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MFN RELATIONS WITH COMMUNIST COUNTRIES: IS THE TWO-DECADE OLD SYSTEM WORKING, OR SHOULD IT BE REVISED OR REPEALED?

*Taunya L. McLarty**

Most Favored Nation (“MFN”) trade status has been a cornerstone of U.S. trade policy since 1934, and it is extended to all nations except those specifically denied MFN status by U.S. law.¹ Since 1934, the United States has used MFN status as leverage to further U.S. national security and foreign policy goals, and on a few occasions, has used it as a tool to obtain trade concessions.

After World War II, the emergence of the United States and the Soviet Union as the world’s superpowers led to chilled diplomatic and economic relations between the two countries. In response, Congress passed the Trade Agreements Extension Act of 1951² to suspend MFN status for all communist countries, which collectively were referred to as the Sino-Soviet bloc. While other developed economies continued to trade with the Sino-Soviet bloc during the Cold War, the U.S. tariff wall blocked the import of many products from these countries and caused the targeted countries to reciprocate with trade barriers to U.S. exports. In balance, however, the U.S. economic position

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1. When the United States affords MFN trade status to another country, it treats the goods from that country with no less favorable treatment than the goods from other trading partners.

2. Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 5, 65 Stat. 73 (codified as amended at 19 U.S.C. § 1351 (1994)).

was strengthened worldwide because the United States was a major force behind the trade-liberalizing rounds of negotiations in multilateral fora that continued under the auspices of the 1947 General Agreements on Tariffs and Trade ("GATT").³

By the early 1970s, the United States was prepared to build on the GATT's Kennedy Round of negotiations of the 1960s. There was sufficient momentum in Congress to pass the Trade Act of 1974,⁴ which authorized further multilateral negotiations and set forth U.S. objectives for such negotiations to liberalize world trade.⁵ Additionally, Title IV of the Trade Act of 1974 contained new guidelines for trade relations with communist countries, also referred to as non-market economies ("NMEs").⁶

Title IV of the Trade Act of 1974 intended to strike a balance between what appeared to be sometimes competing interests—the promotion of free trade versus the preservation of national security and foreign policy interests. The tension between these issues has invoked intense conflict between the

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT]. GATT was signed in Geneva, Switzerland, on October 30, 1947. Generally, GATT has had as a goal the enhancement of trade through lower burdens on all GATT parties.

4. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2111-2495 (1994)).

5. This authority was used by the U.S. Trade Representative to negotiate the Tokyo Round of Negotiations in 1979. The Tokyo Round was the seventh round and produced several side agreements to GATT. Additionally, the Tokyo Round reshaped the Anti-Dumping Code and concluded the first Subsidies Code. *See* GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1979). It also resulted in other agreements on customs valuation, government procurement, and technical barriers to trade.

6. NMEs will have to be defined based on the structure of countries' trade and investment regimes, not based on a former political classification. The U.S. Trade Representative, the Department of Agriculture, the Department of Commerce, and the International Monetary Fund ("IMF") all have definitions of NMEs. The definitions are almost identical, and most of them give the Soviet Union as an example:

Nonmarket Economy: Term used to describe an economic system in which economic activity is regulated by central planning, as opposed to market forces such as supply and demand. Economic factors, such as production targets, prices, costs, investment allocations, inputs, and most other aspects of economic decision making, are executed in accordance with a national economic plan drawn up by a central planning authority. Characteristic of the economic systems of the Soviet Union and most other communist countries.

A PREFACE TO TRADE, USTR GLOSSARY OF INTERNATIONAL TRADE TERMS (1982).

United States and the affected NMEs and has invoked debate between past and current executive and legislative branches.⁷

Essentially, Title IV of the Trade Act of 1974 gave the President the authority to restore MFN status to such NMEs if the NME met a specified two-tier test on trade and freedom of emigration, specifically: (1) completion of a bilateral trade agreement between the NME and the United States; and (2) compliance with freedom of emigration provisions by the NME.⁸ This article considers the Title IV requirements, which have their genesis in the Cold War era, in light of the historical events leading up to the enactment of the Trade Act of 1974, and in the context of the legislative intent and interaction between Congress and the Administration during consideration of the bill.

The effectiveness of Title IV is evaluated in light of its application to several countries: some that satisfied the two-tier test but at a later date had their MFN withdrawn again; some that satisfied the two-tier test and are still under its application; and some that were under the two-tier test but now have permanent MFN status. Because China has emerged as one of the largest and fastest growing world markets, this article focuses on Title IV's application to China in light of its application to other communist countries.

Finally, this article examines, regardless of the geopolitical map of the 1970s and regardless of what Congress intended in 1974, whether the Title IV two-tier test for MFN status can serve a functional purpose of promoting or protecting goals that are vital to current U.S. national interests. The substantive and procedural legislative requirements for the negotiation, approval, implementation, enforcement, and termination of trade

7. Directly in response to President Clinton's policy on China, which is subject to the Title IV requirements, Senator Richard Lugar claimed that "[t]he Administration is showing a poverty of imagination in its responses to the Chinese." A MAJORITY REPORT OF THE SUBCOMM. ON INT'L SEC., PROLIFERATION, AND FED. SERVS., SENATE COMM. ON GOV'T AFFAIRS, *THE PROLIFERATION PRIMER 3* (Comm. Print 1998) (quoting *Missile Proliferation in the Information Age: Hearings Before the Subcomm. on Int'l Sec., Proliferation, and Fed. Servs. of the Senate Comm. of Gov't Affairs*, 105th Cong. 31 (1997)).

8. See Trade Act of 1974 §§ 402, 404, 405, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2431-2435 (1994)).

agreements are often designed to promote and reinforce U.S. economic objectives, national security interests, and foreign policy goals. Whether such legislative requirements produce the intended results must be re-evaluated periodically. This article concludes that MFN treatment has been a useful tool in some respects since 1974, and that Title IV, as currently applied, has faults that were not foreseeable in the 1970s. Thus, this article recommends alternative legislative tools for some U.S. goals and considers new legislative ideas for others.

I. STATUTORY FRAMEWORK FOR MFN TREATMENT OF COMMUNIST COUNTRIES

A. 1934 Grant of MFN to All Countries

The Reciprocal Trade Agreement Act of 1934 granted MFN tariff status to all countries.⁹ Therefore, there is not a list of countries that qualify for MFN status. All countries receive MFN treatment from the United States unless a country is statutorily disqualified.¹⁰

MFN trade status allows foreign countries to export to the U.S. market at a certain level of tariffs. The United States bases three different tariff levels for all importable goods on three classifications of countries. Column 2 tariffs, the highest level of tariffs, apply to countries denied MFN status.¹¹ Col-

9. See Reciprocal Trade Agreement Act, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (1994)).

10. For purposes of comparison, the State Department lists 190 independent countries in the world, 62 dependent countries, Serbia and Montenegro, and Taiwan. See *Department of State Homepage* (visited Feb. 18, 1999) <<http://www.state.gov/www/regions>>.

11. The Column 2 rates average 12.15%. See OFFICIAL STATISTICS OF THE U.S. DEPT OF COMMERCE, U.S. INTERNATIONAL TRADE COMMISSION ORACLE DATABASE (1997) (giving the trade weighted *ad valorem* tariffs, i.e., the percentage of tariffs that are actually collected from U.S. imports from all trading partners within a particular column). The Column 2 average rates, or non-MFN average rates, however, could be much higher as applied to a specific country. For example, the 12.15% would be higher if the Column 2 rates were applied against a country from which the United States receives substantial imports of products that have a particularly high tariff. China, for instance, based on its 1995 exports to the United States, would have faced an average duty rate of 44.1% if it did not have MFN status and was under the Column 2 rates. See *The Costs to the United States Economy That Would Result From Removal of China's Most Favored Nation Status*, INT'L BUS. AND ECO. RE-

umn 2 tariffs were enacted at the height of the U.S. trade protectionist era in 1930. They have not been lowered since their implementation.¹² General Column tariffs apply to MFN trading partners; General Column tariffs have been lowered over time through the GATT rounds of negotiations.¹³ Special Column tariffs apply to free trade agreement partners of the United States and recipients of the Generalized System of Preferences ("GSP"), the Caribbean Basin Initiative ("CBI"), and the Andean Initiative.¹⁴ Special Column tariff levels have also been reduced over time.

B. 1951 Withdrawal of MFN From Communist Countries

Until 1951, the United States did not discriminate against products from countries that became communist or countries dominated by communism. The MFN status of the Soviet Union and all countries of the then Sino-Soviet bloc, however, was

SEARCH CORP. (June 1996). This 44.1%, however, would likely reduce over time due to market forces in the United States. The demand for Chinese imports would decline due to the sudden price increase in the products that had previously faced little or no duty but, under Column 2, would face high duties. Most toys, for example, are currently imported from China duty free, but if China lost its MFN status, Column 2 would impose tariff rates of 40% to 70%. See *Harmonized Tariff Schedule of the United States, Chapter 95* (visited Feb. 18, 1999) <<http://www.customs.ustreas.gov/imp-exp/rulings/harmoniz/index.htm>>.

12. See Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended in scattered sections of the U.S.C.).

13. In the various rounds of negotiations under the General Agreement on Tariffs and Trade, these tariff levels have progressively decreased. Currently, they average 2.77%. See OFFICIAL STATISTICS OF THE U.S. DEPT OF COMMERCE, U.S. INTERNATIONAL TRADE COMMISSION ORACLE DATABASE (1997) (giving the trade weighted *ad valorem* tariffs, i.e., the percentage of tariffs that are actually collected from total U.S. imports from all trading partners within a particular column). Some of the NME countries, which were not party to the GATT and are not members of the WTO, obtain the benefit of these rounds of negotiations if they have MFN treatment from the United States under Title IV of the Trade Act of 1974 because MFN status requires the United States to afford them the same treatment with regard to tariffs that the United States affords the WTO members.

14. Currently, they average 0.15%. See *id.* The United States has free trade agreements with Canada, Mexico, and Israel. The GSP, CBI, and Andean Initiative recipients are generally developing countries that receive preferential trade and tax benefits, unilaterally granted by the United States, to diversify their exports and increase their foreign exchange reserves, which is intended to accelerate their economic growth and development and decrease their dependence on foreign aid. See HOUSE COMM. ON WAYS & MEANS, 105TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 104-06 (Comm. Print 1997).

suspended under the authority of the Trade Agreements Extension Act of 1951.¹⁵ This resulted in the United States imposing Column 2 tariff levels, the 1930 rates, instead of General Column tariffs against imports from any communist country.

The 1951 suspension defined the U.S. policy for communist countries until the mid-1970s. In 1974, there were nineteen countries, including the former Soviet Union, that were denied MFN tariff status.¹⁶

C. 1974 Reinstatement of MFN to Communist Countries

Congress kept the 1951 suspension of MFN status in place through section 401 of Title IV of the Trade Act of 1974.¹⁷ The drive in Congress in the 1970s, however, was to liberalize global trade. This movement led to giving the President latitude to restore MFN status to NMEs if they met certain conditions under the parameters of Title IV of the Trade Act of 1974.

Under the Title IV parameters, which involve a coordinated effort of the executive and legislative branches, MFN status has been restored to many former communist countries. Only six countries are currently denied MFN status.¹⁸ Even so, in 1974,

15. Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 73 (codified as amended at 19 U.S.C. § 1351 (1994)). Following World War II, the United States also imposed export restrictions from the United States to communist countries. In 1948, the United States subjected all such U.S. exports to special licensing procedures. See *Special Report to the Congress and the East-West Foreign Trade Board on Impact on U.S. Imports of Granting Most-Favored-Nation Treatment to Romania*, USITC PUB. 734, A-1 (June 1975).

16. These countries included: Albania, Bulgaria, the People's Republic of China, Cuba, Czechoslovakia, East Germany, Estonia, Hungary, parts of Indochina under communist control or domination, North Korea, the Kurile Islands, Latvia, Lithuania, Outer Mongolia, Romania, Southern Sakhalin, Tanna Tuva, Tibet, and the former Soviet Union. See S. REP. NO. 93-1298, at 201 (1974); H.R. REP. NO. 93-571, at 79 (1973).

17. Trade Act of 1974 § 401, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2431 (1994)). Congress considered a bill similar to the 1974 Act the previous year, but it was folded into the 1974 Act. See H.R. 10710, 93d Cong. (1973).

18. Still today, Afghanistan, Cuba, Laos, North Korea, Vietnam, and Yugoslavia (Serbia and Montenegro) do not have MFN status. Vietnam and Laos are currently negotiating bilateral agreements. See *The Harmonized Tariff Schedule of the United States, General Note 3(b)* (visited Feb. 9, 1999) <www.customs.ustras.gov/imp-exp/rulings/harmoniz/hrm3.html>.

the Senate Finance Committee recognized that “[t]he United States has lagged behind other non-communist countries in expanding its trade relations with the communist world.”¹⁹

II. 1974 TWO-TIER TEST FOR RE-ESTABLISHING AND MAINTAINING MFN FOR NMES

The Trade Act of 1974 sets forth two prerequisites for MFN tariff treatment to be restored to a communist country. Sections 404 and 405 of Title IV require that the country enter into a bilateral commercial trade agreement with the United States and that the agreement be approved by Congress.²⁰ Additionally, section 402, most commonly referred to as the Jackson-Vanik Amendment to the Trade Act of 1974,²¹ requires the country to meet statutory freedom-of-emigration requirements or receive a waiver from the President.²²

A. *Bilateral Trade Agreement*

Section 405(a) of the Trade Act of 1974 authorizes the President to enter into a bilateral commercial agreement that grants MFN treatment to a specific country as long as it is within the U.S. national interest.²³ Section 405(b) sets out the substantive requirements of the agreement and how the agreement will be enacted initially and renewed for three-year terms thereafter.²⁴

19. S. REP. NO. 93-1298, at 201 (1974). In fact, the United States's total trade with East Europe, in the year that it was at its highest (from the time that MFN was repealed in 1951 until the 1974 Act) still did not account for even 10% of the total trade of the free world with East Europe. *See id.* at 201-02.

20. *See* Trade Act of 1974 §§ 404-405, (codified at 19 U.S.C. §§ 2434-2435 (1994)).

21. The Amendment was named after its two strongest proponents, Senator Henry Jackson and Representative Charles Vanik. *See infra* Part IV (discussing the legislative history of the amendment).

22. *See* Trade Act of 1974 § 402 (codified as amended at 19 U.S.C. § 2432 (1994)).

23. *See id.* § 405(a) (codified as amended at 19 U.S.C. § 2435(a) (1994)).

24. *See id.* § 405(b) (codified as amended at 19 U.S.C. § 2435(b) (1994)).

1. Substantive and Procedural Requirements for the Bilateral Trade Agreement

The substantive requirements of a MFN bilateral commercial trade agreement are fairly minimal. The agreement must contain a reciprocal grant of MFN status²⁵ and provide for intellectual property protection.²⁶ Also, because there are a few statutory requirements that are designed to protect U.S. interests in trading with NMEs, the agreement must provide that it can be terminated at any time for national security reasons or for the protection of security interests.²⁷ The agreement must also include adequate safeguards against market disruption in the United States from foreign imports.²⁸ Furthermore, the trade agreement is supposed to contain some level of commitment by the parties to promote trade, for example, through tourist offices, commercial officers, trade fairs and exhibits, and trade missions.²⁹

A bilateral trade agreement should "provide for arrangements for the settlement of [private] commercial differences and disputes."³⁰ Additionally, if there are disputes between the United States and the NME, the agreement should have a consultation mechanism.³¹ A method for formal, binding dispute settlement, such as provided for in the World Trade Organization ("WTO") for its multilateral trade agreements,³² is not

25. *See id.* § 405(b)(1)(B) (codified as amended at 19 U.S.C. § 2435(b)(1)(B) (1994)).

26. *See id.* § 405(b)(4)-(5) (codified as amended at 19 U.S.C. § 2435(b)(4)-(5) (1994)). The protection includes patents, trademarks, and copyrights. The agreement is also supposed to cover "industrial rights and process." *See id.* § 405(b)(6) (codified as amended at 19 U.S.C. § 2435(b)(6) (1994)).

27. *See id.* § 405(b)(2) (codified as amended at 19 U.S.C. § 2435(b)(2) (1994)).

28. *See id.* § 405(b)(3) (codified as amended at 19 U.S.C. § 2435(b)(3) (1994)). The bilateral agreement must "include safeguard arrangements (A) providing for prompt consultations whenever either actual or prospective imports cause or threaten to cause, or significantly contribute to, market disruption and (B) authorizing the imposition of such import restrictions as may be appropriate to prevent such market disruption." *Id.*

29. *See id.* § 405(b)(8) (codified as amended at 19 U.S.C. § 2435(b)(8) (1994)). The requirement is generally to promote trade, and the activities listed are merely nonbinding examples. *See id.*

30. *Id.* § 405(b)(7) (codified as amended at 19 U.S.C. § 2435(b)(7) (1994)).

31. *See id.* § 405(b)(9) (codified as amended at 19 U.S.C. § 2435(b)(9) (1994)).

32. *See* Taunya McLarty, *GATT 1994 Dispute Settlement: Sacrificing Diplomacy*

a requirement. Congress must consider and approve the agreement by joint resolution through a special "fast track" procedure.³³

2. Procedures for Three-Year Review and Renewal of the Bilateral Trade Agreement

The initial term of the agreement is three years.³⁴ After the initial three-year period, the agreement can be extended for an additional three-year term if:

a satisfactory balance of concessions in trade and services has been maintained during the life of the agreement, and . . . the President determines that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfactorily reciprocated by the other party to the bilateral agreement.³⁵

These three-year extensions do not require congressional approval, and they are not subject to congressional disapproval. The President merely has to make the aforementioned determination, and it is not necessary that he publish such determination.³⁶

B. *Jackson-Vanik Amendment*

The Jackson-Vanik Amendment to the Trade Act of 1974 can be satisfied if the President determines that the country is not restricting its citizens' right to emigrate and renews such find-

for Efficiency in the Multilateral Trading System? 9 FLA. J. INT'L L. 241 (1994) (discussing the 1994 dispute settlement procedures of the WTO in light of the 1947 procedures for GATT).

33. See Trade Act of 1974 § 405(c) (codified as amended at 19 U.S.C. § 2435(c) (1994)).

34. See *id.* § 405(b)(1) (codified as amended at 19 U.S.C. § 2435(b)(1) (1994)).

35. *Id.* § 405(b)(1)(A)-(B) (codified as amended at 19 U.S.C. § 2435(b)(1)(A)-(B) (1994)).

36. See *id.* § 405 (codified as amended at 19 U.S.C. § 2435 (1994)).

ing thereafter,³⁷ or if he waives the emigration requirements and sustains the waiver thereafter.³⁸

1. Substantive Requirements of the Jackson-Vanik Amendment

The Jackson-Vanik Amendment, section 402 of the Trade Act of 1974, prohibits the U.S. government from extending MFN treatment³⁹ to any country that:

(1) denies its citizens the right or opportunity to emigrate;

(2) imposes more than a 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.⁴⁰

For the President to waive these three requirements, he has to find that such a waiver will promote substantially the objectives of the Jackson-Vanik Amendment.⁴¹ Furthermore, he has to report to Congress that "he has received assurances that the emigration practices of the country will lead . . . substantially to the achievement of the objectives" of the Jackson-Vanik Amendment.⁴²

2. Procedures for Initial and Annual Review of Emigration Policies

There are several key dates for compliance with the Jackson-

37. *See id.* § 402(a)-(b) (codified as amended at 19 U.S.C. § 2432(a)-(b) (1994)).

38. *See id.* § 402(c) (codified as amended at 19 U.S.C. § 2432(c) (1994)).

39. *See id.* § 402(a) (codified as amended at 19 U.S.C. § 2432(a) (1994)). In addition to MFN treatment, the Jackson-Vanik Amendment prohibits the U.S. government from extending to a country in violation of the emigration provisions any U.S. government credits, credit guarantees, or investment guarantees. *See id.* Also, the United States may not enter any commercial agreement with such country. *See id.* Another provision in Title IV denied these benefits to any country unless it cooperated with U.S. efforts to establish an accounting of all U.S. military personnel missing in action in Asia. *See id.* § 403 (codified as amended at 19 U.S.C. § 2433 (1994)).

40. *Id.* § 402(a)(1)-(3) (codified as amended at 19 U.S.C. § 2432(a)(1)-(3) (1994)).

41. *See id.* § 402(c) (codified as amended at 19 U.S.C. § 2432(c)(1)(A) (1994)).

42. *Id.* § 402(c)(1)(B) (codified as amended at 19 U.S.C. § 2432(c)(1)(B) (1994)).

Vanik Amendment. The Trade Act of 1974 was signed into law January 3, 1975. At that time, the President had the authority to find that a nation was not violating the three emigration requirements in section 402⁴³ or to waive the requirements of section 402 for eighteen months until July 3, 1976.⁴⁴

If the President finds that a country is in compliance with the provisions, he submits his findings to Congress with a report about the country's laws and policies on emigration. Thereafter, the President must make the same finding with regard to that country every six months in order for MFN status to remain in effect.⁴⁵

If, however, the President waives the section 402 requirements, the initial waiver lasts eighteen months.⁴⁶ Thereafter, the President has until thirty days before expiration of the eighteen-month waiver to decide whether to renew the waiver for twelve months by Executive Order.⁴⁷ Thus, because a January 3rd, eighteen-month waiver would expire July 3rd of the next year, the President has until June 3rd to renew the waiver for twelve months.⁴⁸ The twelve-month waiver may be re-

43. *See id.* § 402(b) (codified as amended at 19 U.S.C. § 2432(b) (1994)).

44. *See id.* § 402(c) (codified as amended at 19 U.S.C. § 2432(c) (1994)). This waiver authority was not in the original Jackson-Vanik Amendment to the Trade Reform Act of 1973. *See* H.R. 10710, 93d Cong. (1973). Rather, the communist bloc countries would have had to comply with all of the freedom of emigration provisions. *See id.*

45. *See* Trade Act of 1974 § 402(b)-(c), 19 U.S.C. § 2432(b)-(c) (1994). For instance, Russia initially received approval of its emigration policies in September 1994. Thereafter, its policies have been reviewed by the President, and the President has transmitted to Congress every December and June a statement that Russia's emigration policies remain in line with section 402(a) of the Trade Act of 1974. *See, e.g.*, H.R. Doc. No. 104-154 (1995); H.R. Doc. No. 104-91 (1995); H.R. Doc. No. 104-12 (1994).

46. *See* Trade Act of 1974 § 402(c)(1) (codified as amended at 19 U.S.C. § 2432(c)(1) (1994)).

47. *See id.* § 402(d) (codified as amended at 19 U.S.C. § 2432(d) (1994)).

48. Because the President may give notice that he will extend the waiver *up until* 30 days before July 3, he is not bound to make that notification exactly on June 3. Generally, though, the President issues an Executive Order around June 3. The President must make his recommendation for extension of the waiver to Congress "not later than 30 days before the expiration of such authority," and he must include "a determination that continuation of the waiver . . . will substantially promote the objectives of [section 402], and a statement setting forth his reasons for such a determination." *Id.* § 402(d)(1)(A)-(C) (codified as amended at 19 U.S.C. § 2432(d)(1)(A)-(C) (1994)).

newed by June 3rd every year, and it automatically goes into effect July 3rd⁴⁹ unless Congress by joint resolution⁵⁰ disapproves the waiver within sixty calendar days after July 3rd, the day the waiver would expire but for a Presidential extension of the waiver.⁵¹ If Congress does pass a joint resolution of disapproval by the deadline, the President can still veto the resolution, and the waiver goes into effect unless Congress overrides his veto.⁵²

MFN status accorded conditionally to a country remains in force as long as the trade agreement remains in force and the country complies with the freedom-of-emigration requirement or the requirement is waived. Both of these elements of the two-tier test have to be satisfied.⁵³

III. HISTORICAL CONTEXT OF TITLE IV OF THE TRADE ACT OF 1974

It is essential to consider briefly the Cold War decades leading up to the 1974 Act because the foreign policy aspects of the Jackson-Vanik Amendment relating to freedom of emigration target domestic policies of the Soviet Union developed before World War II. Moreover, the economic and national security aspects of the bilateral trade agreement concern the international balance of powers at the conclusion of World War II.

49. See *id.* § 402(d)(1) (codified as amended at 19 U.S.C. § 2432(d)(1) (1994)).

50. Originally, either the House or the Senate could override the waiver with a resolution of disapproval. However, after *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983), which held that a one-House resolution override is insufficient, the law was changed to require a joint resolution of disapproval. See Trade Act of 1974 § 4032(d) (codified as amended at 19 U.S.C. § 2432(d) (1994)).

51. See *id.* § 402(d)(2) (codified as amended at 19 U.S.C. § 2432(d)(2) (1994)). Congress can introduce a joint resolution for disapproval after the President transmits his renewal of the waiver (June 3rd), but Congress must vote on the resolution within 60 calendar days from the date the waiver expires (July 3rd)—which would be August 31—or else the new 12 month waiver goes into effect automatically. See *id.*

52. See *id.* § 402(d)(2)(A)(ii) (codified as amended at 19 U.S.C. § 2432(d)(2)(A)(ii) (1994)). The override must be by a two-thirds vote and must be done by the later of the end of the 60 day period (August 31st), or 15 days after the President transmits to Congress his veto message.

53. See *id.* § 402(d) (codified as amended at 19 U.S.C. § 2432(d) (1994)).

A. *Emigration Policy of the Soviet Union*

Unlike in the United States, where human rights are inalienable, the former Soviet Union only recognized rights given to the people from the government. While the Soviet Constitution was redrafted four times since 1917, it never recognized a right of emigration.⁵⁴ Furthermore, Soviet law allowed for emigration generally, but the law did not specify any right of emigration or procedural safeguards for emigrant applicants.⁵⁵

The practices of the former Soviet Union reflected this legal deficiency. The country was known for periods of ethnic persecution and attempted genocide,⁵⁶ which, for a variety of reasons, had a disproportionately high adverse effect on the Soviet Jewish population.⁵⁷

During the era of Joseph Stalin, emigration was unthinkable for Soviet citizens as individuals or groups. Stalin considered the very thought of leaving the Soviet body politic an act of treason.⁵⁸

The years of Nikita Khrushchev, however, presented more practical, as opposed to ideological, problems. Emigration proceedings became an economic tool to extract high taxes from the family of the emigrant applicant.⁵⁹ Furthermore, Khrushchev used some individual's requests to emigrate as a foreign

54. See Sandra Drimak, *Human Rights and the USSR Constitution*, 2 TEMP. INT'L & COMP. L.J. 79, 80-85 (1988).

55. See Jeffrey Barist et al., *Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of "State Secrets" in Comparison with Standards of Int'l Law and the Policies of Other States*, 15 HOFSTRA L. REV. 381, 429 (1987).

56. See Robert H. Bradner, *The Jackson-Vanik Amendment to the Trade Act of 1974: Soviet Progress on Emigration Reform is Insufficient to Merit a Waiver*, 4 GEO. IMMIGR. L.J. 639, 642 (1990) (citing U.S. DEPT OF STATE, BACKGROUND INFORMATION ON SOVIET EMIGRANTS: SOVIET JEWS 1 (1989)).

57. See Yaacov Ro'i, *The Historical Link Between Soviet Domestic Developments and Jewish Emigration*, 53 JERUSALEM Q. 137, 138-39 (1990).

58. See *id.* at 138. Because of the Zionist movement, the Jewish population was the most adversely affected ethnic group. See *id.*

59. See *id.* This tax affected Jewish applicants disproportionately because, as compared with other emigrant applicants, Soviet Jews were often related to American Jews that had wealth and influence. See *id.*

policy tool during Arab-Israeli conflicts.⁶⁰ Restrictions on emigration were also used to protect what Moscow thought were its national security interests during East-West tensions. The Soviet officials did not want to approve many emigrant applications because there was the fear that the émigrés, once gone from the Soviet Union, would aid the Western enemies.⁶¹

After the United States recognized the Soviet Union in 1933, the Soviet Union made economic reforms and adopted a new "democratic" constitution in 1936.⁶² The positive U.S.-Soviet relationship was, however, short-lived because of the ethnic purges of the late 1930s.⁶³

B. *National Security Concerns of the United States*

Moscow's role in events at the beginning of World War II, specifically, the Nazi-Soviet pact, the partition of Poland, the bungled invasion of Finland (which made Joseph Stalin look both brutal and incapable), and Stalin's assent to a non-aggression pact with Japan in April 1941, heightened U.S.-Soviet tensions and compounded U.S. public perception "that the Soviet Union was a cruel and rapacious dictatorship, only slightly less repulsive than Nazi Germany."⁶⁴

Adolph Hitler's June 1941 invasion of Russia came at a time when U.S.-Soviet relations were strained. After the German invasion, however, the U.S. State Department recognized that "any defense against Hitlerism . . . will hasten the eventual downfall of the present German leaders, and will therefore redound to the benefit of our own defense and security."⁶⁵

The Roosevelt Administration thought that if the United States and the Soviet Union were not able to cooperate after the war, then "the world would be divided into two armed

60. *See id.*

61. *See id.* at 138, 139. Khrushchev thought this particularly true for Jewish emigrants. *See id.* at 138.

62. *See* JOHN LEWIS GADDIS, *THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947*, at 3-4 (1972).

63. *See id.* at 4.

64. *Id.*

65. *Id.* at 3-4.

camps, a prospect too horrible to contemplate.”⁶⁶ Thus, President Roosevelt’s “grand design” for military collaboration with the Soviet Union to defeat Germany extended beyond the war, and cooperation with Moscow was thought to be vital to ensure postwar peace.⁶⁷

The President knew of the vast differences in U.S. and Russian culture and ideology, yet attributed Russia’s hostility toward the West as simply a lack of knowledge. Roosevelt stated, “I think the Russians are perfectly friendly; they aren’t trying to gobble up all the rest of Europe or the world. . . . They haven’t got any crazy ideas of conquest”⁶⁸ But by 1943, Roosevelt realized that there was a real threat that Stalin would attempt to dominate the postwar governments of eastern Europe.⁶⁹ The Soviet Union’s emergence as a post-World War II superpower then became the focal point of U.S. national security.

C. Development of Roosevelt’s Economic Policy as a Foreign Policy Tool

During the early 1940s, when the United States viewed Russia as an essential element in the equation against Germany, prospects for U.S.-Russian economic relations were positive.⁷⁰ After World War II, the Soviet Union needed U.S. technology and industrial equipment to boost production in its war-torn economy. The United States, on the other hand, had been operating at a wartime production capacity too high for a postwar domestic economy to absorb and needed to sell its products in foreign markets. Russia’s trade deficit with the United States and lack of foreign exchange, however, stood in the way of its ability to increase U.S. imports.

The Roosevelt Administration viewed the absence of international economic cooperation as a major factor in causing war

66. *Id.* at 6.

67. *See id.*

68. *Id.* (quoting President Roosevelt, Speech to the American Youth Congress (Feb. 10, 1940), in FDR: PUBLIC PAPERS, IX, at 93 (1941)).

69. *See id.* at 17.

70. *See id.* at 174.

because an increase in trade barriers often has a parallel relationship to the rise of nationalism:

When . . . the Smoot-Hawley Tariff was enacted [in 1930], the countries of Europe . . . raised their own tariffs, slapped on quotas, adopted new-fangled methods of stopping trade through import licensing and exchange control. International trade broke down. Depression became worldwide. Business collapse led to dictatorship in some countries, and dictatorship has finally plunged Europe once more into a costly war.⁷¹

Therefore, a major part of the Roosevelt Administration's plan to ensure post-war stabilization was to ensure international economic cooperation. Roosevelt's Secretary of State, Cordell Hull, stated that "[a] world in economic chaos would be forever a breeding ground for trouble and war."⁷² Secretary Hull's solution to economic nationalism, which he considered to be a cause of war, was to lower trade barriers worldwide:

To me, unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war. Though realizing that many other factors were involved, I reasoned that, if we could get a freer flow of trade—freer in the sense of fewer discriminations and obstructions—so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance for lasting peace.⁷³

The official position of the State Department was that international trade was foundational "to the attainment of full and effective employment in the United States and elsewhere, to the preservation of private enterprise, and to the success of an international security system to prevent future wars."⁷⁴ The

71. *Id.* at 20 (quoting Henry A. Wallace, Secretary of Agriculture, Speech, (Mar. 12, 1940)).

72. *Id.* at 18 (quoting CORDELL HULL, MEMOIRS OF CORDELL HULL II, at 1681 (1948)).

73. *Id.* at 19.

74. *Id.* at 22 (quoting STATE DEP'T, SUMMARY OF THE INTERIM REPORT OF THE SPECIAL COMM. ON THE RELAXATION OF TRADE BARRIERS (Dec. 8, 1943), reprinted in POSTWAR FOREIGN POLICY PREPARATION 622 (1949)).

Administration's international economic policy developed more quickly than any other postwar policy, but it is important to note that the policy sought to use trade directly as a carrot and a stick to further other goals. It was not a policy based on the notion that trade liberalization alone would indirectly create more security in the world. While U.S. businessmen considered economic relations with Russia an opportunity to access a "new, virtually untapped field,"⁷⁵ administration officials started viewing it as "one of our principal levers for influencing political action compatible with our principles."⁷⁶

D. *Use of Economic Relations as a Foreign Policy and National Security Tool*

At the end of the war, the United States considered extending Russia a sizable postwar reconstruction loan.⁷⁷ Roosevelt delayed approval for the loan several times stating that it was "very important that we hold back and don't give them any promises of finance until we get what we want."⁷⁸ The administration wanted the U.S. loans to be a carrot to direct Moscow's "behavior in international matters."⁷⁹ Specific areas of conflict included German repatriations and east European self-determination.⁸⁰ The changes were not forthcoming, however, and the loan talks failed.⁸¹

75. *Id.* at 185.

76. *Id.* at 189 (quoting Letter from W. Averell Harriman, U.S. Ambassador to Russia, to Cordell Hull, U.S. Secretary of State (Mar. 13, 1944), in *FOREIGN RELATIONS OF THE UNITED STATES: 1944, IV*, at 951 (1969)). W. Averell Harriman, U.S. Ambassador during the war, was one of the most prominent U.S. businessmen during the 1920s who did business with the Soviet Union. See *THE FUTURE OF U.S.-SOVIET RELATIONS: TWENTY AMERICAN INITIATIVES FOR A NEW AGENDA* 85 (Simon Serfaty ed., 1989) [hereinafter *TWENTY AMERICAN INITIATIVES*].

77. During the war, the United States and Russia had a mutual interest in the U.S. establishment of a lend-lease program for Russia. The United States strengthened Soviet cooperation and Russia secured U.S. credit to purchase U.S. military and dual use items. After the war was over, however, U.S. Congressmen argued that taxpayers should not finance Russian reconstruction. Thus, the United States considered the loan options which would be required to be paid back within a specified time and on which the United States would earn interest.

78. GADDIS, *supra* note 62, at 191.

79. *Id.* at 190 (quoting Letter from W. Averell Harriman to Stettinius (Jan. 6, 1945), in *FOREIGN RELATIONS OF THE UNITED STATES: 1945, V*, at 945-47 (1969)).

80. See *id.* at 174-75.

81. See *id.* at 175. The United States's intense effort to secure Russia's adherence

In 1949, the United States, concerned about Russia's arms build-up, formed the Coordinating Committee on Export Controls ("COCOM"). This was an alliance of NATO members⁸² designed to limit strategic exports to communist countries if such exports could have a detrimental effect on members' national security interests.⁸³

As retribution for the Soviet role in the Korean War and as a means to counter the growing threat of communism in the early 1950s, the United States further restricted economic relations with the Soviet Union by withdrawing its MFN status.⁸⁴ At this point, the United States forewent any economic benefits derived or foreseeably attainable through trade with the Soviet Union in the interests of the U.S. strategy to contain the spread of communism. After 1951, denial of MFN status for communist countries was the general rule. The 1974 Act merely allowed individual short-term reinstatements with periodic reviews and renewals.

It is clear from the historical context of Title IV, that national security concerns of the United States play a major role in the decision of whether to negotiate a bilateral trade agreement with a communist country and the decision of whether to consider terminating a bilateral trade agreement in part or completely. During the Cold War, the Sino-Soviet bloc was the United States's enemy. The communist threat defined the need for and scope of U.S. military build up and defense systems. This pervaded many aspects of American society, including trade relations. No other threat has risen to the level of the threat posed by the collective force of the communist countries.⁸⁵

to the International Monetary Fund and the World Bank and negotiation of lowered trade barriers failed at this time as well. *See id.* at 22.

82. COCOM was comprised of NATO countries (except Iceland) and Japan.

83. *See* HOUSE COMM. ON WAYS & MEANS, 105TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 159 (Comm. Print 1997). The United States played a significant role in COCOM, but U.S. participation was not authorized by U.S. law until the Export Administration Act of 1979. *See id.* at 158-59. COCOM was relatively successful.

84. *See* TWENTY AMERICAN INITIATIVES, *supra* note 76, at 85. Also, U.S. loans, such as those from the Export-Import Bank, were cut off.

85. Even countries such as Sudan, Syria, and Iraq still have MFN status because all countries were granted MFN status in 1934, and they maintain that status unless they are statutorily disqualified. *See supra* notes 9-10 and accompanying text. There

In 1958, Khrushchev attempted to discuss options for increased economic cooperation between the Soviet Union and the United States by proposing the negotiation of a trade agreement between the two countries.⁸⁶ Although the original offer was not accepted by the United States,⁸⁷ it was renewed in 1964.⁸⁸

Even though exports of the Soviet Union to U.S. markets were inhibited because of the applicability of the 1930 Smoot-Hawley tariff levels, during the 1960s, Soviet demand for U.S. products such as agriculture, chemicals, and machinery, rose.⁸⁹ The trade volume increased between the two countries, but U.S. exports to the Soviet Union accounted for only 0.2% to 0.5% of total U.S. exports during the late 1960s and early 1970s.

This economic relationship cooled with Khrushchev's ouster. As a result, U.S. businesses were unable to import many Russian-made goods at competitive prices. U.S. exports also were subject to retaliatory Russian import tariffs. The Soviets were quick to point out that the Soviet Union managed to conduct twice as much trade with Finland than with the United States and even more trade with West Germany.⁹⁰

Trade relations expanded again in the 1970s during Leonid Brezhnev's era of detente.⁹¹ The Nixon Administration, specifically Secretary of State Henry Kissinger, viewed east-west trade as a tool to encourage political reform in the Soviet Union. In 1972, the two countries negotiated a series of trade agreements,

are several countries, however, that the United States has embargoed all trade with individually, so while they receive MFN tariff levels, they may not benefit from these lower levels because the United States does not import their goods. For example, commercial transactions with state sponsors of terrorism are prohibited. See Antiterrorism and Effective Death Penalty Act of 1996 § 321, 18 U.S.C.A. § 2332(d) (West 1998). However, as a collective group of nations, the communist bloc is the only category to lose MFN trade status.

86. See Harold J. Berman, *The U.S.-U.S.S.R. Trade Agreement from a Soviet Perspective*, 67 AM. J. INT'L L. 516, 519 (1973).

87. See *id.*

88. See *id.*

89. See TWENTY AMERICAN INITIATIVES, *supra* note 76, at 85-86. During the Khrushchev era, there was some market decentralization, but the Kremlin withdrew such reforms recognizing the inherent political discontent in economic reform. See *id.*

90. See Ronald D. Elving, *The Sponsors: Jackson and Vanik*, 47 CONG. Q. 3230 (1989).

91. See TWENTY AMERICAN INITIATIVES, *supra* note 76, at 86.

consisting of some sectoral agreements⁹² and a general MFN trade agreement. The MFN trade agreement could only go into effect if the two countries granted one another reciprocal MFN tariff treatment.⁹³ The agreement, however, was renounced by Moscow shortly after the United States passed the Trade Act of 1974 because Soviet government officials viewed the Jackson-Vanik Amendment as a "flagrant attempt to interfere in their domestic affairs."⁹⁴

The 1979 Soviet invasion of Afghanistan brought U.S. trade with the Soviet Union to an abrupt halt. The Reagan Administration adopted the position that, in addition to denying its communist enemy sensitive technology, it would implement a virtual trade embargo against the Soviet Union with the hopes of bringing the Soviet Union to its knees.⁹⁵

IV. LEGISLATIVE HISTORY OF TITLE IV OF THE 1974 ACT

Title IV of the Trade Act of 1946 was passed with various other titles. Overall, these titles attempted to strengthen the economic position of the United States globally by liberalizing world trade rules.⁹⁶ In 1973 and 1974, several different additional proposals surfaced, including a Nixon Administration proposal,⁹⁷ a House bill that favorably passed the House and was sent to the Senate,⁹⁸ and a Senate Finance Committee version of the House bill that was passed in 1975 and is the current law.⁹⁹

92. They covered such things as maritime, grain, and lend-lease operations.

93. See Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding Trade, Oct. 18, 1972, 11 I.L.M. 1321.

94. TWENTY AMERICAN INITIATIVES, *supra* note 76, at 85-86; see also Elving, *supra* note 90, at 3230 (stating that the Soviets pulled out of the agreement because of the Jackson-Vanik Amendment); *Secretary of State Kissinger Calls for Early Passage of Trade Reform Act*, 71 DEP'T ST. BULL. 936 (1974).

95. See TWENTY AMERICAN INITIATIVES, *supra* note 76, at 86.

96. In 1973, the Nixon Administration requested the authority to begin a new round of GATT talks and the authority to reinstate MFN status to communist countries.

97. See H.R. 6767, 93d Cong. §§ 501-504 (1973) (as introduced).

98. See H.R. 10710, 93d Cong. (1973) reprinted in H.R. REP. NO. 571 (1973).

99. See H.R. 10710, 93d Cong. (1973), reprinted in S. REP. NO. 93-1298 (1974) (as amended by the Senate Comm. on Finance).

A. *Bilateral Trade Agreement*

From 1973 to 1975, three points were made in the legislative history regarding the negotiation and renewal of the bilateral trade agreement that are of significance to U.S. relations with communist countries, particularly with China.

1. Multilateral Versus Bilateral Trade Negotiations with NMEs

According to House Bill 6767, proposed by the Nixon Administration, the President would have had the authority to reinstate MFN status if either the administration concluded a bilateral commercial agreement with a country or the country became a party to a multilateral trade agreement to which the United States was a party, such as GATT.¹⁰⁰ The House passed a bill including the President's proposal to reinstate MFN status under either the bilateral or multilateral arrangement. The bill required Congress to leave the reinstatement of MFN status to the discretion of the President, who would determine the status through whichever method "appears the more appropriate."¹⁰¹

The Senate Finance Committee stripped the multilateral trade agreement option. The Committee's new language required the President to negotiate a bilateral commercial agreement with the communist country. This would produce an action "intended to assure that the United States obtains appropriate benefits for itself, along with adequate safeguards in conjunction with a grant of nondiscriminatory treatment."¹⁰²

Denying the administration the capacity to rely on multilateral negotiations with NMEs, such as with the Senate's treatment of House Bill 6767, reinforces the opinion that the United States maintains the best negotiating position when it uses access to U.S. markets as leverage to obtain bilateral concessions that will, in turn, maximize the export and foreign investment potential of U.S. companies. Additionally, it is less likely

100. See H.R. 6767, 93d Cong. §§ 501-04 (1973) (as introduced).

101. H.R. REP. NO. 93-571, at 81 (1973).

102. S. REP. NO. 93-1298, at 207-08 (1974).

that the U.S. negotiating position in bilateral negotiations will be diluted by the interests of other trading partners with substantially different export capacities and portfolios or will be undermined by the willingness of other countries to acquiesce prematurely on U.S. negotiating objectives outlined by Congress.

2. Renewal of Bilateral Agreements With NMEs

The Senate Finance Committee changed the House's version of the three-year renewal standard. The Senate version of the bill also made it clear that the minimal elements required for the approval of a bilateral agreement are much lower than the standard for renewal of the agreement every three years.

Under the House version, the agreement could have been renewed if the foreign country maintained satisfactory concessions.¹⁰³ The Senate determined that the review should be based upon an examination of whether a country maintained a satisfactory *balance* of concessions regarding *both goods and services*. The Senate stated specifically that "it is of the utmost importance that the United States receive, on a continuing basis, mutual advantages" for both considerations.¹⁰⁴ Thus, by requiring a "balance" and by adding "trade in services" as elements of the renewal of the agreement, the Finance Committee raised the standard after the initial conclusion of the agreement. The standard for renewing a bilateral agreement is higher than the standard of approving the agreement because the standard of approving the agreement does not require a balance of concessions nor liberalization of trade in services.

In addition to adding services to the renewal standard, the Committee stated clearly that the three-year review procedure would provide an opportunity for periodic review of the parties' experience under the agreement, and that the agreement would not be extended if the balance of trade was not adequate.¹⁰⁵ The three-year review was intended to "afford the opportunity

103. See H.R. REP. NO. 93-571, at 81 (1973).

104. S. REP. NO. 93-1298, at 208 (1974). Among other things, the Committee noted that services would include transportation, insurance, banking, and tourism. See *id.*

105. See *id.*

to secure any adjustment needed to protect our interests."¹⁰⁶ Congress never intended that MFN bilateral trade agreements, as negotiated, would serve the test of time.

In addition to ensuring that the NME keeps up with U.S. concessions, the renewal process also requires the NME's concessions to keep pace with international norms. The renewal of the agreement is conditioned on whether actual or foreseeable U.S. multilateral concessions are satisfactorily reciprocated.¹⁰⁷ The Senate Finance Committee wanted to ensure that communist countries did not obtain a "free ride" on the next round of GATT negotiations that were authorized in the Trade Act of 1974.¹⁰⁸ Presumably, the Senate also created this provision so that concessions of the NMEs would keep pace with future GATT rounds authorized in subsequent legislation.¹⁰⁹

3. National Security in the Calculation of Trade With Communist Countries

The national security exception of the MFN bilateral trade agreement¹¹⁰ must be considered in light of its historical and legislative context as a whole. During the Cold War, the United States attempted to use trade relations with communist bloc countries as a tool to achieve non-trade related concessions. Thus, obtaining market access, through tariffication of non-tariff barriers and overall reduction of tariffs, was not the United States's fundamental goal in its bilateral trade policy for communist countries as conveyed in parallel multilateral trade negotiations in the GATT.¹¹¹

The legislative history of national security issues in the context of the Title IV trade agreements shows that the national security exception was an important factor in the passage of

106. *Id.* at 210.

107. *See id.* at 208.

108. The United States used the 1974 authority for the Tokyo Round of GATT negotiations.

109. For instance, further "U.S. multilateral concessions" and negotiations were authorized in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified in scattered sections of 19 U.S.C.), which allowed the United States to participate in the Uruguay Round of GATT negotiations. *See id.*

110. *See supra* note 27 and accompanying text.

111. *See infra* note 250.

the agreement. The Senate Finance Committee viewed the national security exception to trade obligations, which must be contained in all MFN bilateral trade agreements, as "especially important in agreements with communist countries."¹¹² Further, the Committee stated that encouraging aggression against the United States or its allies would be grounds for termination under the national security exception.¹¹³

B. *Jackson-Vanik Amendment*

Each year, the annual debates on renewal of MFN take a different focus. In recent years, this has especially been true for China. While MFN status can be reinstated only if the substantive language of the Jackson-Vanik Amendment on emigration is either met or waived, there are outstanding issues for evaluation.¹¹⁴ For example, one undetermined issue evaluates the grounds on which MFN status can be revoked or the scope of revocation. Two additional issues that often arise are whether the amendment covers human rights in general or just emigration, and, if only emigration, whether the amendment was simply intended to target Jewish emigration from the Soviet Union.

1. Human Rights Versus Emigration

Generally speaking, the Jackson-Vanik Amendment states that its purpose is "[t]o assure the continued dedication of the United States to fundamental human rights"¹¹⁵ The amendment deals more specifically, however, with the emigration policy of communist countries. The U.S.-based Helsinki Watch Committee ("Helsinki Committee") stated that "in spirit the amendment transcends the emigration practice of a recipient country."¹¹⁶ The Helsinki Committee would argue that the amendment applies to human rights generally. Conversely, one

112. S. REP. NO. 93-1298, at 208 (1974).

113. *See id.* at 209.

114. *See* Trade Act of 1974 § 402, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2432(a)-(c) (1994)).

115. *Id.* § 402 (codified as amended at 19 U.S.C. § 2432(a) (1994)).

116. REPUBLICAN STUDY COMM., 99TH CONG., REPORT ON H.R. 3599: TEMPORARILY SUSPENDING ROMANIA'S MOST FAVORED NATION STATUS 3 (1986) [hereinafter REPUBLICAN STUDY COMM.].

could argue that because freedom of emigration is considered a basic human right,¹¹⁷ the preamble of the amendment merely restated, in a more generic sense, the intent of the amendment to protect this particular human right.

The sponsors of the amendment did not support the policies of the executive branch. Senator Henry Jackson "was a critic of every president from Eisenhower through Carter, charging that they . . . tried too hard to appease the Soviets."¹¹⁸ The legislative history of the amendment, however, shows that it was intended to target the emigration policies of the former Sino-Soviet bloc countries as opposed to human rights in general. A Senate report states that the amendment is "to encourage free emigration."¹¹⁹

Furthermore, emigration was the specific concern of the Senate sponsor in his communications with the executive administration. The House bill did not provide the President waiver authority, but Secretary of State Henry Kissinger, after lobbying to eliminate the Jackson-Vanik provisions, obtained the waiver.¹²⁰ Senator Jackson, a sponsor of the amendment, and Secretary Kissinger exchanged letters regarding the requirements for a waiver,¹²¹ and emigration was the only human right discussed in their letters.¹²²

117. See G.A. Res. 217A(III), 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 440.3 (Richard B. Lillich & Howard W. Smith eds., 2d ed. 1990) (stating that "[e]veryone has the right to leave any country, including his own, and to return to his country"). The Soviet Union was a member to this 1948 Declaration. See D. Mauntz Gustafson, Comment, *Soviet Human Rights Under Gorbachev: Old Wine in a New Bottle*, 16 DENV. J. INT'L L. & POL'Y 177, 179 (1987).

118. Elving, *supra* note 90, at 3231. The sponsors of the amendment, Senator Henry Jackson and Representative Charles Vanik, "[b]oth came from immigrant families with little money." *Id.* Vanik represented a district having many Jewish constituents whose lives under Communist rule led them to emigrate to the United States. See *id.*

119. S. REP. NO. 93-1298, at 206 (1974).

120. See H.R. 10710, 93d Cong. (1973). The waiver provision was offered as an amendment and received overwhelming support. See 119 CONG. REC. 40805 (1973).

121. See Letter from Henry A. Kissinger, Secretary of State, to Henry M. Jackson, United States Senator (Oct. 18, 1974), *reprinted in* S. REP. NO. 93-1298, at 203-05 (1974); Letter from Henry M. Jackson, Senator, to Henry A. Kissinger, Secretary of State (Oct. 18, 1974), *reprinted in* S. REP. NO. 93-1298, at 205-06 (1974).

122. See Mark H. Barth & Barry H. Nemmers, Note, *Roadmap to the Trade Act*, 8 LAW & POL'Y INT'L BUS. 125, 180 (1976). Kissinger outlined assurances he had received from the Soviet Union regarding emigration. These included the following:

The position that the amendment only applies to the human right of freedom of emigration is supported by the actual language of the amendment because the three benchmarks for compliance with the amendment all concern emigration policy.¹²³

2. Emigration of Jews From the Soviet Union

Senator Jackson's letter to Secretary Kissinger, which contained Senator Jackson's conditions for including the waiver in his amendment, set, in addition to general requirements on emigration, a benchmark specifying the number of Soviet Jews that should be allowed to emigrate before granting a waiver.¹²⁴

Some have speculated that the sponsor's "main intent was to force the Soviets to let Jews go to Israel if they wished. The Soviets had just imposed an 'education tax' on those with advanced schooling who sought exit visas."¹²⁵ The decade after the implementation of the Jackson-Vanik Amendment produced statements that congressional concern was "over the Soviet

ending punitive actions against those who apply for authorization to emigrate; eliminating procedural impediments to review of applications; agreeing to review applications based on when they were filed as opposed to the ethnicity, race, religion, or residence of the applicants; expediting hardship cases; and agreeing to maintain diplomatic negotiations on emigration policy. According to Kissinger, these Soviet assurances qualified the Soviet Union for a presidential waiver of Jackson-Vanik. See Letter from Henry A. Kissinger, Secretary of State, to Henry M. Jackson, United States Senator (Oct. 18, 1974), *reprinted in* S. REP. NO. 93-1298, at 203-05 (1974).

Senator Jackson responded to Secretary Kissinger and stated his support to the Kissinger points. Senator Jackson outlined additional requirements that should be included in a waiver. These included eliminating criminal and civil actions against those who apply for emigrant status, ending the requirement that the applicant's family give its consent for the applicant to emigrate, and limiting Russia's use of "state secrets" as reason to deny an emigration application. See Letter from Henry M. Jackson, United States Senator, to Henry A. Kissinger, Secretary of State (Oct. 18, 1974), *reprinted in* S. REP. NO. 93-1298, at 205 (1974).

123. See *supra* note 40 and accompanying text.

124. Senator Jackson set a benchmark of 60,000 emigrants per year as the requirement to grant the waiver. Senator Jackson intended this number to be a "minimum standard" of compliance. See Letter from Henry M. Jackson, United States Senator, to Henry A. Kissinger, Secretary of State (Oct. 18, 1974), *reprinted in* S. REP. NO. 93-1298, at 205 (1974); see also Alyson Pytte, *Jackson-Vanik: A History*, 47 CONG. Q. 404 (Feb. 25, 1989).

125. Elving, *supra* note 90, at 3232.

Union's treatment of Jews wishing to emigrate to Israel."¹²⁶ The Senate Finance Committee noted at the time the amendment was passed, however, that they intended the amendment "to encourage free emigration of all peoples from all communist countries (and not be restricted to any particular ethnic, racial, or religious group from any one country)."¹²⁷

V. APPLICATION OF TITLE IV TO COMMUNIST COUNTRIES

The Title IV statutory framework was designed in 1974 to strike a proper balance between U.S. interests in light of competing global powers at the time and domestic emigration policies of the Soviet Union that were abhorrent by U.S. standards. In evaluating Title IV's application, one must consider whether the statutory requirements for MFN restoration have been met, and if they have, whether the framework, as applied to various communist countries, has successfully or unsuccessfully promoted and protected these U.S. interests. Thus, this section considers the application of the elements of Title IV's two-tier test, the bilateral trade agreement (consisting of the substantive requirements for negotiation and the procedures for renewal) and the Jackson-Vanik Amendment, to certain countries that can demonstrate the elements' success or failure. Specifically, this section evaluates the application of the substantive requirements of the bilateral agreement to Romania, China, and Cambodia. The section then compares renewal process for Romania and China. Finally, the section evaluates application of the Jackson-Vanik Amendment to the Soviet Union, Romania, and China.

A. *Bilateral Trade Agreements of Title IV Countries*

Since 1974, there have been nine Title IV agreements concluded with NMEs.¹²⁸ By way of comparison, four agreements

126. Pytte, *supra* note 124, at 404.

127. S. REP. NO. 93-1298 (1974).

128. There were two Title IV agreements for Romania; a 1992 agreement replaced the 1975 agreement. *See infra* note 131. In June 1990, there was one agreement concluded for the Soviet Union, which, after the dissolution of the Soviet Union in December 1990, was individually applied to the 12 former constituent republics. An

are of particular note: the 1975 Romania Agreement, which was the United States's first ever Title IV agreement;¹²⁹ the 1979 China Agreement;¹³⁰ the 1992 Romania Agreement, which, as the second agreement with Romania, replaced the first,¹³¹ and the 1996 Cambodia Agreement, which is the most recent Title IV agreement concluded by the United States.¹³²

All of the MFN bilateral trade agreements that have been approved by Congress have met most of the minimal requirements of section 405 of the Trade Act of 1974.¹³³ Of particular note are the areas where some of the agreements have exceeded the section 405 requirements, either in the types and scope of trade covered or in the level of commitments.

The agreement with Cambodia is the broadest and most comprehensive. The agreement with China, even though it came after the 1975 Romania Agreement, is by far the least substantive. A House Ways and Means Committee Report stated that China's agreement "is much less detailed and specific in terms of concrete implementing measures or obligations to be undertaken than the agreements with Romania and Hungary; rather it takes the form more of a set of principles, concepts, and a framework for nondiscriminatory bilateral trade relations."¹³⁴

April 1990 agreement for Czechoslovakia was applied to the Czech Republic and to Slovakia after their separation in January 1993. One of the latest agreements, concluded in October 1996, was for Cambodia.

129. See S. REP. NO. 94-281, at 1 (1975).

130. Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651 [hereinafter 1979 China Agreement].

131. See Agreement on Trade Relations Between the Government of the United States of America and the Government of Romania, Apr. 3, 1992, U.S.-Rom., Hein's No. KAV 3709, Temp. State Dep't No. 93-219 [hereinafter 1992 Romania Agreement]; Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania, Apr. 2, 1975, U.S.-Rom., 26 U.S.T. 2305 [hereinafter 1975 Romania Agreement].

132. Agreement Between the United States of America and the Kingdom of Cambodia on Trade Relations and Intellectual Property Rights Protection, Oct. 4, 1996, U.S.-Cambodia, Hein's No. KAV 5171 [hereinafter 1996 Cambodia Agreement].

133. See *supra* Part II.A.1 (outlining the requirements of the bilateral trade agreements). The 1979 China Agreement, however, does not contain a specific provision on safeguards. See *infra* notes 151-53 and accompanying text.

134. H.R. DOC. NO. 96-209, at 7 (1979).

1. Obligations

All of the agreements contain a reciprocal grant of MFN tariff treatment for products.¹³⁵ The agreements with China and Cambodia also provide for nondiscriminatory treatment with respect to quantitative restrictions.¹³⁶ Only the agreement with Cambodia contains a provision on reciprocal national treatment, patterned after the relevant GATT article.¹³⁷

The greatest textual differences between the agreements occur in their protection of intellectual property. Section 405 requires including in the agreements specific provisions that protect intellectual property if the NME in question is not a party to the Paris Convention for the Protection of Industrial Property and the Universal Copyright Convention.¹³⁸ The United States is a party to both conventions.

At the time of signing the 1975 agreement, Romania was a party to the Paris Convention but was not a party to the Copyright Convention. Thus, the 1975 agreement applied both conventions bilaterally between the United States and Romania.¹³⁹ The 1992 Romania Agreement, in addition to these conventions, made commitments on the Berne Convention for the Protection of Literary and Artistic Works and the Geneva Convention for the Protection of Producers of Phonograms.¹⁴⁰

When the 1979 China Agreement was signed, China was party to neither of the conventions listed in section 405. The 1979 China Agreement fails to make specific reference to the conventions or state similar obligations. It provides general

135. See 1996 Cambodia Agreement, *supra* note 132, art. I, para. 1; 1992 Romania Agreement, *supra* note 131, art. I, para. 5; 1979 China Agreement, *supra* note 130, at 4653; 1975 Romania Agreement, *supra* note 131, at 2306-07.

136. See 1996 Cambodia Agreement, *supra* note 132, art. I, para. 2; 1979 China Agreement, *supra* note 130, at 4654.

137. See 1996 Cambodia Agreement, *supra* note 132, art. II.

138. See Trade Act of 1974, § 405(b)(4)-(5), Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2435(b)(4)-(5) (1994)).

139. See 1975 Romania Agreement, *supra* note 131, at 2311.

140. The 1992 Romania Agreement contains 16 pages reaffirming the parties' commitments to the substance of these agreements. See Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309.

protection of intellectual property by stating a commitment to existing laws, regulations, and international practice.¹⁴¹

Cambodia also was not a party to either of the conventions. A major portion of the Cambodia Agreement, however, is devoted to the protection of intellectual property rights and deals in detail with intellectual property's various forms, definitions, and operational aspects.¹⁴²

There is a statutory requirement that agreements promote trade, for example through tourist offices, commercial officers, trade fairs and exhibits, and trade missions.¹⁴³ All four agreements contain provisions calling for general measures and mechanisms to foster economic and trade relations.¹⁴⁴

Specifically, all four agreements contain similar provisions that call on the governments to establish, within the other country, commercial offices for the promotion of trade and other economic relations between the two parties to the agreement.¹⁴⁵ The two Romania agreements and the China agreement also include provisions dealing with the legal and physical establishment, operation, and personnel of firms from the other country on MFN basis. These are considerably more specific and comprehensive in the case of Romania than of China.¹⁴⁶

The agreement with Cambodia contains an undertaking to foster economic and technical cooperation on a broad base,

141. See 1979 China Agreement, *supra* note 130, at 4657-58.

142. In the agreement, 12 out of 25 articles and 26 out of 33 pages concern intellectual property. Separate articles of the agreement deal with the nature and scope of intellectual property rights, obligations, and national treatment. Articles specifically cover copyright, encrypted satellite signals, layout design of semiconductor integrated circuits, trademarks, industrial design, patents, trade secrets, and acts contrary to honest commercial practices. In addition to the rights discussed, the agreement addresses enforcement issues internally and at the border. See 1996 Cambodia Agreement, *supra* note 132, arts. XI-XIX.

143. See Trade Act of 1974 § 405(b)(8).

144. See 1996 Cambodia Agreement, *supra* note 132, art. V; 1992 Romania Agreement, *supra* note 131, arts. III-V; 1979 China Agreement, *supra* note 130, at 4655-56; 1975 Romania Agreement, *supra* note 131, at 2308-11.

145. See 1996 Cambodia Agreement, *supra* note 132, art. V; 1992 Romania Agreement, *supra* note 131, art. IV; 1979 China Agreement, *supra* note 130, at 4655-56; 1975 Romania Agreement, *supra* note 131, at 2308.

146. See 1992 Romania Agreement, *supra* note 131, art. V; 1979 China Agreement, *supra* note 130, at 4655-56; 1975 Romania Agreement, *supra* note 131, at 2308-11.

particularly for the services sectors.¹⁴⁷ The second agreement with Romania has a similar undertaking to achieve a mutually acceptable agreement on investment issues.¹⁴⁸

2. Exceptions

Three of the agreements all include provisions about adequate safeguards against market disruption from imports.¹⁴⁹ The 1975 Romania Agreement contains an annex with more detail for the safeguards procedure.¹⁵⁰ The 1979 China Agreement does not contain a safeguards provision as required by Title IV,¹⁵¹ but the Carter Administration reported to Congress that the general provisions on consultations were intended to cover safeguards.¹⁵²

All four of the agreements permit either party to the agreement to violate its obligations in the agreement if the measures are necessary to protect the national security of a party.¹⁵³ The national security exception is spelled out in greater detail in the Cambodia Agreement than in the other agreements.¹⁵⁴

The 1992 Romania Agreement and the 1996 Cambodia Agreement incorporate by reference the general exceptions contained in GATT, Article XX.¹⁵⁵ A country can adopt and enforce any measures that are "necessary to protect human, animal or plant life or health"¹⁵⁶ or that are "necessary to secure compliance

147. See 1996 Cambodia Agreement, *supra* note 132, art. VIII.

148. See 1992 Romania Agreement, *supra* note 131, art. IX.

149. See 1996 Cambodia Agreement, *supra* note 132, art. IX; 1992 Romania Agreement, *supra* note 131, art. X; 1975 Romania Agreement, *supra* note 131, at 2308.

150. See 1975 Romania Agreement, *supra* note 131, at 2317-18.

151. See Trade Act of 1974 § 405(b)(3), Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2435(b)(3) (1994)).

152. See H.R. DOC. NO. 96-209 (1979) (citing the 1979 China Agreement, *supra* note 130, at 4659; and also noting that section 406 of Title IV regarding market disruption could be used).

153. The Romania and China agreements state: "The provisions of this agreement shall not limit the right of either Party to take any action for the protection of its security interests." 1992 Romania Agreement, *supra* note 131, art. XII; 1979 China Agreement, *supra* note 130, at 4660; 1975 Romania Agreement, *supra* note 131, at 2314.

154. The Cambodia provision resembles the national security in GATT. See 1996 Cambodia Agreement, *supra* note 132, art. XXIV; GATT, *supra* note 3, art. XXI.

155. See 1996 Cambodia Agreement, *supra* note 132, art. XX; 1992 Romania Agreement, *supra* note 131, art. XV; see also GATT, *supra* note 3, art. XX.

156. GATT, *supra* note 3, art. XX, para. 1(b), 61 Stat. at A1422, 55 U.N.T.S. at

with laws or regulations which are not inconsistent with the provisions of this Agreement."¹⁵⁷ Members have often tried to use the GATT exceptions to restrict trade that they perceived would have negative health or environmental impacts while the challengers of those provisions frequently have viewed the measures as economic protectionism intended to protect domestic producers against foreign competition.

3. Dispute Settlement

All of the agreements contain arrangements for the settlement of private commercial differences and disputes. Specifically, the agreements suggest conciliation and arbitration.¹⁵⁸ All of the agreements require consultation,¹⁵⁹ and the three most recent agreements provide for prompt consultations in matters of overall concern arising from trade relations with the United States.¹⁶⁰

262.

157. *Id.* GATT also allows an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." *See id.* And the General Agreement on Trade in Services allows an exception for measures that are "necessary to protect public morals or to maintain public order." General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, 58. The "public order" exception could be implicated when a "genuine and sufficiently serious threat is posed to one of the fundamental interests of society." *Id.* at 58 n.5.

158. *See* 1996 Cambodia Agreement, *supra* note 132, art. X; 1992 Romania Agreement, *supra* note 131, art. XI; 1979 China Agreement, *supra* note 130, at 4659-60; 1975 Romania Agreement, *supra* note 131, at 2313-14.

159. *See* Trade Act of 1974 § 405(b)(3)(A), Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2436(b)(3)(A) (1994)).

160. *See* 1996 Cambodia Agreement, *supra* note 132, arts. IX, XXVI (making a commitment to consult on safeguards and a commitment to consult generally); 1992 Romania Agreement, *supra* note 131, arts. X, XIII (making a commitment to consult on safeguards and a commitment to consult generally); 1979 China Agreement, *supra* note 130, at 4658-59 (making a general commitment to consult on any problems that arise); 1975 Romania Agreement, *supra* note 131, at 2308 (making a commitment to consult with regard to safeguards but not containing a general obligation of consultation).

4. Additional Provisions

Only the 1975 Romania Agreement and the 1979 China Agreement indicate that the respective country is a developing country.¹⁶¹

Notably, the 1975 Romania Agreement contains a provision not mandated by section 405. This provision calls for a review of the operation of the agreement by a Joint American-Romanian Economic Commission aimed at making recommendations for possible improvements.¹⁶²

Under the terms of the agreements and in accordance with section 405,¹⁶³ the agreements enter into force upon the exchange of notes of acceptance by the two parties.¹⁶⁴ They remain in force for an initial three-year term, and they are renewable for successive three-year terms unless they are terminated by either party.¹⁶⁵ A party can terminate the agreement before the end of a term as long as it gives thirty days notice before the expiration of the term.¹⁶⁶ Also, a party can partially or totally terminate the agreement if it lacks the domestic legal authority to carry out its obligations under the agreement.¹⁶⁷ For example, this may occur if the Jackson-Vanik waiver is revoked.

161. See 1979 China Agreement, *supra* note 130, at 4654; 1975 Romania Agreement, *supra* note 131, at 2307.

162. See 1975 Romania Agreement, *supra* note 131, at 2314.

163. See Trade Act of 1974 § 405(b).

164. See 1996 Cambodia Agreement, *supra* note 132, art. XXV; 1992 Romania Agreement, *supra* note 131, art. XVI; 1979 China Agreement, *supra* note 130, at 4663; 1975 Romania Agreement, *supra* note 131, art. XII.

165. See 1996 Cambodia Agreement, *supra* note 132, art. XXV; 1992 Romania Agreement, *supra* note 131, art. XVI; 1979 China Agreement, *supra* note 130, at 4663; 1975 Romania Agreement, *supra* note 131, art. XII.

166. See 1996 Cambodia Agreement, *supra* note 132, art. XXV; 1992 Romania Agreement, *supra* note 131, art. XVI; 1979 China Agreement, *supra* note 130, at 4663; 1975 Romania Agreement, *supra* note 131, art. XII.

167. See 1996 Cambodia Agreement, *supra* note 132, art. XXV; 1992 Romania Agreement, *supra* note 131, art. XVI; 1979 China Agreement, *supra* note 130, at 4663; 1975 Romania Agreement, *supra* note 131, art. XII.

B. *Three-Year Renewal Procedure for Title IV Agreements*

The Senate Finance Committee, when reviewing the three-year renewal process for MFN bilateral agreements, indicated it would “afford *the opportunity* to secure any adjustment needed to protect our interest.”¹⁶⁸ If the committee only wanted to give the administration “the opportunity” to secure additional concessions, it has done that. If, however, the committee intended for the opportunity to be used, it has not succeeded. With one exception, no administration since 1975 has updated or renegotiated any of the bilateral trade agreements like GATT, which has gone through several rounds of negotiations.¹⁶⁹

By way of example, one considers the renewal process for Romania and China. Only the 1975 Romania Agreement has been changed when, in 1992, the State Department negotiated a new agreement. Otherwise, all of the three-year renewals have amounted to a notice by the President published in the Federal Register, using the section 405 standard of renewal. For example, President Clinton recently renewed the 1979 China Agreement stating:

I have determined that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are being satisfactorily reciprocated by the People's Republic of China. I have further found that a satisfactory balance of concessions in trade and services has been maintained during the life of the Agreement of Trade Relations between the United States of America and the People's Republic of China.¹⁷⁰

1. Romania's Renewal Process

As with Russia, MFN status for Romania was used more as leverage to further U.S. national security and foreign policy interests than as a tool to open markets. The 1974 Romanian

168. S. REP. NO. 93-1298, at 210 (1974) (emphasis added).

169. See *supra* note 5 and accompanying text.

170. Renewal of Trade Agreements With the People's Republic of China, 63 Fed. Reg. 5,857 (1998) (statement of President William J. Clinton).

Agreement was signed April 2, 1975, and became effective August 3, 1975.¹⁷¹ It was extended for three years for the first time in 1978, by President Carter,¹⁷² and then again in 1981, 1984, and 1987, by President Reagan.¹⁷³

a. Importance of the Romanian Economy to the United States

Romania was an NME and never afforded U.S. businesses the same access to its markets that Romanian businesses had to U.S. markets.¹⁷⁴ By receiving MFN status from the United States, Romania was also eligible for duty-free treatment for certain exports under the Generalized System of Preferences ("GSP"), U.S. government credit guarantees from the Export-Import Bank and Commodity Credit Corporation, and political risk insurance from the Overseas Private Investment Corporation ("OPIC").¹⁷⁵

The United States benefitted marginally from Romania's MFN status because, relative to the rest of the world, Romania absorbed few U.S. exports, and if MFN status had been revoked, only a small amount of imports from Romania would have been affected.¹⁷⁶ During the early 1970s, however, Roma-

171. See Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania, Tariff Schedules Amended, Notice of Effective Date of Proclamation 4369, 40 Fed. Reg. 34,651 (1975).

172. See Renewal of the U.S.-Romanian Agreement on Trade Relation—Findings and Determination Under Subsection 405(b)(1) of the Trade Act of 1974, 43 Fed. Reg. 25,983 (1978).

173. See Renewal of Trade Agreement with Romania, 52 Fed. Reg. 23,931 (1987); Renewal of Trade Agreement with Romania and Hungary, 49 Fed. Reg. 23,025 (1984); 29,29921 (1981); Renewal of Trade Agreement with Romania and Hungary—Findings and Determinations Under Subsection 405(b)(1) of the Trade Act of 1974, 46 Fed. Reg. 29,921 (1981).

174. See Juliana Geran Pilon, *Why Romania No Longer Deserves to be a Most Favored Nation*, BACKGROUND—THE HERITAGE FOUNDATION, June 26, 1985, at 4.

175. See also REPUBLICAN STUDY COMM., *supra* note 116, at 5.

176. In 1985 and 1986, total U.S. imports from Romania were \$881.3 million and \$579.2 million, respectively. The duty rate on nonpetroleum imports would go up from the GSP and MFN rates to the full rates. This increase was, on average, 6% or 7% up to 15% to 20%. The duty rate on petroleum imports, however, would remain below one percent. Therefore, because about half of all U.S. imports from Romania were petroleum products that would not have significant rate increases and about 7% of all imports from Romania would remain duty free, the impact of revoking Romania's MFN status would have had negligible effects on the U.S. economy. See Pilon, *supra* note 174, at 4.

nia was strategically important to the United States. Up until 1975, Romania was a net exporter of oil to the Soviet Union. Romania exported as much as four million tons annually,¹⁷⁷ and was, therefore, economically independent from the Soviet Union.

In 1973, President Nixon and President Ceausescu met in the United States and signed the U.S.-Romania Joint Economic Statement ("1973 Statement").¹⁷⁸ Due to Romania's emergence as a developing country, the two presidents stated the importance of economic relations between their countries and made commitments to go forward with economic cooperation.¹⁷⁹ In many ways, the 1973 Statement had the same foundation as an MFN bilateral trade agreement, except that it did not actually accord MFN tariff treatment. In the 1973 Statement, however, President Nixon made a commitment to seek the authority to provide MFN treatment to Romania, a commitment made prior to the passage of the Trade Act of 1974.¹⁸⁰ Thus, the 1974 Romania Agreement for MFN status was built on existing relations and was intended "to create a viable framework and favorable atmosphere for the development of trade and economic cooperation."¹⁸¹

177. *See id.* at 3.

178. *See* Joint Statement on Economic, Industrial and Technological Cooperation Between the United States of America and the Socialist Republic of Romania, Dec. 5, 1973, U.S.-Rom., T.I.A.S. No. 8,159, at 38 [hereinafter 1973 Joint Economic Statement].

179. Specifically, the Presidents stated that it would be advantageous for Romania to be eligible for programs under the U.S. Overseas Private Investment Corporation and Export-Import Bank. *See id.* at 39. These programs, however, were not available to those countries that had their MFN status withdrawn under the 1951 Trade Act. Those countries could only be eligible for the programs if MFN treatment were restored. *See* Trade Act of 1974 § 405(b), Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. § 2432(b) (1994)).

The Presidents also welcomed the conclusion of an agreement between the U.S. and Romanian Chambers of Commerce, a Convention with Respect to Taxes on Income and Property, an Agreement Relating to Civil Air Transport, and an Agreement Regarding Fisheries in the Western Region of the Middle Atlantic Ocean. *See* 1973 Joint Economic Statement, *supra* note 178, at 39-40.

Finally, the Presidents committed their respective governments to facilitate the entering of private contracts between firms, the rights of companies to return and repatriate capital, the avoidance of expropriation, the protection of intellectual property, the settlement of commercial disputes, the exchange of commercial information, and the economic cooperation by both countries through the newly-formed joint Economic Commission. *See id.* at 40-41.

180. *See* 1973 Joint Economic Statement, *supra* note 178, at 39.

181. *Hearings Before the Subcomm. on Trade of the House Comm. on Ways and*

From the time of entry into the U.S.-Romania MFN Agreement until the time it was being considered for renewal in 1978, the United States went from a trade surplus with Romania to a small trade deficit.¹⁸² In 1985, a House bill was introduced indicating that the U.S.-Romanian trade deficit had reached a ratio of 4.7 to 1.¹⁸³ Romanian imports, however, had not risen to a level that would cause a market disruption; nor were Romanian imports being dumped in the U.S. market.¹⁸⁴

b. Renegotiation of the 1975 Romania Agreement

Primarily as a result of non-trade related conflicts between the United States and Romania, the two countries mutually renounced MFN status in 1988. When the two countries began diplomatic talks about a restoration of MFN status, the U.S. Department of State wanted to negotiate a new bilateral trade agreement broader in scope than the 1975 Romanian Agreement, which met only the minimal standards of the Trade Act of 1974. The new agreement was initialed April 3, 1992, and submitted by the President to Congress for approval.¹⁸⁵ The joint resolution for approval of the agreement failed to pass the

Means, 97th Cong. 43 (1979).

182. See *U.S.-Romanian Trade Trends*, chart, Treas. Papers 20 (Sept. 1976) (containing excerpts of the Treasury Assistant Secretary Gerald L. Parsky's statement to the Senate Finance Committee favoring the extension of the U.S.-Romanian Trade Agreement) [hereinafter Treas. Papers].

183. See H.R. 3599, 99th Cong. § 1 (1986). From 1976 to 1984, U.S. exports to Romania declined from \$249 million to \$206.5 million, while imports increased to almost \$1 billion, amounting to a \$743 million deficit in 1985. See REPUBLICAN STUDY COMM., *supra* note 116, at 4.

184. As of the Fall of 1976,

[T]he U.S. International Trade Commission has received no petition or request under Section 406 of the Trade Act of 1974 to conduct an investigation to determine whether imports of an article from Romania are causing market disruption, nor has U.S. countervailing duty authority been invoked against Romanian imports. The only case which has arisen since Romania received MFN status is the issuance of an Antidumping Proceeding Notice on Romanian clear sheet glass. The issuance of such a notice, however, merely begins the formal investigative procedure and does not necessarily imply a formal finding of dumping.

Treas. Papers, *supra* note 182, at 19-20.

185. The President also waived Jackson-Vanik for Romania. See Determination Under Section 402(d)(1) of the Trade Act of 1974, as amended—Continuation of Waiver Authority, 58 Fed. Reg. 33,005 (1993).

House in 1992,¹⁸⁶ but the 1992 Romania Agreement was approved in both the House and the Senate in 1993 and went into effect.¹⁸⁷

While the executive branch pursued new negotiations with Romania in the 1990s, the 1975 agreement would have been sufficient to satisfy the two-tier test for MFN restoration. In 1988, only the emigration waiver was renounced by both parties; this is separate from the validity of the bilateral trade agreement.¹⁸⁸

After Romania and the United States mutually revoked MFN status in 1988, the bilateral trade agreement, by its own terms and the terms of Title IV, remained in force. The agreement states that if either party is unable to carry out its obligations under the agreement, in other words, if the waiver under Title IV is not extended, either party may suspend application of the agreement in whole or in part. Neither the United States nor Romania suspended the agreement. Granted, the agreement was not of practical use to either party during the period in which the two-tier test was not met, but presumably, if the parties agreed to reinstate the Jackson-Vanik waiver, the agreement would still be viable. In fact, President Bush renewed the 1975 Romania Agreement in 1990¹⁸⁹ even though the coun-

186. See H.R.J. Res. 512, 102d Cong. (1992). The House decided not to vote on the resolution until after Romania's national elections, which took place October 11, 1992. See H.R. REP. NO. 103-279 (1993).

187. See Trade Policy Staff Comm. (TPSC); Notice of the Effective Date of the Trade Agreement Between the United States of America and the Government of Romania, 58 Fed. Reg. 60,226 (1993).

188. A report by the Republican Study Committee stated:

[T]he U.S. will apply MFN status to trade with Romania during the period of the [bilateral trade] agreement as long as Romania complies with the provisions of Jackson-Vanik, or failing that, as long as a waiver is requested. If a waiver request is denied by Congress, the bilateral agreement is automatically terminated.

REPUBLICAN STUDY COMM., *supra* note 116, at 4. This statement, however, seems to be inaccurate in two respects. First, the waiver has to be more than requested; it has to be granted by the President. More importantly, U.S. law does not state that the bilateral agreement is suspended if the conditions of the Jackson-Vanik amendment are not met or waived. While MFN status terminates if the conditions are not met or waived, the agreement is not terminated unless either or both parties terminate it or let it expire at its three-year renewal term.

189. See Renewal of the Trade Agreement with Romania, 55 Fed. Reg. 27,797 (1990).

tries had mutually denounced the applicability of the Jackson-Vanik Amendment, and President Bush did not extend a Jackson-Vanik waiver.

While a new agreement was not statutorily required, renegotiation was a logical step for U.S. trade negotiators for two reasons. First, the 1975 Romania Agreement called for a review of the agreement's operations. Second, presumably after fifteen years of operation of an agreement, the parties are able to give additional concessions.¹⁹⁰

2. China's Renewal Process

The United States and China re-established diplomatic relations in January 1979, signed a bilateral trade agreement in July 1979, and provided mutual MFN benefits beginning in 1980.¹⁹¹ President Reagan made the first renewal almost three years later.¹⁹² Over the last twenty years, the trade landscape between the two countries has changed dramatically, but the agreement has never been updated or renegotiated.

a. The Importance of the Chinese Economy

China's impact on the global economy, as well as the U.S. economy, is astounding. China is also one of the largest and fastest growing economies in the world and has become one of the United States's most important trading partners.

Overall, China was only the twenty-seventh largest trading country in 1978. Statistics in China show that from 1971 to 1996, however, GDP grew by an annual rate of about 8% and 11.7% in the last five years.¹⁹³ The International Monetary

190. See 1975 Romania Agreement, *supra* note 131, art. XI. The agreement specified that the review of its operations should be done by the joint commission established in accordance with the 1973 Joint Economic Statement. See *supra* notes 178-80 and accompanying text (discussing the negotiation of the 1973 statement).

191. See Meeting Notice, 45 Fed. Reg. 6,662 (1980).

192. See Renewal of Trade Agreements With the People's Republic of China, 47 Fed. Reg. 57,653 (1982).

193. See DIRECTORATE OF INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY, HANDBOOK OF INTERNATIONAL ECONOMIC STATISTICS 28 (1997).

Fund ("IMF") estimates that China's economy could surpass the United States's economy by 2007.

The Chinese economy was ranked as the thirty-second largest U.S. export market in 1978 and the fifty-seventh largest exporter to the United States. In 1978, U.S. exports to China were \$821 million, and imports were approximately \$321 million. This resulted in a \$500 million U.S. trade surplus with China.

Presently, China is the fifteenth largest buyer of U.S. exports and the fourth largest supplier of U.S. imports. In 1997, the United States maintained approximately a \$49.7 billion trade deficit with China while the total U.S. trade deficit for goods with the world was \$198.9 billion.¹⁹⁴ In 1996, the U.S. trade deficit with China alone was about four times as large as the U.S. trade deficit with the entire European continent, including the European Union, Eastern Europe, Russia, and the newly independent states ("NIS").

The disparities in the U.S.-China trading relationship stem partly from the array of trade and investment barriers that China has erected against foreign products. For more than 860 products, China has import standards that are often different than international standards. China's import standards are different for no identifiable scientific reason, and they are often not published.¹⁹⁵ China has an international trading rights policy that restricts the types and numbers of entities within

194. See *U.S. International Trade in Goods and Services*, U.S. DEP'T COM. NEWS 8, 19 (Feb. 19, 1998). These figures are for the deficits in products.

195. See U.S. TRADE REPRESENTATIVE, 1997 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 43-59. (1997). These licensing practices cost U.S. businesses more than \$5 million per agricultural chemical. See *id.* at 49. For example, in 1996, China banned U.S. poultry for reasons inconsistent with international norms. See *id.*

China still imposes punitive tariff levels against some of America's most internationally competitive products, such as chemicals, while many of our other trading partners give U.S. companies open access to their markets. Furthermore, when China does reduce tariffs on certain goods, it repeatedly adopts new polices to undercut gains from tariff reductions. For instance, in the early 1990s, China reduced the import tariff on U.S. apples from 40 to 15 percent, but by 1996, China had erected new backdoor barriers on apples and other agricultural products that are more damaging to U.S. exporters than the import tariffs.

Letter from John Ashcroft, United States Senator, to William Jefferson Clinton, President of the United States (Jan. 30, 1998).

China which have the legal right to engage in trade, whether import, export, or distribution.¹⁹⁶

The disparities, however, exist also in part because the United States has not utilized sufficient leverage to have a significant impact on the structural deficiencies in China, which is still an NME.

b. Continuation of the 1979 China Agreement

In 1979, the Soviet Union was a greater security threat to the United States than China, and establishing a foundation for U.S.-China relations was viewed more as a foreign policy benefit than an economic opportunity.¹⁹⁷ The reasons, however, for initially extending MFN status and the lack of substantive content of the bilateral agreement do not change the fact that renewal of the agreement was not designed to be a process of rubber-stamping the status quo for 20 years.

Specifically, the legislative history for the 1979 China Agreement stated that the agreement was only "a framework for nondiscriminatory bilateral trade relations obligating both governments but yet to be worked out in specific measures and procedures."¹⁹⁸

In a letter to President Clinton, just prior to the 1998 three-year renewal for the 1979 China Agreement, Senator John Ashcroft questioned whether the standard for renewal in section 405 had been met:

This nearly two decades old agreement is woefully outdated in comparison to other U.S. MFN bilateral trade agreements that cover important sectors of the modern global economy—sectors in which U.S. companies are very competitive. Cambodia, for instance, committed in 1996 under its

196. See U.S. TRADE REPRESENTATIVES, *supra* note 195, at 47. This international trading rights policy particularly damages sectors like grains, cotton, vegetable oils, and petroleum. The U.S. does not have such a policy.

197. See 36 CONG. Q. ALMANAC 357 (1980) (discussing the fact that members appeared to have been more concerned with China's emigration policies and improving U.S.-China relations as a method to counter the Soviet Union).

198. *United States-China Trade Agreement: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong. 7 (1979).

bilateral agreement to treat U.S. imports like it treats its own products and to give U.S. companies providing services meaningful opportunities to compete—two commitments China did not make in 1979. U.S. companies have proven to be highly competitive in services sectors, such as banking and finance, and the Asian economic crisis indicates that China needs immediate competition and transparency in these areas. There is absolutely no reason why the U.S. agreement with China should be less comprehensive than updated bilateral agreements with other non-market economies. The U.S.-China Agreement should incorporate, at a minimum, those concessions China has made in its World Trade Organization accession negotiations over the last ten years.¹⁹⁹

When compared with other MFN bilateral trade agreements, the 1979 China Agreement is much less comprehensive particularly because it does not provide for national treatment.²⁰⁰ In light of the 1974 section 405 requirements, which are still the law, the 1979 China Agreement is, however, substantively sufficient on its face.²⁰¹ After Congress approved the agreement, though, the section 405 elements become irrelevant. The standard for keeping the agreement in place is the three-year renewal standard. The Senate Finance Committee indicated this standard becomes higher as more concessions are made worldwide for products and services.²⁰²

C. Application of the Jackson-Vanik Amendment to Title IV Countries

The President has determined that thirteen of the countries that are still under Title IV are in compliance with the three requirements for freedom of emigration for their citizens.²⁰³

199. See Letter from John Ashcroft to William Jefferson Clinton, *supra* note 195.

200. See, e.g., 1996 Cambodia Agreement, *supra* note 132, art. II (providing national treatment to products from the United States).

201. *But see supra* note 151 and accompanying text (pointing out that the 1979 China Agreement does not contain provisions specifically on safeguards).

202. See *supra* Part IV.A.2.

203. A full-compliance determination was made for Russia on September 21, 1994. See H.R. DOC. NO. 103-314, at 1 (1994). A full-compliance was made for Mongolia on September 4, 1996. See H.R. DOC. NO. 104-258, at 1 (1996). President Clinton found that Albania, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan were

He has waived the requirement with respect to two other countries.²⁰⁴

Undoubtedly, it can be seen from the historical context and the legislative history of Title IV that the Jackson-Vanik waiver was largely put in place because of the Soviet Union's emigration policy. While Romania was one of the first communist countries to obtain MFN tariff treatment, it has also faced some of the most significant obstacles to the continuity of its MFN status during the annual waiver procedure. Thus, an examination of the United States's effectiveness regarding the Soviet Union and Romania may demonstrate some problems with current application of the Jackson-Vanik Amendment, specifically to China.

1. The Jackson-Vanik Amendment Applied to the Soviet Union

Following the enactment of the Trade Act of 1974, the Soviet Union did not implement the provisions that Secretary Kissinger conveyed to Senator Jackson.²⁰⁵ The Soviet Union considered emigration policy a matter of its domestic policy and, therefore, not subject to international negotiation.²⁰⁶ Thus, the Jackson-Vanik Amendment was not waived.

Emigration levels rose and fell periodically over the course of the 1970s and 1980s. The number of individuals allowed to emigrate over the course of this twenty year period appears to correspond with landmark events in U.S.-Soviet relations. The

in full compliance. *See* Presidential Determination Under Subsections 402(a) and 409(a) and 409(a) of the Trade Act of 1974, as Amended—Emigration Policies of Albania, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, 62 Fed. Reg. 66,253 (Dec. 5, 1997). Also, the President found that Armenia, Azerbaijan, Georgia, Moldóva, and Ukraine were not in violation of the emigration requirements. *See* Presidential Determination Under Subsections 402(a) and 409(a) of the Trade Act of 1974, as Amended—Emigration Policies of Armenia, Azerbaijan, Georgia, Moldova, and Ukraine, 62 Fed. Reg. 32,017 (June 11, 1997).

204. China (including Tibet) is currently under waiver authority. *See* Determination Under Section 402(d)(1) of the Trade Act of 1974, as Amended—Continuation of Waiver Authority, 63 Fed. Reg. 32,705 (June 3, 1998). Belarus is also under waiver authority. *See* Determination Under Subsection 402(d)(1) of the Trade Act of 1974, as Amended—Continuation of Waiver Authority, 63 Fed. Reg. 32,709 (June 3, 1998).

205. *See supra* notes 122, 124.

206. *See Secretary of State Kissinger Calls for Early Passage of Trade Reform Act, supra* note 94, at 936.

number of Soviets allowed to emigrate rose significantly when the United States and the Soviet Union were engaged in negotiations over the Strategic Arms Limitation Treaties, SALT I, in 1972 and SALT II in 1979. The numbers also declined sharply in 1975 after the passage of the Trade Act of 1974.²⁰⁷ Secretary of State Kissinger testified this was the immediate and apparent effect of adopting the Jackson-Vanik amendment.²⁰⁸ Some commentators do not attribute the fluctuations to events alone. Rather, some authorities attribute the increase in emigration from the Soviet Union, especially in the early 1970s, as a result of "quiet diplomacy."²⁰⁹

President Bush strongly supported the criteria in the Jackson-Vanik Amendment. In a foreign policy speech at Texas A&M University, he stated, "should the Soviet Union *codify* its emigration laws in accord with international standards and *implement* its new law faithfully, I am prepared to work with Congress for a temporary waiver of the Jackson-Vanik Amendment, opening the way to extend Most Favored Nation trade status to the Soviet Union."²¹⁰

President Bush's policy toward the Soviet Union, like President Reagan's, was trust but verify. In his speech at Texas A&M University, President Bush clearly indicated that promises for future action would be insufficient to obtain a waiver. By 1992, Russia had taken adequate steps to warrant a Jackson-

207. For the years 1968 through 1971, the total amount of Jewish emigrants from the Soviet Union was 17,257. In 1972, the number of emigrating Soviet Jews to the United States and Israel rose substantially to 31,681. It fell to 13,221 in 1975 and rose to 51,320 in 1979. During the mid-1980s, the number hit a low of less than 1,000, but by 1989, the number rose to 71,217. See *Soviet Jewry Research Bureau, Jewish Emigration from the U.S.S.R.* (visited Feb. 26, 1999) <<http://www.nesj.org/stats.htm>>.

208. Secretary of State Kissinger noted that just prior to the adoption of the amendment, the number of emigrants had increased significantly, and the Soviets had suspended the emigration tax. See *Secretary of State Kissinger Calls for Early Passage of Trade Reform Act*, *supra* note 94, at 936 (testimony as prepared for the Senate Finance Comm.).

209. Adlai E. Stevenson & Alton Frye, *Time for Trade with Gorbachev*, WASH. POST, Apr. 23, 1989, at C2 (recognizing the apparent surge in emigrant applications approved during START II, 1979).

210. President George Bush, Address at the Texas A&M University Commencement Service (May 12, 1989) in 135 CONG. REC. 5259 (daily ed. May 12, 1989) (emphasis added).

Vanik waiver from President Bush.²¹¹ Since 1994, Russia has fully complied with the amendment's emigration provisions.²¹²

When viewed in light of a narrow objective of changing the emigration policies of a country, as opposed to a general, ill-defined standard on human rights, it is apparent that the Jackson-Vanik Amendment has served its sponsor's intent with regard to the Soviet Union:

When the Amendment was enacted in 1974, the Soviet Union did not recognize the right to free emigration. . . . Jackson-Vanik was intended as, and served as, a pressure tactic to compel a significant change in Soviet emigration policy. . . . Looking only at the figures of Jewish emigration, the main concern and target of the Jackson-Vanik Amendment, the former Soviet Union has surpassed that benchmark in each of the past three years. . . . So we are very pleased to note that, whether due directly to Jackson-Vanik or not, the original goal of the Amendment has clearly been fulfilled.²¹³

2. The Jackson-Vanik Amendment as Applied to Romania

The United States waived the Jackson-Vanik amendment for Romania in 1975.²¹⁴ The United States used MFN status for Romania first as leverage against the balance of power with the Soviet Union²¹⁵ and eventually as a tool to influence Romania's own emigration and human rights policies.

The 1975 extension of MFN status to Romania was an effort to "serve the foreign policy interests of both countries."²¹⁶ The United States, at the beginning of the Ceausescu regime, want-

211. See Exec. Order No. 12,802, 3 C.F.R. 295-96 (1993), reprinted in 3 U.S.C. § 2432 (1994).

212. See Pres. Determination No. 94-51, 3 C.F.R. 1031 (1995).

213. *Cold War Trade Statutes Affecting U.S. Trade and Commercial Relations with Russia and the Other Successor States of the Former Soviet Union: Hearings Before the Subcomm. On Trade of the House Comm. On Ways and Means*, 103d Cong. 19, 20 (1993) (testimony of Julian Spirer, Chair, American Jewish Congress).

214. President Ford issued the waiver. See Exec. Order No. 11,854, C.F.R. 987-88 (1971-1975), reprinted in 30 U.S.C. § 2432 (1994).

215. See *supra* note 180 and accompanying text.

216. Recommendation for Extension of Waiver Authority, 12 WEEKLY COMP. PRES. DOC. 991 (June 7, 1976).

ed to show support for Romania because Romania appeared to be one of the few Eastern Block nations to display public independence from Russia. Romania was sort of a "maverick in foreign affairs."²¹⁷ Specifically, Romania refused initially to align with the Council for Mutual Economic Assistance ("COMECON") of the Soviet bloc.²¹⁸ Romania also refused to permit Soviet troops on its soil for Warsaw pact exercises and condemned Russia's invasion of Czechoslovakia. Additionally, Romania supported Yugoslavia's independence, sent athletes to the 1984 Los Angeles Olympic games despite a Soviet boycott, criticized the Soviet invasion of Afghanistan, and was the only Eastern Bloc nation to maintain relations with Israel.²¹⁹

U.S.-Romania relations, however, were not as positive in the late 1970s and 1980s. During this time, there were repeated, yet unsuccessful, attempts by Congress to suspend Romania's MFN status.²²⁰

David Funderburk, the U.S. Ambassador to Romania from 1981 to 1985, testified before Congress that Soviet agents were in Romania overseeing substantial exports to the Soviet Union, that Romania was transferring western technology to the Soviet Union, and that Romania had become a major exporter of arms.²²¹ Also, former Romanian Director of Foreign Intelli-

217. Pilon, *supra* note 174, at 2.

218. After it did join COMECON, Romania led the COMECON countries in its proportion of trade with the United States. See Recommendation for Extension of Waiver Authority, *supra* note 216, at 991. Romania was also the only COMECON country that was a member of most of the multilateral financial and trade regimes. Romania was a party to the International Monetary Fund ("IMF"), the World Bank, and the General Agreement on Tariffs and Trade ("GATT"). *Continuing Most-Favored-Nation Tariff Treatment of Imports From Romania: Hearings Before the Subcomm. on Int'l Trade of the Comm. on Finance*, 94th Cong. 56 (1976) (statement of Gerald L. Parsky, Assistant Sec. of Treas. for Int'l Affairs, favoring the extension of the U.S.-Romanian Treaty Agreement).

219. See REPUBLICAN STUDY COMM., *supra* note 116, at 5.

220. To ensure the continued renewal of MFN status, in 1974, President Ceausescu set up a permanent task force, consisting of the Minister of Interior, Minister of Foreign Affairs, and Deputy Chief of Foreign Intelligence (Mr. Ion Pacepa). From 1976 to 1983, and again in 1986, congressional resolutions were introduced to disapprove the extension of MFN status for Romania. General Pacepa, after defecting in 1978, stated that "Bucharest is successfully outfoxing Washington day after day" with its review of emigration cases just before MFN renewal, its financing of Romanian emigree groups to demonstrate and lobby Congress, and its paying for hundreds of books and articles to be published in the West about President Ceausescu. *Id.* at 9.

221. See *id.* at 5.

gence, Ion Pacepa, stated that "Mr. Ceausescu . . . serves as a conduit for the transmission of embargoed Western technology to Moscow"²²² and that "[e]very cooperative or joint venture with Western companies is intensively used to infiltrate to the West numerous intelligence officers and agents, for the purpose of illegally obtaining Western technology."²²³ Pacepa also claimed that Romania supported international terrorism through its "support of the Palestine Liberation Organization . . . and the secret cooperation of the Romanian government with the Libyan security forces."²²⁴

Particularly relevant to the annual renewals of the Jackson-Vanik Amendment was the fact that Romania continued to "harass and oppress those who wish[ed] to emigrate."²²⁵ Although Romania allowed emigration, emigration was not without cost. The Ceausescu administration collected 10,000 marks from each adult emigrant in return for exit papers and a ransom of 7,900 marks from the West German government for every ethnic German emigrant. President Ceausescu was quoted as saying "[w]e should make as much money as possible on our vanishing natural resources—oil, Jews, and Germans."²²⁶ The number of Romanian emigrants to the United States rose from 980 in 1975, to 4,545 in 1984, but many of those allowed to leave Romania were reportedly "criminals 'dumped' on the United States, agents instructed to infiltrate the emigre community, or dissidents forcibly exiled."²²⁷

222. Ion M. Pacepa, *Ceausescu: America's Most Favored Tyrant*, WALL ST. J., Jan. 13, 1986, at A26 (the author, Ion Pacepa, defected to the United States in 1978 after being instructed by President Ceausescu to conduct secret assassinations of exiles critical to the Ceausescu regime).

223. Ion M. Pacepa & Michael Ledeen, *Rumania Reaps Rewards of Hi-Tech Thefts*, HUMAN EVENTS, Mar. 16, 1985, at 12.

224. Pacepa, *supra* note 222, at A26.

225. REPUBLICAN STUDY COMM., *supra* note 116, at 7 (stating that "[d]emotion or dismissal from jobs, dismissal from universities, eviction from apartments, denial of ration cards, and loss of citizenship are all common government responses" to a request to emigrate).

226. *Id.* at 8 (attributing this quote to President Ceausescu, as stated by General Ion Pacepa, former Director of Romanian Foreign Intelligence). General Pacepa says that President Ceausescu engaged in what amounts to "selling Romanians" as an export commodity. See Pilon, *supra* note 174, at 7. Ceausescu funneled money from Israel and Germany for the "purchase" of Jews and Germans to personal accounts in the Romanian Foreign Trade Bank and in Switzerland. See *id.*

227. *Id.* at 8.

In 1982, President Reagan, through his request for an extension of the Jackson-Vanik waiver, warned the Romanian government that its MFN status would be in serious jeopardy in 1983 if there were not significant increases in Romania's emigration.²²⁸ President Ceausescu aggravated the situation with a November 1982 announcement that the Romanian government was considering a requirement that emigrants pay an exit tax which would reimburse the government for the cost of the emigrant's education.²²⁹ President Reagan responded assuredly, stating his intention to terminate MFN status for Romania as of June 30, 1983, if the tax plan was not abolished. The education tax was canceled days before the deadline.²³⁰

Freedom of emigration was not the only human right discussed in the annual debate on the waiver of the Jackson-Vanik Amendment. The U.S. Helsinki Watch Committee stated that "Romania is generally considered to be one of the most egregious human rights offenders in Eastern Europe."²³¹ In the

228. President Reagan pointed out that emigration to the United States had increased. He stated, however, that:

I am gravely concerned about the Romanian Government's failure to improve its repressive emigration procedures and the significant decrease in Romania[n] Jewish emigration to Israel This emigration has dropped from an annual rate of 4,000 prior to the 1975 extension of MFN to Romania, to the current (1981) low level of 972. Furthermore, contrary to the 1979 agreement with American Jewish leaders, Romania continues to maintain a considerable backlog of unresolved long-standing emigration cases. . . . Also, contrary to the 1979 agreement, the Romanian Government has not improved its emigration procedures. . . . All these factors demonstrate Romania's negativistic emigration policy which clearly contravenes the intent and purpose of the Jackson-Vanik Amendment. . . .

. . . I intend to inform the Romanian Government that unless a noticeable improvement in its emigration procedures takes place and the rate of Jewish emigration to Israel increases significantly, Romania'[s] MFN renewal for 1983 will be in serious jeopardy.

H.R. DOC. NO. 97-190 (1982).

229. See Pilon, *supra* note 174, at 8.

230. See *id.* The Romanian government simply started imposing back door bribes that amounted to "a substitute for the Education Tax." *Id.*

231. REPUBLICAN STUDY COMM., *supra* note 116, at 6 (citing Report to Congress, U.S. Helsinki Watch Committee (May 14, 1985)). In its 1984 Country Reports on Human Rights Practices, the U.S. State Department stated that "[i]n the area of human rights, major discrepancies persist between Romania's Constitution, laws, public pronouncements, and international commitments on the one hand, and the civil liberties and human rights actually allowed by the regime on the other." U.S. DEPT OF STATE, 98TH CONG., 2D SESS. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES,

mid-1980s, Romanian authorities employed such tactics as beatings, jailing, incarceration in psychiatric hospitals, torture, and even political murder for those who tried to exercise civil liberties, including freedom of expression.²³² Romania was often cited for its violations of the basic human rights of certain ethnic minorities, especially the Hungarians and unregistered religious groups.

By 1985, commentators stated that Romania's lack of reform and its abysmal human rights record "are a mockery of declared U.S. policy goals."²³³ Politically, MFN status for Romania only served to bolster the image of the Ceausescu regime.²³⁴ Economically, MFN status allowed Romania to keep in place a centralized economy while benefitting from open access to the U.S. market.²³⁵

In the fall of 1985, nearly identical bills to suspend Romania's MFN status for six months were introduced in the House and Senate.²³⁶ The House bill cited reports from the State Department, human rights organizations, and congressional delegations about accounts of arbitrary harassment, interro-

1077 (1984). Cf. Juliana Geran Pilon, *The Romanian Distinction Between Negative and Positive Liberty*, in 23 STUDIES IN SOVIET THOUGHT 131 (1982) (arguing, however, that Romanian law, in its context, does not guarantee human rights).

232. See Pilon, *supra* note 174, at 5 (citing *Amnesty International's Concerns in Romania: Hearing on Human Rights in Romania Before the Subcomm. on Eur. and the Middle East and on Human Rights and Int'l Org. of the House Comm. on Foreign Affairs*, 99th Cong. 76 (1985) (statement of Robert Sharlet, Consultant East European Coordination Group, Amnesty International, U.S.A.)).

233. REPUBLICAN STUDY COMM., *supra* note 116, at 6 (quoting Former Ambassador Funderburk from a 1985 press conference).

234. See Pilon, *supra* note 174, at 4 (noting that Ceausescu, by the mid-1980s, was one of the Eastern block's most ruthless dictators and the only true Stalinist left in power).

235. See *id.* at 4.

236. See H.R. 3599, 99th Cong. § 2 (1986) (sponsored by Representative Chris Smith (R-N.J.), Representative Tony Hall (D-Ohio), and Representative Frank Wolf (R-Va.)); S. 1817, 99th Cong. (1986) sponsored by Senator Paul Trible (R-Va.) and Senator William Armstrong (R-Colo.). There were other bills regarding Romania's MFN status. S. 1492, 99th Cong. (1986), sponsored by Senator Jesse Helms (R-N.C.), proposed an outright denial of MFN status for Romania. H.R. 2596, 99th Cong., (1986) sponsored by Representative Mark Siljander (R-Mich.), proposed denial of MFN status if the Romanian government, in an effort to stifle the Hungarian minority in Romania, discriminated on the grounds of religious, ethnic, or cultural orientation. See generally REPUBLICAN STUDY COMM., *supra* note 116, at 1.

gation, and arrest of Romanians who exercised civil liberties.²³⁷

In 1988, the United States and Romania made a mutual agreement to renounce MFN status between the two countries under the conditions of the Jackson-Vanik amendment. Thus, Romania's MFN status was not extended that year and was, therefore, ineffective as of July 3, 1988, when the President's earlier Jackson-Vanik waiver expired.

In the early 1990s, the President and Congress took action to renew Romania's MFN status. President Bush issued a new Jackson-Vanik waiver on August 17, 1991,²³⁸ and the agreement was subsequently waived annually until 1995.²³⁹ In May 1995, President Clinton determined that Romania was in full compliance with the Jackson-Vanik Amendment requirements.²⁴⁰ Since 1995, Romania has been granted unconditional MFN status.²⁴¹

The House Report accompanying the bill to remove Romania from the purview of Title IV stated various reasons relating to trade, democracy, and protection of human rights for Romania's restoration of unconditional MFN status.²⁴² Romania had remained in full compliance with the provisions of the Jackson-Vanik Amendment for a year, approved a new constitution in 1989,²⁴³ held democratic elections in 1991,²⁴⁴ and had imple-

237. See H.R. 3599, 99th Cong. § 1 (1986). The sponsors of H.R. 3599 focused particularly on the lack of religious freedom in Romania. Officially, the country was atheist, and citizens could only practice their religion in recognized sects. Human rights organizations cited many incidents before Congress of others being harassed and even persecuted. See *id.* (citing numerous cases of persecution). One case that was particularly inflammatory in the U.S. press was the revelation that about 20,000 Bibles sent by the World Reformed Alliance to Hungarians in Romania were turned into toilet paper—actual samples of the toilet paper, on which the words were still visible, were displayed in Congress at a press conference. See *id.*; see also, Pilon, *supra* note 174, at 2.

238. See Exec. Order No. 12,772, 3 C.F.R. 347 (1992).

239. See Pres. Determination No. 94-27, 59 Fed. Reg. 31,105 (1994); Pres. Determination No. 93-25, 58 Fed. Reg. 33,005 (1993); H.R. Doc. No. 102-341 (1992).

240. See Pres. Determination No. 95-22, 60 Fed. Reg. 29,463 (1995).

241. See Act of Aug. 3, 1996, Pub. L. No. 104-171, 110 Stat. 1539 (1996). Romania's unconditional MFN status went into effect in the Fall of 1996. See Proclamation No. 6951, 61 Fed. Reg. 58,129 (1996). See *infra* note 313 for an explanation of the importance of unconditional MFN status.

242. See H.R. REP. NO. 104-629 (1996).

243. See *id.* Romania's constitution laid the foundation for a modern parliamentary

mented significant reforms of its trade regime and financial system.²⁴⁵

VI. ALTERNATIVES TO CURRENT USE OF TITLE IV OF THE 1974 ACT

It is possible for some Title IV requirements to serve a functional purpose of protecting and promoting goals that are vital to U.S. national interests today. MFN treatment has been a useful tool in various respects since 1974, but presently, the United States faces different national security, foreign policy, and international economic needs for the 21st century.

A. *Protection of National Security Interests*

National security concerns have often influenced U.S. economic relations. For example, for national security reasons, the United States decided to refrain from pursuing economic cooperation in the 1960s and 1970s when the Soviet Union sought negotiations with the United States. The United States also decided to pursue economic relations in the 1970s with Romania in anticipation of the passage of Title IV because of Romania's economic independence from the Soviet Union. Furthermore, for national security reasons, the United States terminated trade relations with Romania in the late 1980s due to repeated Congressional testimony that Romania's relationship with the Soviet Union had changed to the detriment of U.S. interests.

When using Title IV of the 1974 Act to protect and promote U.S. national interests, one must first consider the issues of whether there exists a threat that rises to a sufficient level to

democracy charged with guaranteeing fundamental human rights, freedom of expression, and respect for private property. *See id.* at 2-3.

244. *See id.* at 3. A new Parliament was elected in 1991. *Id.* at 3. Local elections, parliamentary elections, and presidential elections were also held, and 1996 marked the second nationwide presidential election. *See id.*

245. *See id.* Romania established a two-tier banking system, introduced a modern tax system, loosened price controls, eliminated a lot of subsidies, adopted a tariff-based trade regime, and implemented a rapid privatization of industry and nearly all agriculture. Furthermore, Romania joined the WTO. *See id.* at 2.

upset U.S. economic relations and whether upsetting economic relations furthers U.S. national security interests. In both respects, these are factual determinations that should be made every time the United States uses economic sanctions to further U.S. national security.

Another issue to consider in the use of Title IV is whether the United States should rely on a 1951 classification of "communist country" or a 1974 categorization of "non-market economy" to decide which countries the United States will grant MFN status. With the dissolution of the Soviet Union and the normalization of relations with Russia, very few countries are actually denied MFN status based on national security concerns. The United States has not pursued MFN status for some countries, such as North Korea or Cuba, because of national security interests. The face of international threats, however, is changing and state sponsors of terrorism, like Sudan, are more of a menace to U.S. national security than many countries that were formerly under the domination of communism, such as the Ukraine. This is not to say that none of the countries currently under Title IV presently do or could in the future pose a threat to U.S. national security. Rather, this indicates that the 1951 classification has faults when applied today because there is no longer a "bloc" of communist countries. Some of the countries on the 1951 list are no longer a threat, and some countries outside of the Title IV list are rising threats.

Finally, if the Cold War lines are erased and the United States makes an MFN determination based on updated criteria of what countries or alliances pose an actual threat to U.S. security (in essence, making a Jackson-Vanik type procedure for reviewing national security concerns), there is still the issue of whether withdrawal of MFN status is the appropriate tool to address national security concerns. Or, stated another way, are there better ways to address national security threats around the world?

It would not be particularly beneficial for Congress to establish "procedures" or "time-frames" per se to review the operation of a trade agreement in light of U.S. national security interests for several reasons. First, the protection of U.S. national security is always an option; it does not need a specific time to be reviewed or protected. If Congress was to designate

a "time" to review U.S. national security, Congress may become complacent to national security issues when it is not that "time." Furthermore, simply because it is the appropriate "time" to review U.S. security interests, multiple concerns that should not rise to the level of threats may become exaggerated.

U.S. national security interests do not have to be defined in advance by Congress to be protected. Nor does the review of U.S. national security interests as they relate to a trade agreement need to fit into any Congressionally-defined procedure. Any U.S. trade agreement is unilaterally terminable by the United States at any time to protect national security interests regardless of when and under what terms the agreement specifies for termination.

Most trade agreements actually state that they are terminable for national security reasons. This is the case for U.S. trade agreements that could raise significant national security concerns and for those agreements that focus purely on the economics of free trade. For instance, the U.S.-China Nuclear Cooperation Agreement,²⁴⁶ which covers sensitive technology and was negotiated with a country with which the United States has had proliferation concerns,²⁴⁷ arguably would be more focused on national security and less focused on the broad economic benefits from trade than an MFN bilateral agreement. Neither the agreement, which just went into effect, nor the authorizing legislation,²⁴⁸ have annual or specified times for potential termination of the agreement, outside its specified

246. See H.R. DOC. NO. 99-86 (1985). The joint resolution that adopted the agreement prohibited licenses to export or agreements to transfer nuclear materials, facilities, or components to China under the agreement until after 30 days of continuous session of Congress following the President's submission to Congress of certification. See S.J. Res. 238 (1985) 99-183. President Clinton made this certification to Congress on January 12, 1998. Pres. Determination No. 98-10 (1998), reprinted in H. DOC. NO. 105-197 (1998). The 30 days of continuous session ended March 19, 1998, and the prohibition on licenses was lifted. See Michael Kelly, *Certifying China's Proliferation*, WASH. POST, Mar. 25, 1998, at A20.

247. "China was . . . the primary source of nuclear-related equipment and technology to Pakistan, and a key supplier to Iran during this reporting period [July-December 1996]." DIRECTOR OF CENTRAL INTELLIGENCE, THE ACQUISITION OF TECHNOLOGY RELATING TO WEAPONS OF MASS DESTRUCTION AND ADVANCED CONVENTIONAL MUNITIONS 5 (June 1997).

248. See Atomic Energy Act of 1954, Pub. L. No. 68-703, § 123, 68 Stat. 921, 940 (codified as amended at 42 U.S.C. § 2153 (1994)).

thirty-year lifespan, because such interim termination times are unnecessary. Congress set out the standards for termination, which could apply any time China takes an action rising to the level of a threat.²⁴⁹

The United States is also able to protect sufficiently its national security interests with regard to its participation in the WTO multilateral agreements, such as GATT and GATS. These agreements, when compared with a nuclear cooperation agreement or a MFN bilateral agreement, are much more economic oriented.²⁵⁰ The GATT national security exception, which allows a WTO member to ensure that it does not compromise its essential security interests,²⁵¹ "is so broad, self-judging, and ambiguous" that it essentially can be used for whatever a country desires.²⁵²

Another reason an annual review of national security in light of MFN status would not be beneficial is because many of the

249. *See id.*

250. This economic orientation of the WTO agreements is reflected in the authorizing legislation for the Uruguay Round of negotiations. The principal trade negotiating objectives of the United States in 1988, were to obtain:

- (1) more open, equitable, and reciprocal market access;
- (2) the reduction or elimination of barriers and other trade-distorting policies and practices; and
- (3) a more effective system of international trading disciplines and procedures.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(a), 102 Stat. 1107, 1121 (codified as amended at 19 U.S.C. § 2901(a) (1994)) [hereinafter OTCA]. Furthermore, this economic orientation is clear from the GATT agreement itself. The GATT preamble states that its purpose is: "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra* note 3, 61 Stat. at A11, 55 U.N.T.S. at 194. The GATS has a similar provision. *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 33 I.L.M. 1168 (1994).

251. *See* GATT, *supra* note 3, 61 Stat. at A63, 55 U.N.T.S. at 266.

252. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 204 (1989) (citing an instance in which a country claimed that it had to maintain restrictive measures for shoe facilities because "an army must have shoes!"). The national security exception has, however, rarely been used. *See id.* at 204-05. The United States used national security upon implementation of the Trade Agreements Extension Act of 1951 as a foundation to withdraw MFN status from Czechoslovakia. The "contracting parties" adopted a declaration that authorized the United States and Czechoslovakia to suspend GATT obligations and benefits toward each other. *See id.* at 205.

countries that could now threaten the United States's national security interests are members of the WTO. The United States accords these countries unconditional MFN status, which is a requirement of the GATT and GATS.²⁵³ Therefore, if the United States was to put any of these countries into a classification that gave them only conditional MFN and made them subject to an annual review of their national security policy and practices, the United States would be in violation of its WTO commitments and would have to terminate its recognition of these countries under the WTO agreements.²⁵⁴

This is not to say that the United States could not withdraw a country's unconditional MFN status. At any point, Congress can pass legislation that terminates MFN status for a country if it determines that such a termination is the most appropriate tool to protect U.S. security interests. Congress should wait to take action on a country's MFN status, however, until such point that it needs to withdraw MFN status entirely rather than putting a country into the conditional MFN status classification, which merely keeps business relations unstable and puts the United States at odds with its WTO commitments.

Besides reclassifying a country's MFN status or even revoking MFN status, there are other tools, such as trade embargos and foreign investment restrictions that could be used to address national security threats. The proper tool to use is probably a decision that will have to be made on a case-by-case basis because the landscape of trade and investment flow with the United States is different for every country.

U.S. national security will be preserved best when the United States clearly defines what its interests are,²⁵⁵ increases the substance of its diplomacy at the highest levels,²⁵⁶ builds alli-

253. See *infra* note 313 for an explanation of the WTO agreements' requirement of unconditional MFN.

254. See *infra* note 313 for an explanation of the nonrecognition provision in the WTO agreements.

255. President Ronald Reagan "was [able] to develop a foreign policy of extraordinary consistency and relevance. Reagan might well have had only a few basic ideas, but these also happened to be the core foreign policy issues of his period, which demonstrates that a sense of direction and having the strength of one's convictions are the key ingredients of leadership." HENRY KISSINGER, *DIPLOMACY* 765 (1994).

256. President Reagan knew that his meetings with President Gorbachev were much more than symbolic gestures and fanfare. He intended to and was able to ad-

ances in line with its vital interests,²⁵⁷ uses targeted legislation to address specifically any threats that may arise, or as a last measure, uses military force.

B. *Promotion of Foreign Policy Goals*

The Jackson-Vanik Amendment is a “prototype of self-defeating policies in superpower relations.”²⁵⁸ This assertion is simply incorrect. While the 1951 revocation of MFN targeted superpower relations, the Jackson-Vanik Amendment had little to do with the balance of power between the United States and the Soviet Union. It is not a relic of the Cold War.

While MFN status was rescinded and the Jackson-Vanik Amendment was passed during the Cold War, only the 1951 MFN recession was a national security tool during the Cold War. The Jackson-Vanik Amendment was a foreign policy tool used to address Soviet domestic policy.

dress and resolve great issues of relevance and weight. Just before his first summit with Gorbachev in 1985, President Reagan made these comments:

Starting with Brezhnev, I'd dreamed of personally going one-on-one with a Soviet leader because I thought we might be able to accomplish things our countries' diplomats couldn't do because they didn't have the authority. Putting that another way, I felt that if you got the top people negotiating and talking at a summit and then the two of you came out arm in arm saying, “We've agreed to this,” the bureaucrats wouldn't be able to louse up the agreement. Until Gorbachev, I never got an opportunity to try out my idea. Now I had my chance.

Id. at 770-71.

257. For instance, President Ronald Reagan built relations based on U.S. national interests:

The Reagan Administration achieved . . . successes by putting into practice what became known as the Reagan Doctrine: that the United States would help anticommunist counterinsurgencies wrest their respective countries out of the Soviet sphere of influence. . . . The high-flying Wilsonian language in support of freedom and democracy globally was leavened by an almost Machiavellian realism. America did not go “abroad in search of monsters to destroy,” in John Quincy Adams' memorable phrase; rather, the Reagan Doctrine amounted to a strategy for helping the enemy of one's enemy The United States had no more in common with the mujahideen than Richelieu had with the Sultan of the Ottoman Empire. Yet they shared a common enemy, and in the world of national interest, that made them allies.

Id. at 774-75.

258. Stevenson & Frye, *supra* note 209, at C2.

The decision to evaluate only the emigration policies of the Sino-Soviet bloc, however, is a relic of the Cold War. It is possible that there were no other countries in 1974 that significantly restricted emigration. If there are countries that still significantly restrict emigration today, there is not a rational reason to apply Jackson-Vanik policy only to the former Sino-Soviet bloc.

There is a practical reason, however, not to apply the Jackson-Vanik requirements to many other non-communist countries. If the United States decides, as a matter of U.S. policy, to apply the Jackson-Vanik test to all countries, the President would have to rescind MFN status or grant a waiver to those countries without freedom of emigration. Many of these countries may already be members of the WTO, in which case, the United States would have to terminate application of the WTO multilateral trade agreements for these countries.²⁵⁹

Regardless of what tools the United States uses to affect the emigration policies of other countries, the tools should be used in a nondiscriminating manner. If the United States limited its annual Jackson-Vanik review to the statutorily defined objectives, it possibly could be kept in place with minimal disruption of commercial relations.

A country's emigration is measurable. For instance, Senator Jackson stated that the Soviet Union should at least reach a certain objective benchmark by approving a specified amount of emigration applications.²⁶⁰ There have been repeated efforts to include a general discussion of human rights in the annual renewal process. There are universally recognized human rights in the United Nations Declaration on Human Rights, and the United States has better capabilities currently to monitor human rights violations in foreign countries than it had in the 1970s when an iron curtain masked such atrocities.

Several problems exist, however, with including a general review of human rights in the Jackson-Vanik annual analysis. First, the application of the U.N. standards on human rights is subjective and is, therefore, interpreted differently by some U.S.

259. See *infra* note 299.

260. See *supra* note 122, 124.

Congressmen. Some Congressmen may have a tendency to interpret rights broadly to include what the United States considers civil rights. Also, the monitoring by the United States is not readily available to U.S. businesses which have to determine in which countries to operate. Finally, depending on the prevailing public opinion in Congress, U.S. trading partners and the private sector could be subject to an ever-changing standard.

Under Jackson-Vanik, to keep MFN status in effect for an NME, the President must either make an additional finding of compliance with the Jackson-Vanik requirements every six months²⁶¹ or grant an additional waiver of Jackson-Vanik every year.²⁶² Congress has the power within a specified time period to override the President by a joint resolution.²⁶³ Thus, there are many hurdles to jump in order for an NME to keep its MFN status in effect.

Assuming the Jackson-Vanik Amendment ultimately has been successful for Russia, as opposed to assuming that the increases in the number of emigrants is attributable to something else, it is possible that the policy should remain in place for other countries. Congress has the authority to pass country-specific legislation at any time and remove a country's MFN status for any reason. This should be the correct procedure. The United States could set objective standards as benchmarks for a country's emigration policy. If the standards are not reached, MFN status can be withdrawn until compliance occurs. Countries would be targeted because of their actions. The standard would be clear, and the procedure would be less susceptible to multiple overrides.

In addition, the United States should use other available tools, such as membership in international human rights referenda, diplomacy at all levels, and the use of foreign aid to influence other countries' human rights practices.²⁶⁴ Both im-

261. See Trade Act of 1974, § 402(b), Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. § 2432(b) (1994)).

262. See *id.* at § 402(d) (codified at 19 U.S.C. § 2432(d) (1994)).

263. See *id.* at § 402(d)(2) (codified at 19 U.S.C. § 2432(d)(2) (1994)).

264. See *Cold War Trade Statutes Affecting U.S. Trade and Commercial Relations with Russia and the Other Successor States of the Former Soviet Union*, Subcomm. on Trade of the House Comm. on Ways and Means, 103d Cong. 19 (1993) (testimony of Julian Spirer, Chair, American Jewish Congress). The United Nations has declara-

proving relations, generally, and utilizing quiet diplomacy over emigration issues, specifically, contributed to the changed emigration policy of Russia.²⁶⁵ The value of a principled, consistent diplomatic presence of the United States should not be underestimated. This is a potentially strong tool for the executive branch to use.

C. *Promoting U.S. Economic Goals*

Title IV is not needed to protect national security interests because Congress can pass specific legislation at any point to withdraw the MFN status of countries that pose a threat to the United States. In addition, Congress or the executive branch can use other tools to protect U.S. security. Thus, if U.S. goals for freedom of emigration can be pursued through country-specific legislation, which would be an avenue other than the Jackson-Vanik Amendment, then the amendment becomes irrelevant legally because it does not address any other topics.

Without the Jackson-Vanik amendment to Title IV, the only other part of the two-tier test for MFN status is the bilateral trade agreement requirement. If the MFN bilateral trade agreement and three-year renewal requirements were rescinded, there would be some advantages, but the disadvantages would likely outweigh the advantages.

Congress rescinded some Cold War statutes after they became obsolete. For example, Congress repealed a provision in the Trade Act of 1930, which addressed slave labor practices, because the Soviet Union's political changes made the provision

tions and fora to address human rights, including emigration. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Additionally, in the Conference on Security and Cooperation in Europe ("CSCE"), all parties have agreed to recognize the freedom of movement and religion. Secretary of State James Baker, in the late 1980s, made it clear that considering the Soviet Union for a Jackson-Vanik waiver would be done in light of its compliance with its commitments with such human rights commitments in the CSCE. He noted further that U.S. participation in the CSCE Moscow conference would depend on that country's performance. See Stevenson & Frye, *supra* note 209, at C2.

265. See *Secretary of State Kissinger Calls for Early Passage of Trade Reform Act*, *supra* note 94, at 936 (stating that these tools were probably the reason for the rise in emigration applications that were approved in the Soviet Union prior to the consideration of the Trade Act of 1974).

irrelevant. Congress has not rescinded other Cold War statutes, such as a provision in the Omnibus Trade and Competitiveness Act of 1988, that addressed the accession of NMEs that have state trading practices to the WTO. The slave labor provisions are trade related, but the latter affects trade directly. Furthermore, the latter is still relevant to some countries, albeit, perhaps not the countries it was originally intended to target.²⁶⁶

One major advantage to rescinding Title IV completely would be that U.S. businesses and their Chinese counterparts would not be forced to make business decisions in a business climate that could change dramatically. Consistency is important for business relations. Once an agreement is in place, businesses conclude contracts and make investments in reliance on the agreement. The long-term and high-value nature of some contracts make revocation of MFN status an undesirable policy. Furthermore, due to the fact that there are few eligible buyers in China for some industries, it is important for U.S. exporters to have the ability to develop sufficient positive relationships.

There are, however, potential disadvantages to rescinding Title IV. For one, because denial of MFN status is such a blunt instrument, a threat of such denial is substantial leverage. For instance, in 1991, President Bush used eroding support in Congress for China's MFN renewal to influence Chinese leaders to negotiate a memorandum of understanding on market access that, if fully implemented, would greatly benefit both countries.²⁶⁷

266. See *Cold War Trade Statutes Affecting U.S. Trade and Commercial Relations with Russia and the Other Successor States of the Former Soviet Union*, *supra* note 264, at 3. Testimony stated that the provision should be rescinded in part or at least waived with regard to the FSU countries. See *id.* at 67-69 (statement of Terence P. Stewart) (stating that the circumstances have changed since 1974, including: (1) the breakup of the Soviet Union, making the statute's "major" foreign countries" provision possibly obsolete vis-a-vis the NIS; (2) the implementation of significant privatization plans in the Soviet Union, making state trading less of a dominant force in the Soviet market; (3) the renegotiation of the state trading enterprise article in the GATT, making the multilateral arrangement more enforceable and the U.S. law less relevant or needed; and (4) the provision arguing that recession of this provision would indicate strong U.S. support for Russia's accession to GATT). Such a recession or waiver for the NIS would send a clear message of support for Russia's membership in GATT. See *id.* at 65.

267. See *infra* notes 279-85 and accompanying text.

The MFN bilateral trade agreement requirement should be kept in place, but it needs to more clearly reflect current U.S. economic goals. Furthermore, to add to its leverage and to help promote U.S. economic interests abroad, the United States could pursue sectoral bilateral negotiations that have some measure of enforceability or broad multilateral negotiations.

1. A Title IV Agreement That Could Serve U.S. Economic Goals

Congress should amend the Trade Act of 1974 to require MFN bilateral trade agreements to reflect the substantial negotiations that have continued through the last twenty years. In the Trade Act of 1974, Congress attempted to ensure that trade negotiators had sufficient flexibility but intended for the negotiators to exercise such flexibility to obtain full reciprocity and competitive opportunities for U.S. businesses. Specifically, Congress established the three-year renewal requirement to ensure that commercial agreements with NMEs were monitored and adjusted as needed so that the United States would receive benefits comparable to those it accords to its trading partners and to ensure that NMEs would not be given a "free ride" on the multilateral concessions the United States makes in connection with the GATT.²⁶⁸ It was important that the United States receive mutual concessions on a continuing basis for goods and services. With every presidential administration since 1975, the operation of Title IV, however, has proved that the three-year renewal process has been one of "rubber-stamping" agreements, regardless of how old the agreements.

Title IV should first be amended to lay out additional requirements for any new bilateral MFN agreement that is negotiated. This would be an amendment to section 405²⁶⁹ of the Trade Act of 1974, which sets forth rather minimal requirements.²⁷⁰ Thus, the bulk of the amendment should set out ad-

268. *See supra* Part IV.A.2.

269. The six countries currently denied MFN status are North Korea, Vietnam, Laos, Cuba, Afghanistan, and Yugoslavia. Vietnam and Laos are currently negotiating an agreement with the United States.

270. *See supra* Part II.A.1.

ditional required elements for bilateral agreements that extend MFN status for the first time.²⁷¹

If in fact the MFN bilateral trade agreements are “stepping-stones” to WTO membership, as the United States Trade Representative (“USTR”) indicates,²⁷² then the trade agreements should reflect a majority of the principles in the WTO multilateral agreements. Furthermore, they should incorporate certain principles that are particularly applicable to NMEs.

Overall, the bill’s requirements could reflect what the 1990s MFN bilateral agreements already contain in addition to a few new requirements to section 405. These new requirements could include the following: (1) providing MFN treatment with respect to those services for which that the GATS provides; (2) providing national treatment for the products of the other party; (3) providing market access; (4) including a commitment, regarding to goods and services, on transparency and on the procedures for applying licensing standards; (5) ensuring that technical standards are not used to create unnecessary obstacles to trade; (6) making commitments to reduce barriers to trade in services; (7) providing intellectual property protection adequate to protect U.S. rights at a level similar to the level the United States has agreed to in international conventions and multilateral agreements; (8) including commitments on foreign investment; and (9) disciplining unfair trade practices.

Some new additions to the section 405 requirements could also address specific problems the United States has with NMEs. For example, the requirements could include the following: (1) eliminating any policy that requires, as a condition to trade or investment, a company to make foreign direct investments, license its technology to a domestic company, or make other collateral trade concessions; (2) providing that state trading enterprises must make purchases and sales in accordance with commercial considerations consistent with the bilateral agreement; (3) ensuring that there is adequate access to the distribution system within the country so that foreign suppliers

271. *See supra* Part II.

272. *Hearing Before the Senate Comm. on Foreign Relations, 105th Cong. (1997)* (statement of Joseph Damond, Director for Southeast Asia, Office of the U.S. Trade Representative).

are able to reach the NME's consumers;²⁷³ and (4) making a commitment that if the NME accedes to the WTO while the United States still applies Title IV to that country, the NME will accord to the United States concessions at least as favorable as it accords other WTO members.²⁷⁴

The fourth provision regarding WTO accession in the amended section 405 would be particularly important to include in China's new MFN agreement, and it could obtain the support of U.S. businesses. It is neutral on its face, but it is drafted with the anticipation that China may accede to the WTO without permanent MFN status from the United States. If this happens, then the bill would require China to give U.S. businesses rights at least as favorable as those rights it gives to other WTO members.

The amendment should require two things with regard to agreements existing at the time of enactment of the changes. Currently, the President can renew any agreement every three years if he "determines" that the other country has sufficiently reciprocated trade concessions. Thus, a publication requirement and a reporting requirement should be added to section 405.

Furthermore, the amendment should void any agreement that is 15 years old²⁷⁵ and require the President to renegotiate those old agreements in accordance with the bill's substantive amendments to section 405. None of the agreements, other than China's, would be up for renegotiation until the year 2005 because all of them have been negotiated since 1990.

273. This third provision is necessary because the state trading enterprises in some countries have liberalized while the country has simultaneously allowed there to be monopolies on distribution.

274. See *infra* note 299.

275. China is the only country with MFN status that has a bilateral agreement more than fifteen years old. China's agreement was renewed February 1, 1998. Under the amendment to section 405, the U.S.-China agreement should not be terminated automatically but should remain in place for one year in order to give the United States and China time to renegotiate a new agreement. MFN status for the other 14 countries will be 15 years old on the following dates: in 2006, Mongolia; in 2007, Albania and former Soviet Union ("FSU") countries (Russia, Armenia, Kyrgyzstan, Moldova, Ukraine); in 2008, FSU countries (Belarus, Georgia, Kazakhstan, Tajikistan, and Turkmenistan); in 2009, FSU country (Uzbekistan); and in 2010, FSU country (Azerbaijan).

2. Bilateral Sectoral Agreements With Enforceability

Regardless of whether Title IV is revoked, the United States often has relied on bilateral agreements to address specific problems as they arise. Some of these agreements have been negotiated by the initiative of the executive branch without any enacting legislation from Congress.

After the 1989 Tiananmen Square incident, there were congressional proposals in 1991 and 1992 to link renewal of China's MFN waiver to improvements in four key areas of trade. These areas included market access, intellectual property rights ("IPR") protection, textile transshipments, and prison labor exports.²⁷⁶ President Bush, however, vetoed a package of conditions on China's MFN status stating, "[o]ur approach is one of targeting specific areas of concern with the appropriate policy instruments to produce the required results."²⁷⁷ As an alternative, the President issued an action plan of specific steps the administration would take to address the four key Chinese practices.²⁷⁸

As promised in 1991, President Bush began negotiations on a market access initiative. For a list of specified products,²⁷⁹ China agreed that it would eliminate restrictive licensing practices,²⁸⁰ publish its trade laws,²⁸¹ and adopt a scientific basis

276. See, for example, H.R. 2212, 102d Cong. (1992), which would have set additional conditions for China's MFN status extension, including specific improvements in human rights practices, market access, IPR protection, and weapons proliferation, and H.R. 5318, 102d Cong. (1992), which would have also applied similar conditions to China's MFN renewal but would have denied MFN treatment, if the conditions were not met, only to goods made by Chinese state-owned enterprises.

277. H.R. DOC. NO. 102-197, at 1 (1992).

278. President Bush outlined the action plan in a letter to Senator Max Baucus. Senator Baucus had originally written to the President urging him to take immediate steps to address various trade, human rights, and weapons proliferation issues in order to ensure extension of China's MFN status. See Letter from George Bush, President of the United States, to Max Baucus, United States Senator (July 19, 1991), reprinted in *INSIDE U.S. TRADE*, July 26, 1991, at S-1 to S-3.

279. In the tariff schedule, these included, generally, the following product categories: agriculture, photographic products, chemicals, textiles, iron, steel, and machinery. See *Market Access Agreement, (1992), U.S.-P.R.G. Annex*, *INSIDE U.S. TRADE*, Oct. 16, 1992, at S-8 to S-10.

280. China agreed to "eliminate all import restrictions, quotas, licensing requirements, and controls for the product categories listed in the Annex." *Id.* at S-7.

281. China agreed to:

for its sanitary and phytosanitary inspection requirements on key agricultural commodities.²⁸² Furthermore, China asserted that it does not have or will not have any import substitution policies in place²⁸³ and that it does not or will not make quantitative restrictions on automotive joint ventures' access to parts or kits.²⁸⁴ In return for these commitments, the United States promised that it would "staunchly support GATT accession" if China complied with the market access commitments.²⁸⁵ Most recently, however, the USTR reported that China has complied only marginally with the licensing and transparency commitments and has not complied with the commitment on scientific standards.²⁸⁶ Furthermore, China announced an automotive industrial policy in 1994. This policy includes import substitution requirements that explicitly call for the production of domestic automobiles in substitute for imported ones, and it establishes local content requirements that force the use of do-

[P]ublish on a regular and prompt basis all laws, regulations, rules, decrees, administrative guidance and policies pertaining to the classification or valuation of products for customs purposes, or rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or the transfer of payments therefore, or affecting the sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use of imports or exports.

Id. at S-6. Only those laws which are "published and readily available to other governments and foreign traders will be enforced." *Id.*

282. China committed to base all phytosanitary standards and testing requirements on sound science and to administer them in a manner that does not impede or create barriers to U.S. products. *See id.* at S-7. There was also a commitment in the agreement to apply national treatment for testing and certification standards for non-agricultural products. *See id.*

283. "The Chinese Government confirms that it has eliminated all import substitution regulations, guidance and policies and will not subject any products to any import substitution measures in the future." *Id.*

284. China made this commitment in a footnote to the Annex attached to the 1992 Market Access Agreement:

The Chinese Government also agrees that the operation of current and future U.S. joint ventures in China in the production of motor vehicles and parts will not be affected by quantitative restrictions on parts or kits to be used by the joint ventures. Furthermore, such joint ventures will be permitted to import parts and kits to expand production, including expansion into new product lines.

Id. at S-10.

285. U.S. TRADE REPRESENTATIVE, 1997 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 44-49 (1997).

286. *See id.*

mestic component products regardless of whether they are comparable in price and quality to imported products.²⁸⁷

In addition to the Market Access Agreement, the administration held negotiations on intellectual property. Since 1991, however, the U.S.-China relationship has been dotted by a series of special section 301 threats,²⁸⁸ subsequent agreements, and some enforcement on the part of China.²⁸⁹

Similar to the intellectual property sector, the textile sector has been subject to several threats from the United States, ongoing negotiations between the two countries, and various agreed terms. Several textile arrangements between the United States and China have attempted to address on-going U.S. concerns about market access and illegal transshipment practices.²⁹⁰

The problem with most of these sector-specific trade agreements initiated by the executive branch is that they do not contain enforcement mechanisms within the agreements. There are, however, legislative tools to enforce bilateral agreements that do not have binding dispute resolution, but such tools rarely have been used by the executive. One way that Congress has been able to get the administration to enforce trade agreements by use of targeted sanctions, as opposed to ending trade relations across the board, is through the section 301 procedure.

When a foreign country fails to abide by its commitments in a trade agreement, section 301 of the Trade Act of 1974 allows the President to take retaliatory trade measures as a remedy.²⁹¹ Special section 301, for intellectual property protection, requires the USTR to list a country as a "Priority Foreign Country" if it has egregious practices, if it has significant adverse impact on U.S. products, or if it is not negotiating in good faith.²⁹² The USTR must investigate the country's practices, request the country to negotiate, and use sanctions if neces-

287. *See id.* at 48.

288. *See* 19 U.S.C. §§ 2411-2420 (1994). *See supra* notes 283-87 and accompanying text.

289. *See* U.S. TRADE REPRESENTATIVE, *supra* note 285, at 52-53.

290. *See id.* at 58-59.

291. *See* 19 U.S.C. §§ 2411-2420 (1994).

292. *See id.* §§ 2411, 2414.

sary.²⁹³ When the USTR takes action, it can target a particular sector of the foreign country or it can retaliate broadly across the entire market.²⁹⁴

If a special 301 procedure was set up for NME countries that are non-WTO members, it could be used for such countries when they violate the terms of a bilateral trade agreement.²⁹⁵ The administration could do an annual report on the "Priority Foreign Practices" of these countries. For instance, because China has been violating its 1992 market access commitments on its automobile industrial policy, the USTR could list this action as a priority foreign practice and retaliation or negotiations would be pursued.²⁹⁶ Such a special 301 procedure would be particularly useful because the United States does not have recourse to the WTO's dispute settlement procedure; thus, unilateral action is warranted.²⁹⁷

3. Clearly Defined World Trade Organization Negotiations

The WTO accession process for China, which has been on the negotiating table since 1986, has outlined some much needed concessions. In March 1993, the United States spelled out five conditions that China must meet to gain U.S. support for its application for accession. These conditions include:

a single national trade policy common to all Provinces and regions of the country; full transparency of trade regulations; the continuing gradual removal of nontariff import barriers; a commitment to move to a full market economy; and until the transition to a market economy is completed,

293. *See id.* § 2411.

294. The special 301 procedure has seen some success. In 1996, the administration threatened sanctions against China because of its violation of the 1995 U.S.-China Intellectual Property Rights Agreement. In the month following the threats, China immediately shut down 15 illegal compact disc factories and over 500 laser disc cinemas nationwide. *See* U.S. TRADE REPRESENTATIVE, *supra* note 285, at 52. Thereafter, the Chinese closed nine additional factories and 28 illegal production disc facilities. *See id.* at 53.

295. *See* 19 U.S.C. § 2411 (1994).

296. Most of section 301 contains the procedural steps the administration takes to threaten sanctions. Special 301 simply requires the annual finding and requires the Administration to use the section 301 procedures in the event the administration does list a country as a priority.

297. *See* 19 U.S.C. § 2411 (1994).

the acceptance of a safeguard system to protect GATT members from possible surges in Chinese exports.²⁹⁸

In June 1994, the chair of the Working Party on China's accession issued a report that listed the conditions that were proposed by all of the members to the Working Party.²⁹⁹ This report became the foundation for a draft protocol on accession in January 1995.³⁰⁰

In November 1995, the United States gave China a further "road map" of key areas in which China had to make significant concessions in order for the United States to support its WTO membership. These included liberalization of trading rights for Chinese firms, more rapid elimination of nontariff barriers, reduction of price controls, phasing out of export subsidies, and acceptance of safeguards.³⁰¹

It seems apparent that the "carrot" of WTO membership is not sufficient leverage to force the Chinese government to commit at the appropriate level in order to make its trading system compatible with GATT rules.³⁰² China already obtains many of the benefits of WTO membership because the MFN clause in GATT applies nondiscriminatory treatment with respect to (1) customs, duties, and charges imposed on imports and exports and on international transfers of payments for imports and exports; (2) the method of levying such duties and charges; (3) all rules and formalities involving imports and exports; and (4) internal taxation and regulation of products.³⁰³

298. The Year in Trade 1992: Operation of the Trade Agreements Program, USITC PUB. 2640, 85 n.289 (July 1993).

299. See *GATT Working Party on China Focuses on Members' List of Demands*, INSIDE U.S. TRADE, July 1, 1994, at S-1 to -8. The report included many of the same conditions the United States had initiated.

300. See *Confidential Draft Protocol Proposes Unlimited China Safeguard*, INSIDE U.S. TRADE, Jan. 27, 1995, at S-1 to -12.

301. See Tony Walker, *U.S. Map Puts China on Road to WTO*, FIN. TIMES, Dec. 7, 1995, at 4.

302. Centrally planned commercial activity cannot be compatible with the rules of GATT because GATT is a system based on market principles. See U.S. Dep't of Comm., *Reference Terms for Uruguay Round*, BUS. AM., Nov. 23, 1987, at 21.

303. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Annex 1A, 33 I.L.M. 1154. Many of the other WTO agreements (e.g., Agreement on Technical Barriers to Trade, General Agreement on Trade in Services, and the Agreement on Government Procurement) contain similar MFN obligations. Although, in some instances, the members are allowed to take exception or reservation for particular sec-

The MFN clause in the 1979 China Agreement also requires nondiscriminatory treatment with respect to (1) customs, duties, and charges; (2) customs processing; (3) internal taxes and regulations; and (4) administrative formalities involving the issuance of import and export licenses.³⁰⁴ The United States applies the MFN principle in the 1979 China Agreement in the same way that the principle is applied under "similar circumstances under any multilateral trade agreement" to which either party to the bilateral trade agreement is a party.³⁰⁵ By law, the United States accords its multilaterally-negotiated reduction in tariff rates and import restrictions to the products of all foreign countries that have MFN status, regardless of the agreement in which their MFN status is founded.³⁰⁶

By virtue of its MFN status, therefore, China has been a "free rider" on the U.S. concessions that were made in the WTO trade agreements, even though the MFN three-year renewal procedure was intended to ensure that this did not happen.³⁰⁷ It is most apparent that China, as well as other NMEs that are non-WTO members, values its MFN status highly. This may be, therefore, the most effective leverage.

Additionally, Congress could outline negotiating objectives for the accession of NMEs to the WTO. This could be a process that now is used for the negotiation of multilateral and bilateral trade agreements.

In order to ensure that the United States pursues the policy of free trade efficiently so that U.S. businesses can obtain tangible benefits from the free trade policy, Congress and the administration, following their respective constitutional powers over international commerce and foreign affairs, instituted a cooperative procedure for negotiating and implementing multilateral trade agreements. With regard to U.S. multilateral and bilateral trade agreements, the most common procedure is for (1) Congress to set policy objectives; (2) the administration to

tors or activities.

304. See 1979 China Agreement, *supra* note 130, at 4653-54.

305. *Id.* at 4654.

306. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2436(a) (1994)); Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 878 (codified at 19 U.S.C. § 1881 (1994)).

307. See *supra* notes 108-09 and accompanying text.

exercise its discretion in obtaining concessions from other countries during negotiations that are in line with Congressional objectives but that are reasonable at the time; (3) the administration to submit a report to Congress identifying which objectives were met;³⁰⁸ and (4) Congress then to approve the concluded agreement within a relatively short time even though all of the objectives were not met and to enact implementing legislation.³⁰⁹

Once this process is complete, the agreement is implemented legislatively, then the only action left may be rulemaking within agencies. This legislative process has been used successfully for the negotiation, approval, and implementation of almost all of the United States's multilateral trade agreements³¹⁰ and its free trade area ("FTA") agreements.³¹¹ This implementation process normally will not extend beyond a few months from the time the President submits an agreement to Congress and a

308. For example, in 1988, Congress set a negotiating objective to develop rules to address large and persistent global current account surpluses. Trade Act of 1974, 19 U.S.C. § 2901(5) (1994). This objective, however, was not achieved in the Uruguay Round negotiations. Thus, this becomes part of the USTR's Statement of Administrative Action, which is a report from the administration to Congress of what was achieved from Uruguay Rounds based on the 1988 OTCA negotiating objectives. See H.R. DOC. NO. 103-316, at 1134 (1994) (stating how the Uruguay Round Agreements achieve congressional negotiating objectives).

309. For example, the trade negotiations of the Uruguay Round, April 12-15, 1994, in Marrakesh, Morocco, ended with the adoption of four decisions. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, Apr. 15, 1994, 33 I.L.M. 1140; Multilateral Agreements on Trade in Goods, Apr. 15, 1994, 33 I.L.M. 1154; Marrakesh Declaration, Apr. 15, 1994, 33 I.L.M. 1263; Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144. Those agreements that had not been approved already by Congress were approved that year, and the implementing legislation was passed. See H.R. DOC. NO. 103-316 (1994).

310. Congress and the administration have used this process for multilateral negotiations of the WTO multilateral trade agreements. In the Trade Act of 1974, Congress outlined negotiating objectives that were used for the Tokyo Round. See 19 U.S.C. §§ 2114, 2116-2118, 2131 (1974). In the Omnibus Trade and Competitiveness Act of 1988 ("OTCA"), Congress updated its objectives, which were used by the administration in the most recent negotiations of the Uruguay Round. See 19 U.S.C. §§ 2901(b), 3501-3624 (1994). The Uruguay Round of Negotiations, 1986-1994, institutionalized the World Trade Organization, authenticated a "package" of Multilateral Trade Agreements, and ushered "in a new era of global economic cooperation [for dispute settlement that reflects] the widespread desire to operate in a fairer and more open multilateral trading system." Marrakesh Declaration, Apr. 15, 1994, 33 I.L.M. 1263.

311. These include the U.S.-Canada Free Trade Agreement, the North American Free Trade Agreement, and the U.S.-Israel Free Trade Agreement.

few months from the time Congress approves an agreement.³¹² Most trade agreements, once signed by the President and passed by Congress, go into effect within a relatively short period of time and with little shared jurisdiction by the executive and legislative branches.

If Congress set up WTO accession negotiating objectives, the executive could report on how those objectives were met, and Congress could then cast its vote for or against unconditional MFN status³¹³ based on whether these objectives had been achieved. One may argue, however, that the approach could tie the hands of the negotiators. This same argument could be made, though, with even greater force in the multilateral context where Congress is setting the objectives for future rounds of negotiations. Congressionally set negotiating objectives have not, however, presented insurmountable challenges either in the negotiation or implementation stages for agreements.

The advantage to WTO accession objectives is that the Administration could use this anticipated vote on unconditional MFN status as leverage to obtain the concessions the United States needs in order to protect its economic interests. Congress would be backing the executive's negotiating position. Also, it may ensure that past rounds of negotiations for the GATT and WTO are not diluted by a country such as China entering the WTO at a level that is not compatible with concessions already made by WTO members.

312. Normally, to approve a completed agreement, Congress uses the "fast track" procedure, which is a suspension of Congressional procedure rules. The effect is to give the President a guarantee that if he has complied with consultation requirements for Congress during the course of the negotiation of the agreement and if he has negotiated the agreement in line with Congressional negotiating objectives, he will be able to submit a trade agreement to Congress with out the threat of a filibuster, with deadlines for votes, and with limited amendments (i.e., an up-or-down vote on the agreement).

313. The United States is required to grant a country unconditional MFN status before it can recognize that country's WTO membership. If unconditional MFN status was not passed by Congress for a country under Title IV that obtains WTO membership, the United States would have to invoke Article XIII, the non-application article of the WTO, because the MFN commitment in GATT requires that countries accord immediately and unconditionally to goods of any other members treatment no less favorable than that it accords to like goods and services of any other country. *See GATT, supra* note 3, 61 Stat. at A12 to A13, 55 U.N.T.S. at 196-200.

VII. CONCLUSION

U.S. security interests do not need an annual expiration or evaluation of conditional MFN status in order to be protected. Title IV countries, as well as non-Title IV countries, should be evaluated based on their own merits or threats. If Congress or the administration determines at any given time that it is necessary to withdraw MFN status for national security reasons, the two branches should do so. Furthermore, if MFN status is restored, it should be restored unconditionally.

Human rights protection should be pursued through channels other than the Jackson-Vanik Amendment. The provision is still useful, however, for purposes of U.S. emigration policy if there are countries that significantly limit emigration rights. The United States should, however, set measurable objectives, and if the objectives are met and maintained, unconditional MFN status should not be withheld.

The stakes for U.S. economic interests are much higher now than they were in the 1970s. After the conclusion of the Uruguay Round and the "packaging" of the multilateral trade agreements under the umbrella of the WTO, countries worldwide are held to a higher standard of trade in sectors across the board.

Because the current administration's record tends to focus on new consensus when conflicts arise instead of enforcement of prior commitments, a special 301 for NME sectoral agreements is desirable. "[W]ords we can only applaud. But a new relationship cannot be simply declared. . . . It must be earned because promises are never enough."³¹⁴ Discretion would still lie with the President, however, in making "priority practice" determinations, as would be required by a section 301 proceeding, and in choosing the potential sanctions.

President Bush stated, "we seek the integration of the Soviet Union into the community of nations . . . as they meet the challenge of responsible international behavior—we match their

314. President George Bush, Address at the Texas A&M University Commencement Service (May 12, 1989), in 135 CONG. REC. 5259 (daily ed. May 12, 1989).

steps with steps of our own."³¹⁵ This same rationale should be applied to the economic aspects of the United States's relationship with NMEs, especially with China, which is an increasingly important market for the United States. China's promises and assurances are not enough. Economic relations at the highest diplomatic level have appreciable impacts on private contractual relations. Stability is too important to U.S. businesses for U.S. diplomats to change the standard of cooperation or to rely on assurances that are unimplemented and untested.

The best trade and investment relations are those relations that can be successfully negotiated, that are sufficiently substantive, and that can be adequately enforced. The United States and China should strive for no less.

A past administration stated that the U.S.-Romania Trade Agreement is "a critical element" of the U.S. economic policy toward Romania.³¹⁶ That is possibly why the State Department considered it necessary to update the agreement in 1992. The current administration has said that the Vietnam Bilateral Trade Agreement, now being negotiated, could be a solid stepping stone to Vietnam's WTO accession.³¹⁷ Any trade agreement that is twenty years old is outdated and virtually nonexistent. It is merely a pebble in a swift stream of trade. The United States can no longer afford to have the executive "rubber-stamping" outdated bilateral agreements which are critical for purposes of U.S. bilateral MFN relations and for purposes of the promotion of countries' accession to the WTO. In both of these respects, it is essential that China's bilateral agreement is updated, especially because of the size and growth rates of China's economy and the potential impacts on U.S. trade flows.

Currently, the United States maintains the position that it will not negotiate in multiple fora simultaneously. For instance, it appears that the administration would rather rely on the ongoing WTO negotiations than to pursue bilateral MFN negoti-

315. *Id.*

316. See *Continuing Most-Favored-Nation Tariff Treatment of Imports from Romania: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 94th Cong. 37 (1976)* (statement of Gerald L. Parsky, Assistant Secretary, Dep't of the Treasury).

317. See Damond, *supra* note 272.

ations with China while working on a multilaterally negotiated WTO accession package for China.³¹⁸ Furthermore, it has been stated that to begin MFN bilateral negotiations with China would show a lack of confidence in the WTO accession process. By negotiating in multiple fora, however, the United States demonstrates to China that it is an important trade partner, and it demonstrates to U.S. businesses that their substantive rights will be secured regardless of outcomes in different fora.³¹⁹

Using multiple fora and new procedures outlined for Title IV to promote both national security and trade benefits, unlike those legislative options that pit one interest against another in an all-or-nothing procedure such as MFN termination, could increase trade benefits for the United States while preserving U.S. national security interests and promoting human rights abroad.

318. See generally *Emerging Trade Issues with Asia, Hearing Before the Senate Comm. on Com., Science, and Transp.*, 104th Cong. (1997).

319. The importance of negotiating in multiple fora can be considered in light of an example a debtor-creditor law professor gave when trying to instruct his students about filing judgment liens in multiple counties:

"In how many counties do we need to file a lien?" one student asked.

"I went to the doctor once with a cold," the professor explained. "Really, all you need," the doctor told me, "is to take Vitamin C." "How much?" I asked. "All you can afford." Professor Robert Laurence, Remarks at University of Arkansas School of Law (1995).