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I. Introduction

The state exercises an important influence on the organization and direction of world commerce, particularly foreign trade; and this influence extends even to the large industrially developed Western countries.[1] According to the report of the United Nations Economic

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1. Amerasinghe, *State Breaches of Contracts with Aliens and International Law,* 58 Am. J. Int'l L. 881 (1964); Berman, *Legal Aspects of Soviet Law and East-West Trade,* in *Symposium—Soviet Law and East-West Trade* 16 Record of N.Y.C.B.A. 27 (1961); Berman, *The Legal Framework of Trade Between Planned and Market Economics: The Soviet-American Example,* 53 Am. Soc. Int'l L. Proc. 255 (1959); Böckstiegel, *Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce,* 59 Am. J. Int'l L. 579 (1965); Collins, *Effectiveness of the Restrictive Theory of Sovereign Immunity,* 4 Colum. J. Transnat. L. 119 (1965); Deniau, *The External Policy of the European Economic Community,* 26 Law & Contemp. Prob. 364 (1961); Domke, *Arbitration Between Governmental Bodies and Foreign Private Firms,* 17 Arb. J. 129 (1962); Domke, *Foreign Trade Arbitration,* 46 Chi. B. Rec. 65 (1964); Ellsworth, *Kansan Looks at East-West Trade,* 13 Kan. L. Rev. 363 (1965); Flynn, *Trading with Communists: Use of Foreign Trade for Policy Objectives,* 49 A.B.A.J. 1092 (1963); Height, *U.S. Regulation of East-West Trade,* 19 Bus. Law. 875 (1964); Herman, *The Economic Content of Soviet Trade with the West,* 29 Law & Contemp. Prob. 971 (1964); Hsiao, *The Role of Economic Contracts in Communist China,* 53 Calif. L. Rev. 1029 (1965); Dasdan, *Toward a Reorganization of International Trade—United Nations Conference on Trade and Development,* 19 Record of N.Y.C.B.A. 525 (1964); Lalive, *Contracts Between a State or a State Agency and a Foreign Company,* 13 Int'l & Comp. L.Q. 987 (1964); Larkin, *Effect of Communism on International Trade Arbitration in the Soviet Union,* 33 Geo. Wash. L. Rev. 728 (1965); Li, *Legal Aspects of Trade with Communist China,* 3 Colum. J. Transnat. L. 57 (1964); Lipson, *Legal Aspects of Soviet Law and East-West Trade: Comments in Symposium-Soviet Law and East-West Trade,* 16 Record of N.Y.C.B.A. 35 (1961); Metzger, *Federal Regulation and Prohibition of Trade with Iron Curtain Countries,* 29 Law & Contemp. Prob. 1000 (1964); Metzger, *United States Foreign Trade: Past, Present and Future,* 6 Vill. L. Rev. 503 (1961); Pisar, *Communist System of Foreign-Trade Adjudication,* 72 Harv. L. Rev. 1409 (1959); Ramzaitsev, *Application of Private International Law in Soviet Foreign Trade Practice,* 1961 J. Bus. L. 343; Ramzaitsev, *F.O.B. and C.I.F. in the Practice of the Soviet Foreign Trade Organizations,* 1959 J. Bus. L. 315; Ramzaitsev, *The Law of International Trade in the New Soviet Legislation,* 1963 J. Bus. L. 229; Sarre, *The Law of International Trade and the Developing Countries,* 1963 J. Bus. L. 108; Sester, *Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties,* 55 Am. Soc. Int'l L. Proc. 89 (1961); Summerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba,* 19 Bus. Law. 861 (1964); *Symposium on Japanese-United States Business Transactions,* 38 Wash. L. Rev. 1 (1963); *Symposium: State Trading* (pts. 1-2), 24 Law & Contemp. Prob. 241, 367 (1959); *Symposium: U.S.S.R.: A New Factor in International Patent Regulations?,* 6 PTC J. Res. & Ed. 65 (1962); Tanaka, *Trade Liberalization in the*

Commission for Europe, participation of the state sector in the gross national income in 1957 amounted to 14 to 24 per cent; and it amounted in the totality of fixed means to 14 to 44 per cent.[2] Marc Quinn, deputy director of the commercial and financial department of the Organization for European Economic Cooperation (OEEC), has pointed out that imports effectuated on the European government account in the OEEC countries in 1949 (using a 1948 monetary index) amounted to 917,000,000 dollars of the sum total of 8,940,000,000 dollars, that is, 9.2 per cent.[3] In 1949 only two of the countries included in the study had no state trading—West Germany and Portugal. In France, for instance, in 1958, 22 per cent of the imports were affected by state enterprises; Norway, however, had only 7.7 per cent, Turkey 4.7 per cent, and Italy 4.6 per cent. In addition, 4.2 per cent of the whole West-European import was in the hands of state enterprises. This affected importing many agricultural products into West-European countries, such as tobacco, wheat, corn, flour, rice, butter, cheese, eggs, margarine, oil-seeds, animal fats, spirituous liquors, hard drinks, sugar, bananas, coffee, and tea. In addition, the importation of large quantities of raw materials and fully manufactured articles (31 groups of commodities), such as solid fuel, paper, mining machines, and ships is carried out by state enterprises. Bernard Fensterwald, Jr. points out that today there is no country which could be called a free trade country.[4] Foreign trade is influenced not only by customs' tariffs, but also by many other governmental activities. Mr. Fensterwald includes among such activities the economic and financial constraints on exports and imports. In addition, the United States Government intervenes on the commodity markets. Fensterwald believes that the future will see countries becoming more and more immersed in state trading.

The influence of the state in the organization and control of foreign trade is, as a matter of course, even greater in socialist states than in Western countries. In socialist countries the characteristic features of foreign trade are state monopolization of foreign trade and foreign

Context of United States-Japan Trade, 6 PTC J. RES. & ED. 132 (1962); Thau, *Control of Exports from the U.S.A.*, 19 BUS. LAW. 845 (1964); Wiley, *Edge Act Corporations-Catalysts for International Trade and Investment*, 16 BUS. LAW. 1014 (1961).

2. State sector participation in gross national income was the highest in Austria and Sweden (24%), and the lowest in the German Federated Republic (14%) and Belgium (17%). Its participation in the totality of fixed means was the highest in Austria (44%) and in the United Kingdom (42%), and the lowest in the German Federated Republic (14%) and Belgium (21%).

3. Quinn, *State Trading in Western Europe*, 24 LAW ANL CONTEMP. PROB. 398 (1959).

4. Fensterwald, *United States Policies Toward State Trading*, 24 LAW & CONTEMP. PROB. 369 (1959).

exchange. The exclusive bearer and performer of international connections is the state itself. By virtue of its foreign trade monopoly, it not only regulates and directs foreign trade, but it is fully responsible for both concluding and executing international agreements. All operative activities of foreign trading are performed in socialist countries by state-created enterprises, established for that specific purpose and entrusted by the state with this task. The monopoly of foreign trade is a monopoly *outwards*, that is, all economic activities going beyond the frontiers are exclusively performed by institutions and companies qualified for that aim. It is also a monopoly *inwards*, that is, in the circle of the various goods and services, all foreign trade transactions are concentrated in the hands of a single enterprise or organ functioning as a monopoly. It is in this respect that foreign trade differs from the other branches of the national economy, where the production and distribution in the same sector of the economic activity are performed by several factories, companies, or organs, all of which function collaterally. In the home trade, production is concentrated in one plant only in exceptional cases (*e.g.*, in Hungary, production of glow-lamps); whereas distribution is never so concentrated. In foreign trade, however, all goods or services have one exclusive purchasing and selling organ.[5]

5. VAJDA, SZOCIALISTA KULKERESKEDELEM. A KGST ÉS A SZOCIALISTA NEMETKOZI MUNKAMEGOSZTAS. (SOCIALIST FOREIGN TRADE. THE COUNCIL OF MUTUAL ECONOMIC AID AND THE INTERNATIONAL DIVISION OF LABOUR) 42 (1963); NYERGES, A KELET-NYUGATI KERESKEDELEM IDOSZERU KERDESEI (TIMELY QUESTIONS OF TH EAST-WEST TRADE) 108 (1962); MADL, KULKERESKEDELMI MONOPOLIUM. NEMZETKOZI MAGANJOG (MONOPOLY OF FOREIGN TRADE—PRIVATE INTERNATIONAL LAWQ 50 (1966); SZENDROI, KULKERESKEDELMI ALAPISMERETEK (NOTIONS OF FOREIGN TRADE) 19 (2d ed. 1961). See partieularly the excellent work GYORGY, KATONA, & UJLAKI, KULKERESKEDELMI VONATKORASU TERVSZERZZODÉSEK (PLANNING CONTRACTS IN THE DOMAIN OF FOREIGN TRADE) (1963).

Among the books dealing with legal problems of foreign trade written by authors in socialist countries there are to be mentioned the following: ALTINOFF, MEZHDUNARODNOCHASTNO PRAVATA SISTEMA NA N.R. BULGARYA (PRIVATE INTERNATIONAL LAW OF THE PEOPLE'S REPUBLIC OF BULGARIA) 297 (1955); BLÁGOJEVIC, MEDURARODNO PRIVATNO PRAVO (PRIVATE INTERNATIONAL LAW) 358 (1950); BYSTRICKY, ZAKLADY MEZINARODNIHO PRAVA SOUKROMEHO (SUMMARY OF PRIVATE INTERNATIONAL LAW) 271 (1958); GENKIN, GRAZHDANSKOE PRAVO STRAN NARODNO DEMOKRATII (THE CIVIL LAW OF THE COUNTRIES OF PEOPLES' DEMOCRACY) 511 (1958); GENKIN, PRAVOVOYE VNESHNEI TORGOVLI SSSR S STRANAMI NARODNOI DEMOKRATII (LEGAL QUESTIONS OF THE FOREIGN TRADE OF THE USSR WITH THE COUNTRIES OF THE PEOPLE'S DEMOCRACY) (1955); KOROLENKO, TORGOVOYE DOGOVORY I SOGLASHENYA SSSR S INOSTRANNYMI GOSUDARSTVAMI (TRADE CONTRACTS AND AGREEMENTS OF THE USSR WITH FOREIGN STATES) (1953); KRYIOV, MEZHUDUNARODNOE CHASTNOE PRAVO (PRIVATE INTERNATIONAL LAW) 129 (2d ed. 1959); KUTIKOFF, MEZHUDUNARODNOE CHASTNOE PRAVO NA N.R. BULGARYA (PRIVATE INTERNATIONAL LAW OF THE PEOPLE'S REPUBLIC OF BULGARIA) (2d ed. 1958); LUDWICZAK, MIEDZUNARODONOE PRAVO PRYWATNE (PRIVATE INTERNATIONAL LAW) 84 (1958); LUNZ, 2 MEZHDUNARODNOE CHASTNOE PRAVO (PRIVATE INTERNATIONAL LAW) 103 (2d ed. 1963); RECZEI, NEMZETKOZI MAGANJOG (PRIVATE INTERNATIONAL LAW) 242 (3d ed. 1961); SZASZY, PRIVATE INTERNATIONAL LAW

In this study I shall deal with legal problems relating to the state trading activities of one of the Socialist countries[6]—Hungary. First, I shall try to define the notion of foreign trading activities on the ground of Hungarian legal rules. Then I shall give a short survey on legal rules, international agreements, legal customs, usances and usages regulating the Hungarian foreign trade, the exchange of goods, the settling of accounts, and the carriage of goods in foreign trade. Further, I shall analyze the notion of the state monopoly of foreign trade and foreign exchange and the other direct and indirect means of state favoritism in foreign trade. Finally, I shall study the practice of the Hungarian courts concerning the legal problems relating to foreign trade. To begin with, however, I want to give a short picture of the evolution of the Hungarian foreign trade after World War II.

II. EVOLUTION OF HUNGARIAN TRADE AFTER WORLD WAR II

At the close of the Second World War, Hungary was destitute, pillaged and sacked, a nation left in rags and tatters. The Nazis had destroyed 20 per cent of the country's railway lines, 41 per cent of its bridges (including the bridges across the Danube and the Tisza), 84 per cent of the engines and locomotives, 87 per cent of the carriages for passengers, and 84 per cent of the freight cars. The German occupation army had demolished a considerable part of the Hungarian industrial equipment and had killed half of the Hungarian livestock.[7] Consequently, Hungarian foreign trade needed to be completely reorganized after the war. The country's most important

IN THE EUROPEAN PEOPLE'S DEMOCRACIES (1964); Szaszy, *L'evolution des principes generaux du droit international privé dans les pays de democracie popularie*, 52 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 1-42, 223-62 (1963). See also the works of Vagonov (1954); Genkin (1959); Kalyuzhnaya (1951); Mishustin (1958); Ramzaitzev (1954 and 1957) concerning the general questions of the foreign trade of the USSR with popular democracies and other countries.

6. Szaszy, *Private International Law in Socialist Countries*, 1 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 183 (1964). Authors in the Soviet Union and of the people's democracies characterize their own countries as socialist. These countries are the Soviet Union; the Albanian, Bulgarian, Rumanian, and Hungarian People's Republics; the People's Republic of Poland; the German Democratic Republic; the Czechoslovak Socialist Republic; the People's Republic of China and Mongolia; the Democratic Republic of Vietnam; and the People's Democratic Republic of Korea. In addition, Yugoslavia and Cuba are usually considered socialist countries. According to socialist authors, the main difference between the Soviet Union and people's democratic states is that the Soviet Union has terminated the construction of socialism and is building up communism at present, while the countries of people's democracies are constructing socialism. The ideological difference between socialism and communism is that in communism the prevailing principle is "to everybody according to his needs;" in socialism it is "to everybody according to his work."

7. NYERGES, *op. cit. supra* note 5, at 15 n.10.

partner became the Union of Soviet Socialist Republics, from whom Hungary received important raw materials and fuel, and to whom it exported a large quantity of industrial products and agricultural surplus. It was the credit from her first commercial agreement with the Soviet Union which enabled the renascent Hungarian state to rejuvenate her industry. The first connections between Hungary and her neighbors—Rumania, Czechoslovakia, and Yugoslavia—began to develop in the second half of 1945. A year later connections with the Western countries developed, first with Switzerland and the United Kingdom, and afterward with the United States, which sold her the superfluous European stores of the United States Army.

This was the beginning of the first of five periods we may distinguish in the evolution of Hungarian foreign trade. This initial period encompassed the first three years plan (August 1, 1947 to December 31, 1949).[8] During this time Hungarian foreign trade experienced considerable development. It was the period in which the great political revolutionary transformation occurred in Hungary, Czechoslovakia, Poland, Rumania, and Bulgaria. The principle of state monopoly of foreign trade was included in the constitution of the Hungarian People's Republic. The moving force behind all these changes was a national desire for the reconstruction of the national economy, the reinforcing and strengthening of the social sectors within the framework of the national economy, the raising of the undeveloped technical level of agriculture, and the improvement of the workers' living conditions. The results show that these aims were achieved. Former methods of state control and direction of the national economy were replaced by a system of direct disposition and direct management. The volume of Hungarian trade increased from 2,500.000.000 forints in 1949 (when a forint was worth nine cents) to 6,700.000.000 forints, considerably exceeding the volume of the foreign trade of 1938. As far as the structure (the system of goods) is concerned, there was a recognizable increase in the importation of raw materials (in 1938 it was 41.1 per cent and in 1949 46.6 per cent) and a decrease in the importation of semi-manufactured, semi-finished goods (in 1938 it was 28.7 per cent and in 1949 27.2 per cent) and of the manufactured, ready-made products (in 1938 30.2 per cent and in 1949 26.2 per cent). With regard to exports, the proportion of exported raw materials decreased (from 59.6 per cent to 37.8 per cent); and the proportion of exported semi-manufactured goods increased (from 9.8 per cent to 10.0 per cent), as did the ready-made products (from 30.6 per cent to 52.2 per cent).

In the second period, *i.e.*, in the period of the first five years' plan (1950-1954) and the third period, *i.e.*, between the years 1954 and

8. VAJDA, *op. cit. supra* note 5, at 233.

1957, the Hungarian foreign trade evolved essentially on the basis laid down in the preceding years. During the span of the first five years' plan, the economic structure of the country changed. The industrial character came into prominence; and agriculture was placed second both in the production of national income and in the quantity of goods being exported. The investments destined to develop the national economy were increased considerably; new branches of industry were born; the obsolete plants were reconstructed on modern principles. During the first five years' plan, the socialist transformation of agriculture began. The volume of foreign trade was doubled, due particularly to the increase of business with the U.S.S.R. and the people's democracies. In 1949, 47 per cent of Hungarian foreign trade was with socialist states; this increased to 61 per cent in 1955 and 70 per cent in 1957.[9]

In the fourth period, the second three years' plan (1958-1960) undertook a much more modest task in the field of foreign trade than had the previous plans, but the result that was actually attained during these three years surpassed the sums earmarked by the plan.[10] According to the provisions, the export amounting to 5,700.000.000 forints in 1957 should have risen in 1960 to 7,300.000.00 forints, *i.e.*, a 28 per cent increase. In actuality, however, the export in 1960 amounted to 10,100.000.000 forints, an increase of 77 per cent. The import, too, in 1960 was 40 per cent higher than in 1957. Seventy-one per cent of the export was placed on the socialist market during this period, and 71 per cent of the import originated from these countries. One-third of Hungarian foreign trade was effectuated with the Western states during this period, including one-third of the total export in machines, half of that in chemical articles, 80 per cent in mineral products, and 95 per cent in agricultural goods. Consequently, the decisive part of the Hungarian export directed toward Western Europe consisted of agricultural products and raw materials. The Hungarian import was composed in the first place of industrial raw materials and semi-manufactured goods; these were followed by machines and equipment.

The second five years' plan (1961-1965) earmarked, as compared to the year of 1960, an increase of 61 per cent in the export and 33 per cent in the import.[11] In this period the participation of the machines and precision instruments increased in both the export and the import; the proportion of raw materials in the export decreased; and on the whole the export of agricultural products remained un-

9. *Id.* at 238-39.

10. *Id.* at 242, 266-67.

11. *Id.* at 276-78.

changed. Thus, while about 70 per cent of the turnover was effected with the socialist countries, 30 per cent fell to the lot of the non-socialist states. During this period, Hungary made a considerable effort to increase the volume of East-West trade.[12]

III. What Does Foreign Trade Activity Mean Under Hungarian Legal Rules

By virtue of Decree No. 1/V.10/KKM. of May 1, 1960, which deals with definition of foreign trade transactions and the regulation of certain questions connected with foreign trade activity, the following are considered foreign trade activities: (a) international sales of goods, (b) export and import relations of various establishments to be built up in foreign countries, (c) trading activities connected with processing goods; accordingly, with the making-up of commodities on commission basis, with jobwork effectuated by home-workers abroad or by aliens in the country, (d) international carriage and forwarding of goods, (e) sales and purchases of domestic or foreign copyrights, patents and innovator rights, industrial property rights, (f) propaganda work, and (g) the mediation of these transactions.

Among these activities the most important is the sale in foreign trade.[13] Foreign trade sale contracts are, as a rule, concluded in Hungary between (1) a Hungarian foreign trade enterprise or a state or co-operative organ acting on the strength of an authorization by the Government (usually the Minister for Foreign Trade) or, in exceptional cases, a factory or plant which has been granted a special authorization by the Government and (2) the foreign exchange alien (a party having domicile or seat abroad). Such contracts may concern any kind of movable property susceptible of forming the subject-matter of international trade; or it may concern power, securities containing right of disposal over goods (*e.g.*, bills of lading, dock-warrants, etc.), designs, printed matter or products of fine arts (if they embody or represent the object of copyright). Foreign and domestic currency, means used instead of cash payment, gold coins, and securities, however, may not be included in these contracts, because in this sense they do not qualify as goods. Similarly, the following transactions are not considered as foreign trade sale agreements: contracts concluded by the national banks concerning precious

12. *Szäszy, Grundprobleme des Internazionales Schuldrechts in Aussenhandel zwischen Ost und West,* 19 Osterreische Juristenzeitung 176 (1964). Some article appears in 86 Juristische Blatter 201 (1964).

13. Szaszy, *op. cit. supra* note 5, at 304-05.

metals; sale in domestic currency of goods in the country to a foreign exchange alien, or purchase under the same conditions from a foreign exchange alien; retail sales in the country by authorized persons against foreign currency; and purchases of goods by a foreign exchange inlander abroad within the limits of his personal needs. In the same way, sales of immovable property, sales of registered ships or aircraft, and transactions concerning goods sold at auction under judicial procedure or goods sold in the course of official procedure with the intervention of public authorities are not considered as foreign trade contracts.

The general rules regulating the formal validity of foreign trade transactions are to be applied to foreign trade sales; in other words, the contracts in question are, as a rule to be in writing, but they may be concluded also by exchange of telegrams, telex, or telephone. The sale in writing may be concluded in the form of a deed, a contract-note or offer and its acceptance, and in the placing of an order and its confirmation. It is essential to the validity of the sale contract that the parties be in agreement at least on the goods to be delivered, on their quantity, and on the price. In addition, the contract usually contains the terms of delivery, stipulations concerning packing, and the mode and terms of payment. With respect to the conditions of contracts not regulated by the parties, in general, the rules of the country of the seller shall apply.

IV. DOMESTIC LEGAL RULES

The foreign trade activity of the state is regulated in Hungary by several Acts of Parliament, Law-Decrees promulgated by the Presidium of the Republic, Orders in Council and Executive Decrees of the Minister of Foreign Trade. The text of these legal rules was published in Budapest in 1965 by the "Közgazdasági és Jogi Kiadó" (Economic and Legal Publishing House) in the form of an official publication by the Ministry of Foreign Trade, entitled "A külkereskedelem hatályos jogszabályai" ("Legal Rules of Foreign Trade in Force").

From the point of view of the regulation of the *monopoly of foreign trade*, the following rules seem most important: section 6 of the Act No. XX of the year 1949 comprising the constitution of the Hungarian People's Republic, which provides that "the tasks of the foreign trade and wholesale trade are carried out by state enterprises" and that "the whole commerce is directed by the state;" section 39 of the Law-Decree No. 30 of the year 1950 (Foreign Exchange Code) according to which negotiations in foreign trade might only be entered into with the previous permit of the Minister of Foreign Trade (since 1960 the previous permit is no longer necessary); point II (11) of

the Resolution No. 729/25/1950 NT. of the Council of National Economy and point 36 of the Instructions No. 14/1950 KKM. of the Minister of Foreign Trade implementing the Resolution; sections 1-15 of the Decree 1/1960/V.10KKM. mentioned above; and section 1 of the Order in Council No. 4161/1949/154 which has regulated the exercise of the foreign trade activity.

The *organization* and the *activity* of the Ministry of Foreign Trade are regulated by the Instructions No. 49/1964 KKM. of the Minister of Foreign Trade putting into force the new rules of organization and proceedings of the Ministry of Foreign Trade.

The organization of the Hungarian Chamber of Commerce is regulated by the Decree No. 7.750/1948/VI.221/Korm. amended by the Decree No. 13/1958/II.23/Korm. The rules of procedure of the Court of Arbitration organized beside the Chamber of Commerce are laid down in the Decree No. 1/1953 BKM., the rules of procedure of the Export Commission of the Chamber in the Instructions No. 168/34-35/1953 BKM., and the rules defining the competence of the Corporation of the Average Commissioners organized beside the Chamber in the Instructions of the Minister of Foreign Trade No. 64/44-45/1954.

The provisions of the New York Convention of June 10, 1958, on the *recognition and enforcement of foreign arbitral awards* were enacted in Hungary by Law-Decree No. 25 of the year 1962, and the provisions of the European Geneva Convention of April 21, 1961, by the Law-Decree No. 8 of 1964.

The *foreign trade activity* of the enterprises granted the right to enter into foreign trade transactions is regulated by the common Instructions of the Foreign and Home Trade Ministers No. 14/1957/ KK.E. 11-12/; the foreign trade activity connected with electric energy by the Instructions No. 44/1964/KK.E. 29/; the registration of the firm of the foreign trade enterprises by the Decree No. 3/1961/X.21/KKM. and the Instruction No. 118/1961/I.K.20/I.M.; the competence of the workers of the foreign trade enterprises by the Instructions No. 61/42/1954.KKM. (director) and No. 7272/1955-3/1951.KKM. (head bookkeeper); the elaboration of the statutes of the enterprises by the Instruction No. 22/1960/KK.E.30/KKM.; the protection of the social property in foreign trade by the Instructions No. 12/1962/KK.E. 17/; and the internal control of the enterprises by the Instructions No. 9/1965/KKM.

The *procedure* of importing and exporting goods is regulated by the Decrees No. 56/6/1952. KKM. 8/5/1955 KKM. 4/1959 (v.28) KKM. of the Minister of Foreign Trade and the domestic fundamental conditions of delivery by the Instruction No. 18/1957/KK.E. 14.

V. TRADE AND PAYMENTS AGREEMENTS

Besides the domestic legal rules, other important legal sources are the *trade agreements and payments agreements.* Hungary's exchange of goods with socialist countries is based upon *trade agreements* concluded by the governments. These agreements fix (in terms of types and quantity of goods, sometimes money) the quotas for the import and export of which the contracting parties grant reciprocal licenses. In most instances, the method of authorizing import and export is regulated under specific trade agreements, and mixed governmental committees are formed in order to facilitate their implementation. Separate *payment agreements* have formerly supplemented these trade agreements, and both were often incorporated within *long-term agreements covering five year periods.* These agreements regulate trading between the various socialist countries during their duration; they provide a basis (1) for co-ordinating their export and import plans, thereby facilitating both the division of labor and the specialization of branches of industry in the various countries, and (2) for promoting the improvement of technological development and productivity.[14] Hungary has concluded such trade agreements (complemented and supplemented in certain relations) by commercial treaties, credit agreements, conventions on economic co-operation, and conventions on banking operations with numerous states.[15]

Similarly, there are very important internal legal sources. The Law-Decree No. 16 of the year 1960, which has promulgated the Charter of the Council of Mutual Economic Aid, and the Law-Decree

14. *Id.* at 306. In recent years Hungary has also concluded long-term agreements with some Western countries.

15. Albania (Aug. 16, 1966), Argentina (Oct. 18, 1957), Austria (June 3, 1948), Belgium (Sept. 30, 1924, and Dec. 24, 1958), Brazil (April 19, 1954, and May 15, 1961), Bulgaria (Oct. 25, 1965), Burma (March 11, 1958), Ceylon (June 4, 1956), China (July 15, 1961, and April 20, 1958), Columbia (June 25, 1959), Cuba (Sept. 15, 1960), Czechoslovakia (Nov. 21, 1965, Sept. 11, 1960, and Feb. 17, 1961), Demoeratic Republic of Vietnam (Dec. 29, 1960), Denmark (July 9, 1960), Finland (May 29, 1925, and Sept. 28, 1948), France (Oct. 13, 1925, and May 18, 1961), German Democratic Republic (Dec. 15, 1965), German Federal Republic (Aug. 28, 1948, Nov. 1949, and Dec. 7, 1959), Ghana (Oct. 23, 1961), Great Britain (July 23, 1926, and June 22, 1956), Greece (June 3, 1930, and June 5, 1954), Guinea (Jan. 22, 1960), Holland (Dec. 9, 1924, and Dec. 24, 1958), India (June 25, 1960), Indonesia (Sept. 5, 1961), Ireland (March 6, 1953), Israel (July 3, 1956), Italy (July 4, 1928, Dec. 16, 1948, and Dec. 17, 1957), Japan (April 11, 1961), Luxemhourg (Dec. 24, 1958), Mongolia (Sept. 18, 1965), Morocco (Nov. 1, 1957), Norway (Sept. 16, 1924, and Aug. 1, 1946), North Korea (Feb. 27, 1961), Pakistan (July 31, 1957), Poland (Nov. 23, 1965), Portugal (Feb. 27, 1956), Rumania (Jan. 25, 1965), Spain (Feb. 7, 1958), Soviet Union (Oct. 20, 1965), Sudan (April 1955), Sweden (Nov. 8, 1928, and July 22, 1946), Switzerland (March 9, 1946), Turkey (May 21, 1930), Tunisia (Jan. 1, 1960), United Arab Republic (April 2, 1959), Uraguay (Feb. 28, 1954), and Yugoslavia (July 24, 1926, June 2, 1956, and April 1, 1966).

No. 17 of the year 1960, which has promulgated the convention on legal capacity, immunity and privileges of the Council, were both approved by the Council at its session in Sofia in December, 1959.

The Council of Mutual Economic Aid was established on January 22, 1949. Its members are the European socialist states, *i.e.*, the Soviet Union and the European people's democracies. Mongolia joined on June 6-7, 1962; and since September 17, 1964, Yugoslavia has joined in the work of the Council's permanent commissions and other organs. At present Albania does not take part in the Council.

The Charter of the Council lays down the firm determination of the governments of the member states to continue the development of co-operation on the basis of consistently accomplishing the international social division of labor, in order to facilitate building of socialism and communism in their countries, and to ensure permanent peace in the whole world. The willingness of the member states of the Council to develop relations with all countries, independent of their social and economic system, on the basis of equality of rights, mutual advantages, and non-intervention in domestic affairs, is also laid down in the Charter.

The Charter makes the proviso that membership in the Council shall be open to all other countries of Europe which share the objectives and the basic principles of the Council and undertake the obligation contained therein. The principles underlying the activities of the Council are in conformity with the spirit of the Charter of the United Nations organization.

The convention on the Legal Capacity, Immunity and Privileges of the Council contains provisions generally accepted in international practice concerning this problem.[16]

The principal organs of the Council are the council meeting, the executive commission, the permanent commissions, and the secretariat. As of 1964, eighteen council meetings had been held.[17]

Of the international agreements concluded by the members of the Council, the greatest importance is to be attached to the Multilateral Convention of 1958 concluded on the subject of the General Conditions of Delivery (also termed General Conditions of Commodity Exchange). At the beginning the Convention was held to be valid

16. SZASZY, *op. cit. supra* note 5, at 66-67.

17. The organization and the resolutions of the Council are set forth in detail by Faddejev in his book DER RAT FUR GEGENSEITIGE WIRTSCHAFTSHILFE (RGW published in the German language in Berlin in 1965 and by Imre Vajda in his excellent book SZOCIALISTA KULKERESKEDELEM (The Socialist Foreigu Trade), published in the Hungarian language in Budapest in 1963.

for the year 1958 only, but its validity has since been extended. This Convention, which in Hungary became operative under Decree No. 5/1958 of the Minister of Foreign Trade (Külkereskedelmi Ertesitö No. 4 of 1958), has been in force from February 1, 1958, and has been applied vis-á-vis the Soviet Union from March 1, 1958, and in the relation of certain people's democratic states (*e.g.*, Hungary and Czechoslovakia) from January 1, 1958. It replaced the bilateral General Conditions of Delivery which had been concluded between 1951 and 1957 and which had regulated the exchange of goods between the foreign trade organizations of the respective countries by bilateral protocols. At present only bilateral conventions govern the exchange of goods between Hungary and the people's democratic states of the Far East. The new multilateral convention does not preclude the member states in the Council from laying down bilateral conditions for the Multilateral Convention; it is understood however, that the binding provisions of the latter cannot be set aside.

Such conventions have been concluded by Hungary's Ministry for Trade with Czechoslovakia (July 7, 1958), the German Democratic Republic (April 15, 1958), and Poland (March 3, 1958).[18]

Although the multilateral General Conditions of Delivery contain mainly rules of substantive law which regulate directly, they also contain rules for the choice of law (conflicts rules), which provide for the application of the law of the seller. For instance, Article 74 of the General Conditions calls for the application of the substantive law of the seller in all instances not regulated or not fully regulated by the General Conditions; furthermore, under Paragraph 2, Article 46 provisions are contained to this effect concerning the release of liability. The bilateral Conditions of Delivery concluded with Far-Eastern people's democratic states contain no rules for the choice of law, however.

Under the directly regulating rules of the multilateral General Conditions of Delivery applicable between European members of the Council, the date of the conclusion of the contract of sale is determined to be the date of the signature by the two parties (Section 1). If the parties are not simultaneously present, however, this conclusion date is the date at which the person who has placed the order or the person who has made the offer receives (within the limit time indicated in the order or offer, respectively, or, if such time limit was not fixed, within 30 days) written confirmation of the order, notification of the acceptance of the order without reservations. After the conclusion of the contract, all preceding correspondence and oral agreements connected with the contract lose their force (Section 3).

18. SZASZY, *op. cit. supra* note 5, at 64-65.

In addition, the following matters are regulated down to their details under the General Conditions: (a) the terms of delivery (Sections 4 to 8), (b) the times of delivery (Sections 9 and 10), (c) quality of the goods (Sections 11 and 12), (d) quality tests (Sections 20 and 21), (e) guarantee (Sections 22 to 27), (f) quantity of the goods (Section 13), (g) instances in which the parties may be relieved of liability (Sections 47 to 58), (i-j) technological documentation (Sections 18 and 19), shipping instructions, notification of delivery (Sections 28 to 34), and warranty (Sections 59 to 64), (k) arbitration (Section 65), (l) procedures of payment (Sections 35 to 45) and other issues.[19]

The General Conditions of Delivery provide sanctions in order to guarantee that the contractual obligations are kept. If delivery is delayed or the technological documentation is forwarded too late, or if non-notification or untimely notification by the seller to the buyer occurs, the seller will be obliged to pay a penalty ad valorem. The scale of the penalty is 0.05 per cent *per diem* during the first thirty days, 0.08 per cent per diem during the following thirty days, and after this 0.12 per cent per diem; but its final amount cannot exceed 8 per cent (Section 59). Claims for penalties must be presented within three months (Section 64).

In the event of breach of the time of delivery under a contract for a time, if the buyer renounces the contract, the seller is bound to pay the penalty stipulated in the bilateral agreement or in the contract. Irrespective of whether the contract contains a stipulation on arbitration, all legal disputes are subjected to consideration by arbitration; the dispute is to be submitted to an arbitration tribunal established in the country of the defendant or, if the parties have agreed in this respect, in any other state which is a member of the Council (Section 65).[20]

In connection with the General Conditions of Delivery, it is to be noted that the member states of the Council concluded two further multilateral conventions in 1962: one concerning the general conditions of mounting and technical works connected with the mutual delivery of machines and equipment, and another concerning the maintenance and repairing of machines, equipment and other articles delivered to one another by the foreign trade enterprises of the countries being members of the Council.

The provisions of the first Convention, after necessary definitions (Paragraph 1), determine the order of the conclusion of the contracts and the contents of the contracts (Paragraphs 2-4), the preparation

19. *Id.* at 308-09.
20. *Id.* at 313.

of the mounting works (Paragraphs 5-8), the equipments being necessary for the mounting (Paragraphs 9-15), the working conditions of the specialists of the supplier (Paragraphs 16-29), the mutual connections between the party ordering and the supplier (Paragraphs 39-44), the conditions of exemption from the responsibility (Paragraphs 45-46), the competence of the court of arbitration (Paragraph 47), and other dispositions (Paragraphs 48-49).

The second Convention contains general provisions (Paragraphs 1-2), provisions concerning the conclusion of contracts (Paragraphs 3-6), provisions relating to the liability of the importer (Paragraph 7) and of the exporter (Paragraph 8), provisions regarding the costs of the technical service (Paragraphs 10-17) and the guarantee (Paragraphs 25-28), and other provisions (Paragraphs 29-31).[21]

The sale of equipment of complete plants is, in certain respects, subject to special principles in the relationship between socialist states themselves. The Soviet Union, Czechoslovakia, the German Democratic Republic, Poland, and, to a lesser extent, Hungary, carry out such deliveries. These are based on the trade and payment agreements between governments, and sometimes on separate protocols and agreements. For instance, the agreement between the German Democratic Republic and China on the delivery of complete equipments of electrical, cement and light industry plants is based on a protocol of 1957. In the relationship between the German Democratic Republic and Poland, the obligation of the former is based upon the agreement of April 17, 1957. It should be pointed out that in exportation of complete industrial plant equipment connections of a new type have been emerging between people's democratic countries, with several of the countries undertaking the obligation to deliver *jointly* complete industrial plants. Such *agreements of co-operation* were concluded between the German Democratic Republic, Czechoslovakia, Poland, and Rumania on the construction of a cellulose combine in Braila, Rumania. The literature in people's democratic countries insists upon preparing General Conditions of Delivery binding all socialist countries in the matter of delivery of complete industrial plants.[22]

VI. TRADE TRANSACTIONS BETWEEN HUNGARY AND THE WESTERN STATES

The foreign trade transactions between Hungary and the Western states are conducted according to principles completely different from those prevailing in Hungary's relations with socialist states. In

21. *Id.* at 67-68.

22. BOGUSLAVSKY IN GRAZHDANSKOE PRAVO STRAN NARODNOI DEMOCRATII (CIVIL LAW OF PEOPLE'S DEMOCRATIC COUNTRIES) Genkin ed. 523 (1958); Hofmann, *Kooperations probleme beim Anlageexport*, 22 DER AUSSENHANDEL 809 (1957).

Western trading, the various commercial usages and trading customs play an important role, especially those included in the *Incoterms* (International Commercial Terms). These terms concern the division of expenses and risk between seller and buyer in connection with transportation, and they give a uniform interpretation to the terms employed in this context. The *Incoterms* were drawn up at the meeting of the International Chamber of Commerce held in Paris in 1936, and were adopted by twenty-five states, several of which have now become people's democratic countries. The text of the *Incoterms* 1936 was revised to a certain extent in Vienna in 1953. The *Incoterms* 1953 give uniform interpretation to nine terms of delivery, notably the following ones: ex works, ex factory, FOR (free on rail), FOT (free on truck), freight or carriage paid to, FAS (free alongside ship), FOB (free on board), CIF (cost, insurance, freight), C & F (cost and freight), ex ship, and ex quay. Besides these commercial usages the following terms are also used: CIFC (cost, insurance, freight, commission), CIFI (cost, insurance, freight, interest), and CIFCI (cost, insurance, freight, commission, interest). Under the *Incoterms*, terms of delivery and risk coincide in all cases except CIF, C & F, and *freight or carriage paid to*. In respect of the *ex works*, the risk is incumbent on the seller up to the time when he separates the goods individually and transfers them to the buyer within the stipulated period.

The *Incoterms* may only be applied if their application has been explicitly stipulated by the parties, because they are only a drafting guidance and not a system of international legal rules. Nevertheless, civil courts and arbitration commissions have adopted the *Incoterms* even if not invoked in a contract to decide legal disputes.

In addition to the use of *Incoterms* in Hungary's relationships with Western states, great importance attaches to the unified rules and usages which concern documentary credit, these having been adopted by the XIIIth Congress of the International Chamber of Commerce held June 11-16, 1951. The Hungarian translations of these rules and usages, as well as those of the *Incoterms*, were published with commentaries by the Working Group of the Department of Foreign Exchange of the National Bank of Hungary in 1953 under the title International Usages in Foreign Trade.

As regards relationships between some people's democratic and Western countries, the General Agreement on Tariffs and Trade (GATT), signed in Geneva on October 30, 1947, is also of significance. Only one people's democratic country (Czechoslovakia) is a party to this agreement, however.[23] Poland is an observer.

23. SZASZY, *op. cit. supra* note 5, at 315-17.

VII. CLEARING AGREEMENTS

Among the legal rules governing the trading activity of the state, great significance attaches to the *clearing agreements* which regulate the settling of accounts in foreign trade.[24] It should be pointed out that the clearing procedure is applied in Hungarian relationships with both socialist states and Western states. All commentators in people's democratic countries consider clearing procedure not as a temporary crisis device, but as a permanent institution which is justified (1) by the special nature of the socialist-planned economy and foreign trade as well as by the foreign exchange monopoly of the state, on the one hand, and (2) by foreign exchange restrictions introduced in certain Western countries, on the other. Hungarian writers differentiate bilateral and mutilateral clearing, clearing on one and on two accounts, goods clearing, mixed and total clearing, and clearing with and without swing.

The mode of accounting and making payments between Hungary and the European socialist states who are members of the Council of Mutual Economic Aid was formerly regulated under sections 35-45 of the General Conditions of Delivery and under the bilateral, trilateral, or multilateral clearing agreements concluded by the central state banks. At the beginning, there were only bilateral clearing agreements; then in 1948, trilateral agreements were concluded; and subsequently, at the meeting of the Council on June 20, 1957, a multilateral clearing agreement was adopted.

A. *The Bank of International Economic Co-operation*

In October of 1963 the U.S.S.R., Bulgaria, Hungary, the German Democratic Republic, Mongolia, Poland, Rumania, and Czechoslovakia concluded a Contention relating to the multilateral order of settling of accounts in transferable rouble and the establishment of the Bank of International Economic Co-operation. The Convention became effective on January 1, 1964; and from that date all accounts between the parties to the Convention have been settled in transferable rouble. The gold content of the transferable rouble is 0.987412 gram pure gold. Each party to the Convention may use its balance in the account of transferable roubles for the purpose of settlement of accounts. The Bank, which is a juristic person, has its seat in

24. *Id.* at 319; ALTINOFF, *op. cit. supra* note 5, at 305; Altschuler, *Pravovoye voprosy raschetnyx i kreditnyx otnoshenii SSSR. s evropeiskimi stranami narodnoi demokratii* (*Connections of the USSR with the People's Democratic Countries in the Field of Accounting and Credit*) in GENKIN, *op. cit. supra* note 5, at 172; WASSILEV, *Die rechtliche Regelung der internationalen Zahlungen durch Clearing im internationalen Handel zwischen Landren mit verschiendener Wirtsehaftsstrukur* in FRAGEN DES INTERNATIONALEN PRIVATSRECHTS 184 (1958).

Moscow. Its members are the states which are parties to the Convention. The tasks of the Bank are: (1) to settle the multilateral accounts in transferable rouble; (2) to grant credits in connection with the foreign trade and other commercial operations of the member states; (3) to acquire free means of payment and conserve them in transferable rouble; (4) to collect gold and freely convertible foreign exchange on the accounts; (5) to accept deposits from the member states and other countries and to effect banking operations with these means; (6) to carry on other banking operations in conformity with its tasks; and (7) to finance the establishment, reconstruction and operation of common industrial enterprises, factories, and other establishments out of the separated resources of the member states.

The Bank's capital stock of 300 million transferable roubles is derived from the member states, each being required to contribute on a fixed quota basis. The Bank has a reserve fund and can also create special funds. It is responsible to the limit of its own funds for its own liabilities; but it is not responsible for the liabilities of the member states, and the latter are not responsible for the liabilities of the Bank.

The organs of the Bank are: the Council, composed of representatives of the member states, and the Board of managing directors, with the president at the head. There are several departments and 120 officials. The Bank, the members of the Council, and the leading officials enjoy diplomatic immunities and privileges.

The functioning of the Bank in pursuance of Article 10 does not prevent the development of direct financial and other business relations among the member states, and the banks of the member states may open independent rouble current accounts for the reciprocal settlement of accounts between another.

It is important to state that the new system of the Convention does not alter the order of payments fixed by the General Conditions of Delivery and that no legal relation is established between the Bank and the foreign trade enterprises of the member states, the latter being connected (as regards accounting and credit relations) only with their proper national banks. Since payments resulting from other than commercial transactions do not come within the scope of the Bank, the settlement of such claims will be effected on special interest-free accounts opened by the banks of the member states in national currency.

The Bank grants credits in transferable rouble to the banks of the member states in the form of credit plans. The rate of interest, which is fixed by the Council, varies according to the character and the term of the credit granted. The Bank may also grant seasonal credits and interest-free clearing credits of a revolving character.

B. *Customary Methods of Payment*

The customary methods of payment deployed in the trade between Hungary and other socialist states with planned economies are as follows:[25] (1) payment against documents, *i.e.*, documentary collection (D/P), the special variants of which are prompt collection (immediate cash payment), special prompt collection, collection with time limit, and ordinary collection; (2) letter of credit, *i.e.*, documentary credit (L/C); and (3) ordinary remittance.

1. *Payment Against Documents.*—The essence of payment against documents is that the seller presents the documents on the goods to the bank and instructs the latter not to transfer the documents unless the buyer has the purchase price.

In the case of prompt cash, which is the most perfect form of payment against document, and which is completely unknown in the trading practices among Western states, the State Bank of the exporter's country credits his account with the equivalent of the transported goods immediately upon his surrendering of the documents, and debits simultaneously the corresponding clearing account. On the other hand, the State Bank of the country of the buyer debits the account of the buyer immediately, on the strength of the verified documents, and credits the clearing account of the country of the seller. As a rule, the seller is required to deposit with his own bank the invoice and the documents showing that the goods had been dispatched, *i.e.*, duplicate of the way-bill, bill of lading, receipt of the forwarding agent, postal receipt, etc. The bank will then conduct an examination to determine whether there are any divergencies concerning the facts as shown in the documents.

The special prompt collection is different from prompt cash inasmuch as the bank requests the presentation of the contracts concluded between the foreign trade enterprises, registers them, and examines them in the same manner as is done with letters of credit.

In the case of collection with time limit the seller deposits his documents with his own bank, and the latter transmits the documents to the bank of the buyer with the understanding that the buyer is bound to state within fourteen days whether the payment can or cannot be effected. Payment may be refused only on the ground of well-defined reasons, *e.g.*, incomplete documents, or delivery before the date fixed.

The ordinary collection is destined for the collection of payments if the requirements of prompt cash and collection with time limit have not been fulfilled (for example, the necessary document is missing).

25. SZASZY, *op. cit. supra* note 5, at 390.

In this contingency the buyer is not required to state whether he accepts or refuses the collection within any time limit. Furthermore, he is not obliged to give justification for his refusal.

In the case of payment against documents the buyer instructs his bank to pay a fixed amount to the seller, provided the former has dispatched the goods consigned to the buyer (or elsewhere as instructed by the letter) and has handed over the documents as required.

2. *Letter of Credit.*—For the buyer, the benefit of the letter of credit is that the seller receives the purchase price only if there has been compliance with conditions of the transaction; for the seller, the benefit is the certainty that, if he performs his obligations, he may feel quite sure that he will receive the countervalue. The bank is responsible for the proper conduct of the whole procedure, but it is not responsible for the authenticity of the facts contained in the documents. In case the letter of credit method of settlement is employed, the principal who instructs the bank is usually the buyer, and the beneficiary is ordinarily the seller. The bank opening the letter of credit informs the beneficiary either directly through the bank of the beneficiary or indirectly through its own offices. In the first instance, the opening bank assumes responsibility for the payment, whereas in the second, the bank furnishing the information acts only as a post office. The security for the granting of credit (deposit in cash, credit on current account, credit account) remains in both cases with the bank opening the credit; the documents are transmitted to this bank for examination and "negotiation." If the parties have assented to it, the negotiating bank may simultaneously be the bank of the buyer and of the seller. In addition, it should be noted that in these instances usually a time limit is fixed and the countervalue is paid by the bank within this time limit. The letter of credit may or may not be instantly payable upon the transmission of the documents; it may be revocable or irrevocable, divisible or indivisible, transferable or non-transferable; and it may or may not allow partial deliveries. In most instances, the submission of the bill, documents on the goods (bill of lading, duplicate of the way-bill, storehouse certificate, and the like), and other documents (insurance policy, certificate of origin, certificate on quality) are required in order to obtain payment. Special types of credit include the revolving letter of credit, the frame, the refund, and the local letter of credit.

3. *Ordinary Remittance.*—In the case of ordinary remittance, which is a looser form of payments against documents, the seller dispatches the goods directly to the address and disposal of the buyer and

sends the documents to his bank. In this situation, the seller does not retain possession, and the buyer is compelled to pay even though documents necessary for custom clearance are lacking.

VIII. REGULATION OF THE CARRIAGE OF GOODS IN FOREIGN TRADE

The state also plays an important role in the regulation of the *carriage of goods in foreign trade.*[26] Several people's democratic countries in Europe (Czechoslovakia, the German Democratic Republic, Hungary, Rumania, and Bulgaria) are parties to the multilateral Agreements on Transport of Goods by Railways (CIM) and on Transport of Persons and Luggage by Railways (CIV), which were signed in Bern on October 25, 1952, and which became operative on March 1, 1956. A separate agreement is applied, however, in the relations between the Soviet Union and people's democratic countries in Europe and Asia. This multilateral international agreement, which is known as the *International Agreement on Carriage of Goods by Rail* or the *Agreement for International Freight Communication* (AIFC), was concluded by the Ministries of Communications in Budapest on July 30, 1951, and became operative on November 1, 1951. In addition, agreements were signed in 1950 between the same states on *the transport of persons* and in 1959 on direct *mixed transport* of goods by rail and water. The Agreement mentioned first was revised in Moscow in 1953, in Berlin in 1955, and in Peking in 1956 and 1960.

The state railways of the following states are parties to the Agreement: Albania, Bulgaria, China, Czechoslovakia, the German Democratic Republic, Hungary, Korea, Mongolia, Poland, Rumania, the Soviet Union, and Vietnam. The Agreement has eight Annexes, the most important being: No. 4 on the carriage of dangerous goods, No. 5 on the carriage in tank wagons, and No. 6 on loading of open wagons. No. 1 treats the ticket of loading, No. 2 the form of the bill of freight, No. 3 the statement on the modification of the bill of freight, No. 7 deals with the lists to be drawn up concerning component parts of cars, trucks, tractors, and other vehicles, and No. 8 indicates the description of labels.

The Agreement is supplemented by the Unified Transit Tariff on transit carriage, the Service Instructions containing the rules for the execution of international carriage of goods by rail, and the Regulation on the reciprocal use of railway wagons. Further improvement of the Agreement and the control over its execution are entrusted to the Main Railway Commission, constituted in 1957 with headquarters in Warsaw, which is functioning under the direction of the annual

26. *Id.* at 327.

conference of the Ministers for Communications of the states' parties. The Unified Transit Tariff applies to consignments transported in transit by way of the frontiers, river ports, and maritime ports. Its beneficial effect is the elimination of the disparities which had existed between the good's tariffs (and which had considerably slowed down transport). The tariff is to be applied to every consignment irrespective of whether the transport has been consigned under a CIM, an AIFC bill of freight, or a bill of lading. The only condition for its application is that either the country of origin or the country of final destination be one of the socialist countries which are parties to the AIFC. The schedule of charges is remarkably low. There is a separate Annex listing the frontier lines, river ports, and maritime ports between which traffic is governed by these rates of tariff.

The socialist states, including Hungary, have also concluded agreements on the subject of carriage by water. Initially, these agreements covered transportation only on the rivers crossing several countries (as the Danube), or border rivers (as the Oder). The most important of these agreements is the General Conditions of Transport of Goods, concluded on September 26, 1955, by the Bulgarian BFU, the Hungarian MAHART, the Rumanian NAWROM company, the Soviet SDGP and the Czechoslovakian TSDS. It regulates (as of December 31, 1955) the conditions of transport carried on by these enterprises on the Danube River. The transport documents are the bills of lading (*connaissements, nakladnaja, or Ladeschein*), which must be made out according to the uniform patterns required under the General Conditions.

Several people's democratic countries are parties to the collective agreements regulating matters of maritime transport. Some of these countries, among them Hungary, are parties to some of the early agreements signed in Brussels (in 1910, 1924-1926, 1952, and 1957), including the Agreements of Brussels of August 25, 1924, regulating the liability of maritime shipowners and the bills of lading (Hungarian Acts Nos. IV and VI of 1924). In view of the fact that these agreements do not define charter-parties, the applicable legal definition should be indicated by the conflicts rules of the forum. The connecting factors concomitant with transport by land also arise in this matter with the proviso that in respect to charter-parties the language of the contract and sometimes the law of the flag is invoked by the courts. According to the majority opinion in Hungary, the connecting factors generally applicable to contracts are also to be considered valid in this matter. In my view the law selected by the parties or, in the absence of such, the law of the business seat of the shipowner should be applicable in this respect, too. Otherwise, it is customary

for the charter-parties to stipulate the application of the provisions of the *York-Antwerp Rules 1950* which cover the settlement of damages arising in the case of average. If a bill of lading has been made out on the strength of the charter-party, the relations between the owner of the bill of lading and the carrier are subjected to the *Hague Regulations of 1924,* which regulates the minimum liability and obligation of the maritime carrier, as well as his maximum rights and exemptions.

With regard to transport by air, several people's democratic countries (among them Hungary) are parties to the Agreement of Warsaw of October 12, 1929, on Air Transport (Hungarian Act No. XXVIII of 1936). This Agreement was revised in several respects at The Hague in 1955. In the Agreement the concept of transport by air is defined in a manner different from the Bern Agreement. In the former, transport by air is considered as international, even if the place of dispatch and the place of destination are in the same country, as long as the aircraft makes a landing in a foreign territory. The rules of liability of the carrier are imperative, *i.e.,* the extent of liability cannot be reduced; but the court (on the strength of its own law) may mitigate the liability of the carrier if the carrier succeeds in proving that the damage was due to the fault of the injured party, or that the latter had contributed to it. The main deficiency of the Warsaw Agreement is that the concepts connected with the liability of the carrier, *i.e.,* negligence and culpability, have remained unsettled.

IX. State Monopoly of Foreign Trade and Foreign Exchange

It is thus apparent that in Hungary, as in all socialist states, the direct influence of the state on foreign trade is based on the *state monopoly of foreign trade and foreign exchange.* The state monopoly of foreign trade was introduced first in the U.S.S.R. by the Decree of April 22, 1918, dealing with the nationalization of foreign trade. It was later put in a new form in the Civil Code of 1922, in the Constitution of 1936, and again in the new Civil Code of June 11, 1964. After World War II, the state monopoly of foreign trade was adopted by all socialist states. Article 14 (z) of the Constitution of the Soviet Union provides, for example, that foreign trade operated on the basis of the state monopoly comes under the state-wide problems directed by the Union. By analogy, the monopoly of foreign trade likewise falls under the competence of the state under Article 7 (2) of the Constitution of the Polish People's Republic. Article 6 of the Constitution of the Hungarian People's Republic declares that foreign trade shall be carried out by state enterprise. And, although the

Constitution of 1960 of the Czechosolvak Socialist Republic does not contain any explicit provision for the state monopoly of foreign trade, there is no doubt the entire national economy is being directed by a governmental plan, which includes state monopoly of foreign trade.

It is well known, as stated by Professor Vikton Knapp in a very interesting study on the function and activities of foreign trade corporations in the European socialist countries, that the state monopoly of foreign trade does not necessarily mean that the state itself is a party to individual contracts or legal arangements by which foreign trade is carried out (thus acting as a correspondent of foreign enterprises) although such a possibility is not excluded. In socialist countries, the correspondents of foreign enterprises are generally foreign trade corporations or, as the case may be, other corporate enterprises which are distinct from the state.

The state monopoly of foreign trade means that questions relating to the operation of foreign trade fall under the sovereign right of the state; hence, the state directs and controls by plan the entire foreign trade of the country. The state determines which legal persons have the right to act in foreign trade relations. The state monopoly of foreign trade also implies that the total turnover of goods with other countries is directed by the state plan of foreign trade—a plan which forms part of the national economic plan of the state. Furthermore, the state monopoly situation means that the ministries of foreign trade in the various socialist countries not only exercise exchange control, but also regulate the activities of foreign trade corporations both by controlling the fulfillment of the plan of foreign trade and by granting import and export permits or licenses.[27]

A Soviet author, W. S. Pozdnyakov, defines the notion of the monopoly of foreign trade as follows:

> The monopoly of foreign trade is the form of the direction by the state of the foreign trade. The state draws the export and import plans, the plans of foreign trade, of the carriage of goods, the foreign exchange plans. It determines the circle of the organs authorized to carry out foreign trade activity, their allotted special line, and ensures the uniformity of their operations. It concentrates the means of currency and foreign exchange and ensures uniform methods for settling the accounts. It ensures uniform proceedings for the affreightment of foreign ship's hold, foreign shipping space. It regulates the foreign trade transactions and controls their performance.[28]

27. KNAPP, THE FUNCTION, ORGANIZATION AND ACTIVITIES OF FOREIGN TRADE CORPORATIONS IN THE EUROPEAN SOCIALIST COUNTRIES (THE SOURCES OF THE LAW OF INTERNATIONAL TRADE WITH SPECIAL REFERENCE TO EAST-WEST TRADE) 53 (1964).

28. POZDINYAKOV, DAS STAATLICHE AUSSENHANDELSMONOPOL DER UDSSR UND DIE AUSSENHANDELSVERTRAGE DER SOWJETISCHEN WIRTSCHAFTSORGANIZATION. (DER AUSSENHANDEL UND SEINE RECHTLICHE REGELUNG IN 458 UDSSR) 12 (1963). The origi-

A. M. Smirnov adds to that: "Das staaliche Aussenhandelsmonopol bedeutet nicht nur das Monopol auf die Durchführung der Export-und Importoperationen, sein Inhalt is viel umfassender. Das Aussenhandelsmonopol hat für alle Foremen wirtschaftlicher Verbindungen mit ausländischen Staaten Bedeutung."[29]

Professor I. Vajda defines the notion of the state monopoly of foreign exchange as follows:

> The Socialist state monopoly of foreign exchange means that the international settling of accounts in a Socialist state is carried out by an organ specially appointed to that purpose. This may be a central state bank or a bank of foreign trade. Apart from them nobody is authorized to settle international accounts, to do business in foreign currencies, to deal in foreign exchange neither in the country nor abroad. On the strength of the state monopoly of foreign exchange all means of payments resulting from the export and from other international financial operations are the property of the socialist state, and are concentrated in the hands of a bank appointed by the State. These means of payments are utilized by the state for covering the import and the expenses to be spent abroad.[30]

Because of the state monopoly of foreign trade and foreign exchange in Hungary, foreign trade is carried out by foreign trade corporations which are constituted in the form of state enterprises, the status of which is governed by provisions generally applying to Hungarian state enterprises (particularly articles 28-32 of the Hungarian Civil Code). There is a departure from the rule, however, in respect to the competence to create foreign trade enterprises. The authority to constitute state enterprises operating only within the territory of the Hungarian People's Republic belongs to different organs, according to the importance of the respective enterprises; a foreign trade enterprise, however, can be established only by a decree of the Hungarian government.[31] Under Hungarian law, the foreign trade enterprises are legal persons which, by virtue of their statutes or other constituting instruments, are generally granted a monopoly to export and import certain strictly defined kinds of merchandise or to carry on another foreign trade activity.

The proper activity of the enterprises consists in concluding and executing individual foreign trade operations with foreign export or import correspondents and, at the same time, in assuring the deliveries by inland suppliers of goods for exportations and in securing

nal text of the work was published in Russian under the title: *Pravovoe regulirovanie vneshnei torgovli* SSSR (1961).

29. See *id.* at 14; MADL, *op. cit. supra* note 5, at 56.

30. VAJDA, *op. cit. supra* note 5, at 154.

31. KNAPP, *op. cit. supra* note 27, at 60.

the acceptance of deliveries of imported merchandise by inland customers.

All of the foreign trade enterprises act in their own name and on their own behalf, not only when carrying on the import and export of goods and other commercial activities, but also when securing the deliveries and the acceptance of deliveries by inland correspondents. In consequence, they are independent legal persons which do not act on behalf of the state; nor can the state act on their behalf.[32]

The foreign trade enterprises do not enjoy general capacity under the law, *i.e.*, the law does not confer rights and duties upon them as it does on natural persons; rather they enjoy special capacity—each foreign trade enterprise is, by virtue of its act of constitution and its statutes, entitled only to engage in foreign trade import and export operations concerning a certain category of goods or to supply services in a specified field. This exclusive and special legal capacity is related to the monopoly character of the enterprises concerned; in Hungary there would never be two foreign trade enterprises dealing in the same articles. Although in exceptional cases enterprises other than foreign trade enterprises carry out some activities in the field of foreign trade (generally exporting their own products), the arrangement does not derogate from the general principle which attaches monopoly character to the foreign trade enterprises.[33]

Pursuant to section 31 of the Hungarian Civil Code, foreign trade enterprises are held liable in Hungary for their obligations to the extent of the assets entrusted to them. The state is not liable for the obligations of these enterprises, and the enterprises are not liable for the obligations of other enterprises or organizations or for those of the state—they are responsible only for their own obligations, and only to the extent of their own property subject to execution. The particular significance of this situation is that the business partners of foreign trade corporations risk no danger that the foreign trade enterprises would claim for themselves the immunities and prerogative which belong to the state and its property.[34]

In Hungary there are twenty-seven specialized foreign trade enterprises under the control and authority of the Ministry of Foreign Trade.[35] Nine other enterprises under the authority and control of the Ministry of Metallurgy and Machine Industry are entitled to export their own products. One enterprise under the control of the "Szövetkezetek Országos Szövetsége" (SZOVOSZ), National Union of Co-operatives, exports agricultural products. Three other enterprises,

32. *Id.* at 61.
33. *Id.* at 61-62.
34. *Id.* at 63.
35. NYERGES, *op. cit. supra* note 5, at 158-61; SZENDROI, *op. cit. supra* note 5, at 24.

under the control of other Ministries, export game, films, and stamps. One enterprise under the authority of the Ministries of Home and Foreign Trade (the Konsumex) imports consumer goods.

The following state foreign trade enterprises are operating in Hungary under the control of the Ministry of Foreign Trade: Agrimpex, Monimpex, Terimpex (agricultural articles); Artex, Hungarotex, Importex, Lignimpex, Modex, Tannimpex (articles of light industry); Chemolimpex, Medimpex, Mineralimpex (chemical and mining products); Elektroimpex, Metrimpex, Transelektro (electric articles and precision instruments); Komplex, Metalimpex, Mogürt, Nikex, Technoimpex (materials of heavy industries, machines, and vehicles of transport); Ferunion (mass products belonging to various branches of the production); Kultura (books, periodicals, reviews, gramaphone records, and discs); Licencia (patents); Presto (advertising and advertisement); Mert (control of quality); Masped, Mafracht (MTÜ) (transportation and conveyance of goods). Enterprises under the control of the Ministry of Metallurgy and Machine Industry are: Ganz-Mavag Wilhelm Pick Vagon-és Gépgyár, Györ, (rolling-stock); Budavox, Medicor, Egyesült Izzolampa és Villamsooági rt, Ganz Árammérogyar (articles of telecommunication and electric and precision instruments); Pannonia (certain articles of the ironworks of Csepel); Gábor Áron Vasöntöde (gas generators); Tesco (technical-scientific co-operation). Under the control of various other Ministries are: Filatelia (stamps), Hungarofilm (films), and Mavad (game). Under the common control of the Ministries of Home and Foreign Trade is the Konsumex (exchange of assortments in home trade).

The general manager is at the head of the organization of the foreign enterprise. Under him are several administrative departments—personnel, planning, traffic, forwarding, and shipping departments, departments of statistics, of interstate affairs, of economy, and of market-research; legal advisor; the agent responsible for the export and barter-transactions; and propaganda group. There are also several commercial departments with separate sections for the various articles exported and imported; a central department for the solution of questions of principle; and the bookkeeping department. The working order, the order of business, the organization, the management of the enterprise, and the limits and the measure of the rights and responsibilities of the various departments and employees are determined by the statutes of the enterprise.

Other very important organs of the state monopoly of foreign trade and foreign exchange in Hungary are the Trade Representations. The organization and functions of these Representations differ completely both from those of similar organs in the Western countries and from those of the trade missions (*torgpredstvo*) of the U.S.S.R.

In Western countries the trade delegations form a part of the diplomatic missions in the form of commercial sections. They are agents of the Foreign Office, and their members possess the diplomatic immunities and privileges. As in Hungary, the foreign trade in the Soviet Union is operated by monopoly state associations (*obyedinyeniya*) for export and import. Again, the word "monopoly" is to be understood as meaning that these associations have the exclusive right to deal only in strictly defined kinds of merchandise. The associations, as in Hungary, are distinct from the state—they are independent legal persons.[36] There are exceptions, however; the Soviet torgpredstvo is an organ of the state administration. Its capacity as an organ of the Soviet state is defined by Soviet rules of law, particularly by the Ordinance of September 13, 1933. It forms part of the Soviet diplomatic mission and enjoys the diplomatic immunities and privileges. It can conclude commercial operations within the territory of the receiving state, and it can enter into engagements to furnish security, to agree on arbitral clauses, and the like. Since these activities are carried out on behalf of the government of the Union of Soviet Socialist Republics, the Soviet government is liable for the obligations assumed by the torgpredstvo.

The Hungarian Trade Representations do not conclude commercial operations; they do not enter into transactions; and they do not furnish security. The members of the Trade Representations were until recent times not agents of the Foreign Office, but of the Ministry of Foreign Trade; they did not form part of the Hungarian diplomatic missions. They study the commercial possibilities of the foreign country, follow with attention the connections of the Hungarian foreign trade enterprises with the market in question, make proposals, present suggestions and carry out the tasks which have been entrusted to them by the Hungarian enterprises. In addition, they carry on negotiations with foreign importers and exporters and with foreign trading companies; they give information to foreign businessmen on the possibilities of the Hungarian commerce; and they take part in the preparation of the interstate trading agreement.[37]

Besides the foreign trade enterprises and Trade Representations, the following state organs are connected with foreign trade in Hungary: the Central Planning Board, which draws up the plan of foreign trade; the Parliament and the Council of Ministers, which approve the plan; the Ministry of Finance, which is the chief authority in the field of foreign exchange operation; the Hungarian National Bank, which is the control authority and which keeps the accounts of the Hungarian enterprises; and the Hungarian Bank of Foreign Trade,

36. KNAPP, *op. cit. supra* note 27, at 59.

37. SZENDROI, *op. cit. supra* note 5, at 24.

which is a joint-stock company. On the strength of the Decree No. 17/1960 KKM, the latter organ since August, 1960 has taken over jurisdiction on certain kinds of transactions (barter-transactions, switch-business, re-export, etc). The Hungarian Bank of Foreign Trade also grants the permits for the foreign trade transactions and carries out the banking operations connected therewith. Also connected with foreign trade operations are the Central Court of Arbitration, the Chamber of Commerce and the Corporation of the Average Commissioners.

X. DIRECT AND INDIRECT STATE MEANS TO INFLUENCE FOREIGN TRADE

In most countries the state makes use of several *direct and indirect means* to influence foreign trade. The *direct* means include customs' duties, compensating taxes, the rake-off, the system of contingents and quotas, and the system of licenses. The *indirect* means include subsidies, tax and credit bounties, export guarantees, export credits, and anti-dumping laws.[38]

As a rule, from five to seven per cent of the income of the state is derived from customs' duties. Switzerland is an exception; there the customs' duties amounted to 32 per cent of the income of the state in 1959 and 1960. The chief objects of the customs' duties are to hold back imports by increasing the price of the imported goods and to secure the home market for the capital invested in home production.

The effect of the system of customs' duties is lessened by the use of preferential tariffs (*e.g.*, the preferential tariffs of the British Commonwealth and of the European Common Market), by the determination of the dutiable price of goods on a higher level than the amount of the invoice, by the introduction of the system of licenses, and by the establishment of customs' contingents.

Besides the customs' duties, the imports are obstructed by the various compensating taxes (the turnover and purchase taxes and the various excise-duties on coffee, tea, sugar, shell, playing cards, saccharine, tobacco, and the like) and by various fees, duties, and charges (*e.g.*, cranage, dock dues, excises, customary charges, custom house dues, registration taxes, insurance premiums, harbour dues, landing charges, consular fees, storage fees, postage, charges for warehousing).

The rake-off means that payment of a non-fixed compensating fee is prescribed in favour of the organ of the business federation conforming to the value of the cargo and to the home market price. The system of contingents and quotas means that the state is ready to grant permits in favour of a state (or several states) for the

38. NYERGES, *op. cit. supra* note 5, at 85.

importing or exporting of goods within the limits of a certain value or quantity. The system of licenses is the most effective means by which the state can influence the foreign trade.

Of the *indirect* means available to the state, the use of subsidies is the most effective. Although in most countries both agriculture and industry obtain support from the state, the subsidies granted to agriculture are, as a rule, the more important. The Economic Commission for Europe and the FAO have pointed out in their report of August 30, 1960, that in no country of Europe is agriculture abandoned to the inclemencies and vicissitudes of the weather.

The forms of the export-bounty are quite varied. They include the remission of taxation, tax reliefs, reimbursement of taxes, financing of the establishment, renovation of factories, and others. The various tax and credit subsidies, bounties, drawbacks and export guarantees are also very current; and the export is often financed directly by the state or by semi-state organs, such as the Export-Import Bank in the United States, in Japan, and in the German Federal Republic.

The states protect themselves against the dumping which threatens and jeopardizes the home market with anti-dumping laws. Hungary protects herself against these methods of state intervention in the following ways: by interstate trade agreements which generally include lists of contingents; by a system of licenses; by the new Hungarian double customs tariff; and by a stipulation of the most favored nations clause.

The interstate trade agreements concluded by Hungary have been discussed above. The system of export and import licenses was introduced in Hungary by the Law-Decree No. 30 of 1950 and the Decree No. 4/1959/V. 28/KKM. of the Minister of Foreign Trade, and the decree was implemented by Instruction No. 17/1959/KKÉ.17/KKM and recently by the Instruction No. 6/1965 (KKÉ) KKM of the Minister. The import and export licenses granted by the Ministry are quota licenses, frame licenses, and individual licenses. The quota license renders possible the exportation and importation, within a year, of the whole quantity of goods included in the contingent determined by the trade agreement. The frame license renders possible the importation from any country, and the exportation to any country within the time limit determined by the Ministry of Foreign Trade, of all goods included in the list published in May 28, 1959, by the *Külkereskedelmi Értesitö* (Gazette of Foreign Trade). The individual license is granted by the Ministry for those goods which are not included in either the contingents or the list published in the Gazette of Foreign Trade. Goods, the invoice of which is less than 25,000 forints, may be imported and exported by the foreign trade enterprises without any license.

The new Hungarian customs tariff, which was promulgated by the Decree No. 20/1961/V. 25/Korm on May 25, 1961, and implemented by the Decree No. 2/1961/VII.20/KKM. of the Minister of Foreign Trade became effective on September 1, 1961. It comprises two kinds of customs' duties: the "autonomous" duties and the "conventional" duties. The customs tariff does not extend to the objects imported in passenger transport or to gifts. Because the new customs tariff lists the autonomous customs' duties in two columns, it is called the "double customs' tariff." The first column comprises the minimum duties, and the second column the maximum duties. In the case of the majority of goods, the two are identical. All customs' duties are ad valorem duties. The minimum duties, as well as the lower conventional duties, are applied to goods originating from, or destined to, Hungary on the strength of either international agreements or *de facto* the principle of the most favoured nation. The maximum duties are applied to goods originating from such countries which apply for the goods originating from, or destined to, Hungary on the strength of either international agreements or *de facto* the most favoured nation clause.

As regards the most favoured nation clause, the official Hungarian viewpoint was expounded by the Hungarian experts at the meeting of the Economic and Social Council (ECOSOC) of the UNO held in New York on April 25, 1961, and at the so-called meeting of the experts of the Economic Commission for Europe held in Geneva in June, 1959. According to this viewpoint, the most favoured nation principle includes two kinds of obligations. In a positive sense it means that the state entitled to claim the application of the clause is to be dealt with in the same manner as the most favoured state. In a negative sense the clause means that no disadvantageous, prejudicial treatment may be applied—that no discrimination may be made to the prejudice of the state which is entitled to most favoured nation treatment. The purpose for the stipulation of application in the clause is to secure and maintain fundamental equality between the states. The most favoured nation clause presupposes reciprocity, *i.e.*, that the favour is mutually secured for the contracting states. This follows from the basic legal principle of the equality of states.

In the opinion of Hungarian authors only the absolute and unconditional most favoured nation clause may be regarded as a real most favoured nation clause. It alone guarantees the foreign state immediate and full enjoyment of the favour granted to any third state, whether *de facto* or by law, without any recompense. Before World War II, certain states (including the United States up to the 1920's) persisted in the conditional application of the most favoured nation clause, *i.e.*, they secured the most favoured treatment to a third state

only when they could receive from the other contracting party a consideration (a recompense) in the same or similar value as their contracting partner had obtained in consequence of the application of the most favoured nation clause. As Professor Haberler has pointed out, the conditional most favoured nation clause, from a legal point of view, therefore, had to be considered as a *pactum de contrahendo, i.e.,* as an obligation to enter into negotiations with the other contracting party.[39]

In the third decade of this century the standpoint of these states suddenly changed, and they have now accepted the unconditional principle of the most favoured nations. Why? "The reason was," writes Rittershausen, "that the United States in these years passed over to the export of industrial products. Fifty-one per cent of their export consisted in fully manufactured articles. Accordingly, they had to suffer more and more because of the European industrial customs' duties. . . . The insistence on the former policy would have meant the restriction of the industrial import."[40] It was between 1934 and 1938, during Cordell Hull's tenure as Under-Secretary of State, that the government of the United States definitely broke with the conditional most favoured nation clause.

In opposition to the Hungarian view, Article II of GATT restricts the unconditional most favoured nation treatment in two directions. On the one hand, it limits the effect of the Convention to the export and import duties, fees, and customs' clearances and to the transfer of funds connected with the foreign trade. On the other hand, it limits its effect to relationships between the states which are parties to the Convention (general most favoured nation treatment).

Hungarian authors recognize two exceptions to the application of the most favoured nation clause: the favours granted in the small frontier traffic and the favours granted to the members of customs union. On the other hand, the clause includes (according to the prevailing view in Hungarian legal literature) the regulation of legal questions connected with the international carriage of goods and with the situation of alien natural and juristic persons carrying on commercial or industrial activity in another state. Thus, the application of the clause may not be restricted to the relationships existing between the states which are parties to the GATT. And the view prevailing in Hungarian legal literature does not consider the case of the incomplete custom union to be an exception to the application of the most favoured nation clause.[41]

39. HABERLER, INTERNATIONAL TRADE 365 (7th ed. 1960).

40. RITTERSHAUSEN, INTERNATIONAL HANDELS UND DEVISENPOLITIK 468 (2d ed. 1955).

41. The problem of the most favoured nation clause has been dealt with in an interesting study by Endre Takacs in "A NEMZETKOZI GAZDASAGI KAPCSOLATOK JOGI

XI. HUNGARIAN COURT PRACTICE AND THE REGULATION OF STATE TRADING ACTIVITIES

We now turn to the Hungarian court practice relating to the regulating of state trading activities in Hungary.

In the socialist states, including Hungary, the ordinary state courts do not play an important role concerning legal questions connected with foreign trade; rather these questions are decided by courts of arbitration.[42] These courts, elected *ad hoc*, have practically no importance in inland relations, and less importance in international relations than in Western countries. In contrast, permanent institutional arbitration commissions, which are called upon to exercise jurisdiction in legal disputes connected with foreign trade, are of great significance in socialist countries. In the Soviet Union there are two permanent arbitration commissions: the Foreign Trade Arbitration Commission (co-ordinated with the Federal Chamber of the Soviet Union), which was created by the Decree of June 17, 1932; and the Maritime Arbitration Commission, which was created by the Decree of December 13, 1930. Both commissions are seated in Moscow. In the socialist states, such permanent arbitration commissions generally have been established in conjunction with the chambers of commerce. The Hungarian Arbitration Commission operates in conjunction with the Hungarian Chamber of Commerce; both are seated in Budapest. The Commission's rules of procedure were prescribed by Decree No. 1 (1953)VII.28, as amended by Decree No. 1/1959/I.14/KKM.

The members of the Commission are elected annually by the general assembly of the Chamber of Commerce, and the persons elected are registered. Although Hungarian litigants select their judge from this registrer, a foreign litigant can choose a foreign judge who is not included in the register. Exclusion of an arbitrator can take place

PROBLÉMAI" (LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONSHIPS) edited by Gyula Simon in Budapest in 1963.

42. Szaszy, *Arbitration of Foreign Trade Transaction in the Popular Democracies*, 13. AM. J. COMP. L. 441 (1964); Szaszy, *Nationality of Arbitral Awards* in QUESTIONS OF INTERNATIONAL LAW 144 (1966); SZASZY, NEMZETKOZI POLGARI ELJARASJOG. (INTERNATIONAL CIVIL PROCEDURE) 627 (1963). The organization and practice of the Hungarian Arbitration Commission is well explained in the excellent book of Laszlo Farago, NEMZETKOZI VALASZTOTTBIRASKODAS (INTERNATIONAL ARBITRATION) (1960); *A viszontkereset megengedhetösége az NDK külkereskedelmi k a m a r a j a mellett Szervezett Valaszott Birosagés a Magyar Kereskedelmi Kamara Mellett Szervezett Valaszott Birosag gyakorlataban (Admissibility of Counterclaims in the Practice of the Courts of Arbitration Organized with the Chambers of Commerce of the German Democratic Republic and Hungary)* in JOGTUDOMANYI KOZLONY 169 (1963); and *Elvek és Gyakorlat a Magyar Kereskedelmi Kamara Valaszotott Birosaganak Itelkezésében (Principles and Practice in the Decisions of the Arbitration Court of the Hungarian Chamber of Commerce*, in A NEMZETKOZI GAZDASAGI KAPCSOLATOK JOGI PROBLÉMAI (LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS) 54, 76 (1963).

only for causes enumerated in the code of civil procedure. The arbitration procedure is usually carried out by a council of three members; if they are unanimous, however, the litigants are entitled to request that a single arbitrator (one whose name appears in the register) decide the case. The chairman is elected by the arbitrators; if they cannot agree, he is nominated by the secretary general of the Chamber (on the basis of the register). The administrative functions connected with Arbitration Commissions are performed by the legal secretary of the Chamber and he is entitled to participate in the discussions of the arbitrators. Moreover, he signs the protocol and the decisions of the Commission, together with the chairman. The procedure begins with the statement of the claim by the claimant; then the defendant gives his answer in writing. A foreign party may appoint a foreigner as his representative, but in this case he is obliged to designate an inland person for purposes of service. Evidence is taken either by the Commission itself, by one of its members, or by a competent court of first instance (district court). Attendance of the parties at the hearing can be dispensed with only by mutual agreement of the parties.[43]

The practice of the Arbitration Commission was, at the outset, uncertain and hesitant; even today it is not sufficiently precise on various questions. Initially the question of the law to be applied by the Arbitration Commission was unsettled. The Hungarian Arbitration Commission, in its award No. Vb/565/1956, adopted the view that the law of the defendant is applicable; then in 1961 the Arbitration Commission changed its position and in its award No. Vb/1024 /1961, applied the law of the seller. The latter is unquestionably the correct position. It is to be observed, however, that other awards of the Hungarian Arbitration Commission have referred to the *lex loci contractus* or the *lex loci solutionis* as being applicable.

Similarly, in the beginning the practice of the Arbitration Commission was uncertain on the question whether, in cases where the law to be applied has separate provisions concerning the legal relations of *state organizations inter se*, such separate provisions (*e.g.*, in Hungary Decrees No. 50/1955/VIII.19 MT., replaced by Decree No. 10/1966 Mt., and 51/1955/VIII.19 MT., replaced by Decree No. 15/1962 MT., or the general Code of Commercial Law) should be applied. After the new Civil Code became operative (May 1, 1960), the Hungarian Arbitration Commission (in its awards Nos. VB/565/ 1956 and Vb/566/1956) correctly decided that Decrees Nos. 50/1955

43. Concerning the organization of the Courts of Arbitration in socialist states we have to refer to the excellent new book of Laszlo Farago, *op. cit. supra* note 42, as has been pointed out correctly by Mr. Peter Katona in the excellent work by GYORGY, KATONA, & UJLAKI, *op. cit. supra* note 5, at 97.

and 51/1955 MT., concerning reciprocal legal relations of state organizations, regulate only the legal relations of *inland* state enterprises; therefore the rules of the general Commercial Code are to be applied to state trading. The question was important from the point of view of the period of prescription; the period is six months according to the above-mentioned Decree No. 50/1955/MT., whereas it is thirty-two years according to the general Commercial Code.

In addition, the practice of the Arbitration Commission initially was uncertain on the following point. When the leading foreign trade agencies of the popular democracies meet at the end of the economic year and verify goods which should have been delivered but in fact were not, the question arises as to whether such goods are to be written off or are to be carried forward to the next year—in other words, whether the cancellation should have legal effect *ex tunc* or *ex nunc*. Dependent on the resolution of this problem is the subsidiary question of whether an enterprise which has not made delivery is obliged to pay a penalty. The Hungarian Arbitration Commission has attributed retroactive force to the cancellation and, therefore, has held that no penalty is to be paid. The point of view of the other popular democratic commissions has not been so precise, however.

The view of the Arbitration Commission concerning exoneration for delay is also of interest. The Commission generally allows exoneration for any one of the following reasons: technical changes required by the party issuing the order, delay in the receipt of material delivered by the party issuing the order, delay in the dispositions concerning transport on the part of the party issuing the order, and *vis major*. The Arbitration Commission has not allowed the excuse of *vis major* where a party has had difficulties in procuring the goods or where the harvest has been bad; nor has it allowed the excuse if the party who suffered *vis major* did not observe the necessary formalities (notification in writing, Vb/801/1959, Hungarian award). On the other hand, it has allowed the defense if a government organ has forbidden distribution of the goods either on account of a bad harvest or on account of a different distribution of the goods. The correctness of this view (as properly observed by Mr. Faragó) is very doubtful, however. If the public authority, while independent of the enterprise in legal personality, is at the same time the owner of the enterprise and gives instructions for its operations, such instructions might well be considered an internal action of the enterprise in view of the identity of public authority and ownership (Hungarian Arbitration Commission award No. Vb/554/1957).

In the reciprocal trade among socialist states, it is highly important to respect the order of the necessary steps to be taken in making objection and acknowledgement thereof. The General Conditions of

Delivery prescribe the following order: (1) the buyer files his objection within the prescribed period; (2) the seller refuses the objection; (3) the buyer maintains his objections; and (4) the buyer files his suit within the prescribed period.

If the buyer does not give notice within the time limit fixed for objection, the goods are to be considered as received without fault. If he files objection and the seller does not answer within the prescribed time limit, the objection is considered to be admitted. If, on the other hand, the seller gives an answer and the buyer does not maintain his objection with a notice given within the prescribed time limit, the right of objection ceases to exist in the same way as the right to file a lawsuit ceases to exist if the lawsuit is not filed within the prescribed time limit.

In some cases, both parties may be in default. The buyer may have filed his objection too late, but the seller did not repudiate the same within the time limit; or the buyer may have made his declaration to maintain his rights too late. The first party in delay may try to establish a legal basis in his favour by reason of the delay of the other party on the ground that, although he was in delay, the delay of the other party exculpated his own delay and restored his rights. The Arbitration Commission has not accepted this argument, but it has determined that the first party to delay forfeits his rights, and that it is of no consequence whether the opposing party made a declaration or at what time it was made. In other words, the *vitium* of the first party in delay is not cured by the fact that a counter-declaration also was not made in time or was omitted.[44]

Finally, reference should be made to the adjudication of objections concerning quality and quantity. The Arbitration Commission has considered cases in which objection was made to the quality of the delivered goods, and on this basis the buyer claimed either the return of the goods and, upon their return, repayment of the purchase price (*actio redhibitoria*) or a proportionate reduction of the purchase price (*actio quanti minoris*). In addition, there have been cases in which the party who suffered prejudice repaired the defective goods and claimed both the cost of the repair and the penalty provided in case of delay, the penalty being claimed for the period between the defective delivery of the goods and their repair. A standing problem of the Arbitration Commission was whether the verification of quality, on which the claimant based his claim for cancellation or reduction of the purchase price, was regular and appropriate.

The Arbitration Commission has been disposed to make a declara-

44. On the question of the order to be followed in making objection, the awards Nos. Vb/706/1959, Vb/574/1957, Vb/572/1957, and Vb/703/1958, of the Hungarian Arbitration Commission are especially important.

tion of principle and a practical concession if deviation from the prescribed quality was in question. The statement of principle is that verification of quality has to take place according to the legal system, rules, and customs of the country of the buyer; general practice everywhere is inclined in this context. The concession amounts to an acknowledgement by the Arbitration Commission that, excepting the case of visible deficiency, the task of verification, and the accompanying time limit, starts with the arrival of the goods not at the importing foreign trade enterprise, but at the industrial undertaking or inland enterprise making effective use of the goods. This concession is operative independent of whether the delay was fixed by contract or prescribed by general law. It is to be mentioned in this connection that the receipt of goods is sometimes effected only formally, *i.e.*, "on paper" only.

The situation is different in the case of discrepancy concerning quantity. In this respect the Arbitration Commission has examined whether the sender (the seller) did or did not request verification as to weight and pieces from the railways, and whether the addressee (the buyer) requested the drawing up of a record concerning weight and the number of pieces at the receiving railway station. If this has been done on both sides, the Arbitration Commission has allowed claims for quantitative discrepancy. If this has been done by one party only, the Commission has considered this party to be in a stronger position because he is able to confirm his statement by appropriate railway documents. If, however, this has not been done by either party, the Commission has decided according to the circumstances of the case, always taking into account the classical principle *"affirmanti incumbit probatio"* and its legal consequences. In this connection, awards Nos. Vb/579/1957 and Vb/612/1958 of the Hungarian Arbitration Commission are relevant.