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Slovene-U.S. trade relations: developments since Slovene independence and prospects for the future

Although the potential volume in trade, investment, and other areas of commercial cooperation remains high between the U.S. and Slovenia, neither the United States nor Slovenia have shown the concerted level of dynamism and interest necessary for relations to flourish. The last two years have primarily been a period of lost opportunities on both sides of the Atlantic.

Current volume of trade and investment

According to Slovene government statistics total imports from the United States in 1992 equalled USD 175.4 million, while total exports to the United States equalled USD 143.5 million. This represents 3.1% of total Slovene exports and 2.7% of total Slovene imports. As a percentage of U.S. trade, these numbers are almost inconsequential. The overall volume of Slovene trade with the United States is also low compared with the volume of trade conducted by Slovenia's developed neighbors with the United States, or of Slovenia's turnover with Germany, Croatia, Italy or France¹.

More discouraging than bilateral trade volume is the level of U.S. investment in Slovenia. According to the database of the CICD, there were 20 U.S. investments in Slovenia from 1985–91, valued at only 11.6 million DEM. These investments represented 1.9% of total foreign invested capital in Slovenia.² This number is also when compared to U.S. investment in another former Communist country, Hungary, where U.S. investment in Hungary totaled \$ 269 million during the same

* Copyright by Mark A. Cohen, Washington, DC. This article is dedicated to my wife, Elissa.

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The views expressed in this article are the writer's own opinions and should not be construed as representing in any way the opinions of the governments of Slovenia or the United States, of any company of individual, or of the writer himself in any future proceeding or situation.

¹ Center for International Cooperation and Development ("CICD"), *Doing Business in Slovenia*, at 30 (1993)

² *Id.* at 34–35.

period.³ Also, by comparison, U.S. investment in Poland was about 12% of total foreign investments or about 8% of total foreign invested capital in 1991.⁴ Of course, considering the relatively low level of invested capital throughout the region, any significant investment could make one country a leader in attracting U.S. investment.

Slovenia's attractiveness to foreign investors is, however, generally unbalanced. 91.9% of its investments originated in Germany, Italy and Austria. These three countries also represent 76.3% of total invested capital. A large proportion of this investment capital originated in the Slovene diaspora in these neighboring countries.⁵

A more optimistic view of U.S.-Slovene trade may be made by comparing it with the volume of U.S. trade with other former communist countries in the region. In the early 1990's, the United States has generally conducted as much trade with Slovenia as with a number of formerly communist countries including Albania, Bulgaria, Czech and Slovak Federal Republic, and all three of the Baltic states combined.⁶

The early period of sanctions

Many Slovenes blame the United States with beginning relations with a "wrong step" forward. In early December 1991 President Bush sanctioned all of the "break-away" Yugoslav republics without any demonstrable positive effect on U.S. political interests or human rights. President Bush's sanctions included termination of eligibility of eligible Yugoslav exports for duty free import into the United States under the U.S. Generalized System of Preferences program ("GSP"), termination of textile visa arrangements, and a general suspension of foreign aid grants under the SEED Program subject to limited exceptions. Certain foreign aid to alleviate the suffering of innocent victims of the bloodshed between Serbia and Croatia was also authorized.

The U.S. government at first appeared to be following EC initiatives in imposing sanctions. One month prior to the sanctions announcement, on November 9, President Bush announced he would strongly back EC sanctions against Yugoslavia by implementing comparable measures. Although the EC stated it would impose sanctions that were in fact similar to those announced by the United States, it also withdrew them and opted to recognize Slovenia and Croatia before the U.S. sanctions were implemented. The United States ultimately became the principal sanctioning country of Slovenia with many countries extending complete recognition and withdrawing sanctions effective January 15, 1992. The U.S. decision to maintain sanctions and withhold recognition was in actually an independent process that ultimately served to the damage the perception of America in Slove-

³ See U.S. Trade Representative, *National Trade Estimates Report* (1993), at 115.

⁴ US & FCS, *Poland Country Marketing Plan, FY 1992* (U.S. Foreign & Commercial Service, Warsaw 1991) at 5-6.

⁵ See Matija Rojcek, *Foreign Direct Investment in Slovenia, Some Aspects of Foreign Investors' Considerations* (Ministry of Economic Relations and Development 1993), at 17 ("It is quite probable that in approximately one third of FDI [foreign direct investment] projects in Slovenia foreign investors are directly or indirectly of "Slovene origin." Due to the large number of "Slovene" companies in Germany and Austria, this category of foreign investors in Slovenia is especially relevant in the case of these two countries.")

⁶ U.S. International Trade Commission, *Trade Between the United States and China, the Former Soviet Union, Central and Eastern Europe, the Baltic Nations, and Other Selected Countries During July - September 1992* (Feb. 1993).

nia. Even the U.S. government's timing was wrong: the sanctions against Slovenia came into effect 15 days after their announcement – on December 24, 1991 – a "Christmas Gift" to Catholic Slovenia and Croatia.⁷

In implementing certain of the sanctions, President Bush not only deviated from the European policies he had intended to follow, but also the mandates of U.S. law. The GSP program was established by the Trade Act of 1974, as amended. Sections 504(a)(2) and 502(a)2 of this legislation mandate that the withdrawal or suspension of the "designation of any country as a beneficiary developing country," or "any order which has the effect of terminating such designation", requires at least 60 days advance notification to the House of Representatives and Senate of such actions, together with the considerations for this decision. No such advance notice was provided. This 60 day advance notice would have provided a smoother transition to affected importers and delayed implementation to early February 1992, when the poorly conceived nature of the sanctions may have been more self-evident. Ultimately, the loss of GSP benefits cost Slovene exporters millions of dollars in extra duties, as well injecting an unnecessary element of uncertainty into commercial affairs.

Termination of the textile visa program, although styled as a sanction, was an effort to help Slovenia. Slovene exporters were unable to export textiles to the United States for some time previous to this "sanction" because Belgrade had made the visas unavailable to Slovene manufacturers. No similar official termination of Belgrade authority was, however, apparently undertaken in other regulated areas such as food and drug imports.

The embargo on arms to Slovenia which was initiated at about the time of President Bush's sanctions, has also had its own negative effects. Since recognition, Slovenia has however received so-called "dual use" goods (civil/military) from the United States, including an air traffic control system and may find a more receptive U.S. government in the case-by-case analysis undertaken of such exports.

Slovenia and former Yugoslavia – the continuing comparisons

Merely blaming President Bush and the sanctions policy for the current state of U.S.-Slovene commercial relations is to ignore independent factors that have limited U.S.-Slovene trade.

The most important difference in Slovene attractiveness to U.S. investors is that the Slovene market is considerably smaller than the Yugoslav market, and apart from all other considerations may very well not be worth the effort for some U.S. companies.

The constant association in the U.S. media of Slovenia with Croatia as a "break-away republic" and an unsafe place has also had a commercial effect. Even long-term customers of imported Slovene goods began to question the reliability of supply, while potential investors were disinterested in the perceived risks of Slovenia. Moreover, many older Americans, remembering Croatia and Serbia's positions in World War II, as well as the role of the Yugoslav partisans, also had initial difficulties believing that Serbia was the "enemy" while Slovenia and Croatia were fighting for autonomy and human rights.

⁷ Presidential Proclamation 6389 of Dec. 5, 1991, to Amend the Generalized System of Preferences, 56 Fed. Reg. 64467 (Dec. 9, 1991).

At the same time, various individuals and institutions that formerly functioned to facilitate trade, such as the U.S.-Yugoslav Business Council, encountered serious difficulties in trying to assist individual republics and maintaining its membership.⁸

Many educated Americans continue to remain confused about the geography of Slovenia. To this date, for example, it is nearly impossible to arrange a tour of Slovenia from the United States except through certain specialized tour agencies.⁹ During my several months here, I have also noticed that mail from the United States to Slovenia is also routinely misdelivered – Americans resident in Slovenia routinely receive letters that were routed through Slovakia, Hungary and Poland by the U.S. Postal Service. Mail delivery to Slovenia from the East Coast of the United States is frequently slower than mail to East Asia. It may take as long as 21 days. This slowness, coupled with the exorbitant costs in Slovenia of making overseas telephone calls has impeded the free flow of communication and trade.

Amb. Albright's referring to Slovenia as a "Balkan" country on her visit in January, has been perceived by many Americans friendly to Slovenia as a welcome mistake that may hopefully lead to further corrections in American thinking.

It also appears that the Slovene government never fully understood the full effects of disrupting over one hundred years of commercial ties and legal structures with former republics of Yugoslavia. The State Department's official record, "Treaties in Force" has, for example, recorded a Treaty of Commerce signed in Belgrade October 1881 and entered into force November 15, 1882.¹⁰ Other legal arrangements that were over 60 years old included an extradition treaty dating to 1901 (signed at Belgrade); a consular convention of 1881 (signed at Belgrade); a money order convention (1924) (signed at Washington); and an agreement relating to the exchanged at Belgrade.¹¹

The collapse of Yugoslavia jeopardized these agreements as well as a range of other government programs supporting trade: Overseas Private Investment Insurance for political risk; Export/Import Bank for export credit and export insurance; Commodity Credit Insurance Program for sale of agricultural commodities, etc. Slovenia also was prohibited from participating in the range of new programs for the emerging democracies in Eastern Europe - including the SEED Program, U.S.-government funded consortia for American businesses, trade missions, bilateral investment treaties and bilateral tax treaties, etc. Some of these programs may still not have been fully reinstated.

Ultimately, even if Slovenia had been immediately recognized by the United States, the former privileged status of Yugoslavia as a friendly non-aligned country

⁸ The U.S.-Yugoslav Business Council ultimately restructured itself by establishing business councils for individual republics. Apart from this restructuring, it is now actively seeking to establish organizations of American investors within the former republics, and has decentralized itself in the hope of attracting wider membership and wider involvement. On December 31, 1993, Mr. Richard Johnson, the long-term President of the Council, retired.

Certain Slovene-American organizations were, of course, active in supporting diplomatic and commercial ties with Slovenia after the sanctions were imposed. In addition, the Slovene-American Business Community has itself established a non-profit corporation in New York City to assist it in the U.S. market. A similar organization has also been established in Canada.

⁹ The U.S. government in its official Consular Information Sheet also notes that although Slovenia "is essentially unaffected by the war in Bosnia-Herzegovina, tourist facilities [that] are available may be limited, especially in more rural parts of the country." (Sept. 1993).

¹⁰ *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1992* (State Department 1992) at 270.

¹¹ *Id.* at 269-272.

would have been lost. During the cold war era, many of the U.S. trade rules which discriminated against communist, non-market or state-controlled economies by denying them GSP benefits, imposing onerous antidumping duties under a special non-market economy calculation or by permitting special actions to be filed against increasing imports from communist countries (Section 406 of the Trade Act of 1974).¹² These punitive measures were not imposed on Yugoslavia even when it was a self-avowed communist state. Imports from Yugoslavia were also not subject to the separate customs reporting system for the flow of imports and exports with "non-market economy countries" under Section 410 of the Trade Act of 1974.¹³

Some scholars may believe that those determinations to treat Yugoslavia more favorably than other communist countries were political and not economic.¹⁴ Such a belief is supported by recent decisions in the United States which have found that social ownership is the same as state ownership for purposes of U.S. sanctions against Yugoslavia – thereby suggesting that Yugoslavia should have been considered a non-market, or state-controlled or communist economy country under the various U.S. trade laws. *Milena Ship Management Company v. Newcomb*, 995 F.2d 660 (5th Cir.1993).

An apparent similar reversal was made by the Canadian Import Tribunal when it recently ruled that imports from Macedonia of steel products produced by from Rudnici Zelezara Skopje are, in fact, products of a state-controlled economy, and imposed preliminary antidumping duties at an average level of 40.9%.¹⁵

Apart from its loss of a privileged status, Slovenia must compete for the attention of U.S. business people with the Czech Republic, Poland and Hungary – all of which are seen as in the "front-line" of market reform. Delays in privatization and denationalization have jeopardized Slovenia's potential to be viewed as a "front-line" former Communist state.

Response to the new order in Slovenia

One of the most rapid official acts in continuing bilateral trade occurred on April 29, 1992 when the U.S. Department of Agriculture, Food Safety and Inspection Service ("FSIS") published an interim rule with immediate effectiveness to authorize Slovenia to continue to be eligible to import meat into the United States. As noted before, the U.S. government, when it imposed sanctions, had not divested Serbia of its regulatory authority over exports to the United States. Yugosla-

¹² 19 U.S.C. Sec. 2436.

¹³ 19 U.S.C. Sec. 2440, see, e.g., *Trade Between the United States and China, the Former Soviet Union, Central and Eastern Europe, the Baltic Nations, and other Selected Countries*, supra.

¹⁴ For a discussion of U.S. policy towards unfair pricing activities from Yugoslav enterprises, see Robert A. Anthony, *The American Response to Dumping From Capitalist and Socialist Economies - Substantive Procedures After the 1977 Gatt Code*, 1969 Cornell Law Review at 159 - 231, especially at p. 200 et seq. ("The Treasury [Department] has evolved a special test of fair value for the products of countries having 'controlled economies,' and has consistently through the 1960's applied it to merchandise exported from communist nations other than Yugoslavia" [Emphasis added]) (p. 200). For a general discussion of current U.S. import relief policy towards "economies in transition" see Stephanie Mitchell, "The 1988-89 Department of Commerce Study on the People's Republic of China and Its Implications for 'Economies in Transition'," *The Commerce Department Speaks* 1990, vol. 2, 501 (1990).

¹⁵ Canadian Import Tribunal, *Statement of Reasons - Certain Hot Rolled Carbon Steel Plate And High Strength Low Alloy Plat, Heat Treated or Not, Originating In or Exported From Belgium, Brazil, The Czech and Slovak Federal Republic, Denmark, The Federal Republic of Germany, Romania, The United Kingdom, The United States of America and the Former Yugoslav Republic of Macedonia* (preliminary determination), Jan. 6, 1993. Note that Slovenske Zelezarne (the Slovene Steelworks) had succeeded in excluding itself been excluded from this investigation and was not a part of this determination.

via had been listed as eligible to import meat products by the United States on June 25, 1959. On October 18, 1991, Serbia notified FSIS that it could no longer maintain supervisory control over meat facilities in Slovenia. At the same time, Serbia continued to certify a meat facility that had been destroyed in the Serbian-Croatian war as eligible to export meat to the United States.

On April 17, 1992 Slovene inspection officials notified FSIS that they continued to maintain supervisory control over the meat inspection system, that they enforced these rules prior to October 18, 1991, and that the standards for inspection, sanitation, quality, species verification, residues and other requirements were appropriately applied. Because of these efforts, the FSIS deemed it unnecessary to reevaluate Slovenia's meat inspection regime - a process that could have taken several years, resulting in a loss of customers and reputation.¹⁶

Similar flexibility was demonstrated by the U.S. government in handling of treaty-trader visas. The treaty-trader visa program with Yugoslavia permitted Slovene representatives in the U.S. to obtain one year renewable visas. In response to an inquiry made by this attorney on behalf of the Slovene business community, the U.S. State Department formally advised that Slovenes could continue to benefit from the former Yugoslav treaty-trader program the same day the inquiry was made.

Sometimes such U.S. efforts at flexibility may not have been fully supported by Slovene authorities. In the fall of 1992 I had been informed that the State Department had considered reinstating Slovenia in the GSP program earlier that spring, before the actual recognition of Slovenia as an independent state. This was considered permissible under U.S. trade law, and would have provided considerable comfort to Slovene government officials who had agonized over U.S. delay in recognition. Yet, this effort was not widely known in the business community and may not have been well known to the Slovene Embassy in Washington.

Inconsistent slovene arguments about Slovenia

While Slovenia may have been eligible to re-obtain GSP prior to recognition, it appears that the wood furniture industry in Slovenia may have played an instrumental role in delaying the return of GSP benefits to Slovenia generally. GSP benefits for certain wood furniture products in the 1980's. In apparent response to pressure from the wood furniture industry, the Chamber of Economy of Slovenia argued that wood furniture should requalify for eligibility under the GSP program:

The Chamber of Economy of Slovenia respectfully requests the [U.S. Government] to grant GSP eligibility to the . . . four wood furniture items. Slovenia should not be subject to the limitations placed on Yugoslavia. Slovenia is a newly recognized (by the United States), independent, sovereign nation. Slovenia is not a successor country to the rights and liabilities of Yugoslavia.

Slovenia should be permitted to enter the GSP program *de novo* and *ab initio*, from the beginning and anew or afresh.¹⁷

¹⁶ U.S. Department of Agriculture, Food Safety and Inspection Service, *Imported Product: Addition of Croatia and Slovenia to the List of Eligible Countries*, 57 Fed. Reg. 18079 (Interim Rule - April 29, 1992); 57 Fed. Reg. 36889 (Final Rule - August 17, 1992).

¹⁷ Submission of The Chamber of Economy of Slovenia to Office of the United States Trade Representative, June 9, 1992, at 6 (non-confidential version).

A less expansive and more reasonable argument was made by Slovene Government in support of GSP treatment for wood furniture:

As a matter of law, the limitations applied to wood chairs and parts thereof from Yugoslavia do not apply to Slovenia because the President has not determined to withdraw GSP for wood chairs from Slovenia. Moreover, fundamental fairness dictates that the President should make an independent determination concerning Slovenia and that Slovenia should not be prejudged and required to automatically bear the burden of adverse GSP determinations previously applied to Yugoslavia.¹⁸

The Slovene Government and Chamber of Economy provided no comparable public written support for the manufacturers of products other than wood furniture. More importantly, Slovene authorities also did not explicitly disavow the contention, in the submission of the Chamber of Economy, that Slovenia is not a successor to the rights and liabilities of Yugoslavia. These positions were inconsistent with Slovenia's continued eligibility to export meat, participate in treaty trader arrangements and continue other agreements that had formerly been entered into by Yugoslavia. The notion that Slovenia is "completely new" naturally invited a review of the statutory criteria of Slovene eligibility for the GSP program anew, thereby delaying GSP benefits for all manufacturers. Such criteria include a review of Slovene labor, intellectual property, arbitration, investment protection and other practices.¹⁹

Of course, the arguments of the wood furniture industry were also inconsistent with other Slovene efforts to ensure a continuity of legal relationships domestically and with other countries. The Slovene government had eloquently argued in numerous contexts that Slovenia should continue the GSP arrangement, because "nothing had changed." The Deputy Foreign Minister of Slovenia had argued such in response to a government questionnaires as well as in public writings:

The Republic of Slovenia will continue to apply all the . . . regulations previously used by the Yugoslav government . . .²⁰

Ultimately, the United States was among the slowest in returning GSP benefits to Slovenia – most developed countries, including Norway, Finland, Sweden, Canada, Austria, Taiwan and member countries of the European Community²¹ had extended GSP or similar benefits to Slovenia immediately after recognition or with retroactive effect.²²

Bilateral trade disputes

Trade friction is inevitable in the development of bilateral relations. The rather low level of trade, a lack of recognition of Slovenia as such, and an apparent

¹⁸ Submission of Hon. Ernest Petric to USTR, June 10, 1992 at p. 13.

¹⁹ 19 U.S.C. Secs. 2561-2465.

²⁰ Vojka Ravbar, "In Search of Lost Trust," *Slovenian Business Report* Feb. 1992 at 8,9.

²¹ According to the CICD, the following countries had extended GSP treatment to Slovenia as of June 1993: Austria, Australia, Canada, Czech Republic, Slovak Republic, Finland, Japan, Norway, Sweden, Switzerland, Taiwan and the USA. The CICD also notes that "These countries have recognised the general preferential tariff treatment according to GSP to Slovenia in the same extent as with regard to former Yugoslavia." *Doing Business In Slovenia, supra*, at 73.

²² Non-wood furniture manufacturers had also argued that GSP should be reinstated retroactively and had nearly convinced USTR of this, with the support of sympathetic congressmen such as Dennis Eckert and James Oberstar. These producers had a kind of moral victory when the GSP statute was extended the following year after a hiatus in benefits and reinstated with retroactive effect for all countries. The idea for such retroactivity may have in fact originated with Slovenia.

record of being a fair trader have contributed to a near absence of bilateral trade disputes.

The last U.S. antidumping case filed against Yugoslavia²³ also foreshadowed the breakup of Yugoslavia. Slovenia's sole producer of the subject product, Mercator, was separately represented from other Yugoslav producers. Nonetheless, all Yugoslav manufacturers of the affected product were able to defeat this antidumping case at the "preliminary investigation" stage by demonstrating that there was no reasonable indication that imports of this product were injuring the U.S. industry.

More recently, in the United States, a massive antidumping case²⁴ did not name Slovenia as a party to the investigation, most likely because of Slovenia's limited presence in the U.S. market and relatively low level of threat to U.S. manufacturer.

The fact that Slovenia has not been a named party to an unfair trade investigation does not preclude the possibility of being named in the future. One particular problem is the lack of Slovene succession to the GATT subsidies code or similar agreements. By failing to sign the GATT subsidies Code (Yugoslavia did not) or entering into similar disciplines with the United States, Slovenia is vulnerable to being the subject of countervailing duty (anti-subsidy) investigations by healthy U.S. industries who will not need to prove that such subsidized imports are injuring them.²⁵ If Slovenia signed the GATT Subsidies Code, U.S. industries would have to demonstrate injury by reason of these imports in order for special duties to be imposed.

Slovenia should also be careful in drafting its foreign trade laws and regulations, and in executive decisions, that any subsidies to adjust to imports or export promotion conform to the GATT Subsidies Code. Non-conforming legislation or regulations could otherwise create a "road map" for foreign protectionist industries intent on excluding Slovene exports. Further, protectionist foreign interests could easily argue that any subsidy extended in Slovenia is intended to promote exports because of Slovenia's overall dependence on exports, thereby possibly establishing a prima facie case that a subsidy exists.

Notwithstanding these risks, Slovene manufacturers who depend on exports can structure the benefits they receive from the government or pricing of their exports to limit the impact of unfair trade allegations. They might, in particular, ensure that they are not selling below cost or home market prices and thereby limit the adverse impact of antidumping investigations. They should also take steps to insure that they are not viewed as posing a threat to industries in large markets such as the United States.

Unfortunately, Slovenia faces the basic problem in the U.S. market of sometimes having to price at low levels in order to gain an entry to the U.S. market.

²³ *Tart Cherry Juice and Cherry Juice Concentrate from Germany and Yugoslavia*, Inv. Nos. 731-TA-512 and 513 (Preliminary), USITC Pub. 2378 (May 1991).

²⁴ *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final) USITC Pub 2664 (Aug. 1993)

²⁵ 19 U.S.C. Sec. 1303.

Despite the possibility of such "entry level dumping" I believe the prospects are good for a limited number of antidumping cases being filed.²⁶

A more fruitful area of trade dispute involves "Section 301" and related proceedings. Section 301 of the Trade Act of 1974²⁷ authorizes the United States Trade Representative, upon determining that the rights of the United States are being denied under any trade agreement, or an act, policy or practice of any foreign country is unjustifiable and burdens or restricts U.S. commerce, to take appropriate retaliatory action. The Act contains specific provisions regarding violations of intellectual property rights, most favored nation obligations, limitations on service sector access, etc.

The United States has exercised its muscle in section 301 and related proceedings to address unfair trade practices in areas such as intellectual property and investment protection. Yugoslavia had been criticized by the U.S. government for its GATT-inconsistent customs regime, including special import charges, and ineffective intellectual property protection.²⁸ Many of these matters appear to have already been addressed by the Slovene government.²⁹ Issues involving unfair investment or intellectual property practices have nonetheless recently appeared with greater frequency against Poland, Hungary and other "leading-edge" economies in transition and may be expected in the future against Slovenia.

The U.S. government might complain in the future over such Slovene practices as:

Inadequate enforcement of intellectual property – there are a large number of pirated cassette tapes in Maribor and Ljubljana, and it appears that certain cable TV signals may also be pirated.

Preferences given to countries in the European Union –if such preferences are provided as part of an Association or other arrangement, and such preferences violate GATT or other principles of Most Favored Nation treatment.

Difficulties and discriminatory practices in investing –Slovenia restricts foreign acquisition of real estate, restricts foreigners from performing certain services, prohibits foreigners from serving as a procurator or as the majority members of the boards of Slovene companies.³⁰

A lack of a comprehensive government procurement code – Slovenia needs to

²⁶ See Mark A. Cohen and Jonathon R. Moore, "Svetovalec: Kaka Izvazati V ZDA" [Legal Aspects of Exporting From Slovenia into the United States] (in Slovene) *Gospodarski Vestnik* (December 3, 1992), at 69.

²⁷ 19 U.S.C. Sec. 2411.

²⁸ U.S. Trade Representative, *1991 National Trade Estimate Report on Foreign Trade Barriers* (1992) at 231–32.

²⁹ Slovenia has, for example, done an admirable job of continuing the six principal intellectual property treaties to which the former Yugoslavia was a signatory, and in enacting a model patent law. Slovenia has signed The Convention Establishing the World Intellectual Property Organizations; the Paris Convention for the Protection of Industrial Property; the Madrid Agreement concerning the International Registration of Marks; the Berne Convention for the Protection of Literary and Artistic Works; the Nice Agreement concerning the International Classification of Goods and Services for the Purpose for the Registration of Marks; and the Locarno Agreement Establishing an International Classification for Industrial Designs.

³⁰ See, e.g., Section 20 of the Law on Foreign Trade regarding potential restrictions on foreign professionals, translated in *Slovenian Business Report* (Oct. 1993) at 7. According to recent discussions held with the Ministry of Justice, for example, a foreign lawyer may work in Slovenia as a foreign law expert in a Slovene law firm, and if he registers with local authorities as such. Independent practice appears to be prohibited, although such independent practice is permitted elsewhere in the world provided advice on local law is not given.

Regarding restrictions on foreigners serving in Slovene companies, see sections 246 and 567 of the Law on Commercial Companies which provide that: the director or procurator of a commercial company shall be a citizen of the Republic of Slovenia; the majority of the members of the executive management shall be citizens of Slovenia, and that all agents of subsidiaries of foreign companies shall be permanent residents of Slovenia. *Uradni List*, No. 30 (June 10, 1993), translated in *Slovenian Business Report*, July - August 1993 at 13.

require GATT-consistent government procurement practices. This may also create problems in the future if American companies believe that have been unfairly denied opportunities to participate in significant government projects, such as the highway from Koper to Lendava. A similar problem had already developed over American participation in the Maribor solid waste project.

Current status and prospects

Since independence, Slovenia's attractiveness as a U.S. investment destination has improved dramatically in absolute terms. However, it has likely worsened relative to other Central and Eastern European Countries. Far too much investment in Slovenia comes from "sympathetic" investors – especially companies or individuals active in the Slovene diaspora. Slovenia must redouble its efforts to attract investment that is based solely on economic criteria.

American investors now have a choice of a number of newly democratic European countries in which to invest. Almost all of these countries also have larger markets than Slovenia and cheaper labor. Many of them also offer a sounder bilateral basis than the U.S.- Slovene relationship. The greater rapidity with which privatization and denationalization has been undertaken in some of these countries has also facilitated an easier entry into their markets for U.S. investors.

Slovene-U.S. investment and trade promotion treaties and arrangements are inadequate and invite unwelcome comparisons to other countries. Poland, for example has signed: a bilateral investment treaty with the United States; a treaty on the avoidance of double taxation; an agreement with the U.S. overseas private investment corporation; and is a contracting party to the U.N. Convention on International Sale of Goods. Slovenia has signed none of these agreements, nor is it a contracting party to the GATT.³¹ Yugoslavia had been negotiating a bilateral tax treaty with the United States which regrettably was never completed. A number of other countries have also provided a more comprehensive bilateral framework for trade and investment. Such legal uncertainties have predictably already been cited by a number of foreign investors of different nationalities as a principal difficulty of investing in Slovenia.³²

Because of the still undeveloped state of bilateral legal relations, American investors contemplating the possibility of a profitable joint venture in Slovenia would be well advised to use a third country as a base for investment – provided that country has a tax treaty or investment treaty with Slovenia. Until a tax treaty is signed, for example, large American multinationals will probably not use the United States as a platform for investment, but will operate more indirectly, such as through European subsidiaries. Smaller companies, however, will need to face the prospects of significant additional costs, uncertainties, or tax burdens on their prospective investment.

Slovenia's efforts to emulate German legal and economic models have their own drawback. Considering Slovenia's size, geographic position and human resources, Slovenia might flourish as a more open society than Germany – along the

³¹ *International Business Practices* (U.S. Department of Commerce 1993).

³² Rojec, *Foreign Direct Investment in Slovenia*, *supra*, at 34 - 35. Matija Rojec noted that frequent/constant legal changes, non-accomplished/unstable legal system with uncertainties and vacancies, the fact that the economy is in a phase of transition and inadequate FDI legislation were among the principal obstacles to attracting foreign investment to Slovenia.

lines of the recent economic successes of other small multilingual areas such as Singapore and Hong Kong. From personal experience there frequently appears to be an overemphasis on formality in law and process that investors from more flexible and open jurisdictions may find difficult to understand in the circumstances. Although, for example, Slovenia's Company Law is modern and comprehensive, it is: relatively expensive to capitalize new companies; legal and notarial expense can be high; the process of creating and protecting secured interests (mortgages) is unclear and expensive; the judiciary plays too active a role in corporate formation and related activities; the role of non-profit institutions remains uncertain; the penalties for failure to comply with certain commercial law provisions are severe; and the judiciary is constrained from making new laws of wide impact to fill in the gaps in the legislation.

Slovene government restrictions on overseas investment have also reduced the possibilities of cooperation. Much of the exports from Slovenia to the United States are handled by companies that are directly or indirectly affiliated with Slovene companies. The long and cumbersome approval process involved in establishing a small subsidiary, including the expense of an audit are a disincentive to overseas investment. In certain cases, the costs of an audit may exceed the actual investment. Because many Slovene companies prefer to deal with Slovene companies based in the United States to exporting to the United States, these difficulties in investing in the United States may have had some trade suppressing effect. Such trade suppressing effect is likely less pronounced with respect to Germany, Italy and Austria, where Slovene companies can readily meet their distributor or importer with relative convenience.

The United States' attractiveness to Slovene investment should however increase. Although there are only a limited number of Slovene-owned companies in the United States, most of which are concentrated in the New York City area, the recent conclusion of the North American Free Trade Agreement should attract Slovene companies interested in opportunities throughout North America. Many Slovene products that were competitive in former Yugoslav markets, such as mopeds, outboard motors or air conditioner parts may also be especially suitable for the warmer climates of the southern United States and its Mexican neighbor.

Prospects for the future

In looking to the future, there are three principle avenues for development of stronger bilateral trade and commercial relations: "parity", "differentiation" and "regionalization." If Slovenia follows this course of action, in concert with sympathetic Americans and a sympathetic American government, relations can develop much further.

Parity. Both the Slovene and the U.S. government should make a priority of seeking "legal parity" or better with the Visegrad countries, by passing bilateral investment and tax treaties as quickly as possible, enabling Slovenia to participate in the variety of programs available to developing Central and Eastern European countries. The basic legal structures need to be established for the normalized trade and investment relations.

Differentiation. Slovenia must emphasize that it is different from the other Yugoslav republics. U.S. official actions continue to refer former Republics continue to officially refer to "Each of the former republics of the SFRY other than

Serbia and Montenegro."³³ Until such time as Macedonia is recognized by the United States, this diplomatic verbiage avoids calling Macedonia by its name in order to minimize the possibility of offending Greece. It also has the unintended effect of "lumping" Slovenia with Croatia, Bosnia-Herzegovina and Macedonia.

Slovene officials should also continue to seek differentiation as a concrete goal of any visit they make to North America. One lost opportunity, for example, was the visit last year of President Kucan to the United States. Many Americans, including Nobel laureate Elie Wiesel, were unhappy that Prime Minister Tudjman had been invited. Kucan's presence at a meeting with Tudjman did not help to differentiate him from his neighbor. Even Americans who may have known Slovenia's location may have been unfamiliar with Slovenia's excellent human rights record. Efforts should have been made to engage in private meetings with human rights, religious, ethnic or other groups that would be supportive of Slovenia.

Slovenes delude themselves if they believe the differentiation process is largely completed. In addition to Amb. Albright's designation of Slovenia as a Balkan country, a case in point is the recent controversy over "Transit without a Visa Privilege." In an August 16, 1993 decision, the U.S. government added the Republics of the former SFRY to the list of countries whose nationals are prohibited from transiting through United States airports without a visa, effective immediately. By refusing to waive the passport and visa requirement, Slovenia joined a short list including certain renegade countries such as Afghanistan, Bangladesh, Cuba, Iran, Libya, and Serbia/Montenegro because of the "civil disorders and resulting deterioration of economic conditions in the former SFRY."³⁴ In this instance, Slovenia rightfully seized a misperception by the Department of State, Bureau of Consular Affairs and U.S. Immigration and Naturalization Service to correct the record. The Slovenian-American Business Community, Inc., a recently formed trade association based in New York City, also submitted comments opposing this decision.

Regionalization. Slovenia needs to reemphasize in America's mind that it is an excellent place for doing business in Northern Italy, or Southern Austria and, now with the conclusion of the free trade agreement with the Czech Republic, for that country as well. The various bilateral business councils and trade organizations should seek meetings with groups from these countries in order to expand the scope of interest in Slovenia. Opportunities also exist in Slovenia for creation of duty-free zones for processing goods destined for those countries. Regionalization is the only secure way for Slovenia to attract American investors on the basis of access to markets.

One pending issue, under the U.S. GSP law, is for Slovenia and the Czech Republic can be deemed "one country" for purposes of GSP eligibility of products.³⁵

³³ See, e.g., 58 Fed. Reg. 43438 (revocation of transit without a visa); 57 Fed. Reg. 39095 (amending the GSP program).

³⁴ See 58 Fed. Reg. 43438, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act; Unavailability of Transit Without a Visa to Citizens of the Former Socialist Federal Republic of Yugoslavia (Department of State); 58 Fed. Reg. 4438, Unavailability to Transit Without a Visa to Citizens of the Former Socialist Federal Republic of Yugoslavia (Department of Justice).

³⁵ The U.S. GSP Statute, 19 U.S.C. Sec. 2462, provides this opportunity to be considered as one country. It defines a country as:

any foreign country, any overseas dependent territory or possession of a foreign country, or the Trust Territory of the Pacific Islands. In the case of an association of countries which is a free trade area or customs union, or which is contributing to comprehensive regional economic integration among its members through appropriate means, including, but not limited to, the reduction of duties, the President may by Executive Order or Presidential proclamation provide that all members of such association . . . shall be treated as one country for purposes of this subchapter.

As a practical matter designation of Slovenia and the Czech Republic as one country would have three significant practical effects:

First, because the GSP law requires that at least 35% of the value be added in the exporting country in order to receive GSP benefits, it would permit a wider range of products that have value added in both the Czech Republic and Slovenia to receive GSP benefits.

Second, because the GSP law requires that goods are shipped directly from the GSP-eligible country to the United States, it would permit processing of Czech or Slovene goods for reexport to the United States while maintaining eligibility.

Third, it would join Slovenia with a well-regarded "economy in transition" in the American eye. Slovenia would be clearly separated from the chaos in ex-Yugoslavia. This could provide a needed incentive to trade and investment from America with synergistic effects for both the Czech Republic and Slovenia. *An appropriately worded Presidential Proclamation itself may be one of the most significant gestures undertaken to date to stimulate bilateral trade.*

One difficulty in seeking one-country designation has been expressed to me by the Office of the U.S. Trade Representative. USTR recognizes that such bilateral trade agreements may be a step undertaken in anticipation of membership in the European Union. The current agreement between Poland and the European Union, for example, may give members of the European Union preferences over U.S. investors and exporters. This could ultimately jeopardize Poland's status as a GSP beneficiary. Such problems may not, however, exist with Czech and Slovak Republics and Hungary, thereby making "one country" designation possible. Nonetheless, the concept that Slovenia may deny most favored nation privileges to U.S. traders and investors in its drive for membership in the European Union should also be understood as a warning concerning potential future bilateral problems.

Conclusion

The possibilities are good for further cooperation between Slovenia and the United States. Many Slovenes look forward to a more active role by the United States in the Slovene economy. Slovenia needs America's commercial expertise and would also welcome a more differentiated trading partners. Americans who are familiar with Slovenia similarly would welcome a more active role of Slovenia in the U.S. market. Ultimately close cooperation will be better for both countries.

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No alternative: postmodern art and exigencies of business

The focus of this paper is the mechanism of postmodern art's failure to uphold the standard of modernist art, that is, its negative-critical relationship to society at

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