

COMMENTARY: RUSSIA, THE WTO, AND PNTR

Russia's WTO Accession and the United States' Jackson-Vanik Conundrum

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This article began as a presentation to an audience convened in Washington, DC, in November 2011 by the Global Business Dialogue (GBD). GBD is (in its own words) an "Association for the Global Business Community" whose official motto is "changing the conversation" – in other words, *improving* what is too often a stale and unproductive debate around international economic law and policy. My November 2011 remarks on Russia and Jackson-Vanik took that motto to heart and sought to question some of the underlying assumptions that are influencing debate on this subject.

Unfortunately, that debate is so far showing signs of being just as unproductive and light on substance as most recent U.S. trade policy discussions have been. There is, to be sure, a "first-best" answer policy-wise: prompt enactment of legislation that extends permanent normal trade relations (PNTR) to Russia and creates, as was done in the China PNTR legislation a decade ago, some institutional arrangements for ongoing discussion of issues that were (or could have been) treated in annual most-favoured-nation (MFN) debates. But reaching that first-best solution looks today like a long shot for reasons well summarized in Warren Maruyama's article published alongside this one. That raises the question what is best to do under less-than-ideal circumstances. And *that* in turn raises questions about what alternatives are, and are not, WTO-compatible.

The conundrum in a nutshell:

– Russia's WTO accession is approaching completion at the government-to-government level. Bringing the United States-Russia trade relationship under the WTO umbrella would create for the United States a "WTO obligation" to do something it has already pledged (bilaterally) to do and in fact is already doing: accord MFN (also known as NTR) treatment to Russian products at the U.S. border.

- However, the United States maintains normal/MFN treatment for Russian products through a complex mechanism not utilized with respect to other WTO Members' products: normal treatment is renewed annually through the procedure laid out in the 1974 Jackson-Vanik (J-V) provision by a Presidential action called a "waiver." Without getting too deeply into the details, the President's role consists of determining – and announcing – each year in June that continued normal trading with Russia is in the U.S. national interest. Congress in theory can override the waiver by passing a disapproval resolution that is (i) signed by the President or (ii) re-passed by veto-proof margins after a Presidential veto.
- Although it may serve a political (venting) function, this annual J-V exercise has no remaining policy justification and irritates Russia mightily. Standard U.S. practice when countries subject to this scheme join the WTO is to "graduate" them from it through PNTR legislation. But in Russia's case, for various reasons, Congress appears to be in no mood (or at least no hurry) to pass a PNTR bill.
- Incumbent U.S. trade officials consider that this situation leaves them no choice but to invoke the WTO Agreement's "non-application" provisions at the time Russia formally joins and to keep the United States-Russia trade relationship officially on a bilateral footing until Congress passes (and the president signs) a PNTR bill. This in turn means, as Warren's article explains, that a substantial portion of the benefits of the WTO accession package will remain unavailable to U.S. producers, service providers and intellectual property (IP) right holders. Russia's WTO commitments, insofar as they expand or solidify the favorable treatment already accorded by Russia to U.S. goods and services,

Notes

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would be like a birthday present that cannot be unwrapped – possibly for a lengthy period of time.

Is this unfortunate scenario really unavoidable? Warren has admirably set out the prevailing view, and indeed it is not just prevailing but held almost uniformly by trade and WTO experts. I believe this view overstates what WTO law and the GATT Article I – in particular, the terms “immediately and unconditionally” – require.

I A NON-TECHNICAL EXPLANATION

The easiest way to appreciate this is through a form of reverse engineering.

- Surely the U.S. Congress can debate, at any time, whether the United States should continue to trade on normal terms with any WTO Member. Nothing in any of the WTO agreements purports to regulate the content of legislative debates.
- Surely such a debate would not become prohibited by virtue of being held annually, for example, during early July. Even if the vehicle for such a debate were legislation to suspend normal trading with a particular WTO Member, singled out year after year for this humiliating examination, the debate itself cannot offend GATT Article I.
- Logically, the same must be true (no GATT violation) if the vehicle for debate is a Resolution accorded by the rules of one or both legislative chambers, streamlined treatment.

Anyone accepting the above points concedes that roughly 95% of the existing “annual MFN” process is perfectly WTO-consistent. It may be unjustified, trade-chilling, and profoundly obnoxious, but it is compatible with the United States’ international obligations. This conclusion reflects the intuitively appealing view that GATT Article I can be offended only by actually denying – not by debating or having procedures to debate whether to deny – MFN treatment to products at a border. The MFN commitment promises a *result*: appropriate treatment of incoming products. How a Member delivers that result through its legal system is its own business. Dispute settlement decisions interpreting “unconditionally” in GATT Article I do not refute this view.

2 A SLIGHTLY MORE TECHNICAL EXPLANATION

1. *The J-V scheme is discretionary and therefore non-justiciable.* J-V empowers Congress to terminate MFN treatment of an affected country’s products by voting (with veto-proof margins) for such a result in early July. However, Congress has that same power all year long with respect to the MFN treatment of the products of *any* country or territory,

including all 153 of the WTO’s current Members. The United States being a sovereign and the Congress being its legislature, this is in the nature of things. So Congress’ ability to terminate, in July or at any other time, the United States’ MFN treatment of Russian-origin products cannot be a source of WTO inconsistency. Rather, if the J-V scheme is WTO-incompatible, it must be because that scheme also empowers the President, acting alone, to bring normal treatment to a screeching halt.

It is an unsettling prospect. But is it challengeable through dispute settlement? There is a longstanding jurisprudence on whether the possession, by a Member’s executive, of legal power to take or cause GATT- or WTO-inconsistent actions can itself be considered GATT- or WTO-inconsistent. The old rule is that, where legislation gives the executive discretion to behave either WTO consistently or WTO inconsistently, legislation cannot itself be challenged in dispute settlement; a complaint may be founded on actual behavior, but not on theoretically possible behavior. The policy arguments supporting this approach are many and compelling. To cite just two: (1) a dispute system open to complaints about what a Member *might* do could become a crowded system indeed, diverting resources from the treatment of disputes over actual behavior; and (2) the extent to which legislation constrains executive authority in the legal systems of particular countries (monarchies being an example) might be slight or even non-existent and a rule making such systems per se WTO-incompatible would greatly limit the WTO’s reach and utility.

The “mandatory-discretionary doctrine” has facilitated many sensible dispute settlement rulings. Regrettably, it has been dented or, at least, muddled in some recent cases. I submit that what remains of it could properly be applied to find a challenge to the J-V scheme non-justiciable – regardless of how a complainant seeks to characterize the relevant U.S. “measure.”

2. *The J-V scheme does not amount to a “condition.”* Importing countries impose, GATT consistently, many conditions on importation, from paperwork requirements to safety scanning. This has led many to conclude that what GATT Article I really prohibits is not all conditions, but rather *discriminatory* conditions.

Viewed this way, the prohibition would not catch a (hypothetical) U.S. legal regime limiting MFN treatment to the products of those countries determined by the President, each June, to merit MFN treatment. *Every* exporting country’s products would need a favorable Presidential decision. But subjecting only the products of certain countries to such a Presidential decision (as J-V does) is discriminatory and thus would be caught . . . if it amounts to a “condition” in the first place. Does it?

There is surprisingly little case law, interpreting the GATT Article I term “unconditionally,” to help answer this question. It may be helpful to consider some examples of what would clearly qualify as a condition. In this

category, I submit: (1) “We’ll apply our MFN tariffs to your products if they are produced carbon-neutrally”; and (2) “We’ll apply our MFN tariffs to your products if you cooperate with us on drug interdiction.”

But what about, “we’ll apply our MFN tariffs to your products unless the political branches of our government decide to stop doing so.” That is the J-V scheme boiled down to its essence. In Warren’s memorable phrase, normal treatment exists at America’s “sufferance.” But as explained above, the very same thing is true with respect to every exporting country’s products. Normal trading is indeed a matter of sufferance. It is hard to imagine a coherent definition of the word “unconditionally” that would alter the inescapable fact that the WTO’s Members are sovereigns.

3 DOES IT REALLY MATTER?

The main talking point of the U.S. administration and business community on this subject is that “withholding PNTR prevents us from benefiting from Russia’s WTO commitments.” That is necessarily true, of course, *only* if

the United States invokes non-application. If the United States does not invoke non-application, then various scenarios are possible. Russia might invoke non-application anyway. Or Russia might allow the trade relationship to become WTO covered and immediately proceed to seek dispute settlement over the J-V measure.

Then again, Russia might do neither of those things, choosing instead a “wait-and-see” approach. Maybe a WTO-based relationship, despite beginning under a cloud, will lead to expanded commerce and with it some of the rapprochement that supporters of the accession effort have been predicting. Maybe the political atmosphere for PNTR will improve.

In time, a determined Executive Branch will be able to sell PNTR for Russia – if not outright repeal of the J-V provisions – to a balky Congress. It will be a good thing to consign J-V to the Cold War chapter of history books. But Congress is not yet persuaded, and there is now a realistic chance of becoming mired in a “non-application” scenario for what could be a very long time. The choice between PNTR for Russia and non-application is most likely a false choice. Organizing our behavior according to a false choice is not a sensible thing to do.