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U.S. LAWS AND U.S. AND EC TRADE AGREEMENTS RELATING TO NONMARKET ECONOMIES

Volume 1

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United States International Trade Commission

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This study was prepared by:

William W. Gearhart
Assistant General Counsel

Staff attorneys:
Andrea Casson, Rhonda Hughes, Abigail Shaine

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Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

Staff Research Study #16

U.S. LAWS AND U.S. AND EC TRADE AGREEMENTS RELATING TO NONMARKET ECONOMIES

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INTRODUCTION

Description of the Report

This report is divided into five parts. The first part describes the treatment of nonmarket economy countries (NMEs) under existing U.S. trade law. The first section of this part discusses the principal U.S. statutes relevant to granting most-favored-nation (MFN) treatment to NMEs. The second section of this part discusses the actual application of existing statutory safeguard provisions to NMEs.

The second part of the report summarizes trade-related treaties between the United States and various NMEs. Included in this discussion are the U.S. agreements granting MFN treatment to Romania, Hungary, and China subsequent to enactment of the Trade Act of 1974. Also included is a discussion of the 1972 MFN agreement that was negotiated with the U.S.S.R., but never implemented. In addition, this part describes a number of other trade-related agreements addressing matters such as specific commodities, financial guarantees, double taxation, and visa facilitation. Copies of the agreements are contained in Appendix A.

Part three contains a comparative analysis of the various trade-related agreements between the United States and NMEs. Particular attention has been paid to the MFN agreements. The comparative discussion of these agreements includes a description of the manner in which each agreement addresses the statutory requirements for MFN agreements with most NMEs, as set forth in section 405 of the Trade Act of 1974.

The fourth part describes trade agreements between the European Community (EC) and six NMEs – Czechoslovakia, Hungary, China, Romania, Poland, and the U.S.S.R. Copies of the EC agreements are contained in Appendix B.

Finally, part five contains a comparative analysis of six of the trade agreements between the EC and NMEs. These agreements include MFN agreements with Hungary, China, Poland, and the U.S.S.R., as well as more limited trade agreements with Czechoslovakia and Romania. The analysis parallels the comparison among U.S.-NME trade agreements, and, to the extent possible, reviews the EC trade agreements within the framework of the U.S. requirements set forth in section 405 of the Trade Act of 1974.

Disclaimer

This staff study was prepared by attorneys in the Commission's Office of General Counsel. The comments and any conclusions contained herein have not been adopted by the Commission and do not necessarily represent the views of the Commission or any of the Commissioners.[1] It is being published by the Commission in order to make available to Congress, the Executive Branch, and the public certain resource materials relating to trade agreements with NMEs that are public but have not been compiled and published elsewhere.

[1] Commissioner Eckes notes the Commission did not formally approve either the substance of this Staff Research Study or the allocation of Commission resources for its preparation and publication. This is a departure from the past practice of the agency.

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EXECUTIVE SUMMARY

- *Title IV of the Trade Act of 1974 sets forth several requirements that a country must meet before it can receive most-favored-nation (MFN) treatment.* This same title also governs the content of an MFN agreement with any country that was ineligible for MFN treatment on January 3, 1975, (the date on which the Trade Act of 1974 was enacted).
- *Since the enactment of the Trade Act of 1974, the United States has concluded three bilateral trade agreements granting MFN status to nonmarket economy countries (NMEs).* Agreements have been concluded with Romania (1975), Hungary (1978), and China (1980).
- *Many of the provisions required by the Trade Act of 1974 to be included in these MFN agreements are stated in an identical fashion.* Often the differences among the provisions in the various agreements are nonsubstantive. A few of the differences, such as the variations among the provisions describing the scope, may be significant.
- *The United States negotiated an MFN agreement with the Soviet Union in 1972, but the agreement never went into effect.* Although it was negotiated prior to the Trade Act of 1974, it also contains several provisions similar to those now required by statute.
- *In general, the most comprehensive of the MFN agreements into which the United States has entered is the agreement with Hungary.* The 1972 agreement with the Soviet Union was also quite specific in its contents. The agreement with China is the most general.
- *The EC has concluded four MFN agreements with NMEs.* These agreements have been with the Soviet Union, China, Poland, and Hungary. The China agreement, the oldest of the MFN agreements analyzed here, is the least detailed of the EC agreements. The Soviet Union, Poland, and Hungary agreements are quite similar in content. The MFN agreements are far more detailed than the EC bilateral trade agreements with Czechoslovakia and Romania.
- *Except for the safeguard provisions, the EC MFN agreements and the United States MFN agreements tend to be quite different.* Although some of the provisions in the EC agreements are similar to provisions in the U.S. agreements, certain subjects emphasized in the EC agreements do not even appear in the U.S. agreements. For example, the treatment of EC quantitative restrictions (QRs) is a major subject of the EC agreements, but the United States does not have the same QR system. The EC agreements also address the question of how to reconcile the terms of the EC agreements with bilateral trade agreements between the NMEs and individual EC member states.
- *Both the United States and the EC have chosen to address in separate agreements trade in goods that are very sensitive to imports.* Examples include steel products, textiles and, in some cases, certain agricultural products.

Relevant U.S. Statutes

- *Any country that was ineligible for MFN treatment as of January 3, 1975 must meet the requirements of title IV of the Trade Act of 1974 before it can receive MFN treatment.* The countries governed by this provision are those listed in column 2 of the 1975 Tariff Schedules of the United States (TSUS), and include all Communist countries, except Poland and Yugoslavia. The adoption of the Harmonized Tariff Schedule (HTS) in 1989 did not change the fact that the 1975 TSUS is the operative reference for determining which countries are subject to title IV.
- *The Jackson-Vanik amendment to the Trade Act of 1974 sets forth freedom of emigration requirements that must be met before any country that was ineligible for MFN treatment as of January 3, 1975 may become eligible for such treatment or may participate in U.S. financial guarantee programs.* Before a covered NME may become eligible for MFN or participation in financial guarantee programs, the President must either determine that the country complies with the Jackson-Vanik freedom of emigration provisions

or waive these provisions for that country. The President may waive the provisions only upon a finding that such waiver will substantially promote the Jackson-Vanik objectives, and upon receipt of assurances that the emigration practices of that country will lead to the achievement of these objectives. The President must renew his waiver authority annually.

- *The President may extend MFN treatment to a covered NME only after negotiation of, and Congressional approval of, a bilateral commercial agreement that meets the requirements of section 405 of the Trade Act of 1974.* Section 405 sets a 3 year limit on the life of an agreement, renewable for periods of up to 3 years, contingent upon a satisfactory balance of trade and services concessions and satisfactory reciprocity. In addition, the agreement must include provisions for termination or suspension for national security reasons, safeguards against disruption of domestic markets, protection of intellectual property rights, settlement of commercial disputes, consultations, arrangements for promotion of trade, and other arrangements of a commercial nature.

- *In addition to title IV of the Trade Act of 1974, other statutory provisions prohibit or limit the extension of credit or financial guarantees to transactions involving the Soviet Union.* The availability of credit for business with the Soviet Union is limited by the Byrd Amendment to the Trade Act of 1974, the Stevenson Amendment to and other provisions of the Export-Import Bank Act of 1945, the OPIC provisions of the Foreign Assistance Act, and, to a lesser extent, by the Johnson Debt Default Act.

- *Each of the three MFN agreements into which the United States has entered under section 405 was negotiated after the President waived the Jackson-Vanik requirements for the subject country.* In February 1988, in the expectation that President Reagan would not renew the waiver of the Jackson-Vanik requirements for Romania, that country renounced the renewal of MFN treatment for its products. President Reagan then announced that he would not seek renewal of MFN status for Romania; the MFN agreement was ultimately suspended by agreement of the United States and Romania. In 1989, Hungary enacted an emigration law which President Bush determined to satisfy the Jackson-Vanik requirements. In October 1989, Hungary became the first NME country to receive permanent MFN status since enactment of the Trade Act of 1974.

- *Section 406 of the Trade Act of 1974 sets forth standards and procedures that relate to the taking of a safeguard action with respect to imports from a "Communist" country that are disrupting a U.S. market.* Under section 406, a U.S. industry may file a petition with the U.S. International Trade Commission seeking relief from imports from a Communist country. If the Commission finds that rapidly increasing imports from a Communist country are a significant cause of material injury or threat thereof to a domestic industry, it recommends to the President the relief necessary to prevent or remedy such injury. The President may then provide import relief, generally in the form of higher tariffs or import quotas.

- *The U.S. antidumping law contains special provisions relating to the calculation of foreign value when merchandise is from a NME.* Under the 1988 amendments to the U.S. antidumping law, the foreign value of merchandise from an NME would generally be "constructed" by valuing the NME producer's "factors of production" in a market economy country that is a significant producer of comparable merchandise and which is at a comparable level of development, and then adding amounts for general expenses, profits, and packing.

U.S. Trade Agreements With Nonmarket Economy Countries

Section 405 MFN Agreements

1. Provisions Required Under the Trade Act of 1974

- *The MFN agreements tend to address the duration of the agreement in the same way.* The Hungary, China, and Romania agreements have virtually identical provisions providing for an initial period of 3 years, followed by successive renewal terms of 3 years. This is the maximum period allowed by U.S. law. The 1972 U.S.S.R. agreement also provided for an initial term of 3 years, but with no renewal term.

- *The MFN agreements have virtually identical provisions permitting either party to take any action to protect its national security interests.* The 1972 U.S.S.R. agreement also had a similar provision.

- *The Hungary provision on safeguards, permitting either party to impose whatever restrictions it "deems appropriate" to prevent or remedy actual or threatened market disruption, is the most comprehensive provision, because it defines market disruption.* The provisions of the Romania agreement and the 1972 U.S.S.R. agreement were similar in content, while the China provision is more general. In each case, the parties agree to undertake negotiations to remedy the problem before taking any action if at all possible.

- *The three U.S. MFN agreements differ significantly as to the degree of protection given to intellectual property rights.* The Romania and Hungary agreement,s in large part, reaffirm commitments the parties have already made as signatories to the Convention of Paris for the Protection of Industrial Property and to the Universal Copyright Convention. Because China was not a signatory to either Convention at that time, that agreement is more specific about the rights that it promises and the nature of the protection offered.

- *All of the U.S. agreements encourage arbitration to settle disputes arising in private commercial transactions.* The China and Romania MFN agreements and the 1972 U.S.S.R. agreement suggest recourse to different rules of arbitration, while the Hungary agreement contains no recommendation. All the U.S. agreements recommend that the place of arbitration be a state which is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

- *The U.S. agreements place much responsibility for the promotion and expansion of trade relations on the parties.* Several of the U.S. agreements, including the 1972 U.S.S.R. agreement, refer to the long term development of trade relations and to the expectation that the volume of trade would triple during the life of the agreements. The U.S. agreements focus on promoting the smooth conduct and facilitation of private business operations. Although there are many differences in the language of these provisions, these differences are generally nonsubstantive.

- *As required by law, all three MFN agreements contain provisions setting forth procedures for reviewing the operation of the MFN agreement.* Both the 1972 U.S.S.R. agreement, the Romania agreement and the China agreement set up joint Commissions to oversee the agreement, whereas the Hungary agreement does not.

2. Other Issues Addressed in U.S. MFN Agreements

- *U.S. law requires the maintenance of a satisfactory balance of concessions in trade and services and the satisfactory reciprocation of actual or foreseeable reductions in U.S. tariffs and nontariff barriers to trade during the life of an MFN agreement before renewal is permitted.* Several of the U.S. agreements contain provisions addressing this issue, which primarily repeat the language of the statute. The China agreement contains no such provision.

- *The language describing the scope of MFN treatment differs from one agreement to the other.* Both the Romania and the 1972 U.S.S.R. agreements describe the grant of MFN status as unconditional. The Romania agreement also promises MFN treatment of vessels, as well as products, while the other agreements refer only to products.

- *Several U.S. agreements specify that payments are to be made in freely convertible currency unless otherwise agreed by the parties.* The 1972 U.S.S.R. agreement contains no other provisions addressing financial matters. The other U.S. agreements all contain provisions covering some additional finance issues such as the applicable rate of exchange, the opening and maintaining of bank accounts, or the use of local currency.

Investment Guaranty Agreements

- *The United States has negotiated an investment guaranty agreement with each of the NMEs to which it has granted MFN status.* The United States has negotiated five investment guaranty agreements with NMEs in the last 16 years—Romania, Hungary, Poland, China and Yugoslavia. Neither the treaty with Hungary nor the treaty with Poland is yet in force.

- *The general purpose of these agreements is to protect the United States when it insures or guarantees an investment in another country.* The procedures set forth in these agreements are very similar. Only the China and Romania agreements call for reciprocal agreements in the event that either government obtains the authority to issue coverage for investments in the United States.

Taxation Agreements

- *The United States has agreements regarding double taxation of income with four of the countries discussed here: Hungary, Poland, the Soviet Union, and China.* The general purpose of these agreements is to prevent citizens and corporations from being taxed in more than one country for the same income. Conversely, these agreements also help prevent someone involved in both countries from evading taxation by either government.

EC Trade Agreements With Nonmarket Economy Countries

- *Only the EC agreements with the Soviet Union, Poland, Hungary, and the China grant MFN status.* The agreements with Czechoslovakia and Romania are merely trade agreements.

- *The duration of all the EC agreements is longer than the maximum 3-year period allowed under U.S. law.* With the exception of the Czechoslovakia agreement, which was for only 4 years, the other EC agreements had terms of either 5 years or of 10 years.

- *No EC trade agreement with an NME provides for suspension or termination of the agreement for reasons of national security.* The U.S.S.R. agreement, the only agreement to even address this topic, allows prohibitions or restrictions on the grounds of public security.

- *All of the EC agreements analyzed here have safeguard provisions.* The provisions are generally similar, although the standard for determining injury varied from "injury" in the U.S.S.R. agreement, to "serious injury" in the Czechoslovakia, Hungary, Poland, and Romania agreements, to "material injury" in a special protocol to the Hungary agreement concerning the impact of the abolition of quantitative restrictions. The China agreement, like the China agreement with the United States, is the most general.

- *Only the U.S.S.R. and Hungary agreements address the issue of intellectual property protection.* However, these two agreements are less specific on the nature of the protection to be provided than are the U.S. agreements.

- *The provisions relating to the settlement of commercial disputes in the U.S.S.R., Hungary, and Poland agreements are virtually identical in content.* They all recommend recourse to the rules of the United Nations Commission on International Trade Law and, like the U.S. agreements, arbitration in a state which is a signatory to the Convention on Recognition and Enforcement of Arbitral Awards of June 10, 1958.

- *The EC agreements provide for the establishment of Joint Commissions, similar to those established by the 1972 U.S..-U.S.S.R. agreement and the U.S. agreement with Romania, to review the operation of the agreements.*

- *The EC agreements generally charge the Joint Commissions with the responsibility for the promotion and expansion of trade.* The EC agreements focus more on such activities as trade fairs, seminars, and exhibitions, as well as the exchange of economic information, than on the facilitation of business operations on which the U.S. agreements generally focus.

- *All of the EC agreements, except the China agreement, charge the Joint Commission with examining the trade balance.* The China agreement states only that the parties will make every effort to attain a balance in their reciprocal trade. None of these agreements requires the maintenance of a satisfactory balance of trade or reciprocation of reductions in barriers to trade, as most of the U.S. agreements do.

- *The four MFN agreements are broadest in scope, covering trade in all products except for those covered by the treaty establishing the European Coal and Steel Community and, in some cases, textiles.* The agreement with Czechoslovakia currently covers trade only in industrial and agricultural goods, while the agreement with Romania covers trade principally in industrial products.

- *All of the agreements have provisions addressing a gradual phasing out of quantitative restrictions.* Recent amendments call for an immediate suspension of most of the specific QRs applied to products from Poland and Hungary, accelerating the previously planned phase-out by 1995. Most non-specific QRs with respect to those two countries are suspended for a period of 1 year. The other agreements all call for a more gradual reduction of QRs.

- *Like the United States, the EC has generally handled trade in some of the more sensitive product areas such as steel and textiles in separate agreements.*

PART 1:
TREATMENT OF NONMARKET ECONOMY COUNTRIES UNDER U.S. TRADE LAWS

I. U.S. STATUTES RELEVANT TO GRANTING MFN STATUS TO NONMARKET ECONOMY COUNTRIES

This section discusses the principal U.S. statutes that are relevant to the granting of most favored nation (MFN) treatment to nonmarket economy countries, including the U.S. tariff schedules, title IV of the Trade Act of 1974, and U.S. provisions concerning credit extensions and export controls.

A. U.S. Tariff Schedules

In 1962, Congress enacted the Tariff Classification Act of 1962,[1] which simplified the structure of the tariff schedules that had been established by the Tariff Act of 1930. The 1962 act provided for eight schedules plus an appendix, collectively enacted as the *Tariff Schedules of the United States* (TSUS).[2] The TSUS codified the former "Reduced rate" column as "Column 1" and the former "Full rate" column as "Column 2." The TSUS also codified, in a general headnote (headnote 3(d)), the list of countries that were subject to the rates of duty in column 2; all other countries were eligible for column 1 MFN rates.

With the enactment of the Omnibus Trade and Competitiveness Act of 1988 (OTCA), Congress restructured the U.S. tariff schedule in order to harmonize this country's tariff nomenclature with that of our major trading partners.[3] Effective January 1, 1989, the *Harmonized Tariff Schedule of the United States* (HTS) replaced the former TSUS. The HTS retained the two rate columns entitled "column 1" and "column 2" in the TSUS. Imports continue to be subject to column 1 or column 2 rates depending upon the current status of the country of origin of the goods.[4]

B. The Trade Act of 1974

Title IV of the Trade Act of 1974 contains provisions concerning trade relations with countries not receiving nondiscriminatory treatment at the time of enactment. Except as otherwise provided in that Act, the President is directed under section 401 to continue to deny nondiscriminatory, i.e. MFN, treatment to the products of countries that were denied such treatment as of January 3, 1975 (the date on which the statute was enacted).[5] On the date of enactment, the TSUS listed the following countries or areas as those whose products were subject to tariff treatment under column 2 and, therefore, ineligible for MFN status at that time:

> Albania, Bulgaria, China (any part of which may be under Communist domination or control), Cuba, Czechoslovakia, Estonia, Germany, (the Soviet zone and the Soviet sector of Berlin), Hungary, Indochina (any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control), Korea (any part of which may be under Communist domination or control), Kurile Islands, Latvia, Lithuania, Outer Mongolia, Rumania, Southern Sakhalin, Tanna Tuva, Tibet, [and] Union of Soviet Socialist Republics and the area in East Prussia under the provisional administration of the Union of Soviet Socialist Republics.[6]

The Trade Act of 1974 set out two requirements that must be met by any of the countries listed above, before becoming eligible for and receiving MFN treatment. First, the President must determine that the country complies with the freedom of emigration provisions of section 402 of the Trade Act and submit a report to Congress indicating that this is so.[7] Alternately, the President may, in appropriate circumstances, waive the application of section 402 requirements for that country.[8] Second, the President must complete a bilateral commercial agreement that meets the requirements of section 405 of the Trade Act, discussed in more detail below.[9]

1. Jackson-Vanik Amendment

Section 402 of the 1974 Trade Act is commonly referred to as the Jackson-Vanik amendment. Under this provision, products from a nonmarket economy country may not receive MFN treatment, and the country may not participate in U.S. financial credit or guarantee programs, if the President determines that the country (1) denies its citizens the right or opportunity to emigrate; (2) imposes more than a nominal tax on visas or other documents required

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[1] Public Law No. 87-456, 76 Stat. 72 (1962).

[2] 19 U.S.C. § 1202 (1963).

[3] Public Law No. 100-418, 102 Stat. 1107, 1147-1163, Title I, Subtitle B (1988).

[4] The following countries currently remain subject to tariff treatment under column 2 of the HTS: Afghanistan, Albania, Bulgaria, Cuba, Czechoslovakia, Estonia, German Democratic Republic, Kampuchea, Laos, Latvia, Lithuania, Mongolia, North Korea, Romania, Union of Soviet Socialist Republics, [and] Vietnam. General Headnote 3(b), HTS (1989).

[5] 19 U.S.C. section 2431. Prior to enactment of the 1974 Act, nondiscriminatory trade treatment was denied to all Communist countries, except Poland and Yugoslavia, under

[5]—*Continued*
section 231 of the Trade Expansion Act of 1962, as amended by section 402 of the Foreign Assistance Act of 1963.

[6] General headnote 3(d), TSUS (1975). A decision to grant MFN status to the "Soviet Union" under Title IV raises a question as to the geopolitical areas to be covered by the grant. As noted above, under the 1975 TSUS, Estonia, the Kurile Islands, Latvia, Lithuania, Southern Sakhalin, Tanna Tuva, and "the area is East Prussia under the provisional administration of the Union of Soviet Socialist Republics" were all listed separately from the Union of Soviet Socialist Republics for tariff purposes.
Enactment of the HTS did not change the fact that the 1975 TSUS applies when determining which countries are subject to the requirements of Title IV. See Public Law No. 100-418 § 1214(j) (uncodified), 102 Stat. 1157-58. For informational purposes, however, it should be noted that the HTS lists Estonia, Latvia, and Lithuania separately, and makes no reference to the other areas. General Headnote 3(b), HTS (1989).

[7] 19 U.S.C. § 2432(a),(b).

[8] 19 U.S.C. § 2432(c).

[9] 19 U.S.C. § 2435.

for emigration; and (3) imposes more than a nominal levy, fine, fee, or other charge on any citizen as a consequence of the desire to emigrate.[10]

Products of nonmarket economy countries (NMEs) may be eligible for MFN treatment and for U.S. financial programs, and the President may conclude a commercial agreement with an NME country, only after the President submits a report to Congress indicating that the country is not in violation of the conditions listed in the preceding paragraph. Such report must include information as to the nature and implementation of emigration laws and policies and restrictions or discrimination applied to persons wishing to emigrate.[11] After initial submission of the report, the President must submit updated reports biannually, before June 30 and December 31 of each year that the MFN agreement is in effect.[12]

The President may waive by executive order the application of the above requirements if he reports to Congress that (1) he has determined that the waiver will substantially promote the objectives of the freedom-of-emigration provisions, and (2) he "has received assurances that the emigration practices of that country will henceforth lead substantially to the achievement of the objectives of this section."[13]

2. Sections 404 and 405 of the Trade Act

Sections 404 and 405 of the Trade Act authorize the President to enter into, and effectuate by proclamation, bilateral commercial agreements providing for MFN treatment to the products of countries previously denied such treatment.[14] As explained above, the President must comply with the reporting requirements of the Jackson-Vanik amendment as a precedent to concluding such an agreement. In addition, section 405 specifies certain provisions that must be included in the agreement. Specifically, any such bilateral commercial agreement shall:

(1) be limited to an initial period specified in the agreement which shall be no more than 3 years from the date the agreement enters into force, except that it may be renewable for additional periods[15], each not to exceed 3 years; if—

(A) a satisfactory balance of concessions in trade and services has been maintained during the life of such agreement, and

(B) 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;

(2) provide that it is subject to suspension or termination at any time for national security reasons, or that the other provisions of such agreement shall not limit the rights of any party to take any action for the protection of its security interests;

(3) include safeguard arrangements (A) providing for prompt consultations whenever either actual or prospective imports cause or threaten to cause, or signi- ficantly contribute to market disruption and (B) authorizing the imposition of such import restrictions as may be appropriate to prevent such market disruption;

(4) if the other party to the bilateral agreement is not a party to the Paris Convention for the Protection of Industrial Property, provide rights for United States nationals with respect to patents and trademarks in such country not less than the rights specified in such convention;

(5) if the other party to the bilateral agreement is not a party to the Universal Copyright Convention, provide rights for United States nationals with respect to copyrights in such country not less than the rights specified in such convention;

(6) ... provide arrangements for the protection of industrial rights and processes;

(7) provide arrangements for the settlement of commercial differences and disputes;

(8) ... provide arrangements for the promotion of trade, which may include arrangements for the establishment or expansion of trade and tourist promotion offices, for facilitation of activities of governmental commercial officers, participation in trade fairs and exhibits, and the sending of trade missions, and for facilitation of entry, establishment, and travel of commercial representatives;

(9) provide for consultations for the purpose of reviewing the operation of the arrangement and relevant aspects of relations between the United States and the other party; and

(10) provide such other arrangements of a commercial nature as will promote the purposes of this chapter.[16]

[10] 19 U.S.C. § 2432(a)(1), (2), (3).
[11] 19 U.S.C. § 2432(b).
[12] Ibid.
[13] 19 U.S.C. § 2432(c)(2). The President must renew his waiver authority annually, ibid., § 2432(d).
[14] 19 U.S.C. §§ 2434, 2435.
[15] In addition, if the country entering the commercial agreement has also entered an agreement with the United States regarding the settlement of lend-lease reciprocal aid and claims, MFN treatment will not apply in periods during which such country is in arrears on its obligations under the lend-lease agreement. 19 U.S.C. § 2434(b).

[16] 19 U.S.C. § 2435(b)(1)-(10).

Section 405(c) provides for Congressional approval by the adoption of a concurrent resolution before a bilateral commercial agreement negotiated under section 405 can take effect.[17] Section 405 refers to section 151 of the Trade Act for the procedures to be employed by Congress in introducing and adopting such a concurrent resolution.[18] Under the provisions of that section, the responsible House and Senate committees have 45 days after introduction of the resolution to report it; after the resolution is reported, or after 45 days expires without committee action, the full House or Senate has 15 days to vote on final passage.[19]

If the country entering a commercial agreement under section 405 has entered an agreement with the United States regarding the settlement of lend-lease debts, MFN treatment will not apply in periods during which such country is in arrears on its obligations under the lend-lease agreement.[20] However, the Soviet-American lend-lease settlement agreement conditions the Soviet Union's fourth and all subsequent lend-lease payments upon the extension of MFN treatment to the Soviet Union.[21]

C. Statutory Provisions Concerning Extension of Credit

In addition to making the NME eligible for MFN treatment, compliance with or waiver of the Jackson-Vanik amendment removes or waives the prohibition (of sec. 402 of the Trade Act of 1974) against NME's participation in U.S. financial credit or guarantee programs.[22] There are, however, various other statutory provisions, within and without the Trade Act, that regulate the availability of credit for business with the Soviet Union and other NME's.

1. Byrd Amendment to the Trade Act of 1974

One explicit restriction on the extension of credit for exports to the Soviet Union is contained within the Trade Act of 1974. Section 613 of the Trade Act, commonly referred to as the Byrd amendment, prohibits any agency of the U.S. Government, other than the Commodity Credit Corporation, from approving any loans, guarantees, insurance, or any combination thereof, in connection with exports to the Soviet Union in an amount exceeding $300,000,000, without prior congressional approval "as provided by law."[23]

2. Johnson Debt Default Act

The Johnson Debt Default Act, as amended, makes it a criminal offense within the United States for any "individuals, partnerships, corporations, or associations other than public corporations in which the United States has or exercises a controlling interest through stock ownership or otherwise," to purchase or sell the bonds, securities, or other obligations of, or make any loan to any foreign government (or a political subdivision thereof or any association or organization acting on its behalf) that is in default of its obligations to the U.S. Government, unless that government is a member of both the International Monetary Fund and the International Bank for Reconstruction and Development.[24] Regarding the Soviet Union, this prohibition may apply in that the Soviet Union is in arrears of its debts incurred by predecessor governments.[25]

Since 1934, the U.S. Attorneys General have issued eight opinions interpreting the Johnson Debt Default Act. The most recent, and most relevant for purposes of this study, were issued on October 9, 1963, and May 9, 1967. The 1963 opinion addressed the act's applicability to the proposed export sale of agricultural commodities to the Soviet Union and Eastern European Bloc countries.[26] Attorney General Robert F. Kennedy issued an opinion stating that federal corporations, such as the Commodity Credit Corporation, are exempt from the act's coverage. He further concluded that neither sales transactions by private American exporters on a deferred-payment basis nor credit transactions involving the assignment of commercial obligations constituted "loans" within the meaning of the act. In 1967, Attorney General Ramsey Clark issued an opinion stating that the Johnson Act does not prohibit transactions by United States firms or banking institutions for the financing of export sales of particular goods or services.[27] Specifically, he found no distinction

[17] 19 U.S.C. § 2435(c). On March 1, 1990, the Senate Finance Committee voted to amend sections 402, 405, and 407 of the Trade Act of 1979 to require "joint resolutions" by Congress rather than "concurrent resolutions." See Press Release No. M-4 (March 1, 1990). On March 21, 1990, the House Committee on Ways and Means voted on a similar amendment.

[18] 19 U.S.C. § 2191.

[19] 19 U.S.C. § 2191(e).

[20] 19 U.S.C. § 2434(b).

[21] Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding Settlement of Lend Lease, Reciprocal Aid and Claims, Oct. 18, 1972, 23 U.S.C. 2910, 2913, TIAS No. 7478. For a more detailed discussion of the U.S.-U.S.S.R. lend-lease agreement, *see* the discussion in this report of treaties with the U.S.S.R.

[22] 19 U.S.C. § 2432.

[23] 19 U.S.C. § 2487.

[24] 18 U.S.C. § 955.

[25] The principle indebtedness consists of cash advanced by the U.S. Treasury during World War I, under the Liberty Bonds Act. The Soviet Union also still owes the final payment for its debts incurred during World War II under the Lend-Lease Act. As noted above, however, the Soviet Union is not "in default" of this debt, in that the U.S.-U.S.S.R. lend-lease agreement conditions final payment upon the grant of MFN. For a more detailed discussion of the Johnson Default Act as it applies to the Soviet Union, see generally, Prince, "The Johnson Debt Default Act: How to Comply with What's Left," *Banking Law Journal* vol. 98 (1981) p. 147; Starr, "A New Legal Framework for Trade Between the United States and the Soviet Union: The 1972 US-USSR Trade Agreement," *American Journal of International Law*, vol. 67, (1973) p. 63, 81; Berman, "The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example," *Law and Contemporary Problems*, vol. 24 (1959) pp. 516–17.

[26] 42 Op. Att'y Gen. 229 (Oct. 9, 1963).

[27] 42 Op. Att'y Gen. 357 (May 9, 1967).

between the types of financing previously determined to be permissible and the types of financing arrangements which were the subject of the inquiry before him--lines of bank credit, barter arrangements, and deferrals of payments pending earnings.

3. Export-Import Bank Act

Private transactions undertaken with funding from the Export-Import Bank of the United States (Eximbank) are statutorily exempt from the Johnson Default Act.[28] However, other statutory provisions restrict the Eximbank from loaning money for transactions involving the Soviet Union as well as other communist countries. In addition to the restrictions imposed by the Byrd amendment, Eximbank loans to the U.S.S.R. are further restricted by the Export-Import Bank Act of 1945, as amended (Eximbank Act). The 1974 Stevenson amendment to the Eximbank Act, like the Byrd amendment to the Trade Act, placed a $300,000,000 limit on credits to the Soviet Union.[29] In addition, the Stevenson amendment prohibits the Eximbank from providing any loan or financial guarantee, or any combination thereof, in an amount exceeding $40,000,000 for the "purchase, lease, or procurement of any product or service which involves research or exploration of fossil fuel energy resources" in the Soviet Union.[30]

The 1986 amendments to the Eximbank Act extended an earlier blanket prohibition on any Eximbank transactions with Communist countries by making this prohibition applicable to guarantees, insurance, or extension of credit for leases or products purchased by, or for use in, a "Marxist-Leninist country."[31] This prohibition does not apply to transactions which the President determines are in the national interest.[32]

4. OPIC Provisions of the Foreign Assistance Act

The Overseas Private Investment Corporation (OPIC) is likewise statutorily constrained from providing insurance and guarantees for projects in most NMEs. Section 620(f) of the Foreign Assistance Act of 1961, as amended, prohibits assistance under that act (which includes OPIC funding) for Communist countries.[33]

[28] 12 U.S.C. § 635h.
[29] 12 U.S.C. § 635e(b).
[30] Ibid.
[31] 12 U.S.C. § 635(b)(2)(A). "Marxist-Leninist countries" are listed in the statute. Ibid., § 635(b)(2)(B)(ii).
[32] Ibid., at § 635(b)(2)(D)(i).
[33] 22 U.S.C. § 2370(f). The provisions of this section may be waived only if the President finds and reports to Congress that—

(A)such assistance is vital to the security of the United States;

(B)the recipient country is not controlled by the international Communist conspiracy; and

(C)such assistance will further promote the independence of the recipient from international communism. Ibid.

The President also may remove a country from the prohibitions of this section, for any period, if he determines and reports to Congress that such action is important to the

D. Export Control Provisions

The Export Administration Act of 1979, as amended, provides the authority for controlling the export of goods from the United States.[34] The policy articulated in the Act is to use export controls "only to the extent necessary" to protect the national security, to further U.S. foreign policy and international obligations, and to protect the domestic economy from the drain of scarce materials.[35]

The act directs the Secretary of Commerce to establish a "commodity control list" (CCL) stating license requirements for exports of goods and technology.[36] The CCL divides the world into seven country groups for licensing purposes. The group to which the destination country belongs determines the applicable licensing requirements.[37] The types of transactions regulated include exports from the United States of goods or technical data; exports and reexports from a foreign country of foreign products containing U.S. parts and components or based on U.S. technology; and reexport of U.S.- origin products and technical data from one foreign country to another.[38] The Department of Defense is authorized to review certain applications for national security purposes, while the Department of State reviews specified

[33]—*Continued*
national interest. Ibid § 2370(f)(2). The statute specifies that one factor to be weighed is "whether the country in question is giving evidence of fostering the establishment of a genuinely democratic system, with respect for internationally recognized human rights." Ibid. As a corollary, the OPIC provisions themselves explicitly prohibit assistance to any country "which engages in a consistent pattern of gross violations of internationally recognized human rights." 22 U.S.C. §§ 2199(l), 2152n.

As a further prerequisite to operation in a particular country, OPIC must have entered into an investment program agreement with that country. 22 U.S.C. § 2197(a).

[34] 50 U.S.C., app. §§ 2401–2419 (supp. 1989). The act contains a sunset provision, which has been amended routinely to reauthorize its implementation. Currently, the authority granted by the Act is to terminate on Sept. 30, 1990. Ibid., app. § 2419.

[35] 50 U.S.C., app. § 2402(2) (supp. 1989). See Ibid., § 2404 (National security controls), § 2405 (Foreign policy controls), § 2406 (Short supply controls). The Export Administration Amendments of 1985 include a Congressional finding that—

> The acquisition of national security sensitive goods and technology by the Soviet Union and other countries the actions or policies of which run counter to the national security interests of the United States has led to the significant enhancement of Soviet bloc military-industrial capabilities. This enhancement poses a threat to the security of the United States, its allies, and other friendly nations, and places additional demands on the defense budget of the United States. 50 U.S.C. § 2401(11).

[36] 50 U.S.C., app. § 2403(b) (supp. 1989); 50 App. 2404(c) (supp. 1989).

[37] The Soviet Union is listed in Country Group Y. Also included in that grouping are Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic (including East Berlin), Laos, Latvia, Lithuania, Mongolian People's Republic. Although the countries in Group Y are subject to stringent controls, the countries in Group Z—Cambodia, Cuba, North Korea, and Vietnam—are subject to the most stringent export controls.

[38] 15 CFR § 770.3 (a); 15 CFR §§ 774.1–774.9.

license applications for foreign policy purposes.[39] The Department of State's Office of Munitions Control also conducts a review under the Arms Control Act of 1976.[40]

Those countries listed as "Communist" countries under section 620(f) of the Foreign Assistance Act of 1961[41] must be included on the list of controlled countries, unless the President determines that the export of goods or technology to such country would not make a significant contribution to the military potential of that country or a combination of countries that would prove detrimental to the national security of the United States. In determining whether to add or remove a country from the list, the President is directed to take into account a variety of factors, such as the adversity of the country's policies to U.S. national security, and the present or potential relationship with the United States.[42]

The 1985 amendments formally authorized U.S. participation in the Coordinating Committee on Multilateral Export Controls (COCOM),[43] an informal multilateral export-control body consisting of Japan and all NATO countries except Iceland. COCOM members meet periodically to regulate the export control policies of the members with respect to Communist countries, with the aim of insuring that the Communist countries do not obtain products that have significant military uses.

[39] 50 app. 2404(a)(1) (supp. 1989); 50 app. 2405(a)(5) (supp. 1989); 15 CFR § 770.13(f).
[40] 22 U.S.C. § 2278 (1982+ supp. III 1985).
[41] See above, discussion in the section entitled "OPIC Provisions of the Foreign Assistance Act."

[42] 50 U.S.C., app. § 2404(b)(1).
[43] 50 U.S.C., app. § 2404(i).

II. APPLICATION OF STATUTORY SAFEGUARD PROVISIONS TO NONMARKET ECONOMY COUNTRIES

A. Safeguard actions under the Trade Act of 1974

Section 406 of the Trade Act sets out procedures through which a domestic industry can petition the U.S. International Trade Commission for an investigation as to whether market disruption exists with respect to imports which are the product of a Communist country, or can petition the President to request that he initiate consultations provided for under the safeguard arrangements in trade agreements with Communist countries. Section 406 was included in the Trade Act because Congress was concerned that a communist country, "through control of the distribution process and the price at which articles are sold, could disrupt the domestic markets of its trading partners and thereby injure producers in those countries."[44]

Congress required, in section 405 of the Trade Act, that any trade agreements negotiated with such countries include, among other things, 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".[45] However, a section 406 market disruption petition may be filed with the ITC regardless of whether there is a trade agreement with the Communist country.[46]

As a general matter, by Congressional and Presidential direction most if not all U.S. trade agreements negotiated since 1947 have contained a safeguard or escape clause provision. The Presidential direction for such provisions was first set forth in Executive Order 9832, issued on February 25, 1947, by President Truman in response to Congressional concern and pressure. The order required, among other things, that an escape clause similar to that contained in a 1942 bilateral trade agreement with Mexico be included in all future foreign trade agreements negotiated by the United States. The General Agreement on Tariffs and Trade (GATT), which was negotiated later that year, contains such a clause (article XIX). U.S. trade law provisions setting forth the procedures and findings prerequisite to a U.S. action invoking GATT article XIX are set forth in sections 201-204 of title II of the Trade Act of 1974.

[44] *Trade Reform Act of 1974: Report of the Committee on Finance . . . on H.R. 10710 . . .*, S. Rep. No. 1298, 93d Cong., 2d sess. (1974), at 210.

[45] Section 405(b)(3) of the Trade Act of 1974 (19 U.S.C. § 2435(b)(3)). The basic statutory requirements concerning the content of commercial trade agreements with nonmarket economy countries are set forth in section 405.

Subsection (a) of section 406 requires the ITC to institute an investigation to determine whether market disruption exists upon the filing of a petition by an entity representative of a domestic industry, or at the request of the President or the U.S. Trade Representative, upon resolution of the House Committee on Ways and Means or the Senate Committee on Finance. The Commission may also conduct an investigation on its own motion.[47] The Commission has 3 months to conduct its investigation and report its findings and any recommendations to the President.[48] The Commission must hold a public hearing in the course of the investigation.[49]

If the Commission finds market disruption, it must find and recommend to the President the relief necessary to prevent or remedy such market disruption.[50] The Commission could recommend relief in the form of an increase in or imposition of a tariff, tariff-rate quota, or quantitative restriction. The President has 60 days to determine what if any relief action he will take.[51] In addition to relief in the form of a tariff, tariff-rate quota, or quantitative restriction, the President could choose to negotiate an orderly marketing agreement. If the President takes action that is different from that recommended by the Commission or decides to take no action, Congress may, by means of a joint resolution, direct the President to proclaim the relief recommended by the Commission.[52]

Subsection (c) of section 406 authorizes the President to take emergency action without receiving a Commission report. If the President finds that there are "reasonable grounds to believe" that market disruption exists and that emergency action is necessary, he may take such action as would have been authorized if he had received an affirmative finding from the Commission. However, the President is required, at the time he takes emergency action, to request the Commission to conduct an investigation, and such emergency action would terminate if the Commission later made a negative determination.

Subsection (d) authorizes entities representative of a domestic industry to file petitions with the President requesting the President to initiate consultations provided for by the safeguard arrangements of any agreement entered into under section 405 with respect to imports of an article that is the product of a country the subject of an agreement. If the President determines that there

[46] S. Rep. No. 1298 at 211.

[47] Sec. 406(a).

[48] Sec. 406(a)(4).

[49] Sec. 406(a)(2).

[50] Sec. 406(a)(3).

[51] Sec. 406(b). Section 406(b) adopts by reference the provisions of sections 202 and 203 of the 1974 version (as opposed to the 1988 version) of the Trade Act. For the most part, the factors to be considered by the President in determining whether to provide relief and in what form and amount are set forth in section 202, and the various relief options are set forth in section 203.

[52] Sec. 203(c) of the Trade Act of 1974, 19 U.S.C. sec. 2253(c) (1988), as amended by sec. 248 of the Trade and Tariff Act of 1984 (98 stat. 2998).

are "reasonable grounds" to believe that market disruption exists with respect to the subject article, he is to initiate consultations. However, the statute is silent as to the time period in which the President must make a "reasonable grounds" determination or conclude consultations. Consultations apparently are to be conducted independently of any ITC investigation under subsection (a). Nothing in section 406 provides for a delay in institution of an ITC investigation or a delay in Presidential action if consultations are in progress, or for suspension of an ongoing ITC proceeding pending completion of consultations if consultations are initiated during the course of an ITC investigation.

The term "market disruption" is defined in subsection (e) as follows--

> Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.[53]

Investigations under section 406 are conducted only with respect to imports that are the product of a "Communist" country, regardless of whether the imports from such country receive MFN treatment. The term "Communist country" is defined in subsection (e) to mean "any country dominated or controlled by communism."[54] Section 406 is the only section of title IV in which the term "Communist country" is used. The term "nonmarket economy country" is used in most other sections of title IV, but it is not used in section 406. However, the text of title IV and its legislative history suggest that the terms were intended to be used interchangeably.[55]

The Omnibus Trade and Competitiveness Act of 1988 amended section 406 to clarify the meaning of the terms "rapidly" increasing imports and "significant cause" and to enumerate certain factors to be considered by the ITC in determining market disruption.[56]

[53] Sec. 406(e)(2)(A).

[54] Sec. 406(e)(1).

[55] For example, in the introductory section of the Finance Committee report, which summarizes the provisions of the bill and was probably written last, the term nonmarket economy is generally used in describing the countries potentially subject to a section 406 action; but in the more detailed part of the report relating to section 406 only the term Communist country is used.

[56] The test of rapidly increasing is met if "there has been a significant increase in such imports . . . during a recent period of time." Sec. 406(e)(2)(B)(i). The term "significant cause" was defined to refer to "a cause which contributes significantly to the material injury or the domestic industry, but need not be equal to or greater than any other cause." Sec. 406(e)(2)(B)(ii). The factors to be considered by the Commission are to include, among others, (i) the volume of imports of the subject merchandise, (ii) the effect of imports of such merchandise on prices in the United States for like or directly competitive articles, (iii) the impact of imports of such merchandise on domestic producers of like or directly competitive articles, and (iv) evidence of disruptive pricing practices, or other efforts to unfairly manage trade patterns. Sec. 406(e)(2)(C).

Section 406 is in many respects an adjunct to section 201 of the Trade Act. Section 406 contains similar petitioning procedures, incorporates by reference many of the section 201 definitions, and authorizes the President to provide similar forms of relief. However, section 406 is different in several important respects. The injury test, although parallel to that of section 201, is different and in some respects easier and in other respects more difficult to satisfy.[57] Relief actions may be taken only against imports from the Communist country or countries the subject of the investigation and not all countries.

The Commission has conducted 11 investigations under section 406. The last of these investigations, concerning ammonium paratungstate and tungstic acid from China, was concluded in June of 1987.[58] The Commission made affirmative determinations in three of these section 406 investigations (clothespins from China, anhydrous ammonia from the U.S.S.R., and ammonium paratungstate and tungstic acid from China), and was equally divided in a fourth (canned mushrooms from China). The President provided relief, in the form of an orderly marketing agreement, once--in the tungsten case. This relief action is still in effect. In addition, the President provided relief one time on an emergency basis with respect to anhydrous ammonia from the U.S.S.R., but such relief was later terminated after the Commission conducted a second ammonia investigation and made a negative determination. There are no investigations in progress at the present time.

B. Application of the U.S. Antidumping Law to NME Imports

The U.S. antidumping law, which is set forth in section 731, et seq. of the Tariff Act of 1930 (19 U.S.C. § 1673, et seq.), provides that an antidumping duty is to be imposed, in addition to any other duty, if the "administering authority" (the U.S. Department of Commerce) determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" and the U.S. International Trade Commission determines that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise."[59] If Commerce finds

[57] For example, the tests of "material" injury and "significant" cause are intended to be easier standards to satisfy than the tests of "serious" injury and "substantial" cause in section 201. However, the requirement in section 406 that imports be increasing "rapidly" (section 201 contains no such requirement) and that the injury be linked to imports from just the Communist country or countries the subject of the investigation (rather than imports from all sources as under section 201) would represent more difficult requirements.

[58] 52 Fed. Reg. 23087 (June 17, 1987).

[59] Sec. 731.

LTFV sales and the Commission finds material injury, an antidumping duty order is issued imposing an antidumping duty in an amount equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise (the dumping margin).[60]

Special problems arise in calculating foreign market value in the case of nonmarket economy countries. In the case of a determination involving market economy countries, foreign market value is determined by one of three methods, in order of preference--home market sales, third-country sales, or constructed value. If such article is not sold or offered for sale for home consumption, or if such sales are too small to provide an adequate basis for comparison, third-country sales or the constructed value method may be used.[61] The constructed value is the sum of costs of materials, plus at least 10 percent for general expenses, plus at least 8 percent for profit, plus the cost of containers and other expenses incidental to readying the merchandise for shipment to the United States.[62] However, in the case of a nonmarket economy country, home market sales, third-market sales, and production costs often do not reflect real costs or the effect of market forces. For this reason, various methods of computing surrogate country prices have been used since 1962 in determining foreign market value.[63]

The U.S. antidumping law provisions relating to nonmarket economy countries were substantially amended by the Omnibus Trade and Competitiveness Act of 1988.[64] The amendments were based largely on provisions contained in the Senate bill.[65]

[60] Id.

[61] Sec. 773(a)(1).

[62] Sec. 773(e).

[63] For a general discussion of the history of this practice, including initial codification in the Trade Act of 1974, see C. Verrill, "Nonmarket Economy Dumping: New Directions in Fair Value Analysis," 21 *G. Washington J. Law & Econ.* 427, 428–29 (1988).

[64] Sec. 1316 of the Conference Agreement. The report of the Senate Committee on Finance described the former provisions and need for change as follows:

The current antidumping duty law and procedures as they apply to nonmarket economies do not work well. The Commerce Department is frequently unable to find surrogate producers willing to cooperate in investigations by providing data. Therefore, it has had to develop fall-back methodologies. The dumping margins for a nonmarket economy country will vary widely depending on which methodology or surrogate country is used. As a result, a nonmarket economy country typically is unable to predict whether or not a particular U.S. price will be considered a dumped price, and is unable to structure its activities accordingly. In addition, an American industry faced with low-priced competition from a nonmarket economy producer is unable to determine whether the antidumping duty law would provide a remedy. The Committee is changing the law to overcome this reliance on information that is extremely difficult to obtain, and to provide greater certainty and predictability in the administration of the antidumping duty law as it applies to nonmarket economy countries. *Omnibus Trade Act of 1987: Report of the Committee on Finance . . . on S. 490*, S. Rep. No. 71, 100th Cong., 1st sess. (1987), at 108.

[65] The House bill instead would have substantially modified section 406 by lowering the test for market disruption and requiring consideration by the ITC of such unfair trade practices as subsidies and dumping. ITC reports would have been submitted to the U.S. Trade Representative rather than the President, and the USTR's discretion would have been more limited than that of the President under existing law.

The current U.S. law provides, when the merchandise is exported from a nonmarket economy country and Commerce is unable to determine the foreign market value by one of the above three methods, that the foreign value is to be constructed by valuing the nonmarket economy producer's "factors of production" in a market economy country which is a significant producer of comparable merchandise and which is at a level of economic development comparable to the nonmarket economy and adding amounts for general expenses, profits, and packing.[66] The factors of production include hours of labor, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation.[67] If sufficient information is not available to make a determination on the basis of the value of the factors of production, then Commerce is to determine foreign market value on the basis of the price at which comparable merchandise produced in a market country at a comparable level of development is sold in other countries, including the United States.[68]

The term "nonmarket economy country" is defined to mean "any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[69] In making its determinations, Commerce is to consider the convertibility of the country's currency, whether wages are determined through free bargaining between labor and management, the extent to which joint ventures or other forms of foreign investment are permitted, the extent of government ownership or control of the means of production, the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and other factors that it considers appropriate.[70] Commerce's determination remains in effect until revoked by Commerce,[71] and the determination is not subject to judicial review.[72]

C. Application of the U.S. Countervailing Duty Law to NME Imports

The Department of Commerce, which administers the U.S. countervailing duty law, has taken the position that the U.S. countervailing duty law does not apply to imports from nonmarket economy countries. This position was upheld by the U.S. Court of Appeals for the Federal Circuit in *Georgetown Steel Corp. v. U.S.*, 801 F.2d 1308 (Fed. Cir. 1986).

[66] Sec. 773(c)(1) and (4).

[67] Sec. 773(c)(3).

[68] Sec. 773(c)(2).

[69] Sec. 773(18)(A).

[70] Sec. 773(18)(B).

[71] Sec. 773(18)(C).

[72] Sec. 773(18)(D).

The U.S. countervailing duty law is set forth in two separate provisions of the Tariff Act of 1930--in section 303 and in section 701 et seq. (19 U.S.C. § 1303 and 1671 et seq.). The section 701 provisions apply to imports from countries which are signatories to the GATT Agreement Relating to Subsidies and Countervailing Measures (the GATT Subsidies Code), or which have assumed obligations substantially equivalent to those of the Code. Section 303 applies in all other instances. Section 701 provides that a countervailing duty equal to the amount of the net subsidy is to be imposed, in addition to any other duty, if (1) the "administering authority" (the U.S. Department of Commerce) determines that a subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," and (2) the ITC determines that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation."[73] The section 303 test is similar, but no injury test is required except in the case of duty-free imports from GATT members.

The House version of what became the Omnibus Trade and Competitiveness Act of 1988 would have amended the U.S. countervailing duty law to require that the law apply to a nonmarket economy country to the extent that the Department of Commerce could reasonably identify, and determine the amount of, a subsidy provided by that country. The Senate version contained no such provision, and the House receded in conference.[74]

[73] Sec. 701(a).

In its explanation of the provision in its report on the House bill, the Ways and Means Committee stated that it was sensitive to the theoretical and administrative difficulties of applying the countervailing duty law to economies that are not market oriented.[75] The Committee was of the view that nonmarket economy countries should not be completely exempt from the countervailing duty law under all circumstances, but that the law should apply "where a subsidy practice can reasonably be identified and measured."[76] The provision would have required Commerce to make "a good-faith effort" to identify and measure such practices.[77] In making its determination, Commerce would have been required to consider the particular type of practice alleged, the circumstances in the country relating to the manufacture or exportation of the product, and the extent to which the general product sector in the country is market-oriented.[78] The Committee suggested, as an example, that if a government is providing export rebates or other financial incentives which are not provided to other industries and which are designed to promote exports of the product in question, such government intervention should be considered an export subsidy whether the country is a market or nonmarket economy country.[79]

[74] *Omnibus Trade and Competitiveness Act of 1988: Conference Report to Accompany H.R. 3*, H. Rep. No. 576, 100th Cong., 2d sess. (1988), at 628.

[75] *Trade and International Economic Policy Reform Act of 1987: Report of the Committee on Ways and Means . . . to Accompany H.R. 3*, H. Rep. No. 40, 100th Cong., 1st sess. (1987), at 138.

[76] Ibid.

[77] Ibid.

[78] Id. at 139.

[79] Ibid.

PART 2:
DESCRIPTION OF U.S. TRADE AGREEMENTS WITH NMEs

AFGHANISTAN

Financial Agreements

Agreement Relating to Guaranty of Private Investments[1]

Exchange of notes at Kabul, June 5 and 9, 1957; Entered into force June 9, 1957.

In 1957, the United States signed an agreement with Afghanistan relating to guaranties authorized by section 413(b)(4) of the Mutual Security Act of 1954. Paragraph 1 states that, upon the request of either country, the United States and Afghanistan will consult on projects in Afghanistan proposed by Americans to which guaranties under the aforementioned law have been made or are under consideration.

Paragraph 2 states that the United States will issue no guaranty unless approved by Afghanistan.

Subparagraph a of paragraph 3 states that, if the United States pays any person in U.S. dollars, Afghanistan will recognize the transfer to the United States of any right, title or interest the person had in assets, currency, credits or other property on account of which the payment was made and the United States is subrogated to any claim or right arising in connection with the property. Subparagraph b states that the United States is to accord Afghani amounts it acquires pursuant to these guaranties treatment no less favorable than that accorded to private funds arising from transactions involving Americans. The Afghani amounts are to be freely available to the United States for administrative expenditures. Subparagraph c states that if the United States issues guaranties to cover war losses for investments in Afghanistan, Afghanistan will accord Americans treatment no less favorable than that accorded Afghan nationals or nationals of third countries insofar as reimbursement, compensation, indemnification or other payments are concerned. Afghanistan recognizes the transfer of any right, privilege, or interest from any U.S. national under a guaranty for war loses. Subparagraph d states that any claim against Afghanistan to which the United States may be subrogated as a result of a payment under a guaranty is to be the subject of direct negotiations between the two governments. A sole arbitrator selected by mutual agreement will make a final and binding determination if the two countries cannot settle the claim within a reasonable period. Subparagraph d is not applicable to subparagraph c guaranties.

[1] 8 UST 2507; TIAS 3972.

ALBANIA

1922 MFN Agreement

Agreement Concerning Most-Favored-Nation Treatment and Passports[2]

Exchange of notes at Tirana, June 23 and 25, 1922; Operative, July 28, 1922.

Through this exchange of notes, the United States entered into an agreement with Albania regarding passports, naturalization and most-favored-nation (MFN) treatment.

The first letter, from the United States, relayed Albanian assurances that Albania would recognize all United States passports, especially those of naturalized citizens born in Albania. It explained that naturalized citizens returning to their countries of origin and residing there continuously for more than 2 years would be considered to have expatriated themselves except under certain circumstances. The letter also relayed Albanian assurances that Albania would grant favored nation treatment to American interests in Albania in tandem with initiation of formal diplomatic relations between Albania and the United States, and that Albania was to include this provision in any commercial conventions between it and the United States.

In the second letter, Albania stated that it would recognize American passports given to naturalized citizens born in Albania. Further, it would insert the MFN clause in any commercial treaty. Following official U.S. recognition of the government of Albania and pending conclusion of such a treaty, Albania agreed to accord U.S. interests MFN treatment.

BULGARIA

Commodity Specific Agreements

Textiles

Agreement Relating to Trade in Wool Textile Products Between Bulgaria and the United States

Exchange of notes at Sophia, June 20, 1986 and November 27, 1986;
Entered into force November 27, 1986;
Effective May 1, 1986.

The United States had a textile agreement with Bulgaria from May 1, 1986 to April 30, 1989, governing trade in wool textile products. The

[2] 5 Bevans 9.

purpose of this agreement was to set annual limits on certain categories of wool exports from Bulgaria to the United States. The agreement also required the government of Bulgaria to "use its best efforts to space exports . . . evenly throughout each Agreement period. . ."

CZECHOSLOVAKIA

Commodity Specific Agreements

1. Textiles

Agreement Concerning the Mutual Trade in Textiles Between the Czechoslovak Socialist Republic and the United States of America (Agreement Providing for Consultations Should Exports of Cotton, Wool, and Man-made Fiber Textiles and Apparel Products from Czechoslovakia Cause Market Disruption in the United States)[3]

Agreement effected by exchange of notes signed at Prague March 22 and 28, 1977;
Entered into force March 28, 1977.

By exchange of diplomatic notes, the United States and Czechoslovakia agreed to terminate their bilateral agreement concerning trade in cotton textiles signed on August 29, 1969. They also confirmed their intent to continue in their mutual trade in cotton, wool and man-made fiber textiles and apparel products. They further agreed that, should exports of these products from Czechoslovakia to the United States "develop in such a manner so as to cause or threaten to cause in the United States problems of market disruption as defined in the Arrangement Regarding International Trade in Textiles ['Arrangement']," the United States "may request consultations" with Czechoslovakia. Czecho- slovakia would then have 30 days to respond to such request, and within 60 days it must take part in consultations "(unless otherwise mutually agreed) in order to arrive at an early solution on mutually advantageous terms on the basis not less favorable than that provided by the [Arrangement]."

[3] TIAS 8645.

Agreement Between the Czechoslovak Socialist Republic and the Government of the United States of America Regarding the Exports of Certain Textile Products from Czechoslovakia for Import Into the United States

Exchange of notes at Prague June 25, July 3 and 22, 1986;
Entered into force July 22, 1986;
Effective June 1, 1986.

This agreement sets specific limits for exports of various categories of textiles and textile products from Czechoslovakia to the United States. The Agreement provides for a 3-year term, divided into agreement years, with carryforward and carryover from one year to the next allowed only under certain specified terms. Czechoslovakia is required to space exports to the United States within each category evenly throughout each agreement period.

Under paragraph 14, if Czechoslovakia considers that "it is being placed in an inequitable position in relation to a third country," it may request consultations with the United States "with a view of taking appropriate remedial actions, such as a reasonable modification of this Agreement."

Either government may terminate the agreement effective at the end of an agreement year, by providing 90 days written notice to the other government. The agreement has been amended several times to reflect changes in the Harmonized Commodity Code and to redefine some of the categories covered by the agreement. We believe the agreement that expired on May 31, 1989 has been extended, but do not have official documentation.

2. Steel

Arrangement Between the Government of the United States and the Government of Yugoslavia Concerning Trade in Certain Steel Products

Entered into force January 14, 1986;
Effective October 1, 1984;
Expired by its terms September 30, 1989.

Under this arrangement, Czechoslovakia agreed to restrain exports to the United States of four categories of steel products: hot-rolled sheet and plate; other sheet and strip; wire rod; and all other steel products. The arrangement also contained shipment limitations to ensure that quantities are distributed over the year. A new steel agreement is under negotiation.

ESTONIA

1925 MFN Agreement

The United States exchanged notes with the Republic of Estonia on March 2, 1925, setting forth their mutual treatment of commerce.[4]

Both countries agreed to accord unconditional MFN treatment with respect to import, export and other duties and charges; transit; warehousing and other facilities; and the treatment of commercial travelers' samples. The countries agreed to grant the same treatment accorded commerce of any other country with respect to licensing or prohibitions of imports or exports.

The United States promised not to impose higher or other duties on Estonian imports than on like products from another foreign country. The same treatment was accorded by Estonia to U.S. products. Exports were treated similarly.

The agreement does not relate to certain situations, such as U.S. treatment of Cuba, Estonia treatment of Finland, Latvia, Lithuania or Russia, or safety regulations, *inter alia.*

Thirty days notice is required to terminate the agreement. A party's obligations lapse if its legislature prevents it from abiding by the agreement.

[4] T.S. No. 722, 7 Bevans 608. By notes dated July 10 and 16, 1951, the two governments agreed that the U.S. may apply "such controls as it may consider appropriate" to the trade between it and Estonia while the latter is under Soviet domination or control.

GERMAN DEMOCRATIC REPUBLIC

Commodity Specific Agreements

1. Steel

Arrangement Concerning Trade in Certain Steel Products Between the Government of the German Democratic Republic and the Government of the United States

Entered into force July 17, 1985;
Effective October 1, 1984;
Expired by its terms September 30, 1989.

The United States had a steel agreement in effect with the German Democratic Republic ("GDR") from October 1, 1984 through September 30, 1989; a new agreement is currently being negotiated.

This agreement set forth restraint levels for exports of the following categories of steel products: cold rolled sheet and strip; galvanized steel; plate; wire rod; and all other steel products. The agreement also governed the allocation of the permissible quantity during the year to ensure that the amounts are distributed throughout the calendar year. A licensing procedure was established in order to assist in the enforcement of the export restrictions. The Agreement provided for consultations between the governments to discuss any matters that threatened the goal of the agreement.

2. Textiles

Agreement Relating to Trade in Cotton Textile Products Between the German Democratic Republic and the United States

Agreement by exchange of notes at Berlin on December 10, 1986, and February 27, 1987;
Entered into force February 27, 1987;
Effective January 1, 1987.

The United States had a bilateral textile treaty in force with the GDR from January 1, 1987, through December 31, 1989, which governed the exports of certain cotton textile products from the GDR to the United States. The GDR also committed to using its "best efforts to space exports from the German Democratic Republic to the United States . . . evenly throughout each agreement year. . ."

This agreement was amended in late 1987 to account for the conversion to the Harmonized System.

HUNGARY

A. MFN Agreement

Agreement on Trade Relations Between the United States of America and the Hungarian People's Republic[5]

Agreement signed at Budapest March 17, 1978;
Entered into force July 7, 1978.

In 1978, President Carter waived the Jackson-Vanik requirements of section 402 of the Trade Act of 1974 for Hungary. That waiver was renewed annually, as commercial and political relations between the two countries improved. On September 26, 1989, Hungary enacted a new emigration law, effective January 1, 1990, which complies with the Jackson-Vanik amendment. In response, President Bush determined that Hungary was no longer in violation of the Jackson-Vanik requirements; in October, 1989, Hungary became

[5] TIAS 8967.

the first NME country to receive permanent MFN status since passage of the 1974 Trade Act.[6]

With the original waiver in 1978, the United States and Hungary negotiated a Trade Relations Agreement meeting the requirements of section 405 of the Trade Act of 1974. That agreement remains in effect today. Hungary had acceded to full membership in the GATT prior to the negotiation of this agreement.

1. Provisions Required by Section 405 of the Trade Act of 1974

(1) Duration of the Agreement

Article XI of the agreement establishes the initial term of the agreement as 3 years. Absent written notice by either party within 30 days prior to expiration, the agreement is automatically extended for successive three year periods.

(2) National Security

Article IX of the Agreement preserves the right of either party to take any action for the protection of its security interests.

(3) Safeguard Provisions

Article VII addresses "market disruption safeguards." Paragraph 1 of this paragraph effectively makes the safeguard language of section 405 of the Trade Act applicable to both countries. Thus, the parties agree to consult promptly at the request of either party "whenever either actual or prospective imports of products originating in the territory of the other party cause or threaten to cause or significantly contribute to market disruption." The definition of "market disruption" in the Agreement directly tracks the definition of that term as set out in section 406 of the Trade Act.[7] The Agreement further permits either party to impose "restrictions, limitations or price measures" to prevent or remedy actual or threatened market disruption.

The annex to the agreement contains the procedures for application of the safeguard provisions. The annex requires that consultations initiated under Article VII be concluded within 90 days of the request, unless otherwise agreed. The parties must take "due account" of private commercial contracts and "seek not to impair unreasonably rights of importers and exporters under such contracts." The consultations must provide for review of "production, market and trade situation" of the product involved, and may take into account factors such as production trends, industry profits, employment, sales, inventories, rates of increase of imports, market share, level and prices of imports, sources of supply, and the exporter's situation.

Absent agreement upon a different solution, restrictions or limitations agreed upon by the importing party to be necessary to prevent or remedy the market disruption shall be implemented. In such situations, the other party will then "be free to deviate from its obligations to the first party in respect of substantially equivalent trade as provided in the GATT."

In critical circumstances, "where delay would cause damage difficult to repair," the importing party may provisionally take preventative or remedial action without prior consultation; such action, however, is conditional upon the immediate effectuation of consultation.

Each country agrees to take appropriate measures, in accordance with applicable laws and regulations, to ensure that exports from its country comply with quantitative limitations or other restrictions imposed by the other party. Each party retains the authority to take appropriate measures to ensure that imports from the other country comply with such restrictions.

(4) Intellectual Property Protection

Article V of the agreement addresses "Industrial Property, Copyrights and Industrial Rights and Processes." Under that article, each party reaffirms its commitments made in the Paris Convention for the Protection of Industrial Property, as revised at Stockholm on July 14, 1967, and in the Universal Copyright Convention of September 6, 1952, as revised at Paris on July 24, 1971. In addition, each party agrees to provide to the firms, enterprises and companies of the other party "national treatment or most-favored nation treatment, whichever is more favorable, with respect to legal protection of other industrial rights and processes."

(5) Settlement of Commercial Disputes

Under Article VII, the parties "encourage the prompt and equitable settlement" of commercial disputes. Both parties endorse the adoption of arbitration for disputes that cannot otherwise be amicably settled. The place and rules of arbitration are left to the private entities involved, although the parties encourage their respective commercial entities to provide contractually for arbitration under internationally recognized arbitration rules.

[6] 54 Fed. Reg. 46591 (Oct. 26, 1989).

[7] 19 U.S.C. § 2436(e)(2) (1974 and 1989 Supp). Under this statutory provision, and under the U.S.- Hungary Trade Relations Agreement, "market disruption" exists within a domestic industry "whenever imports of a product, like or directly competitive with an article produced by such domestic industry, are increasing rapidly either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry. The Omnibus Trade and Competitiveness Act of 1988 ("OTCA") did not change the "market disruption" definition, although it added a provision defining "significant cause," which is an element of "market disruption." 19 U.S.C. § 2436 (e)(B)(ii).

(6) Promotion of Bilateral Trade

Article II of the agreement confirms each party's commitment to promote and encourage trade, and "to secure favorable conditions for the continuous, long-term development of trade relations." It is noted that commercial transactions will be effected on the basis of private commercial contracts "on terms customary in international commercial practice." Under Article III of the agreement, the parties agree not to take measures which would "unreasonably impair" the contractual rights of these private entities.

Article III addresses business facilitation. Each party agrees to allow firms, enterprises and companies of the other party various general and specific rights to support the development of mutual trade. These rights include: access to all courts and applicable administrative bodies in accordance with the laws of the host country, on the basis of most-favored-nation treatment; permission to advertise and promote products and services; and contact with present and potential buyers, users and suppliers; access to designated-government organizations in order to present business facilitation problems in cases where all normal channels have been exhausted; publication and distribution by the host country of economic and commercial information to promote trade. The parties also agree to encourage the participation of its own firms, enterprises and companies, as well as such entities of the other country, in trade promotional events. Subject to domestic law, all articles for use in promotional events can be imported and re-exported on a duty free basis, provided that such articles are not sold or otherwise transferred.

Paragraph 11 of Article III provides for the means of facilitating the representation of the firms, enterprises, and companies of one party in the territory of the other. These provisions include: action without delay upon applications for authorization to establish and operate commercial representations; "treatment no less favorable than that accorded to firms, enterprises, and companies of any third country;" the right to hire, compensate and terminate nationals of the host country or of third countries, in accordance with the laws and regulations of the host country; the right to import office equipment and automobiles for the operation of commercial representation, "subject to applicable customs regulation;" residence and housing rights, for the entity's foreign employees and their families; multiple entry and exit visas for these employees and their families. The latter two provisions are further specified to apply to "foreign employees of joint ventures involving firms, enterprises, and companies of both parties who are assigned in the territory of the other party for purposes of the joint venture," and "employees and other representatives of firms, enterprises or companies of either party who are assigned in the territory of the other party pursuant to sales or other contracts between firms, enterprises and companies of the parties."

(7) Bilateral Review of the Operation of the Agreement

Article XI contains provisions for consultation. Paragraph 3 of this article provides for consultation at the request of either party to review the operation of the agreement and other relevant aspects of the relations between the parties.

This article also requires consultation if either party encounters or foresees a problem concerning its domestic legal authority to carry out any of its obligations under the agreement.

2. Other Issues Addressed

(1) Relationship to Multilateral Negotiations

Under paragraph 1 of Article I, the parties agree to apply the provisions of GATT and the Protocol for the Accession of Hungary. But, to the extent that any provision of GATT is inconsistent with any provision of the U.S.-Hungary Agreement, the provision of the bilateral agreement will apply. Under paragraph 2, the parties agree to reciprocate reductions in tariffs and non-tariff trade barriers that result from multilateral negotiations.

(2) Financial Provisions

Financial provisions relating to trade are addressed in Article IV. Financial transactions are to be carried out in United States dollars or any other "freely convertible currency" unless the parties to the transactions agree otherwise. However, expenditures within the territory of a party may be made in local currency.

Under paragraph 3 of this article, each party agrees to grant any authorizations necessary for firms, enterprises, and companies of the other party to trade on a MFN basis (e.g., opening and maintenance of bank accounts in the host country).

Except in time of declared national emergency, the parties agree not to restrict the export from their respective territories of legally-obtained freely convertible currencies, deposits, or instruments.

(3) Establishment of Government Commercial Offices

Under Article VI, the parties will "permit and facilitate the establishment and operation of a government commercial office of the other party as an integral part of its Embassy." The officers and staff members are not permitted to engage in commercial activities inconsistent with their diplomatic status, but they may engage in general trade promotion activity.

B. Other General Trade Agreements

Agreement on Tariff Matters Between the United States of America and the Hungarian People's Republic[8]

Agreement signed at Budapest November 18, 1978;
Entered into force January 1, 1980.

In this agreement, the United States agreed to grant MFN treatment to Hungarian imports listed in Annex I, and Hungary agreed to grant MFN treatment to United States imports listed in Annex II.[9] The parties agreed to implement the concessions specified in those annexes in accordance with the Final Act of the Tokyo Round of Negotiations.

Any disputes arising under this agreement may be settled through use of GATT procedures. In other cases, either party may request mandatory bilateral consultations. If no satisfactory settlement is reached within 60 days following a request for consultations, then either party may suspend the application of the concessions or obligations concerning the disputed matter, and the other party "may take such action as it considers appropriate."

Joint Statement On The Development Of Agricultural Trade And Cooperation Between The United States Of America And The Hungarian People's Republic[10]

Joint statement signed at Washington May 31, 1981;
Entered into force May 13, 1981.

Article I of the Statement notes that it is intended to "promote the accomplishment of the objectives laid down in Article II" of the U.S.-Hungary Trade Relations Agreement. The parties declare their intention to expand bilateral agricultural trade and to promote cooperation in agricultural science and technology.

Under Article II, the parties agree to promote and facilitate joint activities and contacts between their respective companies, associations, and educational and research institutions. In addition, the Joint Statement confirms the permanent Working Group on Agricultural Cooperation, co-chaired by representatives of each party.

[8] 32 UST 5371; TIAS 9992.
[9] By related agreements done at Budapest June 13, 1979 and May, 1980, (entered into force May 30, 1978), and by amending agreement signed at Budapest September 4 and 18, 1980 (entered into force September 18, 1980), several modifications were made to the annexes containing the tariff schedules.
[10] TIAS 10103.

C. Commodity Specific Agreements

1. Textiles

Agreement Providing for Consultations Should Exports of Cotton, Wool, and Manmade Fiber Textiles and Apparel from Hungary Cause Market Disruption in the United States[11]

Exchange of notes signed at Budapest February 12 and 18, 1976;
Entered into force February 18, 1976.

In light of their obligations under Articles 2 and 6(2) of the multilateral Arrangement Regarding Textile Trade ("Arrangement"), the United States and Hungary agreed, by exchange of diplomatic notes, to terminate their bilateral agreement concerning trade in cotton textiles signed on August 13, 1970 at Washington. They further agreed that, should exports of cotton, wool, and manmade fiber textiles and apparel from Hungary to the United States "develop in such a manner so as to cause or threaten to cause in the United States problems of market disruption as defined in the Arrangement," the U.S. "reserves the right to request consultations" with Hungary. Hungary would then have 30 days to respond to such requests, and must "consult within 60 days thereafter (unless otherwise mutually agreed) to arrive at an early solution on mutually satisfactory terms in accordance with the provisions of the Arrangement."

Agreement between the Government of the United States and the Hungarian People's Republic Relating to Trade in Wool Textile Products[12]

Exchange of letters signed at Budapest February 15 and 25, 1983;
Entered into force February 25, 1983;
Effective October 1, 1982.

By exchange of diplomatic letters, Hungary agreed to limit annual exports to the U.S. of wool textile products. For the duration of the agreement, the U.S. agrees not to invoke the procedures of Article 3 of the Arrangement to request restraints on these exports. On February 2 and 3, 1984, the countries agreed, by exchange of letters, to a visa system for the products covered under the agreement. The agreement has since been amended several times to modify the visa system and to add, delete, or further define the product categories covered by the agreement.

[11] 27 UST 1619; TIAS 8270.
[12] TIAS 10666.

2. Steel

Arrangement Between the Hungarian People's Republic and the Government of the United States Concerning Trade in Certain Steel Products

Entered into force May 28, 1985;
Effective October 1, 1985;
Expired by its terms September 30, 1989.

Under this Arrangement, Hungary agreed to restrain exports to the United States of three categories of steel products: plate, hot rolled sheet and strip, and all other steel products. The arrangement also contained quarterly shipment limitations to ensure that quantities are distributed over the year. If the United States, in consultation with Hungary, determined that there was a short supply domestically of any product covered by the Arrangement, the agreement provided for the United States to allow increased shipments from Hungary. A new steel agreement is under negotiation.

D. Treaties Concerning Financial Issues

Investment Guarantee Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic

Signed in Budapest October 9, 1989;
Not yet in force.

The agreement provides for investment insurance, reinsurance, and guarantees (collectively referred to in the agreement as "coverage") which are administered by the Overseas Private Investment Corporation ("OPIC") or any successor agency, either directly or pursuant to arrangements between OPIC and commercial insurance, reinsurance and other companies.

The agreement applies to coverage with respect to private projects or activities only if such projects or activities are registered with or otherwise approved by Hungary. The agreement also applies to coverage with respect to projects to which Hungary, or any agency or political subdivision thereof, has contracted for goods or services or has invited contract bids.

The Hungarian Government agrees to recognize the transfer to OPIC of any currency, credits, assets, or investments made in accordance with the agreement. The issuance of OPIC coverage outside Hungary with respect to a project or activity in Hungary does not subject OPIC to Hungary's insurance and financial organizations laws. Interest and fees on OPIC loans will be exempt from tax in Hungary. OPIC will not be subject to tax in Hungary.

To the extent Hungarian laws partially or wholly invalidate or prohibit a party receiving OPIC coverage from acquiring an interest in property in Hungary, the Hungarian government will permit arrangements under which the interests are transferred to an entity permitted to own such interests under Hungarian laws.

Article 5 states that currency of Hungary acquired by OPIC shall be accorded treatment by Hungary "no less favorable as to use and conversion than the treatment to which such funds would be entitled in the hands of the party under coverage."

Under Article 6, the United States preserves its right to assert a claim under international law in its sovereign capacity, as distinct from any rights of OPIC.

The two governments agree that they will attempt to resolve any disputes regarding interpretation of the agreement or questions of public international law through negotiations. If the two Governments have not resolved the dispute within three months of the request for negotiations, either party may submit the dispute (including the question of whether such dispute presents a question of public international law) to an arbitral tribunal.

Article 7 addresses the establishment and functioning of the arbitral tribunal for resolution of disputes. Within two months of receipt of a request for arbitration, each government will appoint one arbitrator. Within three months of the request, these two arbitrators will agree on a president who is a citizen of a third state and appointed by the two governments. If any of the appointments are not made within the established time limits, either government may, absent any other agreement, request the Secretary-General of the International Center for the Settlement of Investment Disputes to make the necessary appointments. Each government will pay the expenses of its arbitrator and representation, and the two governments will split the expenses and other costs of the president.

The arbitral tribunal will regulate its own procedures. It will make its decision by majority vote, based on "the applicable principles and rules of public international law." Its decision will be final and binding.

Under Article 8, the agreement will enter into force on the date on which each government has notified the other that its constitutional and other legal requirements with respect to the agreement have been fulfilled. It will continue in force until six months from the date of receipt of a note by either government that the other government no longer intends to be a party to the agreement. In the event of termination, the provisions of the agreement with respect to Coverage issued while the agreement was in effect will remain in force for the duration, but in no case longer than twenty years after termination of the agreement.

Convention Between the Government of the United States and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income[13]

Convention, with exchange of notes, signed at Washington, February 12, 1979;
Ratifications exchanged at Budapest September 18, 1979;
Entered into force September 18, 1979.

The purpose of this agreement is to avoid double taxation of income earned in one country by citizens of the other country, while preventing tax evasion. The U.S. taxes to which the agreement applies are federal income taxes and excise taxes imposed on insurance premiums paid to foreign insurers and with respect to private foundations, but excluding the accumulated earnings tax and the personal holding company tax.

Article 6 of the agreement provides that income from real estate will be taxed in the country in which the real estate is located. Article 7 states that the profits of a business enterprise generally will be taxable only in the resident country of that business. However, if the enterprise carries on business through a permanent establishment in the other country, then the other country may tax the profits of the enterprise attributable to that permanent establishment.

Other articles of the agreement address the appropriate tax treatment of: shipping and air transport profits; dividends; interest payments; royalties; capital gains; income derived from personal services; pensions; other payments made by government entities; income from teaching or research; payments to students and trainees; and all other income.

Article 20 allows U.S. residents or citizens to take a credit against U.S. income tax for the amounts of tax appropriately paid to Hungary. Similarly, the agreement provides for the application of a credit to taxes owed by any U.S. company owning at least 10 percent of the voting stock of a Hungarian company from which the U.S. company receives dividends.

The agreement relieves Hungarian residents from double taxation by providing them tax exemptions or tax deductions for taxes paid to the U.S.

Article 21 provides for non-discrimination to the nationals and enterprises of one country in connection with taxes levied on them by the other country. These individuals or enterprises must receive tax treatment that is not more burdensome or less favorable than that to which nationals or enterprises of the taxing country are subjected.

[13] 30 UST 6357; TIAS 9560.

Article 22 allows a resident or national of one of the two governments to present to its own government objections to actions of either country which that person considers will result in taxation not in accordance with the convention. If the competent country is unable to arrive itself at an appropriate solution to a justified objection, the convention encourages the countries to resolve the case by mutual agreement.

Article 23 requires the countries to exchange information necessary for carrying out the convention or relevant tax laws. Any information received by one country from the other country "shall be treated as secret in the same manner as information obtained under the domestic laws of that State," and shall be disclosed only to appropriate persons or authorities. Persons or authorities who receive the information may disclose it in public court proceedings or in judicial proceedings. The competent authority of either country may request the other country to provide information in the form of depositions and unedited original documentary evidence. The competent authority of the other country must provide the requested information to the same extent such depositions and documents can be obtained under the laws and administrative procedures of that other country.

The convention is to remain in force at least 5 years from the date it entered into force. After that time, either country can terminate with 6 months notice.

LATVIA

1926 MFN Agreement

On February 1, 1926, the United States and Latvia signed a provisional agreement relating to MFN treatment in customs matters.[14]

Section 1 provides for mutual application of unconditional MFN treatment regarding import and export duties and all other duties and charges affecting commerce, transit, warehousing, and the like. Reciprocal treatment is to be applied to licensing or prohibition of imports or exports.

Section 2 states that the United States shall not impose higher or other duties on imported Latvian products than it applies to those of other countries.

Section 3 states the same for United States products in Latvia.

Section 4 provides the same with respect to products exported to the other country.

[14] T.S. No. 740, 9 Bevans 528. By unpublished notes dated July 10 and 11, 1951, this agreement was modified. Latvia acquiesced to U.S. controls on trade while Latvia is under Soviet control.

[22Section 5 provides for immediate application of every concession regarding duties, charges or regulations affecting commerce as accorded by law, proclamation, decree, or commercial treaty or agreement.

Section 6 provides that the agreement does not relate to treatment the United States accords Cuba or the Panama Canal Zone, or to its domestic commerce, inter alia, or to treatment that Latvia accords to certain countries and territories. Nor does the agreement apply to sanitary prohibitions or restrictions or to regulations to enforce criminal or tax laws.

Section 7 addresses the duration of the treaty.

LITHUANIA

1925 MFN Agreement

On December 23, 1925, the United States entered into an MFN agreement regarding customs matters with Lithuania. The agreement is embodied within an exchange of notes.[15] The provisions of this treaty are identical to those in the corresponding Estonian treaty.

PEOPLE'S REPUBLIC OF CHINA

A. MFN Agreement

Agreement on Trade Relations Between the People's Republic of China and the United States[16]

Agreement signed at Beijing July 7, 1979: Entered into force February 1, 1980.

This agreement, signed only about 7 months after the United States first formally recognized the government of the People's Republic of China, (China)[17] granted the People's Republic of China MFN status, pursuant to the terms of Title IV of the Trade Act of 1974.

1. Provisions Required by Section 405 of the Trade Act of 1974

(1) Duration of the Agreement

Under paragraph one of Article X, the agreement is to be in force for a period of 3 years. Paragraph 2 extends the agreement for 3 years at a time, in the absence of a notice to the contrary at least 30 days before the end of the effective period of the agreement.

(2) National Security

Article IX of the agreement expresses the right of either party to take any action necessary to protect its security interests.

(3) Safeguard Provision

Article VII of this agreement addresses the safeguard issue. Paragraph 1 of that article provides for an exchange of information and "friendly consultations" on any problems that arise from bilateral trade. Further, the agreement prohibits either party from taking any action to remedy problems that arise from bilateral trade without first attempting to resolve the problem through such consultations.

Paragraph 2 of that article permits either party to take whatever actions it "deems appropriate" if the consultations do not result in a mutually satisfactory solution. In "exceptional" circumstances, a party may take provisional action without consultations in advance, as long as consultations are initiated immediately after taking such an action.

No action taken under this provision is permitted to prejudice the general objectives of the agreement.

(4) Intellectual Property Protection

Article VI of this agreement addresses the issue of patent protection. In paragraph 1 of that article, both parties recognize the importance of "effective protection" of patents, as well as trademarks and copyrights. Paragraph 2 permits persons from either party to obtain exclusive protection of trademarks in the territory of the either party. Paragraph 3 states that each party will seek to provide patent and trademark protection for the natural persons of the other party's territory, equivalent to the patent and trademark protection accorded by the other party.

Paragraph 5 of Article VI addresses the obligation of both parties to ensure protection of copyrights equivalent to the protection offered by the other party.

Paragraph 4 of Article VI promises that both parties will facilitate the enforcement of provisions concerning protection of industrial property set forth in private commercial contracts, as well as provide a means of restricting unfair competition involving the unauthorized use of such property.

(5) Settlement of Commercial Disputes

Article VIII of this agreement addresses the methods provided for settlement of commercial disputes. In paragraph 1 of this article, the parties "encourage the prompt and equitable" settlement of any disputes arising in commercial relations

[15] T.S. No. 742, 9 Bevans 668. By unpublished note dated July 11, 1951, Lithuania acquiesced to the U.S. imposition of trade controls while the country is under Soviet domination or control.

[16] 31 UST 4651; TIAS 9630.

[17] The Joint Communique of December 15, 1978, establishing diplomatic relations between the two countries, can be found at 18 I.L.M. 272 (1979).

"through friendly consultations, conciliation,. . ." or other means.

Under the terms of paragraph 2, the contracting entities may resort to arbitration, if they are otherwise unable to settle a commercial dispute and if arbitration is provided for under their own contract. The agreement states that arbitration may be conducted by an arbitration institution either in the United States, China or a third country. The agreement allows for resort to the arbitration rules of the United Nations Commission on International Trade Law or other international arbitration rules that the disputing entities deem acceptable.

The terms of paragraph 3 require both countries to ensure the enforcement of arbitration awards "in accordance with applicable laws and regulations."

(6) Promotion of Bilateral Trade

Article I of this agreement provides generally for the adoption of whatever measures are necessary to strengthen economic and trade relations between the two countries to promote "long-term development of trade between the two countries. . ."

Under the terms of Article IV, both parties agree to encourage the activities of government trade offices, and to provide facilities "as favorable as possible" for the operation of such offices.

Article III of the agreement specifically addresses the actions that will be undertaken to promote trade relations between the United States and China Under paragraph A, the parties to the agreement promise that firms, corporations, and other entities from the other country will receive treatment "no less favorable" than is offered to such organizations from third countries.

In the second paragraph, the parties to the agreement promise to promote visits by delegations from economic and trade circles, to encourage other commercial exchanges and contacts, and to support the holding of fairs and exhibitions in the other party's country.

The third paragraph requires both parties to facilitate the stationing of representatives and the establishment of offices by firms and corporations "subject to their respective laws and regulations and in accordance with physical possibilities."

The final paragraph in this article refers to the requirement that both parties further support trade promotions and improve the facilities for the conduct of business activities by firms and trading organizations from the other country, including "office space and residential housing, telecommunications, visa issuance, internal business travel, customs formalities for entry and re-export of personal effects, office articles and commercial samples, and observance of contracts." These requirements are also subject to "their respective laws and regulations and physical possibilities. . ."

(7) Bilateral Review of the Operation of the Agreement

Paragraph 4 of Article X provides for a review of the operation of the agreement and other relevant aspects of the relations between the parties.

2. Other Issues Addressed

(1) Balance of Economic Interests

Paragraph 2 of Article I requires each Contracting party to make every effort to "foster the mutual expansion of their reciprocal trade. . ." in an effort to attain "harmonious development of such trade."

(2) Scope of MFN Treatment

Article II of this agreement defines the meaning of MFN status in this specific agreement. Under paragraph 1, MFN treatment is to be provided to "products" in matters regarding such issues as customs duties and charges, rules concerning customs clearance, taxes levied on imported or exported products, laws affecting the internal sale or distribution of imported products, and administrative formalities for the issuance of import and export licenses.

Paragraph 2 requires equitable treatment for the other party's products in instances in which one party applies quantitative restrictions to a certain product being imported from or exported to a third country.

Paragraph 3 requires the parties to take into account the fact that "China is a developing country."

Paragraph 4 states that the MFN principles set forth in this agreement will be applied in the same way as they are applied under any multilateral agreement to which either party is a party. In practical terms, this refers to the operation of the MFN provisions of the GATT, to which the United States is a party. At the time of the execution of this Agreement, China was not a party to any pertinent multilateral agreements.

Paragraph 5 commits both parties to reciprocal treatment in concessions regarding both tariff and non-tariff barriers to trade.

(3) Financial Provisions

Article V of the agreement addresses various financial issues. Paragraph 1 of that article provides for payment in "freely convertible currencies" unless the contract between the parties to a specific transaction specify otherwise.

Paragraph 2 provides generally for facilitation of the availability of official export credits "on the most favorable terms appropriate under the circumstances. . ." The agreement calls for the specifics of this subject to be addressed in a separate agreement.

Under paragraph 3, each party to the agreement is to provide the necessary facilities for financial transactions by organizations of the other party on terms "as favorable as possible."

Paragraph 4 provides that the financial institutions of the other country should be permitted to provide financial services in its territory on a basis no less favorable than that accorded to the financial institutions of third countries.

B. Other General Trade Agreements

A number of other bilateral agreements aimed at improving the economic cooperation between the two countries were signed by the United States and China following the establishment of diplomatic relations in late 1978. Among these agreements were the following:

Implementing Accord Between the Department of Energy of the United States of America and the State Scientific and Technological Commission of the People's Republic of China on Cooperation in the Field of High Energy Physics[18]

The United States and China entered into this agreement in January 1979 to provide a framework for cooperation and collaboration between the two countries in the field of high energy physics. This agreement provides for the exchange of information on scientific developments, as well as the exchange of scientists, engineers and other specialists. The accord established a Committee on High Energy Physics to coordinate any activities undertaken.

Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Cooperation in Science and Technology[19]

This agreement, entered into on the same day as the agreement described above, provides generally for cooperation in scientific and technological fields of mutual interest in such fields as agriculture, energy, space, health, the environment, earth sciences, engineering and other areas of science and technology. Like the Agreement described above, this accord also envisioned the exchange of scientific information and personnel. This agreement established a US-China Joint Commission on Scientific and Technological Cooperation to plan and coordinate the cooperation of the two countries in the described activities.

[18] 18 I.L.M. 345 (1979).
[19] 18 I.L.M. 350 (1979).

Accord on Industrial and Technological Cooperation between the United States of America and the People's Republic of China[20]

This agreement set forth some general procedures and principles designed to strengthen industrial and technological cooperation between the two countries and to "strive for a balance in their economic interests. . ." The agreement specifically provided that each party would attempt to promote and facilitate technology transfer and trade in technology products ". . . in accordance with their respective laws and regulations. . ." This agreement established the U.S.-China Joint Commission on Commerce and Trade to review the implementation of this accord. The Department of Commerce represents the United States on this Commission, while the Ministry of Foreign Economic Relations and Trade represents China.

C. Commodity Specific Agreements

1. Textiles

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Relating to Trade in Textiles and Textile Products

Exchange of notes at Beijing February 2, 1988;
Entered into force February 2, 1988;
Effective January 1, 1988.

After the establishment of diplomatic relations between the United States and China, the two countries entered into a bilateral textile agreement relating to trade in cotton, wool and man-made fiber products, to permit orderly marketing in this country of textile products made in China[21] Specifically, the purpose of such an agreement was to limit the growth of annual exports from China to the United States in the categories covered by the agreement. This agreement was amended numerous times during the 1980's, principally in order to alter the quantity of goods of various categories that would be permitted into the United States.

[20] 23 I.L.M. 144 (1984).
[21] 19 I.L.M. 1114 (1980). At the same time that this agreement was executed, the United States and China also signed agreements governing civil aviation and maritime affairs between the two countries. 19 I.L.M. 1106 (1980) and 19 I.L.M. 1117 (1980).

On February 2, 1988, the United States and China entered into a new textile agreement which will remain in force through December 31, 1991. This agreement addresses exports of cotton, wool, man-made fiber, vegetable fiber other than cotton, silk blend textiles, and other textile products manufactured in China Under paragraph 23, either government may terminate the agreement effective at the end of the agreement Year, upon 90 days written notice.

Paragraph 9 of the current agreement provides for consultations in the event the U.S. believes that imports of textile and apparel products from China are, "due to market disruption, threatening to impede the orderly development of trade between the two countries." Concurrent with requesting consultations, the U.S. must provide a detailed factual statement of reasons and justifications for consultations, with data demonstrating existence or threat of market disruption, and showing the role of P.R.C. products to that disruption. China agrees to consult within 30 days of receipt of the request. Both sides agree to "make every effort" to resolve the issue within 90 days of receipt, unless extended by mutual agreement.

2. Steel

Arrangement Concerning Trade in Certain Steel Products Between the Government of the People's Republic of China and the Government of the United States

Signed at Washington February 25, 1987;
Entered into force February 25, 1987;
Effective January 1, 1986;
Expired by its terms September 30, 1989.

For the last several years, the United States and China have had in effect an agreement limiting the exports of steel products from China to the United States. The most recent agreement expired on September 30, 1989; a new agreement is under negotiation.

This most recent agreement set forth restraint levels for exports of two categories of steel products, nails and all other products, beyond which amounts China was not permitted to export to the United States. The agreement also governed the allocation of the permissible quantity of exports during the year to ensure that the exports were distributed throughout the calendar year. The agreement provided for consultations between the governments to discuss any matters which threatened the stated goals. The agreement also provided that China could seek consultations with the United States if it felt that it was receiving treatment which was inequitable in comparison with a third country.

3. Grain

Agreement on Grain Trade Between the Government of the United States of America and the Government of the People's Republic of China[22]

Agreement signed at Beijing October 22, 1980;
Entered into force January 1, 1981.

Less than one year after the effective date of the MFN agreement with China, China and the United States also entered into a grain agreement. The purpose of that agreement was to stabilize the growth in grain trade between the two countries. The agreement provided for annual purchases of at least between 6-8 million metric tons of wheat and corn, 15-20 percent of which was to be corn. The sales were to be made at normal market prices and in accordance with normal commercial terms.

The United States was obligated only to attempt to assure the availability of sufficient supplies to meet the minimum quantities called for in this agreement. The agreement called for consultation between the parties if, in any given year, there were either inadequate supplies available or if China did not want to purchase the quantities called for under the accord.

The agreement also required China to give notice to the United States if it had an intention to exceed the 8 million tons by more than 1 million metric tons in any given year.

The agreement required the government of China to assure that grain purchased under this agreement was consumed in China.

This treaty has expired and has not been renewed.

D. Treaties Governing Financial Issues

People's Republic of China-United States: Investment Incentive Agreement and Letters of Understanding[23]

Exchange of notes at Beijing October 30, 1980;
Entered into force October 30, 1980.

This agreement addresses matters relating to investment insurance and investment guaranties administered by the Overseas Private Investment Corporation ("OPIC") to cover investments in China The agreement applies to investments relating to projects or activities approved by the government of China.

Article Three of this agreement obligates the Government of China to recognize the transfer to OPIC of any currency, credits, or assets, as well as the succession of OPIC to any right, title, claim or

[22] TIAS 9930.
[23] 32 UST 4010; TIAS 9924; 19 I.L.M. 1482.

cause of action for which payment is made to a private party covered by OPIC's insurance or guaranties. Other provisions of the Agreement ensure that China treats OPIC in the same manner in which the investor would have been treated if OPIC were compelled to make a payment to the investor on its investments in China For example, Article V states that currency of China acquired by OPIC in connection with making a payment to an investor shall be accorded treatment by China "no less favorable as to use and conversion than the treatment to which such funds would be entitled in the hands of the covered investor."

Article VI provides that the two governments will attempt to resolve any disputes through negotiation. If, after 3 months of negotiations, they are unable to reach a resolution, either government can initiate the submission of the dispute to arbitration. The arbitration panel is to consist of one arbitrator designated by each side; these arbitrators are to designate jointly a president who is a citizen of a third country.

Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income[24]

Signed at Beijing April 30, 1984;
Entered into force November 21, 1986.

The purpose of this agreement is to avoid double taxation of income earned in one country by the citizens or entities of another country, while simultaneously attempting to prevent tax evasion. Article 6 of the agreement provides that income from real estate will be taxed in the country in which the real estate is situated.

Article 7 of the agreement states that the profits of an enterprise shall be taxable only in the country in which the enterprise is located. If the enterprise carries on business through a permanent establishment in both countries, then each may tax the income attributable to the permanent establishment in its country.

Under Article 8, either party to this agreement may attribute profits of one enterprise to another, and tax those profits, if the relationship between the two enterprises in their commercial or financial dealings differs from what one would expect from two independent entities. The agreement requires either country to make an adjustment if that country has already taxed profits which, under the terms of this paragraph, were in fact properly attributable to an enterprise in the other country.

[24] 23 I.L.M. 677 (1984).

Other articles similarly address the proper tax treatment of dividends, interest payments, royalties, gains from the sale of real property, salaries and wages, income for services rendered, directors' fees, income paid to an entertainer, pensions, other payments made by government entities, remuneration for teaching and lectures, and payments to students and apprentices.

Article 22 eliminates double taxation by China by ensuring that, when a resident of that country derives income in the United States on which the United States taxes him, the amount of the United States tax shall be applied as a credit against the amount of the Chinese tax. That article also addresses granting credits for taxation by the United States on profits out of which dividends are paid, when the dividend is paid to a company in China which owns 10 percent or more of the shares of the U.S. company.

That article also requires the United States to allow a credit to a citizen against tax on income in the amount of any income tax paid to China by or on behalf of the resident. Similarly, the agreement provides for a credit to be applied to taxes owed to the United States by a company owning at least 10 percent of the voting rights of a Chinese company from which the U.S. company receives dividends.

This agreement is to remain in force indefinitely, but can be terminated by giving notice before June 30 of any calendar year, starting 5 years after the date on which this agreement entered into force.

E. Agreements Regarding Entry and Exit Visas

Agreement Relating to Reciprocal Facilitation of Visa Issuance

Exchange of notes at Beijing December 2, 1985;
Entered into force November 21, 1986.

China and the United States entered into this agreement to facilitate the travel of diplomats and officials between the two countries and ease the requirements for nonimmigrants seeking visas for travel to China The effect of the agreement was to provide for expanded visa validity for diplomats and officials of both countries; the elimination of requirements for forms, photographs, and fees for applications for visas by diplomats and officials; expansion of all transit visas to two entries during a six month period; submission of visa applications in any language; and the reduction of processing time for visa approval to a maximum of ten working days for all nonimmigrant visas.

POLAND

A. General Trade Agreements

Agreement Relating to Economic and Financial Cooperation[25]

Exchange of notes at Washington, D.C. April 24, 1946;
Entered into force April 24, 1946.

The United States and Poland entered into the agreement on April 24, 1976. In the agreement, the United States noted its satisfaction at the successful conclusion of negotiations concerning Export-Import Bank credits and credits for the purchase of surplus U.S. property. The United States stated that "durable and mutually beneficial economic and financial cooperation" between the two countries could only develop if all forms of discriminatory treatment in international commerce were eliminated and tariffs and other trade barriers were reduced. Further, Poland was to be in accord with the general tenor of the "Proposals for Expansion of World Trade and Employment" and to abstain from adopting new measures which would prejudice the objectives of the international conference on trade and employment contemplated by the proposals. Poland was required to continue to accord to nationals and corporations of the United States the treatment provided for in the Treaty of Friendship, Commerce and Consular Rights signed on June 15, 1931.[26] The governments of both countries were required to make adequate and effective compensation to nationals and corporations whose properties are requisitioned or nationalized. The agreement required the governments to afford each other adequate opportunity for consultation regarding the above matters. Finally, Poland agreed to make available to the United States full information, similar to that normally made public by the United States concerning Poland's international economic relations.

Joint Statement on the Development of Agricultural Trade[27]

Signed at Washington October 8, 1974;
Entered into force October 8, 1974.

Part I of this agreement states that the parties will regularly exchange agricultural economic information.

Part II states that, each July, Poland is to provide the United States with a list of agricultural commodities and quantities intended for import from the United States. The United States will provide Poland with estimates of market demand and export abilities. The United States will accord Poland's applications for CCC credit "no less favorable treatment" than that which is accorded other socialist countries and developed countries. Long-term purchasing agreements are encouraged. Each party notes its intent to facilitate bilateral agricultural trade and each party reaffirms the desirability of treating the other's imports in accordance with the MFN principles and the GATT. A permanent working group on agricultural trade is to be established within the framework of the joint American-Polish Trade Commission, to meet at least once a year. This agreement does not prejudice or modify existing undertakings by either country under the GATT.

[25] 11 Bevans 286; TIAS No. 1516.

[26] This treaty was terminated on January 5, 1952, pursuant to notice given by the United States on July 5, 1951.

[27] 25 UST 2763; TIAS No. 7944.

B. Treaties Concerning Financial Issues

Investment Guaranty Agreement Between Poland and the United States[28]

Signed October 13, 1989;
Not yet in force.[29]

Article 1 of this recently-signed agreement explains the scope of the agreement by defining the term "coverage." Also defined is the term "issuer."

Article 2 states that the agreement is limited to projects approved by Poland or with respect to which Poland has entered into a contract.

Article 3(a) provides that Poland will recognize transfers to issuers on account of which payment is made under coverage. Paragraph (b) limits the scope of the issuer's rights with respect to transferred interests. Paragraph (c) states that the issuance of coverage outside of Poland will not subject the issuer to regulation under Polish laws. Paragraph (d) limits the tax to which the issuer is subjected.

Article 4 provides that if Polish laws invalidate or prohibit the issuer's acquisition of an interest in property within Poland from a party under coverage, Poland will allow transfer to an entity which can own such interests.

Article 5 accords MFN treatment to Polish currency, including credits, acquired by issuers.

Article 6 provides for the resolution of disputes. After three months of negotiations, either party may submit a dispute presenting a question of public international law to an arbitral tribunal for resolution. Provisions are made for appointment of the tribunal, the basis of its decision and payment of its expenses.

[28] 28 I.L.M. 1393 (1989).

[29] This is an OPIC agreement, which does not require U.S. Senate advice and consent to ratification. For the program to become operational in Poland, each government will have to give notice to the other that all requirements for ratification have been satisfied.

Article 7 explains termination of the agreement. Six months notice is required. Provisions with respect to coverage issued while the agreement was in force may remain in force for the duration of the coverage, but no longer than 20 years after the agreement has been terminated.

Entry into force will occur when each government notifies the other that its legal requirements with respect to the agreement have been fulfilled.

Agreement Establishing a Procedure for Funding of Travel-Related Expenses[30]

Exchange of notes at Washington October 7, 1972; Entered into force October 7, 1972; Effective January 1, 1973.

Through this agreement, the United States and Poland agreed to a procedure for funding international travel and transportation and other travel-related expenses from U.S.-owned zlotys in Poland.

Paragraph 1 explains that the travel addressed by the agreement either originates in Poland, originates outside Poland and goes to or through it, or originates outside Poland when the traveler goes from, to or through Poland. The travel must be by persons traveling on official United States business or in connection with U.S.-financed activities. Transportation includes the shipment of goods for official purposes. Travel-related costs are defined.

Under paragraph 2, the United States is to set aside a certain amount of zlotys in a specified bank to cover the above expenditures. Valuation and maintenance of the account are explained, as is the processing of bills, including those incurred in relation to U.S.-Polish cooperative science programs funded under Public Law 480. Maintenance of the account is also related to the surplus agricultural commodities agreement.

Paragraph 3 provides for currency conversions to cover expenses for Polish citizens and reports to the United States Embassy of these conversions.

Paragraph 4 states that the organizations sponsoring the travel or transportation determine the amount, frequency and persons involved in travel, subject only to annual budgetary limits.

Paragraph 5 addresses the United States Embassy transfer of funds to cover retroactive disbursements made for certain travels by Polish travelers during a specified time frame.

Paragraph 6 states the effective date of the agreement.

[30] 24 UST 426; TIAS No. 7557.

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income[31]

Signed at Washington October 8, 1974; Entered into force July 22, 1976.

The purpose of this agreement is to avoid double taxation of income earned in one country by citizens of the other country, while preventing tax evasion. Article 1 provides that the convention applies to persons who are residents of one or both parties.

Article 2 states that the convention applies to taxes on income imposed by each party. It explains what the present taxes are. It also states that future taxes are covered. For the purposes of Article 21, national, state or local taxes are covered. The parties are to notify each other of changes to the tax laws at least annually.

Article 3 defines Poland, the United States contracting state, person, company, resident of a party, enterprise, competent authority, state, tax, and international traffic.

Article 4 defines the fiscal residence of a person residing in both contracting states.

Article 5 explains the general rules of taxation.

Article 6 defines "permanent establishment" as it pertains to a business.

Article 7 provides that income from real property may be taxed by the country in which it is situated.

Article 8 limits the taxation of business profits to enterprises carrying on business through a permanent establishment.

Article 9 exempts from taxation income derived from international shipping and air transport.

Article 10 provides for the taxation of profits that would have accrued to an enterprise which is managed or controlled directly or indirectly by an enterprise of the other party or which is managed or controlled by persons participating in the management or control of enterprises of both parties.

Article 11 states that dividends may be taxed. The amount of tax is limited. The limitation does not apply if the recipient has a related permanent establishment in the other country.

Under Article 12, interest is exempted from taxation. The limitation does not apply if the recipient has a permanent establishment in the other country and the indebtedness is related to it. The article defines "interest."

Article 13 addresses the taxation of royalties. The term is defined.

Article 14 addresses the taxation of capital gains.

[31] 28 UST 891; TIAS No. 8486.

Article 15 addresses the taxation of income from independent personal services. Generally, such income is exempt unless the person is present in the country 183 days or more during the tax year. The term "professional services" is defined.

Article 16 addresses the taxation of dependent personal services, i.e. wages and salaries from employment. There are limiting conditions placed on the tax.

Article 17 addresses the taxation of teachers' or researchers' income. There is a two-year exemption.

Article 18 provides that certain students are exempt from tax for 1 year or 5 years, depending on the nature of study.

Article 19 addresses the taxation of wages and salaries of government personnel.

Article 20 explains how double taxation is to be avoided. Credits against the tax of one country are allowed citizens and residents of the other.

Article 21 deals with nondiscrimination. Residents and permanent establishments of one state are not to be subjected to more burdensome taxes than citizens of that state.

Article 22 allows a resident who believes that he may be subject to taxation not in accordance with the convention to present his case to the competent authority of the state of which he is a resident or citizen. The goal is to resolve the case by mutual agreement between states.

Article 23 prescribes the exchange of information necessary to carry out the provisions of the convention, to prevent fraud, or to administer the tax laws to which the convention applies. The information will generally be treated as secret.

Article 24 preserves the fiscal privileges of diplomatic or consular officials.

Article 25 provides for the entry into force of the agreement.

Article 26 provides for termination of the agreement.

A related note dated October 8, 1974, explains that the United States is not entering into agreements restricting or limiting state taxes, except to prohibit the imposition of discriminatory taxes. It appears that Polish residents who are granted reduced tax rates or tax exemptions would not generally be subject to state taxes.

C. Commodity Specific Agreements

1. Steel

Agreement Relating to Limitation of Imports of Specialty Steel from Poland[32]

Exchange of letters at Washington October 18, 1983;
Entered into force October 18, 1983;
Amended and extended on October 19, 1987.

This agreement addresses U.S. import relief measures under section 203(a) of the Trade Act of 1974.[33] Imports will be limited for 3 3/4 years. Poland is to seek to avoid circumvention of the restraint levels. The United States will give Poland as much notification as possible if it is necessary to delay importation in a category due to filling of the restraint level. Procedures are given for the treatment of shortfalls. Provision is made for consultations in the event of imports increasing beyond a certain amount and Poland being placed in an inequitable position vis-a-vis third countries importing steel into the United States. The two parties may amend the agreement by mutual consent. Sixty days written notice is required to terminate the agreement. Reciprocal rights and obligations under the GATT are reserved.

Arrangement Concerning Trade in Certain Steel Products

Exchange of letters at Washington July 11, 1985;
Entered into force July 11, 1985;
Effective October 1, 1984;
Expired by its terms September 30, 1989.

On July 11, 1985, the United States and Poland entered into an arrangement to create a period of stability in steel trade between the two countries.

Article 1 states that Poland is to restrain exports to the United States during a certain period.

Article 2 states that the United States includes United States customs territory and United States foreign trade zones.

Article 3 states that the entry into effect of the arrangement is conditional upon the withdrawal of all listed countervailing duty and antidumping duty petitions by a certain date. Poland may terminate the arrangement after 15 days after the conclusion of consultations if trade actions threaten the attainment of the arrangement's objectives. A similar provision applies with respect to antidumping or countervailing duty investigations.

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[32] TIAS No. 10901.
[33] 19 U.S.C. § 2101.

Article 4 describes the products that are the subject of the arrangement.

Article 5 sets forth the restraint levels and export licensing and certificate requirements.

Article 6 states that no more than 60 percent of allowable exports can be shipped to the United States in any two consecutive quarters, but only with prior U.S. agreement. The parties will exchange information regarding export license and certificate violations.

Article 7 allows for adjustment of up to five percent of the specific restraint levels, but only with prior U.S. agreement, and states the procedures to be followed.

Article 8 allows for increased delivery by Poland if the U.S. industry cannot meet demand for a particular product.

Article 9 provides for monitoring by the exchange of non-confidential information on export licenses and certificates issued.

Article 10 states that consultations will be held if imports of one product show a significant increase in relation to products within the same category. The parties will take necessary measures to prevent shifting of product mix if the consultations show this has happened.

Article 11 allows for consultations at the request of either party to discuss any matter pertaining to implementation of the arrangement.

Article 12 states that the parties will take any necessary actions to fulfill their obligations.

Article 13 gives names and addresses of representatives of each party to whom notices and communications will be sent.

By side letter also dated July 11, 1985, the United States explains how it will be accommodating in certain specific areas, such as by exercising discretion to accommodate shipment schedules and increasing initial period restraint levels.

2. Textiles

Agreement Regarding Polish Exports of Cotton, Wool and Manmade Fiber Textiles and Textile Products to the United States

Exchange of notes at Warsaw December 5 and 31, 1984;
Entered into force December 31, 1984;
Effective October 1, 1984.

This bilateral textile agreement lasted from January 1, 1985 through December 31, 1989.[34] Textiles were classified in four groups. Within the aggregate limit, the individual group limits could be exceeded by specific percentages set for each group. Category-specific limits were specified for the agreement year. Carryovers were permitted subject to certain conditions. Shipments of textiles and apparel individually valued at $250 or less were not charged to the limits. The regular exchange of data was set forth. The parties agreed to consult on any question arising in implementing the agreement. Ninety days written notice before the end of the agreement year was required to terminate the agreement, effective at the end of an agreement year. Either party could propose revisions at any time.

[34] A new agreement has been entered into, but was unavailable because it had not reached the State Department at the time these treaties were obtained.

ROMANIA

A. MFN Agreement

Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania[35]

Agreement signed at Bucharest April 2, 1975;
Entered into force August 3, 1975.
Agreement suspended by agreement signed at Bucharest June 22, 1988;
Suspension effective July 3, 1988.

The United States entered into a MFN agreement with Romania on April 2, 1975. The United States commenced negotiations shortly after the legislative authority for such agreements came into force pursuant to the Trade Act of 1974. Romania was already a member of the GATT at the time that this agreement was signed.

In 1987, in reaction to concerns about Romania's emigration and human rights policies, both Houses of Congress adopted resolutions to suspend Romania's MFN status for 6 months. These resolutions were attached as an amendment to the then-pending trade bill.[36] On February 26, 1988, in the expectation that President Reagan would not renew the waiver of the Jackson-Vanik requirements for Romania, Romania renounced the renewal of MFN treatment for its products. Accordingly, President Reagan proclaimed that he would not seek renewal of MFN status for Romania; Romanian products ceased receiving MFN treatment on July 3, 1988. As of that date, Romania was no longer eligible to receive credits, credit guaranties or investment guaranties from the U.S. Government.[37]

[35] 26 UST 2305; TIAS 8159.

[36] *See 57th Quarterly Report to the Congress and Trade Policy Committee on Trade Between the United States and Nonmarket Economy Countries During 1988*, USITC Publication 2176, p. 11 (57th Quarterly Report...).

[37] 53 Fed. Reg. 24921 (1988).

1. Provisions Required by Section 405 of the Trade Act of 1974

(1) Duration of the Agreement

Paragraph 2 of Article XII provided that the initial term of the agreement was to be three years. The agreement was to be extended for successive 3-year periods unless either party notified the other of an intent to terminate at least 30 days prior to the expiration of the agreement.

(2) National Security

Article X of this agreement reserves the right of either party to take whatever action is necessary to protect its own security interests.

(3) Safeguard Provisions

Article III and Annex 1 of the agreement address the safeguard issue. Paragraph 1 of this article provides for prompt consultation if either party determines that imports or prospective imports are "causing or threaten to cause, or are significantly contributing to, market disruption. . ." of a domestic industry.

Paragraph 2 provides that either party may impose whatever restrictions it feels are necessary to prevent or remedy such market disruption.

As stated in paragraph 3, Annex 1 sets forth the procedures under which the provisions of this article are to be implemented.

(4) Intellectual Property Protection

Article V of the agreement addresses intellectual property rights. Because Romania is a member of the Paris Convention for the Protection of Industrial Property, a provision explicitly protecting patent rights is not required by the Trade Act of 1974.[38] Paragraph 1 of Article V requires each party to continue to provide the protection of industrial property rights set forth in the Convention of Paris.

Romania is a party to the Uniform Copyright Convention of 1952 (UCC),[39] but is not a party to the Uniform Copyright Convention *as revised* in 1971 (UCC revised).[40] Paragraph 3 of Article V requires each party to provide each other with the copyright protections set forth in the UCC revised.

Paragraph 2 provides that, with respect to industrial rights and processes not referred to in Paragraphs 1 and 3, the parties will afford each other the same rights provided to their own nationals.

[38] 19 U.S.C. § 2435 (1980).
[39] 6 UST 2731; TIAS 3324.
[40] 25 UST 1341; TIAS 7868.

(5) Settlement of Commercial Disputes

Article VIII of this agreement addresses the methods suggested for the settlement of commercial disputes. Paragraph 1 reaffirms the commitment set forth in the Joint Statement of Economic, Industrial, and Technological Cooperation of December 3, 1973, to "prompt and equitable settlement on an amicable basis. . ." of commercial disputes.

Paragraph 2 is a commitment by both parties to encourage the participants in private commercial contracts to adopt arbitration as a means of settling private commercial disputes. The agreement requires contracts to provide for arbitration under the rules of arbitration of the International Chamber of Commerce in Paris, and recommends a place of arbitration, other than the United States or Romania, that is a party to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of New York[41], although it allows the parties to a contract to specify a different location if they wish.

(6) Promotion of Bilateral Trade

Several articles, as well as Annex 2, address subjects relevant to the promotion of bilateral trade. For example, Article II requires the parties to take "appropriate" measures, in accordance with applicable laws, "to encourage and facilitate" the exchange of goods and services between the two countries. In connection with that statement, the agreement specifically notes that there is an expectation that total bilateral trade will at least triple in the first three years in which the agreement is in effect in comparison with the period 1972-1974. Romania notes its expectation that there will be purchases by its organizations of machinery and equipment, agricultural and industrial materials, and consumer goods. The United States notes its belief that the effect of this agreement will be to increase purchases of products from Romania.

Article IV addresses commitments to business facilitation. Paragraph 1 grants firms and companies from either country the right to open offices in the other country. Paragraph 2 grants the organizations from each party access to the courts and administrative tribunals of the other country. Under Paragraph 3, both parties commit to permitting organizations from the other country to engage in the full range of activities permitted by their laws. Other paragraphs address the following issues: treatment on a level equal with that accorded to organizations of third countries; freedom of contact between companies from the two countries; facilitation of access to information concerning market opportunities; duty-free treatment of samples as provided in the Geneva Convention of November 7, 1952[42]; development of appropriate facilities and services and provision of access thereto; facilitation of travel by tourists; and the

[41] 21 UST 2517.
[42] 8 UST 1636.

facilitation of participation in fairs and exhibitions as expressed in the Joint Statement on Economic, Industrial, and Technological Cooperation of December 5, 1973.

Annex 2 sets forth the specific rights which are to be accorded and obligations which will apply to organizations from one country which are establishing operations in the other country. This Annex addresses matters as detailed as the right of employees to import their personal effects duty-free and the ability of these operations to acquire communications facilities, such as office or home telephones, as promptly as possible.

Article IX provides that each party will facilitate the establishment of governmental commercial offices by the other party. Paragraph 2 provides that, to the extent that the employees of these commercial offices enjoy diplomatic immunity, they may not negotiate trade transactions or carry on trade activities.

(7) Bilateral Review of the Operation of the Agreement

Article XI provides that the function of reviewing the operation of the agreement is to be performed by the American-Romanian Economic Commission, established in accordance with the Joint Statement on Economic, Industrial, and Technological Cooperation of December 5, 1973.

2. Other Issues Addressed

(1) Scope of MFN Treatment

Paragraphs 1 and 2 of Article I define the scope of MFN treatment. In Paragraph 1, both parties commit to apply the GATT reciprocally, including the Protocol for the Accession of Romania of October 15, 1971. In Paragraph 2, the parties commit to grant each other's *products* MFN treatment immediately and unconditionally as provided for in the GATT, except as otherwise stated in this agreement.[43]

(2) Balance of Economic Interests

Under Paragraph 3 of Article I, both parties agree to maintain a satisfactory balance of concessions in trade and services during the period of the agreement, and to "reciprocate satisfactorily reductions by the other party in tariffs and non-tariff barriers to trade that result from multilateral negotiations."

That paragraph also states as follows: "[i]n this respect, it is noted that Romania, as a developing country, could be eligible for treatment accorded to developing countries."

[43] *See also* the discussion in Paragraphs 3 and 4 below.

(3) Financial Provisions

Article VI addresses the financial issues covered in this agreement. Under Paragraph 1 of this article, both parties commit to according MFN treatment to all organizations of the other party with respect to "payments, remittances and transfers of funds or financial instruments," and to grant whatever authorizations are necessary to carry out this commitment.

Paragraph 2 of this article covers currency issues. Under this paragraph, all financial transactions are to be done in U.S. dollars or another freely convertible currency, unless the private parties otherwise agree. The parties also commit to permitting unrestricted export of freely convertible currencies if such currencies were received in an authorized manner. This paragraph also promises that organizations from either party will receive treatment no less favorable than the organization of any other country with respect to rates of exchange.

Under the terms of paragraph 3, organizations of each party are to receive MFN treatment with respect to opening and maintaining accounts in local and freely convertible currency.

(4) Navigation

Article VII of this agreement addresses matters pertinent to navigation issues. Under paragraph 1, vessels carrying the flag of a given party, and carrying documents in proof of nationality, shall be deemed to be vessels of that party. Paragraph 2 states that the documents of a vessel or the documents referring to crews validly issued by one party will be recognized by the government of the other party.

Paragraph 3 promises that the vessels of either party (other than warships) will have liberty to enter the waters and ports of the other party on an equal basis with other countries unless requirements of national security require otherwise. This paragraph also guarantees that vessels and cargos will be accorded MFN treatment in all respects within the ports and waters of the other party. Paragraph 4 excepts fishing vessels from Paragraph 3, acknowledging that those vessels continue to be covered by the Agreement Regarding Fisheries in the Western Region of the Middle Atlantic Ocean, concluded on December 4, 1973.[44]

This article also provides for the suspension of this agreement, either in whole or in part, if either party is unable to carry out its obligations under this agreement. Prior to undertaking suspension of the agreement, however, this article requires that the parties each undertake consultations with the other party with a view to finding a solution that would make suspension unnecessary.

[44] 24 UST 2366.

B. Other General Trade Agreements

Long Term Agreement on Economic, Industrial and Technical Cooperation Between the United States of America and The Socialist Republic of Romania[45]

Agreement signed at Bucharest November 21, 1976;
Entered into force May 5, 1977.

The purpose of this agreement was to enlarge on the provisions of the Joint Statement of Economic, Industrial and Technological Cooperation between the United States and Romania of December 5, 1973, in an effort to ensure continuous expansion and diversification of economic, industrial and technical cooperation, as well as the provision of information to facilitate such cooperation. This agreement, signed in November 1976, was to remain in force for 10 years, and, but for the intervening renunciation of the MFN agreement, would have been automatically renewable for successive 1-year terms, subject to 6 months notice being given by either party.

Under the terms of Article I of this agreement, the parties committed to take all appropriate steps to "facilitate economic, industrial and technical cooperation between firms, companies and economic organizations, including those of small and medium size. . . ." Under paragraph 2 of Article I, the parties committed to ensuring that companies and economic organizations enjoy suitable operating conditions, including access to facilities. Paragraph 3 of this article provided that goods produced under cooperation agreements between organizations would be treated in accordance with the 1975 agreement, as long as it remained applicable, or with whatever other laws and regulations apply. Under paragraph 4, both parties committed to refrain from taking unreasonable measures that would "impair the contractual or other rights of firms or companies operating within the territory." Paragraph 5 promised that assets belonging to nationals of the two countries would not be appropriated except for public purposes, and then only with payment of "prompt, adequate and effective compensation."

Other provisions of this agreement governed specific ways in which the two parties could assist in the development of further trade. Among the interesting provisions in the balance of this agreement were those set forth in Annex 1, paragraph 4, governing the establishment of joint companies in either territory. This agreement promised joint ventures the right to hire and compensate directly employees in the country in which the operation is located. The agreement also gave firms participating in these joint companies the following rights: the right to share in profits in proportion to capital participation; the right to share in assets resulting from dissolution in proportion to one's capital contribution; the right to transfer for value rights arising from capital participation; the right to examine accounting records for verification; the right to be represented in management in proportion to capital participation; the right to limit liability to the value of capital contributions; the right to enter into arrangements for management of the joint company permitting the management full powers to direct and organize production, sales and other activities; and the right to exercise other rights established by agreement of the parties in the instruments establishing the joint company.

[45] 28 UST 5228; TIAS 8624.

C. Commodity Specific Agreements

1. Textiles

The United States has entered into bilateral agreements governing textile trade between the United States and Romania. Most recently, these agreements have included the Bilateral Cotton-Textile Agreement of January 28 and March 31, 1983, and the Bilateral Wool and Man-Made Fiber Textile Agreement of September 2 and November 3, 1980. These agreements limit annual exports from Romania to the United States of the covered products. They have been continually amended as to the quantities of exports permitted throughout the 1980's.

2. Steel

Arrangement Concerning Trade in Certain Steel Products Between the Socialist Republic of Romania and the Government of the United States of America

Entered into force June 3, 1985
Effective October 1, 1984;
Expired by its terms September 30, 1989.

For the last several years, the United States and Romania have had in effect an agreement limiting the exports of steel products from Romania to the United States. The most recent agreement expired on September 30, 1989.

This most recent agreement set forth restraint levels for exports of several categories of steel products: hot rolled sheet and strip; cold rolled sheet and strip; other sheet and strip; plate; OCTG; Other Pipe and Tube; and all other steel products. The agreement also governed the allocation of the permissible quantity during the year to ensure that the amounts were distributed throughout the calendar year. The agreement provided for consultations between the governments to discuss any matters which threatened the goal of the agreement.

[223. Agriculture

Protocol on Cooperation in Agriculture Between the Department of Agriculture of the United States and the Ministry of Agriculture and Food Industry of the Socialist Republic of Romania[46]

Protocol on Development of Agricultural Trade Between the Department of Agriculture of the United States of America and the Ministry of Agriculture and Food Industry of the Socialist Republic of Romania[47]

Protocols signed at Washington September 11, 1975;
Entered into force September 11, 1975.

Romania and the United States signed these Protocols in order to facilitate cooperation in the development of agricultural trade between the two countries. The expressed purpose of the Protocol on Cooperation was to facilitate the development of the agricultural sectors of both countries in the fields of plant, animal and soil science and mechanization, including "exchanges of germplasm, cooperation in methods for application of agricultural chemicals and use of mathematical models in agriculture." The protocol established a permanent Working Group on Agricultural Cooperation and Trade within the framework of the U.S.-Romanian Joint Economic Commission, which was to meet at least once a year. This protocol was to be in effect for five years, with an additional 5-year extension in the absence of six months notice to the contrary.

Under the Protocol on Development, the two countries agreed to exchange agricultural economic information, including stocks, and forward estimates of supply and demand, on a regular basis. In Article II of this protocol, Romania agreed to provide the Department of Agriculture each year with lists of commodities that it intended to purchased, subject to various conditions, including the availability of financing from the United States.

Article III committed the United States to consider applications for CCC credits for exports to Romania under the criteria then being applied, in accordance with the treatment due Romania under the MFN agreement. Article V also addressed the MFN issue, reaffirming the "desirability of according agricultural imports from the other. . ." MFN status under the GATT. The parties to the protocol further agreed to encourage the use of long term contracts in an effort to introduce more stability into the commodity markets.

D. Treaties Concerning Financial Issues

Agreement Relating to Investment Guaranties[48]

Agreement affected by exchange of notes at Bucharest April 28, 1973;
Entered into force April 18, 1973.

Paragraph 1 of this agreement called for consultation between the two countries whenever an investor proposed to invest in an economic organization within Romania with the assistance of insurance or guaranties and either government thought consultation was necessary.

Under Paragraph 2 of this agreement, Romania agreed that insurance or coverage may be issued for any investment in a joint venture that has been properly approved by the appropriate Romanian government agency.

Paragraph 3 of this agreement obligated Romania to recognize the transfer of the rights and obligations of the investor with respect to which payment is made to the United States entity issuing the coverage. Paragraph 5 required the two governments to attempt to resolve any differences through negotiations; however, if there was no resolution after 6 months of negotiation, the conflict was to be submitted to arbitration. The agreement called for each government to appoint one arbitrator, and for those two to select a third resident of a country other than Romania or the United States to be the president of the arbitration panel.

The agreement was to remain in force until 6 months after one country informed the other that it no longer wished to be a party to this agreement. At that time, the provisions with respect to coverage issued while the agreement was in effect would remain in force for the duration of the coverage, provided that in no circumstances would such coverage extend for more than 20 years beyond the denunciation of the agreement.

E. Agreements Regarding Entry and Exit Visas

Agreement Relating to Reciprocal Visa Facilitation[49]

Agreement effected by exchange of notes at Bucharest September 1 and October 10, 1977;
Entered into force October 10, 1977.

Under the terms of this agreement, the United States agreed to issue multiple entry visas for a

[46] 26 UST 2486; TIAS 8166.
[47] 26 UST 2500; TIAS 8167.
[48] 24 UST 1073; TIAS 7627.
[49] 29 UST 4705; TIAS 9075.

6-month period to Romanian citizens seeking tourist or business visas.

The United States also committed itself to process the applications of Romanian diplomats and officials for visas assigned permanently or temporarily to the Romanian Embassy in Washington, D.C., or to the Romanian Mission in New York, within five working days. This time period is to be reduced even further in urgent cases.

The Romanian government undertook reciprocal obligations with respect to visa applications from United States citizens.

U.S.S.R.

A. Synopsis of U.S.-U.S.S.R. Trade Prior to 1972

After the Revolution of 1917, most Western countries rejected MFN treatment for the Soviet Union. The concerns were that complete monopolization of commerce presented insuperable difficulties with the traditional MFN clause and that the Soviet Union had defaulted in payment of the prewar debts of the Russian empire.[50] The United States changed its views in 1935, when the first Soviet-American commercial agreement was concluded granting nondiscriminatory treatment for the export of Soviet products into the American market. Between 1935 and 1951, MFN treatment was accorded the Soviet Union. It was withdrawn during the Korean War by the Trade Agreements Extension Act of 1951, which directed the President to withdraw or suspend the MFN status of all countries under the control of international communism. For 21 years prior to signing the 1972 trade agreement, the United States and the Soviet Union had engaged in trade relations without a bilateral trade agreement being in force. The amount of trade was rather small, however.[51] Discussions for expanded U.S.-Soviet trade began in November 1971, when former Secretary of Commerce Stans visited Moscow for talks with Chairman Kosygin and Soviet Foreign Trade Minister Patolichev. In May 1972, Minister Patolichev continued the discussions in Washington with President Nixon and Secretary of Commerce Peterson.

B. 1972 Trade Agreement

1. Agreement to Negotiate

By a May 26, 1972 communique, the United States and the U.S.S.R. entered into an agreement on the establishment of a Joint Commercial Commission.[52] The Joint Commission was to negotiate an overall trade agreement including reciprocal MFN treatment, arrangements for the reciprocal availability of government credits, provisions for the reciprocal establishment of business facilities to promote trade, and an agreement establishing an arbitration mechanism to settle commercial disputes.[53] The Joint Commission was also to study possible participation in the development of resources and the manufacture and sale of raw materials and other products,[54] as well as to monitor commercial relations and identify and resolve issues when possible.

[50] Gabor, *The Trade Act of 1974 – Title IV: Considerations Involved in Granting Most-Favored-Nation Status to the Nonmarket Economy Countries*, 11 Int'l Law. 517, 518 (1977).

[51] From 1950 to 1959, U.S. exports to the Soviet Union averaged less than $1 million per year and Soviet exports to the U.S. averaged $21 million. In 1960, U.S. exports totaled $39.6 million, climbing to $57.7 million in 1968. With passage of the 1969 Export Administration Act, U.S. exports reached $105.5 million. Soviet exports to the U.S. hovered around the $20 million level until 1965, when they reached $42.6 million. Note, *The Trade Act of 1974: Soviet-American Commercial Relations and the Future*, 5 Ga. J. Int'l & Comp. L. 505, 521–22 (1975) [hereinafter Note on Commercial Relations]. In 1970, U.S.-Soviet trade amounted to $190 million, with $72 million in imports from the U.S.S.R. and $118 million in U.S. exports. Department of State Telegram at 3 (May 27, 1972). In 1971, total U.S.-Soviet trade was $220 million – $162 million in U.S. exports in return for $58 million in Soviet imports. Soviet exports to the U.S. were 0.5 percent of total Soviet exports in 1965 and 0.6 percent in 1970. U.S. exports to the U.S.S.R. were less than 0.2 percent of total U.S. exports in 1965, and less than 0.5 percent in 1971. Note on Commercial Relations at 522.

[51] *–Continued*
U.S. exports consisted primarily of nonelectric machinery and equipment ($62 million in 1971), chemicals ($38 million), and hides and wood pulp ($23 million). The U.S. imported Soviet raw materials such as chromium ore, diamonds, and palladium, as well as semi-finished products. Licensing controls have been imposed to ensure that U.S. exports will only be used for peaceful purposes. GIST, No. 83, at 1 (August 1972) [hereinafter GIST].

The effect of the 1972 agreement on trade was dramatic. American exports, including grain sales, totaled $546.7 million. Soviet sales to the U.S. reached $95.4 million. This occurred even though the trade agreement had not entered into force. *Address by Charles N. Brower, Acting Legal Adviser: The Soviet Trade Agreement – What It Is*, Department of State Bulletin 264, 265 (March 5, 1973) [hereinafter Brower Address]. Even after the Soviets repudiated the agreement upon passage of the Trade Act of 1974, which included the Jackson-Vanik amendment, trade did not decline significantly in 1975. U.S.-U.S.S.R. trade turnover during the first six months of 1975 totaled $659 million. Editor's Foreword, *Soviet-American Trade in a Legal Perspective: Proceedings of a Conference of Soviet and American Legal Scholars*, 5 Den. J. Int'l L. & Pol'y 217, 219 & n.7 (1975).

[52] 26 UST 1334, TIAS No. 8116.

[53] For a collection of the background information compiled for the Congress on six major commercial agreements concluded with the U.S.S.R. during 1972 and 1973, *see* Background Materials Relating to the United States-Soviet Union Commercial Agreements, 93d Cong., 2d Sess. (April 2, 1974) (Staff Document).

[54] A primary goal of the Soviet desire to increase trade was to obtain Western technology, of which the United States was the leading producer. The Soviets wished to obtain Western capital and knowhow to help in modernization and to mine untapped gas, oil, lumber, copper, and nickel in Siberia. Computer technology and the like was also of premium importance to the Soviets. The most important nontechnological item which the Soviets wished to import was grain. Note on Commercial Relations at 534.

The terms of reference and rules of procedure state that meetings are to be held at least once a year, alternately in each country.[55] The Commission can establish joint working groups to consider specific matters. Expenses incidental to the meetings are borne by the host country. Travel, living, and other personal expenses are borne by the sending party.

Pursuant to its mandate, the Joint Commission negotiated a trade agreement. On October 18, 1972, the United States and U.S.S.R. signed this agreement, but it never entered into force.

2. Basic Principles of U.S.-U.S.S.R. Relations

On May 29, 1972, the United States and the U.S.S.R. signed an agreement regarding basic principles guiding their relations.[56] There are 12 principles, which are summarized below:

First, the parties will conduct their relations on the basis of peaceful coexistence.

Second, the parties will do their utmost to avoid military confrontations and prevent the outbreak of nuclear war.

Third, the parties have a responsibility not to increase international tensions.

Fourth, the parties intend to widen the juridical basis of their relations and implement bilateral agreements they have concluded and multilateral treaties and agreements to which they are jointly parties.

Fifth, the parties reaffirm their readiness to continue to exchange views on problems of mutual interest.

Sixth, the parties will continue efforts to limit armaments on a bilateral as well as multilateral basis.

Seventh, the parties regard commercial and economic ties as important and necessary in strengthening bilateral relations. They will actively promote the growth of those ties and facilitate cooperation between the relevant organizations and enterprises of the countries and conclusion of appropriate agreements and contracts, including long-term contracts.

Eighth, the parties deem it timely and useful to develop mutual contacts and cooperation in science and technology.

Ninth, the parties reaffirm their intention to deepen cultural ties.

Tenth, the parties will seek to ensure that their ties and cooperation in all the above-mentioned fields are built on a firm and long-term basis.

Eleventh, the parties make no claim to any special rights or advantages in world affairs and would not recognize such claims made by others.

Twelfth, the principles do not affect earlier obligations of the parties with respect to other countries.

3. Trade Agreement[57]

Article 1[58] accorded unconditional MFN treatment[59] regarding customs duties and charges; internal taxes, sales, distribution, storage, and use; charges on international transfer of payment for import or export; and rules and formalities relating to import or export.[60] If quantitative restrictions were applied to products originating in or exported to third countries, the party was to afford equitable treatment vis-a-vis those third countries to like products originating in or exported to the other party. Certain exceptions to these requirements were explained.[61]

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[55] The Commission's first meeting was held in Moscow on July 21, 1972. The second session was held in Washington in October. The Secretary of Commerce headed the U.S. delegation and was assisted by representatives from the Departments of Commerce, State and the Treasury. Soviet Minister of Foreign Trade Patolichev chaired the U.S.S.R. delegation.

[56] 11 I.L.M. 756 (1972).

[57] This analysis does not include a discussion of the Lend-Lease Settlement of October 18, 1972, which is closely related to the trade agreement. The U.S.S.R. agreed to settle its World War II lend-lease debt in a *quid pro quo* exchange for MFN status. This topic is covered in Survey of Views on the Impact of Granting Most Favored Nation Status to the Soviet Union, USITC Pub. No. 2251, at 1–3 (January 1990).

[58] According to the Department of State, this provision was "extremely carefully drafted." The Acting Legal Adviser stated, "Particular care was exercised to preserve our ability to grant preferences to less developed countries and also to preserve our right to take any action either required or permissible under the General Agreement on Tariffs and Trade." Brower Address at 265.

[59] The Soviets considered the Jackson-Vanik amendment to be a violation of this provision of the agreement. Pregelj, *Jackson-Vanik Amendment and Granting Most-Favored-Nation Treatment and Access to U.S. Financial Programs to the Soviet Union*, CRS Report for Congress No. 89–686 E, at 5 (December 20, 1989). From the Soviet viewpoint, MFN status was necessary to implement the agreement, in part because it was a matter of national pride. In fact, the Soviets considered tariff discrimination against their exports to be a violation of international law. Practically speaking, MFN treatment is important to the success of a bilateral trade program. Note, *The US-USSR Trade Agreement from a Soviet Perspective*, 67 Am. J. Int'l L. 516, 520 (1973).

It has been stated that MFN treatment should not be confused with non-discrimination. The latter refers to the right to demand similar conditions as those enjoyed by *all* countries. MFN status grants the right to demand the most favorable, beneficial and privileged conditions. Usenko, *Most-Favored-Nation Treatment in Soviet-American Trade Relations*, 5 Den. J. Int'l L. & Pol'y 243, 244 (1975) [hereinafter Usenko]. In Soviet trade treaty practice MFN status is granted unconditionally. *Id.* at 245.

[60] Soviet sources estimated that duties on certain goods would be cut between 50 and 75 percent by granting MFN status. Fitzpatrick, *Soviet-American Trade, 1972–1974: A Summary*, 15 Va. J. Int'l L. 39, 66–67 (1974) [hereinafter Fitzpatrick].

[61] This provision apparently refers to the GATT. Under the GATT, a signatory may limit the quantity or price of imported goods provided it observes certain conditions protecting the interests of the other signatories in order to ensure its external financial position and balance of payments. Usenko at 247. However, this exception may also be found in other trade treaties. *Id.* at 248.

Article 2 stated that both countries were to encourage and facilitate the exchange of goods and services between them. They were to facilitate the conclusion of contracts between natural and legal U.S. persons and Soviet foreign trade organizations.[62] The long-term requirements of each country in raw materials, equipment and technology were to be particularly examined. Soviet foreign trade organizations were to place substantial orders for U.S. machinery, plant and equipment, agricultural products, industrial products, and consumer goods.

Article 3 was the safeguards provision. Each party was to "take such measures as it deems appropriate" to ensure that imports did not cause, threaten or contribute to disruption of the domestic market.

Article 4 provided that currency payments were to be made in U.S. dollars or other freely convertible currency mutually agreed upon.

Article 5 provided for the establishment of an American commercial office in the U.S.S.R. and Soviet trade representation in the United States. These offices would not affect the rights of United States persons and Soviet foreign trade organizations to maintain direct relations with each other, nor were they participate directly in trade transactions.

Article 6 stated that there was no immunity from liability with respect to commercial transactions. Lawfully organized corporations and the like would have legal existence in the other country.

Article 7 stated that both countries "encourage" arbitration for the settlement of disputes as provided for in contracts or separate agreements. Details of the arbitration were set forth. Companies and the like could appear in the other country's courts to bring or to defend against actions, including but not limited to trade transactions.[63]

Article 8 permits either party to take any action to protect its security interests.

Article 9 states how and when the agreement is to enter into force. It is to remain in force for 3 years, unless extended by mutual agreement.[64] The parties were to work through the Joint U.S.-U.S.S.R. Commercial Commission to oversee and facilitate implementation of the agreement. Before the agreement expired, the Commission was to begin consultations to extend the agreement or prepare a replacement agreement.

Annex 1 explained how Article 3, the safeguards provision, was to be implemented. Consultations were to include a review of the market and trade situation for the product. Consultations were to conclude within 60 days unless otherwise agreed. Also, unless otherwise agreed, the quantitative import limitations or other conditions stated by the importing country as necessary to prevent or

[62] While foreign trade organizations are state organizations, they also function as independent subjects of the law. They conclude transactions in their own name and not in the name of the state, and enjoy the rights of legal entities. However, acts of the state, *e.g.*, a ban on exports or imports, are binding on them. Laptev, *The Legal Status of Soviet Trade Organizations*, 5 Den. J. Int'l L. & Pol'y 283, 284, 285, 287 (1975). The functions of foreign trade organizations, *i.e.*, the purposes for which they may conduct legal actions, are usually listed in detail in their charters. *Id.* at 287.

It has been noted that nothing in the agreement expressly provides that Soviet foreign trade organizations are responsible for their own obligations. There is a question as whether an executive agreement alone could impose an obligation on a court to accept the separate legal identity of these organizations in all circumstances. Yet, it is believed that there is little risk that a U.S. court would not determine that they were separate entities, except in unique circumstances such as undercapitalization or when there is clear evidence of an agency relationship between it and another Soviet entity. Starr, *A New Legal Framework for Trade Between the United States and the Soviet Union: The 1972 US-USSR Trade Agreement*, 67 Am. J. Int'l L. 63, 74–75 (1973) [hereinafter Starr].

Other questions have been raised concerning the applicability of the principle of sovereign immunity to foreign trade organizations. A related question is that of the use by non-immune foreign trade organizations of immune premises belonging to trade delegations, which would effectively result in immunity from legal process for the officials and documents involved in any litigation.

[63] The rules specified as governing arbitration, the Arbitration Rules of the Economic Commission for Europe (ECE), were developed by the ECE for Europe specifically for application to disputes arising in East-West trade. The United States believed these rules to incorporate the standards of fairness and due process necessary to American business. In addition, the provision for arbitration in a third country that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards was inserted to ensure the ability to compel arbitration and to secure enforcement of awards. Brower Address at 267. Both the U.S.S.R .and the U.S. are parties to the convention. This is apparently the reason that the agreement was silent as to recognition of arbitration awards or execution of these awards. Bilateral trade and navigation agreements signed by both countries generally include a provision on this point. Lebedev, *Arbitration in Soviet-American Trade Relations*, 5 Den. J. Int'l L. & Pol'y 337, 344 (1975).

The agreement provided that the trade partners could agree to any other form of arbitration they deemed preferable. Because the Soviets have always sought to domesticate foreign trade disputes in their Foreign Trade Arbitration Commission (FTAC), it was believed likely that arbitration not under the ECE rules would come before the FTAC. Note, *United States-Soviet Commercial Arbitration Under the 1972 Trade Agreement*, 7 Case W. Res. J. Int'l L. 121 (1974). In 1974, there was a question concerning the impartiality of the FTAC, but the limited information available at that time regarding actual cases heard by it apparently showed that a Western party could obtain justice. *Id.* at 125; *accord* Starr at 76.

It has been suggested that voluntary reporting of arbitral activities by U.S. firms and Soviet trade organizations to the Joint Commercial Commission would facilitate monitoring of the agreement. Starr at 78.

Also of note is the fact that several participants, both American and Soviet, during a conference of scholars from both countries, suggested that more work was needed to clarify arbitration provisions for the better development and expansion of East-West Trade. They thought both FTAC and the American Arbitration Association should participate in this work. *See* Discussion, *Soviet-American Trade in a Legal Perspective: Proceedings of a Conference of Soviet and American Legal Scholars*, 5 Den. J. Int'l L. & Pol'y 369 (1975).

[64] The agreement was to last only 3 years because the document was viewed, at least by the United States, as "a sort of working prototype" to which modifications would be made based on experience. Transcript of Press Conference of Secretaries of State and Commerce at 5 (October 18, 1972) (remarks of Secretary of Commerce Peterson).

remedy the market disruption were deemed agreed to. These limitations could be put into effect before the consultations were concluded if an emergency situation existed. Each party was to take appropriate measures to ensure its exports did not exceed these limitations. The importing country could take similar measures.

Annex 2 explained the status of the American commercial office in the U.S.S.R. Article 1 explained that the office would have two functions: promotion of the development of trade and economic relations between the two countries and provision of assistance to U.S. persons in facilitating commercial transactions.

Article 2 set forth the number and composition of the staff. The office was to be an integral part of the U.S. embassy and enjoy all its privileges and immunities. Similarly, the principal officer and his deputies were to be entitled to diplomatic privileges and immunities, and the administrative, technical, and service staffs were to be entitled to the privileges and immunities enjoyed by corresponding embassy staff.

Annex 3 set forth the status of the Soviet trade representation. Article 1 stated that this trade representation had two functions: promotion of the development of trade and economic relations between the two countries; and representation of Soviet interests in all foreign trade matters and assistance to Soviet foreign trade organizations in facilitating commercial transactions.

Article 2 was identical in substance to Article 2 of Annex 2, relating to the U.S. commercial office.

There were several related letters, all dated October 18, 1972, accompanying the agreement. The first related to Article 3 and Annex 1. The United States agreed to make available to U.S. exporters information regarding the quantities or conditions requested by the U.S.S.R. or otherwise established. The U.S.S.R. was to limit or establish conditions on exports if requested to do so in accordance with Annex 1.

The second letter related to Article 5. It confirmed that the U.S.S.R. trade representation officers and staff members could engage in appropriate activities to promote trade generally as is customary in international practice. They could not, pursuant to U.S. law, participate directly in trade transactions. The United States was prepared to consider amending Article 5 to permit officers and members of the administrative, technical, and service staffs of the U.S. commercial office and the Soviet trade representation to participate directly in trade transactions and to carry on trade.

The third letter concerned U.S.S.R. accreditation and treatment of U.S. companies under Article 6. MFN treatment was to be accorded these firms in all matters relating to accreditation and business facilitation. Any problems that could not be resolved through regular procedures would be referred to the Joint U.S.-U.S.S.R. Commercial Commission at the request of either side. The U.S.S.R. was planning to build a large trade center to be used, *inter alia*, for housing and office facilities for accredited U.S. companies. The protocol sections of the Soviet Foreign Trade Ministry and State Committee of the Council of Ministers of the U.S.S.R. for Science and Technology were to be available to help resolve the problems of U.S. businessmen. Attached to this letter is a summary of certain stipulations and procedures for U.S. business facilities, such as the number of employees, type of equipment to be provided, type of goods to be imported for personal use, and issuance of exit visas and permits to open offices.

Another letter on Article 6 explained that both sides had reasons for not honoring all requests for expanded facilities and new organizations. The Kama River Purchasing Commission was set forth as a good example of mutual desire to improve trade between the two countries. The United States was to view sympathetically a Soviet request for a particular export facility or organization to stimulate Soviet exports to the United States. An attachment referred to the Kama River Truck Complex Temporary Purchasing Commission.

The last letter was an agreement on financing procedures. It provided for financing of the purchase of U.S. goods and services through the Export-Import Bank of the United States.[65]

Paragraph 1 provided that the Eximbank would grant the Soviet Bank for Foreign Trade credits in U.S. dollars. The credits were to be repaid in U.S. dollars according to schedules to be set forth in the credit agreements.

Paragraph 2 provided for the submission of applications for preliminary commitments to Eximbank.

Paragraph 3 provides that it was expected that the applications would be submitted before the conclusion of purchase contracts with U.S. suppliers.

Paragraph 4 provided for Eximbank's examination of the information in the application. Interest rates, maturities, grace periods, and other conditions were not to be less favorable than those usually extended to other purchasers in similar transactions.

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[65] This agreement was not signed by the two governments, but by representatives of the Eximbank and the Soviet Bank for Foreign Trade. Nor was it tied to the trade agreement. Fitzpatrick at 41.

In 1973, the Soviet trade imbalance with the U.S. was approximately $976.3 million, and its debt to the West was estimated to be $2.7 billion. In order to finance the massive importation of western technology needed to develop their economy, the Soviets needed substantial credits from the West. *Id.* at 61. It was said that trade might continue if MFN treatment were denied, but trade would be severely hindered if Eximbank credits were totally denied, because little large-scale export financing had been done without Eximbank participation. *Id.* at 67.

Paragraph 5 stated that Eximbank would not issue preliminary commitments directly to U.S. suppliers. It was to refer such inquiries to the Foreign Trade Bank.

Paragraph 6 stated that the Foreign Trade Bank would inform the appropriate Soviet entities when it received Eximbank's preliminary commitment. The U.S.S.R. was then seek to conclude purchase contracts.

Paragraph 7 stated that the Foreign Trade Bank could, at any time while the preliminary commitment was effective, apply to Eximbank for final approval and formalization of the financing.

Paragraph 8 stated that the Foreign Trade Bank was to submit all necessary information specified in the attached exhibit in any application for financing.

Paragraph 9 provided for the U.S.S.R.'s unconditional guarantee of repayment. This guarantee is a condition precedent to Eximbank's financial support. Provision was made for the parties to enter into a continuing guarantee agreement in English.

Paragraph 10 provided for credit agreements to be in English and subject to the laws of a U.S. state or the District of Columbia.

Paragraph 11 stated that the parties would send communications via telex whenever possible.

An exhibit to the agreement addressed information required in the application for preliminary commitment, such as a description of the project, the financing required, a list of proposed purchases, and a proposed time schedule for the project. It also contained a listing of the principal conditions of credits for financing Soviet exports, such as the form of sales contracts, credit terms and conditions, form of promissory notes, insurance and shipping requirements, compliance with government regulations, and definitions.

C. Commercial Agreements Related to 1972 Agreement

1. Commercial Facilities

On June 22, 1973, the United States and U.S.S.R. signed a protocol on commercial facilities.[66] This protocol referenced the October 1972 trade agreement and set forth the actions taken by each country with respect to the expansion and improvement of their commercial facilities. The trade representation of the U.S.S.R. and the U.S. commercial offices were to open simultaneously as soon as possible and no later than October 31, 1973.

On October 3, 1973, the United States and U.S.S.R. signed another protocol on commercial facilities.[67] This protocol referenced the October 18, 1972 trade agreement and the June 22, 1973 protocol, providing for the "inauguration" of the commercial office and trade representation on October 3, 1973 and setting the number of authorized personnel of each office at 25, subject to change by mutual agreement.

[66] 24 UST 1501; TIAS No. 7657.
[67] 24 UST 2222; TIAS No. 7738.

2. Chamber of Commerce

On June 22, 1973, the United States and the U.S.S.R. signed a protocol on the establishment of a U.S.-U.S.S.R. chamber of commerce. The results of the consultations in each country were to be reported promptly to the Joint U.S.-U.S.S.R. Commercial Commission.

3. Cooperation

On June 29, 1974, the United States and U.S.S.R. signed an agreement to facilitate economic, industrial, and technical cooperation.[68]

Article I stated the aim of the agreement, *i.e.* facilitation of economic, industrial and technical cooperation.

Article II described the nature of the cooperation: purchases and sales of machinery and equipment in certain fields; purchases and sales of raw materials and hard goods; purchases, sales, and licensing of patent rights and industrial knowhow, designs, and processes; training of technicians and exchange of specialists; and appropriate joint efforts in the construction of facilities in third countries.

Article III provided for a working group of experts to meet at least once a year to exchange information and forecasts of basic economic, industrial and commercial trends.

Article IV provides for the acquisition or lease of business and residential premises, importation of office equipment and supplies, hiring of staffs, issuance of visas, and business travel.

Article V granted the joint commercial commission authority to monitor implementation of the agreement, together with other joint bodies when necessary.

Article VI stated when the agreement would enter into force and that it was to remain in force for 10 years. The parties were to agree upon necessary measures to facilitate further development of economic, industrial, and technical cooperation no later than 6 months before expiration of the 10-year period.

4. Temporary Purchasing Commission

By an exchange of letters signed on May 21, June 21, and October 7, 1974, the United States and the U.S.S.R. agreed to establish a temporary purchasing commission.[69]

[68] 25 UST 1782; TIAS No. 7910.
[69] 27 UST 2982, TIAS No. 8356. This agreement resulted from the Soviets expressing their intention to establish a large trade and economic exposition center with facilities available to U.S. companies. *See* letter relating to Article 6 of agreement discussed in text, *supra*.

By this agreement, the work of the commission for a truck plant and chemical production complex in New York City was extended for 2 years and the personnel increased to 31. The staff of the U.S.S.R. trade representation was increased from 25 to 30.

D. Other Recent Agreements

1. Visas

By exchange of notes dated September 29, 1975, the United States and the U.S.S.R. agreed to grant 1-year visas for multiple entries and exits to permanently accredited correspondents and their families.

By exchange of notes dated July 30, 1984, the United States and the U.S.S.R. agreed to issue diplomatic visas to certain government officials. This agreement increases the number of authorized entry-exit points and specifies periods for decisionmaking with respect to the issuance of visas. Visas issued for persons traveling under exchange programs are good for a single entry and a single exit, and are valid for no more than 1 year. Each party is to endeavor to shorten the necessary processing time for determining the status of commercial representatives and issuing visas to them. There is a specified time for decisionmaking with respect to visa applications made in third countries. The parties agree to give "prompt and sympathetic" consideration to visa applications for citizens traveling under exchange programs.

By exchange of notes dated October 31, 1986, the United States and U.S.S.R. agreed to change an entry/exit point in New York for Soviet diplomatic and consular use.

2. Taxation

On June 20, 1973, the United States and the U.S.S.R. signed a convention, with related letters, regarding double taxation of income.[70]

Article I described the taxes which are covered by the convention.

Article II defined Soviet Union/U.S.S.R., the U.S./U.S.A, resident of the Soviet Union, resident of the United States, contracting state, and competent authorities.

Article III described the categories of income derived within one state by a resident of the other which are taxable. It also described certain activities which are not taxable.

Article IV explained the means for taxing income from commercial activity.

Article V exempted from taxation certain income derived from the operation of ships and aircraft in international traffic and their disposition. Also exempted was remuneration received by an individual who was an employee aboard such a ship or aircraft.

Article VI provided for special exemptions for governmental employees, participants in intergovernmental cooperation programs, teachers and researchers, students, trainees and specialists. Personal service income which was not exempt was to be taxable only if the person was in the country more than 183 days during the tax year.

Article VII allowed a party to tax its own citizens.

Article VIII stated that the convention applied only to lawfully conducted activity.

Article IX stated that, if income of a resident was exempt in one state, the transaction giving rise to that income was also to be exempted exempted.

Article X stated that citizens of one state resident in the other would not be subject to more burdensome taxes than citizens of the other. Nor would citizens or representations be subject to more burdensome taxes than those imposed on citizens or representations of residents of third countries carrying on the same activities.

Article XI allowed a resident to present his case to the competent authorities of the state of which he was a resident or citizen if he believed he was taxed not in accordance with the convention. Provision was made for agreement on this issue.

Article XII provides for annual notification of amendments of tax legislation.

Article XIII provided for ratification and entry into force.

Article XIV provided for the duration of the agreement and its termination.

Related letters dated June 20, 1973, provided more specifics regarding the interpretation of the agreement. The status of brokers and general commission agents was explained. A limitation on the exemption in Article VI was stated. The parties were to seek to secure exemption from state, local and republic taxes. The status of journalists and press, television and radio correspondents on foreign assignment was explained. This agreement increases the number of catagorized entry–exit points and specifies periods for decisionmaking with respect to issuance of visas.

[70] 27 UST 1, TIAS No. 8225.

3. Grains

On October 20, 1975, the United States and U.S.S.R. signed an agreement on the supply of grain.[71]

Article I provided that the agreement was for the purchase and sale of wheat and corn for supply to the U.S.S.R. The U.S.S.R.'s foreign trade organizations was to buy a specified amount (six million metric tons) from private commercial sources in the United States for shipment in 12-month periods beginning October 1, 1976. The U.S.S.R. was permitted to increase this amount up to a specified amount without consultations, unless the U.S. grain supply was below a certain level. Purchase and sale were to be at the prevailing market price at the time of the purchase or sale.

Article II stated that the United States would not impose controls on the grain exports.

Article III stated that the U.S.S.R. would try to space its purchases and shipments as evenly as possible over each 12-month period.

Article IV stated that the grain is to be supplied for consumption in the U.S.S.R., unless otherwise agreed.

Article V stated that if the total U.S. grain supply fell below a certain point, the United States could reduce the grain available for purchase by the U.S.S.R.

Article VI provided for contact by either government of the other if the first wished to purchase or sell more grain than specified in Article I. Consultations were then to take place to agree on quantities.

Article VII stated that grain shipments were to be in accordance with the provisions of the American-Soviet Agreement on Maritime Matters.[73]

Article VIII provided for periodic 6-month consultations regarding implementation of the agreement and whenever requested by a party.

Article IX provided for entry into force, termination and extension of the agreement.[73]

On August 25, 1983, the United States and U.S.S.R. signed another agreement for the supply of grain.[74]

Article I provides for the purchase and sale of wheat and corn for supply to the U.S.S.R. Shipments are to take place in each 12-month period beginning October 1, 1983 in the specified amount of nine million metric tons. The U.S.S.R. is also given the option to purchase a certain amount of soybeans and/or soybean meal, if interested. Provision is made for the increase of the amount purchased up to a certain limit without consultations. Purchase and sale are at the prevailing market price at the time of the purchase or sale.

Articles II through IV are the same as in the previous grain agreement.

Article V is the same as Article VI in the previous grain agreement, except that the term "immediately notify" the government is replaced by simply "notify." (Article V in the previous agreement pertained to measures to be taken when the U.S. grain supply is below a certain level.)

Article VI states that the United States will be of assistance on questions regarding the "appropriate quality of the grain" to be supplied to the U.S.S.R.

Articles VII through IX are virtually the same as in the previous grain agreement.

4. Textiles

On December 4, 1987, through an exchange of notes, the United States and U.S.S.R. entered into a bilateral textile agreement.[75]

The agreement is to run from August 1, 1987 to December 31, 1988. The term is divided into two periods, one ending on December 31, 1987 and the other on December 31, 1988. The agreement covers cotton textile products. Soviet exports of these products to the United States are limited. Eleven percent carryover and six percent carryforward is allowed, but no carryover is allowed in the first agreement period and no carryforward in the last. The United States may help the U.S.S.R. implement the limits. Shipments exceeding the limit may be denied entry. If allowed in, they will be charged to the limit in the next period. The U.S.S.R. is to use its best efforts to space exports evenly throughout the period, taking into account seasonal factors. The parties are to exchange data on exports and imports and to supply promptly information requested and needed to enforce the agreement. The parties agree to consult on any questions. Either party may propose revisions to the agreement. The parties are to cooperate to avoid circumvention of the agreement. Ninety days notice before the end of the agreement period is required to terminate the agreement at the end of that agreement period.

[71] TIAS No. 8206. On July 8, 1972, President Nixon announced the signing of the largest Soviet grain purchase agreement ever made with the U.S. The USSR agreed to buy at least $750 million worth of U.S. grain from August 1, 1972 through July 31, 1975, guaranteeing a minimum purchase of $200 million the first year. The U.S. was to make credit available through the Commodity Credit Corporation at the going rate of interest for repayment in three years from the dates of deliveries, with the total amount of credit outstanding not to exceed $500 million. *See* analysis, *infra*, for a comparison of the grain agreements.
In late 1971, the Soviets bought $136 million worth of grain. They made subsequent large purchases on cash terms after July 1972. GIST at 2.

[72] TIAS No. 8195. This agreement was in force from January 1, 1976 to December 31, 1981.

[73] The agreement was extended twice, for one year each time, and expired on September 30, 1983.

[74] TIAS No. 10828. This agreement was amended on November 28, 1988.

[75] To date unpublished.

E. Miscellaneous Agreements

1. General Relations

On November 16, 1933, through an exchange of notes, the United States and the U.S.S.R. entered into an agreement on the establishment of normal diplomatic relations.[76]

The agreement provides that neither country will interfere in the other's internal affairs. Neither will act overtly or covertly to injure the order or security of the other, in particular with regard to armed intervention or forceful change in the political or social order. Neither will allow a group to claim to be the government of the other or support military groups aiming at armed struggle against the other. Nor will either allow groups aiming to overthrow the political or social order of the other.

The United States indicated its concern for its citizens' exercise of freedom of conscience and religious liberty. The U.S.S.R. cited in detail its laws and regulations allowing such. The U.S.S.R. said it is prepared to include these rights in a consular convention to be negotiated immediately after the establishment of diplomatic relations; reference is made to rights no less favorable than those enjoyed in the U.S.S.R. by citizens of the nation "most favored in this respect." The U.S.S.R. reserved the right to refuse visas to Americans wishing to enter the country on personal grounds, but did not intend to base such refusals on "persons having an ecclesiastical status."

The U.S.S.R. also stated it was prepared to include in a consular convention provisions granting U.S. citizens rights to legal protection no less favorable than those granted the most favored nation. The U.S.S.R. also referenced a portion of an agreement between Germany and the U.S.S.R. regarding notification of the consul of the arrest of nationals of the other country and visits by the consul to the arrested person. The United States noted that American diplomatic and consular officers will be zealous in guarding Americans' rights, especially with regard to the right to a fair, public and speedy trial and the right to be represented by counsel of their choice.

The U.S.S.R. explained its policy pertaining to dissemination of economic information. It stated its intended actions with regard to a final settlement of claims and counterclaims between the two countries and their citizens. It will not attempt to enforce court decisions or initiate new cases for amounts due. The U.S.S.R. agreed to waive any and all claims arising out of military activities of the United States in Siberia or assistance to military forces in Siberia after January 1, 1918.

[76] *Foreign Relations*, 1933, Vol. II, 805, 11 Bevans 1248.

2. Corporations

On June 25, 1904, the United States and the U.S.S.R. signed an agreement regulating the position of corporations or stock companies and other commercial associations, financial or industrial.

Article 1 provides that each country is to recognize the legal existence of the other's companies, which have the right to appear before the courts to bring or defend against actions.

Article 2 states that the companies will enjoy the same rights granted to similar companies of other countries.

Article 3 states that the agreement does not impact on the issue of whether a company will be permitted to transact its business in the other country, which permission is always subject to the country's regulations. A 1-year notice is required for termination of the agreement.

3. Peace

On October 1, 1914, the United States and U.S.S.R. signed a treaty for the advancement of peace, *i.e.* dispute settlement.[77]

Article I stated that, when diplomatic measures failed, differences between the countries were to be submitted to a permanent international commission. There were to be no acts of force before the commission tendered its report.

Article II explained the composition of the commission and the length of its members' service. The countries were to each pay half of the commission's expenses.

Article III stated that the commission was to be governed by the provisions of the 1907 Hague Convention. It had 1-year to complete its work, unless otherwise agreed. The parties reserved their rights as to what action is to be taken on the commission's report.

Article IV explained the terms of ratification and the duration of the treaty (5 years). The terms of renewal for a year were delineated.

4. Exportation of Embargoed Goods

Through an exchange of notes on August 10 and 31, 1917, the United States and the U.S.S.R. entered into an agreement regarding the exportation of embargoed goods.[78]

The U.S.S.R. set forth certain rules and regulations regarding bank deposits and applications for permission to export the goods from Russia, and cancellation of the prior September 23, 1915 protocol of agreement on this subject. The United States acquiesced in the cancellation of the protocol.

[77] 39 Stat. 1622, T.S. No. 616, 11 Bevans 1239.
[78] 11 Bevans 1245.

YUGOSLAVIA[79]

A. Commodity Specific Agreements

1. Agricultural Commodities Agreements

In the 1950's and the 1960's, the United States and Yugoslavia entered into numerous Agricultural Commodities Agreements under Title IV of the Agricultural Trade Development and Assistance Act, as amended.[80] Under these agreements, the United States agreed to finance sales to purchasers authorized by Yugoslavia of commodities specified within the particular agreement.[81] On October 15, 1971, the two countries signed a *Memorandum of Understanding*, entered into force on the same date, Regarding the *Rescheduling of Certain Payments Under Agricultural Commodities Agreements*.[82] This MOU amended the schedule for Yugoslavia's repayment of principal and interest for commodities delivered under various commodities agreements. The last payment became due on December 31, 1983.

[79] In the opinion of some analysts, it is not appropriate to classify Yugoslavia as a nonmarket economy country. Moreover, the U.S. International Trade Commission, after consultations with the United States Trade Representative and the appropriate congressional committees, discontinued discussion of Yugoslavia in its East-West Trade Reports as of 1981. *See 27th Quarterly Report to the Congress and Trade Policy Committee on Trade Between the United States and the Nonmarket Economy Countries During April–June 1981*, USITC Publication 1188, September 1981, p.1, and all subsequent *Quarterly Reports* at n. 1.

Despite the uncertainty as to whether Yugoslavia is truly an "NME" country, we have included Yugoslavia in this treaty analysis, in part because a number of the treaties reviewed were negotiated prior to 1981. In addition, the agreements negotiated or effective after that date (*e.g.*, the Investment Guarantee Agreement) provide a good vehicle for comparison to similar agreements with other countries included in this analysis.

It should be noted that, because Yugoslavia was eligible for MFN treatment at the time the Trade Act of 1974 was enacted, that country was not subject to the bilateral agreement requirements of section 405.

[80] 7 U.S.C. §§ 1731–1736.

[81] Commodities included in the various agreements included: cotton, oil seed, meal cake, tallow, pea beans, cotton seed oil, soya bean oil, dry edible beans, and wheat.

[82] #23 UST 222; TIAS 7298.

2. Textiles

Agreement Providing for Consultations Should Exports of Cotton, Wool, and Manmade Fiber Textiles and Apparel from Yugoslavia Cause Market Disruption in the United States[83]

Agreement effected by exchange of notes signed at Belgrade January 14, 1976;
Entered into force January 14, 1976.

In light of their obligations under Article 2 of the multilateral Arrangement Regarding Textile Trade ("Arrangement"), the United States and Yugoslavia agreed, by exchange of diplomatic notes, to terminate their bilateral agreement concerning trade in cotton, wool and man-made fiber textiles signed on December 31, 1970 at Belgrade. They further agreed that, should exports of cotton, wool, and manmade fiber textiles and apparel products from Yugoslavia to the United States "develop in such a manner so as to cause or threaten to cause in the United States problems of market disruption as defined in the Arrangement," the United States "may request consultations" with Yugoslavia. Yugoslavia would then have 30 days to respond to such request, and "to consult within 60 days thereafter (unless otherwise mutually agreed) to arrive at an early solution on mutually satisfactory terms."

Bilateral Agreement Between the United States and Yugoslavia Concerning Trade in Certain Cotton, Wool and Man-Made Fiber Textiles and Textile Products

Exchange of notes at Belgrade December 5 and 26, 1986;
Entered into force December 5, 1986;
Effective January 1, 1987[84]

This agreement sets specific limits for exports of various categories of textiles and textile products from Yugoslavia to the United States. The governments agree to replace the visa arrangement contained in their earlier bilateral textile agreement with a separate administrative arrangement, except that the visa arrangement will continue to apply to categories under restraint. The agreement provides for a 3-year term, divided into agreement years, with carryforward and carryover from one year to the next allowed only under certain specified terms. Yugoslavia is required to space exports to the United States within each category evenly throughout each agreement period.

[84] #27 UST 1622; TIAS 8271.

[84] Although this agreement officially was concluded as an extension of the textile agreement of October 26 and 27, 1978 (TIAS 9447), it effectively replaces the earlier agreement.

Under paragraph 14, if Yugoslavia considers that "it is being placed in an inequitable position in relation to a third country," it may request consultations with the United States "with a view of taking appropriate remedial actions, such as a reasonable modification of this agreement."

Either government may terminate the agreement by providing 90 days written notice to the other government. The agreement has been amended several times to reflect changes in the Harmonized Commodity Code and to redefine some of the categories covered by the agreement. Typically, the United States and Yugoslavia have extended their textile agreement beyond the existing expiration date. We believe the agreement that expired on December 31, 1989 has been extended, but do not have official documentation.

3. Steel

Arrangement Between the Government of the United States and the Government of Yugoslavia Concerning Trade in Certain Steel Products

Entered into force January 14, 1986;
Effective October 1, 1984;
Expired by its terms September 30, 1989.

Under this arrangement, Yugoslavia agreed to restrain exports to the United States of three categories of steel products: nails, pipe and tube, and all other steel products. The arrangement also contained quarterly shipment limitations to ensure that quantities were distributed over the year. A new steel agreement is under negotiation.

B. Financial Agreements

Memorandum of Understanding Regarding the Rescheduling of Certain Payments Under Agricultural Commodities Agreements[85]

Signed at Belgrade October 15, 1971;
Entered into force October 15, 1971.

See discussion, above, under Agricultural Commodities Agreements.

Swap Agreement Between the United States Treasury and the Narodna Banka Jugoslavije

Signed at Washington and Belgrade June 10, 1988;
Entered into force June 10, 1988.

In a multilateral effort to assist Yugoslavia in addressing its balance of payments difficulties, the Bank for International Settlements, acting for a number of central banks, and the United States Department of Treasury (U.S. Treasury) agreed to provide short-term credit facilities to the Yugoslav Bank, the Narodna Banka Jugoslavije.

Under the terms of the relevant agreement, the U.S. Treasury, through its Exchange Stabilization Fund, agreed to extend to the Yugoslav Bank a drawing facility (Treasury SWAP Facility) aggregating not more than fifty million U.S. dollars. The agreement provided for a single drawing of the allocated funds, some of which would be credited in freely disposable funds to the Yugoslav Bank, and some of which would be placed in a non-transferable U.S. Treasury Certificate of Indebtedness maturing November 30, 1988. The Yugoslav Bank reserved the right to prepay principal and interest.

Agreement Relating to Investment Guarantees[86]

Exchange of notes at Belgrade January 18, 1973;
Entered into force May 30, 1973.

This agreement addresses investments in projects or activities in Yugoslavia that are guaranteed by the Government of the United States.[87] In order for the provisions of the agreement to apply, the project or activity involved must be registered in accordance with applicable Yugoslav laws.

The Yugoslav Government agrees to recognize the transfer to the U.S. government of any currency, credits, assets, or investments made in accordance with the agreement. To the extent Yugoslav laws partially or wholly invalidate the acquisition of any interests in any property in Yugoslavia, the Yugoslav government will permit arrangements under which the interests are transferred to an entity permitted to own such interests under Yugoslav laws.

Paragraph 5 states that currency and credit of Yugoslavia acquired by the U.S. government shall be accorded treatment "neither less nor more favorable than that accorded" to funds of Yugoslav nationals deriving from similar investment activities.

Paragraph 6 addresses dispute resolution. The two governments will attempt to resolve any disputes regarding interpretation of the agreement or questions of public international law through negotiations. If the two governments have not resolved the dispute within 3 months of the request for negotiations, either party may submit the dispute (including the question of whether such dispute presents a question of public international law) to an arbitral tribunal.

Within 2 months of receipt of a request for arbitration, each government will appoint one arbitrator. Within 3 months of the request, these

[85] 23 UST 222; TIAS 7298.

[86] 24 UST 1091; TIAS 7630.

[87] Note that this Agreement does not specifically mention OPIC, but would apply to OPIC guarantees.

two arbitrators will agree on a president who is a citizen of a third state and appointed by the two governments. If any of the appointments are not made within the established time limits, either government may, absent any other agreement, request the Secretary-General of the International Center for the Settlement of Investment Disputes to make the necessary appointment or appointments. Each government will pay the expenses of its arbitrator and representation, and the two governments will split the expenses and other costs of the president.

Only the respective governments may participate in the arbitral procedure. The arbitral tribunal will regulate its own procedures. It will make its decision by majority vote, which decision will be binding. With regard to disputes concerning questions of public international law, the agreement specifies that the tribunal shall base its decision "exclusively on the applicable principles and rules of public international law."

The agreement provides that it will continue in force until 6 months from the date of receipt of a note by either government that the other government no longer intends to be a party to the agreement. In the event of termination, the provisions of the agreement with respect to guarantees issued while the agreement was in effect will remain in force for the duration, but in no case longer than 20 years after termination of the agreement.

C. Agreements Regarding Entry and Exit Visas

Understanding Relating to Entry and Exit Visas for American Citizens Visiting Yugoslavia[88]

Exchange of notes signed at belgrade March 23 and 25, 1950;
Operative April 1, 1950.

By this exchange of notes, Yugoslavia agreed to grant entry and exit visas on the American passports to all American citizens who qualify for entry into Yugoslavia for temporary visits. The agreement specifies that it does not pertain to persons applying for permanent residence in Yugoslavia.

Agreement for the Abolition of All Nonimmigrant Visa Fees[89]

Exchange of notes at Belgrade December 30, 1963, March 27 and April 4, 1964;
Entered into force April 15, 1964.

Under this Agreement, the United States and Yugoslavia agreed to abolish all nonimmigrant visa fees for travel between the two countries. The agreement provides for termination by either party upon 12 months written notice.

[88] 1 UST 471; TIAS 2087.
[89] 15 UST 355; TIAS 5564.

PART 3:
COMPARISON OF U.S. TRADE AGREEMENTS WITH NMES

COMPARISON OF THE TREATMENT OF CERTAIN ISSUES IN U.S. TRADE AGREEMENTS WITH NONMARKET ECONOMIES

This section compares the way in which certain bilateral trade agreements between the United States and nonmarket economy countries address issues that may be relevant to the negotiation of a bilateral trade agreement with the Soviet Union. The section describes the differences among several recent trade agreements the United States has negotiated with the Romania, Hungary, China, granting these countries MFN status under section 405 of the Trade Act of 1974.[1] This comparison also includes the relevant provisions of the 1972 agreement with the U.S.S.R., although this agreement was drafted before enactment of the Trade Act of 1974. Finally, this section describes the differences among recent taxation treaties, investment guarantee treaties, and grain agreements between the United States and certain NMEs.[2]

I. SECTION 405 MFN AGREEMENTS

A. Provisions Required under the Trade Act of 1974

1. Duration of Agreement

Any bilateral commercial agreement negotiated under section 405 of the Trade Act shall:

(1) be limited to an initial period specified in the agreement which shall be no more than 3 years from the date the agreement enters into force, except that it may be renewable for additional periods, each not to exceed 3 years;[3]

[1] 19 U.S.C. § 2435. Unless otherwise noted, all references to the Trade Act of 1974 reflect the current (1989) language of the statute. With the exception of one language clarification in 1979, section 405 has not been amended since its enactment.

[2] Although a number of economists no longer believe it is appropriate to classify Yugoslavia as a nonmarket economy country, we have included Yugoslavia in this analysis, because some of the relevant treaties with that country were negotiated when there was less certainty as to its NME status, and because the more recent agreements with Yugoslavia provide a good vehicle for comparison to similar agreements with other countries included in this analysis.

[3] 19 U.S.C. § 2435(b)(1). This provision is conditional upon the two further requirements that: (A) a satisfactory balance of concessions in trade and services has been maintained during the life of such agreement, and (B) the President determines that actual or foreseeable reductions in United States tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfac torily reciprocated by the other party to the bilateral agreement. The ways in which the MFN agreements have discussed these conditional requirements are discussed *infra*, under "Other Issues."

The 1972 U.S.S.R. agreement, negotiated before enactment of the Trade Act of 1974, provided under Article 9 for a term of three years, unless extended by mutual agreement.

The duration issue is also addressed in Article XI of the Hungary agreement, Article X of China agreement, and Article XII of the Romania agreement. These three agreements all contain nearly identical provisions providing for the maximum term permissible under the statute—an initial term of 3 years followed by successive three years terms absent notice of a contrary intent at least 30 days before the end of a term.

2. National Security

A bilateral commercial agreement granting MFN treatment under section 405 must:

> provide that it is subject to suspension or termination at any time for national security reasons, or that the other provisions of such agreement shall not limit the rights of any party to take any action for the protection of its security interests.[4]

Article 8 of the 1972 U.S.S.R. agreement stated that the provisions in the agreement would not limit the right of either government to take any action to protect its security interests. Article IX of China agreement reads the same, except for substitution of the term "Contracting Party" for "Government." In Article X of the Romania agreement, the term "Party" is used, but the remainder of the provision is the same. Article IX of the Hungary agreement is exactly the same as the related clause in the Romania agreement.

3. Safeguard Provisions

All bilateral commercial agreements negotiated under section 405 must contain a safeguard provision

> (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 market disruption.[5]

[4] 19 U.S.C. § 2435(b)(2).

[5] 19 U.S.C. § 2435((b)(3). Congress authorized the President to initiate consultations with a country which is a party to such an agreement upon determining that there are "reasonable grounds to believe . . ." that market disruption exists. 19 U.S.C. § 2436.

As discussed in the section of this report relating to U.S. trade laws, the term "safeguard actions" in this context generally refers to actions that one government may take to restrict imports from another country when it finds that imports from the latter are causing or threatening injury to a domestic industry. Such actions generally involve an increase in tariffs or imposition of a quota, are temporary in nature, and are for the purpose of helping the industry adjust to new conditions of competition. Safeguard provisions are also known as "escape clause" provisions in reference to the fact that they allow a party to "escape" from its obligations. The General Agreement

Article 3 and Annex 1 of the 1972 agreement with the Soviet Union addressed the safeguards issue. This subject was also addressed in an exchange of letters between the two countries shortly after the agreement was signed. Article 3 contained a general statement permitting either country to take whatever actions it "deems appropriate" to prevent products from the other country from disrupting or threatening to disrupt its domestic market. The Annex set forth procedures for the implementation of this Article, including a paragraph requiring prompt consultation and a paragraph describing the procedures and timetables for such consultations. The remedy called for, in the absence of any other agreed-upon solution, was a limitation on the exports of the offending country of the products involved. The Annex permitted such limitations to be imposed prior to the conclusion of consultations if the complaining Government determined that an emergency existed. A subsequent letter from the United States to the Soviet Union confirmed that the Soviet Union would "limit or establish conditions on exports" if required to do so under the terms of Annex I, while the United States would only be required to inform United States exporters of quantities or conditions either stated by the Soviet Union in its request or agreed to in consultations pursuant to Annex I.

This approach is similar to the one that was used in the MFN agreement with Romania, the first MFN agreement negotiated under the Trade Act of 1974. Article 3 and Annex 1 of this agreement address the safeguards issue. Paragraph 2 of Article 3 contains a statement, like the one in Article 3 of the 1972 U.S.S.R. agreement, permitting either party to impose whatever restrictions it "deems appropriate" to prevent or remedy actual or threatened market disruption. The provision requiring "prompt consultations," which appeared in the Annex of the 1972 provision, also appears in Article III of the Romania agreement. The other procedures set forth in Annex I of the Romania agreement are similar to those contained in the Annex to the 1972 U.S.S.R. agreement.

Article VII of the Hungary MFN agreement, as well as the Annex thereto, are very similar in content to the Romania safeguards provisions. A notable difference in this agreement is the inclusion of a definition of the term "market disruption." Market disruption is defined to exist whenever:

> imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

This language mirrors the statutory definition of market disruption at the time that this agreement was drafted.[6]

In stark contrast to the safeguard provisions in these agreements is the very general provision in the MFN agreement with China Article VII of the China agreement provides only for consultations in the event of any "problems that may arise from their bilateral trade." This Article also permits either party to the agreement to take emergency action if the party claiming injury deems it necessary. There is not even a reference to the term "market disruption," let alone a definition; nor are there any specified procedures governing the way in which consultations are to be undertaken.

4. Intellectual Property Protection

Section 405 requires bilateral commercial agreements negotiated under this statute to afford certain intellectual property protection, as follows:

> (4) if the other party to the bilateral agreement is not a party to the Paris Convention for the Protection of Industrial Property, provide rights for United States nationals with respect to patents and trademarks in such country not less than the rights specified in such convention;[7]
>
> (5) if the other party to the bilateral agreement is not a party to the Universal Copyright Convention, provide rights for United States nationals with respect to copyrights in such country not less than the rights specified in such convention;[8]
>
> (6) ... provide arrangements for the protection of industrial rights and processes;[9]

The U.S.S.R. agreement contained no clause covering intellectual property rights.[10] The other three agreements contain such clauses, but differ significantly as to how they address the issue.

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[5]—*Continued*
on Tariffs and Trade (GATT) contains several escape clause provisions, the best known of which is found in GATT article XIX. The GATT article XIX escape clause allows a GATT contracting party to escape from its obligations when increased imports are causing or threatening serious injury to domestic producers of like or directly competitive products. Since 1947, all U.S. trade agreements have been required to include an escape clause provision.

[6] Although the Omnibus Trade and Competitiveness Act of 1988 did not alter the definition of the term "market disruption," 19 U.S.C. § 2436 (e)(2)(A) (Supp. 1989), it did add a definition of "significant cause." 19 U.S.C. § 2436 (e)(2)(B)(II) (Supp. 1989). This section defines "significant cause" as "a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause."

[7] 19 U.S.C. § 2435(b)(4).

[8] 19 U.S.C. § 2435(b)(5).

[9] 19 U.S.C. § 2435 (6).

[10] The U.S.S.R. is a party to the Paris convention, but with reservation under article 28. See 21 UST 1583; 24 UST 2140; TIAS 6923, 7727 (Stockholm convention of July 14, 1967, revising the Paris convention of March 20, 1883, as revised, for the protection of industrial property). Paragraph (1) of Article 28 provides that any dispute between two or more countries to the convention that is not settled by negotiation may be brought before the International Court of Justice. Paragraph (2) of Article 28 permits any country to the convention to declare that it does not consider itself bound by the dispute resolution provisions set out in paragraph (1). The U.S.S.R., which is not a member of GATT, has made such declaration.

The U.S.S.R. is a party to the Universal Copyright Convention (UCC) (done at Geneva September 6, 1952; in force September 16, 1955) (effective with respect to U.S.S.R. May 27, 1973; 6 UST 2731), but is not a party to the Universal Copyright Convention

The first paragraph of Article V of the Romania agreement states that each party "shall continue to provide nationals, firms, companies and economic organizations of the other Party" with the industrial property rights accorded by the Convention of Paris for the Protection of Industrial Property, as revised at Stockholm on July 14, 1967.[11] Paragraph 2 grants reciprocal protection to these entities with respect to industrial rights and processes other than those referred to in paragraphs one and three. Paragraph 3 grants the same entities the rights with respect to copyrights set forth in the Universal Copyright Convention as revised at Paris on July 24, 1971.[12]

Paragraph 1 of Article V of the Hungary agreement states that each party reaffirms the commitments made in the Paris Convention. Paragraph 2 states that each party reaffirms the commitments made in the copyright convention. The third paragraph states that, with respect to legal protection of other industrial rights and processes, each party will provide to the firms, enterprises and companies of the other national treatment or most-favored-nation treatment, whichever is more favorable.

Unlike the other countries that have entered into section 405 agreements with the United States, China, at the time it entered the bilateral trade agreement, was not a signatory to either the Paris Convention or the UCC.[13] Thus, the China agreement does not reference these conventions. The first paragraph of Article VI of the China agreement states simply that both contracting parties recognize the importance of effective protection of patents, trademarks and copyrights. The second paragraph states that, on the basis of reciprocity, the parties agree that legal or natural persons of either party may apply for registration of trademarks and acquire exclusive rights thereto in the territory of the other party, in accordance with its laws and regulations. The third paragraph states that the parties agree that, under their laws and international practice, each will seek to ensure protection of patents and trademarks equivalent to the protection accorded by the other party. Paragraph 4 states that the parties will permit and facilitate the enforcement of provisions concerning protection of industrial property in contracts, and will provide lawful means to restrict unfair competition involving the unauthorized use of those rights. The fifth paragraph is virtually the same as the third, but applies to copyrights and states that each party "shall take appropriate measures . . . to ensure" protection rather than "shall seek . . . to ensure" protection.

5. Commercial Dispute Settlement

Each bilateral agreement negotiated pursuant to section 405 must contain a provision setting forth "arrangements for the settlement of commercial differences and disputes. . ."[14]

Article 7 of the 1972 U.S.S.R. agreement addressed commercial dispute settlement. That article committed both governments to encourage participants in private commercial transactions to adopt arbitration as the method of resolving disputes, while recognizing that the method of resolving commercial disputes would be governed by the individual contracts. In cases in which the entities chose to provide for arbitration, the article recommended further that the contract require resort to the Arbitration Rules of the Economic Commission of Europe of January 20, 1966, that it designate an Appointing Authority for the appointment of an arbitrator in a place other than the United States or the U.S.S.R., and that it specify a place other than these two countries that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in which to hold the arbitration.

Paragraph 2 of this article promised that corporations and other commercial organizations, properly organized in conformity with the applicable laws, would have access to the courts to bring or defend against a suit, with the same rights that similar companies from third countries would have.

Article VIII of the Romania MFN agreement, like Article VII of the U.S.S.R. agreement, also commits the parties to encourage the use of arbitration as a means of settling private commercial disputes, noting that dispute resolution methods are to be governed by private commercial contracts. The Romania agreement also suggests that the place of resolution be a country other than the domicile countries of the two entities involved, that is a party to the 1958 Convention for the Recognition and Enforcement of Arbitral Awards. This agreement, however, suggests following the rules of arbitration of the International Chamber of Commerce in Paris.

Article VIII of the China agreement also suggests arbitration as a means of resolving private commercial disputes, but in milder language, and only if the required "friendly consultations" fail. The language mandating "friendly consultations" probably stems from the Chinese notion that people doing business are friends first and businessmen second, and that, therefore, most difficulties can and should be resolved informally. A clause requiring

[10] —*Continued*
revised (UCC revised) (done at Paris 1971; in force July 10, 1974). Neither the 1974 Trade Act nor any subsequent trade laws explicitly require that the other country to the binational commercial treaty be a party to the UCC *revised*. It should be noted that Romania, in its MFN agreement, agreed to comply with the UCC revised, although that country, like the U.S.S.R., is a party to the UCC, but not the UCC revised.

[11] See TIAS Nos. 6923, 7287; 21 UST 1583; 24 UST 2140.

[12] 25 UST 1341; TIAS 7868.

[13] China has, however, since become a party to the Paris Convention, effective March 19, 1985.

[14] 19 U.S.C. § 2435(b)(7).

"friendly" consultations is not atypical in private commercial contracts to which a Chinese entity is a party.

The China agreement is also less specific about the preferred location for holding the arbitration or the preferred rules of procedure. This agreement provides that the arbitration may be held either in China, the United States or a third country, that the rules of procedure of the relevant arbitration institution are applicable, and that the arbitration rules of the United Nations Commission of International Trade Law may also be used if appropriate in the circumstances.

Article VIII of the Hungary agreement contains stronger language than the China agreement about encouraging the use of arbitration by the parties to a private commercial dispute. However, it is more general than the other agreements on other aspects of dispute resolution. While the article does state specifically that, if the place of arbitration is other than Hungary or the United States, the country should be a signatory to the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards, it does not recommend particular rules of procedure, permitting the private entities to provide for any rules of arbitration in their contracts.

6. Promotion of Bilateral Trade

An agreement negotiated under section 405 must

> provide arrangements for the promotion of trade, which may include arrangements for the establishment or expansion of trade and tourist promotion offices, for facilitation of activities of governmental commercial officers, participation in trade fairs and exhibits, and the sending of trade missions, and for facilitation of entry, establishment, and travel of commercial representatives.[15]

Articles 2, 5, and 6 of the U.S.S.R. agreement, as well as Annexes 2 and 3, addressed this issue.[16]

The first paragraph of Article 2 stated that both governments would take appropriate measures, commensurate with current laws and regulations, to encourage and facilitate the exchange of goods and services. Both governments envisioned that, when compared to the period 1969-71, total bilateral trade would at least triple during the 3-year period of the agreement.

The second paragraph stated that commercial transactions would be effected in accordance with the laws and regulations governing import and export control and financing, as well as on the basis of contracts. Both governments were to facilitate the conclusion of contracts between U.S. persons and Soviet foreign trade organizations. The contracts were "generally" to be concluded on terms customary in international commercial practice.

Paragraph 3 stated that the governments would examine the fields in which expansion of commercial and industrial cooperation was desirable. In particular, they were to look at the long-term requirements and resources of each country in raw materials, equipment and technology. On the basis of this examination, theywould promote cooperation between organizations and enterprises interested in looking towards realizing projects developing natural resources and in manufacturing.

The fourth paragraph expressed the Soviets' expectation that their foreign trade organization would place "substantial" orders for U.S. machinery, plants and equipment, agricultural products, industrial products, and consumer goods.

The first paragraph of Article 5 stated that the United States could establish a commercial office in Moscow and that the U.S.S.R. could establish a trade representation in Washington. The offices were to be opened simultaneously, with date and locations to be decided later. The second paragraph referred to Annexes 2 and 3 regarding the functions, privileges, immunities, and organizations of these two offices. The third paragraph stated that the commercial office and trade representation would not affect the rights of others (natural or legal persons in the United States and foreign trade organizations in the U.S.S.R.) to maintain direct relations vis-a-vis the negotiation, execution, and fulfillment of trade transactions. The commercial office and trade representation could provide office facilities to the others. Neither the commercial office nor trade representation were permitted to negotiate, execute or fulfill trade transactions or otherwise carry out trade.

Paragraph 1 of Article 6 stated simply that the appropriate entities (natural and legal persons of the United States and foreign trade organizations of the U.S.S.R.) could open their offices in the other country. The second paragraph stated that these entities were not immune from suit or execution of judgment or other liability with respect to commercial transactions. Paragraph 3 stated that corporations, stock companies and the like, domiciled and regularly organized in conformity to one country's laws, would be recognized as legal entities in the other country.

Annex 2, pertaining to the status of the U.S. commercial office in the Soviet Union, consisted of two articles. The first listed the two functions of the office: promotion of the development of trade and economic relations; and provision of assistance to natural and legal persons in facilitating purchases, sales, and other commercial transactions. The first paragraph of Article 2 stated that the commercial office would have one principal officer, no more than three deputy officers and a mutually agreed

[15] 19 U.S.C. § 2435(b)(8).

[16] By exchange of notes dated July 30, 1984, the United States and the U.S.S.R. reached agreement regarding the status of commercial representatives and issuance of visas to them.

upon number of staff personnel. By mutual agreement, the number of officers and staff personnel could be changed. The second paragraph stated that the commercial office would be an integral part of the U.S. embassy in Moscow, wherever the office was located. The U.S.S.R. was to facilitate the acquisition or lease of suitable premises for the office. The third paragraph stated that the commercial office would enjoy the same privileges and immunities as the embassy, and would have the right to use cipher. The principal officer and deputies would have the same privileges and immunities as those of the diplomatic staff of the U.S. embassy. The administrative, technical, and service staff of the commercial office would have the same privileges and immunities as would corresponding personnel in the U.S. embassy.

Annex 3 pertained to the status of the Soviet trade representation in United States. Its provisions were basically the same as those in Annex 2. Of note, however, is the second paragraph of Article 1, which provided that the trade representation could represent the U.S.S.R.'s interests in all matters relating to Soviet foreign trade and provide assistance to Soviet foreign trade organizations in facilitating purchases, sales, and other commercial transactions. The corresponding clause in Annex 2 stated simply that the commercial office could provide assistance to U.S. natural and legal persons in facilitating the same transactions.

Articles III and IV of the China agreement address promotion of trade. Under Article III, the parties agree to four points. First, they will accord the other party's firms, companies, and corporations, and trading organizations treatment no less favorable than that afforded to any third country or region. Second, they will promote visits by those in economic, trade, and industrial circles; encourage commercial exchanges and contacts; and support fairs, exhibitions, and technical seminars. Third, they will permit and facilitate, under law and in accordance with "physical possibilities," the stationing of the other party's representatives or the establishment of business offices. Fourth, again under law and in accordance with physical possibilities, they will further support trade promotions and improve facilities and related services, such as office space, residential housing, telecommunications, visa issuance, internal business travel, customs formalities for personal effects, office articles and commercial samples, and observance of contracts, so that firms and trade organizations can conduct their business.

Article IV states that the parties realize the importance of government trade offices and that they agree to encourage and support these offices' trade promotion activities. They are to provide these offices with facilities that are as favorable as possible.

Articles II, III and VI of the Hungary agreement address the promotion of trade and commerce. The first paragraph of Article II states that the parties will take appropriate measures to encourage and facilitate the exchange of goods and services and to secure favorable conditions for the continuous, long-term development of trade relations. This is similar to the comparable clause in the U.S.S.R. agreement, but there is no mention of future trade relations in that clause. The second paragraph is similar to Article IV of the China agreement. It states that the parties recognize the significant role of economic, industrial, and technical cooperation in the development of economic and trade relations, and that they "confirm their readiness" to encourage, promote, and facilitate such cooperation in industry, agriculture trade, and technology. The third paragraph states that contracts between firms, enterprises, and companies will be the basis of commercial transactions, including contracts for services (especially commercial, technical, financial, transportation, and insurance services). The terms customary in international commercial practice will generally govern. This paragraph is somewhat similar to the second paragraph in Article 2 of the U.S.S.R. agreement.

Article III, entitled "Business Facilitation," primarily addresses the facilitation of the business of firms, enterprises, and companies, rather than the promotion of trade. Paragraph 6 states that each party is to permit and facilitate the entry, exit, and stay of foreign employees and representatives of the other party's firms, enterprises, and companies, subject to applicable laws and regulations. Paragraph 7 states that each party will continue to publish and make available economic and commercial information to promote trade. Paragraph 8 states that each party will encourage the participation of the above- mentioned entities in trade promotional events such as fairs, exhibitions, missions, and seminars. It also states that the parties agree, subject to law, to allow the duty-free import and re-export of articles for use in promotional events, so long as they are not sold or otherwise transferred.

Paragraph 11 of Article III refers to commercial representations, *inter alia*. First, the value of commercial representations is recognized. Then, the parties agree to facilitate their establishment and operation. The parties will act on applications for any required authorizations without delay. Firms, enterprises, and companies with commercial representations will be accorded treatment no less favorable than that accorded to the similarly-situated third-country entities. Entities with commercial representations may hire, compensate, and terminate nationals of the host country or of third countries, according to applicable laws and regulations. Commercial representations may import office equipment and automobiles, subject to applicable customs regulations. Re-export of properly imported equipment is authorized if the commercial representation is terminated. Foreign employees of commercial representations and their families may reside in the country, subject to laws and regulations applicable to aliens. They will be permitted to secure housing and office facilities. Each party will normally issue multiple entry and exit visas to these foreign employees and their families, who may import personal effects for personal use only and may export their imported personal effects duty free.

Article VI pertains to government commercial offices. The first paragraph states that each party will permit and facilitate the establishment and operation of the other country's government commercial office as an integral part of its embassy, which may be on premises separate from the embassy. Separate arrangements will govern the opening of branches of these offices. Representatives of firms, companies, and enterprises of either party will have full access to these offices for commercial purposes. Under paragraph 2, neither these offices, their officers, nor staff shall function as agents or principals in commercial transactions, enter into contractual agreements on behalf of commercial organizations, or conduct other commercial activities inconsistent with their diplomatic status. They may engage in general trade promotion activity, however.

Articles II, IV and IX of the Romania agreement, as well as Annex 2, address trade promotion concerns. Article II addresses the expansion of trade. The first paragraph is similar to the first and fourth paragraphs of Article 2 of the U.S.S.R. agreement, stating that the parties will take appropriate measures to encourage and facilitate the exchange of goods and services. Both governments envisioned that total bilateral trade would at least triple over the initial three-year period of the agreement as compared with the period 1972-74. Romania expected that its firms, companies and economic organizations would place substantial orders for U.S. machinery and equipment, agricultural and industrial materials, and consumer goods. Unlike paragraph 4 of Article 2 of the U.S.S.R. agreement, the Romania agreement further set forth U.S. expectations: that the effect of the agreement would be to encourage increasing purchases by U.S. firms, companies, economic organizations and consumers of Romania products. The second paragraph is quite similar to paragraph 3 of Article II of the Hungary agreement. It states that commercial transactions will be effected on the basis of contracts between firms, companies, and economic organizations (the Hungary agreement uses the terms "firms, enterprises, and companies") in accordance with applicable laws and regulations. The contracts are generally to be concluded on terms customary in international commercial practice. The Hungary agreement goes a bit further by specifying coverage of service contracts and giving examples of them.

Article IV governs the facilitation of business enterprises generally. Paragraph 13 refers to the parties' confirmation of their commitment to facilitate participation in fairs and exhibitions, as expressed in the Joint Statement on Economic, Industrial and Technological Cooperation of December 5, 1973. Duty-free import and re-export of all articles for use by firms, companies, and economic organizations is allowed, providing the articles are not transferred.

Article IX pertains to governmental commercial offices. It is somewhat similar to Article VI of the Hungary agreement. Paragraph 1 provides for the establishment and operation of government commercial offices on a reciprocal basis, to promote the development of trade and economic relations between the parties and to provide assistance to their firms, companies and economic organizations. (The Hungary agreement refers to *expansion* of trade and economic cooperation rather than their development; the Romania agreement states that assistance is to be provided to firms, companies, economic organizations, and nationals engaged in commercial activities, whereas the Hungary agreement is silent on this point.) The Romania agreement states that the establishment and operation of these offices is subject to laws and regulations and terms, conditions, privileges, and immunities as agreed upon by the parties; this language is absent from the Hungary agreement. Both agreements grant some persons unrestricted access to the offices for commercial purposes. However, the Romania agreement affords this right to "nationals" whereas the Hungary agreement grants it specifically to "[r]epresentatives of firms, companies and enterprises." Paragraph 2 in the Romania agreement states simply that neither these offices nor their officers or staff members may participate directly in the carrying on of trade, whereas the Hungary agreement is more specific, stating that these persons will not function as agents or principals in commercial transactions or enter into contracts on behalf of the commercial organizations, although they may engage in general trade promotion activity.

7. Bilateral Review of the Operation of the Agreement

Each bilateral agreement negotiated pursuant to section 405 must contain a provision ". . . for consultations for the purpose of reviewing the operation of the agreement and relevant aspects of relations between the United States and the other party. . ."[17]

While the 1972 U.S.S.R. agreement did not have a paragraph calling for a bilateral review of the operation of the agreement, it did establish a Joint U.S.-U.S.S.R. Commercial Commission to oversee and facilitate the implementation of the agreement. Although the 1972 U.S.S.R. agreement was never

[17] 19 U.S.C. § 2435(b)(9).

put into effect, the provisions for establishment of a joint commercial body were rejected in the creation of the U.S.-U.S.S.R. Trade and Economic Council.

Article XI of the Romania agreement gives the joint American-Romania Commission, established in the Statement on Economic, Industrial and Technological Cooperation, the task of reviewing the operation of the Romania MFN agreement.

Paragraph 3 of Article XI of the Hungary agreement and Paragraph 4 of Article X of the China agreement provide only for consultation to review the operation of the agreement at the request of either party. A 1984 Accord on Industrial and Technological Cooperation Between the United States and the China established a U.S.-China Joint Commission on Commerce and Trade to pursue the objectives of that accord.

B. Other Issues

1. Balance of Economic Interests

Section 405 allows for renewal of agreements entered into under this statute only if

> (A) a satisfactory balance of concessions in trade and services has been maintained during the life of the agreement and (B) the President determines that actual or foreseeable reductions in U.S. tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfactorily reciprocated by the other party.[18]

Although the statute does not require the agreements to have provisions related to these subjects, some of the treaties do so. The U.S.S.R. agreement, however, contained no language on this topic.

Article I, paragraph 3, of the Romania agreement states that the parties agree to maintain a satisfactory balance of concessions in trade and services during the period of the agreement (anticipated to be 3 years). The parties agree in particular to reciprocate, satisfactorily, reductions in tariffs and non-tariff barriers to trade resulting from multilateral negotiations. The agreement notes that Romania is a developing country and could be eligible for treatment accorded developing countries.

Article I, paragraph 1, of the Hungary agreement is the same as the comparable provision of the Romania agreement, except that the former contains no reference to Hungary as a developing country.

Article II, paragraph 5, of the China agreement states that the parties agree to reciprocate satisfactorily concessions with regard to trade and services, particularly tariff and non-tariff barriers to trade, during the term of the agreement.

[18] 19 U.S.C. § 2435(b)(1)(A), (B).

Paragraph 3 of the same article states that the parties will take into consideration that China is a developing country. The agreement contains no language regarding the maintaining of a satisfactory balance of concessions in trade and services. Paragraph 2 of Article I does state that, in order to strive for a balance in their economic interests, the parties will make every effort to foster the mutual expansion of trade and contribute to attaining the harmonious development of such trade balance.

2. Scope of MFN

Article I of the 1972 U.S.S.R. agreement promised unconditionally treatment of *products*, originating in or exported to the other country, no less favorable than that accorded to products from other countries. That guarantee was specifically stated to relate to the following matters: customs duties and other charges levied in connection with importation or exportation; internal taxation, sale, distribution, storage and use; charges imposed on the international transfer of payments for importation or exportation; and rules and formalities in connection with importation or exportation.

Paragraph 2 of that article required equitable treatment of the products of either party in the event that either Government applied quantitative restrictions to products originating in, or exported to, a third country.

Paragraph 3 exempted from the scope of the application of nondiscriminatory treatment any privileges granted to neighboring countries for the purpose of facilitating frontier traffic, any preferences granted in recognition of Resolution 21 (II) of March 26, 1968 adopted by UNCTAD, or any action permitted by a multilateral trade agreement to which either government is a party if such agreement would permit such actions with respect to their impact on third countries that are signatories to the multilateral agreement.

Article II of the China MFN agreement promises most-favored-nation treatment of the *products* originating in, or destined for, the other party. The scope of this commitment is similar to that defined in the 1972 U.S.S.R. agreement, promising nondiscriminatory treatment with respect to the following: customs duties and other charges applied for import, export, re-export or transit of products; rules and procedures for the collection of such duties; rules and procedures concerning customs clearance and warehousing; taxes and other charges levied on imports or exports; all laws and regulations affecting all aspects of internal sale, purchase, transportation and distribution; and administrative formalities for the issuance of import and export licenses.[19]

Paragraph 2 also contains a provision similar to Paragraph 2 of Article II of the U.S.S.R. agreement,

[19] See also the discussion below of the financial provisions of the China agreement.

promising equitable treatment in the case of the application of quantitative restrictions to products originating in or exported to a third country.

Paragraph 4 of Article II, addressing a subject similar to a portion of paragraph 3 of Article I of the U.S.S.R. agreement, states that the principles of Article II would be applied in the same way as they are applied under any multilateral agreement to which either party is a party on the date of entry into force of this agreement.

Paragraph 3 of Article II promises to take into account the fact that China is a developing country, a provision that did not appear in the U.S.S.R. agreement.

Paragraph 5 guarantees reciprocal concessions with regard to trade and services, "particularly tariff and non-tariff barriers to trade," during the term of the agreement. The 1972 U.S.S.R. agreement did not contain any such provision.

The promise of MFN status in Article I of the Romania agreement differs from that contained in the U.S.S.R. and China agreements in part because of Romania's membership in the GATT. Paragraph 1 reaffirms the importance of the principles in the GATT, and promises that both parties will apply the provisions of the GATT, including the protocol for the accession of Romania, in trading with each other.

Under paragraph 2 of that Article, the parties commit further to grant each other's *products* "immediately and unconditionally" MFN treatment as provided in the GATT,[20] and with respect to the following: customs duties and charges and the levying thereof; rules and formalities in connection with the importation and exportation of products; and other matters as provided in the GATT. To the extent that there are any inconsistencies between the provisions of this agreement and the requirements of the GATT, the terms of the bilateral agreement are to control.

Distinctive to this agreement is the guarantee in Article VII of equal treatment of the vessels of either party with respect to their treatment in the ports, places, and waters of the other party, except as modified by security requirements. The other MFN agreements with NMEs contain no similar provision.

Article I of the Hungary agreement is briefer and more reliant on the GATT than is Article I of the Romania agreement. The relevant provision of the Hungary agreement states simply that the parties will apply between themselves the provisions of the GATT, including the accession of Hungary, except that the bilateral agreement is to govern in the case of any inconsistencies.[21] Hungary and the United States also promise to reciprocate reductions by either party in "tariffs and non-tariff barriers to trade that result from multilateral negotiations."

3. Financial Provisions

The only financial provision in the 1972 U.S.S.R. agreement was Article 4, which stated that all currency payments between U.S. entities and Soviet entities were to be made in U.S. dollars, or "any other freely convertible currency mutually agreed upon by such persons and organizations."

Paragraph 1, Article V of the China agreement promises only that payments for transactions may be made in freely convertible currencies or as otherwise provided in accordance with agreements signed by the parties to the transactions.

In Paragraph 2 of Article V of the China agreement, the parties promise to facilitate the availability of official export credits on "the most favorable terms appropriate under the circumstances . . . " This subject is not addressed in the other MFN agreements analyzed here. Paragraph 3 of this article requires the contracting parties to provide each other, "on the basis of most-favored nation treatment . . ." the necessary facilities for financial, currency and banking transactions on terms as favorable as possible. Paragraph 4 promises further that each party would look favorably on the participation by the financial institutions of the other country in "appropriate" aspects of banking services related to international trade. Such financial institutions are to be permitted to provide services in the other country's territory on "a basis no less favorable than that accorded to financial institutions of other countries."

Article VI of the Romania agreement is similar to the China agreement in that it states that financial transactions are to be made in U.S. dollars or in any other freely convertible currency, unless the parties to the transaction agree otherwise. Further, the agreement guarantees that there will be no restrictions on the export of convertible currency received in an authorized fashion. This agreement also specifies that if either party maintains more than one rate of exchange, entities of the other party will receive "no less favorable" treatment with respect to the rate of exchange than that received by the entity of any third country.

Paragraph 1 of Article VI also promises that organizations of each party shall be accorded MFN treatment with respect to "payments, remittances and transfers of funds or financial instruments between the territories," either between the two countries or between one of the parties and a third country.

Paragraph 3 promises nondiscriminatory treatment with respect to the opening and maintaining of accounts in local and convertible currencies, and with respect to the use of such currencies.

[20] See also the discussion of the financial provisions of the Romania agreement below.

[21] See also the discussion below of the financial provisions of the Hungary agreement.

Article IV of the Hungary agreement contains provisions which, like the Romania and the China agreements, states that financial transactions can be carried out in U.S. dollars, other freely convertible currencies, or any other currency to which the parties to a specific transaction agree. However, the article permits expenditures made by an entity of one country in the territory of the other country to be made in local currencies.

Like the Romania agreement, paragraph 3 of Article IV of the Hungary agreement promises nondiscriminatory treatment with respect to transactions involving payments, remittances, and transfers of convertible currencies; rates of exchange; the opening and maintaining of accounts in local and convertible currencies; and the use of these currencies.

Another provision similar to a provision in the Romania agreement is contained in paragraph 5, which promises that there will be no restrictions upon the export of currency received in an authorized manner, except in time of national emergency.

Finally, the Hungary agreement contains a provision similar to the Romania agreement, permitting the entity of one country to make expenditures in the territory of the other country in local currency.

II. INVESTMENT GUARANTY AGREEMENTS

During the last 16 years, the United States has negotiated five investment guaranty treaties relevant to this analysis--treaties with Romania, Hungary, Poland, China, and Yugoslavia.[22] Neither the treaty with Hungary signed on October 9, 1989, nor the treaty with Poland, signed on October 13, 1989, is yet in force.

The treaties with Yugoslavia and Romania are very similar in content. Both provide for consultation between the United States and the other government whenever the United States proposes to insure or guarantee an investment in that country and either government consideres consultations to be necessary. Further, under the terms of the second paragraph of each agreement, the procedures apply only to an investment made in accordance with the applicable laws of the Host Government.

Paragraph 3 of both agreements requires the Host Government to recognize the transfer to the Guaranteeing Government, of the currency, credits, assets or investment for which payment is made under a guaranty. Both treaties provide further that the government issuing the guarantee will claim no rights greater than those of the investor, with the express reservation that the governments retain their rights to assert claims in a sovereign capacity under international law. (This provision appears in Paragraph 3 of the Romania treaty and Paragraph 4 of the Yugoslavia agreement.)

Paragraph 4 of both agreements permits the investor and the Guaranteeing Government to arrange a transfer to an appropriate entity in cases in which the Host Government's laws partially or wholly invalidate a transfer of interests from the investor to the Guaranteeing Government.

Paragraph 5 of the Yugoslavia agreement ensures that the Guaranteeing Government will receive treatment no less favorable with respect to currency of the local government than the investor would have received. The Romania agreement contains no similar provision.

Both agreements provide for negotiations between the two governments if they differ as to the interpretation of the provisions of the investment guaranty agreements. However, the Yugoslavia agreement provides for 3 months of consultations while the Romania agreement provides for 6 months. Further, the Yugoslavian agreement also provides for up to 3 months of negotiations in the case of a claim arising out of investments guaranteed in accordance with the terms of the agreement.

Both agreements provide for arbitration in the event that the two governments are unable to settle the dispute through negotiation. The procedures permitting each government to appoint an arbitrator, and those two arbitrators to select a third to be the President, are identical in both agreements, although the time period allotted for accomplishing these appointments varies between the agreements. There are also some additional minor procedural provisions in the Romania agreement, pertaining to such matters as the method of paying the arbitrators, that are not in the Yugoslavia agreement.

The Romania agreement contains one other significant paragraph that is not in the Yugoslavian agreement. Under paragraph 6, the two governments agree that a reciprocal agreement will be made with Romania should that government obtain the authority to issue coverage for projects of Romania entities in the United States.

The investment guaranty agreements with China, Poland, and Hungary are very similar to each other and, in many ways, very similar to the two agreements described above as well. For example, these three agreements like the two described above, contain a provision in Article 3 recognizing the transfer to the issuer of the guaranty of any currency, credits, assets or investment pursuant to which the issuer made payment. They also contain a provision promising that the Issuer will assert no greater rights than the transferring party would have had.

The new Hungary and Poland agreements, however, contain two provisions that none of the other agreements have. Paragraph (c) of both agreements states that issuance of coverage with respect to Hungary or Poland, respectively, does not subject the Issuer to regulation under that country's insurance or financial organizations laws.

Paragraph (d) of that article provides further that a transfer of rights to the Issuer would not subject that entity to taxation by either Poland or Hungary. The Hungary agreement also specifically guarantees that interest and fees on loans made are exempt from taxation in Hungary. Both agreements state that any other transactions undertaken by the Issuer are to be determined either by the applicable laws or by specific agreement between the Issuer and the other party.

Article 4 of the Hungary, Poland and China agreements contains a provision similar to one contained in the other two agreements, stating that if the laws of the Host Government partially or wholly invalidate the acquisition by the Issuing Government of an interest which would otherwise be acquired pursuant to a payment, the Host Government promises to give the Issuer an opportunity to arrange transfer to an entity permitted to own such interests under the applicable laws.

[22] Treaties with Afghanistan and Bulgaria, which entered into force in 1957 and 1965, respectively, are not discussed here.

Article 5 of the Poland, China, and Hungary agreements provide for treatment of amounts of currency acquired by the Issuer pursuant to a guaranty "no less favorable as to use and conversion than the treatment" to which the covered investor would have been entitled. These provisions are also very similar to provisions in the Romania and Yugoslavia agreements.

Like the Yugoslavia agreement, these three agreements provide for up to 3 months of negotiations to resolve disputes that arise under these agreements. They also call for the same method of arbitration that the Yugoslavia and Romania agreements describe in the event of an inability to resolve the dispute through negotiations.

Only the China agreement contains a paragraph, similar to that of the Romania agreement, calling for a reciprocal agreement in the event that the Chinese government obtains the authority to issue coverage for investments in the United States.

The provisions in the Poland and Hungary agreements, relating to the method by which the agreements are to enter into force, differ from those in the other agreements. The earlier agreements entered into force upon completion of the necessary procedural process for ratification by the other country. The Poland and Hungary agreements, however, require each government to give notice before the agreement becomes operational. The OPIC program cannot become operational in Poland and Hungary upon satisfaction of their internal requirements alone because of the U.S. statutory prohibition in Section 620(f) of the Foreign Assistance Act of 1961, as amended (FAA), against assistance to communist countries.[23] In the case of Yugoslavia and China, this problem was overcome by amending Title IV of the FAA, which constitutes OPIC's corporate charter, so as to permit OPIC to operate in these countries.[24] There is currently legislation pending which would add Poland and Hungary to the countries named in section 239(f) of the FAA. It might also be possible to rely upon a presidential waiver of the prohibition imposed by 620(f) of the FAA.[25] OPIC expects that the exchange of notices will take place in the near future, either on the basis of legislation or a presidential waiver[26]

[23] 22 U.S.C. §2370 (1988)

[24] See, 22 U.S.C. § 2199(f) (1988).

[25] See discussion and footnote in the section of this report addressing relevant U.S. statutes.

[26] See 28 I.L.M. 1393 (1989).

III. TAXATION AGREEMENTS

The United States has agreements regarding double taxation of income with four NME countries: Hungary, Poland, the Soviet Union, and China.

Article I of the agreements with Poland, Hungary and the China specifies to whom the agreement applies, *i.e.*, to persons who are residents of one or both of the contracting states. The statement in the Hungary agreement contains the caveat, "except as otherwise provided." The U.S.S.R. agreement uses the term "resident" throughout.

The Hungary agreement is the only one specifying (in Article I) which taxes are not affected. Article I of the U.S.S.R. agreement generally applies to taxes as provided for by law, while Article 2 of the other agreements specifically lists the types of taxes at issue. Article III of the U.S.S.R. agreement lists categories of income taxable only in the state of residence.

All agreements contain a section defining terms. This is Article II in the U.S.S.R. agreement and Article 3 in the other agreements.

Article 4 in the Poland, Hungary and China agreements defines "resident." The definitions in the Hungary and China agreements are the most detailed, including businesses as well as individuals,[27] whereas the definition in the Poland agreement includes only individuals. The U.S.S.R. agreement does not define "resident," although that term is used throughout the agreement. Article IV of that agreement does provide, however, for taxation of income from a commercial activity if derived by a "representation," which is defined in the article.

Article 5 of the Hungary and China agreements and Article 6 of the Poland agreement define the term "permanent establishment."[28] These articles also explain the tax status of independent agents. For the Soviets this status is handled in an exchange of letters dated June 20, 1973.

Article 7 of the Poland agreement and Article 6 in the Hungary and China agreements address the taxation of income from real property. This issue is not addressed in the U.S.S.R. agreement.

Article 8 of the Poland agreement and Article 7 of the Hungary and China agreements apply to the taxation of business profits. In addition, Article 8 of the China agreement and Article 10 of the Poland agreement detail the taxation of profits of enterprises who (or the same personnel of which) manage or control enterprises in the other contracting state. The issue of taxation of business profits is addressed to some degree in Article IV of the U.S.S.R. agreement, which refers to the taxation of commercial income from a representation.

Article 9 of the Poland agreement and Article 8 of the Hungary agreement address the taxation of income derived from the operation in international traffic of ships or aircraft. This subject is addressed in Article V in the U.S.S.R. agreement, and in paragraph 8 of the protocol accompanying the China agreement.

Article 9 of the Hungary and China agreements and Article 11 of the Poland agreement, refer to the taxation of corporate dividends.[29]

Article 10 of the Hungary and China agreements, and Article 12 of the Poland agreement address the taxation of interest income. The China provision is especially detailed, while the Hungary provision is quite concise. This issue is not addressed in the U.S.S.R. agreement.

Article 11 of the Hungary and China agreements, and Article 13 of the Poland agreement concern the taxation of royalties. The Poland and China provisions are quite detailed, while the Hungary provision is, again, more concise. The China protocol, in paragraph 6, also provides for tax on a specified amount of some royalties. The U.S.S.R. agreement does not address this topic.

Article 12 of the Hungary and China agreements, and Article 14 of the Poland agreement address the taxation of capital gains income. The China provision is more detailed than the others. The issue is not addressed in the U.S.S.R. agreement.

Article 14 in the Hungary and China agreements, and Article 15 of the Poland agreement refer to the taxation of income from independent personal services. This subject is not covered in the U.S.S.R. agreement.

Article 14 of the Hungary and China agreements, and Article 16 of the Poland agreement refer to the taxation of income from dependent personal services, that is, of remuneration derived by a resident of a contracting state for employment exercised in the other contracting state. This topic is not discussed in the U.S.S.R. agreement.

Article 17 of the Poland and Hungary agreements, and Article 19 of the China agreement address the taxation of teachers' and researchers' income. Article VI, paragraph 1(c) of the U.S.S.R. agreement addresses this issue.[30]

[27] The protocol accompanying the China agreement also defines "person" to include an estate or a trust.

[28] Article 5 of the Poland agreement concerns general rules of taxation, provisions which are not present in the other agreements. However, Article VI, paragraph 2 of the U.S.S.R. agreement addresses general exemptions, and Articles VII through IX of that agreement address the issues of the non-restriction of the right to tax citizens, the taxation of lawful income, and the taxation of income exempt from tax in one state. Paragraph 5 of the protocol accompanying the China agreement provides for the application of the United Nations Model Double Taxation Convention between Developed and Developing Countries in deciding on the residency of a person.

[29] The protocol accompanying the China agreement provides for denial of benefits under Articles 9, 10, and 11 to a company of a third country if the company becomes a resident of a contracting state principally for the tax benefits.

[30] Article VI, paragraph 1(f), of the U.S.S.R. agreement limits the duration of exemptions applied to participants in intergovernmental exchange programs, teachers, researchers, students, and trainees.

Article 18 of the Poland and Hungary agreements, and Article 20 of the China agreement, explain the taxation of students' and trainees' income. Article VI, paragraphs 1(d) and (e), cover this issue in the U.S.S.R. agreement. The Poland agreement is quite detailed.

Article 19 of the Poland agreement, Article 16 of the Hungary agreement, Article 18 of the China agreement, and Article VI, paragraph 1(a), of the U.S.S.R. agreement apply to the taxation of income benefiting government employees. Article VI, paragraph 1(b), of the U.S.S.R. agreement also applies to the taxation of the income of persons in intergovernmental exchange programs in the fields of science and technology.

Article 15 of the Hungary agreement and Article 17 of the China agreement deal with the taxation of pensions. The other two agreements do not address this topic.

Article 15 of the China agreement deals with the taxation of fees paid to members of the board of directors of a company. No provision of this type is found in the other agreements.

Article 16 of the China agreement deals with the taxation of the income of entertainers and athletes. This topic is not dealt with in the other agreements.

Article 19 of the Hungary agreement and Article 21 of the China agreement contain a provision stating that items of income of a resident of a state which are not dealt with in the preceding sections are taxable only in that state. The other agreements do not contain this provision.

Article 20 of the Poland agreement, Article 20 in the Hungary agreement, and Article 22 of the China agreement explain how relief from double taxation is to be avoided, *i.e.*, by way of credit for tax paid to one contracting state against the tax due to the other. The U.S.S.R. agreement does not address this matter.

Article 21 of the Poland and Hungary agreements and Article 23 of the China agreement refer to nondiscrimination. That is, persons resident in one state who are citizens of the other cannot be subjected to other or more burdensome taxes than citizens of the state in which they are resident. Article X in the U.S.S.R. agreement addresses this topic.

Article XI of the U.S.S.R. agreement, Article 22 in the Poland and Hungary agreements, and Article 24 in the China agreement allow residents believing that they are not being taxed in accordance with the provisions of the agreement to present their cases before the competent authorities of the state of which they are residents or citizens. The U.S.S.R. and Poland agreements grant this right to residents; the Hungary agreement applies it to nationals as well as residents; and the China agreement refers simply to a "person." The China agreement contains a 3-year limitation on such cases, whereas the other agreements contain no such provision.

Article 23 of the Poland and Hungary agreements, and Article 25 of the China agreement, state that the authorities are to exchange information necessary to carry out the terms of the agreement. The Poland and China agreements also refer to the exchange of information to prevent fraud, and the China agreement adds the prevention of tax evasion. The Poland and China agreements specify that the information will be treated as secret, with limited disclosure as specified. Article XII of the U.S.S.R. agreement is somewhat similar in that it requires annual notification of amendments to tax legislation.

Article 24 of the Poland and Hungary agreements, and Article 26 of the China agreement preserve the rights of diplomatic and consular officials. The Hungary agreement also preserves matters handled by the law of a contracting state or by any other agreement between the contracting states. China, in an accompanying protocol, addresses this issue. The U.S.S.R. agreement contains no provisions to this effect.

Article XIII of the U.S.S.R. agreement, Article 25 of the Poland and Hungary agreements, and Article 27 of the China agreement set forth the terms for entry into force. Article XIV of the U.S.S.R. agreement, Article 26 of the Poland and Hungary agreements, and Article 28 of the China agreement address termination. The U.S.S.R. agreement is to remain in force for 3 years and indefinitely thereafter, unless notice of termination is given 6 months before the end of the calendar year. The other agreements provide for an indefinite term, unless terminated after 5 years by giving 6 months notice before termination in the case of Poland and Hungary, and unless terminated by notice by June 30 in the case of China.

The June 20, 1973 exchange of letters pertaining to the U.S.S.R. agreement also provides that both contracting states exercise tax jurisdiction over journalists and media correspondents on foreign assignment. An April 30, 1984, letter pertaining to the China agreement states that no tax-sparing credit, as provided in Article 22, will be provided; the agreement will be amended to allow such if the United States amends its laws or reaches an agreement with another country on this issue.

An October 8, 1974 exchange of letters concerning the Poland agreement notes that individual states within the United States have the authority to impose taxes. It is expected that Poland residents will probably not be subject to state taxes, nor will Poland enterprises engaged in international traffic of ships or aircraft. The U.S. tax authorities will use their best efforts to secure exemptions for the latter if necessary.

IV. GRAIN AGREEMENTS

The following is an analysis of three grain agreements between the United States and NME countries: the U.S.S.R. (two agreements, signed in 1975 and 1983) and China.

Article I in all three agreements addresses the commodity at issue and the amount to be purchased or sold. Both U.S.S.R. agreements specify purchase by Soviet foreign trade organizations from private commercial sources. The China agreement simply states that the United States will supply the grain "through normal private commercial organizations."[31] The China agreement sets a minimum amount of grain to be purchased in the form of wheat and corn, with 15 to 20 percent stipulated to be corn. The 1975 U.S.S.R. agreement states simply that a specified quantity of wheat and corn will be purchased in approximately equal proportions, whereas the 1983 agreement specifies a minimum amount of wheat and corn to be purchased and also allows the purchase of soybeans and/or soybean meal in proportion to the grain purchase.

Provision is made in Article I of the U.S.S.R. agreements for certain increases in quantity without consultations. Article III of the China agreement provides that China shall give the United States prior notice if it intends to exceed the quantity specified in Article I beyond a certain amount. The United States is to inform China promptly of any measures which may affect the availability of U.S. grain supplies beyond the excess amount. It is stated that "[t]his provision has the general purpose of facilitating the growth of trade through improving the availability of information."

Article I of the U.S.S.R. agreements provides that the U.S. government is to "employ its good offices to facilitate and encourage such sales by private commercial sources." Article II of the China agreement requires that the United States endeavor to assure availability of grain supplies through advance planning to meet the import requirements under the agreement. All three agreements provide that purchases and sales will be made at the prevailing market prices and in accordance with normal commercial terms. In addition, all three agreements provide for purchase and sale during each 12-month period covered by the agreement.

Article II of both U.S.S.R. agreements is the same, stating that the United States will not use its discretionary authority under the law to control the grain exports. No such provision is found in the China agreement. In fact, Article II of the China agreement contains a clause providing for prior consultations in the event the United States must apply measures to limit the availability of its wheat and corn to all foreign purchasers and would thus supply less than specified in Article I. This clause calls for the application of such measures to exports to China on a basis no less favorable than application of the measures to such exports to other foreign grain purchasers. Likewise, another clause in Article II of the China agreement provides for prior consultations in the event China must reduce the minimum levels of normal imports from all foreign suppliers; MFN status is also applied to U.S. imports as it is applied to U.S. exports to China in the preceding clause.

Article III of the two U.S.S.R. agreements is the same. It states that the Soviet foreign trade organizations will endeavor to space their purchases and shipments as evenly as possible over each 12-month period.[32] Article IV of the China agreement is similar, stating that "[b]oth sides shall seek to avoid excessive volatility in their grain trade," with China endeavoring to space its purchases "to enable orderly market adjustment" and the United States seeking to use its authorities to maintain the stability of U.S. market conditions for wheat and corn.

Article IV is identical in both U.S.S.R. agreements, stating that the U.S.S.R. will assure that the purchases and sales are for consumption in the U.S.S.R.. Article VI of the China agreement uses similar language.

Article V of the 1975 U.S.S.R. agreement provides for a reduction in sales if U.S. carry-in stock estimates and forward crop estimates fall below a certain point. This provision is not in the other two agreements.

Article VI of the 1975 U.S.S.R. agreement and Article V of the 1983 U.S.S.R. agreement both refer to the Soviet desire to purchase more grain and the United States desire to sell more than the quantity specified in Article I of the agreement. The 1975 agreement calls for *immediate* notification of the other government, whereas the 1983 agreement calls for simply "notification." Consultation by both parties as soon as possible to reach agreement on "possible quantities" to be supplied is specified. The China agreement does not contain a similar

[31] This is likely the case because the Soviet Ministry of Foreign Trade conducts its activities abroad directly through trade representatives, who are part of the Soviet diplomatic corps. Trade representatives, under Soviet law, are not legal entities, cannot sue or be sued, are not responsible for their debts, and may invoke the doctrine of sovereign immunity. Trade representatives are supervisory in nature, performing functional secondary duties, and are rarely involved in major legal disputes. Comment, "The Evolving U.S.-U.S.S.R. Grain Trading Structure: A Comparison of the 1972 and 1975 Grain Agreements", 4 *Syracuse J. of Int'l L. & Com.* 227, 229 & n.9 (1976)[hereinafter Comment].

[32] This provision represents the repair of a flaw in the 1972 U.S.-Soviet grain agreement, which contained an open-ended purchase option with only a requirement to purchase a minimal amount by a specified date. The U.S.S.R. cornered one-quarter of the U.S. wheat crop in July and August of 1972, as a result. This action caused a price increase in the cost of domestic wheat and other grains, which in turn caused higher food and production costs, which then eventually caused higher consumer costs for most food items. Comment, *supra* at 238-39.

provision, although, by a subsequent exchange of letters, the United States and China agreed that, if China provides notice that it wishes to purchase grain above the excess amount stated in Article III, the United States expects that it would promptly provide an affirmative response or request immediate consultations in exceptional circumstances.

Article VI of the 1983 U.S.S.R. agreement states that the United States will provide assistance on questions as to the appropriate quality of grain to be supplied. No comparable provision exists in the other agreements.

Article VII of both U.S.S.R. agreements is the same, stating that the U.S.-U.S.S.R. agreement on maritime matters will govern the grain shipments. No such provision is present in the China agreement.

Article VIII of the U.S.S.R. agreement provides for consultations regarding the implementation of the agreement and related matters at 6-month intervals and whenever a party so requests. Article V of the China agreement provides for consultations annually or when requested by a party. The article also specifies who has jurisdiction over the conduct of the consultations for both sides.

Article IX of the U.S.S.R. agreement and Article VII of the China agreement provide for entry into force and date of termination.

Through an exchange of letters dated October 22, 1980, China and the United States agreed that the United States would consider credit arrangements for the purchase and sale of the grain. The two Soviet grain agreements discussed here did not provide for extension of credit.[33]

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[33] An earlier 1972 U.S.S.R. agreement did allow for the extension of U.S. credit to the Soviet Union. Elimination of credit in the later agreements could mean that the goal was to force the U.S.S.R to increase its exports to the United States and other Western countries in order to get the convertible currency necessary for grain purchases. See Comment, *supra*, at 244, 253.

PART 4:
DESCRIPTION OF EC TRADE AGREEMENTS WITH NMEs

BACKGROUND

The European Community (EC, or Community) has endeavored to establish official relations with its Eastern bloc trading partners almost since its inception.[1] A 1963 Community memorandum to the Soviet Union sought the establishment of normal diplomatic relations between the two parties. As early as 1974, the EC was prepared to conclude separate commercial agreements with each country in Eastern Europe. However, the Council for Mutual Economic Assistance (COMECON)[2] pursued bilateral relations with the EC as a whole, while the EC remained insistent on having separate trade agreements with each of the COMECON countries[3] In 1980, the EC signed a trade agreement with Romania, the only Eastern bloc country willing to enter into a separate trade agreement at that time.[4] The operation of this agreement was suspended in December 1989 as a means of protesting the political situation in Romania.

On June 25, 1988, the EC and COMECON signed a joint declaration signalling the restoration of official relations between the two parties after 30 years. Since that date, the EC has concluded bilateral trade and cooperation agreements with Hungary, Czechoslovakia, Poland, and the U.S.S.R.[5]

The EC is currently negotiating a trade agreement with Bulgaria which may be completed as early as March.

The EC had previously commenced negotiations with East Germany for a trade agreement that was to be fairly limited in scope. In light of the rapid changes in East Germany, the Community has decided instead to undertake negotiation of a broader agreement resembling those with the Soviet Union, Poland and Hungary.[6] That agreement is also currently under negotiation, and is likely to be concluded by June.[7] It is expected that the agreement will last for ten years and will call for the phasing out of quantitative restrictions (QRs) by the end of 1995.[8] West Germany is already seeking to have the phase out period shortened, as the EC has done for Hungary and Poland.[9]

The EC is also considering entering into a broader agreement with Czechoslovakia, and renewing and expanding its trade relations with Romania.[10]

[1] *European Report*, No. 1550, "Special Feature, EEC Relations with the Countries of Eastern Europe" ("Special Feature") (Dec. 20, 1989).
[2] Also abbreviated as CMEA. This organization consists of the Soviet Union, Czechoslovakia, Hungary, Poland, Romania, East Germany, Bulgaria, Mongolia, Cuba, and Vietnam.
[3] Special Feature at 4.
[4] Ibid.
[5] Special Feature at 1.
[6] *European Report*, No. 1560, External Relations at 1 (Feb. 3, 1990).
[7] Ibid.
[8] *European Report*, No. 1557, External Relations at 1 (Jan. 24, 1990).
[9] Ibid.
[10] Special Feature at 1; *Europe-1992, The Report on the Single European Market*, at 523 (Feb. 7, 1990).

EC-CZECHOSLOVAKIA

Background[11]

On December 16, 1988, the EC and Czechoslovakia signed an agreement on trade in industrial products.[12] The agreement is to remain in force for at least 4 years.

In December 1989, the Czech Prime Minister wrote to the European Commission President, stating that the Czechs were prepared to begin talks to establish the basis for another trade and economic cooperation agreement. This is due to the fact that the current agreement is limited in scope, being confined to trade in manufactured goods. Czechoslovakia has indicated that it hopes to see the abolition of the economic-political restrictions on technology transfers to the country and limits on Czech exports to the EC member states, as well as aid for vocational training and the expansion of EC private-sector investment in Czechoslovakia. The European Commissioner for External Relations has stated that he will seek a mandate from the EC Council of Ministers in order to begin talks as soon as possible.

Agreement

Agreement Between the European Economic Community and the Czechoslovak Socialist Republic on Trade in Industrial Products

Article 1 indicates the products to which the agreement does and does not apply. It applies to products falling within Chapters 25 to 96 of the Harmonized Commodity Description and Coding System, but does not apply to products covered by the treaty establishing the European Coal and Steel Community, to certain trade in textiles, or to products listed in Annex I of the agreement.

Article 2 provides that the parties are to adopt measures to ensure the "harmonious development and the diversification" of their mutual trade. They are to consider each other's suggestions to this end.

Article 3 states that the EC will ensure that substantial progress is made towards abolishing specific QRs applying to Czechoslovakia. Progress in liberalization of trade is to take into account the GATT. A consultation body will assess annually the progress made in liberalization.

Article 4 provides that the EC will undertake to eliminate QRs on imports into regions and of products listed in Annex II.

[11] See *European Report*, Nos. 1556, External Relations at 3-4 (Jan. 20, 1990); 1555, External Relations at 6-7 (Jan. 17, 1990); 1554, External Relations at 12 (Jan. 13, 1990); 1551, External Relations at 1 (Dec. 23, 1989), for more information.
[12] Published in *Official Journal of the European Communities*, No. L 88, p. 1 (March 31, 1989). The agreement entered into force on April 1, 1989.

Article 5 states that the EC will suspend the application of QRs on imports into regions and of products listed in Annex III.

Article 6 states that for each calendar year, the EC will open import quotas for products which are of interest for Czechoslovak exports and which are subject to QRs. Consultations will be held annually to determine what increases in quotas can be made.

Article 7 states that imports into the EC of products covered by the agreement are not to be charged against the quotas referred to in Article 6 if declared as being intended for reexport and if they are reexported in an unaltered state or after inward processing, per EC arrangements.

Article 8 provides that the parties are to inform each other of any changes in their tariff or statistical nomenclature or of decisions taken regarding the classification of products covered by the agreement.

Article 9 provides that goods are to be exchanged at market-related prices.

Article 10 pertains to market disruption, providing that the parties are to consult each other if any product is being imported "in such increased quantities, or under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products." All information necessary for a detailed examination of the situation will be provided by the requesting party to the other party. Consultations are to conclude within 30 days unless otherwise agreed. If the situation described (*i.e.*, market disruption) does exist, exports will be limited or other action may be taken to prevent or remedy injury. This may include action with respect to the price at which the exports are sold. If agreement is not reached, the party requesting the consultations may restrict the imports to the extent and for such time as necessary to prevent or remedy the injury. The other party may then deviate from its obligations in respect of substantially equivalent trade. When critical circumstances exist, preventive or remedial action may be taken without prior consultation; consultation is then effected immediately after taking the action. The parties are to give priority to actions causing the least disturbance to the functioning of the agreement when taking action under this article. They may hold consultations to determine when the protective measures taken will cease to apply.

Article 11 states that Czechoslovakia is to take appropriate measures to encourage imports from the EC into that country. Certain aims are listed, namely supplying the EC with information regarding economic development, general import arrangements and forecasts, and import and investment intentions in Czechoslovak industry. Other goals are creating conditions facilitating EC business in Czechoslovakia, encouraging and facilitating trade promotion activities there, and promoting visits by those involved in trade between the two parties.

Article 12 sets forth the tasks of the consultation body. Consultations will be held once a year, in Brussels and Prague alternately, with the opportunity for special meetings.

Article 13 sets forth the jurisdiction of the agreement.

Article 14 provides for entry into force of the agreement, which is to last for 4 years. Thereafter, it is to be automatically renewed year by year unless written notice is given 6 months before expiration.

Annex I sets forth products which are not covered by the agreement. Annex II sets forth products for which QRs will be abolished at the EC and regional levels. Annex III lists products for which QRs will be suspended at the regional level according to French and Italian regulations. The annexes were replaced in 1989; and certain QRs were abolished and others suspended.[13]

In an exchange of letters, it was agreed that the goods listed in the annexes are to be modified so as to identify and classify products according to the Harmonized Commodity Description and Coding System.

In another exchange of letters dated January 27, 1989, a West German import scheme is explained and agreed to. The scheme, dating from early 1980, is aimed at the potential removal of QRs on certain industrial imports and provides for the issuance of import licenses above and beyond quota limits on an experimental and temporary basis. Should it be necessary to discontinue the practice because of market trends, Czechoslovakia will be informed immediately and prior consultation may take place.

EC-HUNGARY

Background[14]

Hungary currently has a 10 year trade agreement in effect with the EC that covers trade in industrial and agricultural products. Key provisions in the agreement were rewritten in November 1989, in the context of the PHARE Action Programs.[15] At that time, the EC Council of Ministers replaced the 7 year timetable for the elimination of all specific QRs with a regulation eliminating them as of January 1, 1990. The EC also decided to extend the Community's GSP Treatment to products from Hungary during 1990, and to suspend the application of all non-Hungary specific QR's to Hungarian exports to the EC, except for Spain and Portugal, for the same period.

[13] See *Official Journal of the European Communities*, No. L 390, p. 22 (Dec. 30, 1989).

[14] For further detail see, *European Report*, No. 1550, "Special Feature: EEC Relations With the Countries of Eastern Europe," at 2.

[15] *Special Feature*. PHARE, Poland Hungary Aid for Restructuring of Economies, is a program designed by the Group of 24 to coordinate economic aid to Hungary and Poland.

Agreement

Agreement Between the European Economic Community and the Hungarian People's Republic on Trade and Commercial and Economic Cooperation[16]

Article 1 of this agreement accords MFN treatment to Hungary in accordance with the GATT and the protocol for the accession of Hungary to the GATT.

Under the terms of Article 2, this agreement applies to trade in all products except for products covered in the treaty establishing the European Coal and Steel Community.

Article 3 makes clear that this agreement does not modify the terms of any existing agreements concerning trade in either textile or agricultural products, whether existing at the time of enactment of this agreement or concluded subsequently. The agreement requires negotiations on the treatment of textiles not later than 6 months before the expiration of any agreements regulating trade in textiles.

Article 4 requires each party to accord "the highest degree of liberalization," which it generally applies to third countries, regarding imports of each other's products. Under the terms of this paragraph, the EC agreed to abolish the QRs referred to in Article 4(a) of the protocol for accession of Hungary to GATT. A protocol attached to the agreement describes the timing of the gradual removal of QRs, which was to be completed no later than December 31, 1995, and sets forth a specific schedule by tariff number and by country.[17]

Article 5 states that the contracting parties will examine the possibility of increasing their mutual trade by the "abolition, reduction or other modification of tariffs" in conformity with the GATT.

Article 6 commits the parties to examine the possibility of granting each other reciprocal concessions on a product-by-product basis in the field of agriculture.

Article 7 provides for consultations in any case in which increased quantities or other conditions "cause or threaten serious injury to domestic producers of like or directly competitive products." Any consultations are to be completed in 30 days. If the parties agree that an improper situation exists, exports are to be limited or another action taken to "prevent or remedy the injury." If the parties are unable to reach an agreement as to what action to take, the contracting party requesting the consultations is "free to restrict the import of the products concerned" to the extent required to remedy the injury. The other contracting party would them be permitted to deviate from its obligations under the agreement "in respect of substantially equivalent trade."

In "critical circumstances," a party is free to take remedial action under Article 7 without consultations. Article 7 also permits any disagreement arising out of this article to be referred to GATT once the procedures in this article have been fully implemented.

The protocol concerning the abolition of QRs also has special safeguard provisions which apply when the level of increase in imports as a result of the abolition of QRs "cause or threaten to cause material injury to Community producers of like or competitive products . . ." Until the end of 1998, if the contracting parties are unable to provide a solution to such problems after 10 days of consultations, the protocol gives the EC the right to maintain a QR at an annual level not lower than the level of trade already achieved in the normal course of trade prior to the consultations. In such circumstances, Hungary will not have the right to resort to retaliatory action under Article 7(5).

Article 8 requires the parties to inform each other of any change in their tariff or statistical nomenclature or any other decision concerning the classification of products covered by this agreement.

Article 9 addresses the issue of resolution of private commercial disputes. Each of the contracting parties agrees to encourage the adoption of arbitration for the settlement of such disputes. The parties agree, further, that each private party may freely choose its own arbitrator, and that the presiding arbitrator may be a citizen of a third country. Finally, the contracting parties commit to encourage recourse to the arbitration rules of the United Nations Commission on International Trade Law, and to arbitration in any country which is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Article 10 calls for the parties to make every effort to expand bilateral trade between the two countries. The parties agree that countertrade may cause "distortions" in international trade, and such practices shall be regarded as "temporary and exceptional." The parties promise to improve business regulations and facilities for each other's firms in their respective markets.

Article 11 addresses the various means by which the parties shall foster a broader base of economic cooperation. Particular focus is to be given to the following sectors: industry; mining; agriculture; scientific research in designated sectors; energy; transportation; tourism; and environmental protection. To accomplish this cooperation, the parties commit to encourage the adoption of measures aimed at creating economic cooperation, including, exchanges of commercial information, the development of a favorable climate for

[16] *Official Journal of the European Communities*, Vol. 31, L 327, p. 3, (Nov. 30, 1988).

[17] See the description of EEC REg. No. 3381/89, described *infra*.

investment (including arrangements for the transfer of profits and repatriation of invested capital), and the organization of trade fairs and exhibits.

Article 12 states that this agreement shall not affect the powers of the Member States of the Community to enter into separate economic cooperation agreements of their own with Hungary.

Article 13 establishes a Joint Committee to ensure the proper functioning of this agreement and to recommend measures for achieving its goals.

Article 14 states that this agreement will not affect or impair the rights and obligations of the parties under the GATT and the protocol for accession to the GATT. It provides further that provisions of this agreement will take precedence over any incompatible provisions in bilateral agreements between Hungary and an EC Member State.

Under the terms of Article 15, the agreement applies to the territories in which the treaty establishing the EC applies and to Hungary.

Article 16 states that the agreement is to be in force for an initial period of 10 years.[18] The agreement is automatically renewed on an annual basis unless either party gives written notice to the contrary 6 months before it is due to expire. Provision is made for amendment of the agreement by mutual consent.

European Economic Community Regulations

Council Regulation (EEC) No. 3691/89[19]

This regulation suspends the operation of non-specific QRs with respect to Hungary and Poland for a period of 1 year, permitting free circulation of products from these two countries throughout the European Community, except for Spain and Portugal where the restrictions are to continue to apply. This regulation went into effect on January 1, 1990.

Council Regulation (EEC) No. 3381/89[20]

This regulation calls for the suspension of certain of the specific QRs applied to products from Poland and Hungary commencing on January 1, 1990, thus accelerating the previously planned phase out of specific QRs by the end of 1995.

[18] This agreement entered into force on December 1, 1988.
[19] *Official Journal of the European Communities*, Vol. 32, No. L 362, p. 1 (Dec. 12, 1989).
[20] *Official Journal of the European Community*, Vol. 32, L 326, p. 6 (Nov. 11, 1989).

EC-PEOPLE'S REPUBLIC OF CHINA

Agreement

Trade Agreement Between the European Economic Community and the People's Republic of China[21]

Under Article 1, the EC and China agree to attempt, within the framework of their existing laws, to promote and intensify trade.

Article 2 grants reciprocal MFN status in all matters regarding: customs duties and related charges; regulations and procedures concerning customs clearance and warehousing; taxes and other internal charges; and administrative formalities for the issuance of import and export licenses.

That article specifically exempts from coverage advantages accorded by either party to states which are members of a customs union or free trade area; advantages accorded to neighboring countries; and measures taken to meet the requirements of international commodity agreements.

Article 3 states that the contracting parties will make every effort to foster the harmonious expansion of their reciprocal trade.

Under the terms of Article 4,China promises to give favorable consideration to imports from the EC. The EC promises to strive for an increasing liberalization of imports from China The article states that the EC will attempt to introduce measures extending the list of imports for which requirements have been liberalized and quotas increased.

Article 5 provides for an exchange of information and "open friendly consultations" for the purpose of resolving any problems. Paragraph 2 permits either party to take measures in an "exceptional case," but promises that every effort will be made to hold consultations first.

In Article 6, the contracting parties undertake to promote visits by persons, groups and delegations from economic and trade circles, to facilitate industrial and technical exchanges and to foster the organization of fairs and exhibits.

Article 7 states that trade and services shall be undertaken at "market-related prices and rates."

Article 8 provides that payments for transactions shall be made either in currencies of the member states of the EC, renminbi or any other convertible currency accepted by the two parties to the particular transaction.

Article 9 establishes an EC-China Joint Committee for Trade to monitor the functioning of the agreement, to examine questions about the agreement's implementation, and to consider other trade related problems. The committee is to meet once a year in the absence of the need for an extraordinary meeting.

[21] *Official Journal of the European Communities*, Vol. 21, No. L 123 (May 11, 1978).

Article 10 states that the EC will apply the agreement to the territories in which the treaty establishing the EC is applied.

Article 11 states that the agreement is to be in effect for 5 years. (The agreement went into effect on June 1, 1978.) The agreement is renewable in the absence of a written denunciation 6 months prior to its expiration.

EC-POLAND

Background[22]

On September 19, 1989, the EC and Poland signed an agreement on trade and commercial and economic cooperation. It is to remain in effect for at least 5 years.

The Polish External Trade Minister has stated that Poland is willing to begin negotiations this year for a more developed form of association with the EC, which could lead to full integration into the EC. The President of the EC's Council of Foreign Ministers and his Polish counterpart have stated that the trade agreement is already outdated due to improved relations between the two sides and that strengthening the agreement to include much more economic cooperation is necessary. Poland reportedly would like to sign an agreement on scientific cooperation and lifting restrictions on Western imports of high technology equipment.

Agreement

Agreement Between the European Community and the Polish People's Republic on Trade and Commercial and Economic Cooperation[23]

Article 1 states that the parties undertake to facilitate and promote trade and economic cooperation with each other.

Title I pertains to trade and commercial cooperation and includes Articles 2-17.

Article 2 reaffirms the parties' commitment to MFN status in accordance with the GATT and the protocol for the accession of Poland.

Article 3 states that the agreement shall apply to all products except for those covered by the treaty establishing the European Coal and Steel Community.

Article 4 states that the agreement will not affect existing or future agreements on trade in textiles or agricultural products.

Article 5 states that the parties will adopt appropriate measures to attain the objectives of the agreement. They are to consider favorably suggestions made by the other party towards this end.

Article 6 states that each party "shall accord the highest degree of liberalization" to the other's imports, taking into account the GATT and the protocol for the accession of Poland. The EC will undertake to phase out QRs referred to in the protocol.

Article 7 states that the EC undertakes to eliminate QRs on imports of products listed in Annex I by the end of the first year the agreement is in force.

Article 8 states that the EC undertakes to eliminate QRs on imports of products listed in Annex II by December 31, 1992. This list may be amended.

Article 9 states that the EC will open, for 1990 and after, import quotas for products listed in Annex III and will regularly increase these quotas with a view to their elimination by December 31, 1994.[24]

Article 10 states that in 1994 the joint committee described in Article 20 will draw up arrangements applying after December 31, 1994, regarding the imports referred to in Article 9.

Article 11 states that import quotas will be opened over time so as not to hinder normal trade flows. Imports which are intended for reexport and are reexported in an unaltered state or after inward processing will not be charged against the quotas.

Article 12 states that the parties will accord each other agricultural trade concessions in accordance with the provisions set forth in Annexes IV and V. The joint committee will examine the possibility of granting new product-by-product concessions on a reciprocal basis.

Article 13 states that the parties will inform each other of changes in tariff or statistical nomenclature or of any decisions concerning the classification of products covered by the agreement.

Article 14 states that goods will be traded at market-related prices.

Article 15 pertains to market disruption and states that the parties will consult each other if any product is being imported "in such increased quantities or under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products." Consultations are to be *completed* within 30 days, unless the parties agree otherwise. If market disruption exists, the parties may limit exports or take other action to prevent or repair the injury,

[22] For more information, see *European Report*, Nos. 1558, External Relations at 10 (Jan. 27, 1990); 1554, External Relations at 12 (Jan. 13, 1990).

[23] Published in *Official Journal of the European Communities*, No. L 339, p. 1 (Nov. 22, 1989). The agreement entered into force on Dec. 1, 1989.

[24] The EC recently passed regulations accelerating the previously planned phase out of QRs and temporarily suspending the operation of certain QRs with respect to Poland and Hungary. *See* discussion at IV–6, *supra*.

including measures relating to prices. If the parties do not reach agreement, the party which requested consultations may restrict imports and the other party may deviate from its obligations respecting substantially equivalent trade. Interim protective measures may be taken without prior consultation in critical circumstances, with consultations to be held immediately thereafter.

The parties are to give priority to measures which cause the least disturbance to the functioning of the agreement. The parties may hold consultations to determine when the measures adopted shall cease to apply. If there is disagreement after exhaustion of the procedures in this article, the parties may refer the matter to the GATT.

Article 16 provides that the parties are to make every effort to promote, expand and diversify their trade on a basis of non-discrimination and reciprocity. The parties are to ensure the publication of comprehensive data on commercial and financial issues, including production, consumption and foreign trade statistics and information in accordance with the GATT. The parties are to cooperate with a view towards simplifying customs procedures and documents. The parties are to maintain and improve favorable business regulations, facilities and practices.

Article 17 provides that the parties are to encourage the adoption of arbitration for the settlement of disputes. When a dispute is submitted to arbitration, each party may freely choose its own arbitrator, who can be of any nationality, with the presiding third arbitrator or sole arbitrator being a citizen of a third state. Recourse to the Uncitral rules and arbitration by a center of a state which is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards is encouraged.

Title II, Articles 18-19, refers to economic cooperation.

Article 18 states that the contracting parties are to foster economic cooperation on as broad a base as possible. Certain broad objectives are set forth. Promotion of economic cooperation in certain specified sectors in particular is encouraged. The parties are to encourage the adoption of certain measures aimed at creating favorable conditions for economic and industrial cooperation.

Article 19 states that the agreement will not affect the powers of the EC member states to undertake bilateral activities with Poland with respect to economic cooperation.

Title III contains Article 20, which explains the nature of the joint committee. It will consist of EC and Polish representatives and will formulate recommendations. It will adopt its own rules of procedure and program of work. It will meet once a year in Brussels and Warsaw alternately, with special meetings convened upon mutual agreement at the request of either party. Each party will be chairman alternately. The joint committee may set up specialized subcommittees.

The joint committee is to ensure the proper functioning of the agreement. It is to find ways to encourage the development of trade and commercial and economic cooperation between the parties.

Title IV, general and final provisions, consists of Articles 21-24.

Article 21 states that the agreement will not affect rights and obligations under the GATT and the protocol for the accession of Poland thereto. Subject to Article 19, provisions of the agreement are to replace provisions of bilateral agreements between the EC member states and Poland when incompatible or identical.

Article 22 sets forth the jurisdiction of the agreement.

Article 23 provides for entry into force of the agreement. It is to last for 5 years and will be automatically renewed year by year unless written notice is given 6 months before expiration. The agreement may be amended by mutual consent.

Article 24 sets forth the languages in which the text of the agreement is to be drawn up.

Annex I sets forth products referred to in Article 7. Annex II sets forth products referred in Article 8. Annex III sets forth products referred to in Article 9. Annex IV lists agricultural products for which customs duties or levies on imports into the EC from Poland are to be reduced beginning January 1, 1990. Annex V lists agricultural products for which customs duties on imports into Poland from the EC are to be reduced beginning January 1, 1990. Annex VI relates to Article 16 and lists measures to be included in the favorable regulations, facilities and practices for EC firms in Poland.

In an exchange of letters, a West German import scheme is explained and agreed to. The scheme, dating from early 1980, is aimed at the potential removal of QRs on imports of certain industrial products and provides for the issuance of import licenses above and beyond quota limits on an experimental and temporary basis. Should it be necessary to discontinue the practice because of market trends, Poland will be informed immediately and prior consultation may take place.

In another exchange of letters, it was agreed that the goods listed in the annexes are to be modified so as to identify and classify products according to the Harmonized Commodity Description and Coding System.

There is a Joint Declaration concerning Article 9 which states that the obligation contained in that article to open quotas for imports from Poland does not prejudge the volume of the quotas.

The Joint Declaration on EC arrangements applicable to imports of young male bovine animals intended for fattening originating in and coming from Poland provides for a suspension of the total levy at 30 percent. The maximum number to which the suspension shall apply is to be fixed annually by the EC Council. Procedures for devising this estimate are set forth.

The declaration by Poland relating to the protocol for the accession of Poland to the GATT states that Poland wishes to renegotiate the protocol. It further states that Poland's foreign trade system has been fundamentally changed and the state's monopoly of foreign trade has been abolished. Poland intends to replace its undertaking concerning the volume of imports with tariff concessions.

EC-ROMANIA

Background[25]

Romania currently has a bilateral trade agreement with the EC that covers only industrial products. This agreement, which came into force in 1981, was renewed for another 5-year term in 1986.

Romania expressed an interest in negotiating a more comprehensive trade agreement as early as 1981. Negotiations began on a new agreement in 1986. However, negotiations were suspended, in part because of Romania's human rights record and in part because of Romania's excessive demands concerning liberalizing QRs.

In December 1989, the EC suspended the operation of the existing trade agreement and called off the meeting of the Joint EC-Romanian Economic Commission, while waiting for the political situation to improve in Romania.

In early January, Romania's Council of the National Salvation Front officially requested the establishment of diplomatic relations with the EC, and expressed the desire to renew and broaden the trade agreement. The EC Commission expressed its intent to renew the operation of the existing agreement and to seek to negotiate a broad agreement comparable to those signed with Hungary, Poland, and the Soviet Union.

Agreements

Agreement Between the European Economic Community and the Socialist Republic of Romania on Trade in Industrial Products [26]

Under the terms of Article I, this agreement applies to all products originating in Romania falling within Chapters 25 to 99 of the Customs Cooperation Council Nomenclature (principally industrial products). The agreement specifically states that it does not apply to products addressed in the Treaty establishing the European Coal and Steel Community, to textile products, or to certain additional products listed in the annex. An attached exchange of letters confirms that products within the province of the treaty establishing the European Coal and Steel Community "are or may be" covered by separate agreements.

Article 2 addresses the intention of both parties to promote and expand trade in industrial products.

Article 3 commits the Community to accord "the highest possible degree of liberalization" to imports of products from Romania. The Community also promises to make efforts towards the gradual abolition of the restrictions contained in Article 3 of the protocol of accession of Romania to GATT. Further, the Community undertakes not to introduce new QRs on imports covered by the agreement. Exchange of Letters No. 2 further addresses the issue of QRs. The letter states that the EC could not undertake to meet Romania's request to abolish the QRs referred to in Article 3 of the protocol of accession of Romania to the GATT. The EC did agree to undertake to abolish or suspend the QRs on certain products listed in Annex II. In making up that list, the EC took into account products identified by Romania as priorities for export, attached as Annex I.

Under Article 4, the Community undertakes to suspend QRs on the importation into certain of its regions of products which are of priority importance to Romanian exports. The list of products is attached in an annex. A protocol attached to the agreement addresses the operation of Article 4, setting forth specific import control procedures and procedures for the issue of export licenses by Romania.

Article 5 states that the parties will hold consultations annually to discuss whether quotas on particular products would be increased for the following year.

Article 6 addresses the exemption of various products from quotas. For example, paragraph 1 states that products to be reexported from the EC, either in an unaltered state or after processing within the EC, are not to be covered by the quotas. Similarly, products exported to Romania for processing and reimported into the EC are not to be counted against Romania's quotas.

Under Article 7, the Romanian authorities promise to ensure that goods will be delivered to the EC at "market-related prices or on terms which do not cause or threaten serious injury to producers of like or directly competing products at a comparable marketing stage."

Article 8 requires consultations if any product is being imported in such increased quantities as to "cause or threaten serious injury to domestic producers of like or directly competing products." If, after consultations, the parties acknowledge that the situation exists, the parties are to take

[25] This discussion summarizes the accounts set forth in the following sources: *European Report*, Nos. 1550, Special Feature at 4; 1551, External Relations at 8; 1553, Institutions and Policy Coordination at 1; 1556, External Relations at 4.

[26] *Official Journal of the European Communities*, Vol. 23, L 352, p. 5 (Dec. 29, 1980).

"appropriate measures" on a regional basis, including measures to address pricing practices where the injury is caused by prices which are "abnormally far below the normal level of competition."

Article 9 commits Romania to expand its imports of products originating in the European Community at least at the same rate that it increases its purchases from other members of GATT.

Under Article 10, the two parties undertake to promote visits by persons, groups and delegations involved in trade between the two parties and to facilitate the organization of trade exhibitions by each party in the territory of the other party.

Article 11 states that the "contracting parties" will agree that payments for transactions are to be made "in any convertible currency agreed by the two parties concerned in the transaction."

Article 12 states that the agreement applies to the territories to which the treaty establishing the EC applies, and to Romania.

Under the terms of Article 13, this agreement entered into force on January 1, 1981 for a period of 5 years. The agreement was to be renewed automatically in the absence of a notice of denunciation of the agreement 6 months before its expiration. The agreement was renewed for another 5 years in 1986.

Article 14 states that the agreement is to be drawn up in duplicate in Danish, Dutch, English, French, German, Italian, and Romanian.

Among the attachments to this agreement is Exchange of Letters No. 3. That exchange describes a new import scheme introduced by the Federal Republic of Germany covering almost half of the industrial products still subject to QRs by that country. The program was aimed at subsequent liberalization of QRs and was designed to assess the extent to which QRs on certain sectors might be removed. The letter states that Romania would be informed if market trends resulting from Romanian imports made it necessary to discontinue this practice.

Agreement between the European Economic Community and the Socialist Republic of Romania on the Establishment of the Joint Committee[27]

This agreement establishes a Joint Committee of representatives from the EC and Romania to examine the various aspects of trade between the parties, to make recommendations on any trade problem of mutual concern and to seek a means of avoiding difficulties in the fields of trade.

Article 3 requires the committee to meet at least once a year. Under Article 2, the committee can meet on an *ad hoc* basis when necessary to deal with special problems.

[27] *Official Journal of the European Communities*, L 352, Vol. 23, p. 2 (Dec. 29, 1989.)

Agreement amending certain Annexes to the Agreement on Trade in Industrial Products[28]

By an exchange of letters, the two parties implemented the recommendations of the Joint Committee extending the list of products in Annexes I and II to the protocol on the application of Article 4 and increasing some of the amounts set forth therein. These changes were implemented on January 1, 1982.

Similar changes were implemented in 1984[29] and 1988.[30]

EC-U.S.S.R.

Background[31]

On December 19, 1989, the European Economic Community and the European Atomic Energy Community signed an agreement with the U.S.S.R. on trade and commercial and economic cooperation. The initial duration of the agreement is 10 years.

The agreement was concluded on November 27, 1989, in Brussels, pursuant to three rounds of talks and 15 months after diplomatic relations were established between the parties. In terms of scope, this is the largest agreement ever concluded by the EC with a third country.

When the agreement was negotiated, the main differences of opinion reportedly revolved around trade cooperation. It has been stated that the U.S.S.R. wished to extend the agreement to cover textiles, steel, and coal. The final agreement, however, does not apply to trade in coal and steel, nor does it affect the provisions of the previous EC-U.S.S.R. agreement on textile trade. It has also been stated that the EC also wished the U.S.S.R. to be responsible for facilitating the activities of European businessmen in the Soviet Union. The obligations involved included access to statistical information, logistical problems, the issuance of licenses, and the availability of foreign exchange. The Soviets reportedly wished to have the costs split between the parties. The final agreement describes the economic and cooperation between the parties to achieve these ends. The agreement is the first signed with an Eastern European country to include nuclear safety and research for civilian purposes.

[28] *Official Journal of the European Communities*, L 369, Vol 24, p. 13. (Dec. 24, 1981) .

[29] *Official Journal of the European Communities*, L 53, Vol. 27, p. 1 (Feb. 24, 1984).

[30] *Official Journal of the European Communities*, L 212, Vol. 32, p. 83 (Jul. 22, 1989).

[31] For more information, see *European Report*, Nos. 1551, External Relations at 2-3 (Dec. 23, 1989); 1550, External Relations at 5-6 (Dec. 20, 1989); 1548, External Relations at 7 (Dec. 13, 1989); 1544, External Relations at 8 (Nov. 29, 1989); 1531, External Relations at 8-9 (Oct. 14, 1989).

It is envisioned that between now and 1995, the EC will lift its QRs on Soviet products in three stages. A timetable for phasing out the QRs is to be established and in June 1992, a Joint Committee will meet to review this process. It is reported that to avoid problems related to surplus production, the EC decided to keep its borders closed to Soviet farm products.

A separate textile trade and cooperation agreement was initialed on December 11, 1989. It provides for a greater than fourfold increase in the next 3 years of the textile quota granted to the Soviet Union. The parties are also negotiating a trading agreement for fisheries and textiles, which the European Commission stated should be concluded within a short period of time. In addition, the Soviets have proposed creating a cooperation structure among the European Free Trade Association (EFTA), the EC and COMECON.

In 1988, trade between the EC and the U.S.S.R. showed a deficit of 2.7 billion ECUs in favor of the Soviet Union. Of the EC member states, only West Germany exported more to the U.S.S.R. than it imported and had a positive balance of 1.3 billion ECUs in 1988.

Agreement

Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on Trade and Commercial and Economic Cooperation[32]

Title I addresses general matters. Article 1 of that title states that the parties are to use their best endeavors to facilitate and promote the harmonious development and diversification of their trade as well as the development of various types of commercial and economic cooperation. They are to consider favorable suggestions by the other party towards this end.

Title II, entitled Trade and Commercial Cooperation, consists of Articles 2-16.

Article 2 sets forth the goods to which the agreement applies. It does not affect the provisions of the EC-U.S.S.R. textile agreement of December 11, 1989, nor any subsequent agreements on trade in textile products.

Article 3 states that MFN status is to be accorded each party with regard to: customs duties and charges applied to imports and exports; customs clearance, transit, warehouses and transshipment provisions; taxes and other internal charges applied directly or indirectly to imports; methods of payment and the transfer of payments; and rules relating to the sale, purchase, transport, distribution, and use of goods on the domestic market. Exceptions are provided for advantages granted with the aim of creating a customs union or free trade area; advantages granted to particular countries in accordance with the GATT and other international arrangements favoring developing countries; and advantages granted to neighboring countries to facilitate frontier zone trade.

Article 4 states that the contracting parties undertake to allow relief from charges for goods reexported in an unaltered state or after inward processing.

Article 5 states that the U.S.S.R. is to grant to imports from the EC non-discriminatory treatment vis-a-vis the application of QRs, the granting of licenses and the allocation of currency to pay for the imports.

Article 6 provides that trade is to be conducted in accordance with the parties' regulations, unless otherwise specified.

Article 7 states that each party is to accord the highest possible degree of liberalization to the other's imports. Liberalization is to take into account certain specified conditions.

Article 8 states that the EC undertakes efforts to ensure progress towards the progressive abolition of "specific quantitative restrictions." The EC is also to undertake to eliminate, within 1 year, QRs on imports of products listed in Annex I. Lastly, the EC is to suspend, within 1 year, QRs on imports of products listed in Annex II.

Article 9 states that the joint committee will examine, before June 30, 1992, further changes to be made in import arrangements. Measures which may be considered are listed.

Article 10 states that the EC is to open import quotas for products subject to QRs. The parties are to consult each year regarding what increases can be made in the quotas and whether quotas can be opened for other products the next year.

Article 11 states that the EC undertakes to abolish by December 31, 1995 the remaining specific QRs, excepting those pertaining to sensitive products. The joint committee will determine arrangements to apply after December 11, 1995 to the imports of the sensitive products.

Article 12 provides that the imports into the EC are not to be charged against quotas when intended for reexport and actually reexported either in an unaltered state or after inward processing.

Article 13 states that the parties are to inform each other of any changes in tariff or statistical nomenclature or of decisions taken concerning the classification of products.

Article 14 states that goods are to be traded at market-related prices.

Article 15 provides that the parties are to avoid conflict situations requiring safeguard measures. If conflicts do arise, the parties are to open consultations no later than 30 days after a request.

[32] *Official Journal of the European Communities*, No. L 68, p. 3 (Mar. 15, 1990).

No action is to be taken before consultations, except under critical circumstances. This provision applies in particular to products imported "in such increased quantities or under such conditions as to cause, or threaten to cause, injury to domestic producers of like or directly competitive products." If no agreement is reached after consultations, the requesting party may restrict the imports. The other party may then deviate from its obligations respecting substantially equivalent trade. A party may act before consultations in critical circumstances, with consultations occurring immediately after taking action. The parties are to give priority to measures which cause the least disturbance to the achievement of the aims of the agreement.

Article 16 provides that the agreement is not to preclude prohibitions or restrictions based on public morality, law and order or public security, protection of life and health, protection of industrial, commercial and intellectual property, or rules relating to gold or silver or for the protection of national treasures. Such prohibitions and restrictions are not to constitute a means of arbitrary discrimination or a disguised restriction on trade. The agreement does not preclude taking action to protect "essential security interests" relating to fissionable materials, arms trafficking, or war.

Title III, Commercial and Economic Cooperation, contains Articles 17-19.

Article 17 states that the parties will make every effort to promote, expand, and diversify trade. The joint committee referenced in Article 22 is to give special importance to ways to encourage trade expansion. The parties are to undertake to facilitate exchanges of commercial and economic information on matters assisting the development of trade and economic cooperation. Particular areas are listed in which cooperation between customs services is to be facilitated. Similarly, particular areas are listed in which the parties are to undertake to facilitate trade and economic cooperation. The parties are to encourage trade compatible with the efficient conduct of international business relations. Countertrade practices are to be regarded as temporary and exceptional. However, when firms resort to countertrade operations, the parties will encourage them to furnish all relevant information to facilitate the transaction. The parties are to maintain and improve favorable business regulations, facilities and practices for each other's firms.

Article 18 addresses dispute settlement and provides for arbitration.

Article 19 states that the parties undertake to ensure adequate protection and enforcement of industrial, commercial and intellectual property rights.

Title IV, Economic Cooperation, contains Articles 20-21.

Article 20 states that the parties are to foster economic cooperation on as broad a base as possible. Particular goals of cooperation are listed, such as strengthening and diversifying economic links, and contributing to the development of the countries' economies and standards of living, *inter alia.* Specific areas in which economic cooperation is to be encouraged are listed. The parties are to encourage the adoption of certain measures to create favorable conditions for economic and industrial cooperation.

Article 21 provides that the agreement does not affect the undertaking of bilateral activities between the U.S.S.R. and the EC member states in the field of economic cooperation.

Title V, Joint Committee, consists of Article 22. EC representatives as well as representatives of the U.S.S.R. will make up the joint committee, which will adopt its own rules of procedure and work program. It will meet once a year in Brussels and Moscow alternately. Special meetings may be convened at the request of either party. The chairman will alternate between the parties. The joint committee is to ensure the proper functioning of the agreement and devise and recommend measures to achieve its objectives. It is to find ways of encouraging the development of trade and commercial and economic cooperation, and particular means of achieving these ends are listed.

Title VI, covers General and Final Provisions, and contains Articles 23-26. Article 23 provides that provisions of this agreement are to replace those of other agreements between EC member states and the U.S.S.R., to the extent provisions are incompatible or identical. Article 24 sets forth the jurisdiction of the agreement. Article 25 provides for entry into force of the agreement. It is to last 10 years, with automatic renewal year by year unless written notice of denunciation is given 6 months before expiration. The parties may amend the agreement. Article 26 lists the languages in which the agreement is to appear.

Annex I lists EC regions and products referred to in the second paragraph of Article 8. Annex II lists EC regions and products referred to in the third paragraph of Article 8. Annex III is a declaration by the U.S.S.R. on the implementation of Article 17(6). In it, the U.S.S.R. undertakes to take certain measures to facilitate commercial and economic cooperation and to encourage mutual trade. There is also a joint declaration by the EC and the U.S.S.R. concerning Article 23, which allows for bilateral agreements on trade and navigation.

In an exchange of letters, a new West German import scheme is explained and agreed to. It dates from early 1980 and is aimed at the potential removal of QRs on imports of certain industrial products and provides for the issuance of import licenses above and beyond quota limits on an experimental and temporary basis. Should it be necessary to discontinue the practice because of market trends, the U.S.S.R. will be informed immediately and prior consultation may take place.

PART 5:
COMPARISON OF EC TRADE AGREEMENTS WITH NMEs

COMPARISON OF THE TREATMENT OF CERTAIN ISSUES IN TRADE AGREEMENTS BETWEEN THE EUROPEAN COMMUNITY AND NONMARKET ECONOMY COUNTRIES

This section compares the way in which several recently negotiated bilateral trade agreements between the EC and NMEs address issues that may be relevant to the negotiation of a trade treaty with the Soviet Union. The discussion includes four EC agreements granting reciprocal MFN to the U.S.S.R. Hungary, China, and Poland. Two other EC trade agreements, with Romania and Czechoslovakia, are discussed although they do not grant MFN.[1]

These EC agreements obviously are not governed by the U.S. statutory requirements for MFN agreements with NMEs.[2] Nonetheless, we have structured this section of the report to parallel the section comparing U.S. MFN agreements, and have therefore included a description of the U.S. statutory requirements in the discussion of those issues to which such a citation is relevant. The first part of this section addresses the EC treatment of provisions that U.S. laws require in MFN agreements with most NMEs. The second part discusses issues that are addressed in some of the U.S. trade agreements with NMEs, although there is no statutory requirement in U.S. laws. Those provisions that have no counterpart in any of the U.S. trade agreements with NMEs are considered last.

A. Provisions Addressing Topics Mandated under the Trade Act of 1974

1. Duration of Agreement

Under U.S. law, bilateral commercial agreements granting MFN to an NME shall:

> (1) be limited to an initial period specified in the agreement which shall be no more than 3 years from the date the agreement enters into force, except that it may be renewable for additional periods, each not to exceed 3 years;[3]

Article 25 of the EC agreement with the Soviet Union provides for an initial term of 10 years. The agreement is then renewed automatically on an annual basis unless either party gives written notice 6 months before the expiration date.

Article 16 of the EC agreement with Hungary also provides for an initial period of 10 years. This agreement called for renewal on a basis identical to that contained in the U.S.S.R. agreement.

The initial period of the agreement with Romania, set forth in Article 13, was 5 years. Like the U.S.S.R. agreement, this agreement was to be renewed automatically on an annual basis. In practice, however, this agreement was renewed in 1986 for a second 5-year period.

Article 23 of the agreement with Poland and Article 11 of the agreement with China are essentially identical to the provision governing the duration of the agreement with Romania.

Article 14 of the agreement with Czechoslovakia provides for an initial term of only 4 years. This agreement also calls for subsequent renewal on an annual basis in the absence of 6 months notice before the expiration date.

2. National Security

A U.S. bilateral commercial agreement granting MFN treatment under section 405 of the Trade Act of 1974 must:

> provide that it is subject to suspension or termination at any time for national security reasons, or that the other provisions of such agreement shall not limit the rights of any party to take any action for the protection of its security interests.[4]

Only one of the six EC agreements with NMEs analyzed here, that with the Soviet Union, contains a clause relating to actions to be taken for national security reasons, as required for U.S. agreements. Article 16 of the EC-U.S.S.R. agreement allows prohibitions or restrictions justified on the grounds of public security, *inter alia*. Further, the agreement does not preclude taking actions justified to protect "essential security interests" relating to fissionable materials or the materials from which they are derived, relating to arms trafficking or actions taken during time of war or other emergency in international relations. Unlike the provisions in U.S. agreements addressing national security, the clause does not provide for suspension or termination of the agreement for national security reasons.

3. Safeguard Provisions

All U.S.. bilateral commercial agreements negotiated under section 405 of the Trade Act of 1974 must contain a safeguard provision

[1] We have included these bilateral trade agreements that did not grant MFN because they do address most of the other subjects governed by the MFN agreements.

[2] As discussed previously in this report, U.S. MFN agreements with most NMEs are subject to the requirements of Section 405 of the Trade Act of 1974, 19 U.S.C. § 2435.

[3] 19 U.S.C. § 2435(b)(1).

[4] 19 U.S.C. § 2435(b)(2).

(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 market disruption.[5]

Each of the EC agreements analyzed here has a safeguard provision. Article 15 of the EC agreement with the Soviet Union addresses the safeguards issue. That article provides that it will apply in situations in which a product is being imported "in such increased quantities or under such conditions as to cause, or threaten to cause injury to domestic producers of like or directly competitive products." There is no standard for determining the level of injury that must be sustained or threatened before these provisions become operative. The article requires consultations before either party takes any action unless critical circumstances exist. If the parties are unable to reach an agreement after consultations, the party which requested the consultations is free to restrict the imports of the product concerned for as long as the party deems necessary to remedy the problem. The other party is permitted to "deviate from its obligations . . . in respect of substantially equivalent trade." Finally, the article provides that the contracting parties should try to select the remedial measures which would cause the "least disturbance" to the overall goals of the agreement.

Article 10 of the agreement with Czechoslovakia is similar in content to the provision described above. One important difference is the use of the word "serious" to describe the level of injury that must be shown in order to trigger the procedures in the safeguards article. This is the same standard of injury required under article XIX of the GATT. Another distinction is the additional requirement that the parties complete consultations within 30 days of the initial request. This article also specifically states that a party may take action with respect to the price of the goods causing injury as a means of curing a problem, in addition to restricting entry of goods, where such an action could be an effective remedy. The article calls for consultations, if necessary, to determine when it is appropriate to terminate whatever remedial actions the parties have taken.

[5] 19 U.S.C. § 2435((b)(3). Congress authorized the President to initiate consultations with a country which is a party to such an agreement upon determining that there are "reasonable grounds to believe..." that market disruption exists. 19 U.S.C. § 2436. As discussed in the section of this report relating to U.S. trade laws, the term "safeguard actions" in this context generally refers to actions that a signatory government may take to restrict imports from another signatory country when it finds that imports from the latter are causing or threatening injury to a domestic industry. See footnote in safeguards discussion of section analyzing U.S. trade agreements with NMEs.

Article 7 of the agreement with Hungary and Article 15 of the agreement with Poland are identical to the agreement with Czechoslovakia, except for an additional provision permitting either party to refer a disagreement to the GATT, in accordance with the protocol for accession of to the GATT, after all the applicable procedures of the bilateral trade agreement have been fully implemented.

A protocol to the Hungary agreement concerning the abolition of QRs also has special safeguard provisions which apply when the level of increase in imports as a result of the abolition of QRs "cause or threaten to cause *material* injury to Community producers of like or competitive products . . ." (emphasis added). Until the end of 1998, if the contracting parties are unable to provide a solution to such problems after *ten* days of consultations, the protocol gives the EC the right to maintain a QR at an annual level not lower than the level of trade already achieved in the normal course of trade prior to the consultations. In such circumstances, Hungary would not have the right to resort to retaliatory action under Article 7(5).

Article 8 of the agreement with Romania also calls for consultations if any product is being imported "in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers of like or directly competing products." These consultations are to be held "with due regard for the fundamental aims of the agreement and the general principles of international law," and like the Czechoslovakia agreement, are to be completed within 30 days. The article contains a broad provision permitting the contracting party requesting the consultations to take whatever actions it deems necessary to remedy the problem if the consultations are not successful. In such circumstances, the article permits the other party to "waive its obligations towards the first party in respect of substantially equivalent trade." Provisional action without consultation is permitted in "exceptional cases."

The safeguard provisions in the agreement with China, set forth in Article 5, are more general. This article promises only "open friendly consultations" to resolve any problems. It also provides that either party may take preventative measures in an "exceptional case," but promises that every effort will be made to hold consultations prior to taking any action.

4. Intellectual Property Protection

United States law requires that MFN agreements negotiated with most NMEs afford certain intellectual property protection, as follows:

> if the other party to the bilateral agreement is not a party to the Paris Convention for the Protection of Industrial Property, provide rights for United States nationals with respect to patents and trademarks in such country not less than the rights specified in such convention . . . ;[6]

[6] 19 U.S.C. § 2435(b)(4).

> if the other party to the bilateral agreement is not a party to the Universal Copyright Convention, provide rights for United States nationals with respect to copyrights in such country not less than the rights specified in such convention . . . ;[7]
>
> provide arrangements for the protection of industrial rights and processes;[8]

Only two of the four EC MFN agreements, and neither of the other two EC trade agreements, address intellectual property protection. Article 19 of the U.S.S.R. agreement states that the parties are to undertake to ensure adequate protection and enforcement of industrial, commercial and intellectual property rights. They are to ensure the honoring of their international commitments in the field of industrial, commercial and intellectual property rights. Lastly, they are to encourage appropriate arrangements between EC and Soviet undertakings and institutions to accord "due protection" of industrial, commercial and intellectual property rights.

An annex to the Hungary agreement relating to Article 10 addresses intellectual property protection in a cursory fashion. Article 10 states that the parties are to maintain and improve favorable business regulations and facilities for each other's firms or companies as provided in the annex. The annex includes among the regulations and facilities referred to the legal protection by Hungary of intellectual property rights for both products and processes in accordance with two international conventions to which Hungary is a signatory.

5. Commercial Dispute Settlement

Each U.S. bilateral agreement negotiated pursuant to section 405 must contain a provision setting forth "arrangements for the settlement of commercial differences and disputes . . ."[9]

Three of the EC MFN agreements, and neither of the other EC-NME trade agreements, contain a provision providing for the settlement of commercial differences and disputes.

The U.S.S.R. agreement with the EC provides for the encouragement of arbitration to settle commercial disputes, within the limits of the parties' respective powers, in Article 18. Each party may choose its own arbitrator regardless of nationality. Similarly, the presiding third arbitrator or sole arbitrator may be a citizen of a third state. The foregoing provisions do not apply if the rules of the arbitration center provide otherwise, however. The parties are to recommend that their "economic operators" choose by mutual consent the law applicable to their contracts. Recourse to the United Nations Commission on International Trade Law rules is encouraged, as well as arbitration by any center of a state which is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

Article 9 of the Hungary agreement is identical to the U.S.S.R. agreement, but for the fact that it omits two clauses. The first states that each party may choose its own arbitrator and sets forth the selection procedures, *except* when the rules of the arbitration center provide otherwise. The second clause which is present in the U.S.S.R. agreement, but not in the Hungary agreement, pertains to the choice of law.

Article 17 of the Poland agreement is identical to the comparable provision in the Hungary agreement.

6. Promotion of Bilateral Trade

A U.S. bilateral trade agreement negotiated under section 405 must

> provide arrangements for the promotion of trade, which may include arrangements for the establishment or expansion of trade and tourist promotion offices, for facilitation of activities of governmental commercial officers, participation in trade fairs and exhibits, and the sending of trade missions, and for facilitation of entry, establishment, and travel of commercial representatives.[10]

All six EC agreements analyzed here contain clauses similar to that required in U.S. MFN agreements with NME countries regarding the promotion of trade.

Article 6 of the China agreement with the EC provides that the parties undertake to promote visits by persons, groups and delegations to facilitate industrial and technical exchanges and contacts connected with trade. They are also to foster the organization of fairs and exhibitions by both sides and the relevant provision of services.

The comparable provision in the U.S.S.R. agreement is more detailed. Article 17 states that the parties are to make every effort to promote, expand and diversify their trade. The Joint Committee (established by Article 22) is to "attach special importance" to ways to encourage trade expansion. The parties are to facilitate the exchange of commercial and economic information on all matters assisting the development of trade and economic cooperation; this includes the publication of data on commercial and financial issues. The parties are to facilitate cooperation between their customs services. They are to facilitate trade and economic cooperation by encouraging trade promotion activities in favor of their enterprises and by providing the other party's natural and legal persons with guarantees of individual and property rights, including access to the courts. They are also to facilitate trade and economic cooperation by encouraging contacts between the business associations of the EC and the U.S.S.R. Forms of trade compatible with the efficient conduct of

[7] 19 U.S.C. § 2435(b)(5).
[8] 19 U.S.C. § 2435 (6).
[9] 19 U.S.C. § 2435(b)(7).
[10] 19 U.S.C. § 2435(b)(8).

international business relations are to be encouraged, and countertrade practices are to be regarded as temporary and exceptional. Finally, the parties are to maintain and improve favorable business regulations, facilities and practices for each other's firms or companies. Article 20 of the U.S.S.R. agreement states, in part, that the parties are to encourage and facilitate trade promotion activities, such as the organization of seminars, fairs and exhibitions.

Article 22 of the U.S.S.R. agreement, which discusses the Joint Committee, sets forth particular ways in which it is to encourage the development of trade and economic cooperation. These primarily involve the exchange of information, examination of situations and making of recommendations. Absent is any requirement concerning the establishment or expansion of trade and tourist promotion offices or the facilitation of activities of governmental commercial officers. Annex III to the agreement, however, does state that the U.S.S.R. will undertake, within the limits of its powers: the facilitation of the entry, stay and movement of EC businessmen in the U.S.S.R.; facilitation of direct access of EC businessmen to business contacts and end-users in the U.S.S.R.; facilitation of the non-discriminatory establishment and operation of representative offices of EC firms in the U.S.S.R.; facilitation of non-discriminatory free recruitment of local staff; non-encouragement of barter transactions by firms in the U.S.S.R.; and centralization of licensing in the U.S.S.R. within one state body to ensure the proper implementation of the provisions of Article 5, which pertains to the non-discriminatory treatment of EC imports by the U.S.S.R.

Like the comparable provision in the U.S.S.R. agreement, Article 10 of the Hungary agreement states that the parties are to make every effort to promote, expand and diversify their trade. Unlike the U.S.S.R. agreement, the Hungary agreement states that the foregoing is to occur on the basis of non-discrimination and reciprocity. Also, as stated in the U.S.S.R. agreement, the Hungary agreement provides that the Joint Committee will attach special importance to examining ways to encourage the reciprocal and harmonious expansion of trade. Both agreements also provide that the publication of data is to be ensured, although the Hungary agreement provides that this is to be done in accordance with Article X of the GATT. Countertrade practices are to be regarded as temporary and exceptional and the parties are to maintain and improve favorable business regulations and facilities for each other's firms, as is stated in the U.S.S.R. agreement. Article 11 states, in part, that the parties are to encourage the organization of seminars, fairs, business weeks or exhibitions, as well as exchanges and contacts between persons and delegations representing commercial or other relevant organizations. Article 13, which discusses the Joint Committee, is almost identical to the comparable provision in the U.S.S.R. agreement; however, the U.S.S.R. agreement contains two clauses which are absent from the Hungary agreement. These require the Joint Committee to exchange information about the parties' laws, regulations and formalities and to "examine the situation" regarding the award of contracts for the supply of goods or services. An annex to the agreement specifies the regulations and facilities referred to in Article 10.

Article 16 of the Poland agreement is quite similar to the comparable provision in the Hungary agreement, although the reference to countertrade is absent and there is an additional statement that the parties are to cooperate in simplifying customs procedures and documents. Article 18 states, in part, that the parties are to facilitate exchanges and contacts between persons and delegations representing commercial or other relevant organizations and to encourage business contacts, as well as organize seminars, fairs or exhibitions, symposia, and business weeks. That portion of Article 20 discussing the Joint Committee's role in developing trade is virtually identical to the comparable provision in the Hungary agreement, with only minor word changes. Annex VI specifies the business regulations, facilities and practices referred to in Article 16.

Article 11 of the Czechoslovakia agreement is quite different from the trade promotion articles of the preceding agreements. It states generally that Czechoslovakia is to take appropriate measures to encourage imports from the EC. These measures are to be aimed, in part, at creating conditions facilitating EC business operations in Czechoslovakia, especially closer contacts between representatives and experts of both parties' firms. They are also to focus on encouraging and facilitating trade promotion activities in Czechoslovakia, such as the organization of fairs and exhibitions, and the promotion of visits by persons, groups and delegations involved in trade between the parties.

The Romania agreement also differs from the MFN agreements. Article 2 provides that the parties are to make every effort to promote and expand their trade in industrial products. The Joint Committee is to attach special importance to examining ways to encourage the reciprocal and harmonious expansion of trade. Article 9 states that Romania will expand and diversify its imports from the EC at least at the same rate as its purchases from the other contracting parties to the GATT. Article 10 states simply that the parties are to undertake to promote visits of persons, groups and delegations and to encourage and facilitate the organization of fairs and exhibitions.

7. Bilateral Review of the Operation of the Agreement

Each U.S. bilateral trade agreement negotiated pursuant to section 405 must contain a provision ". . . for consultations for the purpose of reviewing the operation of the agreement and relevant aspects of relations between the United States and the other party . . ."[11]

The EC agreements have provided a joint commission mechanism for reviewing the operation of the agreements which is very similar to that which has been developed to meet the U.S. statutory requirements. Article 22 of the agreement with the Soviet Union establishes a joint committee, charged, *inter alia*, with ensuring the proper functioning of the agreement and with recommending measures for achieving its goals. The article provides that the committee will meet once a year, unless additional special meetings are convened by mutual consent. The article also states that the chairmanship of the committee will alternate between the two countries.

Article 20 of the agreement with Poland and Article 13 of the agreement with Hungary contain provisions establishing a joint committee which are identical to the provisions in the U.S.S.R. agreement.

Article 12 of the agreement with Czechoslovakia contains provisions establishing a body for "regular consultations." One of the tasks of this body is to "ensure the proper functioning of the agreement. This article also provides for an annual meeting, unless there is a mutual agreement to convene a special meeting. Like the three agreements described above, this article also requires the chairmanship to be alternated between representatives of the two contracting parties.

Article 9 of the China agreement establishes an EC-China Joint Committee for Trade to monitor the functioning of the agreement, to examine questions about the agreement's implementation, and to consider other trade-related problems. The committee is to meet once a year in the absence of the need for an extraordinary meeting.

The EC and Romania entered into an entirely separate agreement governing the establishment of a joint committee. The committee's responsibilities, set forth in Article 1 of that agreement, include seeing that all agreements between the parties function properly. This article also requires that the joint committee "meet at the highest possible level . . ." Like the other agreements, Article 3 of this agreement calls for an annual meeting unless the parties mutually agree on a need for an interim special meeting.

B. Other Issues Addressed in Some U.S. MFN Agreements, Although Not Statutorily Required

1. Balance of Economic Interests

Section 405 allows for renewal of U.S. trade agreements entered into under this statute only if

(A) a satisfactory balance of concessions in trade and services has been maintained during the life of the agreement and (B) the President determines that actual or foreseeable reductions in U.S. tariffs and nontariff barriers to trade resulting from multilateral negotiations are satisfactorily reciprocated by the other party.[12]

The United States has sometimes included provisions on these subjects in MFN agreements with NMEs. The EC agreements analyzed here do not contain any explicit provisions on these subjects, but do make some general references to these subjects.

The China agreement with the EC does state, in Article 3, that the parties will make every effort to help, each by its own means, to attain a balance in their reciprocal trade.

Article 22 of the U.S.S.R. agreement states that one of the tasks of the joint committee is to examine various aspects of trade between the parties, including the trade balance.

Article 12 of the Czechoslovakia agreement also states that one of the tasks of the "consultation body" (similar to the joint committee) is to examine various aspects of the development of trade, including the trade balance situation.

Article 6 of the Hungary agreement states that the parties are to examine via the joint committee the possibility of granting each other reciprocal concessions on a product-by-product basis in the trade in agricultural products. Article 13 of the Hungary agreement, which provides that thejJoint committee is to examine the trade balance, is virtually identical to the comparable provision in the U.S.S.R. agreement.

Article 20 of the Poland agreement, relating to the joint committee, is virtually identical to the above provisions with respect to the requirement of the Joint Committee to examine the trade balance.

Article 1 of the Romania agreement on the establishment of the joint committee states that one of its tasks is to examine the trade balance.

2. Scope of Agreement

The U.S.S.R. agreement is one of the broadest EC-NME trade agreements. Article 3 of that agreement grants reciprocal MFN status with respect to: customs duties and other related charges; provisions relating to customs clearance and warehousing; and taxes and other internal charges applied to imported goods. The provisions specifically do not apply to advantages granted with the aim of creating a customs-union, advantages granted to particular countries in accordance with the GATT, and advantages granted to neighboring countries.

[11] 19 U.S.C. § 2435(b)(9).

[12] 19 U.S.C. § 2435(b)(1)(A), (B).

Under Article 2, this agreement applies to trade in all goods, except for products covered by the treaty establishing the European Coal and Steel Community.[13]

Article 2 of the agreement with Poland grants reciprocal MFN status in accordance with the GATT and the protocol for the accession of Poland thereto. Like the U.S.S.R. agreement, Article 3 of this agreement makes it applicable to trade in all products except for those covered by the treaty establishing the European Coal and Steel Community.

Articles 1 and 2 of the agreement with Hungary contain provisions identical to those described in the Poland agreement.

Article 2 of the agreement with China also grants reciprocal MFN status in all matters regarding: customs duties and related charges; regulations and procedures concerning customs clearance and warehousing; taxes and other internal charges; and administrative formalities for the issuance of import and export licenses. The agreement does not limit the goods to which this agreement applies.

As noted previously, the agreement with Czechoslovakia does not involve a grant of MFN status. Further, under the terms of Article 1, it is limited in scope to trade in industrial and agricultural goods.

Like the agreement with Czechoslovakia, the current agreement with Romania does not grant MFN status. It is even narrower in scope than the Czechoslovakia agreement, covering principally industrial products in accordance with the terms of Article 1. Like the agreements with the Soviet Union, Poland, and Hungary, it also specifically excludes from coverage products addressed in the treaty establishing the European Coal and Steel Community, textile products, and certain additional products listed in Annex I.

3. Financial Provisions

The U.S. MFN agreements analyzed in this report contain clauses referring to the type of currency in which payment is to be made, rates of exchange and other matters relating to finance.

Article 8 of the EC-P.R.C. agreement states that payments are to be made, in accordance with the parties' existing laws and regulations, in currency of the EC member states, Renminbi[14] or any convertible currency accepted by the parties.

Article 11 of the Romania agreement states that payments are to be made, in accordance with the parties' laws and regulations, in any convertible currency agreed to by the parties.

4. Economic Cooperation Provisions

Three of the EC MFN agreements (those with the U.S.S.R., Poland, and Hungary) contain quite detailed provisions relating to economic cooperation and steps the parties are to take in order to expand trade relations. The provisions are similar to those concerning the promotion of bilateral trade, but have a slightly different focus.

Article 20 of the U.S.S.R. agreement states generally that the parties are to foster economic cooperation on as broad a base as possible in all fields deemed to be in their mutual interest. Specific objectives are listed to fulfill this obligation. They include: strengthening and diversifying economic links between the parties, taking into consideration the complementary nature of their economies; contributing to the development of their respective economies and standards of living; opening up new sources of supply and new markets; encouraging cooperation between economic operators, with a view to promoting investment and joint ventures, licensing agreements, and other forms of industrial cooperation to develop their respective industries; encouraging participation of small and medium-sized enterprises in trade and cooperation; encouraging environmentally sound polices; and encouraging scientific and technological progress.

To achieve these objectives, the parties are to encourage economic cooperation in specific areas of mutual interest, which include: statistics; standardization; industry; raw materials and mining; agriculture; environmental protection and the management of natural resources; energy (including nuclear energy); science and technology; economic, monetary, banking, insurance and other financial services; transport, tourism, and other service activities; and management and vocational training.

Specific measures are then listed in the U.S.S.R. agreement to give effect to the objectives, i.e. facilitating exchanges and contacts between persons and delegations representing commercial, economic, business or other appropriate organizations; encouraging and facilitating trade promotion activities, such as the organization of seminars, fairs and exhibitions; facilitating the conduct of market research and other marketing activities on their respective territories; promoting activities involving the provision of technical expertise in appropriate areas; promoting the

[13] When the treaty was signed in 1951, "coal and steel," defined in Annex I, included, *inter alia*, fuels (such as hard coal, coke, run-of-mine brown coal), raw materials for iron and steel production, pig iron, and end products of iron, ordinary steel or special steel. Article 81 of the treaty provides for additions to these lists by unanimous decision of the Community's Special Council of Ministers.
A separate textile trade and cooperation agreement between the EC and U.S.S.R. was initialed on December 11, 1989, and negotiations are underway for more trading agreements for fisheries and textiles. *European Report*, No. 1544, External Relations at 8 (Nov. 29, 1989).

[14] "Renminbi," which translates roughly to "people's currency," is the currency of China, the basic unit of which is the yuan. A yuan equals 100 cents or one dollar.

exchange of information and contacts on scientific subjects of mutual interest; and fostering a favorable climate for investment, joint ventures and licensing arrangements.

Article 18 of the Poland agreement is similar, although the terminology varies in some places. One objective that is stated differently is the *reinforcement* rather than strengthening of economic links. Cooperation between *firms* is encouraged, rather than between economic operators. Missing are the objectives to encourage the participation of small and medium-sized enterprises in trade and cooperation and to encourage environmentally sound polices. Added is the objective of supporting structural changes in the Polish economy to increase and diversify trade in goods and services with the EEC.

With respect to the provision describing how the objectives are to be achieved, the Poland agreement notes specifically that *industry* includes petrochemicals and shipbuilding and ship repair. In the U.S.S.R. agreement, *agriculture* is described as including the food-processing industries, while the Poland agreement describes it as including agro-industries and agricultural machinery. The Poland agreement includes simply mining, whereas the U.S.S.R. agreement combines raw materials with this term. Unlike the U.S.S.R. agreement, the Poland agreement includes telecommunications as well as health (including medical equipment). The Poland agreement also lists scientific research, while the U.S.S.R. agreement lists nuclear research under the area of science and technology. The Poland agreement also lists vocational training and management training, in banking and insurance, *inter alia*, while the U.S.S.R. agreement simply lists management and vocational training as one area while limiting any reference to banking and insurance to financial services.

In terms of giving effect to the objectives, the Poland agreement lists facilitating the exchange of commercial and economic information, which is not listed in the U.S.S.R. agreement. The Poland agreement lists *developing*, rather than fostering, a favorable climate for investment. With respect to facilitating exchanges and contacts between persons and delegations, the Poland agreement specifies the setting up of the appropriate infrastructure. The Poland agreement adds symposia and business weeks to the list of functions to be organized. While the U.S.S.R. agreement lists the promotion of the exchange of information and contacts on scientific subjects of mutual interest, the Poland agreement adds to it encouraging, according to law and policy, joint research and development activities, the exchange of information and contacts between research and educational establishments and businesses. Lastly, the Poland agreement lists facilitating cooperation between businesses on the markets of third countries, which is absent from the U.S.S.R. agreement.

Article 11 of the Hungary agreement is akin to the comparable provision in the Poland agreement. In stating the objectives, the Poland agreement uses the term "economic operators" rather than "firms."

In listing ways to achieve the objectives, the Hungary agreement, like the U.S.S.R. agreement, uses the term industry; like the Poland agreement, it uses the term mining. Agriculture is listed as including agro-industries. Scientific research, transport, tourism, and environmental protection and the management of natural resources are listed without further description. Energy is listed, however, as including the development of new sources of energy. No other areas are listed.

In describing ways to give effect to the objectives, the facilitation of exchanges of commercial and economic information is to occur on all matters which would assist the development of trade and economic cooperation. Functions to be organized are seminars, fairs, business weeks or exhibitions. The exchange of scientific information is to occur according to law and policy.

Article 11 of the Czechoslovakia agreement incorporates its economic cooperation provisions within a listing of measures to be taken to encourage imports. It simply includes the creation of conditions facilitating the activities in Czechoslovakia of EC business operators; the encouragement and facilitation, notably by practical measures, of trade promotion activities in Czechoslovakia, such as the organization of fairs and exhibitions; and the promotion of visits by persons, groups and delegations involved in trade between the parties.

The China agreement has no provision addressing economic cooperation.

The only reference in the Romania agreement to economic cooperation arrangements is in Article 9, which provides that Romania is to supply the EC with information on annual economic development programs and in Article 10, which concerns the promotion of visits by persons, groups and delegations and the organization of fairs and exhibitions.

5. Reconciliation With Other Multilateral and Bilateral Agreements

Article 23 of the agreement with the Soviet Union sets forth the basic principle that the provisions of this agreement replace provisions in any bilateral agreements between individual EC member states and the Soviet Union, to the extent that the individual agreements are incompatible with the EC-wide agreements. A Joint Declaration attached to this agreement states that the bilateral agreements referred to in this article may include agreements on trade and navigation.

Nonetheless, under Article 21, member states are free to enter into new economic cooperation agreements with the Soviet Union. Further, Article 2 notes that this agreement shall in no way affect the operation of the EC-U.S.S.R. agreement on trade in textile products, or any exchange of letters or other arrangements concluded subsequently in connection with textile trade.

Articles 21 and 19 of the agreement with Poland set forth similar principles. The provisions of the EC agreement are to prevail over any inconsistent provisions in an individual member state's bilateral agreement. The member states do, however, retain the right to enter into new economic cooperation agreements. This agreement contains an additional provision, in Article 21, stating that the agreement will not affect or impair the rights and obligations of the parties under the GATT and the protocol for the accession of Poland to the GATT. Like the U.S.S.R. agreement, this agreement specifies, in Article 4, that it is not intended to alter the effect of existing or subsequently negotiated provisions in agreements governing trade in textiles. Article 4 of this agreement contains an additional caveat that it is not intended to affect specific agreements covering agricultural products or any successor agreements.

Articles 3, 12, and 14 of the agreement with Hungary are identical in content to the provisions in the EC agreement with Poland described above.

The Czechoslovakia agreement does not contain any comparable provisions, although Article 1 does note that the provisions apply neither to trade covered by the treaty establishing the European Coal and Steel Community, nor to trade in textile products.

Like the Czechoslovakia agreement, the agreement with Romania does not contain any provisions concerning the reconciliation of any inconsistencies between this agreement and bilateral agreements with the member states. An attached exchange of letters does note that the agreement does not apply to trade covered by the treaty establishing the European and Steel Community.

C. Subjects Not Included in U.S. MFN Agreements with NMEs

1. Quantitative Restrictions[15]

In the nature of intraborder controls, the 12 EC member states impose over 1,000 QRs. They are generally in the form of quotas or voluntary restraint agreements aimed at state-trading nations and Asian exporters. They cover a wide variety of products, ranging from silverplated spoons to textiles to automobiles.

Many QRs were maintained by the member states when they acceded to the EC and were grandfathered in following accession. Others were linked directly to agreements concluded by the EC Commission, such as the Multifiber Arrangement and the Generalized System of Preferences. Currently, the countries with the greatest number of residual quotas are Italy, France and Spain.

The EC intends to remove all border controls between the member states by 1992, which means that the EC plans to eliminate all member state QRs by then. The EC is expected to transform some QRs into EC-wide quotas or other protective measures, especially in sensitive areas. It appears that an EC-wide quota is likely to be imposed for automobiles, and EC-wide measures may be imposed for shoes and consumer electronics.

The six EC trade agreements discussed in this study call for the elimination of many existing national QRs. In fact, the agreements deal in greater detail with this topic than with any other. While QRs are not addressed in the U.S. agreements, the manner in which the EC handles them may impact on the volume of trade between the United States and an NME as well as the negotiation of any concessions.

Articles 8-12 of the U.S.S.R. agreement, and an attached letter from the EC, address the treatment of QRs that apply to products from the Soviet Union. Under Article 8, the EC promises to undertake to ensure progress in the abolition of "specific" QRs which concern products other than those to which QRs are applied under EC Regulation No. 288/82,[16] to eliminate certain QRs in force in certain regions as specified in Annex I, and to suspend within one year the application of QRs on certain imports in certain regions, as specified in Annex II. Article 9 states that the parties will examine what changes can be made to QRs not listed in either Annex no later that June 30, 1992. Article 10 promises that the EC will open some import quotas of interest to the Soviets each year, and that the Parties will enter into consultations to determine what changes in QRs can be made. All QRs are to be eliminated by December 31, 1995, except for "a limited number of products which might be deemed sensitive at that time." Article 12 provides that products intended for re-export, either in an unaltered state or after "inward processing," will not be charged against the quotas. In an attached letter, the EC describes a new import scheme covering almost half of the industrial products instituted by the Federal Republic of Germany ("FRG") in an effort to liberalize import quotas for that country. The purpose of this program is to permit the FRG to consider in what product areas it can liberalize QRs. The letter states that the U.S.S.R. will be informed if,

[15] For more information on quantitative restrictions, see *The Effects of Greater Economic Integration Within the European Community on the United States*, USITC Pub. No. 2204 (July 1989), chapter 11, and the subsequent update of this report to be published in March 1990.

[16] Council Regulation No. 288/82 sets forth common rules for imports other than those from state-trading countries (*i.e.*, NMEs), as well as for imports other than certain textile products.

as a result of U.S.S.R. exports, market trends make it necessary to discontinue this practice.[17]

Articles 7-11 of the agreement with Poland, and an attached separate agreement, address the subject of QRs. Although the timing of the elimination of QRs and the treatment of specific products may differ, the basic scheme is similar to that in the U.S.S.R. agreement. Under Article 7, the EC pledges to eliminate within 1-year QRs on those products and in those regions listed in Annex I.[18] Under the terms of Article 8, the EC makes a similar undertaking by the end of 1992 with respect to those imports listed in Annex II. Article 9 requires the EC to open and increase QRs on products listed in Annex III annually, with a view to the elimination of all QRs on these items, subject to certain exceptions, by the end of 1994. Article 10 gives the responsibility of drawing up arrangements applicable to those excepted products after 1994. Article 11 contains a provision similar to Article 12 of the U.S.S.R. agreement, stating that products intended for reexport will not be included in the quotas. There is also a separate agreement incorporating a letter from the EC addressing the new German liberalization program, identical to that attached to the U.S.S.R. agreement.

Article 4 of the agreement with Hungary, together with a separate protocol attached to the agreement, contains the provisions concerning QRs. Article 4 states that the EC will abolish the QRs referred to in Article 4(a) of the protocol for accession of Hungary to the GATT in accordance with that protocol. The agreement, like the U.S.S.R. and Poland agreements, contains a schedule for phasing out certain QRs. The protocol attached to the EC agreement sets forth a schedule for removal of certain QRs on an annual basis as specified in Annex A and B. The EC undertook to abolish all restrictions referred to in the protocol for accession to the GATT by December 31, 1995.

The EC has already amended the provisions in the agreements with Poland and Hungary regarding the schedule for the abolition of QRs. EEC Regulation 3381/89 suspends certain of the specific QRs applied to products from Poland and Hungary, thus accelerating the previously planned phase-out of specific QRs by the end of 1995. Under EEC Regulation No. 3691/89, the operation of non-specific QRs with respect to both countries has been suspended for a period of 1 year, except for products destined for Spain or Portugal.

Articles 4 through 7 of the agreement with Czechoslovakia, together with an attached letter from the EC, address the subject of QRs. This agreement also follows the pattern of scheduling a phased removal of QRs. Under Article 4, the EC commits to eliminating certain QRs in certain regions, as specified in Annex II. Article 5 guarantees the suspension of the application of other QRs in certain regions, as specified in Annex II. Article 6 requires annual consultations to determine what increases in quotas can be made for the following year. Finally, like the other agreements, Article 7 provides that products intended for reexport either in an unaltered state or after inward processing will not be counted against the quota. This agreement also has the Attachment concerning the new import liberalization program in the FRG.

Articles 3-6 of the agreement with Romania, and Exchange of Letters No. 3, address the EC's commitment to reduce certain QRs on products from Romania. Article 3 contains a provision similar to that in Article 4 of the agreement with Hungary committing the EC to make "substantial progress" towards the gradual abolition of the restrictions referred to in Article 3(a) of the protocol of accession of Romania to the GATT. In an attached exchange of letters, however, the EC notes that it cannot undertake to meet this obligation immediately. Instead, Romania submitted a list of products viewed as a priority for removal of QRs, which is attached as Annex I. Annex II, also attached to the exchange of letters, contains a list of those products on which the EC committed to either abolish or suspend the applicable QRs. The EC also promises not to introduce any new QRs on products imported from Romania. Article 4 states that the EC would suspend QRs on the products being imported into certain regions, as specified in the attached Protocol. Under the terms of Article 5, the parties agree to consult each year to determine what quotas can be increased during the following year. Article 6 has a provision like the other agreements, stating that products imported into EC with the intent to re-export them will not be charged against the quota.

Article 4 of the EC's agreement with China promises only that the EC will attempt to extend the list of imports for which requirements have been liberalized and quotas increased.

2. Tariff Provisions

Some of the EC agreements analyzed here contain tariff provisions that find no parallel in the U.S. MFN agreements. These provisions include a requirement to provide information relating to changes in the tariff or statistical nomenclature or classification of products, a modification of a provision concerning the tariff and statistical nomenclature, and the examination of ways to

[17] The new import scheme, called "Testausschreibung," was implemented in 1980. An exchange of letters on the scheme is attached to the EC's agreements with Czechoslovakia, U.S.S.R., Poland, and Romania. The scheme does not cover QRs applying to textile and steel products. In determining which QRs might be removed in the future, the "particular importance" that the NME attaches to the expansion of economic relations as well as the NME's contractual relations with the EC will be taken into consideration.

[18] These products vary widely. They include chemicals, glassware, engines, batteries, radio broadcast receivers, and television receivers, among others. The goods to which QRs apply vary from country to country because, as explained in the text above, many were maintained by the EC member states when they acceded to the EC and were grandfathered in thereafter.

modify tariffs in conformity with the GATT. Not every agreement contains all of these clauses, however.

Article 2 of the China agreement provides that the parties are to accord each other MFN treatment in all matters regarding customs duties and charges of all kinds applied to products which are imported, exported, reexported, or in transit, including the procedures for collection, except under certain circumstances.

Article 3 of the U.S.S.R. agreement is similar albeit simpler, granting MFN treatment respecting customs duties and charges applied to imports and exports, including the method for collecting them. Article 4 states that the parties will allow relief from duties, taxes and other charges and grant licenses in respect of goods temporarily in the country which are to be reexported in an unaltered state or after inward processing. Article 13 states that the parties are to inform each other of any changes in their tariff or statistical nomenclature or of any decision taken in accordance with the procedures in force concerning the classification of products covered by the agreement.

Tariff references in the Czechoslovakia agreement are fewer. Article 8 is virtually identical to Article 13 of the U.S.S.R. agreement. An exchange of letters explains modifications to be made regarding the tariff and statistical nomenclature in order to comply with a provision of the agreement.

Article 5 of the Hungary agreement states that the parties are to examine the possibility of increasing trade by abolishing, reducing, or otherwise modifying tariffs in conformity with their obligations under the GATT. Article 8, which deals with informing the other party of changes regarding tariff classifications, differs somewhat from the comparable provision in the U.S.S.R. agreement. This article provides that the parties will inform each other of any modification in their tariff or statistical nomenclature or of any other decision concerning the classification of products covered by the agreement. Absent is any reference to notification in accordance with the procedures in force. A joint declaration refers to the replacement of the annexes to the protocol on the abolition of QRs because of changes to the tariff and statistical nomenclature required for compliance with the agreement.

Article 13 of the Poland agreement is virtually identical to the comparable provisions in the U.S.S.R. agreements regarding informing the other party of changes to tariff or statistical nomenclature. An exchange of letters refers to modifications to be made regarding the tariff and statistical nomenclature to comply with the agreement.

There are no provisions in the Romania agreement relating to tariffs.

3. Pricing

All of the EC agreements analyzed here, except the Hungary agreement, contain a clause stating that trade is to occur at market-related prices.

Article 7 of the China agreement states that the trade in goods and provision of services is to be effected at market-related prices and rates.

Article 14 of the U.S.S.R. agreement and the Poland agreement are simpler, stating only that goods are to be traded at market-related prices.

Article 9 of the Czechoslovakia agreement provides that the exchange of goods is to be effected at market-related prices.

Article 7 of the Romania agreement is the most detailed and specifies that the Romanian authorities will ensure that goods are delivered at market-related prices or on terms which do not cause or threaten serious injury to producers of like or directly competing products at a comparable marketing stage.