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The Application of United States and European Community Domestic Trade Laws to the Imports of Nonmarket Economy GATT Contracting Parties - A Time for Change

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DEPARTMENT OF LAW

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To my Father

THE APPLICATION OF UNITED STATES AND EUROPEAN COMMUNITY DOMESTIC TRADE LAWS TO THE IMPORTS OF NONMARKET ECONOMY GATT CONTRACTING PARTIES - A TIME FOR CHANGE

By Diarmuid Rossa Phelan

Ricercatore, E.U.I.

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THE APPLICATION OF UNITED STATES AND EUROPEAN COMMUNITY DOMESTIC TRADE LAWS TO THE IMPORTS OF NONMARKET ECONOMY GATT CONTRACTING PARTIES - A TIME FOR CHANGE

Abstract

This is an enquiry into the application of the United States and European Community trade laws, specifically antidumping laws, to the imports of nonmarket economy GATT contracting parties, specifically Poland, the Czech and Slovak Republic, and Hungary. Reference is also made to Romania, Russia, and China. The United States and European Community trade instruments and their case applications fall to be considered in the light of the rules of the General Agreement and the multilateral codes thereunder. There is a question mark over legality of the preference for antidumping over antisubsidy trade remedy responses, particularly in the Georgetown Steel case. This question touches on legality of the threat of antidumping duties to secure voluntary restraint agreements on price and export quantities. The general approach of the United States and European Community to import trade from Eastern European nonmarket economies contrast in their response to the market economy changes in these countries. This approach is illustrated both by the application of trade remedies in particular cases and in the wider context by bilateral treaty programs. The European Community stands to gain by aiming for a free trade area excepted by GATT from the Most Favored Nation obligation, whereas the United States has been slower to adapt. A change of attitude and a change of rules will be in the interests both of international trade law and of the countries involved.

Note

The Annexes which were to form part of this paper have been omitted because of reproduction difficulties. The reader is referred to the following sources:

1. The Eighth Annual Report of the Commission on the Community's Antidumping and Antisubsidy Activities, released 29 January 1991 (Brussels).

2. Table Summary of Antidumping Activity amongst Contracting Parties 1986-1989, *GATT Activities*, Geneva 1990.

3. Table Summary of Antidumping Activity amongst Contracting Parties 1989-1990, *Report of the Committee on Antidumping Practices*, 37 BISD 1991.

4. Table Summary of Antidumping Activity amongst Contracting Parties 1988-1989, *Report of the Committee on Antidumping Practices*, 36 BISD 1990, p.439.

5. Table Summary of Antidumping Activity amongst Contracting Parties 1986-1988, *Report of the Committee on Antidumping Practices*, 35 BISD 1989, p.359.

6. Table Summary of Antidumping Activity amongst Contracting Parties 1985-1986, *Report of the Committee on Antidumping Practices*, 34 BISD 1988, p.201.

I THE STATUS OF A NONMARKET ECONOMY COUNTRY

A. Introduction

At the conclusion of the general debate of the Forty Fifth Session of the GATT the chairman noted three major points:

> - World trade growth had been impressive but was unequally distributed.
> - The alarming tendency on the part of some major trading nations to take unilateral decisions on retaliation measures. This tendency had undermined the credibility of the GATT system.
> - The implementation of protective measures through misuse of GATT rules such as those on antidumping.[1]

At the time of drafting the International Trade Organization (ITO) charter,[2] the intention was that the ITO would be a universal organisation encompassing countries of all economic structures. The drafters of the General Agreement on Tariffs and Trade[3] itself, however, were pursuing the goals of reduction of tariffs and trade liberalization consistent with the needs of market economy countries. Like many of the persistent problems with GATT, the difficulty in applying GATT rules and multilateral concepts to the mutual satisfaction of both nonmarket and market economy contracting parties arises in part from the failure of the Havana Charter.

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[1] *GATT Activities 1989* (Geneva, June 1990).

[2] *Havana Charter for an International Trade Organization (ITO)*, March 24, 1948 (never in force).

[3] *General Agreement on Tariffs and Trade*, BISD, Volume IV.

This institutional gap left it open to dominant contracting parties to shape the development of international trade law to promote their idealogies and interests, and to interpret that law in antidumping and countervailing duty legislation, as well as bilateral agreements. Although the occasional determinations of GATT panels are important for particular issues, in the absence of an effective court it is up to informed independent opinion to point to imbalances and encourage reform. The most recent annual GATT report remarked on the increasing recourse to GATT settlement procedures particularly under the Tokyo Round but noted that the failure to implement decisions continued to undermine their effectiveness.[4] This is the objective of the criticism of this paper, which aims to be informed rather than expert, of the worlds two mighty trade lawyers, the United States and the EC.

The term "nonmarket economy" is generally applied to countries where goods, services, and resources are allocated according to the central government's economic plan, where there is no "price mechanism", no "invisible hand", no market balancing of price and demand, no free flow of capital - in short, no market. International trade, one of the "economic heights" seized early on by the Bolsheviks, is conducted through Foreign Trade Organizations, which are juridically separate from the state, though

[4] *Agence Europe* 17 March 1992.

controlled as a state monopoly. The emerging economies of Central and Eastern Europe are increasingly inadequately characterised by this description. Yet it remains the superficial basis for the application of special anti-dumping and countervailing duty laws to their exports.

One hundred and two countries comprise the current membership of GATT. In economic terms, they divide up as follows:

Industrialized Countries	25
(of which European Community	12)
Advanced Developing Countries	10
Developing Countries	56
Nonmarket economies	6

Of these last six, four were members of the recently dissolved Warsaw Pact and defunct Soviet led trade bloc Comecon (or CMEA - Council for Mutual Economic Assistance).[5] These are Hungary,[6] Poland,[7] Romania,[8] and

[5] The other two are Yugoslavia, which went through the normal accession process, and Cuba, who was an original entrant. Yugoslavia is particularly difficult to characterize. It is often used as a surrogate country in countervailing duty cases to determine normal value for a particular product (*see below*). At the time of writing China is negotiating to rejoin as a new member, and the interest of the USSR in membership has been increasing since 1985.

[6] *Protocol for the Accession of Hungary*, GATT, BISD 20 Supp.3 (1974).

[7] *Protocol for the Accession of Poland*, GATT, BISD 15 Supp 46 (1968).

Czechoslovakia,[9] all of whom are Council Members. The terms "nonmarket economies" or "nonmarket economy countries", without more, in this paper refer to these four countries in particular. As the political importance of weakening these countries economic dependence on the Russian Federation decreases, the economic importance of establishing good trading relations in a multilateral framework increases. The nonmarket economy countries are opening their markets to all the imports needed to modernize, and to satisfy liberated consumer demand; to pay for this they seek to increase exports beyond the moribund Comecon:

> A new challenge to policy makers in the 1990s is provided by the efforts of the East European countries and the Soviet Union to reform their economies and stimulate economic growth... both the level and pattern of world trade will be affected as their trade with countries outside the CMEA increases in importance.[10]

Professor Jackson asserts:

> The GATT trading system is based on principles of free trade in free markets. The GATT rules make sense in that context... they make much less sense in the case of trade involving

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[8] *Protocol for the Accession of Romania*, GATT, BISD 15 Supp. 5 (1972).

[9] Czechoslovakia was an original entrant in 1954, when it was still a market economy.

[10] *GATT Activities 1989* (Geneva, June 1990), pp. 15,16.

nonmarket economies or state trading monopolies.[11]

The rules certainly make little sense after the United States and the European Community have purported to implement them. It is in all the parties interest to move away from antidumping law and back to a modified countervailing duty / subsidy determination approach, which is at least closer to the GATT rules than the current system.[12] Furthermore the United States, unlike the European Community, has failed to take the opportunity to establish the sort of programmatic trade agreements which the European Community is pursuing as part of an overall or "holistic" approach to the interface problem.

B. Rules Dependent on Status Alone

1. GATT

> Attaching a simplistic label such as "market" or "nonmarket" to something as complex as a national economy is inaccurate, but a necessity no matter which approach to import relief is chosen[13]

Changes in the economies of Eastern Europe have reached the stage where

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[11] J.H. Jackson and W.D. Davey, *Legal Problems of International Economic Relations*, Second Edition (1986).

[12] The term "countervailing duty" in this paper refers throughout to anti-subsidy measures.

[13] G.N. Horlick and S.S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/ Countervailing Duty Laws*, 18 Int'l Law. 807 (1984).

the label "nonmarket economy" is too inaccurate to be a necessity for import relief regulation which is both fair and workable. Poland, for example, recently claimed that it maintains one of the most liberal trading regimes in the world.[14]

(i) Article XVII

"Article XVII addresses the problem of state trading enterprises and its provisions are not very rigorous."[15] On its face the Article applies not only to the FTOs of nonmarket economies, but also to the state controlled enterprises of all economies, for example even sectors of the advanced industrialized economies of Western Europe, as in France or Italy, so far as they tend towards an économie dirigée. The application of the Article to both state controlled enterprises in an otherwise "free" market, as well as to nonmarket economy organizations that are instrumentalities of a centrally planned economy, may be particularly important as the nonmarket economies continue to evolve their market structure.

> Under paragraph 1(a) each GATT contracting party undertakes that: If it establishes or maintains a State enterprise... or grants to

[14] *Europe* April 1991.

[15] J.H.Jackson, *The World Trading System* (1989), p.284.

> any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

The generally accepted interpretation is that this Article contains only a general Most Favored Nation [MFN] obligation, not a "national treatment" obligation in the sense of Article III. Consequently the provision, and indeed the rest of the Article, is primarily concerned with the treatment of imports into nonmarket economies, not with the rights of contracting parties to respond to imports. Since in practice imports into nonmarket economies have been limited,[16] not least due to the inability to pay for them, an understandable reaction is: "they won't [or can't] buy from us, why should our liberal policies encourage our consumers to support their economy?". This has been a dilemma of interfacing trade between different economies[17] under the post-war system.[18]

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[16] Section III.D.1.

[17] Section V.B.1.

[18] Three primary goals pursued at the international level through the Bretton-Woods system are 1) high employment, 2) stable exchange rates, and 3) trade liberalization. These goals correspond to the triad of institutions under the Bretton-Woods system: 1) the International Bank for Reconstruction and Development (IBRD); 2) the International Monetary Fund (IMF) concerned with balance of payments; and 3) GATT, concerned with foreign trade. The pursuit of these three goals has not always been mutually complimentary. For example, increased trade liberalization may

(ii) A question of law

Yet one ought not conclude, as Jackson does, that "most of the economic activity of this economy evades the effective responsibilities and policies of GATT".[19] Effective for what, and policies of whom? GATT must be taken to mean what it says; there is no natural law of GATT. Yet there is a tendency for the European Community and the United States to assume in a propitious manner the existence of such an unwritten law, and thereupon appoint themselves as interpreters, and thereafter to write their interpretation into protectionist and aggressive domestic trade laws. This paper will endeavor to show that such laws are more questionable, both legally and under "the policies of GATT", than the practices of nonmarket economies.

Jackson admits that nonmarket economies are often "in complete conformity with the technical rules of GATT" and that it may be politically impossible to tighten discipline on state trading in the Uruguay Round.[20]

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result in the depression of manufacturing sectors which lack a comparative advantage, thus bringing a decrease in employment, and an increase in the balance of payments deficit. Since the Bretton Woods system was initiated, employment has been the primary domestic political, and hence international economic, goal.

[19] J.H. Jackson, *The World Trading System* (1989), at 284.

[20] *Id.*

This is an unconscious acknowledgement that, as far as the General Agreement is concerned, much of the activity natural to a nonmarket economy is lawful.[21] Article XVII, the only GATT article specifically concerned with the sort of practices most often associated with nonmarket economy countries, primarily seeks only to encourage state trading companies to act along lines parallel to a commercial enterprise. They may be nonmarket economies, they are not enemies.

(iii) Notification

The only obligation concerning exports imposed specifically on nonmarket economies is notification. Paragraph 4(a) requires notification of the contracting parties by nonmarket economies[22] of products exported from their territories by enterprises of the kind described in paragraph 1(a). Paragraph 4(c) grants a right to a contracting party which "has reason to believe that its interests under this agreement are being adversely

[21] There is another obligation relating to imports by state trading enterprises relating to *import* activities that amount to quantitative restrictions. The Interpretative Note on Articles XI, XII, XII, XIV, and XVII (the quantitative restrictions articles) in the *Notes and Supplementary Provisions* annexed to GATT provides that throughout those articles "the term 'import restrictions'... include[s] restrictions made effective through state trading operations."

[22] "The obligation is clearly placed on the contracting party, not on the enterprise" - J.H. Jackson, *World Trade and the Law of GATT*, (1969), p. 349..

affected by the operations of an enterprise of the kind described in paragraph 1 (a)" to request the nonmarket economy "to supply such information regarding the carrying out of the provisions of this Agreement". This might have been an important right in the calculation of foreign market value under domestic antidumping law.[23] But in characteristic GATT style, the subparagraph following deprives it of its efficacy:

> The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.[24]

Foreign trade legislation does encourage the supply of information, but for the dubious reason that it is in the interests of the investigated exporter to try to avoid the partisan guesswork of the investigator.[25]

(iv) Protocol obligations

Article XIX permits "escape clause" relief in the form of modification of concessions granted under the Agreement if as a result of "unforeseen developments" increases in imports of a product "cause or threaten to

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[23] Section V.B.2(ii).

[24] Article XVII (4)(d).

[25] Section IV.C.

cause serious injury to domestic producers."[26] Such modification is not targeted against a specific producer or country, but against a product, and is applied generally because of the MFN principal. The Protocols of Accession of Hungary, Poland, and Romania, did secure two major substantive rights for contracting parties specifically against nonmarket economies' exports. Firstly, they allow the use of this Article on a non-MFN, i.e. a selective, basis. Secondly, they provide for the possibility of withdrawal of concessions after negotiations. These "selective safeguard" and protectionist provisions, whose effectiveness is multiplied by the difference in bargaining power, presage the antidumping responses below.

2. The European Community

European Community trade law[27] contains no definition of nonmarket economy:[28] it uses a legislative list. Council Regulation of 1988 ("the 1988 Regulation"), on protection against dumped or subsidized imports from countries not members of the European Economic Community, expressly refers to those countries to which previous

[26] Article XIX (1)(a).

[27] The Community's competence in this area is summarized in Section II.C.1(i).

[28] OJ No L 209/1.

regulations apply. In the case of the nonmarket economies considered here, the measure is Regulation 1765/82.[29] This approach appears to differ radically from the United States method considered below.

3. The United States

(i) Background

The roots of the United States regime for imports from nonmarket economies lie in McCarthyism and the reaction to the Cold War. In 1951 Congress passed a law prohibiting the grant of MFN status to countries dominated by world communism.[30] A later example of this attitude was the "Jackson-Vanik amendment", promoted particularly by the Jewish lobby, which withheld the entitlement of MFN status to communist countries who restricted free emigration. At the time the Nixon administration was pursuing a policy of détente. Negotiations towards an MFN agreement with the Soviet Union (which was never ratified) roused Congress to action, and this amendment was included in title IV of the Trade Act of 1974.[31] At the same time, Section 406[32] was adopted. Attitudes changed, especially in

[29] (EEC) No 1765/82, OJ No L 195, 5.782, considered *infra*..

[30] Pub.L. No. 49, ch 139, Section 5,65 Stat. 73 (1951).

[31] Pub.L. 93-618, Title IV, Section 409, 19 USC Section 2439(b).

[32] Section V.B.2(iv).

the executive branch of government, and the United States was willing for Poland , Romania, and Hungary to join GATT.

However under the 1974 Act the United States must opt out of a GATT relationship with a new, communist contracting party by exercising its non-application rights under Article XXXV. The United States then enters into similar arrangements on a bilateral arrangement, but with a legislatively mandated review of the relationship, and with the possibility of application of Section 406.[33] Hungary and Romania are under such an arrangement;[34] but in 1988 Romania renounced its MFN status and the United States suspended it.[35]

(ii) Determination of status as a nonmarket economy

Unlike either GATT or the European Community, the United States does define the term "nonmarket economy"; it was given a statutory, functional definition for the first time in Section 1316 of the 1988 Act. This added a new Section 771 (18)(A) to Title VII of the Tariff Act of 1930, which defines a nonmarket economy as:

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[33] Sections V.B.2(iv)(a) and (b).

[34] *See* J.H. Jackson, *The World Trading System* (1989), p.294.

[35] *International Trade Reporter* 5 [1988], 286.

> any foreign country that the administering authority [the Department of 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.

Subparagraph (B) lists the factors to be considered:

> (i) the extent to which the currency of the foreign country is convertible...
> (ii) the extent to which wage rates are determined by free bargaining...
> (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,
> (iv) the extent of government ownership or control of the means of production,
> (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
> (vi) such other factors as the administering authority considers appropriate.[36]

On the face of this section, the whole matter is on a case by case, non-political basis. Not so. The determination is made by the Department of Commerce, and under subparagraph (D) is not subject to the judicial review otherwise available under subtitle B of this title. This is important when one considers that the status of the nonmarket economies under

[36] These factors follow preexisting Department of Commerce methodology: *See* P.D.Ehrenhaft, *The Application of Antidumping Duties to Imports From "Non-market Economies"* p.302, footnote 1, in *Antidumping Law and Practice*, edited by J.H.Jackson and E.A.Vermulst. *See also* the Electric Golf Carts from Poland case.

consideration might have already changed if the determination was purely economic and apolitical, certainly in the case of Hungary. Most of the nonmarket economies will now only meet objectively a few of the criteria. If the case by case basis is adhered to in more than just form, soon nonmarket economy producers will be able to prove "costs as 'real' as those of producers... subject to other 'normal' antidumping cases."[37]

(iii) Change of status

At the moment the countries considered in the European Community legislative list as nonmarket economies correspond to the determinations of the Department of Commerce. That this determination is unfavorable to the investigated organisation is illustrated by the fact that the investigated organisation is always keen to hotly contest the status; that it operates as an *a priori* list is shown by the way "sophisticated counsel advise their clients not to bother".[38] Ehrenhaft states that these provisions are "virtually unique in this body of legislation in 'judicializing' administrative

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[37] **G.N. Horlick, *The United States Antidumping System*, in *Antidumping Law and Practice*, edited by J.H. Jackson and E.A. Vermulst (1989), at p.139.**

[38] ***Id.*.**

proceedings beyond recognition."[39] It is undeniably a "judicialization" in form, but as Vermulst wrote in 1987:

> it is unlikely that the Department will ever easily change its qualification of a "State-controlled economy", even in situations where socialist economies are rapidly moving in more market-oriented directions (such as Hungary...)[40]

The European Community's approach, though in form less adaptable, is at least honest. The repercussions of a determination that an industry in a nonmarket economy was guided by market forces would radically affect the application of countervailing duty and antidumping law, Section 406, MFN status, not to mention the whole question of bilateral relationship outside of GATT in the case of Hungary and Romania. Such a decision is not likely to be made on the persuasiveness of a foreign respondents legal arguments. In one of the most recent nonmarket economy countervailing duty cases, which concerned the importation of chrome plated lug nuts from the People's Republic of China, the respondent made a plausible case that the manufacturer in question was independent from government control. For the Import Administration of the ITA it was sufficient to draw on its final determination of sales at less than fair value in Certain Headgear from the

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[39] *The Application of Antidumping Duties to Imports from "Non-market Economies" Op. cit.*, p.309.

[40] E.A. Vermulst, *Antidumping Law and Practice in the United States and European Community* (1987), p.355.

People's Republic of China:[41]

> Despite the fact that cotton cloth purchased by headgear producers is outside the government plan, the large presence of the government in the production of cotton cloth would indicate that its actions *affect* the prices and quantities available for producers outside the plan.[42]

This uncharitable determination was supported by CIA reports.

C. Conclusion

Nonmarket economies are subject to different approaches by the United States and the European Community before they even start to trade. The different attitudes to nonmarket economies will be seen to be reflected in their trade law systems overall. The GATT rules themselves are permissive and neutral; the domestic laws are not. The special obligations imposed by the Protocols of Accession have not been considered sufficient by the European Community or the United States.

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[41] 54 FR 11983 (23 March 1989).

[42] 56 FR 15857 (18 April 1991) [emphasis added].

II. RESPONSES TO NONMARKET ECONOMY EXPORTS: COUNTERVAILING DUTY LAW

A. The Economics of Subsidies

A government can affect international trade by subsidies in two ways.[43] Firstly, when a government subsidizes domestic produce, foreign imports find it difficult to compete in price, and thus the market is protected. Secondly, the subsidy may be in the production and export of goods, thus enabling the domestic goods to have a competitive price advantage in foreign markets. Production subsidies, which apply to all domestic output of a product, and export subsidies, which apply only to those exported, are of concern to the importing state because they place home producers of the same or like products at a competitive disadvantage. The export of subsidized goods can be met with countervailing duty law, in order to "level the playing field". The application of football analogies to international relations is a dangerous sport. The playing field for nonmarket economies and less developed countries was not level to begin with. In the Uruguay Round Review of Subsidies and Countervailing Measures India noted that underdeveloped infrastructure, fragmented markets, poor marketing, and the high cost of some inputs required

[43] *See* J.H. Jackson, *World Trade and the Law of GATT*, (1969), chapter 15, p.365.

offsetting subsidies to enter the field in the first place.[44] Bangladesh pointed out that subsidies form an integral part of economic development programs.[45]

Subsidies are not generally prohibited under international law; most of GATT rules concern the use of countervailing duties, since these of themselves operate as a barrier to trade, and the remainder concern restrictions on the use of subsidies. The economic effects of subsidizing are a matter of current debate: the trend of opinion suggests that it is the country who does the subsidizing that automatically pays for his "crime" through losses in net national economic wealth whilst the rest of the world gains.[46] Certainly in regard to each country importing subsidized goods, the benefit of lower prices to the consumer offsets the possible harm to native producers. However it is generally the well organized producers who have the government's ear, for example when they are represented by professional lobbyists in the hearings of the various congressional

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[44] *GATT Activities 1989* (Geneva, June 1990), p. 62.

[45] *GATT Activities 1989* (Geneva, June 1990), p. 62.

[46] J.H. Jackson, *The World Trading System* (1989), 251.

committees and subcommittees which consider trade matters.[47] The United States has been responsible for the imposition of ninety per cent of the countervailing duties imposed by contracting parties during the 1980s.[48]

B. The GATT Subsidy Rules

1. Restrictions on the use of subsidies

(i) Article XVI

Unlike Article VI, Article XVI concerns subsidies alone. Unlike Article VI, it does not confine itself to permissible responses. There is a prohibition (of sorts) in paragraph 4, but it is confined to the grant of subsidies to non-primary products where the subsidy results in the sale for export at a price lower than the price charged on the domestic market. The 1955 review session introduced these amendments, the first substantive obligations regarding subsidies. This prohibition is contained under Section B, entitled "Additional Provisions on Export Subsidies", and consequently only applies to export subsidies of non-primary products, and not general, production, or domestic subsidies. Furthermore, a declaration applying these paragraph

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[47] *See Options to Improve the Trade Remedy Laws*, Hearings before the Subcommittee on Trade of the Committee of Ways and Means of the House of Representatives, Ser 98-15, 98th Congress, 1st Session, 1983.

[48] *Uruguay Round Review of Subsidies and Countervailing Duties,* GATT Activities 1989 (Geneva, June 1990), p. 63.

4 obligations was opened for signature in 1962 but has only been signed by the industrialized countries. So under the GATT alone, the use of subsidies by nonmarket economies is not illegal, though a restrictive trade measure in response thereto may be legal.

(ii) Multilateral Trade Negotiation Subsidies Code

There are two principal agreements which concern the subject in hand which were the product of the Multilateral Trade Negotiations, in whose negotiation the nonmarket economy countries took part. Officially entitled the "Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade", the Subsidies Code has been signed by most industrialized contracting parties, but not by any nonmarket economy country.[49] Jackson calls it: "the first general multilateral discipline of the use of subsidies in international trade and the first elaboration of the subsidy rules since the 1955 GATT amendments"[50] Due to the absence of unanimity in this area, lawyers tend to look to these MTN codes for guidance. There is also a tendency to consider its provisions as in some measure customary international law.

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[49] Similarly in the case of the Tokyo Round Code on Government Procurement, but not the case with the Antidumping Code considered in Section IV.A.1.iii.

[50] John H. Jackson, *The World Trading System*, p.258.

Moreover, the Agreement, like many of the MTN Codes (including the Anti-Dumping Code) purports to be an interpretation of the GATT, and certainly has interpretative value. Consequently, although the Subsidies Code does not now apply to nonmarket economies on a multilateral basis, it does effect trade relations with them.

The substantive obligations under the code are divided into "Track I" and "Track II" obligations. "Track II", i.e. Part II, concerns the international obligations on governments to refrain from the use of subsidies. Again it must be stressed that the provisions thereunder do not make subsidies illegal. Article 8(1) neatly sums up the ambivalence of this Part:

> 1. Signatories recognize that subsidies are used by governments to promote important objectives of social and economic policy. Signatories also recognize that subsidies may cause adverse effects to the interests of other signatories.

Article 11 considers for the first time "subsidies other than export subsidies". Paragraph 1 of this Article could have been written by the nonmarket economies in 1992:

> 1. Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies

> **to achieve these and other important policy objectives which they consider desirable. Signatories note that among such objectives are:**
> **...(b) to facilitate the restructuring under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade,**
> **...(c) generally to sustain employment and to encourage re-training and change in employment.**

The other objectives, which are also recognised by the Signatories as so important that they do not intend to restrict the *right* to use them, are the encouragement of research and technology, tackling environmental problems caused by industry, and the elimination of economic and social disadvantages in particular regions - a veritable agenda for the governments of nonmarket economies in transition. The United States Court of Appeals, Federal Circuit, accepted last year that such activities could not constitute subsidy under Section 303 of the Tariff Act of 1930.[51] Paragraph 2 merely contains a recognition that such subsidies may nullify or impair benefits accruing to another contracting party, and commands that signatories "in addition to the essential internal objectives to be achieved, shall also weigh, as far as practicable, taking into account the nature of the particular case, possible adverse effects on trade."

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[51] **19 U.S.C. 1303. The case id PPG Industries, Inc. v United States 30 I.L.M. 1179 .**

The GATT articles and the Codes constitute the written international law in this area. Even if permitted trade responses are applied with full force to nonmarket economies, the practices per se of such economies would not be illegal. Since a subsidy is granted by a government, for a foreign importing nation to counter the subsidy is to confront directly practices which a sovereign trading partner thought, to be wise economic policy. In the face of unquestioning assumptions of the illegality or unfairness of nonmarket economy practices it is easy to forget that the focus of international trade law, in stark contrast to domestic law, is on the control of the responses.

2. Restrictions on the use of responses

(i) Article VI

(a) Restrictions

> **Article VI(3) deals specifically with countervailing duties:**
>
> **3. No countervailing duty shall be levied ... in excess of an amount equal to the estimated bounty or subsidy determined to have been granted... The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy...**

No allowed restriction apart from countervailing duty is mentioned, and if imposed it must be less than or equal to the subsidy. Article VI thus operates as an exception to the GATT aim of reduction of trade barriers,

not as a prohibition of subsidies. It stresses the purpose of offsetting, not punishing, and the restriction of the countervailing duty to the size necessary to offset. All other GATT provisions and agreements concerning subsidies, with the exception of Article XVI(1), have been accepted only by the industrialized country minority.[52]

(b) Confusion between countervailing duty and antidumping responses

Paragraph 3 of Article VI suggests, if what constitutes a subsidy under GATT is dealt with by an antidumping duty, that firstly the incorrect legal basis is being used, and secondly the antidumping duty cannot exceed the would-be countervailing duty:[53] imports cannot be subject to higher barriers by virtue of their treatment as dumped goods when in fact they are subsidized.[54] However Article VI(5) is the first of several provisions (infra Articles 15(1) and 19(1) of the Subsidies Code) that blur the distinction between responses in the form of countervailing duties and in the form of antidumping duties:

> 5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to

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[52] GATT, (1984) BISD 30 Supp. 140, 164.

[53] Section III.C.

[54] Section IV.C.1.

> compensate for the same situation of dumping or export subsidization.

A possible interpretation of this provision is that the situation can be treated either as subsidy or dumping (clearly not as both.) Under Article VI(6)(a) both the levying of anti-dumping and countervailing duties are put under the same injury requirement established in Article VI(1).

(ii) The Subsidies Code[55]

(a) The suitability of using countervailing duty law against imports from nonmarket economy countries.

The clearest obligations in the Code are contained in Part I, Articles 1 to 7; these circumscribe the rights of contracting parties to impose countervailing duties in response to a subsidy. The Code still does not supply a definition of subsidy, but does provide an "Illustrative List of Export Subsidies" annexed to the Agreement. Many of these are concerned with tax advantages, but the first two examples would apply to nonmarket economies:

> (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
> (b) Currency retention schemes or any similar practices which involve a bonus on exports.

[55] GATT (1980) BISD 26th Supp., p.56.

Article 2(1) provides that there must be a subsidy, a material injury, and a causal link between the two. Article 4(2) reiterates the obligation in Article VI (3) of the General Agreement that "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist."

(b) The confusion between countervailing duty and antidumping law.

Whilst the import of the Code is to further contain the use of countervailing duties, it also further confuses the division between countervailing and antidumping duties. Part IV, Article 15(1), entitled "Special situations" provides:

> 1. In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement [i.e. a nonmarket economy country][56] the importing signatory may base its procedures and measures either

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[56] The Interpretative Note on Article VI here referred to clearly covers nonmarket economy countries. Paragraph 1, point 2 provides

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability... and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This note was adopted on an initiative taken by Czechoslovakia in 1955, and was reflected in the old European Community legislation in Article 3(6) of Regulation 259/68, and Recommendation 77/239.

> (a) on this Agreement, or, alternatively
> (b) on the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade.

On a first reading this provision apparently allows a contracting party to react with either (though not with both - GATT Article VI (5)) countervailing duties under the Subsidies Code (the agreement referred to in Subparagraph (a) of the provision) or with antidumping duties under the Antidumping Code (referred to in Subparagraph (b)), to the same situation. Furthermore, the second paragraph provides:

> 2. It is understood that in both cases (a) and (b) above the calculation of the margin of dumping or of the amount of the estimated subsidy can be made by comparison of the export price with
>
> (a) the price at which a like product of a country other than the importing signatory or those mentioned above is sold, or
> (b) the constructed value [defined as the cost of production plus a reasonable amount for administrative selling and any other costs and for profits] of a like product in a country other than the importing signatory or those mentioned above.

This Article purports to allow the signatories to treat the suspect imports from a nonmarket economy either under its antidumping or countervailing duty law. Whichever response a contracting party chooses, the calculation of size of subsidy or margin of dumping, and thus the maximum size of the imposed duty, is to be according to the same methods - either surrogate producer or constructed value.

However, Part VII, Article 19 (entitled "Final Provisions"), states in paragraph one:

> No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.

This would seem, like the effect of Article VI (3) on Article VI (5), to preclude the use of antidumping law where the exporting parties practices are better characterised as subsidy than dumping. Again, this issue is ambiguous since there is a footnote which states: "This paragraph is not intended to preclude action under other relevant provisions of the General Agreement, where appropriate." The footnote, however, might only refer to the availability of escape clause (Article XIX) or nullification and impairment (Article XXIII) proceedings. The wide acceptance that there are interpretative difficulties and shortcomings in this Subsidies Agreement[57] has focused attention on the Negotiating Group on Subsidies and Countervailing Measures of the Uruguay Round, who have so far failed to reach consensus. In the Trade Negotiations Midterm review Agreement on Subsidies and Countervailing Measures[58] no mention was made of using antidumping law where countervailing duty law was as or more readily applicable.

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[57] *GATT Activities 1989* (Geneva, June 1990), p. 119.

[58] Reproduced in *GATT Activities 1988* (Geneva, June 1989), p. 149.

C. The European Community Countervailing Duty law

1. The law

(i) The legal background

The constitutional basis for the European Community's competence to act as a unit for the Member States in matters of trade law is laid by Chapter 4 (Commercial Policy) of the Treaty of Rome.[59] Article 110 speaks of the customs union contributing to "the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers". Article 113 provides the authority for the European Community to create its antidumping and countervailing duty systems:

> **the common commercial policy shall be based on uniform principals, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.**

The European Community, represented by the Commission authorized by the Council under Article 113(3), is competent for the Member States in all GATT matters: "Member States shall... proceed within the framework of international organizations of an economic character only by common action." (Article 116 (EEC))

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[59] **Treaty of Rome, as amended by the Single European Act (UK Treaty Series No. 47 (1988)).**

External trade policy used to be governed on an administrative basis under Article 113, strengthened by Articles 30 to 36 (EEC).[60] Third countries who were not GATT Member States were generally treated on an MFN basis unless they were the subject of special privileges as part of the Generalized System of Preferences (initiated in 1971) or negotiated reductions,[61] neither of which applied to nonmarket economies.

(ii) The current law

The principal legislation which now governs Community antidumping and countervailing duty law is Council Regulation 2423/88 ("the 1988 Regulation"),[62] entitled a Regulation on "protection against dumped or subsidized imports from countries not member states of the European Economic Community". Article 3 (1) provides for the imposition of countervailing duties to offset subsidies, bestowed directly or indirectly, which cause injury. There is no definition of "subsidy", but the 1988 Regulation annexes the Annex to the 1979 Code, which provides an

[60] Title 1, Chapter 2, is headed: "Elimination of Quantitative Restrictions between Member States".

[61] *See* Kennedy and Webb, *Eastern Europe and the European Community*, 1990 Columbia Journal of Transnational Law, p.633 at 638.

[62] OJ No. L 209/1.

"illustrative list of export subsidies". As considered above,[63] several of the illustrated subsidies are particularly applicable to nonmarket economies.

2. The problems

(i) The confusion between countervailing duty and antidumping law

Article 13 (9) of the 1988 Regulation mirrors GATT Article VI (5), providing:

> No product shall be subject to both antidumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy.

However the Regulation does not contain a provision equivalent to GATT Subsidies Code Article 15 (1). Nowhere does it say that a case of subsidization may be treated as dumping, or visa versa. However a Commission decision imposing countervailing duties on products already the subject of antidumping duties reasoned that where the reduction of production costs allowed an equal drop in both domestic and export prices the domestic subsidies cannot have influenced the dumping margin (presumably since the margin of dumping is the difference between domestic and export price). In such circumstances Article 13 (9) does not

[63] Section II.B.2.ii(a).

preclude the imposition of countervailing duties also.[64]

The 1988 Regulation does confuse antidumping and countervailing duty law when it comes to the calculation of the duties to be imposed on nonmarket economy exports, as Article 3 (4)(d) provides that in the case of nonmarket economy countries:

> the amount of the subsidy may be determined in an appropriate and not unreasonable manner, by comparing the export price as calculated in accordance with Article 2 (8) with the normal value as determined in accordance with Article 2 (5).

Article 2 (5), considered in more detail below,[65] provides for the calculation of the normal value of the suspect product by the surrogate producer or the constructed value methods - the two methods contained in Article 15 (2) of the Subsidies Code. The result is that in any single situation the estimated size of the subsidy and the estimated margin of dumping will be the same.

(ii) GATT problems[66]

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[64] Imposition of provisional countervailing duties on polyester fibers and polyester yarns from Turkey, OJ (1991) L 137/8.

[65] Section IV.B.3.

[66] Considered in more detail *infra* Section IV.B.4. *See also* Section III.C.2.

One might well ask what difference this confusion makes to an investigation, since the calculation of values and thus the determination of the existence of an unfair practice will not vary. However in Article 13 (4) of the 1988 Regulation the factors which the Council takes as relevant in the determination of whether to impose increased or retroactive duties differ in the case of subsidy and dumping. More importantly, where the exporter is able because of comparative advantage to absorb the duty by lowering his export price, Article 13 (11) (a) allows for the imposition of an additional duty if the case has been dealt with as dumping; there is no comparable provision in the case of subsidies.

D. The United States Countervailing Duty Law[67]

Since Georgetown Steel the United States treats imports from nonmarket economy countries as dumped, never as subsidized. Before considering this phenomenon, the United States extreme version of the confusion between antidumping and countervailing duty law, a review of the United States countervailing duty law serves three purposes:

1) To provide the background to the change in Georgetown Steel,

[67] For a general history of the search for fair value pursued through the United States countervailing duty and antidumping law, *see* G.N. Horlick and S.S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/ Countervailing Duty Laws*, 18 Int'l Law. 807 (1984).

2) To illustrate that the countervailing duty law is suitable to be applied to nonmarket economies, and

3) To suggest proposals for the modification of the current regime.

1. Grandfather rights

The law prior to 1974 required the Secretary of the Treasury to assess countervailing duties on imports which benefitted from a "bounty or grant" (which terms since 1922 effectively covered what are now referred to as "domestic" and "export" subsidies, even though domestic subsidies were not considered a proper target for international trade law remedies until 1979. The original United States countervailing duty legislation predated the GATT with the result that in certain situations the United States may impose countervailing duties on subsidized imports without the requirement of injury to domestic producers mandated by GATT Article VI. Section 303(a) of the Tariff Act of 1930, as amended,[68] provided for the imposition of such duties.

2. Post-GATT extension of the law imports an injury test, but not for nonmarket economies

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[68] **19 U.S.C. 1303; P.L. 71-361, as amended by P.L. 93-618, P.L. 96-6, and P.L. 96-39.**

(i) The Trade Act of 1974

The Trade Act of 1974 extended the countervailing duty law to cover countervailing duty responses to subsidized duty free imports. Since this domestic law was enacted after the United States had incurred the international legal obligation of an injury test under Article VI of GATT, the requirement of injury applies to cover this extension of the law where GATT contracting parties are concerned - that is, to otherwise duty free imports from GATT members.

(ii) The Trade Agreements Act of 1979

Congress later approved the GATT Subsidies Code under section 2(a) of the Trade Agreements Act of 1979. Section 101 of the 1979 Act added a new title VII to the Tariff Act of 1930, to bring United States' law into conformity with the obligations thus imposed.[69] Subtitle A of Title VII of the Tariff Act of 1930, as amended[70], applies under Section 701(a)(1) to "country under the Agreement". The phrase is defined in section 701(b) to include countries which are signatories of the Subsidies Code. Thus Section

[69] Also in 1979, President Carter's Reorganization Plan No.3 transferred the administration of the subsidy portions of countervailing duty law from the Department of the Treasury to the Department of Commerce. (Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.)

[70] 19 U.S.C. 1671; P.L. 71-361, as amended by P.L. 96-39, P.L. 98-181, P.L. 98-573, P.L. 99-514, P.L. 100-418, and P.L. 100-647.

303(2) now requires a determination of injury by the Commission under Title VII of the 1930 Act, but only where such determination is required by the international obligations of the United States.

3. Effect on Nonmarket Economies

In the result, there is still no injury requirement for subsidized imports from nonmarket economies since they are not signatories to the Subsidies Code, nor are their imports duty free.

Section 303(b)(1) provides specifically that in such a situation "no determination by the United States International Trade Commission under section 703(a), 704, or 705(b) shall be required."

One of the consequences of this statutory history is that, if Georgetown Steel was overturned by court or Congress, there would be no injury requirement before countervailing duties could be imposed on imports from nonmarket economies, (whether or not they were GATT contracting parties), providing that subsidy was proved, and the imports are not otherwise duty free. For example, the Court of International Trade (CIT) in the landmark case of Continental Steel Corp. v. United States[71] (which was to become Georgetown Steel) Watson, J., noted that the

[71] 614 F.Supp. 548 (CIT 1985).

proceedings were governed by Section 303 (19 U.S.C. Section 1303) because:

> the countries producing the products which were the subject of these petitions were not countries "under the Agreement" within the meaning of 19 U.S.C. Section 1671(b) [Title VII of the Tariff Act of 1930]. This meant only that the assessment of countervailing duties would not require an injury determination if a "bounty" or "grant" was found to exist.[72]

4. The comparability of the subsidies covered by the countervailing duty law to nonmarket economy practices

Though under Section 303 the injury requirement does not apply to nonmarket economies, the Section 701 process for the determination of the existence of subsidy prior to Georgetown Steel did. There is no straight definition of subsidy, but Section 771(5) provides that the term "subsidy" has the same meaning as the phrase "bounty or grant" used in Section 303. Illustrations are provided by Section 771(5)(i) and (ii): "Subsidy" includes any export subsidy listed in Annex A of the Subsidies Code,[73] and any domestic subsidy including the "assumption of any costs or expenses of

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[72] *Id.* at 550.

[73] Section II.B.2(ii)(a). Of particular note are these illustrations:
(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
(b) Currency retention schemes or any similar practices which involve a bonus on exports.

manufacture, production, or distribution".[74] In Continental Steel the practices complained of included "a beneficial rate of currency exchange to the exporter, allowing exporting companies to keep a portion of the hard currency earned from their exports and providing tax exemptions based on export performance",[75] practices which, though even the Court of International Trade did not mention this, are all listed in Annex A.

5. No calculation of fair market value necessary

The importance of the comparability of subsidies covered by countervailing duty law and the practices of nonmarket economies for the applicability of countervailing duty law to nonmarket economies is increased by the fact that no determination of fair market value is necessary to determine the existence of a subsidy. As the CIT held:

> if the "absence' of a fair market value did not impede the enforcement of the antidumping law, in which it was a literal

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[74] Under Section 701(e), added by the 1988 Act, the Department of Commerce is to include in its determination the existence of "upstream subsidies." This term is defined in Section 771(A) as any domestic subsidy described in Section 771(5)(B)(i-iv) which is bestowed on an input product used in the manufacture or production of the merchandise which is the subject if the countervailing duty proceeding, if it has a significant effect on the cost and bestows a competitive benefit (broadly construed). However the sort of subsidies listed in subparagraphs (i) to (iv) are concerned primarily with advanced trade techniques of countries like Japan, and do not really cover nonmarket economy trade practices, at least as currently understood.

[75] 614 F.Supp. 548, 552 (CIT 1985).

> requirement, why is its absence an impediment to the enforcement of a law in which it is not even a named factor, but merely one of the possible guides to the detection or measurement of subsidies.[76]

Whereas the determination of the existence of a subsidy and the net amount of that subsidy are separate, in the case of dumping the determination of foreign market value and United States price (and hence the margin of dumping) is one and the same as the determination of the existence of dumping. The regulations of the International Trade Association of the Department of Commerce provide that the Secretary of the Department of Commerce will maintain a library of foreign subsidies practices in order to help in the determination of the existence of a subsidy.[77]

6. Georgetown Steel abolishes antisubsidy countervailing duty law for nonmarket economies[78]

Georgetown Steel petitioned the International Trade Administration (ITA) of the Department of Commerce[79] on behalf of domestic producers

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[76] 614 F.Supp. 548, 555 (CIT 1985).

[77] 19 Code of Federal Regulations Ch.III (4-1-90 Edition), Section 355.5.

[78] Georgetown Steel Corporation v. United States, (Federal Court of Appeals) 801 F.2d 1308.

[79] Under the United States system the ITA determines whether the subsidy exists, whilst the International Trade Commission (ITC) determines the existence of injury. As explained above there was no need to petition the ITC in this case.

to seek the imposition of countervailing duties on Czechoslovakian and Polish imports of carbon steel wire which they alleged were subsidized. The ITA held that Section 303 did not apply to nonmarket economies; antidumping law was the proper approach. The CIT reversed; the Federal Court of Appeals per Friedman, J., upheld the ITA, and reversed the CIT.

According to the Court of Appeals, the purpose of the United States countervailing duty law was to protect American firms from the unfair competitive advantage gained by a foreign government assuming part of the exporting producers expenses. The court then states: "In exports from nonmarket economies, however, this kind of "unfair" competition cannot exist." In making this statement, and in referring to the absence of a definition of "subsidy" in the Trade Acts, the court tacitly accepts the ITA's definition of subsidy as "any action that distorts or subverts the market process and results in misallocation of resources, encouraging inefficient production and lessening world wealth".

According to the court, congressional intent, determined in part by the enactment of methods for determination of margins of dumping for nonmarket economies in the 1974 Trade Act, establishes that "any selling by nonmarket economies at unreasonably low prices should be dealt with

under the antidumping law". In this extraordinary judgement the court apparently did not consider that subsidy can result in sales at reasonable prices, or that apparently low prices may be the result of a comparative advantage. The court believed itself confirmed in its conclusion that countervailing duty law does not apply by the law's silent failure to specifically state that it applies to nonmarket economies.

III. THE SHIFT TO ANTIDUMPING LAW

A. The Economic Rationale of Antidumping Law and its Unsuitability for Nonmarket Economy Practices

1. Introduction

Economic principles underpin GATT. Before directly considering the GATT legal problems caused by the shift from countervailing duty to antidumping law, it is useful to consider whether the economic rationales of antidumping law fit more suitably the special situations pertaining to nonmarket economies than countervailing duty law.

2. The economic concepts of antidumping law

Between market economies, and even within a single market economy "[T]here is more than a little controversy over whether the internationally sanctioned antidumping rules make sense economically."[80] International antidumping law is aimed at the sale of products to other countries at prices below the cost of production, or at least below the domestic price. Davey states "There is no economic rationale for generally controlling this

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[80] **J.H. Jackson and W.D. Davey, *Legal Problems of International Economic Relations*, Second Edition (1986), p.653.**

behavior",[81] and goes on to show how these dumping practices are tolerated in domestic antitrust law, within certain bounds.

In contrast to the experts view, the popular perceived effect of international dumping is that it harms the producers in the importing country, directly by underselling and thus shrinking domestic producers market share, and indirectly by preventing domestic production growth, by directing consumer interest away from not directly competitive but similar domestic products, and finally by domestic user industry reliance on the undependable supply of dumped goods.[82] This suggests a strong protectionist motivation (considered below[83]) in the use of antidumping law, but to the extent that this is economically vindicated, the Escape Clause and GATT Article XIX is more suited to deal with it.[84]

3. The question of unsuitability

One of the main publicly voiced concerns that justify the use of

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[81] W.J. Davey, *Antidumping laws in the GATT and the EC, in Antidumping Law and Practice*, edited by J.H. Jackson and E.A. Vermulst (1989), at 296.

[82] *Op. cit.* Jackson and Davey (1986), 656-657.

[83] Section III.D.2.

[84] *Op. cit.* Davey (1989), p.297.

antidumping law instead of escape clause relief appears to this author to be the fear of predatory pricing. But economists no longer consider predatory pricing, with a view to monopolistic gains, as viable. Indeed Horlick points out that whilst the United States Trade Representative (USTR) was alleging "predatory" dumping by the Japanese, the United States Supreme Court noted the unlikelihood of such behavior in an antitrust case.[85] Specifically with respect to wheezing nonmarket economies, it can hardly be seriously considered that their goal is to squeeze out domestic producers to gain monopoly profits.

The whole history and thrust of antidumping law is to counter "unfair' market actions by strong private producers. One can almost deduce *a priori* that the determination of a country as a nonmarket economy would preclude the application of antidumping law to state controlled exporters. The CIT held that to apply antidumping law to nonmarket economy subsidies was to reach the following absurdity:

> the more completely a government becomes involved in production and the more thoroughly it eliminates the possibility of internal reference to "market", in short the more perfectly it insulates production from normal economic reality the less likely it is to be "subsidizing."

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[85] G.N. Horlick, *The United States Antidumping System*, in *Antidumping Law and Practice*,edited by J.H. Jackson and E.A. Vermulst (1989), p.103.

Indeed there is a degree of correspondence between the factors listed in the new Section 771(18)(B) added by the 1988 Omnibus Trade and Competitiveness Act to Title VII of the Tariff Act of 1930,[86] and the Illustrative List of Export Subsidies annexed to the 1979 Subsidies Code.[87] The practices of nonmarket economies invite application of countervailing duty law. One can only conclude otherwise by making the sort of leap of faith which Commerce made in Continental Steel:

> even those incentives tied to export, some of which might be considered export subsidies in a market economy, do not, in our opinion, operate as export subsidies in an NME [sic].[88]

and which the CIT dismissed as "analytical legerdemain", but which the Court of Appeals accepted in Georgetown Steel. Horlick states it plainly:

> To the extent that antidumping rules were originally intended to regulate the price activities of private entities seeking to maximize profit (at least over the long term), they should not apply to NMEs where trading is not done by such entities.[89]

It is only against nonmarket economy countries that such a

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[86] Section I.B.3.ii.

[87] Compare, for example, factor (i) in the United States law with illustration (b) in the Subsidies Code, factor (v) with illustration (d), factor (vi) with illustration (l), and factor (iv) with the combined effect of the tax and credit subsidies illustrated in (e) through (k).

[88] 614 F.Supp. 548,552 (CIT 1985).

[89] *Op. cit.* G.N. Horlick, (1989) p.138.

contradiction of economics and such scheme of pretence could be unashamedly maintained as a system of law. If one did not consider the motivation behind the rules one might assume, as Gulliver did in his reply to the noble Houyhnhm:

> that in all points out of their own trade, [lawyers] were usually the most ignorant and stupid generation among us... [tirade of invective continues...] avowed enemies to all knowledge and learning, and equally disposed to pervert the general reason of mankind in every other subject of discourse, as that of their own profession.[90]

B. The Reasons for the Shift to Antidumping Law

The CIT agreed with Gulliver:

> The great irony of the Commerce Department's approach is that while it gives the countervailing duty law a grandiose, theoretical objective, it destroys a significant part of its practical domestic purpose. [protecting domestic industry]

Yet international trade lawyers have outwitted these two masters of irony (Swift and Watson, J.); for the motivation to rely on antidumping law was to better protect domestic producers.[91] Georgetown Steel and the increase

[90] Jonathan Swift, *Gulliver's Travels*, Penguin Edition 1985, p.297.

[91] He who neighs last, neighs loudest. Previously to the recent increase in the need to protect domestic producers, there was not much call for the United States to apply its countervailing duty law to imports to nonmarket economies, which partly if not wholly accounts for the paucity of cases.

in European Community antidumping proceedings[92] against nonmarket economies were prompted by the advantages antidumping law has over countervailing duty law for the implementing country. The Director General of GATT, Mr. Arthur Dunkel, noted in his annual report in 1989 the increased interest in the subject of antidumping and "its importance as a trade policy instrument".[93] It is the most frequently invoked trade policy instrument in the United States and the European Community. Australia, Canada, the European Community, and the United States between them initiated more than one thousand antidumping actions since 1980.[94]

The Director General stated that the scope of antidumping procedures had tended to become broader in recent years with the adoption of legislative or regulatory measures, and with changes in the methods used to determine whether dumping had occurred. From the Director General, these are heavy hints. The shift to antidumping law entails several advantages:

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[92] More than 50% of the European Community's antidumping cases between 1970 and 1986 have been against nonmarket economies - J.F. Bellis, *The EEC Antidumping* System,in *Antidumping Law and Practice*,edited by J.H. Jackson and E.A. Vermulst (1989), at 42 - 43.

[93] *GATT Activities 1989*, "International Trade Policy Developments in 1989" (Geneva, June 1989) p. 17.

[94] *See* the Annexes to this paper.

a) It is naive to think that the non-application of countervailing duty law to nonmarket economies places them in a more favorable position to Western democratic market economy allies. At the time of Georgetown Steel, the then deputy assistant secretary of Commerce for Import Administration, Mr. Alan Holmer, remarked:

> These decisions do not mean that nonmarket economy countries are being let off the hook with respect to our unfair trade laws. The antidumping laws still apply to these countries.[95]

He continued ominously:

> While in the Polish case we found that the countervailing duty law cannot be applied, we also on the same day found preliminary antidumping margins of nearly 60 per cent on wire rod from Poland. This shows that the antidumping laws can be effective in protecting U.S. companies from unfairly traded imports from nonmarket economy countries.[96]

In an interview after he had left the Administration, Mr. Holmer stated that antidumping law had in fact often been opted for by domestic industry, and continued:

> The size of dumping margins in cases involving nonmarket economies over the last year or two underscores the viability of this option, that is readily available to petitioners.[97]

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[95] International Trade Reporter's *U.S. Import Weekly*, Vol. 9, No. 31; pg. 967 (9 May 1984).

[96] *Id.*

[97] International Trade Reporter, Vol. 2, No. 32, Pg. 1016 (7 August 1985).

b) The methodology used in antidumping actions[98] gives rise to higher duties, unrelated to market conditions.[99] This is so as a rule, since countervailing duty law is tied more closely to market place criteria.[100]

c) Safeguard countervailing duty measures[101] must in theory be applied on a non-discriminatory basis to all exporting countries, whereas antidumping duties can be levied against an individual exporting country, or an individual exporting firm.[102]

d) Whereas countervailing duty law extracts a fixed duty, antidumping actions can directly control the price at which the imported good is sold.[103] Last year the Commission initiated for the first time an investigation under Article 13 (11) of the 1988 Regulation which allows for the imposition of an additional antidumping duty to compensate for the

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[98] Section IV.B.

[99] I. Van Bael, *Lessons for the EEC: More Transparency, Less Discretion, and, At Last, a Debate*, in *Antidumping Law and Practice*,edited by J.H. Jackson and E.A. Vermulst (1989), p.405.

[100] *Op. cit.* Horlick, (1989) p.102.

[101] "Safeguard" in the sense that these measures are allowed not as a punishment against foreign practices but as compensation for domestic industry.

[102] *Op. cit.* Bellis, (1989), p.43. *See also* I. Van Bael, in the same collection, p.405.

[103] *Op. cit.* Horlick (1989), at 103. *See also* E.A. Vermulst, *Have Antidumping Laws Become a Problem?*, Michigan Journal of International Law, p. 767, footnote 4, Vol. 10 (1989).

amount borne by the exporter.[104] This in particular must be of questionable validity under GATT since the Panel decision of invalidity of Article 13 (10).[105]

e) In the United States since the 1988 Act,[106] a private complainant can avoid a refusal to grant relief on "political" grounds.[107] The antidumping law is both streamlined and non-discretionary.[108]

f) As early as 1969 Jackson wrote that antidumping law can be "a protectionist device in disguise".[109] With this shift from countervailing duty law, antidumping law now constitutes the best weapon against nonmarket economy exports.

Antidumping law as an offensive weapon of trade policy has replaced the defense instrument of countervailing duty law. It is often now used in

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[104] Woven polyolefin bags from China OJ (1991) C 157/5.

[105] E.Vermulst, *Commercial Defence Actions and other International Trade Developments in the European Communities* 2 European Journal of International Law (1990) 166, 167.

[106] But not in the European Community because of the "Public Interest" Rule - Article 12 (1) of the 1988 Regulation. *See* Section IV.C.5.

[107] *Op. cit.* Horlick (1989), p.102.

[108] E.A. Vermulst, *Have Antidumping Laws Become a Problem?*, Michigan Journal of International Law, p,767 Vol. 10 (1989)

[109] J.H. Jackson and W.D. Davey, *Legal Problems of International Economic Relations*, Second Edition (1986), p.323.

"fast track" proceedings merely to force a country in a weaker bargaining position to accept a quota agreement.[110] Provisions of the law allow "prevention of circumvention" by increasing the duty even if the producer lowers costs.[111] Horlick sums up the situation in the United States:

> **The preference is quite clear among sophisticated trade lawyers in Washington, virtually all of whom seek antidumping relief in preference to any other form if it is perceived as "winnable". Consequently, while the U.S. apparently has the widest range of privately triggered trade actions, an antidumping complaint is still the weapon of choice.[112]**

Antidumping law is the leader in the race to the bottom of unilateral interpretations of GATT principles in order to cope with trade from nonmarket economy countries.

C. GATT Dislikes Shiftiness

1. Meaning

(i) An unauthorized shift

> **The term "subsidy" as it applies in the export activity of a nonmarket economy does not present any real difficulties of "meaning"... If there are any difficulties here, they are not difficulties of *meaning*, but problems of *measurement*, which are precisely within the expertise of the agency [Commerce].[113]**

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[110] *Op. cit.* Van Bael, (1989) p. 405.

[111] E.g. Article 11 (4) of the 1988 Regulation.

[112] *Op. cit.* Horlick, (1989) p.102.

[113] Continental Steel Corp. v. United States, 614 F.Supp. 548, 553.

Crimes of property and violence are often combined. But a court cannot convict a man of battery when he has committed theft alone. Similarly, there is a preliminary GATT question mark over the application of domestic antidumping systems in the place of countervailing duty law, where a nonmarket economy country subsidizes an industry, but that industry does not engage in dumping as such, although its goods may be cheaper than the comparable domestic product. Dumping and subsidy are two different events, with different meanings. If the concept of subsidy and the remedy of countervailing duty law is more applicable to the practices of nonmarket economy countries than dumping and the remedies of antidumping law, than it is against the proper interpretation of the law (if not simply illegal) to apply antidumping law.

The confusion existing in the GATT Articles and Codes has been considered above.[114] But it can be argued that this confusion is not itself enough to legalize the shift in the domestic systems of the European Community and the United States, who up to the last decade were content to apply countervailing duty law as well. In the first place, whilst the nonmarket economy countries are signatories to the Antidumping Code, they are not signatories to the Subsidies Code. This raises the question

[114] Section 3.B.2.(ii)(b).

whether the provisions in the Subsidies Code[115] which attempt to treat antidumping and countervailing duty law interchangeably bind the nonmarket economy countries. The United States or European Communities might claim that since there are other signatories and since they themselves actively interchange these laws that non-signatories are bound under customary international law. A stronger argument could base itself on interpretation: the Code is merely declares the true meaning behind the confusion in Article VI of the General Agreement. However the thrust of this paper is that these provisions do not bind the nonmarket economy countries at all, and that the confusion in Article VI of GATT is an insufficient legal basis for the interchange of these remedies.[116]

Nonmarket economies are not treated as pariahs by the General Agreement.[117] GATT is a multilateral instrument whose obligations depend on acceptance by the contracting parties. Just as in their relations with other contracting parties, the European Community and United States cannot under the Agreement create unilateral rights for themselves. To establish that GATT, which provides in Article VI and XVI for separate

[115] Article 15 (1) and (2), Section II.B.2.ii(b).

[116] Section II.B.2.i(b).

[117] Section I.

measures of antidumping and countervailing duty law,[118] may so easily be interpreted by the minority of industrialist nations in the 1979 Subsidies Code for their own advantage, is to set a precedent for dissolution. It is to be noted that Commerce did not base their shift to antidumping law on the Code, nor were these provisions in the Code referred to in the 1979 Act. The ostensible reason was that the notion of subsidy, as defined by Commerce, has no meaning in a nonmarket economy. In December 1989 the Council of GATT conducted a comprehensive examination of trade policies of the United States to launch the new Trade Policy Review Mechanism established by the Uruguay Round. During the course of this review Council member representatives pointed out to the United States representative that "there was no justification for the unilateral interpretation of the rights and obligations of contracting parties under the General Agreement".[119] There is no room in GATT for a trade vigilante.

(ii) Disadvantages to nonmarket economies

Nonmarket economies may be disadvantaged by this shift in two ways. Firstly, both GATT and domestic rules on subsidies are suitable to be

[118] Sections II.B.1.(i), II.B.2.(i).

[119] *GATT Activities 1989* (Geneva, June 1990), pp. 28.

applied to nonmarket economies.[120] Indeed as regards the United States law, the Supreme Court has stated that "a word of broader significance than "grant" could not have been used".[121] Unlike subsidy, dumping is a concept economically unsuited to apply to nonmarket economies.[122] Because antidumping and countervailing duty law differ there is a risk of determination of dumping where there is no subsidy. The result is that a duty may be imposed in some cases though there does not exist either subsidy or dumping, but merely the legitimate practices of a nonmarket economy. (Market economies do have other remedies, such as Escape Clause Article XIX and Section 406 type proceedings if protection is needed[123]). Not only is the unilateral groundless imposition of duties an illegal increase in tariffs, but their selective application is also a denial of nonmarket economies MFN rights.

Secondly, the regime of antidumping law is harsher then that of countervailing duty law. All the "advantages" of an antidumping action

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[120] Section II.C.2.

[121] Nicholas & Co. v. United States, 249 U.S. 34, 39, quoted in Georgetown Steel Corp. v. United States, 614 F.Supp. 548, 551.

[122] Section III.A.3.

[123] Section V.B.2(iv)(a) and (b).

admired by trade lawyers[124] are disadvantages to the nonmarket economy which go beyond the response allowed by GATT for subsidies.[125] One of the examples given above is that prevention of "circumvention" measures are more strenuous in antidumping cases.

Finally, one may question whether the countries under consideration qualify any longer as state-controlled economies, or have their reforms outstripped that concept at least in some industry sectors? It appears to be only a matter of time before this is unquestionably true.

2. Measurement

The CIT did not see the measurement of subsidy as insurmountable.[126] After the shift to antidumping law, the calculation of foreign market value gives rise to special problems of GATT validity.[127] The first two problems arise in the context of a nonmarket economy practice which would formerly have been dealt with by a countervailing duty action. Firstly, if the practice is closer to subsidization then dumping,

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[124] Section III.B.(a)-(e).

[125] Section II.B.2.

[126] Section III.D.4.

[127] Section IV.C.

there is a problem of proportionality of response,[128] if the calculated margin of dumping is greater than the would-be countervailing duty. Secondly, if the method of calculation of value in an antidumping action is more likely to result in a finding adverse to the nonmarket economy, than a countervailing duty action, then there is a problem of justification for the measure.

There is also the umbrella question of whether the special antidumping laws applied to nonmarket economies even if the practice constitutes dumping are within the parameters of GATT permissiveness of antidumping responses at all, bearing in mind that nonmarket economies are not to be treated any worse than "ordinary" contracting parties.

3. Conclusion

The shift is not going to be reversed on grounds of GATT legality alone. A consideration of the attitude of the United States to trade with nonmarket economies supplies background to the system currently in place, and suggests proposals for reform.

D. Attitude of the United States to Trade with Nonmarket Economies

[128] *See* Article VI (3) (GATT), and Section II.B.2.(i).

1. Communist criminality

Give a dog a bad name and hang him. In the United States nonmarket economy countries have always been linked to Communism, and Communism has not been the flavour of the century. Nonmarket economies are thought of as not taking their fair share of United States exports.[129] The Cold War McCarthyism mentality at the root of the relevant United States trade law[130] has not yet changed its aspect in the governing legislation. There remains a general assumption of illegality, a presumption of guilt if you will, which translates into seeing dumping everywhere, and antidumping law as an instrument of free (United States) trade:[131]

> Dumping is... anti-free trade and is illegal under U.S. Law as well as the [GATT]. In short, sanctions against illegal dumping and for opening markets are pro-, not anti-free trade.[132]

This misapprehension is not confined to the media; Senator Heflin stated simply "'Dumping' is clearly unlawful".[133] When Romania fell from grace in 1988 during the Sixth Review under the Protocol of Accession the

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[129] Section I.B.1(i).

[130] Section I.B.3(i).

[131] Sections II.B.1(ii), III.B.

[132] Malcom Baldbridge, "There Won't Be a Trade War" quoted in J.H. Jackson, *The World Trading System* (1989), p.382, note 39.

[133] Senate Judiciary Committee, *The Unfair Foreign Competition Act of 1985: Hearings on S.1655.*

Rumanian trade representative remarked on the exclusion of his country from the Generalized System of Preferences and the proposal to exclude it from MFN treatment that:

> [s]uch developments were conducive to negative effects in bilateral trade relations and tended to institutionalize recourse to non economic criteria in order to introduce new obstacles to trade.[134]

2. Aggression and protectionism

This mistaken belief has lead to an aggressive protectionism, and to plain aggression. Taking the latter first, the CIT accused the Commerce Department of an attempt, which proved successful in the Court of Appeals, of viewing the response provisions of the trade law as:

> a means for influencing the way the wealth of the world is developed or the way other countries choose to allocate resources or organize production. This would be totally improper, and would be a dangerous distortion of the law. The countervailing duty law is not a tool of foreign policy.[135]

GATT Council members remonstrated with the United States during the recent Trade Policy Review that "there was no justification for unilateral action aimed at inducing another contracting party to bring its trade

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[134] 35 BISD 1988, p.343, paragraph 22.

[135] Continental Steel at p. 553.

policies into conformity with the General Agreement".[136]

As regards aggressive protection,[137] former Commerce official Mr. A. Holmer responded to criticism of not being sufficiently aggressive: "Do we vigorously enforce the law? Absolutely."[138] Section 157 of the Trade and International Policy Reform Act of 1987 Bill was introduced into the House of Representatives to overturn the Court of Appeals ruling in Georgetown Steel to *increase* protection of United States industry: "it is not the intent of the Committee to allow for nonmarket economy countries to be completely exempt from the countervailing duty law."[139] In the Senate, Senator Heinz stated of the altered version of the Bill, the Omnibus Trade Act of 1987, that:

> the bill reported by the Committee once again misses an opportunity to attack unfair trade practices more aggressively through reforms of our antidumping and countervailing duty laws. They address unfair trade practices - market distorting practices nations have committed not to engage in through their signing of the GATT Codes.[140]

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[136] *GATT Activities 1989* (Geneva, June 1990), p.28.

[137] Section III.A.2.

[138] International Trade Reporter Vol.2. No. 32; Pg 1016.

[139] *Report of the Committee on Ways and Means* on H.R.3. 100th Congress 1st Session (1987), House Report 100-40, Part 1.

[140] Comments of Senator John Heinz, *Report of the Senate Committee on Finance on the Omnibus Trade Act of 1987*, Sen. Rep. No 71, 100th

He combined self-contradiction: "These laws are not punitive statutes", with self-delusion: "Thus these laws are ultimately market reinforcing because they encourage nations not to subsidize and companies not to dump".[141] The United States makes much more use of antidumping actions than any other trading country, including the European Community which is the world's largest trading entity.[142] Columbia recently complained that the United States was using its antidumping law as a reaction against comparative advantage.[143]

3. Ways and means

Mr. Horlick, then Deputy Assistant Secretary for Import Administration, began his submission to the Subcommittee on Trade of the Committee on Ways and Means by asserting that the administration had implemented the import laws "aggressively", and then hit on one of the

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Congress, 1st Session (1987)., p.268 at 269.

[141] *Ibid.*

[142] *See* the Annex to the Report of the Committee on Antidumping Practices [established under the Antidumping Code], L/6609 45 BISD 1989 p.435, and other annexes in the Annex to this paper.

[143] The United States preliminary decision doubled the antidumping duty on Columbian flowers. Columbia stressed that it was the ideal soil and climatic conditions which gave them price competitiveness, and it questioned the methodology used by the United States in determining the new dumping margin. Columbia further maintained that the United States action was contrary to the standstill agreement of the Uruguay Round.

primary motivations behind the shift, retaliation:

> The biggest foreign subsidy... is import protection overseas, high tariff barriers, and we do not find that a countervailing duty. Under the GATT rules it isn't... If Congress wishes to change this it is obviously a fairly complicated matter because, quite candidly, we protect a lot of industries. We have import barriers.[144]

One year later the Court of Appeals reversed the CIT in Georgetown Steel, and the legislature began passing "aggressive" bills around. What better way to have your cake and eat it, whilst reforming communists at the same time, than to use a specialized antidumping law?

[144] "Options to Improve the Trade Remedy Laws", *Hearings before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives*, Sen 98-15, 98th Congress, 1st Session, 1983.

IV. RESPONSES TO NONMARKET ECONOMY EXPORTS: ANTIDUMPING LAW

A. Principles of Antidumping Law

1. The GATT antidumping rules

(i) Background

> **In particular, the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping. - GATT Panel, 1984.[145]**

At the time of the World Economic Conference of 1933, national antidumping laws were of as much concern as dumping itself. The revival of unilateralism in domestic antidumping law theory[146] is a regression back to this troubled time. GATT law has been principally concerned from its inception[147] to the present day with controlling antidumping responses, not at all with outlawing dumping. The Surveillance Body established by the current Multilateral Trade Negotiations oversees the commitments made in the Punta del Esta Ministerial Declaration[148] on the "standstill" of restrictive measures. There are several specific commitments:

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[145] GATT, BISD 30 Supp. 140, 164 [1984].

[146] The increase in unilateralism is noted in J.H. Jackson and W.D. Davey, *Legal Problems of International Economic Relations*, Second Edition (1986), p.102.

[147] Section IV.A.1.

[148] 20 September 1986, launching the Uruguay Round.

- no new trade restrictions inconsistent with GATT.

- no new trade restrictions which go further than necessary to remedy specific situations provided for in GATT.

- no trade measures taken to improve negotiating positions.[149]

The increasing application of antidumping law in the place of countervailing duty law to nonmarket economy exports can be seen as a breach of all three commitments.

(ii) Article VI

Article VI of GATT provides:

> 1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of the contracting party or materially retards the establishment of a domestic industry.

Then in Article VI(2) comes the allowed response:

> 2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the difference determined in accordance with the provisions of paragraph 1.

(iii) The antidumping codes

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[149] *GATT Activities 1988* (Geneva, June 1989), p.138, *Annex 1: Trade Negotiations Committee Mid-Term review Agreements, Part I Negotiations on Trade in Goods, Surveillance of Standstill and Rollback.*

There are in fact two antidumping codes. The first was negotiated under the Kennedy Round of GATT trade negotiations (1962-1967),[150] important in this context as proof that the primary concern of GATT contracting parties as a whole has been the limitation of anti-dumping practices and procedures of governments which were damaging international trade.[151] For all practical purposes the Tokyo Round Code has superseded the 1967 Code since all of the 1967 Code signatories bar Malta have signed the new Code, which contains an explicit denunciation of the 1967 agreement.[152]

The "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" has been signed by Czechoslovakia, Hungary Poland, Romania, and Yugoslavia, though not by Cuba. Article 2(1) of that Code retains the definition of dumping in Article VI(1) of the General Agreement.

2. The United States antidumping rules

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[150] *Agreement on the Implementation of Article VI*, GATT, BISD 15 Supp.24 (1968).

[151] J.H.Jackson, *The World Trading System* (1989), p.226.

[152] Part II, Article 16(5).

(i) Background

The Antidumping Act of 1916 provided a civil cause of action in Federal court for private damages as well as for criminal penalties against parties who dumped foreign merchandise in the United States.[153] The evidentiary requirement of intent is so difficult to meet, however, that this statute is a dead letter. Congress passed the Antidumping Act of 1921 which provided the statutory basis until 1979 for an administrative investigation by the Department of the Treasury of alleged dumping practices, and for the imposition of antidumping duties.[154] It also supplied the source for a United States draft article which became the basis for GATT Article VI.

In 1954 the function of determining injury was transferred to the U.S. Tariff Commission, now the International Trade Commission, whilst the determination of sales at less then fair value remained with the Treasury Department. The Trade Act of 1974 was the first legislation to penalize below-cost sales. This was accepted internationally in the 1979 GATT Antidumping Code, and is now common. The United States, then, has often been at the forefront of an expansion in the scope of antidumping law.

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[153] Act of September 8, 1916, ch.463, sec.801, 39 Stat. 798, 15 U.S.C. 72.

[154] Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160 (now repealed).

Congress approved the revised antidumping code - product of the Tokyo Round - under section 2(a) of the Trade Agreements Act of 1979,[155] Title I of which act repealed the Antidumping Act of 1921 and added a new Title VII to the Tariff Act of 1930, ostensibly in implementation of the provisions of the GATT Agreement. The responsibility for making dumping determinations was transferred from the Department of the Treasury to the Department of Commerce in 1979.[156] Further amendments followed in Title VI of the Trade and Tariff Act of 1984,[157] and Title I, subtitle C, part 2 of the Omnibus Trade and Competitiveness Act of 1988.[158]

(ii) The basic provisions

Subtitle B of Title VII of the Tariff Act of 1930, as amended,[159] provides firstly in Section 731(1) that the Department of Commerce must make a determination that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value". Secondly,

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[155] Public Law 96-39, approved July 26, 1979.

[156] Reorganization Plan No.3 of 1979, 44 Fed. Reg. 69273 (Dec. 3, 1979); and Exec. Order NO.12188, January 2, 1980, 45 Fed. Reg. 989.

[157] Public Law 96-39, approved July 26, 1979.

[158] Public Law 100-418, 102 Stat. 1107.

[159] 19 U.S.C. 1673; P.L. 71-361, as amended by P.L. 96-39, P.L. 98-573, P.L. 99-514, P.L.100-418, and P.L. 100-647.

under Section 731(2) the International Trade Commission (an independent body) determines that "an industry in the United States is materially injured, or is threatened with material injury" by such dumping. The antidumping and countervailing duty law share the same standard of injury defined in Section 771(7) as "harm which is not inconsequential, immaterial, or unimportant".[160] The petitioner must establish dumping, injury, and a causal connection between the two. If both these determinations are positive, an anti-dumping order is issued which imposes anti-dumping duties *equal* to the margin of dumping.[161]

3. The European Community Antidumping Rules

(i) Background

The remark is often made that though the European Community has invoked its antidumping rules against nonmarket economies far more often than the United States, it has attracted far less criticism. One commentator suggests that this may be due to the rules greater simplicity and

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[160] 19 U.S.C. 1677; P.L. 71-361, as amended by P.L. 96-39, P.L. 98-573, P.L. 100-449, and P.L. 100-647.

[161] The structure of determinations in the countervailing duty law, Section 701(2), is identical.

bluntness.[162]

(ii) The basic provisions

Article 2(A) sums up the principles neatly: an antidumping duty may be applied to any dumped [where the export price is less than the normal value] product whose release for free circulation in the Community causes injury. Article 2(B) contains provisions on normal value, and what constitute the ordinary course of trade. These are not so important in this context because, just as the European Community determines status by legislative list,[163] theoretically unlike the United States case by case approach,[164] there is no opportunity to try to apply the ordinary rules for calculation of margins, again unlike the United States law.[165]

B. Calculation of Value

The calculation of values is at the center of the antidumping systems, and is the heart of the changes in the law applied to nonmarket economies. This is so because, as the principles of law in the last section demonstrate,

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[162] E.A. Vermulst, *Antidumping Law and Practice in the United States and European Community* (1987), p.433.

[163] Section I.B.2.

[164] Section 1.B.3.

[165] Section IV.B.2(i).

dumping is defined in terms of values. In contrast, subsidies have remained often illustrated, but never defined. It is in the rules on calculation of value that many of the protectionist retaliatory attitudes above[166] find expression, and it is in their application that many of the advantages of antidumping law are sought.[167]

1. GATT rules

(i) Article VI methods

Article V (1) provides that a product is dumped if it is:

> introduced into the commerce of an importing country at less than its normal value if the price of the product exported from one country to another
>
> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (b) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
>
> (ii) the cost of production in the country of origin plus a reasonable addition for the selling cost and profits. [constructed value test]
>
> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

The Interpretative Note to Article VI (1) recognizes in paragraph 2 that in

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[166] Section III.D.

[167] Section III.B.

cases where the State has "a complete monopoly of its trade and where all domestic prices are fixed by the State" [my emphasis] that there may be difficulty in determining the comparable domestic price, and if this is the case contracting parties "may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate" [my emphasis]. So the stress in the original GATT Article on when "special" methods of value determination may be used is heavily on necessity in exceptional circumstances.

Article 2(4) of the Code expands on how the margin of dumping may be calculated where there is difficulty in determining normal value, as is the case with nonmarket economies:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule the addition for profit shall not exceed the profit normally realised on sales of products of the same general category in the domestic market of the country of origin.

In sum, the law of GATT allows a contracting party which is considering the imposition of restrictions to calculate normal market value for the

purpose of establishing the existence of dumping by making only *reasonable* additions for extra costs. Furthermore, costs for profits must be both *reasonable* and less than or equal to those *ordinarily realised*.

(ii) The requirement of fairness

> The primary concern is fairness. Code Article 2 (6) provides further:
>
> In order to effect a fair comparison between the export price... and the price established pursuant to the provisions of Article VI:1(b) of the General Agreement [the normal value established under one of the tests], the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.

Article 8(3) reiterates the requirement of Article VI(2) of the General Agreement that the anti-dumping duty not exceed the margin of dumping,[168] but Article 8(1) goes further, mirroring its counterpart provision Article 4(1) of the Subsidies Code:

> It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

The overriding principle that anti-dumping measures must be controlled, fair, (and non-discriminatory) is clear from Article VI paragraphs 1, 2, 5, and 6 of the General Agreement, and Articles 2 paragraphs 4 and 6, and Article 8 paragraphs 1 to 3 of the antidumping code. This principle governs

[168] Section IV.A.1(ii).

domestic antidumping law and procedures for the calculation of value. It was stressed in the Uruguay Round Review of MTN Agreements and Arrangements that:

> There was a tendency to abuse the right to take measures against dumping.... [Participants] considered that stricter rules governing the conditions under which these measures can be taken and more precise ways of calculating antidumping margins should be elaborated.[169]

2. United States rules

(i) Case by case choice of method: "normal" methods

The determination of whether "less than fair value" (LTFV) sales exist within the meaning of Section 731(1), in order to establish the margin of dumping, is based on a comparison of foreign market value with the United States price. As regards nonmarket economies a close reading of the statutes shows that the determination of comparable value is only made by a separate methodology if the home market or export sales do not permit a determination of foreign market value.[170] However the determination of a country as a nonmarket economy already means that "sales... do not

[169] *GATT Activities 1989* (Geneva, June 1990), p. 57.

[170] *See also* 19 CFR Ch.11 (4-1-90 Edition), Section 353.52.

reflect the fair value [of the products]".[171] Though it thus appears to be a pointless exercise under the statute as well as under the Regulations,[172] nonetheless, Commerce first looks to calculate foreign market value according to three methods under Section 773(a) in order of preference, and declining order of accuracy. The first is home market sales (i.e. domestic consumption),[173] the second is third market sales (the price of the merchandise exported into a third country),[174] and the third, referred in Section (a)(2) to section (e), and which applies only when neither of the first two options is available, is constructed value.

(ii) Factors test

When Commerce is unsuccessful under these possibilities in Section 773 (a) then, since the sales do not permit of proper comparison, Subparagraph (c) provides a special method for the determination of foreign market value. Under paragraph (1) the method to be used is the factors of production test, which is:

On the basis of the factors of production utilized in producing

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[171] Section 771 (18)(A) of Title VII of the Tariff Act of 1930, *supra* Section I.B.3(ii).

[172] 19 CFR Ch.11 (4-1-90 Edition), Section 353.52.

[173] Section 773(a)(1)(A).

[174] Section 773(a)(1)(B).

> the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e).[175]

This factors of production test replaced in 1988 the former surrogate producer test.[176] However the philosophy behind the changing tests remains constant. It was well illustrated before the 1988 Act by ICC Industries v. U.S.[177], where an antidumping duty was imposed retroactively on a United States importer. The Court of Appeals held that the Chinese exporter was dumping because the unit price of the merchandise (potassium permanganate) was 40 per cent less than that of the domestic product. This case suggests that the guiding factor is whether or not the nonmarket economy exporter is undercutting domestic producers. The factors of production test now stands as the fourth method of evaluation in order of preference. The surrogate producer test which is prevalent in the European Community is retained as an exception.[178] It is to be noted that nowhere is this test, unlike the surrogate producer test, specifically mentioned in

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[175] 19 U.S.C. 1667b, Section 773 (c)(1)(B).

[176] Omnibus Trade and Competitiveness Act 1988, Section 1316, amending Section 773 (c) of Title VII of the Tariff Act of 1930 (19 U.S.C. 1671).

[177] 812 F.2d 694 (United States Court of Appeals) affirming Watson, J., in the Court of International Trade.

[178] Section 1316 of the 1988 Act inserted this as subsection (c)(2) of section 773 (19 U.S.C. 1677b).

GATT or in the Codes.[179]

(iii) Evaluation of costs

The market economy chosen for valuation of factors is that "considered to be appropriate" by the Department of Commerce, hardly an unpolitical body.[180] As the nonmarket economies develop it may become easier to determine foreign market value according to one of the three methods referred to in Subsection (a). The factors of production test is itself already linked to the determination of constructed value, taking into the sum all the costs therein mentioned. The big difference is that in the case of nonmarket economies these costs are assessed in a foreign, "appropriate", market economy country, and not in the country of export. Paragraph (3) of Subsection (c) gives a non exhaustive list of the factors of production to be considered: the hours of labor, the raw materials, the amount of energy and other utilities, and the representative capital cost. This approach appears more "scientific" at least on the surface than the former surrogate producer test[181]. Yet the test must still be run according to a type of best evidence rule - that is, "on the best available information

[179] Section II.B.2(ii)(b).

[180] Section I.B.3(iii).

[181] Section V.B.2(ii).

regarding the values of such factors in a market country." This rule can seriously distort in practice the results of any test which depends on it.

(iv) Evaluation of expenses

The amount for general and other expenses is set out in section (e) - the provision for determination of constructed value. General expenses, according to Section 773(e)(1)(B) "shall not be less than 10 percent of the cost as defined in subparagraph (A)". Subparagraph (A) is the cost "of materials... and of fabrication or other processing of any kind employed in the producing of such or similar merchandise... in the ordinary course of business." The cost of materials and fabrication is one of the "other expenses" referred to in Section(c)(1)(B). The last additional cost is the cost of containers, defined in Section(e)(1)(C).

(v) Comparison with United States price

The United States price is that of each import sale, whereas foreign market value, whether based on home or third country prices, represents the weighted average of prices in the period under investigation. The term "United States price" is defined in Section 772 as the purchase price (paragraph (b)) or the exporter's sale price (paragraph (c)). Paragraphs (d) and (e) provide for adjustments so that the price paid includes all costs,

duties, taxes, and transportation expenses.

3. European Community rules

The Preamble of the 1988 Regulation refers to Article 113 (EEC), Article VI (GATT), and then states:

> Whereas it is desirable that the rules for determining normal value should be presented clearly and in sufficient detail;
> Whereas it should be specifically provided that where sales on the domestic market of the country of export or origin do not for any reason form a proper basis for determining the existence of dumping, recourse may be had to constructed normal value.

Unlike the US, the European Community regulation does not consider outside of the Preamble the possibility of the application to NMEs of the usual method of determination of normal value (the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the country of origin.)[182] Article 2 (5) provides:

> 5. In the case of imports from non-market economy countries, and in particular those to which Regulations (EEC) No 1765/82 and (EEC) No 1766/82[183] apply, normal value shall be determined in an *appropriate* and *not unreasonable* manner on the basis of one of the following criteria:
> (a) the price at which the like product of a market economy third country is actually sold:

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[182] Article 2 (B)(3).

[183] Section I.B.2.

> (i) for consumption on the domestic market of that country; or
> (ii) to other countries, including the Community; or
> (b) the constructed value of the like product[184] in a market economy third country. [my emphasis]

Subparagraph (c) is a fallback - the price payable in the Community for the like product. So the choices differ from the United States: first choice is surrogate producer, second is constructed value, and third is the exception, Community prices. This was confirmed by the European Court of Justice in Technointorg v. E.C. Commission and E.C. Council; the European Court of Justice went on to state that:

> The aim of that provision is to prevent account being taken of prices and costs in nonmarket economy countries which are not normally the result of market forces.[185]

C. GATT Problems

1. The four possibilities[186]

The four possible GATT violations that may arise from the interchange of trade remedies are:

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[184] "Like product" is defined in Article 2 (F) (12) as a product which is identical to the product under consideration, or in the absence of such a product, a product which has characteristics closely resembling those of the product under consideration.

[185] Technointorg v. E.C. Commission and E.C. Council, [1989] 1 C.M.L.R. 281, at 299.

[186] Section III.C.2.

i) In a case where there is in fact no subsidy, but where a suspect nonmarket economy practice is tested by antidumping, if the method of calculation of value results in establishing a margin of dumping, then the imposition of a special duty in response is not a trade restriction justified or excepted under GATT, but is prohibited by it.

ii) In a case where the nonmarket economy practice is more suited to a response through the antisubsidy law, if the method of calculation of value results in the imposition of antidumping restrictions which are greater than the countervailing duty restrictions which would otherwise have been imposed, then this is a breach of GATT prohibitions of restrictions greater than the amount of the subsidy.

ii) Even if the nonmarket economy practice may properly be suspected of constituting dumping rather than subsidy, which situation will become more likely as nonmarket economies evolve and private firms have more freedom, yet the domestic antidumping law produces a finding of dumping where none could "GATTly" or reasonably be said to exist, the imposition of restrictions is not justified or excepted under GATT, and is thus prohibited by it.

iv) In the same situation, but where dumping does exist, if the calculation of values results in establishing a margin greater than the margin which would be established if the calculation was impartial and in the spirit of

GATT, then this is a breach of GATT prohibitions on the imposition of restrictions greater than the margin of dumping.

Since there is no consensus on whether the domestic antidumping laws of the European Community and US breach GATT, nor any court determination on the matter, one may only highlight some particulars of the calculation of value to show how arbitrary and unjust a system it is, the product of the attitudes and motivations discussed above, which should be denounced by GATT as illegal.

2. General reasonableness

Commentators have pointed out that GATT vagueness has lead to unilateral interpretations which have facilitated findings of dumping and expanded remedies.[187] Though this writer agrees in the result, the cause is not so much GATT vagueness, though such exists,[188] but in deliberate aggressive use of rules both offensively and defensively to mask bargaining power differences. Davey states:

> Antidumping duties may afford protection to domestic industry in an appropriate amount, but there is no reason to expect them to do so. So in the vast majority of cases prices will be

[187] E.g. Vermulst, (1989) at 801.

[188] Section II.B.2(ii)(b).

raised under circumstances where there is no justification for the amount of such increases.[189]

It has been stated above[190] that the principle of reasonableness runs through the GATT antidumping provisions. Consequently methods common to both European Community and United States systems such as the addition of expenses,[191] the comparison of an average with a single price,[192] and the stress on "not unreasonable" in the place of "reasonable", and "appropriate" in the place of "fair",[193] bring these domestic systems into disrepute. The disreputability of domestic systems can only exacerbate the contentiousness of the use of such laws as instruments of trade policy and the dispute about their legitimacy.[194]

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[189] W.J. Davey, *Antidumping laws in the GATT and the EC*, in *Antidumping Law and Practice*,edited by J.H. Jackson and E.A. Vermulst (1989) at 299.

[190] Section IV.B.1(ii).

[191] Sections IV.B.2(iii) and (iv).

[192] Section IV.B.2(iv).

[193] Section IV.B.3.

[194] The question of legitimacy has been highlighted by the GATT Panel report, adopted by the Council, which determined that the anticircumvention measures taken under Article 13 (10) of the 1988 Regulation (the screwdriver amendment) violated *inter alia* Article III (2) of GATT, and was not justified under Article XX (d) - E.Vermulst. *Commercial Defence Actions and other International Trade Developments in the European Communities*, 2 European Journal of International Law (1990) 166, 167.

There have been several recent challenges to determinations under the 1984 Regulation on the same grounds which will arise under the 1988 Regulation. Technointorg provides an example of unreasonableness in practice. Although Technointorg argued that Russian wage levels and component costs gave it a comparative advantage not reflected in the country of comparison, the European Court of Justice held that a fair comparison required that no further allowances be made beyond those in the governing Regulation.[195] In Sermes SA v Directeur des services des douanes de Strasbourg one of the questions of validity raised by Article 177 (EEC) reference concerned the misuse of powers by the Council in adopting a definitive antidumping duty on electric motors from Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, and the USSR.[196] The court rejected the claim that the Council had been guided not by the Community interest but by the interest of the French industry in question.

The situation in the United States was summed up by Mr. G.

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[195] *Technointorg v. E.C. Commission and E.C. Council*, [1989] 1 C.M.L.R. 281, at 300. The law in question was Articles 2(9) and (10) of Regulation 2176/84.

[196] Case 323/88 [1990] ECR 3027 concerning Council Regulation (EEC) No 864/87 of 23 March 1987.The importer also asserted, unsuccessfully, that the sampling of the export price was not representative of its own sales in France.

Horlick, then a Commerce official, in an interview: "The results of these cases have nothing to do with reality. They are just random, and you could do just as well with a roulette wheel.... The problem is getting worse".[197] Mr. A. Holmer, also a former Commerce official, has stated that it is "exceedingly difficult to achieve a fair and predictable result for the parties involved."[198] A specific illustration of both the unpredictability and the general unreasonableness of the United States law is given by ICC Industries v. United States, referred to above[199], where the CIT upheld the ITA's retroactive penalization of importers of nonmarket economy products because, according to the court, the importers had a reasonable opportunity to change their actions. Such rulings necessarily have a "chilling effect" on trade with nonmarket economies; not only are nonmarket economy producers "charged" with the alternate "crime" of dumping, of which they are promptly and without discretion convicted by aggressive roulette players, but the domestic importers may also be retroactively punished.

3. Accuracy of tests

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[197] International Trade Reporter's *U.S. Import Weekly*, Vol. 8, No. 8; Pg 292, (25 May 1983).

[198] International Trade Reporter, 7 August 1985, Vol. 2, No. 32, Pg. 1016.

[199] Section IV.B.2(ii).

The United States nor the European Community inadequately deal with problems arising from soft currencies. Neither system takes into account the real value of hard currency exports to a nonmarket economy. Valuation of costs in market economy terms forgets that such costs are not paid for in hard currency. The European Court of Justice, considering an Article 173 claim for annulment of a Commission Regulation imposing a provisional antidumping duty on USSR imports in which Yugoslavia was taken as the surrogate, would not take into account that the official exchange rate for the Yugoslav dinar was double that paid by Community banks.[200] Community the disregard for

(i) United States law

Even the International Trade Administration acknowledged that the methods before the factors of production test were inadequate: "the most important issue in the antidumping area today is how to make the antidumping law more administrable and more predictable for nonmarket economy country cases".[201] An example of the unfairness of the surrogate

[200] Joined Cases 305/86 and 160/87 Neotype Techmashexport GmbH v Commission and Council of the European Communities [1990] ECR, concerning Commission Regulation (EEC) No 3019/86, and applying Case 255/84 Nachi Fujikoshi v EC Council [1987] ECR 1861.

[201] Testimony of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, on comprehensive trade legislation, *Hearings before*

producer test as used by the Administration is China National Metals & Minerals Import & Export Corporation v. United States. There the Court per Tsoucalas, J., upheld the choice of the Department of Commerce of a basket of countries to use as analogue, despite Chinese manufacturer's petition that information from India was available. The countries in the basket were Italy, Japan, Switzerland, Taiwan, and the United Kingdom. So much for taking macroeconomic factors into consideration. The Chinese exporter asserted with justification that this was the "least preferable method".[202]

The theory behind the United States approach is that but for the nonmarket character of the economy, the nonmarket economy producers would incur the same costs and maintain the same prices as producers in market economies with comparable GNP per capita. Mr. Horlick believes that this approach is weakened by how it defines comparability in the rules of the various tests, and by the assumptions it makes as to the role of a

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the Committee of Ways and Means of the House of Representative and its Subcommittee on Trade on Bill H.R.3 referred to above.

[202] China National Metals & Minerals Import & Export Corporation v. United States, 642 F. Supp. 1482, 1483 (1987) (CIT). *See also* Urea from the Socialist Republic of Romania, 52 FR 19553.

particular industry on the economy as a whole.[203] But a more fundamental objection is that the "but for" test is simply too big a but to allow accurate predictions on what would be the case if a nonmarket economy was completely different to what it is.

Even though the surrogate producer method is now exceptional in the United States, the factors of production test (first used by administrative fiat in Electric Golf Carts from Poland) is not a solution. Though some commentators consider it a better method,[204] the matter is not simple. The rate of turnover of different tests suggests that the factors test will itself only last a few years, to be replaced by a different set of rules producing equally harsh results and achieving the same aggressive protectionist aims. On the one hand, if the economy is really a nonmarket economy, "the price and cost data are probably meaningless, including the quantities of inputs used, since no market is determining those variables"[205] The inputs themselves might differ in a market economy because of availability.

The same administrative problems which resulted in, for example, the

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[203] *Op. cit.* Horlick and Shuman, 18 Int'l Law. 807 (1984).

[204] *Op. cit.* Vermulst (1989) at p.790, and p.804.

[205] *Op. cit.* Horlick (1989) p.142.

establishment of fair value of imports of Urea from Romania on the basis of prices of commodities in the Netherlands and labor rates established by public information from the United Kingdom, are ever present in the application of the factors test. In a recent preliminary review of antidumping duties on antifriction bearings from Romania, the ITA determined Algeria, Brazil, Malaysia, Mexico, Yugoslavia, and South Africa to be comparable to Romania in economic development.[206] The ITA increased the duty relying, because of the unavailability or unusability of the data, on publicly available Eurostat data, a readily accessible administrative fallback having no other virtue. In the "Sparklers from China" case in comment 2 the heartily fed up respondents urged Commerce to obtain "more legally and factually defensible surrogate country information".[207] The determination imposed an antidumping duty.

(ii) European Community law

The validity of the imposition of antidumping duties, provisionally by the Commission and definitively by the Council, under the 1984 Regulation has been the subject of several challenges.[208] The arbitrariness of the

[206] 56 FR 11190 (15 March 1991)

[207] 56 FR 20588, 6 May 1991.

[208] E.g. *op.cit* Sermes SA and Neotype Technomaskexport.

selection of analogue countries to establish normal value according to Article 2 (5)(a) of the 1988 Regulation is illustrated in the investigation Roller chains for cycles from China.[209] For the purposes of the previous proceeding the Commission had chosen Spain as the analogue country, but since Spain had become a Member State of the European Community before the proceeding in question, the Commission decided to choose Japan instead. China and Japan are simply not comparable. The prices in the United States have been used to determine normal value for exports to the Community from China and the former Soviet Union.[210] In Paint, distemper, varnish and similar brushes from China a dumping margin of over 90% was found based on prices in Sri Lanka, where there were just two producers, one of which was owned by a Community firm.[211]

The European Community ostensibly focuses on countries whose microeconomic development, such as in production processes and scale, in the industrial area under investigation is comparable. But like the United States concern for macroeconomic comparability, the matter is not

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[209] OJ (1988) L 115/1.

[210] Calcium metal from China and the Soviet Union OJ (1989) L 271/1 (definitive); Barium Chloride from China and the German Democratic Republic OJ (1989) L 227/24 (provisional).

[211] OJ (1989) L 79/24 (definitive).

determinative. In Timex Corporation v. Council and Commission of the E.C.[212] the European Court of Justice upheld the determination of the Commission under Article 2(5) of the 1979 Regulation[213] (reproduced in the 1988 Regulation), which used Hong Kong as the surrogate country. Timex, represented by the Brussels law firm of Van Bael & Bellis, made a strong argument that the Commission had produced an "optimal", and not a "normal", value to compare with the price of the imports. The Soviet timepiece industry (the exporters) had a complete cycle of production, unlike in the surrogate country, Hong Kong. The Commission combined the advantages of technology in France with the availability of cheap labor in Hong Kong where the watch movements were assembled, thus achieving an artificial cycle of production not possible in reality, since technological advance and cheap labor are not found together in one country. The European Court of Justice simply stated that the use of this artificial and unfeasible construct was within the wide discretion the Commission possessed in the assessment of values.

In the last resort Article 2 (5)(c) of the 1988 Regulation provides for the calculation of normal value based on prices in the Community. In one

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[212] [1985] ECR 849, [1985] 3 CMLR 550.

[213] Council Regulation (EEC) No 3017/79.

case, when it became necessary to switch from the United States as surrogate in the provisional determination to Community prices in the definitive determination, the dumping margin increased from 46% to 50%.[214] The first time Community prices were used to establish normal value was in Oxalic Acid from China and Czechoslovakia, where the Commission based normal value on the prices of the producer who had requested the review.[215] In another case the two producers involved, one German and the other Chinese, were the only ones in the world.[216] Another example is provided by a Council Regulation of July 1990,[217] where the dumping margin was determined by comparing the import price to the Community price established on the basis of information available in Eurostat. The duty imposed was not even *ad valorem* but was a specific duty "in order to remedy the continuous price decrease of the Chinese imports".

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[214] Barium chloride from China OJ (1991) L 60/1.

[215] OJ (1988) L 343/34.

[216] Pure silk typewriter ribbon fabrics from China OJ (1990) L 174/27. A price undertaking was accepted. See also Silicon metal from China OJ (1990) L 80/9.

[217] Regulation (EEC) No 2200/90, imposing a definitive antidumping duty on imports of silicon metal originating in the People's Republic of China, 1990 OJ L 198.

4. Additional costs

The provisions on additional costs and reasonable additions are used to increase the "normal" value as much as possible. For example, there is a United States statutory requirement[218] that constructed costs must include 10% for administrative overheads and 8% for profit, though this figure is economically unfeasible in times of slack demand, and so is doubtful under Article 2(4) of the Antidumping Code.[219] In Comment 5 appended to the final determination of sales at less than fair value in Urea from the Socialist Republic of Romania[220] the petitioner argued that general, administrative, and selling expenses had been assessed unfairly since the 10 per cent statutory minimum must at least individually value the elements in these expenses. The Department of Commerce nonetheless maintained that these expenses may be calculated without reference to specific factors or components of these expenses in Romania, and instead determined the expenses involved in production and distribution of urea on the basis of those normal in the United Kingdom. Such expenses are of course not related to those in Romania.

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[218] 19 U.S.C. Section 1677b (e)(1)(B).

[219] Section IV.B.1(ii).

[220] 52 FR 19553 (ITA 26 May 1987).

5. Discretion

Discretion in the antidumping laws may of course be exercised to make up for shortfalls in the law, a sort of administrative equity, considered in the next subsection. However discretion also allows for corruption[221] and uneven application of the law, in particular to the detriment of weaker interests. The nonmarket economy countries are in this situation. Some industries in the United States have used the antidumping laws as levers for securing quotas through voluntary restraint agreements. In the event of agreement on voluntary restraint, surprise!, the administration does have discretion to suspend proceedings.

In the European Community, the Public Interest Rule and the fact that restrictions are in the end imposed by regulation of the Council of Ministers, is at least honest in admitting the political nature of determinations, and allows a measure of control and adaptability now so badly needed. The European Community is very aware of the function of the Public Interest rule; Mr Andriessen in an answer on behalf of the Commission stated:

> **The Commission considers that it is in the general interest of the Community that its antidumping policy is well balanced and takes into account not only of the European Community**

[221] *Op. cit.* **Vermulst (1989) p.782.**

producer's interests but also of the Community's role as the world's most important trading partner. This is why the Community's antidumping legislation contains a public interest test, which is a unique feature of the European Community legislation.[222]

6. The Lesser Duty Rule

The rationale of the antidumping duty (at least ostensibly), is to protect domestic producers from the harm caused by unfairly priced products.[223] Article 13(3) of the European Community 1988 Regulation takes up the prompt in Article 4(1) of the GATT Subsidies Code and Article 8 of the Antidumping Code: the duty (antidumping or countervailing) "should be less [than the margin of dumping or size of the subsidy] if such lesser duty would be adequate to remove the injury". The European Court of Justice has interpreted the "should" as "shall".[224]

The European Community Commission enjoys considerable discretion in its analysis of the injury margin, which may be used to inflate dumping

[222] QXW0075/90EN (11 April 1990).

[223] F.G.Jacobs, *Observations on the Antidumping Law and Practice of the European Community, And Some Possible Reforms*, in *Antidumping Law and Practice*,edited by J.H. Jackson and E.A. Vermulst (1989) p.354.

[224] Allied Corp v. Council 53/83 [1985] ECR 1621, 1659.

margins in order to compensate for the lesser duty rule.[225] However the Commission applies as standard practice the injury margin maxim to duties on imports from nonmarket economies.[226] Also, Article 2 (9)(a) of the 1988 Regulation provides for various adjustments to ensure a fair comparison between normal value and export price.

In any event, although the lesser duty rule practice does go some way to remedying GATT problem (d),[227] a practice does not make up for a default in the system of rules. It is also the Commissions practice to apply the rules on nonmarket economies to any industry in any of the countries in the legislative list, and to disregard claims that liberalization and freedom from state control should make the exporter subject to the "normal" antidumping rules.[228] The situation is worse in the United States, which inflates margins as much as the European Community, yet

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[225] *Op. cit.* Vermulst (1989) p. 781.

[226] Espadrilles from China OJ (1990) L365/25 (1provisional), OJ (1991) L 166/1 (definitive); Barium Chloride from China OJ (1991) L 60/1 (definitive); Pure silk Typewriter Ribbon Fabrics from China OJ (1990) L 174/27 (provisional), OJ (1990) L 306/21 (definitive). *Op. cit.* Bellis (1989) p. 57.

[227] Section IV.C.(i).

[228] *Op. cit.* Bellis (1989) p.782. Similarly the Commission always applies the normal rules to nationalized industries in market economies. This practice may have been influenced by the presence of many such industries within the European Community Member States.

does not have this saving provision. That said, the Commission's most common approach is to dispense with the duty once it has served to help negotiate an advantageous voluntary price undertaking by the nonmarket economy exporter. Over one period, out of 82 positive determinations regarding nonmarket economy imports, sixty ended in such agreements, and the remaining twenty two were terminated before completion.[229]

[229] *Op. cit.* Horlick and Shuman (1984) p.807.

V. A TIME FOR CHANGE

A. Proposals

1. Benchmark test

The idea of a benchmark test is that an artificial pricing standard is established as the benchmark for determining if nonmarket economy imports are being sold below value. Several possibilities for this standard have been proposed by Senator Heinz: for example the lowest price in the United States market;[230] or the price of the largest importer.[231] The best version of this proposal would be a four step process: first, establish injury; second, see if "normal" antidumping and countervailing duty rules can apply; third, if this fails test the import price of the product exported from the nonmarket economy with the benchmark price; fourth, if the import price is below the benchmark price, impose a corresponding duty and do not consider whether it is subsidized or dumped.

However there are serious flaws with the various benchmarks suggested. Horlick concludes the search for a satisfactory benchmark to be impossible.[232] The proposals were even rejected in the 1988 Omnibus

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[230] S539, 100th Cong. 1st Sess. section 5008a(1) (1987).

[231] S1420, 100th Cong. 1st Sess. section 325(a)(1987).

[232] *Op. cit.* Horlick (1989) at p.143.

Trade and Competitiveness Act. The benchmark test effectively punishes nonmarket economy countries for failure to come under "normal" antidumping rules, that is, for their status. Most importantly, there is no authority under GATT for such a test. The benchmark test avoids the question marks over the legitimacy of the change from countervailing duty law to the exclusive use of antidumping law. It is a carrot and stick approach; nations are not donkeys.

2. Standardization

A proposal that is gaining increasing currency is to standardize domestic antitrust and foreign international trade law approaches.[233] Though the proposal means well - to end hypocritical application of a less rigorous standard of trading fairness to domestic producers than to foreign, particularly nonmarket economy producers - the vision is still insular. Whilst there is much to be said for the honesty of approach involved in each country harmonizing the standards of fairness applied domestically with those applied internationally, the result would be quite the opposite from standardization between nations: the proposal in fact assumes that

[233] E.g. *Op. cit.* Davey (1989) pp. 299-300.

economies should be standardized.[234]

B. A New Proposal: The Rules

1. Interface through rules

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[234] Professor Zeisman of the Berkeley Round Table on International Economic Affairs (BRIE) strongly propounded in commenting on this paper an argument in vogue especially in the United States. In this author's view, the argument boils down to the following: if countries with non-conforming economies wish to be part of the GATT system, they must enter on market economy terms. If they do not wish to be part of GATT, fine; 80 per cent of world trade is controlled by the Big Three (the European Community, the United States, and Japan) and is market economy driven. The global trading system will consist of GATT plus an assortment of collateral negotiated agreements to cover those nations which would not, or could not, make it. The advanced industrialized countries can continue with the business of making wealth in their own way.

There is now a coincidence, for the first time, of technological, political, and economic abilities which is capable of shaping a world economic system. Is its basis to be the pursuit of self-interest? a division of labor on the global level with all those attendant evils? Riots in inner cities can be suppressed; to suppress riots on a global scale will require a stick bigger than the world can safely use.

Professor Zeisman, motivated by the same concerns, strongly advocates aid and development, but as collateral international economic arrangements. This looks very much like global social welfare. Why put a system in place which will result in a high proportion of the world's population becoming dependent on this support. How can a "level playing field" be justified when so many players are sickly and will not have an equal opportunity to compete? The rationale of survival of the fittest is naturally advocated by the fittest.

The humiliating difficulty the USSR experienced before dissolution, begging to borrow money to buy food, exemplifies the unlikelihood of a powerful trading system being tempered by the self-interested benevolence of the self-interested. There is no human achievement in the economic goal of the globalization of market inequalities. A world trade system must value the equality of different national systems in a structure of rules which does not relegate nations for non-conformity with market economy doctrine.

> **Although some are tempted to use GATT membership... to try to force different national economic systems to change, it can be argued strongly that GATT has a responsibility to change and to figure out an appropriate way to accommodate the different economic systems.[235]**
>
> **Some interface mechanism may be necessary to allow different economic systems to trade together harmoniously.[236]**

One should also recall the ideas of universalism underpinning the International Trade Organisation charter.[237] Solutions as simple as those expounded in the section above belie the complexity of the interface problem. Nonmarket economy countries have a different status to other countries and a set of different legal standards greet their imports. In this system is included varying methods for the determination of values within their territories, which methods appear doomed *a priori* since if the concept of value has meaning in these countries, special rules are not necessary, whereas if it lacks meaning, methodology in calculation serves primarily as a cover or excuse for the restriction to come.

The shift of focus from subsidy to dumping, and from countervailing duty to antidumping law, whichever came first, and whatever about the

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[235] *Op. cit.* Jackson (1989) p. 290.

[236] J.H. Jackson and W.D. Davey, *Legal Problems of International Economic Relations*, Second Edition (1986), p.650-651.

[237] Section I.A.

legality or illegality of this shift under GATT, was only possible since the international economic legal system is not a system wherein legal rules control, but one where legal rules disguise - legerdemain, as Watson, J. said. Members of the Council of GATT voiced concern during the Trade Policy Review of the United States that: "the United States trade system was based on a structure of laws, agencies, and public hearings [whose] very complexity reduced the transparency of trade policy formulation and administration.'[238]

The proposal below returns to the concept of subsidy and the use of countervailing duty law. In the European Community this switch would be possible by administrative decision of the Commission to apply the existing law, but in the United States, since Georgetown Steel was based on a judicial interpretation of the meaning of legislation, a reversal of the judgement is called for. This could be achieved by the courts via cases pressed strongly by the Department of Commerce (in the way the judgement of the Federal Court of Appeals in Georgetown Steel was created), or by Congress. If this is thought to be an impossible proposal then consider why was countervailing duty law thought to be the theoretical norm until the 1980's, and why else would the 1979 Subsidies Code have

[238] *GATT Activities 1989* (Geneva, June 1990), p. 27.

provided for this option in Article 15(1) and (2)?

2. Back to the Future I

(i) Suitability

The suitability of the GATT countervailing duty law structure has already been mentioned.[239] Yet the European Community, whilst not determining as a matter of principle that countervailing duty law is inapplicable to nonmarket economy exports, as a matter of practice relies on its antidumping law.[240] The first United States countervailing duty law was enacted in response to subsidized sugar imports from Russia in 1897. Yet (only since 1984) the United States law has shifted exclusively to antidumping law to treat nonmarket economy exports. Even in the ITA's preliminary determination in the case which became Georgetown Steel it drew on the arguments and briefs in a countervailing duty investigation which was then ongoing but was dropped before completion. It was concluded in that investigation of the import of textiles, apparel, and related products from the People's Republic of China,[241] on "the weight of

[239] Section II.B.2(ii)(a).

[240] *See* comments of P.D.Ehrenhaft, International Trade Reporter's *U.S. Import Weekly*, Vol. 9, No. 6; pg. 22 (9 November 1983).

[241] 48 FR 4600 and 46092.

informed opinion", and on "a narrow reading of the Act" which "by its terms, applies to 'any country, dependency, colony, province, or other political subdivision of government'", that nonmarket economy exports were covered by the countervailing duty law.

The motivation for the shift has been discussed above,[242] but what is at its technical root is a different definition of the concept of subsidy. When the ITA made its final determination in Carbon Steel Wire Rod from Czechoslovakia[243] it adopted a definition confined solely to concepts of profit and market process.[244] The decision in that case amounted to a self-fulfilling prophecy; quite consistently with its terms, the ITA determined that such a definition could not be applied to nonmarket economies. But this definition is certainly not mandated by GATT and is arguably inconsistent with it, since the GATT subsidy rules which do not regulate the imposition of restrictions are concerned with the state help of exports, and are not confined to solely market and profit concepts in interface rules. A subsidy can be identified without exclusive reliance on such concepts, since where such exists government action treats one group preferentially so that

[242] Section III.B.

[243] 49 FR 19370.

[244] Section II.D.6.

that group receives a bounty relative to other groups in the same country.

During a hearing called by the ITA on the question of whether countervailing duty law was applicable to nonmarket economies,[245] Senator Thurmond pointed out that the legislation does not exempt a country because of the type of government it maintains. In regard to the subsidy granted to Chinese textile exports he remarked that a special settlement rate allowed exporters to exchange hard currency at a rate 43 per cent higher than the official rate which was clearly a countervailable benefit. The Bank of China openly referred to this rate as the "subsidy rate". Senator Heinz reaffirmed that the countervailing duty law was intended to have the "broadest possible applicability"; the single distinction with regard to nonmarket economies was the absence of an injury requirement. Ehrenhaft agreed that there was no conceptual reason why the countervailing duty law should not apply to nonmarket economy countries. Indeed precedent for the application of countervailing duty law to state controlled economies can be found in the interwar period, when it was used against Nazi Germany, and before the Bolshevik revolution when there was

[245] International Trade Reporter's *U.S. Import Weekly* (9 November 1983) Vol. 9 No. 6. p.226 *et seq.*.

significant trade with czarist Russia.[246]

The principal relevant difference between nonmarket economy countries and market economy countries, leaving aside political questions, is the degree of State involvement. If this difference suggests to market economies the opportunity for special trade law rules, state control also connotes subsidy, not dumping. Though few types of subsidy are actually prohibited, and none that nonmarket economies have agreed to, GATT sanctions relief actions quite readily. This has the advantage that relief may be sought even where the subsidy does not result in dumping. If there is dumping without subsidy, one must question how far the state can be controlling the exporter and domestic prices, which suggests that, quite the opposite of the system now in place, dumping is a concept better adapted to market economies.

(ii) Estimation of subsidy

(a) Measurement

The definition of subsidy espoused by the United States domestic law relies on the existence of commercial benchmarks in order to measure the subsidy in terms of prices, thus making the calculations at least as difficult

[246] M. Ligh, *Note on Continental Steel*, 80 A.J.I.L. 359.

as those involved in the calculation of the dumping margin. If the preferential treatment model of subsidization is adopted the problem of estimation in nonmarket economies is not insurmountable:

> All that will be needed in these cases will be the normal operation of central control and the exceptional or disproportionate or unfair event.... Its potential difficulties do not justify the exception to the law sought to be made in this case.[247]

The "potential difficulties" are certainly no greater than is currently the case in the application of the antidumping law. Ehrenhaft has pointed out that the surrogate methodology for the calculation of value can be adapted;[248] at least what is to be measured will be identifiable apart from the measurement. The greater conceptual suitability of countervailing duty law may make measurement easier: Senator Heinz believed that in the Chinese textile imports case the subsidy can be "easily measured as the difference between the preferential exchange rate and the normal rate."[249]

Professor Barcelo of Cornell Law School has criticized the approach advocated in this paper on the ground that any GATT response to nonmarket economy trade practices requires a market economy outcome as

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[247] *Op. cit.* Judgement of the CIT in Continental Steel.

[248] ITA Hearings, *U.S. Import Weekly*, (1983) Vol. 9 No. 6, p. 226.

[249] *Id.*.

a benchmark to serve as an indicator of government intervention. Professor Barcelo points out that to look at a particular government policy which in a market context would appear to grant preferential treatment would not disclose whether it is indeed preferential treatment in the nonmarket economy. Consequently, one cannot determine whether there is preferential treatment against a benchmark which does not exist. However this argument, like the final decision in the Georgetown Steel, is self-fulfilling. A purely free market concept of subsidy is by defintion meaningless in a nonmarket economy context. The GATT does not mandate a market economy benchmark for dealing with nonmarket economy products either by its provisions or in the light of its role as an interface mechanism in a world system. Rather the workings of different economic systems need to be understood, and their relative internal effects quantified simply in terms of benefit and detriment within those systems to particular industries, rather than creating market values by the artificial superimposition of a market economy schematic.

The ITA went so far as to acknowledge, in the preliminary determination to Steel Wire Rod from Czechoslovakia, that the government currency retention scheme constituted a subsidy under Annex A of the Subsidy Code and hence under 19 U.S.C. 16775 and 1303, and yet "such

alleged benefits to not constitute a bounty or grant".[250] To estimate a nonmarket economy subsidy the ITA realizes that "our traditional tools - prices - are of questionable value", but do not consider that such tools are not mandated under GATT but rather may have to be modified to avoid GATT problems.[251] Certainly there is no authority for the exclusive use of such tools when this would result in the deprivation of rights under GATT. The ITA admits that since 1890 the identification of benefits has been "based in part on differential treatment of an industry or a group of industries within that country".

(b) Sector approach

"Sector approach" has two meanings. Firstly, it is a requirement of United States law that government intervention, to be the subject of countervailing duty law as a subsidy, must be specific on its face or in its application to an enterprise, an industry, or groups thereof.[252] Secondly, it is advocated here that imports from market economies should be considered according to the economic sector of origin, not according to the

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[250] 49 FR 6773.

[251] Section IV.C.

[252] PPG Industries Inc v United States Judgement of Federal Court of Appeals 22 March 1991, 30 I.L.M. 1179 (1991).

blanket status of nonmarket economy. Since the nonmarket economy countries under consideration are fast approaching a sufficiently free market in certain industries to retain market benchmark techniques for their products, it may be possible to use a sector approach in deciding whether special or "normal" subsidy estimation techniques are appropriate. In determining the amount of the subsidy, a sector approach is more suitable than considering the economy as a whole. In this approach the industrial sector whence the allegedly subsidized exports originated is analyzed in order to see if the amount may be calculated after the manner of such calculations for market economies.[253] Vermulst, considering this approach in the calculation of dumping margins, claims that:

> a pure sector approach is a dangerous over simplification of economic realities because it does not take into account the constant interaction between micro-economic and macroeconomic realities.[254]

However subsidies by their nature operate on this borderline. The European Community considers sectors only in determining whether the relevant prices in the surrogate country are market determined, or whether

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[253] If the amount cannot be so calculated, the approach outlined in subsections (a) - measurement - and (c) - notification - of this section are of course available.

[254] *Op. cit.* Vermulst (1987) pp. 356-357.

they are fixed by the State or subject to a total or near-total monopoly.[255] The United States in theory considers in each case the sector of origin of the exports to determine whether the ordinary methods of calculation of domestic price can apply. In practice the United States also eschews a sector approach; indeed the ITA in its final determination in the Czechoslovakian Steel Wire Rod case stated that the issue of the applicability of the countervailing duty law was a jurisdictional question, and under the statute law the jurisdiction did not extend to imports from nonmarket economy countries.[256] In Four "H" Corporation v. U.S.[257] the CIT upheld the ITA's treatment of imports from the Chinese canned mushroom industry. The ITA took the transaction between the export agency and the U.S. importer to be the import price even though the agency, China National Cereals Oils and Foodstuffs Import and Export Corporation (CEROILS) was not a manufacturer or producer within 1677a(b). The plaintiffs argued that the correct transactions were those between the Chinese canneries and the CEROILS, but the court held:

> Plaintiffs concede that the People's Republic of China economy is state controlled. They *must* concede, therefore, that the price between the canneries and CEROILS is state controlled to some

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[255] *Op. cit.* Neotype Techmaskexport.

[256] M.Ligh, 80 A.J.I.L. 359 (1986).

[257] 611 F.Supp.981 (1985 CIT).

> degree. If it is state controlled *to any degree* it is not a reliable price when compared to prices set entirely by market forces.[258]

One wonders what such reasoning would mean for imports from certain state dominated sectors of market economies if it was there applied; there is no doubt that the judgement leaves little room for a sectoral approach in United States current trade practice.

In March of 1989 the question rearrose when the ITA asked whether it was possible to isolate a specific product sector and find it sufficiently market oriented that domestic prices could be used to determine whether dumping exists.[259] That September the Commerce Department released a report concluding that a sectoral approach in antidumping law (no mention was made of countervailing duty law) could be applied to nonmarket economies in transition to greater market orientation which would analyze a specific sector apart from the country's larger economic scenario.[260] Nonetheless, in two decisions more recent than this report Commerce has demonstrated its continuing hostility to such an approach.

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[258] *Id.* at 983 (emphasis added).

[259] 54 FR 12941.

[260] International Trade Reporter, Vol. 6, No. 36, Pg 1147.

In Chrome Plated Lug Nuts from the People's Republic of China,[261] the respondent claimed that regardless of Commerce's view of the PRC macro-economy, the chrome plated lug nut sector was sufficiently market oriented to permit the ITA to determine fair market value under Section 773(a) of the Tariff Act of 1930 (U.S.C. 16736). The ITA remarked that "in every case conducted by the Department, it has treated the PRC as a nonmarket economy" and that since the government was involved in steel output, no sectoral approach could apply. The second of these reasons could apply to every steel industry worldwide to a varying extent, and the first reason simply rejects the case by case approach imbedded in the statutory rules.

The ITA also refused to apply ordinary rules of identification and estimation in the final determination of sales at less than fair value in Sparklers from the People's Republic of China.[262] The Department of Commerce restated their theoretical position (and the rule on the burden of proof) in response to a comment by the respondent: "nonmarket economy countries are entitled to separate, company specific margins when they can demonstrate an absence of central government control, both in law and in fact, with respect to exports". Evidence supporting ("though not

[261] 56 FR 15857 (18 April 1991).

[262] 56 FR 20588 (6 May 1991).

requiring") the sectoral application of normal rules includes the absence of restrictive business stipulations on the exporter's business, and decentralization of companies both in law and in de facto absence of government control. These evidentiary requirements are increasingly fulfilled by the nonmarket economy countries under consideration. This position should be implemented in practice, not just restated in theory.

(c) Notification

The sector approach if adopted ought to be combined with a stress placed on the notification obligations in GATT Article XVII (4)(c) and (d).[263] These obligations, unlike the many false assumptions at the root of the current system,[264] are real. Compliance will especially help importing countries to judge the existence and amount of subsidy if, because of State control of an industrial sector, market economy calculation methods are insufficient, having regard however to the exposition of GATT Article VI(1) contained in the Interpretative Note.[265] Moreover, a willingness on the part of nonmarket economies to supply information (easy to secure in these times), and on the part of the United States and the European Community

[263] Section I.B.1(iii).

[264] Section III.D.1.

[265] Section IV.B.1(i).

to use it, will avoid the horrendous inaccuracies which result from the administrative difficulties in gathering information from comparable market economies (due to their natural reluctance) and the consequent application of the best evidence rule. This combined proposition also allows for the self-correcting / case by case approach imbedded in the United States law which is in theory to be applied to the determination of status and the calculation of values.[266]

A recent Decision of the Contracting Parties arising from action taken by the Uruguay Round Trade Negotiations Committee established a "Trade Policy Review Mechanism" which may be used to stimulate use of notification.[267] The objectives of this mechanism are:

> To contribute to adherence by all contracting parties to GATT rules, disciplines and commitments, and hence to the smoother functioning of the multilateral trading system by achieving greater transparency in, and understanding of, the trade policies and practices of contracting parties. Accordingly the review mechanism will enable the regular collective appreciation and evaluation by the Contracting Parties of the full range of individual contracting parties trade policies and practices and their impact.[268]

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[266] Section I.B.3(ii) and (iii); Section IV.B.2(i).

[267] GATT BISD 36 1988/89 p.403.

[268] Section IA(i) of L/6490.

This review mechanism removes the excuse, so far as it is based on ignorance, that it is not possible to estimate a subsidy in a nonmarket economy. Under Section B contracting parties must provide reports whenever there are changes in their trade policies, as well as an annual update of statistical information. These requirements chime with the Article XVII and other GATT notification obligations: "Information contained in the country reports shall to the greatest extent possible be coordinated with notification made under GATT provisions". Some of the descriptions which must be supplied are the evolution or existence of sectoral trade policies, their economic goals and significance. [269] The policy behind the decision is to improve adherence to the actual GATT rules, as distinguished from fictional 'extras' in the 'spirit of GATT' or 'fairness' in the appropriated sense of those words.

(iii) The requirements of injury and MFN

The reversion to countervailing duty law will not cause the United States to lose its grandfather rights, and thus it need not implement a requirement of injury,[270] though the European Community must. Some form of injury requirement is desirable, since its absence in Section 303

[269] GATT BISD 36 1988/89 p.408.

[270] Section II.D.1.

proceedings results in an imbalance in favour of domestic producers. There are two principal advantages. Firstly, there is no risk of losing the case on account of a negative injury determination by the International Trade Commission, who are institutionally more independent than the ITA. Secondly, Petitioners avoid the time and expense which detailed injury information and answering ITC questionnaires impose, not to mention the additional expenses of separate proceedings at the ITC.[271] An injury requirement as a precondition to the application of countervailing duty remedies to nonmarket economy subsidized imports would not overburden the petitioner because of the wideness of the United States definition of material injury, which includes harm that is not immaterial or inconsequential.

The acceptance of an injury requirement could be traded off against an agreement, similar to that contained in the Protocols of Accession concerning Article XIX relief, that the restrictions once subsidy and injury are established, may be implemented selectively against nonmarket

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[271] **A.F.Holmer and J.H.Bello, *U.S. Trade Law and Policy Series #7: The Countervailing Duty Law's Applicability to Nonmarket Economies*, 20 Int'l 319.**

economies.[272] Such an agreement could be concluded bilaterally with all the nonmarket economies here considered and the European Community and the United States. It would only cover situations where the "normal" rules were inapplicable, and would provide that as the nonmarket economies evolve these "normal" rules will be applied automatically. Alternatively the nonmarket economy countries may be induced to sign the Subsidies Code which would automatically deprive the United States of grandfather rights in their regard. In return the antisubsidy law contained in that Code could be applied against nonmarket economy signatories in the place of antidumping law.

As in the European Community, the imposition of the restriction in the final instance should be discretionary. The politics involved is then at least brought out into the open where, since there is no question of imposition of a duty not allowed by the rules, it can only act permissively. For example, the Commission has been viewed as reducing antidumping

[272] There is some inconsistency between a requirement of injury and selective imposition, since the only legitimate reason for looking to injury is to asses the existence and degree of harm whose remedy is the concern of the restrictions. There is no perfect solution to interfacing incompatiblities, just a reduction of the problems.

activity as a measure of indirect aid.[273]

(iv) The red economic menace.

Horlick advocates that the best solution is the implementation of an "injury only" market disruption clause.[274] In this writer's view such actions will only be necessary in the unforeseeable future after the nonmarket economy countries have emerged from market reforms. Indeed it appears from recent events to be axiomatic that the East European nonmarket economies can only be in a position strong enough to rapidly increase exports, and so cause enough market disruption to fall under these special nonmarket economy provisions, if they cease to be nonmarket economies! Often in the last few years the nonmarket economy countries could not even fill the quota allocated to them by the European Community.

One wonders how many safeguards market economies need, since they already have economic advantage, and since it is their theory of trade liberalization that underpins GATT. It is easy to forget that the phrase "level playing field' fails to refer to the game: the European Community

[273] Kennedy and Webb, *Eastern Europe and the European Community*, 1990 Columbia Journal of Transnational Law, p.633 at 638.

[274] *Op. cit.* Horlick (1989) p. 143.

and the United States are setting the rules in MTN codes and have all the biggest and most able players.[275] However to stress the possibility of an increased use of measures already on the books in both the European Community and the United States will serve a psychological function in reassuring protectionists and "trade hawks".

(a) The rules

The Council Regulation on common rules for imports from State-trading countries[276] provides for protective measures in Title V.[277]

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[275] Romania's recent trade history provides a good example of this game. Credits to pay for western economies exports led to crippling debt. Only by restricting their market and concentrating on exports did the national economy recover. *See* A. Lekovesk, *U.S. Romanian Trade: Foreign Debt, Trade Barriers, and Future Problems and Prospects*, Law and Policy in International Business 1989 Vol. 1, p. 71.

[276] (EEC) No 1765/82, OJ No L 195, 5.782.

[277] Council Regulation (EEC) No 2641/84 (OJ No L 252/1) on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices might be used as an additional mechanism, but it is too aggressive for a buffering or interface role although it does have a benefit in that it focuses on removing the injury and thus not with an evaluation of how far prices differ. Nevertheless it has two characteristics of doubtful worth: its aims are too general, and it eschews all classification of nonmarket economy practices as either subsidy or dumping.

Article 1 provides:

This Regulation establishes procedures in the matter of commercial policy which, subject to compliance with existing international obligations and procedures, are aimed at:

(a) responding to any illicit commercial practice with a view to

Article 11 states that where a product is imported into the Community:

> in such greatly increased quantities or on such terms and conditions as to cause or threaten to cause substantial injury to Community producers, and where the interests of the Community require immediate intervention... may alter the import rules for that product by providing that it may be put into free circulation only on production of an import authorization... under Article 12.

Section 406 of the Trade Act of 1974[278] is entitled "Relief from Market Disruption by Imports from Communist Countries". The Section applies to imports from communist countries whether or not they are contracting parties. Section 406 provides a lower standard of injury causation then sections 201-203 of the Trade Act of 1974, which will be an additional boost to those still wary of the red menace.[279]

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removing the injury resulting therefrom;
(b) ensuring the full exercise of the Community's rights with regard to the commercial practices of third countries.

However to label nonmarket economy trade efforts as illicit commercial practices, defined in Article 2 as "any international trade practices which are incompatible with international law or with generally accepted rules" is to codify the prejudice against nonmarket economy countries that this paper argues against.

[278] Public Law 93-618, approved January 3, 1975, and amended by section 1411 of the Omnibus trade and Competitiveness Act of 1988 (Public Law 100-418) 19 U.S.C. 2436.

[279] *The Wall Street Journal*, May 13 1991, p. A(11).

Under the definitions Subsection (e)(2)(A) of Section 406 market disruption exists whenever "rapidly" increasing imports of a product are a "significant cause of material injury, or threat thereof" to domestic industry. Under subsection (e)(2)(B)(i) the rapidly increasing requirement is defined widely to include any significant increase, actual or relative to domestic production, during a recent period of time. Subsection (e)(2)(B)(ii) states that the cause need not be equal to or greater then any other cause. The International Trade Commission is allowed to consider in making a determination of market disruption "evidence of disruptive pricing patterns", or any other efforts to "unfairly manage trade patterns".[280]

The ITC is to conduct its investigation upon the filing of a petition by inter alia any trade association, firm, union, or group of workers which is representative of an industry,[281] so the private sector retains its right to initiate actions. The Commission must complete its investigation in 3 months, including a public hearing.[282] The Commission finds the amount of duty or other restriction necessary to remedy the market disruption (note

[280] Subsection (e)(2)(C)(iv).

[281] Section 406 (a)(1) referring to section 202(a) of the Trade Act of 1974.

[282] Section 406 (a)(4).

the difference in language: not the amount necessary to offset the injury or counter the subsidy), and submits this along with its report to the President.[283]

(b) The remedies

Article 12 provides for discretion in responses:

> 1. The Council may, in particular in the situation referred to in Article 11 (1), adopt appropriate measures...

The only limitation is appropriateness, which in typical European Community and civil law fashion gives as much freedom in a word of discretion as the United States law accomplishes by a list. The response may even "be limited to imports intended for certain regions in the community" (Article 11 (2)). Quantitative restrictions are a normal response.

In the United States the President under subsection (b)(2)(A) may take any action authorized under sections 202 and 203, described as actions to facilitate positive adjustment to import competition. Such responses allow the President to impose or increase in tariffs, quantitative restrictions, to negotiate orderly marketing agreements, to impose an import license regime, to submit legislation benefitting domestic industry, and to

[283] Section 406 (a)(3).

implement trade adjustment measures.[284] Relief applies only to imports from the subject communist country and lasts for a period of five years, subject to a three year renewal. The discretion cuts both ways. Until 1984 every case where the ITC found injury under Section 406 the President refused a remedy. In one case where he had withheld relief, after the Soviet military intervention in Afghanistan the President reinstituted an investigation on the same facts on which he had just denied relief.[285]

C. A New Proposal: The Approach

1. Introduction

The improvement in the position of nonmarket economies which the above proposal would bring about are partly technocratic: rapprochement proceeds as quickly as the nonmarket economies succeed with market reforms. This is partially how the nonmarket economies view their own position, but they seek western help to make that change, and have accepted the chronology of macroeconomic, then microeconomic, restructuring which facilitates aid.[286] If the proposal is confined to domestic rule changing

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[284] Section 203 (a)(3)(A-J) of the Act of 1974.

[285] *Op. cit.* Horlick and Shuman (1984) p.807.

[286] *Op. cit.* Kennedy and Webb (1990) p.674.

alone, it will be incomplete. The nonmarket economies would have reason to share Bellis concern:

> My worry is that any alternative to this system (for example some form of selective safeguards) would not necessarily be less protectionist.[287]

Although the domestic trade law systems in the United States and the European Community have many similarities, the European Community's general strategy or "holistic" approach to the economic changes in Eastern and Central Europe differs radically from that of the United States. For example, in the Seventh Review of Trade with Hungary under the Protocol of Accession[288] the United States representative referred to "reducing the role of central planing in economic decision making and reducing subsidies to inefficient enterprises"; "much more needed to be done", the representative continued, "in these and other areas if Hungary was to become the sort of market oriented economy on which the GATT system is based."[289] The representative in the same breath thus demonstrated the United States unwillingness to interface through anything other than their

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[287] *Op. cit.* Bellis (1989) p. 97.

[288] Report by the Working Party on Trade with Hungary, adopted on 19 July 1989 (L/6535) BISD 45 p.416 (1989).

[289] *Ibid*, paragraph 10.

own standards, whilst simultaneously admitting that subsidies exist in the nonmarket economy countries, which subsidies the Department of Commerce maintains are conceptually meaningless. The view expressed by the European Community's representative contrasts; he refers to the EEC's trade and economic cooperation with Hungary, and remarks that the reforms "augur well for a fuller integration of the Hungarian economy in the GATT family and the world economy",[290] and suggests that Hungary be one of the early candidates for trade policy review.

2. Beyond antidumping and countervailing duty law: the bilateral treaty program of the European Community

Despite, or perhaps because of, the rapid pace of bilateral agreements, the European Community's system of antidumping law remains in place. This was expressly affirmed by Article 23 of the Implementation Agreement. The proposals on rules made in this paper must still be addressed.

However bilateral agreements are changing the framework of Trade with Eastern and central Europe. The European Community program reaches beyond its domestic laws; it is supplying the investment needed for

[290] *Ibid*, **paragraph 11.**

restructuring the economies and infrastructure, and making agreements which will in the long run result in the European Community's accumulation of all the major benefits. Under the first generation of such agreements the focus was on the reduction on the one hand of the European Community's quantitative restrictions and on the other the liberalization of the nonmarket economies import licensing systems. The second generation of such agreements were primarily a reiteration of GATT obligations arising from the General Agreement and the Protocols of Accession. These trade and commercial cooperation agreements gave a firm commitment to abolish quantitative restrictions by an early date (which other GATT contracting parties had removed since 1975).

The European Community has extended extra time to these three states to dismantle tariffs. Furthermore it will allow cumulation in its rules of origin: in future, a product exported for example from Poland, but using components from Hungary or Czechoslovakia will nor be considered any less "Polish" for purposes of duty-free entry into the European Community. The European Community's attentions are not limited to these three states. The European Community and the former USSR signed a ten year agreement on trade and economic cooperation which includes a mutual grant of MFN status and a commitment by the European Community to

abolish quantitative restrictions by 1995.[291] The Council passed regulations on emergency food aid for Romania,[292] and concluded a cooperation agreement with Romania for trade, commercial, and economic cooperation.[293]

The Dublin Summit (June 1990) approved the extension of the Poland / Hungary Assistance for Economic Restructuring to Czechoslovakia, Romania, Hungary, Bulgaria, and Yugoslavia. Poland and Hungary were in a more favorable position than other East European GATT contracting parties. The PHARE program has overtaken the second generation of trade agreements; it combines trade concessions and aid, and investment opportunities and political commitments to multi-party elections.

PHARE includes food aid, for example a Commission decision granted 31m ECU to Poland and 20m to Romania in December 1990.[294] The European Community has also pledged to provide fifty per cent of the

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[291] 18 December 1989.

[292] OJ No L 31/1, 2 February 1990; OJ No L 48/1, 24 February 1990.

[293] OJ No. L79, p.12, 26 March 1991.

[294] *Six Financing Decisions Concerning Economic Assistance to Certain Central and Eastern European Countries*, Brussels, 19 December 1990.

Group of 24 economic assistance to Central and Eastern European countries.[295] But much of the money goes to strategically planned programs, such as those for the modernization of the infrastructures for foreign trade,[296] for support mechanisms for private sector initiatives to set up joint ventures,[297] and for technical assistance programs.[298]

The links do not stop at agreements and joint projects. The Community listed Poland and Hungary as beneficiary countries in their Generalised System of Preferences for the first time in 1990. Yugislavia had been previously listed.[299] Jacques Attali, the President of the European Bank for Reconstruction and Development (EBRD) spoke of that institution as "third generation". GATT, along with the World Bank and the International Monetary Fund, are first generation structures.[300] Its charter stipulates that its purpose is to support transition in Central and

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[295] Press Release, Brussels, 30 January 1991.

[296] *Id.*

[297] *Phare*, Brussels, 30 January 1991.

[298] *Id.*

[299] E.Vermulst, "Commercial Defence Actions and other International Trade Developments in the Europan Communities" 2 European Journal of International Law (1990) 166, 167.

[300] *Europe* April 1991 p. 18.

Eastern Europe to market economies. These countries are full members of the Bank. The United States supplies only ten per cent of its capital, compared to fifty one per cent coming from the Member States and directly from the European Community (and six per cent from the Soviet Union).

The goal for these Poland, Czechoslovakia, and Hungary is membership of the European Community. Poland has dismantled all quantitative restrictions and reduced duty rates to farm and industrial products to five per cent. A GATT working party has been established to consider the renegotiation of the terms of Poland's GATT membership which impose not only MFN obligations but also the obligation to increase imports by seven per cent per annum.[301] President Havel of Czechoslovakia has expressed his country's hope to be member by the end of the decade. Progress in integration has left the United States standing. First came the ageements with the European Economic Community on trade, commercial, and economic cooperation.[302] The Protocols with the

[301] GATT Activities (1990, Geneva) p.131. The sanction is suspension of GATT privileges, for example by the United States in 1982 - *Focus*, GATT Newsletter Volume 68 February 1990.

[302] With Hungary: 26 September 1988; with Poland: 19 September 1989; with the Czeck and Slovak Republic: 7 May 1990.

European Coal and Steel Community followed.[303]

The European Agreements establishing an association between these countries and the European Communities came in Christmas of last year.[304] The Preambles of these agreements, in an important concession to East European wishes, refer to potential EC membership "as an ultimate, though not automatic, goal".[305] The approach in these agreements is to create economies in Eastern Europe in the image of the EC. This is a goal which is unattainable through trade remedy and extraterritorial antitrust law. The Agreements contain the basic framework of the EC fundamental freedoms of goods, services, establishment, and in more limited form without the right of entry, workers. The principle of non-discrimination on the grounds of nationality is present throughout. Most importantly, however, is Title V Chapter II which provides for the approximation of laws as a step to eventual EC membership. The Visegrad countries have announced that they will apply for membership simultaneously.[306]

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[303] With the Czeck and Slovak Republic: 28 June 1991; with Poland: 16 October 1991; with Hungary: 31 October 1991.

[304] 16 December 1991.

[305] Irish Center for European Law, Bulletin No. 14, May 1991.

[306] *Agence Europe* 8 May 1992.

The Council by decision adopted the Interim Agreements on trade and trade related matters in February of this year. Article 1(1) of those agreements provides:

> The Community and [country] shall gradually establish a free trade area in a transitional period lasting a maximum of 10 years starting from the entry into force of this Agreement... in comformity with [the provisions] of the General Agreement on tariffs and trade.

It is being mooted that these three states are likely to be in a second wave of new members after some European Free Trade Association (EFTA) states join in the mid-1990s.[307] Commission President Delors has more realistically expressed the idea of à Europe of concentric circles, with a tightly knit European Community at the center. What is clear is that the United States will be on the very fringes.

As regards Russia Delors and Kozynev, the current Russian foreign minister, have announced that a cooperation agreement like those with the Visegrad countries will be concluded this year.[308] Kozynev has talked of Russia joining the European Community some day.[309] A cooperation

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[307] Czechoslovakia has initialed a Free Trade Agreement with EFTA already -*Agence Europe* 3 March 1992.

[308] *Agence Europe* 12 March 1992.

[309] *Agence Europe* 11 March 1992.

agreed has already been signed with Albania.[310]

3. No GATT problem

The European Community has taken GATT Article XVII (3) to heart. That Article provides:

> The contracting parties recognize that [state trading enterprises] might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.

GATT has itself established a trade policy training program for government officials from Eastern and Central Europe. The increasing ties between West and East Europe, which by their bilateral form exclude the United States, are sanctioned by GATT Article XXIV on customs unions and free trade areas. Paragraph 4 provides:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.

Article 8(b) defines a free trade area as:

> A group of two or more custom territories in which the duties and other restrictive regulations of commerce (*except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX*) are eliminated on *substantially all* the trade between

[310] *Agence Europe* 13 May 1992.

> the constituent territories in products originating in such territories. [my emphasis]

This Article shows that the European Community and the nonmarket economies do not have to be closely integrated before they fall under the GATT exemptions. Under Article XXIV such free trade organizations do not have to place reductions in restrictions on a MFN basis. Fortress Europe seems suddenly to grow larger. And this is without consideration of the European Economic Area between European Free Trade Association and the European Community.

4. The United States response

The United States must look beyond domestic law. As the United States strives to aggressively implement increasingly protectionist laws, the European Community is creating trading fiefdoms in the new Europe. Not that the European Community law is any less strict. In fact, the figures on antidumping and antisubsidy investigations initiated between the years 1987 to 1990 shows a strong increase in attention to nonmarket economies.[311] In 1989, fifty percent of the provisional duties imposed, seventy five per cent of the reviews of previous duties which concluded in the imposition of

[311] *Eighth Annual Report of the Commission on the Community's Antidumping and Antisubsidy Activities*, released on 29 January 1991. In 1987, 5 out of 39 investigations concerned nonmarket economies. In 1988 the figures were 15 out of 40, and in 1989 12 out of 27.

definitive duties, and 100 per cent of the reviews which resulted in the amendment of existing duties, concerned nonmarket economies.

The United States has made some bilateral progress. On 11 November 1989 President Bush designated Hungary a developing country eligible for benefits under the United States Generalized System of Preferences. Since 1974 the President annually waived in the case of Hungary the freedom of emigration requirement of the Jackson-Vanik amendment to the trade Act of 1974.[312] President Bush is now pushing Congress to grant permanent MFN status to Hungary, but Congress is only prepared to meet him half-way. ^&*&^

Yet even in "holistic agreements" the United States believes in the virtue of aggression. The Poland-United States Treaty Concerning Business and Economic Relations,[313] which entered into force on 21 March 1990, is a prime example. The President described it as "The first to be transmitted under my initiative to strengthen economic relations with East European countries, in support of the political and economic reforms taking

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[312] *Multinational Strategies, Country Monitoring Service*, LEXIS January 1. 1990

[313] U.S. Senate Treaty Document 101-18 (101st Cong., 2nd Sess); 29 I.L.M. 1194 (1990).

place there."[314] A such it is to be welcomed. But the treaty's significance and success is determined by how far it wrings concessions from an adversary; the treaty is described as the first time an East European country has consented to international arbitration of discriminatory treatment against a foreign investor, and the first time that such a country has recognized a more stringent standard of compensation for expropriation.[315] The President summarizes the Treaty's objectives: "It will encourage, facilitate, and protect United States investment and business activity in Poland".[316] There are no provisions for aid; any benefit that will accrue to Poland will be the result of investment with secured repatriation of profits. If Poland achieves a benefit, then it is incidental to the provisions of this agreement.

5. Danger for emerging economies

There is a real risk that these agreements will allow the nonmarket

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[314] Letter of transmittal, the White House, 19 June 1990. The United States also entered into an agreement on trade relations with Mongolia on 23 January 1991 - 30 I.L.M. 515 (1991).

[315] 29 I.L.M. 1194 at 1198 (1990).

[316] Letter of transmittal, the White House, 19 June 1990. *See also* the Letter of Submittal, Department of State, Washington, D.C. 8 June 1980, where the aim of the Treaty is described the extension of United States investment policy from the developing world to the "different landscape of Eastern Europe".

economy countries only to change from their inferior trade status to the inferior status of a developing debtor country. The Sixth Review of Trade with Romania under the Protocol of Accession illustrated the potential tensions.[317] The Romanian representative stated that foreign debt servicing reduced the amount of convertible currency available for imports by 50 per cent. Anticipating the reimbursement of part of the debt would reduce interest payments and make convertible currency more available for purchasing market economy exports.[318] The United States representative asked how the decline in purchases was related to Romania's commitment to the Protocol of Accession. The Romanian representative replied that it was due to weak demand in contracting parties for Romanian exports and repeated:

> Romania's foreign debt was owed to contracting parties and in convertible currency.... The decline was not due to discrimination on the part of Romania but to insufficient financial means.... Romania's authorities had endeavored to repay its debt.

The United States repeated that Romania's debt problems did not address the question of import commitments under the Protocol of

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[317] GATT 35 BISD 1988, p.343.

[318] *Id*, paragraph 9, p.338, 339.

Accession and was beyond the terms of reference of the Working Party.[319] The European Community representative's remarks were a toned down version of those of the United States. If trade liberalization is no more than a step to the domination of the strongest, then the status of nations will follow the status of people which resulted from the division of labor and the accumulation of capital. If a more enlightened general strategy is not adopted than the nonmarket economy countries will have thrown off the yoke of communist central planning merely to become, under the more indirect oppression of the free market, free instead of unfree underdogs.

5. "Make love, not war"

The United States rules on trade with nonmarket economies are no less protectionist than those of the European Community. Yet in the face of the European Community's rapid gains in economic control over the nonmarket economy countries, in the United States trade hawks argue that now the security imperative has been reduced there is an opportunity for greater unilateral action to promote U.S. trade interests.[320] Trade accounted for ninety per cent of the United States GNP growth in 1990. A

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[319] *Id*, paragraph 25, p.344.

[320] Bergsten, *The World Economy After the Cold War*, Foreign Affairs, Summer 1990 p.96, 98.

known economist recently declared that "Trade is now the driving force of our economy...[it is] the only thing standing between a recession and a depression".[321] And yet zealous protectionists, praising aggression and urging caution in the United States reactions to changes in Europe, risk replacing military conflict with the sort of bilateral aggressive conflict over economic issues[322] that lead to such increased political rivalries before the two Great Wars. It is the United States who will lose.[323]

6. Back to the Future II

As the Bard wrote: "where are you tonight?".[324] Combining reform of domestic law with aggressive international diplomacy to establish agreements and arrangements with the nonmarket economy countries will benefit the United States. If the United States wishes to gain some

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[321] Warren T. Brookes, *San Francisco Chronicle*, May 14 1991.

[322] Reactions have already started. The Korean Trade Commission recently ruled by Seoul held that three foreign companies sold plastic resin in South Korea at artificially low prices. The companies were from Japan, Germany, and the United States. There are accusations in the United States and Europe that Korea is using its antidumping laws unfairly as it prepares an export drive for its petrochemical industry - *Wall Street Journal* 25 April 1991.

[323] These risks were a major theme of the conference *The Future of European Society* held by the Institute of International Studies in UC Berkeley in April 1991.

[324] No, Bob Dylan.

international institutional counterbalance to the European Community's monopoly on economic issues in Europe, then GATT is the way to do it. The situation in Eastern Europe provides a speeded up, scaled down trial run for how to cope with the prospect of renewed GATT membership for China, which is under consideration by a GATT working party,[325] and possible new membership for the Russian Federation. So far, the United States has not done well. Having protected Europe for the duration of the Cold War, it is reaping few of the benefits of its end.

An investment in a holistic strategy to deal with the changing economies of Eastern Europe, even if it classified as a research experiment in preparation for the big event of possible Chinese and Russian GATT membership, would benefit the United States economically, reduce unnecessary and unprofitable adversariness, and make it some new friends. The former GATT economist Jan Tumlir stated:

> The trade part of the international economy order can thus be understood as a set of policy commitments exchanges between and among countries in order to minimize policy-generated uncertainty and so to maximize gains from trade.[326]

The nonmarket economy countries considered are not enemies but rather

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[325] *GATT Activities* 1990 p. 132.

[326] Quoted in J.H. Jackson, *Restructuring the GATT System (1990), p. 55.*

NEMs - newly emerging markets. A healthy combination of competition and cooperation, the rationale at the root of GATT, will serve everybody's interests.

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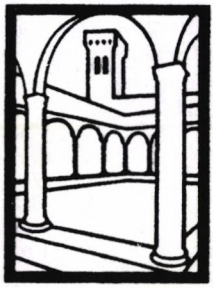

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