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# The NME Import Regulation Dilemma: Two Proposals for a New Regulatory Approach

Christopher F. Corr\*

As international trade has increased in volume and significance, the United States has expanded its trade relationship with nonmarket economy countries (NMEs).<sup>1</sup> This increased trade has exacerbated the unique and substantial difficulties the United States has encountered in applying import regulations to products from NMEs. The purpose of this Article is to explain the alarming inadequacy in the existing U.S. laws regulating imports from NMEs and to analyze current proposals for a solution to this problem. The Article will discuss the increasing imports from NMEs, the present U.S. laws regulating such imports, the problems with these laws, and the potential alternatives to present laws.

## I. The Nonmarket Economy Country

The U.S. International Trade Commission (ITC),<sup>2</sup> as the agency required to monitor trade between the United States and NMEs, defines NMEs as countries whose imports can be investigated under section 406<sup>3</sup> of Title IV of the Trade Act of 1974.<sup>4</sup> Section 406 applies to countries dominated or controlled by communism.<sup>5</sup>

Section 410 of Title IV of the Trade Act of 1974 requires the

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<sup>1</sup> See *infra* notes 2-4.

<sup>2</sup> 19 U.S.C. § 1332 (1982) empowers the U.S. International Trade Commission (ITC) to conduct investigations to determine fiscal and economic effects of U.S. customs laws upon U.S. domestic industry and labor. The organization of the ITC and its general powers is explained at *id.* §§ 1330-31.

<sup>3</sup> *Id.* § 2436.

<sup>4</sup> Trade Act of 1974, Pub. L. No. 93-816, § 331, 88 Stat. 2049. For references to this definition, see ITC 41ST Q. REP. TO CONGRESS AND THE TRADE POL'Y COMM. ON TRADE BETWEEN THE U.S. AND THE NONMARKET ECON. COUNTRIES DURING 1984, 3 (1985) [hereinafter 41ST ITC REP.].

<sup>5</sup> 19 U.S.C. § 2436(e)(1) (1982); see also *Nonmarket Economy Imports Legislation: Hearing Before the Subcomm. on International Trade of the Senate Finance Comm.*, 98th Cong., 2d Sess. 72 (1982) (statement of the AFL-CIO discussing the definition of NMEs) [hereinafter *Senate NME Hearing*].

ITC to monitor trade between the United States and NMEs.<sup>6</sup> The ITC has determined that the countries to be monitored<sup>7</sup> as NMEs are those listed in headnote 3(d) of the Tariff Schedules of the United States.<sup>8</sup> Countries presently listed under headnote 3(d) are: Albania, Bulgaria, Cuba, Czechoslovakia, East Germany, Estonia, parts of Indochina under communist domination, North Korea, the Kurile Islands, Latvia, Lithuania, Outer Mongolia, Poland, Southern Sakhalin, Tanna Tuva, and the U.S.S.R.<sup>9</sup> In addition, the ITC treats Hungary, the People's Republic of China, and Romania as NMEs.<sup>10</sup>

In trade regulation cases involving the Department of Commerce (Commerce),<sup>11</sup> NMEs are defined as countries in which "sales or offers of sales of such or similar merchandise in that country . . . do not permit a determination of foreign market value," under the regular antidumping laws.<sup>12</sup> This determination is made on a case by case basis, but in practice, the countries found by Commerce to be NMEs are the same as those listed by the ITC.<sup>13</sup>

NMEs, principally the People's Republic of China (PRC) and the U.S.S.R. and Eastern Europe, as they have worked to reform their economies, have developed into important U.S. trading partners.<sup>14</sup> From 1974 to 1981 total trade between the United States and its principal NME trading partners tripled,<sup>15</sup> and it increased from 1981

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<sup>6</sup> 19 U.S.C. § 2441 (1982).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 1202(d).

<sup>9</sup> *Id.* § 1202(3)(d).

<sup>10</sup> ITC 47TH Q. REP. TO CONGRESS AND THE TRADE POL'Y COMM. ON TRADE BETWEEN THE U.S. AND THE NONMARKET ECON. COUNTRIES DURING APRIL-JUNE 1986, 1 n.3 (1986) (explaining why Yugoslavia is no longer considered an NME) [hereinafter 47TH ITC REP.] The ITC has determined that the NMEs that trade with the United States at a level which might possibly injure a domestic industry are: Bulgaria, China, Czechoslovakia, East Germany, Hungary, Poland, Romania and the U.S.S.R. *Id.*

<sup>11</sup> As will be discussed *infra* at notes 44-61, in antidumping cases, the Department of Commerce determines whether an NME is selling at less than fair value. Their term for NME is a "state-controlled economy."

<sup>12</sup> 19 C.F.R. § 358.8(a) (1986). In Potassium Chloride from the Soviet Union, 49 Fed. Reg. 23,428 (Dep't of Comm. 1984) (rescission of initiation), the Department of Commerce defined an NME as a country that "operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country or to other countries do not reflect the market value of the merchandise." *Id.*

<sup>13</sup> See Petroleum Wax Candles from the People's Republic of China, 51 Fed. Reg. 25,085 (Dep't of Comm. 1986) (notice), for detailed discussions of the economic criteria that Commerce applies in determining whether a country is an NME. These criteria chiefly concern government controls, both indirect and direct, over the factors of production of manufactured goods, and over the planning and production of agricultural products in the economy as a whole. *Id.* at 25,086. Commerce's broad application of these factors in these subsequent cases appears to indicate that no sector of an NME, no matter how market-oriented, will be defined as an NME. See also Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3259 (Dep't of Comm. 1981) (prelim. determination).

<sup>14</sup> Senate Finance Committee, Memorandum of the Senate Finance Comm. (May 4, 1984) (unpublished document) [hereinafter Senate Finance Memo].

<sup>15</sup> *Id.*

to 1985 by twenty-three percent.<sup>16</sup> U.S. merchandise trade with NMEs during this period has consistently run a significant surplus — this is especially important in light of the present massive U.S. trade deficit.<sup>17</sup> In addition to economic trade benefits,<sup>18</sup> the increased economic interaction with NMEs is thought to provide political benefits for the United States, particularly with the PRC and Eastern European nations, “through greater economic interdependence . . . .”<sup>19</sup> As NMEs have become more active in international trade, however, the United States has encountered unique and substantial problems in regulating the growing number of NME imports entering the United States. The basic dilemma for the United States is, in essence, how to enhance trade with NMEs and protect domestic industry at the same time.

Effective import regulation is particularly important with respect to NME goods because NME exporters may have a variety of motives for selling their goods in the United States at “unfairly” low prices.<sup>20</sup> First, the NME may have the common predatory purpose of subduing competition in the importing country and recouping losses by raising prices once the market is effectively dominated.<sup>21</sup> Second, the NME exporter may want to sell surplus or accidentally produced goods in an untried or occasional market abroad at a low

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<sup>16</sup> *Id.* Moreover, three communist countries receive most-favored-nation (MFN) tariff treatment: Hungary, China and Romania. 19 U.S.C. § 1202(g) (1986). MFN status allows a country to receive the benefits of tariff rate concessions, set forth in column 1 of the tariff schedule. *Id.*; see also 47TH ITC REP., *supra* note 10, at 2, in which the ITC provides the history of MFN treatment given to NMEs, including Poland.

<sup>17</sup> See 41ST ITC REP., *supra* note 4, at 9; ITC, 45TH Q. REP. TO CONGRESS AND THE TRADE POLY COMM. ON TRADE BETWEEN THE U. S. AND THE NONMARKET ECON. COUNTRIES DURING 1985 (1986) [hereinafter 45TH ITC REP.]. This surplus has been declining, however, from 3.57 billion in 1983 to 1.2 billion in 1985.

<sup>18</sup> See 45TH ITC REP., *supra* note 17, at 5, which states that U.S. exports to the PRC have increased while exports to the USSR have decreased (chiefly grain shipments), making the PRC's share of U.S. exports to NMEs increase to 54.1% in 1985. See also *Senate NME Hearing*, *supra* note 5, at 2 (statement of Senator Robert Dole); 47TH ITC REP., *supra* note 10, at 5, stating that U.S. exports to Eastern European countries increased by 14.1% in the first quarter of 1986; *Trade Policy No. 227*, Daily Executive Reporter (BNA) 2 (Nov. 25, 1986) (stating that East-West trade is predicted to increase in the next five years); *Journal of Commerce*, Nov. 19, 1986, at 4A, col. 1 (stating that there are 40 planned U.S.-Soviet joint ventures).

<sup>19</sup> See *Senate NME Hearing*, *supra* note 5, at 2. The PRC's rapidly expanding trade with the United States has propelled it to a dominant trade position which may enhance political relations. Speech by Paula Stern, Chairwoman, U.S. International Trade Commission, to The Washington Foreign Law Society (Nov. 13, 1984), *reprinted* in 18 GEO. WASH. J. INT'L L. & ECON. 709 (1985) [hereinafter Stern Speech]; see also *Options to Improve Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Ways and Means Comm.*, 98th Cong., 1st Sess. 915 (1983) (statement of Professor Lee Albert) [hereinafter *House Trade Hearings*]; 129 CONG. REC. S7355 (daily ed. May 24, 1983) (statement of Sen. Heinz, noting the increase in U.S. trade with China).

<sup>20</sup> Feller, *The Antidumping Act and the Future of East-West Trade*, 66 MICH. L. REV. 115, 120-21 (1967).

<sup>21</sup> *Id.* at 120.

price calculated to give him an immediate turnover.<sup>22</sup> Third, a new NME exporter lacking predatory intent may simply wish to gain a foothold in the market by underselling competitors.<sup>23</sup> NMEs have a unique incentive in this third scenario because they may have to overcome a purchaser's uncertainty as to continuing supply, lack of spare parts, and the absence of a servicing or distribution organization due to the stigma of communist country origin.<sup>24</sup> Fourth, an NME may sell at low prices to fulfill a state-planned export quota.<sup>25</sup> Finally, an NME may practice price discrimination solely to obtain badly needed hard currency.<sup>26</sup>

Despite the need for effective import regulation, current legislation is widely criticized as inadequate.<sup>27</sup> This criticism comes not only from U.S. importers<sup>28</sup> and NME exporters,<sup>29</sup> but domestic industries<sup>30</sup> and administering agencies<sup>31</sup> as well.

## II. Existing Law

The present mechanisms for regulating imports from NMEs can be divided into three categories: unfair trade law, injury based law and antitrust law.

### A. Unfair Trade Laws

The U.S. unfair trade laws protect U.S. industry from imported goods sold in the United States at unfairly low prices.<sup>32</sup> These laws are divided into the antidumping laws (AD), which protect against

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 121.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 120.

<sup>26</sup> *Id.*

<sup>27</sup> See *infra* notes 28-31.

<sup>28</sup> *Senate NME Hearing, supra* note 5, at 33 (statement by Allen L. Merkin, President, Action Tunsgam, Inc. of East Brunswick calling existing legislation "absurd, unpredictable and expensive").

<sup>29</sup> See Soltysinski, *U.S. Antidumping Laws and State-Controlled Economies*, 15 J. WORLD TRADE L. 251, 255 (1981) (calling the existing legislation "time consuming and costly," and the present regulation of NME imports "arbitrary and political."); see also Interface One: Conference Proceedings on the Applications of U.S. Antidumping and Countervailing Duty Laws to Imports from State-Controlled Economies and State-Owned Enterprises 106 (D. Wallace, F. Spina, & R. Rawson, eds. 1980) (available from The Institute For International and Foreign Trade Law, Georgetown University Law Center) [hereinafter Interface One].

<sup>30</sup> *Senate NME Hearing, supra* note 5, at 49 (statement of W. Ray Shockley, American Textile Manufacturers Institute (A.T.M.I.) describing present NME import regulation law as "no more predictable than a 'roll of the dice.'").

<sup>31</sup> *Id.* at 3 (Lionel Olmer, Under Secretary of Commerce for International Trade, stating that existing law is "enormously burdensome and excessively complicated."); see also Stern Speech, *supra* note 19, in which Chairwoman Stern states that U.S. NME regulation law is in need of a "major overhaul."

<sup>32</sup> See Interface Two: Conference Proceedings on the Legal Framework of East-West Trade, (D. Wallace & D. Flores, eds. 1980) (available from The International Law Institute, Georgetown University Law Center) [hereinafter Interface Two]. Robert Hudec, Pro-

the importation of goods sold in the United States for less than what they are sold for in the exporting country<sup>33</sup> and the countervailing duty laws (CVD), which protect against the importation of subsidized goods.<sup>34</sup> Both AD and CVD laws are criticized as being ineffective, overly complex, expensive, time consuming, unpredictable, and inequitable.<sup>35</sup> Critics allege that both sets of laws negatively impact domestic producers as well as U.S. importers and NME exporters.<sup>36</sup>

During the revision of the General Agreement on Tariffs and Trade (GATT) at the Tokyo Round of Multilateral Trade Negotiations of 1979, the problem of applying the market based AD and CVD laws to NMEs was left unresolved.<sup>37</sup> U.S. unfair trade laws, based on the GATT system, presuppose that "importation and exportation are handled by private firms which, stimulated by profit motives, are guided by commercial considerations."<sup>38</sup> The government controlled NME countries, however, do not operate on market principles, and the actual cost of producing their goods is generally impossible to determine; price references are not useful and the factors of production cannot be valued because currency is not convertible and resource allocation is not governed by the market forces of supply and demand.<sup>39</sup>

U.S. unfair trade laws are based on the free market economic

fessor of Law at the University of Minnesota Law School provides a discussion of U.S. unfair trade laws.

<sup>33</sup> 19 U.S.C. §§ 1673-77 (1982).

<sup>34</sup> *Id.* §§ 161-72.

<sup>35</sup> *Remedy For Artificial Pricing of Articles Produced by Nonmarket Economy Countries: Hearing Before the Subcomm. on International Trade of the Senate Finance Comm.*, 97th Cong., 2d Sess. 21-28 (statement of Harry Kopp, Deputy Assistant Secretary of State for Trade and Commercial Development) [hereinafter *Senate Hearing on S. 958*]; see also *id.* at 7-20 (statement of Lionel Olmer). "In both cases [antidumping and countervailing duty laws], the normal investigative process becomes immersed in debates over comparative and constructive values that quickly lead to proposed determinations based on hypothetical rather than real transactions." *Id.*

<sup>36</sup> *Id.* at 7-20 (statement of Lionel Olmer).

<sup>37</sup> *Senate NME Hearing*, *supra* note 5, at 72 (statement of the AFL-CIO).

<sup>38</sup> K. DAM, *THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 317-18 (1970).

<sup>39</sup> See Horlick & Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L L. 807, 818-19 (1984), stating:

The heavy intervention of the government in the setting of relative prices means that *the ultimate prices and costs in NMEs reflect political, economic, or bureaucratic factors rather than local supply and demand*. World-market prices are not decisive facts in a typical NME production function as the internal economy enjoys sufficient isolation from the world economy to effectively insulate its producers from these economic forces . . . [I]ndeed, even if Commerce could measure a "real" home-market price or cost in a nonmarket economy, they would have to find a way around the inconvertibility of all NME currencies (except perhaps the Hungarian forint).

*Id.* (emphasis added); see also Carbon Steel Wire Rod From Czechoslovakia, 49 Fed. Reg. 19,370 (Dep't of Comm. 1984). Commerce stated that in an NME, "resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning." *Id.* at 19,371.

principles of comparative advantage and free trade,<sup>40</sup> and in order to determine whether an import price is "unfair," these laws require costs and values that are unavailable from NMEs.<sup>41</sup> Because U.S. unfair trade laws require information not available from NMEs, their application to imports from these centrally-controlled countries creates a major problem.<sup>42</sup> Hence, there is almost universal agreement that price-based U.S. unfair trade laws do not adequately contemplate the economic systems of NMEs<sup>43</sup> and are in need of revision.<sup>44</sup>

### 1. *Antidumping Duty Law*

Commerce imposes AD duties<sup>45</sup> when imports are sold in the United States for less than fair value,<sup>46</sup> and threaten or cause material injury.<sup>47</sup> Sales at less than fair value occur when, taking into ac-

<sup>40</sup> *Senate NME Hearing*, *supra* note 5, at 19 (statement of Gary Horlick).

<sup>41</sup> Recent Developments, 5 J. OF CORP. BUS. & COMP. MARKET L. 395, 397 (1983).

<sup>42</sup> Senator Heinz stated:

The concept of dumping—sales at less than fair value—is inherently a free-market concept. It is useful only to the extent that costs and prices in an economy are real, so that a fair value can be determined. With rare exceptions, these conditions do not exist in a nonmarket economy and our law has become seriously contorted in an effort to deal logically with this fundamental inconsistency.

129 CONG. REC. S7356 (daily ed. May 24, 1983) (statement of Senator Heinz); *see Barcelo, Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 L. & POL'Y INT'L BUS. 779, 850 (1977). "One cannot speak of market imperfections and nondistortive actions or even the distinction between exports and domestic subsidies if an economy as a whole is not governed by the market principle." *Id.*

<sup>43</sup> *Senate Hearing on S. 958*, *supra* note 35, at 245 (letter of Juliana Pilon, policy analyst of the Heritage Foundation, to the Senate Finance Comm.); *see also Senate NME Hearing*, *supra* note 5, at 19 (Gary Horlick commenting on the "meaninglessness" of pursuing real costs and prices of nonmarket economies).

<sup>44</sup> *See Horlick & Shuman*, *supra* note 39, at 830, stating that the debate over change in NME trade legislation is a question of "in what way?" not "whether?"; *Senate NME Hearing*, *supra* note 5, at 5 (statement of Lionel Olmer); *see also id.* at 74. In a letter to Senator Danforth, Richard Breault, group vice president, U.S. Chamber of Commerce, stated that "there is clearly a need to reform U.S. laws governing the treatment of imports from nonmarket economies." *Id.*

<sup>45</sup> Zarin, *Countertrade and the Law*, 18 GEO. WASH. J. INT'L L. & ECON. 235, 247 (1984). Zarin states:

An antidumping investigation is initiated when the Commerce Department believes one is warranted or when an "interested party" files a petition on behalf of an industry that claims to have been materially injured or whose establishment in the United States has been materially retarded as a result of sales of foreign merchandise in the United States at less than fair value.

*Id.*

<sup>46</sup> *See infra* notes 48-49.

<sup>47</sup> 19 U.S.C. § 1673 (1982). Zarin states:

After determining the foreign market value, the Commerce Department will determine the appropriate measure of the U.S. price, the other variable necessary to ascertain whether dumping has occurred. The U.S. price is measured by either the purchase price or the exporter's sales price, as appropriate. The purchase price is the price at which the goods are purchased or agreed to be purchased from the manufacturer or producer of the merchandise prior to importation. When the merchandise is purchased from the producer or manufacturer prior to importation by a person unrelated to the seller for export to the United States the purchase price is the

count certain adjustments, the same or similar merchandise is sold at a higher price in a foreign market than it is in the United States.<sup>48</sup> Commerce determines whether dumping has occurred by comparing the U.S. price of the merchandise with the foreign market value.<sup>49</sup> With regard to imports from market economies, the foreign market value of products is calculated according to a methodological hierarchy.<sup>50</sup> Commerce looks first to the home market price, which is the adjusted price the foreign manufacturer charges to customers in the country of export.<sup>51</sup> Second, Commerce looks to the price of exports to customers in other countries. Finally, Commerce will construct the value of such goods based on adjusted material costs plus general expenses and profits.<sup>52</sup>

The Treasury Department, as the predecessor to Commerce, recognized the inadequacy of these three methods for determining the foreign market value of imports from NMEs because the necessary costs and prices are unavailable. Thus, the Treasury Department initiated a fourth method of calculation of less than fair value specifically for NME imports, that calculates a theoretical cost of production in any "surrogate" market economy judged to be economically comparable to the NME in question.<sup>53</sup> This methodology for NMEs was codified by Congress<sup>54</sup> based on the rationale that surrogate countries' costs should be used because supply and demand forces do not operate to produce reliable prices for comparison, either in the home market or in third countries. It was carried forward into Commerce regulations, and is currently in practice.<sup>55</sup>

Under this NME statutory provision and its regulations, Commerce ignores prices and costs in an NME and instead bases an NME import's fair market value on the price or cost figures of a "surrogate" market economy producer of a similar good.<sup>56</sup> This statutory and regulatory scheme sets forth a hierarchy of alternate methodolo-

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appropriate measure of the U.S. price. When the parties are related, and the goods are not sold to an unrelated purchaser until after importation, the exporter's sales price is the price of the merchandise when it is sold in the United States by or for the account of the exporter.

Zarin, *supra* note 45, at 250.

<sup>48</sup> 19 U.S.C. §§ 1673, 1677a (1982).

<sup>49</sup> Zarin, *supra* note 45, at 248.

<sup>50</sup> 19 U.S.C. § 1677b(b) (1982).

<sup>51</sup> *Id.* § 1677b(a)(1)(B).

<sup>52</sup> *Id.* § 1677b(a)(2)(e). "Under the constructed value analysis, the Commerce Department focuses on whether the cost of manufacturing plus profit exceeds the U.S. price." Zarin, *supra* note 45, at 249.

<sup>53</sup> See Amendment of Antidumping Act, 43 Fed. Reg. 35,262-63 (1978). In 1978 treasury regulations regarding NMEs were amended to require that surrogate countries be economically comparable. See also 43 Fed. Reg. 272 (1978).

<sup>54</sup> 19 U.S.C. § 1677b(c) (1982).

<sup>55</sup> 19 C.F.R. § 353.8 (1986).

<sup>56</sup> 19 U.S.C. § 1677b(c) (1982).



gies for determining the value of an NME import.<sup>57</sup> The first statutory preference of Commerce is to use the home market or export price of similar goods sold in a comparable market economy country (surrogate) to calculate value;<sup>58</sup> if Commerce is unable to make such a calculation because it cannot find a surrogate that produces a similar product, the NME provides that its second preference is to construct the value of such goods in a comparable market economy; that is, Commerce makes the cost valuation of a product based on wages, prices and costs in the surrogate country, despite the fact that the surrogate country does not produce the product in question.<sup>59</sup> If Commerce is unable to find a comparable surrogate that produces a similar product, then the regulations provide a fall-back provision in which Commerce uses the import prices of market economies which produce similar goods.<sup>60</sup>

These regulations, which set forth the methodology for applying AD law to NMEs, are fundamentally flawed and have been widely criticized for a variety of reasons.<sup>61</sup>

#### *a. Surrogate Price Methodology*

Commerce's first preference, the surrogate economy concept, has a number of problems. First, the regulations have the effect of imposing shorter procedural time constraints on an NME proceeding because within the same time period for a "normal" antidumping proceeding, a number of complex preliminary determinations must be made. Commerce must first determine if the exporting country is an NME.<sup>62</sup> If it finds in the affirmative, Commerce must identify a surrogate country and then secure the cooperation of both the government and a producer or producers of similar products within this country.<sup>63</sup>

Second, finding a similar product in a market economy is often problematic and can lead to an arbitrary result. Variations in the

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<sup>57</sup> *Id.* § 1677b(c)(i)(2); see 19 C.F.R. § 353.8 (1986).

<sup>58</sup> 19 C.F.R. § 353.8(b)(1) (1986).

<sup>59</sup> *Id.* § 353.8(b)(2); see also Senate Finance Memo, *supra* note 14, at 3 (Lionel Olmer, Undersecretary of Commerce for International Trade, discussed the application of the Commerce regulations to nonmarket economies); *House Trade Hearings*, *supra* note 19, at 912 (statement of Professor Paul Marer discussing the effectiveness of constructed value and surrogate country methods of valuation).

<sup>60</sup> 19 C.F.R. § 353.8(a), (b)(3) (1986). Generally, as a last resort, Commerce will interpret the regulations to permit the use of the average import price of a "basket" of importing countries. See, e.g., *Porcelain-on-Steel Cooking Ware From the People's Republic of China*, 51 Fed. Reg. 18,469 (Dep't of Comm. 1986) (preliminary determination); *Iron Construction Castings From the People's Republic of China*, 51 Fed. Reg. 17,222 (Dep't of Comm. 1986) (determination); *Shop Towels from the People's Republic of China*, 48 Fed. Reg. 12,764 (Dep't of Comm. 1983) (preliminary determination).

<sup>61</sup> See *supra* notes 27-31 and accompanying text.

<sup>62</sup> 19 U.S.C. § 1677b(c) (1982).

<sup>63</sup> See Horlick & Shuman, *supra* note 39, at 820.

quality and composition of products result in value disparities that make a price comparison of two "similar" products inappropriate. To base the "fair" price of a low-quality NME product on the price of a similar, but higher quality market economy product is unfair, and can have a substantial impact on the dumping determination.<sup>64</sup>

Third, finding an economically comparable surrogate country that produces a similar product is difficult, time consuming, and often leads to an arbitrary and unpredictable result.<sup>65</sup> Assuming a market economy country producing a similar product is identified, Commerce must secure the government's permission before approaching the country's producers.<sup>66</sup> Even if permission is granted, a surrogate country's producers often do not cooperate because there is no incentive to provide the information Commerce requires to draw accurate comparisons.<sup>67</sup> In fact, there is often a disincentive because cooperating with Commerce as a surrogate involves allowing Commerce investigators access to confidential information which becomes part of the record and can expose the surrogate country to an AD action.<sup>68</sup> Consequently, it has become increasingly unlikely for Commerce to find a surrogate country willing to cooperate in the investigation.

If a surrogate does cooperate, the "fair" price and resulting dumping margins are arbitrary and unpredictable because no one knows what surrogate will be chosen;<sup>69</sup> exporters cannot set their

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<sup>64</sup> See *infra* notes 240-46 and accompanying text for a discussion of the difficulties encountered in determining comparable goods.

<sup>65</sup> See *infra* notes 66-70 and accompanying text.

<sup>66</sup> See Horlick & Shuman, *supra* note 39, at 821; see also Carbon Steel Plate from Romania, 49 Fed. Reg. 12,292 (Dep't of Comm. 1984) (final admin. review).

<sup>67</sup> See *Senate NME Hearing, supra* note 5, at 4 (statement of Lionel Olmer); see, e.g., Horlick & Shuman, *supra* note 39, at 821; Carbon Steel, 49 Fed. Reg. at 12,292; Unrefined Montan Wax from the German Democratic Republic, 48 Fed. Reg. 36,870, 36,871 (Dep't of Comm. 1983) (final determination) (West German producer refused to provide needed data); see also Cuneo & Manuel, *Roadblock to Trade: the State-Controlled Economy Issue in Antidumping Administration*, 5 FORDHAM INT'L L. J. 277, 302 n.134 (1981-82). The authors note that "[q]uite apart from the normal desire to keep business information confidential, competitive considerations may play a role in determining the willingness to cooperate." *Id.*

<sup>68</sup> Cuneo & Manuel, *supra* note 67. In Carbon Steel, 49 Fed. Reg. 12,293, Finland agreed to serve as a surrogate for the antidumping investigation, providing detailed information and allowing verification examinations. Soon afterward, on February 10, 1984, U.S. Steel filed an antidumping complaint against Finnish steel plate using information provided by Finland for Commerce.

<sup>69</sup> See Horlick & Shuman, *supra* note 39, at 817; see also *Senate NME Hearing, supra* note 5, at 4 (statement of Lionel Olmer). Indeed, the unpredictability and unfairness of the surrogate methodology is manifested in a recent case, ICC Industries Inc. v. United States, No. 86-1201, slip op. (Fed. Cir. 1987), in which the Court of Appeals for the Federal Circuit held that an importer of Chinese potassium permanganate "should have known" that such imports were priced at less than fair value when compared to the surrogate Spain. The court held that the importer was liable for retroactive deposits under 19 U.S.C. § 1673d(b)(4)(A) (1982), despite the fact that it was impossible for the importer to know which country would be chosen as a surrogate and thus what a "fair" price would be. The court was unmoved by this "seemingly unfair" fact. *Id.*

prices at a "fair" level when they do not know which country's export prices will represent fair value, and the domestic industry cannot know if it will be granted relief.

"Fair value" determinations and the resulting dumping margins are often arbitrary because they will fluctuate depending on the country that is chosen as a surrogate. Moreover, dumping margins can be arbitrary because of differences between a particular industrial sector in the NME and in the country chosen as the surrogate.<sup>70</sup>

NMEs have several complaints concerning the alleged discriminatory nature of the surrogate approach of U.S. AD law.<sup>71</sup> First, U.S. AD law does not allow for consideration of the lower costs of labor, energy and raw materials in the NME.<sup>72</sup> Second, the NME exporter does not possess a firm basis for calculating fair value prior to the date of exportation of the merchandise.<sup>73</sup> Third, NMEs encounter significant problems in challenging price and cost information submitted by their foreign competitors to Commerce.<sup>74</sup> Fourth, the NME exporter is often at the mercy of its competitors who serve as surrogates. These surrogates have vested interests in the final outcome of the procedure establishing fair value, and are protected by confidentiality.<sup>75</sup>

#### *b. Constructed Value Methodology*

As stated above, if Commerce cannot satisfy its first preference because the home market or export price of a surrogate that produces a similar product cannot be determined, the statutory NME methodology next requires Commerce to make a complex constructed valuation of NME goods.<sup>76</sup> This method involves calculating the sum of the estimated costs of production and other expenses, including profit and packaging costs of the NME import<sup>77</sup> in a comparable market economy country.<sup>78</sup> This constructed value method-

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<sup>70</sup> Horlick & Shuman, *supra* note 39, at 817. The dumping margin will also fluctuate depending on which country is chosen as surrogate. Zarin, *supra* note 45.

<sup>71</sup> See *infra* notes 79-83.

<sup>72</sup> See Interface One, *supra* note 29, at 99 (statement of Prof. Franklin D. Holtzman).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* For instance, in steel investigations, NMEs are not permitted access under protective order to SSSI (Special Summary Steel Invoice) information regarding the specific breakdown of steel types from surrogate countries that Commerce considers in determining fair value; thus, they do not have adequate information from which to challenge such findings at the agency level.

<sup>75</sup> *Id.* Nonmarket economies also find antidumping procedures arbitrary and political because of their orientation. They assume the executive in the United States has the discretion to intervene and protect their goods when necessary, as is often the case in European Economic Community countries. Furthermore, antidumping law is viewed as arbitrary because it is a difficult concept to interpret. *Id.* at 107 (statement of Professor Paul Marer).

<sup>76</sup> See *supra* note 39 and accompanying text.

<sup>77</sup> 19 U.S.C. § 1677b(e) (1982 & Supp. III 1985).

<sup>78</sup> *Id.* § 1677b(c)(2) (1982).

ology is plagued by similar difficulties in finding comparable market country producers from which to obtain price or cost information, and yields the same unpredictable results. It often leads to more unpredictable, unrealistic and arbitrary results than the surrogate price valuation methodology because the final cost calculation is the result of a complicated, hypothetical compilation of various production and finishing costs of an industry in a surrogate country that may not even produce the goods in question.<sup>79</sup>

The fact that two countries are comparable at a macroeconomic level does not mean that their costs and prices in a particular industry are the same. Thus, to superimpose the production function of an NME upon the production costs and prices of a macroeconomically comparable country cannot yield an accurate determination of "fair price," and yet this is the approach taken by the constructed value methodology.<sup>80</sup> Often, the surrogate country's industry is not comparable to the NME industry, and consequently, the resulting value construction is inaccurate.<sup>81</sup> Finally, because of the many possible surrogate countries that can be chosen, Commerce has broad discretion in its selection, and a "politicized" administrator may abuse such discretion.<sup>82</sup>

Regardless of whether a surrogate sales price or a constructed value is used to determine fair value, the "comparable economy" concept is fundamentally flawed for a number of reasons. The regulations state that the determination of comparability is essentially based on macroeconomic data.<sup>83</sup> This concept assumes that accurate values can be obtained from an NME on a macroeconomic level,

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<sup>79</sup> See *Senate NME Hearing*, *supra* note 5, at 73 (statement of R. Breault: "The current approach of using a surrogate country to construct a fair market value . . . has created tremendous confusion on the part of domestic industry and foreign exporters alike); see, e.g., *Unrefined Montan Wax*, 48 Fed. Reg. at 36,870, in which there were few countries producing montan wax, and none of those few producer countries were at a comparable economic level. The determination of a "comparable economy" is often arbitrary because such determination, made on the basis of aggregate data is unreliable and ignores differing levels of development and sophistication in specific sectors of the economy. *Id.* at 4.

<sup>80</sup> See Horlick & Shuman, *supra* note 39, at 825.

<sup>81</sup> *Senate NME Hearing*, *supra* note 5, at 16 (statement of Richard Cunningham). The constructed value regulation bases prices on the costs of production in a market economy "determined to be reasonably comparable in economic development" to a nonmarket economy if specific "objective components or factors of production" of the nonmarket economy are used in the valuation. The inherent flaw in the regulation is that the "components or factors of production" of the nonmarket economy will be distorted by government intervention and hence will not be comparable to the surrogate. *Id.*; see, e.g., *Electric Golf Carts From Poland*, 40 Fed. Reg. 25,497 (1975) (final determination). There the costs of a very sophisticated Polish golf cart industry were to be determined using the costs, prices, and wages of Spain, a "comparable economy" with a very unsophisticated golf cart industry.

<sup>82</sup> See Horlick & Shuman, *supra* note 39, at 825-26.

<sup>83</sup> 19 C.F.R. § 353.8(b)(1) (1986); see also *Steel Wire Nails from the People's Republic of China*, 51 Fed. Reg. 10,247, 10,248 (1986) (final determination) in which Commerce stated that it placed greater reliance on "general macro-economic criteria."

despite the conceded fact that accurate microeconomic price and cost data is impossible to obtain. Such an argument is unsound.<sup>84</sup>

Another problem with the "comparable economy" concept is that, within comparable economies, sectors can be widely divergent in levels of development, especially in an NME where the government targets certain industries for development.<sup>85</sup> The NME's exporting *industry* is often larger and more sophisticated than that which normally exists in a country that is at a comparable level of overall *economic* development (*i.e.*, a very sophisticated NME steel industry may exist in an otherwise unsophisticated economy).<sup>86</sup> The standard thus provides an economically distorted price comparison because it can result in the selection of a surrogate country whose industry is less sophisticated than that of the NME.<sup>87</sup> This, in turn, may create an unrealistically favorable price comparison for the NME exporter, or vice versa.<sup>88</sup> This may likely occur with goods exported from the PRC's special economic zones — sectors which contain an increasing number of sophisticated industries.<sup>89</sup>

### *c. Import Price Fall-Back Methodology*

The use of U.S. import prices as a fall-back method of determining fair value is also plagued with problems.<sup>90</sup> This method, which usually derives an average import price from a basket of foreign ex-

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<sup>84</sup> There is no dispute that micro-economic data is not reliable in NMEs. It is unclear whether the micro-economic data upon which Commerce relies is any more reliable.

<sup>85</sup> See Horlick & Shuman, *supra* note 39, at 820; *Senate NME Hearing, supra* note 5, at 16 (statement of R. Cunningham).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 18; *see, e.g.*, Trailer Axle From Hungary, 47 Fed. Reg. 66 (1982) (final determination), stating:

The obvious surrogate [*Trailer Axle*] was Canada where the producers manufactured trailer axles that were comparable in size and specifications to those the Hungarian manufacturer produced for the U.S. market. Moreover, the axles made and sold to Canada were exactly like those sold in the United States by U.S. industry. Despite these considerations, Commerce instead selected a small Italian manufacturer as the surrogate which led to numerous difficulties.

*Id.*; *see also* Speech by Charles Verrill Jr. given to the U.S. Chamber of Commerce Roundtable Conference on Nonmarket Economy Import Regulations, (July 12, 1984) [hereinafter Verrill Speech]; Interface One, *supra* note 29, at 168 (Charles Verrill provides three problem areas with comparable economy motion: 1) no adequate basis of comparison; 2) illogical underlying assumptions; 3) reliance on NME industry costs); *but see* Interface Two, *supra* note 32, at 173 (Prof. Soltysinski of Poland supporting the comparable economy notion as almost "universally accepted").

<sup>88</sup> See Verrill Speech, *supra* note 87. However, it should be noted that such a comparison may have the exact opposite effect—an unrealistically favorable price comparison for the domestic industry. This would likely occur when a sophisticated NME exporter is compared to a backward, high-cost surrogate market industry.

<sup>89</sup> See generally Klitgaard & Rasmussen, *Preferential Treatment of Foreign Investment in the People's Republic of China: Special Economic Zones and Industrial Development Districts*, 7 HASTINGS INT'L & COMP. L. REV. 377 (1984); Comment, *Evaluating China's Special Economic Zones*, 2 INT'L TAX & BUS. L. 376 (1984).

<sup>90</sup> See, *e.g.*, *Porcelain-on-Steel*, 51 Fed. Reg. at 36,419; *Iron Construction Castings*, 51 Fed.

porting countries, cannot provide a realistic cost valuation because it generally does not consider whether the market countries in the basket, as well as the particular industrial sectors, are in any way economically comparable with the NME under investigation, and does not make circumstance of sale adjustments as to such prices.<sup>91</sup> This basket method is also unpredictable because neither the exporter nor the domestic industry can know in advance which countries will actually make up the basket, what actual prices and volumes of sales will be during the time period under investigation, and, consequently, what the actual "fair" price will be after the average price is calculated.<sup>92</sup>

The average price calculation will be arbitrary as well, because the product category for which prices are selected may be overbroad, and may include products with substantial qualitative differences.<sup>93</sup> Domestic manufacturers argue that the use of import prices is inappropriate because they may be artificially low, due to the fact that they reflect the unfair NME import prices.<sup>94</sup> In contrast, NMEs complain that the use of import prices allows their competitors to increase their prices in order to raise the average price upon which fair value is based and thus, precipitate a determination that NME imports are being dumped.<sup>95</sup>

In a 1981 report, the General Accounting Office (GAO) summarized the problems with the application of AD duties to NMEs by stating that the combined effect of difficulties in the surrogate selection process, data verification, and the need for subjective adjustments makes the current methods of applying AD law highly unpredictable, of limited economic validity, and costly.<sup>96</sup>

An illustration of the arbitrary and unworkable nature of the present NME statutory provision may be illustrated by a brief review of events in *Barium Chloride from China*.<sup>97</sup> In the original investiga-

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Reg. at 9483; Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China, 50 Fed. Reg. 52,812 (Dep't of Comm. 1985) (final determination).

<sup>91</sup> *Id.*

<sup>92</sup> The countries which make up the basket may not be subject to an unfair trade investigation themselves. Such countries may vary the volume and files of their sales of the imported product due to market considerations. See Legal Times, Oct. 20, 1986, at 18, col.1.

<sup>93</sup> See *infra* note 242 and accompanying text.

<sup>94</sup> See Horlick & Shuman, *supra* note 39, at 818.

<sup>95</sup> *Id.*

<sup>96</sup> COMPTROLLER GEN. REP. TO THE CONGRESS OF THE U. S. ON U.S. L. & REG. APPLICABLE TO IMPORTS FROM NONMARKET ECON. COULD BE IMPROVED 24 (1981) [hereinafter COMPTROLLER GEN. 1981 REP.]. Some commentators, however, support existing legislation with certain modifications. *House Trade Hearings*, *supra* note 19, at 913, 1069. Both Professor Marer and Peter Ehrenhaft find present regulations workable, although both call for the substitution of constructed value for the surrogate country concept as the preferred method of valuing NME products. *Id.*

<sup>97</sup> 49 Fed. Reg. 33,916 (Dep't of Comm. 1984) (preliminary determination); see also *id.* at 40,635.

tion,<sup>98</sup> Commerce identified India as the surrogate because it was economically comparable to the PRC and was a producer of a product similar to the NME import. When India did not cooperate with Commerce, Commerce attempted, but failed, to find another market country, comparable or not, that produced a similar product. Under increasing time constraints, Commerce then decided that Thailand, which did not produce barium chloride, was "reasonably comparable" for purposes of constructing the value of this chemical.<sup>99</sup> After a complex valuation of Thai costs of production, based on the PRC's production function, Commerce found that the barium chloride was being dumped at margins of 14.5 percent.<sup>100</sup> Several components of this calculation were appealed to the Court of International Trade. The court held, in part, that Commerce erred when it did not value one of the components of barium chloride which the PRC received at no charge, and that Commerce was correct in valuing the energy component of production based on the cost of coal in Thailand, despite the fact that the PRC used natural gas (unavailable in Thailand) for half of its production.<sup>101</sup>

One week after this decision, Commerce published its determination in the annual review of the *Barium Chloride* case.<sup>102</sup> During this review, Commerce determined that India and Peru were comparable countries that produced the chemical, but neither country cooperated. Consequently, in its preliminary determination, Commerce based the "fair" price of barium chloride from the PRC on the average import price of barium chloride from four highly developed Economic Community (EC) industries, and the dumping margin jumped from 14.5 to 48.08 percent.<sup>103</sup> This dramatic, unpredictable, and potentially exclusionary increase in the dumping margin was a result of the different method of calculation, not of any actions by the Chinese producers. Later, in the final determination of its annual review,<sup>104</sup> Commerce switched back to a constructed value methodology based on Thai costs, and determined that the Chinese dumping margin was 7.82 percent, half of the original margin. Commerce noted, however, that it was entirely within its statutory discretion to use a different fair value methodology in the administrative review than it used in the original investigation. This discretion is particularly startling in light of this case where, depending on which methodology is chosen, the margin of "fair" value can vary from seven percent to forty-eight percent.

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<sup>98</sup> *Id.* at 33,916.

<sup>99</sup> *Id.* at 13,730.

<sup>100</sup> *Id.* at 23,341.

<sup>101</sup> *Chemical Prod. Corp. v. United States*, 645 F. Supp. 289 (C.I.T. 1986).

<sup>102</sup> 51 Fed. Reg. 41,141 (Dep't of Comm. 1986) (preliminary admin. review).

<sup>103</sup> *Id.*

<sup>104</sup> 52 Fed. Reg. 313 (Dep't of Comm. 1987) (final admin. review).

## 2. Countervailing Duty Law

The Tariff Act of 1930,<sup>105</sup> as amended by the Trade Agreements Act of 1979,<sup>106</sup> provided for the imposition of duties, as determined by Commerce,<sup>107</sup> to offset by an equivalent amount foreign subsidies<sup>108</sup> on goods imported into the United States. There are two CVD laws.<sup>109</sup> The first, Title VII of the Tariff Act of 1930,<sup>110</sup> applies to countries "under the agreement,"<sup>111</sup> meaning those countries that are signatories to the GATT Subsidies Code or have taken an equivalent obligation.<sup>112</sup> Before imposing a CVD order, the ITC must find that a U.S. industry is materially injured.<sup>113</sup>

The second CVD law, section 303 of the Tariff Act of 1930<sup>114</sup> applies to countries, including most NMEs, not subscribing to the GATT Subsidies Code.<sup>115</sup> In contrast to Title VII, imports from countries under section 303 are not entitled to an ITC finding of injury before a duty is imposed unless such goods are imported duty free from a GATT member,<sup>116</sup> or an international obligation requires such an injury finding.<sup>117</sup>

Under both Title VII and section 303, prior to the imposition of a duty, Commerce must determine that a foreign person or country<sup>118</sup> has subsidized the imports.<sup>119</sup> This determination is extremely difficult when an NME import is involved<sup>120</sup> because the concept of the CVD subsidies law is economically rooted in the belief that private entities stimulated by profit motives should exist because they are efficient, not because they are subsidized. Since NME governments control the means of production, private entities as envisioned by CVD subsidies law do not exist in NMEs and hence, CVD law is inapposite to NMEs.<sup>121</sup>

<sup>105</sup> Tariff Act of 1930, c. 497, Title III § 303, 46 Stat. 687.

<sup>106</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I § 103, 93 Stat. 190, 193.

<sup>107</sup> 19 U.S.C. § 1303 (1986). "[W]henver any country shall pay or bestow, directly or indirectly any bounty or grant upon the manufacture or production or export of any article or merchandise . . ." *Id.*

<sup>108</sup> Zarin, *supra* note 45, at 257.

<sup>109</sup> *Id.*

<sup>110</sup> 19 U.S.C. §§ 1671-77g (1982 & Supp. 1986).

<sup>111</sup> *Id.* § 1671(b).

<sup>112</sup> *Id.* § 1671(b)(1), (2).

<sup>113</sup> *Id.* § 1671(a)(2).

<sup>114</sup> *Id.* § 1303 (1982 & Supp. 1986).

<sup>115</sup> *Id.* § 1303(a)(1) (1986).

<sup>116</sup> *Id.* § 1303(a)(2). The allowance of an injury test from GATT members does not require signing of the subsidies code. Zarin, *supra* note 45, at 248 n.161.

<sup>117</sup> 19 U.S.C. § 1303(a)(2) (1982 & Supp. 1986).

<sup>118</sup> *Id.* §§ 1671(a)(1)(B), 1677(b), 1303(a).

<sup>119</sup> *Id.* §§ 1671(a)(1), 1303(a)(6).

<sup>120</sup> *Senate NME Hearing, supra* note 5, at 5 (statement of Lionel Olmer).

<sup>121</sup> *Id.* at 30 (statement of the American Association of Exporters & Importers (AAEI)). "Countervailing law designed to redress governmental interventions in nonmarket economies are so pervasive as to make it impossible to identify any single governmental intervention as a distortion or differential treatment actionable under the coun-



In its report to Congress in 1981, the GAO acknowledged the extensive difficulties of applying the CVD laws to NMEs.<sup>122</sup> In addition to discussing the problem of access to information concerning subsidy amounts,<sup>123</sup> the GAO described the equally difficult problem of ascertaining suitable exchange rates for converting subsidy amounts stated in foreign currencies into U.S. dollars.<sup>124</sup> The GAO concluded that "[t]he practical effect of these problems is that actually identifying and quantifying subsidies remains only remotely possible."<sup>125</sup>

On May 1, 1984, Commerce determined that CVD laws cannot be applied to imports from NMEs.<sup>126</sup> In *Carbon Steel Wire Rod from Czechoslovakia*<sup>127</sup> and *Carbon Steel Wire Rod from Poland*,<sup>128</sup> Commerce concluded that a CVD action cannot be brought against NMEs. Commerce reasoned that subsidies cannot be identified in NMEs because their centrally directed economic activity and use of administered prices, plans, and targets, were irreconcilable with market standards.<sup>129</sup> Domestic industries have opposed these Commerce determinations as a significant detriment to U.S. producers because such findings eliminate one of the present legal mechanisms for obtaining relief from damaging imports.<sup>130</sup>

The Commerce determinations in these cases were reversed by the U.S. Court of International Trade (CIT) in *Continental Steel Corp. v. United States*,<sup>131</sup> but were later affirmed by the U.S. Court of Appeals for the Federal Circuit which reversed the CIT ruling in *Georgetown Steel v. United States*.<sup>132</sup> In that case, the court held that CVD law does not apply to NMEs based on the intent and purpose of the CVD law as evidenced by its legislative history.<sup>133</sup> The court stated that no "unfair" countervailable subsidies existed in NMEs because

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tervailing duty law." *Id.* Subsidies are disfavored by free trade advocates because they encourage inefficiency by distorting economic behavior which would otherwise be controlled by market forces of supply and demand. *Id.* at 5.

<sup>122</sup> COMPTROLLER GEN. 1981 REP., *supra* note 96, at 27. "Perhaps the most perplexing aspect of import trade administration vis-a-vis the nonmarket economy countries involves questions of subsidies and countervailing duties." *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 32.

<sup>126</sup> See *infra* notes 127-128.

<sup>127</sup> 49 Fed. Reg. 19,370 (Dep't of Comm. 1984) (final determination).

<sup>128</sup> *Id.* at 19,374.

<sup>129</sup> *Id.* at 19,371. "In NMEs, resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert." *Id.* at 19,372.

<sup>130</sup> *Senate NME Hearing*, *supra* note 5, at 50 (statement of W. Ray Shockley, American Textile Manufacturers Institute).

<sup>131</sup> *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (C.I.T. 1985).

<sup>132</sup> *Georgetown Steel Corp. v. United States*, No. 85-2805, slip op. 21 (Fed. Cir. Sept. 18, 1986).

<sup>133</sup> *Id.* at 13.

any export incentives would not help an NME make a sale in the United States, and that to the extent a subsidy can be identified, the NME would only be subsidizing itself.<sup>134</sup>

The court held that Congress, through its specific amendment of the AD statute,<sup>135</sup> intended AD law to apply to NMEs.<sup>136</sup> To the extent the AD law is inadequate, the court stated that the appropriate remedy was corrective legislation, not the application of the CVD law.<sup>137</sup>

As discussed previously, the AD law is clearly inadequate, and yet, as a result of the decision in *Georgetown Steel*, AD law is the only unfair trade law that presently applies to NME imports. While the court's decision that CVD law should not be applied to NME imports is the only economically rational conclusion that could be reached, the fact remains that the confused and unworkable NME import control system will contain one less remedy with which to protect U.S. industry. It is apparent that the court left it to Congress to improve the present NME import regulation system.<sup>138</sup>

In *Georgetown Steel*, the court also mentioned that there was another law especially fashioned for application to NME imports: the injury based section 406.

#### B. Discretionary, Injury-Based Law — Section 406

Section 406 of the Trade Act of 1974,<sup>139</sup> termed the "market disruption" statute, is the corollary of section 201 (the escape clause) of the Trade Act of 1974,<sup>140</sup> and has special application to imports from communist countries,<sup>141</sup> regardless of whether such countries have been granted Most Favored Nation (MFN) status.<sup>142</sup> This law was especially composed for application to NMEs as a recognition by Congress that existing laws inadequately regulated NME imports.<sup>143</sup>

Under section 201, the ITC investigates whether an article is be-

<sup>134</sup> *Id.* at 17-18. This was held not to be the kind of "unfair" subsidy that the CVD law was intended to prevent.

<sup>135</sup> 19 U.S.C. § 1677(c) (1982); see *supra* notes 45-60 and accompanying text.

<sup>136</sup> *Georgetown Steel*, No. 85-2805, slip op. 21.

<sup>137</sup> *Id.* at 22-23.

<sup>138</sup> See *Legal Times*, Oct. 20, 1986, at 18, col. 4. It should be noted that the House Ways and Means Committee added a provision to its trade bill (H.R. 3, 100th Cong., 1st Sess. 1987), which states that Commerce may apply CVD law to NMEs when it can "identify and quantify" subsidies in an NME. As a practical matter, it is unlikely that this provision would cause Commerce to apply CVD law, because Commerce holds to the view that subsidies cannot be identified in NMEs. A determination by Commerce that subsidies cannot be identified or quantified, however, would be reviewable by the CIT under this provision. See 4 INT'L TRADE REP. (BNA) at 397 (Mar. 25, 1987).

<sup>139</sup> 19 U.S.C. § 2436 (1982).

<sup>140</sup> *Id.* § 2251.

<sup>141</sup> *Id.* § 2436(e)(2).

<sup>142</sup> *Interface Two*, *supra* note 32, at 341 (statement of Charles Verrill).

<sup>143</sup> *Legal Times*, Oct. 20, 1986, at 18, col. 1.

ing imported into the United States "in such increased quantities as to be a substantial cause of serious injury, or threat thereof," to the domestic industry producing an article directly competitive with the imported article.<sup>144</sup>

Because the purpose of section 201 is to provide an injured industry with a protected period in which to adjust,<sup>145</sup> it applies to fairly as well as unfairly traded goods so long as they cause sufficient injury to a U.S. industry (*e.g.*, there need not be sales at less than fair value or a subsidy).<sup>146</sup> If the ITC makes an affirmative injury determination, the President of the United States has the broad authority to grant a variety of relief measures<sup>147</sup> or to deny relief if he finds such relief contrary to U.S. economic interests.<sup>148</sup> No relief is granted after an affirmative ITC determination unless action is taken by the President.<sup>149</sup>

Market disruption under section 406 is very similar to section 201 in that it too is injury-based. Market disruption occurs when the volume of like articles imported from a communist country is increasing so as to be a significant cause of material injury to a U.S. industry.<sup>150</sup> Although section 406 is procedurally similar to section 201,<sup>151</sup> it differs substantially in certain respects.<sup>152</sup> First, material injury under section 406 is a lesser standard than the "serious injury" requirement of 201 (*e.g.*, under section 406, domestic industry need not show as severe an injury as a prerequisite for relief).<sup>153</sup> Second, market disruption must only be a significant cause of injury, a lesser standard than the section 201 substantial cause requirement.<sup>154</sup> These section 406 standards are lower because of congressional concern about the possibility of rapid market flooding by NMEs.<sup>155</sup> However, under section 406, domestic industry must

<sup>144</sup> 19 U.S.C. § 2251(b)(1) (1982).

<sup>145</sup> *Id.* § 2251(a). This period is for a maximum of eight years.

<sup>146</sup> Zarin, *supra* note 45, at 267.

<sup>147</sup> 19 U.S.C. § 2436(e)(2) (1982).

<sup>148</sup> *Id.* § 2253(a). The President may impose or increase a tariff, proclaim a tariff rate quota or quantitative restriction, regulate an order making agreement, or combine any of the above. *Id.*

<sup>149</sup> This reflects U.S. trade policy. It shows a reluctance to allow relief when the trade is not unfair.

<sup>150</sup> 19 U.S.C. § 2252(a)(1)(A) (1982).

<sup>151</sup> *See* Zarin, *supra* note 45, at 272.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* However, the § 406 injury standard is greater than the AD or CVD standard. This reflects the fact that under section 406, the NME imports are not "unfair."

<sup>154</sup> *Id.* at 273.

<sup>155</sup> Calabrese, *Market Disruption Caused By Imports from Communist Countries: Analysis of section 406 of the Trade Act of 1974*, 14 CORNELL L. REV. 119 (1981). This lesser standard was chosen because of congressional concerns that: 1) nonmarket economies are able to disregard economic conditions and concentrate their resources on one product, so as to flood U.S. markets much more quickly than a foreign market economy industry; 2) the United States is unable to effectively apply existing unfair trade laws to NME imports; 3) the United States will become dependent on communist countries for vital raw materials;

prove that imports are "rapidly increasing," a difficult requirement that does not exist under section 201.<sup>156</sup>

Although the statute has been in effect since 1974, relief has *never* been granted in the history of section 406 and only ten cases have been filed. Hence, the provision has been attacked as an ineffective mechanism for relief of U.S. industry.<sup>157</sup> Proceedings under the provision are "very unpredictable, extremely costly, and are heavily influenced by political and international policy considerations, which are prone to frequent and swift change."<sup>158</sup> The President's broad discretion is generally believed to be the statute's major problem. In all cases where the ITC has made an affirmative determination, the President has denied relief.<sup>159</sup> Many commentators have called for the modification of section 406<sup>160</sup> to make it a useful, rational approach to regulating NME imports.

Section 406 is also troubling to importers and NME exporters because neither the statutory provisions of section 406 nor the ITC determination under section 406 set forth any standards for compliance with the law.<sup>161</sup> Professor Stanislaw Soltysinski of Adams Mickiewicz University, Poznan, Poland, and NME exporters in general, argue section 406 is discriminatory because it lumps all communist countries together as "per se unfair" and applies a lower standard of

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4) because communist nations are generally not signatories to bi- or multilateral agreements, which require signatories to bind themselves to predetermined annual increases, U.S. producers are unable to predict the level of imports from communist countries. It is then more difficult for them to set their own levels of production. *Id.* at 118. *But see* Speech by Robert Herzstein to the U.S. Chamber of Commerce Roundtable Conference on Nonmarket Economy Import Regulation (July 12, 1984) (asserting that it is unlikely that nonmarket economies will mount a concerted effort to disrupt U.S. markets).

<sup>156</sup> 19 U.S.C. § 2436(e)(a) (1982); *see also* Horlick & Shuman, *supra* note 39, at 827-28.

<sup>157</sup> Horlick & Shuman, *supra* note 39, at 827; *see also* Senate NME Hearing, *supra* note 5, at 15 (statement of R. Cunningham); Speech by R. Gearhart to the U.S. Chamber of Commerce Roundtable Conference on NME Import Regulation (July 21, 1984).

<sup>158</sup> *See* Senate NME Hearing, *supra* note 5, at 15 (statement of Gary Horlick commenting on the inadequacy of § 406); 125 CONG. REC. 15,706 (1979) (Senator Heinz discussing the "excessive latitude given the President to overrule the ITC recommendations in § 406 cases") *Id.*; *see, e.g.,* Anhydrous Ammonia from the U.S.S.R., 45 Fed. Reg. 27,570 (Int'l Trade Comm. 1980) (report to President) stating:

The ammonia case is a vivid example of the capricious nature of decision-making under § 406, both at the International Trade Commission and at the executive level. In October, the ITC determined that there was "market disruption"; seven months later, it determined exactly the opposite. Even more striking was the President's policy reversal. In December, he rejected import restrictions; one month later, he changed his mind to the point of ordering an emergency quota to protect the U.S. industry.

Interface Two, *supra* note 32, at 372-73 (statement of R. Cunningham).

<sup>159</sup> In addition to the *Anhydrous Ammonia* case, the President denied relief after affirmative ITC determination in Clothespins from the PRC, 43 Fed. Reg. 45,547 (Int'l Trade Comm. 1978) (Presidential memorandum), and Canned Mushrooms from the PRC, 47 Fed. Reg. 45,981 (Int'l Trade Comm. 1982) (determination).

<sup>160</sup> *See* Stern Speech, *supra* note 19. Chairwoman Stern called for greater authority to be provided the President in § 406 cases, for increased flexibility.

<sup>161</sup> Senate NME Hearing, *supra* note 5, at 15 (statement of R. Cunningham).

injury to their imports.<sup>162</sup> Even if special rules are necessary for NMEs in the unfair trade law area where cost valuation is not applicable to government-controlled NME price structures,<sup>163</sup> Professor Soltysinski argues that there is no reason to make such a distinction in the injury area, where domestic injury is the sole criteria for relief and cost disparities are not at issue.<sup>164</sup>

### C. Antitrust Law

Congress enacted the Robinson-Patman Anti-Discrimination Act,<sup>165</sup> an antitrust statute, with the intention of preventing predatory pricing practices.<sup>166</sup> In addition to the unfair trade and discretionary relief laws discussed previously, the mechanisms of the Robinson-Patman Act may be invoked by private firms allegedly injured by predatory pricing.<sup>167</sup> Predatory pricing may include cut-rate sales<sup>168</sup> or sales below costs intended to disable a competitor<sup>169</sup> or take over a market.<sup>170</sup> In contrast to the other previously discussed trade law, antitrust law imposes severe sanctions, such as injunctions, treble damages, and imprisonment for violators.<sup>171</sup>

As in the case of unfair trade laws,<sup>172</sup> the difficulty of determining a fair NME import price or the valid cost of production in an NME is substantial because NME costs and prices are distorted by central planning.<sup>173</sup> Courts often lack the expertise of the ITC or Commerce in analyzing complex product pricing and other economic regulations based on surrogate or hypothetical calculations.<sup>174</sup> As a result, courts have refused to decide the "reasonableness" of prices in NMEs and hence, will not apply antitrust law to NME imports.<sup>175</sup>

Although AD law provides for the constructed value of such prices when they cannot otherwise be validly obtained,<sup>176</sup> the Robin-

<sup>162</sup> Interface Two, *supra* note 32, at 184 (statement of Professor Stanislaw Soltysinski of Adam Mickiewics University, Poznan, Poland).

<sup>163</sup> See *supra* notes 35-42 and accompanying text.

<sup>164</sup> Interface Two, *supra* note 32, at 196 (statement of Professor Soltysinski).

<sup>165</sup> Robinson-Patman Anti-Discrimination Act, c. 323 § 2, 38 Stat. 730 (codified as amended 15 U.S.C. §§ 13-13b (1982)).

<sup>166</sup> 15 U.S.C. § 13(a) (1982). See, e.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

<sup>167</sup> Interface Two, *supra* note 32, at 105 (statement of Louis B. Schwartz).

<sup>168</sup> 15 U.S.C. §§ 15, 72 (1982).

<sup>169</sup> Interface Two, *supra* note 32, at 105 (statement of Louis B. Schwartz).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* notes 38-44.

<sup>173</sup> Interface Two, *supra* note 32, at 106 (statement of Louis B. Schwartz).

<sup>174</sup> *Id.* at 109.

<sup>175</sup> See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries, 273 U.S. 392 (1927); United States v. Addyson Pipe and Steel Co., 85 F. 271 (6th Cir. 1898).

<sup>176</sup> 19 U.S.C. § 1677b(c) (1982).

son-Patman Act does not,<sup>177</sup> and courts have refused to construct prices for NMEs in antitrust cases when NME home market sales cannot be ascertained.<sup>178</sup> Because courts are not suited to calculate complex price valuations, commentators have urged that antitrust law is an "inappropriate and dangerous solution" to problems involving low-priced imports.<sup>179</sup> It is especially dangerous because the imposition of the draconian sanctions of the Act may disrupt trade relations and instigate retaliation.

#### *D. Impact of Present Law on NME Trade*

Because section 406 and the antitrust laws have been almost completely ineffective in regulating NME imports, and because courts will no longer apply CVD law, the burden of regulating NME imports falls almost exclusively on the AD law.<sup>180</sup> As previously discussed,<sup>181</sup> this law is flawed; while it expressly recognizes that a "fair" price cannot be determined in an NME,<sup>182</sup> it proceeds to set forth complex, hypothetical procedures to do just that. Despite diligent efforts on its part, Commerce cannot be expected to do the impossible — to find a free-market price where there is no free market. Rather than providing an accurate "fair" price, the application of these procedures leads to an arbitrary, unpredictable and expensive result that satisfies no one.

The potential impact of this flawed regulatory process should not be underestimated. As noted above,<sup>183</sup> the United States has a favorable balance of trade with NME countries. This trade is significant in volume and is generally predicted to increase in the future.

However, this promising trade picture can quite clearly be shattered by the application of a burdensome and arbitrary AD law. NMEs need to earn hard currency from their exports so that they

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<sup>177</sup> *Interface Two*, *supra* note 32, at 107.

<sup>178</sup> *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D.Del. 1978). The Delaware District Court refused to construct a price for NME imports, holding that it would be a "perversion of both the judicial function and the antitrust laws" to go beyond interpretation of existing law to create protectionist legislation for those who cannot compete with lower prices. The court concluded that antitrust laws do not apply to unfairly priced NME goods due to control of subsidization foreign governments. *Id.* at 400.

<sup>179</sup> *Interface Two*, *supra* note 32, at 135 (statement of Louis B. Schwartz).

[T]he antitrust laws are ill-adapted to policing the fairness of cheap imports. Rules relating to predatory pricing are virtually impossible to apply because of the difficulty in determining costs in a centrally planned economy. Discovery procedures are difficult to carry out fairly. The courts are not equipped to engage in the continuing supervision, or to provide a nationally uniform response as the basis for diplomatic negotiations and business planning.

*Id.* at 105.

<sup>180</sup> Comment, *U.S. Trade Laws Hinder the Development of U.S.-PRC Trade*, 22 COLUM. J. OF TRANSNAT'L L. 135 (1983).

<sup>181</sup> See *supra* notes 63-96 and accompanying text.

<sup>182</sup> That is why subsection c, the "state-controlled economy" provision of the AD law was added to § 773 of the Tariff Act of 1930. See 19 U.S.C. § 1677b (1982).

<sup>183</sup> See *supra* notes 14-19 and accompanying text.

may purchase imports from the United States.<sup>184</sup> Further, NMEs may retaliate against U.S. exports because of frustration with the AD law's perceived unfair and exclusionary impact.

For example, the PRC is the United State's largest NME trading partner, and is an important and growing market for U.S. manufactured and agricultural products.<sup>185</sup> The PRC has retaliated against U.S. protectionist trade legislation in the past,<sup>186</sup> and has expressed frustration at present U.S. trade regulation laws.<sup>187</sup>

Therefore, if the United States wants to insure the future expansion of trade with NMEs, it must make changes in its regulation of NME imports. The Court of Appeals for the Federal Circuit made it clear that such changes must be made by Congress in the form of new legislation.<sup>188</sup> Any change in this law must achieve a crucial balance: on the one hand, it must protect U.S. industry, and on the other hand, it must not disrupt the growing and beneficial U.S. trade relationship with NMEs.<sup>189</sup>

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<sup>184</sup> See S. CON. RES. 47, 96th Cong., 1st Sess., 52-53 (1979); see also TRADE SUBCOMM. OF THE HOUSE COMM. ON WAYS AND MEANS, 99TH CONG., 1ST SESS., REPORT ON THE TRADE MISSION TO THE FAR EAST 47-52 (Comm. Print 1985).

<sup>185</sup> See STAFF OF THE HOUSE SUBCOMM. ON ENERGY AND COMMERCE, 98TH CONG., 1ST SESS., REPORT ON U.S. TRADE RELATIONS WITH CHINA AND JAPAN: 1983, 7-8 (Comm. Print 1983).

<sup>186</sup> *Id.* The PRC drastically reduced agricultural imports from the United States, causing significant injury to the U.S. farm industry.

<sup>187</sup> See Han Xu, *U.S. Laws Threaten the Future of China-U.S. Trade*, CHINA BUS. REV., Nov.-Dec. 1986, at 6, in which Mr. Han Xu, the Chinese ambassador to the United States argues that China's access to the U.S. market is unfairly restricted because "the U.S. dumping law as applied to China is contrary to what are generally considered the basic characteristics of law — consistency, stability, predictability, and fairness." See also Han Xu, *Sino American Economic Cooperation*, 3 CHINA L. REP. 160 (1986). This frustration is exacerbated by the fact that the unilateral application of U.S. trading laws contradicts the letter and spirit of the 1979 Trade Agreement between the United States and the PRC. Agreement on Trade Relations, July 7, 1979, 31 U.S.T. 4651, T.I.A.S. No. 9630 (published by the American Society of International Law). This agreement requires both countries to take all efforts to create "the most favorable conditions for strengthening in all aspects, economic and trade relations between the two countries so as to promote continuous long term development of trade between the two countries" and for the "mutual expansion of their reciprocal trade." *Id.* Trade disputes are to be resolved first by consultation, and only after consultations fail, by unilateral trade restraints. *Id.* at 1048-49. It is easy to see how, after entering such an agreement in good faith, the PRC would be frustrated by unilateral application of the arbitrary AD NME provisions.

<sup>188</sup> *Georgetown Steel*, No. 85-2805, slip op., at 23.

<sup>189</sup> Because they would fundamentally change existing law, the two proposals discussed *infra*, are considered to be, for the purposes of this Article, the major proposals for reform of NME legislation. There have been other proposals, but these have been either limited in scope or conceptually similar to current law or to the two proposals discussed *infra*. One such proposal, however, put forth by the Committee for Fair Trade with China, should be noted briefly. (See *Hearings on Comprehensive Trade Legislation, before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987) (statement of Edward Furia, Comm. for Fair Trade with China)). This proposal is essentially a combination of existing law and the artificial pricing proposal, but it contains a novel provision that would create a separate category of NMEs, termed "planned market economies," comprised of countries that are found to be implementing economic reforms that would enable them to operate on market principles (*e.g.*, China and Hungary). The imports from

### III. Proposals for Change in Existing Law

After reviewing the almost universal criticism of the present flawed regulatory system, it is not surprising that there are proposals for the sweeping reform of this system. There are two major proposals for the reform of NME trade laws which will be considered in the future. One, the artificial pricing proposal,<sup>190</sup> is price based, and the other, the amended market disruption proposal,<sup>191</sup> is injury based.

Before discussing these proposals, it should be noted that neither is flawless. The proponents of both proposals concede that there is no perfect solution to the NME import problem, in free-market terms, because precise valuations cannot be made for NME imports, and so it cannot be determined if they are actually "fair" or "unfair." In recognition of this fact, neither proposal attempts to force the application of the comparative advantage principles in this context. Instead, both aim to add simplicity and predictability to a process now overly complex and arbitrary.

#### A. Artificial Pricing Proposal

Senator John Heinz<sup>192</sup> has led the effort to reform the current problematic system of regulating NME imports.<sup>193</sup> He has done so by proposing artificial pricing bills in each Congress since 1979.<sup>194</sup> Generally, the artificial pricing legislation proposes to add a new subtitle to the 1930 Tariff Act through the creation of a new artificial pricing remedy for domestic industries competing with NME imports.<sup>195</sup> This legislation would create a distinct trade remedy law

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countries in this category would be subject to a constructed value methodology; the problems with this methodology are discussed *supra*, at notes 76-82 and accompanying text. The imports of NMEs that are not in this new category would be regulated under an artificial pricing standard; the problems with this standard are discussed *infra*, at notes 228-79 and accompanying text.

<sup>190</sup> See *infra* notes 193-200 and accompanying text. There have been several variations of the artificial pricing proposal; a result of differing minimum allowable import price standards. The fundamentals of these various versions are essentially the same and so, for the purposes of this Article, they are considered together.

<sup>191</sup> See *infra* notes 282-95 and accompanying text.

<sup>192</sup> Second-term Senator from Pennsylvania, assisted by Chief Legislative Assistant William Reinsch.

<sup>193</sup> See *supra* notes 35-36 and accompanying text. Senator Heinz stated: "In my view, consideration of this issue is particularly necessary due to the growing complexity of our trade relations with socialist countries. Increased trade has produced more unfair practice cases involving nonmarket economies and consequently more dissatisfaction with present law." 129 CONG. REC. S7356 (daily ed. May 24, 1983).

<sup>194</sup> The most recent bill was S. 307, 99th Cong., 2d Sess., 133 CONG. REC. S. 707 (daily ed. Jan. 13, 1987) [hereinafter S. 307]. He has proposed other artificial pricing bills such as S. 1868, 99th Cong., 1st Sess., 131 CONG. REC. S. 16,002 (daily ed. Nov. 20, 1985) [hereinafter S. 1868]; H.R. 3398, amend. 4267, 98th Cong., 2d Sess. (1980), 130 CONG. REC. S11372 (daily ed. Sept. 18, 1984); S. 1351, 98th Cong., 1st Sess. (1983) [hereinafter S. 1351]; S. 958, 97th Cong., 1st Sess. (1981) [hereinafter S. 958]; and S. 1966, 96th Cong., 1st Sess. (1979).

<sup>195</sup> See, e.g., S. 307, *supra* note 194; S. 1868, *supra* note 194.



track for application to NMEs, separate from that used for market economies.<sup>196</sup> Traditional AD law would no longer apply, and instead, the artificial pricing proposal would create an entirely separate, analogous group or track of provisions especially for application to NME imports. Prior bills had proposed the replacement of the CVD law,<sup>197</sup> and the repeal of section 406.<sup>198</sup>

The objective of the artificial pricing proposal is to create a system with greater certainty, simplicity, and fairness in the regulation of imports from NMEs<sup>199</sup> by augmenting the Trade Agreements Act of 1979,<sup>200</sup> which has not been effective in remedying the trade problems unique to NME imports.<sup>201</sup>

The proposal seeks to change existing law through its three major provisions: (a) the NME definition, (b) the two-track procedure, and (c) the minimum allowable import price standard.

### 1. *The NME Definition Provision*

A major provision of the artificial pricing proposal involves the definition of NMEs on an economic, rather than a political basis.<sup>202</sup> Under this provision, Commerce will determine whether the economy of a country "operates on market principles of cost or pricing structures,"<sup>203</sup> and may compile a list designating those countries that do not operate in such a manner as NMEs.<sup>204</sup> In making this determination, the bill requires Commerce to consider: (1) the convertibility of currency; (2) the extent wage rates are determined by free bargaining; and (3) the allowability of joint ventures with foreign firms.<sup>205</sup>

Senator Heinz asserts that this provision adds fairness and simplicity to the bill. He argues that it recognizes and thus encourages

<sup>196</sup> See, e.g., S. 1868, *supra* note 194.

<sup>197</sup> S. 1351, *supra* note 194.

<sup>198</sup> S. 958, *supra* note 194.

<sup>199</sup> *Senate Hearing on S. 958*, *supra* note 35, at 25, in which Kopp stated:

[The bill] seeks to create a fairer and more certain means of determining whether an unfair practice has occurred . . . . GAO studies and other evidence presented to Congress in different contexts makes clear that uncertainty is one of the major deterrents to trade. One of the biggest drawbacks of present law is the uncertainty that the investigatory process creates for both parties in a dispute.

*Id.*

<sup>200</sup> Pub. L. No. 96-39, 93 Stat. 151-93 (1979).

<sup>201</sup> 130 CONG. REC. S11378 (daily ed. Sept. 18, 1984); see also S. 307, *supra* note 194, § 1(c)(1)(A).

<sup>202</sup> See 133 CONG. REC. S. 708 (daily ed. Jan. 13, 1987); 131 CONG. REC. S16002 (daily ed. Nov. 20, 1985). The Trade Act of 1974 defines NMEs as those nations dominated by Communism.

<sup>203</sup> See S. 1868, *supra* note 194, § 1(b)(18)(B).

<sup>204</sup> The most recent artificial pricing proposal, S. 307, does not contain a listing requirement, but previous proposals have consistently required such a listing. See, e.g., S. 1868, *supra* note 194, § 1(b)(18)(F).

<sup>205</sup> See S. 307, *supra* note 194, § 1(b)(18)(B); S. 1868, *supra* note 194, § 1(b)(18)(C).

the progress of NMEs in adopting western economic models.<sup>206</sup> The concept of annual listing of NMEs will also simplify the procedure, he has asserted, because it avoids the necessity of making a determination on a case by case basis.<sup>207</sup>

This provision has several flaws. First, the factors considered by Commerce are rigid and unrealistic, and it is apparent that no NME, no matter how progressive, could satisfy them and be considered a market economy.<sup>208</sup> These factors consider only the economy as a whole and do not consider progress in a particular sector. Further, the maintenance of a list is itself rather inflexible<sup>209</sup> because the list is legislatively fixed; thus, it will be difficult to remove a country despite efforts by an NME to liberalize its economy. Some commentators express concern that the definition is vague and as a result gives Commerce excessive discretion in defining an NME.<sup>210</sup> The provision also has been criticized for its failure to include state-owned enterprises in market economies.<sup>211</sup>

## 2. *Two-Track Procedure*

This "two-track" concept is the second major provision of the artificial pricing proposal.<sup>212</sup> It states that when an NME industry provides verifiable and sufficient price information to Commerce, then, in that particular investigation, AD law will apply to the NME industry as it would to any market country's industry.<sup>213</sup> The purpose of this provision is to treat NME industries as much like free market economies as possible.<sup>214</sup> Senator Heinz argues that this "carrot and stick" approach will encourage NMEs to cooperate with Commerce and provide sufficient, reliable information demonstrating that the prices of a particular industry are market reflective;

<sup>206</sup> 131 CONG. REC. S1602 (daily ed. Nov. 20, 1985) (statement of Senator Heinz).

<sup>207</sup> *Id.*; see also *Senate NME Hearing*, *supra* note 5, at 34 (Allen Merken describing time pressure under the previous legislation).

<sup>208</sup> The requirements that currency be freely convertible and wage rates be freely negotiated between management and labor are clearly unrealistic for socialist countries for the foreseeable future. No NME could satisfy them despite substantial efforts to liberalize economic sectors. See *infra* notes 299-302 and accompanying text for more realistic criteria.

<sup>209</sup> See Horlick & Shuman, *supra* note 39, at 833. Again, it should be noted that the most recent version of the artificial pricing proposal, S. 307, dropped the listing requirement. See 133 CONG. REC. S. 707 (daily ed. Jan. 13, 1987). However, the rigid effect of the listing requirement is maintained under S. 307, because under § 1(b)(18)(C), all determinations by Commerce that a country is an NME will remain in effect until actually revoked by Commerce; there will be no case by case analysis.

<sup>210</sup> *Senate NME Hearing*, *supra* note 5, at 75 (statement of Richard Breault).

<sup>211</sup> *House Trade Hearings*, *supra* note 19, at 1019 (discussion of problems of applying law to state controlled enterprises in market economies). The Heinz bill defines a country as an NME based on its economy as a whole.

<sup>212</sup> See, e.g., S. 1868, *supra* note 194, § 1(c)(1)(B).

<sup>213</sup> 131 CONG. REC. S1602 (daily ed., Nov. 20, 1985).

<sup>214</sup> *Id.*

otherwise, they will face the average import price standard.<sup>215</sup> This cooperation in compiling realistic price figures will in turn help the NME to move toward market principles, he asserts.<sup>216</sup>

Domestic industry spokesmen oppose the two-track provision, and cite three reasons why the provision should be removed from the legislation.<sup>217</sup> First, they claim AD law is not appropriate for NME imports<sup>218</sup> because NMEs can never provide reliable price information.<sup>219</sup> U.S. industry deems the notion that an NME can prove its prices are market-oriented as lacking merit in view of the fact that NMEs: (1) have no decentralized pricing mechanisms;<sup>220</sup> (2) are members in long-term trade agreements within the eastern block trade group, the Council of Mutual Economic Assistance (CMEA), which removes the possibility for any member to become significantly involved in trade with market economy countries;<sup>221</sup> (3) distort consumer demand;<sup>222</sup> and (4) industrial investment is almost totally provided by the central government.<sup>223</sup>

Second, the U.S. steel industry urges that the determination of what constitutes sufficient and verifiable information will give too much discretion to Commerce.<sup>224</sup> Finally, domestic industry projects that the provision will render the artificial pricing proceedings overly complex, time consuming, and costly.<sup>225</sup> Other critics assert that the time limit for switching from an artificial pricing to an AD investigation are insufficient.<sup>226</sup>

In contrast, Senator Heinz asserts that the two-track concept recognizes that some NME industries increasingly are becoming market oriented,<sup>227</sup> citing the current economic policies in Hungary and the People's Republic of China as examples.<sup>228</sup> It is uncertain, however, what exactly will be considered "sufficient" information, and whether it will be realistically possible for an NME to meet that requirement.

<sup>215</sup> *Id.*

<sup>216</sup> 130 CONG. REC. S11378 (daily ed., Sept. 19, 1984); 133 CONG. REC. S16002 (daily ed., Nov. 20, 1985).

<sup>217</sup> *Senate NME Hearing, supra* note 5, at 56 (statement of Mangan, American Iron and Steel Institute).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 73 (statement of the AFL-CIO).

<sup>220</sup> *Senate Hearing on S. 958, supra* note 35, at 245 (letter from Juliana Pilon of the Heritage Foundation).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See Horlick & Shuman, *supra* note 39, at 836-37.

<sup>227</sup> *Senate NME Hearing, supra* note 5, at 9 (statement of Sen. Heinz).

<sup>228</sup> *Id.* (Sen. Heinz notes China's policy of encouraging capitalism and free market principles in its industries).

### 3. *Minimum Allowable Import Standard*

The artificial pricing proposal's most controversial provision would establish some type of a weighted average price benchmark, below which no NME could sell, for each imported article.<sup>229</sup> This standard has changed considerably through the legislation's history, and presently there is no agreement on an appropriate standard.

In its early stages, the minimum allowable import standard was the "lowest" average import price of a similar article from market economy countries.<sup>230</sup> Despite administration support, this standard was vehemently attacked by domestic industry advocates as being unfairly low,<sup>231</sup> and as a result, was defeated on the Senate floor.<sup>232</sup> Senator Heinz modified the standard, setting it at the average market economy import price level,<sup>233</sup> a more difficult, and in his words, a "more realistic and more appropriate standard."<sup>234</sup> However, this standard has also been attacked for a variety of reasons, and as a result, the legislation was dropped in conference from the Trade and Tariff Act of 1984.<sup>235</sup> The most recent change in the standard sets it

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<sup>229</sup> See, e.g., S. 307, *supra* note 194, § 1(c)(1); S. 1868, *supra* note 194; see also 131 CONG. REC. S16002 (daily ed. Nov. 20, 1985). A duty would be imposed upon NME imports to the extent this price standard exceeds the actual import price.

<sup>230</sup> See S. 1351, *supra* note 194. It should be noted that this lowest average standard was repropoed by Representative Bill Frenzel as part of H.R. 3, 100th Cong., 1st Sess. (1987). Despite support from the administration, this provision was deleted from the bill as a result of an amendment by Representative Richard Schulze, who was dissatisfied with this standard and wanted a higher benchmark price. This bill would have amended the current NME provision of antidumping law by applying a minimum import price benchmark that would be based on the "average import price of the eligible market economy supplier whose average import price is lowest among the average import prices of all eligible market economy suppliers." *Id.* The provision qualified this lowest average standard by providing Commerce with substantial discretion to choose a "next higher average" price whenever it determined that the market economy supplier with the lowest average import price was at a level of economic development which was significantly lower than the NME under investigation. Notwithstanding its lower standard, this provision would have been subject to the same problems of arbitrariness and unpredictability as the average price standard. Moreover, this provision would have been more arbitrary than other artificial pricing proposals, because it would have broadened the standard for determining comparable goods. It would have allowed Commerce to rely on a new standard, termed "comparable merchandise," that would have been broader than the "such or similar" standard for comparison under present law. This provision would have increased the likelihood, already substantial, that NME goods would be compared with non-similar market economy goods, and that, hence, the "fair" import price of their goods would have been based on the price of such dissimilar market goods.

<sup>231</sup> See *Senate NME Hearing*, *supra* note 5, at 49-64 (statement of American Iron and Steel Institute, Domestic Nitrogen Producers and American Textile Manufacturers Institute). These commentators objected to the standard presumption that NMEs were as efficient as the most efficient market producers. They asserted that this standard would legitimize NME dumping as prices dropped to meet NME competition.

<sup>232</sup> See *Senate NME Hearing*, *supra* note 5, at 2.

<sup>233</sup> See S. 1868, *supra* note 194, § 1(c)(1).

<sup>234</sup> See 129 CONG. REC. 7355 (daily ed. May 24, 1983).

<sup>235</sup> This was mainly due to strong administration opposition to this standard. While the administration supported the lowest average import price standard, it opposed the average price standard.

at the average U.S. import price of the largest volume market economy exporter of a like article.<sup>236</sup>

Supporters of the minimum import price provision assert that it is administrable and as fair as possible considering that actual prices are unavailable.<sup>237</sup> They assert that the average import price standard is simple and administrable because it is based on shipping and customs data already available,<sup>238</sup> and is predictable because this data is available to exporters, importers, and domestic industries.<sup>239</sup>

Although supporters of the average price standard are uncomfortable with the standard's presumption that NME producers cannot be more efficient than market producers,<sup>240</sup> they defend the standard by asserting that the establishment of an average price benchmark is the best possible method of regulating NME imports because of the impossibility of determining costs and prices in an NME.<sup>241</sup> Supporters point to the NME's recognized potential for dumping due to government control and intervention as a rationale for the average price concept.<sup>242</sup>

Further, the proposal's promoters assert that the principle of comparative advantage is not applicable to NMEs because it is impossible to ascertain a realistic price for their goods.<sup>243</sup> Some believe market economies are always more efficient producers and competitors than NMEs<sup>244</sup> because market economy producers are stimulated by profit motives and must be responsive to market

<sup>236</sup> See S. 307, *supra* note 194, § 1(c)(1).

<sup>237</sup> 131 CONG. REC. S. 7355 (daily ed. Nov. 20, 1985).

<sup>238</sup> The COMPTROLLER GEN. 1981 REP., *supra* note 96, at 22 states:

The administrative advantage of this approach is that it eliminates the need to analyze other market economies and their producers for suitability as surrogates as well as the need to gain their cooperation. The administering authority also is freed from the need to make what are often very subjective adjustments to a surrogate producer's selling prices for differences in production technology and scale.

In addition, this approach would give both nonmarket economy exporters and prospective U.S. petitioners a significantly clearer idea of what the foreign market value of a given product is likely to be . . .

*Id.* Further, the ease of administration resulting from this provision will reduce the litigation costs for both parties. *Senate Hearing on S. 958, supra* note 35, at 18 (statement of Undersecretary Olmer); 131 CONG. REC. S1602 (daily ed. Feb. 20, 1985).

<sup>239</sup> *Senate NME Hearing, supra* note 5, at 6 (statement of Undersecretary Olmer). "We believe the artificial pricing investigation proposed in [the Heinz legislation] would be simpler and more predictable than current law, and therefore the best way to protect U.S. industry against unfairly traded NME imports . . . Domestic manufacturers could more effectively anticipate the likelihood of relief, and weigh the costs and benefits of seeking relief . . . Importers would benefit from increased predictability by not buying imports likely to be found unfairly traded . . . NME producers could price more fairly in the first place." *Id.*

<sup>240</sup> Recent Developments, *supra* note 41, at 396.

<sup>241</sup> *Id.* at 397.

<sup>242</sup> *Senate NME Hearing, supra* note 5, at 14 (statement of Richard Cunningham).

<sup>243</sup> *Id.* at 19 (statement of Gary Horlick).

<sup>244</sup> *Id.* at 5 (statement of Undersecretary Olmer).

forces,<sup>245</sup> while NME producers are insulated from the market place and often operate without profit motives or domestic competitors to keep them efficient.<sup>246</sup> Other supporters contend the assertion that NMEs can have lower costs is meaningless in view of the fact that real costs in an NME are unascertainable.<sup>247</sup> Finally, proponents assert that the severity of the presumption of inefficiency is mitigated by the bill's two-track provision which allows NMEs to be treated the same as market economy countries if certain requirements are met.

Moreover, some commentators assert that it is a standard that is generous to NMEs because they are generally less efficient.<sup>248</sup> Supporters of the bill believe the standard will add certainty to the NME import regulation process, which will in turn decrease the amount of dumping from NMEs and the consequent disruption of trade with NMEs.<sup>249</sup>

However, the minimum import price benchmark has some major flaws. First, it is arguably as arbitrary as the present regulatory approach. Commerce does not have a readily available price data base from which to compare products from market countries to similar products from NMEs.<sup>250</sup> Thus, Commerce may often find that the only import statistics that are available are contained in the Tariff Schedules of the United States (TSUS).<sup>251</sup> However, TSUS classifications generally contain numerous items which vary greatly in type and price and thus, to base the minimum allowable price of an NME product on the average price of a TSUS category would be arbitrary.<sup>252</sup>

Moreover, there will always be variations in quality between similar products which are legitimately reflected in price differentials.<sup>253</sup> Consequently, a minimum price standard based on the averaging of

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*; see also *House Trade Hearings*, *supra* note 19, at 953 (John Heebner, president of a domestic china producer, stating that despite the greater efficiency of U.S. producers, they are undersold because Chinese producers are aided by a low standard of living and a Communist government).

<sup>247</sup> *Id.* at 17.

<sup>248</sup> *Senate NME Hearing*, *supra* note 5, at 56, 64.

<sup>249</sup> *Id.* at 22 (discussion of Sen. Heinz, Richard Cunningham and Gary Horlick, agreeing that the Heinz legislation would remedy the uncertainty and expense of present law that discourages domestic industries from bringing antidumping cases).

<sup>250</sup> See Comment, *Artificial Pricing As An Alternative to Countervailing Duties Against Imports From Nonmarket Economies*, 8 J. COMP. BUS. & CAP. MARKET L. 75, 83-84 (1986). The artificial pricing proposal does specify how Commerce will determine which products are comparable and from where Commerce will obtain the price data necessary to calculate the minimum allowable import price standard.

<sup>251</sup> 19 U.S.C. § 1202 (1982 & Supp. 1986).

<sup>252</sup> For example, TSUS item 646.3040 includes six types of galvanized and non-galvanized nails. The prices of these nails can vary by up to 40%-50%. To base the "fair" price of a particular NME nail import on the average price of nails in TSUS item 646.3040 would be arbitrary and unfair.

<sup>253</sup> See *Senate NME Hearing*, *supra* note 5, at 34 (statement of AAEL).

import prices will contain a range of error that is often substantial.<sup>254</sup> Further, available import price data is often deceptive, because inaccurate information may be provided by exporters,<sup>255</sup> and import prices often reflect a number of factors unrelated to costs (such as marketing and advertising).<sup>256</sup> Thus, the artificial pricing proposal's minimum import standard will be unacceptably arbitrary and may result in prohibitively high minimum price standards.<sup>257</sup>

A second flaw in the standard is that it will be unpredictable. NME exporters and U.S. importers can never be certain which products Commerce will determine to be sufficiently similar to use for comparison with NME imports.<sup>258</sup> Further, even if NME exporters knew this information, the price, volume, and exporters of a particular product can vary substantially from month to month,<sup>259</sup> making it impossible to know the minimum import price in advance and thus very difficult to take steps to comply.<sup>260</sup>

A third flaw in the standard is that it will likely be very difficult to administer. Commerce must somehow compile, verify, and adjust price information, on a quarterly basis at minimum, for each and every product that is imported into the United States from an NME. This task appears to be extremely difficult and expensive,<sup>261</sup> and the artificial pricing proposal does not explain how Commerce can be expected to administer the standard.

A fourth problem with the standard results from the "special rule for fungible products" provision contained in the most recent artificial pricing proposal.<sup>262</sup> This provision states that for those products deemed "fungible," foreign market value will be deter-

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<sup>254</sup> See *id.* at 34 (statement of Alan Merken).

<sup>255</sup> See Verrill Speech, *supra* note 87, at 10.

<sup>256</sup> Under an average import price standard, circumstances of sales adjustments, which are vital to an accurate comparison, are not possible.

<sup>257</sup> The arbitrary nature of this standard can be demonstrated through the hypothetical example of an importer of automobiles from an NME. If during the investigative period, the largest market producer was BMW, the "fair" price of the NME imports would be prohibitively high; if, however, the largest exporter was Volkswagon, the "fair" price would be markedly lower. Even if the largest exporter were Volkswagon, the "average" price would vary substantially depending on the quantity of Jettas imported relative to the quantity of the lower-priced Golfs imported.

<sup>258</sup> This will be especially true with very sophisticated or technical imports because there are many features that can differentiate one product from another, and make them non-comparable. See Comment, *supra* note 250, at 83-84.

<sup>259</sup> The same is true for the largest market producer of a particular import under S. 307, which can vary from month to month as well, depending on the volume of a particular product that each market producer exports. Actual duties are not determined until one year later, during the annual review, and hence, it is impossible to set prices at a "fair" level when an exporter can do no more than guess at what the average price will be in the future.

<sup>260</sup> See Comment, *supra* note 250 n. 139. The artificial pricing proposals are silent on this problem.

<sup>261</sup> See *Senate NME Hearing*, *supra* note 5, at 30 (statement of AAEI).

<sup>262</sup> See S. 307, *supra* note 194, § 1(c)(3).

mined pursuant to what amounts to be a constructed value calculation.<sup>263</sup> This special test opens up a potentially enormous loophole in the "artificial pricing" concept because a wide variety of products can be considered "fungible," and thus subject to the problematic constructed value test.<sup>264</sup> This result is especially ironic in light of the fact that the artificial price concept would apply most effectively to "fungible" products, which have few qualitative differences and may thus be more easily compared and averaged.<sup>265</sup>

Another flaw in the minimum price standard lies in its inherent presumption that all NME produced imports are per se unfair if they sell under the average import price of such goods.<sup>266</sup> NME critics decry this presumption as discriminatory and arrogant<sup>267</sup> for a number of reasons. First, NMEs are the most efficient producers of certain products<sup>268</sup> because of highly developed industrial sectors, and therefore lower prices reflect cost advantages in labor, materials, and production.<sup>269</sup> Second, some commentators believe that NMEs do not purposely engage in predatory pricing,<sup>270</sup> and that they often attempt to obtain the highest possible price.<sup>271</sup> Third, some commentators believe that the currencies of NMEs are overvalued<sup>272</sup> and that the prices of imports will be cheaper if standard currency rates are applied.<sup>273</sup> Finally, there are a number of other factors that account for the low prices of NME imports that have no relation to unfair pricing. NMEs, as new market entrants, need to compensate for the prejudice against goods produced in a communist country, both by consumers<sup>274</sup> and the U.S. government:<sup>275</sup> the nature of their primary product imports often requires competitive pricing;<sup>276</sup>

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<sup>263</sup> *Id.* The provision calls for a determination of foreign market value from the "factors of production incurred in producing the merchandise." *Id.*

<sup>264</sup> Hence, this provision will undermine the principle objective of the artificial pricing proposal — to simplify NME import regulation through the application of an "average" price — by subjecting a substantial amount of NME imports to the flawed constructed value methodology. See *supra* notes 76-82.

<sup>265</sup> This irony is especially disturbing in light of the fact that this provision was included in the proposal for political reasons, and not out of concern for a more workable NME statute.

<sup>266</sup> Interface Two, *supra* note 32, at 186 (Prof. Soltysinski).

<sup>267</sup> *Id.* at 186.

<sup>268</sup> Interface Two, *supra* note 32, at 465.

<sup>269</sup> *Id.*

<sup>270</sup> *Senate NME Hearing, supra* note 5, at 30 (statement of the AAEI); see also Interface Two, *supra* note 32, at 34 (statement of Alan Merken, Action Tungsram, Inc., supporting the same assertion).

<sup>271</sup> *Senate NME Hearing, supra* note 5, at 34 (statement of Merken).

<sup>272</sup> Interface Two, *supra* note 32, at 465.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 181 (Prof. Soltysinski).

<sup>275</sup> *House Trade Hearings, supra* note 19, at 914 (Prof. Marer). Discrimination is said to be explicit and implicit, in the form of tariff and non-tariff barriers.

<sup>276</sup> See *supra* note 259 and accompanying text.



and their low prices reflect differences in quality<sup>277</sup> or lack of experience in marketing their goods through methods such as advertising, service, warranties, and brand names.<sup>278</sup>

Thus, to require NME imports to sell at or above the average import price, which is generally the price of established market leaders, would be unfair, and could very well preclude them from the U.S. market altogether.<sup>279</sup>

Supporters of the average price standard point out that Commerce has successfully applied an average import standard in recent cases.<sup>280</sup> However, Commerce itself recognizes the problems encountered with this standard, and uses it only as a last possible approach when no other information is available. Further, in these cases, Commerce has had difficulty finding a comparable import category from which to take prices.

As a result of its many flaws,<sup>281</sup> the minimum import price standard is an unacceptable basis for regulatory NME imports, and as long as the artificial pricing proposal contains such a standard, it is fundamentally flawed. The impact of this standard should not be underestimated. The arbitrary nature of the price standard may result in a prohibitively high minimum allowable price. This standard forces NMEs to price at average market rates which are generally the rates of well-established market leaders. NMEs are generally new market entrants, who must prove that they are reliable suppliers and who cannot realistically price at such levels. Therefore, the standard may have a severely restrictive effect on NME imports and as a result, may jeopardize the overall U.S.-NME trade relationship.

While the minimum import price provision has laudable objectives, it fails because, like the present law, it attempts to determine a "fair" NME import price when such a price is impossible to determine.

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<sup>277</sup> Interface One, *supra* note 29, at 254.

<sup>278</sup> House Trade Hearings, *supra* note 19, at 914 (Prof. Marer).

<sup>279</sup> See Han Xu *supra* note 187, at 6, in which Mr. Han Xu states that:

[U]nfortunately a number of U.S. trade laws and legislation now being considered by the U.S. Congress threaten to restrict China's exports to the U.S., and thus jeopardize the prospects for growth and bilateral trade. . . . We are particularly opposed to using the U.S. average import price as a benchmark because it would severely erode China's competitive advantages in labor and raw materials.

<sup>280</sup> See *Porcelain-on-Steel Cooking Ware*, 51 Fed. Reg. at 36,419; Certain Iron Construction Castings from the People's Republic of China, 51 Fed. Reg. 9483 (Dep't of Comm. 1986)(final determination).

<sup>281</sup> Another flaw of the minimum allowable import price standard becomes apparent when there are no "eligible" market economy producers. In such a case, foreign market value would be determined by the flawed constructed value approach of current law. See S. 307, *supra* note 194, § 1(c)(2). The use of the constructed value approach was not an uncommon event; for example, this approach would be applied when all market exporters are either under investigation, or are under a dumping order.

## B. Amended Market Disruption Proposal

### 1. Overview

Like the advocates of the artificial pricing proposal, the proponents of an amended market disruption proposal view the existing unfair trade laws,<sup>282</sup> particularly the surrogate country/constructed value approach of AD law, as tremendously confusing, unfair, expensive and arbitrary for importers, NME exporters, domestic industry and government administrators.<sup>283</sup> However, the amended market disruption proposal (the section 406 proposal) would go further than the artificial pricing proposal in redrafting and amending the existing regulatory system.

The advocates of the section 406 proposal assert that there is no equitable and predictable way for measuring the fair market value of NME imports or of valuing the cost of production in NMEs.<sup>284</sup> Hence, its proponents argue that *any* import regulation laws attempting to legislate a price-based mechanism for measuring fair market value, including artificial pricing legislation, with its minimum allowable import price standard,<sup>285</sup> will fail when applied to NMEs.<sup>286</sup> Because the artificial pricing proposal will impose a price-based standard on imports from countries where prices cannot be determined, the advocates argue that it will be subject to many of the economic flaws of present law, which is also price-based.

Specifically, they assert that the artificial pricing proposal's average price standard will be arbitrary and unpredictable because of the problems encountered in obtaining accurate price data for "comparable" imports.<sup>287</sup> Further, they argue that the standard's assumption that NMEs are unable to produce efficiently at internationally competitive prices is unfair, discriminatory, and potentially disruptive;<sup>288</sup> the average price standard will likely be prohibitively high and will preclude many industrial sectors of NMEs' economies, which are labor intensive and depend on lower prices to compete, from trading with the United States. Finally, the proponents contend that this prohibitive effect could lead to retaliation against U.S. exports, particularly agricultural exports.<sup>289</sup>

Because there cannot possibly be an effective price-based NME

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<sup>282</sup> See *supra* notes 32-44 and accompanying text.

<sup>283</sup> See *Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways & Means*, 99th Cong., 1st Sess. (1986) (statement of Frank L. Morsani, Chairman of the Board of the U.S. Chamber of Commerce) [hereinafter *Trade Reform Hearings*].

<sup>284</sup> *Id.*

<sup>285</sup> U.S. Chamber of Commerce, East-West Task Force, Statement on Revising U.S. Import Laws Regulating NME Imports (Mar. 1986) (unpublished document).

<sup>286</sup> See U.S. Chamber of Commerce, East-West Trade Policy Newsletter (Mar. 1986) (unpublished document) [hereinafter *Trade Policy Newsletter*].

<sup>287</sup> See *id.*

<sup>288</sup> See *id.*

<sup>289</sup> See *id.*

trade provision, advocates of the section 406 proposal have called for a provision that is entirely injury-based; an injury determination would be the *sole* requirement for import relief under this proposal.<sup>290</sup> The proposal eliminates the futile, theoretical, troublesome, costly, and arbitrary struggle to find a "fair" price. The policy behind this novel approach is that if the NME import is not having an injurious effect in the United States, then the price charged is irrelevant. If, on the other hand, the imports have an injurious effect on U.S. industry, and if the actual prices cannot be determined, then action must be taken based on the *effect*, not the *price*.<sup>291</sup>

While the idea for such a section 406 approach has circulated through the trade community for a number of years, no legislative proposal has been initiated to replace the various laws governing NME imports with an amended section 406 provision.<sup>292</sup> As a result, this Article sets forth a legislative proposal for an amended market disruption statute that would replace the present system of regulating NME imports in its entirety.<sup>293</sup> The proposal is attached to this Article as an appendix, and will be discussed below.<sup>294</sup>

This proposal<sup>295</sup> is essentially a substantial amendment of section 406.<sup>296</sup> Section 406 provides a basic procedure for relief to domestic industries that have been injured by imports from communist countries. This procedure has been ineffective, however, principally due to two problematic provisions: the requirement that imports are "rapidly" increasing, and the President's broad discretionary authority to accept or reject the ITC relief recommendations.<sup>297</sup> This proposal would amend and augment section 406 with several provisions in order to make it an effective and rational relief mechanism; one that is the best possible alternative to present law. The proposal basically allows any domestic entity (industry, manufacturer, or labor

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<sup>290</sup> See *Trade Reform Hearings*, *supra* note 283.

<sup>291</sup> See Atlantic Council on East-West Trade, *East-West Trade Managing Encounter and Accommodation 112* (1977) (unpublished document); *Legal Times*, Oct. 20, 1986, p. 19.

<sup>292</sup> There was a proposal for the amendment of § 406 that was put forth in the 99th Congress by Congressman Schulz of Pennsylvania. It was proposed as § 124 of H.R. 4800 99th Cong., 2d Sess. (1986). However, this bill did not seek to change the existing system of NME trade regulation. Instead, it sought to make it easier for a domestic industry to bring a § 406 complaint, mainly by lowering the injury standard and by reducing presidential discretion. The bill seeks to limit such discretion by transferring the President's authority to the U.S. Trade Representative. In reality, this will do little to curtail executive discretion.

<sup>293</sup> The proposed revision of § 406 represents the personal views of the author. However, in composing the proposal, the author has attempted to reflect the general concepts put forward by advocates of an amended § 406, particularly the concepts of the East-West Task Force of the International Division of the U.S. Chamber of Commerce, which is directed by Donald Hasfurther.

<sup>294</sup> See generally Appendix.

<sup>295</sup> *Id.*

<sup>296</sup> See *supra* notes 139-64 and accompanying text.

<sup>297</sup> *Id.*

union) to file a petition for import relief with the ITC. The ITC would then make an investigation to determine if market disruption exists. If it finds in the affirmative, then it may use a variety of remedial measures to relieve the injured domestic industry. The ITC would have the discretion to choose the least disruptive measure. Any actions taken by the ITC would be subject to dramatically reduced presidential discretion, and would be subject to an immediate review, as well as an annual review. The major provisions of the section 406 proposal are discussed below.

## 2. *NME Definition*

The first major amendment to section 406 would make it “non-ideological” by defining NMEs on an economic rather than a political basis.<sup>298</sup> Similar to the “two-track” provision of the artificial pricing proposal,<sup>299</sup> this provision would allow an NME industry to supply information that its prices will reflect market forces, and thus subject it to investigation under normal AD or CVD law.<sup>300</sup> Second, like the artificial pricing proposal,<sup>301</sup> there would be a specific set of definitional guidelines for Commerce to follow in determining what countries are to be considered NMEs.<sup>302</sup> Unlike the artificial policy proposal, however, the section 406 proposal’s guidelines would be less rigid and more pragmatic: (1) the provision will not require NME countries to be listed,<sup>303</sup> which would allow the ITC to be flexible in dealing with NMEs on a case by case basis; and (2) the guidelines themselves would include such factors as uniformity of exchange rates (not convertibility) and permissibility of repatriation of foreign investment returns, which would realistically apply to countries such as Hungary and China that are adopting market-oriented policies.<sup>304</sup>

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<sup>298</sup> See Appendix § 406(h)(1).

<sup>299</sup> See *supra* notes 203-18 and accompanying text.

<sup>300</sup> See Appendix § 406(h)(1)(i). Under the proposal, an NME is defined on a sectoral basis and not in terms of the entire economy. This provides NMEs with a more feasible opportunity to be treated like other countries, and will therefore serve as an incentive to them to transform important industries to operate on market principles. Unlike the artificial pricing approach, there need not be a complex “switch” by a country “listed” as an NME. Instead, at the outset of each investigation, a determination will be made, based on the industrial sector of a country, as to whether such country should be defined as an NME.

<sup>301</sup> See *supra* notes 201-10 and accompanying text.

<sup>302</sup> See Appendix § 406(h)(1).

<sup>303</sup> See *supra* note 203 and accompanying text; *supra* note 208 and accompanying text.

<sup>304</sup> See Appendix § 406(h)(1)(ii)-(iv). These factors are more realistic with respect to progressive NMEs because there is a strong possibility that, with further economic reforms, they may be satisfied. The factors set forth in the artificial pricing legislation are meaningless because no NME will be able to sufficiently satisfy them all.

### 3. Injury Standard

The proposal would amend section 406 by establishing an injury standard (a significant cause of material injury)<sup>305</sup> that is higher than AD law (a "cause of material injury")<sup>306</sup> but lower than section 201 (a "substantial cause of serious injury").<sup>307</sup> Further, the provision amends section 406 by removing the stringent requirement that NME imports be "increasing rapidly."<sup>308</sup>

The standard was set at this level as a compromise in light of the fact that it is impossible to determine whether an NME is trading unfairly. The proposal's standard is set above the unfair trade injury standard (AD and CVD) because that low standard assumes NME imports are selling at an unfair price (which is unknown in the case of an NME), and hence does not require the domestic industry to make much of a showing of injury.<sup>309</sup> The proposal's standard is set lower than the escape clause injury standard because that high standard assumes the import is selling fairly and thus requires domestic industry to make a very compelling showing of substantial injury.<sup>310</sup> The section 406 standard is set at a point where there is neither an assumption that the NME is trading unfairly nor that it is trading fairly, and where domestic industry is protected without unreasonably or unnecessarily imposing arbitrary, price-based relief measures on NMEs.<sup>311</sup>

The fact that NME imports would no longer be subject to price-based law does not mean that NMEs will be treated more leniently than other market economy countries. First, the only reason price-based laws would not be applied to NMEs is that, as demonstrated throughout this Article, realistically they cannot be. This proposal recognizes this fact. Second, NMEs are actually treated more harshly than other countries under this provision because section h(2) would apply a lower injury standard to NME imports, despite the fact such imports have not been demonstrated to be unfair.

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<sup>305</sup> See Appendix § 406(h)(2), (3), (4).

<sup>306</sup> See *supra* note 47 and accompanying text.

<sup>307</sup> See *supra* notes 144-48 and accompanying text.

<sup>308</sup> See Horlick & Shuman, *supra* note 39, at 838; *supra* note 156 and accompanying text.

<sup>309</sup> Under the Unfair Trade Laws, NME imports need only be "a" cause of material injury.

<sup>310</sup> Under the escape clause, NME imports must be a *substantial* cause of *serious* injury. 19 U.S.C. § 2251 (b)(1) (1982).

<sup>311</sup> The amended proposal of § 406(h)(2) will protect domestic industry because the standard is not difficult to satisfy. "A significant cause of material injury" will be interpreted by the ITC to require only a moderate showing of injury before remedial measures are taken under § 406(b). However, when the domestic industry is not injured, NMEs will be able to freely trade their goods in the U.S. market to the benefit of U.S. consumers.

#### 4. Relief

The amended section 406 proposal would invest the ITC with the power to take a broad variety of measures to relieve domestic industry upon a finding of market disruption.<sup>312</sup> The ITC may impose a duty or a quota, or may call for a negotiated agreement.<sup>313</sup> As is the case under present law, the section 406 proposal allows the ITC to impose a duty on NME imports, including a duty based on a comparison of the NME import price with the lowest average market economy import price.<sup>314</sup>

However, unlike the present law or the artificial pricing proposal, the amended section 406 approach generally does not require that a duty be imposed in each case where an affirmative determination is made.<sup>315</sup> In circumstances where other, more administrable and less disruptive measures can provide relief to domestic industry, the ITC need not impose duties.<sup>316</sup> For instance, the ITC can direct the United States Trade Representative (USTR) to negotiate a long term quantitative restraint agreement that would remedy domestic industry, but at the same time would foster consistent, stable trade relations.<sup>317</sup>

Finally, it should be noted that the time period under the amended section 406 proposal would also be shorter than either AD or CVD law. This procedural fact will benefit U.S. industry because it will allow them to obtain relief much more swiftly.<sup>318</sup>

#### 5. Presidential Discretion

A very important provision of the amended section 406 proposal would drastically reduce the discretion afforded the President under

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<sup>312</sup> See Appendix § 406(b)(2).

<sup>313</sup> *Id.*

<sup>314</sup> The ITC may impose the relief provided for in the artificial pricing proposal under § 406(b)(2)(a) of the Appendix. The ITC may, if it deems appropriate, impose a duty based on a comparison of the NME sales price with the average import price of a comparable article from the market producer which is the largest exporter of the article.

<sup>315</sup> Both present law and the artificial pricing proposal require that, upon a final determination of dumping, see 19 U.S.C. § 1673 (1982), or artificial pricing, see S.1868, *supra* note 194, § 1(c)(1), a duty must be imposed. Under the artificial pricing proposal, the duty is effectively the difference between the "actual" price, and the average market economy price.

<sup>316</sup> Where the imposition of a duty would be disruptive of trade with NMEs or difficult to administer, the ITC is not forced to impose the duty. For instance, if the ITC has difficulty in obtaining price data with regard to a comparable product, then it need not struggle with such comparisons if it can find another effective remedy. No such flexibility exists under the artificial pricing proposal.

<sup>317</sup> Long-term trade agreements are consistent with the way NMEs often conduct trade. They provide the NME with a consistent, predictable trade structure with which they can comply.

<sup>318</sup> See Trade Policy Newsletter, *supra* note 286. The process will be much faster because there will no longer be a need for complex, hypothetical price calculations and product comparisons.

the original section 406.<sup>319</sup> Under this proposal, only in a national emergency, narrowly construed, would the President have the authority to interfere with an ITC determination or action under the proposal.<sup>320</sup>

Further, as a procedural matter, the President's veto power has been restructured. Unlike the original section 406, under which the President must act before the relief order will take effect, the ITC relief order automatically would go into effect *unless* the President acts.<sup>321</sup> This further reduces presidential discretion.<sup>322</sup>

### 6. Review

There are two provisions for review under the amended section 406 proposal. The first grants a right of immediate review to anyone adversely affected by the ITC final determination or relief action taken pursuant thereto.<sup>323</sup> The appeal would be to the U.S. Court of International Trade, and the ruling of that court would be mandatory.<sup>324</sup> This provision would allow a petitioner who received insufficient relief to immediately appeal the ITC action to the CIT and would protect domestic industry from any potential unenthusiastic enforcement by the ITC.

The second review provision of the amended section 406 proposal requires the ITC to conduct an annual review of its market disruption determination.<sup>325</sup> The ITC is directed to determine whether market disruption still exists, and if so, whether the actions taken by the ITC have sufficiently relieved the injured domestic industry.<sup>326</sup> This provides further protection to domestic industry because it insures that the relief measures taken by the ITC would be closely monitored to insure that the market disruption is eliminated.

After a review of the amended section 406 proposal, it is clear that it is the most preferable alternative to existing law. The administering agency benefits because the proposal is much more ad-

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<sup>319</sup> See Appendix § 406(e).

<sup>320</sup> See Appendix § 406(e)(4). The ITC action must have a "serious negative" impact on national security.

<sup>321</sup> Thus, if the President does nothing, the ITC relief action will still be implemented under Appendix § 406(e)(2). This procedure is modeled on the presidential veto structure of § 337 of the Tariff Act, 19 U.S.C. § 1337 (1982 & Supp. 1986).

<sup>322</sup> See Palmeto, *Torquemada and the Tariff Act: The Inquisition Rides Again*, 20 INT'L L. 641, 651 (1986), for a discussion of the effects of the implementation of the § 337 presidential veto model.

<sup>323</sup> See Appendix § 406(f).

<sup>324</sup> The standard of review would be the abuse of discretion standard, the same as exists under the present law.

<sup>325</sup> See Appendix § 406(g)(2). This provision is similar to the annual review provision of the current unfair trade laws found at 19 U.S.C. § 1675 (1982), but with specific reference to NMEs.

<sup>326</sup> It should be noted that no such provision exists under the artificial pricing proposal.

ministrable than current law,<sup>327</sup> and because it is granted flexibility in fashioning relief. Domestic industry will benefit because upon a moderate demonstration of injury, they will quickly receive complete relief—relief that is not contingent on a determination of “unfair” value.<sup>328</sup> Further, domestic industry will have a right to both an immediate and an annual review of the ITC relief action. NMEs will benefit in three important ways: they will have a realistic opportunity to demonstrate that a particular industrial sector is market-oriented; the remedial measures imposed upon them will be less disruptive of trade; and such measures will be reviewed annually. A final benefit to the administering agency, the domestic industry, and the NMEs is that the proposal will create a less litigious, and consequently less costly, process.<sup>329</sup>

#### IV. Conclusion

There is a strong consensus that the present laws regulating imports from NMEs have fundamental economic and legal flaws. Not only do they create unwarranted delay, confusion, expense, and waste of resources, but more importantly, they disrupt trade between the United States and the NMEs.<sup>330</sup> As a result, swift and wide-ranging reform of these laws is essential.

This Article discusses the two major proposals for the reform of current NME trade laws. The adoption of either proposal would be preferable to the status quo. Both recognize the reality that actual prices and costs of NMEs cannot be valued in free market terms, both allow an NME industry to provide information that will allow it to be treated under conventional AD or CVD law in a particular investigation, and both define NMEs in economic rather than political terms.

In the final analysis, however, the section 406 proposal is substantially better than the artificial pricing proposal. The artificial pricing proposal suffers from a number of flaws that speak out against its adoption. This proposal still struggles to find a price-based solution, even though prices cannot be determined. The two-track and NME definition provisions contain unrealistic require-

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<sup>327</sup> There will no longer be a dual agency approach that wastes tremendous resources struggling to determine a “fair” market price in an NME. Rather, one agency will determine whether a U.S. industry is injured, which is a determination that is easy to quantify from readily available data.

<sup>328</sup> Under existing law, an injured domestic industry will not receive relief if Commerce determines, based on a complex, hypothetical, and arbitrary calculation of home market value, that the NME imports are not selling at an unfair price.

<sup>329</sup> The process will be temporarily shorter, and will involve only one agency (the ITC) and one issue (injury). The complex and litigious price calculations will be eliminated.

<sup>330</sup> See *supra* notes 32-44 and accompanying text.



ments that render those provisions almost useless.<sup>331</sup> Finally, the minimum allowable import price standard is problematic in a number of respects: it is discriminatory; it requires difficult if not impossible comparisons; and it is subject to a substantial range of error. These problems render the standard arbitrarily unpredictable, unadministrable, unfair, and most importantly, potentially disruptive of trade with NMEs.<sup>332</sup>

Thus, while the artificial pricing proposal has laudable goals, it is much less appealing than the legally and economically pragmatic section 406 proposal. The section 406 proposal recognizes the futility of applying cost-based law to NMEs and instead applies a simple, effective, and administrable injury-based law.

The section 406 proposal has a realistic NME definition provision that would allow the ITC flexibility in dealing with various industrial sectors of NMEs, and would encourage NMEs to move toward market principals.<sup>333</sup> It would be simpler, fairer, more administrable, and less litigious, because remedial actions are taken based on demonstrated injury to a U.S. industry.<sup>334</sup> Finally, the proposal would effectively satisfy the difficult trade dilemma encountered when striving to regulate NME imports: on the one hand, it would protect domestic industry from injury, while on the other hand, it would not disrupt trade relations with NMEs.<sup>335</sup> Indeed, the ITC's flexibility in applying the least disruptive measure would enhance the U.S.-NME trade relationships because it would add stability and consistency to the regulatory process.

Therefore, the section 406 proposal is economically and legally the realistic, feasible, and necessary choice in replacing a troubled and ineffective system of import regulation. It is also politically acceptable, and hence, Congress should act to implement the proposal in the upcoming trade bill. Adoption of the proposal would help trade with NMEs to increase to its full potential, and would benefit both the United States and NMEs.<sup>336</sup> A final point that is perhaps the most significant of all is that through increased trade and economic interdependence, the section 406 proposal may foster closer political and social relations between NMEs and the United States.

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<sup>331</sup> See *supra* notes 201-27 and accompanying text.

<sup>332</sup> See *supra* notes 180-88 and accompanying text; *supra* notes 171-94 and accompanying text. The standard may disrupt trade with NMEs because it will likely set arbitrarily high price benchmarks that will preclude NMEs from exporting from a variety of industrial sectors. This will reduce the "hard" currency with which NMEs can purchase U.S. exports, and will invite retaliation against U.S. manufactured and agricultural exports.

<sup>333</sup> See *supra* notes 298-304 and accompanying text.

<sup>334</sup> See *supra* notes 303-05 and accompanying text.

<sup>335</sup> See *supra* notes 306-08 and accompanying text.

<sup>336</sup> See *supra* notes 14-19 and accompanying text.

**Appendix***PROPOSED BILL***MARKET DISRUPTION**

Section 773 of the Tariff Act of 1930 (19 U.S.C. 1677(b)) is amended—

- (1) by striking subsection (c);

Section 406 of the Trade Act of 1974 (19 U.S.C. 2436) is amended—

- (1) by striking out “Communist country” each place it appears therein and inserting “non-market economy country”;
- (2) by striking paragraphs (3) and (4) of subsection (a).
- (3) by amending subsection (b) to read as follows:

*Determination*

“(b)(1) The Commission shall make its determination under this section at the earliest practicable time, but no later than 3 months after the date on which the petition is filed (or the date on which the request or resolution is received or the motion is adopted as the case may be). The Commission shall make public such determination and shall cause a summary thereof to be published in the Federal Register.

“(b)(2) If the Commission determines that market disruption exists with respect to an article produced by a domestic industry, it shall, to the extent it determines necessary to prevent or remedy such market disruption:

“(a) Direct an increase in or imposition of any duty on the article causing or threatening to cause market disruption, including a variable duty based on a comparison of the non-market economy import price of a comparable article from the market producer which is the largest exporter of the product to the United States.

“(b) Direct the imposition of a tariff-rate quota on such article;

“(c) Direct a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;

“(d) Direct the United States Trade Representative to negotiate, conclude and carry out, within 60 days of its determination, orderly marketing agreements with foreign countries and the import into the United States of such articles within 60 days of its determination; or

“(e) Take any combination of such actions.

- “(b)(3) The Commission shall include in its determination any directives issued under subsection (2), and shall notify the Secretary of the Treasury of any action under paragraph (a), (b) or (c) of subsection (2).”
- (4) by amending subsection (e) to read as follows:

*Referral to President*

- “(e)(1) If the Commission determines that market disruption exists under this section, it shall promptly transmit to the President a copy of such determination, together with the entire record upon which such determination is based.
- “(e)(2) If the President does not disapprove such determination within 60 days of the day he receives a copy of such determination or if he notifies the Commission before the close of such period that he approves such determination, then such determination shall be effective as of the date of publication thereof in the Federal Register, and shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.
- “(e)(3) If before the close of such 60 day period the President disapproves such determination and notifies the Commission of his disapproval, then effective on the date of such notice, such determination and the action taken under subsection (b)(2) of this section with respect thereto shall have no force or effect.
- “(e)(4) The President may disapprove such a determination only if such determination and action taken under subsection (b)(2) of this section with respect thereto would have a serious negative impact on the national security of the United States.”

- (5) by adding at the end thereof, the following new subsection:

*Review*

- “(f) Any person adversely affected by a final determination and actions taken under subsection (b)(2) of this section with respect thereto of the Commission, including a petitioner under subsection (a) of this section who has not received sufficient relief from actions taken under subsection (b) of this section, may appeal such determination to the United States Court of International Trade, which

shall have jurisdiction to review such determination.”

*Duration*

- “(g)(1) Except as provided in subsection (e) of this section, any action taken under subsection (b) of this section shall continue in effect until the Commission finds that the conditions which led to determination of market disruption under subsection (b) no longer exist.
- “(g)(2) At least once during each 12 month period beginning on the anniversary of the date of Publication of an action taken under subsection (b) of this Section, the Commission shall:
- “(i) Determine whether the conditions which led to a determination of market disruption under subsection (b) still exist, and if so, whether the action taken under Sub-section (b) of this section was sufficient to completely eliminate market disruption.
- “(ii) Review the current status of, and compliance with any agreement entered under subsection (b)(2)(a).

*Definition*

- “(h)(1) For purposes of this section, the term ‘non-market economy country’ means any foreign country that is designated as a non-market economy country by the United States Trade Representative. In making such a designation, United States Trade Representative shall consider the following factors:
- “(i) The extent to which the industrial sector of the economy of the foreign country operates on market principles of cost or pricing structures, so that the sales of merchandise of such countries reflect the fair value of the merchandise; and
- “(ii) the extent to which the currency of the foreign country is uniform with the currency of other countries; and
- “(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; and
- “(iv) the extent to which repatriation of foreign investment returns is permitted; and
- “(v) such other factors as the United States Trade Representative considers appropriate.”

- “(h)(2) For purposes of this section, market disruption exists within a domestic industry whenever an article is being imported into the United States in such increased quantities (either absolutely or relatively) as to be a significant cause of material injury or a threat thereof, to the domestic industry providing an article like or directly competitive with the imported article.
- “(h)(3) In making its determination under paragraph (2), the Commission shall consider, among other factors -
- “(i) the volume of imports of the merchandise which is the subject of the investigation;
  - “(ii) the effect of imports of the merchandise on prices in the United States for like or directly competitive articles;
  - “(iii) the impact of imports of such merchandise on domestic producers of like or directly competitive articles;
  - “(iv) evidence of disruptive pricing practices, or other efforts to unfairly manage trade patterns; and
  - “(v) the extent to which the import price is below the average import price of a comparable product from the market producer which is the largest exporter of the product to the United States.”
- “(h)(4) For purposes of paragraph (3) -
- “(a) In evaluating the volume of imports of merchandise, the Commission shall consider whether the increase in the volume of imports of the merchandise, either in absolute terms or relative to production or consumption in the United States, is significant.
  - “(b) In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether:
    - “(i) there has been significant price undercutting by the imported merchandise as compared with the average import price of a comparable product from the market producer which is the largest exporter of the product to the United States, and
    - “(ii) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which other-

wise would have occurred, to a significant degree.

“(c) In examining the impact of the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to -

“(i) actual and potential decline in output sales, market share, profits, productivity, return on investments, and utilization of capacity,

“(ii) factors affecting domestic prices, and

“(iii) actual and potential negative effects on cash flow, inventories, employment wages, growth, ability to raise capital, and investment.”<sup>337</sup>

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<sup>337</sup> See *supra* notes 2-4.

