of the statute of limitations under Soviet law. Under all three situations the claim was barred.¹⁶¹

Award 64 is the last case where the FTAC ruled in favor of a Soviet respondent seller's defense. Because this is the infamous Israeli-Soviet Oil Arbitration case, it is discussed in detail later in this note.¹⁶² In summary, of the cases considered so far, there is nothing which would indicate that the FTAC is not applying a restrictive application of *force majeure* circumstances in that it gives effect to the parties allocations of risk *per* their contract. In addition, there is no indication that the FTAC is showing undue favoritism to the Soviet position.

The "Award of February 9, 1955 in the Case . . . of the Greek Firm Konstantinides (Athens) [v.] V/O Prodintorg (Award 47)"¹⁶³ is somewhat difficult to classify. The FTAC properly rejected the Greek firm's counter defense of *force majeure*. If nothing else, the case is instructive as to the FTAC's method of analysis. The dispute involved a

force majeure circumstances. That is, the Soviet FTO was not allowed to repudiate the contract on the grounds that it made a "bad deal", *i.e.*, the prices of its goods were increasing.

159. Award 34, *supra* note 2.

160. Award 29, *supra* note 2.

161. Award 34, *supra* note 2.

162. See *infra* notes 173-92 and accompanying text.

163. Award 47, *supra* note 2.

c.i.f. contract for oranges. Due to certain weight shortages on delivery, the Soviet FTO deducted certain amounts from payment of the purchase price.

The claimant's position was that the Soviets were at fault for any weight loss or spoilage, because the Soviets were responsible for shipping delays. Apparently, the Soviet FTO had warned sellers of ice conditions existing at the port of delivery. The claimants contended that this knowledge was the cause of the delay in shipping the goods from the port of origin. The FTAC concluded that *per* the contract, the Soviet purchaser was under no obligation to warn the sellers of ice conditions; under c.i.f. contracts [by international custom], the purchaser was not responsible for shipping delays at the port of origin; and most importantly, according to the independent expert appointed by the FTAC, the short delay involved could not have caused the spoilage in question in the case. Therefore, the FTAC ruled in favor of the Soviet purchaser's counterclaim.¹⁶⁴

The one occasion where a foreign respondent buyer's *force majeure* defense was successful is "Award of April 17, 1940 in the Case of . . . V/O Soyuznefteexport [v.] the Latvian Joint-Stock Company Latviela (Award 65)."¹⁶⁵ Here the non-Soviet party bought oil products f.o.b. and agreed not to sell the products outside Latvia. The respondents, in defense to the claim for liquidated damages *per* the contract for violation of the restrictive sales clause, maintained that the *force majeure* circumstance of the French authorities forcibly capturing and requisitioning the cargo excused its breach. The FTAC rejected the respondents' evidence of requisitioning and questioned the respondents' good faith, namely that the respondents were aware of the war-time conditions and in taking the route they did, capture was hardly unforeseeable. The FTAC ruled for respondents nonetheless, and excused them from liability. Moreover, the FTAC concluded from independent evidence in its own files that the respondents' vessel and cargo had been seized.¹⁶⁶

The "Award of November 14, 1952, in the Case of . . . German Machine Trading Association [v.] V/O Tekhnopromimport (Award 41)" involved a dispute where the East German [GDR] seller sued for a refund of certain deductions the Soviet buyer had made from the

164. Award 47, *supra* note 2. The distinction in terms of the international custom c.i.f. contracts between this case and Award 5, *supra* note 147, is that in Award 47 the delay occurred before the goods had left the port of origin, and therefore, the bill of lading had not been issued, while in Award 5 the delays occurred in transit.

165. Award 15, *supra* note 2.

166. *Id.*

purchase price of goods because of a late delivery.¹⁶⁷ The seller successfully argued that delivery was late because the American authorities had blockaded the GDR border from the West German [FRG] border and such blockade had made it impossible for the East German seller to secure a critical piece of equipment required for it to perform the contract. Apparently, the part was not available elsewhere, and therefore, performance was objectively impossible. The FTAC also rejected the Soviet buyer's argument that the seller had failed to comply with the notice requirements for *force majeure* circumstances of the General Provisions on the Delivery of Goods Agreement between the GDR and U.S.S.R. because the agreement was not yet in effect at the time the contract was entered into.¹⁶⁸

The "Award of September 17, 1956 in the Case of . . . Foreign Trade Association . . . Prague [v.] State Import/Export Organization . . . Sofi (Award 54)" is a classic example of a natural disaster excusing a party's performance.¹⁶⁹ Here an earthquake and a subsequent flood in the Bulgarian seller's mine, which was the only mine capable of producing lead ore of the quality specified by the contract, reduced the mine's production capacity by fifty-nine percent. The FTAC accordingly excused the seller from supplying fifty-nine percent of the quantity stated in the contract. But because the FTAC interprets objective impossibility almost literally, it held the seller liable for its failure to deliver to the Bulgarian buyer a pro rata share of the mine's forty-one percent remaining capacity. Damages were based on the contractually specified penalty percentage.¹⁷⁰

As a preface to the discussion on the Israeli-Soviet Oil Arbitration case, an example of what is not a *force majeure* circumstance is useful. In "Award of October 1, 1962 in the Case of . . . Technokommerz GDR [v.] V/O Machinoexport (Award 100)," the Soviet respondent seller essentially maintained that his failure to deliver certain goods according to contract requirements should be excused due to the reconstruction work at the FTO's domestic supplier's plant.¹⁷¹ The FTAC rejected this argument, concluding that such delays were not a *force majeure* circumstance under paragraph 46 of the General Conditions for Delivery of Goods, CMEA (otherwise referred to as Comecon).

167. Award 41, *supra* note 2.

168. *Id.* See also clause 45 of the General Provision on Delivery which is the predecessor of the multilateral Comecon Agreement and sets forth certain notice requirements and certificate procedures when a party intends to assert a *force majeure* argument; see *supra* note 81.

169. Award 54, *supra* note 2.

170. *Id.*

171. Award 100, *supra* note 2.

Furthermore, such delays were not unforeseeable, inevitable or exceptional.¹⁷² In effect, the FTAC refused to depart from the restrictive definition of *force majeure* and recognize the doctrine of economic impossibility in the guise of frustration of purpose or to define liberally unforeseeability to protect a Soviet party. Additionally, in contrast to the case below, the FTAC refused to relieve a Soviet party for acts by other agents of the Soviet state — *e.g.*, domestic organizations.

The last case for consideration and certainly the most famous in terms of international comment is the Israeli-Soviet Oil Arbitration case. Formally known as “Award of June 19, 1958, in the Case of . . . Israeli Firm Jordan Investments Ltd. [v.] V/O Souznefteexport, (Award 64),” the case involved an Israeli firm’s f.o.b. contract to purchase 650 tons of oil from a Soviet FTO.¹⁷³ After the signing of the contract, the Soviet FTO applied for an export permit from the Ministry of Foreign Trade. Unfortunately, the 1956 Egypt-Israeli war broke out before the export permit was issued. On November 5, 1956, the Ministry informed the FTO that its permit request was denied. Moreover, performance of the contract was prohibited.¹⁷⁴

The Soviet seller then informed the Israeli firm that the export license had been cancelled and that such cancellation represented a *force majeure* circumstance according to the contract. The Israelis denied that such an event constituted a *force majeure* circumstance and filed a claim for damages of over two million U.S. dollars.¹⁷⁵

The Israelis made the following arguments: the sellers had a duty to obtain the export license *per* international custom of f.o.b. contracts; the buyers had not contractually agreed to release the sellers of this obligation; the Foreign Trade Ministry had no right to prohibit performance of the contract; *per* Article 119 of the RSFSR Civil Code, only objective impossibility relieved a party of liability and as oil is a generic good, the seller had not established that it could not secure the goods elsewhere; and the Trade Ministry’s prohibition could not be considered *force majeure* as it and the seller were agencies of the same state.¹⁷⁶

The Soviet FTO’s arguments were: that the license denial was a *force majeure* circumstance *per* the contract; it was under no duty to obtain the license; as denial of the license was unforeseen and insurmountable, Article 118 of the RSFSR Civil Code relieved it of liabil-

172. *Id.*

173. Award 64, *supra* note 2.

174. *Id.*

175. *Id.*

176. *Id.* The Code provisions cited above may vary from the ones cited earlier as the earlier discussion referred to the RSFSR Civil Code of 1964.

ity; Article 119 did not apply, and even if it did, the prohibition by the Ministry of Trade made performance objectively impossible; notwithstanding the FTO's legal independence, it was legally required to follow the order of the Ministry of Trade.¹⁷⁷

Basically, accepting the FTO's arguments, the FTAC dismissed the claim concluding that Article 118 of the RSFSR Civil Code was the relevant statute, and therefore, a party was released from liability for causes beyond the party's control. The FTAC, without direct reference to the war itself, concluded that the denial of the export license was beyond the FTO's control and unforeseeable. Moreover, the FTAC interpreted an ambiguous clause in the contract, apparently a result of translation difficulties, to reinforce its conclusion that a party is excused for any cause beyond its control.¹⁷⁸

The FTAC made short shrift of the claimant's other arguments. It noted simply that the FTO was a legal personality in its own right and not an "organ of state power."¹⁷⁹ Performance of the contract was objectively impossible as the Ministry of Trade prohibited performance of the contract regardless of the availability of non-Soviet oil. Finally, the FTAC concluded that the FTO seller was under no duty to obtain an export license, because the contract made no reference to export licenses.¹⁸⁰

The Israeli-Soviet Oil decision was, to put it mildly, not well received in the West.¹⁸¹ Critics of the decision noted the fact that the decision was announced an hour after the conclusion of the final of thirteen hearings and claimed the decision was "a foregone conclusion in view of the totalitarian nature of the Soviet regime."¹⁸² It was claimed that the Israelis were denied an opportunity to present essential proof.¹⁸³ The decision brought the relationship of the Soviet state, FTO's and the FTAC into acute focus.

177. *Id.*

178. *Id.* The clause involved the English version of the contract which had been signed by the parties. The clause was an addition to the standard *force majeure* clause and read "but also by any other cause beyond the control of the party." Apparently this clause was a carry-over from the Russian text of earlier contracts between the same parties. See, Berman's comments, *infra* notes 181-89 and accompanying text.

179. Award 64, *supra* note 2.

180. *Id.*

181. See generally *Notes on Israeli-Soviet Arbitration* 13 *ARB. J.* 159 (1958); Domke, *The Israeli-Soviet Oil Arbitration* 53 *AM. J. INT'L L.* 787 (1959); Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investments v. Soiuznefteksport*, 73 *HARV. L. REV.* 1128 (1960); Leff, *supra* note 62, at 1.

182. See *Notes on Israeli-Soviet Arbitration*, *supra* note 181, at 160.

183. *Id.*

Professor Berman was one of the few who attempted to make an in-depth analysis of the merits of the case.¹⁸⁴ But on the two principal issues of concern to his paper, Professor Berman was unable to "explain" the decision using a strict legal analysis.¹⁸⁵ The first issue he addressed was the effect of the "but also" clause at the end of the contract's *force majeure* clause.¹⁸⁶ After noting that the entire contract was badly drafted, particularly the English translation, he argued that if the Soviets accept "a restrictive theory of *force majeure* [then] [the contract presents] a hopeless ambiguity" by incorporating by reference Article 118 of the RSFSR Civil Code which he maintained is somewhat broader than the traditional *force majeure* circumstance.¹⁸⁷ In any event, Professor Berman concluded that the decision required more analysis than the FTAC's simply defining the meaning of terms in the clause to correspond to the understanding of Article 118.¹⁸⁸

The second issue involved the analysis of international custom concerning the allocation of risk in obtaining export licenses in f.o.b. contracts where the contract does not allocate that risk. Although far from universal, the general rule in f.o.b. contracts appears to be that absent a provision to the contrary, "the risk of denial of an export license is on the exporter."¹⁸⁹ The policy rationale supporting this principle is that "it is just to impose the risk of government action upon the party which is in the better position to influence the action."¹⁹⁰ Moreover, Berman maintains that this position is supported by Soviet domestic law.¹⁹¹

In short, the conclusion is inescapable that the FTAC did a great disservice to its reputation and the Israeli party by giving such short shrift to the export license argument in particular and to all the arguments in general. As Professor Berman notes, however, many of the criticisms concerning the procedural aspects of the case were simply unfounded. For example, he notes that the Soviet counsel assisting the Israelis in their presentation of the case provided some helpful arguments.¹⁹²

184. Berman, *supra* note 137. In fairness to Messrs. Domke and Leff, their articles, although critical in general, did recognize the possibility that reasonable men can differ and analyzed the merits of the case, in contrast to the commentary in *Notes on Israeli-Soviet Arbitration*, *supra* note 181.

185. Berman, *supra* note 137, at 1138-40. Berman discusses the obvious political overtones and implications of the case.

186. *Id.* at 1133-34.

187. *Id.* at 1134.

188. *Id.* at 1136.

189. *Id.* at 1141; *see also* Domke, *supra* note 181, at 791.

190. Berman, *supra* note 137, at 1143.

191. *Id.*

192. *Id.* at 1145, n.36.

VIII. CONCLUSION

This analysis of FTAC decisions indicates that where a party asserts a *force majeure* argument and can produce sufficient evidence that an extraordinary unforeseeable circumstance occurs which renders that party's performance objectively impossible, that party will be excused from performance and relieved of liability. This assumes that the party did not assume the risk of the particular event by contract, including international understanding of those contractual terms — or otherwise by international agreement. The accepted *force majeure* circumstances in FTAC decisions appear to be traditional ones such as the "capitalist states," natural disasters, restraint of prices, war, but not strikes. Its decisions on *force majeure* circumstances tend to follow a restrictive interpretation of that doctrine; the method preferred by at least one prominent Western writer.

With the one possible exception of the Israeli-Soviet Oil case, the FTAC has prevented its structural association with the Soviet state from detectably influencing its decisions in favor of Soviet parties. The 1975 statutory revision explicitly declared that FTAC arbitrators remain independent and impartial. While it is, of course, debatable whether in a Socialist state, or any other, objectivity can ever be declared by legislative fiat; the FTAC, as of the publication of Hoya's book in 1984¹⁹³, has not issued a decision widely accused of somehow being politicized.

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193. T. W. HOYA, *supra* note 1.

