Denver Journal of International Law & Policy

Volume 5
Number 3 *Special Issue*
Soviet-American Trade in A Legal Perspective

Article 7

January 1975

Most-Favored-Nation Treatment in Soviet-American Trade Relations

E.T. Usenko

Follow this and additional works at: https://digitalcommons.du.edu/djilp

Recommended Citation

E.T. Usenko, Most-Favored-Nation Treatment in Soviet-American Trade Relations, 5 Denv. J. Int'l L. & Pol'y 243 (1975).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Most-Favored-Nation Treatment in Soviet-American Trade Relations

Keywords
State Trading, States

This article is available in Denver Journal of International Law & Policy: https://digitalcommons.du.edu/djilp/vol5/iss3/7

Most-Favored-Nation Treatment in Soviet-American Trade Relations

E.T. USENKO*

In the practice of international relations a number of legal principles and norms have been worked out, which constitute a legal regime for the promotion of trade and other economic relations between countries. Prominent among these principles and norms is the most-favored-nation principle. Its application to a definite sphere of economic (and sometimes other) relations among countries creates the system of legal rules and legal conditions called the most-favored-nation treatment. The significance of this treatment in international trade is so great that without its establishment and observance normal relations cannot exist between the countries concerned.

This is strikingly demonstrated by Soviet-American trade during the entire period after World War II, when the United States, in spite of the 1937 agreement on most-favored-nation treatment, instituted a number of discriminatory measures in its trade with the Soviet Union[1] and thereby denounced the agreement itself. For many years Soviet-American trade was close to the zero level.[2] Even in recent years, despite the relaxation of discriminatory measures, trade between the two countries could not develop normally in view of the fact that it was not based on most-favored-nation treatment. In 1971, for instance, trade between the U.S.S.R. and the United States was only one-quarter of the volume of the trade between the U.S.S.R. and Japan, or that between the U.S.S.R. and the Federal Republic of Germany, although the economic potential and resources of the United States and the U.S.S.R. are incomparably greater than that of Japan or Germany.

This situation brought the leaders of the U.S.S.R. and the United States to the conclusion that it was necessary to raise the level of the economic links between the two countries. They came to an understanding that these links should develop on the basis of mutual

---

* Evgenii Trofimovich Usenko, Doctor of Legal Sciences, Professor; Chief of Section, Institute of State and Law of the Academy of Sciences of the U.S.S.R. Author, *O pravovoi prirode neposredstvennykh sviazei po linii ministerstv i vedomstv stranchlenov SEV (On the Legal Nature of Direct Communications Among Ministries and Departments of Member Countries of CMEA)* in MEZHVEDOMSTVENNYE SVIAZI V USLOVIAKH SOTSIALISTICHESKOI EKONOMICHESKOI INTEGRATSII (INTERNATIONAL COMMUNICATIONS IN CONDITIONS OF SOCIALIST ECONOMIC INTEGRATION) Iuridicheskaia literatura [publishing house] (E.T. Usenko ed., Moscow 1973).

1. U.S. government agencies began to implement such meaures in 1948.

2. For instance, trade between the U.S.S.R. and the United States amounted to only 22 million rubles in 1955. 50 LET SOVETSKOI VNESHNEI TORGOVLI (50 YEARS OF SOVIET FOREIGN TRADE) 219 (P.N. Kumykin ed. 1967).

benefit and in accordance with accepted international practice.[3] The logical outcome of this understanding was the Trade Agreement of October 18, 1972, whose main purpose is to establish the most-favored-nation treatment. Together with the other documents signed at that time, this Agreement, to quote U.S. Secretary of Commerce Peterson's pronouncement at a press conference on October 19, 1972, will put an end to the abnormal trade relations that existed between the U.S.S.R. and the United States during the past 25 years.[4]

Since one can find various definitions of the most-favored-nation principle, it would be expedient to give from the very beginning what we feel is the most clear-cut definition of that principle. The most-favored-nation principle means that international treaties contain a clause under which each signatory country pledges to accord the other signatory country, in areas of their relations delineated in the treaty, the rights, privileges, advantages, and benefits that it accords or will in the future accord to any third country. The formula "what it accords or will in the future accord to any third country" embraces the treatment enjoyed by a third country regardless of whether it is based on an international treaty, a national law, or actual practice.[5]

Moreover, from the very outset it must be stressed that most-favored-nation treatment should not be confused or identified with non-discrimination. The principles underlying these concepts are different. The substance of the principle of non-discrimination is the right to demand similar conditions as those enjoyed by all countries, i.e., conditions common to all. On the other hand, the substance of the most-favored-nation principle is the right to demand the most favorable, beneficial, and privileged conditions. Most-favored-nation treatment thus presupposes non-discriminatory treatment but is not reduced to it.

Further, the principle of non-discrimination is the general outcome of the sovereign equality of countries. It has the character of a mandatory, common legal norm and therefore does not require treaty recognition. However, as an *international-legal norm* the most-favored-nation principle is of a treaty character. With regard to non-discrimination, the U.N. International Law Commission stated quite clearly on one occasion that it is a general rule stemming from the equality of states,[6] and on another occasion that it is a general rule

3. Joint Soviet-American Communique on Trade and Commercial Relations, Pravda, May 31, 1972, at 1, col. 3; 66 DEP'T STATE BULL. 899, 900 (1972).

4. Pravda, Oct. 20, 1972, at 4, col. 1.

5. Ustor, *(Third) Report on the Most-Favored-Nation Clause*, U.N. Doc. A/C.N. 4/257 (1972).

6. Commentary to Article 44, in Sandstrom, *Draft Articles on Diplomatic Intercourse and Immunities*, [1958] 2 Y.B. INT'L L. COMM'N 89, 105, U.N. Doc. A/CN. 4/116 Add. 1, 2.

stemming from the *sovereign* equality of states.[7]

In Soviet trade treaty practice the most-favored-nation clause is applied unconditionally. Prior to World War I the United States adhered to the principle of conditional most-favored-nation treatment, under which the benefits received by a third country applied to a signatory country only if it accorded the other signatory country the same rights and privileges that the latter received from the aforesaid third country (the principle of equivalence or compensation). After World War I (for the first time in the trade treaty with Germany in 1923) the United States began to implement the principle of unconditional most-favored-nation treatment.[8] However, with some countries the old treaties founded on the principle of reciprocity are still in force. In this connection it is important to note that under Article I of the Soviet-American Trade Agreement of 1972 the parties accorded each other "unconditional," i.e., absolute most-favored-nation treatment. This means that in according the other signatory country the privileges it accords to any third country, each party to the agreement cannot demand an "equivalence" or "compensation" on the grounds that such an "equivalence" or "compensation" is received by it from a third country.

The basic object of the most-favored-nation clause is the definition of its scope or, in other words, the areas of its application. Under Article 1 of the Soviet-American Agreement the most-favored-nation clause must be applied by each of the parties to goods imported from the other country or exported to the other country in all questions relating to:

> a) all customs tariffs levied on imports or exports or in connection with imports or exports, including the method of levying such tariffs;
> b) internal taxes, marketing, distribution, storage, and use;
> c) dues on international remittances of payments for imports or exports;
> d) rules and formalities linked with imports and exports.

It must be noted that in many of the treaties signed by the U.S.S.R. and the United States with third countries, the area of operation of the most-favored-nation clause is considerably wider. In the Soviet Union's treaties with some countries provision is made, for example, for the application of the most-favored-nation clause to all

7. Commentary to Article 70 of the Draft Articles on Consular Intercourse and Immunities, in *Int'l L. Comm'n Report*, [1961] 2 Y.B. INT'L L. COMM'N 88, 128, U.N. Doc. A/4843.

8. Leites, *O sisteme naibol'shogo blagopriatsvovania (The Most-Favored-Nation System)*, [1915] 42 VESTNIK FINANSOV, PROMISHLENNOSTI I TORGOVLI 218; 2 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1504 (2d ed. 1951); SNYDER, THE MOST-FAVORED-NATION CLAUSE: AN ANALYSIS WITH PARTICULAR REFERENCE TO RECENT TREATY PRACTICE AND TARIFFS 243 (1948).

questions of trade and shipping.[9] Moreover, in treaties with a number of countries use is made of the all-embracing formula "in all questions related to trade and shipping, as well as other forms of economic relations between the two countries."[10]

Thus, in areas not covered by the Soviet-American agreement, commercial relations may prove to be under less favorable conditions than the conditions enjoyed by some other countries in their economic relations with the U.S.S.R. or, correspondingly, with the United States. For that reason it is not to be ruled out that as the commercial links between them expand the two countries may be confronted with the need for enlarging the area of operation of the most-favored-nation principle.

The question of exceptions to the principle is of immense significance for the effective operation of the most-favored-nation mechanism. Inasmuch as most-favored-nation treatment is a treaty clause, the contracting parties must define its scope. Consequently, the exceptions established by the parties which narrow the scope of most-favored-nation treatment, or exclude various relations from its operation, are quite consistent with the nature of the agreement.

The matter is more complicated when exceptions are made with reference to third countries to which a contracting party accords various benefits and privileges. In principle, such exceptions run counter to the idea of most-favored-nation treatment. For that reason allowance for them is made only where it is necessitated by custom or by the specific status of the country to which such privileges are accorded.

Among the exceptions provided for in paragraph 3 of Article 1 of the Soviet-American Trade Agreement the most notable is the exclusion of the privileges accorded to "neighboring countries with the object of facilitating border trade." This exception is quite common in trade treaties because it would be inappropriate to apply to all areas of foreign trade the privileges established for border trade, which are quite specific. Also consistent with treaty practice is the provision in Article 8 of the Agreement that most-favored-nation treatment would not limit the right of each of the parties to take any action to safeguard its security.

---

9. Soviet-French Agreement on Trade Relations and on the Status of the Trade Mission of the U.S.S.R. in France of September 3, 1951, art. 1 in SBORNIK TORGOVYKH DOGOVOROV, TORGOVYKH I PLATEZHNYKH SOGLASHENII I DOLGOAROCHNYKH TORGOVYKH SOGLASHENII S.S.S.R. S INOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF TRADE TREATIES, TRADE AND PAYMENTS AGREEMENTS AND LONG-TERM TRADE AGREEMENTS BETWEEN THE U.S.S.R. AND FOREIGN STATES) 736 (2d ed. 1965) [hereinafter cited as TRADE TREATIES].

10. *See, e.g.*, Treaty on Trade and Shipping of September 27, 1957 between the U.S.S.R. and the German Democratic Republic, art. 2, TRADE TREATIES 200.

By virtue of paragraph 3 (ii) of Article 1 of the Agreement the most-favored-nation clause does not cover any of the preferences that each of the signatory countries accords through its recognition of Resolution 21 (II), adopted by UNCTAD on March 26, 1968, which recognizes the need for the speediest introduction of a system of general preferences in favor of the developing countries without reciprocity and without discrimination. This resolution was adopted by UNCTAD in view of the acute need for creating favorable trade and political conditions that could accelerate the economic advancement of the developing countries.

All these exceptions are quite clear. However, certain special restrictions established by the Soviet-American Agreement merit a more detailed examination.

Paragraph 3 (iii) of Article 1 of the Agreement exempts from the requirement of most-favored-nation treatment any action by either government which is permitted under a multilateral trade agreement of which it is a signatory at the time of the signing of the Agreement, with respect to the products originating in or exported to a country which is a signatory of the multilateral agreement. It must be underscored that paragraph 3 (iii) of Article 1 provides for the possibility of extending to the other country rights and privileges granted to a co-signatory of a multilateral trade agreement insofar as the multilateral agreements would permit such extensions.

This provision is evidently a reference to the General Agreement on Tariffs and Trade, of which the United States is a signatory. That agreement, which is based on the most-favored-nation principle and on mutual tariff concessions, allows for certain exceptions to this principle. We feel that for Soviet-American trade relations real significance may attach to the right, envisaged by GATT, that, in order to ensure its external financial position and balance of payments, any signatory may limit the quantity or price of imported goods provided it observes certain conditions that protect the interests of the other signatories.

From what we have said regarding paragraph 3 (iii) of Article 1 we may draw the following conclusions:

> 1. The U.S.S.R. and the United States act on the general rule that the most-favored-nation treatment established by the Agreement signed by them covers the corresponding advantages and privileges that have been or may be established by any multilateral international agreement. This must be emphazised in view of the fact that in scholarly literature[11] we sometimes encounter the misguided opinion that the privileges established by a multilateral agreement allegedly do not come under the operation of the most-favored-nation clause in treaties between signatories and

11. STRUPP-SCHLOCHAUER, 2 WOERTERBUCH DES VOLKERRECHTS 501-502 (1961).

non-signatories of a multilateral agreement.

2. The privileges established by a multilateral trade agreement for its signatories may be excluded from the most-favored-nation treatment only if the multilateral agreement was *in operation* on the day the Soviet-American Trade Agreement was signed. As any other exception to a general rule, this provision cannot be applied extensively. It means, in particular, that it may not be proliferated to other multilateral agreements that may be signed after that date.

3. Inasmuch as the paragraph in question in fact implies GATT and, more specifically, its provisions on the right of signatory countries to introduce restrictions in order to ensure their external financial position and balance of payments, it must be noted that this exception is frequently encountered in trade treaty practice. We may cite, for example, Article 7 of the Soviet-Japanese Trade Treaty of December 6, 1957.[12]

4. In accordance with paragraph 1 (iii) of Article 1 of the Soviet-American Agreement, and in accordance with general treaty practice, restrictive actions are subject to the principle of non-discrimination.

The provisions of paragraph 2 of Article 1, which concern quantitative restrictions, must evidently be included among the special exceptions to the most-favored-nation clause. Under that paragraph each of the parties pledges that in the event it applies quantitative restrictions on exports or imports with regard to third countries it will accord the goods of the other party treatment that is equitable in relation to the treatment it accords to third countries.

A comparison between this rule and the rule established in paragraph 3 (iii) of Article 1 allows us to draw the conclusion that the former applies to cases where restrictions are applied in general to third countries, i.e., in principle to all third countries, while the latter can be applied in instances provided for by multilateral agreements to a limited number of countries. Inasmuch as paragraph 2 of Article 1 has in mind the restrictions applied in principle to all third countries, "equitable" treatment in the spirit of the Soviet-American Trade Agreement must imply at least common non-discriminatory treatment in the given matter. If in such a case any country or countries were given privileged treatment, then most-favored-nation treatment would be "equitable" treatment.

The exceptions to the most-favored-nation principle envisaged in Article 3 of the Agreement are quite specific. Under that Article each of the parties may take such steps as it considers necessary to ensure that goods from the other side are not imported in such a quantity or on such terms as would call forth or intensify the dislocation of the internal market or create a threat of such dislocation. Essentially, this is an anti-dumping clause, which is unusual in Soviet trade treaty practice. This clause is not included in treaties signed by the U.S.S.R. because dumping, a weapon in trade war, is alien to the

12. TRADE TREATIES 869.

Soviet Union, which pursues a policy of promoting normal trade with all countries, with the result that the U.S.S.R.'s trade partners have no grounds for fearing dumping by the U.S.S.R. Equally, the Soviet Union has no grounds for fearing dumping by its foreign partners, for it is adequately protected against this by the state monopoly of foreign trade.

We therefore feel that in Soviet-American commercial relations the reservation in Article 3 will not and cannot have any practical significance. Its presence in the Soviet-American Trade Agreement is probably due to the U.S. practice of treaty relations with third countries. In this aspect it has a formal significance: the countries whose treaties with the United States contain that reservation will thus be unable to assert that in this respect the Soviet Union has been accorded more favorable treatment.

In assessing the provisions on most-favored-nation treatment in the Soviet-American Trade Agreement it must be said that by and large they conform to accepted international practice. We stress this point particularly because in the Joint Soviet-American Communique accepted practice is indicated as a standard for the trade relations between the two countries.[13] We regard this Communique and the "Principles of Relations Between the U.S.S.R. and the U.S.A."[14] as fundamental documents for understanding and interpreting all the supplementing treaties and the norms stated in these treaties.

The unswerving observance of the most-favored-nation principle, as well as of more general principles of international relations such as sovereignty, equality, non-interference in internal affairs, and mutual benefit, will create legal guarantees for the stable development of commercial relations between the U.S.S.R. and the United States.

At the same time, we must pinpoint the obligation of the two countries, stated in Article 2 of the Agreement, to take, in accordance with the laws and regulations in operation in each country, appropriate measures to encourage and facilitate exchanges of goods and services on the basis of mutual benefit and in accordance with the provisions of the Agreement. On the basis of such joint efforts by the two countries it is expected that Soviet-American trade will show very high rates of growth, as envisaged in the Agreement (an increase of at least 200 percent as compared with the period 1968-1971).

The change that has taken place in the climate of Soviet-American relations following the Moscow talks between Soviet lead-

13. Joint Soviet-American Communique, *supra* note 3.

14. Basic Principles of Relations Between the United States and the Union of Soviet Socialist Republics, May 29, 1972, 66 DEP'T STATE BULL. 898 (1972).

ers and the U.S. President led to a perceptible activation of trade even in 1972; it almost doubled to reach the sum of half a billion rubles.[15] However, it was still far short of the potentialities of the two countries. In 1972 its volume did not reach the level even of Soviet-Finnish trade. The years 1973 and 1974 witnessed a further expansion of Soviet-American trade. However, in 1972, as in 1973 and 1974, Soviet-American trade grew chiefly through Soviet purchases. But, as N.S. Patolichev, the Soviet Minister of Foreign Trade, told a TASS correspondent, Soviet-American trade must develop in both directions "for without this, trade can have no prospects."[16] Only the speediest introduction of most-favored-nation treatment can open broad prospects for the growth of mutually beneficial trade between the Soviet Union and the United States.

---

15. Patolichev, *Sovetskaia vneshniaia torgovlia: rol' i perspektivy (Soviet Foreign Trade: Role and Prospects)*, Pravda, Mar. 9, 1973, at 4, col. 1.

16. Pravda, Oct. 21, 1972, at 4, col. 4.