

ARTIFICIAL PRICING AS AN ALTERNATIVE TO COUNTERVAILING DUTIES AGAINST IMPORTS FROM NONMARKET ECONOMIES

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Confusion surrounds the application of countervailing duty (CVD) statutes to imports from nonmarket countries. The CVD laws depend upon economic measurements that have not been adequately defined by international agreements and which cannot be applied to NMEs with the amount of certainty, administrability, or equity required of a legal sanction. Although imperfect, artificial pricing could remedy these inadequacies by providing an alternative to the application of U.S. CVD laws.

1. Introduction

As the volume of goods exported from nonmarket economy [1] producers to market economy purchasers rapidly increases [2], the unresolved problem of how to apply market economy unfair trade laws to these imports has gained increased international attention [3]. Attempts to apply two major unfair trade remedies – the antidumping [4] and countervailing duty [5] statutes – to nonmarket economy producer exports highlight the difficulties of comparing two fundamentally different economic systems [6]. The key to a solution may lie in developing administrable, certain, and equitable laws and regulations that interpret economic actions in nonmarket economy countries with less dependence upon market-based concepts such as dumping and subsidizing [7].

In 1984, the U.S. International Trade Administration (ITA) decided for the first time [8] whether the U.S. countervailing duty (CVD) statutes applied to imports from nonmarket economy (NME) producers [9]. The ITA's final determination, that NME countries were exempt per se from the countervailing duty law because "bounties or grants, within the meaning of [19 U.S.C. § 1303], cannot be found in NMEs", [10] triggered renewed debate on a solution for unfair trade practices by NME governments [11]. Although the Court of International Trade eventually reversed the ITA, holding that CVD law does apply to imports from NMEs [12], the ITA determination reflected a widely-

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accepted belief that the existing countervailing duty laws as written should not be enforced against NME imports, because of the difficulties in identifying and quantifying a subsidy in a nonmarket economy [13].

Artificial pricing theory, proposed in response to these difficulties, will accomplish the objective of the CVD laws without the need to measure the subsidy granted to an NME producer and without substituting antidumping calculations as a surrogate methodology [14]. Artificial pricing theory presumes that there is no reasonable method to evaluate NME actions in order to measure the market economy concepts of “subsidy” or “less than fair value” [15]. Proposed legislation based on this theory [16] would replace CVD and antidumping investigations against NME imports with an inquiry focused on a benchmark price mechanism called the “minimum allowable import price” [17]. If an NME import was priced below the minimum allowable import price, the statutory presumption would be that the NME committed an unfair trade practice by subsidizing the producer or by pricing goods at less than fair value [18]. A duty to be paid by the importer would then be added to the price of the import [19].

Artificial pricing, although arbitrary and conceptually flawed [20], would better protect domestic industries from unfair competition by providing more guidance in its application, and easier administration than the countervailing duty laws. Because artificial pricing could satisfy the United States’ international obligations, an artificial pricing remedy should be incorporated into U.S. trade law to replace countervailing duties applied to NME imports.

This comment first examines the history and substantive provisions of the U.S. countervailing duty and the international trade agreements law as applied to NME imports in order to illustrate existing administrative and legal problems. The comment criticizes the methodology suggested by the latest international agreement to measure subsidies granted by NME governments as too uncertain in its application and administration to be an effective legal remedy. This comment then describes artificial pricing and analyzes its theory and premises. It concludes with an examination of artificial pricing as an alternative to a countervailing duty statute under U.S. international obligations.

2. U.S. Countervailing Duty Statutes and International Agreements as Applied to NME Imports

A brief summary of U.S. law and international agreements on the application of CVD law to NME imports will help the reader understand: (1) the undesirability of using antidumping methodology (the proposed international approach) to correct CVD shortcomings; and (2) the international framework with which any countervailing duty or artificial pricing law should comply.

2.1. History of International Obligations and Domestic Law

Since the first U.S. countervailing duty statute was enacted in 1897 [21], the main objective of the law has been to protect domestic industries from foreign competitors that have received subsidies from their governments [22]. Under U.S. law, a duty equal to the amount of the subsidy must be imposed upon the imported good in order to countervail the perceived effects of the unfair subsidy [23].

The most recent change in the countervailing duty law occurred in 1979 with the passage of the Trade Agreements Act [24], an attempt to conform domestic trade laws with U.S. international obligations, particularly the General Agreement on Tariffs and Trade (GATT) [25] and the Subsidies Code [26]. Neither GATT, the Subsidies Code, nor the Trade Agreements Act, however, provides any explicit guidelines on the application of countervailing duty law to NME imports.

Although it remains the cornerstone of international trade relationships, GATT lacks specific provisions regulating trade with NMEs for at least two reasons. First, no centrally-planned economy countries participated in the original drafting of GATT in 1947 [27]. Second, GATT was meant only to be the first in a series of trade agreements, rather than the basic working agreement for almost forty years [28].

Because GATT has become the central document regulating international trade, lawyers and traders with NMEs depend upon the market concepts and language of article VI [29]. Article VI provides the basic parameters for enacting and enforcing permissible antidumping and CVD laws. Nowhere in article VI, nor in any other part of GATT, is a subsidy defined [30] nor is a method to quantify a subsidy outlined [31]. In contrast, "dumping" is described in GATT as selling "at less than the normal value of the products" [32], and a method is outlined in article VI to measure "less than normal value" [33].

In a vague footnote added to article VI in 1957, the parties to GATT recognized the implausibility of measuring an unfair trade practice by comparing a price set by central planners to a price that reflects market supply and demand [34]. Because it did not define a more appropriate measurement, footnote 2 laid the foundation for much of the current confusion. Although, by its terms, footnote 2 refers to measurements of dumping [35], its basic premise applies equally to countervailing duties and subsidies [36].

By the start of the Tokyo Round of Multilateral Trade Negotiations in 1973 [37], confusion surrounding subsidies, countervailing duties, and trade with NME countries had grown [38]. The negotiators established two lofty objectives in an attempt to resolve the uncertainties: to define subsidy [39] and to establish methods to measure a subsidy by an NME [40]. The resulting agreement of the Tokyo Round, the 1979 Subsidies Code [41], failed to attain either objective [42].

Article 15 of the Subsidies Code, indicatively titled "Special Situations," extends the premise and discretionary approach taken toward antidumping duties and NMEs under GATT article VI, note 2, to countervailing duties [43]. Article 15 suggests, but does not mandate, an alternative means for a code signatory to estimate the existence and amount of a subsidy where the imported product originated in a country described by footnote 2 [44]. Because footnote 2 recognizes that an accurate measurement of pricing activities in centrally-planned economies is not always possible, [45] article 15 has been interpreted to imply that centrally-planned economies also do not permit the direct measurement of a subsidy [46].

Under the article 15 alternative, a government may identify and quantify the existence of a subsidy from an NME under either the dumping calculations contained in the Antidumping Code [47], or its countervailing duty law [48]. Rather than develop a separate measurement for subsidies granted by NME countries, article 15 allows one set of measurement regulations to quantify either a subsidy or the amount of dumping [49]. An important addition to article 15 expresses the same uncertainty concerning the accuracy and administrability of the antidumping measurement techniques reflected in footnote 2 [50]. Whatever formula is used to quantify a subsidy by an NME, article 15 requires the method to be "appropriate and not unreasonable" [51].

With the passage of the Trade Agreements Act of 1979 [52] near the end of the Tokyo Round, Congress amended the countervailing duty law. Amended section 303 of the Tariff Act, a countervailing duty provision, currently applies to products from all the NME countries [53].

The Customs Service proposed regulations interpreting section 303 that define a subsidy [54] and provided a method of computing the amount of that subsidy pursuant to dumping calculations [55]. Under the proposed regulation, the amount by which the foreign market value of the import exceeded the sales price of that import in the United States would equal the amount of the subsidy [56]. The Treasury thus proposed the same approach recommended in article 15 of the Subsidies Code [57], but extended this calculation to all imports investigated under section 303, not just imports from countries that had signed the Subsidies Code [58].

Soon after, the Department of Commerce assumed all previous functions of the Department of Treasury relating to sections 303 and 701 of the Tariff Act [59]. The Department of Commerce deferred publication of the final proposed regulations [60] because of the complexity of the issues, its lack of experience in the area, and the absence of time pressure [61]. Although acceptable justifications, one expert thinks that the Department of Commerce also doubted the effectiveness and administrability of the antidumping calculations for NME imports as the best way to identify and measure a subsidy from an NME country [62]. To date, the Department of Commerce has yet to propose different regulations governing the calculation of a subsidy granted to an NME import [63].

Thus, in late 1983, when the ITA began its investigation of the countervailing duty petition filed by four domestic steel manufacturers (against imported carbon steel wire rod from Polish and Czechoslovakian producers) [64], no statutes or Department of Commerce regulations outlined how to identify or quantify the alleged subsidies [65]. It was alleged several practices subsidized the foreign producer [66]. In its preliminary determination, the ITA found that section 303 did apply to nonmarket economies, but that none of the alleged economic practices conferred a subsidy [67]. After additional hearings and briefs, the ITA reversed itself and determined that the countervailing duty law did not apply per se to nonmarket economies because “we could not disaggregate government actions in such a way as to identify the exceptional action that is a subsidy” [68]. The subsequent reversal of the ITA by the Court of International Trade [69] does not clarify the question of appropriate methodology for identification and measurement of subsidies by NMEs.

2.2. Problems Arising from Application of Existing Unfair Trade Law to Imports from NME Countries

The ultimate goals in devising and applying unfair trade remedies to imports from NME countries should be the enhancement of certainty, administrability, and equity [70]. Certainty, for purposes of this article, is defined as clarity in the activities made illegal by a law and consistency in application of the law. Administration of trade laws should incorporate defined methods of comparison of the economic actions by different economic systems that can be anticipated by domestic industries and foreign producers, and easily applied by an administering authority. Equity does not mean equal treatment; the international community and U.S. lawmakers have recognized that the exact calculations used for market economy products cannot be used for nonmarket economy imports [71]. Rather, equity is defined to mean fair and nondiscriminatory [72] treatment in an attempt to allow all traders to compete in the domestic market and benefit from the principle of comparative advantage [73]. These goals cannot be achieved by current CVD law.

2.2.1. Lack of Certainty in Administration of Countervailing Duty Law

The ITA determinations in the carbon steel wire rod cases, which were reversed on appeal in *Continental Steel* [74], reflect the uncertainty surrounding whether Congress intended the countervailing duty law to apply to NME imports. With no precedent as a guide [75], the ITA looked in vain to the legislative history of the trade laws [76]. In 1974, and again in 1979, Congress examined the strengths and weaknesses of the CVD law and amended the law each time [77]. However, Congress never debated the possibility of applying the countervailing duty law to NME imports [78].

The *Continental Steel* decision holds only that the ITA must apply counter-

vailing duty law to NMEs. The opinion also suggests, in very general terms, how the ITA should accomplish this task [79]. However, problems of uncertainty and potentially inequitable administration remain unsolved. First, identifying the grant of a subsidy [80] is a matter of law based upon the facts in each case, while quantifying the subsidy is a factual issue [81]. Because subsidies granted by an NME government are difficult or impossible to quantify, any legal determination of the existence of a subsidy would be questionable. For political reasons, an NME government rarely provides the administering agencies with the required data on costs of production, pricing determinations, currency valuations, and tax exemptions [82]. Even under the “best information available” statute [83], which instructs the ITA to proceed with its determinations using the data available, incomplete economic data “is frequently adverse to respondent [the NME]” [84] because the petitioners provide the bulk of the economic information. Without the necessary factual economic data, a precise legal determination that a subsidy has been granted would be suspect at best.

More problematic, however, is the measurement of the subsidy itself under the CVD law. Some prominent trade experts and economists argue, contrary to the court’s conclusion in *Continental Steel*, that a subsidy is a market-economy concept and cannot be identified or quantified in a rational or equitable manner under a countervailing duty law [85]. As the ITA reasoned:

[A] subsidy...is definitionally any action that distorts or subverts the market process and results in a misallocation of resources In NME's, resources are not allocated by a market.... There is no market process to distort or subvert. Resources may appear to be misallocated in an NME when compared to the standard of a market economy, but the resource misallocation results from central planning, not subsidies.... [I]n an NME system the government does not interfere in the market process, but supplants it.... Because the notion of a subsidy is, by definition, a market phenomenon, it does not apply in a nonmarket setting. To impose that concept where it has no meaning would force us to identify every government action as a subsidy.... [W]e will not impose the market-based concept of a subsidy on a system where it has no meaning and *cannot be identified or fairly quantified* [86].

Nonetheless, *Continental Steel* requires the ITA to identify an undefined concept in economies where subsidies may not even exist, and then measure the amount of that subsidy using unarticulated measurement techniques. Current CVD law after *Continental Steel* hardly meets the goals of certainty and administrability.

2.2.2. *Use of Antidumping Calculations as an Alternative to Countervailing Duty Law*

Use of the methodology of antidumping law to quantify a subsidy from an NME country appears to have substantial support in the international com-

munity. This approach is suggested by article 15 [87], and the proposed Treasury regulations [88], and followed in Canada [89] and by the EEC [90]. The dumping calculation approach, however, has been called a “least-worst” solution by one of its originators [91]. At a time when the rapid increase in imports from NME countries demanded some decision on how to apply a CVD law to NME imports [92], the dumping calculation approach was considered the most tenable alternative among a variety of unacceptable proposals [93].

Even assuming that the surrogate third country [94] and constructed value approaches [95], utilized in antidumping calculations, are economically valid [96], the methods for determining “less than fair value” [97] are too complex, uncertain, and expensive to be effective as practical legal remedies for the subsidies problem. A report by the Comptroller General to Congress in 1980 concluded: “Methods of assessing the fair value of products from nonmarket economies [in antidumping investigations]...are increasingly difficult to administer, their outcomes are unpredictable, are of limited economic validity, and are costly for the parties involved” [98].

The principle administrative drawbacks of the surrogate third country approaches are the selection of the surrogate country and producer and the calculations necessary to make the determinations [99]. The criteria used to select a surrogate country are outlined broadly in the Department of Commerce regulations [100], but leave ample discretion for the Department to select any market economy country. The factors for selecting a producer within the surrogate country – production technology, product similarity, volume of output, or some other factor – are not specifically published by the Commerce Department [101]. Selection of the criteria often causes long delays in the investigation [102]. Once appropriate surrogates are selected, investigators of antidumping violations often encounter the reluctance of surrogate producers to provide economic data on costs of production [103]. The possibility of a subsequent antidumping investigation of a selected surrogate producer undermines the surrogate’s incentive to provide the requisite detailed and verifiable information [104]. The Department of Commerce, motivated by the desire to make its determination of foreign market value as precise as possible, makes highly selective and subjective adjustments to the data to correct perceived differences in the method of production, quantities sold, and labor expenses [105]. The cumulative effect of selecting a surrogate country and a cooperative surrogate producer, and verifying and adjusting the economic data provided by the producer being investigated, results in a lengthy and expensive administrative proceeding that has questionable validity and an unpredictable outcome [106].

The administrative problems with the constructed value calculation, although less severe than the surrogate country approach, still make this alternative an uncertain and complex procedure. In a constructed value

calculation, foreign market value is determined by valuing the costs of production of the NME producer at prices corresponding to those in a comparable market economy [107]. Along with the difficulties of selecting the most appropriate comparable market economy, constructed value requires the NME producer to provide the actual production factors (that is, labor hours, raw materials, energy costs, etc.) and a willingness to allow the administering authority to verify the production data [108]. Therefore, the main obstacles to measuring a subsidy by an NME government still exist under the constructed value calculation of foreign market value [109].

Moreover, exorbitant legal costs and complex proceedings contribute to the uncertainty of the outcome of an antidumping investigation [110]. This uncertainty, in turn, discourages domestic industries from prosecuting antidumping violations, even when they believe dumping has occurred [111]. Some commentators fear that the law itself has become a barrier to international trade [112].

Antidumping methodology cannot provide the certainty and administrability necessary to achieve the purpose of the countervailing duty law: protection of domestic industries from unfair foreign competition [113].

3. Artificial Pricing Duties

Supporters of artificial pricing applaud the relative simplicity, clarity, and ease of administration that use of artificial pricing would bring to U.S. trade law [114]. Critics decry the arbitrary and discriminatory economic assumptions and implicit rejection of comparative advantage in artificial pricing theory [115]. No one contends that artificial pricing is the ultimate solution to the nonmarket economy trade quagmire [116]. Because artificial pricing, however, would be fairer for both NME producers and domestic purchasers than current unfair trade laws, artificial pricing duties should replace the countervailing and antidumping duties now levied on imports from NME countries.

A bill incorporating artificial pricing has been introduced in each Congress since 1979 [117]. More recently, however, artificial pricing has gained impressive supporters, including the Reagan Administration and major industry groups [118].

Under the concept of artificial pricing, if an import from an NME country producer was priced below the minimum allowable import price, and the import caused or threatened to cause material injury to a domestic industry, a duty equal to the amount by which the minimum allowable import price exceeded the import price would be imposed upon the goods [119]. Comparable to a variable trigger price mechanism [120], the selected minimum allowable import price definition would strongly influence the effectiveness of an artificial price remedy and has been a focus for debate [121].

3.1. The Minimum Allowable Import Price

Artificial pricing requires a definition of a minimum allowable import price. At present, no single formula of minimum allowable import price [122] is completely accepted, even among advocates of artificial pricing.

Proposed definitions of the minimum allowable import price include: (1) the lowest average price of the most suitable U.S. producer of a like article in sales to U.S. purchasers [123]; (2) the lowest average price of all U.S. producers of a like article in sales to U.S. purchasers [124]; (3) the lowest average price of the most suitable market economy producer of a like article in sales to U.S. purchasers [125]; (4) the lowest average price of all market economy producers of a like article in sales to U.S. purchasers [126]; and (5) the lowest average price of each market economy producer of a like article comprising a commercially significant part of the sales to U.S. purchasers [127]. Selection of the “most suitable” domestic or market economy producer as the benchmark producer (definitions (1) and (3) above) would retain many of the uncertainties inherent in the selection of a surrogate country and surrogate producer under the antidumping regulations [128].

Administration of a minimum allowable import price concept might retain certain problems. For example, products still could be dumped in the U.S. market, like article categories might be difficult to define, and the threshold price would have to be adjusted on a timely basis to reflect price shifts by the benchmark producer or producers [129]. Each of these problems could be minimized through careful definition of the minimum allowable import price.

Any benchmark price formula grants an NME producer a marketing advantage since the exporter can set its sales price at or above the minimum allowable import price without regard to its costs of production and without risking an artificial pricing duty [130]. Some commentators refer to this advantage as an ability to dump products in the United States [131]. A market economy exporter, on the other hand, must set its price in relation to its own costs of production and home market selling price to avoid antidumping duties imposed by the importing country [132]. Artificial pricing proponents acknowledge that some NME producers might lower their price upon learning the current minimum allowable import price of that product [133]. The NME producer, however, would not escape all trade laws simply by setting its price slightly above the minimum allowable import price. For example, if the imports are causing market disruption and are increasing rapidly so as to be a significant cause of material injury, relief under the “escape clause” fair trade law, section 406 [134], may be available to the domestic industry.

Under artificial pricing, a separate minimum allowable import price would be calculated for each product imported from an NME based upon the price of “like articles” sold to U.S. purchasers [135]. Defining like article categories specific enough to account for differences in quality of imported goods would

be difficult and time-consuming [136]. Definitions for fungible commodities or commodities with standard specifications would present little difficulty. However, as imports became more technical or differentiated, subjective determinations in their definition would increase the administrative costs and uncertainty for the NME producer, and the competing domestic industry [137]. Technical or distinctive imports would require an administrator to determine whether the import product price should or could be compared fairly with the prices of products within a previously defined category, or whether the import price required comparison to a redefined category of like article prices [138]. Narrow product categories would be essential to avoid the numerous subjective adjustments made in each calculation of less than fair value in an antidumping investigation against an NME import.

Adjusting the minimum allowable import price each time the selected benchmark producer or producers alter the price of a product would be difficult and expensive [139]. Quarterly adjustments might be adequate to reflect shifts in the benchmark producer or producers' prices. Quarterly adjustments would limit the potential period of material injury to a domestic industry to three months before any artificial pricing remedy could be sought [140].

3.2. Premises of Artificial Pricing

Artificial pricing is intended to replace both countervailing duty and antidumping remedies when an industry alleges injury from an NME import [141]. No attempt is made under artificial pricing to distinguish whether the difference between the import price and the minimum allowable import price is caused by a subsidy or a form of dumping [142]. In this sense, artificial pricing adopts the assumption implicit in both article 15 of the Subsidies Code and the proposed Treasury regulations that there is no distinction between a subsidy and other economic acts by an NME government that result in a sales price below the fair market value of the import [143].

Critics claim that artificial pricing incorporates distrustful assumptions about NME capabilities. Artificial pricing assumes that an NME producer can never sell below the minimum allowable import price as a result of comparative advantage [144]. Indeed, an NME producer may be able to produce at a price below the minimum allowable import price because of production efficiencies, greater availability of raw materials, or technological superiority [145]. As a result, critics claim that artificial pricing does not distinguish between unfair trade practices, such as subsidies, and fair trade practices, such as comparative advantage.

Supporters of artificial pricing balance this economic criticism against the administrative advantages of artificial pricing over existing laws [146]. They acknowledge the distrustful assumptions about NMEs contained within artifi-

cial pricing theory [147]. Senator John Heinz (R-Pa.), the principal congressional advocate of artificial pricing, stated upon introducing S.1966: “Artificial pricing also rests on some assumptions which will be the subject of debate, particularly its suggestion that no nonmarket economy is more efficient than the most efficient freemarket producer... .” [148].

The major support of artificial pricing flows from its two basic premises. The first premise supporting artificial pricing is that the terms “subsidy” and “dumping” are inherently market economy concepts and are meaningful only to the extent that they correspond to the costs of production and prices in a market economy. Because market equivalents of costs, prices, and production efficiency are unavailable for an NME, the U.S. trade laws should not attempt to measure any subsidy on or dumping of goods produced by an NME producer by using market-based methodologies [149].

This first premise supporting artificial pricing is similar to the premise accepted by the ITA prior to *Continental Steel*. The ITA concluded that a CVD law cannot apply per se to imports from an NME [150]. The ITA defined a subsidy as any action that distorts the market or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth [151]. Applying this definition, the ITA determined that a subsidy cannot be identified in an economic system that has no market allocation of resources [152]. Artificial pricing does not attempt to identify the actions granting the equivalent economic effect of a subsidy. Instead, artificial pricing assumes that the amount of a subsidy granted by an NME government cannot be quantified in any accurate, certain, or administrable manner [153].

The second premise supporting artificial pricing is that methods for measuring dumping by an NME producer fail to reflect accurately economic policies in an NME and the results of these policies on domestic industries [154]. The measurement methods are uncertain, unadministrable, and inequitable [155]. A more certain and administrable system, although potentially more arbitrary and, therefore, less equitable, would be preferable to a system achieving none of the three goals of trade laws.

Artificial pricing would be more certain, administrable, and equitable than current unfair trade laws. Domestic traders would be more certain of the applicable rules under artificial pricing when structuring trade contracts or deciding whether to pursue an unfair trade claim [156]. The relative ease of determining the minimum allowable import price would offer greater administrability as compared to the complicated and subjective determinations presently required for dumping or subsidies calculations [157]. Also, with clear guidelines, an NME exporter or domestic purchaser would know whether their planned transactions violated U.S. unfair trade laws and be ensured an equitable application of the laws to their situation [158].

3.3. *Artificial Pricing and U.S. Obligations Under International Law*

The artificial pricing concept achieves the same goal as the unfair trade laws: protection for domestic industries from unfair foreign competition [159]. Because artificial pricing would replace the countervailing duty and antidumping remedies, artificial pricing should be analyzed under the international legal obligations of the United States that regulate unfair trade remedies [160]. Because artificial pricing is allowed under GATT article VI [161] and could meet the guidelines of article 15 of the Subsidies Code [162] and article 2, paragraph 7, of the 1979 Antidumping Code [163], the United States could add an artificial pricing remedy to its domestic law without violating its international obligations.

Although Poland is the only NME contracting party to GATT to which the United States applies GATT [164], artificial pricing could satisfy any obligations arising from article VI which the U.S. owes to Polish imports. Artificial pricing would contain a material injury test for all imports from Poland [165]. Also, Polish imports would not be subject both to artificial pricing duties and other unfair trade duties to compensate for the same alleged unfair trade practice [166].

Article VI requires that no antidumping duty or CVD be levied against imports unless the effect of the dumping or subsidy causes or threatens to cause material injury [167]. As interpreted by the Subsidies Code, this GATT provision requires that injury or threat of injury to domestic industries caused by other factors (such as comparative advantage) must not be attributed to subsidized imports [168]. Arguably, artificial pricing would violate this provision since comparative advantage and other fair trade practices are not distinguished from unfair practices under artificial pricing [169]. However, exceptions could be included in artificial pricing legislation in order to comply with article VI. Exceptions could allow for investigations under antidumping or CVD laws where the NME industry was “market-oriented” and provided “sufficient verifiable information” [170]. Such exceptions may satisfy the causal relationship required by GATT [171]. Arguably, cause and effect could be determined as accurately under artificial pricing and its “exceptions” as under the subjective antidumping calculations, which do meet the causal relationship criteria.

Since no NME government has signed the Subsidies Code [172], and the United States is not obligated under the Subsidies Code’s conditional most-favored-nation principle to extend its benefits to nonsignatories [173], artificial pricing need not comply with article 15 of the Subsidies Code [174]. Even in the unlikely event that an NME government signed the Subsidies Code, the measurement methods outlined in article 15 are not mandatory [175]. The only mandatory obligation in article 15 requires a “method of comparison [that] is appropriate and not unreasonable” [176].

Although four NME governments have signed the 1979 Antidumping Code [177], the United States would not violate any international commitments contained in the 1979 Antidumping Code by implementing an artificial pricing remedy. The 1979 Antidumping Code also embodies a conditional, rather than unconditional, most-favored-nation principle [178]. Unlike the elaboration of GATT article VI in the Subsidies Code, the 1979 Antidumping Code interprets GATT article VI without adding new benefits or obligations [179]. Therefore, because the United States only applies GATT to Poland, its commitment to NME governments under these provisions of the 1979 Antidumping Code only apply to Poland [180]. Since the discretionary approach contained in footnote 2 of GATT article VI is expressly approved in the 1979 Antidumping Code [181], artificial pricing could be viewed as an application of footnote 2 and thus a valid international legal approach to dumped imports, including those from Poland.

4. Conclusion

[Artificial pricing] entail[s] an element of what some have called 'rough justice.' But the precision of the results of the way we handle certain cases now is more theoretical than real [182].

Artificial pricing contains conceptual flaws. It is not the ultimate solution to the difficult problem of protecting domestic industries from subsidized imports from NME producers.

Artificial pricing is, however, an improvement over unclear countervailing duty laws. Antidumping calculations fail to achieve the certainty, administrability, and equity necessary to protect domestic industries, while at the same time allowing import trade from NME countries to increase. Expanding trade with NMEs is both an economic and a political goal of the United States [183].

Artificial pricing would benefit both domestic and NME traders by acknowledging that attempts to achieve equitable comparisons of two fundamentally different economic systems have failed. The emphasis in unfair trade laws should shift to goals that law can achieve and reject continued focus on achieving theoretical economic equity. Artificial pricing can offer certainty and administrability while still adhering to U.S. international obligations and guidelines.

An artificial pricing remedy represents an improvement over current approaches to regulating subsidized import trade from NME countries and should be added to U.S. trade law.

Notes

[1] There is no universally accepted definition of a nonmarket economy (NME). Three common elements that distinguish a nonmarket economic system from market economic systems include: planned resource allocation; administratively set domestic prices; and a nonconvertible currency or multiple foreign exchange rate system. Comptroller General, Report to the Congress: U.S. Laws and Regulations Applicable to Imports from Nonmarket Economies Could Be Improved 2 (1981).

U.S. laws and regulations use different terms to identify nonmarket economy countries. The antidumping law refers to "state-controlled" countries, 19 U.S.C. § 1677b(c) (1982), while the market disruption provision of the antidumping law refers to "Communist" countries, 19 U.S.C. § 2436(c) (1982). In fact, the definitions of nonmarket economy country proposed by Sen. John Heinz (R.-Pa.) in his artificial pricing proposals have generated controversy. See *Nonmarket Economy Imports Legislation: Hearing on S. 1351 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 98th Cong., 2d Sess. 18 *passim* (1984) [hereinafter cited as *Hearing on S. 1351*]; *Remedy for Artificial Pricing of Articles Produced by Nonmarket Economy Countries: Hearing on S. 958 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 97th Cong., 2d Sess. 15, *passim* (1982) [hereinafter cited as *Hearing on S. 958*].

A recent form of the proposed legislation sets forth the following three factors that the administering agency would have to take into account when placing a country on the list of NMEs: "(i) the extent to which the country's currency is convertible; (ii) the extent to which wage rates are determined by free bargaining between labor and management; and (iii) the extent to which joint ventures or other investments by foreign firms are permitted." H. R. Rec. 3398, Amend. No. 4267, 98th Cong., 2d Sess., 130 Cong. Rec. S11372, S11376-77 (daily ed. Sept. 18, 1984). Substantially similar legislation is planned for introduction in the 99th Congress as part of a more comprehensive trade bill. Telephone interview with William A. Reinsch, Chief Legislative Assistant to U.S. Sen. John Heinz (Sept. 27, 1985).

This Comment adopts the list of NME countries used by the International Trade Commission, one of the administering agencies of the U.S. unfair trade law: Albania, Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, "those parts of Indochina under Communist control or domination (including Vietnam)," North Korea, Mongolia, People's Republic of China, Poland, Romania, and the U.S.S.R. U.S. Int'l. Trade Comm'n. 39th Quarterly Report to the Congress and the Trade Policy Committee on Trade Between the United States and the Nonmarket Economy Countries During April-June 1984 1 (Sept. 1984). Market-economy countries, therefore, will be defined as all countries not listed as a nonmarket-economy country.

[2] Exports from NME economy producers to European Economic Community (EEC) members rose 60% from 1978 to 1984. International Monetary Fund, Directory of Trade Statistics, 1984 Yearbook 55-60 (1985). Exports in 1978 from NMEs to the EEC totaled \$18.683 billion, comprising 4% of the total goods imported by EEC members. Exports in 1984 from NMEs to the EEC totaled \$29.873 billion, comprising 5% of all goods imported by the EEC. *Id.*

The total dollar amount of U.S. imports from NMEs rose 189% from 1978 to 1984. *Id.* at 390-401. In 1978, U.S. imports from NMEs totaled \$1.984 billion, comprising 1% of the total goods imported by the U.S. In 1984, exports from NMEs to the U.S. totaled \$5.738 billion, comprising 1.7% of total goods imported by the U.S. *Id.*

[3] See Interface One: Conference Proceedings on the Application of U.S. Antidumping and Countervailing Duty Laws to Imports from State-Controlled Economies and State-Owned Enterprises (D. Wallace, G. Spina, R. Rawson & B. McGill, eds. 1980) [hereinafter cited as Interface One]; Interface Two: Conference Proceedings on the Legal Framework of East-West Trade (D. Wallace & D. Flores, eds. 1982) [hereinafter cited as Interface Two].

[4] Antidumping statutes impose a duty when a foreign producer prices the export at less than fair value of the good and sales of that good cause or threaten to cause material injury to a

domestic industry. See, e.g., 19 U.S.C. §§ 1673, 1677b (1982); Antidumping Act, Can. Rev. Stat. ch. A-5, §§ 8-9 (1970); 22 O.J. Eur. Comm. (No. L 339) 2-5 (1979).

[5] Countervailing duty statutes impose a duty when a foreign government grants a foreign producer a subsidy that is considered an unfair competitive advantage. See, e.g., 19 U.S.C. §§ 1303, 1671 (1982); Customs Tariff Act, Can. Rev. Stat. ch. C-41, §§ 7(1)-(2) (1970); 22 O.J. Eur. Comm. (No. L 339) 5-6 (1979). One additional area of international controversy, beyond the scope of this article, involves defining when a government practice should be considered a "subsidy." For a thoughtful approach to the topic, see Mundheim & Ehrenhaft, *What Is a "Subsidy"?*, in *Interface Three: Legal Treatment of Domestic Subsidies* 95 (D. Wallace, F. Loftus & V. Krikorian, eds. 1984).

[6] See *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370 (Int'l. Trade Admin. 1984) (final determination) [hereinafter cited as *Czechoslovakian Steel - Final*]; *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19, 374 (Int'l. Trade Admin. 1984) (final determination) [hereinafter cited as *Polish Steel - Final*].

[7] See *Hearing on S. 1351*, *supra* note 1, at 14, 56; *Hearing on S. 958*, *supra* note 1, at 4; Comptroller General, *supra* note 1, at 14-15; Ehrenhaft, *The Treasury's Proposed Approach to Imports from State-Controlled Economy Countries and State-Owned Enterprises Under the Antidumping and Countervailing Duty Laws*, in *Interface One: Conference Proceedings on the Application of U.S. Antidumping and Countervailing Duty Laws to Imports from State-Controlled Economies and State-Owned Enterprises* 76-77 (D. Wallace, G. Spina, R. Rawson & B. McGill, eds., 1980).

[8] *Carbon Steel Wire Rod From Czechoslovakia*, 49 Fed. Reg. 6773, (Int'l Trade Admin. 1984) (preliminary determination) [hereinafter cited as *Czechoslovakian Steel - Preliminary*]; *Carbon Steel Wire Rod From Poland*, 49 Fed. Reg. 6768 (Int'l Trade Admin. 1984) (preliminary determination) [hereinafter cited as *Polish Steel - Preliminary*]; *Czechoslovakian Steel - Final*, *supra* note 6 at 19,370; *Polish Steel - Final*, *supra* note 6 at 19,374. In its preliminary determination in the Czechoslovakian case, the ITA correctly acknowledged that "[t]his proceeding raises the issue, *not yet decided*, whether section 303 [19 U.S.C. § 1303]...applies to a nonmarket economy country." *Czechoslovakian Steel - Preliminary* at 6774 (emphasis added).

On appeal to the Court of International Trade, one argument made by the petitioners was that the U.S. countervailing duty laws had been enforced against NME producers in the 1930s. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 555-56 (Ct. Int'l. Trade 1985). The petitioners alleged that the economy of Nazi Germany had the same elements as nonmarket economies, including planned resource allocation and nonconvertible currency. Therefore, the steel companies argued, the application of the CVD law to imports from Nazi Germany constituted precedent for applying 19 U.S.C. § 1303 to nonmarket economies. *Id.* See, e.g., *Countervailing Duties on Imports from Germany*, T.D. 49,821, 74 Treas. Dec. 389 (1939); *Countervailing Duties on Certain German Products*, T.D. 48,350, 69 Treas. Dec. 1008 (1936). The court accepted this historical argument as evidence that the extent of control exercised by a foreign government over its economy should not impede the ITA from applying the broad statutory language of 19 U.S.C. § 1303 to NMEs. *Continental Steel*, 614 F. Supp. at 557-58.

[9] The applicable countervailing duty statute, 19 U.S.C. § 1303 (a) (1), applies: "[w]hensoever *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 manufactured or produced in such country...." *Id.* (Emphasis added).

[10] *Czechoslovakian Steel - Final*, *supra* note 6, at 19,1371. 19 U.S.C. § 1303 uses the terms "bounty or grant." 19 U.S.C. § 1671 (1982) uses the term "subsidy." Subsidy is defined as a bounty or grant. 19 U.S.C. § 1677 (5). Therefore, regardless of whether the actual language in the applicable law, regulation or agreement is bounty, grant, or subsidy, this article uses the term "subsidy."

[11] *In Reversal of Preliminary Decision, ITA Says Law Not Applicable to NME Countries*, 9 U.S. Import Weekly (BNA) No. 31, at 967 (May 9, 1984).

[12] *Continental Steel*, 614 F. Supp. at 548. The court, rejecting the ITA's premise that subsidies by NMEs cannot be identified and quantified, held that countervailing duty law applies to imports from countries with nonmarket economies. *Id.* at 554. Although this decision alleviates the uncertainty surrounding the applicability of existing CVD laws to NMEs, it fails to provide guidelines for measuring subsidies in NME countries.

[13] See *Hearing on S. 1351*, *supra* note 1, at 18 (statement of Gary H. Horlick, Esq., O'Melveny & Meyers, Washington, D.C.); *Hearing on S. 958*, *supra* note 1, at 48 (statement of Richard O. Cunningham, Esq., Steptoe & Johnston, Washington, D.C.); Comptroller General, *supra* note 1, at 32-33; Hudec, *Interface Revisited: Unfair Trade Policy After the Tokyo Round*, in *Interface Two: Conference Proceedings on the Legal Framework of East-West Trade* 7, 23 (D. Wallace & D. Flores, eds. 1982); Barcelo, *Subsidies and Countervailing Duties - Analysis and a Proposal*, 9 *Law & Pol'y Int'l Bus.* 779, 850 (1977). But see *Hearing on S. 1351*, *supra* note 1, at 50 (statement of John D. Greenwald, Esq., Wilmer, Cutler & Pickering, Washington, D.C.).

[14] See S. 1351, 98th Cong., 1st Sess., 129 Cong. Rec. S7356-62 (daily ed. May 24, 1983) [hereinafter cited as S. 1351]; S. 958, 97th Cong., 1st Sess., 127 Cong. Rec. 7095-96 (1981) [hereinafter cited as S. 958]. The latest international agreement considering how to apply a countervailing duty law to imports from NME producers suggests resorting to antidumping calculations. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *opened for signature* April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted in* Basic Instruments and Selected Documents 56 (26th Supp. 1980) [hereinafter cited as Subsidies Code].

[15] *Hearing on S. 1351*, *supra* note 1; *Hearing on S. 958*, *supra* note 1.

[16] S. 1351, *supra* note 14. Senator Heinz plans to introduce similar legislation in the 99th Congress. See *supra* note 1.

[17] S. 1351, *supra* note 14, § 741(a).

[18] *Id.*

[19] *Id.*

[20] See *infra* notes 134-38 and accompanying text.

[21] Tariff Act of 1897, ch. 11, 30 Stat. 151 (1897).

[22] 30 Cong. Rec. 318 (1897).

[23] 19 U.S.C. § 1303(a)(1) (1982). Note that the General Agreement on Tariffs and Trade, art. VI, para. 3, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (*as amended*), *reprinted in* 4 Basic Instruments and Selected Documents (1969) [hereinafter cited as GATT] and the EEC Regulation, 22 O.J. Eur. Comm. (No. L 339) 11 (1979), do not require the countervailing duty imposed to be equal to the subsidy provided. Rather, both provide for a lesser duty if adequate to remove the harm resulting from the subsidy. Further, the U.S. law is mandatory, 19 U.S.C. § 1303(a)(1) ("there shall be levied and paid..."), whereas, the EEC Regulation is optional, ("A countervailing duty may be imposed..."), 22 O.J. Eur. Comm. (No. L 339) 5 (1979).

[24] Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified as amended in scattered sections of 19 U.S.C.).

[25] GATT, *supra* note 23.

[26] Subsidies Code, *supra* note 14. See S. Rep. No. 249, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. Code Cong. & Ad. News 387 [hereinafter cited as S. Rep. No. 249].

[27] Drafters represented Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States of America. GATT, *supra* note 23.

[28] After World War II, the International Trade Organization (ITO) was intended to be the major coordinating body for initiatives in international trade and economic cooperation, and GATT was to be one specific trade agreement enforced by the ITO. When the U.S. Congress

repeatedly refused to back the administration and join the ITO, the ITO failed to become a reality. By 1950, therefore, world leaders recognized that GATT (which had been accepted by the U.S. executive branch without congressional approval) would have to be revised to serve both international administrative *and* substantive purposes. Because the drafters of the charter of the failed ITO did not provide guidelines on trade with NMEs, no administrative guidelines or substantive rules were incorporated into GATT either. For a general discussion and history of the ITO and GATT preparatory work, see J. Jackson, *World Trade and the Law of GATT* 35–38 (1969); K. Dam, *The GATT: Law and International Economic Organization* 10–16 (1970).

[29] GATT, *supra* note 23, art. VI.

[30] *Id.*

[31] *Id.*

[32] *Id.* at art. VI, para. 1.

[33] Article VI defines “less than normal value” as sale of the export:

- (a) [at] less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country; or
- (b) in the absence of such domestic price, [at] less than either:
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade; or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Id.

[34] *Id.* at art. VI; annex I, para. 1, n.2. Footnote 2 was explicitly reaffirmed in the International Antidumping Code, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 2, para. (g), *opened for signature* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431 [hereinafter cited as 1967 Antidumping Code] and the 1979 Antidumping Code, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 2, para. 7, *opened for signature* April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 [hereinafter cited as 1979 Antidumping Code].

[35] Footnote 2 reads:

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

GATT, *supra* note 23, art. VI, annex I, para. 1, n.2.

[36] *Id.*

[37] Director-General of GATT, *The Tokyo Round of Multilateral Trade Negotiations*, Vol. 1, at 1 (1979). Under the aegis of GATT, the Tokyo Round was the seventh (and latest) round of multilateral trade negotiations.

[38] *Id.* at §3–60.

[39] *Id.* at 54.

[40] *Id.*

[41] Subsidies Code, *supra* note 14.

[42] Unable to write a definition of subsidy acceptable to the participants, the negotiators compromised and included an annex of illustrative examples of unfair domestic subsidies. *Id.*, annex, at 80. The NME governments consider many of the illustrated unfair domestic subsidies to be “subsidies granted by governments in pursuit of valid economic and social policies.” and thus generally not “unfair” subsidies. Director General of GATT, *supra* note 37, at 53.

[43] *See supra* notes 34–36 and accompanying text.

[44] Subsidies Code, *supra* note 14, art. 15, para. 1.

[45] *See supra* notes 34–36 and accompanying text.

[46] Comptroller General, *supra* note 1, at 28.

[47] The 1979 Antidumping Code states that:

when, because of the particular market situation, such sales do not permit a proper comparison [with the home market price in an NME], the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country...or with the cost of production in the country of origin... .

Supra note 34, art. 2, para. 4. Both the 1967 and 1979 Antidumping Codes expressly approve the discretion granted in GATT art. VI, para. 1, n.2 to contracting parties to develop regulations to measure dumping by an NME producer. *See supra* note 34.

[48] Subsidies Code, *supra* note 14, art. 15, para. 1.

[49] Subsidies Code, *supra* note 14, art. 15. Under antidumping methodology, dumping by an NME producer occurs when an imported good is sold at less than fair value and the import causes or threatens to cause material injury to a U.S. industry. *See* 19 U.S.C. § 1673 (1982). “Fair value” is synonymous in U.S. law with foreign market value. *See* 19 C.F.R. § 353.1 (1985). Foreign market value is defined as the normal costs, expenses, and profits as reflected by: (1) the price at which such or similar merchandise produced in a non-state-controlled country is sold in that non-state-controlled country (surrogate third country home market price); (2) the price at which such or similar merchandise produced in a non-state-controlled country is sold to a third country, including the United States (surrogate third country export price); or (3) the constructed value of such or similar merchandise produced in a comparable non-state-controlled economy country (constructed value). 19 U.S.C. § 1677b (1982); 19 C.F.R. § 353.8 (1984). Article 15 permits the United States to determine the amount of an unfair subsidy granted by the NME country under one of these three calculations of foreign market value. The amount by which the calculated foreign market value exceeds the sales price of the import is assumed to be the result of an unfair subsidy. Subsidies Code, *supra* note 14, art. 15, para. 1.

The Subsidies Code does not bind the United States to apply article 15 to any NME imports since none of the NME governments signed the Subsidies Code. The signatories of the Subsidies Code, as of June 1, 1983, were: Australia, Austria, Brazil, Canada, Chile, Egypt, Finland, India, Japan, Korea, New Zealand, Norway, Pakistan, Spain, Sweden, Switzerland, the United Kingdom, the United States of America, Uruguay, Yugoslavia, and the EEC. General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 39 (30th Supp. 1984) [hereinafter cited as BISD]. No nonmarket economy countries had signed the Subsidies Code. *Id.* Article 15 should be viewed, however, as evidence of the current international approach to the application of CVDs to NME imports.

[50] Subsidies Code, *supra* note 14, art. 15, para. 4.

[51] *Id.* “Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale or in taxation and for the other differences affecting price comparability, so that the method of comparison applied is appropriate and not unreasonable.” *Id.*

[52] Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified as amended in scattered sections of 19 U.S.C.).

[53] 19 U.S.C. § 1303(a) (1982).

[54] 44 Fed. Reg. 57,044, 57,047 (1979) (to be codified at 19 C.F.R. §§ 155.0-.64) (proposed Oct. 3, 1979).

[55] *Id.* at 57,047.

[56] *Id.*; *see also* 19 C.F.R. § 353.8 (1984) (current regulation outlining the calculation of foreign market value of merchandise from state-controlled economies under the antidumping laws).

[57] See *supra* note 49.

[58] See 44 Fed. Reg. 57,046-47 (1979) (to be codified at 19 C.F.R. § 155) (proposed Oct. 3, 1979).

[59] Reorganization Plan No. 3 of 1979, 3 C.F.R. 513 (1979), *reprinted in* 19 U.S.C. § 2171 app. at 963-67 (1982), *and in* 93 Stat. 1381 (1979); Exec. Order No. 12,188, 3 C.F.R. 131 (1980), *reprinted in* 19 U.S.C. § 2171 app. at 968-69 (1982).

[60] 45 Fed. Reg. 4932 (1980).

[61] *Id.*

[62] Telephone interview with Charles O. Verrill, Esq., Washington, D.C. (October 1984).

[63] See 19 C.F.R. § 353.0-57 (1984) for other dumping regulations the Commerce Department applies to imports from NME countries.

[64] Czechoslovakian Steel – Final, *supra* note 6, at 19,371; Polish Steel – Final, *supra* note 6, at 19,375.

[65] The Trade Agreements Act of 1979 made several procedural changes in the countervailing duty laws. A brief explanation of the procedure required to assess a countervailing duty under 19 U.S.C. § 1303 will help the reader understand the role of the ITA. Within 85 days (150 days for complicated cases) after the petitioner files for a CVD investigation, the administering authority designated by the Commerce Department, the ITA, must make a preliminary determination, based on the best evidence available at that time, whether there is a reasonable basis to believe or suspect that a subsidy exists. If the ITA's preliminary determination is negative, the ITA continues to investigate. (The ITA determined in these cases that there was no reasonable basis to believe that Poland or Czechoslovakia was subsidizing carbon steel wire rod.)

Within 75 days after its preliminary determination, the ITA must make a final determination whether a subsidy exists. If the final determination is negative (as it was in the carbon steel wire rod cases), the proceeding ends. If the final determination is positive, the ITA assesses the amount of the duty. If an injury determination is required, *see* 19 U.S.C. § 1303(a)(2), the ITC (International Trade Commission) determines whether a domestic industry is being threatened with material injury due to the subsidized import. S. Rep. No. 249, *supra* note 26, at 400.

[66] Among the practices condemned by petitioners were: tax exemptions based upon export performance; currency retention programs allowing exporters to retain portions of earned foreign currencies; and multiple exchange rates depending upon the product exported and its destination. Czechoslovakian Steel – Preliminary, *supra* note 8, at 6774-77; Polish Steel – Preliminary, *supra* note 8, at 6770-73.

[67] Czechoslovakian Steel – Preliminary, *supra* note 8, at 6777; Polish Steel – Preliminary, *supra* note 8, at 6773.

[68] Czechoslovakian Steel – Final, *supra* note 6, at 19,372; Polish Steel – Final, *supra* note 6, at 19,376.

[69] See *supra* note 12.

[70] See *Hearing on S. 958, supra* note 1, at 3 (statement of Sen. John. C. Danforth, Chairman of the Subcommittee on Int'l Trade of the Committee on Finance); *Id.* at 7-8 (statement of Hon. Lionel H. Olmer, Undersecretary of Commerce for Int'l Trade); *Id.* at 51 (statement of Richard O. Cunningham, Esq.); Ehrenhaft, *supra* note 7, at 76-77; Soltysinski, *U.S. Antidumping Laws and State-Controlled Economies*, 15 J. World Trade L. 251, 263-64 (1981).

[71] See 19 U.S.C. § 1677b(e); Subsidies Code, *supra* note 14; 19 C.F.R. § 353.8 (1984).

[72] Nondiscriminatory, as used here, is synonymous with "fair," but not synonymous with "equal." Fairness would recognize the difference between economic systems by developing distinct trade laws incorporating different but comparable mechanisms and measurements designed to achieve a single objective.

[73] The concept of comparative advantage means that a country will export those goods that the country can produce more efficiently than the importing country. C. Kindelberger, *International Economics* 88-90 (1953).

[74] See *supra* note 12 and accompanying text.

[75] See *supra* note 8 and accompanying text.

[76] Czechoslovakian Steel – Final, *supra* note 6, at 19,373; Polish Steel – Final, *supra* note 6, at 19,377–78.

[77] See S. Rep. No. 249, *supra* note 26, at 423; H.R. Rep. No. 1644, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7367; H.R. Rep. No. 571, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7186.

[78] See *supra* note 68.

[79]

The term ‘subsidy’ as it applies in the export activity of a nonmarket economy does not present any real difficulties of ‘meaning.’ The subsidies alleged to exist here are not acts peculiar to nonmarket economies. If there are any difficulties here, they are not difficulties of meaning, but problems of measurement, which are precisely within the expertise of the agency.

...

[S]ubsidization...is a distortion of a pattern of regularity.... [T]he Commerce Department has the authority and ability to detect patterns of regularity and investigate beneficial deviations from these patterns – and it must do so regardless of the form of the economy.

Continental Steel, 614 F. Supp. at 556.

[80] Definition of a subsidy in market economies has developed through administrative determinations and case law. See, e.g., *United States v. Zenith Radio Corp.*, 562 F. 2d 1209, 1216 (C.C.P.A. 1977) (“Congress’ intent to provide a wide latitude, within which the Secretary of the Treasury...may determine the existence or non-existence of a bounty or grant, is clear from the statute itself, and from the congressional refusal to define the words ‘bounty,’ ‘grant,’ or ‘net amount,’ in the statute or anywhere else, for almost 80 years.”), *aff’d*, 437 U.S. 443 (1978).

[81] *Zenith Radio Corp.*, 562 F. 2d at 1224 (Miller, J., dissenting).

[82] Comptroller General, *supra* note 1, at 31–32; see also *Czechoslovakian Steel – Final*, *supra* note 6, at 19,317 (Czech government refused to provide verifiable economic data and has “chosen not to cooperate in this investigation”).

[83] 19 U.S.C. § 1677e(b) (instructing the ITA to proceed with its determinations using the best information available).

[84] *Czechoslovakian Steel – Preliminary*, *supra* note 8, at 6774.

[85] See Comptroller General, *supra* note 1, at 32 (“[A]ctually identifying and quantifying subsidies [in NMEs] remain only remotely possible.”); H. Malmgren, *International Order for Public Subsidies* 48 (1977) (describing how the extent to which a nonmarket system subsidizes will always be unclear); Barcelo, *supra* note 13, at 850 (analysis of subsidies is entirely inapplicable in an economy not governed by market principles since “any given scale may be subsidized or not”); Hudec, *supra* note 13, at 7 (“The cost and price criteria [of the CVD laws] are based on market economy phenomena that have no equivalent in nonmarket economies.”).

[86] *Czechoslovakian Steel – Final*, *supra* note 6, at 19,372 (emphasis added).

[87] See *supra* notes 42–51 and accompanying text.

[88] See *supra* notes 54–56 and accompanying text.

[89] Customs Tariff Act, Can. Rev. Stat., ch. A-41, §§ 7(1)–(2) (1970). Neither the statute nor regulations pertaining to countervailing duties make any specific reference to NMEs. *Id.*; Can. Gaz. ch. 520 (1978). Nor does Canadian law define subsidy or how to quantify a subsidy. *Id.* For an overview of Canadian unfair trade laws and NMEs, see *Interface One*, *supra* note 3, at 43–48 (statement of Eric Hohner, Chairman of Corporation House, Ltd., Ottawa, Canada).

[90] 22 O.J. Eur. Comm. (No. L 339) 5–6 (1979). For an excellent comparative study of the U.S. and EEC unfair trade laws applied to NMEs, see Soltysinski, *The Application of Antidumping, Countervailing Duties and Other Import Relief Laws to State Controlled Economy Imports by the*

U.S. and EEC Authorities (Sept. 1, 1983) (unpublished manuscript available at the Journal of Comparative Business and Capital Market Law) [hereinafter cited as Soltysinski Comparative Study].

[91] Ehrenhaft, *supra* note 7, at 85.

[92] *See supra* note 2.

[93] Ehrenhaft, *supra* note 7, at 85.

[94] *See supra* note 49 and accompanying text.

[95] *Id.*

[96] Compare Wasowski, *Comparisons with Domestic Prices in Poland*, in Interface One: Conference Proceedings on the Application of U.S. Antidumping and Countervailing Duty Laws to Imports from State-Controlled Economies and State-Owned Enterprises 278, 286 (D. Wallace, G. Spina, R. Rawson & B. McGill, eds., 1980) ("Comparisons of Polish domestic prices...with the prices prevailing in the free market world is an experience in frustration.... Data controlled in Soviet-type planned economies...are not directly comparable with...western counterparts.") with Soltysinski, *supra* note 70, at 254 (criticizing Wasowski's viewpoint).

[97] *See supra* notes 42–51 and accompanying text.

[98] Comptroller General, *supra* note 1, at 24.

[99] *See generally* *Hearing on S. 1351*, *supra* note 1, at 4–5 (statement of Undersecretary Lionel H. Olmer); Comptroller General, *supra* note 1, at 14; Horlick & Shuman, *Nonmarket Economy: Trade and U.S. Antidumping/Countervailing Duty Law*, 18 Int'l Law 807, 817 (1984).

[100] 19 C.F.R. § 353.8(b)(1) (1984) ("Comparability of economic development shall be determined from *generally recognized criteria*...") (emphasis added).

[101] *See id.* § 353; Comptroller General, *supra* note 1, at 26 (recommending that Commerce amend its regulations to reflect more accurately the criteria used for selecting surrogate producers and countries).

[102] *Hearing on S. 1351*, *supra* note 1, at 4 (statement of Undersecretary Lionel H. Olmer).

[103] Comptroller General, *supra* note 1, at 13–15; *see* Horlick & Shuman, *supra* note 99, at 821.

[104] *Hearing on S. 1351*, *supra* note 1, at 4; Horlick & Shuman, *supra* note 99, at 821.

[105] 19 C.F.R. § 353.8(b)(2) (1984) ("[T]he prices or constructed value...shall be...suitably adjusted for known differences in the costs of material and labor.").

[106] *See Hearing on S. 1351*, *supra* note 1, at 4; *Hearing on S. 958*, *supra* note 1, at 12; Comptroller General, *supra* note 1, at 15.

[107] 19 C.F.R. § 353.8(b)(1) (1984).

[108] *Id.* § 353.8(c).

[109] *See supra* note 106.

[110] *See Hearing on S. 1351*, *supra* note 1, at 22–23; Comptroller General, *supra* note 1, at 15–16; Hudec, *supra* note 13, at 15–16, 39–40; Soltysinski, *supra* note 70, at 255.

[111] *See Hearing on S. 1351*, *supra* note 1, at 23 (statement of Richard O. Cunningham, Esq.) ("[I]t is not worthwhile bringing the case, because it is just rolling the dice; you have no way of knowing whether you are going to win or not, and why commit the six figures that it takes to bring a dumping case?"); *Hearing on S. 958*, *supra* note 1, at 7 (statement of Undersecretary Lionel H. Olmer).

[112] *See Hearing on S. 1351*, *supra* note 1, at 38 (statement of Peter D. Ehrenhaft, Esq., former Deputy Ass't. Secretary and Special Counsel (Tariff Affairs), Dep't. of the Treasury (1977-79) ("I have come to suspect that our legal rules may impede rather than facilitate, the creation of the healthy trading system we want."); Interface Two, *supra* note 3, at 39–40 (statement of Robert E. Hudec, Prof. of Law, Univ. of Minnesota Law School) ("[T]he law has now become so complex that it may be impossible to administer.... [I]n its present state of complexity...[the law] serve[s] simply as a trade barrier.... [T]he proceedings will be so long and so costly that the threat of proceedings will act as a deterrent to trade.").

[113] Another fault with the countervailing duty laws as applied to at least one NME, Poland, is that the law violates GATT art. I (most-favored-nation principle) and art. VI.

Nations do not sign GATT; nations contract to adhere to GATT through a Protocol of Provisional Application or a Protocol of Accession. GATT, *supra* note 23, art. XXVI, para. 4. The U.S. Protocol of Provisional Application, Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308, contains a "grandfather clause." *Id.* para. 1(b). The "grandfather clause" states in part that the U.S. law must adhere to GATT art. VI to the fullest extent possible not inconsistent with U.S. law existing on the date of provisional application, Oct. 30, 1947. *Id.*

The U.S. countervailing duty law added by the Tariff Act of 1930 (and thus, existing on Oct. 30, 1947) did not grant any imports a material injury test. Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1303 (1975)). GATT art. VI requires each contracting party to grant all imports from another GATT contracting party a material injury test. GATT, *supra* note 23, art. VI, para. 6(a). A material injury test is based upon the premise that even if an import has been subsidized, no duty should be imposed unless the import of the product causes or threatens to cause sufficient harm to a domestic industry, or materially retards the establishment of a domestic industry. *Id.*; see K. Dam, *supra* note 28, at 168-69.

Congress amended the CVD law in 1974 to make imports of duty-free goods subject to countervailing duties. 19 U.S.C. § 1331(a) (1982) (originally enacted as Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978). Congress acknowledged that this change would not be protected by the "grandfather clause," and added a material injury test for imports of duty-free goods only. S. Rep. No. 1231, 93d Cong., 2d Sess. 185 (1974); H.R. Rep. No. 571, 93d Cong., 1st Sess. 74 (1973). Dutiable imports still did not receive the benefit of a material injury test before a countervailing duty could be imposed. Many countries, including the European allies, thought that the U.S. amendment violated GATT. Director General of GATT, *supra* note 37, at 59; J. Jackson, J. Louis & M. Matsushita, Implementing the Tokyo Round 157 (1984).

The Trade Agreements Act of 1979 provided a material injury test to all imports from countries that had (1) signed the Subsidies Code, (2) substantially assumed equivalent obligations, or (3) had an unconditional most-favored-nation agreement with the United States but had not contracted to join GATT. No NMEs come within section 701. 19 U.S.C. § 1671 (1982).

Because the 1979 amendments changed the products designated to receive a material injury determination under U.S. CVD law, the 1979 amendments should not be protected by the "grandfather clause." The current substantive provisions of the CVD law differ significantly from the 1930 law, to the extent that the United States cannot state that the current CVD law was "existing legislation" on Oct. 30, 1947. Because Poland is a GATT contracting party to which the United States recognizes its GATT obligations (see *infra* note 164), but is not a Subsidies Code signatory, existing CVD law also violates Poland's most-favored-nation rights guaranteed in GATT art. I. See Soltysinski Comparative Study, *supra* note 90, at 18-20. *But see* Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 Law & Pol. Int'l Bus. 74-77 (1980).

[114] See, e.g., *Hearing on S. 958, supra* note 1, at 3 (opening statement of Sen. John C. Danforth) ("[T]he [antidumping laws] are inadequate.... [A] simplified, reliable way of calculating the fair value of nonmarket economy good (sic) is essential..."); *Id.* at 4 (statement of Sen. John Heinz) ("GAO studies and other evidence presented to Congress in different contexts makes clear uncertainty is one of the major deterrents to trade.").

[115] See *Hearing on S. 1351, supra* note 1, at 53 (statement of John D. Greenwald, Esq.); Soltysinski, *The Application of U.S. Antidumping and Other Foreign Trade Competition Laws to the So-called State-Controlled Economy Enterprises*, in *Interface Two: Conference Proceedings on the Legal Framework of East-West Trade* 169, 184-185 (D. Wallace & D. Flores, eds. 1982); Soltysinski, *supra* note 70, at 258.

[116] See *Hearing on S. 1351, supra* note 1, at 7 (discussion between Sen. John C. Danforth and Undersecretary Lionel H. Olmer); *Hearing on S. 958, supra* note 1, at 13; *Interface Two, supra* note 3, at 198 (statement of William A. Reinsch).

[117] S. 1351, *supra* note 14; S. 958, *supra* note 14; S. 1966, 96th Cong., 1st Sess. 125 Cong. Rec. 30, 677-78 (1979).

[118] *Hearing on S. 1351, supra* note 1 at 54 (statement of John J. Morgan, Esq., on behalf of the American Iron and Steel Institute); *Id.* at 60-61 (statement of Philip H. Potter, Charles E. Walker Associates, Inc., on behalf of the Ad Hoc Committee of Domestic Nitrogen Producers); *Hearing on S. 958, supra* note 1, at 7 (statement of Undersecretary Lionel H. Olmer); *Id.* at 38 (statement of Michael Hathaway, Deputy General Counsel, U.S. Trade Representative); see *Nonmarket Economy Legislation to Revise Handling of Trade Cases Generally Endorsed by the Reagan Administration*, 9 U.S. Import Weekly (BNA), No. 31, at 963 (May 9, 1984).

[119] See, e.g., S. 1351, *supra* note 14.

[120] The minimum allowable import price has been compared to the trigger price mechanism recently used in an attempt to aid the ailing U.S. steel industry. See Hudec, *supra* note 13, at 18. The trigger price mechanism was announced on Dec. 30, 1977. 42 Fed. Reg. 65,215 (1977). The Treasury was responding to European steel producers who had "lowered their prices to the U.S. market since 1976 in an attempt to maintain their output and employment after trying but failing to stabilize their domestic markets through concerted action." *Report to the President: A Comprehensive Program for the Steel Industry 1* (1977) [hereinafter cited as Solomon Report]. The trigger price mechanism was intended to provide for continuous monitoring of costs of production, capital, and reasonable profits of the most efficient steel producer, conceded by Treasury to be Japan. 43 Fed. Reg. 1464 (1978); see Note, *The Steel Trigger Price Mechanism*, 33 S.C.L. Rev. 593, 604-05 (1982). The Treasury calculated quarterly a trigger price based upon estimated costs for each Japanese steel producer, adding raw material costs, labor expenses, overhead, profit margin, capital, freight, and handling charges. 43 Fed. Reg. 1464, 1466 (1978). If any foreign producer attempted to sell steel at a price below the trigger price, the Treasury initiated an antidumping proceeding.

The trigger price mechanism was indefinitely suspended on Jan. 11, 1982. 47 Fed. Reg. 2392 (1982). Commerce had announced it would not raise the trigger price that quarter, and the U.S. steel industry retaliated by filing 132 unfair trade petitions. Note, *supra*, at 609. The trigger price mechanism failed because, among other things, it added an additional procedural layer before the steel industry could obtain relief from foreign imports. *Id.*

The trigger price mechanism differs from the minimum allowable import price in three important ways. First, artificial pricing would replace antidumping and CVD laws while the trigger price mechanism attempted only to speed relief to steel industries by eliminating the time and cost necessary for the industry to file an antidumping petition.

Second, the trigger price was based on adjusted cost factors, compiled by the administering authority, thus compounding the subjectivity of the price mechanism. A minimum allowable import price would be based upon the selling price of imports, not a price constructed from adjusted costs of production. See *supra* notes 99-109 and accompanying text.

Third, a foreign producer could sell above the trigger price and still be subject to an antidumping proceeding and duty. If an NME producer sold its product above the minimum allowable import price, the NME producer would be subject to other import relief laws, but not the unfair trade laws.

[121] See, e.g., *Hearing on S. 1351, supra* note 1; *Hearing on S. 958, supra* note 1.

[122] The concept of a variable benchmark price as a "trigger" for an artificial pricing duty has not changed, although various names have been ascribed to it. In S. 1966 and S. 958, it was referred to as "lowest free-market price." S. 958, *supra* note 14, § 406(d)(2)-(3); S. 1966, 96th Cong., 1st Sess. § 2(e)(3), 125 Cong. Rec. 30,677-78 (1979). S. 1351 adopted the phrase "minimum allowable import price." S. 1351, *supra* note 14, § 741(a).

[123] See S. 1351, *supra* note 14, § 749(a)(21).

[124] See *Hearing on S. 958, supra* note 1, at 154 (statement of Stephen Kaplan, Legislative Representative of the AFL-CIO) ("Anything else [besides using the U.S. average price as a

benchmark] would encourage imports from nonmarket economies – to the detriment of U.S. production.”).

[125] See S. 1351, *supra* note 14, § 749(a)(21)(A).

[126] See *Hearing on S. 958, supra* note 1, at 217 (statement of Footwear Industries of America).

[127] *Id.* at 208 (statement of Textile/Apparel Import Steering Group).

[128] For example, in order to select a “most suitable” producer, an administering authority must make subjective determinations as to which economic traits make a producer “most suitable,” e.g., volume of output, size of facilities, level of technology and automation, similarity of product, similarity of production process, etc. The determination of the “most suitable” producer in any given case could retain much of the uncertainty involved in the subjective choices of surrogates under current antidumping law. See *supra* notes 99–102 and accompanying text. Artificial pricing, however, tries to reduce the subjectivity and uncertainty in the application of trade laws, not perpetuate the problems in a different format. See *Hearing on S. 1351, supra* note 1, at 15–17 (statement of Richard O. Cunningham, Esq.); *Id.* at 35 (statement of Alen L. Merken, Pres., Action Tungsram, Inc., East Brunswick, N.J.).

[129] See *infra* notes 130–140 and accompanying text.

[130] See *Hearing on S. 958, supra* note 1, at 122–23.

[131] *Id.* at 104 (statement of Charles O. Verrill, Esq.).

[132] See 19 U.S.C. § 1673 (1982); 19 C.F.R. §§ 353.2–7 (1984).

[133] See *Hearing on S. 1351, supra* note 1 at 20 (statement of Sen. John C. Danforth); *Hearing on S. 958, supra* note 1, at 14–15 (statement of Undersecretary Lionel Olmer).

[134] 19 U.S.C. § 2436 (1982). See S. 1351, *supra* note 14, § 741(b) (artificial pricing is in addition to any other fair trade remedies). For a discussion of section 406 and its flaws as a trade remedy for imports from NME producers, see *Hearing on S. 958, supra* note 1, at 56–57 (statement of Richard O. Cunningham, Esq.); Rawson, *An Outline of United States Regulation of Trade With Non-Market Economy Countries*, in *Interface Two: Conference Proceedings on the Legal Framework of East–West Trade* 523, 545–50 (D. Wallace & D. Flores eds. 1982); Verrill, *Countertrade and Section 406: Statutory Description of Trade*, in *Interface Two: Conference Proceedings on the Legal Framework of East–West Trade* 332, 335–60 (D. Wallace & D. Flores eds. 1982). Note also that artificial pricing under previously proposed legislation would have modified section 406 rather than the antidumping and CVD laws. See S. 1966, 96th Cong., 1st Sess., 125 Cong. Rec. 30, 677–78 (1979).

[135] S. 1351, *supra* note 14, § 749(a)(19) (1983). “Like article” is defined in S. 1351 as “an article which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation....” *Id.* Compare this definition which the term “such or similar merchandise” in the antidumping laws applied to NME producers, 19 U.S.C. § 1677(b)(c)(1)–(2), and the term “like or directly competitive” articles in the escape clause provision of section 406, 19 U.S.C. § 2437(e)(2).

[136] *Hearing on S. 1351, supra* note 1, at 46 (statement of Peter D. Ehrenhaft, Esq.); *Hearing on S. 958, supra* note 1, at 103 (statement of Charles O. Verrill, Esq.).

[137] See *supra* note 136.

[138] *Id.*

[139] See, e.g., Ehrenhaft, *supra* note 7, at 85. Although artificial pricing calculations would be simpler than dumping calculations, preparing minimum prices in the thousands of trade categories would be a monumental task.

[140] The trigger price for steel imports was adjusted quarterly. See *supra* note 120.

[141] S. 1351, *supra* note 14, § 741(e) (an artificial pricing remedy cannot be pursued if a CVD or antidumping investigation petition has been filed); see *Hearing on S. 1351, supra* note 1, at 4–7.

[142] See *supra* note 141.

[143] *Id.*

[144] See *Hearing on S. 958, supra* note 1, at 45–46 (statement of Frank Conahan, Director, International Division, U.S. General Accounting Office) (NME should be allowed to prove its economic efficiencies); Soltysinski, *supra* note 70, at 258.

[145] See *Hearing on S. 958, supra* note 1, at 45–46 (statement of Frank Conahan).

[146] *E.g., Hearing on S. 958, supra* note 1, at 13–14 (statement of Undersecretary Lionel H. Olmer); *id.* at 68–69 (statement of Richard O. Cunningham, Esq.).

[147] See, *e.g., id.* at 14–15, 68–69.

[148] 125 Cong. Rec. 30,616, 30,677 (1979).

[149] See *Hearing on S. 958, supra* note 1, at 4 (statement of Sen. John Heinz); *id.* at 14–15 (statement of Undersecretary Lionel H. Olmer).

[150] See *supra* notes 65–68 and accompanying text.

[151] Czechoslovakian Steel – Final, *supra* note 6, at 19,371.

[152] *Id.* at 19,372–74. *But see Continental Steel*, 614 F. Supp. at 548. J. Watson found the concept of “subsidy” applicable to NMEs. *Id.* at 557. He also insisted that the CVD laws be enforced “to the full extent of [Commerce’s] authority and ability.” *Id.* at 554. J. Watson argued that Congress intended the CVD laws to protect U.S. domestic industries from NME imports as well as from market economy imports. To argue that CVD laws should be applied to NMEs does not solve the problems associated with measuring the “subsidy” granted by an NME – in effect, *how* the law should be applied.

[153] “It is precisely because we do not think that we can truly measure prices or costs in an NME that we think the artificial pricing concept is a simple, predictable, and nondiscretionary remedy for NME dumping [or unfair trade practices].” *Hearing on S. 958, supra* note 1, at 14–15 (statement of Undersecretary Lionel H. Olmer).

[154] *E.g., id.* at 23–24 (statement of Harry Kopp, Deputy Assistant Secretary of State for Trade and Commercial Development); *id.* at 62–67 (statement of Richard O. Cunningham, Esq.).

[155] See *id.* at 23–24, 62–67.

[156] *Id.* at 12–14 (statement of Undersecretary Lionel H. Olmer); *id.* at 51 (statement of Richard O. Cunningham, Esq.).

[157] *Id.* For detailed criticisms of the antidumping calculations used in NME producer investigations, see Comptroller General, *supra* note 1, at 12–26.

[158] See *supra* note 156.

[159] See 127 Cong. Rec. S3782 (daily ed. Apr. 9, 1981) (statement of Sen. John Heinz) (purpose of artificial pricing is to prevent “serious market disruptions”).

[160] *Cf. Soltysinski, supra* note 70, at 261–62 (agreeing on need to examine artificial pricing under U.S. international trade obligations but reaching the conclusion that artificial pricing would violate them).

[161] GATT, *supra* note 23, art. VI; *Hearing on S. 1351, supra* note 1, at 25 (statement of Gary H. Horlick, Esq.) (“I believe that with the injury test [S. 1351] would be GATT-legal. Without the injury test, you would have trouble.”). *But see Soltysinski, supra* note 70, at 260–62 (artificial pricing is discriminatory and therefore violates U.S. obligations under GATT).

[162] See Subsidies Code, *supra* note 14, art. 15.

[163] See 1979 Antidumping Code, *supra* note 34, art. 2, para. 7.

[164] Five NME governments, Cuba, Czechoslovakia, Hungary, Poland, and Romania, are contracting parties to GATT. BISSD, *supra* note 42, at vii. However, using the security exception of GATT art. XXI and the waiver/nonapplication provisions of GATT arts. XXV and XXXV, the United States does not apply GATT to the NME contracting parties except Poland. Soltysinski, *supra* note 70, at 261 (U.S. has full GATT relations with Poland). These actions by the United States accord entirely with international law under GATT. See, *e.g.*, General Agreement on Tariffs and Trade, II Basic Instrument and Selected Documents, Decisions, Declarations, Resolutions, Rulings, and Reports 36 (1952) (suspension of U.S. obligations to Czechoslovakia pursuant to art. XXI). See J. Jackson, *supra* note 28, at 100–02, 543–47, 749–50.

[165] See *supra* note 113.

[166] See GATT, *supra* note 23, art. VI, para. 4 (“No product...shall be subject to both antidumping and countervailing duties...for...the same situation of dumping or export subsidization.”); S. 1351, *supra* note 14, § 741(b) (1983) (no artificial pricing duty to be imposed if CVD or antidumping duty has been levied).

[167] GATT, *supra* note 23, art. VI, para. 5.

[168] Subsidies Code, *supra* note 14, art. 6, para. 4 & n. 20.

[169] See *supra* note 144 and accompanying text.

[170] S. 1351, *supra* note 14, § 748(a)(1)(A)-(B).

[171] See *supra* notes 167-68 and accompanying text.

[172] See BISD, *supra* note 49, at 39.

[173] See Subsidies Code, *supra* note 14, art. 1.

[174] Rubin, *Most-Favored Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution*, 6 Int'l Trade L.J. 221, 236 (1981). Although it could be suggested that artificial pricing may not comport with the “spirit” of the Subsidies Code, which the United States helped draft, the United States is not legally obligated to incorporate in its law any other country’s interpretation of the “spirit” of CVD laws intended by art. 15. In fact, it could be argued that the discretion allowed by art. 15 encourages and would support the United States if it were to adopt a reasonable means of handling imports from NME countries.

[175] Subsidies Code, *supra* note 14, art. 15.

[176] *Id.* art. 15, para. 4; see also *Hearing on S. 1351, supra* note 1, at 24 (outlining a possible response to an allegation that minimum allowable import price may not satisfy this requirement).

[177] BISD, *supra* note 49, at 67. As of April 25, 1983, Czechoslovakia, Hungary, Poland, and Romania had signed the Code.

[178] 1979 Antidumping Code, *supra* note 34, art. 2, para. 7.

[179] See *id.* art. 2, paras. 4, 7.

[180] See Rubin, *supra* note 174, at 236.

[181] See *supra* note 34.

[182] *Hearing on S. 958, supra* note 1, at 25 (statement of Deputy Ass’t Secretary Harry Kopp).

[183] S. Rep. No. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7333-49 (although increasing trade between the United States and NMEs is a goal, the United States should not become over-dependent); Comptroller General, *supra* note 1, at 3.