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Stephanie M. Smith
University of Michigan Law School

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STEPHANIE M. SMITH

When the Antidumping Act of 1921[1] was enacted, the mechanics of its application to products of state-controlled economies (hereinafter SCES)[2] understandably was not treated. There was only one state-controlled economy in existence in 1921, and its trade with the United States was relatively insignificant.

Recently, however, trade with SCEs has been increasing, and continued growth is likely. United States imports from SCEs in 1977 increased to $1,686 million from a volume of $50 million in 1951.[3] This larger volume of trade necessitates a reassessment of the way in which the problems of interaction with these completely different economies are handled.

It is to be expected that two different economic systems do not act according to the same rules. Even if one trading partner has no ulterior purpose, the mere fact that it has different bases for making economic decisions may make those decisions seem unfair, or may even cause injury to the other partner.

The United States antidumping law, by penalizing injurious imports which are either discriminatorily priced or priced below cost, requires that imports compete in the United States market according to its rules and assumptions. The antidumping law thus appears to be a reasonable mechanism for assuring that imports compete on the same basis as domestic products. However, the antidumping law is a product of the free market system it seeks to preserve. It is not designed to deal with products from economies as different from the free market as are the SCEs. As trade with SCEs has grown, the law has been adapted and modified to account for the differences in

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Stephanie Smith is a member of the class of 1980, University of Michigan Law School.

economic systems; whether it is now adequate for its task is the subject of this article.

SCEs in general, and the Soviet Union in particular, have been accused of dumping many times since the 1930s, when the Soviet Union sold basic commodities on the world market at very low prices, causing severe disruption.[4] Consequently, there has been a persistent fear that the Soviet Union and other Communist countries would use their state monopoly of trade to disrupt Western industries for political reasons;[5] in fact, the dumping may simply reflect the fact that production cost need not determine price in an economy designed and operated for purposes different from the capitalist goal of maximizing economic efficiency.[6]

In an economy where exports and imports are determined by state policy, economic planners may directly link the two in a way not possible in a market economy. For example, if the Soviet Union has an unanticipated need for imports, *e.g.*, wheat, it might export large quantities of surplus products at low prices, or even at a loss, to obtain the foreign exchange needed to purchase the imports.[7] The export price would be determined not in relation to production costs, but by the amount of foreign exchange needed.

SCEs may be tempted to lower prices for marketing reasons. For the most part, the SCEs are newcomers to Western markets, and must sell at a discount to overcome their recognition problem. Lower prices may also be the inducement necessary to overcome consumer resistance due to a lack of spare parts and servicing, uncertainty of continued supply, buyers' fears of being blacklisted, or simply buyers' anticommunist political biases.[8]

Currency problems can contribute to an appearance of dumping where there is none, or may disguise dumping where it in fact occurs. Because the currencies of most SCE countries are not convertible, there will likely be disparities between the domestic and foreign values of the currency. The export price of a product could thus appear to be only a fraction of the domestic price.[9]

An SCE may dump for political as well as economic reasons. It may, for example, wish to maintain its trade ties with a less developed country when trade at nondumping prices would not be advantageous to the other country. Lowering prices artificially increases the trade advantage to the less developed country, inducing a trade dependence, which may lead to the desired political dependence.[10] Moreover, the possibility of predatory dumping and market manipulation designed to disrupt Western industries, though unlikely, cannot be ruled out.

Thus, in the state-controlled economy, domestic prices for goods are not determined strictly by costs and market demand, but may reflect social and political considerations as well. Even if a domestic price is based on production costs, the SCE may absorb certain costs which in a traditional free market economy would be charged to the producer (*e.g.*, housing, medical care or education). Such prices are not considered to be in the "ordinary course of trade," which is the basis for determining home market value under United States law.[11] Finding a suitable substitute standard from which to evaluate the margin of dumping is, then, the central problem in the application of the United States antidumping law to the products of SCEs.

The problem of distorted cost distribution is not restricted to products from SCEs. In most western countries and almost all developing countries there is some government regulation of or interference in industry in one form or another.[12] However, in other cases involving government ownership of enterprises in non-state-controlled economies, Treasury has not disregarded the home market price.[13]

Treasury treated four early antidumping cases involving products from SCEs similarly to cases from other countries. In *Christmas Tree Ornaments from Poland,* there were no sales in the home market; Treasury used the regular export price to third countries for the dumping comparison.[14] In *Bicycles from Czechoslovakia,* Treasury used domestic prices for the purposes of comparison, apparently without questioning their validity.[15]

In *Jalousie-Louvre Sized Sheet Glass from Czechoslovakia,*[16] where there were no home market sales or sales to third countries, Treasury used the prices of western European producers for comparison, because the information on costs of materials and labor in Czechoslovakia necessary to determine a constructed value was not available.

In *Portland Cement from Poland* Treasury disregarded available home market prices for the first time because "sales for home consumption in Poland are not made in the ordinary course of trade within the meaning of the statute,"[17] although Treasury did suggest that it might have used a Polish export price to a third country had there been other exports. (In future cases, however, export prices to third countries would also be considered suspect.)

By ruling out home market prices and prices for export to third countries as bases for antidumping comparisons, Treasury was forced to develop a new measurement which would most closely approximate a free market price. In response to this problem, Treasury formulated a "third country rule": in the absence of a home market price or price to a third country it would determine the foreign market value by using the home market price or the export price for the same or similar product produced in a non-state-controlled economy, usually a western European country.[18] Where comparable noncontrolled state prices are not available, a constructed value based on costs of the non-state-controlled economy producer would be used.[19] Eventually, this rule was enacted by the Trade Act of 1974 as 19 U.S.C. § 164(c).[20]

The third country rule has been criticized by both SCEs and domestic producers. Domestic producers note that where the third country is also dumping the SCE will not be discovered if it dumps at a lesser rate.[21] The use of a western European producer's price may also allow any production economies of that producer to benefit a less efficient producer in the SCE. SCE producers, on the other hand, protest that the third country rule, by requiring them to charge the prices of possibly less efficient producers in a different country, denies them any price advantage that they possess.[22] They feel it is inherently unfair that they be accountable for prices over which they have no control and which they have difficulty discovering. While in two 1967 cases[23] antidumping proceedings were discontinued and producers were allowed to raise their prices after learning what the constructed value would be, this practice has not been continued.

These problems seem relatively minor when compared with the complicated issue presented in the case of *Electric Golf Carts from Poland*[24] where no third country manufactured the item. The market for golf carts was largely confined to the United States. At the time proceedings were begun, golf carts were manufactured in the United States, Poland, Japan and Canada. Prices of Japanese manufacturers were prohibitively high for the United States market; using Japanese prices for the constructed value would have effectively prevented Polish competition in this market. The Canadian producer was very small and was going out of business. Nevertheless, Canadian prices were used, resulting in a determination of sales at less than fair value. Pezetel, the Polish producer, argued that the Canadian prices were too high—that using them did not allow for Pezetel's comparative cost advantages. The United States producers, on the other hand, argued that the Canadian prices were distress sales and consequently were too low.

The Canadian prices were used as a reference for liquidating duties from March 1974 through August 1975. The Canadian producer then went out of business, so there was no reference price at all for Polish golf carts.

The American producers argued that under 19 U.S.C. § 164(c), Treasury should resort to the United States price to find the fair value.[25] Pezetel would then not be able to compete in the United States market since it would have to charge the United States price plus transportation costs for a product relatively unknown in the United States market.[26] As of late 1978 the valuation problem still had not been resolved, and duties have not been assessed for entries after August 1975.

Electric Golf Carts from Poland demonstrates that the third country rule is of limited utility when applied to cases where no valid prices from foreign producers are available. Even when it works, however, the third country rule does not achieve its aim of creating a free market based on comparative advantage. The SCEs are only allowed as much or as little advantage as any given non-SCE possesses. The SCEs understandably feel aggrieved by what they perceive as an arbitrary rule.[27] The fact that the rule is "as good as any other"[28] and that no one has come up with a better provision[29] does not allay the suspicions of either the domestic or the SCE producer that the rule is not accurate enough to assure competition on an equal footing.

In new regulations announced August 9, 1978,[30] Treasury responded to many complaints by specifying standards to be used in choosing a country of comparison and announcing a new method of determining constructed value.

The new regulations provide that foreign market value is to be determined by prices of similar merchandise in a non-state-controlled economy other than the United States.[31] Where possible, the country should be at "a stage of economic development comparable to the state-controlled-economy country." Comparability is to be determined by common economic data such as "per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)." If no comparable country can be found, the determination may be made using another non-SCE country other than the United States. Only if prices or constructed value are still unavailable will Treasury use the prices and costs in the United States.[32]

A major change is made in the computation of the constructed value in the absence of third country prices. Constructed value will be determined by using the third country prices of the actual inputs used by the SCE producer.[33] In this way the SCE is allowed to take advantage of any economies of production which it might have and is prevented from taking advantage of the economies of the third country producer which it does not share.[34]

These changes in the Treasury regulations are, on the whole, an improvement. By permitting consideration of the state of economic development in choosing a third country, the Treasury Department reduces the possibility that the SCE producer will be charged with higher factor costs or other economic differences between economies of different economic levels of development. Less developed countries, for example, usually have wage scales significantly below those of developed countries. To equate the costs of production in the two economies, therefore, is to eliminate entirely the comparative advantage that naturally accrues to a producer with those lower factor costs. The SCE producer obviously prefers the new constructed value based on the producer's own inputs, because the constructed value will now more closely reflect the actual costs, which still allows a producer with a natural comparative advantage to profit from it. In spite of this, constructed value probably will remain only an alternative to third country prices under the present law. The construction of a surrogate plant from the SCE inputs in a third country is complicated and imprecise because of problems in valuing factor costs in the third country and calculating inputs in the SCE. This would be especially true where a given factory has several different products, or in any other situation where allocating costs between one or more products would be difficult. Assuming that the inputs are determined and the costs in the third country available, there is still the possibility of error or exaggeration as estimates at each different step are added to and multiplied by other estimates.[35]

Constructed value is a closer approximation of true market value, but is still only a second- (or third-) best guess of what the normal costs, expenses, and profits for a given product would be. Dumping is a free enterprise concept not easily adapted to trade with a state-controlled economy; results are cumbersome and unpredictable. But the newly-enacted regulations take some much needed steps toward the goal of assuring free competition in our markets, with access by imports determined as much as possible by comparative advantage.

NOTES

1. Ch. 14, tit. II, 42 Stat. 11 (1921), *as amended*, 19 U.S.C. §§ 160–73 (1976).
2. Throughout this note the term "state-controlled economy" refers to a country that the Treasury Department has considered to have an economy controlled to such an extent that home market sales would not be considered in the normal course of trade within the meaning of 19 U.S.C. § 164(c) (1976). In practice this refers to the Communist countries of Asia and Europe except Yugoslavia.

   Because Yugoslavia's economy is largely price-based, Treasury treats its prices as made in the normal course of trade. *Cf.* Wooden Coat Hangers from Yugoslavia, 29 Fed. Reg. 2,952 (1964) (home market price); Portland Cement from Yugoslavia, 28 Fed. Reg. 41 (1963) (home market price); Headboards from Yugoslavia, 30 Fed. Reg. 8,016 (1965) (constructed value based on Yugoslav costs). *But see* Copper Sheets from Yugoslavia, 29 Fed. Reg. 8,149 (1964) (there were no home market sales; the price was compared with the western European price rather than with a constructed value based on Yugoslav costs).

   See U.S. INTERNATIONAL

TRADE COMMISSION, QUARTERLY REPORT TO THE CONGRESS AND THE EAST-WEST FOREIGN TRADE BOARD ON TRADE BETWEEN THE UNITED STATES AND THE NONMARKET ECONOMY COUNTRIES DURING APRIL-JUNE 1978, USITC Publ. 921 (1978).

3. Public policy now supports trade with SCEs. A stated purpose of the Trade Act of 1974 was "to open up market opportunities for United States commerce in nonmarket economies." 19 U.S.C. § 2102 (1976). *See generally* COMMITTEE FOR ECONOMIC DEVELOPMENT, EAST-WEST TRADE: A COMMON POLICY FOR THE WEST (1965); 2 U.S. INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD: PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 363, 397 (1971); Grzybowski, *East-West Trade Regulations in the United States: The 1974 U.S. Trade Act, Title IV,* 11 J. WORLD TRADE L. 501 (1977); Hoya, *The Changing U.S. Regulation of East-West Trade,* 12 COLUM. J. TRANSNAT'L L. 1 (1973); McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters,* 2 L. & POL'Y INT'L BUS. 42 (1971).
4. *See* U.S. LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE, A BACKGROUND STUDY ON EAST-WEST TRADE PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS OF THE UNITED STATES SENATE 49 (1965); WILCZYNSKI, THE ECONOMICS AND POLITICS OF EAST-WEST TRADE 146 (1969); Wilczynski, *Dumping and Central Planning,* 74 J. POL. ECON. 251 (1966).
5. Feller, *The Antidumping Act and the Future of East-West Trade,* 66 MICH. L. REV. 115, 121 (1967).
6. In theory, there could also be a problem of western European dumping in eastern European markets. However, imports into state controlled economies are regulated in both quantity and type by the state. There is no complaint if the Western producer wishes to sell at a lesser price. Wilczynski, *Dumping, supra* note 4, at 251.
7. Holzman, *East-West Trade and Investment Policy,* 2 U.S. INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD: PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 390 (1971).
8. Feller, *supra* note 5, at 120–21; Wilczynski, *Dumping, supra* note 4, at 258.
9. Holzman, *supra* note 7, at 369, gives an example where Soviet exports were officially valued at one-tenth of domestic prices. Where dumping is occurring, the exchange rate may complicate the determination of the extent of dumping. *See also* J. WILCZYNSKI, THE ECONOMICS AND POLITICS OF EAST-WEST TRADE 163 (1969).
10. Wilczynski, *Dumping, supra* note 4, at 121.
11. 19 U.S.C. § 164(a) (1976).
12. *Oversight of the Antidumping Act of 1921: Hearings on the Adequacy and the Administration of the Antidumping Act of 1921 before the Subcomm.*

on Trade of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 87, 100 (1977) (Statements of William H. Knoell and Alexander J. Vogl). *See generally* J. H. Cottman & Co. v. United States, 20 C.C.P.A. 344 (1932);

Kostecki, *State Trading in Industrialized and Developing Countries*, 12 J. WORLD TRADE L. 187 (1978); papers delivered at Airlie House Conference on Trade with State Controlled Economies and State Owned Enterprises, Georgetown University Institute of International and Foreign Trade Law, July 21, 1978. To be published in 1979 under the title INTERFACE ONE.

13. A recent case in which this is an issue is Condenser Paper from Finland, 43 Fed. Reg. 35,137 (1978).
14. 26 Fed. Reg. 8,857 (1961).
15. Bicycles from Czechoslovakia, 25 Fed. Reg. 6,657 (1960).
16. Jalousie-Louvre Sized Sheet Glass from Czechoslovakia, 27 Fed. Reg. 8,457 (1962).
17. Portland Cement from Poland, 28 Fed. Reg. 6,660 (1963).
18. Anthony, *American Response to Dumping from Capitalist and Socialist Economies*, 54 CORNELL L. REV. 159, 201 (1969).
19. 19 C.F.R. § 153.7 (1977).
20. Because the rule was without statutory basis, the Administration in 1970 requested as part of its trade bill that the Antidumping Act be amended to incorporate the third country rule. In 1973, however, the Administration did not request such an amendment in its proposals because there were no court challenges of the rule and it was thought important to maintain flexibility. *The Trade Reform Act of 1973: Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 443 (1973) (testimony of Matthew Marks).

Congress felt that a statutory basis was important and made the Treasury regulations part of Title III of the Trade Act of 1974:

(c) If available information indicates to the Secretary that the economy of the country from which the merchandise is exported 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 under subsection (a), the Secretary shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) and section 202, at which such or similar merchandise of a non-state-controlled-economy country or countries is sold either (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States; or
(2) the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries as determined under section 206.

19 U.S.C. § 164(c) (1976).

21. *Hearings on Trade Reform Act of 1973, supra* note 20, at 445 (testimony of Matthew Marks). *See generally Oversight Hearings, supra* note 12, at 106 (statement of Donald A. Webster).
22. Douglass, *East-West Trade: The Accession of Poland to the GATT,* 24 STAN. L. REV. 761 (1972).
23. Shoes from Rumania, 32 Fed. Reg. 4,029 (1967); Fur Felt Hat Bodies from Czechoslovakia, 32 Fed. Reg. 4,004 (1967).
24. AA1921–147, USITC Publ. 740 (1975). For a discussion of this case, including letters by counsel for the parties, *see Oversight Hearings, supra* note 12, at 106–9 (statement of Donald A. Webster).
25. Only once has the United States price been used as the constructed value for an SCE product. Fishery Products from the U.S.S.R., 32 Fed Reg. 5,375 (1967).
26. Stanislaw Soltysinski, paper presented at Airlie House Conference, *supra* note 12.
27. *See* Barth & Nemmers, *A Roadmap to the Trade Act,* 8 L. & POL'Y INT'L BUS. 170 (1976), Coudert, *The Application of U.S. Antidumping Law in the Light of a Liberal Trade Policy,* 65 COLUM. L. REV. 250 (1965).
28. Campbell, *The Foreign Trade Aspects of the Trade Act of 1974, Part II,* 32 WASH. & LEE L. REV. 665 (1976).
29. Testimony of Matthew Marks, *supra* note 20, at 445.
30. 43 Fed. Reg. 35,263 (1978); 19 C.F.R. § 153.7 (1978).
31. 19 C.F.R. § 153.7(a) (1978)
32. 19 C.F.R. § 153.7(b) (1978)
33. 19 C.F.R. § 153.7(c) (1978).
34. CUSTOMS BULL. & DECISIONS, Aug. 23, 1978, at 5. *See generally Oversight Hearings, supra* note 12 (statement of Donald A. Webster).
35. Nonetheless, the problems of calculating input costs and of allocating costs between products are familiar ones under the constructed value formula.