Maryland Journal of International Law

Volume 1 | Issue 1 Article 7

Most-Favored-Nation Treatment of Imports to the U.S. From the U.S.S.R

Stanley D. Metzger

MOST-FAVORED-NATION TREATMENT of Imports to the U.S. from the U.S.S.R.

STANLEY D. METZGER*

No aspect of international trade between the United States and the Soviet Union has received more attention in recent years than the question of most-favored-nation treatment of Soviet imports to the United States. Most-favored-nation (MFN) treatment means that imported articles from a country enjoying it cannot be subjected to customs duties or other charges in connection with importation, or rules and formalities, less favorable than that which is accorded to like imported articles originating in any other country. It is a rule, whether established by domestic law of the importing country, or by international agreement, or both, against discriminatory treatment of imports based upon their place of origin.

Soviet imports to the United States have not enjoyed most-favored-nation treatment since 1951—they have been subjected to the duties specified in the Smoot-Hawley Tariff Act of 1930, not to those duties as they have been reduced in trade agreements with other countries concluded since the 1934 Trade Agreements Act. In 1972, in conjunction with the conclusion of a Lend-Lease Settlement Agreement, the United States and the Soviet Union negotiated a Trade Agreement[1] which provided for most-favored-nation treatment of Soviet imports with respect to customs duties, their internal taxation or distribution in the United States, any charges upon transfers of payments for their importation, and any rules or formalities in connection with their importation. The Trade Agreement by its terms was to enter into force after written notices of acceptance were exchanged, which it was understood would take place following changes in U.S. domestic law permitting MFN treatment to be accorded to Soviet imports. The Trade Act of 1974, enacted on January 3, 1975, after much travail, authorized MFN treatment to goods imported from the Soviet Union under specified conditions, including assurances concerning emigration of Jews and others from the Soviet Union, and a limitation of $300 million on Exim Bank credits during a 4-year period, without further Congressional authorization. On January 14, 1975, Secretary of State Kissinger announced that

*Professor of Law, Georgetown University Law Center.

[1] Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding Settlement of Lend Lease, Reciprocal Aid and Claims, Done at Washington, D.C., October 18, 1972, 67 DEPT. OF STATE BUL. 898 (1972).

the Soviet Union had informed the United States Government that "it would not put into force" the 1972 Trade Agreement, because to do so would mean accepting "a trade status that is discriminatory and subject to political conditions."[2] The result is that for the near future, at least, MFN will continue not to be accorded to Soviet imports to the United States.

This paper outlines the origins and status of the discriminatory legal regime which existed from 1951-1974, and the likely economic consequences of adoption or non-adoption of a most-favored-nation system, in the process touching upon some of the problems which have beset efforts to effectuate such a change.

A. *The Legal Regime*

Most-favored-nation treatment was accorded to Soviet imports to the United States between 1934 and 1951. Under the Trade Agreement Act of 1934,[3] as amended and extended until 1951, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under the Trade Agreements program was required as a matter of domestic American law to be applied to products of "all foreign countries, whether imported directly or indirectly."[4] This meant that tariff reductions and bindings negotiated with other countries were applied in like situations to imports from the U.S.S.R. While MFN treatment could be suspended whenever a country discriminated against American goods, such suspensions had occurred infrequently, and not in respect of U.S.S.R. imports.[5]

The Trade Agreements Extension Act of 1951,[6] which was considered and enacted during the active hostilities of the Korean War, required the President to withdraw the application of MFN treatment from products of the U.S.S.R. and certain other countries under its "domination or control."[7] The Administration had not proposed this amendment of the 1934 Act. It was first proposed by the minority of the Ways and Means Committee of the United States House of Representatives during the Committee's consideration of the extension bill,[8] but only in respect of future tariff concessions; it was rejected by the majority of the Committee, and then voted into the bill by the full House. When the bill reached the Senate Finance Committee, Secretary of State

---

[2] Dept. of State Press Conference, Jan. 14, 1975, p. 1 (PR 13/46).
[3] Trade Agreements Act of 1934, 48 Stat. 943.
[4] *Id.* 944.
[5] *See* T.D. 47600, 68 Treas. Dec. 470 (1935) (Germany); T.D. 48947, 71 Treas. Dec. 707 (1937) (Australia).
[6] Trade Agreements Extension Act of 1951, 65 Stat. 73.
[7] *Id.* § 5.
[8] H.R. Rep. No. 14, 82d Cong., 1st Sess. 22 (1951).

Acheson testified against it.[9] The "effects of this amendment would be virtually nil," he pointed out, for it "would have little effect upon the salability of dutiable Soviet products," and "would not affect the salability of their duty-free products at all." The Senate nonetheless rejected his position and even extended the House prohibition to all trade concessions, past or future; the resulting Act reflected the Senate position. At the same time the Senate adopted an amendment prohibiting imports of Soviet mink, sable, and other furskins, again over Administration opposition.[10] This too found its way into the Act.

There is no doubt that the reason for the 1951 Congressional action denying MFN treatment to Soviet imports was "political," as Secretary Kissinger characterized it in testimony to the Senate Finance Committee in March, 1974.[11] Congress was taking an opportunity at hand, the consideration of a trade bill, to indicate its strong disapproval of Soviet support for North Korea, then in combat with American armed forces, despite its awareness of the extremely limited economic effect of its action. Indeed, this is but one of many examples[12] in the area of controls over East-West trade during the past twenty-five years in which the Congress has taken a position far more restrictive than that of the Administration.[13] In more general terms, they represent a familiar occurrence in American politics—substantial domestic public opinion concerning an international matter which differs markedly from dominant official opinion relating thereto, and is reflected in Congressional action in opposition to Administration policy. The most recent of these has been Congressional mandating of a cessation of military aid to Turkey in the wake of the Turkish invasion of Cyprus following the temporary overthrow of Makarios by the then-ruling Greek military dictatorship.

The statutory denial of MFN treatment of Soviet imports was reiterated in the 1962 Trade Expansion Act,[14] and thus has continued for the past twenty-four years. Successive Administrations sought ways to restore it, though with varying degrees of intensity. The Eisenhower Administration indicated, in 1959-60 discussions with the U.S.S.R. concerning a lend-lease settlement (one of a number held from time to time without result

[9] *Hearings on H.R. 1612 Before the Senate Committee on Finance*, 82d Cong., 1st Sess., 3-10 (1951).

[10] S. Rep. No. 291, 82d Cong., 1st Sess. (1951).

[11] *Hearings on H.R. 10710 Before the Senate Committee on Finance*, 93d Cong., 2d Sess., pt. 2 at 455 (1974).

[12] *E.g.*, The Mutual Defense Assistance Control Act of 1951 (The Battle Act), 65 Stat. 644 (1951), *as amended*.

[13] One of the rare exceptions took place in 1969 when the Administration opposed Senators Muskie and Mondale in their successful effort to loosen controls over U.S. exports to the Soviet Union and certain other countries. The Administration wished to "link" this relaxation to other matters affecting U.S.-Soviet relations. *See* Export Administration Act of 1969, Pub. L. No. 91-184.

[14] Trade Expansion Act of 1962, § 231, 76 Stat. 872, 876 (1962).

until 1972), that an atmosphere favorable to MFN restoration could be created if a reasonable lend-lease settlement could be negotiated. A bill proposed in the mid-1960s by the Johnson Administration which would have authorized restoration of MFN treatment, based on similar conditions, failed to secure sufficient Congressional support to be reported out of committee.

Finally, in 1973, following the 1972 negotiations of a Trade Agreement, a lend-lease settlement, and related agreements reflecting a "detente" in U.S.-Soviet relations, the Nixon Administration sought similar authority in order to effectuate these agreements. As in 1951, however, political considerations proved to be a formidable obstacle to the Administration's proposal, in this instance primarily because of Soviet restrictions upon Jewish emigration. While these restrictions are more closely connected with the "internal affairs" of a foreign state than, for example, Soviet support of North Korean hostilities in 1951, it is difficult to classify them as being wholly "internal." For they are among that class of a nation's acts which are also "affected with an international concern," the right to emigrate having been one of the human rights (Article 13(2)) proclaimed by the General Assembly of the United Nations in 1948 as a "common standard of achievement for all peoples and all nations."

On October 10, 1973, the House Ways and Means Committee reported out H.R. 10710,[15] the "Trade Reform Act of 1973," with changes in Title IV (relating to MFN for Soviet imports) which added conditions upon the authority of the President to accord MFN to Soviet imports. Under the bill, MFN could not be provided to the products of any "nonmarket economy" country that 1) denies its citizens the right or opportunity to emigrate, 2) imposes more than nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever, or 3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice. MFN could be accorded only after the President submits a report to the Congress indicating that such country is not in violation of "1), 2), or 3)" above.[16]

The House of Representatives acted favorably upon H.R. 10710 on December 11, 1973, following two days of debate. However, before doing so it adopted by a vote of 319 to 80 an amendment to Title IV as it had been reported out—the so-called Vanik Amendment.[17] The Vanik Amendment added to the denial of MFN

[15] H.R. 10710, 93d Cong., 1st Sess. (1973).
[16] *Id.* § 402.
[17] 119 CONG. REC. 11064 (daily ed. Dec. 11, 1973). Rep. Charles Vanik (D., Ohio) was the House sponsor of the amendment.

treatment to certain countries restricting emigration, the denial of participation by any such country "in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly," which means primarily Exim Bank loans.

In March 1974, when hearings upon the House-passed bill began before the Senate Finance Committee, Secretary of State Kissinger strongly opposed the Vanik Amendment (in the Senate it was known as the Jackson Amendment after Senator Henry Jackson (D., Wash.), the leading proponent of the measure), as well as the denial of MFN treatment written into H.R. 10710 by the House Ways and Means Committee.[18] The ensuing deadlock over the emigration problem continued until October 18, 1974, when Secretary Kissinger and Senator Jackson outlined a "compromise" in a public exchange of letters.[19]

The Secretary of State informed the Senator that he had been assured that the Soviet Government would adhere to the following "criteria and practices" in its emigration policy:[20] no punitive actions will be taken against the persons attempting to emigrate; no extraordinary administrative barriers will be raised against those applying for emigration; applications for emigration will be processed on a non-discriminatory basis as regards place of residence, race, religion, national origin and professional status of the applicant; hardship cases will be given sympathetic consideration; the collection of an emigration tax will remain suspended; and the U.S. will be in a position to inform the Soviet Government of any indications that these criteria are not being followed.[21] Secretary Kissinger also stated that "it will be our assumption" that with the application of these criteria the rate of emigration from the U.S.S.R. would begin to rise promptly from the 1973 level in correspondence with the number of applicants.

In his letter to Secretary Kissinger, Senator Jackson listed a series of "understandings" which conditioned his agreement to modify the Jackson-Vanik Amendment. Essentially, these "understandings" are additional specifications to the criteria listed by Secretary Kissinger: the military draft will not be used against those seeking to emigrate; criminal prosecution for attempting to emigrate will be barred; adult applicants for emigration will not have to receive permission from their parents or relatives; persons "who have had access to genuinely sensitive classified information" will not be impeded from emigrating; and

[18] *Supra* note 10, at 456.
[19] *See* 120 CONG. REC. No. 174, S21411-12 (Dec. 13, 1974) for texts of letters.
[20] *Id.*
[21] *Id.*

the "minimum standard of initial compliance" will be the issuance of 60,000 visas per year by the Soviet Government.[22]

The purpose of the exchange between Senator Jackson and Secretary Kissinger was to obtain for the President a statutory power of waiver of the restrictions imposed by Section 402 of the Trade Act, which were summarized above. The Jackson amendment of § 402, adopted 88-0 by the Senate on December 13, 1974, allows the President to extend MFN treatment and to continue granting credits to the Soviets for an initial period of eighteen months,[23] and thereafter under a complex procedure: one month prior to the period's expiry the President could ask Congress for a one-year renewal of his authority to waive the restrictions of the Jackson-Vanik Amendment; the Congress could grant the renewal by passing an affirmative concurrent resolution within sixty days;[24] if Congress did not pass such a resolution, the trade benefits would continue unless either House of Congress voted within forty-five days to discontinue them.[25]

The Soviet Government did not publicly acknowledge the Kissinger-Jackson arrangement. Indeed, Secretary Kissinger made clear in his testimony before the Senate Finance Committee on December 3, 1974, that a formal agreement on emigration from the Soviet Union did not exist and could not be expected.[26] Secretary Kissinger did not disclose, then or earlier, that on October 26, 1974, when he visited Brezhnev in Moscow, he had been given a letter denouncing the Jackson-Vanik amendment and threatening rejection of the 1972 Trade Agreement. The Gromyko letter was only released by the U.S.S.R. on December 18, 1974, on the eve of final Congressional action on the Trade Act of 1974.[27]

B. *The Economic Consequences*

Various estimates of the possible growth of U.S.—U.S.S.R. trade have been made, on varying hypotheses, were MFN to be a reality. Given the development of economic relations in a setting of political rapprochement, Ray Cline, former Director of the State Department's Bureau of Intelligence and Research, posited a theoretical calculation of growth of U.S. exports to the U.S.S.R. to about $2 billion annually, with Soviet imports amounting to $1.7 billion.[28] According to Cline, the achievement of such a vol-

---

[22] *Id.*
[23] *See* note 19 at S21406-7. Another adopted amendment, the Harry Byrd amendment, limits the amount of loans, guarantees, etc., to the Soviet Union to $300 million aggregate for 4 years without prior Congressional approval. *Supra* note 19, at S21400.
[24] *Id.* at S21406-7.
[25] *Id.*
[26] N.Y. Times, Dec. 4, 1974, at 5, col. 3.
[27] EAST-WEST TRADE COUNCIL, NEWSLETTER (Vol. 3, No. 2, Jan. 31, 1975).
[28] 67 DEPT. OF STATE BUL. 334, 338 (1972). For a generally more conservative assessment, *see* N.Y. Times, Nov. 5, 1973, at 61, col. 1 (Shabad article).

ume of trade would "take quite a few years," however, and the "creation of more systematic division of labor between the two countries."

What role would MFN play in this kind of projection? A study by the staff of the U.S. Tariff Commission[29] has indicated that while tariff discrimination has "generally constituted less of a handicap to U.S.S.R. trade than is commonly supposed," it nonetheless has affected adversely about 10 per cent (based on value) of Soviet imports in 1970. The study pointed out, however, that the traditional trade pattern between the U.S.S.R. and the United States and "probably the deliberate actions of U.S. importers and Soviet foreign-trade corporations, lead to a concentration in imports of the items which avoid the full rates." It further noted, however, that there were a number of Soviet products which might well experience growth in exportation to the U.S. if MFN were accorded, among them: plywood; manganese ore; ferrovanadium; steel wire rods, plates, sheets, and other shapes; metalworking equipment; hydrofoil boats; electrical-generation equipment; cotton and man-made fibers; and apparel.[30]

Mere according of MFN treatment would work no magic. Quality manufactures, "reliable and fast installation and repair service,"[31] and effective merchandising are necessary to lasting trade gains. Nonetheless, it seems clear that continuing denial of MFN to Soviet imports will impede, and according MFN would assist, the growth of U.S. U.S.S.R. trade in practical no less than in psychological ways.

Conclusion

It is of course a truism that political considerations affect seriously both the bilateral economic relations between the U.S. and the U.S.S.R., and the other economic relationships which they are in a position to influence. There has been a presumption in the U.S. toward insulating "normal" economic intercourse from political considerations—as evidenced by the 1934 Trade Agreements Act. This presumption, while stronger in respect of dealings with lesser powers, has been apparent, in degree, even in bilateral U.S.-U.S.S.R. relations. Unfortunately, or perhaps inevitably in Marxist-Leninist terms, there is no evidence that the U.S.S.R. has practiced such "compartmentalization" in any of its foreign policies, and little likelihood that it will innovate on this score in the foreseeable future. Despite the fact that "link-

[29] F. MALISH, JR., UNITED STATES EAST EUROPEAN TRADE (U.S. Tariff Commission, Staff Research Studies No. 4, 1972).
[30] *Id.* 44.
[31] *Supra* note 28, at 335.

age" of the economic and political seems ordained for some time to come, however, it would be most useful for the citizens of both countries were political considerations at least to be contained, and the development of trade relationships were to proceed on the basis of nondiscrimination and comparative advantage in the production and distribution of goods and services. Unless progress is made in this direction—and it takes actions, including a certain forbearance in the face of smaller provocations by both countries to make it—the future of trade relations will likely track fairly closely political relationships, with little likelihood of long-term dependability. It is a pity, like so much of what we have recently been witnessing.