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# THE SEARCH FOR CONSISTENCY: TREATMENT OF NONMARKET ECONOMIES IN TRANSITION UNDER UNITED STATES ANTIDUMPING AND COUNTERVAILING DUTY LAWS

Robert H. Lantz\*

## INTRODUCTION

Beginning in the 1980s with the People's Republic of China (PRC), and continuing in the 1990s with the nations of Eastern Europe and the states of the former Soviet Union, countries with state-controlled nonmarket economies (NMEs) have begun to institute market reforms. These market reforms raise questions concerning the adequacy of United States antidumping (AD) and countervailing duty (CVD) laws to deal with imports from economies in transition. The United States Commerce Department has twice introduced new approaches for administering the AD law in cases involving economies in transition in an attempt to keep pace with the market reforms in these countries.<sup>1</sup>

However, the Clinton Administration has pursued inconsistent policies concerning the amendment of United States AD and CVD laws to accommodate economies in transition. Initially, statements by Secretary of Commerce Ron Brown indicated that the Clinton Administration disfavored amending the AD and CVD laws despite the market reforms underway in NME countries.<sup>2</sup> In fact, only a week prior to introducing

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1. See *infra* notes 254-73 and accompanying text (discussing the two approaches of the Clinton Administration for NMEs in transition) (the terms "NMEs in transition" and "economies in transition" will be used interchangeably in this article).

2. *Brown Douses Reform of Antidumping Laws For Non-Market Economies*,

the implementing legislation for the Uruguay Round of the General Agreements on Tariffs and Trade (GATT),<sup>3</sup> the Administration felt it unnecessary to amend United States AD and CVD laws in cases involving NME in transition countries.<sup>4</sup> However, just before presenting the implementing legislation to congressional committees for review, the Administration reversed itself and decided to include proposals altering the treatment of NME in transition countries.<sup>5</sup> Following three months of debate by various congressional committees, the House and Senate conferees agreed to drop the economies in transition proposals from the Uruguay Round implementing legislation.<sup>6</sup> Then, the day after introduction of the implementing legislation, thereby making it unamendable under the Congress' fast-track authorization, President Clinton, in a joint press conference with Russian President Boris Yeltsin, indicated that he would pursue legislation designating Russia as an economy in transition under United States AD law.<sup>7</sup> These events reflect the inconsistent ap-

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INSIDE U.S. TRADE, Jan. 28, 1994, at S-22 (quoting Secretary Brown). There, Brown stated in a January 24, 1994 press conference that the Administration had "no specific plans" to review the AD law relating to nonmarket economies. *Id.* Additionally, he stated that, "[The Department of] Commerce is charged with the mission of enforcing the antidumping and countervailing duty laws on the books . . . [w]e intend to do that aggressively." *Id.*

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

4. INSIDE U.S. TRADE, Special Report, June 17, 1994, at S-1 (reporting that as late as June 17, 1994, the Administration rejected proposals for changing the AD methodology applied to NMEs).

5. INSIDE U.S. TRADE, Special Report, June 21, 1994, at S-1, S-22-23 [hereinafter Special Report, June 21, 1994] (stating that "the proposal for economies in transition represents a reversal for the Administration, which had made it clear late last week that it did not want to change antidumping methodology for non-market economies in the Uruguay Round implementing bill"); see also *infra* notes 253-73 and accompanying text (outlining specifics of the proposed changes in methodology).

6. See *U.S. Reassures Chile of Commitment to Free Trade Deal, U.S. Officials Say*, 11 INT'L TRADE REP. (BNA) 1442 (Sept. 21, 1994) [hereinafter ITR] (reporting on Congressional action relating to NME countries).

7. Press Conference by President Clinton and President Yeltsin, 1994 WL 525367, at 7-8 (White House).

Question: "Now COCOM and antidumping campaign, are there any specific decisions—any specific time lines and schedules and solutions?" President Clinton: "With regard to the antidumping, I think what you're referring to is my attempts to get the Congress to pass legislation which would declare Russia an economy in transition, which would facilitate more two-way trade. I have proposed such legislation to the Congress; it has not yet passed. We are working on a package of initiatives which would include the reduction of trade

proaches of the United States as to whether, or how, to alter American unfair trade laws to address the market reforms underway in Eastern Europe, the former Soviet Union and the PRC.

To understand United States policy regarding NMEs in transition, it is important to understand the theory and practice that has governed the treatment of NMEs both before and after the introduction of market reforms. An understanding of the theory underlying both United States AD and CVD laws and prior administrative practices concerning NMEs will produce a trade policy responsive to the needs of NMEs implementing market reforms, while remaining consistent with the principles at the heart of United States unfair trade laws. Furthermore, such a policy actually will support the measures that economists agree are necessary for these countries to implement their market reforms successfully.

This article reviews the treatment of NMEs and NMEs in transition under United States AD and CVD laws. This article also discusses an approach for dealing with economies in transition that takes account of the market reforms while remaining consistent with the principles governing United States unfair trade laws. Section I reviews the economic theory underlying United States AD law, as well as the treatment of NME manufacturers under United States AD law. Section II reviews the economic theory behind United States CVD law and analyzes that law as it relates to NMEs. Section III provides an overview of the steps economists believe NME nations must adopt to transform successfully into market-driven economies. Section III also discusses attempts by the Department of Commerce (Commerce) to formulate a policy for treating NMEs in transition under current United States unfair trade laws. Section IV critiques several proposals to amend United States unfair trade laws relating to economies in transition, and provides the author's recommendations. Finally, the article provides concluding thoughts.

## I. THE ECONOMICS OF DUMPING AND UNITED STATES ANTIDUMPING STATUTES

Before discussing the specifics of United States AD statutes, it is important to understand the economic rationale supporting the creation and enforcement of United States AD law. The economic analysis relating to dumping is the same for both market economies and NMEs.

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barriers in Russia and some more initiatives on our part so that we could get that kind of economy in transition status . . . ."

*Id.*

However, the administration of United States AD law differs with regard to NMEs because Commerce historically has been unable to verify costs and prices in an economy where the government, and not the market, determines the allocation of resources. After describing the economics of dumping and the general process for administering the United States AD statutes for market economies, the following discussion will address the specific difficulties relating to NMEs.

#### A. THE ECONOMICS OF DUMPING

Dumping is defined as the sale of foreign merchandise in the United States at less than fair value (LTFV) or below the cost of production.<sup>8</sup> Dumping cases involving market economies require a comparison of the price paid for the merchandise in the United States with the merchandise's foreign market value (FMV).<sup>9</sup> Therefore, determining whether dumping has occurred requires an analysis of market prices in the United States and the value of the good outside the United States.<sup>10</sup> To eliminate differences in the manner in which goods are sold in various markets, a manufacturer's foreign and domestic prices charged for the merchandise are reduced to the factory cost.<sup>11</sup> The price of the merchandise in the foreign market then is converted into United States dollars for purposes of comparison.<sup>12</sup> Dumping occurs when the ex-factory price of the foreign merchandise sold in the United States is less than the ex-factory price charged for comparable merchandise sold in the foreign manufacturer's domestic market or a third market.<sup>13</sup>

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8. See TARIFF ACT OF 1930, Pub. L. No. 98-573, Title VI, § 602(b), 98 Stat. 3024 (codified as amended at 19 U.S.C. § 1673(1) (1988)) [hereinafter the TARIFF ACT OF 1930, as amended] (defining "dumping"); Michael S. Knoll, *An Economic Approach To The Determination Of Injury Under The United States Antidumping And Countervailing Duty Law*, 22 N.Y.U. J. INT'L L. & POL. 37, 42-44 (1989) (explaining the definition of dumping); David M. Repp, Note, *Antidumping And Countervailing Duties: Protection At A Cost*, 15 J. CORP. L. 65, 70-72 (1989) (describing antidumping as unfair barrier).

9. 19 C.F.R. §§ 353.42, 353.46 (1994); Knoll, *supra* note 8, at 42.

10. See Michael Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW 761, 763 (1985) (describing analysis employed to determine when a product is "dumped").

11. Knoll, *supra* note 8, at 42.

12. 19 U.S.C. § 1677a(c) (1988).

13. See Sandler, *supra* note 10, at 763 (explaining final analysis in determining whether product is dumped); Knoll, *supra* note 8, at 43 (same).

Dumping may occur under several different conditions. For instance, short term or sporadic dumping may occur as a foreign manufacturer attempts to sell unwanted or outdated merchandise.<sup>14</sup> Predatory dumping is a deliberate attempt by a foreign manufacturer to underprice its competition in its export market by temporarily lowering prices to gain market share or to drive competition out of the market.<sup>15</sup> However, most observers believe that dumping occurs most often as a form of international price discrimination.<sup>16</sup> Specifically, price discrimination is a function of the manufacturer selling comparable products at different prices in different markets.<sup>17</sup> Economists have found that for a firm to engage in "classic" price discrimination, the firm must operate under conditions where markets are separable, the firm has market power, and the two markets have different levels of demand for the product.<sup>18</sup>

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14. See THE MIT DICTIONARY OF MODERN ECONOMICS 115 (David W. Pearce ed., 4th ed. 1986) [hereinafter MIT DICTIONARY] (defining short term or sporadic dumping). Jacob Viner performed the ground-breaking work in the area of dumping. JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923).

15. MIT DICTIONARY, *supra* note 14, at 115 (defining predatory dumping); PETER H. LINDERT, *INTERNATIONAL ECONOMICS* 183 (8th ed. 1986) (discussing predatory dumping). According to Lindert, predatory dumping occurs when a foreign firm temporarily discriminates in favor of foreign buyers to lower the market price, win market share, and eliminate competitors, before raising its prices after the competition is no longer in the market. *Id.* Some companies, however, may desire to gain market share even if they are not able to completely drive competition from the market and raise prices to recover the initial loss. *Id.*

16. See Jeffrey E. Garten, *New Challenges in the World Economy: The Antidumping Law and U.S. Trade Policy* 8 (Remarks Before the U.S. Chamber of Commerce, Washington, D.C. (Apr. 7, 1994)) (defining dumping broadly as price discrimination between national markets). Mr. Jeffrey Garten is the Under-Secretary of Commerce for International Trade. *Id.*; see also Richard D. Boltuck, *An Economic Analysis of Dumping*, 21 J. WORLD TRADE L. 45, 45-46 (stating that although predatory pricing is tied to the origin of United States AD law, economists believe predatory dumping is not a "frequent phenomenon").

17. See Boltuck, *supra* note 16, at 46 (defining price discrimination); LINDERT, *supra* note 15, at 184-89.

18. See *id.*, at 46-47 (defining "classic" price discrimination). Classic price discrimination provides that:

- 1) Markets are separable. This means customers purchasing the same product in different markets cannot trade among themselves, thereby equalizing the price through arbitrage;
- 2) The firm has market power in at least some markets. Market power means the firm will not lose all sales if it raises its price. (Monopoly is the extreme case of market power.) Raising the price will have two effects on the revenue of such a firm: it will increase due to the higher unit price, but fall due to

When these conditions exist, price discrimination results in a firm maximizing its profits.<sup>19</sup>

Dumping theory is premised on a series of assumptions governing the effect on domestic producers when a foreign manufacturer lowers prices below fair market value or cost as part of a strategy of price discrimination. The first assumption is that, when a foreign firm dumps products in the United States, domestic producers that cannot compete at lower prices will lose market share or be driven from the market.<sup>20</sup> United States consumers initially enjoy lower prices due to the dumping of foreign merchandise.<sup>21</sup> The second assumption is that, after United States firms lose considerable market share or are driven from the market, the foreign firm will recoup its initial losses by charging a higher price, or failing to lower the price, for its merchandise.<sup>22</sup> To counteract the negative long-term effects of dumping, AD duties are imposed to nullify the impact of a foreign firm's dumping practices.

As part of the dumping determination, dumping margin must be calculated as accurately as possible to assess an AD duty equal to the amount by which the FMV of the foreign merchandise exceeds the United States price.<sup>23</sup> The AD duty is not intended to punish the for-

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smaller sales volume;

3) The demand curves for different markets have different elasticities [defined as the percentage change in quantity sold caused by a one percent increase in price]. This means customers are more responsive to price changes in some markets than in others. The firm will charge a lower price in the market where customers are more price responsive.

*Id.*

19. See LINDERT, *supra* note 15, at 184-85 (illustrating this point with a hypothetical example using the United States and Japan).

20. Repp, *supra* note 8, at 71 (explaining that the ultimate result of predatory dumping is that all competitors are driven out of business); Garten, *supra* note 16, at 10 (explaining adverse consequences of dumping). Mr. Garten states: "[d]umping sends false signals to the market . . . . The ability to dump acts as a disincentive to investment in the country where dumping is occurring and fosters excessive investment in the market of the dumper . . . . Dumping has a dramatic effect on investors' decisions." *Id.*

21. Repp, *supra* note 8, at 71.

22. *Id.* at 71; see RICHARD G. LIPSEY ET AL., *ECONOMICS* 790, 800 (7th ed. 1984) (explaining that a successful predatory strategy eventually drives domestic producers out of business and allows foreign producers to raise prices because of the consumer's dependence on imports).

23. 19 U.S.C. § 1673(e) (1988); *Rhone Poulenc, Inc. v. United States*, 899 F. Supp. 1185, 1190 (Fed. Cir. 1990) (holding that accurate dumping margins are necessary to accomplish purpose of the AD statute).

eign firm; rather, it is intended to deter the foreign firm from continuing its dumping practices.<sup>24</sup> Denying the benefits of dumping to the foreign manufacturer forces a profit-maximizing firm to raise the price of its merchandise sold in the United States while simultaneously lowering the price in markets where it charged a higher price.<sup>25</sup> In theory, the foreign producer eventually will charge a single price in both markets that falls between the original foreign market and United States prices.<sup>26</sup>

Antidumping duties serve three purposes. First, they protect domestic industry and jobs in the short run from the effects of unfair pricing from abroad. The second purpose is connected to the first; namely, AD duties prevent foreign manufacturers from dumping products into the United States altogether. Finally, AD duties ultimately protect the consumer from higher prices. In theory, AD statutes are designed to even the playing field between foreign firms dumping products and United States firms facing the prospect of losing market share due to unfair foreign pricing practices. However, under the facts of a given case it may be difficult to discover whether dumping is occurring or to calculate the amount by which the foreign firm is dumping products into the United States market. It also may be difficult to determine whether a foreign firm's dumping practices have injured United States firms in the industry. Commerce has been charged with the difficult task of determining whether dumping has occurred, and the International Trade Commission (ITC) is responsible for determining if a United States industry has been harmed as a result of dumping.

#### B. OVERVIEW OF UNITED STATES ANTIDUMPING LAW

The United States Congress first promulgated AD statutes as part of the Revenue Act of 1916.<sup>27</sup> However, this legislation proved inadequate because United States petitioners were required to prove that the foreign

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24. See *Badger-Powhatan, Div. of Figgie Intern., Inc. v. United States*, 608 F. Supp. 653, 657 (Ct. Int'l Trade 1985) (stating that antidumping law is remedial and not punitive); William E. Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 B.U. INT'L L. J. 345, 381 (1985) (same).

25. Boltuck, *supra* note 16, at 48.

26. *Id.*; Lindert, *supra* note 15, at 185.

27. See Ch. 463, § 801, 39 Stat. 756, 789-99 (1921) (codified at 15 U.S.C. § 72 (1988)), cited in Greyson Bryan and Dominique Guy Boursereau, *Antidumping Law in the European Communities and The United States: A Comparative Analysis*, 18 GEO. WASH. J. INT'L L. & ECON. 631, 665 (1985) (discussing first AD statutes).



company intentionally dumped its products into the United States.<sup>28</sup> Although the portions of the 1916 Act serving as an antidumping corollary to the Robinson-Patman antitrust statute survive to this day, Congress replaced almost all of the 1916 Act when it enacted the Antidumping Act of 1921.<sup>29</sup>

Since the end of World War II, countries have sought to promote international trade by negotiating multilateral agreements to lower tariffs, to reduce or eliminate nontariff barriers, and to harmonize the remedies available for unfair trade practices such as dumping. For instance, Article VI of GATT, adopted in 1947, condemns dumping and permits GATT members to enact AD duties.<sup>30</sup> The GATT Antidumping Code, negotiated in 1979 during the Tokyo Round, served as the first effort to harmonize the substantive, and to a lesser extent, the procedural aspects of the members' AD statutes.<sup>31</sup> The 1994 Agreement on Implementation of Article VI of GATT constitutes a further refinement of the AD rules and is incorporated into United States law through the Uruguay Round Agreements Act.<sup>32</sup> As a signatory to GATT, the Antidumping Code, and the 1994 Agreement on Implementation of Article VI of GATT, the United States has implemented AD statutes consistent with these agreements.<sup>33</sup> The specific provisions of United States AD statutes reflect Congress' intent to enforce the AD statutes through a bifurcated system in which Commerce determines the amount of dumping, if any,

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28. Bryan & Boursereau, *supra* note 27, at 665 (discussing first AD statutes).

29. Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 9, 11-15, *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193; *see* Bryan & Boursereau, *supra* note 27, at 666 (noting that the Antidumping Act of 1921 introduced many of the concepts contained in current antidumping statutes). For instance, the 1921 Act included the use of injury determinations, purchase price, exporter's sale price, and foreign market value. *Id.*; *see also* Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEXAS INT'L. L.J. 265, 269 (1987) [hereinafter Knoll, *Reconsideration*] (noting that the 1921 Act introduced the bifurcated administrative process still in use today).

30. GATT, *supra* note 3.

31. GATT, *supra* note 3. The GATT Antidumping Code is a separate document. Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade (Relating to Antidumping Measures), *reprinted in* H.R. DOC NO. 96-153, Part I, 96th Cong., 1st Sess. 309 (1979); *see* Sandler, *supra* note 10, at 763 (discussing the statutory authorization for antidumping laws). As a signatory, United States antidumping laws are predicated on GATT. *Id.*

32. Uruguay Round Agreements Act, H.R. 5110, 103d Cong., 2d Sess., §§ 201-34 (1994).

33. 19 U.S.C. § 1671-72 (1988 & Supp. V 1993).

and the ITC determines whether the dumping harms a United States industry.<sup>34</sup>

### 1. Generally Applicable United States Antidumping Law

As defined under United States AD law, dumping occurs when a manufacturer charges a lower price in the United States market than in the manufacturer's home market, or a third market, for the "same or similar merchandise" after accounting for differences in sales conditions and merchandise characteristics.<sup>35</sup> In cases involving market economies, Commerce employs a standard methodology for determining a product's FMV. First, Commerce determines whether a foreign manufacturer's goods were sold in the United States for LTFV by comparing the United States price of the product with the FMV of such or similar merchandise in the firm's domestic market.<sup>36</sup> If the product is not sold or offered for sale in the foreign firm's domestic market, Commerce identifies the price at which the product is sold or offered for sale in countries other than the United States.<sup>37</sup> Finally, if there are no sales in the home market or to third countries, the statute authorizes Commerce to utilize a "constructed value."<sup>38</sup> If Commerce finds that dumping occurred, Commerce fixes the dumping margin by calculating the average amount by which the FMV exceeds the price of the product in the United States.<sup>39</sup> The finding of dumping and the fixing of the dumping margin establishes the first of the two prongs required to impose an AD duty.

The ITC investigation, in turn, seeks to determine whether the dumping caused, or threatens to cause, material injury<sup>40</sup> to a United States industry.<sup>41</sup> The governing statutes direct the ITC to consider var-

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34. *Id.*

35. See 19 U.S.C. § 1677(16) (defining "same or similar merchandise" as merchandise with identical physical characteristics); see also Knoll, *Reconsideration*, *supra* note 29, at 267 (describing when dumping occurs); Boltuck, *supra* note 16, at 45-47 (same).

36. 19 U.S.C. § 1677b(a)(1)(A).

37. See 19 U.S.C. § 1677b(a)(1)(B) (stating that Commerce may look at sales in third countries if sales in the firm's domestic market are too small for comparison).

38. See 19 U.S.C. § 1677b(a)(2) (defining the use of constructed value); 19 U.S.C. § 1677b(e)(1) (providing the method of calculating constructed value).

39. 19 U.S.C. § 1673b(b)(1)(A).

40. See 19 U.S.C. § 1677(7)(A) (stating that "[t]he term 'material injury' means harm which is not inconsequential, immaterial, or unimportant").

41. N. David Palmeter, *Dumping Margins and Material Injury: The USITC Is*

ious factors in ascertaining whether there is "injury" to a United States industry.<sup>42</sup> A finding of "threatened injury" requires support by evidence that "the threat of material injury is real and that actual injury is imminent" and "not merely based on conjecture or supposition."<sup>43</sup> Additionally, sufficient grounds to impose an AD duty exist if the ITC determines that development of a United States industry may be materially retarded by foreign dumping.<sup>44</sup>

Dumping investigations are difficult enough when they involve market economies. However, as the following discussion illustrates, they become much more complicated when the dumping investigation involves a NME.

## 2. United States Antidumping Law Relating to NMEs

Application of United States AD statutes to NMEs pose unique problems, because by definition NMEs do not allocate resources according to market concepts of supply and demand.<sup>45</sup> The Antidumping Act of 1921 did not provide for a different dumping analysis in cases involving NMEs.<sup>46</sup> Therefore, it was not until the 1960 case, *Bicycles From Czechoslovakia*, that the Department of the Treasury<sup>47</sup> (Treasury) announced a methodology for dealing with NMEs.<sup>48</sup> In *Bicycles*, home

*Free to Choose*, 21 J. WORLD TRADE L. 173-75 (1987) (commenting that the Commission has broad discretion in using dumping margins to determine injury).

42. See 19 U.S.C. § 1673b(a) (stating that a preliminary determination of injury may be found by reason of imports that materially retard United States industry); 19 U.S.C. § 1673d(b) (providing that imports or sales for import may be determinative of injury in a final determination); 19 U.S.C. § 1677(7) (Supp. 1993) (listing as dispositive factors volume, price, impact on affected domestic industry, cumulation, and treatment of negligible imports).

43. 19 U.S.C. § 1677(7)(F)(ii).

44. 19 U.S.C. § 1673(2)(B); *Certain Dried Salted Codfish from Canada*, 7 INT'L TRADE REP. DEC. 2353 (July 1985) (discussing "material retardation" of United States industry by dumping practices).

45. Although when the author visited the Soviet Union in 1984, the manager of a collective farm in Ukraine attempted to minimize the differences between capitalism and communism by saying "Don't worry, we count the money here too."

46. Judith H. Bello et al., *Searching for "Bubbles of Capitalism": Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies*, 25 GEO. WASH. J. INT'L L. & ECON. 665, 673 (1992).

47. Charles O. Verrill Jr., *Nonmarket Economy Dumping: New Directions in Fair Value Analysis*, 21 GEO. WASH. J. INT'L L. & ECON. 427, 428 (1988) (arguing that Treasury was responsible for determining the dumping margin prior to 1980 when the task was given to the Department of Commerce).

48. *Bicycles From Czechoslovakia*, 25 Fed. Reg. 6,657 (Dep't Treas. 1960) (final

market prices for the Czechoslovakian manufacturer were rejected because they failed to reflect market forces.<sup>49</sup> Because it was considered impossible to determine the FMV of a NME manufacturer's product, it was determined that a suitable surrogate country's prices and costs would be substituted.<sup>50</sup> Although Treasury had developed and refined its methodology for conducting dumping investigations involving NMEs in the early 1960s, Congress did not pass legislation codifying the administrative practice until the Trade Act of 1974.<sup>51</sup> Despite the years of administrative practice and the passage into law of a methodology for dealing with NMEs, the surrogate methodology proved difficult to apply because there were occasions when there was no available surrogate. Therefore, it was necessary to devise an alternative methodology to use when an appropriate surrogate could not be located.

In 1975, a dumping investigation involving *Electric Golf Cars From Poland* required Treasury to come up with a new methodology for determining the FMV of golf cars produced by a Polish manufacturer.<sup>52</sup> In *Golf Cars*, Treasury adopted a method whereby the amount of each factor input of the Polish manufacturer would be determined and the cost of each factor input would be taken from a market economy country, in this case Spain, considered by Commerce to be at a comparable stage of economic development.<sup>53</sup> This new methodology became known as the "factors of production approach."<sup>54</sup> In the 1979 Trade

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LTFV determination) [hereinafter *Bicycles*]; Bello et al., *supra* note 46, at 673; Verrill, *supra* note 47, at 449-450.

49. *Bicycles*, *supra* note 48, at 6,657.

50. *Id.*; Verrill, *supra* note 47, at 428. Treasury determined that the home market or export price of similar merchandise produced in surrogate market economies, or the constructed value of the Czechoslovakian bicycles was the best means for determining foreign market value. *Id.* Another influential case which established the methodology for dumping investigations involving NMEs was *Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia*, 27 Fed. Reg. 8457 (Dep't Treas. 1962) (final LTFV determination).

51. Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2074 (amending Antidumping Act of 1921, ch. 14 § 205, 42 Stat. 9, 13).

52. *Electric Golf Cars From Poland*, 40 Fed. Reg. 25,497 (Dep't Treas. 1975) (final LTFV determination) [hereinafter *Golf Cars*]. In *Golf Cars*, Treasury initially relied on a Canadian producer as a surrogate. However, in the midst of the investigation the Canadian producer ceased production and Treasury was left without a means of verifying the fair market value of the Polish manufacturer by reference to a market economy manufacturer. *Id.*

53. *Id.*

54. Bello et al., *supra* note 46, at 674-76.

Act, Congress included the factors of production approach as an alternative methodology to be used in NME cases where it was impossible to find an appropriate surrogate.<sup>55</sup>

The surrogate country approach was severely criticized due to the seemingly unpredictable and arbitrary dumping margins it produced against NME manufacturers.<sup>56</sup> Additionally, Commerce was finding it increasingly difficult to locate surrogates willing and able to provide reliable price data.<sup>57</sup> Therefore, Congress was once again faced with the necessity of revising United States AD statutes in order to find a more effective method for dealing with NMEs.

In 1988, after considering several proposals for amending United States AD law covering NMEs,<sup>58</sup> Congress incorporated new provisions for NME countries within the 1988 Trade Act.<sup>59</sup> The new provisions in the 1988 Trade Act included the first definition of a NME contained in section 771(18), codified at 19 U.S.C. § 1677(18). Additionally, section 771(18) provided that Commerce's determination that a country was a NME country would not be judicially reviewable.<sup>60</sup>

55. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 776, 93 Stat. 144, 186 (codified at 19 U.S.C. § 1677e). After passage of the 1979 Trade Act, the Commerce Department issued regulation 19 C.F.R. § 353.8(a)-(c), outlining the hierarchy of methods for determining the foreign market value in investigations involving NMEs. The regulation provided that foreign market value should be determined:

- (1) according to the home market prices of such or similar merchandise in a surrogate country;
- (2) the export price of such or similar merchandise shipped from a surrogate;
- (3) when actual or accurate prices are not available, the constructed value of such or similar merchandise in a surrogate country; and
- (4) the value in a surrogate country of the factors of production used in the NME for such or similar merchandise.

19 C.F.R. § 353.8(a)-(c).

56. Report of the Committee on Finance, U.S. Senate, *Omnibus Trade Act of 1987*, Report No. 100-71, June 17, 1987 at 108. S. Rep. No. 71, 100th Cong., 1st Sess. 108 (1987) [hereinafter Senate Report 1987]; see also Jeffrey S. Neeley, *Nonmarket Economy Import Regulation: From Bad to Worse*, 20 LAW & POL'Y INT'L BUS. 529, 534 (1989); Bello et al., *supra* note 46, at 680.

57. Senate Report 1987, *supra* note 56; see Verrill, *supra* note 47, at 450.

58. Neeley, *supra* note 56, at 537-540. Bello et al., *supra* note 46, at 680-683.

59. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amendments throughout Title 19 of the United States Code).

60. 19 U.S.C. § 1677(18). Section 1677(18) provides:

(18) Nonmarket Economy Country-

- (A) In General.-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 mer-

The 1988 Trade Act also included a provision amending the methodologies for calculating the FMV for NME countries.<sup>61</sup> However, the

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chandise in such country do not reflect the fair value of the merchandise.

(B) Factors To Be Considered.-In making determinations under subparagraph (A) the administering authority shall take into account-

- (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 appropriate.

(C) Determination In Effect.-

[Subsection (C) states that a determination of NME status can be made against any country at any time and will remain in effect until revoked.]

(D) Determination Not In Issue.-Notwithstanding any other provision of law, *any determination made by the administering authority under subparagraph (A) shall not be subject to judicial review in any investigation conducted under subtitle B.*

(E) Collection Of Information.-

[Subsection (E) requires the Commissioner of Customs to provide information concerning countries under review for a determination of NME status.]

*Id.*

61. See 19 U.S.C. § 1677b(c); Neeley, *supra* note 56, at 540. Section 1677b(c) provides:

(c) Nonmarket Economy Countries-

(1) In General.-If-

(A) the merchandise under investigation is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a),

the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e). Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such

FMV methodologies under the 1988 Trade Act were similar to the 1979 Trade Act except that the factors of production approach replaced the surrogate country method as the preferred method of calculating FMV for a NME manufacturer.<sup>62</sup> Different commentators have characterized the 1988 Trade Act's changes in the FMV calculation as a "commendable achievement" or a "modest, almost marginal" change.<sup>63</sup> Regardless of the view one takes of the value of the changes made in the 1988 Trade Act, virtually everyone would agree that Commerce has had a difficult time administering the current AD law in cases involving NMEs in transition.<sup>64</sup> The NME methodology under the 1988 Trade Act produces unpredictable results which usually result in a higher

factors in a market country or countries considered to be appropriate to the administering authority.

(2) Exception.-If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise under paragraph (1), the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is-

- (A) comparable to the merchandise under investigation, and
- (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,

is sold in other countries, including the United States.

(3) Factors of Production.-For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to-

- (A) hours of labor required,
- (B) quantities of raw materials employed,
- (C) amounts of energy and other utilities consumed, and
- (D) representative capital costs, including depreciation.

(4) Valuation of Factors of Production.-The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are-

- (A) at a level of economic development comparable to that of the nonmarket economy country, and
- (B) significant producers of comparable merchandise..

19 U.S.C. § 1677b(c).

62. *Id.*

63. Compare Verrill, *supra* note 47, at 457 (supporting the change because the new methodology is relatively predictable and based as much as possible on actual information from the NME) with Bello et al., *supra* note 46, at 680. See also Neeley, *supra* note 56, at 540.

64. See *infra* notes 193-252 and accompanying text (discussing Commerce's efforts at administering the AD law to NMEs in transition).

dumping margin for NME products than would exist if any of the standard methodologies were applied.<sup>65</sup> However, the provisions of the 1988 Trade Act will continue to be the basis on which Commerce makes determinations concerning NMEs in transition, because the provisions concerning NMEs in transition were not included within the Uruguay Round Agreements Act.<sup>66</sup>

### 3. Conclusion

The 1988 Trade Act requires Commerce to calculate the cost of goods for NME manufacturers that do not operate in market economies with market pricing systems. Despite the attempt to use costs from economies at a similar state of economic development, costs are not transferrable from one country to another. Each nation has a comparative advantage in some factor of production. Manufacturers tend to use more of the factors of production they have in abundance, with a relatively lower cost, and less of those scarce factors carrying a relatively higher cost.<sup>67</sup>

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65. Carey et al., *Transitional Relief for Russia Under the U.S. Trade Laws: New Policies for Assisting Russia's Entry into U.S. and Global Markets*, U.S.-RUSSIA BUSINESS COUNCIL (Prepared by Steptoe and Johnson) (undated), sec. 1, at 3 (discussing NME methodologies); see also James K. Kearney & Jim Wang, *The Department of Commerce's Market-Oriented Industry Methodology for Nonmarket Economies in Antidumping Investigations: The Responding Party's Perspective*, in THE COMMERCE DEPARTMENT SPEAKS 1992: DEVELOPMENTS IN IMPORT ADMINISTRATION; EXPORT AND INVESTMENT ABROAD, at 255, 266-67 (PLI Corp. Law & Practice Handbook Series No. 789, 1992), available in Westlaw, JLR database. As Carey, Cunningham & Abbey state:

This special NME Methodology [19 U.S.C. § 1677b(c)] yields unpredictable and unfair results—to the detriment of both Russia and U.S. industry—because: (1) the selection of the surrogate country is inherently arbitrary; (2) the dumping calculation in practice relies heavily on inaccurate and unfavorable “best information available” data (usually proffered by the U.S. petitioners), used to punish the [Russian Federation] government for their inability to provide actual data. . . .

Carey et al., *supra*, sec. 1, at 3.

66. See *supra* notes 2-7 and accompanying text (discussing the failure to include provisions regarding economies in transition in the final GATT implementing legislation); *infra* notes 254-73 and accompanying text (providing a substantive discussion of the proposed treatment of NMEs in transition).

67. MIT DICTIONARY, *supra* note 14, at 183-184 (describing the Heckscher-Ohlin approach to international trade). For instance, assume Ukraine has an abundant supply of cheap labor and that Norway has a scarcity of labor. If manufacturers in both countries are producing textiles, the Ukrainian manufacturer will use a greater amount of laborers, while the Norwegian manufacturer will use more automation and fewer



Therefore, taking the factor input figures from a NME country, and combining them with the costs of those inputs from a market economy country with a different cost structure, produces higher dumping margins than would exist under any of the methodologies for determining FMV in a market economy. The same problem exists when Commerce uses the surrogate country approach. Placing artificially high antidumping duties on goods from NME in transition manufacturers will inhibit their ability to sell goods to the United States and earn dollars. Reducing the access of NME in transition manufacturers to the United States market will harm the process of market reform, because successful implementation of many of the market reforms requires economy in transition countries to export products to earn Western currency.

Since 1988, market reforms in NME countries have made it more difficult for Commerce to administer the NME provisions of the 1988 Trade Act. One of the reasons for the difficulty in administering the AD law relating to NMEs is that the NMEs are in a state of transition from communist systems to various forms of market economies. Each NME country in transition is pursuing market reforms according to its particular social, political, and economic situation. Although former NME countries are pursuing market reforms in different ways, Commerce must cope with NMEs in transition within the framework of the outdated NME provisions contained within the 1988 Trade Act. Commerce, using its administrative discretion, has addressed this problem by devising new methods to determine the point at which NME in transition sourced factor input prices sufficiently reflect market forces for inclusion in the FMV calculation. Despite its best efforts, Commerce has not found a satisfactory solution to the problem of factor pricing in economies in transition that is consistent with the theory behind United States AD law.

Another reason why Commerce is having difficulty with the changes occurring in NMEs is the relationship between the use of United States AD law and CVD law in situations involving NMEs in transition. Use of the CVD law in cases involving economy in transition manufacturers must be interpreted in light of Commerce's decision, upheld by the United States Court of Appeals for the Federal Circuit, making the CVD law inapplicable to NMEs. To fully appreciate the impact of Commerce's decision not to apply the CVD law to NMEs, it is important to understand the economics of subsidies and the treatment of subsidies under United States law.

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laborers to produce similar products.

## II. THE ECONOMICS OF SUBSIDIES AND UNITED STATES COUNTERVAILING DUTY STATUTES

As the following discussion illustrates, the AD and CVD laws are administered similarly. For instance, United States CVD law requires Commerce to determine whether a subsidy has been paid. In addition, where required, the ITC is responsible for determining whether injury, the threat of injury, or material retardation of a United States industry, has resulted from the importation of subsidized products. However, before discussing the administration of United States CVD law, it is important to understand the theoretical debate concerning the scope and purpose of United States subsidies law.

### A. THE ECONOMICS OF SUBSIDIES

In economic terms, a subsidy is defined as a “[p]ayment by the government (or possibly some private individuals) which forms a wedge between the price consumers pay and the costs incurred by producers, such that price is less than marginal cost.”<sup>68</sup> Subsidies are used to transfer societal wealth to a particular class, to influence the supply or demand for a particular good, and most commonly, to complement a price stabilization program.<sup>69</sup> Classical economic theory holds that subsidies distort the market outcome that would have occurred absent the subsidy, thereby creating inefficiencies in resource allocation which lower global welfare.<sup>70</sup> Because subsidies provide a benefit to the man-

68. MIT DICTIONARY, *supra* note 14, at 413.

69. *Id.* Such reasons include:

(1) a transfer from taxpayers to producers or consumers of a particular good, for example, in order to raise farmers' incomes, (2) to influence behavior of suppliers or demanders via the mechanism of elasticity of supply or demand, for example, in the case of an external economy, (3) to keep prices of certain goods low or stable, for example, as part of an anti-inflation policy.

*Id.*

70. See Garten, *supra* note 16, at 9-10 (quoting JAGDISH N. BHAGWATI, *PROTECTIONISM* (1988)). Mr. Garten quotes Mr. Bhagwati as writing:

If one applies the logic of efficiency to the allocation of activity among all trading nations, and not merely within one's own nation state, it is easy enough to see that it yields the prescription of free trade everywhere . . . . If any nation uses tariffs or subsidies (protection or promotion) to drive a wedge between market prices and social costs rather than to close a gap arising from market failure, then surely that is not consonant with an efficient world allocation of activity. The rule then emerges that free trade must apply to all.

ufacturers from one country that competing manufacturers from other countries do not receive, the subsidized manufacturers can compete more effectively in an export or domestic market.<sup>71</sup>

If the subsidized goods are sold only in the subsidized manufacturer's domestic market or a third country's market, United States CVD law cannot counteract the effects of the subsidy.<sup>72</sup> In markets where United States manufacturers compete with the subsidized product, they will lose sales as a result of the foreign government subsidizing its manufacturer.<sup>73</sup> If, however, the subsidized products are sold in the United States, and injury to the United States industry has occurred, a CVD may be placed on the foreign product as it enters the country.<sup>74</sup>

Even though the United States adopted its first CVD statute over 100 years ago,<sup>75</sup> a debate persists as to the theoretical underpinnings which should guide the administration of United States CVD law. Two apparently competing theories have emerged to explain the purpose of these laws.<sup>76</sup> First, the deterrence theory holds that CVDs will deter govern-

. . . The trade regime that one constructs must then rule out artificial comparative advantage arising from interventions such as subsidies and protection.

*Id.* (emphasis added).

71. ROBERT B. REICH, *THE WORK OF NATIONS* 22 (1991) (citing to *STATE PAPERS AND SPEECHES ON THE TARIFF* 275 (F.W. Taussig ed., 1892)). Mr. Reich notes that, while speaking about tariffs, Abraham Lincoln said:

I do not much know about the tariff, but I know this much, when we buy manufactured goods abroad we get the goods and the foreigner gets the money.

When we buy the manufactured goods at home we get both the goods and the money.

*Id.* As it applies to buying subsidized products from abroad, Lincoln's statement would need little modification: when we buy subsidized products from abroad, we get the goods, but inefficient foreign producers get the money and inefficient foreign workers get the jobs. When we buy nonsubsidized goods, on the other hand, we get the goods, and efficient firms and workers wherever located get the money and the jobs.

72. See Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767, 781-82 (1989) (discussing the application of United States CVD laws).

73. *Id.*

74. *Id.*

75. See *infra* notes 103-20 and accompanying text (providing a historical overview of United States CVD laws).

76. See Charles J. Goetz et al., *The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law*, 6 INT'L REV. LAW & ECON. 17, 19-20 (1986) (comparing the deterrence theory, which seeks to dissuade foreign firms from accepting subsidies, and the neutralization theory, which accepts the existence of subsidies); Diamond, *supra* note 72, at 778 (same).

ments from granting subsidies because they deny a foreign government or firm the benefits resulting from the subsidy.<sup>77</sup> However, the deterrence theory has received criticism for failing to account for situations where market externalities<sup>78</sup> result in an allocation of resources which are not socially desirable.<sup>79</sup> Externalities occur where no market exists, in areas such as police, fire, and public education, or where there is an inability of markets to define and enforce property rights.<sup>80</sup> In such cases, subsidies provide a needed boost to the production of a product that society values, but which is not produced in sufficient quantity in the marketplace.<sup>81</sup>

The argument that the deterrence theory of the CVD law does not account for externalities fails to address whether it is proper for government to interfere in the marketplace by granting subsidies to address certain externalities. First, pursuant to United States CVD law, challenged products must operate within established markets and be the beneficiaries of specific government subsidies.<sup>82</sup> According to the spec-

77. See Goetz et al., *supra* note 76, at 19-20 (discussing the deterrence theory); Diamond, *supra* note 72, at 778 (same).

78. MIT DICTIONARY, *supra* note 14, at 146 (defining "externalities"). The dictionary defines externalities as:

. . . an interdependence of utility and/or production functions . . . . A beneficial externality, known as an external economy is, where an externality-generating activity raises the production or utility of the externally-affected party. For example, a beekeeper may benefit neighboring farmers by incidentally supplying pollination services. An external diseconomy is where the externality-generating activity lowers the production or utility of the externally-affected party. Examples of these are the numerous forms of environmental pollution.

*Id.*

79. See WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS* 539-43 (3d ed.) (analyzing how externalities operate in the economy).

80. See *id.* at 542-43 (describing the phenomenon of externalities); MIT DICTIONARY, *supra* note 14, at 146 (defining "externalities").

81. See Diamond, *supra* note 72, at 778-79 (discussing the use of subsidies). Professor Diamond writes:

. . . [the] conceptual difficulty arises [in the deterrence rationale] because the efficient economic equilibrium assumed to exist absent subsidization is at times subject to externalities. When an externality leads to a market price which does not fully capture the social value of the product, the firm will produce less than the efficient quantity of the good. In such cases, the proper government subsidy on the production of the good will result in a distortion, but in a more efficient outcome than would have existed without the subsidy. [footnote omitted]

*Id.*

82. 19 U.S.C. § 1677(5). In defining a subsidy, the statute provides in pertinent

ificity requirement, general government involvement to improve the lives of its citizens by providing public services does not trigger application of CVDs.<sup>83</sup>

The failure to grant subsidies to domestic firms or industries does not necessarily preclude fostering economic competitiveness, addressing social problems, or stimulating production of particular products considered socially useful. Governments have alternative means at their disposal, such as a tax policy, to regulate economic activity within their borders.<sup>84</sup> Moreover, nations disagree over what policies should be followed in pursuit of social welfare, and it is not the function of the CVD law to distinguish the "social value" of various products. What is clear is that when governments provide subsidies to specific firms or industries in order to enhance a country's social welfare, investment and production patterns in other countries are affected and the world as a whole fails to maximize its production potential.<sup>85</sup> Therefore, countries

part:

. . . (ii) The following domestic subsidies, if provided or required by government action *to a specific enterprise or industry, or group of enterprises or industries*, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise: . . .

*Id.* (emphasis added).

The Uruguay Round Agreement on Subsidies and Countervailing Measures, Article 2, incorporates the specificity requirement. Agreement on Subsidies and Countervailing Measures, Part I, Art. 2.

83. See Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507, 518 (1990) [hereinafter Diamond, *Search*] (describing governmental actions and countervailing duties). As Professor Diamond explains:

In modern society, all producers benefit from government action. Governments regularly provide road systems, police and fire protection, and other services which the producer would otherwise have to provide for itself. If such governmental actions were countervailable, virtually every product in international trade could be subject to a levy, a result which contrasts with accomplishments under GATT. To avoid this result, some test is generally applied which exempts from countervailing duties government actions which provide general benefits, rather than benefits to a few specific industries or firms.

*Id.*

84. See BAUMOL & BLINDER, *supra* note 79, at 543 (discussing the implications of imposing a tax to offset externalities).

85. See GARTEN, *supra* note 16, at 10. Although Mr. Garten was addressing the impact of dumping, it is equally true that subsidies send false signals to the market by creating a disincentive for investors to invest capital in manufacturers that are in competition with the subsidized manufacturer.

should be allowed to use their CVD laws to deter subsidies, thereby promoting the efficient utilization of resources on a global scale.<sup>85</sup>

The second argument against deterrence theory is that GATT agreements regarding subsidies and countervailing measures recognize the social usefulness of subsidies, and do not prohibit subsidies.<sup>87</sup> It is disingenuous to rely on the premise that GATT members recognize the usefulness of government involvement in the economy to bolster the argument that deterrence theory is unsound with respect to subsidies to specific firms or industries. The signatories to GATT subsidies agreements acknowledge that subsidies can distort and inhibit international trade to the detriment of all countries.<sup>88</sup> Otherwise, the signatories would not have negotiated for the countervailability of subsidies in the first instance, nor recognized that to permit indiscriminate government subsidization of specific industries would invite "beggar thy neighbor" policies which export unemployment and other social problems.<sup>89</sup> GATT members also recognize that it is politically impossible to eliminate subsidies completely.<sup>90</sup> However, the failure to prohibit subsidies completely under GATT is not inconsistent with the deterrence theory. Rather, GATT members have agreed to permit individual countries to place CVDs on

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86. See *supra* notes 68-73 and accompanying text (discussing the economics of subsidies).

87. See Diamond, *supra* note 72, at 779. As Professor Diamond states: The deterrence rationale is also inconsistent with current international agreements. The GATT Subsidies Code, for example, rejects claims that all such payments are *per se* improper, while recognizing their potential for harming some individuals. [Article then quotes from Subsidies Code Article 11].

*Id.*

88. AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI, AND XXII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, done Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter GATT SUBSIDIES CODE].

89. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Subsidies and Countervailing Measure, Apr. 15, 1994, at art. 5-7, in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1319 (1994) [hereinafter Agreement on Subsidies] (providing multilateral CVD remedies such as consultations and convening a dispute settlement body). These remedies intend to address subsidies that cause "serious prejudice" to the trade interests of other members such as the practice of displacing or impeding the exports of like products of a member into a third country market. *Id.*

90. *Id.*

goods imported from countries granting subsidies to specific firms or industries.<sup>91</sup>

The second theory, the neutralization or entitlement rationale, holds that deterrence is not the purpose of United States CVD law.<sup>92</sup> Rather, United States CVD law should apply only to the extent that the granting of a subsidy results in foreign firms selling goods in the United States in greater quantity, or at lower cost.<sup>93</sup> Therefore, under the neutralization rationale, countervailing duties should apply only to the extent necessary to ensure that United States firms receive the result they were "entitled" to absent the foreign subsidy.<sup>94</sup> In the vast majority of cases, the neutralization approach produces a lower countervailable subsidy than the deterrent approach.<sup>95</sup> However, it remains to be determined

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91. *Id.*

92. *See* Goetz et al., *supra* note 76, at 20 (noting that, under the neutralization theory, a CVD serves to neutralize 'relevant' effects of the subsidy on the subsidized firm in the form of altering its behavior).

93. *See id.* at 23 (discussing adverse competitive impact on United States industry). As stated by the authors:

In general, a necessary condition for adverse competitive impact on American producers is that the subsidy is output-*increasing* for the subsidized firm. In particular, the legitimate focus of concern is because a subsidy either directly or indirectly causes a foreign firm's variable costs of producing goods for sale in the American market to be lower.

*Id.* Professor Diamond further argues that:

. . . [W]hile the reduction of marginal cost is a necessary condition for the imposition of a countervailing duty, it is not a sufficient condition. Under certain market conditions, the entitlement of U.S. producers is not affected even when government payments lower a foreign firm's marginal cost curve and the imposition of a duty is not warranted.

Diamond, *supra* note 72, at 777.

94. *See* Goetz et al., *supra* note 76, at 18-19 (discussing the use of countervailing duties). As stated by the authors:

We assume that American firms are entitled to that domestic market outcome which would have resulted from a 'fair', competitive process, by which is meant one which has not been 'manipulated' by foreign government subsidization. The idea then is to restore competition in the American market to its 'but for' state by neutralizing the effect of the subsidy.

*Id.* Professor Diamond concludes that:

. . . U.S. countervailing duty law should entitle [U.S. firms] to an outcome which limits the direct impact of the subsidized foreign firms in the U.S. market—that is, its impact as a direct seller in that market- to what it would have been had the government subsidy not been available.

Diamond, *supra* note 72, at 782.

95. Goetz et al., *supra* note 76, at 25 (describing variable costs and subsidy

whether the difference in measurement of the CVD under the neutralization approach makes it fundamentally different than the deterrence approach.

Many theoreticians use the neutralization rationale to describe the purpose of United States CVD law, but the deterrence theory dominates the enforcement process.<sup>96</sup> The deterrence theory supports the imposition of United States CVDs in many situations where the neutralization rationale would not.<sup>97</sup> Furthermore, it has been argued that in cases involving nonmarket economies or those rare occasions where there are a fixed amount of resources relative to demand, that government activity will not distort the market.<sup>98</sup> However, in cases where the neutralization

grants). There, the authors note that the impact on the variable cost, as the neutralization theory suggests, would result in situations where a foreign government would provide a subsidy to a specific firm or industry without the payments affecting the firm's variable costs. *Id.* Professor Diamond cites three examples of these situations as:

. . . [1] when a government grant does not require a change in the behavior of the firm or when it results in a change of behavior which does not affect production. Subsidies which require no change in behavior may occur if the subsidy is intended simply as a transfer of benefits to owners of the firm. Other examples are government payments provided to cover operating losses, to decommission unused facilities, to help in the clean-up of existing company wastes, or to pay vested retirement allowances, if the payments were unanticipated.

. . . [2] that of the firm which would have performed the activity required to receive government funds even if the funds had not been offered [by the government].

. . . [3] payments which equal the additional cost to the firm of the behavior necessary to qualify for the payment. An example would be a government stipend to pay the wages of employees whom, for social reasons, the government requires the company to hire, but who do not participate in production.

Diamond, *supra* note 72, at 786-88.

96. See Goetz et al., *supra* note 76, at 20-25 (noting explanations as to why the enforcement process is dominated by the deterrent approach to deny all benefits of a subsidy). The authors state:

The benefit-oriented approach is, however, easier to implement than the cost-based approach in one fundamental respect: the causal link between receipt of the benefit and the firm's behavior in the American market need never be examined.

*Id.*

97. See *supra* notes 93-96 and accompanying text (discussing when a subsidy would not be countervailable under the neutralization approach).

98. The argument that a government activity did not produce market-distorting effects was successfully made to a United States-Canada Free Trade Agreement Article 1904 Binational Panel. See *In The Matter of Certain Softwood Lumber Products*



From Canada, 1993 WL 549652 (U.S.Can.F.T.A.Binat.Panel). In this case, two binational panels were involved. The first panel remanded the case back to the United States Commerce Department ordering Commerce to consider the price and output effect of alleged subsidies existing within the Canadian government's provincial stumpage fee programs, and to consider whether these programs were in fact market-distorting. *Id.* at 24.

On remand, the second binational panel summarized the situations where government activity may not affect production as follows:

There may of course be circumstances where this presumption of market distortion will not apply, either because there is no relevant competitive market against which distortion can be measured (the case of nonmarket economies) or because of the special characteristic(s) of the market in question. In these exceptional cases, the economic theory that underlies countervailability is inoperable, and as a matter of U.S. law, no countervailable subsidy exists.

*Id.* at 24; *see infra* notes 140-70 and accompanying text (discussing the two schools of thought on the applicability of United States CVD laws to NMEs).

The panel summarized the arguments of the Canadian complainants as follows: From the outset the Canadian Complainants have maintained that the provincial stumpage markets constitute one of these exceptional cases. They rely on classical Ricardian rent theory, which applies with respect to natural resources for which there is a basically fixed supply and strictly limited alternative uses. According to rent theory, there will be a range of prices for a resource (the 'normal range') over which output will remain constant. Within the normal range, a reduction in price will not increase use of the resource.

*Id.*

After remanding the case so that Commerce could consider whether Canadian stumpage policy had a market-distorting effect, Commerce adopted the:

'Marginal cost theory'. . . [standing] for the proposition that fewer trees will be harvested where an increase in stumpage fees results in a higher marginal cost for stumpage uses. Commerce views this theory as more in conformity with the real world of stumpage markets than economic rent theory. According to Commerce, marginal cost theory sustains the conclusion that Canadian stumpage programs create a distortion in normal competitive markets, i.e. that these programs result in a greater output of timber and lower log prices than would exist in a normal competitive market.

*Id.* at 28.

After reviewing the substance of the analysis under the Ricardian rent theory and the marginal cost theory, the panel determined:

. . . assuming (as we ought) the accuracy and rigor of [Commerce's] sources, they simply do not contradict the basic insight of rent theory on the question of the effects of stumpage pricing on the output and price of timber and lumber. . . We are not here, however, faced with two competing theories, because. . . 'the rent theory approach is not opposed to the supply-demand model.' Instead we are faced with two complementary and interrelated approaches to resource markets, neither of which provide support for Commerce's conclusion that where lower stumpage prices exist in an administered system, output will be increased beyond the level that otherwise prevail in a normal competitive

theory would countervail a subsidy in order to ensure United States firms receive the outcome they are entitled to in the United States market, it is consistent with the principles of deterrence theory.<sup>99</sup> Therefore, the differences between the deterrence and neutralization approaches relate to determining whether, and by how much, to countervail a subsidy. Once a CVD is imposed, the intended outcome under either the deterrence or neutralization approaches is to prevent foreign subsidization from having an effect in the United States market. Eventually, the foreign government will cease providing, or the foreign producer will refuse to accept, the subsidy.

By counteracting and deterring specific subsidies, CVDs promote actions by foreign governments and firms that are consistent with the provisions of GATT. While the United States acting alone may not influence the behavior of a foreign government or firm to end a subsidy, the cumulative effect of several nations imposing CVDs on a subsidized product could bring an end to the subsidy. Despite the differences in defining or measuring a countervailable subsidy, the imposition of CVDs serves the interest of global efficiency by denying governments and firms the benefits of subsidy programs.<sup>100</sup>

In addition to the controversy over the theoretical foundations of United States CVD law, there are questions concerning whether NME governments are capable of providing countervailable subsidies.<sup>101</sup> If it

market.

*Id.* at 29.

Although the binational panel determined that the Canadian provincial stumpage program did not distort the softwood lumber market, the terms of the economic analysis underlying the decision and the wording of the decision itself indicate that this was an exceptional case. Therefore, its dubious whether economic rationale of the *Softwood Lumber* case would apply in other situations.

99. Goetz et al., *supra* note 76, at 22 (acknowledging that, in some situations, these theories are consistent). The authors explain:

Presumably, some subset of subsidies which would have been accepted if firms could make sales in the American market resulting from subsidy-induced reductions in the costs of producing goods for that market will instead be declined if this possibility is foreclosed by the imposition of a countervailing duty offsetting the subsidy-induced reductions in cost. *Thus implementing the neutralization rationale has deterrent consequences on foreign subsidization . . .*

*Id.* (emphasis added).

100. *See infra* note 315 and accompanying text (discussing deterrence and coercion as they relate to attempts to prompt NME governments to cease subsidizing inefficient enterprises).

101. *See infra* notes 128-37 and accompanying text (discussing the theoretical basis for CVDs on NMEs).

is determined that subsidies cannot exist within a NME, United States CVD law cannot be used to promote the efficient use of resources in NME countries.<sup>102</sup> However, before discussing United States CVD law as applied to NMEs, it is necessary to review the generally applicable provisions of United States CVD law.

## B. OVERVIEW OF UNITED STATES CVD LAW

In 1890, the United States Congress promulgated the first CVD statute to protect United States sugar producers from unfair payment of a subsidy by foreign governments to their respective domestic sugar producers.<sup>103</sup> The 1890 Act was intended to protect United States sugar producers from the unfair trading practices of sugar producers in nations that "pay, directly or indirectly, a [greater] bounty on the exportation of" refined sugar.<sup>104</sup> Later, in the Tariff Act of 1894<sup>105</sup> and the Tariff Act of 1897,<sup>106</sup> Congress made CVDs available against all foreign products receiving a bounty or grant<sup>107</sup> from a foreign government.<sup>108</sup> Concepts contained in the Tariff Act of 1897 were contained in section 303 of the Tariff Act of 1930,<sup>109</sup> which remained part of United States CVD law even after the adoption of GATT.<sup>110</sup> However, section 303 was recently repealed by provisions of the Uruguay Rounds Agreement Act.<sup>111</sup> Additionally, provisions of United States CVD law are based on United States obligations arising under GATT.<sup>112</sup>

The first GATT Subsidies Code (Subsidies Code),<sup>113</sup> was negotiated during the Tokyo Round, as a separate interpretation of the subsidy

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102. See *infra* notes 140-69 and accompanying text (explaining the two schools of thought).

103. Tariff Act of Oct. 1, 1890, ch. 1244 § 237, 26 Stat. 567, 584.

104. *Id.*; see *Zenith Radio Corporation v. United States*, 437 U.S. 443, 451 (1978) (discussing the origin of the CVD in the Tariff Act of 1890).

105. Tariff Act of 1894, 28 Stat. 509 ch. 349.

106. Tariff Act of 1897, 30 Stat. 151, ch. 11.

107. See *Nicholas & Co. v. United States*, 249 U.S. 34, 39 (1919) (stating that "a word of broader significance than 'grant' could not have been used").

108. See *Zenith*, 437 U.S. at 452 (discussing the evolution of the imposition of CVDs under the Tariff Act of 1894 and the Tariff Act of 1897).

109. Tariff Act of 1930, 19 U.S.C. § 1303 (Supp. 1994).

110. See *infra* notes 123-27 and accompanying text.

111. See H.R. REP. NO. 826, 103d Cong., 2d Sess. § 261 (1994) (noting that the Uruguay Round Agreements Act repeals section 303).

112. See *Diamond*, *supra* note 72, at 771 (discussing the conformance of United States CVD legislation with GATT).

113. GATT SUBSIDIES CODE, *supra* note 88, at art. II, 1-2.

provisions contained in GATT, as opposed to an addition to, or amendment of, GATT itself.<sup>114</sup> There were two reasons for negotiating the Subsidies Code as a "stand alone" agreement applicable only to those countries signing the Subsidies Code or voluntarily undertaking the obligations contained in the Subsidies Code. First, the Western industrialized countries recognized that an agreement further restricting the use of subsidies would not gain the support of developing nations.<sup>115</sup> Second, the United States Congress believed that the negotiation of a separate agreement would create an incentive for all parties seeking the benefits of the agreement to grant concessions at the negotiating table.<sup>116</sup> Previously, countries could "free-ride" by passively accepting the benefits of an agreement which had general applicability negotiated between the major trading nations.<sup>117</sup> However, application of the Subsidies Code to some, but not all GATT members, was at odds with the basic premise of GATT, namely the unconditional most favored nation (MFN) clause of Art 1.<sup>118</sup>

The Uruguay Round Agreements Act, consistent with the Uruguay Round Agreement on Subsidies and Countervailing Measures, alters United States CVD law by repealing section 303 of the 1930 Tariff Act.<sup>119</sup> Although section 303 was repealed, the Uruguay Round Agreements Act provides that countries which did not sign the Uruguay Round Agreements Act on Subsidies and Countervailing Measures are not entitled to an injury determination.<sup>120</sup> Therefore, it is unclear

114. SUBCOMM. ON INT'L TRADE OF THE SENATE COMM. OF FINANCE, 96th Cong., 1st Sess. 8 (Comm. Print 1979) [hereinafter FINANCE SUBCOMMITTEE]; see Walter Kolligs, Note, *The United States Law of Countervailing Duties and Federal Agency Procurement After the Tokyo Round: Is It "GATT Legal"?*, 23 CORNELL INT'L L.J. 553, 554 (1990) (noting that the Tokyo Round negotiations constitute "stand alone" treaties independent of GATT).

115. Kolligs, *supra* note 114, at 555.

116. *Id.*

117. See S. REP. NO. 1298, 93d Cong. 2d Sess. 77-78 (1974) [hereinafter REPORT ON TRADE ACT OF 1974] (discussing the tendency of developing countries to accept agreements passively without undertaking domestic reform).

118. GATT, *supra* note 3, art. 1. The relevant portion of Article 1 states that: With respect to customs duties and charges of any kind . . . any advantage, favor, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*Id.*

119. Uruguay Round Agreements Act, *supra* note 32, at § 261.

120. See *id.* at § 262(c) (defining countries not entitled to an injury determina-

whether the treatment of NMEs in transition under United States CVD law would change due to the repeal of section 303. Because it is unclear how the Uruguay Round Agreements Act altered the treatment of NMEs in transition under United States CVD law, it is necessary to trace the development of United States CVD law and the treatment of NMEs under that law.

### 1. Generally Applicable Provisions of United States CVD Law

Until the passage of the Uruguay Round Agreements Act, the United States maintained two sets of substantive provisions for administering United States CVD law. The first provision was section 303 of the Tariff Act of 1930, codified in 19 U.S.C. § 1303, and the second substantive provision was codified at 19 U.S.C. §§ 1671 *et. seq.* Despite the division of United States CVD law into two sets of statutes, the modern term "subsidy" contained in section 1671 was interpreted to have exactly the same meaning as the term "bounty" or "grant" under section 303.<sup>121</sup> The difference between section 303 and section 1671 related to the requirement of finding injury to a United States industry before imposing a CVD.<sup>122</sup>

The grandfather provisions in GATT's implementing document, the Protocol of Provisional Application, permitted continued use of section 303.<sup>123</sup> Since section 303 was based on the 1897 Act, rather than the Subsidies Code, no injury determination was required before imposition of a CVD.<sup>124</sup> However, the countries undertaking the obligations of the Subsidies Code were entitled to an injury test pursuant to section 1671.<sup>125</sup> If it was determined that NME countries, or countries with economies in transition, were subject to United States CVD law, they would fall under the provisions of section 303 because the United States

tion); *id.* at § 262(d) (defining a subsidies agreement country).

121. 19 U.S.C. § 1677(5); see David Simon, *Can GATT Export Subsidy Standards Be Ignored by the United States in Imposing Countervailing Duties?*, 5 J. INT'L. L. BUS. 183, 185 (1983) (discussing the definition of "subsidy" under the two relevant statutory sections).

122. Simon, *supra* note 121, at 185-86.

123. PROTOCOL OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308 [hereinafter PPA]; Kolligs, *supra* note 114, at 567.

124. See *Roasted In-Shell Pistachios From Iran*, 51 Fed. Reg. 35,679 (Dep't Comm. 1986) (final CVD determination) (stating that under section 303, petitioners do not have to allege material injury).

125. 19 U.S.C. § 1671(b).

applied the injury determination on a conditional MFN basis only to those countries accepting the obligations imposed by the Subsidies Code.<sup>126</sup> With the repeal of section 303, United States CVD law will continue to be administered on a conditional MFN basis, but now in accordance with the provisions of the Uruguay Round Agreements Act.<sup>127</sup>

The decision to repeal section 303 and administer United States CVD law based on the Uruguay Round Agreements Act will affect a NME or economy in transition country if two conditions are met: 1) if the country in question is a Subsidy Agreement country as provided in section 262(b) of the Uruguay Rounds Agreement Act; and 2) the country's government is capable of providing a subsidy. Determining whether a country is a Subsidies Agreement country under section 262(b) should not be difficult. In the past, however, disagreement has existed over whether a NME country government can grant a subsidy. Historically, the impact of section 303 with its lack of an injury determination may have played a role in Commerce's position that governments in NMEs cannot grant subsidies. With the repeal of section 303, and while NMEs are in a state of transition, it may be time to revisit the question of the applicability of United States CVD laws to NMEs and economy in transition countries.

## 2. United States CVD Law Relating to NMEs

There are two schools of thought as to whether governments of NMEs can grant subsidies.<sup>128</sup> One school argues that it is possible for governments of NMEs to grant subsidies, but that locating and measuring the subsidy necessitates the application of a nontraditional subsidy analysis.<sup>129</sup> This school argues that a subsidy should be analyzed in terms of "preferential treatment" rather than a benefit provided by the

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126. 19 U.S.C. § 1303; see Robert L. Harris, Note, *Goin' Down the Road Feeling Bad: U.S. Trade Laws' Discriminatory Treatment of the East European Economies in Transition to Capitalism*, 31 COLUM. J. TRANSNAT'L L. 403, 422-23 (1993) (stating that NMEs could not receive the benefit of the test for material injury because not one NME is a signatory to the GATT Subsidies Code).

127. Uruguay Round Agreements Act, *supra* note 32, at §§ 261, 262(b), 262(c).

128. See Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L L. 807, 829 (1984) (describing the two approaches to granting countervailable duties in NME countries).

129. *Id.*

government.<sup>130</sup> Under the "preferential treatment" analysis, if the government provides preferential treatment to one group or industry, that preference is countervailable.<sup>131</sup> Application of United States CVD law under this analysis requires Commerce to establish the normal or average price levels within a country, and then determine whether the group or industry in question received any preferential treatment.<sup>132</sup> This analysis can be applied to measure the degree of preferential treatment received by one group or industry in either a market or nonmarket economy.<sup>133</sup>

The difficulty with this analysis is that it fails to deal with subsidies embedded in a NME's normal or average price levels. Therefore, a group or industry could be the beneficiary of government involvement in setting the economy's normal or average price levels without incurring CVD liability. For Commerce to identify a countervailable subsidy, it would have to find a second level of government preference for that group or industry beyond that normally found throughout the economy. Under this approach, a great deal of government subsidization would not be countervailable.

The second school argues that it is impossible for a NME government to grant a countervailable subsidy.<sup>134</sup> Proponents of this theory acknowledge that government action distorts the allocation of resources within the economy. However, this theory asserts that because the subsidies pervade the economy, it is impossible to isolate and quantify a subsidy for purposes of applying the CVD law.<sup>135</sup> In CVD cases involving market economies, Commerce relies on commercial benchmarks for establishing the standard against which to measure the amount of a subsidy.<sup>136</sup> By contrast, commercial benchmarks are impossible to find

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130. *Id.*

131. *Id.*

132. *Id.*

133. Horlick & Shuman, *supra* note 128, at 829. Horlick and Shuman write: This definition of subsidy hinges on the concept of preferentiality: if the government treats a group specially (to that group's benefit) a subsidy is conveyed. The approach could be characterized as follows: If a subsidy is thought of in economic terms as a governmental action such that one group benefits relatively more than others in a country, a countervailable subsidy exists to the extent that the level of benefit to the targeted recipient exceeds the normal or average level of benefit. This can be done in a market as well as nonmarket context as long as the average is measurable.

*Id.*

134. *Id.*

135. *Id.*

136. *Id.* (explaining that benchmarks represent the normal or average commercial

when the public sector owns the means of production and there is no private sector as exist in market economy nations.<sup>137</sup> However, Commerce finds it theoretically consistent to utilize commercial prices from market economies in determining a NME manufacturer's FMV in cases under United States AD law.<sup>138</sup> This issue is discussed in greater detail below.<sup>139</sup>

The two schools of thought concerning the applicability of United States CVD laws to NMEs were addressed in *Georgetown Steel Corp.*<sup>140</sup> There, the United States Court of International Trade (CIT), in a sharply-worded opinion, overruled Commerce's final determinations in several combined CVD cases involving NMEs.<sup>141</sup> As stated by the CIT, Commerce presented four reasons for concluding that United States CVD law does not apply to NMEs.<sup>142</sup> However, only two of the stated reasons are relevant to this analysis.<sup>143</sup>

situation as found by the average business community).

137. *Id.* Horlick and Shuman write:

The United States countervailing duty law relies on the existence of commercial benchmarks to determine when a subsidy exists (i.e., a countervailed subsidy occurs when a government behaves in a way that is more beneficial to the recipient than the same commercial action based upon unrestrained market forces). Where, as in a NME, there are no significant commercial benchmarks, there is no commercial standard against which to compare the government intervention. Therefore, lacking a market-based norm, it is impossible to determine if a producer or exporter is receiving a subsidy and, if so, how to measure it.

*Id.*

138. *See supra* notes 51-55 and accompanying text (explaining how the "factors of production" approach uses cost of input factors of market economies to determine FMV in NMEs).

139. *See infra* notes 221-52 and accompanying text (describing Commerce's current approach to calculating FMV under the factors of production methodology).

140. *Continental Steel Corp. v. United States*, 614 F. Supp 548, 550 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

141. *Carbon Steel Wire Rod From Czechoslovakia*, 49 Fed. Reg. 19,370 (Dep't Comm. 1984) (final neg. CVD determination); *Carbon Steel Wire Rod From Poland*, 49 Fed. Reg. 19,374 (Dep't Comm. 1984) (final neg. CVD determination); *Potassium Chloride From the Soviet Union*, 49 Fed. Reg. 23,428 (Dep't Comm. 1984) (rescission of initiation of CVD investigation).

142. *Continental*, 614 F. Supp. at 549-50.

143. *See id.* at 549-50 (listing the reasons for the CIT's decision). The two reasons not relevant to this analysis are that Commerce relied on "the consensus" of the academic literature in the area, and, that Commerce asserted broad discretion in determining whether subsidies exist. *Id.*



First, Commerce determined that section 303 did not apply to NMEs because Congress was silent on the application of United States CVD law to NMEs while at the same time specifically amending United States AD law to cover NMEs.<sup>144</sup> Therefore, argued Commerce, Congress must not have intended United States CVD law to apply to NMEs.<sup>145</sup> Commerce buttressed its argument by citing to Article 15 of the Subsidies Code, which permits signatories to treat NMEs under their AD law or their CVD law.<sup>146</sup> Commerce interpreted Congress' amendment of United States AD statutes in the 1979 Trade Act as an expression of Congressional preference that United States AD law govern the treatment of NMEs.<sup>147</sup> Furthermore, Commerce believed that it was unfair to use section 303 to deprive NMEs of the benefits of an injury determination.<sup>148</sup>

The CIT, determining that section 303 applied to NMEs, stated that "[t]he language of the law [is] so abundantly clear and its purpose so obvious" that the statute applied to "any country."<sup>149</sup> The CIT interpreted Article 15 as expressly permitting application of the CVD law against NME countries, and found that the amendments to the United

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144. *Id.* at 549-50.

145. *Id.* at 549-50.

146. *Id.* at 556.

147. *Continental*, 614 F. Supp. at 556. The CIT wrote:

The government has made an argument, difficult to follow, that Congressional approval of the Subsidies Code in the Trade Agreements Act of 1979, somehow indicated a choice of antidumping law rather than the countervailing duty law for use with products from nonmarket economies. This argument evidently takes the continuation of special provision for nonmarket economies in the antidumping law (previously shown here to be nothing more than a ratification of past administrative practice) as a sign that Congress had rejected the countervailing duty law for use with nonmarket economies. (*footnotes omitted*)

*Id.*

148. *Id.* at 556. The CIT wrote:

. . . the government injects the novel idea that had Congress not rejected the countervailing duty law *it would have given petitioners a way to avoid the injury test of the antidumping law*—as if the governments of countries with nonmarket economies have a vested interest in getting the procedure of an injury determination before their products could be assessed with special duties.

*Id.* (*emphasis added*).

149. *Id.* at 550 (recalling that, in dealing with arguable NMEs such as Czarist Russia and Nazi Germany, the Treasury Department had no difficulty in applying the CVD law). The court concluded "[t]hese latest determinations are new developments by the administrative agency. In short, they have no weight of historical administrative practice behind them." *Id.* at 555-56.

States AD law constituted nothing more than a codification of prior administrative practice as announced in *Bicycles* and *Golf Cars*, rather than a congressional preference for use of the AD law.<sup>150</sup> Because countries with NMEs participated in negotiating the Subsidies Code, the CIT found that those countries as well as Congress acknowledged the applicability of CVDs to NMEs.<sup>151</sup> Finally, the CIT noted there was no legal reason to prefer the use of a methodology which would allow NMEs to obtain an injury determination before assessing duties against their products.<sup>152</sup>

Secondly, the CIT addressed the theoretical principles governing the administration of United States CVD law to NMEs. Commerce had maintained that because no market exists in NMEs, it was impossible for a NME government to grant a subsidy.<sup>153</sup> Commerce argued that the absence of a market indicated the absence of commercial benchmarks necessary for Commerce to determine the amount of the subsidy conferred by the government.<sup>154</sup>

However, the CIT disagreed by finding that subsidies could be granted by NME governments despite the absence of a market or commercial benchmarks.<sup>155</sup> The CIT's decision reflected the "preferential treatment" approach to subsidies, wherein a government of a NME can convey a subsidy by bestowing special treatment on a particular firm or industry even in the absence of markets or commercial benchmarks.<sup>156</sup> The CIT

150. *Id.* at 556; see *supra* notes 48-56 and accompanying text (discussing *Bicycles* and *Golf Cars*).

151. *Continental*, 614 F. Supp. at 556-57. The CIT writes:

Article 15 of the [Subsidies] Code clearly gives a country the choice of using subsidy law *or* antidumping law for imports from a country with a state-controlled economy. Moreover, Congress was informed that countries with nonmarket economies had participated in the preparation of the Code and that it had been signed, subject to subsequent ratification, by two such countries.

. . . In the opinion of the Court this constitutes overwhelming evidence that the 1979 Act shows a definite understanding by Congress that the countervailing duty law covers countries with nonmarket economies.

*Id.* at 556-57.

152. *Id.* at 556. The CIT concluded that ". . . the Commerce Department's determinations were contrary to law. To allow it to develop such an extraordinary exception to the law would go beyond deference to an administrative agency. It would be an abdication of judicial responsibility." *Id.* at 557.

153. *Id.* at 549.

154. *Id.*

155. *Id.* at 552-55.

156. *Continental*, 614 F. Supp. at 553. The CIT explained that:

found that an opposite conclusion would exempt from section 303 regulation those governments most guilty of providing subsidies.<sup>157</sup>

Although the CIT declined to specify a methodology for determining the subsidy amount, the court stated that the problem Commerce faced was not whether section 303 applied, but rather, how to measure the amount of the subsidy.<sup>158</sup> The CIT noted that Commerce had no theoretical difficulty in determining FMV for NME manufacturers under United States AD law without the use of domestic commercial benchmarks.<sup>159</sup> Moreover, under the CIT-favored preferential treatment approach, it would be easier for Commerce to determine the amount of a subsidy than to determine a dumping margin based on a surrogate market economy.<sup>160</sup> Therefore, the court concluded that the AD law created "a far greater problem" for nonmarket economies than the CVD law.<sup>161</sup>

Although the CIT clearly stated that the CVD law is not "a tool of foreign policy,"<sup>162</sup> the reasoning behind Commerce's original negative

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Subsidization in one of its purest forms is the encouragement of exportation by means of some type of special preference.

. . . The Commerce Department cannot say that such a preference is impossible in a nonmarket economy. It can only say that distortions of a 'market' are not possible. That may be true but it does not eliminate the possibility of subsidization.

*Id.*

157. *Id.* at 553. The CIT writes:

The Commerce Department's reasoning suggests the absurd result that the more completely a government becomes involved in production and the more thoroughly it eliminates the possibility of internal reference to 'market,' in short, the more perfectly it insulates production from normal economic reality, the less likely it is to be 'subsidizing.'

*Id.*

158. *Id.*

159. *Id.* at 555.

160. *Id.* at 553.

161. *Continental*, 614 F. Supp. at 555.

162. *Id.* at 553. In *Georgetown Steel*, Commerce argued that the purpose of United States CVD law was consistent with the deterrence theory for countervailing subsidies. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The CIT disapproved of Commerce's view, however, that the purpose of United States CVD law was to deter a distortion of the market, a misallocation of resources, and a reduction in world wealth. *Id.* The CIT went so far as to say that Commerce's statement regarding the purpose of the United States CVD law was an attempt at "influencing the way the wealth of the world is developed." *Id.* Finally, the court endorsed something approximating the neutralization theory of United States CVDs when it stated that the purpose of the United States law was to protect domestic producers.

final CVD determination was based, in part, on foreign policy considerations to avoid a conflict with NME governments over the imposition of CVDs without an injury test.

In *Georgetown Steel*, the United States Court of Appeals for the Federal Circuit (CAFC) reversed the CIT and reinstated Commerce's original determination concerning subsidies and NMEs.<sup>163</sup> The CAFC agreed with Commerce that section 303, as a direct descendent of the 1897 Act, was not intended to address NMEs.<sup>164</sup> The CAFC based its decision on a finding that Article 15 of the Subsidies Code provided Congress with a choice of enforcing unfair trade remedies against NMEs through either the AD law or the CVD law.<sup>165</sup> The CAFC felt that by providing remedies against NMEs in the AD law Congress had expressed its desire to pursue enforcement of United States unfair trade remedies against NMEs through the AD law rather than the CVD law.<sup>166</sup>

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*Id.*

163. *Georgetown Steel*, 801 F.2d at 1309, 1314. The CAFC stated:

Based upon the purpose of the countervailing duty law, the nature of nonmarket economies and the actions Congress has taken in other statutes that specifically address the question of exports from those economies, we conclude that the economic incentives and benefits that [nonmarket economies] have provided for the export . . . do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended.

*Id.*

164. *Id.* at 1309, 1314.

165. *Id.* at 1317-18. The CAFC wrote:

Article 15 of the Subsidies Code permitted signatory countries to regulate imports from State-controlled economies based on a surrogate cost methodology under either antidumping or countervailing duty legislation enacted in the particular signatory country.

. . . Since the Subsidies Code was the product of the joint agreement among a number of countries, which had varying laws dealing with selling at unreasonably low prices by foreign producers, it was only natural that the Code would merely prescribe the method for determining the existence of a subsidy, and leave it to each country to determine the particular method it would use to deal with the problem.

*Id.*

166. *Id.* The CAFC went on to state:

In the United States, as we have held, Congress elected to deal with the problem under the antidumping and not under the countervailing duty law. The fact that Congress adopted the Code under which the United States also could have proceeded under the countervailing duty law, does not establish that in fact it did so.

*Id.*

In rejecting the CIT's adoption of the preferential theory of subsidies, the CAFC agreed with Commerce that, where no market exists, a government cannot distort resource allocation through subsidization.<sup>167</sup> Unlike the CIT, the CAFC failed to acknowledge that application of United States AD law rather than section 303 would grant NMEs manufacturers the benefits of an injury determination.<sup>168</sup> The CAFC decision and Commerce's position resulted in a curious situation where GATT members with market economies that had not undertaken the Subsidies Code obligations were not entitled to an injury determination, while NME countries which were not GATT members received the benefit of an injury determination.<sup>169</sup> The position of Commerce and the CAFC that NMEs cannot provide subsidies remains an open debate, especially after the repeal of section 303 and the emergence of more NME countries seeking to implement market reforms.

### 3. Conclusion

Neither the view of Commerce, upheld by the CAFC, nor the opinion of the CIT which was reversed, are completely satisfactory. Commerce and the CAFC advanced the rationale that subsidies cannot exist in a nation where the government owns every facet of production, mandates the level of production for all major goods and services, sets costs and prices throughout the economy, and ensures that inefficient producers will not go out of business. This view suggests that a little subsidization will invoke the CVD law, while a substantial amount of subsidization will not invoke such duties.

Article 15 of the Subsidies Code permits the application of a signatory's AD or CVD law to NMEs. For market economy signatories of the Subsidies Code, both AD or CVD laws would require an injury determination, so the issue of inconsistent treatment does not arise. However, section 303 remained applicable due to the grandfather provi-

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167. *Id.* at 1315-16. The CAFC stated that:

Although, these benefits [provided by the government to producers in a NME] may encourage these entities to accomplish the economic goals and objectives of the central planners set for them . . . they do not create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed.

*Id.*

168. *See supra* notes 149-54 and accompanying text (noting CIT criticism of providing NMEs with an injury determination).

169. This result leads to an interesting MFN status problem which could be adjudicated under the GATT dispute resolution as a violation by the United States.

sions of the PPA. Congress' decision to amend the AD law to conform to the previous administrative practice, and not to amend the CVD law, did not foreclose the application of United States CVD law to NMEs. By its terms, section 303 applied to "any country," and precedent existed for using section 303 against nonmarket economies such as Tsarist Russia and Nazi Germany. Therefore, the *Georgetown Steel* decision, which declined to apply section 303 in NME cases, created a curious result: NMEs gained the benefit of an injury test while GATT members, not taking on the obligations of the Subsidies Code, received no injury test. This decision was inconsistent with, if not a violation of, United States MFN obligations under GATT because United States trade laws treated imports from GATT members not covered by the Subsidies Code less well than imports from NMEs.

The CIT's statutory analysis of section 303, and its finding that governments in NMEs can provide subsidies, is more consistent with the theory underlying United States CVD law than the view taken by Commerce and the CAFC. However, the concept of preferential treatment within a NME as the basis for countervailing a NME governmental subsidy requires closer scrutiny. The use of United States CVD law not only protects domestic industry from the harmful effects of subsidized competition, but it also fosters the efficient allocation of resources throughout the global economy. Under the preferential treatment approach, government control of an economy resulting in a misallocation of resources is acceptable; but if the government takes a second step to show further preferential treatment to a manufacturer, then a CVD may be assessed. This approach fails to countervail all of the subsidy.

The distinction between the deterrence and neutralization theories is mostly an argument over how to measure a subsidy correctly. Subsidies are an anathema to the goals of free trade underlying GATT and United States trade policy. Countervailing subsidies deny manufacturers receiving the subsidy any advantage in the United States market, and, to that extent, deter governments of those manufacturers from subsidizing products intended for sale in the United States. Therefore, even though United States CVD statutes, or the legislative history, fail to state expressly that United States CVD law is premised on deterrence theory, the imposition of United States CVDs has a deterrent effect.

With the replacement of section 303 by section 262 of the Uruguay Round Agreements Act, United States GATT obligations require an injury test before a countervailing duty for all Subsidy Agreement countries, regardless of whether they are NMEs or economies in transition. Therefore, in light of the changes in United States CVD law and the

market reforms introduced in NME countries, the *Georgetown Steel* decision requires a reexamination. The introduction of market reforms in NMEs has created an opportunity to utilize United States AD law in conjunction with the CVD law.<sup>170</sup> Furthermore, using United States AD and CVD laws together will assist NME governments in carrying out reforms necessary to transform successfully from state-controlled NMEs to market-oriented economies.

Before discussing ways to coordinate United States AD and CVD laws in cases involving NMEs in transition, the nature of the economic transition underway in these countries requires understanding. This article will also review the attempts Commerce has made to cope with NMEs in transition under the provisions of the 1988 Trade Act. The final section will analyze several proposals for dealing with NMEs in transition.

### III. THE ECONOMICS OF NMEs IN TRANSITION AND AN OVERVIEW OF THE ADMINISTRATIVE RESPONSE BY COMMERCE

Since the 1980s, many countries traditionally identified as NMEs have pursued policies designed to introduce market reforms into their economies. These market reforms forced Commerce to reconsider its treatment of NMEs in transition under United States AD and CVD laws. A series of AD and CVD cases involving PRC manufacturers required Commerce to develop new approaches for administering United States unfair trade laws in cases involving economies in transition. The first attempt at administering the AD and CVD laws in cases involving economies in transition manufacturers resulted in the "bubbles of capitalism" approach.<sup>171</sup> However, within a short period of time, Commerce replaced the bubbles approach with the more restrictive "market oriented industry" approach.<sup>172</sup> Before discussing the details of Commerce's attempts to administer the AD and CVD laws to manufacturers operating within economies in transition countries, this article will consider the economic steps these countries must take in order to transform successfully into market oriented economies.

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170. See *infra* notes 329-30 and accompanying text (arguing that Commerce should utilize the CVD law in conjunction with the AD law).

171. See *infra* notes 196-220 and accompanying text (examining the "bubbles of capitalism" approach used by Commerce in administering the AD and CVD laws).

172. See *infra* notes 221-49 and accompanying text (describing the "market-oriented industry" approach used by Commerce in administering the AD and CVD laws).

## A. THE ECONOMICS OF NMEs IN TRANSITION

While the PRC slowly began introducing market reforms in the early 1980s,<sup>173</sup> only in the last several years have the NME countries of Europe begun to address the legacy of their communist past by instituting market reforms.<sup>174</sup> Although market reforms are proceeding, economists have yet to reach a consensus regarding the optimal speed and sequencing the reforms should take.<sup>175</sup> Furthermore, economists disagree over the appropriate level of government involvement in the transition process.<sup>176</sup> Despite these differences about the pace of reform, economists

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173. See Yingyi Qian and Chenggang Xu, *The M-form Hierarchy and China's Economic Reform* 37 EUR. ECON. REV. 541 (1993) (noting that from 1979 to 1991, market reforms have yielded substantial growth).

174. Philippe Aghion, *Economic Reform in Eastern Europe, Can Theory Help?* 37 EUR. ECON. REV. 525 (1993); Peter Murrell and Yijiang Wang, *When Privatization Should Be Delayed: The Effect of Communist Legacies on Organizational and Institutional Reforms*, 17 J. COMP. ECON. 385, 386 n.2 (1993). Murrell and Wang state:

We define a communist economy in terms of its fundamental feature: the dominance of the state sector guaranteed both by favorable resource allocation and by systematic legal restrictions on private ownership. Once the major legal restrictions to the development of the private sector are abolished, an economy is no longer communist and has started its transition. By this criterion, countries like China are no longer communist, but rather transitional economies, despite the presence of a large state sector. By the same criterion, the Hungarian and Polish economies of the mid-1980s were still communist, despite significant reform efforts and a more tolerant policy toward the private sector. Final elimination of the major legal barriers on the private sector occurred in 1988 in Hungary and in 1989 in Poland.

*Id.*

175. Aghion, *supra* note 174, at 525.

176. *Id.* at 525-26; Jeffrey Sachs & David Lipton, *Poland's Economic Reform*, 69 FOREIGN AFF. 47 (1990); PROMOTING DEMOCRACY AND FREE MARKETS IN EASTERN EUROPE (Charles Wolf, Jr. ed., 1991) [hereinafter Wolf]; cf. Edward J. Green, *Privatization, the Entrepreneurial Sector, and Growth in Post-Comecon Economies* 17 J. COMP. ECON. 407 (1993). In fact, Green's thesis provides in part that:

(1) The Soviet system of production has been more efficient than is commonly recognized. The benefits from dismantling this system abruptly by privatizing its constituent enterprises may not exceed the costs.

(2) Soviet planning procedures, which primarily operated via planning ministries at the industry level rather than from within enterprises, were not dramatically different from the planning procedures that have risen within some industries in market economies. In some industries, at least, relocating planning to the enterprise level is likely to be counter-productive.

*Id.* at 408.



widely agree about the necessary steps to move NMEs toward more market-oriented systems.

Economists have identified the necessary steps for a successful transformation from NMEs to more market-oriented economies. These steps fall under six headings: 1) monetary reform to control the money supply and stop inflation; 2) fiscal control to limit budget deficits and coordination of fiscal and monetary policies; 3) price and wage deregulation to link supply and demand within the economy; 4) privatization, including legal protection of property rights, and antitrust laws to break up former state monopolies; 5) a social "safety net" to assure social stability during disruptions caused by the transition; and 6) freely convertible currency to foster the integration of the economy in transition with international markets and to encourage international trade.<sup>177</sup> The effectiveness of these steps depends on the willingness of the governments to enact them as part of a comprehensive package of reforms.<sup>178</sup> If these reform measures are not adopted in toto, the beneficial effects of each individual reform measure is lost.<sup>179</sup> For example, the unemployment resulting from policies of freely convertible currency and increased foreign trade requires a social "safety net" to prevent political upheaval.<sup>180</sup> Although the domestic consequences of the transition process will be different in each country, only the general benefits arising from increased international trade require discussion in this article.

An open trading policy provides three benefits to the economic development of economies in transition. First, increased trade, coupled with a freely convertible currency, is essential for efficient resource allocation within the economy in transition.<sup>181</sup> The need for greater efficiency is created because the establishment of a convertible currency links the cost of a country's domestic production with the rest of the world, allowing comparative advantage to dictate the allocation of resources within the transitional economy.<sup>182</sup> Second, competitive pressures reduce the monopoly inefficiencies present in large state-owned enterprises within the economy.<sup>183</sup> Ultimately, the price effects of foreign trade

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177. II THE TRANSITION TO MARKET ECONOMY at 44 (Paul Marer & Salvatore Zecchini eds., 1993) [hereinafter Marer & Zecchini]; Wolf, *supra* note 176, at 8-10; Sachs & Lipton, *supra* note 176, at 55.

178. Wolf, *supra* note 176, at 8.

179. *Id.*

180. *Id.* at 9.

181. Marer & Zecchini, *supra* note 177, at 270; Wolf, *supra* note 176, at 9; Sachs & Lipton, *supra* note 176, at 54.

182. Wolf, *supra* note 176, at 9-10; Sachs & Lipton, *supra* note 176, at 54.

183. Marer & Zecchini, *supra* note 176, at 270; Klaus Werner, *Russia's Foreign*

assist the economy in transition in stabilizing prices because foreign trade introduces international cost and pricing standards into the economy.<sup>184</sup> Finally, increased foreign trade promotes greater efficiency through the introduction of foreign investment, technology, and import competition.<sup>185</sup> Despite general agreement among economists regarding the necessity for, and benefits of, market reforms and free trade in promoting long term stability and growth in economy in transition countries, these countries have yet to reap fully the rewards resulting from market reforms.<sup>186</sup>

Initially, economists believed that the economies in transition would experience what is known as a "J-curve."<sup>187</sup> Economists predicted that

*Trade and the Economic Reforms*, INTERECONOMICS, May/June 1993, at 144-45. Werner states:

[In Russia the] old, monopolistic structures continue to predominate, it has only been possible to establish properly functioning capital, goods and labor markets in exceptional cases, and factors of production are largely immobile, . . . . The price signals issuing from external markets are distorted or suppressed, and thus cannot trigger off the response from enterprises which would normally be expected in a market economy.

Werner, *supra*, at 144-45.

184. Werner, *supra* note 183, at 145.

185. Marer & Zecchini, *supra* note 177, at 270.

186. David Rohde, *A New Curtain Rises Behind Ex-Iron Curtain*, CHRISTIAN SCI. MONITOR, Feb. 27, 1995, at 6. The article states:

Five years after the fall of the Iron Curtain, a new 'cultural curtain' is descending on East Europe. Instability and underdevelopment, some financial analysts warn, will now divide tens of millions where ideology divided them in the past.

On one side, Poland, Hungary, and the Czech Republic *could* successfully complete the transition to free-market economies and gain entrance to the European Union and NATO.

But Romania, Bulgaria, Albania, Russia, and most former Soviet republics may continue to suffer through years of political instability and economic underdevelopment reminiscent of the third world. (emphasis added).

*Id.*

187. Charles Wyplosz, *After the Honeymoon, On the Economics and the Politics of Economic Transformation*, 37 EUR. ECON. REV. 379 (1993). A J-curve exists when: In the period immediately following a Depreciation or Devaluation of its currency a country may experience a Balance of Payments deficit. In the subsequent period however this will be eliminated and the current account slowly moves into surplus . . . . In explanation of these events it is usually argued that the volume of Exports and Imports respond only slowly to the change in relative prices that the devaluation has introduced and therefore imports remain high and exports low in the immediate post-devaluation period . . . .

after a short period of recession, the economy in transition countries of Europe would experience rapid growth, catching up with Western Europe within two decades.<sup>188</sup> Unfortunately, after enacting policies geared towards stimulating market reforms and economic growth, most economy in transition countries are experiencing worse than anticipated unemployment, inflation, budget deficits, and falling production.<sup>189</sup> As a result of these unexpectedly harsh conditions, public support for politicians supporting market reform policies has declined.<sup>190</sup> Electoral set-

MIT DICTIONARY, *supra* note 14, at 224.

188. Wyplosz, *supra* note 187, at 379.

189. *Id.*; John E. Elliott and Abu F. Dowlah, *Transition Crises in the Post-Soviet Era*, 27 J. ECON. ISSUES 527 (1993). The drastic devaluation of the Russian ruble in October 1994 demonstrates the volatility of the economic picture in Central and Eastern Europe. Margaret Shapiro, *Ruble Plunges to New Low, Of Nearly 4,000 to a Dollar*, WASH. POST, Oct. 12, 1994, at A29. The article stated:

The Russian ruble lost more than 25 percent of its value today, tumbling into a free fall that is severely challenging government assertions that Russia's troubled economy has finally entered a period of tentative stability.

. . . The battered currency fell from 3,081 rubles to the U.S. dollar to 3,926 on the official Moscow Interbank Currency Exchange. Since the beginning of October, the ruble has lost nearly half its value.

*Id.*; see Margaret Shapiro, *Yeltsin Fires Finance Minister Over Ruble Fall; Currency Makes Slight Recovery, But Consumer Anxiety Continues*, WASH. POST, Oct. 13, 1994, at A27 [hereinafter *Yeltsin Fires Finance Minister*]. The *Post* reports:

Economists said the main reason for the ruble's plunge was a series of government decisions this summer to loosen the budgetary strings and grant new credits to agriculture and the military. Those actions sent people scurrying to unload rubles and buy dollars as a hedge against inflation. The inflation rate crept up in September to 7.7 percent [per month] and is expected to worsen this month.

The ruble's drop has challenged government assertions that the turmoil of the past few years is mostly over and that Russia has achieved a measure of economic stability.

*Yeltsin Fires Finance Minister, supra*, at A27.

190. Shapiro, *Yeltsin Fires Finance Minister, supra* note 189, at A27. Yeltsin faces several political consequences to Russian reform efforts:

. . . Yeltsin, responding to the dramatic free fall this week of the Russian ruble, fired his finance minister today and demanded that parliament dismiss the head of the Russian Central Bank.

As Russia's monetary crisis threatened to turn into a serious political crisis for Yeltsin, the Russian leader moved to distance himself and his policies from the turmoil. He suggested that the ruble's collapse may have been orchestrated as an international act of 'sabotage,' and he appointed a special commission, headed by the director of the former KGB, to investigate.

backs of supporters of reform in countries such as Lithuania, Poland, Hungary, Ukraine, Byelarus, and Russia, are evidence of the diminishing public confidence in market reform policies.<sup>191</sup> Due to the economic hardships experienced in the economy in transition countries, there is political pressure in the West to provide economic assistance to these countries, especially Russia.<sup>192</sup> Against this social, political, and eco-

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Russia's parliament, dominated by legislators who oppose Yeltsin's policies, signaled it would use this crisis to increase pressure on the government by scheduling a no-confidence vote for Oct. 21.

*Id.*

191. Jane Perlez, *Welcome Back Lenin*, N.Y. TIMES, May 31, 1994, at A1, A9. A survey of results in several Central and Eastern European Countries shows a steady erosion of support for reformers and a return to power for Communists by means of the ballot box. *Id.* The *Times* reported that:

Soon after the Berlin Wall tumbled . . . the talk in diplomatic salons was that Eastern Europe would join the European Community within a few years . . .

These expectations were not met . . . [and] the new leaders soon started to be replaced by old faces . . .

Within two years Lithuania voted former Communists back into power. Poland followed in 1993. In Ukraine, ex-Communists did well in recent parliamentary elections. And now, in the most staggering turn of all, Hungary handed Parliament over to the old Communists.

*Id.* at A1; see David B. Ottaway, *Socialists Win in Hungary*, WASH. POST, May 8, 1994, at A1 (reporting that the Hungarian Socialist Party won nearly 33% of Parliament while the Democratic Forum, a reform party, only won 12%); *The Road to Ruin*, ECONOMIST, Jan. 29, 1994, at 23 (detailing the failure of reforms and the political misfortunes of reformers); Fred Hiatt, *Voters in Ukraine, Belarus Oust Their Leaders*, WASH. POST, July 12, 1994, at A1 (describing the reinvigorated Communist voting alliance resulting from the economic hardships of post-Soviet democracy); *Belarus Votes to Go Back to the Future*, WASH. POST, May 16, 1994, at A14 (pointing to the reasons for the defeat of political reformers).

192. *The Road to Ruin*, *supra* note 191, at 23. The article states:

Harvard Professor Jeffrey Sachs, who resigned as an advisor to the Russian government, condemns the West and particularly the International Monetary Fund (IMF) [for setback's in Russia's reform policies]. *The purpose of aid to Russia, insists Mr. Sachs, should be political: to keep reformers in power.* The West failed to support the reformers and lost them.

*Id.* (emphasis added).

On September 28, 1994, the United States and Russia entered into a Partnership for Economic Progress, establishing a framework for expanding bilateral trade between the two nations. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, U.S.-RUSSIA STATEMENT ON PARTNERSHIP FOR ECONOMIC PROGRESS, SEPT. 28, 1994 [hereinafter PARTNERSHIP FOR ECONOMIC PROGRESS].

Russia will receive many benefits from this partnership:

conomic backdrop, Commerce has struggled over the past several years to develop an approach for administering United States unfair trade laws in cases involving countries with economies in transition.

#### B. COMMERCE'S RESPONSE TO NMES IN TRANSITION

Despite the fundamental economic transition occurring in the PRC and NME countries of Europe and the states of the former Soviet Union, Congress has yet to define an economy in transition under United States unfair trade laws, or provide statutory guidance for Commerce to follow in administering the AD and CVD laws in cases involving economy in transition manufacturers.<sup>193</sup> Within the framework of the 1988 Trade Act, only Poland is credited with completing the transition from a NME to a market economy.<sup>194</sup> Because Congress has not provided statutory

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Major investments by U.S. companies in such areas as energy production and conservation, pharmaceutical and medical products, food processing, and the conversion of defense production to production of goods for civilian consumption will boost Russian living standards and *help spur Russia's progress toward a viable market democracy* and a full global partnership in peaceful commerce.

. . . Through the Joint Statement, Russia commits itself to continued market-oriented reforms creating a hospitable environment for doing business. The United States, in turn, commits to supporting Russia's reforms and facilitating Russian industry and export market development.

OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET ON PARTNERSHIP FOR ECONOMIC PROGRESS, Sept. 28, 1994, at 1-2 (emphasis added).

193. See Susan H. Kuhbach, *L'Etat, Ce N'Est Pas Moi*, in THE COMMERCE DEPARTMENT SPEAKS 1992: DEVELOPMENTS IN IMPORT ADMINISTRATION; EXPORT AND INVESTMENT ABROAD, at 169 (PLI Corp. Law & Practice Course Handbook Series No. 789, 1992), available in WESTLAW, JLR database (describing the Commerce Department's position regarding investigations of trade from nonmarket economy countries). Kuhbach notes the early history of the Commerce Department's investigations:

The possibility of singling out a particular sector or industry and finding it to be market-oriented despite the fact that the larger economy was not market-oriented arose as early as the 1980 antidumping duty investigation of natural menthol from the People's Republic of China [as determined at 46 Fed. Reg. 24,614].

*Id.* at 172.

194. Certain Cut-to-Length Carbon Steel Plate From Poland, 58 Fed. Reg. 37,205 (Dep't Comm. 1993) (final LTFV determination). The Commerce Department determined that:

Poland is no longer an NME country within the meaning of section [1677(18)] of the Act. Although Poland has not yet achieved its objective of complete political and economic integration with the European Community, [Commerce] finds that Poland's domestic markets, unlike those of a traditional nonmarket economy, are open to trade and foreign investment and are not insulated or

guidance, Commerce has used its discretionary authority to develop approaches for administering the AD and CVD laws in cases involving NMEs in transition.<sup>195</sup>

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protected from external market influences . . . . [Commerce] finds that Poland's economy operates on the basis of market principles to such an extent that Polish domestic prices can reasonably be used as a basis for calculating fair market value within the meaning of the U.S. antidumping law.

*Id.* at 37,206-07. Commerce went on to provide nine reasons for its decision that Poland was no longer an NME:

(1) The zioty is convertible into other currencies, including the U.S. dollar. (2) . . . Wages and work conditions are subject to collective bargaining between the management of Polish enterprises and union representatives. (3) Poland has a long history of permitting foreign direct investment. . . (4) Under Polish law, the management of State-owned enterprises makes independent decisions in all business matters. . . (5) Poland has eliminated price controls on virtually all producer and consumer goods. . . (6) There are no restrictions on exports, except for weapons, goods in short supply, and products that have potential military uses. (7) [Poland's antimonopoly law aims] to create conditions under which fair competition is ensured. (8) Poland has a securities exchange. . . (9) [Poland's customs law and antidumping law follow GATT].

*Id.* at 37,206. Interestingly, reasons one, two, four, five, six, and seven match the requirements that economists believe are required for NMEs to implement market reforms successfully. Specifically, reasons one and six match the requirement of a freely convertible currency to foster the integration of the economies in transition with international markets and encourage trade; reasons two and five match the need for price and wage deregulation to link supply and demand within the economy; and reasons four and seven coincide with the economic requirement of privatization, including legal protection of property rights, and antitrust laws to break up former states monopolies.

Yet, even Poland voted former Communists back into power. Perlez, *supra* note 191, at A1.

195. Sparklers From the People's Republic of China, 56 Fed. Reg. 20,588 (Dep't Comm. 1991) (final LTFV determination) [hereinafter Sparklers]; Uranium From Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan (prelim. LTFV determination), and Uranium From Armenia, Azerbaijan, Byelarus, Georgia, Moldova and Turkmenistan (prelim. determination of sales not LTFV), 57 Fed. Reg. 23,380 (Dep't Comm. 1992) [hereinafter Uranium]. The Commerce Department stated that:

[T]he former USSR was a nonmarket economy country during the POI [Period of Investigation] . . . . [A]ny determination that a foreign country is an NME shall remain in effect until revoked. This presumption covers a geographic area, each part of which assumes the previous NME character in the event of dissolution.

Uranium, *supra*, at 23,383; *see also* Ferrosilicon From Kazakhstan and Ukraine (final LTFV determination), and Ferrosilicon From the Russian Federation (postponement of final determination), 58 Fed. Reg. 13,050, 13,052 (Dep't Comm. 1993) (concluding that Kazakhstan and Ukraine maintain their NME status).

## 1. The Bubbles of Capitalism Approach

The first approach adopted by Commerce, the bubbles of capitalism approach, evolved during AD investigations involving manufacturers from the PRC.<sup>196</sup> Although the PRC's economy was continually viewed as a NME from a macroeconomic perspective, Commerce recognized that sectors within the PRC were operating under market principles.<sup>197</sup> Therefore, Commerce announced that in calculating FMV under the factors of production methodology it would include the cost of factor inputs purchased under market conditions, whether they were foreign or PRC sourced, and obtain from surrogate countries the remaining factor inputs for costs that were not market-driven.<sup>198</sup> The origins of the bubbles approach is traceable to an AD investigation involving *Fans From the PRC*.<sup>199</sup> In the case of *Fans*, the Chinese representatives argued that market forces were at work in the PRC's economy, and therefore, Commerce should have calculated FMV as though the oscillating and ceiling fan industry was market-driven.<sup>200</sup> The Chinese manufacturers requested that the calculation of FMV proceed under the standard methodology of reviewing either home market prices, third country prices, or constructed values, rather than under the factors of production methodology.<sup>201</sup> Commerce's response was that absent a showing that all costs

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196. Kearney & Wang, *supra* note 65, at 266-67.

197. *Id.*; see Sparklers, *supra* note 195, at 20,589 (concluding that the PRC is still treated as a NME).

198. The methodology adopted by Commerce was commonly known as "bubbles of capitalism" but was also known as "mix and match" or "sectoral analysis."

199. Oscillating Fans and Ceiling Fans From the People's Republic of China, 56 Fed. Reg. 25,664, 25,667 (Dep't Comm. 1991) (prelim. LTFV determination) [hereinafter Preliminary Fans]; David W. Richardson & Robert E. Nielsen, *Recent Developments in the Treatment of Nonmarket Economies Under the AD/CVD Laws*, in THE COMMERCE DEPARTMENT SPEAKS 1992: DEVELOPMENTS IN IMPORT ADMINISTRATION; EXPORT AND INVESTMENT ABROAD, at 149 (PLI Corp. Law & Practice Course Handbook Series No. 789, 1992), available in WESTLAW, JLR database; Bello et al., *supra* note 46, at 695-96.

200. Preliminary Fans, *supra* note 199, at 25,666. Generally, the Chinese manufacturers argued that: 1) their respective companies were either privately owned or foreign owned; 2) most of their inputs were purchased from market economies, and the factor inputs purchased within China were purchased at arms-length and reflected market prices; 3) the Chinese government had no control over the type or volume of production; 4) the fans were sold outside of China; and 5) the labor and capital used in production were free of government distortion and reflected market conditions. *Id.*

201. *Id.*

and prices were market-driven, FMV must be based on the factors of production methodology, using appropriate surrogates to provide prices for factor input costs that were not market-driven.<sup>202</sup> However, Commerce provided that where a NME proved that factor inputs were purchased from market economies, Commerce would value them at the purchase price.<sup>203</sup> Furthermore, Commerce announced that if a NME manufacturer could show that factor inputs purchased within the NME reflected market conditions, those NME sourced inputs would replace surrogate country prices in calculating FMV.<sup>204</sup> If the entire industry could show that costs for all factor inputs were set in the marketplace, Commerce would use the reported market prices in calculating FMV.<sup>205</sup> Commerce stated that it would wait until the final determination before ultimately verifying whether the factor input prices were market-oriented.<sup>206</sup> During the interval between the preliminary and final determinations in the *Fans* case, Commerce began reevaluating the bubbles approach in another case involving the PRC.

In *Lug Nuts From the PRC*,<sup>207</sup> Commerce refined and restricted the bubbles approach.<sup>208</sup> Commerce continued to use the cost of PRC sourced factor inputs determined by market forces, combined with surrogate country prices for factor inputs that were not market-driven.<sup>209</sup> However, Commerce began reexamining the theoretical underpinnings of the bubbles approach by questioning whether bubbles of capitalism within an otherwise NME was common or merely an "exceptional event."<sup>210</sup> On the other hand, Commerce continued to acknowledge that

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202. See *id.* at 25,667 (stating that the Commerce Department preliminarily found that not all inputs were market-based); Bello et al., *supra* note 46, at 693 (noting that "significant inputs" like labor and overhead are addressed to determine fair market value of products in state-controlled markets); Richardson & Nielsen, *supra* note 198, at 157-59 (describing how Commerce modified the bubbles of capitalism approach by evaluating only those inputs of NMEs that are demonstrably market-driven and by using surrogate market economy country values to assess remaining central government influences).

203. Preliminary *Fans*, *supra* note 199, at 25,667.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Chrome Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46,153 (Dep't Comm. 1991) (final LTFV determination) [hereinafter *Final Lug Nuts*].

208. See *id.* at 46,154 (noting that Commerce first used term "bubble of capitalism").

209. *Id.*

210. *Id.* Commerce used the following example to show the difficulties in having



the use of surrogate country prices for factor inputs with market-driven prices would not serve the goals of accuracy, fairness, and predictability.<sup>211</sup>

In *Final Lug Nuts*, Commerce determined that the cost of steel and chemical factor inputs purchased within the PRC had overcome the presumption of state price controls.<sup>212</sup> For the first time, Commerce found that factor inputs purchased within a NME could reflect market forces and be used to calculate FMV under the factors of production approach. However, Commerce's decision that PRC sourced factor inputs prices were market-driven created unintended consequences for potential liability under section 303 of United States CVD law. The potential CVD liability caused Commerce to reverse itself in the final determination of the *Fans* case.<sup>213</sup>

As a result of adopting the bubbles of capitalism approach, the same United States petitioners who had originally argued against including market-driven prices for PRC sourced input factors because the PRC

a true bubble of capitalism within a NME:

For example, an individual producer of chrome-plated lug nuts may be outside of direct government control in the sense that inputs are purchased outside the plan, management is selected by workers, and decisions on what to produce and sell, and what prices to charge are left to the producing entity. Nevertheless, this freedom from direct control occurs in an environment where the domestic currency is not fully convertible, a portion of basic industrial output is produced for the state at state-controlled prices, and most trade is still carried out through trading companies which only recently have begun to separate from national, central-government-owned trading companies.

*Id.*

211. *Id.* Commerce addressed the issue of congressional intent under the AD laws by stating:

With the individual factor input methodology described above, we believe that we are addressing the paramount concern expressed by Congress for not using NME prices to determine FMV, while at the same time recognizing that a NME country that is undergoing a transition to a market-oriented economy may contain sectors within its overall economic structure where market forces have already come into play. When the Department is able to verify the existence of such conditions, we believe it is appropriate to use those prices to determine FMV.

*Id.* at 46,155.

212. *Id.*

213. *Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 55,271, 55,273 (Dep't Comm. 1991) (final LTFV determination) [hereinafter *Final Fans*]. Commerce held that the Respondent failed to provide adequate evidence that the prices of PRC sourced inputs were market-driven because they were purchased in market economy currencies. *Id.*

was a NME, began filing CVD cases against the PRC fan and lug nut manufacturers. The petitioners alleged that these manufacturers were beneficiaries of bounties or grants within the meaning of section 303 of United States CVD law.<sup>214</sup> Commerce's finding that bubbles of capitalism could exist within a NME opened the door for CVD petitions filed by United States industries challenging the applicability of the *Georgetown Steel* rationale to NMEs in transition.<sup>215</sup> In addition, United States firms filed an appeal challenging the use of the bubbles approach in the *Lug Nuts* decision.<sup>216</sup>

After adopting the bubbles of capitalism approach, Commerce faced the possibility that by finding NME sourced factor input prices were market-driven, it would expose NME manufacturers to liability under section 303 of United States CVD law. Commerce appeared unwilling to face the prospect of applying United States CVD law without an injury test against manufacturers from economies in transition.<sup>217</sup> Alternatively, on appeal, the CIT could overturn Commerce's decision to use the bubbles approach within the factors of production methodology. Overturning the bubbles approach would prevent Commerce from acknowledging and rewarding NME manufacturers for participating in market reform efforts. Therefore, it was not surprising that subsequent to its final determination in *Lug Nuts*, Commerce sought, and was granted, a

214. Oscillating Fans and Ceiling Fans From the People's Republic of China, 56 Fed. Reg. 57,616 (Dep't Comm. 1991) (initiation of CVD investigations) [hereinafter *Initiation Fans CVD*]; Chrome Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 877 (Dep't Comm. 1992) (initiation of CVD investigations) [hereinafter *Initiation Lug Nuts CVD*]; Bello et al., *supra* note 46, at 713-14.

215. Initiation Fans CVD, *supra* note 214, at 57,616. The petitioner alleged that: [R]egardless of the nature of the PRC economy, the PRC fans sector operates substantially pursuant to market principles and that the CVD law should apply. Therefore, [Commerce] must decide (1) whether the PRC fans sector does, in fact, operate in a market setting; and (2) if so, whether the CVD law can be applied to this sector. In order to answer these questions, we must start with the fundamental principles set forth in [*Georgetown Steel*].

*Id.*

Commerce concluded that:

[I]t is appropriate to investigate whether the CVD law applies to fan producers and, if so, whether fan producers in the PRC receive bounties or grants within the meaning of section 303 of the Act.

*Id.* at 57,617.

216. Consolidated Int'l Automotive, Inc. v. United States, 797 F. Supp. 1007 (Ct. Int'l Trade 1992).

217. See Harris, *supra* note 126, at 429 (stating that the Commerce Department abandoned its initial adjudicating approach by adopting the MOI test).

remand from the CIT to reconsider the bubbles approach.<sup>218</sup> However, before issuing its *Amended Final Determination in Lug Nuts*,<sup>219</sup> Commerce abandoned the bubbles approach altogether in the case involving *Sulfanilic Acid From the PRC*.<sup>220</sup> In place of the bubbles approach, Commerce adopted the more restrictive Market Oriented Industry (MOI) approach for determining whether to use NME in transition sourced inputs in calculating FMV.

## 2. The Market Oriented Industry Approach

Relying on statements made during the initiation of CVD cases involving *Fans* and *Lug Nuts* from the PRC, Commerce announced the MOI approach for determining when NME in transition sourced factor input prices were market-driven in *Preliminary Sulfanilic Acid*.<sup>221</sup> In *Preliminary Sulfanilic Acid*, Commerce established the criteria for determining when NME in transition manufacturers operated within a market oriented industry.<sup>222</sup>

First, government involvement in setting the price and volume of production for the merchandise under investigation must be nearly non-existent.<sup>223</sup> Second, private or collective ownership should characterize the entire industry under investigation, rather than just the producer in question.<sup>224</sup> Third, market-determined prices must be paid for all but an insignificant portion of the inputs accounting for the total value of the

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218. See *Consolidated Int'l Automotive*, 797 F. Supp. at 1009 (holding that before all the issues in the case were decided Commerce's motion for remand on the issue of use of the bubbles approach granted); Richardson & Nielsen, *supra* note 199, at 4 (noting that following the remand of *Consolidated Int'l Automotive*, the Commerce Department developed the MOI test).

219. *Chrome Plated Lug Nuts From the People's Republic of China*, 57 Fed. Reg. 15,052 (Dep't Comm. 1992) (amended final LTFV determination) [hereinafter *Amended Final Lug Nuts*].

220. *Sulfanilic Acid From the People's Republic of China*, 57 Fed. Reg. 9409 (Dep't Comm. 1992) (prelim. LTFV determination) [hereinafter *Preliminary Sulfanilic Acid*].

221. *Id.* at 9411.

222. *Id.*

223. *Id.* Commerce stated: "For example, state required production or allocation of production of the merchandise, whether for export or domestic consumption in the nonmarket economy country would be an almost insuperable barrier to finding a market-oriented industry." *Id.*

224. *Id.* Commerce elaborated: "There may be state-owned enterprises in the industry but substantial state ownership would weigh heavily against finding a market-oriented industry." *Id.*

merchandise.<sup>225</sup> A manufacturer operating in an industry failing to meet these conditions will have FMV calculated under the factors of production approach utilizing surrogate country costs.<sup>226</sup>

While *Preliminary Sulfanilic Acid* ushered in the MOI approach, *Amended Final Lug Nuts*, published a month later, provided the rationale for Commerce's decision to adopt the MOI approach. In *Final Lug Nuts*, Commerce found that the prices paid by some manufacturers for PRC sourced steel and chemicals were market-driven.<sup>227</sup> But in *Amended Final Lug Nuts* Commerce stated that it needed to broaden its examination to look beyond the specific transactions involving the lug nut manufacturers in order to determine whether PRC steel and chemical prices were market-driven.<sup>228</sup> Under the newly articulated standard, Commerce determined that the price for steel was not market-driven because the government played a significant role in the production volume and prices for steel within the PRC.<sup>229</sup> Once Commerce found that PRC fan and lug nut manufacturers were not operating in market-oriented industries, all CVD cases filed against these manufacturers resulting from Commerce's findings under the bubbles approach were dismissed.<sup>230</sup>

225. *Preliminary Sulfanilic Acid*, *supra* note 220, at 9411.

226. *Id.*

227. *Final Lug Nuts*, *supra* note 207, at 46,155; *Amended Final Lug Nuts*, *supra* note 219, at 15,053.

228. *Amended Final Lug Nuts*, *supra* note 219, at 15,053. Commerce stated that: Upon reexamination, we find that our scope of inquiry was too narrow [under the bubbles approach]. The absence of explicit government involvement in these transactions is not sufficient to warrant the conclusion that the prices for these inputs are market-driven. Instead, it is necessary to examine whether market forces are at work in determining the steel and chemical prices within the PRC. [F]or example, it may be the case that the state purchases large quantities of the input in question. Where this is so, it is reasonable to assume that the state's purchases affect the quantity available to non-state consumers and the prices they would pay. Also, where the state owns many of the input producers and where the input is an important commodity fundamental to the operation of the larger economy, it is not at all clear that the pricing and production of those input producers would mirror those of privately-owned, profit maximizing enterprises.

*Id.*

229. *See id.* (explaining that no need existed to review other inputs based on these findings).

230. *Oscillating and Ceiling Fans From the People's Republic of China*, 57 Fed. Reg. 10,011 (Dep't Comm. 1992) (neg. prelim. determination) [hereinafter *Preliminary Negative CVD Fans*] (announcing the negative CVD determination based on Commerce's findings in *Preliminary Sulfanilic Acid*); *Oscillating and Ceiling Fans*

Commerce provided guidance for future United States firms contemplating filing CVD cases against manufacturers from economies in transition by announcing that if the conditions imposed under the MOI approach were not met, no CVD investigation was necessary.<sup>231</sup> The question then arose whether Commerce would ever find that a NME manufacturer satisfied the conditions imposed by the MOI approach.

Since the MOI approach was announced, commentators with differing perspectives toward NME in transition manufacturers have criticized it on various grounds. Some object to the MOI approach because the test, especially the third prong, almost guarantees that no MOI will be found.<sup>232</sup> Another criticism is that Commerce's determination that "significantly all" factor input prices must be market-driven is ambiguous and can lead to arbitrary results.<sup>233</sup> Furthermore, under the MOI approach, a NME government can enact substantial market reform while remaining immunized from CVD investigations, thereby retaining the benefits of an injury determination under United States AD law.<sup>234</sup>

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From the People's Republic of China, 57 Fed. Reg. 24,018 (Dep't Comm. 1992) (final neg. CVD determination) (announcing that the PRC fans industry is not an MOI and that, therefore, the CVD law is not applicable to that industry); Chrome Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 Fed. Reg. 10,459 (Dep't Comm. 1992) (rescission of initiation of CVD investigation due to the adoption of the MOI approach).

231. Preliminary Negative CVD Fans, *supra* note 230, at 10,012. Commerce discussed the impact of the MOI approach on CVD investigations when it stated:

If an MOI exists, thereby permitting dumping margins to be calculated using the NME producer's actual costs and prices, the United States industries would be left at a disadvantage if they were not able to seek protection from subsidies to that industry . . . . On the other hand, if an industry is determined to be nonmarket, so that [Commerce] would have to value the factors of production in a surrogate country, subsidies to the NME producers become irrelevant—any AD margin would not be calculated using NME prices potentially influenced by subsidies.

*Id.*

232. Lawrence J. Bogard & Linda C. Menghetti, *The Treatment of Non-Market Economies Under U.S. Antidumping and Countervailing Duty Law: A Petitioner's Perspective*, in THE DEPARTMENT OF COMMERCE SPEAKS 1992: DEVELOPMENTS IN IMPORT ADMINISTRATION; EXPORT AND INVESTMENT ABROAD, at 6-7 (PLI Corp. Law and Practice Course Handbook Series No. 789, 1992), available in WESTLAW, JLR database; Kearney & Wang, *supra* note 65, at 9. Kearney and Wang believe that the MOI test is as ineffective as the Commerce Department's bubbles of capitalism test for NME industries. *Id.*

233. Kearney & Wang, *supra* note 65, at 10. Kearney and Wang argue that the MOI test will victimize producers who act within a free market. *Id.*

234. Bogard & Menghetti, *supra* note 232, at 9-11. Additionally, Bogard and

On the opposite side, other commentators believe that the MOI test fails to resolve the "risk" of future United States CVD liability without the benefit of an injury test.<sup>235</sup> However, the replacement of section 303 with section 262 of the Uruguay Round Agreements Act means that future United States CVD cases involving NME or economy in transition manufacturers may require an injury test.<sup>236</sup> Additionally, a concern exists that CVD liability will apply retroactively to actions taken by NME governments prior to the introduction of market reforms.<sup>237</sup> Finally, these commentators object to Commerce's policy of linking FMV determinations in dumping cases with potential CVD liability. These commentators believe that it would be detrimental to the market reform process if potential CVD liability was linked to Commerce's efforts to develop alternative approaches for calculating FMV in case involving economy in transition manufacturers.<sup>238</sup>

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Menghetti argue that the third element of the MOI approach is inconsistent with *Georgetown Steel*, and that as *Georgetown Steel* is a judicial exception to section 1303, the administrative expansion of the court's decision in *Georgetown Steel* is unlawful. *Id.* at 10.

235. Carey et al., *supra* note 65, sec. III, at 15-16; Harris, *supra* note 126, at 441. Mr. Harris argues:

Once a substantial portion of the economy has privatized and the Commerce Department begins recognizing that market-oriented enterprises exist, U.S. domestic industry will begin bringing CVD suits en masse . . . . This perverse incentive structure creates the anomaly of initially applying countervailing duties to those industries that most aggressively pursue privatization, while leaving those enterprises remaining state-owned [without the threat of CVD liability].

*Id.* at 441-42.

236. See *supra* notes 109-27 and accompanying text (explaining the United States CVD law under section 303 and the effect of replacement by section 262 of the Uruguay Round Agreements).

237. Carey et al., *supra* note 65, sec. III, at 15-16. The authors write that: The biggest concern facing Russian producers is that the U.S. CVD law will apply to them retroactively, such that participation in government programs today could lead to CVD liability tomorrow . . . .

[S]uch a retroactive withdrawal of the *Georgetown Steel* exemption occurred in the 1993 *Certain Steel Products from Germany decision* [sic], where Commerce-ITA determined that the CVD laws would apply to the former East Germany after October 1990, reasoning that on that date the region began 'operating under a market-oriented economy for which the concept of subsidies does have meaning.

*Id.*

238. *Id.* sec. II, at 6-7. The authors believe that: Soon after announcing the new policy [bubbles approach], however, Commerce-ITA so tightened the test for its application [by adopting the MOI approach] as

Despite widespread criticism, the MOI approach remains Commerce's policy due to the Clinton Administration and Congress' inability to provide new statutory guidance to Commerce in cases involving economies in transition. Before discussing possible amendments to United States unfair trade laws to address the economies in transition issue, an examination of how the MOI approach operated in a specific case is instructive. Commerce's preliminary findings in *Certain Helical Spring Lock Washers From the PRC* is an example of the difficulties faced by economy in transition manufacturers under the MOI approach.<sup>239</sup>

In *Preliminary Helical Washers*, Commerce sought information from the PRC in order to determine whether the spring lock washer industry was sufficiently market-oriented to have FMV based on the actual prices paid by PRC manufacturers.<sup>240</sup> The Chinese government sought to satisfy each of the three prongs of the MOI approach in order to show that the spring lock washer industry was market oriented.<sup>241</sup> Commerce relied upon information provided by the Chinese government as analyzed in a memorandum prepared by the Acting Director of Antidumping Investigations.<sup>242</sup>

As to the first prong, the Chinese government stated that it was not involved in setting the production volume or prices in the spring lock washer industry.<sup>243</sup> However, Commerce found the record insufficient

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to virtually preclude the possibility that any part of an NME dumping calculation would be based on actual costs . . . . Commerce-ITA's response was to create a direct linkage between application of the Standard Methodology to NME imports and their exposure to CVD liability, and to establish a narrow test governing eligibility for both. The difficult issue of whether and how the CVD law would be applied to transitional economies was thus avoided, but at the cost of much-needed reform of the NME Methodology for determining dumping.

[T]he net result of this two-year odyssey was to retain the NME Methodology and the *Georgetown Steel* exemption until comprehensive economy-wide reform is achieved.

*Id.*

239. *Certain Helical Spring Lock Washers From the People's Republic of China*, 58 Fed. Reg. 26,112 (Dep't Comm. 1993) (notice of prelim. LTFV determination) [hereinafter *Preliminary Helical Washers*].

240. *Id.* at 26,113.

241. Memorandum re: Market-Oriented Industry (MOI) Status of the Chinese Lock Washer Industry 2-3 (Jan. 19, 1993) [hereinafter *Lock Washer Memo*].

242. *Preliminary Helical Washers*, *supra* note 239, at 26,113; *id.*

243. *Lock Washer Memo*, *supra* note 241, at 2. The memo quotes the Chinese government as stating:

to determine the nature of control exerted by central or regional government bodies.<sup>244</sup> The second prong of the MOI approach, relating to ownership of enterprises in the lock washer industry, revealed that six of the sixteen manufacturers were state-owned.<sup>245</sup> Therefore, Commerce determined that there was “substantial state ownership” within the lock washer industry.<sup>246</sup> Under the third prong of the MOI approach, one manufacturer, Hangzhou, stated it imported all of its primary raw materials from market economies and paid market prices for all PRC sourced factor inputs.<sup>247</sup> PRC government authorities were unable to provide information regarding the market-driven nature of the factor inputs for the remaining fifteen firms.<sup>248</sup> Because Commerce requires a view of the entire industry under investigation, Commerce determined that market-determined prices were not paid for all significant inputs, even though Hangzhou provided information on prices it paid for its factor inputs.<sup>249</sup> Despite the Chinese government’s attempt to provide sufficient information to Commerce, it was unable to persuade Commerce that the first two prongs of the MOI approach were met. Even though the PRC made the effort to comply with Commerce’s information request, it was unable to provide the requisite information to address the third prong of the MOI approach. This example indicates the difficulty in fully complying with Commerce’s information requests.

Under the MOI approach, Commerce presumes that the NME in transition government controls an industry, unless the foreign manufacturer can prove otherwise. It is difficult for NME in transition manufacturers to rebut Commerce’s presumption by proving a negative, namely that no government control exists. Because the MOI approach has caused so much confusion and disagreement, the Administration will eventually

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[T]he government of China exerts no control over the lock washer industry. Each producer is responsible for making all decisions regarding production and sale of lockwashers, and for managing all profits and losses generated from the production of lockwashers.

*Id.*

244. *Id.* at 2-3.

245. *Id.* at 2. The percentage of the total lock washer production produced by state-owned manufacturers was withheld from the public version of the Lock Washer Memo. *Id.*

246. *Id.* at 3.

247. *Id.* at 2.

248. Lock Washer Memo, *supra* note 241, at 2-3.

249. *Id.* at 3.



develop a new policy for administering United States unfair trade laws in cases involving manufacturers operating in economies in transition.

### 3. Conclusion

With the adoption of the more stringent MOI approach, Commerce continues to analyze NME in transition manufacturer costs exclusively under AD law. Commerce has avoided analyzing cases involving NMEs in transition utilizing the AD law in conjunction with an analysis of potential CVD liability. With the replacement of section 303, Commerce should not resist utilizing the CVD law in conjunction with United States AD law in cases involving NMEs or economies in transition that are deemed Subsidy Agreement countries under section 262 of the Uruguay Round Agreements Act, because under either the AD or the CVD law, a showing of injury to a United States industry is required.

Furthermore, Commerce should reexamine its policy of refusing to impose CVD liability against non-Subsidy Agreement countries in order to capture all governmental interference in an economy. If NME in transition manufacturers purchase NME sourced inputs which benefit from subsidies, Commerce should analyze the downstream effect of the subsidy. But if Commerce acknowledges that NME sourced inputs could receive subsidies, NME in transition manufacturers would be exposed to potential CVD liability regardless of whether they are entitled to an injury determination. However, Commerce's recognition that NME governments grant subsidies would indicate a reversal of Commerce's position in *Georgetown Steel*. Therefore, rather than develop an approach which acknowledges the market reforms occurring in NMEs, Commerce has opted to raise the bar against NME in transition manufacturers by adopting the MOI approach that few, if any, economy in transition industries can meet.

The bubbles of capitalism approach is analytically superior to the MOI approach for several reasons. First, the bubbles approach better achieves the policy goals of accuracy, fairness, and predictability in calculating FMV as enunciated in *Lug Nuts*.<sup>250</sup> Additionally, to establish consistency with the policy goals underlying United States unfair trade laws, a CVD rather than an AD investigation should determine the effect subsidies have on NME in transition sourced factor inputs. United States AD and CVD laws were designed to work together to offset the

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250. See *supra* notes 208-13 and accompanying text (articulating the policy goals in determining the calculation of FMV).

impact of unfair trading practices, and Commerce should use them in tandem during investigations of economy in transition manufacturers, *Georgetown Steel* and prior administrative practice notwithstanding.

Second, the bubbles of capitalism approach focuses on an individual manufacturer's costs, and not the entire industry's costs. Using the market-driven costs of a NME manufacturer's domestically-sourced inputs provides an incentive for those individual manufacturers to continue to operate under market principles. Additionally, NME in transition manufacturers receiving the benefits of the bubbles approach will have an advantage over other producers of similar products in the United States market. To the extent that the United States export market is important to the success of NME in transition manufacturers, the manufacturers will reduce their dependence on government subsidies and initiate their own market reforms.<sup>251</sup> Therefore, the bubbles approach promotes market reforms for individual manufacturers within the economy in transition. Furthermore, the use of the CVD law will assist in eliminating the effects of both direct and indirect subsidies, because manufacturers will implement market principles to avoid United States CVD liability.

Third, use of the bubbles of capitalism approach will encourage cooperation in AD investigations. If a NME manufacturer believes it can prevail upon Commerce to use its actual costs in calculating FMV, the manufacturer should be more willing to share information. In contrast to the *Helical Washer* case, individual manufacturers providing information regarding domestically-sourced input pricing will be rewarded.

Commerce's task is to design an approach for implementing the factor of production methodology that protects United States industry from unfair trade practices, while accurately capturing the costs of NME in transition manufacturers. The broader policy question is whether the Clinton Administration and Congress can agree on legislation that rewards those manufacturers participating in the market reform process, thereby reinforcing United States efforts encouraging governments in NME countries to continue implementing market reforms.

The bubbles of capitalism approach, while analytically superior to the current MOI approach, is not the only means for the United States to deal with NMEs in transition. The Clinton Administration proposed

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251. If the NME manufacturer does not export to the United States, then United States unfair trade laws have no impact on that firm's decision-making. If other market economy nations importing goods from NME manufacturers adopt laws similar to the United States, then all NME manufacturers exporting to market economies will have a similar incentive to avoid government control and subsidies.

statutory language dealing with economies in transition in the Uruguay Round Agreements Act. Although the Administration's proposals were eventually dropped from the Act,<sup>252</sup> the proposals serve as a useful starting point for discussing possible future changes in United States unfair trade laws relating to economies in transition. Additionally, other commentators have suggested numerous methods for addressing issues relating to economies in transition under United States unfair trade laws. These proposals, along with the author's suggestions, will be discussed below.

#### IV. PROPOSALS FOR CHANGE IN UNITED STATES AD/CVD LAWS RELATING TO NMEs IN TRANSITION

##### A. ADMINISTRATION PROPOSALS FOR NMEs IN TRANSITION

Initially, the Clinton Administration declined to amend United States unfair trade laws to deal specifically with economies in transition. After reconsidering its position, the Administration ultimately made two proposals to the congressional committees drafting the Uruguay Round Agreements Act relating to economies in transition. However, neither of the two provisions were included in the final version of the Uruguay Round Agreements Act.<sup>253</sup>

The first Administration proposal was to create a special category for economies in transition under United States unfair trade laws.<sup>254</sup> The proposal was intended to provide a mechanism for protecting United States industry from unfair imports from manufacturers in economies in transition, while simultaneously promoting the United States foreign policy goal of encouraging the economic and political reforms underway in NME in transition countries.<sup>255</sup> Under the new provision, economies

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252. See *supra* note 6 and accompanying text (stating that the House and Senate agreed to drop proposed anti-dumping provisions from the Uruguay Round Agreements Act).

253. See *supra* notes 4-7 and accompanying text (discussing the Administration's introduction of NME in transition proposals).

254. Administration Proposal: Economies in Transition [hereinafter Initial EIT Proposal]; see also Special Report, INSIDE U.S. TRADE, July 15, 1994, at S-5 [hereinafter Special Report, July 15, 1994] (detailing the Administration's "economies in transition" proposal).

255. Special Report, July 15, 1994, *supra* note 254, at S-5. Commerce Department Assistant Secretary for Import Administration Susan Esserman was reported to have said:

in transition were defined as those countries instituting a right to private property and establishing a mechanism for privatizing state-owned enterprises.<sup>256</sup> Additionally, the new provision would have substantially altered the administration of United States trade laws by eliminating Commerce's participation in cases involving manufacturers from NMEs in transition. Under the new provision, only the ITC would review petitions for relief in cases of economy in transition imports.<sup>257</sup>

The economies in transition provision would have been effective for five years, during which time no other United States unfair trade statute would apply to NMEs in transition.<sup>258</sup> The proposal would have eliminated the dumping calculation, and required mandatory relief upon a showing of *serious injury or threat of serious injury* to a United States industry by reason of *increasing imports* from an economy in transition country.<sup>259</sup> The proposal's requirement of serious injury to a United States industry was the same injury standard required in section 201 safeguard cases, but a higher standard than the showing of material injury required under United States AD and CVD laws.<sup>260</sup> But accord-

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the Administration will use a 'set of criteria' to identify which countries would be considered economies in transition rather than naming them specifically in the legislation. For example, countries would have to have instituted a right to private property and have started a process of privatization . . . [T]he principal countries eligible would be the states of the former Soviet Union and Eastern Europe, and . . . *the change [is] not meant to benefit the People's Republic of China.* (emphasis added).

Special Report, June 21, 1994, *supra* note 5, at S-23.

256. Initial EIT Proposal, *supra* note 254; see also Special Report, July 15, 1994, *supra* note 255, at S-5 n.247 (discussing the distinction between the market and non-market economies in the Administration proposal).

257. Initial EIT Proposal, *supra* note 254.

258. *Id.*; see also Special Report, July 15, 1994, *supra* note 254, at S-5 (discussing the details of the non-application provision of the Administration's proposal).

259. Special Report, July 15, 1994, *supra* note 254, at S-5.

260. Compare Initial EIT Proposal, *supra* note 254; Special Report, July 15, 1994, *supra* note 254, at S-5; Special Report, June 21, 1994, *supra* note 5, at S-1 with United States Trade Act of 1974 § 201, 19 U.S.C. § 2251 (1988). Section 201 is based on Article 19 of GATT, Emergency Action on Imports of Particular Products. These provisions permit GATT members to enact temporary trade barriers against the injurious effects of foreign imports that result from fair trade. *Id.* Under United States AD and CVD laws, a petitioner must show merely serious injury, which means not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A). Under section 2252(c)(1)(A) and (B), however, the ITC must take into account the economic factors, including but not limited to:

(A) with respect to serious injury-

ing to the Administration, the requirement that the serious injury result from *increasing* NME in transition imports is a lower standard than the causation standard contained in section 201.<sup>261</sup> If a petition included imports from more than one economy in transition country, the ITC could combine all the imports in order to make its injury determination.<sup>262</sup> The proposal would have required a remedy if the ITC determined that increasing imports from a NME in transition country was the cause of serious injury or threat of serious injury to a United States industry.<sup>263</sup>

After a positive injury determination by the ITC, the Administration's proposal mandated that the United States provide a remedy to United States industry in the form of increased tariffs, tariff rate-quotas, quotas, or international negotiations.<sup>264</sup> Although the available remedies were broader than under the AD law, the Administration had discretion to apply any remedy it deemed appropriate in a given case.<sup>265</sup> Remedies imposed in a given case would remain for a minimum of three years.<sup>266</sup>

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- (i) the *significant* idling of productive facilities in the domestic industry,
  - (ii) the inability of a *significant* number of firms to carry out domestic production operations at a reasonable level of profit, and
  - (iii) *significant* unemployment or underemployment within the domestic industry; (emphasis added)
- (B) with respect to threat of serious injury-
- (i) a decline in sales or market share, . . . and a downward trend in production, profits, wages, or employment . . .
  - (ii) [domestic firms are] unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or . . . research and development, . . .

19 U.S.C. §§ 2252(c)(1)(A)-(B) (1988) (emphasis added).

261. Special Report, June 21, 1994, *supra* note 5, at S-1. Deputy United States Trade Representative Rufus Yerxa told reporters:

[T]he new rules would not use the same standard as section 201 safeguard procedures to establish whether imports are the cause of injury. Instead, the new proposal for economies in transition uses a lower causation standard according to which petitioners would have to prove to the International Trade Commission that imports are a 'cause of injury,' . . . .

*Id.*

Section 202 of the United States Trade Act of 1974 provides that "[f]or purposes of this section, the term 'substantial cause' means a cause which is important and not less than any other cause." 19 U.S.C. § 2252(b)(B).

262. Initial EIT Proposal, *supra* note 254.

263. *Id.*

264. *Id.*; Special Report, July 15, 1994, *supra* note 254, at S-5.

265. Initial EIT Proposal, *supra* note 254; Special Report, July 15, 1994, *supra* note 254, at S-5.

266. Initial EIT Proposal, *supra* note 254; Special Report, July 15, 1994, *supra*

While the remedies in the Administration's initial proposal were designed to relieve economy in transition countries from the effects of the AD law, the Administration recognized that such relief should not exist indefinitely.

Because the Administration wanted to further the policy goal of encouraging market reforms in economy in transition countries, the Administration required review of the proposed provision after five years.<sup>267</sup> At the conclusion of the review, countries would either "graduate" to market economy status or return to the NME category.<sup>268</sup> Presumably, NMEs in transition that graduated to market economy status would become subject to the standard methodology for calculating FMV under United States AD law and subject to United States CVD liability. For those countries that returned to NME status, the current MOI approach of Commerce, or some new approach, would determine liability under United States AD law. Because the Administration's initial economies in transition proposal was not included in the Uruguay Round Agreements Act, details about the treatment of economy in transition countries at the end of the five-year period remain unclear.

After the congressional committees drafting the Uruguay Round Agreements Act declined to include the Administration's initial proposal in the final bill, the Administration proposed a more modest proposal dealing with economies in transition. The second Administration proposal permitted Commerce to suspend AD investigations in circumstances where the foreign manufacturer agrees to stop sales at LTFV, or under extraordinary circumstances, where an agreement exists to eliminate the injurious activity.<sup>269</sup> The second Administration proposal provided Commerce with a broader range of options in negotiating suspension agreements in cases involving NMEs for a period of eighteen months.<sup>270</sup> Therefore, the suspension agreement proposal was intended

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note 254, at S-5.

267. Initial EIT Proposal, *supra* note 254; Special Report, July 15, 1994, *supra* note 254, at S-5.

268. Initial EIT Proposal, *supra* note 254.

269. 19 U.S.C. § 1673(c) (1988). Section 1673(b) which discusses agreements to completely eliminate sales at less than fair value or to cease exports of merchandise, and section 1673(c), which discusses agreements to eliminate injurious effect, provide the statutory guidelines for Commerce to use in suspending an AD investigation. 19 U.S.C. §§ 1673(b)-(c) (1988).

270. *See* Improvement of Suspension Authority to Respond to Dumping From Economies in Transition (EITs) [hereinafter Suspension Proposal] (describing the effects of the adoption of the proposed amendments).

to reflect a greater receptivity towards reaching suspension agreements in cases involving economies in transition.<sup>271</sup> The Administration argued that the suspension agreement provision insured that significant injury caused by imports from economies in transition would be remedied in the short term, while enhanced enforcement authority would promote effective long range agreements.<sup>272</sup>

However, as with the Administration's initial proposal, the suspension agreement proposal was not included in the Uruguay Round Agreements Act.<sup>273</sup> Both proposals relating to NMEs in transition were too controversial to be included in the Uruguay Round Agreements Act. Therefore, the question of how, or if, the United States should amend its unfair trade laws to account for the market reforms taking place in NMEs remains unanswered.

#### B. PROPOSAL OF THE U.S.-RUSSIA BUSINESS COUNCIL

The U.S.-Russia Business Council (Business Council) has also proposed several changes to the treatment of Russia under United States unfair trade laws.<sup>274</sup> Although the focus of the Business Council is on Russia, the proposed changes are equally applicable to other NMEs in transition. The Business Council believes that some of these changes require congressional action, while the executive branch may accomplish others on its own.<sup>275</sup> The Business Council's proposed legislative package is very similar to the Administration's initial proposal to create a new category for economy in transition countries.

The legislative agenda proposed by the Business Council is as ambitious as the Administration's initial proposal.<sup>276</sup> Because the Business Council believes that the methodology for determining FMV for manufacturers operating in economies in transition is unreliable, the Council

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271. *Id.*

272. *Id.*

273. *See supra* note 6 and accompanying text (discussing the dropping of EIT language from the Uruguay Round Agreements Act on September 10, 1994).

274. Carey et al., *supra* note 65, sec. IV, at 1-8 (outlining proposals for the reform of transitional relief to Russia under United States trade laws).

275. *Id.* This author is skeptical that the President can achieve the goals of Business Council for two reasons: 1) Major changes in the application of United States trade laws through executive orders are of questionable constitutional validity given Congress' activity in the trade law area; and 2) Congress simply would not permit the President to act unilaterally.

276. *See supra* note 5 and accompanying text (discussing the Administration's Uruguay Round Agreements Act proposals).

proposed eliminating the use of the dumping margins in AD cases involving Russia.<sup>277</sup> Instead, action against imports from Russian manufacturers would occur only if a serious injury to a United States industry.<sup>278</sup> As with the Administration's initial proposal, the Business Council recommends the adoption of the serious injury standard similar to that used under 19 U.S.C. § 2252.<sup>279</sup> Alternatively, the Business Council proposed the adoption of a "benchmark pricing test" that defines dumping as the pricing of products below an established benchmark price.<sup>280</sup> As the benchmark methodology would provide greater predictability, the Business Council asserts that the benchmark methodology would represent an improvement over the current AD methodology.<sup>281</sup> The Business Council also recommends several steps that the

277. Carey et al., *supra* note 65, sec. IV, at 3, 6-7 (offering alternatives to current United States anti-dumping provisions). The Business Council's proposal provides:

Congress should recognize through legislation that, given the present stage of development of the Russian economy, it is impossible or not cost effective to accurately measure price discrimination and sales below cost to assess whether or not dumping has occurred. Surrogate methodologies generally have not worked and have permitted the imposition of significant penalties on NME importers based on tenuous evidence. Instead of continuing to create hypothetical dumping models, with their arbitrary and unpredictable results, Congress should regulate Russian imports solely on the basis of their injurious effect on U.S. industry.

*Id.* at 6.

278. *Id.* at 6-7.

279. *Id.* at 6-7. The Business Council proposal provides:

The injury standard made applicable to Russia under this approach should be significantly strengthened. A 'serious injury' test should be adopted, similar to the test that governs so-called 'safeguards' or 'escape clause' actions against imports which harm U.S. industry but are not necessarily unfairly traded.

The higher injury standard should be accompanied by a presumption, similar to that which exists in the safeguards provisions of the Canada-U.S. Free Trade Agreement . . . and the North American Free Trade Agreement . . . that imports below a certain threshold level will not be found to cause serious injury.

*Id.* (footnotes omitted).

280. *Id.* at 7. The Business Council's proposal suggests that:

Alternatively [to elimination of calculating NME dumping], the NME methodology should be replaced by a 'benchmark pricing test' that defines dumping as the pricing of products imported into the United States at below a specified benchmark price. Not only would such a test greatly enhance predictability, in most cases it would be considerably less arbitrary in its treatment on Russian imports than the current methodology.

*Id.*

281. *Id.* The Business Council proposal states that:



President may take in the absence of congressional action to assist Russia in navigating through the sometimes turbulent waters of United States trade laws.

The Business Council's first proposal is that the President issue an executive order designating Russia as a "Transitional Economy" entitled to special trade relief.<sup>282</sup> The trade relief would center around creation of a consultative mechanism to address individual trade disputes as an alternative to the costly, rigid, and adversarial use of litigation.<sup>283</sup> Furthermore, the President could issue an executive order requiring AD or CVD petitioners to utilize the consultative mechanism before filing a petition with Commerce.<sup>284</sup>

The Business Council further proposes that the President issue an executive order covering three areas of potential CVD liability of Russian manufacturers.<sup>285</sup> First, during the period Russia is designated a "Transitional Economy," Russia would continue to receive an exemption from liability under United States CVD law.<sup>286</sup> Second, the proposal would permit only a prospective determination of Russian CVD liability upon termination of the transitional economy designation, thereby insulating Russia from liability for previous subsidization.<sup>287</sup> Third, the executive order would dissolve Commerce's linkage between the methodology for determining FMV under the AD law and potential liability under the CVD law.<sup>288</sup> The Business Council believes these measures

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During the review and debate preceding the 1988 Trade Act amendments, three basic benchmark price formulas were suggested: (1) the lowest importing market economy price; (2) the average price of all market economy country imports; and (3) the average price of the imports from the market economy country with the largest volume of imports into the United States . . . . The lowest, fairly traded, import price is thus a more appropriate benchmark price, because in most cases Russian products cannot compete at significantly higher prices [due to quality concerns among consumers].

*Id.* (footnotes omitted).

282. Carey et al., *supra* note 65, at 1 (indicating that the special designation would last for an initial period of three to five years with subsequent biannual reviews).

283. *Id.* at 2 (proposing the creation of a bilateral United States-Russia Trade Commission, modeled after the Canada-United States Trade Commission, which would resolve trade disputes through a variety of consultation and voluntary arbitration procedures).

284. *Id.*

285. *Id.* at 3.

286. *Id.*

287. Carey et al., *supra* note 65, at 3.

288. *Id.*

regarding CVD liability are necessary to prevent substantial tariff liability and the chilling of foreign investment in Russian industries.<sup>289</sup> Additionally, the Business Council asserts that the President can amend certain administrative practices through the use of executive orders.

Although the Business Council prefers to eliminate the requirement for calculating FMV and the dumping margin in cases involving Russia, it argues that if FMV is calculated, Commerce should utilize the actual costs of Russian producers under the standard methodology for calculating FMV used for market economy manufacturers.<sup>290</sup> Additionally, the proposal would limit Commerce's use of the best information available method for determining FMV when prices from the Russian manufacturer are not verifiable.<sup>291</sup> Furthermore, the Business Council proposed that in situations where the standard methodology is not available, state-owned enterprises should be permitted to show autonomy from governmental control in order to qualify for manufacturer-specific dumping margins.<sup>292</sup> Finally, the Business Council proposed that the Presi-

289. *Id.*

290. *Id.* The Business Council's proposal states:

[W]e recommend that the Administration adopt an explicit policy of use, to the greatest extent practicable, actual rather than surrogate country costs in assessing whether dumping has occurred. Specifically, the Standard Methodology (used to calculate dumping by market economy producers) should be used to calculate a Russian producer's cost of production . . . to the extent it purchases production inputs at arm's-length; in markets transactions; and on the basis of price, quality and terms considerations.

Commerce-ITA should thus adopt an approach of using actual costs to value individual inputs in determining NME cost of production even in the presence of *some* governmental controls.

*Id.* sec. IV, at 4.

291. *Id.* sec. IV, at 4 (noting that under the best information available rule, "Commerce-ITA is free to determine dumping based on any evidence in the record"). This provides an incentive for NME manufacturers to provide requested information. *Id.*

292. Carey et al., *supra* note 65, sec. IV, at 5. The Business Council's proposal provides:

We recommended . . . that Commerce-ITA use actual cost data (*i.e.*, the Standard Methodology) to calculate dumping by Russian producers to the greatest extent practicable. This should, as with market economies, generally result in a dumping assessment of individual enterprises. However, to the extent this policy cannot be implemented, state-owned NME enterprises should be permitted to demonstrate their autonomy from government control in order to qualify for producer-specific antidumping duty rates under the NME methodology. Commerce-ITA should thus abandon the per se exclusion of state-owned NME producers from eligibility for company-specific dumping margins . . . .

*Id.*

dent order Commerce to establish a consultative mechanism to guide Russian companies through the intricacies of United States trade laws.<sup>293</sup>

The proposals advanced by the Business Council would fundamentally alter the trade laws governing Russia, and all other countries designated as economies in transition. Some commentators have suggested less comprehensive reforms to United States trade laws in order to deal with economies in transition. The most common suggestion is to amend section 406 of the Tariff Act of 1930 to provide greater flexibility in dealing with NMEs in transition.

### C. AMENDING SECTION 406

Although section 406 is rarely utilized,<sup>294</sup> it has received attention from those seeking changes in the treatment of NMEs in transition under United States trade laws.<sup>295</sup> For example, the Business Council proposed removing Russia from the list of countries covered by section 406 due to the commercial uncertainty and political stigma created by Russia's identification as a "communist" country.<sup>296</sup> At the other extreme, two commentators recommend abandoning the use of AD laws in cases involving economy in transition manufacturers and substituting an amended section 406.<sup>297</sup>

Some commentators characterize section 406 as superior to AD laws in dealing with manufacturers operating within economies in transition because section 406 does not require a LTFV determination, the use of surrogate countries, or the calculation of prices in inflationary economies subject to the fluctuating exchange rates.<sup>298</sup> Furthermore, section 406 is

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293. *Id.* sec. IV, at 6.

294. Neeley, *supra* note 56 (noting that historical evidence indicates section 406 is rarely used).

295. Compare Carey et al., *supra* note 65, sec. IV, at 5 (suggesting that the application of section 406 creates unwarranted commercial uncertainty and political stigma to Russia); Neeley, *supra* note 56, at 548-51 (suggesting that section 406 should be revised to give the President wider discretion to implement ITC determinations which fall under section 406) with Richard N. Eid, *The Effect of Georgetown Steel Corp. v. United States on Nonmarket Economy Imports*, 3 AM. U.J. INT'L L. & POL'Y 65, 89-97 (1988) (recommending that Congress explicitly define what constitutes "significant cause" for ITC).

296. See Carey et al., *supra* note 65, sec. IV, at 5 (noting that the term "communist" countries in section 406 attaches political stigma which affects Russia and other former communist countries).

297. Neeley, *supra* note 56, at 550-54; Eid, *supra* note 294, at 89-97.

298. Eid, *supra* note 295, at 90-91. 19 U.S.C. § 2436(e) states:

considered more economical than AD laws to administer.<sup>299</sup> However, the two commentators advocating reform of section 406 provide differing views on exactly how to amend it.

One commentator, Richard N. Eid, believes that the President should have discretion in implementing ITC decisions under section 406 because it promotes consideration of foreign policy concerns before the United States takes remedial action against manufacturers from economies in transition countries.<sup>300</sup> Mr. Eid also advocates legislative amendments to section 406 changing the section's rapidly increasing imports standard,<sup>301</sup> as well as further defining the material injury standard<sup>302</sup> and the significant cause standard.<sup>303</sup>

Another commentator, Jeffrey S. Neeley, argues for limitations on presidential discretion in order to remove politics from the decision-making process.<sup>304</sup> Therefore, Mr. Neeley seeks to amend section 406 by including an advisory opinion procedure,<sup>305</sup> using prices charged in

(2)(A) Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

(B) For purposes of subparagraph (A):

(i) Imports of an article shall be considered to be increasing rapidly if there has been a significant increase in such imports (either actual or relative to domestic production) during a recent period of time.

(ii) The term 'significant cause' refers to a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause.

19 U.S.C. § 2346(e)(2)(A)-(B).

299. Eid, *supra* note 295, at 92 (noting that under section 406, litigation of trade conflicts is reduced considerably).

300. *Id.* at 92 (commenting that the President will consider international consequences prior to the imposition of sanctions).

301. *Id.* at 93-95. Two main problems exist with the rapidly increasing imports standard: 1) Congress failed to provide a time frame for determining import growth and the ITC lacks historical information necessary to make the determination; and 2) NME manufacturers could manipulate their imports to avoid the rapidly increasing standard and United States manufacturers would be denied relief. *Id.*

302. *Id.* at 95-96. Congress should provide objective criteria for determining material injury such as those present in section 201. *Id.*

303. *Id.* at 96-97. Apparently "significant cause" "occupies a middle position between 'substantial cause' and 'contribute importantly,'" but Congress should provide clarification for the ITC. *Id.*

304. Neeley, *supra* note 56, at 550.

305. *Id.* at 550-51 (asserting that an advisory opinion could provide a surrogate in advance to assist the NME manufacturer in determining potential dumping vulnerabili-

third countries by economy in transition manufacturers,<sup>306</sup> and developing a new approach to joint ventures and other market entities within economy in transition countries.<sup>307</sup>

Additional suggestions could be offered to amend section 406 to reflect the changes occurring in economy in transition countries. However, the proposals offered by Messrs. Eid and Neeley for amending section 406, provide an example of the difficulty involved in reaching a consensus on the best method for improving the administration of United States unfair trade laws in cases involving NMEs in transition. Although several approaches exist to amend United States unfair trade laws to deal with the issues surrounding imports from economies in transition, no consensus concerning whether, or how, the United States should proceed is evident. The following section of this article will analyze the proposals examined thus far, and will outline the author's recommendations.

#### D. CONCLUSION

The two proposals by the Clinton Administration, as well as the recommendations by the Business Council and the commentators seeking to amend section 406, fail to address several of the most fundamental issues regarding the application of United States unfair trade laws to support the process of market reform. Any amendments to United States laws to deal with economy in transition countries should buttress the broader United States policy of promoting market reforms and democracy. Additionally, any changes to the administration of United States unfair trade laws toward NME in transition countries must be consistent with the theoretical principles underlying all of the unfair trade laws. However, the amendments should permit flexibility by Commerce because the market reform process underway in NME countries may undergo radical alterations in the future. The next section will examine the two proposals made by the Administration, the Business Council, and

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ty). The advisory opinion would serve the overall purpose of reducing the unpredictability which plagues NME AD cases. *Id.* at 551.

306. *Id.* at 551-52 (suggesting that Commerce should not automatically refuse to consider sales in third countries when calculating FMV). Sales to third countries, combined with a verification of NME cost, may assure that sales are market-driven. *Id.*

307. *Id.* at 552-53. To promote joint ventures and market reforms, calculation of a dumping margin involving a joint venture requires consistency with the methodology employed for market economies rather than NMEs. *Id.* at 553.

those seeking to change section 406. The author will then offer recommendations on the administration of United States AD and CVD laws in cases involving manufacturers from NME in transition countries.

## 1. Analysis of Proposals by the Clinton Administration, the Business Council, and Commentators Seeking to Amend Section 406

### a. *The Administration's Proposals*

The Administration's initial proposal to create a special category within United States trade laws for economies in transition conflicts with the theoretical principles governing United States trade laws.<sup>308</sup> Additionally, the proposal is inconsistent with the Administration's broader policy of supporting market reforms in NMEs.<sup>309</sup> A comparison of the Administration's initial proposal with the market reforms economists agree NMEs must implement will highlight how the proposal fails to support long term market reforms.

The Administration's proposed definition of an economy in transition is too narrow. The Administration defines an economy in transition as one where the government has instituted the right of private ownership and established a mechanism for privatizing state-owned enterprises. Establishing private ownership and privatizing state-owned enterprises is only one of several steps economists believe NMEs must implement to complete the market reform process successfully.<sup>310</sup> Any definition of

308. See *supra* notes 253-68 and accompanying text (discussing the Administration's initial proposal to create a special category for economies in transition under United States trade laws).

309. *International Economics: Treasury Secretary Bensten Urges Russia to Take Bold Steps with New Reform*, DAILY REP. FOR EXECUTIVES (BNA) sec. A, at 185 (Sept. 27, 1994). Former Treasury Secretary Lloyd Bentsen stated:

. . . Russia needs to undertake a 'bold stabilization effort' aimed at reducing inflation quickly; to create modern institutions that work; and to press on with its integration into the world economy by ratifying the U.S.-Russia Bilateral Investment Treaty and committing itself to joining the World Trade Organization, which is due to replace the General Agreement on Tariffs and Trade next year . . . .

Bentsen said that the present situation in Russia worries him:

I can't tell you how this will turn out, . . . [b]ut I do know that to avoid slipping backward, Russia must take a bold step forward . . . .

Let me be clear . . . [*our support has been successful because our lending is conditional*]. For Russia to get all the money I've mentioned, it needs a bold economic reform program.

*Id.* (emphasis added).

310. See *supra* note 177 and accompanying text (noting that economists identified

an economy in transition should also include a review of the government's actions promoting monetary reform to stop inflation, fiscal control to limit deficits, wage and price deregulation to link supply and demand within the economy, and supporting freely convertible currency to foster the country's integration into world markets. These necessary market reforms were not addressed in the Administration's proposed definition of an economy in transition.

Additionally, eliminating the requirement of a dumping determination and the calculation of FMV would actually decouple the wages and prices of the economy in transition countries from those of United States and foreign competitors. Furthermore, the lack of a dumping determination removes some of the incentive for a government to permit free convertibility of its currency as part of a program of integrating the NME in transition into the world trading system. If NME in transition manufacturers are not required to undertake the same business decisions as market economy manufacturers regarding wages, prices, and currency fluctuations, no incentive will exist to use market principles in the manufacturing of products they export to the United States. Eliminating the dumping determination in favor of an injury only determination undermines, rather than supports, the broader process of market reforms underway in economy in transition countries.

The establishment that the "serious injury or threat of serious injury" standard as the only basis for United States producers to obtain relief for an economy in transition manufacturer's unfair trading policy also contradicts United States unfair trade laws and GATT policy. The serious injury standard contradicts United States policy because it divorces questions regarding the market-oriented practices of a manufacturer from questions of liability under United States unfair trade laws. Since the serious injury only standard is a higher standard of injury than required under United States AD and CVD laws, it probably violates United States MFN obligations under GATT.<sup>311</sup> By replacing the dumping determination with a serious injury only test, the United States would treat economy in transition countries, many of which are not GATT members, better than current GATT members. Furthermore, the remedies available

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the steps to make a successful transition to a market oriented economy, including monetary reform, fiscal control, price and wage deregulation, privatization of property, assure social stability, and currency convertibility).

311. *See supra* notes 259-60 and accompanying text (noting that the NME in transition provision initially introduced by the administration contained a less stringent standard).

against economy in transition manufacturers under the Administration's proposal are theoretically inconsistent with United States obligations to provide unconditional MFN treatment to GATT members.

The Administration's initial proposal was intended to provide special economy in transition status to certain countries for a period of five years. During the five-year period, no other provision of United States unfair trade laws could be utilized by United States petitioners in cases involving economy in transition manufacturers. Therefore, the CVD law would be unavailable to deter the providing of subsidies to economy in transition manufacturers. By eliminating the application of the CVD law, governments of economies in transition countries could avoid enacting monetary reforms and run budget deficits by supporting inefficient manufacturers exporting to the United States, so long as the subsidized manufacturers' exports do not cause serious injury to United States industries. Subsidized manufacturers will not be deterred from accepting government assistance since United States CVD law would not prevent the benefit of subsidies to manufacturers in the United States market.

Finally, the Administration's initial proposal called for a review of all countries with economies in transition status after five years. At the end of five years, countries would either graduate to market economy status or return to NME status. No economic rationale exists to justify a five-year period. As noted, economists remain uncertain about the pace that market reforms should take.<sup>312</sup> Given that the road from a NME to a more market-oriented economy is fraught with difficulty, the Administration should not place a five-year limitation on the process. The limitation could place pressure on economy in transition governments to proceed with rapid market reform measures at the expense of preserving the social safety nets economists believe are necessary for maintaining social stability. The Administration should pursue a policy that is consistent with existing United States unfair trade laws, and is capable of applying to any economy in transition country on an individual basis over a longer period of time. As a result, economy in transition countries can avoid sacrificing social stability to guarantee that their exports enter the United States under market economy status rather than NME status.

The Administration's second proposal, to increase Commerce's authority to negotiate suspension agreements, was also inconsistent with United States unfair trade laws principles.<sup>313</sup> Since suspension agreements

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312. See *supra* notes 173-76 and accompanying text (discussing that economists disagree over the pace of market reforms).

313. See *supra* notes 269-73 and accompanying text (discussing the



merely remedy the immediate effects of dumped foreign goods entering the United States, they fail to respond to the underlying unfair trade practices causing injury to United States industry. Additionally, Commerce's increased authority to enter into suspension agreements for only eighteen months demonstrates that the Administration's second proposal was only a stop gap measure. Therefore, the Administration's second proposal failed to support long term United States policy goals of assisting economy in transition countries which pursue market reforms, while protecting United States industries from the injurious effects of unfair trading practices.

Denying foreign governments and manufacturers the perceived benefits of engaging in unfair trading practices has a deterrent effect.<sup>314</sup> By deterring unfair trading practices, United States AD and CVD laws, combined with those of other nations, assist in promoting the efficient allocation of resources throughout the world. Because the Administration's two proposals are a departure from the principles governing United States unfair trade laws, they fail to promote the efficient allocation of resources within NMEs in transition. By exempting economy in transition countries from investigation under United States AD and CVD laws which promote efficient resource allocation, the Administration's proposals contradict the broader United States policy of supporting market reforms.

*b. The Business Council's Proposals*

The Business Council's proposals seeking congressional action are very similar to those contained in the Administration's initial proposal.<sup>315</sup> The theoretical difficulties with the Business Council's proposals stem from the preferential treatment toward Russia, and other NMEs in transition. Similar to the Administration's initial proposal, the Business Council's legislative agenda is to create a mandatory consultative mechanism for economies in transition such as Russia, exempt economies in transition from United States CVD laws, and eliminate dumping margin determinations in favor of an injury only standard for application of

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Administration's second proposal).

314. *See supra* notes 96-100 and accompanying text (asserting that the intended outcome of imposing the CVD law is to deter foreign governments or manufacturers from utilizing subsidies).

315. *See supra* notes 274-79 and accompanying text (proposing that a remedy is required if the ITC determines that a NME in transition country injures United States industries).

United States AD law. However, each of these actions could violate United States commitments under GATT. For example, GATT members from less developed countries, not identified as economies in transition, that attempt to introduce market reforms, would receive less favorable treatment than Russia, a non-GATT member. Therefore, United States action would constitute a violation of GATT's MFN requirement.

Additionally, the theoretical foundations of United States AD and CVD laws require the most accurate possible identification and quantification of market-distorting activities of a foreign manufacturer or government. The Business Council's proposals would increase Russian exports to the United States in the short run, but would reduce pressure on Russia to halt dumping and subsidy practices in the long run. Therefore, the Business Council's recommendations do not promote long term market reforms, which require the efficient allocation of resources within the Russian economy.<sup>316</sup> Finally, granting favorable trading status to Russia is beneficial to United States-Russian relations today, but such concessions may prove difficult to withdraw if relations are damaged in the future, or the current Russian market reform efforts fail.<sup>317</sup>

The Business Council also proposed that the President implement changes in Commerce's administration of United States unfair trade laws through executive orders.<sup>318</sup> One recommendation was to apply the standard methodology in calculating FMV for United States AD cases involving Russia. Although the calculation of FMV in dumping investigations should incorporate actual costs of NME in transition sourced inputs when they reflect market pricing,<sup>319</sup> it is premature to utilize the standard methodology for calculating FMV in cases involving NME in transition manufacturers.<sup>320</sup> The standard methodology is not applicable at this time because the prices charged for the same or similar goods in Russia or a third country may not reflect the actual cost of production. Furthermore, because information on NME in transition manufacturers is currently difficult to obtain and verify, a constructed value may not be

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316. See *supra* notes 285-88 and accompanying text (proposing the exemption of CVD liability for Russia).

317. See *supra* notes 189-92 and accompanying text (discussing the volatility in Russian markets and politics).

318. See *supra* notes 282-85 and accompanying text (proposing the use of executive orders by the President).

319. See *supra* notes 221-31 and accompanying text (discussing an approach to FMV utilizing market-driven NME in transition sourced input costs).

320. See *supra* notes 36-39 and accompanying text (discussing the standard methodology).

determinable. Because information is so difficult to obtain and verify, Commerce must continue to use the best information available standard for calculating FMV.<sup>321</sup> But as Commerce continues to investigate NME in transition manufacturers, it will build a database of information regarding the costs of NME in transition sourced factor inputs.

Finally, the Business Council recommended making NME in transition manufacturers eligible for producer-specific AD duty rates.<sup>322</sup> As was evident in *Certain Helical Spring Lock Washers From the PRC*, a NME in transition manufacturer such as Hangzhou should be allowed to prove that it operated under market conditions despite government involvement in the industry.<sup>323</sup> In that case, all Hangzhou's PRC sourced factor input costs reflecting market prices should have been included in calculating a separate AD duty for Hangzhou. Therefore, under the Business Council's recommendation, Commerce should incorporate the manufacturer-specific AD duty rates in calculating FMV under the factors of production methodology.<sup>324</sup>

The Business Council's legislative proposals are similar to those contained in the Administration's initial proposal. Like the Administration's first proposal, the Business Council urges Congress to cast aside the guiding principles of United States unfair trade laws and grant special status to Russia. But granting special status to any economy in transition country to increase exports to the United States may harm the broader United States policy of promoting market reforms. The Business Council's proposals for presidential action are consistent with the principles of United States AD law, except that the Council would grant Russia the same treatment under the standard methodology as that accorded market economy countries. However, given the inability of Commerce to verify all the costs of NME in transition sourced factor inputs, use of the standard methodology is not feasible. Rather, Commerce should calculate a separate AD duty rate for those NME in transition manufacturers that can show that prices for NME in transition sourced factor inputs are market-driven.

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321. See *supra* notes 291-92 and accompanying text (discussing the best evidence available standard).

322. See *supra* notes 247-49 and accompanying text (noting the unavailability of an individual dumping margin calculation to Hangzhou).

323. See *supra* note 249 and accompanying text (asserting the difficulty of rebutting Commerce's presumption of government intervention and control).

324. See *supra* notes 250-51 and accompanying text (describing how the MOI test could act to impose CVD liability on those industries which pursue industrialization most aggressively).

*c. Proposals for Amending Section 406*

The proposed amendments to section 406 suffer from many of the same deficiencies as the Business Council's proposals. Section 406 is a market disruption statute designed to protect the United States economy from "sudden and deliberate" destabilization by hostile communist governments.<sup>325</sup> However, the AD law and not section 406 evolved into the primary tool for enforcing United States trade laws in cases involving NMEs. As with both the Administration and the Business Council's proposals, amendment of section 406 to provide special treatment to NMEs in transition would be theoretically inconsistent with United States unfair trade laws and a possible GATT MFN violation.

Additionally, an amended section 406 would likely retain some form of ITC and presidential discretion necessary to provide remedies against imports from NME in transition countries. Such discretion would leave NME in transition manufacturers uncertain about which practices would subject them to sanctions under United States law. If an amended section 406 permitted the United States to negotiate orderly market agreements concerning access to the United States market directly with economy in transition governments, the United States policy of promoting market reforms would actually suffer harm. Since the amended section 406 would force NME in transition manufacturers to rely on their government's negotiating skills, rather than the manufacturer's business skills, for access to the United States market, the manufacturers will continue to depend on their governments.

Moreover, since agreements rather than market conditions will determine the access of NME in transition manufacturers to the United States market, less incentive will exist for the NME in transition governments to pursue market reforms. This argument holds true even if the United States government negotiates remedies under section 406 directly with the economy in transition manufacturers. United States trade policy should permit economy in transition manufacturers to sell their goods in the United States without limitation, subject to a duty only if they engage in unfair trade practices. Therefore, amending section 406 will not

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325. Carey et al., *supra* note 65, sec. III, at 16. The United States government feared that a command economy government could harm vital United States industries through an economic strategy of rapidly flooding the United States market with a high volume of goods. Section 406 provides the United States government with a mechanism to quickly respond to such a threat.

provide a long term solution to the problem of how to administer United States trade laws in cases involving NME in transition manufacturers.

## 2. Further Recommendations for Changes in the Administration of United States AD/CVD Laws Relating to NMEs in Transition

Just as Congress provided a definition of NMEs in section 1677(18), Congress should provide statutory guidance to Commerce concerning the definition and treatment of economy in transition countries.<sup>326</sup> The criteria for designation as an economy in transition country should include all six of the reforms economists believe are critical for a country to transform successfully from a state-controlled to market-oriented economy.<sup>327</sup> Furthermore, the statute should expressly recognize that the goals of accuracy, fairness, and predictability in administering United States unfair trade laws are best achieved by permitting Commerce to calculate a dumping margin for individual economy in transition manufacturer's products.<sup>328</sup> The FMV calculation should include those NME in transition sourced input costs that reflect market prices.

Additionally, the statute should firmly link the use of the AD law with the CVD law in cases involving economy in transition manufacturers. The CVD law should apply regardless of whether the manufacturer under investigation is entitled to an injury determination, because intellectual consistency dictates analyzing subsidies under the CVD law rather than the AD law.<sup>329</sup> Those economy in transition manufacturers operating in non-Subsidy Agreement countries will receive the same conditional MFN treatment as other GATT members unwilling to undertake the obligations of the Agreement on Subsidies and Countervailing Measures. Finally, because each economy in transition country will pursue market reforms at its own pace, the statute should not include a time limitation. However, the statute should call for periodic reviews by Commerce to determine whether market reforms are continuing. As long as a country makes a good faith effort at implementing market reforms,

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326. See *supra* note 60 and accompanying text (describing section 1677(18)).

327. See *supra* note 177 and accompanying text (outlining the steps economists believe NMEs in transition must undertake to achieve a successful transition to a market-based economy).

328. See *supra* notes 251-53 and accompanying text (advocating that Commerce utilize the bubbles of capitalism approach of calculating FMV when analyzing NME manufacturer actions under United States unfair trade laws).

329. See *supra* note 251 and following text (suggesting that Commerce should analyze NME manufacturer actions under the CVD law).

United States interests are best served by retaining that country's economy in transition designation. Therefore, the NME designation should only apply to those countries that fail to implement market reforms.

Until Congress enacts a statute creating an economies in transition category within United States unfair trade laws, Commerce can apply the factors of production methodology in a fashion which rewards those countries and manufacturers that implement market reforms. This approach should prove consistent with generally accepted principles of United States unfair trade laws. Additionally, this approach should fit within the framework of the economies in transition statute outlined above.

Commerce started down the correct path when it announced the bubbles of capitalism approach to administering the factors of production methodology.<sup>330</sup> Indeed, Commerce could utilize a modified version of the bubbles approach in administering the factors of production methodology in future cases involving NME in transition manufacturers. Although in the past the factors of production method produced significantly higher dumping margins than the standard methodology,<sup>331</sup> permitting the use of market-driven NME in transition sourced input costs to calculate FMV will reduce the inaccuracies in the FMV calculation. As United States AD law is remedial rather than punitive, Commerce should use NME in transition sourced input prices where possible. This preserves the comparative advantage enjoyed by economy in transition manufacturers in the input factors they use most, so long as they are subject to market-driven pricing.<sup>332</sup> Additionally, using market-driven input costs promotes the deregulation of prices and wages within an economy in transition country, thereby assisting in integrating the economy with international markets and help maintain a freely convertible currency. Integration with international markets and currency convertibility will occur because free trade requires that a country's currency reflect the true value of the products produced by economy in transition manufacturers, a value determined in large part by input and wage prices.

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330. See *supra* notes 196-220 and accompanying text (discussing the bubbles of capitalism approach).

331. Kearney & Wang, *supra* note 65, at 1.

332. See *supra* note 67 and accompanying text (discussing factor inputs and comparative advantage, and outlining the practical disadvantages for NME manufacturers of Commerce's failure to use NME in transition sourced input cost in calculating FMV).

Where it is not possible to verify that NME in transition sourced input prices are market-driven, Commerce must use the best information available in choosing the surrogate prices to calculate the FMV under the factors of production method.<sup>333</sup> However, Commerce should amend its policy for choosing surrogates by first seeking a suitable economy in transition surrogate, rather than immediately selecting a market economy surrogate. It is likely that an economy in transition surrogate with a market-driven factor input cost will have more in common with the NME in transition manufacturer under investigation than a market economy surrogate. This new policy would face initial difficulty because of the few NME in transition manufacturers with market-driven factor inputs determined by Commerce. But as future cases produce NME in transition manufacturers with market-driven factor input prices, a database of economy in transition sourced factor inputs with market-driven prices will develop. In subsequent investigations requiring the use of an economy in transition surrogate, Commerce would update its information to ensure that the factor input is still market-driven. This updating should not prove much more difficult than searching for an appropriate market economy surrogate.<sup>334</sup>

This new surrogate policy would allow economy in transition manufacturers to prove to Commerce that certain factor input prices were market-driven. This incentive should allow Commerce to obtain updated information from NME in transition surrogates, provided Commerce devises procedures to ensure that negative information collected against the NME in transition surrogate is not used against that party in subsequent cases. This new policy should reduce inaccuracies produced in applying the best information available standard to market economy surrogates alone. In future investigations, Commerce should only use market economy surrogates under the factor of production approach if no suitable NME in transition surrogate is available.

Finally, as recommended by the Business Council, Commerce should calculate manufacturer-specific AD duty rates for each economy in transition manufacturer that provides the required information, rather than

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333. See *supra* note 291 (discussing the best information available standard).

334. An example of an appropriate market economy surrogate may be found in the Final Lug Nuts determination where Commerce held that the PRC sourced steel and chemical inputs were market-driven. Final Lug Nuts, *supra* note 207, at 46,155. In future cases involving another NME country, the PRC steel and chemical industries could serve as surrogate prices upon a review of the industry status to ensure they were still market-driven.

calculating one industry-wide rate.<sup>335</sup> Because manufacturer-specific duty rates reward those economy in transition manufacturers operating under market conditions, manufacturer-specific duties provide an incentive for manufacturers to become efficient market-oriented producers. For example, a firm-specific duty rate calculated under a revised bubbles of capitalism approach would have benefitted Hangzhou in the *Helical Spring Lock Washer* case.<sup>336</sup>

Because the modified bubbles of capitalism approach would analyze specific NME in transition sourced factor input costs and produces manufacturer-specific dumping rates, the modified bubbles approach will be more consistent with the principles of United States AD law. Furthermore, analyzing specific costs and firms under a modified bubbles approach is analytically superior to the MOI approach, which only views industries as a whole. However, using a revised bubbles approach would trigger use of United States CVD law in economy in transition cases, as it did in the *Fans* and *Lug Nuts* cases.<sup>337</sup>

As discussed above, the use of the CVD law in conjunction with the AD law protects United States industry by deterring market-distorting activities.<sup>338</sup> In denying foreign governments and manufacturers the benefits of subsidies, countervailing duties deter governments from granting, or manufacturers from accepting, subsidies on goods intended for sale in the United States market. Therefore, countries imposing countervailing duties promote the efficient allocation of resources throughout the world.<sup>339</sup> Additionally, countervailing duties serve to promote the reform measures necessary for NMEs to complete the transition to market-oriented systems successfully.

Applying United States CVD law against economy in transition manufacturers will force them to cease exporting subsidized products to the United States market. Eliminating such subsidy payments to inefficient producers will assist economy in transition governments in gaining control of spending and reducing budget deficits. Reduced budget defi-

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335. See *supra* notes 291-93 and accompanying text (outlining the Business Council's proposals).

336. See *supra* notes 239-49 and accompanying text (describing the difficulty for a firm to meet the MOI standard).

337. See *supra* notes 214-16 and accompanying texts (finding that market pricing under the bubbles approach led to CVD filings).

338. See *supra* note 77 and accompanying text (discussing the deterrence goal of United States CVD law).

339. See *supra* text following notes 26 and 70 (discussing the beneficial effects of United States AD and CVD law).



cits will assist economy in transition governments in their attempts at monetary reform to slow inflation. Finally, using the CVD law against state-owned manufacturers will induce economy in transition governments to continue the privatization process.<sup>340</sup> Thus, application of the general principles of United States CVD law in cases involving economies in transition could actually support the United States policy of encouraging market reforms in NME in transition countries.<sup>341</sup>

Although the use of the CVD law contributes to the market reform process underway in NMEs in transition, Commerce has shown reluctance to use United States CVD laws against NME in transition manufacturers.<sup>342</sup> However, *Georgetown Steel*, dealing with "classic" NMEs, can be distinguished from future cases should Congress pass a statute creating a separate economy in transition designation, or if Commerce determines that economy in transition cases require a different analysis than *Georgetown Steel*.<sup>343</sup>

When applying United States CVD law in cases involving economy in transition manufacturers, CVD theory requires Commerce to attempt to countervail the entire subsidy.<sup>344</sup> Because of the market reforms underway in former NME countries, Commerce should not adopt the preferential treatment theory of subsidies discussed in *Georgetown Steel*.<sup>345</sup> Rather, Commerce should establish commercial benchmarks within the

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340. This is especially true if AD and CVD duties are calculated on a manufacturer-specific basis, rather than on an industry-wide basis.

341. See *supra* note 170 and accompanying text (discussing the United States policy concerning NMEs and the prospect that application of the CVD law would further this policy).

342. See *supra* notes 221-52 and accompanying text (discussing Commerce's application of the CVD law to economy in transition manufacturers and the implications of *Georgetown Steel* for Commerce's future practice).

343. Another interesting issue involves assessing a CVD for the subsidy amount remaining after a previously state-owned enterprise is privatized. Commerce can choose to calculate the remaining impact of subsidies in the same manner as for privatization efforts in market economies. Alternatively, Commerce could rely on *Georgetown Steel* and determine that in "classic" NMEs, no subsidies exist for purposes of United States CVD law. Therefore, CVDs can only apply to subsidies granted after the country in question initiated market reforms. However, the measurement of the amount of subsidy remaining after privatization is an issue which should not affect the theory supporting the applicability of the CVD law to NMEs in transition.

344. See *supra* notes 96-98 and accompanying text (discussing United States CVD law's goal of countervailing subsidies).

345. See *supra* notes 155-57 and accompanying text (discussing Commerce's reasoning for the non-applicability of United States CVD law to NMEs).

economy in transition, and if none exist, look first to commercial benchmarks in other economy in transition countries before looking to market economies. Adopting this policy for establishing commercial benchmarks in calculating the subsidy amount is consistent with the recommended policy in AD cases where surrogate prices are used. Harmonizing the approaches for selecting surrogates in AD and CVD cases will promote consistency and predictability for United States petitioners, and economy in transition manufacturers.

These proposals are merely a starting point for further debate. There is no shortage of ideas concerning the policies the United States should follow in its trade relations with economy in transition countries. But whatever specific amendments to, or refinements of, United States unfair trade laws are adopted, they must be consistent with the theories underlying United States AD and CVD law and United States obligations under GATT. Furthermore, applying the AD and CVD laws in a theoretically consistent manner will prevent preferential treatment for NME in transition countries which may, in fact, prove detrimental to their long term efforts at achieving market reform.

#### CONCLUSION

A great many challenges lie ahead for countries seeking to transform from state-controlled to more market-oriented economies. The United States should actively promote and reward market reforms in these countries by applying United States unfair trade laws in a manner that ensures economy in transition manufacturers fair, accurate, and predictable results in AD and CVD investigations. Additionally, to the extent the United States is an important export market for economy in transition manufacturers, the use of the AD law in conjunction with the CVD law will deter the inefficient allocation of resources within economy in transition countries. Utilizing United States AD and CVD laws in tandem will influence economy in transition governments to enact the programs economists agree are necessary for successful market reforms.

Commerce faces a difficult task in administering current United States unfair trade laws in cases involving NMEs in transition. Commerce has attempted to develop an approach for economies in transition that produces accurate results while protecting the interests of United States industry. This task will be achieved if Commerce's approach builds upon the general principles guiding the administration of United States AD and CVD laws.