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John Quigley

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Most-Favored-Nation Status and Soviet Emigration: Does the Jackson-Vanik Amendment Apply?

JOHN QUIGLEY*

In the Trade Act of 1974, Congress adopted a free-trade policy for the United States. It included, by way of exception, a provision that "products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment)" if "the President determines" that the country "denies its citizens the right or opportunity to emigrate."¹ The denial of most-favored-nation status should continue until "the President determines that such country is no longer in violation" of this requirement.² This Article analyzes the application of this provision to the Soviet Union.

THE TRADE ACT OF 1974

Senator Henry Jackson and Representative Charles Vanik proposed the quoted language as an amendment to the Trade Act of 1974. It is popularly referred to as the Jackson-Vanik Amendment. The Amendment's purpose is to pressure certain countries to permit freer emigration. While Congress seems to have had the U.S.S.R. and its allies in mind, the Trade Act names no countries. Instead, Congress used the general phrase "nonmarket economy." It did not explain why it barred most-favored-nation treatment only to "nonmarket economy" countries that denied emigration.

Since the Trade Act does not name specific countries, one might expect that the President would designate the "nonmarket economy" countries that deny emigration. The Jackson-Vanik Amendment seems to direct the President to determine which countries fail to meet the statutory requirements.³ It states that "products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment) . . . during the period beginning with the date on which the President determines

* Professor of Law, Ohio State University. LL.B., M.A., Harvard University, 1966.

1. 19 U.S.C. § 2432(a) (1983).

2. *Id.*

3. *Id.*

that such country—(1) denies its citizens the right or opportunity to emigrate.”⁴

By specifying that the denial of most-favored-nation treatment was to begin on the date of a Presidential determination, Congress implied that the President was to make that decision. Yet, no President has made such a determination under the Jackson-Vanik Amendment. Instead, successive Presidents have assumed that the Amendment applied to the U.S.S.R. and allied countries and have not granted them most-favored-nation status. Presidents have issued waivers for those countries to which they did not want Jackson-Vanik to apply. For example, President Ford granted a waiver to Romania in 1975.⁵ That waiver continued in effect until July 3, 1988, when Romania “renounced” the waiver after Congress held hearings on human rights in Romania.⁶ President Carter also granted a waiver to Hungary in 1978,⁷ and to the People’s Republic of China in 1979.⁸ The two latter waivers remain in force.⁹

This method of implementation contradicts the statutory language, directing the President to make a determination. It would seem meaningless to grant a waiver to a country that has never been designated as falling within the Amendment. While it is unlikely that any judicial remedy exists against the President’s implementation of the Amendment, one may question whether the Amendment applies to any countries at all, given the lack of any Presidential determination.

This reading of the Jackson-Vanik Amendment is reinforced by the Amendment’s role in the Trade Act of 1974. A principal aim of the Act is free trade. Congress stated that “the overall United States negotiating objective” was “more open and equitable market access and the harmonization, reduction, or elimination of devices which distort trade or commerce.”¹⁰ The Trade Act of 1974 established a presumption in favor of free trade. Congress declared as its policy that the United States was better served by a world trade scheme with few barriers to trade. It called on the President “to take all appropri-

4. *Id.*

5. Exec. Order No. 11,854, 40 Fed. Reg. 18,391 (1975).

6. 5 Int’l Trade Rep. (BNA) 286 (Mar. 2, 1988). In light of Romania’s renunciation, the Reagan Administration suspended that country’s waiver. *Id.* at 499 (Apr. 6, 1988).

7. Exec. Order No. 12,051, 43 Fed. Reg. 15,131 (1978).

8. Exec. Order No. 12,167, 44 Fed. Reg. 61,167 (1979).

9. Determination of President No. 87-14, 52 Fed. Reg. 22,431 (1987).

10. 19 U.S.C. § 2113 (1983).

ate and feasible steps within his power . . . to harmonize, reduce, or eliminate" barriers to international trade.¹¹

The Jackson-Vanik Amendment provides an exception to the overall objective of the Trade Act of 1974. It creates an obstacle to trade, in pursuit of a particular policy objective. As a statutory provision providing an exception, the Jackson-Vanik Amendment must be construed narrowly.¹²

Given what Congress intended, the President has never invoked the Jackson-Vanik Amendment against any country. Thus, an argument can be made that it has never been implemented. Nonetheless, successive Presidents since 1975 have assumed the Jackson-Vanik Amendment applies to the U.S.S.R. and its allies, with the exceptions noted, and have denied them most-favored-nation treatment.¹³

If Jackson-Vanik is to apply, the President should make a determination that it applies to a particular country. Absent such a determination, the President is under the general injunction of the Trade Act of 1974 to pursue free trade; this means granting most-favored-nation status.

POLICY OBJECTIVES OF THE JACKSON-VANIK AMENDMENT

Since adopting the Jackson-Vanik Amendment in 1974, Congress has not given any substantial attention to the possibility of repealing it. The Amendment has enjoyed the support of liberals, since it promotes human rights. It has also enjoyed the support of conservatives, since it is directed against the U.S.S.R.

Yet, policy objections have been raised against the Amendment and its application to the U.S.S.R. The Atlantic Council of the United States has urged that the Jackson-Vanik Amendment not be applied to the U.S.S.R., because the Amendment has failed to increase emigration and has exacerbated U.S.-U.S.S.R. relations.¹⁴ Application of the Jackson-Vanik Amendment to the U.S.S.R. has been criticized as ineffective in achieving more substantial emigration.¹⁵

Furthermore, Presidents have inconsistently applied the Jackson-

11. 19 U.S.C. § 2112(a) (1983).

12. *U.S. v. Scharton*, 285 U.S. 518, 521-22 (1932).

13. *Administration Does Not Plan to Address Jackson-Vanik Waiver at Summit*, *Verity Says*, 5 Int'l Trade Rep. (BNA) 691 (May 11, 1988).

14. 4 Int'l Trade Rep. (BNA) 458 (Apr. 1, 1987).

15. Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 N.W.J. INT'L L. & BUS. 213, 263-64 (1988).

Vanik Amendment.¹⁶ For example, the Amendment's application to the People's Republic of China was waived in 1979, not because of a change in China's policy on emigration, but for other foreign policy reasons.¹⁷ It has been suggested that the U.S.S.R.'s willingness to permit large-scale emigration has been greater in periods of détente with the West, and that this factor is more significant than the Jackson-Vanik Amendment.¹⁸

There are few guidelines on how the President should determine whether a "nonmarket economy" country "denies its citizens the right or opportunity to emigrate." Whether the East European countries have "nonmarket economies" is not as clear as it may have seemed in 1974. The Jackson-Vanik Amendment does not define the meaning of denying emigration. It could mean a total denial of emigration at one extreme or a denial in a single instance at the other.

The U.S.S.R. forbids emigration where: (1) the person possesses state secrets or the emigration would otherwise affect state security, (2) the rights of other Soviet citizens would be impaired, (3) the person has not met financial obligations to the state, (4) the person is being prosecuted for a crime, or (5) the person has been convicted of a crime and has not yet served the sentence.¹⁹ The Jackson-Vanik Amendment provides no guidance on whether use of any or all of these factors would constitute a country's denying emigration.

International human rights law includes a right to emigrate but permits states to deny emigration on bases similar to some of those used by the U.S.S.R. The International Covenant on Civil and Political Rights states that although "everyone shall be free to leave any country, including his own," a state may restrict that right "to protect national security, public order, public health or morals or the rights and freedoms of others."²⁰ It is generally recognized that a country may restrict emigration for such reasons.²¹

16. *Id.* at 265.

17. *Id.*

18. Percy, *The Crisis of Soviet Jewry: Lessons from the 70's and a Response for the Mid-80's*, 31 FED. B. NEWS & J. 212 (1984).

19. Statute on Entry into the U.S.S.R. and Exit from the U.S.S.R., Sept. 22, 1970, SP SSSR (1970), no. 18, item 139, as amended SP SSSR (1986), no. 31, item 163, *reprinted in* 26 I.L.M. 425 (1987).

20. International Covenant on Civil and Political Rights, art. 12, para. 3, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967). For a discussion of article 12 of this Covenant, see H. HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 24-26 (1987).

21. HANNUM, *supra* note 20, at 4.

EMIGRATION FROM THE U.S.S.R.

In 1988 the U.S.S.R. permitted the emigration of approximately 20,000 Jews.²² According to the National Conference on Soviet Jewry, only 2,696 other Soviet Jews had applied to emigrate and were refused by the Soviet government.²³ An Administration official was quoted as saying that the Administration anticipated that in the near future approximately 2,000 Soviet Jews per month would be permitted to emigrate. In 1988 the U.S.S.R. also permitted the emigration of 45,000 Germans and 10,000 Armenians.²⁴

Given these figures and projections, it is difficult to make a case that the U.S.S.R. is currently prohibiting the emigration of a significant number of its citizens. The fact that a certain number may be desirous of emigrating, and are not permitted to do so, does not necessarily mean that the U.S.S.R. is violating the right of emigration. As indicated above, certain valid grounds are recognized for restricting the right to emigrate.

Presently, there is no factual base for determining that the U.S.S.R. is a country that denies the right or opportunity to emigrate. If those desiring to emigrate are permitted to do so, a country would not appear to deny the right or opportunity to emigrate, at least to any significant degree.

Given the recent trend in Soviet emigration, President Bush might grant the U.S.S.R. a waiver from the Jackson-Vanik Amendment.²⁵ Vanik, citing increased emigration, urged Bush to grant a waiver to the U.S.S.R.²⁶ Others have suggested that it should be granted only if the current Soviet policy continues for some unspecified period.²⁷ As far as a Presidential determination is concerned, however, the only issue is whether a country denies emigration. If it presently does not deny emigration, the fact that it may have done so

22. A figure of 20,082 was given by the Intergovernmental Committee for Migration (Geneva), *Israel Drawing Even Fewer Soviet Jews*, Chicago Tribune, Jan. 6, 1989, at 4, col. 3; and 19,287 by the National Conference on Soviet Jewry (U.S.A.); *Reagan: Soviets Can Host Rights Meeting*, Chicago Tribune, Jan. 4, 1989, at 3, col. 3. The U.S. State Department gave a figure of 19,292 in its annual human rights report. U.S. Dept. of State, *Country Reports on Human Rights Practices for 1988* (1989).

23. *Reagan: Soviets Can Host Rights Meeting*, Chicago Tribune, Jan. 4, 1989, at 3, col. 3.

24. 6 Int'l Trade Rep. (BNA) 205 (Feb. 15, 1989).

25. Address of Representative Stephen Solarz, International Relations Task Force, Women in Government Relations, 6 Int'l Trade Rep. (BNA) 142 (Feb. 1, 1989).

26. 6 Int'l Trade Rep. (BNA) 183 (Feb. 8, 1989).

27. *Soviet Bid to U.S. on Easing of Trade Curbs Is Expected*, N.Y. Times, Dec. 6, 1988, at A6, col. 1.

in the past would be irrelevant. The fact that it may do so in the future would also be irrelevant. If that were to occur, the President could issue a new executive order repealing the waiver.

The matter seems to be beyond the realm of discretion. The Jackson-Vanik Amendment applies only if the President determines that a country denies emigration.²⁸ Absent such a determination, there is no statutory basis in the Jackson-Vanik Amendment for a denial of most-favored-nation treatment.

Nonetheless, United States decisions on Jackson-Vanik waivers have focused on the country's overall human rights policy, rather than solely on emigration.²⁹

A State Department spokesperson suggested that even if the U.S.S.R. cannot be shown to be restricting emigration, a waiver to Jackson-Vanik would still not be required.³⁰ That position misconstrues the Trade Act of 1974. Since the Act sets a presumption in favor of free trade, the President is required to promote free trade unless a statutory exception applies. If emigration policy is not an obstacle, the President is required to grant most-favored-nation status.

CONCLUSION

Since 1975, each President has misconstrued the Jackson-Vanik Amendment. No President has properly invoked Amendment. At present, there is no factual basis for applying it to the U.S.S.R. The President is thus under the general obligation stipulated by the Trade Act of 1974 to pursue a free trade policy with the U.S.S.R. Therefore, the President is required by the Trade Act of 1974 to negotiate with the U.S.S.R. towards most-favored-nation status.

28. 19 U.S.C. § 2432(a) (1983).

29. 6 Int'l Trade Rep. (BNA) 205 (Feb. 8, 1989).

30. *Id.*