Book Review

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BOOK REVIEWS

THE SOVIET FOREIGN TRADE MONOPOLY—INSTITUTIONS AND LAWS. By John Quigley. Columbus: Ohio State University Press, 1974. Pp. ix, 256. $15.00.

The world has grown quite used to the fact that almost all Soviet export and import transactions are conducted by specialized state foreign trade organizations (ob'edineniia, "combines" or "associations")[1] subordinate to a single state agency, the Soviet Ministry of Foreign Trade. The idea of such a "state monopoly" of foreign trade was originally put forth by Lenin and instituted by a decree of April 1918. It was intended primarily as a means of national economic defense: to protect the fledgling Soviet economy against anticipated imperialist exploitation. This was before the introduction of a centrally planned economy, and before even the introduction of War Communism (1918-21) with its program of state ownership of the "commanding heights" of the economy.

During the period of the New Economic Policy (1921-28), with its emphasis on some forms of private domestic trade, the "foreign trade monopoly" was vigorously challenged (by Stalin among others), but Lenin insisted upon retaining it. In the subsequent era of full-scale central planning when agriculture was collectivised and virtually all production and distribution of industrial goods was placed in the hands of specialized ministries ("people's commissariats"), each responsible for a particular branch of the economy, it seemed quite natural to leave exporting and importing to one such ministry and a number of subordinate combines, each with its own monopoly of export and/or import of particular types of products.

In the post-Stalin period, however, the monopoly concept has had to be defended once again, this time against tendencies toward decentralization of operations within a state-owned, state-administered economic system. The issue now is not, as it was in 1917 and 1918 and again in 1921-28, whether economic enterprises, private or state, should be allowed to participate independently in foreign trade under a system of state licensing or under indirect state controls such as tariffs and exchange restrictions, but

1. Professor Quigley uses the term "combine," which was preferred for many years. More recently the acronym "FTO" has become more popular. This review follows Professor Quigley's usage in most instances.

whether state-owned production enterprises operating within separate economic ministries should be allowed to participate autonomously both in the planning of foreign trade and in contracting—under the plan—with foreign suppliers and purchasers, instead of remaining almost wholly insulated from foreign markets by subordinate organizations of the Foreign Trade Ministry. This issue is only in the background of Soviet discussions, but is overt in Hungary, the German Democratic Republic, Romania, Poland, and other Eastern European countries, which adopted the Soviet system of foreign trade in the late 1940's, but which have begun to modify it substantially in the last ten to fifteen years.

Seen in this way, the question of centralization or decentralization, which underlies Professor Quigley's analysis of the Soviet system of foreign trade, may have a misleading appearance of narrowness. In fact, as he shows, it is a sharp question but hardly a narrow one. Although his main focus is on the institutional and legal aspects of the monopoly itself, the reader is not allowed to forget that they have important political and economic implications.

A second—and not unrelated—virtue of the book is its comprehensive treatment of the early history of the debates over the forms that state control should take. Over one-third of the text is devoted to the period from the October Revolution to the mid-1920's. This is the best treatment we have had on these matters, at least in English. Here Professor Quigley has been able to use a massive body of unpublished notes and materials written or collected by Alexander N. Sack in the early 1950's, just before his death. Professor Sack was a leading European authority on the law of international finance who came to the United States before World War II and taught for a while at New York University Law School. For this reviewer to give credit to Professor Sack, as the author also does in his Preface, in no way detracts from Professor Quigley's work. On the contrary, it is much to Professor Quigley's credit that he was able to sort and synthesize Professor Sack's valuable materials and notes and, further, to give them his own stamp of interpretation.

Professor Quigley's account of the evolution of the Soviet foreign trade administration in the post-Stalin period is also of great interest, particularly in light of his subsequent discussion of the more extensive decentralization of the foreign trade administration of other Communist countries, especially Hungary. In 1955, Soviet economic assistance to other countries, particularly other socialist countries, was transferred out of the Foreign Trade Ministry to a recently established agency of equal rank. Also, in that year, concurrent authority over the patenting of Soviet inventions abroad (and later over the sale of Soviet licenses abroad and Soviet purchases of foreign licenses) was transferred to still another agency. In 1961 and 1965 a new all-union State Committee for Science and Technology was given jurisdiction over planning importation of advanced technology and collaboration in scientific research with foreign countries. Ocean shipping, export and import of cinematic films, tourism, and several other types of foreign trade activities have also been removed to the jurisdiction of other economic ministries. Nevertheless, despite these and some other measures, Professor Quigley concludes that during the post-Stalin period foreign trade has been "deconcentrated" much less than other branches of the Soviet economy. With slight exaggeration, he states that "[a] mere handful of combines [of the Foreign Trade Ministry] (forty-nine at present) conduct all export and import for the world's second-ranking industrial power."[2]

Strict central administration and operation of foreign trade result in legal requirements of which foreign firms trading with Soviet organizations must beware. Professor Quigley singles out three principal legal problems. The first is the insistence on strict formalities in the formation of contracts. Under Soviet law a foreign trade contract must be in writing and signed by two duly authorized persons. No offer, as Professor Quigley states, may be accepted by silence.[3] Moreover, no oral agreements made in conjunction with a written contract are binding, even if consistent with the written terms, and no subsequent written statements (for example, by exchange of letters) concerning the meaning of the contract are binding unless signed by the two authorized persons.[4] The author

2. J. QUIGLEY, THE SOVIET FOREIGN TRADE MONOPOLY—INSTITUTIONS AND LAW 103 (1974) [hereinafter cited as QUIGLEY]. On page 81 it is stated more precisely that the Ministry's combines operate directly approximately 95 per cent of total Soviet foreign trade. A later study shows that as of mid-1974 there were 61 Foreign Trade Organizations, of which 18 were subordinate to state agencies other than the Ministry of Foreign Trade. However, of those 61, only 45 engaged directly in export and/or import; the others engaged in technical assistance and special services. *See* Berman & Bustin, *The Soviet System of Foreign Trade*, in BUSINESS TRANSACTIONS WITH THE USSR 31-32, 35-38 (R. Starr ed. 1975).

3. QUIGLEY at 112.

4. Professor Quigley omits these two points, although he states correctly that any modification of a contract must comply with all the requirements for conclusion of the original contract, and that once a contract has been concluded no previous correspondence may be used to interpret or alter its terms (although

offers two explanations of the rules requiring a written contract and two authorized signatures. The first, which was more important in the 1920's and 1930's, is to provide protection against foreign businessmen and foreign judges who may imagine oral agreements when none were made. The second is to prevent Soviet Government officials from squandering state property or using it for private profit. He does not mention in this context a more important explanation: the desire for centralized control over officials of the foreign trade combines by higher officials of the Ministry and of other State and Party agencies. These officials make the final decisions in many instances, and since they have usually not participated in the negotiations they want to be sure there is nothing hidden from their view.[5]

A second legal problem discussed by Professor Quigley is posed by the strict Soviet rule of *ultra vires*. Any transaction that exceeds the powers conferred upon the combine by its charter is void. Moreover, the charters of the combines limit those powers fairly narrowly: each combine has its own "monopoly" over the export and import of a given type of product or over a given sphere of activity. Again, the governmental character of economic activity under the Soviet system of planned economy makes this understandable. The doctrine of *ultra vires* retains vitality even in our own law where actions by government departments are involved, and in Soviet law it is applied not only to foreign trade transactions but also, and more especially, to domestic transactions between state economic enterprises. Soviet law, however, adds a very stringent sanction: when a party acts with knowledge of the *ultra vires* character of the transaction, all that it receives from the other party and all that it is owed by the other party is forfeited to the Soviet state treasury; even when both parties act innocently, each

previous correspondence may be considered part of the contract if it is clear the parties so intended). *Id.* at 112-13. *See* note 5 *infra*.

5. This would explain the rule, mentioned at note 4 *supra*, that even agreements consistent with the written terms of the contract are not binding unless they are themselves in writing and signed by the authorized persons. For example, under Soviet law an exchange of letters confirming a contemporaneous oral understanding that a binding contract to deliver 1000 tons of ore in a given two-year period requires delivery of at least 250 tons in the first year would not make that oral understanding effective unless the Soviet letter were signed by the two authorized persons. This is not primarily a matter of squandering state property or using it for private profit, but rather a matter of preventing subordinate officials of foreign trade organizations from making commitments which their administrative superiors have not approved in advance.

is obliged to restore to the other all that it has received. Soviet jurists have debated whether these rules of Soviet civil law are applicable to foreign parties in trade transactions with Soviet foreign trade organizations. Apparently the sanctions have never been so applied, and Professor Quigley concludes that "[b]oth the impracticality of enforcement and the threat to security of commerce militate against application of the *ultra vires* rule to combine transaction with foreigners . . . ."[6] Still, the problem has both a theoretical and an practical significance.[7]

Professor Quigley also discusses a third legal problem related to the nature of the Soviet foreign trade monopoly—the fact that foreign trade combines have a low capitalization (usually about five million rubles, though some have as much as fifteen million rubles) and very few physical assets that a creditor could reach. This is at least a theoretical problem, because under Soviet law the combine is an autonomous legal entity, which alone is liable for its debts. As a practical matter, the combines have always paid their debts; further, as a practical matter everyone supposes that if a combine could not pay its debts the Soviet state would find a way to prevent default. Nevertheless, firms engaged in large-scale transactions with foreign trade combines cannot ignore the fact that their Soviet customers have only a small amount of money of their own and that, as Professor Quigley shows, their plant and equipment are "basic assets," which are immune from execution under Soviet law, while goods in transit normally do not come into their possession and control ("operative management") at all (as in the case of imports, where the combine acts only as a commission agent of a domestic Soviet organization, or in the case of exports, where the Soviet domestic producer normally retains possession and control until the combine passes title to the foreign purchaser).[8]

One of the most valuable parts of Professor Quigley's book is his discussion of techniques of exporting and importing. He describes in some detail the present system, adopted in 1940, whereby the foreign trade combine issues to domestic Soviet producers requisition orders for goods for export. Prior to 1940, the power of the combine over the producer was more limited: the two entered into a contract, and although the most important terms of the contract

6. QUIGLEY at 119.

7. *Cf.* Berman and Bustin, *supra* note 2, at 47.

8. QUIGLEY at 119-20. It is not stated in the text to what extent the chartered capital of the corporation is immune from execution.

were required by planning acts, nevertheless the opportunity to contract gave the domestic supplier additional responsibilities and additional safeguards against arbitrary orders. The elimination of the normal Soviet system of transfer of goods by contract is only one of many features of Soviet export techniques, discussed in the book, which place the domestic supplier in a disadvantageous position vis-a-vis the export combines. Professor Quigley seems to accept the argument of Soviet writers that these legal advantages enjoyed by the combines are a necessary counterpart of their superior familiarity with foreign markets, their superior expertise in dealing with foreign buyers, and their need for "flexibility and maneuverability."[9] However, that argument does not rebut the proposition that if the domestic suppliers were given the opportunity to go onto foreign markets independently of the combines, they would soon acquire the necessary familiarity, expertise, and maneuverability.

One may question, nevertheless, the Soviet characterization, which Professor Quigley adopts, of the relations between domestic suppliers and export combines as "noncontractual." It is true that the basic terms of their relations are determined by a 1960 decree of the Soviet Minister of Foreign Trade "On the Conditions of Delivery of Goods for Export" (a substantial portion of which is translated and reproduced by Professor Quigley in an Appendix). It is true also that the supplier may not resort to the quasi-judicial, quasi-administrative tribunal Arbitrazh to annul unfair or unauthorized provisions of the *zakaz-nariad* ("order-requisition") presented to him by the combine, but may only complain about them to administrative superiors. Nevertheless, other claims by one party against the other arising out of the relationship are resolved in Arbitrazh on the basis of civil law, including contract law, and the Conditions of Delivery of Goods for Export set forth a framework of procedures and remedies that are appropriate to contract law. The crucial distinctions between the law governing requisitions of deliveries for export and the law governing contracts of delivery of goods for domestic consumption derive from the monopoly position of the foreign trade combines, which enables them unilaterally to impose critical terms of quality, quantity, times of delivery, etc., on the domestic supplier. However, even in domestic contracts these terms may be dictated by planning and administrative agencies.

9. *Id.* at 134.

It is interesting that import techniques differ substantially from export techniques in respect of the autonomy of the domestic consumer vis-a-vis the import combine. The combine must contract with the consuming enterprise and, indeed, acts as its commission agent. Professor Quigley explains this very simply: "It is important that import goods satisfy precisely the requirements of the Soviet organization that will use them. Therefore, a substantial role must be given either to the end-user or to an agency familiar with the user's needs."[10] Here, in other words, the monopoly has yielded to the requirements of efficiency. Control over the consuming enterprise comes not from the Foreign Trade Ministry but from its own superior ministry and from the State Planning Committee.

Professor Quigley's last chapter is entitled: "Further Rationalization of the System: The Future Leads to Contract." Here, as earlier, he draws on Eastern European experience, especially Hungarian, to argue that "the Soviet foreign trade monopoly, though providing the Soviet economy with many advantages, reveals a number of disadvantages that could be eliminated without loss of the monopoly's advantages."[11] The disadvantages which he considers are largely those of bureaucracy, red tape, lack of incentives, and the like. These could be eliminated, he argues, by greater decentralization of operations. The domestic supplier and consumer ministries and enterprises should be allowed to enter foreign markets independently of the Ministries of Foreign Trade. Contract should be allowed to play an increasingly important role. State enterprises are now sufficiently mature and sufficiently patriotic to act rationally in the interest of the socialist system as a whole.

This argument is convincing. It omits, however, an additional important consideration, namely, the relation of the Soviet system to the volume and character of Soviet foreign trade. Since 1918, a principal purpose of the monopoly has been to *restrict* foreign trade—to restrict both its volume and its character. It is true that in the past twenty years Soviet foreign trade has increased very rapidly and has become much more diversified. Moreover, we are beginning to see the emergence of more intimate and more enduring forms of economic relations between Soviet economic organizations and those of other countries. Nevertheless, the fact remains that the approximately 50 billion dollars worth of export and im-

10. *Id.* at 163.
11. *Id.* at 173.

port transactions by Soviet foreign trade combines in 1974 should have been at least 100 billion (the figure for the United States was almost 200 billion), and further that Soviet economic relations with the advanced industrial countries should involve not only importation of goods and technology but also joint ventures on a large scale. These developments are hindered by the Soviet foreign trade monopoly, which still has some connotations of national economic defense against foreign imperialism.

The fact that Professor Quigley has not dealt expressly with these political-economic questions does not diminish the effectiveness of his treatment of those important technical matters which form the principal object of his attention. This is a very good book by one of the leading younger scholars in the field of Soviet law; readers will confidently look forward to other books of high quality from him in the future.

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