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TREATMENT OF DUMPED IMPORTS FROM NONMARKET ECONOMY COUNTRIES

JOSEPH P. HORNYAK*

With the decline of communism in Eastern Europe, the United States treatment of imports from Eastern European countries becomes increasingly significant. The success of the new governments in these countries depends, in large part, on their ability to revive their countries' dormant economies. Access to the U.S. markets will play an important role in these emerging economies. Currently, most communist countries are classified as "nonmarket economy countries" by the Department of Commerce and many of their imports to the U.S. are subject to U.S. anti-dumping duties.¹ The duties effectively raise the U.S. price for the dumped merchandise because the duties are an additional cost the importer must pay to bring the merchandise to market.²

Import duties are especially harmful to goods imported from communist countries. Often, these goods must be priced below market levels because there is a perception on the part of American consumers that goods from communist countries are of inferior quality.³ Moreover, some consumers choose not to purchase goods from communist countries for political reasons.⁴ In addition, the Court of Appeals for the Federal Circuit has recently held that the countervailing duty laws do not apply to nonmarket economy nations.⁵ Thus, the antidumping

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1. The Department of Commerce has determined that the following countries have nonmarket economies: Czechoslovakia, East Germany, Hungary, Poland, the People's Republic of China, Romania and the Union of the Soviet Socialist Republics. See generally, *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 549 (Ct. Int'l Trade 1985).

2. In the case of menthol from the People's Republic of China, imports fell "precipitously" after the initial determination of a 13% dumping margin. See Alford, *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, 88 (1987) [hereinafter Alford].

3. *Id.* at 92-93.

4. *Id.*

5. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). Generally, the countervailing duty laws are designed to offset any unfair competitive advantage foreign producers attain from certain types of governmental subsidies. *Georgetown Steel*, 801 F.2d at 1315. In *Georgetown Steel*, the court noted that unfair competition which necessitates countervailing duty laws does not exist in nonmarket economies due to state controls. *Id.* at 1315. According to the court, Congress created a special method for determining whether imports from nonmarket economies were being

law is now the principal means for combatting unfair trade practices from such nations.

Part I of this paper provides a brief overview of the U.S. antidumping law. In Part II, the paper discusses the practical effect of determining that a country has a nonmarket economy or state-controlled economy. Part II also comments on the fairness of enforcement of the antidumping law against these countries. In Part III, the paper focuses on the statutory and regulatory provisions that define a nonmarket economy country and discusses the U.S. Department of Commerce's ("DOC") treatment of past attempts at reform in state-controlled economies. Part III also comments on the present state of reforms in communist countries as they relate to nonmarket economy status under the antidumping law.

I. OVERVIEW OF THE ANTIDUMPING LAWS

A. Background

The antidumping law is provided by Title I of the Trade Agreements Act of 1979,⁶ which implements the Tokyo Round Multilateral Trade agreements on dumping.⁷ It supersedes the Antidumping Act of 1921.⁸ The antidumping law is intended to protect U.S. industry from unfair price discrimination in the form of predatory pricing by foreign producers.⁹ Generally, it imposes an antidumping duty on foreign merchandise sold in the U.S. at "less than fair value" if, by reason of those sales, a U.S. industry is "materially injured" or "threatened with material injury."¹⁰ The duty is "the amount by which the foreign market

dumped while establishing no such method with respect to the countervailing duty laws. *Id.* at 1316. Ultimately, the court deferred to Congress' conclusion that the only way to protect "the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law." *Id.* at 1318.

6. Pub. L. No. 96-39, §§ 101-107, 93 Stat. 144 (1979), *as amended by* the Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 602-605, 609, 612, 98 Stat. 2948 (1984) *and by* the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§1316, 1317, 1327, 1328, 1330, 102 Stat. 1107 (1988) (codified at 19 U.S.C. §§ 1673 - 1677k).

7. See S. REP. NO. 249, 96th Cong., 1st Sess. 2, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 387. Congress clearly provided that the Tokyo Round accords on dumping are to be disregarded to the extent that they are inconsistent with the U.S. antidumping statute. See 19 U.S.C. § 2504(a).

8. Ch. 14, 42 Stat. 11 (1921), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193.

9. *U.S.X. Corp. v. United States*, 682 F. Supp. 60, 65 (Ct. Int'l Trade 1988).

10. 19 U.S.C. §1673 (1988).

value exceeds the United States price for the merchandise.”¹¹ After an initial determination by the DOC, the importer must post a bond equal to the dumping margin. Once the DOC issues a final order, the importer must deposit cash with the U.S. Customs Service.

The U.S. producer usually initiates an investigation by filing a petition with the administering authority.¹² There are two basic elements of an antidumping investigation: (1) a determination by the International Trade Commission (“ITC”) that certain dumped imports cause or threaten to cause “material injury to a U.S. industry,” and (2) a determination by the DOC that certain “foreign merchandise is being, or is likely to be sold in the United States at less than its fair value”¹³

B. Material Injury to a U.S. Industry

In making a determination that there is “material injury” to a U.S. industry, the ITC is required to consider: (1) the volume of imports of the merchandise which is the subject of the investigation; (2) the effect of imports of that merchandise on prices in the United States for like products; and (3) the impact of imports of such merchandise on domestic producers of like products, limited to production operations within the United States.¹⁴

The ITC may also consider any economic factors it deems relevant.¹⁵ The analysis for material injury is the same for nonmarket economies as it is for market economies. Thus, a less than fair value determination alone does not result in the assessment of a duty.¹⁶ In addition, since volume is an important consideration, a nonmarket economy country must export sufficient quantities of a particular prod-

11. *Id.*

12. 19 U.S.C. §1673a(b)(1) (1988).

13. 19 U.S.C. § 1673 (1988).

14. 19 U.S.C. § 1677(7)(B)(i) (1988).

15. 19 U.S.C. § 1677(7)(B)(ii) (1988).

16. An example of this is the case of menthol imported from the People’s Republic of China (PRC). After an extensive investigation of the PRC’s economy, the DOC determined that menthol from the PRC was being sold in the U.S. at less than fair value. The DOC ordered the U.S. Customs Service to suspend liquidation of Chinese menthol pending a final determination. After the Chinese importers posted a bond equal to 13.5% of the product’s freight-on-board value, as required by the law; the ITC found that these imports had neither caused nor threatened material injury to a U.S. industry. Thus, the DOC terminated its investigation. *See Menthol from the People’s Republic of China: Determination of the Commission in Investigation No. 731-TA-28 (final)*, USITC Publication 1151, June, 1981.

uct before it will be assessed an antidumping duty.¹⁷

C. *Less Than Fair Value*

Less than fair value is the difference between the U.S. price and the "fair value" of the merchandise. "Fair value" is essentially the same as the "foreign market value" ("FMV").¹⁸ The statute and regulations provide three methods of determining the foreign market value in a market economy country. First, the preferred FMV is the price charged by the foreign producer in its domestic market (the "home market"). Second, where there are insufficient sales of such merchandise in the home market to form an adequate basis for comparison,¹⁹ FMV is the price at which the goods are sold for export to a third country or countries.²⁰ Ideally, the third country or countries selected for comparison should have markets organized similarly to the U.S. market. There should also be a sufficient volume of exports to the third country.²¹ Finally, FMV may be the constructed value based on prices of inputs, including labor and materials, general expenses and usual profit.²²

The U.S. price is the price of the merchandise to the U.S. buyer and is calculated by one of two methods: (1) the purchase price or (2) the exporter's sales price. The purchase price is the price at which the merchandise is purchased or agreed to be purchased before importing into the United States.²³ This is the price between the producer and

17. For purposes of determining material injury to a U.S. industry, the ITC is required to assess cumulatively the price and volume effects of imports from other countries subject to antidumping and countervailing duty investigations. *Bingham & Taylor Division, VA Industries v. United States*, 815 F.2d 1482, 1485 (Fed. Cir. 1987). Therefore, imports from nonmarket economy nations may be grouped with similar imports from other nations for purposes of determining injury to a U.S. industry.

18. 19 C.F.R. § 353.42(a) (1990). The terms "fair value" and "foreign market value" have essentially the same meaning under the statutory scheme. The reason for the difference is that "fair value" is used during the investigation as an estimate of foreign market value. Congress felt that this term would provide the DOC with greater flexibility in administering the law. H.R. REP. NO. 96-137, 96th Cong., 1st Sess. 59 (1979). Once the DOC makes a final determination, the foreign market value is used to calculate the actual amount of the antidumping duty.

19. Sales in the home market are normally considered inadequate to form a basis for comparison if home market sales are less than five percent of the amount sold to third countries. 19 C.F.R. § 353.48(a) (1990).

20. *Id.*

21. 19 C.F.R. § 353.49(b) (1990).

22. The amount added for profit is the amount "usually reflected in sales of the same class or kind as the merchandise . . ." 19 C.F.R. § 353.50(a)(2) (1990).

23. 19 U.S.C. § 1677a(b) (1988); 19 C.F.R. § 353.41(b) (1990).

reseller or unrelated middleman in the home market prior to export to the U.S. The DOC prefers to use the purchase price as the U.S. price because there are fewer adjustments when comparing it to the FMV. It is used whenever the merchandise has been sold to an unrelated U.S. buyer. When a buyer who is unrelated to the producer sells merchandise,²⁴ the exporter's sale price is used. This is the price at which the merchandise is sold in the U.S.

Both the FMV and the U.S. price are subject to certain adjustments "in an attempt to reconstruct the price at a specific 'common' point in the chain of commerce, so that the prices can be fairly compared on an equivalent basis."²⁵ Generally, the U.S. price is increased by packing costs,²⁶ import duties of the home country not paid or rebated, taxes not paid because of exporting where such taxes would have been payable if sold at home, and U.S. countervailing duties.²⁷ The U.S. price is reduced by U.S. import duties, freight incurred in importing and any export taxes.²⁸ There are additional deductions from the U.S. price if the exporter's sales price is used because it is further along in the chain of distribution than the purchase price. These additional deductions include commissions and expenses for selling the merchandise in the U.S. as well as any increased value from manufacturing and assembly in the U.S. after importing.²⁹ The purpose of these adjustments is to eliminate any other factors that would account for the difference between the U.S. price and the FMV. In short, the statute and regulations employ various complex and often cumbersome methods of calculating a dumping margin based on the difference between the U.S. price and the price at which the merchandise should have been sold if it were not being dumped.

II. NONMARKET ECONOMY DETERMINATION

A. *Effect on Antidumping Duty*

Generally, a determination that merchandise is produced in a

24. This includes agents of the exporter, persons controlled either directly or indirectly by the exporter and persons who directly or indirectly control the exporter. 19 U.S.C. § 1677(13) (1988).

25. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571-72 (Fed. Cir. 1983).

26. Packing costs are also added to FMV so if identical to the U.S. price, no adjustments are made. *See, e.g.*, 19 C.F.R. § 353.46(a)(i) (1990).

27. 19 C.F.R. § 353.41(d)(1) (1990).

28. *Id.* at § 353.41(d)(2).

29. *Id.* at § 353.41(e).

nonmarket economy country affects the method used to calculate foreign market value. As explained above, the general rule for market economy nations is that the DOC prefers to use the price in the home market to determine whether sales are being made at less than fair value. In the case of a nonmarket economy, the DOC presumes the home market price to be a price fixed by the government and not subject to market forces. Consequently, home market prices in a nonmarket economy country are never used to calculate dumping margins.

Prior to the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Act"),³⁰ if a country were determined to be a state controlled economy, foreign market value was calculated in one of two ways. The preferred method of determining FMV in these cases was on the basis of prices of the same or similar merchandise produced in a non-state-controlled economy country in its home market or for export to other countries.³¹ For the purpose of comparison, the DOC would attempt to select a non-state-controlled economy country at a stage of economic development comparable to that of a state-controlled economy country under investigation.³² If there were insufficient sales in a non-state-controlled economy or if there were insufficient data available concerning such sales, the constructed value method would be used.³³

Section 1316 of the 1988 Act significantly changes the method used to calculate FMV for imports from nonmarket economies. If the merchandise under investigation is exported from a nonmarket economy country and available information does not permit calculation of FMV based on home market values, which is almost always the case, FMV is calculated based on the "factors of production utilized in producing the merchandise."³⁴ The factors of production are the hours of labor required, the quantities of raw materials employed, the amounts of energy and other utilities consumed, and representative capital cost, including depreciation.³⁵ Included in the calculation is an amount for general expenses and profit plus the cost of containers, coverings, and

30. Pub. L. No. 100-418, 102 Stat. 1107, 1186-1189 (1988).

31. 19 U.S.C. § 1677b(c)(1) (1930) (*amended by* the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(a)); 19 C.F.R. § 353.52(a) (1990).

32. 19 C.F.R. § 353.52(b)(1) (1990).

33. *See Unrefined Montan Wax From East Germany*, 46 Fed. Reg. 38,555 (1981).

34. 19 U.S.C. § 1677b(c)(1)(B) (1988).

35. *Id.* at § 1677b(c)(3).

other expenses as used in the calculation of a constructed value.³⁶ In valuing the factors of production, the DOC is to use, "to the extent possible," the prices or costs of factors of production in market economy countries that are at a stage of economic development comparable to the nonmarket economy country and who are "significant producers of comparable merchandise."³⁷ If the DOC cannot acquire sufficient information to value the merchandise using the factors of production method, FMV is calculated on the basis of prices in other countries (including the United States) of similar merchandise produced in market economy countries at a level of economic development comparable to that of the country under investigation.³⁸

The difference between the "factors of production" method in the 1988 Act and the "constructed value" method of section 1677(b)(e) is not altogether clear. Both methods attempt to calculate fair market value without regard to actual prices charged for the merchandise under investigation. In other words, both methods attempt to calculate the price that should or would have been charged if the producer had not engaged in dumping. Even prior to the 1988 Act, the DOC would construct FMV based on the "factors of production." For instance, in *Chloropicrin from the People's Republic of China*,³⁹ the DOC constructed the value of chloropicrin from China based on the prices of the "factors of production" in India. The DOC valued the raw materials, labor, energy and factory overhead of several chemical companies in India. In short, the "factors of production" method set forth in the 1988 Act appears to be a codification of existing practice. The significance of the 1988 Act's changes is that the factors of production method is not the preferred method of calculating FMV for imports from nonmarket economy countries. The factors of production method is particularly harmful to nonmarket economy producers because it eliminates any comparative advantage producers may have over competing producers in a market economy nation. The dumping margin is inflated because the inputs, or factors of production, are valued at prices in a market economy country where they are presumably used more efficiently. This point is best illustrated by the use of labor. Under

36. *Id.* at § 1677b(c)(1).

37. *Id.* at § 1677b(d). In valuing the factors of production, the DOC uses information generally available at the time rather than using information obtained through a new investigation. The DOC should not use prices which it suspects may be dumped or subsidized prices. *See*, H. CONF. REP. NO. 576, 100th Cong., 2d Sess. 590-91 (1988), *reprinted in* 1988 U.S. CODE & ADMIN. NEWS 1612, 1623-1624.

38. 19 U.S.C. § 1677b(c)(2) (1988).

39. 49 Fed. Reg. 5,982 (1984).

the factors of production method, the DOC calculates the number of hours of labor used in producing the merchandise by the nonmarket economy producer and then multiplies that number by a wage rate from a market economy country. Since nonmarket economy countries are often technologically inferior, production is more labor intensive. Thus, it usually takes more hours to produce a single unit in a nonmarket economy country than in a market economy. However, because of organized unions and more advanced job skills, wage rates tend to be higher in market economy countries. Under the factors of production method, the value of labor to the producer is artificially inflated. For instance, in *Urea from the Socialist Republic of Romania*,⁴⁰ the DOC used the wage rates in the United Kingdom to construct the price of Urea from Romania. This effectively negated the Romanian producer's advantage from the use of cheaper labor, without considering the fact that Romanian workers are probably less efficient than those in the U.K.

The comparative advantage of a nonmarket economy producer may also be lost in the selection of a surrogate country. In *Shop Towels of Cotton from the People's Republic of China*,⁴¹ the DOC used Indonesian wage rates in valuing the factors of production of shop towels from the PRC. However, the World Bank has calculated Indonesia's 1983 GNP to be twice that of China's. As one commentator noted:

Although both [Indonesia and China] are developing countries, a difference of nearly 100 percent in this basic economic indicator is likely to reflect a major difference in wages. By using the labor cost of a surrogate country with twice its per capita GNP, China's comparative advantage in labor costs is simply dissipated.⁴²

In this case, the use of the Indonesian values resulted in a 38.8 percent dumping margin.⁴³

The valuation of energy also illustrates the comparative advantage problem of the factors of production method. If machinery and equipment in nonmarket economy countries are generally less efficient, they will consume more energy than comparable machinery and equipment

40. 52 Fed. Reg. 19,553 (1987).

41. 48 Fed. Reg. 12,764 (1983).

42. Neeley, *Nonmarket Economy Import Regulation: From Bad to Worse*, 20 LAW & POL'Y INT'L BUS. 529, 544 (1989) [hereinafter Neeley].

43. 48 Fed. Reg. 37,055 (1983).

in market economy countries. Nevertheless, the producers will be deemed to have paid the energy prices in market economy countries. Even if a different type of energy is used in production, the DOC will base the price of this input on an amount of another type of energy source with the same calorific value.⁴⁴ Thus, producers in nonmarket economy countries cannot benefit from any advantage they may have in terms of domestic energy supplies. For example, in *Urea from the U.S.S.R.*,⁴⁵ the DOC based the factors of production for natural gas in the U.S.S.R. on prices in the United Kingdom.⁴⁶ Using the U.K.'s price for natural gas effectively offset the U.S.S.R.'s advantage due to its vast reserves of natural gas.

Another problem with the factors of production method is allocating the factors of production to the merchandise under investigation. For example, in *Chemical Products Corp. v. United States*,⁴⁷ a foreign producer in the PRC manufactured two products at the same plant, HSG and barium carbonate. Only barium carbonate was under investigation. The DOC apportioned the factors of production between barium carbonate and HSG based on the relative quantities produced at the plant. The court held that DOC was required to ascertain the market value of HSG and allocate the factors of production "to reflect the differences in the value of the two products."⁴⁸ The court noted that "[i]t is not reasonable to allocate factors of production between barium carbonate and HSG on a quantity basis if the value of one product is significantly greater than the other."⁴⁹ *Chemical Products* illustrates

44. See *Chemical Products Corp. v. United States*, 650 F. Supp. 178, 181-2 (Ct. Int'l Trade 1986).

45. 52 Fed. Reg. 19,557 (1987).

46. *Id.* at 19,558. U.K. natural gas prices at the time of the investigation were linked to a rate called the "F price." This is a price set by the gas board in the Netherlands and category "F" is the established price for large industrial users throughout Europe. The DOC stated that the "F price represents the most accurate, verifiable gas price for the fertilizer sector in the U.K." *Id.*

47. 645 F. Supp. 289 (Ct. Int'l Trade 1986).

48. *Id.* at 297.

49. In the case of barium carbonate, the DOC could have used the home market prices in Mexico as a basis for FMV. In fact, the DOC obtained home market price data and other information required to calculate FMV. However, the DOC ultimately determined "Mexico not to be a suitable surrogate . . . because it is not at a stage of economic development comparable to the PRC." 49 Fed.Reg. 33,913, 33,915 (1984). The court quoted a DOC economist who stated, "Mexico's per capita GNP is more than seven times that to China's (US \$2,090 v. \$290). 64% of Mexico's labor force is engaged in the industrial and service sectors of the economy, with only 36% still in agriculture. By contrast, 71% of China's labor force is employed in the agricultural sector, with only 29% in industry and service. 67% of Mexico's total population resides

an inherent problem in the factors of production method in its application of market-oriented decision making principles to nonmarket countries. The court assumed that the managers of the plant in question would allocate the factors of production to the more valuable product. However, without a profit incentive, the managers would not have considered the relative market values of the two products in allocating resources.

The statute attempts to minimize the harsh effects of the factors of production method by requiring the DOC to select a surrogate country "at a level of economic development" comparable to that of the nonmarket economy country for purposes of valuing the factors.⁵⁰ However, the 1988 Act also requires the DOC to use a "significant producer" of comparable merchandise.⁵¹ Thus, smaller nonmarket economy countries may still be deemed to have paid the higher wage rates of more advanced producers. In short, use of the factors of production method results in a higher FMV and consequently a higher dumping margin. This may imply that Congress designed the antidumping law to effectively punish communist countries for their lack of adherence to market principles.⁵² As one commentator stated, the present law creates "situations in which the United States, as a market economy nation, seeks to remedy a trade problem with a nonmarket economy country by imposing a nonmarket solution, even though the regulated behavior may be common to both market and nonmarket nations."⁵³ Using the factors of production method, countries whose goods threaten U.S. industries must pay sizable dumping duties. Consequently, such products are less likely to enter U.S. markets.⁵⁴

in urban areas, while only 13% of China's total population does." 645 F. Supp. at 292-3. It is not clear what any of this has to do with the price of barium carbonate in China.

50. 19 U.S.C. § 1677b(c)(4)(A) (1988).

51. 19 U.S.C. § 1677b(c)(4)(B) (1988).

52. At least one court has recognized that the antidumping statute generally is intended to be remedial and not punitive. *Badger-Powhatan, Div. of Faggie International v. U.S.*, 608 F. Supp. 653 (Ct. Int'l Trade 1985). This official "remedial" purpose was probably necessary for diplomatic and political reasons. However, politically, Congress could probably afford to design the antidumping statute to be punitive with respect to communist countries.

53. Alford, *supra* note 2, at 99-100 (1987).

54. In the Chinese menthol case, after the initial determination of a dumping margin equal to 13.5% of the f.o.b. value, Chinese exports of natural menthol to the U.S. fell "precipitously." See Alford, *supra* note 2, at 88.

B. Fairness Considerations

Whether or not Congress intended to punish communist countries by limiting their ability to compete effectively in the U.S. market, the antidumping law is often criticized as being protectionist and unfair. One analyst observed that the 1988 amendments to the antidumping laws "have not helped clarify or otherwise define what could be objectively called unfair. And they have further tilted the playing field against respondents and foreign exporters under the guise of leveling that playing field."⁵⁵ But before passing judgment on the fairness of the antidumping law, it is necessary to examine the economic phenomenon of dumping. As applied to nonmarket economy nations, antidumping law combats what could objectively be called unfair trade.

"Dumping" has been described as "the sale of commodities in a foreign market at a price which is lower than the price or value of comparable commodities in the country of their origin."⁵⁶ The purpose of the antidumping law is to protect U.S. industries from this unfair price discrimination which is manifested in the form of predatory pricing by foreign producers.⁵⁷

Predatory pricing and price discrimination are generally considered to be "unfair trade practices." Effective enforcement of the U.S. antitrust laws could eliminate these practices.⁵⁸ Nevertheless, domestic industries have been unsuccessful in establishing predatory pricing and price discrimination by foreign producers under the antitrust laws. Their failure in this regard is primarily due to the absence of any predatory intent on the part of the foreign producers.⁵⁹ There is usually no intent to dump because, as most commentators agree, evidence of predatory dumping is indicative of irrational economic behavior. Such a scheme presupposes that the producer is willing to incur substantial

55. Cameron & Crawford, *An Overview of the Antidumping and Countervailing Duty Amendments: A New Protectionism?*, 20 LAW & POL'Y INT'L BUS. 471, 499 (1989). The authors refer to the 1988 Act as a "special interest" statute because it is "a response to the particular circumstances arising in individual cases." They conclude that the Act, by codifying existing practice, may "facilitate protectionism." *Id.* at 471-72.

56. *Zenith Radio Corp. v. Matsushita Electronic Industrial Co.*, 494 F. Supp. 1190, 1194 (E.D.Pa. 1980).

57. *U.S.X. Corp. v. U.S.*, 682 F. Supp. 60, 65 (Ct. Int'l Trade 1988).

58. The antitrust laws have jurisdiction over foreign conduct that has an effect on commerce within the U.S. 15 U.S.C. § 1; *U.S. v. Aluminum Co. of America (ALCOA)*, 148 F.2d 416, 444 (2d Cir. 1945).

59. *See, e.g., Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

losses by selling its product below the market level. The predator hopes to eventually drive its competition out of the market thus realizing a monopoly with artificially inflated prices. The predator must also take into account that its monopoly may be short-lived since new competitors may be quick to enter the market after the monopoly is established. For such scheme to be rational, the "future flow of profits, appropriately discounted, must then exceed the present size of the losses."⁶⁰ One Treasury Department official with considerable antidumping experience stated that he has never come into contact with any case which he would categorize as predatory dumping.⁶¹ Further, in *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, the Supreme Court argued that

predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-detering

. . .⁶²

In short, profit-seeking foreign producers rarely, if ever, intentionally dump their products in the American markets. It is perhaps for this reason that, neither the 1921 Act nor its 1979 replacement require proof of predatory intent. In addition, although "meeting competition" is considered a defense to predatory pricing under the antitrust laws, no such defense exists under the antidumping laws. Imports can be assessed an antidumping duty even if their U.S. price is consistent with the price charged by domestic producers for similar merchandise.⁶³ Without the intent requirement or a meeting competition defense, enforcement of the antidumping law is merely an exercise in arithmetic. There is no way a foreign producer can undersell a U.S. producer in the domestic market unless the volume of its exports is so small that it

60. R. BORK, *THE ANTITRUST PARADOX* 145 (1978).

61. Marks, *United States Antidumping Laws: A Government Overview*, 43 *ANTI-TRUST L.J.* 580, 581 (1974).

62. *Id.* at 594-95. The Supreme Court reversed the Third Circuit Court of Appeals' grant of summary judgment of the Plaintiffs-U.S. manufacturers' antitrust claims. The plaintiffs also alleged violation of the Antidumping Act of 1916, which also required proof of predatory intent. The antidumping claims were dismissed by the District Court. 494 F. Supp. 1190 (E.D. Pa. 1980).

63. Of course, if the U.S. price for foreign goods were higher than the price charged by domestic producers, it is doubtful that there would be the required "material injury" to a U.S. industry.

cannot "materially injure" the U.S. industry. Thus, the antidumping law, despite its official purpose, effectively insulates entrenched U.S. industries from foreign competition. But when the antidumping law is applied to imports from nonmarket economy countries, the antidumping law combats actual "unfair trade practices." While it may be irrational economic behavior for a profit-motivated producer to engage in dumping, such conduct may not be irrational for the producer in a state-controlled economy. Because the economic deterrent to predatory pricing schemes does not exist in most state-controlled economy countries, the above analysis of predatory pricing would not apply to these producers. The state-controlled producer can set a price for goods shipped to the U.S. at a number lower than the fair market value, without actually intending to engage in predatory dumping. Conversely, the market economy producer must price the product high enough to realize a profit. Thus, with respect to these nonmarket economies, the antidumping law protects U.S. industries from having to compete with foreign producers who are not expected to price their products high enough to realize a profit. In this way, the antidumping law actually does combat unfair trade.

This is not to suggest that state control gives foreign producers an advantage over U.S. producers. Overall, state controlled economies are rarely successful in foreign markets. However, if the nation with a state-controlled economy concentrated its resources on producing a particular product, it could cause injury to U.S. producers in the same industry even if the U.S. producers were operating at maximum efficiency. This is one way in which state-controlled economies can distort international markets. Thus, while most advocates of free trade and "laissez faire" policies, including former President Ronald Reagan,⁶⁴ generally oppose aggressive enforcement of the antidumping laws, these free traders should applaud efforts to apply the antidumping laws to imports from countries where most of the production decisions are, in fact, controlled by the state.

III. DETERMINING A NONMARKET ECONOMY COUNTRY

In the previous section, this paper concluded that antidumping duties on imports from nonmarket economy countries will often be higher using the "factors of production" method of calculating foreign market value than using the home market price method. In addition, there may be strong policy reasons for enforcing the antidumping laws against

64. Remarks at a White House Meeting with Business and Trade Leaders, PUB. PAPERS 1985 Vol. II, 1127 (September 23, 1985).

nonmarket economy nations. Thus, determining whether a country is a nonmarket economy is crucial.

This section will focus on the statutory and regulatory provisions that guide the DOC in determining that a country is a nonmarket economy. It will then review cases where the DOC made such a determination to explore the economic conditions that existed in certain sectors of the economy as opposed to the national economy. Finally, it will consider the DOC's likely treatment of reforms in communist countries as they affect nonmarket economy status under the antidumping law.

A. Statutory Provisions

Section 1316 of the 1988 Act replaced the term "state controlled economy" with the term "nonmarket economy." This section provides:

The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.⁶⁵

It is not clear whether these changes will have any substantive effect on the operation of the statute. In fact, the term "state-controlled economy" was never defined in either the previous statute or the regulations. The 1988 Act, however, also set forth the factors to be considered in determining that a country is a nonmarket economy:

- (i) the extent to which the currency of the foreign country is convertible into the currency of other countries,
- (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,
- (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,
- (iv) the extent of government ownership or control of the means of production,
- (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
- (vi) such other factors as the administering authority considers

65. 19 U.S.C. § 1677(18) (1988).

appropriate.⁶⁶

While these enumerated factors provide some guidance, as a practical matter, they are simply a codification of past DOC practice. Courts have noted that the DOC has broad authority in administering the antidumping law.⁶⁷ Moreover, because the determination that a country is a nonmarket economy is not subject to judicial review,⁶⁸ the DOC has much discretion in making such a determination.⁶⁹

B. Nonmarket Economy Status Determination by Sectoral or National Basis?

The DOC's determination is somewhat easier in the case of a hard-line communist country such as the U.S.S.R., where the central government makes all major production and investment decisions and sets wages and prices.⁷⁰ Other communist countries have allowed some free-market type reforms in sectors of the economy. Importers of goods from these reformist countries may argue that, while the economy is generally state controlled, the relevant sector of the economy operates on market principles. Thus, for purposes of calculating the antidumping duty, the country should be considered a market economy.

Neither the statute nor the regulations state whether the DOC must analyze only the relevant sector of the economy or the national economy to classify a nation as a nonmarket economy. In *Carbon Steel Plate from Romania*,⁷¹ the DOC determined that the Romanian steel market was a product of a state-controlled economy, but did not base its decision solely on an analysis of the steel market. Instead, it based its decision on the following factors:

(1) Central governmental authorities make all major production and investment decisions. Central authorities also fix prices and control the activities of enterprises.

(2) Wages are determined by law. All wages and wage classifications, including those for the steel industry, are clearly

66. 19 U.S.C. § 1677(18)(B) (1988).

67. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983).

68. H. CONF. REP. NO. 576, 100th Cong., 2d Sess. 591 (1988), *reprinted in* 1988 U.S. CODE & ADMIN. NEWS, 1612, 1624.

69. Once such a determination is made, it remains in effect until revoked. 19 U.S.C. § 1677(18)(C)(i) (1988).

70. *See Potassium Chloride From the U.S.S.R.*, 50 Fed. Reg. 4,562 (1985); *Carbon Steel Plate From Romania*, 47 Fed. Reg. 35,666 (1982).

71. 47 Fed. Reg. 35,666 (1982).

spelled out with ceilings for each occupation.

(3) All major investment decisions, including those in the steel industry, are made by central governmental authorities and are the basis for implementing projects drawn up at the ministry level.⁷²

Based on the cited factors, it appears that the DOC conducted a broad analysis of the Romanian economy rather than limiting its focus to the steel industry. Similarly, in *Chloropicrin from the Peoples Republic of China*,⁷³ the DOC stated:

Our determination is not that the PRC chloropicrin is totally state-controlled. Rather, we have determined that the economy of the PRC is state-controlled to an extent that sales of such or similar merchandise in the PRC do not permit a determination of foreign market value.⁷⁴

In *Natural Menthol from the People's Republic of China*,⁷⁵ the respondent presented "persuasive evidence" that the purchases and sales of natural menthol in the PRC were based on market principles. The DOC still found it to be a state-controlled economy because two of the major factors in the production of natural menthol, land and labor, were subject to extensive state regulation. The DOC also noted that general state planning controls over other agricultural products limited the autonomy and distorted the incentives of producers.⁷⁶ Since all sectors of the economy are inter-dependant, analysis of the economy in general seems appropriate. But on the other side of this debate, it has been argued that:

in a nonmarket economy certain products could be sold free of direct state control (as menthol appeared to be in China), or could be sold in regions (such as China's special economic zones) in which the state has indicated it will allow "market principles" to play a major role in economic decisions.⁷⁷

Nevertheless, communist countries who want to rid themselves of the

72. *Id.* at 35,667 (1982).

73. 49 Fed. Reg. 5,982 (1984).

74. *Id.* at 5,985 (1984).

75. 46 Fed. Reg. 3,258 (1981).

76. *Id.* at 3,259 (1981).

77. Alford, *supra* note 2, at 90.

effects of nonmarket economy status for purposes of U.S. antidumping duties will have to go further in reforming their entire economies. Limited reforms in particular sectors of the economy will not suffice.

C. *Attempted Reforms in Communist Countries*

Reforms instituted in communist countries thus far have received little approval from the DOC. Perhaps the least state controlled of the communist countries is Hungary, which instituted market-oriented reforms in the 1970s. However, in 1981, the DOC determined that the Hungarian economy was state-controlled based on a number of factors.⁷⁸ The DOC found that the Hungarian government applied a marginal tax rate ranging from 50% to 100% for wage increases above the government's acceptable level. Further, the Hungarian currency was not convertible with "hard currency" countries and the government had the power to appoint high level enterprise management. The DOC concluded that market-oriented reforms instituted in the Hungarian economy in 1978 were "uncertain."

Another example of an attempt to introduce market principles to a sector of a state-controlled economy is the People's Republic of China (PRC). Since 1984, the PRC has instituted extensive economic reforms in rural-based industrial enterprises. The DOC addressed these reforms in the candle industries in *Petroleum Wax Candles from the People's Republic of China*.⁷⁹ In that case, the candle factories under investigation were operated as collectives. The materials used to make the candles were not supplied under a government quota nor were the prices paid for the inputs set directly by the central government. In addition, the production levels of the factories were not subject to a quotas or price controls.

Despite the reforms in the PRC candle industry, two factors led the DOC to determine that the PRC candle economy was state controlled. First, paraffin wax, the primary ingredient in candles, was produced by state-owned petroleum firms operating under prices and quotas fixed by the central government. Any wax produced in excess of the fixed quota could be sold at prices within 20% of the price set by the central government. Though the candle producers purchased wax at the "uncontrolled" prices, the DOC concluded that no market forces had any effect on the price of paraffin wax. Second, most of the candle production was sold to state-owned trading companies which were re-

78. Truck Trailer Axle-and-Brake Assemblies From the Hungarian People's Republic, 46 Fed. Reg. 46,152 (1981).

79. 51 Fed. Reg. 25,085 (1986).

quired to surrender their foreign earnings to the Bank of China. Candle producers were not allowed to receive foreign exchange from their exports. Licensing requirements and other limitations were imposed on all imports into the PRC. The DOC concluded that these restrictions could limit competition by other imports and insulate candle producers from external market forces.⁸⁰

The factors relied upon by the DOC in the *Petroleum Wax Candles* case might apply in a market economy country — including the United States. For instance, the United States menthol industry is hardly governed by “the unbridled operation of the supply and demand forces.”⁸¹ The federal government “sets minimum prices for tobacco and limits the amount that each farmer can grow.”⁸² In addition, many imports to the U.S. are subject to licensing requirements and other import restrictions similar to those in the PRC. Ironically, even the U.S. antidumping law might be considered a “layer of government” that insulates U.S. producers from the external world market. Nevertheless, the DOC seems to place more emphasis on these factors in countries attempting to introduce reforms than in established market economies. In the *Petroleum Wax Candles* case, the DOC stated:

While controls in foreign exchange and imports and exports are not dispositive on the issue of a state control (certain market economies display many of these characteristics), they are important criteria to consider in countries that are moving from highly centralized systems by introducing certain market-like mechanisms. This is because such controls are traditionally employed by nonmarket economies to maintain economically irrational prices by protecting [sic] their internal prices from external market forces. As a result, we necessarily place more emphasis on the existence of such controls in countries like the PRC than we would in countries that are traditionally more market oriented.⁸³

80. *Id.* at 25,086. The DOC referred to the restrictions on imports and foreign exchange as a “layer of government [which] creates a buffer between the internal PRC economy and the external, world market.” *Id.*

81. See Alford, *supra* note 2, at 103.

82. Richards, *Tobacco Price Props Come Under Criticism Even by Growers*, Wall St. J., Apr. 4, 1985, at 1, col. 6. Similar circumstances exist in the American peanut industry. Some argue that Congress has effectively foreclosed entry into the peanut industry by newcomers. See Alford, *supra* note 2, at 108, n.169.

83. 51 Fed. Reg. 25,086 (1986).

This decision indicates that traditional state-controlled economy countries attempting to reform their economies will have to overcome a heavy presumption of nonmarket status before the DOC will use their home market prices in antidumping investigations. Congress, responding to pressure from domestic industry, seems determined to prevent state-controlled economy producers from gaining any competitive advantage over American producers unless such producers are only subject to market forces.⁸⁴ Thus, while the 1988 Act provided some guidance as to what factors the DOC should examine, past DOC decisions suggest that in the eyes of the DOC, reform-minded communist countries will probably have to reform their entire economies before losing nonmarket economy status. Market-oriented reforms in limited sectors of the economy only will not suffice. At this point, it is too early to tell whether Eastern European reforms will go far enough to satisfy the DOC.

The re-unification of East and West Germany means that former East German industries are part of a market economy nation. In addition, Poland has significantly reformed its national economy. In Poland, "nearly all price controls and subsidies were ended with the stroke of a pen on January 1 [1990]."⁸⁵ Poland has also out-paced other Eastern European nations in encouraging private investment from the West.⁸⁶ While Polish industry is still 95% state-owned, Poland has adopted new rules for creating private companies from state-owned enterprises. For example, the Polish government has announced plans to sell the Gdansk shipyard, the birthplace of the Solidarity trade union, to workers and the public.⁸⁷ Due to a lack of domestic capital, however, only five out of over 8,000 state-owned enterprises were sold in 1990.⁸⁸

84. Prior to enactment of the 1988 Act, several bills were introduced by Senator John Heinz (R-Pa.) attempting to address the problem of applying the antidumping laws to nonmarket economy nations. A few of these bills proposed that nonmarket economy goods not be considered to be sold below fair value if sold in the U.S. at or above the lowest average price charged in the U.S. market by any market economy producer who was selling at or above fair value. See S. 1966, 96th Cong., 1st Sess., 125 CONG. REC. 30,670 (1979); S. 958, 97th Cong., 1st Sess., 127 CONG. REC. 7088 (1981). Supporters of domestic industries competing with imports attacked the bill as condoning nonmarket economy dumping.

85. Wash. Post, April 11, 1990, at A18, col. 1.

86. See Newman, *Gold Rush: Capitalists Jam Poland Asking Which Way to the Biggest Deals*, Wall St. J., April 11, 1990, at A1, col. 1.

87. *Id.* at A11, cols. 3-4.

88. Harden, *East Europe's Effort to Sell State Firms Off to Slow Start*, Wash. Post, February 12, 1991, at C1, cols. 2-3 [hereinafter Harden]. Poland has succeeded in privatizing approximately half of its small shops and businesses. *Id.* at C1, Col. 3.

Poland's "shock therapy" approach to reform has been suggested in the Soviet Union. But the fear of high unemployment, something new in Soviet society, will probably force the Kremlin to "adopt a more cautious, stage-by-stage approach" with "gradual price reform."⁸⁹ Other Eastern European countries use various approaches. In Hungary, the new prime minister, Jozef Antall, has pledged to reduce state ownership of enterprises from 90% to 30% within three years. This effort, however, is off to a slow start, as only 130 out of 2,300 "salable" enterprises were privatized in 1990.⁹⁰ Antall appears willing to accept large-scale unemployment as "an unavoidable consequence of a shift to a free market."⁹¹ In addition, joint ventures between U.S. firms and Hungary appear to be on the rise.

In Czechoslovakia, economic reforms have been introduced at a "snail's pace."⁹² The major dispute in Prague is over the freeing of prices on basic consumer goods. President Vaclav Havel advocates gradually releasing price controls over the next two to three years. As in the U.S.S.R., the government fears the impact of sudden market reforms on unemployment, inflation and the general dislocation of workers.⁹³

Under DOC's national economy approach, only Poland appears to be making sufficiently comprehensive reforms to its national economy to rid itself of nonmarket economy status in antidumping investigations. Moreover, even Poland's efforts to privatize industry have stalled. Accordingly, determination of a nonmarket economy should be based on a more lenient approach. Sector analysis, as opposed to national economy analysis, would probably allow more exports from Eastern European countries to enter the U.S. market without the burden of high antidumping duties. Moreover, it would still achieve the objective of combatting unfair trade. Sector analysis would encourage communist countries to make reforms in certain areas of the economy gradually without the troubles caused by sudden shifts in a national economy. This more lenient approach might even accelerate the revival of

89. *Id.* Radical economic reform has received less public support in the U.S.S.R. than in other Eastern European nations.

90. Harden, *supra* note 88, at C1, Col. 3.

91. Harden, 'Hungarian-ness' Back in Fashion, *Nationalist Appeal Brought Sweeping Election Victory*, Wash. Post, April 11, 1990, at A16, col. 2.

92. Randal, *Slowness of Economic Change Threatens a Rift in Prague: Some Fear Consequences of Market Forces*, Wash. Post, April 11, 1990, at A19, col. 5.

93. *Id.* According to the Washington Post, "Czechoslovakia recently scored a smashing success in its first auction of restaurants and small stores. It plans to sell more than 100,000 small businesses [in 1991]." Harden, *supra* note 88, at C1, col. 3.

Eastern European economies, a result consistent with the Bush Administration's policy of encouraging perestroika.

IV. CONCLUSION

The 1988 Act codifies prior DOC practices, by forcing the DOC to use the factors of production method as a first resort in determining foreign market values for nonmarket economy nations. Use of the factors of production method will probably result in higher antidumping duties for imports from nonmarket economy nations. High duties severely limit, if not negate, access to U.S. markets, especially for goods from communist countries where there is a perception of poor quality. While antidumping law is generally attacked as being protectionist, as it is applied to nonmarket economy nations, it combats "unfair trade practice." Accordingly, the antidumping law should be aggressively enforced against imports from nonmarket economies where the producer is, in fact, controlled by the state.

Due to the statute's harsh treatment of nonmarket economy nations, a determination of nonmarket economy status is critical to reform-minded Eastern European nations. The 1988 Act set forth several factors defining a nonmarket economy, but these factors only codify existing practice. Most probably, the DOC will still require market forces throughout the national economy, as opposed to the relevant sector. This means that Eastern Europe has to be broad-based. To date, only Poland appears to be making significant advances toward reforming the economy on a national scale. However, the other countries appear to be headed in the right direction. To assist these countries in trade with the U.S., the DOC should adopt sector analysis in determining nonmarket economy status. Sector analysis still achieves the goal of combatting unfair trade where the imports are produced in a state-controlled sector, yet allows some imports from Eastern Europe entry into the U.S. market. This may provide additional incentives to reform sectors of the economies and accelerate the revival of these economies.

