

COUNTERTRADE AND TRADE LAW

Stewart A. BAKER * and Richard O. CUNNINGHAM **

1. Introduction

East–West trade is increasingly dominated by countertrade [1]. In its simplest form, countertrade means bartering one product for another. In its most complex form, countertrade can be a disguised form of direct capitalist investment in socialist countries; the Western firm provides the capital and expertise to build and run a new plant and gets in return a share of the plant's output.

In all its aspects, countertrade now spurs hundreds of millions of dollars in U.S. imports every year [2]. In the European Community (the “EC”), yearly countertrade imports are worth billions [3]. As these imports begin to make themselves felt in the marketplace, domestic industries faced with new competition are starting to seek relief, largely in their countries' trade laws. At the same time, U.S. companies engaged in countertrade have become uneasy as their large investments in long-term agreements are placed at risk by these same laws. How to apply the trade laws to countertrade is a question that lawyers, scholars, and government officials have only begun to consider. This article offers a survey of the applicable laws and a preliminary analysis of the issues likely to arise as countertrade moves from the bargaining table to the courts.

2. GATT

Any discussion of the legal constraints on East–West countertrade logically begins with the international regime established by the General Agreement on Tariffs and Trade (the “GATT”). The GATT is the closest thing the world has to an international law of trade. We will discuss the GATT only briefly,

* Mr. Baker is an associate with the Washington, D.C. law firm of Steptoe and Johnson, Chartered.

** Mr. Cunningham is a member of the Washington, D.C. law firm of Steptoe and Johnson, Chartered.

however, both because it is covered elsewhere in this issue [4] and because as a practical matter the GATT does little to regulate countertrade demands.

The GATT is a multilateral agreement designed to liberalize trade, first, by requiring that nations rely only on tariffs to provide trade protection and, second, by providing for the negotiation of gradual reductions in those tariffs [5]. The GATT's effectiveness in the context of countertrade, however, is limited at the outset by the small number of Communist countries that have joined the agreement. The Soviet Union is not a contracting party, nor are many of the Eastern European countries. Nonetheless, countries with state-controlled economies are showing a new interest in joining the GATT. For years, the only state-controlled economies belonging to the GATT were countries that joined before adopting central planning – such as Cuba and Czechoslovakia. Now several others, including Romania, Hungary, and Poland, have recently acceded to the GATT.

While these accessions have prompted new efforts to adapt the GATT to East–West trade, the adjustment has been awkward at best. Some provisions seem readily adaptable, particularly those dealing with state-owned enterprises or state monopolies and monopsonies in particular product lines. Article XVII: 1(a) of the GATT requires that state enterprises treat imports and exports “in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders”. This provision incorporates the “national treatment” principle in Article III: “[L]aws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products... should not be applied to imported or domestic products so as to afford protection to domestic production” [6]. This principle, as elaborated by other parts of Article III [7], would appear to limit countertrade requirements even when imposed by commercial enterprises controlled by the state; the only exception is for government agencies procuring products “for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale” [8].

These provisions seem designed to require that state-controlled enterprises accept the broad duties the GATT imposes on states. This design is made explicit with respect to quotas and other quantitative restrictions. These trade barriers are covered by Articles XI, XII, XIII, XIV, and XVIII, and an interpretative note states that “[t]hroughout [these articles] the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through state-trading operations” [9].

While these provisions block an obvious loophole by which the requirements of the GATT could be evaded, they do not deal with the more difficult problems caused by state-owned enterprises. These enterprises, whether operating in a market environment or as part of a state-controlled economy, are in a position to engage in subtle forms of discrimination either against all imports

or against particular trading partners. The only effort to deal with this possibility on a general level may be found in Article II:4, which requires any contracting party with an import monopoly not to use the monopoly “so as to afford protection on the average in excess of the amount of protection provided” by its GATT tariff schedule. The precise meaning of this language (and its almost wholly opaque interpretative note) may never be known, but it presumably requires state import monopolies not to resell imported goods at a monopoly premium that is higher than the applicable tariff. Whatever protection it may offer in a mixed economy, this GATT rule is plainly unenforceable in centrally planned economies that may create shortages without raising prices.

In fact, the accession protocols negotiated with Romania, Hungary, and Poland suggest that GATT members have despaired of calculating “tariff equivalencies” for centrally planned economies. The protocols do not establish tariff schedules for these countries – a critical omission given the overarching GATT policy of eliminating all trade barriers other than tariffs. Instead of creating schedules for nonmarket economies (“NMEs”) and then reducing those tariffs, the protocols focus simply on increasing the volume of these countries’ imports from GATT members, evidently assuming that increasing volume is the best proof that trade barriers are being lowered.

This simplistic approach to East–West trade liberalization may have a substantial impact on the analysis of countertrade as an import barrier. There is little doubt that countertrade can be abused. If, as appears to be the case, countertrade is more often demanded in dealings with companies from developed Western nations, the practice may violate the nondiscrimination requirement that the GATT specifically imposes on state trading companies. If countertrade is demanded more frequently in connection with certain products (*e.g.* capital goods, high-technology items, or luxuries), the practice may be viewed as a GATT-proscribed quota on the affected products.

The difficulty with carrying this analysis further is that the accession protocols, by abandoning the effort to create NME tariff schedules, seem to accept even blatant restrictions on imports by countries with state-controlled economies, as long as the total volume of imports continues to increase at a satisfactory rate. Thus, Romania may well be free to demand countertrade in its trade with the West, and not in its trade with the Soviet Union, as long as it continues to “increase its imports from [GATT members] as a whole at a rate not smaller than the growth of Romanian imports provided for in its Five-Year Plans” [10]. By the same token, Poland may violate no GATT provision when it demands higher countertrade percentages for luxury goods than for industrial equipment, as long as it continues “to increase to total value of its imports from [GATT members] by not less than seven percent per annum” [11].

While this result is repugnant to the spirit of the GATT, it may be the only

practicable one. Unless GATT members are willing to search out and proscribe all of the countless subtle ways by which a state-controlled economy can discriminate against particular countries or can limit particular classes of imports, it makes little sense to attack countertrade on the ground that it may be used for these purposes.

Finally, we do not mean to imply that such uses of countertrade would always violate even the spirit of the GATT. Despite several rounds of tariff reductions under the GATT, most countries still have tariff structures that substantially favor certain imports over others (*e.g.* low or no tariffs on raw materials and relatively high tariffs on manufactured luxuries). Moreover, under the GATT, quantitative limitations may be imposed by members facing a balance of payments squeeze [12] as well as by less-developed members [13]. In short, when countertrade is used as a way of producing a reasonable trade balance with the West, which seems to be a primary *raison d'être*, the GATT offers few grounds for attack.

The upshot is that only national restrictions on countertrade are likely to have much bite. As we shall see, the trade laws of both the United States and the EC do impose special restrictions on East–West trade, although the extent to which these special measures deal effectively with the unique aspects of countertrade is open to question.

3. National restrictions

Nonmarket economies that have not joined the GATT theoretically may be the object of severely discriminatory trade measures. The U.S. tariff schedules, for example, apply higher “column 2” duties to imports from socialist countries that have not established most-favored-nation (“MFN”) trade relations with the United States [14]. Generally, however, the special trade standards applied by Western nations to NMEs do not distinguish very crisply between those that have joined the GATT and those that have not. This is true both in the United States and in the EC, not only in escape clause actions but also in antidumping and countervailing duty actions.

3.1. *Escape clause*

Escape clause proceedings draw their name from Article XIX of the GATT, which permits countries to suspend tariff concessions and other GATT obligations for particular products imported in “such increased quantities and under conditions as to cause or threaten serious injury to domestic producers... of like or directly competitive products”. Exporting countries affected by such a protective measure are licensed to retaliate by suspending “substantially equivalent concessions”.

3.1.1. The United States Trade Act of 1974

3.1.1.1. *Section 201.* The United States has written the escape clause into section 201 of its Act of 1974 (the “Trade Act”) [15]. Section 201 requires the U.S. International Trade Commission (the “ITC”) to recommend import restrictions, including quotas or tariffs, on goods imported “in such increased quantities as to be a substantial cause of serious injury, or the threat thereof” to a U.S. industry [16]. Perhaps because the escape clause is meant to be a limited exception from the GATT (and certainly because its use invites retaliation), relief under section 201 is subject to modification or nullification by the President, whose action may in turn be overturned by a congressional veto [17].

3.1.1.2. *Section 406.* When goods are imported from an NME, however, section 201 is not the only source of relief. Section 406 of the Trade Act creates a special escape clause that applies only to imports from a “Communist country” [18]. Like section 201, section 406 requires the ITC to grant relief when increased imports cause domestic injury. The standards for relief, however, are somewhat different. Instead of simply increasing, imports must be “increasing rapidly, either absolutely or relatively” [19]. Instead of being a substantial cause of serious injury, as under section 201, the imports need only be “a significant cause of material injury, or threat thereof”, to domestic industry [20]. As with section 201, the ITC’s recommendation for relief may be overridden by the President, whose decision may be overruled by congressional veto.

Section 406 has in fact been little used. At last count, only nine actions, involving six products, had been brought under section 406, and no final relief had been obtained in any of the proceedings [21]. One domestic industry, clothespin manufacturing, eventually discovered that section 201 provided a better vehicle for relief than section 406, largely because of the heavy diplomatic and political influences in East–West cases. In the clothespin case, the President rejected the ITC’s recommended section 406 relief against Chinese imports, stating that he was doing so because of a pending section 201 investigation [22]. That investigation eventually produced a “global” quota system that lumped Chinese clothespins together with other imports [23]. Apparently, U.S. relations with China made it more palatable to restrict Chinese trade on such a “nondiscriminatory” basis.

Although the heavily political nature of section 406 has generally left domestic complainants empty-handed, it is not without impact on trade with NME nations. The danger of changing diplomatic winds and the expense of defending a section 406 action can have a deterrent effect on countertrade deals. These agreements, especially compensation arrangements, are frequently

long-term, and they often require the Western partner to extend credit against a pay-off to come years in the future.

There is no better example of the dangers that section 406 poses to long-term countertrade than the ITC investigations of anhydrous ammonia imported from the Soviet Union. The ammonia imports at issue were part of a long-term fertilizer counterpurchase agreement entered into by Occidental and the Soviet Union in 1973. Over a twenty-year period beginning in 1978, Occidental was to export superphosphoric acid in return for an equivalent value of ammonia, urea, and potash.

The deal was reviewed and approved by the U.S. government in 1973 and endorsed by the President. Occidental took pains to avoid disrupting the domestic market for ammonia. The agreement provided that the ammonia was to be priced no lower than prevailing market prices. It also called for importing steady quantities of ammonia, which were to increase over the first five years and then level off. Over the life of the agreement, these quantities would never exceed 10% of U.S. consumption and they would begin to decline as a percentage of U.S. consumption in the middle 1980s.

In 1979, five years after the United States endorsed the agreement, but only one year after Occidental began to get the benefit of its investment, a section 406 action was begun. In October of that year, the ITC recommended a three-year quota [24]. President Carter rejected that recommendation in December, deciding that import relief was not in the national economic interest [25].

Only one month later, however, after the Soviets invaded Afghanistan, the President reversed his decision on the ground that recent events had altered international economic conditions. He ordered a new ITC investigation and imposed a one-year interim emergency quota on ammonia imports [26]. This time, however, the ITC voted 3-2 that there was no injury from Soviet imports, and it terminated the President's temporary quota [27]. The case was over, but no one had won. Each side's legal fees were tremendous. The domestic ammonia producers obtained no relief and Occidental saw its \$20 billion trade agreement brought to the brink of dissolution twice in a single year.

The President's change of heart in the ammonia case, and the more recent Western reaction to events in Poland, shows how rapidly favored NME trading partners can become virtual pariahs. The likelihood that such changes in diplomatic relationships will translate into section 406 relief must enter into the plans of any U.S. company contemplating an extended countertrade agreement.

3.1.2. *Europe*

The European version of the escape clause can best be understood in the broader context of European trade practice toward NMEs. In contrast to U.S.

practice, Europe has tended to use quotas rather than duties to limit trade. Although the quotas of the 1930s are illegal within the Community, they continue to play a role between the EC and its extra-Community trading partners. The old quotas have largely been reduced and simplified into Community-wide "liberalization lists". Products on these lists may be imported free of quantitative and similar restrictions. Of 1,010 tariff categories, 892 (or 88%) are now completely liberalized for free market MFN trading partners [28]. The EC maintains separate liberalization lists for NMEs, however, particularly Eastern European NMEs. While these lists have also been expanded, only some 700 headings (or 69%) have been fully liberalized [29].

Unlike the United States, which merely moves NMEs from "column 1" to "column 2" on the tariff schedules when it grants MFN status, the EC has been slow to eliminate quotas and similar barriers to trade with NMEs that join the GATT. The trend toward GATT membership among NMEs, however, has fragmented the EC's lists, leaving the Soviet Union with many more restrictions than Hungary or Poland, while China has negotiated an entirely separate liberalization list [30]. But even favored NMEs that have joined the GATT complain about the slow pace of liberalization, and some have questioned whether the liberalization process will ever reach products they actually export. One Hungarian trade representative, for example, saw little to cheer about in the EC's lifting of restraints on Hungarian coffee or in the prospect that Hungarian bananas and pineapples might some day soon be free of EC import limits [31].

Despite these differences between U.S. and EC trade traditions and practices, their legal frameworks are remarkably similar. Like the United States, for example, the EC has one set of escape clause rules for NMEs and another for the rest of the world. And again, like the United States, the differences seem hardly worth the trouble.

3.1.2.1. Regulation No. 288/82. The rules governing imports into the EC are updated and reissued from time to time. The latest general rules were adopted in February 1982 as Regulation No. 288/82. They contain for the first time a "transparent" Community investigation procedure for determining whether escape clause relief is warranted. The product of strenuous U.S. lobbying during the Tokyo Round, these procedures will look familiar to students of the ITC's procedures in U.S. escape clause proceedings. They include publishing announcements of escape clause investigations in the EC's *Official Journal*, hearing the views of interested parties (except in emergencies), and preserving the confidentiality of information supplied for escape clause proceedings. The new rules also list the factors to be considered in deciding whether imports have injured or threaten to injure domestic industry [32].

The substantive standards the EC applies in granting escape clause relief are

also similar to U.S. law: imports of a product must be entering "in such greatly increased numbers and/or on such terms and conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products" [33]. Relief, which in the EC almost always means quotas, may be granted by a qualified majority of the European Council based on the proposal of the European Commission [34]. In a critical situation, the Commission may even act on its own [35].

For situations falling short of these standards but nonetheless requiring at least the appearance of action, the Council may impose "surveillance". Surveillance is essentially a paperwork requirement that allows the EC to keep track of the origins, importers, and prices of sensitive imports. Surveillance of a product may be ordered under Regulation 288/82 whenever "developments in the market... threaten to cause injury to Community producers of like or directly competing products" [36].

3.1.2.2. Regulation No. 1765/82. These general rules are modified slightly for NMEs by Regulation No. 1765/82, which was promulgated on June 30, 1982. On the one hand this new rule grants NMEs the benefit of the procedural rules used in other escape clause proceedings. On the other hand the relevant EC domestic industry is defined somewhat more broadly to include all those making "like or competing" products rather than "like or directly competing" products [37]. The Commission is further required "to take into account the economic system peculiar to State-trading countries" in applying the new injury standards [38]. Finally, the standard for imposing surveillance is greatly diluted; instead of a finding that market developments threaten injury to domestic industry, the Commission need only decide that "Community interests... require" surveillance of NME imports [39].

As in the United States, there may be less to these differences than meets the eye. The arguably meaningful distinction between "competing" and "directly competing" products may prove empty in application. Indeed, if any difference was originally intended, the EC may have inadvertently elided it recently by borrowing wholesale from the "transparent" procedural rules that apply to free-market imports. The procedural rules, which Regulation No. 1765/82 now makes applicable to NMEs, include a section giving content to the injury standard; although relief may be granted when "similar or competing" products are affected, the new procedural section requires the Commission to focus on "similar or directly competitive products".

By requiring the Commission to consider the peculiarities of NMEs in determining injury, the rules will no doubt spur imaginative counsel to emphasize NMEs' theoretical ability to shift masses of products quickly from the domestic to the export market. This would weigh in favor of a "hair trigger" injury or threat-of-injury standard. So long as NMEs' ability to move

nimbly in export markets remains more theoretical than real, however, this clause may simply be read to state the obvious: when investigating NME imports, do not forget where they come from.

Finally, while the easy imposition of surveillance opens up substantial room for petty harassment and excessive paperwork, surveillance alone will not cause the collapse of a major countertrade deal. Companies doing business with NMEs long ago learned to live with heavy doses of paperwork and bureaucratic oversight. Moreover, the NME rules seem to offer somewhat greater protection against politically motivated harassment by putting the decision whether to require surveillance in the hands of the independent Commission, instead of the Council, leaving less opportunity for individual member countries to impose surveillance on their own or to affect the EC's decision.

As in the United States, the main danger posed by the escape clause to EC companies engaged in countertrade is not the modest differences in legal standards applied to NMEs. It is the ease with which escape clause relief can be turned to political uses. Nothing in Regulation No. 1765/82 protects long-term agreements from shifting diplomatic winds. The standards for granting relief are broad and easily may be interpreted to justify severe restrictions on existing agreements. The EC is less insulated from political influences than the ITC in the United States, and the Council's authority over the final decision is at least as great as the authority of the President and Congress under section 406. Even the dubious discipline of the GATT is largely missing, for most NMEs are not members. Although at this point the EC seems less likely to display the rapid swings that U.S. policy has shown toward East-West trade, its escape clause rules add little or nothing to the certainty that large-scale countertrade requires.

3.2. Antidumping and countervailing duties

Perhaps predictability is too much to expect from escape clause provisions, which are designed to offer practical relief from the certainties of free trade obligations. Antidumping and countervailing duty laws, on the other hand, aspire to certainty and claim consistency with free trade principles. In practice, however, because of fundamental confusion in applying these laws to NMEs, antidumping and countervailing duty rules pose the same Damoclean threat to countertrade as escape clause provisions.

Unlike escape clause relief, antidumping and countervailing duties can be justified as preventing artificial distortions of an international free market [40]. A firm with a domestic monopoly might use its monopoly profits to subsidize its own exports and destroy foreign competitors despite their comparative advantage. Antidumping laws prevent such discriminatory export pricing. Similarly, a firm subsidized by its home government could undercut more

efficient but unsubsidized foreign rivals. Countervailing duties wipe out such “unfair” advantages.

That at least is the theory, but the theory assumes free market conditions. When prices are set by central state planners and scarcities are allocated in part by such nonmonetary devices as queues, party membership, and the like, antidumping and countervailing duty concepts become difficult to apply. How can one locate government subsidies to particular industries when all industries belong to the government? How can one determine the true domestic price of goods that are cheap but never in stock? The problem is further complicated when currency values are set by the state, making meaningful currency conversions nearly impossible.

3.2.1. GATT

The GATT, which provides the framework for Member States’ national antidumping and countervailing duty laws, recognized early that these laws would require modification for NMEs. Article VI of the GATT regulates antidumping and countervailing duty laws. Paragraph 1 states that dumping is to be condemned only when sales below “normal value” injure a domestic industry. Normal value is usually the exporter’s home market price: “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” [41]. When no home market price can be found, two other definitions may be adopted: “the highest comparable price... for export” to a third country or “the cost of production... in the country of origin plus a reasonable addition for selling cost and profit” [42].

In analyzing NME trading practices, however, the possibility of arbitrary domestic prices makes both home market price and home market cost meaningless. Only the price charged by an NME in a free-market third country could have real meaning; but even under the third country price system an NME would be safe from attack if it dumped in all its foreign markets, something that is quite possible if the NME is selling to obtain hard currency.

Acknowledging these problems, the GATT added an interpretative note to Article VI in 1955:

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 the purposes of paragraph 1, 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 [43].

This hesitantly worded note deals only with antidumping laws; it says nothing about countervailing duties. Indeed, if one may read between the lines, the GATT’s drafters seem to have thrown up their hands at the thought of

trying to identify individual government subsidies in countries where the government is the economy. The peculiar result, in the United States at least, has been that the primary limits on NME trade practices stem from the antidumping laws, which are designed to stop private unfair trade practices, rather than the countervailing duty laws which are aimed at government subsidies. Like the GATT's drafters, U.S. trade officials have flinched from attacking NME export subsidies directly.

More fundamentally, the note raises two important questions. First, if a strict comparison with domestic prices is not always appropriate, what replaces it? Second, which countries does the note cover? One may assume that it applies to Czechoslovakia, which requested the clarification in 1955 [44], but what does one do with later NME members of the GATT, particularly "liberalized" NMEs in which the state does not set all prices?

These questions were answered *ad hoc* in the negotiations over Poland's admission to the GATT. The Working Party on Polish accession first noted that Poland was a country covered by the interpretative note and then suggested that GATT members might want to substitute a relatively simple test for the usual domestic price measures. The Working Party suggested asking whether Polish prices were lower than the importing country's existing market price or the price charged by manufacturers in a third (presumably free-market) country:

[A] contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable [45].

This *ad hoc* process continued in other NME accessions and other Working Party reports, with the result that the interpretative note now clearly covers Romania [46] and Hungary [47]. Yugoslavia, in contrast, is apparently not covered by the note [48].

In the Tokyo Round, the question was treated somewhat more comprehensively. Article 2.7 of the GATT's 1979 antidumping code simply retained the interpretative note, and no effort was made to draw a distinct line between free-market countries and NMEs. In contrast, Article 5 of the 1979 subsidies code broke new ground by refining the tests to be used in measuring normal value for NME exports. The code collapsed antidumping and countervailing duty standards into a single test: whether the NME's export price was less than (1) the selling price of like products in another free-market country, (2) the constructed value of like products in another free-market country, or (3) as a last resort, the price charged in the importing country (plus reasonable profits where necessary).

3.2.2. United States

3.2.2.1. *Present law.* In the wake of the Tokyo Round, U.S. laws and regulations were amended to reflect the new antidumping and countervailing duty codes. While countervailing duty laws were not amended to cover NMEs, section 773(c) of the amended Tariff Act of 1930 now states a special rule for determining the domestic value of NME exports in antidumping cases. The section does not explain which countries are to be considered NMEs; it applies whenever a country's economy "is State controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value" by the usual methods [49]. This is an apparently open-ended standard that some Western industries would have trouble meeting. Indeed, the United States found it necessary to offer reassurances that state trading companies in free-market countries would not be covered [50]. On the other hand, the test also leaves the administrators enough flexibility to treat Eastern European nations like free-market countries. In fact, in *Truck Trailer Axles from Hungary*, the Commerce Department noted proposed changes in Hungary's economy and declared that "[t]hese reforms, if adopted as expected, may change the Hungarian economy sufficiently to establish 'free-market' characterization in future cases" [51].

The law is, however, reasonably clear in spelling out the surrogates to be used in measuring NME home-market values. It allows antidumping administrators either to use the domestic or export prices charged by producers in a free-market country for similar goods or to use the constructed value of similar goods produced in a free-market country.

The implementing regulations complicated this scheme by introducing the notion of comparable economic development. The regulations assume that prices and costs in poor NMEs cannot fairly be compared to those in rich free-market countries. Thus, the free-market surrogate must be "at a stage of economic development comparable" to the NME [52].

What these regulations mean is open to argument, even among the administrators themselves. One surrogate for NME home market price, however, is clearly preferred: the price charged in a comparably developed free-market country. In the absence of suitable prices, antidumping administrators may use the constructed value of similar goods, but, once again, only goods produced in a comparably developed free-market country. Even if no comparable country produces similar goods, the administrators need not abandon the quest for comparability; they may measure the NME producer's objective, individual "factors of production" (hours of labor, raw materials, energy, and the like), price these components in a comparable free-market country, and, by totalling these factor costs, create a composite indicative of the price which would have been charged in the free-market country if it produced such a good. This was

done in the notorious Polish golf cart case, where administrators based their determination on a study by the Polish exporter, that hypothetically reconstructed a Polish golf cart factory in Spain, complete with labor force and supply lines, to determine the Spanish cost of Polish carts [54].

Only if no comparably developed country can be found do the regulations apparently permit the use of prices and constructed value in “noncomparable” free-market countries (and even then the rules exclude U.S. prices and costs) [55]. Under this method, prices and costs must be “suitably adjusted for known differences in the costs of materials and labor” [56], a remarkable requirement given that one only finds oneself in this part of the rulebook when cost differences cannot be known. The last option, when all else fails, is to use the market price established by U.S. manufacturers [57].

Despite this wealth of complex options, one point emerges clearly from these rules: deciding which free-market country is comparable to which NME now offers the key to NME antidumping cases. The comparability decision allows the U.S. Commerce Department to reach the result it chooses by excluding as not comparable those countries with home-market prices that are too high (or too low). The only check on this administrative discretion is the virtually contentless requirement that the Department measure comparability by resorting to “generally recognized criteria, including per capita gross national product and infra-structure development (particularly in the industry producing such or similar merchandise)” [58].

The methodology chosen by the U.S. regulations has serious theoretical problems. First, there is no good reason to assume that costs in two comparably developed countries are similar. If their costs were similar, comparably developed countries would have no comparative advantages and no reason to trade with each other. The volume of trade among such “comparably developed” partners as the United States, Europe, and Japan suggests that their economies in fact have very different cost structures. However, even if the theory of the U.S. regulations were correct for most countries, it would not work for NMEs. Unlike less-developed free-market countries, a less-developed NME may draw upon the nation’s entire resources to create “export platforms” – highly sophisticated industries that exist exclusively to earn foreign currency. The industries most comparable to these showpieces may be found only in the most developed countries [59].

If countertrade flourishes best in an atmosphere of reasonable certainty, the most significant aspect of the U.S. regulations is the sweeping discretion that they confer on the administrators of the antidumping laws. This may be illustrated by another reference to the Polish golf cart case. U.S. administrators originally used a Canadian manufacturer as a surrogate for the Polish factory [60]. The result was a determination of consistent dumping, with substantial dumping margins. When the Poles protested, the U.S. State Department took their side and another surrogate was sought [61]. The results, as described in a

memorandum of November 29, 1977, from the Commissioner of Customs to the General Counsel at the Treasury Department, were as follows:

The State Department has conducted a survey in an attempt to find a third country in which the selling prices of golf carts would be lower than the prices in Canada (which we have used in the past) or the United States. The results of this survey are not terribly conclusive, but are summarized as follows:

Italy – \$3,000

Japan – \$2,850

United Kingdom – \$2,328 (uses Polish chassis)

Germany – \$2, 635

South Africa – \$3,680

The current price being charged by a United States manufacturer of golf carts closely similar to those produced in Poland is approximately \$1,400.

Domestic manufacturers no doubt find it disturbing that the U.S. State Department set out to find foreign prices which “would be lower than the prices in Canada... or the United States” so that the Polish manufacturer could undercut U.S. prices without dumping liability. Equally troubling, when the administrators could not find such a country, they simply declared that none of the third countries where golf carts were manufactured had sufficient sales and turned to an approach now enshrined in the regulations. They hypothetically moved the Polish factory to Spain, measured the cost of Polish carts built at Spanish prices, and found no sales below fair value [62]. After several years of such calculations, the antidumping order was reviewed and withdrawn [63].

In that case, administrative discretion plainly benefited the NME exporter. The antidumping laws, it seems, currently function in much the same way as section 406: largely in favor of NMEs. But this is cold comfort for those who deal in countertrade, for the history of section 406 shows that advantages won through administrative discretion may be lost overnight when the political and diplomatic tides turn.

Awkward as they are in dealing with NME trade generally, U.S. anti-dumping laws are even less attuned to the peculiarities of countertrade. Take, for example, a Western firm that signs two counterpurchase contracts with an Eastern European nation, one contract selling digital electronic watch technology and the other buying agricultural products such as poultry. If the Western firm sells its technology at market value and buys the poultry at a price below market value, antidumping duties will be imposed on the imported poultry. If the price of both products is simply increased, however, the Commerce Department currently has no method of calculating the value of the reciprocal contract. This clearly demonstrates that the Commerce Department has not heard Professor Hudec’s story about the farmer who, when offered a \$1,000 watch by a traveling salesman, responded, “I don’t have the cash. Why don’t

you take two \$500 chickens?" [64]. It also shows that U.S. antidumping laws and regulations will require a substantial interpretative overhaul before they can deal effectively with countertrade.

3.2.2.2. The Heinz bill. A bill designed to reduce the uncertainty associated with NME trade laws has been introduced by Senator Heinz of Pennsylvania. The bill, S.958, repeals section 406 and the special antidumping section applicable only to NMEs [65]. Instead, NME imports challenged as unfair would be considered on one of two tracks. The case may be treated as an ordinary antidumping or countervailing duty investigation if the NME provides sufficient information to do so, including information on "true" exchange rates. If sufficient information is not available, the investigation would proceed like a countervailing duty case, except that the standard of compliance with the trade laws would be whether the NME is pricing its exports below the lowest average price charged by a free-market producer – whether U.S. or foreign.

Assuming that most NMEs will end up on the second track, this approach has the advantage of relative certainty [66]. Most exporters know what the competition is charging for its goods and imports from NMEs will be immune from challenge so long as they stay at or above this level. The bill is theoretically unfair both to NMEs having the world's most efficient operations and to competitors more efficient than NME sellers. As a practical matter, these flaws may make little difference. There are few industries in which NMEs can claim to be more efficient than any other producer, and such claims will always be unprovable so long as NME costs cannot be measured. At the same time, NMEs are unlikely to do much harm to domestic industries so long as they limit themselves to matching rather than undercutting market prices.

From the point of view of countertrade, however, the Heinz bill would appear to have at least one drawback. Countertrade goods frequently sell at a substantial discount, both because of quality problems and because private firms must be induced to accept products for which they have no established distribution system. Unless the Heinz bill takes such problems into account, the prices ordinarily encountered in countertrade may well trigger duties. In contrast, such discounts apparently will receive favorable treatment under current U.S. antidumping regulations, which adjust for quality differences.

The Heinz bill has not yet aroused a strong response in Congress and seems unlikely to pass in the near future. Over the long run, however, it may stand a reasonably good chance. Those interested in countertrade would do well to consider whether the increased certainty of the Heinz approach outweighs its possible impact on pricing flexibility.

3.2.3. Europe

Like the United States, the EC has a special set of antidumping and

countervailing duty rules for NME imports. The EC's rules are substantially simpler but no less discretionary. The EC has followed the hint in the 1979 GATT subsidies code that antidumping and countervailing duty rules be consolidated for NMEs; the EC's 1979 countervailing duty regulations therefore simply incorporate the antidumping standards for finding NME sales below normal value. [67].

The antidumping rules create a special definition of "normal value" for NME imports:

In the case of imports from non-market economy countries and, in particular, those to which Regulations No. 2532/78 and No. 925/79 apply [*i.e.* China, Bulgaria, Hungary, Poland, Romania, Czechoslovakia, East Germany, U.S.S.R., Albania, Vietnam, North Korea and Mongolia], normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

- (a) the price at which the like product of a market economy third country is actually sold:
 - (i) for consumption on the domestic market of that country, or
 - (ii) to other countries, including the Community; or
- (b) the constructed value of the like product in a market economy third country; or
- (c) if neither price nor constructed value as established under (a) or (b) above provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted if necessary, to include a reasonable profit margin.

In some respects, these rules, which largely repeat the GATT subsidies code, are more definite than the U.S. rules. For example, by incorporating a nonexclusive list of nonmarket economies, the EC's rules reduce guess-work and administrative agonizing over whether a particular country is an NME.

The EC rules also eschew reliance on economic "comparability" in determining the free-market countries that will be used as surrogates for NMEs. While this should probably be welcomed because it makes economic sense, it adds nothing to the rules' certainty of application. Complex though it is, the U.S. scheme at least provides a hierarchy of tests for NME home-market value and attempts to reduce (though hardly to eliminate) administrative license to choose a surrogate that guarantees a particular result. The European rules make no effort to restrain administrative discretion. Beyond the statement, required by the GATT, that EC prices will be used only if third country prices or constructed value do not provide "an adequate basis", the EC's rules suggest no preference for real prices over constructed value or for domestic over export prices. No standards are suggested for choosing among possible surrogate countries. In short, nothing prevents Europe from having its own Polish golf cart case, with the same result-oriented scouring of the globe for a proper surrogate.

Notes

[1] See, e.g., Organization for Economic Cooperation and Development, *East-West Trade: Recent Developments in Countertrade* (1981); P. Verzariu, *Countertrade Practices in East Europe, the Soviet Union, and China: An Introductory Guide to Business* (1980).

[2] United States International Trade Commission, *Analysis of Recent Trends in Countertrade*, U.S.I.T.C. Pub. 1237, at 16 (March 1982).

[3] de Miramon, *Countertrade: A Modernized Barter System*, 114 OECD Observer 12 (Jan. 1982).

[4] See Gadbow, *The Implications of Countertrade Under the General Agreement on Tariffs and Trade*, 5 J. Comp. Bus. & Cap. Mkt. L. (1983), this issue.

[5] See K. Dam, *The GATT: Law and International Economic Organization* 19 (1970).

[6] GATT, Article III: 1.

[7] Article III: 4, for example, requires national treatment "in respect of all laws, regulations and requirements affecting [imports'] internal sale, offering for sale, purchase, transportation, distribution or use". See also Article III: 5.

[8] GATT, Article III: 8(a). In practice, this exception has proved fairly broad in free-market countries. See, e.g., *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*, 75 N.J. 272, 381 A. 2d 774 (1977) (government commission supplying water at cost falls within exception because resale is not "commercial"). This style of analysis would immunize many of the activities of state-owned enterprises in NMEs from GATT scrutiny.

[9] GATT, Annex I.

[10] Protocol for the Accession of Romania to the General Agreement on Tariffs and Trade, 18 BISD Supp. 5, 10 (1971).

[11] Protocol for the Accession of Poland, 15 BISD Supp. 46, 52 (1967). It is worth noting, however, that if Poland fails to meet its 7% quota, compliance with other GATT rules will not save it from retaliation; indeed, the United States recently seized on Poland's failure to meet its import commitments to justify a suspension of Poland's most-favored-nation status. 47 Fed. Reg. 49005 (Oct. 29, 1982).

[12] GATT, Article XII.

[13] GATT, Article XVIII.

[14] See, e.g., 19 U.S.C.A. §1202, headnote 3(e).

[15] 19 U.S.C. §2251.

[16] *Id.*

[17] 19 U.S.C. §§2252, 2253.

[18] 19 U.S.C. §2436.

[19] *Id.*

[20] *Id.*

[21] Canned Mushrooms from the People's Republic of China, U.S.I.T.C. Pub. 1293 (Sept. 1982); Certain Ceramic Kitchenware and Tableware from the People's Republic of China, U.S.I.T.C. Pub. 1279 (Aug. 1982); Unrefined Montan Wax from East Germany, U.S.I.T.C. Pub. 1214 (Jan. 1982); Anhydrous Ammonia from the U.S.S.R., U.S.I.T.C. Pub. 1051 (April 1980); Anhydrous Ammonia from the U.S.S.R., U.S.I.T.C. Pub. 1006 (Oct. 1979); Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, U.S.I.T.C. Pub. 902 (Aug. 1978); Certain Gloves from the People's Republic of China, U.S.I.T.C. Pub. 867 (March 1978).

[22] 43 Fed. Reg. 45547 (Oct. 2, 1978).

[23] Clothespins, U.S.I.T.C. Pub. 933 (Dec. 1978).

[24] Anhydrous Ammonia from the USSR, U.S.I.T.C. Pub. 1006 (Oct. 1979). Our firm represented the importer, Occidental Petroleum Corporation, in these proceedings.

[25] 44 Fed. Reg. 71809 (Dec. 12, 1979).

[26] 45 Fed. Reg. 3875 (Jan. 21, 1980).

[27] Anhydrous Ammonia from the USSR, U.S.I.T.C. Pub. 1051 (April 1980).

[28] Commerce Clearing House, *Common Market Reports* ¶3816.291.

[29] *Id.* at ¶3816.35.

[30] *Id.* at ¶3816.355.

[31] 25 BISD Supp. 155, 159 (1978).

[32] EC Regulation No. 288/82, arts. 6-9.

[33] *Id.* art. 16.

[34] *Id.*

[35] *Id.* art. 15.

[36] *Id.* art. 10.

[37] EC Regulation No. 1765/82, art. 7.

[38] *Id.*

[39] *Id.* art. 6. Other differences abound, but many are simply stylistic. Among the arguably significant differences is the provision permitting the Commission to restrict NME imports on an emergency basis "where the interests of the Community require immediate intervention". Restricting free-market imports, in contrast, requires "a critical situation, in which any delay would cause injury which it would be difficult to remedy, [and which] calls for immediate intervention in order to safeguard the interests of the Community". Compare EC Regulation No. 1765/82, art. 11.1 and EC Regulation No. 288/82, art. 15.1.

The NME rules also omit the suggestion, contained in the free-market rules, that before imposing quotas on liberalized goods, the Commission and Council consider such factors as (1) "the desirability of maintaining, as far as possible, traditional trade flows"; (2) "the volume of goods exported under contracts concluded on normal terms and conditions before the entry into force of a protective measure within the meaning of this Title, where such contracts have been notified to the Commission by the Member State concerned"; and (3) "the need to avoid jeopardizing achievement of the aim pursued in establishing the quota". EC Regulation No. 288/82, art. 15.2.

[40] *But cf.* Lowenfeld, *Fair or Unfair Trade: Does It Make a Difference?*, 13 Cornell J. Int'l L. 205 (1980).

[41] GATT, Article VI.

[42] *Id.*

[43] GATT, Annex I. For the background of this note, consult 3 BISD Supp. 222, 225 (1955).

[44] 3 BISD Supp. at 223.

[45] 15 BISD Supp. 109, 111 (1967).

[46] 18 BISD Supp. 94, 96 (1971).

[47] 20 BISD Supp. 34, 37 (1973).

[48] 14 BISD Supp. 15, 63 (1965).

[49] 19 U.S.C. §773(c).

[50] 25 BISD Supp. 25 (1976). An Argument to that effect had been advanced by a petitioner's counsel and rejected without comment by the administrators in *Knitting Machines for Ladies' Seamless Hosiery from Italy*, 41 Fed. Reg. 36521 (1976).

[51] 46 Fed. Reg. 46152, 46153 (1981). This case, which was eventually settled without a final determination, appears to be the only U.S. antidumping case to involve a countertrade agreement.

[52] 19 C.F.R. §353.8(b) (1).

[53] *Id.* §353.8(c).

[54] *See generally*, *Electric Golf Cars from Poland*, U.S.I.T.C. Pub. 1069 at A-4 & A-5 (June 1980). Our firm advised a domestic golf cart manufacturer about some aspects of this case.

[55] 19 C.F.R. §353.8(b) (2).

[56] *Id.*

[57] *Id.* §353.8(b) (3).

[58] *Id.* §353.8(b) (1).

[59] This point was made forcefully by the Poles in the golf cart case: they complained bitterly that their sophisticated golf cart factory was being compared improperly to a “Mom and Pop” industry in Canada.

[60] Electric Golf Cars from Poland, Determination of Injury, 40 Fed. Reg. 49153, 49154 (Oct. 21, 1975).

[61] *See, generally*, Electric Golf Cars from Poland, Determination of No Threat of Injury, U.S.I.T.C. Pub. 1069, at A-5 (June 1980).

[62] *Id.*

[63] *Id.*; *see also* 45 Fed. Reg. 39581 (June 11, 1980).

[64] Professor Hudec, formerly with the U.S. Special Trade Representative’s Office, currently teaches at the University of Minnesota.

[65] *See* Cong. Rec., vol. 127 No. 59 (April 9, 1981).

[66] The bill’s basic approach is supported by a detailed Comptroller General report. Comptroller General of the United States, *Report to the Congress: U.S. Laws and Regulations Applicable to Imports from Nonmarket Economies Could Be Improved* (Sept. 3, 1981).

[67] EC Regulation No. 3017/79, art. 3, para. 4(e).

Stewart A. Baker received his A.B. from Brown University in 1970 and his J.D. from U.C.L.A. in 1976. Currently with Steptoe and Johnson in Washington, D.C., Mr. Baker served as Deputy General Counsel of the Department of Education in 1980–81 and as Special Assistant to the Secretary of Education in 1979–80. Among his recent publications are *Foreword: Toward a Center for State and Local Advocacy*, 31 Catholic U.L. Rev. 357 (1982) and *Federalism and the Eleventh Amendment*, 48 Colo. L. Rev. 139 (1977).

Richard O. Cunningham received his A.B. (1964), A.M. (1966), and J.D. (1968) degrees from George Washington University. A partner of Steptoe and Johnson, Mr. Cunningham also chairs two ABA committees on class actions and speaks frequently on international trade issues. His most recent publication on international trade is *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, U.N.C.J. Int’l Law & Com. Reg. (1982).