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# The U.S. Import Relief Laws and Trade with Centrally Planned Economies

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# THE U.S. IMPORT RELIEF LAWS AND TRADE WITH CENTRALLY PLANNED ECONOMIES

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## I. INTRODUCTION

Pressure for protection against "cheap" imports has generated a variety of emergency legal measures, including anti-dumping and countervailing duties laws. These non-tariff barriers were the focus of much attention during and after the Tokyo Round. Their inherently discretionary nature makes them very difficult to apply in a fair and non-discriminatory manner. For instance, unlike intra-system trade disputes, disagreements about subsidies between centrally planned economy (CPE) countries and market economy (ME) countries stem from fundamental differences in views on the role of government in society. Another example is when economic policies legitimatized by one system can cause effects considered harmful by another system.

This article analyses the legal substantive and procedural criteria governing the imposition of selected U.S. import relief laws on CPE exports. The article describes U.S. anti-dumping provisions, countervailing duties, rules, market disruption, regulations and other laws applicable to CPE exports. Then the article examines the consistency of these laws under GATT and other international standards. Finally it discusses alternative solutions against the background of the earlier analyses.

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## II. The Legal Framework and Application of Anti-dumping Laws

In 1979 the U.S. Congress passed the Trade Agreements Act (TAA),[1] intending to make U.S. practices consistent with the agreements negotiated during the Tokyo Round.[2] Although this new Anti-dumping Code introduced special provisions dealing with the determination of the "foreign market value" of imports from countries with state-controlled economies (SCEs), it also reenacted the "old" provisions of the Anti-dumping Act of 1921 dealing with the same subject.

The pertinent provisions of the new law are as follows:

> "(c) If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State — controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the U.S. do not permit a determination of foreign market value under subsection a/ of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either –
> (1) The prices at which such or similar merchandise of a non-state — controlled — economy country or countries is sold either —
> (A) for consumption in the home market of that country or countries, or
> (B) to other countries, including the U.S., or
> (2) the constructed value of such or similar merchandise in a non-state — controlled — economy country or countries as determined under subsection (e). . . ."[3]

The U.S. anti-dumping authority first applied the key concepts of the "surrogate" foreign market value (FMV) adopted in TAA in the case of Bicycles from Czechoslovakia.[4] The authority then implemented

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1. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) [hereinafter TAA].

2. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 36 (1979). However, §3 of the TAA states that in case of conflict between a norm of the trade agreements resulting from the GATT negotiations and any domestic statute of the United States, the latter shall prevail.

3. 19 U.S.C. §1677(b)(c)(1982).

4. 25 Fed. Reg. 6657 (1960). Before this method was incorporated into statutory law, the Treasury had implemented it into its regulation of 1968. *See* Fed. Reg. 53.5.

in the Trade Act of 1974. Apart from this single issue of calculating FMV, all other substantive and procedural provisions of the U.S. anti-dumping laws are equally applicable to imports from SCEs.

A few anti-dumping proceedings, especially the notorious Polish Golf Cart case,[5] demonstrate the inequities resulting from the application of the methods incorporated in section 733c of the Tariff Act of 1930.

The four-years anti-dumping proceedings subsequently continued in the form of an antitrust dispute, which ended by way of settlement eight years after the initiation of the original anti-dumping complaint.[6] The legal dispute highlighted the protectionist potential of "unfair competition" laws as well as genuine difficulties in establishing fair "interface" devices aimed at regulating competition between "free-market" and CPE countries.

Before the adoption of the 1978 Regulations,[7] which largely resulted from the experiences encountered in the Golf Case case, the CPE petitioners raised the following objections:

First, the CPE petitioners argued that, in many cases, a CPE exporter is prevented from effectively competing with its U.S. and third country competitors because it is usually prohibited from selling merchandise at a price cheaper than the average or prevailing price of the same or similar merchandise in the importing country. Paradoxically, the more concentrated the world market and the U.S. market are, the greater the risk is of establishing FMV on the basis of an

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5. 40 Fed. Reg. 5,383 (1975). The abundant legal literature on this subject includes, inter alia: Downey & Graham, *The Regulation of Dumping from State-Controlled Economies: Where Next?* in INTERFACE TWO, CONFERENCE PROCEEDINGS ON THE LEGAL FRAMEWORK OF EAST-WEST TRADE 436-437, (D. Wallace & D. Flores, eds. 1982), [hereinafter INTERFACE TWO]; Comment, *Dumping by State-Controlled Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations*, 128 U. PA. L. REV. 217 (1979); Note, *Dumping from State-Controlled Economy Countries: The Polish Golf Cart Case*, 11 L. & POL'Y INT'L BUS. 777-800 (1979).

6. The anti-dumping procedure was initiated in 1975 and ended practically in 1979 when the ITC found that, due to "changed circumstances", there was no likelihood of injury to the domestic industry. *See Electric Golf Carts from Poland*, ITC-740 (1974). The parallel antitrust dispute, where the plaintiff alleged more or less the same facts (i.e. selling below FMV by the Polish Foreign Trade company and its U.S. distributors), ended in 1984 when the Judge and the parties signed a stipulation and order of dismissal. *See* Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168 (D. Del. 1979); Schwartz, *American Antitrust and Trading with State Controlled Economies*, in INTERFACE TWO *supra* note 5, at 103-168; Soltysinski, *Price Competition Between Free-Market and State Controlled Economy Enterprises: The Legacy of the OMC v. Pezetel Litigations*, 24 SWISS REV. OF INT'L COMPETITION L. 5-23 (1985).

7. 43 Fed. Reg. 35,262 (1978) [hereinafter 1978 Treasury Regulations].

oligopolistic or monopolistic price charged by the CPE exporter's competitors. In a case where there is a single U.S. producer of the same product and no appropriate third country "free-market" economy manufacturer, the CPE exporter is exposed to the risk of being required to sell its product for a price higher than that charged by the U.S. monopolist for the same product. Two factors combine to produce this result: (1) giving preference to a "price test" rather than a "constructed value" test and (2) rejecting the CPE exporter's legitimate claims for price adjustments, e.g., adjustments due to economies of scale, cheaper labor, etc. The best illustration is the Polish Golf Cart case, where the imported product was manufactured, in adequate quantities, only in Poland and the U.S. When dealing with that case, the Treasury was ready to assess FMV and anti-dumping duties on the basis of the ex-factory prices charged by Textron, the dominant American golf cart manufacturer. Such a solution would effectively exclude the CPE imports, "since to that U.S. price, the exporter would have to add transportation and other expenses to bring the product here plus the normal U.S. customs duties. . . ."[8]

The second objection was that CPE exporters face almost insurmountable difficulties in challenging price and cost information submitted by their free — market economy competitors to the administering authority. Because most of such information is confidential, in many cases, the exporter is at the mercy of its actual or potential rivals who have vested interests in the final outcome of the dispute. Again, the best illustration is by the Polish Golf Cart case, where, in its antitrust case, the petitioner, after having resorted to an expensive discovery procedure, was able to present the Court with written evidence indicating that U.S. firms were engaged in supplying the Treasury Department and the Customs office with false price and injury determination-related information.[9] Earlier in that case, Treasury Department had established the FMV for the Polish golf carts on the basis of unsworn information submitted by a Canadian producer of a similar product; this unsworn information turned out to be inaccurate after the petitioner had paid anti-dumping duties. This is why the

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8. Letter from P. Ehrenhaft, Deputy Assistant Treasury Secretary to Congressman H. Reuss of December 28, 1977, *as published in* INTERFACE ONE CONFERENCE PROCEEDINGS ON THE APPLICATION OF U.S. ANTI-DUMPING AND COUNTERVAILING DUTY LAWS TO IMPORTS FROM STATE CONTROLLED ECONOMICS, 165-166 (D. Wallace, G. Spina, R. Rawson, B. McGill, eds., 1980) [hereinafter INTERFACE ONE].

9. Melex counterclaim against O.M.C. *See* Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168 (D.Del. 1979)(on motion to dismiss the counterclaim).

"best evidence rule" applied by the U.S. anti-dumping authorities usually works to the disadvantage of the foreign exporter.

Third, under the U.S. anti-dumping law, the CPE exporter is usually unable to establish a "fair price" for his product. Although the main purpose of the U.S. unfair trade laws is to prevent the exporter from discriminating between various national markets, Congress expressly held that it wished to avoid situations in which such an exporter is found liable for the imposition of dumping duties "on the basis of prices which it cannot control and may not even know about."[10] However, the mechanical application of either the "surrogate" market economy price or the "constructed value" test, the final result of which is "by definition, not known to the non-market exporter until long after his goods are sold, results in a kind of retroactive or ex post facto punishment."[11]

Fourth, unlike its "free market" economy competitors, the SCE exporter is not only deprived of a self-determinable benchmark against which he can set his export price strategy, but he is also unable to influence the FMV by lowering his home market price or by reducing costs of production, since under the analyzed statutes, the FMV is almost totally within the control of its competitors.

The inequities of the U.S. anti-dumping legislation and practice demonstrated in the early stages of the Golf Cart case led to the adoption of the 1978 Treasury Regulations. Although the amended anti-dumping Regulations had not eliminated all the weaknesses of the U.S. anti-dumping law, they represented a considerable improvement. Their most interesting innovation consisted of a novel test of constructed value "determined from the costs of specific, objective components or factors of production incurred in producing the merchandise in question, including, but not limited to, hours of labor required, quantities of raw materials employed, and amounts of energy consumed, if such information is obtained from the producer of the merchandise in the state controlled economy under investigation, and verification of such information in the state-controlled economy country is concluded to the satisfaction of the Secretary." The 1978 Treasury Regulations provided that the second stage of such a hypothetical constructed value operation consisted in valuing the factors of production thus obtained and expressed in physical quantities, e.g., kilos of

10. Report of the U.S. Senate Committee on Finance on the Trade Reform Act of 1974, at 177.

11. Statement of Carl W. Schwartz before the Subcommittee on Int. Trade, U.S. Senate Comm. on Finance, 97th Congress, 2d Sess. (1982). Suffice to say that in 1977 various Customs Officials estimated the foreign market value of the Polish golf carts ranging from $643 to $1300.

steel or hours of work used per unit of the merchandise in question, in a non state-controlled-economy (SCE) country comparable in economic development to the SCE country under investigation. To the value thus obtained, an appropriate sum for general expenses, profits and costs of transportation was added, and the amount for profit was fixed at the level of eight percent of all costs incurred.

Until 1984, the administering authority adopted the simulated constructed value in only three anti-dumping proceedings: the Polish Golf Cart case, the case of Montan Wax from the German Democratic Republic,[12] and the case of shop towels from PRC.[13] Since the test relied on the measurable physical factors of production actually used by the SCE producer, it permitted at least a rough estimate of the costs, "and, therefore, the competitive advantages or disadvantages of the non-market producer."[14]

A merit of the 1978 Regulations is that *No* also established the following hierarchy of statutory tests for determining FMV:

(1) the price at which such or similar merchandise is sold in a comparable ME country;
(2) a new "simulated constructed value" test based on "raw" data from the exporting SCE country;
(3) the price or constructed value determined in any ME country other than the U.S.; or
(4) the price or constructed value determined by sales or production of such or similar product in the U.S.

By ascribing priorities to the tests for determining FMV, the 1978 Regulations reduced the administering authority's discretion in choosing among sometimes numerable points of reference. Likewise, the regulations reduced the degree of unpredictability by indicating that the two basic tests should be computed on the basis of the costs of prices in an ME country at a stage of development comparable to the exporting SCE. Finally, the Regulations meaningfully restricted the probability of the application of the U.S. prices or costs.

However, subsequent legal and political developments seriously undermined the practical significance of the 1978 amendment. From its inception, large segments of the domestic industry in the U.S. leveled severe criticism at the innovative Regulations, and especially

12. 46 Fed. Reg. 43,727 (1981).

13. 48 Fed. Reg. 3579 (1982).

14. Statement by G. Hufbauer before the Senate Finance Committee, Subcommittee on International Trade on S. 958, 97th Congress, 2d Sess. (1982).

the "simulated constructed value" test.[15] Furthermore, in the aftermath of the TAA of 1979, the Department of Commerce promulgated new regulations relating to anti-dumping duties, but the 1978 amendments concerning state-controlled economies remained in force. This was interpreted, as an indication of uncertainty about the efficacy of the 1978 amendment. This conclusion stemmed from the legislative history of the TAA, which emphasized that the legislators were reluctant to express "approval or disapproval of the regulations promulgated by the Secretary of the Treasury on August 9, 1978."[16]

These and other developments contributed to the adoption of new regulations[17] elaborated under the auspices of the Commerce Department, an agency which substituted for the Treasury as the administering authority in anti-dumping and countervailing duties laws. The current regulations make it clear that their first choice for the determination of FMV in CPE anti-dumping cases are the prices or costs of similar merchandises produced and sold in ME countries. The surrogate ME country chosen by the administering authority should represent a comparable level of economic development measured in terms of the GNP per capita, natural resources and overall economic structure.

In the case where no available actual price or cost data is available from ME countries, the administering authority may still use the constructed FMV test introduced in the Treasury Regulations of 1978 and applied in the Polish Golf Cart case. Finally, as a last resort, the present Regulations permit the use of U.S. domestic costs or prices of similar merchandise.

Under the present Regulations, the administering authority usually uses for the determinations of fair value in a CPE anti-dumping case the "real" prices of similar goods produced in a ME country chosen for its comparable level of economic development. Apart from its known pluses and minuses previously discussed in the context of the Polish Golf Cart case, the administrability of this test poses serious

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15. Some commentators argued that the statute did not authorize the use of any data from a CPE country but the Treasury and defenders of the new test emphasized that while cost and price data may not be reliable, the actual physical inputs in such economies are objective and verifiable. *See* Downey & Graham, *supra* note 5, at 444; Soltysinski, *supra* note 5, at 253-257. Opponents of the 1978 Treasury Regulations, *supra* note 7, also questioned the wisdom of using the "comparable economy" standard for selecting a reference country. *Compare* Wasowski, *Comparisons with Domestic Prices in Poland* in INTERFACE ONE, *supra* note 8, at 278-284 *with* a less critical opinion by Professor F. Holzman in INTERFACE TWO, *supra* note 5, at 514-522.

16. S. Rep. No. 249, 96th Cong., 1st Sess. 36, at 96 (1979).

17. 19 C.F.R. §353.8 (1983).

problems. The Department of Commerce follows a two-step procedure. First, it must obtain permission from the government of the surrogate country to approach its producers. Second, it must persuade the producers themselves to cooperate with U.S. government investigators. The producers from the surrogate country in many cases refuse to grant access to their confidential data. In one extreme case, six consecutive countries rejected the Department of Commerce's requests for information.[18] This is understandable, considering that the danger exists that the U.S. industry may use such data to file an anti-dumping case against the surrogate producers in the future.[19] Such changes are usually biased against the respondent because of actual or potential competition.

In a few cases, the Department of Commerce used the price of other ME country exports to the U.S.[20] The latter "yardstick", while ignoring any real comparative advantage which the CPE exporter may have, permits the ME exporter to sell at the same price that is allegedly charged by his competitors from other exporting countries. Thus, although he may still undersell the U.S. domestic producers, the exporter is locked into the price of the "average" or comparable exporter of the same or similar product to the U.S.

According to this author's knowledge, since 1979, the U.S. enforcement authorities, the Treasury Department and the Department of Commerce, have never resorted to the use of the most anti-competitive method of establishing FMV based on U.S. prices or costs. As already mentioned, the hypothetical constructed value test in a surrogate ME country was applied in three cases.[21]

## III. COUNTERVAILING DUTIES LAW

The TAA of 1979 has changed the existing countervailing duties laws by requiring of the ITC that an industry in the U.S. be materially injured or threatened with material injury, or that the establishment of an industry in the country be materially retarded, by reason of imports of the merchandise in question.[22]

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18. Horlick & Shuman, *Non-market Economy Trade and U.S. Anti-dumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 821 (1984). The authors describe the case involving shop towels from The People's Republic of China ("P.R.C."), 48 Fed. Reg. 37,055 (1983).

19. *See* Cotton Shop Towels from Pakistan, 48 Fed. Reg. 43,187 (1983).

20. Anti-dumping Natural Menthol from the P.R.C., 46 Fed. Reg. 24,614 (1981). In this case Commerce used the Paraguayan export price to the U.S.

21. *See supra* note 13 and the accompanying text.

22. Tariff Act §701.

The introduction of the injury requirement was probably the most important concession made by the U.S. vis-a-vis its trading partners during the Tokyo Round. The benefits of this important legal guaranty are not available to SCE exporters: Instead, under section 701(b) of the Tariff Act, the new procedures for the imposition of countervailing duties apply to dutiable imports from countries which have assumed the obligations (or substantially equivalent obligations) of the Tokyo Subsidies Code. As of the present time, no CPE country has assumed obligations under the new Code. Thus, the question arises whether the imposition of countervailing measures against imports from socialist countries is subject to much stricter "old" standards, regardless of whether the goods originate in a GATT country. Only in so far as non-dutiable imports are concerned, the injury requirement is applicable to all GATT signatories, including imports from CPE countries.

In the fall of 1979, the Treasury Department published draft Regulations concerning the definition and calculation of subsidies, with specific reference to imports from SCE countries.[24] Since the present administering authority, namely, the Department of Commerce, decided to defer publication of the final text of these guidelines, the Regulations were never tested in practice.

It is worth mentioning, however, that the 1979 proposals were based upon the assumption that proscribed subsidy practices in CPEs could be determined and measured by reference to similar practices in a free-market economy country at a comparable stage of economic development. For instance, the draft Regulations assumed that the amount of a subsidized loan received by a CPE producer would be the difference between the interest rates paid by such enterprise and the rates of interest on loans offered without government support, payable: (1) by the same enterprise, (2) by other economic units of comparable size and resources in the same country, or (3) by comparable enterprises in an ME country at a comparable stage of economic development.

Recognizing the complexity of the problem, other sections of the proposed guidelines seemed to rule out the elaborate special tests described above by permitting the administering authority to determine the existence of a subsidy and to assess its amount by the same

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23. *See* Certain Public Works Castings from India, USITC Pub. No. 1056 (Apr. 1980).

24. But Commerce has issued regulations which seem to apply the "injury test" to all duty-free goods. 45 Fed. Reg. 4938, §355 (1980).

methods which are used in the dumping cases involving goods imported from SCEs.[25]

Until recently, because of a combination of economic, political and legal factors, no full-scale countervailing duty investigations concerning SCE imports have existed. In 1980, U.S. meat producers took initial steps to institute a complaint against importation of Polish ham, which, for many years, had been the largest item of Polish export to the U.S. The formal petition eventually was never filed, probably because of the substantial decrease of the imports and their high prices and because of uncertainties concerning the identification and valuation of the alleged subsidies.

The first attempt to file a countervailing duties petition against a CPE exporter occurred in 1983, when the American Textile Manufacturers Institute and two trade unions filed a petition alleging subsidization of textiles imported from the the People's Republic of China. The petitioners argued that China is not a party to the Tokyo Subsidies Code, and, therefore, it is not entitled to an injury test. The petition was withdrawn only after the textile industry obtained assurances from the Administration that the U.S. would undertake measures aimed at reducing textile imports from China and other countries.[26]

The filing of the first countervailing duties petition against textiles from China encouraged similar legal actions. On November 23, 1983, U.S. producers of carbon steel wire rods filed petitions against imports of competing products from Poland and Czechoslovakia.[27] A few months later, petitions against imports of potash from the GDR and the Soviet Union were submitted to the Department of Commerce.

In its final determination, the Department of Commerce ruled that the countervailing duty law is not applicable to non-market economy countries. In the view of the administering authority, if a subsidy is a distortion from a market norm, then it can only exist in a market economy system.[28] After having reviewed recent economic reforms in

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25. "If the imported merchandise which is the subject of the investigation is manufactured or produced in a State-controlled economy, so that the existence or non-existence of a subsidy cannot be determined by reference to market information in that country, the existence . . . and the amount of the subsidy will be determined by whether, and the extent to which, such merchandise would be found to have been sold at less-than-fair value pursuant to §153.8 of the Customs Regulations." *Id.* at §155.4.

26. *Compare* Holmer & Bello, *U.S. Trade Law and Policy Series No. 7: The Countervailing Duty Law's Applicability to Non-market Economies*, 20 INT'L LAW. 319, 320 (1986).

27. In the matter of Carbon Steel Wire Rod from Czechoslovakia, 48 Fed. Reg. 56,419 (1983); Carbon Steel Wire Rod from Poland, 48 Fed. Reg. 56,419 (1983).

28. Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 6768-77 (1984).

Poland, the Department of Commerce observed that because of the substantial governmental control of prices, investment capital, and the allocation of scarce commodities, the resource misallocation resulted from central planning, rather than from the alleged "subsidies". The final determination was that it would be irrational to impose the market-based concept of a subsidy on a system for which it had no meaning and thus could not be identified or fairly quantified.[29]

Finally, the Department of Commerce buttressed its negative determination with arguments that it was unclear whether Congress intended the countervailing duty laws to apply to CPEs. It further asserted that it had been granted broad discretionary powers in determining the existence or non-existence of a bounty or grant. Subsequently, the administering authority summarily determined that since the U.S.S.R. and Poland were CPEs, the investigations in the potash cases should also have been terminated.

The petitioners in the two steel cases appealed to the U.S. Court of International Trade (CIT), which had jurisdiction to review the Department of Commerce's decisions in this field. The CIT reversed the decision that subsidies could not be found in CPEs. Judge Watson noted that the language of the statute section 303 was "so abundantly clear" and its purpose "so obvious" that the Department of Commerce abused its discretion and thus committed a basic error in the interpretation of the countervailing duty laws.[30]

Commentators correctly predicted that if the CIT Judge Watson's decision were to stand, the Department of Commerce would be flooded with complaints about allegedly subsidized imports from CPEs:

> If the government does not appeal or loses an appeal, virtually every import from an NME could become subject to a subsidy investigation. Since countervailing duties would be assessed regardless whether the NME imports injured U.S. producers, this could mean a drastic reduction in NME imports. On the other hand, if the government appeals and wins, domestic industries adversely affected by imports from NMEs may continue to resort to dumping petitions or other trade remedies involving, unlike the subsidy and dumping laws, political discretion, or seek new legislation.[31]

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29. Poland, Final determination, 49 Fed. Reg. 19.374, 19,376. Commerce relied, inter alia, on the opinions of leading U.S. scholars such as Professor J. Barcelo from Cornell and Professor R. Hudec from Minnesota Law School. *See* INTERFACE ONE, *supra* note 8, at 242 (statement by Professor Barcelo); INTERFACE TWO, *supra* note 5, at 26-27 (statement by Professor Hudec).

30. Continental Steel Corp. v. United States, 614 F. Supp. 548, 550 (Ct. Int. Trade 1985).

31. Bello & Horlick, *Court Overrules Commerce on Nonmarket Economy Subsidies*, at 7 (1985) (an unpublished paper).

As expected, the government appealed to the Court of Appeals for the Federal Circuit. The Court of Appeals held that the U.S. subsidies law did not apply to imports from countries with non-market economies, and reversed the earlier decision of the CIT. The Court of Appeals agreed with the gist of the arguments presented by the Department of Commerce in its final negative countervailing duty determination.[32]

Naturally, the decision of the Court of Appeals angered the domestic producers and was criticized by many commentators. It is argued, for instance, that the Court's ruling was "as incorrect on the merits, and that it invites either judicial or legislative reversal".[33] The criticized decision is viewed as unacceptable as a matter of law and policy. Despite some difficulties, the technical problem of valuing CPE subsidies under the countervailing duties law is, allegedly, not insolvable. For instance, counsel for petitioners in the Georgetown Steel case opined that Polish currency retention schemes were quantifiable.[34] Others asserted that the quantification should be based upon one of the existing methods used by the Department of Commerce for the determination of FMV of dumped goods.[35]

While admitting that the applicable statute does not expressly exempt CPEs from the reach of countervailing duty sanctions, the Court of Appeals decision is sound in light of legal and policy considerations. The principal argument that, without a market-based norm, a subsidy is impossible to determine is logically unimpeachable. Only by defining a subsidy by reference to the concept of preferentiality[36] can one open the door to the application of the countervailing duties laws to CPEs goods. This can be allegedly done in a market as well as CPEs, "as long as the average is measurable".[37] However, substituting the concept of "subsidization" for "preferentiality" would also re-

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32. Georgetown Steel Corp. v. United States, No. 85-2805, slip op. at 1 (Fed. Cir. Sept. 18, 1986).

33. Speak, Georgetown Steel Corp. v. United States: *Applying the Countervailing Duty Law to Imports from Non-market Economy Countries*, 18 L. & POL'Y IN INT'L BUS. 313, 315 (1987).

34. *Id.* at 328.

35. *Id.* at 339. Speak favors the hypothetical constructed value method. In his opinion, it takes into account the CPE's production process.

36. Horlick & Shuman, *supra* note 18, at 829. The authors characterize this approach 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 recipients exceeds the normal or average level of benefit.

37. *Id.*

quire statutory authorization. Furthermore, measuring the average level of government benefits seems to be an impossible task both in free market and CPE countries.

To visualize the problem more clearly, one needs to consider the following example: many dominant firms in Poland prefer selling at home than abroad. Paradoxically, reforms aimed at relaxation of price controls have opened the door to easy and profitable sales in Poland where the dominant firm faces no competition. Cases exist where price equalization programs for exports do not alleviate "losses" resulting from the depressed rate of exchange of the U.S. dollar vis-à-vis the local currency. The first government action, export equalization payments, constitutes a subsidy (preference), but it is aimed at correcting the consequences of the artificially low rate of exchange which, in turn, is introduced to keep the inflation under control. This raises the question of how one measures the degree or value of the negative government intervention in the latter case where there is no verifiable rate of exchange. Even preferential rates of exchange for exporters may not constitute a subsidy in the proper sense where the market value of the converted foreign currency is artificially deflated. The adherence to the concept of "preferentiality", instead of "subsidization", can establish, for instance, that exporters receive more advantageous treatment than importers. However, it would be as pointless to isolate for scrutiny only one of many preferences existing in a CPE as it is pointless to isolate such a "subsidy" as price retention scheme under countervailing duties laws in an economy riddled with government interventions.

It is sometimes argued that the judicial declaration of non-applicability of the countervailing duties law to CPEs imports amounts to granting preferential status to these countries, since domestic producers are left to rely principally on the unsatisfactory anti-dumping measures.[38] Indeed, the present anti-dumping law is imperfect, arbitrary, and costly. However, its overall effects are far more detrimental to CPE exporters than to its competitors. Moreover, the myth of preferential treatment accorded to CPE traders under U.S. law is at odds with the reality. Indubitably, the recent decision in the Georgetown Steel Corp. case amounts to an exemption from the application of the countervailing duties laws, but the cumulative effects of anti-dumping and other selective import relief laws applicable vis-à-vis CPEs more than offset this apparent concession.[39] The non-applicability of counter-

38. *Compare* Holmer & Bello, *supra* note 26, at 325.

39. *See infra* para. 6 of this paper.

vailing duties measures to CPEs by countries which employ selective anti-dumping and market disruption mechanisms is universally accepted in the GATT.[40] Conspicuously, the Georgetown Steel Corp. case never discussed this argument, since the U.S. domestic legislation always prevails in case of conflict with international law. However, one can expect that where the statute does allow interpretation that conforms to U.S. international obligations, such as GATT Codes, the courts will use this opportunity.[41] It may also be that the Court of Appeals was looking "beyond the domestic law" to the GATT Codes it implements, but given the sensitive nature of the problem, it chose to mention this aspect of the problem.

In summation, complaints by some commentators that the courts refuse to interpret the law in such a way that they can grant to domestic industry relief measures which can open the possibility for attacking every import from CPEs, regardless whether the imports injured U.S. producers, are rather shocking, unless one assumes that the primary objective of these trade laws is to eliminate or drastically reduce trade. As of today, neither Congress nor the Executive Branch has opined that this is an objective of the U.S. foreign policy, even with respect to CPEs. Despite many examples of the use of trade sanctions as an instrument of foreign policy in the U.S. relationship with Socialist countries, the U.S. government promulgate many statements confirming the proposition that the development of greater economic interdependence can lead to an improvement of political relations between East and West.[42]

## IV. Other Potential Legal Non-tariff Restraints and the Abuse of Import Relief Laws

Apart from anti-dumping and countervailing duties laws, domestic industries in the U.S. may file petitions under section 337 of the Tariff Act (unfair practices in foreign trade),[43] section 201 of the Trade Act (normal escape clause),[44] and section 406 of the Trade Act (market

40. *Compare infra* note 59 and accompanying text.

41. *Compare* Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in Studies in Transnational Economic Law 187, 237 (1986).

42. *See, e.g.*, Comptroller General, U.S. General Accounting Office, Report to the Congress of the United States: U.S. Laws and Regulations Applicable to Imports from Non-market Economies Could be Improved 32 (1981).

43. 19 U.S.C.A. §1337 (Supp. 1980).

44. 19 U.S.C.A. §2251 (Supp. 1980). This is a safeguard measure under Art. XIX of the GATT.

disruption).[45] The domestic firm may also bring a plethora of antitrust actions against a foreign competitor and its local distributors. The danger of abusing this arsenal of legal remedies is well known, and the first legislative steps have been taken to limit the scope of such legal harassment. For instance, the new version of section 337(b)(3) of the Tariff Act requires the U.S. International Trade Commission to terminate an unfair practices investigation when it has reason to believe that the matter before it is based solely on alleged acts and consequences which are within the purview of the countervailing or anti-dumping laws.[46]

In many respects, the legal hazards experienced by a CPE exporter are similar to those risked by an ME entrepreneur. However, the degree of that risk of legal persecution by way of the artificial multiplication of petitions, often based on the same or partly the same acts and effects, is much higher in the case of an SCE exporter. This results from the fact that the arsenal of legal remedies available against the Communist countries contains a selective market disruption petition (section 406) and that the unsuccessful use of discriminatory remedy does not foreclose the possibility of the U.S. industry resorting to a normal escape clause procedure (section 201). In addition, because the U.S. law has developed only one set of methods for establishing unfair pricing of CPE imports and because these methods, elaborated in the context of the anti-dumping laws, are viewed as the only practical ways of determining all forms of illegal price discrimination, there is a real danger of double or even triple jeopardy, not to mention the possibility of multiple legal harassment.

As the Golf Cart case illustrates, the U.S. plaintiff in the antitrust case against the Polish exporter viewed the determination of a margin of dumping as prima facie proof of predatory pricing and price discrimination under the Sherman Act, the Wilson Tariff Act, the 1916 Predatory Dumping Act, and so on.[47] An ME exporter runs the risk of multiple sanctions only if proof exists that he has committed two or more distinct illegal acts, such as selling below FMV, receiving export subsidy or selling below his own costs with the intention of achieving a monopoly. However, his CPE counterpart can be "caught" for dumping and, arguably, even for violating the Sherman Act on the basis

45. 19 U.S.C.A. § 2436 (a) & (i) (Supp. 1980). This is a selective import relief measure applicable to all SCEs regardless of their GATT status. *See* Soltysinski, *supra* note 5, at 260-261.

46. *See also* Rawson, *An Outline of the U.S. Regulation of Trade with Non-market Economy Countries* in INTERFACE TWO, *supra* note 5, at 551.

47. *See Outboard Marine Corp.*, 474 F.Supp. at 168.

of a single FMV finding based upon the surrogate "free-market" price test [which is clearly valid in anti-dumping possibly . . . in an antitrust forum].[48] The overruling of the Georgetown Steel case by the Supreme Court or Congress would mean that the test for measuring FMV of goods imported from CPEs would also be applicable in the countervailing duties context.

Apart from the Golf Cart case, at least two other examples illustrate the danger of a multiplicity of legal proceedings used by the domestic industry as non-tariff barriers against Socialist exporters. The first case involved Montan Wax from the GDR, in which the relief was sought under both antidumping and market disruption laws.[49] In the second case, a Chinese exporter was prosecuted under section 406 of the Trade Act (market disruption) and section 206 (escape clause).[50]

## V. The Consistency of the U.S. Legal Standards with International Law

One should remember that a basic disagreement exists between leading legal schools as to whether all international trade relations shall be subject to non-discriminatory treatment. Scholars from Eastern Europe and the majority of developing countries are of the opinion that the principle of equality of states enshrined article 2 of in the United Nations Charter should be observed by states in their economic intercourse to prevent discrimination.[51] Western scholars, especially those in the U.S., consider freedom of commerce as "a purely optional pattern of international economic law"[52] and feel that no country can demand the granting of MFN treatment under customary international law.

As this basic dispute has not yet been resolved, the author limits his analysis to the consistency of Western import relief laws with their bilateral and multilateral treaty obligations. As documented above,

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48. The validity of this surrogate test proposed by the plaintiff under the Sherman Act has not been judicially clarified after eight years of litigation. *See supra* note 6.

49. 47 Fed. Reg. 3,579 (1982) (anti-dumping) and 47 Fed. Reg. 2,957 (1982)(market disruption).

50. Certain Gloves, TA-201-9, USITC 760, Certain Gloves from PRC, TA-406-2, USITC 902 (Aug. 3, 1978).

51. Official Records of the General Assembly, Thirteenth Session, Supp. No. 9 /A/3859, p. 27, chap. III, sec. II, s.1 of the commentary to art. 44 /Yearbook . . . 1958, vol. II, p. 105, document A/3859, chap. III, sect. II, s.1 of the commentary to article 44.

52. Hazard, *Comment: Commercial Discrimination and International Law*, 52 A.J.I.L. 495 (1958); Schwarzenberger, *Equality and Discrimination in International Economic Law*, 25 Y.B. of World Aff. 163, 164-165 (1971).

despite the fact that some SCE countries are GATT members, all "Communist countries" are treated in an equally discriminatory manner in some areas of U.S. domestic legislation. Interestingly enough, the exceptions to full MFN treatment are found only in non-tariff measures, a point which illustrates the decline of the tariff as an instrument of trade policy.

The inequality of treatment documented in the preceding chapter is so notorious that even some U.S. lawyers are of the opinion that the issue of full and unconditional MFN treatment does not arise vis-a-vis Socialist countries.[53]

The legal treatment of the CPE countries belonging to the GATT by U.S. domestic law has never been given an in-depth analysis. Some CPE countries have separate trade agreements granting MFN Status, e.g. PRC and Hungary. Others, like Poland and Yugoslavia, acquire non-discriminatory treatment under a President's declaration made under section 231 (b) of the Trade Expansion Act of 1962.[54] In 1964, President Johnson determined that the two countries are eligible to obtain "nondiscriminatory and unconditional" MFN treatment. Yet, section 406 of the Trade Act (market disruption) and other discriminatory provisions of U.S. domestic law dealing with either "communist" or "state-controlled-economy" countries are applicable to Yugoslavia, Poland, and the remaining Socialist countries having GATT status. Interestingly, the selective safeguard measures incorporated in section 406 are placed in Title IV of the Trade Act of 1974 entitled "Trade Relations with Countries Not Currently Receiving Non-Discrimination Treatment", suggesting that "market disruption" provisions apply only to non-GATT countries. However, the legislative history and subsequent U.S. practice indicate that Congress intended section 406 to apply imports from "any Communist country, including Poland and Yugoslavia."[55]

Some U.S. specialists in this field raise the argument that Socialist countries had consented to the concept of selective safeguard measures in the domestic legislation of their ME partners when signing their treaties of accession to GATT and, in some cases, when entering into bilateral trade agreements.[56] True, these instruments provide for spec-

53. *See* Rawson, *supra* note 63, at 560 n.63.

54. *See* Soltysinski, *supra* note 5, at 261-262.

55. *See* Trade Reform Act of 1974, 93d Congress, 2d session, Rep. No. 93-1298, at 211 (1974).

56. *See, e.g.*, the protocols of accession signed by Poland, Romania and Hungary, GATT, BISD, 15th Supp. 47 (1968); *id.*, 18th Supp. 6 (1972); *id.*, 20th 3-4 (1974). On the subject of bilateral trade agreements between SCES and MEC, see Taylor, *The Role of Bilateral Agreements in East-West Trade*, in EAST-WEST TRADE — MANAGING ENCOUNTER AND ACCOMMODATION 83 (Atlantic Council Policy Series, 1977). *See generally* INTERFACE TWO, *supra* note 5 (statement by Professor J. Jackson and Hudec).

ial safeguard measures under certain circumstances and are subject to specific procedures. However, the market disruption provisions found in section 406 are in many respects inconsistent with these treaties. For instance, the U.S. domestic market mechanism requires the existence only of "material injury," which is a lesser standard than "serious injury" under Poland's Treaty of Accession to GATT. Furthermore, the U.S. domestic legislation does not provide for a special consultation mechanism as required under the Treaty.

The modifications and exceptions found in those treaties stem from the distinctive character of a foreign trade monopoly and cannot be interpreted as an overall limitation of the MFN concept. In the remaining areas, i.e., those which were not modified by agreement, the SCE adherents to the GATT have retained "non-discriminatory" and "unconditional" MFN status. The said protocols of accession make it clear that, subject to a limited list of specific exceptions, all of the General Agreement, including the MFN clause, shall apply to such countries as Poland,[57] Hungary or Rumania.

Assuming that the decision of the Court of Appeal in the Georgetown Steel case is wrong, the U.S. domestic legislation would be breaching of the relevant GATT obligations with respect to the condition found in the countervailing duties provisions of the TAA. The Act clearly discriminates between these GATT signatories which have ratified the new MFN agreement and those which have not implemented the new interpretations of articles VI, XVI, and XXIII of the GATT. Thus, if one shares Judge Watson's interpretation of the TAA in the Georgetown Steel case, which states the U.S. subsidies law apply to all CPEs, regardless of whether their exports cause an injury to the American industry, then one must admit that while revising its anti-subsidies law in 1979, the U.S. violated articles I and X.3/a/ of the GATT[58] and breached its international obligations to the CPEs belonging to that organization.

The rejection of the court's interpretation of the subsidies law and acceptance of the proposition that it applies to SCEs along with the antidumping law would mean that Congress intended to breach the Tokyo Round Code. Article 15 of the new Subsidies Code states that with respect to non-market countries, an importing country may use either anti-dumping or countervailing duties measures. Whichever con-

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57. *Cf.* J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

58. *Cf.* Hudec, *Interface Revisited: Unfair Trade Policy After the Tokyo Round*, in INTERFACE TWO *supra* note 5, at 86; Jackson, Louis, Matsushita, *Implementing the Tokyo Round, Legal Aspects of Changing Economic Rules*, 81 MICH. L. REV. 362, 363 (1982).

cept is used, the measure is the same; the phenomenon is measured by the difference between the import price and FMV.[59] It would be erroneous to interpret the TAA as a statute which intends to coerce CPEs to ratify and observe the Tokyo Round Anti-Subsidy Code, but which excepts the U.S. from application so that the U.S. would be free to violate its own basic rule concerning these countries (article 15).

Finally, although the author conducts no systematic research on the enforcement, based on his personal experience and interviews, he believes that the majority of serious complaints regarding the administration of Western import relief laws results from the imperfection of both the substantive criteria for measuring the FMV and the procedural safeguards available to the protectionist forces, rather than from discriminatory enforcement practices. Some petitioners from CPEs display passivity and lack of expertise during anti-dumping investigations, thus increasing the risk of losing their legal battles. In sum, the overall record from the past decade of the U.S. enforcement agencies (especially the ITC) and the courts raises no substantial doubts as to their integrity and fairness.

## VI. The Economic Impact of Present Import Relief Measures on East-West Trade

The data presented in the proceding sections of this paper confirm the view of the decline of tariffs as a protective device in Western ME countries. Pressure for protection against imports has resulted in the unprecedented growth in significance of non-tariff measures, such as anti-dumping and countervailing duties, safeguard provisions and so on.

The extent to which the analysed import relief laws contribute to the slowdown in CPE exports, especially in the field of manufactured goods, is difficult to measure. However, enough evidence exists to confirm the conventional wisdom that discriminatory and selective non-tariff measures are being more and more vigorously applied against Eastern exports.

The best illustration of the indicia of this trend are the statistics of anti-dumping and other safeguard measures. While, in the decade preceding the Tokyo Round Codes (1968-1978) and the introduction of the new legal standards, there had been nine anti-dumping cases and

59. Hudec, *supra* note 58, at 47, 49. It is worth mentioning that the EEC laws conform to the requirements of Art. 15 of the Tokyo Agreement and provide solely for the application of anti-dumping measures.

four market disruption cases against CPE exporters in the U.S., in the subsequent three years, until January 11, 1982, the ITC investigated eight anti-dumping complaints and three section 406 complaints.[60]

The EEC statistics show an even more alarming increase of anti-dumping measures for the comparable periods. During the time when the "old" Regulation (No. 459-68) was in force, the EEC authorities investigated seventy-six dumping cases, among which forty-five were directed against ME exporters and thirty-one against Socialist foreign trade organizations.[61] During the next four years (1979-1982), the Commission initiated eighty-six new anti-dumping cases against developed ME and developing countries and seventy-seven proceedings against traders from Socialist countries.[62]

The statistics presented above show two interesting phenomena. First, the more rigid U.S. measures were applied in a relatively limited number of cases, in comparison with the more flexible and liberal EEC legal devices, which showed a tendency to increase rapidly year by year. This can be mainly attributed to the fact that the volume of the CMEA exports to the EEC is much larger than their exports to the U.S.,[63] and that the larger exporters from Eastern Europe, the U.S.S.R., Czechoslovakia, GDR, and so on, being deprived of MFN treatment in the U.S., are thereby practically excluded from competing in manufactured and semi-processed goods therein. As a result, the value of processed products in the Socialist countries exports to the U.S. is lower than to the EEC.[64] One should remember in this context that the import relief measures are biased principally against manufactured products.[65]

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60. INTERFACE ONE, *supra* note 8, at 288 *et seq.*; INTERFACE TWO, *supra* note 5, at 607 *et seq.* Market disruption cases were added top anti-dumping proceedings since they are applicable only against SCE imports and frequently treated as alternative import relief measures against "dumped" goods. Because one proceeding may involve a single or several foreign imports, the figures presented in this report refer to the actual number of independent exporters involved therein.

61. J.F. BELLIS, LA REGLAMENTATION ANTI-DUMPING DE LA COMMUNAUTE ECONOMIQUE EUROPE (the data covers the decade 1968-1978).

62. *Anti-Dumping Proceedings published in* O.J. EUR. COMM. (1979-1982).

63. In 1981 the value of the CMEA exports to the EEC amounted to $28.7 billions and in the case of the U.S. only $3.0 billions. Monthly Bulletin of Statistics, U.N., vol. 37, no. 5, May 1983 (Table E).

64. The total volume of the CMEA exports to the EEC during the analyzed period was roughly ten times larger than to the United States. Processed goods from the CMEA region accounted for 0.6 percent of all U.S. imports and 1.2 percent of the EEC imports.

65. Thus, for instance, virtually all anti-dumping investigations conducted in the years 1979-1982 in the U.S. dealt with processed products.

Second, the percentage of import relief investigations conducted against exporters from Socialist countries is disproportionately high in comparison with the corresponding share of their exports to the U.S. and the EEC. While the total value of Eastern imports in the U.S., including those originating from the PRC, amounts to one percent, the anti-dumping investigations directed against Socialist F.T.Os represented five percent of the total number of foreign exporters affected by such legal measures during 1979-1982. In the EEC, during the decade when the "old" Regulation of 1968 was in force (1968-1978), more than forty-three percent of all anti-dumping investigations were conducted against FTOs from Socialist countries, although their share of all imports to the Community represented only four to five percent of the total volume of imports. In the years 1979-1982 petitions against SCE imports rose to forty-six percent.[66] Given the imperfection of the existing methods of measuring FMV of SCE imports, it is doubtful whether the data presented above can be treated as reliable evidence of the extent of unfair "price-undercutting". Rather, the data demonstrates the frequency of application of non-tariff measures to products originating from CPE countries.

Many anti-dumping cases end with price assurances in accordance with a formula negotiated by the petitioner with the enforcement agency. Such assurances frequently contain an escalation clause providing for temporary price adjustments. While occasionally the CPE petitioner is able to use the clause as a leverage to raise its prices, in most cases, the clause leads to the reduction of the volume of exports or, in some instances, the elimination of the foreign exporter. The author's personal experience is that a serious threat of legal harassment, not to mention the initiation of a proceeding against a foreign trade company, encourages self-restraint in exports because of uncertainty as to the method for establishing "fair market value". In essence, price assurance leads to the establishment of variable and unpredictable minimum import prices for SCE products.

An analysis of trade data concerning goods subject to anti-dumping measures conducted by UNCTAD supports the proposition of their negative impact on imports. One of the most important conclusions from this study is an indication of an adverse effect of these investigations, regardless of their final legal outcome, and of the discrimination against CPEs.[67] The latter countries not only a percentage of all

66. J. F. BELLIS, *supra* note 61; *Anti-Dumping Proceedings*, *supra* note 62.

67. Protectionism and Structural Adjustment, UNCTAD TD/B/979(1984), at 5 *et seq.*

anti-dumping cases that is disproportionately high in relation to their share of the world trade, but also a percentage of dismissed petitions filed against them that is much lower than that of ME traders.[68]

Sometimes, even a single precedent can have chilling effects on trade, creating uncertainty as to the future of large-scale East-West transactions. Two related Soviet ammonia investigations before the U.S. International Trade Commission best illustrate this point.[69] The deal between a Soviet foreign trade company and Occidental Petroleum had been approved by all relevant Government agencies and by the President of the United States because the agreement was in the national interest and because they wanted to ensure that it did not undercut U.S. domestic prices. Despite all those "orderly marketing" steps, the twenty-year agreement was twice on the verge of collapse because of political and protectionist pressures.[70]

## VII. CONCLUSIONS

Given the present world trade situation and current East-West political tensions, it would be unrealistic to propose radical changes aimed at elimination of non-tariff barriers. However, the restoration of East-West trade relations to a more economically rational basis, which is a precondition for the repayment of substantial debts owed by some Socialist countries to their Western creditors, will sooner or later require a more secure framework of cooperation.

Efforts by the U.S. to press those CPE countries belonging to the GATT into ratifying the entire GATT article XVI and the Tokyo Countervailing Duties Code with the threat of discrimination would not only be inconsistent with international law but would also be unfair. No CPE country concerned about the integrity of its international obligations can commit itself to do something that cannot be determined until after a foreign administrative authority has found an alleged violation by utilizing the concept of a "surrogate" price or "constructed value".[71] Recognizing the fact that basic public policy differences and "interface" problems exist, the CPE members of the

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68. In the EEC the percentage of dismissed cases vis-à-vis the developed ME countries was 34 percent. In the case of Eastern Europe the share of dismissed cases was 12 percent. *Id.* at 9 (The study covered the period 1979-1982.).

69. *See* Anhydrous Ammonia from the USSR: Report to the President . . ., USTC No. 1051, at 104-112 (1980).

70. *See generally* Cunningham, *The Need for a "Rules of Conduct" Approach to the Regulation of U.S. Trade with Non-Market Economies*, in INTERFACE TWO *supra* note 5, at 369-373.

71. *See* Hudec, *supra* note 58, at 25.

GATT are permitted to accept only the first three subsections of article XVI. Besides, since even leading ME countries practice, subsidization of export activities,[72] it would be unrealistic to expect CPEs to eliminate them overnight.

In my opinion, the advocated and long-delayed reforms cannot be reduced to East-West "interface" accommodations, such as giving more autonomy to foreign trade enterprises or establishing special economic zones to foreign investors. Until domestic state-owned, cooperative, and private firms are permitted to invest, compete, and conduct foreign trade without discrimination, subject to a reasonable minimum of government planning and control, there is little chance that the CPE's will be able to obtain a truly non-discriminatory status within the GATT. Furthermore, without rejecting outdated economic dogmas, such as the traditional concept of monopoly of foreign trade, the CPE will not be able to compete effectively in world markets. Such changes are necessary not only because they raise the possibility of avoiding the application of the selective Western import relief laws described in this paper but also, what seems to be more important, because many traditional socialist policies (e.g. comprehensive price controls, equalization payments, rationing, etc.) make it difficult, if not impossible, to evaluate the economic performance of domestic enterprises. These self-imposed rules of economic intercourse tend to favor the least effective and the most wasteful firms. As a result, they have more chilling effects on productivity and enterprising attitudes of our companies then the discriminatory Western foreign trade laws described in this paper.

The eventual success of the reforms, which are by no means universally supported even in such countries as Poland, depends to some extent upon the response of the ME's to trade problems with the CPE's. Capricious policies of the West have adverse effects on the reforms and strengthen the position of the partisans of the conservative school of socialist economics, who are sceptical about the advantages of the economic experiments and the expansion of East-West trade, especially with the U.S.

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72. The enactment of the DISC export subsidy by Congress in 1971 was an example of direct violation of GATT Article XVI:4. The measure was repealed in 1984 and replaced by a similar measure known as the Foreign Sales Corporation. 26 U.S.C. 921-927; *cf.* Hudec, *supra* note 58, at 240.

Apart from various proposals aimed at the rationalization of existing legal concepts discussed *inter alia* in Congress,[73] the ME and CPE countries should analyze the whole legal framework of legal non-tariff barriers in East-West trade. This would perhaps require setting up a special subcommittee at the UNCTAD or GATT forum, which could study and make recommendations regarding more radical changes in this context. It should be pointed out that the legal and economic literature contains a number of alternative proposals regarding various approaches to existing import relief measures.

The proposed action at the international level should review the possibilities of strengthening the existing and introducing a new, international trade dispute mechanism. The creation of binding and non-binding settlement procedures would "muzzle" the direction of the present power-oriented economic diplomacy.

Such procedures would seem to be better for solving difficult trade disputes than the present unilateral actions and endless discussions. The unprecedented success of *ad hoc* arbitration procedures in commercial East-West disputes suggests resorting to a similar mechanism in bilateral and multilateral economic controversies involving sovereign states. Such rule-oriented diplomacy, advocated also by some U.S. specialists,[74] would be more fair, than the present exercise of sheer power in economic intercourse, especially for weaker countries.

As a side note, the author stresses the fact that because of basic economic and political differences between MEs and CPEs, complete elimination of discriminatory treatment seems to be a sheer impossibility. Nevertheless, the present arbitrary and costly system of solving trade disputes in the analyzed field can be substantially improved. Likewise, successful implementation of economic reforms in Socialist countries can contribute to a gradual normalization of East-West trade relations. This will be possible only if CPEs are able to introduce the market mechanism, competition, currency convertibility and foreign trade patterns similar to those prevailing in ME countries. The even-

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73. *Compare* Horlick & Shuman, *supra* note 18, at 830-840. The authors discuss, inter alia, Senator Heinz bill submitted as S.958 in 1981 and S.1351 in 1983. *See also* a thorough study by the General Accounting Office publication entitled *U.S. Laws and Regulations Applicable to Imports from Non-Market Economies Could be Improved, supra* note 42 (ID-81-35).

74. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 100-101 (1978). Although this survey is as free from bias and objective as I could make it, the reader should know that I was "of counsel" to "pezetel" in its anti-dumping and anti-trust disputes discussed in this paper /the Golf Cart case/.

tual success of such policies, which are, by no means, universally supported even in such countries like Poland, depends, to some extent, upon the response of the West to trade problems such countries face in dealing with MEs. Capricious and discriminatory policies of the West have adversely effected the reforms and have strengthened the position of the partisans of the conservative school of the Socialist economics, who are skeptical about the advantages of the reforms and the expansion of East-West trade, especially with the U.S.

The preceding paragraph should not be interpreted as a value judgment but, rather, as a description of certain realities.