

1990

Factors or Prices? An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies

Lydia Brashear

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Brashear, Lydia. "Factors or Prices? An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies." American University International Law Review 5, no. 3 (1990): 893-920.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

NOTES & COMMENTS

FACTORS OR PRICES? AN EVALUATION OF ANTIDUMPING LAWS AS APPLIED TO COMPANIES EXISTING IN NONMARKET ECONOMIES

Lydia Brashear*

INTRODUCTION

One area of United States trade policy focuses on the effect of foreign imports on American industries.¹ To counter the effect of foreign import injury, domestic industries request that the United States Department of Commerce (DOC) enforce laws to determine whether foreign companies are illegally "dumping" their products into the United States economy.² To determine foreign companies' compliance with fair competition laws, Congress and the DOC have developed procedures for penalizing foreign companies that harm or threaten to harm Ameri-

* J.D. Candidate, 1991, Washington College of Law, The American University. This article is dedicated in memory of my mother, Lydia Rothman Brashear.

1. See Jackson, *Introduction: Perspective on Antidumping Law and Policy*, reprinted in *ANTIDUMPING LAW: POLICY AND IMPLEMENTATION 1* (1979) (stating that although trade policy concerns foreign relations, in the United States trade has often been viewed as an internal policy issue). The United States treats trade as a domestic issue because private citizens and businesses demand to participate in decisions ultimately affecting them. *Id.* at 2.

2. *Id.* Dumping refers to a foreign company's practice of selling its goods in the United States at prices lower than those in the foreign company's home market. *Id.* The laws penalize foreign companies only to the extent that the dumped products hurt domestic companies. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, SUMMARY OF PROCEDURES FOR ANTIDUMPING FAIR VALUE INVESTIGATIONS UNDER TITLE VII OF THE TARIFF ACT OF 1930 AS AMENDED 5 (1987) [hereinafter SUMMARY OF PROCEDURES]. The ITA estimates dumping duties at the level that the value of merchandise exceeds the United States price. *Id.* The Code defines dumping margins as the amount by which the foreign market value exceeds the United States price of the merchandise. 19 C.F.R. § 353.2(f) (1989). The weighted average dumping margin is the result of dividing the aggregate dumping margins by the aggregate United States prices. *Id.*

can industries.³ Under congressionally enacted rules and procedures, the DOC determines when and to what extent a foreign company is dumping its products.⁴ Antidumping laws, which serve several main purposes,⁵ most importantly deter foreign companies from attempting to sell their products at less than fair value (LTFV)⁶ in the United States.⁷

The Omnibus Trade and Competitiveness Act of 1988⁸ (1988 Trade Act) substantially changed the procedures for determining when imports from nonmarket economies⁹ (NMEs) threaten the ability of American producers to sell their products and earn profits.¹⁰ This case comment will focus on the changes in United States trade law and the effect of these changes on determining when NME companies violate that law. Presently, changes in world order, economic alignment, and the recent political and economic shifts in the Union of Soviet Socialist

3. See INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, UNITED STATES ANTIDUMPING/COUNTERVAILING DUTY LEGISLATION 1 (1987) [hereinafter ANTIDUMPING LEGISLATION] (describing the DOC's application of antidumping laws and countervailing duties to determine when the United States should redress injuries to domestic industries caused by foreign company imports).

4. *Id.* at 1; see also Coursey & Binder, *Hypothetical Calculations Under the United States Antidumping Duty Law: Foreign Market Value, United States Price, and Weighted-Average Dumping Margins*, 4 AM. U.J. INT'L L. & POL'Y 537, 537-53 (1989) (describing how dumping calculations are made in a hypothetical case).

5. SUMMARY OF PROCEDURES, *supra* note 2, at 1; see U.S. DEPT. OF COMMERCE, THE TOKYO ROUND TRADE AGREEMENTS: ANTIDUMPING DUTIES 1, 1 (1982) [hereinafter TOKYO ROUND] (claiming that antidumping duties "neutralize the effect" of dumping, protect American companies, and "promote fair international trade").

6. SUMMARY OF PROCEDURES, *supra* note 2, at 1. The statute itself provides no definition of less than fair value (LTFV) sales. *Id.* A LTFV sale occurs when the "free on board" (FOB) plant price to purchasers in the exporter's home market exceeds the FOB plant price to United States purchasers. *Id.* The FOB is a price option contract term between the seller and the buyer of international goods. R. FOLSOM, M. GORDON & J. SPANOGLE, INTERNATIONAL BUSINESS TRANSACTIONS 34 (1986) [hereinafter R. FOLSOM]. When the buyer purchases goods FOB, the contract price of the goods includes the list price of the goods plus the cost of crating the goods for shipment. *Id.*

7. ANTIDUMPING LEGISLATION, *supra* note 3, at 1. In comparison to dumping laws, countervailing duty laws penalize infringing countries with an unfair trade advantage caused by their own government provided subsidies. *Id.*

8. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(b)(18), 102 Stat. 1107, 4143 (1988) (amending 19 U.S.C. 1677 Supp. 1988).

9. *Id.* The term NME refers to an economy in which the forces of supply and demand fail to operate freely. FOLSOM, *supra* note 6, at 1037. NMEs usually exist in communist countries where the government's intervention in the economy monopolizes all forms of trade. Allan & Hiscock, *East-West Trade: The Philosophies and Practicalities of State Trading*, 8 MONASH U.L. REV. 135, 135 (1982). In trading with NME companies, the western importer will often deal with state trade organizations or other governmental agencies. R. FOLSOM, *supra* note 6, at 12. Economists often characterize NME nations as having a shortage of hard currency. *Id.*

10. See *infra* notes 67-74 and accompanying text (describing the changes facilitated by the 1988 Trade Act's NME provisions).

Republics (USSR) and the East European bloc countries have increased the significance of this trade issue.¹¹ Additionally, as the interdependence among nations increases, the United States' concern over the actions of its trade partners correspondingly increases.¹²

This Comment will analyze the complexity of applying the new 1988 Trade Act to cases concerning NME countries.¹³ Part I provides a background, describing, first, how the International Trade Commission (ITC) and the International Trade Administration (ITA)¹⁴ proceed with dumping determinations and, second, how the NME element influences these dumping calculations. Part II discusses the ITA's recent determination in *Urea from the Union of Soviet Socialist Republics*,¹⁵ while Part III analyzes the ITA's decision and illuminates the difficulty of applying complicated rules to this area of trade law. Part III then discusses alternatives to the present NME dumping calculation by ex-

11. Watson, *Super Partners*, NEWSWEEK, Dec. 11, 1989, at 31. The discussions between Gorbachev and Bush during the Malta summit, held aboard the Maxim Gorky, indicate that the United States and the USSR want to facilitate increased free trade. *Id.* The United States hopes to aid the USSR in achieving needed economic reform, or *perestroika*, by approving more liberal free trade agreements between the two countries. *Id.* During the summit, Bush's proposals for aiding the USSR included negotiating a new trade agreement that would give the USSR most favored nation status, concluding a treaty to protect and encourage American investment in the USSR, and eventually offering the USSR observer status in the General Agreements on Tariff and Trade (GATT). *Id.*; see Giscard d'Estaing, Nakasone, Kissinger, *East-West Relations*, 68 FOREIGN AFFAIRS 2, 14 (1989) (stating that Gorbachev intended the Soviet Union to become a "normal" participant in international economic relations); Hey, *How Much is That in Rubles?*, 37 NAT'L J. 2,245, 2,245 (1989) (revealing one example of the USSR's recent attempts at capitalism through a Soviet competition to develop the best idea for converting the ruble to hard currency).

12. See Jackson, *supra* note 1, at 2-3 (1979) (discussing the revolutionary developments affecting modern trade policy). These revolutionary developments include: (1) an increased degree of international interdependence; (2) sharp fluctuations in the relative prices of goods; (3) the aftermath and breakdown of post World War II rules of modern trade conduct; and (4) the revelation that the GATT's inflexibility and outdateness cannot remedy problems in the modern trade world. *Id.*; Stanfield, *Beyond the Cold War*, 37 NAT'L J. 2,254, 2,254 (1989) (describing the recent changes in the Soviet Union and eastern bloc countries). East-West specialists acknowledge that developing a new economic relationship is a "plunge into the uncharted." *Id.* at 2,257. Yet United States economic involvement is crucial not only for the Soviets but to maintain American relations with Western Europe. *Id.* Many commentators agree that the United States can only help the USSR by removing obstacles impeding free trade between the two countries. *Id.* at 2,258. The effect of the United States' interference in the trade policies of other eastern bloc countries may vary because these countries have their own individual economic systems and problems. *Id.*

13. See S. REP. NO. 71, 100th Cong., 1st Sess. 108 (1987) [hereinafter S. REP.] (explaining how the DOC experiences difficulties when applying antidumping laws to NME cases).

14. See *infra* note 23 (describing the ITA's function).

15. *Urea From the Union of Soviet Socialist Republics, Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 19,557 (1987).

plaining proposals brought before Congress enacted the 1988 Trade Act. Finally, Part IV of this Comment suggests possible changes to simplify the present law.

I. BACKGROUND

A. DUMPING DETERMINATIONS

Administrative procedures governing dumping determinations¹⁶ are highly technical calculations which the ITA and the ITC must undertake in a timely manner.¹⁷ Dumping investigations and proceedings begin when an interested party¹⁸ files a petition with the ITA.¹⁹ This petition must contain information about the petitioner and the allegedly dumped goods.²⁰ The petition should also contain the grounds for suspecting the dumping and describe the potential material injury to the United States industry or industries.²¹ The investigative portion of a dumping proceeding progresses in the same manner against a foreign company whether its country has a market or nonmarket economy.²²

16. See 19 C.F.R. § 353 (1989) (regulating the application of Antidumping duties).

17. See *infra* note 24 (illustrating the time frame for dumping investigations).

18. 19 C.F.R. § 353.2(k) (1989). The Code defines an interested party as: (1) a foreign manufacturer, producer or exporter or United States importer of the same goods; (2) a foreign government in which the goods are produced; (3) a United States manufacturer producing the same goods; (4) a certified or recognized United States union representing the industry in question; (5) a United States trade or business association producing a like product; or (6) an association wherein a majority are interested parties according to this section. *Id.*

19. See *Id.* § 353.12 (discussing petition requirements).

20. *Id.* The act requires petitioners to include the following relevant information: (1) the address of the petitioner; (2) the names of foreign firms producing and exporting goods; (3) a description of the goods in question; (4) the volume and value of these goods; and (5) a list of companies exporting or importing the goods. *Id.* If the petition deals with goods exported from a NME country, petitioner must supply any available information on the alleged goods' sales price within the NME country's own economy. *Id.* § 353.12(8). A complete petition also includes evidence of costs and prices of imported goods helpful to the ITA in calculating the FMV and the United States price. *Id.* § 353.12(7); see ANTIDUMPING LEGISLATION, *supra* note 3, at 3 (describing what facts a petitioner must allege before filing the complaint with the ITA).

21. 19 C.F.R. § 353.12 (1989); see ANTIDUMPING LEGISLATION, *supra* note 3, at 3 (describing the factors that evidence material injury). These are: value and volume of imports over three years prior to case initiation, the effect imports have on undercutting or depressing prices of similar American products, decline in productivity in United States industry, and detrimental effects on inventories, employment, salaries, cash and investment. *Id.*; see also TOKYO ROUND, *supra* note 5, at 4 (claiming that for injury determinations, the DOC looks at the imports' effect on sales, market share, profits, productivity, investment return, capacity, prices, cash flow, inventories, labor, wages, growth rate, and ability to invest or raise capital).

22. 19 C.F.R. §§ 353.11-353.26 (1989).

1. Investigations and Proceedings

The ITA and the ITC conduct simultaneous dumping investigations.²³ After receiving a petition from a domestic company or interested party, the ITA conducts a summary investigation.²⁴ Upon completion of this initial inquiry, and within twenty days after receiving the petition, the ITA either dismisses the case or initiates a full dumping investigation.²⁵ Once the ITA decides to proceed with the investigation, it mails questionnaires to exporters requesting information on prices and costs of the dumped products.²⁶ After receiving the results from these questionnaires, the ITA attempts to verify the data received.²⁷

Problems arise, however, when respondents fail to complete or return the questionnaires.²⁸ If the ITA does not receive responses to its ques-

23. SUMMARY OF PROCEDURES, *supra* note 2, at 1. The ITA and the ITC operate as independent agencies of the DOC. *Id.* The ITA determines if a foreign company exported its goods at LTFV, while the ITC focuses on the extent a foreign company injured a United States industry. *Id.*

24. *Id.* The ITA dismisses the petition if it fails to contain sufficient information on which to base antidumping charges. 19 C.F.R. § 353.13 (1989). The following table provides a visual timeline of a DOC dumping investigation:

Flowchart for a Normal Antidumping Duty Investigation Day Action

0	Petition filed
20	Decision on Initiation
45	Preliminary Injury Determination by ITC
160	Preliminary Determination by ITA
235	Final Determination by ITA
280	Final Injury Determination by ITC
287	Publication of Order Administrative Review

SUMMARY OF PROCEDURES, *supra* note 2, at 7.

25. ANTIDUMPING LEGISLATION, *supra* note 3, at 3.

26. SUMMARY OF PROCEDURES, *supra* note 2, at 2. The Secretary of Commerce will require questionnaire respondents to submit information for the 140 days prior to and thirty days after the month that the ITA first received the petition. *Id.*; see Horlick & DeBusk, *Commerce Procedures Under Existing and Proposed Antidumping/Countervailing Duty Regulations*, 22 INT'L LAW. 99, 109 (1988) (revealing that a respondent's response to questionnaires can decisively affect the success or failure of respondent's case).

27. 19 C.F.R. § 353.36 (1989). See generally Macrory, *Fair Value Investigations and Administrative Reviews Under the Anti-Dumping Statute*, reprinted in 372 U.S. IMPORT RELIEF LAWS 9, 11 (1985) (stating that DOC officials will actually visit foreign manufacturers to check the reliability of questionnaire answers). It is helpful to think of verifications as thorough financial audits because the ITA traces individual responses to the company's source documents and financial statements. *Id.* at 13.

28. See Verrill, *Nonmarket Economy Dumping: New Directions in Fair Value Analysis*, 21 GEO. WASH. J. INT'L L. & ECON. 427, 428-29 (1988) (supporting the proposition that problems arose when the DOC implemented verification procedures). Foreign manufacturers and exporters either lack access to relevant data on prices and costs or the expense to the foreign company providing this data outweighs the benefit of the foreign company's participation in the investigation. *Id.*; see Tung-Pi Chen, *Are Anti-Dumping Laws of Canada and Other Western Countries Keeping Pace with*

tions within the 160 days that the Code mandates for issuing a preliminary determination,²⁹ the ITA lacks essential data that it needs to proceed with the dumping calculations.³⁰ When the ITA does not receive company data or is unable to verify data received, it applies the doctrine of "best information otherwise available" (BIA).³¹ This rule enables the ITA to estimate prices and costs by substituting alternative sources of data for the missing information.³²

Before the ITA concludes its initial investigation, the ITC preliminarily decides if a foreign company's trading activities injured or threatened to injure American industries.³³ If the ITC finds no injury, it immediately terminates the investigation.³⁴ If the ITC finds an actual or threatened injury, the ITA makes and publishes a preliminary determination.³⁵ The ITA then makes a final determination within seventy-five days of its preliminary determination.³⁶

In addition, if the petition alleges "critical circumstances," the ITA investigates to determine if they exist.³⁷ Critical circumstances exist if the country has a history of dumping, and "massive" imports of the product occurred over a relatively short period of time.³⁸ A positive determination of critical circumstances subjects a foreign company to

China's Economic Structural Reform? 19 GEO. INT'L L. & POL'Y 717, 736 (1987) (describing verification problems).

29. 19 C.F.R. § 353.15 (1989).

30. *Id.* § 353.37 (1989).

31. *Id.* The provision requires the Secretary to use the best information available (BIA) whenever respondents fail to complete an accurate and timely factual response to questionnaires, or when the Secretary cannot verify accuracy and completeness of the factual information submitted within the investigation's time restraints. *Id.*

32. *Id.* Other sources may include information that the petitioner provides or public statistics on certain facets of an industry. *Id.* If the petitioner prevents the ITA from receiving such data, the ITA will consider this in its determination. *Id.*

33. SUMMARY OF PROCEDURES, *supra* note 2, at 2.

34. 19 C.F.R. § 353.17(c) (1989).

35. *Id.* § 353.15(a). Under this regulation, the ITA issues a preliminary determination 160 days after receiving the petition. *Id.* In its preliminary determination, the ITA decides whether there is a reasonable basis to suspect that importers are selling or are likely to sell imported goods at LTFV. *Id.* § 353.39(a)(1). The ITA will also hold a hearing if any party to the investigation so requests. *Id.* § 353.38.

36. SUMMARY OF PROCEDURES, *supra* note 2, at 4. In some instances, when exporters or petitioners so request, the ITA will postpone the determination to not later than 135 days after the date of a preliminary determination. *Id.*

37. U.S. DEP'T OF COMMERCE, GLOSSARY OF ANTIDUMPING TERMS AND PHRASES (1987) [hereinafter GLOSSARY].

38. *Id.* Under the regulations, critical circumstances exist if: (1) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation; or (2) the importer knew or should have known that the producer or seller was selling the merchandise at LTFV, and there have been massive imports of the merchandise over a relatively short period. 19 C.F.R. § 353.16 (1989).

an extended period of antidumping duties.³⁹

2. Calculations for LTFV Sales

Throughout the investigation and proceedings, the ITA attempts to find information to prove that a foreign company has sold its products at LTFV.⁴⁰ To facilitate the determination of LTFV sales, the ITA will compare the United States price⁴¹ to the foreign market value (FMV) of the product.⁴² If the FMV is higher than the United States price, and a material injury occurred, the ITA will order anti-dumping sanctions against the company.⁴³

B. NME DUMPING

1. Difficulties Arising from NME Dumping

Comparing the FMV to the United States price, generally a straight-

39. 19 C.F.R. § 353.16 (1989). An antidumping duty is a sanction placed against companies that violate American antidumping laws and is determined individually for each imported product. GLOSSARY, *supra* note 37. The amount of the antidumping duty is valued at the difference between the United States price and the FMV at the time of sale. *Id.* If the Commerce Department makes a positive finding of critical circumstances, it will suspend goods for 90 additional days and will apply the duties for this additional time period. 19 C.F.R. § 353.16 (1989).

40. See *supra* note 6 and accompanying text (describing sales at LTFV).

41. 19 C.F.R. § 353.41 (1989). The ITA defines the United States price as either the purchase price or the exporter's sales price. GLOSSARY, *supra* note 37. The distinction between these two price values turns on whether the exporter is related to the United States importer. Macrory, *supra* note 27, at 22. The ITA uses the purchase price in cases where the foreign exporter is unrelated to the United States importer and the exporter's sales price when the two parties are related. *Id.*

A Federal Court of Appeals decision explains why the ITA uses these two possible values for the United States price. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). The court stated that one of the statute's goals is to make "the fair value comparison on a fair basis - comparing apples with apples." *Id.* Therefore the ITA must make comparisons using the purchase price value separate from comparisons using the exporter's sales price value. *Id.* If the ITA used both the exporter's sales price offset and the purchase price in the same United States price comparison, the exporter's sales price would favor a higher dumping margin. *Id.*; accord Homer & Bello, *Import Law and Policy Series: Fair "Apples to Apples" Comparisons in Dumping Cases*, 19 INT'L LAW. 927, 929 (1985) (deciphering the Court of Appeals' decision).

42. GLOSSARY, *supra* note 37. The FMV is the price at which manufacturers sell or offer to sell merchandise in the principal markets of the exporting country. *Id.* For example, if the ITA finds viable foreign home market sales, the agency bases FMV on prices to third countries or constructed values. *Id.* The ITA makes adjustments for quantities sold, circumstances of sale, and differences in the merchandise to ensure a proper comparison with prices in the United States. *Id.*

43. 19 C.F.R. § 353.21 (1989). After receiving a positive final determination, the ITA publishes an antidumping duty order. *Id.* The DOC then requires the foreign company to pay extra duties on goods previously under investigation. *Id.*

forward procedure, becomes problematic when the ITA attempts to apply the antidumping laws to companies operating in NME countries.⁴⁴ To determine when a foreign company in a market economy dumps its products, the ITA calculates the FMV by using the producers' costs and prices.⁴⁵ In investigating a NME dumping case, however, the ITA must account for the fact that NME governments set producers' costs and subsidize factors of production.⁴⁶ Because of this government intervention, the prices of goods that the United States imports from NME countries fail to reflect the market forces of supply and demand.⁴⁷ Thus, the comparison between the United States price which reflects market forces, and the FMV which reflects non-market forces, is of little value.⁴⁸

Despite the awareness of the difficulties inherent in NME dumping, legislators have only recently confronted these problems.⁴⁹ One reason for changes in this area of the law is the difficulty of applying pre-existing laws to NME cases.⁵⁰ For example, the ability of NME companies to provide adequate price data has decreased dramatically.⁵¹ Another reason is the concern for protecting American industries and

44. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(b)(18), 102 Stat. 1107, 4143 (1988).

45. Stokes, *Trade Moves China Off the Sidelines*, 18 NAT'L J. 1,080, 1,080 (1987). Yet, when a NME economy is involved, the ITA finds it extremely difficult to obtain the needed information from NME companies to calculate FMV. *Id.*

46. *Id.*; see F. HOLZMAN, *THE SOVIET ECONOMY PAST, PRESENT AND FUTURE* 6 (1982) (comparing the Soviet Union which operates under a central planning system to western capitalist countries where the interaction of market forces determines a good's quantity, production time and customers). In the Soviet Union, central planners, known as the *Gosplan*, draw up guidelines for production that manufacturers must adhere to over a period of time. *Id.*

47. Verrill, *supra* note 28, at 428. The absence of traditional forces of supply and demand place prices and cost structures of the NME beyond the scope of a normal antidumping calculation. *Id.*

48. See Kaplan & Varga, *Recent Developments in the Antidumping and Countervailing Duty Area*, reprinted in 372 U.S. IMPORT RELIEF LAWS 77, 84 (1985) (stating that no basis exists for home market prices because the governments of NME countries determine the relative costs and prices of goods and do not base prices on the interplay of local or worldwide supply and demand).

49. See Cuneo & Manuel, *Roadblock to Trade: The State Controlled Economy Issue in Antidumping Laws Administration*, 6 FORDHAM INT'L L.J. 277 (1982) (describing antidumping legislation and stating that the 1974 Trade Act contained the first statutory provision to deal with NME countries).

50. See *supra* note 47 and accompanying text (implying that the antidumping laws prior to the 1988 Trade Act do not work well).

51. See *supra* notes 28-32 and accompanying text (revealing that verification poses a real problem for the ITA when it is trying to complete an investigation); *infra* notes 119-122 and accompanying text (illustrating in *Urea* the inadequacies of employing the price method).

laborers from NME dumping.⁵²

2. Legislation

a. Historical perspective

The Antidumping Act of 1921 (1921 Act) first provided duties against companies that dumped their products in the United States economy.⁵³ The 1921 Act provided only two methods for determining

52. See Memorandum to the File, Ex-Parte Meeting Antidumping Case on Urea from the Soviet Union (Sept. 3, 1986) (statement of Albert Melnikov, Acting Trade Representative of the USSR) (emphasizing that Soviet trade organizations are working with American companies to complete trade contracts based on economic cooperation). After 1986, this concern escalated because the Federal Circuit Court of Appeals in *Georgetown Steel Corp. v. United States* overturned one method for dealing with the NME problem. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The court held that a NME does not contain countervailable subsidies. *Id.* Countervailing duty law tests whether a foreign company has an "unfair competitive advantage" stemming from the receipt of government subsidies. ANTIDUMPING LEGISLATION, *supra* note 3, at 1; see also Comment, *Implementation and Policy Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1,647, 1,647 (1988) [hereinafter Comment, *Implementation and Policy*] (declaring that the *Georgetown* decision does not exempt countervailing duty laws from NME cases). *Georgetown*, however, makes the countervailing duty laws inapplicable to NME cases because of the difficulty of identifying and quantifying subsidies in NMEs. *Id.*; Note, *The Effect of Georgetown Steel Corp. v. United States on Nonmarket Economy Imports*, 3 AM. U.J. INT'L L. & POL'Y 65, 83 (1988) (claiming that the *Georgetown* decision left only interested parties with the remedies of antidumping laws and section 406 of the Trade Act of 1974, 19 U.S.C. § 2436 (1982), to redress NME import injuries). Section 406 allows the President to act immediately if a communist country's imports threaten an American industry. *Id.* at 87. The President invokes section 406 pending an investigation. *Id.*; Hunter & Kuhbach, *Subsidies and Countervailing Duties: Highlights Since 1984*, reprinted in 570 THE COMMERCE DEPARTMENT SPEAKS 1987 491, 495-506 (1987) (explaining the effect of *Georgetown* on the future of NME trade cases).

In hindsight, the changes in the NME law were practical as the possibility of increased trade with the USSR seems imminent. B. BUBNOV, FOREIGN TRADE WITH THE USSR, A MANAGER'S GUIDE TO RECENT REFORMS 72 (1987). Reforms within the USSR have affected the country's "external economic relations." *Id.* at 73. These reforms would include implementation of an integrated policy to deal with foreign markets and the increase in trade and production. *Id.* But cf. F. HOLZMAN, *supra* note 46, at 57 (stating that trade between the two countries may decrease despite economic changes). The United States lacks strong economic ties with the Soviet Union and, therefore, cannot strongly influence the USSR by reducing trade. *Id.* Furthermore, the unwillingness of Western Europe to apply sanctions against the USSR in accordance with the United States' efforts greatly reduces American influence in Soviet economic policy. *Id.*

53. Act of May 27, 1921, § 201, 42 Stat. 11, repealed and superceded by Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144; see Comment, *Implementation and Policy*, *supra* note 52, at 1653-54 (stating that the 1921 Act was broader in scope and "much easier to trigger" than the preceding 1915 law, which accorded damages and criminal sanctions against foreign companies that dumped).

the FMV of dumped products.⁵⁴ First, the United States Department of Treasury could base FMV on the price of goods sold in the exporters' home markets,⁵⁵ or, second, on a constructed value that the evaluator derived from the sum of the costs of materials and fabrication plus expenses and profits.⁵⁶ The 1921 Act, however, provided no basis for determining FMV of NME imports.⁵⁷

In 1968, the Treasury Department issued the first regulations specifically focusing on foreign market valuation and non-market economies.⁵⁸ Under these regulations, the Treasury Department constructed the value of allegedly dumped products to determine FMV for goods imported from NMEs.⁵⁹ The Treasury Department did so by considering the sales price of comparable products from the non-state-controlled or market economy country (surrogate)⁶⁰ in either the surrogate's home market or in other countries including the United States.⁶¹ The Trade Act of 1974 (1974 Trade Act) codified this approach.⁶²

Under the 1974 Trade Act, Congress provided a list of options for determining FMV of NME goods.⁶³ First, the ITA could base FMV of NME exports on the prices at which manufacturers in market economy countries sold similar products in their own country or other countries (the price method).⁶⁴ Alternatively, the ITA could construct FMV using a market economy by considering the cost of materials needed to

54. Cuneo & Manual, *supra* note 49, at 282-83.

55. *Id.*

56. *Id.*

57. S. Smith, *The Treatment of Products from State-Controlled Economies under the U.S. AntiDumping Law*, in ANTIDUMPING LAW: POLICY AND IMPLEMENTATION 249 (1979). The 1921 Act is a free market law preserving the free market system. *Id.* Congress did not design the law for products from non-market and state controlled economies. *Id.*

58. 19 C.F.R. § 53.5(b) (1969). The Treasury handled dumping investigations until 1980, when it transferred such investigations to the DOC. Reorg. Plan No. 3 of 1979, reprinted in U.S. CODE CONG. & ADMIN. NEWS 3396, 3399 (1979); Exec. Order No. 12,175, reprinted in U.S. CODE CONG. & ADMIN. NEWS 3366 (1979).

59. 19 C.F.R. § 53.5(b) (1969).

60. Trade Act of 1974, Pub. L. No. 93-618, § 321(a), 88 Stat. 2043 (1975) (codifying the 1968 regulations). The act does not use the word surrogate. *Id.* "Surrogate," however, refers to a market country that the ITA chooses to establish a market/non-market comparison of prices and costs of dumped goods. *Id.*

61. 19 C.F.R. § 53.5(b) (1969).

62. Trade Act of 1974, Pub. L. No. 93-618 § 321(a), 88 Stat. 2043, 2045 (1975).

63. *Id.*

64. *Id.*; see Comment, *Dumping by State-Controlled-Economy Countries: the Polish Golf Cart Cases and the New Treasury Regulations*, 128 U. PA. L. REV. 217, 224 (describing the 1974 Trade Act). The possibility of valuing NME prices by looking at similar product prices in the United States, under § 321(a)(1)(B), appears to favor a protectionist policy. *Id.* at 226-27. Use of American domestic prices as the standard of fair value effectively eliminates state-controlled import competition. *Id.* at 226.

produce the good, expenses and profits, and the cost of containers for shipment of the product to the United States (the factors of production method).⁶⁵ The Trade Agreements Act of 1979 (1979 Trade Act), which followed, changed the methodology of dumping investigations rather than the substance of the FMV provision.⁶⁶

b. The current law regarding FMV calculations

In 1988, the Omnibus Trade and Competitiveness Act amended the 1979 Trade Act.⁶⁷ The 1988 Trade Act significantly clarified the NME country definition.⁶⁸ Under the new law, a NME country is any country where market principals of supply and demand fail to operate in such a way that sales prices of products reflect the fair value of the products' worth.⁶⁹

The 1988 Trade Act also redesigned the basis for FMV calculations.⁷⁰ Congress designated that the factors of production method⁷¹ should be used to calculate FMV where feasible. Otherwise, the price method should be used.⁷² Under the factors of production method, the ITA is required to consider factors such as labor hours, raw material quantities, energy and utility consumption, and costs of capital invest-

65. *Id.* Although the act itself does not prefer the price method over the constructed value method, in practice the Treasury tended to favor the price method. *Id.*

66. Trade Agreements Act of 1979, Pub. L. No. 96-39 § 101, 93 Stat. 144 (codified at 19 U.S.C. § 1671-78 (Supp. III 1979)); see Comment, *Implementation and Policy*, *supra* note 52, at 1654 (stating that the 1979 Trade Act contributed to making the dumping law conform with agreements reached at the Tokyo Round Multilateral Trade Negotiations); TOKYO ROUND, *supra* note 5 (describing the decision reached during the multilateral trade negotiation affecting the GATT).

67. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1108, 1186-87 § 1677(18) (1988).

68. *Id.*; see Verrill, *supra* note 28, at 432 (explaining that the new definition of NME includes elements from previous laws). As criteria for NME status, the new definition includes references to the workers' ability to bargain for wages and the amount of government control over foreign investment. *Id.*

69. 19 U.S.C. § 1677(18)(A) (1988). This subsection lists the following factors to consider when determining whether a country has a NME: (1) the convertability of foreign currency; (2) the degree to which free bargaining determines wage rates; (3) the extent that other countries may invest in the state; and (4) the amount of government control over the means of production, allocation of resources, and setting of prices. *Id.*

70. 19 U.S.C. § 1677(b) (1988).

71. *Id.* The act provides, in relevant part, that the ITA will calculate the FMV based on the value of the factors of production that the country used to produce the merchandise. *Id.* The value of these factors will include amounts for general expenses, profits, and the cost of shipping containers and covers. *Id.* Under the act, the ITA may base the costs of these factors on the BIA. *Id.*

72. *Id.* The ITA will resort to the price method only if the ITA finds that information on factors is inadequate for calculating the FMV of goods. *Id.*

ments.⁷³ To value the factors the ITA must choose a surrogate country which is a significant producer of the relevant merchandise and has a market economy at a level of economic development comparable to the NME country.⁷⁴ *Urea from the USSR*⁷⁵ illustrates most profoundly the application of the Trade Act and the difficulties of establishing FMV in a NME.

II. A RECENT CASE BEFORE THE ITA CONCERNING NME DUMPING: *UREA FROM THE UNION OF SOVIET SOCIALIST REPUBLICS*

A. FACTUAL BACKGROUND

In *Urea from the USSR*, the ITA calculated FMV based on the factors of production method.⁷⁶ Although the ITA decided *Urea* before the enactment of the 1988 Trade Act, the ITA applied the law as if it was already in place.⁷⁷ The case provided the impetus for the changes in the 1988 Trade Act.⁷⁸

In *Urea*, the Ad Hoc Committee of Domestic Nitrogen Producers (petitioners) filed a petition with the ITA on July 16, 1986.⁷⁹ The petitioners contended that the major Soviet urea producer was selling urea at LTFV⁸⁰ and that the imported products caused or threatened to cause material injury to the United States fertilizer industry.⁸¹ After

73. *Id.* § 1667.

74. *Id.* Although the act does not refer to the market economy as a surrogate, it is in essence a surrogate. See *supra* note 60 and accompanying text (describing the concept of surrogate). The ITA values the factors by looking at the costs of factors in the chosen surrogate market. 19 U.S.C. § 1667(c) (4) (1988).

75. 52 Fed. Reg. 19,557 (1987).

76. *Id.*

77. *Id.* The ITA decided *Urea* when the applicable law preferred the price method for FMV calculations. *Id.* Nevertheless, the ITA exercised its discretion and applied the factors of production method. *Id.*

78. Verrill, *supra* note 28, at 434. The *Urea* decision played an important role in Congress' decision to make the factors of production method the primary method for determining FMV in a NME antidumping investigation where adequate factor data is available. *Id.*

79. *Urea*, 52 Fed. Reg. 124 (1987) (preliminary determination).

80. *Id.*, Petition on Behalf of the Ad Hoc Committee of Domestic Nitrogen Producers 2 (July 16, 1986) (Inv. No. A-461-601) [hereinafter Petition]. This case was brought in conjunction with urea cases from the German Democratic Republic and Romania. *Id.* This article will only discuss the USSR case.

81. *Id.* at 41. The petitioner stated that the American urea industry suffered material injury as shown by a substantial decrease in domestic manufacturing, employment, sales, and profitability. *Id.* Petitioner demonstrated that, in 1985 and 1986, domestic production of urea declined while American consumption of urea rose. *Id.* Further, domestic capacity for production decreased 90.7% in the first half of 1985 and 67.3% in the second half. *Id.* at 43. Meanwhile, domestic urea inventories accumulated, evi-

reviewing the petition, the ITA found that it contained sufficient information for the ITA to proceed with an antidumping investigation.⁸² The ITA formally began the investigation on August 5, 1986.⁸³ Following publication of the initiation proceedings, the ITA presented eight questionnaires to United States importers who acted on behalf of the Soviet government.⁸⁴ Although the ITA extended the questionnaire response period pursuant to the regulations, the ITA received only one response from the major Soviet exporter, Sojuzpromexport.⁸⁵ The ITA limited the scope of the investigation to solid urea and did not investigate other fertilizer solutions.⁸⁶

B. FAIR VALUE COMPARISON

In its final determination, the ITA made a LTFV calculation by comparing the United States price to the FMV of Soviet urea.⁸⁷ In making this calculation, the ITA chose the United Kingdom (UK) as the appropriate surrogate country.⁸⁸ The ITA selected the UK because both the UK and the USSR produce urea in significant quantities.⁸⁹

dencing a lack of sales and decrease in profits. *Id.* at 45-46. The petitioner also showed that Soviet producers' predatory pricing of urea imports lowered prices of urea within the United States. *Id.*

82. 52 Fed. Reg. 124 (1987).

83. 51 Fed. Reg. 28,857 (initiation 1986).

84. 52 Fed. Reg. 125 (1987); see Letter and Questionnaire from ITA to Sojuzpromexport (Oct. 10, 1986) (instructing Soviet exporters to answer and return the questionnaires within thirty-seven days). The questionnaires contained questions about corporate structure, distribution systems, accounting practices, merchandise, quantity and value of sales, documentation, sales to the United States, charges, adjustments for discounts and rebates, exporters' sales price, transactions, commission offsets, and terms of payment. *Id.*

85. 52 Fed. Reg. 125 (1987).

86. *Id.*

87. 52 Fed. Reg. 19,557 (1987). In making its calculation, the ITA looked at all sales of urea from January 1 to June 30, 1986. *Id.*

88. 52 Fed. Reg. 125 (1987). The ITA concluded, after investigating several urea producing countries, that the UK was the best surrogate choice. *Id.*; see Memorandum from Francis McFaul to Michael Coursey (Oct. 3, 1986) (concerning urea from the USSR). The letter described the ITA's choice of the UK as the proper surrogate. *Id.* The ITA based its decision on World Bank and CIA statistics. *Id.* The ITA chose the UK because, like the USSR, the UK produced natural gas, a major component in urea manufacturing. *Id.* If the UK had not cooperated with the investigation, the ITA would have chosen New Zealand, with Italy and then France as alternative surrogates. *Id.* at 2.

89. 52 Fed. Reg. 19,560 (1987). Respondent objected to the ITA's choice of the UK as a surrogate claiming that lesser developed countries would provide a better surrogate comparison to the USSR. *Id.* Respondent urged the ITA to choose a surrogate from such countries as Egypt, Indonesia, Kuwait, Malaysia, Mexico, Qatar, Saudi Arabia, Trinidad and Tobago, the United Arab Emirates, and Venezuela. *Id.* Respondent based its suggestion on raw material supplies, income comparability, and the size of the agricultural sectors of these urea producing and consuming nations. *Id.*

Furthermore, the ITA sent a questionnaire and obtained a response from a major British producer of urea, Imperial Chemical Industries.⁹⁰

After designating the UK as the surrogate country, the ITA focused its investigation on two major exporters of urea to the United States: Philipp Brothers and Sojuzpromexport.⁹¹ To make the LTFV comparison, the ITA analyzed data from sales of these two exporters and made separate LTFV calculations for each company.⁹² The ITA chose to make separate LTFV calculations based on arguments from Philipp Brothers in its post-hearing brief.⁹³ Philipp Brothers asserted that the ITA should calculate separate LTFV comparisons for trading companies who know their products are destined for the United States and for manufacturers who lack this knowledge.⁹⁴ In its final determination, the agency established individual dumping margins for Sojuzpromexport and Philipp Brothers.⁹⁵

C. UNITED STATES PRICE

In its LTFV analysis, the ITA made several preliminary considerations for determining the United States price and FMV.⁹⁶ To determine the United States price, the ITA used both the exporter's sales price and the purchase price.⁹⁷ The ITA used the exporter's sales price

90. 52 Fed. Reg. 125 (1987); see Memorandum to File, Urea from the USSR (Dec. 12, 1986) (statement of Gilbert Kaplan, Deputy Assistant Secretary for the United States Import Administration) (suggesting the United Kingdom as a proper surrogate because it was willing to cooperate).

91. 52 Fed. Reg. 19,557 (1987).

92. *Id.*

93. *Id.*

94. Brief for Respondent, Philipp Brothers LTD and Philipp Brothers Inc. at 1-2 (submitted May 8, 1987) (Inv. No. A-461-601) [hereinafter Brief for Philipp Brothers]. The respondent claimed that the *Roller Chain* determination holds that when manufacturers and trading companies are unrelated, the ITA should make separate dumping calculations. *Id.*; cf. *Roller Chain Other than Bicycle from Japan: Preliminary Results of Administrative Review of Antidumping Finding and Tentative Determination to Revoke in Part*, 48 Fed. Reg. 39,673 (1983). The respondent asserted that the ITA cannot compare United States price and cost of acquisition when calculating fair value for trading companies existing independently of the manufacturers. *Id.* at 4. Philipp Brothers, however, urged the ITA to use the trading company's price to third countries instead of the manufacturer's home market price. *Id.* at 3.

95. 52 Fed. Reg. 19,557 (1987).

96. *Id.*

97. *Id.* In its preliminary determination, the ITA used only the purchase price paid for solid urea from Sojuzpromexport as the United States price. 52 Fed. Reg. at 125 (1987). The ITA further modified the United States price by calculating the purchase price based on the price to unrelated purchasers and deducting charges for inland freight, brokerage and loading. *Id.* The ITA based these deductions on prices found in a non-state-controlled economy. *Id.*

for sales from Sojuzpromexport to Philipp Brothers.⁹⁸ The ITA did so because it determined that the Soviet urea producers did not know that the urea's final destination was the United States.⁹⁹ After applying the exporter's sales calculation for determining the United States price the ITA further factored in relevant deductions.¹⁰⁰

D. FMV

1. *The USSR as a NME Country*

Before proceeding with a FMV calculation, the ITA determines whether a country's economy is state-controlled and, thus, whether the NME law is applicable.¹⁰¹ In *Urea*, the ITA first determined that the USSR had a state controlled economy and then applied the NME antidumping law.¹⁰²

2. *The FMV Calculation*

In *Urea*, the ITA attempted to use the price method for computing FMV.¹⁰³ To implement this method, the ITA sought price data from Imperial Chemical Industries,¹⁰⁴ by sending a questionnaire¹⁰⁵ and vis-

98. 52 Fed. Reg. 19,557 (1987). See *supra* note 41 (explaining the definitional differences between exporters' sales price and purchase price when calculating the United States price).

99. 52 Fed. Reg. 19,560 (1987). The ITA believed Sojuzpromexport was unaware of its product's destination because the contract between Philipp Brothers and Sojuzpromexport listed several possible destinations for Soviet urea. *Id.* In addition, Philipp Brothers, in its general practice, sells urea to importers other than those in the United States. *Id.*

100. *Id.* at 19,557. Exporter price deductions included port handling and loading charges, credit, and other expenses involved in selling products in the United States. *Id.* The ITA estimated port handling expenses by examining costs of port handling to surrogates. *Id.*; see *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 29,434, 29,435 (1984) (holding that the ITA should base the port handling on costs for these expenses in market economies).

101. See *supra* note 9 (defining NME).

102. 52 Fed. Reg. 19,557 (1987). Compare *Urea* 52 Fed. Reg. 19,557 (1987) (offering a brief discussion of the USSR's NME status) with *Final Determination of Sales at Less than Fair Value; Certain Headwear from the People's Republic of China*, 54 Fed. Reg. 11,983 (1989) [hereinafter *Headwear*] (containing a lengthy discussion of whether the ITA should consider China a NME for purposes of this investigation). The respondent in *Headwear* urged the ITA to use the law applicable to market economies in its investigation of the Chinese headwear industry's alleged dumping. *Id.* at 11,987. The ITA held that China's headwear industry was state-controlled, although it recognized that the degree of government control over inputs and outputs provided a "mixed picture" of state controlled and market forces. *Id.* at 11,984.

103. 52 Fed. Reg. 19,557 (1987); see *supra* note 60-64 and accompanying text (describing the price method).

104. 52 Fed. Reg. 19,557 (1987).

105. *Id.*

iting the firm's English plants.¹⁰⁶ The ITA, however, failed to gather enough information to calculate FMV based on UK prices.¹⁰⁷ Because of the deficient data, the ITA decided instead to employ the factors of production method.¹⁰⁸ Although the ITA chose the factors of production method, it still lacked data on Soviet factors and employed the best information available calculation.¹⁰⁹

Despite the ITA's preference for the factors of production method in both its preliminary and final determinations, the petitioners and respondents debated the method's applicability, revealing the benefits and costs of both the factors of production and the price method.¹¹⁰ The petitioner argued that the agency should determine FMV based on factors of production,¹¹¹ urging the ITA to evaluate the factors by invoking the BIA rule.¹¹² Petitioner favored the BIA calculation because of the ITA's failure to verify important Soviet cost and price information.¹¹³

106. 52 Fed. Reg. 125 (1987).

107. *Id.*

108. 52 Fed. Reg. 19,557 (1987); *see supra* note 71 and accompanying text (describing the use of the factors of production method).

109. *See supra* notes 65 and 74 and accompanying text (restating a description of the factor method); *supra* note 31 and accompanying text (describing when the ITA invokes the BIA rule). The Code does not define BIA, but states that it includes such information supporting a petition or provided by an interested party to the action. 19 C.F.R. § 353.37 (1989); Post hearing Brief for Petitioner (submitted May 8, 1987) (Inv. No. A-461-601) 25-36 [hereinafter Brief for Petitioner] (complaining in *Urea* that the ITA could not fully verify price data despite a verification that took place in Moscow during the end of March 1987). Petitioner contended that the Soviet's inability to report actual quantities, credit expenses, and amount of total sales made it paramount for the ITA to invoke the BIA rule for determining the United States price. *Id.* In *Urea*, the ITA noted that it relied on public sources for the UK values of gas, electricity and labor. 52 Fed. Reg. 19,558 (1987). When these public sources were unavailable, the ITA relied on information provided in the petition. *Id.*

110. 52 Fed. Reg. 19,561 (1987).

111. Brief for Petitioner, *supra* note 109, at 13; *see* Anti-Dumping Hearing on *Urea* from the USSR (Inv. No. A-461-601) (Apr. 28, 1987) 62 (statement of Valerie Slater, attorney for petitioner) (warning the ITA to use the factors of production method separate and apart from the constructed values method). If the two methods were used together, the ITA would need to adjust factors depreciation in the UK, and would need to adjust the UK prices for the Soviet Union experience. *Id.* at 62-63. This is essentially "mixing your apples and oranges." *Id.*

112. Brief for Petitioner, *supra* note 109, at 5-6. Petitioner contends that the ITA failed to verify the following factor data provided by the Soviet producer: (1) actual usage (Soviet respondent provided data only on standard usage); (2) information provided on financial statements or plant construction dates; (3) labor statistics concerning the number of workers and indirect labor costs; (4) information on depreciation rates. *Id.*

113. *Id.* at 11. Petitioner pointed out that the ITA received incorrect information and in some important instances received no data at all on the costs of Soviet factors. *Id.* When the Soviet producers failed to provide the needed information, the petitioner provided supplementary data in its brief to determine the costs of factors. *Id.* at

In opposition to the petitioner's argument, the respondents urged the ITA to use the price method because the ITA had used that method in previous cases.¹¹⁴ Respondent Philipp Brothers requested that the ITA base the FMV on the average prices of a sample of market imports.¹¹⁵ Respondent noted, however, that if the ITA chose to use the factors of production method, the calculation should reflect market conditions and not rely on the BIA rule¹¹⁶ because this method would overstate the factors costs.¹¹⁷

Despite respondent's arguments, the ITA chose to use the factors of production method for several reasons.¹¹⁸ First, the ITA claimed that the price method was inappropriate because it appeared that the large amount of urea exported from NME companies had affected urea prices throughout the world.¹¹⁹ Using the price method would reflect NME prices and not the sought after market influenced prices. Second, if the ITA used the price method, it would have difficulty isolating prices to provide a useful non-market/market comparison for this time period.¹²⁰ Third, the ITA decided against the price method because, in

Appendix.

For example, during the verification of the Cherkassy plant in the Ukraine, the ITA failed to uncover information on plant costs and financing. FACTORS OF PRODUCTION VERIFICATION REPORTS, CHERKASSY IN THE UKRAINE 5 (1987). Although the plant's clerk prepares annual and monthly financial reports for the fertilizer ministry, the company refused to allow ITA officials to review these reports. *Id.* at 6. The ITA did verify information on raw materials used in production, labor rates, number of plant facilities, and production. *Id.* The ITA received similar results from the verification at the Odessa plant, which is also located in the Ukraine. FACTORS OF PRODUCTION VERIFICATION REPORTS, ODESSA 7 (1987).

114. Brief for Philipp Brothers, *supra* note 94, at 9-10; Post Hearing Brief for Respondents Ameropa A.G., Cargill Inc., Conagra Fertilizer Co., Contichem, Inc., Helm Fertilizer Corporation, Kairchem International Corp., Mitsui & Co., Inc. and Occidental Chemical Agricultural Products Inc. 2-13 (submitted May 8, 1987).

115. Brief of Philipp Brothers, *supra* note 94, at 9-10. The law firm of Steptoe & Johnson submitted a paper describing the market basket method. *Id.*

116. *Id.* at 9-11. The DOC's use of the BIA rule for valuing factors of production imposes a punitive levy upon Soviet importers (or exporters) because these importers could not know what standard the ITA would apply when annually reviewing companies for dumping violations. *Id.* at 10. The importers do not know the standard because cost information is extremely sensitive, and the BIA changes radically from one case to another. *Id.*

117. *Id.* at 11. Respondent claimed that petitioner's assertion that the Soviets are high cost producers is unfounded. *Id.* The Soviet Union's large supply of natural gas and superior plant conditions reveal that the Soviets can effectively produce urea at lower costs than countries lacking such raw material supplies. *Id.*

118. 52 Fed. Reg. 19,557 (1987).

119. *Id.* at 19,559. In response to one of petitioner's comments urging the use of the factor method, the ITA stated that producers' inability to separate pricing and supply decisions from market demand conditions has contributed to the distortion of worldwide urea prices. *Id.*

120. *Id.* There were not enough foreign suppliers available to provide needed price

this case, the Soviet and UK producers provided insufficient price data.¹²¹

Once the ITA chose the factors of production method over the price method, it still had problems determining the basis for the factors.¹²² To begin its analysis, the ITA determined that the USSR produced urea in thirty-six plants.¹²³ From among these thirty-six plants, the ITA obtained sample data from six, and verified the data from two of the six plants.¹²⁴ To make its determination, the ITA then averaged the costs of factors from these two plants.¹²⁵

Despite an attempt to further verify this data, the ITA had to use the BIA to value certain factors.¹²⁶ The ITA noted that it could not quantify or appropriately value certain factors from the UK's information.¹²⁷ In these instances, the ITA used the most reliable objective information contained in the investigation record, depending heavily on data from the petitioner's brief.¹²⁸ After calculating FMV, the ITA confirmed its preliminary determination decision, holding that no critical circumstances existed.¹²⁹ Although the ITA found some increase in sales, it attributed this to seasonal trends in urea imports and not to massive dumping.¹³⁰

III. ANALYSIS

A. PROBLEMS

Urea illustrates the complexity of applying the 1988 Trade Act to NME cases. For each calculation, the ITA made a variety of choices that significantly affected the final determination of whether dumping

data because such suppliers imported amounts too small for investigation purposes or were already under an antidumping investigation, or the governments of these foreign countries provided subsidies to the industries in question. *Id.*

121. *Id.*

122. *Id.* at 19,558.

123. *Id.* at 19,557-58.

124. *Id.* at 19,558.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* For example, the ITA derived the Soviet factors from supplemental reports on factor costs provided in the petitioner's brief. *Id.* In its final determination, the agency revealed the extent that it relied on outside sources to obtain values for certain factors. *Id.* Outside reports included the *Fertilizer Manual*, *Energy Prices and Taxes*, and *Hourly Compensation Costs for Production Workers in Chemicals and Allied Products Manufacturing*. *Id.* In addition, the ITA determined the value of natural gas from Gasoline NV, a gas board for the Netherlands, and the UK labor rates from public source material. *Id.*

129. *Id.*

130. *Id.*

had occurred.¹³¹ As a consequence of the numerous decisions made during the application of the factors of production method, the ITA failed to provide other NME companies with guidelines for predicting when the agency will impose dumping duties in other cases.¹³² The ITA's failure to supply a set standard makes it virtually impossible for a NME company to determine if its actions will constitute a violation until well after the ITA has begun an investigation of the company.¹³³ Thus, like prior antidumping legislation, the 1988 Trade Act fails to provide predictability in highly technical and important dumping determinations.¹³⁴

Despite the new law, the ITA still must determine whether a country has a NME, whether the price or factors of production method should apply, whether a surrogate is properly chosen, and whether it can verify the data it gathers to complete its investigation.¹³⁵ Not surprisingly, results from such a system will remain unpredictable unless Congress legislates further changes in the law.¹³⁶

1. LTFV Comparison

In *Urea*, the inherent complications of applying the antidumping law are revealed most profoundly in the ITA's LTFV comparison and FMV

131. See *supra* notes 93, 97, 108, 118, 124 and accompanying text (deciphering the choices the ITA made for each leg of the calculations).

132. See *infra* note 133 (illustrating why the *Urea* case provides no application in other proceedings). Arguments against the price method are equally applicable here. Verrill, *supra* note 28, at 427 (emphasizing that prior to the 1988 Trade Act, critics of the price method felt that use of prices did not provide predictability in similar cases); Chen, *supra* note 28, at 736 (explaining that the price method made it difficult for exporters to value their exports so as to avoid dumping duties and difficult for importers to predict whether to add additional costs to the goods as duties).

133. See S. REP., *supra* note 13, at 108 (stating that often the DOC cannot find surrogate producers who will cooperate with investigations). The DOC employs alternative methods when a surrogate is uncooperative. *Id.* Therefore, the ITA may estimate varying dumping margins for similar NME cases based on the choice of surrogate methodology used in a specific case. *Id.* Hence, a NME cannot plan its production activities to avoid possible dumping duties. *Id.*

134. Pub. L. No. 100-418, 102 Stat. 1107, § 1316 (1988). The new law changed the previous act by preferring the factors of production method over the price method. *Id.* The act did not abolish the price method, but simply made it the second available choice after the factors method for calculating FMV. H.R. CONF. REP. NO. 576, 100th Cong. 1st Sess. 590, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1548, 1623-24 (1988). The Conferees intended the ITA to value factors of non-subsidized prices, yet they did not expect the ITA to extensively investigate whether the government dumped or subsidized such prices. *Id.* Instead, the Conferees expected the DOC to use information that was generally available. *Id.*

135. See *supra* note 131 (listing the choices made by the ITA in *Urea*).

136. But see Verrill, *supra* note 28, at 436 (concluding, in reference to the 1988 Trade Act, that "a relatively predictable methodology has emerged").

calculations. When calculating LTFV, the ITA first decides whether to undertake separate calculations for unrelated exporters and trading companies.¹³⁷ In *Urea*, the ITA chose to calculate two LTFV comparisons because the two exporters, Sojuzpromexport and Philipp Brothers, operated independently of one another.¹³⁸ The ITA's decision, however, has no value as a precedent because the ITA fails to assert that dividing unrelated purchasers from trading companies will be the rule in similar cases.¹³⁹

In its LTFV comparison, the ITA also faces the question of a country's status as a market or nonmarket economy.¹⁴⁰ In *Urea*, the ITA decided with limited discussion that the USSR had a NME for purposes of the investigation.¹⁴¹ Yet, unlike *Urea*, the NME decision may present complex problems.¹⁴² The ITA sometimes encounters an exporting country in which the economy intermingles market forces with non-market forces.¹⁴³ Some countries with socialist and communist governments do not have pure NMEs.¹⁴⁴ Instead, certain sectors of the economy are rigidly controlled by the state, while other sectors of the economy operate with substantial free market influences.¹⁴⁵ As several

137. See *supra* note 94 and accompanying text (espousing the importance of undertaking separate less than fair value calculations for unrelated exporting entities).

138. *Id.*

139. See Brief for Philipp Brothers, *supra* note 94, at 6-7 (urging the ITA to undertake separate LTFV calculations for Philipp Brothers as a predictable method). The Respondent emphasized this approach because it applies "normal dumping procedures whenever possible." *Id.* at 7.

140. See GLOSSARY, *supra* note 37. To begin a LTFV comparison, in deciding if a country has a NME, the ITA checks whether a country's government controls the economy and looks for the existence or non-existence of free market forces of supply and demand. *Id.*

141. 52 Fed. Reg. 19,557 (1987); see Petition, *supra* note 80, at 2 (stating that the USSR has a non-market economy because production, investment, and pricing plans in the USSR are not subject to commercial considerations (profits) as found in market economies). The petitioner most appropriately questioned why the ITA makes separate calculations for NME and market economies. *Id.* Petitioner claimed that when NME producers sell products in the free market countries, their presence can destroy the normal functioning of the marketplace. *Id.*

142. Petition, *supra* note 80, at 2.

143. See *Headwear*, *supra* note 102, at 11,983 (using China's headwear industry to illustrate an economic sector containing both market and non-market forces). While the ITA may generally consider China a NME country, market forces do exist in its headwear sector. *Id.* Although the state outwardly controls the Chinese headwear industry, the following market forces are also at work: the producers' ability to purchase cotton cloth outside the government plan; the employees' status based on profits; producers' and manufacturers' ability to negotiate prices with suppliers; and the choice of where to export headwear products and at what prices. *Id.*

144. See Chen, *supra* note 28, at 742 (claiming that no country has either an exclusively free market or NME). Countries differ as to which and how many economic sectors the government controls. *Id.*

145. See U.S. DEP'T OF COMMERCE, STUDY OF CHINA'S NEW MARKET ORIENTA-

of the traditional NME countries undergo economic reform, the inadequacy of the United States trade law for dealing with this phenomenon becomes even more apparent.¹⁴⁶ Additionally, the law does not account for the increasing capitalistic factors found in certain economies.¹⁴⁷

2. Complexities in Determining FMV

When calculating the FMV of a NME product, the ITA faces two issues: first, whether the ITA has chosen a proper surrogate, and, second, whether the ITA can verify enough information in time for the investigation.¹⁴⁸ The choice of the surrogate producer is extremely important because, whether utilizing the price or factors of production method, the ITA uses a surrogate country to value monetary terms.¹⁴⁹ The problem with the surrogate rule is finding the surrogate and, once found, compelling that country to provide needed data.¹⁵⁰ For example, in *Urea*, the ITA chose the UK as the proper surrogate to the USSR.¹⁵¹ The briefs of the two respondents and the ITA's own file, suggest that the ITA could easily have chosen surrogate countries other

TION & U.S. TRADE LAWS, Aug. 1989 [hereinafter NEW MARKET ORIENTATION] (describing the reforms in China's economy affecting the application of the 1988 Trade Act to companies existing in these newly oriented NMEs). The problem with these newly evolving NMEs is articulated best as follows: "an economy may be found to be more market oriented under some of the factors and somewhat or not at all market oriented under others, depending on the product being investigated." *Id.* at 6. Because of this phenomenon, the ITA must apply antidumping laws on an individual case basis, "lending uncertainty to the administrative process." *Id.*

146. See Verrill, *supra* note 28, at 432 (revealing that the new Trade Act's definition of a NME is no longer "facially ideological" so as to include only Communist countries). Arguably, countries such as China and Hungary can object to the ITA classifying them as having NMEs. *Id.*

147. See NEW MARKET ORIENTATION, *supra* note 145, at 158 (revealing that China is not the only country which poses problems for the ITA). The ITA must apply its law to deal effectively with other countries which although traditionally classified as NME countries, now due to economic reform, have economies in transition. *Id.* The problem with the present law is that it only deals with non-market and market economies without coping with the "gray" area for economies that are moving from a non-market orientation to greater market orientation. *Id.*

148. See S. REP., *supra* note 13, at 106 (discussing complications in choosing surrogates and verifying data).

149. See *supra* note 60 (describing a surrogate).

150. See *supra* note 133 and accompanying text (describing the unpredictability of the surrogate mechanism within the antidumping laws); see also Alfred, *When is China Paraguay? An Examination of the Application of the AntiDumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79, 81 (1987) (denouncing the legal fiction the ITA creates through its use of a surrogate, whereby the ITA analogizes one country to another for purposes of the foreign market value calculation).

151. 52 Fed. Reg. 19,557-58 (1987).

than the UK.¹⁵²

The problem of verification is linked to the ITA's dependence on a surrogate country.¹⁵³ Even when a surrogate agrees to answer a questionnaire, the ITA must determine if the responses are correct and based on similar accounting standards, such as American price or cost data.¹⁵⁴ Further, the ITA must work within the time constraints of the law.¹⁵⁵ If a surrogate country fails to provide essential data on time, the ITA turns to alternative means of valuing prices or costs.¹⁵⁶ Yet, even if exporters provide all necessary data, the ITA still chooses which data it will ultimately verify, making calculations even less predictable.¹⁵⁷

Urea provides an excellent example of this randomness.¹⁵⁸ In *Urea*, despite the ITA's choice of the factors of production methodology and the UK as a surrogate, the ITA still had difficulty obtaining and verifying essential data from the USSR to calculate the cost of factors.¹⁵⁹ When valuing factors, the ITA used information from a multitude of sources.¹⁶⁰ Although the law requires the ITA to use the BIA in these instances, this does not necessarily mean the ITA possesses the strongest information for its calculations.¹⁶¹

152. See *supra* note 88 and accompanying text (assessing the ITA's choice of the UK as the proper surrogate).

153. See *supra* notes 28-32 and accompanying text (considering the problems the ITA faces at verification).

154. S. REP., *supra* note 13, at 107-08. The proposed changes in the trade law avoided use of the price method due to problems of predicting, gathering, and verifying this information. *Id.*

155. 19 C.F.R. § 353.36 (1989).

156. *Id.* § 353.37.

157. *Id.* § 353.36(a)(2). If the ITA determines that the amount of verifiable data is too large, the agency may choose a smaller sample to verify. *Id.*

158. 52 Fed. Reg. 19,557 (1987).

159. *Id.* at 19,558. The ITA could not quantify certain factors and could not appropriately value other factors from the UK data. *Id.* at 19,557. In these cases, the ITA used the most reliable objective information in the records of the investigation. *Id.*; see *contra* *Comprehensive Trade Legislation: Hearings on H.R. 3 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 893 (1987) [hereinafter *Hearings*] (statement of Ad Hoc Comm. Domestic Nitrogen Producers and Independent Refiners Coalitions on Proposed Trade Law Reform) (referring to the use of the factors of production method in *Urea*). Implementation of the factors of production method in *Urea* reveals that, although the Soviets do not use capital, materials, and labor efficiently, they nevertheless sell urea in American markets at prices significantly below their own production costs. *Id.* The main advantage of the factors of production method is that it recognizes the NME's actual production efficiencies but values them against verifiable market prices. *Id.*

160. 52 Fed. Reg. 19,558 (1987). The ITA's supplementary sources included public reports on fertilizer costs, information on the Netherlands' tariffs, public sources for UK labor rates, and an ITA-generated ratio for overhead factory costs. *Id.*

161. 19 C.F.R. § 353.37 (1989).

B. AMERICAN PROPOSALS

Over the years, critics of the United States antidumping law have offered several proposals for calculating the FMV of NME products.¹⁶² Before passage of the 1988 Trade Act, Congress evaluated several of these proposals.¹⁶³ After careful analysis of the problem, Congress adopted the factors of production method in an attempt to solve the difficult evaluation problems inherent in trade with NMEs.¹⁶⁴ The following NME proposals provided alternatives to the present Act.

1. Artificial Price Benchmark Proposals

Two proposals urged the continuing use of the price method for calculating FMV.¹⁶⁵ Advocates of these proposals suggested, in different variations, establishing an artificial benchmark price of a particular good against which to compare NME prices.¹⁶⁶ First, the Reagan Administration suggested using the lowest import price of goods received from market economies as the benchmark price.¹⁶⁷ The second variation proposed the use of the average import price of the highest volume market economy importer.¹⁶⁸ Prices below this artificial benchmark would result in the imposition of dumping duties against the NME company.¹⁶⁹

The question inherent in these two suggestions is whether it is fair to compare NME import prices with either the average or lowest import prices of market economy goods.¹⁷⁰ The use of an artificial benchmark

162. See generally *Hearings*, *supra* note 159 (providing statements criticizing prior legislation).

163. *Id.*

164. See *supra* notes 65 and 73-74 and accompanying text (describing the factors methodology).

165. See *Hearings*, *supra* note 159, at 648, 656 (1987) (statements of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration and Alan F. Holmer, General Counsel, United States Trade Representative's Office).

166. *Id.* at 649.

167. *Id.* at 653. The Reagan Administration supported this proposal first because it seemed more fair and more reliable than constructing the prices or factors of goods. *Id.* Second, the Administration also wished to avoid intimidating NME companies into pulling their goods out of American markets. A. WOODS & B. SMART, ADMINISTRATION COMMENTS ON PROPOSED ANTIDUMPING AND COUNTERVAILING DUTY AMENDMENTS 2 (1987). Third, the Administration favored using the lowest import prices as the benchmark because NME goods generally receive lower prices than market economy goods sold in the American economy. Verrill, *supra* note 28, at 430-31.

168. S. REP. *supra* note 13, at 106.

169. *Id.*

170. *Hearings*, *supra* note 159, at 893. One criticism of the Administration's method is that it would allow NME producers to sell at the benchmark prices even without proving that the NME company was the lowest producer. *Id.* Likewise, the

price fails to reflect real costs within the NME.¹⁷¹ Further, benchmark prices do not abolish the problem of establishing a FMV through the use of a surrogate.¹⁷²

2. Market Disruption

The market disruption system allows the president, prior to a full dumping investigation, to restrict imports from communist countries that threaten to injure domestic industries.¹⁷³ The president may use this provision whenever communist countries export large quantities of goods to the United States that disrupt the United States' market.¹⁷⁴

Prior to passage of the 1988 Trade Act, commentators suggested changes to the market disruption provision, including a proposal to make the provision the sole law applicable to NME companies that dump their products.¹⁷⁵ Critics of this proposal, however, argued that it would severely discourage NME exports to the United States.¹⁷⁶ The 1988 Trade Act, therefore, did not enact the market disruption rule as the sole provision to apply against NMEs.¹⁷⁷

3. Creating a New Category for Planned Market Economies

Another proposal suggested changing the law to account for the differences inherent in various NME countries.¹⁷⁸ This proposal took into

average import benchmark would provide a "safe harbor" for NME companies who do not produce goods at average prices. *Id.* The proposed price benchmark approach is arbitrary and potentially unfair to nonmarket economies. *Id.* (statement of Aerospace Industries Association of America).

171. *Id.*

172. 52 Fed. Reg. 19,557-58 (1987); *see supra* note 89 and accompanying text (describing the problem with using a surrogate in *Urea*).

173. *See supra* note 52 (describing the § 406 market disruption provision).

174. *Id.*

175. *Hearings, supra* note 159.

176. *Id.*

177. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1241, § 1411 (amending 19 U.S.C. § 2436 (1988)).

178. *See supra* notes 142-47 and accompanying text (describing the difficulties of applying one NME law to different NME countries). This proposal attempted to distinguish between countries with economies as divergent as China and the Soviet Union. *Id.*; *see Hearings, supra* note 159, at 612 (statement of Edward Furia, Committee for Fair Trade with China) (stating that reforms in China's economy since 1979 have created market forces within the state controlled economy to such an extent that the ITA should not "rigidly" label China a NME along with such countries as Cuba, North Korea, and the USSR). Furia states that it is unfair to group China along with these other NME countries because China's economy shows signs of change. *Id.* The current law, which does not account for China's new economic status, appears unfair because when China penetrates United States' markets, it immediately faces dumping duties. *Id.*; *see U.S. DEP'T OF COMMERCE, ANTIDUMPING AND COUNTERVAILING DUTY CASES*

account the fact that some expanding NME countries have market and nonmarket forces within the same economic system.¹⁷⁹ The Committee for Fair Trade with China (CFTC) proposed the establishment of a new provision to deal with NMEs that are in transition.¹⁸⁰ The CFTC proposed the addition of another category to dumping legislation for planned market economies such as China.¹⁸¹ Under the CFTC proposal, the ITA would calculate FMV of goods from a planned economy based on costs of factors that have market components.¹⁸² To value factors where the production reveals non-market forces, the ITA would use a representative world price.¹⁸³

The planned economy proposal, therefore, suggests that the ITA needs to create new categories of NMEs to account for the varying stages of NME evolution.¹⁸⁴ This creates an administrative problem because the ITA will continually need to create new categories for countries at different stages of free market development.¹⁸⁵ Furthermore, the CFTC proposal requires Congress to delve into a complex analysis to segregate market forces from non-market forces within a particular economy.¹⁸⁶

ACTIVE SINCE 1/1/80 (1989) (acknowledging the fact that the ITA investigated seventeen dumping cases against China between 1980 and 1989). Within this same time period, the ITA investigations for other NME countries were not nearly so numerous. *Id.*; see Han Xu, *U.S. Laws Threaten the Future of China—U.S. Trade*, CHINESE BUS. REV. 6 (Nov.-Dec. 1986) (arguing that United States trade laws unfairly apply to China); *Competitive Challenges Facing United States Industry Before the Committee on Commerce, Science and Transportation*, 100th Cong., 123 (1987) (statement of Milledge A. Hart III) (testifying that the current law hurts China's ability to trade with the United States).

179. See note 143 and accompanying text (discussing this dual phenomenon found in the Chinese economy).

180. *Hearings*, *supra* note 159, at 615-24.

181. *Id.* at 638. The CFTC defines a planned market economy as:

[A]ny foreign country whose government has been determined by the administering authority to have announced and to be implementing economic reforms of a kind that, when fully implemented, will have brought the foreign country to a state where its cost and pricing structures are primarily influenced by market principles so that sales of merchandise in such country will reflect the fair value of the merchandise.

Id.

182. *Id.* at 635.

183. *Id.* The proposal suggests that the ITA will divide elements of a good into portions whose production involves market forces and portions whose production involves non-market forces. *Id.* at 617.

184. *Id.* at 617-18.

185. See *id.* at 664-65 (statement of Kaplan) (testifying that the CFTC approach is unworkable as a trade law). The CFTC plan requests that Congress legislate to push China toward trade reform rather than provide relief for American industry. *Id.* at 665. This is not the goal of antidumping legislation. *Id.*; see generally *supra* notes 5-7 and accompanying text (enunciating the purpose of antidumping laws).

186. *Id.*

IV. RECOMMENDATIONS

An analysis of the application in *Urea* of the NME methodology, adopted in the 1988 Trade Act, reveals that the present law has failed to simplify the procedures for determining when a NME company dumps its products in the United States.¹⁸⁷ This section provides recommendations for improvements in the trade law, through an incorporation of previous proposals, to make the law more predictable and easier to apply.¹⁸⁸ The following recommendations present a wide range of proposals; it may not be beneficial to implement all such changes at one time.

Congress should first severely limit the number of variables within a FMV calculation.¹⁸⁹ The factors of production method in the Trade Act has merit, however, and should remain intact, but stricter rules should govern the ITA's application of the law.¹⁹⁰ For example, to make the law more predictable for NME companies, Congress should establish a set list matching market economy countries with NME countries for the ITA to use when valuing factors of production.¹⁹¹ By establishing such a list, a NME company could estimate factor values to determine if it had violated American trade law prior to exportation.¹⁹²

To further increase the law's predictability, Congress must standardize the BIA rule.¹⁹³ Instead of allowing the ITA to employ any data it sees fit to use,¹⁹⁴ Congress should require the ITA to use only data with a high probability of verification. In addition, data acquired under the BIA rule should consist of information that appears to roughly correspond with data needed for valuing factors. At present, when the ITA has insufficient data to calculate FMV, it first uses the data provided by the petitioner.¹⁹⁵ The automatic use of petitioner's information creates a bias in the calculation. Instead, the ITA should develop a procedure wherein disinterested parties obtain data on costs of factors and

187. See *supra* notes 148-57 and accompanying text (reviewing the law's problems as applied in *Urea*).

188. See *supra* notes 165-186 and accompanying text (listing these proposals).

189. See *supra* note 131 (listing the many choices the ITA must make in a NME dumping decision as exemplified in *Urea*).

190. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(b)(18), 102 Stat. 1107, 4143 (1988).

191. See *supra* note 133 (suggesting that a law based on surrogates fails for lack of predictability).

192. See *id.* (explaining why the law's predictability would help NME companies).

193. 19 C.F.R. § 353.37 (1989).

194. See *supra* note 31 and accompanying text (setting forth the BIA rule).

195. 19 C.F.R. § 353.37 (1989).

comparable surrogates.

In order to simplify the ITA's application of the law, Congress could sharpen the verification procedures.¹⁹⁶ Sanctions or penalties might compel NME manufacturers to turn data over to the ITA more readily. The ITA's use of treaties or other international agreements would also be helpful. Such treaties would establish the principle that a country's trade with the United States is conditioned on the country's compliance with providing the ITA with the requested data. Congress could then penalize the NMEs with more severe dumping duties if these countries fail to provide needed data.¹⁹⁷

Finally, a better NME dumping law must account for the changes in evolving NME countries.¹⁹⁸ The CFTC introduces a valid concern about using the same law to apply to all NMEs.¹⁹⁹ Further, economic and political changes in the Soviet Union and Eastern Bloc countries indicate that the governments of these countries may reduce control over their respective economies.²⁰⁰ When such developments occur, the law should account for the market and non-market forces within a single economic sector.²⁰¹ To solve these problems, Congress should be prepared to create new categories of laws to apply to countries in which a mix of market and non-market forces exist.²⁰²

Congress could also change the law so as to investigate dumping on a

196. *Id.* § 353.36.

197. *See supra* note 2 (describing the calculation of dumping duties under present law).

198. *See* note 181 (discussing the proposal for creating a planned market economy).

199. *Id.*

200. M. BOGUSLAVSKY & P. SMIRNOV, *THE REORGANIZATION OF SOVIET FOREIGN TRADE* vii (S. Legitsky ed. 1989). Due to the Soviet policy of *perestroika*, the government has reorganized foreign trade firms. *Id.* These firms have more "managerial autonomy," self-financing and full cost accountability. *Id.* Although central government supervision over the foreign trade organizations still exists, there is no direct government interference in day to day operations. *Id.* at x. According to Soviet analysts of the *perestroika* legislation, this means that in the conduct of foreign trade operations, commercial considerations and economic principles customarily applicable in international markets must at all times guide the foreign trade organizations. *Id.* at ix; *see also* NEW MARKET ORIENTATION, *supra* note 145, at 2 (noting that since 1979, China's economic reform policies have pushed the economy towards a greater market orientation). Because of political developments in China, however, the effect and scope of economic reforms remain uncertain. *Id.* at 5.

201. *See also* NEW MARKET ORIENTATION, *supra* note 145, at 160 (revealing that despite China's "clouded" future, eventually new economic reforms in China and other traditionally NMEs will lead these countries to be classified as economies in transition). As a result of reforms in these countries, specific economic sectors may become non-state controlled at varying rates. *Id.* at 159.

202. *See supra* notes 178-86 and accompanying text (proposing a new category—"planned economies"—for the antidumping laws).

sectoral basis.²⁰³ To use this sectoral method, the DOC would apply the dumping law for either market economies or NMEs depending on the capitalistic influences within a particular good's production sector and regardless of whether the country's economy is generally thought of as a NME.²⁰⁴ The sectoral method, however, may be premature because the effect of trade reforms within traditional NMEs is still uncertain.²⁰⁵

CONCLUSION

Calculating dumping margins for cases involving NME countries is especially difficult because of the variables inherent in such a calculation. It is disappointing that the 1988 Trade Act did little to remedy the existing problems with the law. The Act only provided a definition for NMEs and switched the preference for calculating the FMV from the price method to the factors of production method.

Congress should work to simplify and clarify the NME law so that companies involved in a dumping investigation can understand and predict the fate of their exports. With the emergence of Eastern Europe's new political status, the need for such legislation may prove to be of paramount importance. In the future, Congress must confront the NME issue and legislate changes that have real meaning.

203. NEW MARKET ORIENTATION, *supra* note 145, at 159. A proposed change in the antidumping law would account for "Bubbles of Capitalism" found in specific production industries of the NME. *Id.* at 158-59. When the DOC finds that an industry or part of an industry being investigated is controlled by substantial market influences it could apply a sectoral analysis. *Id.* at 159. Under sectoral analysis, when the DOC finds a sector of the NME which is not state controlled, it will base foreign market value "on prices/costs in that country" and will not use the factors of production method. *Id.* As of yet, the DOC has not determined whether this sectoral analysis is legal. *Id.* A problem arises when a given sector has inputs governed by capitalistic influences, such as the price of material inputs, but has other inputs, such as labor, which are still controlled by the state. *Id.* at 160.

204. *Id.*

205. *See id.* at 173 (proposing that Congress should wait to amend the antidumping laws to account for sectoral analysis while reforms in NME's "are still in their early stages").