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Roadblock to Trade: The State-Controlled Economy Issue in Antidumping Law Administration

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Donald L. Cuneo and Charles B. Manuel, Jr.

Abstract

This article will review and analyze the background of the SCE provisions, the operation and limitations of the current law as evidenced by recent cases, and the proposed legislation currently before Congress.

ROADBLOCK TO TRADE: THE STATE-CONTROLLED ECONOMY ISSUE IN ANTIDUMPING LAW ADMINISTRATION

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INTRODUCTION

The United States antidumping laws¹ are meant to protect domestic industries from unfairly priced imports.² Dumping occurs when imported merchandise is sold at "less than fair value" (LTFV) and an industry in the United States is "materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of"

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1. 19 U.S.C. §§ 1673-77 (Supp. III 1979). These sections are the present codification of the original Antidumping Act of 1921, ch. 14, §§ 201-212, 42 Stat. 11 (1921), 19 U.S.C. §§ 160-173 (1964) [hereinafter cited as Antidumping Act], amended by Trade Act of 1974, Pub. L. No. 93-618, Title III, § 321, 88 Stat. 1978, 2043-49 (1974) [hereinafter cited as the Trade Act]. The Antidumping Act of 1921 was repealed by the Trade Agreements Act of 1979, 19 U.S.C. §§ 1673-77 (Supp. III 1979) [hereinafter cited as the Trade Agreements Act].

2. See, e.g., COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED (1981) [hereinafter cited as COMPTROLLER GENERAL'S REPORT]: "U.S. antidumping law provides methods by which domestic industries can obtain relief from unfairly priced imports that place them at a competitive disadvantage." *Id.* at 12. Cf. *City Lumber Co. v. United States*, 290 F. Supp. 385 (Cust. Ct. 1968), *aff'd*, 311 F. Supp. 340 (Cust. Ct. 1970), *aff'd*, 457 F.2d 991 (C.C.P.A. 1972) ("The intent of Congress was to protect domestic industry from sales of imported merchandise at less than fair value which either caused or continued an injury to competitive domestic producers of merchandise . . ." 290 F. Supp. at 392) (emphasis in original). For a discussion of this case's novel continuation of injury theory of law, see Comment, *Antidumping Act—Determination of Injury—Purposeful Importation at Depressed Market Price Held Prohibited Under Continuation of Injury Theory*, 3 N.Y.U. J. INT'L L. & POL. 376 (1970); see also *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961). ("The history of the Antidumping Act . . . makes it clear that the concern of Congress was to protect the producers of the United States against actual or threatened demoralization of American markets which could result from the exportation from foreign countries of articles into the United States at prices less than the fair market value of those articles . . ." *Id.* at 306).

the imports in question.³ As indicated by three recent antidumping decisions of the Department of Commerce (Commerce),⁴ significant problems are encountered in determining if sales are being made at LTFV in antidumping investigations involving products from socialist and communist countries.

Under present Commerce practice, the determination in an antidumping investigation of whether a country has a state-controlled economy (an SCE) might be compared to the celebrated technique of defining pornography: I cannot define it, but I know it when I see it.⁵ Although for certain purposes this subjectivity may be desirable, in antidumping law it presents a difficult dilemma for foreign producers whose products are the subject of an antidumping investigation. It is one thing for government regulators to determine that an economy is state-controlled; it is quite another for producers subject to such determinations to determine pricing strategies and overcome the inherent disadvantages of offshore markets. When SCE determinations take place, foreign producers cannot predict their exposure to charges of dumping their products nor can they modify their practices to avoid such charges. The avoidance of sales at LTFV—the heart of antidumping law theory—is seriously compromised to the detriment of both United States and foreign producers.

The pluralistic structure of the economies of many nations makes the determination of state control even more difficult.⁶ One

3. 19 U.S.C. § 1673 (Supp. III 1979). See COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 12. This article addresses only that part of the statute concerning "fair value."

4. Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981); Unrefined Montan Wax from the German Democratic Republic, 46 Fed. Reg. 38,555 (1981); Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic, 46 Fed. Reg. 46,152 (1981).

5. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps could never succeed in intelligibly doing so. But I know it when I see it. . . ." *Id.*).

6. Consider the case of Brazilian manufacturers who get an approximate thirty percent drawback or credit on customs duties on Paraguayan peppermint oil if they re-export the menthol it produces within six months. In addition, producers/exporters receive an export incentive from the government of eight percent of the export value of menthol and twenty-four percent of the export value of dementholized peppermint oil. See GREENHALGH, *THE MARKET FOR MINT OILS AND MENTHOL* 26 (1979). The export incentive can take any one of five forms in Brazil, including an exemption from withholding tax paid on export commissions or exemption from excise tax. See PRICE WATERHOUSE & CO., *DOING BUSINESS IN BRAZIL* 88-89 (1980). Moreover, there is an exemption from excise and sales taxes on exported goods with respect to income attributable to export sales. *Id.* at 89. See PEAT, MARWICK, MITCHELL

might readily agree that the Soviet Union has an SCE, both as a nation and on any industrial sector basis. Disagreements may arise, however, when considering mixed political and economic systems such as Yugoslavia or Hungary. A country may be "free-market" in one sector of its economy but demonstrably "state-controlled" in another sector. On a sectoral basis, even United States agriculture might not escape the characterization of state control in certain respects:

Although government price-support programs remain controversial in the United States, a majority of those in Congress have voted in favor of continuing such programs over the past forty years. Support programs in some form have been maintained since the 1930's for most grains, cotton, tobacco, oil-seed crops, wool, sugar, and milk. These commodities account for about half the cash receipts of farmers in the United States. Prices of commodities which account for the remaining half of gross farm receipts, including poultry and eggs, beef, pork, fruits, and vegetables, have not been supported directly, although the prices of these commodities have been influenced by support programs on grains, and to a modest degree by government purchase programs and marketing orders for a few commodities.⁷

Prompted by these problems and by the negative impact of the current antidumping statutes on expanding United States trade with countries that may potentially be labelled as SCEs,⁸ Congress is considering a substantial revision⁹ of the sections of the anti-dumping laws that deal with imports from SCEs (the "SCE provisions").¹⁰ This Article will review and analyze the background of the SCE provisions, the operation and limitations of the current law as evidenced by recent cases, and the proposed legislation currently before Congress.

& Co., INTERNATIONAL TAX AND BUSINESS GUIDE TO BRAZIL 37-38 (1979). In these circumstances, home market sales are undoubtedly of little interest to Brazilian producers unless the home market purchasers are willing to pay artificially high prices in order to match the tax benefits enjoyed by exporters.

7. W. TOMÉK & K. ROBINSON, AGRICULTURAL PRODUCT PRICES 277 (1972). See also Schwartz, *American antitrust and trading with state-controlled economies*, ANTITRUST BULLETIN 513, 514-15 (1980) (for a discussion of the ways in which the United States government regulates economic activity).

8. See COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 3-5.

9. S. 958, 97th Cong., 1st Sess., 127 CONG. REC. S3782 (daily ed. April 9, 1981) (introduced by Sen. Heinz).

10. 19 U.S.C. § 1677b(c) (Supp. III 1979).

I. THE EVOLUTION OF SPECIAL SCE PROVISIONS IN UNITED STATES ANTIDUMPING LAW

A. *The Reasons for SCE Provisions and the Problems They Create*

Antidumping investigations include a determination by Commerce of whether LTFV sales have taken place in a given period, usually a period six months prior to the initiation of the investigation.¹¹ To determine if LTFV sales have taken place, Commerce is mandated by statute to compare the United States price of the merchandise in question with its "foreign market value."¹² If, for example, the product being investigated comes from Canada and is also sold in Canada in reasonable commercial quantities, the comparative process is relatively easy. If the United States price is lower than the "home market price," then LTFV sales have occurred. If it is equal or higher on an F.O.B. factory basis, no LTFV sales have occurred and the antidumping investigation stops.

However, if the product originates from a country that arguably is "state-controlled," while the determination of the United States price of the product in question may be relatively easy, the issue of determining the "foreign market value" for purposes of comparison to the United States price is highly problematic. Where

11. The investigation is initiated by the filing of a petition or by Commerce itself. When a petition is filed, Commerce shall, within twenty days of filing, determine whether the petition alleges the elements for the imposition of an antidumping duty (the amount by which the foreign market value exceeds the United States price) and contains information reasonably available to the petitioner supporting the allegations. 19 U.S.C. § 1673a (Supp. III 1979). Simultaneously, the International Trade Commission (ITC) is notified of an investigation by the filing of the petition or by Commerce. Within forty-five days of filing or initiation the ITC determines whether there exists a reasonable indication of material injury, a threat thereof or material retardation of the establishment of an industry in the United States by reason of the imports. 19 U.S.C. § 1673b(a) (Supp. III 1979).

In order to conform to the Trade Agreements Act, *supra* note 1, and Reorganization Plan No. 3 of 1979, in 1980 the International Trade Administration of the Department of Commerce (ITA) assumed responsibility for antidumping investigations. 45 Fed. Reg. 8,182, 35,803 (1980). The Customs Service of the Treasury Department formerly had been responsible for antidumping determinations.

12. 19 U.S.C. § 1673 (Supp. III 1979). See generally Note, *Treasury Runs the Maze: Less Than Fair Value Determinations Under the Antidumping Act of 1921*, 8 GA. J. INT'L & COMP. L. 919 (1978) (detailed analysis of LTFV determination procedure). For a review of antidumping investigation procedures in general, see Victor, *United States Antidumping Rules*, 10 ST. MARY'S L. REV. 217 (1978). For a somewhat outdated but still useful detailed analysis of the criteria used in determining the existence of LTFV sales, see Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409 (1965).

an SCE is involved, the producer's "home market" price is not utilized, and various alternative formulas are employed.¹³ The unwillingness to use the SCE's home market price results from the theory that prices and markets in an SCE are artificial and do not reflect a fair "foreign market value."¹⁴

The impact of not using the foreign producer's home market price as the foreign market value because of an SCE designation is very significant. The initial problem is inability to predict the outcome of Commerce's LTFV determination. Potential United States petitioners find it difficult to predict their chances of success and may be discouraged from seeking relief. Similarly, the foreign producer does not have the data to make a fair-value comparison and thus determine if a problem exists. Dumping cannot be avoided if the rules and the numbers of the game are not known to the players. That circumstance has several ramifications. Settlement by virtue of an agreement not to sell at LTFV is at least delayed, if not denied, as a possibility. Most important, the foreign producer is no longer in control of his destiny as a marketer to the United States. This is because his United States price will, under current law, be compared in the LTFV determination to another producer's price in that producer's home market or a third country, or to the United States itself, as a replacement or "surrogate" for the home market price in the SCE. It becomes impossible to determine if one's price is, or will be, high enough to avoid the LTFV designation.

Worse yet, one's United States price can, in effect, be dictated by a competitor's price if a competitor is chosen as a surrogate for the SCE, as is often the case under recent Commerce practice.¹⁵

13. See 19 U.S.C. § 1677b(c) (Supp. III 1979); 19 C.F.R. § 353.8 (1980).

14. See *infra* notes 24-72 and accompanying text. See also S. REP. NO. 1298, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7311 (accompanying the Trade Act, *supra* note 1). "The Committee is concerned that the technical rules in the [Trade] Act are insufficient to counteract dumping from State-controlled-economy countries where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes." *Id.*

15. See, e.g., Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981); Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic, 46 Fed. Reg. 46,152 (1981). Another curious by-product of choosing a surrogate is the difficulty in applying the "critical circumstances" provisions. These provisions are designed to subject the importation of goods found to be sold at LTFV to withholding of appraisement at an earlier stage in an antidumping investigation if the imports are "massive" and either (1) the foreign producer or the importer "knew or should have known" the sales were at LTFV or (2) there is a history of dumping. 19 U.S.C. § 1673(b)(e) (Supp. III 1979). If a surrogate is used it is difficult to envisage a circumstance where the foreign producer or the importer

Comparative economic cost advantages cannot be realized, even though the concept of comparative advantage is at the foundation of international trade theory. In addition, because United States importers will be liable under the statutory scheme for antidumping duties if there are LTFV sales after a certain date, the uncertainty and lack of predictability dries up markets and makes long-term contracting difficult, if not impossible. In view of these practical commercial problems, foreign producers from countries susceptible to designation as SCEs are at a distinct competitive disadvantage.

B. *The Pre-1968 Statutory and Regulatory Provisions*

The original Antidumping Act of 1921 (Antidumping Act)¹⁶ contained no provision dealing specifically with SCEs. At that time the Soviet Union had the only communist government, and United States antidumping law did not indicate that communist or socialist countries were to be treated differently from other countries. The Antidumping Act provided that the existence of sales of merchandise at LTFV should be determined by a comparison of United States import price and foreign market value or, in the absence of such value, the "constructed value."¹⁷ Generally, foreign market value was defined as the price at which the merchandise was sold for home consumption in the exporting country in the ordinary course of trade.¹⁸ If that price could not be determined, the price

"knew or should have known" of sales at LTFV. The United States petitioner has little hope of employing "critical circumstances" unless there is a history of dumping. For an example of unsuccessful attempts to assert "critical circumstances," see *Natural Menthol from the People's Republic of China*, 46 Fed. Reg. 3,258 (1981) (preliminary LTFV determination), 46 Fed. Reg. 24,614 (1981) (final LTFV determination); *Haarmann & Reimer Corp. v. United States*, No. 81-1-00027, slip op. February 2, 1981 (denying application of Haarmann & Reimer Corp. for preliminary injunction in litigation challenging Commerce's denial of critical circumstances). See also *Unrefined Montan Wax from the German Democratic Republic*, 46 Fed. Reg. 38,555 (1981) (final LTFV determination holding that absence of other history of dumping suggested no "reasonable basis to believe that importers knew, or should have known, that the GDR exporter was selling Montan Wax at less than fair value."). *Id.* at 38,566.

16. Antidumping Act, *supra* note 1.

17. *Id.* at §§ 201-06, 19 U.S.C. §§ 160-65 (1964).

18. *Id.* at § 205, 19 U.S.C. § 164 (1964). That section of the Antidumping Act defined foreign market value as:

the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale

at which such merchandise was sold for exportation to countries other than the United States was taken to be the foreign market value.¹⁹ Constructed value, which was to be used in the event that foreign market value could not be determined, was measured by the sum of the cost of materials and fabrication plus an amount for expenses and profit.²⁰ Again, these factors were to be considered to the extent that they occurred in the ordinary course of business or trade.²¹

Thus the original statutory provisions provided that the preferred sources for values in foreign market value determinations were:

- (1) home market sales,
- (2) sales to third countries, or
- (3) constructed value (based on costs in the home economy).

Based on these provisions of the Antidumping Act, the Department of the Treasury (Treasury), which was at that time responsible for conducting antidumping investigations,²² promulgated procedural regulations.²³ Although the Treasury antidumping

quantities and *in the ordinary course of trade* for home consumption (or, if not sold or offered for sale for home consumption, of if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States)

Id. (emphasis added).

19. *Id.*

20. Section 206(a) of the Antidumping Act, *supra* note 1, described how the constructed value was to be determined:

[T]he constructed value of imported merchandise shall be the sum of—

(1) the cost of materials . . . and of fabrication or other processing of any kind employed in producing such or similar merchandise . . . which would ordinarily permit the production of that particular merchandise *in the ordinary course of business*;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the *ordinary course of trade*

Id. (emphasis added).

21. *Id.*

22. Antidumping investigations are now conducted by the Department of Commerce.

See supra note 11.

23. 19 C.F.R. §§ 14.6-13 (1967). Specifically, Section 14.7 defined "fair value" in the same way that "foreign market value" is defined in the statutory provisions, although Section 14.7, n.15 stated that the "definition of fair value does not in any way modify or affect

regulations did not contain explicit provisions dealing with SCEs, Treasury developed a special policy whereby, for any communist country except Yugoslavia, home market prices were not used to determine the foreign market value of products.²⁴

C. Pre-1968 Cases Dealing With SCE Designations

Treasury's earliest antidumping decisions involving SCEs seemed to consider, to some extent, the use of home market prices. None of these decisions, however, was finally decided *solely* on the basis of a comparison between United States price and home market price. For example, in *Bicycles from Czechoslovakia*,²⁵ Treasury determined that the proper foreign value comparison was between the United States price and either the home market price or constructed value. Treasury in fact used both home market price and constructed value and found the United States price to be lower than either,²⁶ although the published decision failed to explain what measure of constructed value was used.

Similarly, in *Fur Felt Hoods, Bodies, and Caps from Czechoslovakia*,²⁷ Treasury appeared to consider home market prices but found that sales for home market consumption were inadequate to furnish a satisfactory basis for an LTFV comparison.²⁸ Treasury therefore used a test that compared United States price with the prices at which similar merchandise from competing third countries was sold to the United States.²⁹ The "third country price" test applied in *Fur Felt Hoods* was unusual since Treasury used the

definitions of foreign market value given in . . . the Antidumping Act." In addition, note 15 indicates that:

[a]n industry in the United States which considers that it is being injured by sales of merchandise at less than fair value will ordinarily have insufficient information on which to submit proof either of fair value . . . or foreign market value or constructed value The industry may, however, submit . . . such material as is available to it, including information indicating the market price for similar merchandise in the country of exportation and in any third countries in which merchandise of the producer complained of is known to be sold.

Id.

24. See Anthony, *The American Response to Dumping From Capitalist and Socialist Economies—Substantive Premises, and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159, 200-05 (1969).

25. 25 Fed. Reg. 6,657 (1960).

26. *Id.*

27. 27 Fed. Reg. 6,099 (1962).

28. *Id.*

29. *Id.*

price of similar merchandise sold to the United States from third countries, rather than the price at which similar merchandise was sold to other countries from Czechoslovakia. Treasury regulations did not provide for the use of a "third country price" until they were amended in 1968.³⁰

A similar procedure was followed in *Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia*,³¹ in which there were neither home market sales nor exports of comparable Czech sheet glass to countries other than the United States. Treasury determined that:

Under these circumstances, a comparison between the purchase price paid by the importer in the United States and the constructed value, as defined in the Antidumping Act of 1921, was deemed appropriate.

. . .

In the absence of information as to the actual costs of materials and labor and as to the amount ordinarily added for general expenses and profit in Czechoslovakia, the constructed value was calculated on the basis of the Western European price, f.o.b. shipping port, for exportation to the United States, of glass jalousies most nearly similar to the jalousies exported from Czechoslovakia to the United States.³²

As in the *Fur Felt Hoods* case, Treasury resorted to a third country price to make its LTFV determination. Although use of this value was not authorized,³³ it seems that Treasury was left with no alternative because the circumstances of the *Czech Sheet Glass* case were not anticipated in the statutory or regulatory provisions.

If a lack of cost information as in the *Czech Sheet Glass* case³⁴ can be assumed, Treasury's heavy reliance on a third country price rather than the constructed value in subsequent decisions can be explained. Of course, reasons for rejection of home market price and normal third country price (sales from the SCE country to third countries) must also be assumed in those cases where no such reasons were stated by Treasury.

30. 19 C.F.R. § 53.5(b) (1969) (merchandise from controlled-economy country). See *infra* notes 73-79 and accompanying text.

31. 27 Fed. Reg. 8,457 (1962).

32. *Id.*

33. For a discussion of Treasury's "unauthorized" use of the third country price, see Anthony, *supra* note 24, at 200-05.

34. 27 Fed. Reg. 8,457 (1962).

Another possible explanation for Treasury's primary reliance on third country price is suggested by the *Portland Cement from Poland* case,³⁵ where use of home market sales was rejected because such sales were "not made in the ordinary course of trade within the meaning of the statute [the Antidumping Act of 1921]."³⁶ To use home market sales or sales to third countries as a basis for an LTFV comparison, such sales must be made "in the ordinary course of trade."³⁷ Furthermore, the costs used in calculating a constructed value must also occur "in the ordinary course of trade" or "in the ordinary course of business."³⁸ Thus, if Treasury assumed in a case involving an SCE that home market sales, sales to third countries, and the costs considered in calculating a constructed value did not occur in the ordinary course of trade, a foundation would have been laid for consistent use of third country price.³⁹

Unfortunately, Treasury often did not explicitly state its reasons for rejecting home market sales, sales to third countries and constructed value, and as a consequence the decisions seem inconsistent and haphazard.⁴⁰ For example, in *Portland Cement from*

35. 28 Fed. Reg. 6,660 (1963).

36. *Id.*

37. The phrase "ordinary course of trade" is incorporated into both the provision for home market price, 19 C.F.R. § 14.7(1) (1967), § 57.3(a) (1969), § 353.3 (1980) by reference to § 205 of the Antidumping Act, 19 U.S.C. § 164 (1964), and the provision for sales to third countries (19 C.F.R. § 14.7(2) (1967), § 53.4(a) (1969), § 353.4 (1980) by reference to § 206 of the Antidumping Act, 19 U.S.C. § 165 (1964)). See *supra* note 18.

38. Antidumping Act, *supra* note 1, at § 206, 19 U.S.C. § 165 (1964). See *supra* note 20.

39. Professor Anthony suggests this perception as the explanation of Treasury's behavior: "[b]ecause any available figures reflect transactions that are not 'in the ordinary course,' the Treasury has no choice but to disregard figures from the exporting economy and simply to do the best it can to construct the value in some other manner consistent with the spirit of the [Antidumping] Act." Anthony, *supra* note 24, at 203-04. Anthony adds that the statutory definition of constructed value did not specify how the Treasury was to proceed either when information as to costs, expenses and profits was unavailable or when that information reflected transactions that were not in the ordinary course. *Id.* at 204, n.188. Further, according to Anthony, § 53.5 of the 1968 Treasury amendments did not close the gap. *Id.* See *infra* notes 73-79 and accompanying text.

See also Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189, 225-26 (1965) ("the [Treasury] Department has concluded that it may reject all the elements of constructed value under Section 206(a) [of the Antidumping Act] and apply the 'best evidence available' under Section 206(b), which it has determined to be the export prices of similar goods from free market countries other than the United States").

40. See the recommendations of the Comptroller General, *infra* notes 184-94 and accompanying text. See also Schwartz, *The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping Duties*, 14 VA. J. INT'L LAW 463 (1974). The author suggests that Treasury decisions should contain an explicit statement

Poland,⁴¹ after rejecting use of home market sales because they were not made in the ordinary course of trade, Treasury rejected sales to third countries because they were inadequate, and did not state why third country price was chosen over constructed value.⁴² The relative lack of judicial review during this period probably contributed to the relative freedom with which Treasury applied its own techniques to each situation.

Not only did Treasury's subsequent decisions choose third country price consistently and with little or no explanation, the decisions also referred to this price as the "constructed value." Illustrative of this confusing use of terminology are the *Window Glass from U.S.S.R.*⁴³ and *Window Glass from Czechoslovakia*⁴⁴ cases, where Treasury, without explanation, stated: "it was determined from the evidence presented that the proper comparison for fair value purposes is between purchase price and constructed value. . . ."⁴⁵ The measure of constructed value used by Treasury, however, was actually a third country price.⁴⁶ While this use of the term "constructed value" was inaccurate, it anticipated subsequent statutory⁴⁷ and regulatory⁴⁸ amendments which provided for use of a constructed value based on third country prices in the case of an SCE.

Treasury's decisions between 1964 and 1968 involving SCEs seem to anticipate the 1968 amendments to the Treasury regula-

of reasons which makes manifest the issues presented and the disposition made of them. *Id.* at 463, 473-74.

41. 28 Fed. Reg. 6,660 (1963).

42. *Id.*

43. 29 Fed. Reg. 8,381 (1964).

44. 29 Fed. Reg. 13,405 (1964). See also Coudert, *supra* note 39, at 226:

the legal validity of the Treasury Department's use of West European export prices as the Czech constructed value was challenged in [this case] as contrary to the legislative history and the actual language of Section 206(b) [of the Antidumping Act]

The Treasury Department persisted in its position—notwithstanding the submission by the Czech exporter of all the elements of value required by Section 206(a) It recognized a possible legal problem in its declared policy but chose to continue the policy 'in the absence of a court decision overruling it.' Inasmuch as the *Czech Sheet Glass* case terminated in a finding of no injury, the legal questions underlying Treasury policy in this area [remained unresolved].

Id. (footnotes omitted).

45. 29 Fed. Reg. 8,381, 13,405 (1964).

46. *Id.*

47. See *infra* notes 80-82 and accompanying text.

48. See *infra* notes 73-79 and accompanying text.

tions.⁴⁹ Thus two 1966 cases involving Czechoslovakia, *Shoes from Czechoslovakia*⁵⁰ and *Fur Felt Hat Bodies from Czechoslovakia*,⁵¹ both used the third country price. In addition, Treasury first used "controlled economy" language in the *Fur Felt Hat* case: "Comparison between purchase price and constructed value based on comparable hat bodies from a country not having a controlled economy"⁵² This decision came only eleven months before Treasury's Proposed Rules which contained the new "Merchandise from controlled economy country" provision.⁵³

Similar decisions were rendered in *Fishery Products from U.S.S.R.*⁵⁴ (the first Treasury decision to name a specific country, Kuwait, as the basis for a third country price), *Pig Iron from Czechoslovakia*⁵⁵ (use of price of comparable pig iron sold for home consumption in countries not having an SCE), and *Cast Iron Soil Pipe and Fittings from Poland*⁵⁶ (where there were no sales for home consumption in a non-SCE, the price chosen for comparison purposes was the export price from France). By early 1968, Treasury apparently was completely at ease with its method of making fair-value determinations based on procedures that were not to be incorporated into its own regulations for several months. Typical language appeared in *Pig Iron from Czechoslovakia*,⁵⁷ *Pig Iron from East Germany*,⁵⁸ *Pig Iron from Romania*,⁵⁹ *Pig Iron from the U.S.S.R.*⁶⁰ and *Titanium Sponge from the U.S.S.R.*:⁶¹

It was determined that the appropriate comparison for fair value purposes is between purchase price and constructed value . . .

49. These amendments, as described below in section II D, provided that in the case of merchandise from a controlled economy, constructed value could be based on the price in a third country, either (1) for home consumption, or (2) for export to another country, including the United States. 19 C.F.R. § 53.5(b) (1969).

50. 31 Fed. Reg. 1,207 (1966).

51. 31 Fed. Reg. 15,024 (1966).

52. *Id.*

53. See *supra* note 49.

54. 32 Fed. Reg. 1,101 (1967). While the choice of Kuwait as a surrogate for the Soviet Union may seem unlikely, there is a rationale. The fishery products in question originated from the same waters as those sold by the Kuwaiti producers.

55. 32 Fed. Reg. 2,901 (1967).

56. *Id.*

57. 33 Fed. Reg. 5,105 (1968).

58. *Id.*

59. *Id.*

60. *Id.* at 5,106.

61. *Id.* at 5,467.

...
 inasmuch as the merchandise under consideration was produced in a state-controlled-economy country, constructed value was based on the ex-factory prices at which similar merchandise was sold for home consumption in a free-economy country. The country chosen for this purpose was Italy. [The United Kingdom was used in the *Titanium Sponge* case.]⁶²

Four cases involving Yugoslavia are somewhat anomalous to the preceding discussion.⁶³ In three of the four cases Treasury, although presumably dealing with an SCE,⁶⁴ used normal methods for determining foreign market value. Home market price was used

62. *Id.* at 5,106.

63. For a thorough discussion of the Yugoslav cases, see Anthony, *supra* note 24, at 213-26.

64. This presumption, of course, may be incorrect. Yugoslavia is widely considered, and considers itself, to be a communist country with a market economy. COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 18-19. The reasons set forth are:

Economic decisions are made at the enterprise level, with little or no direct government influence Key features of Yugoslavia's self-management socialism are (a) worker ownership of enterprises, (b) economic decisionmaking assigned and restricted to individuals *directly* affected by the decision, (c) direct exercise of power by these individuals without intermediaries (i.e., a managerial class or the state), and (d) operation of firms to earn profits.

The national economic plan is "indicative" rather than binding—it imposes no legal or mandatory obligations on individual enterprises.

National and state annual budgets are public documents (the U.S. Embassy in Belgrade prepares an English-language translation and line item analysis annually) and the local media reports parliamentary debate on these budgets.

The dinar, while not used in foreign trade transactions, can be valued in terms of convertible currencies and a market exchange rate exists which is a fairly reliable reflector of its value.

Capital markets tend to be regional, not national, and the self-managed banking sector has considerable competence and autonomy in allocating investment resources.

Yugoslav enterprises publish annual reports disclosing income statements, balance sheets, and other operating data using accounting principles very similar to those generally used in the United States.

Id. However accurate this analysis may be, Treasury did not publish this type of discussion at the time the decisions were made, and, therefore, did not help to alleviate the confusion they engendered. In a subsequent case, Animal Glue and Inedible Gelatin from Yugoslavia, 42 Fed. Reg. 39,288 (1977), Treasury stated that Yugoslavia did not have a state-controlled economy for the purposes of the Antidumping Act. See *infra* note 83. However, no basis was given for this determination in the published decision. In this regard, see the recommendations in the COMPTROLLER GENERAL'S REPORT, *supra* note 2, discussed *infra* notes 184-94 and accompanying text.

in both *Portland Cement from Yugoslavia*⁶⁵ and *Wooden Coat Hangers from Yugoslavia*⁶⁶ and a normal constructed value (based on costs in the Yugoslav economy) was used in *Headboards from Yugoslavia*.⁶⁷ *Copper Sheets from Yugoslavia*⁶⁸ is perhaps the most confusing decision, since although the country involved was Yugoslavia, the value used was home market price in third countries, a value that was used only in determinations involving SCEs. Sales price to third countries is not mentioned as a possible alternative in the *Copper Sheets* investigation, and no explanation for this omission is offered. For the first time in these pre-1968 cases, the value chosen was home market price in Western European countries.⁶⁹ Once again, this value was not provided for in the original statutory or regulatory provisions, but found its way into the 1968 amendments.⁷⁰ Treasury also noted that the sales in question were between unrelated persons,⁷¹ which ordinarily would mean that Treasury would not disregard a constructed value as reflected by third country transaction prices. In fact, Treasury went to the trouble of calculating the constructed value (which produced a similar negative LTFV determination), but then stated that this procedure was not controlling.⁷² One explanation for this multifaceted approach is that Treasury was trying to satisfy as many of the interested parties as possible. Since it did not make a difference to the LTFV determination which value was used, Treasury decided to explain that both values were considered.

D. A More Explicit Approach: The 1968 Treasury Regulations

In 1968 Treasury promulgated a new provision dealing explicitly with SCEs, which provided:

Merchandise from controlled economy country. Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to

65. 27 Fed. Reg. 41 (1962).

66. 28 Fed. Reg. 2,952 (1964).

67. 30 Fed. Reg. 8,016 (1965).

68. 29 Fed. Reg. 8,149 (1964).

69. *Id.*

70. 19 C.F.R. § 53.5(b) (1969). See *infra* notes 73-79 and accompanying text.*

71. 29 Fed. Reg. 8,149 (1964).

72. *Id.*

an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under § 53.3 or § 53.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses and profits as reflected by the prices at which such or similar merchandise is sold by a non-state-controlled economy country either (1) for consumption in its own market; or (2) to other countries, including the United States.⁷³

The primary purpose of the 1968 amendments was to conform the United States antidumping regulations to the provisions of the International Antidumping Code (the Code).⁷⁴ The Code in turn interprets Article VI of the General Agreement on Tariffs and Trade (GATT) and elaborates rules for its application.⁷⁵ However, certain provisions in the amendments were added "to reflect current Treasury Department interpretation or practice."⁷⁶ Treasury stated that the provision regarding SCEs fell into this latter category.⁷⁷ While the new provision apparently reflected existing Treasury practice, there was still no statutory authority for such an amendment.⁷⁸

Cases arising after the 1968 amendments to the Treasury regulations and before the statutory reform in 1974 apparently presented little difficulty. Treasury employed uniform language noting that the exporting country had a controlled economy, and, therefore, the fair value would be determined by comparing purchase price with third country price either for home consumption or

73. 19 C.F.R. § 53.5(b) (1969). The 1968 amendments to the antidumping procedures were proposed October 28, 1967 (32 Fed. Reg. 14,955), adopted June 1, 1968 (33 Fed. Reg. 8,244), and took effect July 1, 1968. The former antidumping procedures, §§ 14.6-14.13, were deleted, and the new procedures codified at 19 C.F.R. §§ 53.1-53.64 (1969). The previous methods of calculating foreign market value in non-SCE situations remained intact in the new regulations. 19 C.F.R. §§ 53.3-53.5(a) (1969). Provisions for home market value (§ 53.3), sales to third countries (§ 53.4), and constructed value based on costs in the home economy (§ 53.5(a)) remained unchanged.

74. 32 Fed. Reg. 14,955 (1967). Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431, 651 U.N.T.S. 320 (entered into force July 1, 1968, *reprinted in* 32 Fed. Reg. 14,955, 14,962 (1967) and 6 I.L.M. 920 (1967)).

75. 32 Fed. Reg. 14,955 (1967).

76. *Id.*

77. *Id.*

78. In 1970 Part 53 of 19 C.F.R. was redesignated Part 153, with no textual change. 35 Fed. Reg. 9,271 (1970).

export.⁷⁹ Treasury gave no indication of whether it had carried out an analysis of whether or not the country or the industrial sector involved was an SCE.

E. *The Trade Act of 1974: Statutory Reform*

The first statutory provision dealing with SCEs⁸⁰ was added to the Antidumping Act by the Trade Act of 1974 (the Trade Act).⁸¹ The new provision affirmed the Treasury regulations and gave Treasury the additional alternative of considering "the constructed value of such or similar merchandise in a non-state-controlled economy country or countries as determined under section [206 of the Act]."⁸² Thus, Treasury's options were all third country prices: home market, export or constructed value.

F. Electric Golf Cars from Poland: *Statutory and Regulatory Reform*

Cases arising between 1975 and 1978, with one exception, were handled routinely under the regulatory provisions.⁸³ The one exception, involving golf cars from Poland, presented serious diffi-

79. See, e.g., Cast Iron Soil Pipe Fittings from Poland, 36 Fed. Reg. 13,338 (1971), 37 Fed. Reg. 12,978 (1972); Hat Bodies of Fur, Not on Skin, from Czechoslovakia, 36 Fed. Reg. 14,483 (1971); Welt Work Shoes from Romania, 39 Fed. Reg. 10,002 (1974); Electric Golf Cars from Poland, 39 Fed. Reg. 20,815 (1974).

80. Pub. L. No. 93-618, § 321(a), 88 Stat. 2043 (1975) amending § 205 of the Antidumping Act, 19 U.S.C. § 164 (1976).

81. Trade Act, *supra* note 1. For a general discussion on changes made in practices and procedures by the Trade Act, see Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167 (1976).

82. 19 U.S.C. § 164 (1976). Although the House and Senate Reports accompanying the provision asserted that it was intended to adopt existing Treasury regulations, H.R. REP. No. 571, 93d Cong., 1st Sess. 72 (1973); S. REP. No. 1298, 93d Cong., 2d Sess. 174 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7,186, 7,311, those regulations did not include the use of a constructed value. See *supra* note 73 and accompanying text.

83. The provision for use of a constructed value in a non-state-controlled economy, added by the Trade Act (see *supra* notes 80-82 and accompanying text), was not utilized. The decisions were made using prices for either home consumption or export in third countries. See, e.g., Clear Sheet Glass from Romania, 41 Fed. Reg. 14,909 (1976); Animal Glue and Inedible Gelatin from Yugoslavia, 42 Fed. Reg. 4,921, 4,922 (1977). In the *Inedible Gelatin* case, however, Treasury subsequently used home market prices in Yugoslavia since it was determined that "the economy of Yugoslavia is not state-controlled to an extent that sales or offers of sales of such or similar merchandise in Yugoslavia do not permit a determination of foreign market value under section 205(a) of the [Antidumping] Act (19 U.S.C. 164(a))." 42 Fed. Reg. 39,288 (1977).

culties under the regulatory and statutory provisions, and, in fact, prompted their amendment.⁸⁴

In *Electric Golf Cars from Poland*,⁸⁵ United States manufacturers of electric golf cars complained that golf cars from Poland were being sold in this country at LTFV.⁸⁶ Accordingly, Treasury carried out its dumping investigation using the constructed value of golf cars in Canada,⁸⁷ the only country other than Poland and the United States that produced golf cars in sufficient quantities.⁸⁸

Problems arose in 1975 after the Canadian producer ceased to manufacture golf cars.⁸⁹ Since Poland was deemed a controlled economy country, under its regulations Treasury could use only United States prices or constructed value because no other country manufactured the product.⁹⁰ The Polish producer urged Treasury not to use United States price or constructed value.⁹¹ The Poles asserted that exports are possible only where the producing country achieves cost savings relative to the importing nation, and that, therefore, use of United States values would effectively preclude them from the United States market.⁹² The Poles were not producing for a home market and the United States market appeared to be the primary target of the Polish production.

84. See Note, *Dumping from 'Controlled Economy' Countries: The Polish Golf Car Case*, 11 LAW & POL'Y IN INT'L BUS. 777 (1979) [hereinafter cited as *Dumping from 'Controlled Economy' Countries*].

85. 40 Fed. Reg. 25,497 (1975).

86. See *Dumping from 'Controlled Economy' Countries*, *supra* note 84, at 778.

87. 40 Fed. Reg. 25,497 (1975). The problems encountered in using the Canadian constructed value were complicated and numerous. See *Dumping from 'Controlled Economy' Countries*, *supra* note 84, at 785-86. For example, the Polish producer urged Customs to reduce the fair value, which had been calculated from Canadian prices, to adjust for relative economies of scale. *Id.* at 786. The United States petitioner, on the other hand, found no statutory basis for such an adjustment, and argued that Customs should restrict its adjustments to those set out in the statute. *Id.* Despite this lack of clear statutory authority, and with no reason stated in the published decision, Treasury granted an adjustment for economies of scale. *Id.* The investigation resulted in a sales at LTFV finding. 40 Fed. Reg. 25,497 (1975).

88. *Dumping from 'Controlled Economy' Countries*, *supra* note 84, at 784 n.61.

89. *Id.* at 784, 787.

90. In 1976 Treasury amended its regulations to conform to the statutory provisions of the Trade Act and to explicitly provide for the use of United States price or constructed value "where sales or offers for sale of such or similar merchandise in any other non-state-controlled-economy country do not provide an adequate basis for comparison." 41 Fed. Reg. 26,203, 26,205 (1976).

91. *Dumping from 'Controlled Economy' Countries*, *supra* note 84, at 788.

92. *Id.* at 788 n.93.

In response to these concerns,⁹³ Treasury once again amended its regulations, which have remained in force to this day.⁹⁴ The current regulations⁹⁵ establish a hierarchy of values to be used in computing foreign market value; most preferred are prices (either home market or export) or constructed value in a non-SCE country which produces merchandise similar to that in question, and which is at a stage of economic development comparable to that of the SCE country.⁹⁶ Comparability of economic development is determined from "generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)."⁹⁷ Considered next are prices or constructed value in a non-controlled-economy country which produces merchandise similar to that in question but which does not have a comparable economy.⁹⁸ As an alternative, if no non-state-controlled economy country of comparable economic development produces such or similar merchandise, use may be made of a constructed value determined by costs, in the SCE, of specific objective components or factors of production.⁹⁹ Such components or factors include hours of labor required, quantities of raw materials employed, and amounts of energy consumed.¹⁰⁰ This information must be obtained from the producer of the merchandise in the SCE under investigation, and verified to the

93. *Id.* at 788, 803. The extent of Treasury's responsiveness can be measured by the February 21, 1978 letter sent by Pezetel, the Polish producer of golf cars, to the Commissioner of Customs, which stated:

PEZETEL welcomes the initiative of the U.S. Treasury Department to issue the new regulations (published in the January 9, 1978, issue of the *Federal Register*), which according to the declarations delivered by the American Side during the Warsaw Session of the Polish American Commission for Trade and President Carter's visit to Poland, is intended to eliminate the concern of the Polish Side that the existing Regulations are handicapping Polish exports into the USA.

94. 43 Fed. Reg. 35,263 (1978).

95. In 1980, part 153 of 19 C.F.R. was deleted, and the antidumping regulations were codified at 19 C.F.R. pt. 353. This change was made to conform with the transfer of responsibility for antidumping investigations from the Customs Service to the ITA. *See supra* note 11. The only change in the SCE provision, 19 C.F.R. § 353.8 (1980), was the codification of the previously unstated preference for comparisons based on prices in § 353.8(a). 45 Fed. Reg. 8,182, 8,184 (1980).

96. 19 C.F.R. §§ 353.8(a)(1),(2),(b)(1) (1980).

97. *Id.* at § 353.8(b)(1). *See infra* note 174 and accompanying text.

98. 19 C.F.R. § 353.8(b)(2) (1980). These values are to be considered if no country can be identified under § 353.8(b)(1).

99. *Id.* at § 353.8(c).

100. *Id.*

satisfaction of the Secretary (of the administering authority).¹⁰¹ Finally, such components or factors are valued and then verified in a non-state-controlled economy country determined to be reasonably comparable in economic development to the SCE country being investigated.¹⁰² As a last resort, United States price or constructed value of such or similar merchandise may be considered.¹⁰³

These amendments to the Treasury regulations were made under the authority of the Trade Act of 1974.¹⁰⁴ While there was some question as to their validity under the Trade Act,¹⁰⁵ Congress has most recently re-enacted the provision of the Trade Act dealing with merchandise from SCE countries.¹⁰⁶ However, the reenactment was made with the specific caveat that it was

not intended as a general expression of approval or disapproval of current regulations or administrative practice. This should be emphasized with respect to regulations regarding the current law on dumping from nonmarket economy countries.¹⁰⁷

Thus, the status of the current regulatory scheme is unclear, especially in light of current legislative proposals, discussed below.

II. THE RECENT CASES: MOUNTING DISSATISFACTION WITH THE SCE PROVISIONS

The difficulties encountered by Treasury in the *Polish Golf Car* case have not abated since responsibility for administering United States antidumping law was transferred from Treasury to Commerce.¹⁰⁸ In three recent cases, respondents from the People's Republic of China,¹⁰⁹ the German Democratic Republic¹¹⁰ and the

101. *Id.*

102. *Id.*

103. *Id.* at § 353.8(b)(3).

104. Trade Act, *supra* note 1. See 19 C.F.R. pt. 153 (1979).

105. See *Dumping from 'Controlled Economy' Countries*, *supra* note 84, at 790-93.

106. Trade Agreements Act of 1979, 19 U.S.C. §§ 1673-77 (Supp. III 1979).

107. S. REP. No. 249, 96th Cong., 1st Sess. 96, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 482.

108. See *supra* note 11.

109. See Natural Menthol from The People's Republic of China, 46 Fed. Reg. 3,258 (1981) (preliminary LTFV determination), 46 Fed. Reg. 24,614 (1981) (final LTFV determination). The authors of this Article participated in the menthol antidumping investigation.

110. See Unrefined Montan Wax from the German Democratic Republic, 46 Fed. Reg. 38,555 (1981) (final LTFV determination).

Hungarian People's Republic¹¹¹ have vigorously challenged both the applicability and the means of implementation of the SCE provisions in their cases.

Such challenges reflect the inequity and uncertainty that socialist and communist countries have concededly encountered in SCE cases. At a recent congressional hearing on proposed legislation to amend the SCE provisions, Lionel Olmer, Undersecretary of Commerce for International Trade, testified that the current statute and regulations are burdensome, complicated and costly to administer.¹¹² He added that the results of investigations of non-market economies may be "highly unpredictable, difficult to calculate, and based on commercial behavior of a [surrogate] producer not involved in the alleged unfair trade practice."¹¹³ Mr. Olmer's candor may well have reflected Commerce's extraordinarily difficult recent experience in the *Menthol*, *Montan Wax* and *Truck Trailer Axle* cases. The theory that a comparable economy can be found to substitute for a purported SCE is at best a very crude concept. In reality, there is no "free-market" economy that is reasonably comparable to the economy of China or East Germany, for example. If such a surrogate really exists, its economy would not normally be free-market in structure. Potential surrogates that are comparable in an overall macroeconomic sense are generally mixed or socialist economies with considerable government intervention—perhaps even more than the putative SCE.

While the Antidumping Act purportedly does not infringe on the comparative advantage of greater efficiency or lower production costs that might be enjoyed by exporting countries, an SCE determination often ensures that production advantages in socialist and communist countries will be secondary to an often artificial price determined on the basis of home market or export prices or constructed values of producers in another country. Furthermore, once an SCE finding is made (assuming an affirmative dumping determination follows), the exporter from the "controlled" economy country in effect relinquishes control over its pricing decisions for exports to the United States, since prices or costs of a third country producer or exporter will have become the determinant of

111. See *Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic*, 46 Fed. Reg. 46,152 (1981) (preliminary LTFV determination).

112. U.S. IMPORT WEEKLY (BNA) 410-11 (Feb. 3, 1982).

113. *Id.* at 411.

the SCE exporter's prices. Marketing under such circumstances is difficult, and United States importers are unwilling to assume the risk of significant antidumping duties.

A. Natural Menthol from the People's Republic of China

The case of *Natural Menthol from the People's Republic of China*¹¹⁴ was the first antidumping case involving exports from the People's Republic of China (China). Confronting both the affirmative SCE determination in the *Polish Golf Car* case and the widespread perception in the United States of a high degree of central planning and state control in China, the China National Native Produce and Animal By-Products Import & Export Corporation (CNEC), the Chinese menthol exporter, sought both to alter that perception and to distinguish its case from the *Polish Golf Car* case.¹¹⁵ In its filings with the Commerce Department, CNEC asserted that (i) the production and sale of menthol in China is essentially free from state control, (ii) the perception of the Chinese economy as totally dominated by the central government is inaccurate, particularly in light of recent changes, and (iii) the agricultural sector, comprising approximately eighty percent of China's economy, is subject to limited state influence with no significant state intervention in the production and pricing of nonessential products, including menthol.¹¹⁶ While CNEC argued that the overall role of the government in China's economy has been overstated by commentators, CNEC emphasized the almost complete lack of government intervention in the nonessential agricultural goods sector of the Chinese economy.¹¹⁷

In its filings in opposition to CNEC's papers, the United States petitioner, Haarmann & Reimer Corp., emphasized the evidence of general intervention of the Chinese government in the nation's economy, pointing to China's reliance on state and regional plan-

114. 46 Fed. Reg. 3,258 (1981) (preliminary LTFV determination), 46 Fed. Reg. 24,614 (1981) (final LTFV determination).

115. See Statements, Affidavits and Memoranda filed by CNEC with Department of Commerce (Oct. 16, 1980 and Nov. 25, 1980) [hereinafter cited as CNEC papers] (copies on file at the *Fordham International Law Journal* office).

116. *Id.*

117. See the Memorandum and Affidavit submitted on behalf of CNEC to the International Trade Administration, Oct. 16, 1980.

ning in industry and in essential agricultural goods.¹¹⁸ Haarmann & Reimer argued that the changes in the Chinese economy were limited, and that the general characterization of the economy as state-controlled remained correct.¹¹⁹

CNEC's and Haarmann & Reimer's arguments highlighted an issue that remains unresolved under the current SCE statute and regulations. Under the SCE statute Commerce shall make an SCE determination

[i]f 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 United States do not permit a determination of foreign market value . . .*¹²⁰

This provision indicates that the SCE determination rests upon an evaluation of the extent of state influence in order to determine its impact on prices of the merchandise in question in the exporting country's home market or non-United States export markets. It invites extensive argumentation and sophisticated economic analysis of a country's economic structure and makeup. In the *Menthol* case, Commerce was confronted by a question not clearly resolved by the statute: should the SCE issue be determined by examining the impact of state influence on the particular sector of the exporting country's economy in which the merchandise is produced and sold, or should Commerce make a more general determination of state control in the economy as a whole.

In its preliminary LTFV determination (which was incorporated, as to the SCE issue, in the final LTFV determination), Commerce recognized the issue of the sectoral versus the general economy approach but did not decide it:

A threshold question is raised by respondent's [CNEC's] contention that the special rules of section 773(c) apply only if

118. Letter from Eugene L. Stewart (special counsel to Haarmann & Reimer Corp.) to Mary S. Clapp, Supervisory Import Administration Specialist, Department of Commerce (Nov. 17, 1980).

119. Letter from Eugene L. Stewart (special counsel to petitioner Haarmann & Reimer Corp.) to Mary S. Clapp, Supervisory Import Administration Specialist, Department of Commerce (Nov. 1, 1980).

120. 19 U.S.C. § 1676(c) (Supp. III 1979) (emphasis added).

the effects of state economic controls on the *particular sector* in question are such that a fair value determination under normal procedures cannot be made. Respondent finds support for its position in the language of the statute, which is drafted in terms of whether an exporting country being state-controlled “to an extent that sales or offers of sales of *such or similar merchandise*” (emphasis added) do not permit normal foreign market value calculations. Respondent also finds support for its position in a number of antidumping determinations by the Treasury Department in the 1960’s.

Counsel for petitioner contends that the statutory language quoted above, when read in light of its legislative history, requires the administering authority to apply the special provisions of section 773(c) whenever a determination is made that the economy of a country is *generally* state controlled. Under this interpretation, sectoral analysis of the impact of state controls is unnecessary.

In reaching our conclusion in this preliminary determination, we have examined (and discuss below) both the degree of control exercised by the State over the PRC economy generally and the impact of state control on the production and sale of menthol. Since our conclusion would be the same under either petitioner’s or respondent’s interpretation of the statute, we need not specifically decide the issue at this time. We do, however, note that in our view, respondent has raised arguments which would have to be given very careful consideration where different conclusions would have resulted depending upon the approach taken.¹²¹

Commerce decided that while “the [Chinese] government has considerable control over the composition of inputs and the distribution of outputs . . . natural menthol is subject to very little direct regulation [T]he *purchases and sales* of menthol in the PRC essentially are based on market considerations.”¹²² However, it also decided (i) that the primary components in the production of menthol—land and labor—were not bought and sold in a genuine market and (ii) that the “pervasiveness of state planning and control of major agricultural products . . . distorts the incentives that

121. 46 Fed. Reg. 3,259 (1981).

122. *Id.*

would be developed by a freely operating market.”¹²³ On that basis, Commerce made an affirmative SCE determination.¹²⁴

Commerce then proceeded to address the second part of the SCE issue: the choice of an alternative, or “surrogate,” for China’s home market prices for menthol. CNEC suggested that, since menthol is bought and sold through an international market based in London, such a free market would furnish a reliable indicator of foreign market value and is authorized under the statute¹²⁵ and prior cases utilizing sales of the merchandise to other countries.¹²⁶ Haarmann & Reimer proposed that Commerce use Brazilian home market prices for menthol as the basis for the fair value determination. Commerce adopted neither suggestion, and instead selected Paraguay as the menthol-producing country whose economy most nearly approximated that of China. However, since Paraguay was found to have no home market for menthol, Commerce used prices in Paraguay’s principal export market, the United States.¹²⁷

The convoluted SCE inquiry in the *Menthol* case left Commerce relying on one or two telephone inquiries to a United States importer of Paraguayan menthol to determine the foreign market value, with no time even to consider adjustments at the preliminary stage. This resulted in a 13.5 percent preliminary LTFV margin—more than five times the margin finally determined.

As in the *Polish Golf Car* case, the final SCE determination in the *Menthol* case entailed consideration of a variety of adjustments to Paraguay’s prices in order to arrive at an equitable comparison of ex-factory Chinese and Paraguayan prices. While Commerce made several of the proposed adjustments, it was not able, for lack of time and data, to make proposed adjustments for differences in Chinese and Paraguayan contract periods and in the volume of menthol sold under individual contracts.¹²⁸ As a result, an LTFV margin of 2.5 percent was found by Commerce in its final determination. Ulti-

123. *Id.*

124. *Id.* at 3,260 (1981). Ultimately, the ITC determined that there was no material injury, threat thereof or material retardation of an industry in the United States, and antidumping duties were not assessed. 46 Fed. Reg. 31,796 (1981).

125. 19 U.S.C. § 1677b(c)(1), which authorizes the use of “the prices . . . at which such or similar merchandise of a non-state-controlled-economy country . . . is sold . . . to other countries, including the United States”

126. See *supra* notes 54-62 and accompanying text.

127. 46 Fed. Reg. 3,260 (1981).

128. 46 Fed. Reg. 24,615 (1981).

mately, however, no dumping was found because the International Trade Commission found that no material injury or threat of injury had occurred by reason of Chinese menthol imports.¹²⁹

Throughout the *Menthol* case CNEC urged Commerce to embody a measure of comparative economic analysis in its SCE determination. CNEC emphasized the irony and inequity that would result if Commerce selected a surrogate country whose production and sale of the merchandise under consideration involved greater state influence (at least in the sector under consideration) than that of China.¹³⁰ Commerce's rejection of several potential surrogates, such as South Korea and Brazil, may have been influenced by this consideration. However, Paraguay also had state controls, including taxes, minimum export prices set by the central bank, and a dual exchange rate system, that did not exist in China.¹³¹ While Commerce ultimately made an adjustment for Paraguay's export tax, it ignored other adjustments that would have insured greater comparability between Paraguay and China.¹³²

B. Unrefined Montan Wax from the German Democratic Republic

Commerce's inquiry in the case of *Unrefined Montan Wax from the German Democratic Republic* (East Germany) did not focus, as it had in the *Menthol* case, upon the determination of whether the foreign market value in the home country could be determined. With little dispute from the parties, Commerce found that the economy of East Germany is state controlled such that East German home market or export prices could not be utilized. The key issues in the *Montan Wax* case were (i) the method of valuation, (ii) the choice of a surrogate country, and (iii) the nature and amounts of adjustments to the surrogate country values.

At the outset, Commerce confronted the issue of whether to use surrogate country prices or constructed value as the measure of foreign market value:

[W]e are required by section 773(c) of the Act [19 U.S.C. § 1673 b(c)] to use the prices, or the constructed value, of such or

129. 46 Fed. Reg. 31,796 (1981).

130. See, e.g., CNEC papers, *supra* note 115, Memorandum of Oct. 16, 1980, at 20-53 and Reply Memorandum of Nov. 25, 1980, at 27-34.

131. See CNEC papers, *supra* note 115, Memorandum of Oct. 16, 1980, at 51-53.

132. 46 Fed. Reg. 24,615 (1981).

similar merchandise in a non-state-controlled country or countries. Our regulations establish a clear preference for a foreign market value based upon sales prices and stipulate that, to the extent possible, sales prices or constructed value should be determined on the basis of prices or costs in a non-state-controlled-economy country. . . .¹³³

However, the "clear preference for a foreign market value based upon sales prices" proved unavailing in the *Montan Wax* case. Apart from a West German producer that refused to provide data, there was no commercial production of unrefined montan wax or similar merchandise in a non-SCE other than the United States. Therefore, Commerce had to use a constructed value.¹³⁴

The next question was the selection of a surrogate country. The Commerce Department indicated early in the case that it favored the Federal Republic of Germany (West Germany) as the surrogate for East Germany. Counsel for the importer of montan wax from East Germany argued that such a choice was unfair, primarily because the primary cost inputs of montan wax—labor and lignite—were much higher in West Germany.¹³⁵ Statistics collected by Commerce's economists showed that per capita annual gross national product in West Germany was \$8160, as opposed to \$4680 in East Germany.¹³⁶

The importer observed that the relevant labor costs in montan wax production were equally disparate and argued that the much higher West German labor costs would yield an unfairly high constructed value for montan wax and, in effect, construct a dumping margin that did not actually exist.¹³⁷ The importer proposed that

133. 46 Fed. Reg. 38,555 (1981).

134. *Id.* The refusal to provide data by surrogate country producers can be a difficult problem for Commerce. Surrogate country producers are often competitors of both the United States petitioner and the respondent in antidumping investigations. Quite apart from the normal desire to keep business information confidential, competitive considerations may play a role in determining the willingness to cooperate.

135. *See, e.g.*, Letters from Chapman, Duff and Paul (counsel to Strohmeyer & Arpe, the United States importer) to John Greenwald, Deputy Assistant Secretary for Import Administration (Jan. 6 and Feb. 12, 22, 24 and 26, 1981) [hereinafter cited as Chapman, Duff and Paul Letters].

136. Memorandum from Michael K. Levine, Office of the Chief Economist, Import Administration, to Shannon Shuman, Office of Policy, Import Administration (Oct. 14, 1980) [hereinafter cited as Levine Memorandum].

137. Chapman, Duff and Paul Letter (Feb. 22, 1981), *supra* note 134.

the United Kingdom be used as surrogate (possibly in combination with Canada), since the United Kingdom's annual per capita GNP closely approximated that of East Germany, and its other production cost factors were also closer to East German costs than those of West Germany.¹³⁸

The importer also attempted to distinguish the *Montan Wax* case from the *Menthol* case, in which the surrogate selected by Commerce—Paraguay—had much higher GNP and labor costs than China. The importer observed that it was unimportant in *Menthol from China* to compare Paraguayan and Chinese cost components, since Commerce was able to compare the two countries' prices in foreign markets in reaching its LTFV determination. The importer argued that Paraguayan prices in foreign markets were not determined by production costs, but were the result of market factors. However, the importer argued that because in *Montan Wax* Commerce was specifically using production costs in its constructed value exercise, large variances in surrogate and exporting country production costs would completely skew the foreign market value determination.¹³⁹

Without analysis, Commerce rejected the importer's contentions, stating in conclusory fashion that "we found that, of the industrialized countries, the FRG is more comparable to the GDR for purposes of this case than is the UK or Canada."¹⁴⁰ Commerce made its choice a double blow to the respondents when it also refused to make any adjustments for differences in East and West German GNP and labor costs, or for any other reason, stating that "once a reasonably comparable surrogate is chosen, then no adjustments are to be made under section 353.8(c) of the Commerce Regulations."¹⁴¹ The result was an assessment of a 13.02 percent dumping duty against the East German exporter.¹⁴²

The determination in *Montan Wax* highlights the inequities of the current SCE statute and regulations, as well as the potential arbitrariness of Commerce determinations thereunder. Any production cost advantages enjoyed by the East German producer were obliterated in favor of the much higher costs of a more pros-

138. Chapman, Duff and Paul Letter (Feb. 12, 1981), *supra* note 134.

139. Chapman, Duff and Paul Letter (Feb. 26, 1981), *supra* note 134.

140. 46 Fed. Reg. 38,556 (1981).

141. *Id.* See 19 C.F.R. § 353.8(c) (1980).

142. 46 Fed. Reg. 43,727 (1981) (amended final determination).

perous neighbor. Uncontroverted evidence of the disparities in East and West German production costs, documented extensively by the importer, were disregarded without explanation in Commerce's final determination. Commerce's memoranda suggest that the physical, cultural and historic proximity of East and West Germany were considered as much as the economic factors.¹⁴³

C. Truck Trailer Axles From Hungary

In *Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic*,¹⁴⁴ Commerce continued to adhere to the modes of analysis and conclusions it had followed in *Menthol from China*. Indeed, the *Truck Trailer Axle* case closely paralleled the *Menthol* case in terms of the nature and difficulty of the issues raised and the positions taken by the parties.

The producer of the merchandise, Hungarian Railway Carriage and Machine Works (RABA), furnished substantial evidence of the gradual reform and decentralization of Hungary's economy in the past decade.¹⁴⁵ RABA, like CNEC in the *Menthol* case, suggested a sectoral approach to the SCE issue, noting that intermediate industries like truck trailer axle producers operated in the least controlled sector of Hungary's economy; but RABA also argued that Hungary's economy was generally not state controlled.¹⁴⁶

143. Levine Memorandum, *supra* note 136, at 2. Commerce's initial inclination toward West Germany may have reflected the fact that West Germany, like East Germany, is a large producer of lignite, the principal raw material in montan wax production, *id.* at 4, while the United Kingdom produces very little lignite. See Chapman, Duff and Paul Letter, February 22, 1981, *supra* note 135, at 12. Further, a West German producer of refined montan wax, Hoechst, was potentially available to supply actual lignite production cost figures. The United States importers furnished data showing the West German lignite production was much more difficult and costly than East German production, *id.*, and they suggested that lignite production costs in Canada be used together with the other cost components from the United Kingdom. Chapman, Duff and Paul Letter, February 26, 1981, *supra* note 135. In any event, any potential advantage resulting from use of actual West German lignite production cost figures was lost when Hoechst refused to provide the data. Commerce's final LTFV determination made no reference to West German lignite production costs. 46 Fed. Reg. 38,556 (1981).

144. 46 Fed. Reg. 46,152 (1981).

145. See Further Submission of Hungarian Railroad Carriage and Machine Works (RABA) in Support of the Use of Hungarian Values for Determining Foreign Market Value, submitted by Sutherland, Asbill & Brennan, Counsel for RABA, to Commerce, May 12, 1981.

146. *Id.*

Commerce's own economists made an initial recommendation for the use of Hungary's home market prices, finding that reforms in Hungary had progressed sufficiently to warrant serious consideration of a non-SCE designation.¹⁴⁷ However, petitioner Rockwell International Corporation argued vehemently that Hungary's economy remained state-controlled, and Commerce concluded in its preliminary determination that Hungary's economy was state-controlled for purposes of the investigation.¹⁴⁸ The factors upon which the determination was based included (i) government controls on wage increases by means of prohibitive tax rates (which had themselves been subject to recent reform), (ii) state control over capital financing through taxation and control over banking, (iii) restrictions on imports through licensing and currency controls, (iv) the government's power of appointment of industrial management, and (v) uncertainty concerning the degree of implementation of the more recent reforms.¹⁴⁹

RABA's counsel requested an explanation of the process used by Commerce in determining that Hungary had an SCE for purposes of the trailer axles cases. The unspecific and conclusory response is indicative of Commerce's practices and demonstrates the lack of predictability in dealing with SCE determinations:

[T]here is no single decisive factor in such a determination. There are many factors which may be relevant . . . and they will vary depending on the economy and product involved. Each case involving the issue of state control is unique, and therefore independent of decisions made in other cases.

In the case of Hungarian trailer axles, the Department considered information obtained from many sources, such as the Department's economists, other experts on the Hungarian economy throughout the government and in the academic sphere, and persons from private organizations such as the attorneys for both the petitioner and the respondents. The Department's research was thorough.

There were numerous factors that were important in the determination that Hungary, in the axles case, is state-controlled

147. Draft Memorandum from Richard Boyce, Office of Policy and Compliance, to John Greenwald, Deputy Assistant Secretary for Import Administration (Apr. 1, 1981).

148. 46 Fed. Reg. 46,152 (1981).

149. *Id.* at 46,152-53.

including the inconvertibility of the forint and the ceiling on average wage increases. These are not the only factors. I must emphasize to you that no factor was valued more than any other in the determination of state control.¹⁵⁰

Commerce's SCE finding was decisive in the *Truck Trailer Axle* case: Italy was selected as a surrogate, and, after a brief inquiry of the Italian trailer axle producer, Commerce reached an "estimated" preliminary LTFV margin of 68.1 percent.¹⁵¹ Ironically, Commerce conceded that it had only a limited opportunity to calculate and verify this prohibitive margin because of "gaps" in data received from the Italian producer.¹⁵² Unverified adjustments were made, under those constraints, only for obvious product differences, but Commerce promised to correct such deficiencies—or even select an entirely different surrogate—at the time of the final determination. Moreover, no final determination was ever reached, since RABA entered into an agreement for the suspension of the investigation after the preliminary determination¹⁵³ was published.

Commerce's preliminary determination in the *Truck Trailer Axle* case emphasized that a different finding could be made on the SCE issue in future cases.¹⁵⁴ In a separate letter to RABA's counsel announcing the SCE determination, Commerce was almost apologetic for the uncertainty generated by the current statute: "As you know, the Congress is at present considering changes in this area of the trade laws, and perhaps there will be more definite statutory guidance in the future."¹⁵⁵

Adding to the unpredictable situation where surrogates are involved, surrogate country currency fluctuations can radically change the LTFV comparison and increase, reduce or even eliminate the purported LTFV sales. Indeed, significant reductions of LTFV margins in the East German *Montan Wax* and Hungarian *Truck Trailer Axle* matters were experienced following the LTFV determinations in those cases. These currency fluctuations relative

150. Letter from Lawrence J. Brady, Assistant Secretary for Trade Administration, to Arthur T. Downey, counsel for RABA (July 31, 1981).

151. 46 Fed. Reg. at 46,153-54 (1981).

152. *Id.* at 46,153.

153. 47 Fed. Reg. 66 (1982).

154. *Id.*

155. Letter from Lawrence J. Brady, Assistant Secretary for Import Administration, to Arthur T. Downey, (counsel for RABA) (June 19, 1981).

to the United States dollar may reflect little on the relative values in the surrogate country and in the United States of the particular product under investigation.

What emerges from the *Menthol*, *Montan Wax*, and *Truck Trailer Axle* determinations is a picture of an administering authority uncomfortable with the obvious absurdities and rigidities imposed by the governing statute and compelled to apply that statute under strict time constraints to increasingly complex economic realities. The results are (i) a series of SCE determinations reflecting limited economic analysis, and (ii) a series of hasty LTFV margin determinations that are both inequitable to the exporters and unfathomable to petitioning United States parties, thereby reducing desirable emphasis on rationality and predictability in United States antidumping law administration.

III. THE PROPOSED LEGISLATION TO RECTIFY THE SCE DETERMINATION PROBLEMS

Senate bill 958,¹⁵⁶ commonly known as the Heinz bill, currently before Congress, would amend the SCE provisions. The present SCE statute is triggered by allegations of a petitioning United States party that the economy of the exporting country is state-controlled to the extent that a determination of foreign market value cannot be made.¹⁵⁷ Ambiguities inherent in this approach have been noted above.¹⁵⁸ The Heinz bill approaches the problem somewhat differently:

The term nonmarket economy country means any country the economy of which, as determined by the administering authority, operates on principles other than those of a free market to an extent that sales or offers of sale of merchandise in that country or to countries other than the United States do not reflect the fair value of the merchandise.¹⁵⁹

Remarks accompanying the introduction of the Heinz bill noted that the present law interprets nonmarket economy narrowly in applying the SCE provisions only to communist countries, and that “[a]s the international economy grows in sophistication and

156. See *supra* note 9.

157. 19 U.S.C. § 1677b(c) (Supp. III 1979).

158. See *supra* section II.

159. 127 CONG. REC. S3784 (daily ed. April 9, 1981).

complexity, a number of the socialist countries are becoming mixed national economies, and the prior definition which put everything in the context of communism becomes simplistic."¹⁶⁰ This statement is not correct because the prior definition did not "put everything in the context of communism"—communism has never been explicitly stated as the basis for an SCE determination. In any event, S. 958 attempts to approach the problem from the standpoint of economic theory, under which the administering authority would be making an economic judgment about the country's market system rather than a political judgment about the country's government.¹⁶¹ Admittedly, this approach would not necessarily make the practical difficulties any easier, but it would be faithful to the principle the new legislation is trying to establish.¹⁶²

The bill does, however, provide for the possible use of home market prices even though a nonmarket economy country is involved. If such a country furnishes verifiable information, it may be treated as a free market economy country for the purposes of the antidumping investigation.¹⁶³ Thus, the new provision would explicitly favor a sectoral approach to determining state control (or the presence of a nonmarket economy) over a more general, "communist country" approach, at least where the administering authority would be able to verify the relevant data.

One of the more distasteful aspects of antidumping investigations from the perspective of foreign producers is the role of the United States government as arbiter of dumping complaints. This is particularly true where there is some degree of state involvement in enterprises and the United States government seeks to verify data it requests in antidumping investigations. Sovereigns may be uncomfortable with the notion of inspectors from the United States gov-

160. *Id.* at S3783. The quoted language appears to refer to Title IV, § 406 of the Trade Act, *supra* note 1, at 2062-63, which is not part of the antidumping statute and which deals with market disruption from communist countries. S. 958 amends § 406, as well as the antidumping law, which probably explains the confusing reference to a definition that puts "everything in the context of communism."

161. *Id.*

162. *Id.* "In short, we have tried to create with this legislation a carrot and stick mechanism that will encourage nonmarket economies to cooperate with our Government in investigating the allegations in petitions filed against them and to adjust their economies in a way that will permit such cooperation to take place." *Id.* The theory that the administration of the United States antidumping law can encourage a move to market-type economic systems is unsupported and seems unlikely.

163. *Id.* at S3784.

ernment visiting production facilities in their countries and asking for extensive data on costs and pricing. As a practical matter, the “carrot and stick” approach of the Heinz bill to encourage nonmarket economies to adjust their economies to permit use of home market prices may not be effective. It is doubtful that sovereigns will alter their economic systems in order to use home market prices in United States antidumping investigations. Ironically, the existence of some state control can facilitate verification. The determination to cooperate can be direct and swift and the supply of data can be uncomplicated compared to verification in “free-market economies.” Cultural differences, not economic structure, may be the determinative factor. Acceptable and flexible verification practices will have to be employed.

Where no verifiable data is available, the Heinz bill would do away with the alternative measures currently available¹⁶⁴ for determining foreign market value and use only the “lowest free-market price.” Lowest free-market price is defined as:

the lowest average price, adjusted for differences in quantity, level of trade, duties or other factors required to insure comparability, charged for like articles in this country by any producer or aggregate of producers from an appropriate free-market country, including the United States, which . . . produces a sufficient quantity of like articles for the administering authority to determine a representative price.¹⁶⁵

This method has considerable advantages. It would eliminate the current “comparable economy country” approach, which assumes that a “simple and accurate basis exists for determining when economies are at comparable stages of development and that comparable overall levels of development—assuming such can be determined—mean comparable levels within a particular industry.”¹⁶⁶ The Comptroller General’s comments on this approach¹⁶⁷ are particularly revealing:

The administrative advantage of this approach is that it eliminates the need to analyze other market economies and their

164. See *supra* notes 94-103 and accompanying text.

165. 127 CONG. REC. S3784 (daily ed. April 9, 1981).

166. *Id.* at S3782.

167. The Comptroller General’s Report, *supra* note 2, at 20-22, recommends this same approach, coupled with a simulated constructed value which would always be available as an alternative. See *infra* notes 178-183 and accompanying text.

producers for suitability as surrogates as well as the need to gain their cooperation. The administering authority also is freed from the need to make what are often very subjective adjustments to a surrogate producer's selling prices for differences in production technology and scale.

In addition, this approach would give both nonmarket economy exporters and prospective U.S. petitioners a significantly clearer idea of what the foreign market value of a given product is likely to be (to the extent they can gauge the lowest weighted average price in the U.S. market). This contrasts with current simulation methods, where it is not possible to predict which producer's prices would be used or what adjustment made.¹⁶⁸

However, the Comptroller General's Report goes on to suggest an unfairness that is inherent in the proposal: "A weakness of this approach is that it presumes that nonmarket producers are never the most efficient producers of a product . . ." ¹⁶⁹ In addition, such an approach would re-introduce the problem encountered in the *Polish Golf Car* case of possible preclusion from the United States market,¹⁷⁰ at least where the United States and a nonmarket economy country were the only two countries producing the relevant merchandise in sufficient quantities.

IV. RECOMMENDATIONS BY THE COMPTROLLER GENERAL

The Comptroller General of the United States has recently criticized the SCE provisions and Commerce procedure.¹⁷¹ Building on the current statutes, the Comptroller General recommends that Commerce should "develop and publish criteria to be used in determining whether a nonmarket economy producer's actual prices or costs could be used in a dumping case."¹⁷²

168. COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 22.

169. *Id.*

170. *See supra* notes 85-92 and accompanying text.

171. *See* COMPTROLLER GENERAL'S REPORT, *supra* note 2.

172. *Id.* at ii. *See also id.* at 16-20. The Comptroller General's Report goes on to suggest what these criteria might be:

The criteria to be included would reasonably focus on economic factors related to the country, sector, and enterprise. National economy factors might include a domestic price system which reflects supply and demand and the existence of a

The Comptroller General goes further and explicitly recommends the use of home market prices, where possible, to avoid problems associated with surrogate selection and use.¹⁷³ If Commerce decides that a surrogate must be used, the Comptroller General recommends that Commerce "set out the criteria to be used in selecting surrogate producer(s) and publish the reasons for specific selections in individual dumping cases."¹⁷⁴ The Comptroller General believes that Commerce's selection process is reasonable,¹⁷⁵ but that amending the regulations to indicate the types of factors that are considered would afford parties a better basis for arguing which surrogate is the most appropriate.¹⁷⁶ Similarly, publishing decision memoranda in individual cases that state the bases for surrogate selections would improve prospective parties' understand-

single market exchange rate for the domestic currency or the ability to approximate such a rate.

Sectoral and enterprise factors might include:

a high degree of decentralized decisionmaking with enterprise control over production levels, product mix, marketing, and pricing.

Enterprise goals expressed in terms of earnings, not physical output units.

Valuation of inputs in accordance with world prices.

Documented and verifiable records of sales.

Books and records in verifiable, acceptable format.

Physical input units/costs and major indirect costs that can be verified as they are in the United States.

Capitalization in a convertible currency.

Acquisition of significant percentages of plant and/or real estate assets under market conditions.

Id. at 19-20.

173. *Id.* at 16-19.

174. *Id.* at ii.

175. Commerce regulations state that the selection of a comparable surrogate economy is to be based on "generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)." 19 C.F.R. § 353.8(b)(1) (1980). See *supra* note 96 and accompanying text. However, the Comptroller General's Report, *supra* note 2, asserts that "Commerce's case analysts actually use a blend of macroeconomic and enterprise factors when selecting the surrogate country or producer. Commerce officials believe that doing this better enables them to identify the surrogate whose prices and costs require the fewest adjustments." COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 24.

176. *Id.*

ing of the selection process and improve the quality of petitions and responses.¹⁷⁷

The Comptroller General also recommends amending the SCE provisions. Specifically, the Comptroller General's Report suggests that fair value for merchandise from nonmarket economy countries be determined by either the price being charged by the lowest price market producer selling in the United States or a constructed value based on valuing actual factors of production at appropriate market economy prices.¹⁷⁸ It should be observed that the first value is similar to that suggested by the legislation currently before Congress,¹⁷⁹ and the alternative value is the measure of constructed value currently provided for in the Commerce regulations.¹⁸⁰ After explaining the advantages of the "lowest free market producer" test,¹⁸¹ the Comptroller General goes on to note that "[a] weakness of this approach is that it presumes that nonmarket producers are never the most efficient producers of a product."¹⁸² In an effort to offset this weakness, the Comptroller General suggests that the constructed value method should always be an option.¹⁸³

The problem with this approach is the difficulty of accurately measuring efficiency to determine if, in fact, the nonmarket producer is the most efficient. Assuming that the problem can be solved and a constructed value method is employed, Commerce will then have to struggle with the process of determining a fair constructed

177. *Id.*

178. *Id.* at ii.

179. *See supra* notes 164-70 and accompanying text, where use of this value with *no* alternative is suggested by S. 958.

180. 19 C.F.R. § 353.8 (1980).

181. *See supra* note 168 and accompanying text.

182. COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 22.

183. *Id.* at 22. Although it notes the difficulties involved in using a simulated constructed value, the Comptroller General's Report goes on to enumerate the advantages of such an approach:

It is a fair way to permit a nonmarket economy producer to attempt to show it has economic efficiencies.

It permits the use of production factors within some control of the actual producer.

It provides costs that can be valued in U.S. dollars.

It reduces the administrative problems associated with gaining the cooperation of surrogate producers and making the necessary adjustments for differences in production techniques and scales.

Id. at 23.

value. A constructed value determination is basically unstructured and its outcome is extremely difficult to predict. Due to the lack of clear parameters in determining a fair constructed value, abuse of discretion is a concern. In any event, participants in the evaluation may be frustrated by the lack of predictability, the cost and the possible appearance of arbitrariness.

V. EEC AND GATT PROVISIONS FOR SCEs

The European Economic Community (EEC) provisions dealing with dumping from nonmarket economy countries (called "State-trading countries") are both similar to and different from the United States provisions. The most striking difference is the simplicity of the initial decision of whether a country is an SCE. As discussed above, in the United States there is considerable debate over how this determination should be made and whether a sectoral or more general overall economy or a "communist country" approach should be used. The EEC takes a straightforward approach, and has simply incorporated a list into its regulations of what it considers to be State-trading countries.¹⁸⁴ Short of changing the regulation, there would appear to be no flexibility with regard to the correctness of an SCE designation at the outset of an investigation.

The EEC provision is similar to the United States provision in the price alternatives available for determining foreign market value (called "normal value" in the EEC regulations) once a country has been designated as having a nonmarket economy. The choices set out in the EEC regulations are third (market economy) country prices (either in the home market or export prices to other countries) or the constructed value in a market economy third country.¹⁸⁵ If neither third country price nor constructed value provides an adequate basis for comparison, the price actually paid

184. Council Regulation of Dec. 20, 1979, No. 3017/79, 22 O.J. EUR. COMM. (No. L 339) 1, 3 (1979), reprinted in C. STANBROOK, *DUMPING* 105, 107 (1980), incorporating Council Regulation of Oct. 31, 1978, No. 2532/78, 21 O.J. EUR. COMM. (No. L 306) 1 (1978) and Council Regulation of May 29, 1979, No. 925/79, 22 O.J. EUR. COMM. (No. L 131) 1 (1979). The list includes the People's Republic of China, Bulgaria, Hungary, Poland, Romania, Czechoslovakia, German Democratic Republic, U.S.S.R., Albania, Vietnam, North Korea, and Mongolia. Regulation No. 3017/79 states that the special provisions regarding dumping from State-trading countries apply in particular to these countries, but leaves open the possibility that there might be other nonmarket economy countries. Council Regulation No. 3017/79, art. 2(5).

185. *Id.*

or payable in the Community, including a reasonable profit margin, may be used.¹⁸⁶ Further, if third country prices are used, the third country selected must normally be a country at a stage of development comparable to that of the State-trading country.¹⁸⁷

EEC questionnaires issued in connection with investigating complaints request information for 12 months preceding the initiation of the antidumping investigation.¹⁸⁸ Information as to home market price in a market economy third country is supplied by the party lodging the dumping complaint,¹⁸⁹ while price information for sales to third countries is supplied by the producer and/or exporter of the merchandise under investigation,¹⁹⁰ as is information regarding the cost of production in the exporting country.¹⁹¹

The General Agreement on Tariffs and Trade (GATT) has no explicit provision dealing with SCEs. Normally, dumping occurs when the price of the product exported from one country to another "is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."¹⁹² However, if sales within an SCE are interpreted as not occurring "in the ordinary course of trade,"¹⁹³ there will be no meaningful home market price and resort may be made to either the highest export price to any third country or the cost of production in the country of origin (plus a reasonable addition for selling cost and profit.)¹⁹⁴ The GATT provisions do not reflect a sophisticated analysis or the evolution of provisions from particular cases.

186. *Id.*

187. EEC Questionnaire for lodging complaints, question 2, n.4, *reprinted in* C. STANBROOK, *supra* note 184, at 89.

188. EEC Questionnaire intended for *producers and exporters* of products which are the subject of an antidumping anti-subsidies complaint and EEC Questionnaire for importers of products which are the subject of an antidumping complaint, *reprinted in* C. STANBROOK, *supra* note 184, at 95-104 (emphasis in original).

189. EEC Questionnaire for lodging complaints, *reprinted in* C. STANBROOK, *supra* note 184, at 89.

190. *See supra* note 188.

191. *See* C. STANBROOK, *supra* note 184, at 100.

192. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. VI, § 1(a), 61 Stat. A3, A23, T.I.A.S. N. 1700, 55 U.N.T.S. 187.

193. *See supra* notes 35-39 and accompanying text; the issue presented is whether transactions within an SCE occur "in the ordinary course of trade," and the importance of the question to United States antidumping law.

194. General Agreement on Tariffs and Trade, *supra* note 192, art. VI, § 1(b). *See Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade, supra* note 74, art. 2(d), *reprinted in* C. STANBROOK, *supra* note 184, at 139. With regard to article VI of the GATT, the International Antidumping Code, and implementation of the

VI. RECOMMENDATIONS AND CONCLUSION

The expansion of United States trade with communist and socialist countries,¹⁹⁵ coupled with the increasing role of market influences in such countries' economies,¹⁹⁶ have made the current SCE provisions of the Antidumping Act unworkable, inequitable and obsolete. Congressional reexamination of the SCE provisions is thus essential. The Heinz bill¹⁹⁷ is a step in the right direction. While it will have little impact on Commerce's current practice in determining whether a particular economy is state controlled, it should at least simplify the foreign market value calculation once an SCE determination has been made.¹⁹⁸

However, the criticism of the proposed revisions also has merit. It is unclear, for example, why the willingness of an SCE producer to furnish data to the United States authorities should determine the use or non-use of its prices in making the foreign market value determination. The theory that such prices may not reflect real market value and should not be used would be ignored. If the home market price is artificially high, United States petitioners will fight for its use—if artificially low, the foreign producer will want to use the home market price. Similarly, the "lowest free-market price" alternative virtually guarantees, as critics of the proposal suggest,¹⁹⁹ that the exporter from an SCE country will not be permitted to sell its products in the United States at prices below those of all other producers, even if the SCE producer is more efficient than its competitors.

Congress should thus consider a more complete revision of the SCE provisions, to include the following:

1. *A real revision of the factors involved in reaching an SCE determination.* The *Menthol*²⁰⁰ and *Truck Trailer Axle*²⁰¹ cases es-

Code both abroad and in the United States, see Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 524-58 (1972); Myerson, *supra* note 80, at 188, n.130.

195. See COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 3-5; 127 CONG. REC. S3782 (daily ed. April 9, 1981) (remarks accompanying S. 958).

196. See *id.*; COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 18-19.

197. See *supra* note 9.

198. The Heinz bill would do away with the alternative values currently available for determining fair market value and use only the "lowest free-market price." *Id.* at S3784. See *supra* notes 164-68 and accompanying text.

199. See *supra* note 169 and accompanying text.

200. Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981). See *supra* notes 114-32 and accompanying text.

201. Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic, 46 Fed. Reg. 46,152 (1981). See *supra* notes 144-55 and accompanying text.

establish that Congress should specifically address the issue of using a sectoral or an overall economy approach to the SCE determination. The economic realities of today's world favor a sectoral approach.²⁰² State influence in the general economy is a reality in every country,²⁰³ and a generalized SCE designation for particular countries ignores economic reality and discriminates against countries which, although currently denominated SCEs, in fact have less state control in particular sectors than do current non-SCE countries. Congress can and should also define Commerce's mode of analysis on a sectoral SCE basis: Commerce should determine whether the cost components of the particular producers in question are so distorted by direct or indirect state controls that adjustments to those prices cannot be made to allow their use in a fair value determination.²⁰⁴ Specific statutory authorization of the sectoral approach might also reduce the time that Commerce must devote to the SCE determination in each case.

2. *Statutory requirements for all adjustments necessary to ensure comparability.* One of the principal frustrations of the foreign producers in the recent SCE cases²⁰⁵ has been the inability or refusal of Commerce to make necessary adjustments needed to reach comparable United States and foreign market prices. While the Heinz bill may reduce such problems by reducing reliance on a surrogate economy approach, it makes no economic sense for the administering authority to be able to arbitrarily reject particular adjustments on the basis of real or imagined statutory constraints. Instead, the statute should specifically instruct Commerce to make every proposed adjustment that, under ordinary economic analysis, would better ensure comparability.

3. *Specific allowance for comparative advantage.* Neither the current SCE statute²⁰⁶ and rules²⁰⁷ nor the Heinz bill²⁰⁸ allows an

202. Compare with the approach taken by the EEC in Council Regulation of December 20, 1979, No. 3017/79, which incorporates a list of countries considered to have non-market economies, thus completely eliminating the state-controlled economy controversy. *See supra* note 184 and accompanying text.

203. *See, e.g., supra* notes 5-6 and accompanying text.

204. *See, e.g.,* the recommendations in the Comptroller General's Report, *supra* note 172.

205. *See supra* notes 11-107 and accompanying text.

206. 19 U.S.C. § 1677b(c) (Supp. III 1979).

207. 19 C.F.R. § 353.8 (1980).

208. *See supra* note 9.

SCE, in any real sense, to enjoy true cost savings resulting from production efficiencies. However, as noted,²⁰⁹ such a “comparative advantage” concept is basic to free markets and international trade generally. Therefore, any amendment to the SCE provisions should specifically allow adjustments to foreign market value reflecting cost savings that result from production efficiencies, if such efficiencies can be demonstrated by the foreign producer. Such a proposal could be added to the “lowest free-market price” provision of the Heinz bill,²¹⁰ and would correct the problem with that provision noted in the Comptroller General’s Report.²¹¹

There is a strong consensus, reinforced by Commerce’s unsatisfactory experience in recent cases, favoring a major revision of the SCE provisions of the Antidumping Act. While possible changes are many, the two principles that should be paramount in a revision of the SCE provisions are (1) greater conformity of the statute to the realities of an increasingly diverse international economic environment, and (2) greater specificity of the parameters to be utilized by the Department of Commerce in making the SCE determination.

209. *See supra* notes 169, 182 and accompanying text.

210. 127 CONG. REC. S3784 (daily ed. April 9, 1981).

211. COMPTROLLER GENERAL’S REPORT, *supra* note 2, at 22.

