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China, Cuba and trade law

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Recent U.S. policies call into question America's commitment to the principle of nondiscrimination in trade. Consider the following. In March, Congress expanded sanctions against Cuba despite opposition from our closest trading partners. Earlier this month, the Clinton administration threatened to impose trade sanctions on China for inadequate protection of copyrights and patents. Next month, Congress is poised to begin debate on President Clinton's decision to renew most-favored-nation treatment for China. One idea being floated in Congress is to withdraw MFN from products made by the Chinese military.

Under U.S. trade law, MFN for China (and a few other countries) is conditioned upon freedom of emigration. In 1993, the Clinton administration unwisely linked MFN for China to human rights. A year later, the administration retreated and de-linked MFN from human rights. Thus, the legal test for MFN renewal is still just emigration. Since China generally permits emigration, it qualifies for MFN.

The willingness of congressional leaders to make time for legislation to punish Cuba and China is troubling because Congress is disregarding important treaty obligations of the United States.

The China-U.S. Agreement on Trade Relations of 1979 provides that each country will extend MFN to the other. Any retrenchment of MFN by the president or Congress — for instance, by excluding military-made products — would be a violation of the 1979 agreement. Trade sanctions tied to intellectual property concerns also could violate that treaty.

If China were a member of the World Trade Organization, it would have a right to protest a loss of MFN status or any other discriminatory action by the United States. In a 1994 case before the General Agreement on Tariffs and Trade, a panel found that international rules do not permit a government "to take trade measures so as to force other contracting parties to change their policies within their jurisdiction." This interpretation would seem to prohibit unilateral sanctions by the Clinton administration to force greater protection of intellectual property by China.

Unfortunately, China is not a contracting party to world trade rules. Despite efforts spanning a decade, China has not been allowed to join the WTO. The reason, obviously, is that China's markets are not open enough. But Europe and the United States are also worried about competition from China. By dragging out WTO accession talks, they retain leverage over China on commercial concerns.

China's membership in the WTO would benefit the United States by giving us a forum for complaining about China's weak protection of intellectual property. A neutral dispute panel could evaluate China's practices and point out needed changes. This would be preferable to an investigation by the U.S. trade representative.

While China's practices probably do injure U.S. investors, unilateral retaliatory action by the United States would be perceived as unfair in most national capitals. After all, GNP per capita in the United States ($25,860) is about 50 times higher than it is in China ($530).

In contrast to China's outsider status, Cuba is a member of the WTO. Thus, the United States has obligations to Cuba for nondiscriminatory treatment. The recently enacted Cuban Liberty and Democratic Solidarity Act appears to violate the WTO in several ways. Although most of the complaints about the new law have focused on provisions concerning trafficking in confiscated property, the clearest WTO violation is the codification of the U.S. trade embargo against Cuba.

Unilateral trade embargoes are illegal under GATT rules. The only potentially applicable exception is GATT Article XXI, which permits action that a government considers necessary for the protection of its essential security interests during an "emergency in international relations." In 1962, when President Kennedy imposed the embargo on Cuba, he characterized it as a response to the threat from Cuba's alignment with "Sino-Soviet communism." The U.S. government later invoked Article XXI as a legal justification for the embargo.

Although that defense seems thin in retrospect, it was far more tangible than any defense of a U.S. embargo on Cuba today. There is no international emergency. The promotion of Cuban liberty, though important, is not an "essential security interest" of the United States. Although the embargo may hasten political change in Cuba, its real motive is seemingly to propitiate voters in Florida. The Castro regime might make its first positive contribution to the international legal order by lodging a protest in the WTO.

Although the Clinton administration and the Congress have diverged on some aspects of trade policy, they are united in their occasional disrespect for the principle of nondiscrimination in world trade. Trade discrimination by the U.S. government against unfavored nations is bad economics, bad diplomacy and bad law. It is bad economics because it reduces the opportunity for voluntary exchange. It is bad diplomacy because, as George Washington explained, discrimination excites "jealousy, ill will and a disposition to retaliate." It is bad law because it violates U.S. treaty commitments and weakens the international economic regime.

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