Policies on Imports from Economies in Transition

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Two Case Studies

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and L. Alan Winters

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Foreword

With the end of the cold war and the establishment of market−oriented policies, the countries of Central and Eastern Europe and the Commonwealth of Independent States have gained much greater access to the markets of the European Union and the United States. Practically all of them have been granted most−favored nation status, many benefit from the generalized system of preferences, and those that have signed "Europe Agreements" enjoy free trade access to EU markets for a large range of products. Nonetheless, many officials and exporters in these countries feel that they do not yet face a level playing field in the European and U.S. markets, at least in part because they are subject to safeguards (emergency) protection and antidumping actions. These, they argue, fall disproportionately on goods from transition economies because the latter are subject to different—and potentially more protectionist—rules than are exports from market economies.

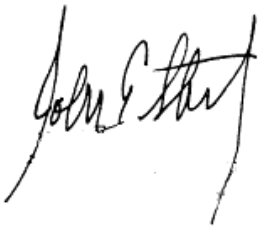
This volume offers one of the first investigations of the antidumping and safeguards procedures used by the European Union and the United States on the transition economies' exports. It argues that the special procedures used to assess antidumping claims against countries classified as "nonmarket economies" may be inappropriate forcontinue

the many transition economies that have taken great strides toward liberalizing their economies. Although the research does not establish that the differences in procedure lead to systematically more restrictive measures than those based on normal market−economy procedures, it does find that the present procedures introduce additional elements of arbitrariness. This arbitrariness, together with the procedures for settling antidumping claims, may increase the strategic value of threatening antidumping actions in order to elevate prices, thus undermining competition and efficiency in international trade. Ultimately, however, the volume finds that the fundamental problems stem not from the special procedures used when the United States and European Union designate an economy "nonmarket," but from the problems with antidumping rules more broadly, as well as the particular difficulties faced by firms with inadequate accounting practices and limited access to information about international trade rules and regulations.

The volume urges that the transition economies, the European Union, and the United States take steps—possibly within the context of the transition economies' accession to the World Trade Organization—to remove the justification for maintaining different procedures in the determination of antidumping.

The work described in this volume—sponsored jointly by the Development Economics and Europe and Central Asia Vice Presidencies—exemplifies the World Bank's analytical contribution to developing countries' efforts to

integrate themselves into the world economy. It analyzes the concerns expressed by client country policymakers, puts them into perspective, and helps to focus future policy making efforts in the most fruitful directions.break



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Preface

This volume grew out of the concerns expressed by policymakers from transition economies that their exports faced disproportionate barriers from antidumping actions in high−income countries' markets. The Europe and Central Asia Department III and the International Economics Department approached leading experts on EU and U.S. international trade law to describe and analyze the situations in these two main markets.

The two main papers in this volume were completed in late 1995 and have informed World Bank policy advice and dialog since then. Since they have proved very useful in that role and since their main conclusions have not been changed by the passage of a year, we have decided to make them more widely available, along with a new introduction.

In preparing this volume the editors and authors have been greatly assisted by comments from Michael Finger, Aleksander Kaliberda, Daniel Kaufmann, Vladimir Konovalov, lain Shuker, Joseph Stiglitz, David Tarr, and Paulo Vieira da Cunha. They are also grateful to Maria Luisa de la Puente, Audrey Kitson−Walters and Jennifer Ngaine for logistical help, Marie Helene Le Manchec for some research assistance, Meta de Coquereaumont for editing the main chapters, and Jeff Hayden for editing the Introduction, undertaking the desk−top publishing, and managing the production process.break

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Policies on Imports from Economies in Transition: Summary and Overview

Constantine Michalopoulos and L. Alan Winters

With the end of the cold war and the establishment of market−oriented policies, the countries of Central and Eastern Europe and the Commonwealth of Independent States (CIS) have gained considerably greater access to the EU and the U.S. markets. Practically all of the countries have been granted most−favored nation (MFN) status in these markets, even though most are still not members of the World Trade Organization (WTO). Many enjoy generalized system of preferences (GSP) privileges, and countries that have signed the so−called "Europe Agreements" enjoy free trade access to EU markets for a large range of products (Kaminski, Wang and Winters, 1996).

This volume focuses on one dimension of transition economies' market access—contingent protection, primar−soft

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ily in the form of antidumping measures, in the European Union and United States. Within this dimension it asks specifically whether the special regulations applied to so−called "non−market" economies disadvantage exporters from transition economies relative to those from other developing countries. While contingent protection is most often singled out in the complaints about market access raised by these countries, there has been little systematic investigation of the role of these differences in the antidumping procedures used by the European Union and United States or of their impact on transition economies' exports. Many countries employ measures of contingent protection, but the United States and European Union have been chosen for detailed investigation because together they account for about two−thirds of exports of the countries of Central and Eastern Europe and the CIS.

The two papers in this volume, by Peter D. Ehrenhaft and Brian Hindley, provide detailed analyses of U.S. and EU antidumping policies and practices toward transition economies. They analyze the legal and institutional basis of these policies and consider the outcomes in the cases in which antidumping investigations were initiated against transitional economies.[1] They also examine the implications of these policies for the exports of economies in transition, and present a number of recommendations to enhance these countries' access to U.S. and EU markets. This overview summarizes and places in context the authors' main findings and conclusions, briefly reviews the progress of market reforms in the trade systems of the countries in transition, and highlights some of the main recommendations for reform for the countries in transition as well as for the European Union the United States and the international community.

In interpreting the results reported here it is important to bear in mind that antidumping legislation restricts a far wider range of exports than the subset that is actually subject to action. This is because even an implicit threat of antidumping duties is sufficient to change exporter behavior—see, for example, Finger (1993), Winters (1994), and Prusa (1996), who provide related evidence. Thus any quantification based only on the observed outcomes of actual cases will identify only the lower bound of the effects of the legislation. Nonetheless, because credible threats must be at least partly grounded in actual outcomes, because lower bounds do contain valid information, and because actual outcomes provide a public and contestable basis for analysis, it is useful to start with the evidence from actual cases. However, to provide a complete picture, the analysis provided here by Ehrenhaft and Hindley needs to be supplemented by further evidence, currently at best only anecdotal and a priori, on the way in which the different treatment of "nonmarket economies" affects the "strategic" or "threat" dimension of antidumping policy.

The Main Findings

U.S. Policies and Practices

U.S. antidumping law permits a U.S. industry to seek the imposition of extra customs duties on merchandise sold in the United States at less than fair value, if such sales cause or threaten to cause material injury to the domestic industry producing like products. Fair value is equivalent to the term normal value used in the WTO Antidumping Code.

The law distinguishes between the method used to determine normal value in market economies from that used in nonmarket economies. In market economies, normal value is determined on the basis of the producer's ex−factory prices to unrelated buyers in its home market, adjusted for differences in things such as freight costs, the physical characteristics of the goods, the terms of sale, and warranties, in order to make it comparable to the ex−factory price of like goods shipped for export to the United States.

Starting in the late 1970s, the U.S. Treasury decided that, in nonmarket economies, local currency prices in the home market could notcontinue

provide an acceptable basis for calculating normal or fair value. This is because with inconvertible local currencies and price controls transaction prices in centrally planned economies reflect political and administrative factors rather than anything like the normal value of merchandise within the meaning of the antidumping law. The Treasury developed a different methodology under which a nonmarket economy producer is required to document its actual use of materials, labor, energy and capital. The U.S. administration (since 1980, the U.S. Department of Commerce) then determines normal value by pricing these factors of production in another (surrogate) country that is a market economy at a similar level of economic development and by adding a profit margin. Starting in 1988, the surrogate country also had to produce the good in question.

This methodology, based on the precedent setting "Polish Golf Cart" case and elucidated in Ehrenhaft (1978), has been in use since 1980, although it was incorporated into law only in 1988. At that time, the legislation established six criteria for determining whether a country is to be considered a nonmarket economy: currency convertibility; determination of wages through free bargaining between labor and management; the extent to which foreign joint ventures are permitted; the extent of government ownership or control of the means of production; the extent of government control over the allocation of resources and the price and output decisions of enterprises; and other factors that the administering authority considers appropriate—usually related to the extent to which exporters are able to export their goods on terms and conditions fixed without government interference.

The United States does not maintain a list of countries that it classifies as nonmarket economies. Rather, a determination is made on a case by case basis—essentially based on the allegations made by the complaining firm—as to whether an exporter is from a market or nonmarket economy. The U.S. Department of Commerce has allowed respondents to demonstrate that their country ought not be regarded as a nonmarket economy (Poland did so in 1993 but then decided to retain its nonmarket status because of the benefits it received under that classification), or that their particular company operates in a market environment ("a bubble of capitalism") even though the country as a whole is designated as a nonmarket economy.

Once determined, normal value is compared (both for market and nonmarket economies) with the export price. If the export price is lower, a dumping margin equal to the difference is calculated (expressed as a percent of the export price). A dumping margin of less than 2 percent is regarded as de minimis and is not actionable. If the margin is higher, a determination is made as to whether the imports are a cause or threat of material injury. In chapter 2, Ehrenhaft argues that the threshold for determining injury in antidumping cases is lower than in safeguard actions and that, in practice, it includes "any injury that may be attributed to the [allegedly dumped]

imported merchandise, even if other causes (such as recession, changes in consumer tastes or imports from third countries not at less than fair value) may also be causing the injury."

If injury is found, an antidumping order is issued requiring importers to pay a cash deposit on each subsequent entry of the affected goods equal to the antidumping margin. The U.S. antidumping law prohibits the absorption or reimbursement by the foreign producer or exporter of antidumping duties paid by the importer. If a reimbursement is made, it is "treated as a reduction in the export price. . ., which has the effect of doubling the duties due" (see Chapter 2).

Based on evidence from the legal structures and practice and from the cases initiated against transition economies, Ehrenhaft concludes that contingent protection has not posed an important general barrier to transition countries' access to the U.S. market. He argues thatcontinue

despite the fact that the proportion of antidumping cases against transition economies is higher than those countries' share of total U.S. imports, most cases are concentrated either in sectors like paper clips, which account for a small share of total imports, or against a single country—China. Clearly for countries whose exports are concentrated in critical sectors the effect could be significant, but in the case of China, Ehrenhaft argues, the relatively large number of cases has not prevented the strong expansion in Chinas actual share of the U.S. market, even if they have reduced it below potential.

Ehrenhaft also concludes that the designation of a country as a nonmarket economy and the use of a different methodology in determining normal value does not make it more likely that a finding of dumping will result. He argues that the main problems faced by all countries, market and nonmarket alike, relate to the unfamiliarity of foreign enterprises with the U.S. law and procedures, and the requirement to respond in English and at short notice to detailed technical questionnaires about prices and costs in the absence of internationally Generally Accepted Accounting Practices (GAAP) in their home countries. The determination of dumping is essentially a judicial procedure where both the U.S. companies alleging injury and the foreign exporters have an opportunity to present evidence in support of their claims. But in cases where the respondents, from market or nonmarket economies, are unable to provide detailed information on prices and cost according to the questionnaires, the U.S. Department of Commerce uses the "facts available" to make its findings. The latter is frequently a euphemism for the information provided by the complaining U.S. firms.

To the extent that exporters in transition economies have less experience and less ability to cope with U.S. procedures—including the willingness to accept site visits to verify information—they may experience greater burdens from antidumping than do other exporters. However, we should note that this is not a direct result of the "nonmarket" methodology. Indeed, Ehrenhaft argues that the different methodology used in determining normal value in nonmarket economies imposes no more onerous requirements than the methodology used for market economies. In cases involving products from market economies, many firms have to respond not only to a price questionnaire but also to a questionnaire probing costs of production— much like a nonmarket economy.

Ehrenhaft notes that the regulations concerning "suspension agreements," whereby the antidumping investigation is suspended in return for an undertaking by the exporter on prices or quantities, are less demanding for nonmarket than for market economies. The case of uranium from Russia is one such case. Whether the greater ease of concluding a suspension agreement is a plus or a minus for the exporting firm, however, is not completely clear. If the exporter has an unconstrained choice as to whether to make an undertaking and if in cases that run to conclusion nonmarket economies fare no worse than other exporters, then this fact favors them. If, on the other hand, the exporter is constrained (perhaps because it has insufficient financial resources to fight on) or if the possibility of a suspension encourages U.S. firms to lodge complaints, then the greater scope for seeking suspensions penalizes nonmarket economies. From the point of view of an exporting country overall, suspension agreements are undesirable in the long run because they undermine attempts to establish competitive disciplines

and stimuli (see below).

Ehrenhaft also recognizes that the use of surrogate country valuation poses additional complexities in the determination of dumping margins. First, if the surrogate's exchange rate is undervalued, the costs of the nonmarket economy's export in U.S. dollars would be biased downward and dumping may be found where none exists. But Ehrenhaft feels that the Department of Commerce's choice of surro−soft

gates has not been biased in this way to favor domestic producers and increase the likelihood of finding dumping. Rather, the main problems have been practical ones: The choice of a surrogate country is made late in the proceedings so that only data of questionable reliability are available and respondents have little time to analyze them. Moreover, he observes that in one case, a respondent from Poland, which had a choice, found it more advantageous to use a nonmarket rather than a market economy methodology for determining normal value.

The final disadvantages that Ehrenhaft notes in the nonmarket economy designation is that the Commerce Department treats all producers in a nonmarket economy as though they were a single enterprise. This means that a low−cost producer may face antidumping duties if there is an antidumping finding against another producer from the same country. To avoid this, the producer has to demonstrate that it is sufficiently independent from government control to justify a separate calculation of its cost structure—a procedure that is difficult, time consuming, and not very transparent.

EU Policies and Practices

In Chapter 3, "The Regulation of Imports from Transition Economies by the European Union," Brian Hindley reaches conclusions similar to Peter Ehrenhaft's. While the European Union's application of contingent protection has generated many complaints, both from its trading partners and from external commentators, there is no particular evidence that it has impinged more heavily on economies in transition—even those that are deemed to be nonmarket economies—than on other low−cost exporters.2 Hindley does caution, however, that for those transition economies that have not entered Association or Cooperation Agreements with the European Union and that are not members of the WTO, this is at least partly because the European Union has chosen not to exercise the full rigor that its trade laws permit.

In EU trade law a country is categorized as a nonmarket economy by a decision of the Council, the highest political authority in the European Union, on the basis of whether it is deemed to have taken sufficient steps toward market principles. There is no scope for case−by−case exceptions nor for legal counter arguments. At present none of the countries formally designated as nonmarket economies (see table 3.1) is a member of the WTO. Moreover, to date, the decision to shift a country from nonmarket to market status has been entirely coterminous with whether or not it has signed a Europe Agreement with the European Union. There is no necessary legal connection between the two processes, however, and one can anticipate that in due course members of the CIS will attain market status without such agreements. It is worth noting that, apart from the requirement to seek cooperative solutions through the Association Councils (high−level joint political bodies), the Europe Agreements place no formal constraint on the European Unions use of contingent protection in either "market" or "nonmarket" forms.

While they have been involved less frequently than in the past, the countries of Central and Eastern Europe that have been deemed market economies by the European Union have continued to express frustrations over EU antidumping actions. These relate to the documentary burdens and apparent arbitrariness of the procedures, and they correspond closely to the views also expressed by other low−cost exporters such as Korea or Taiwan (China). Thus they are not specifically related to issues of nonmarket status and so are not dealt with further in this volume. (See Finger, 1993, for a thorough discussion of "regular" antidumping.)

For the designated nonmarket economies, the situation is quite different for safeguards protection than for antidumping. With safeguards, nonmarket economies face a potentially more rigorous regime because they are not members of the WTO and hence do not have the protection of Article XIX of the GATT. Tocontinue

impose safeguards against nonmarket, non−WTO economies, the European Union merely needs to demonstrate the coexistence of higher imports and injury to domestic producers, whereas Article XIX requires a causal link to be established. Similarly, Article XIX limits the duration of safeguards measures and requires longer−lived ones to decline through time, whereas the EU's nonmarket economies legislation imposes no such restrictions. Unless explicitly stated in the terms of its accession, a nonmarket economy would avoid these problems as soon as it acceded to the WTO, even if the European Union continued to regard it as a nonmarket economy.

The situation is quite different for antidumping actions. Here the Uruguay Round Agreement on the Implementation of Article VI (of the GATT) explicitly recognizes the right of an importing country to use alternative ways of determining "normal value" for nonmarket economies. Thus WTO accession offers no defense against the use of surrogate−country (analogue−country, in EU parlance) techniques. To avoid the application of these techniques a country must be deemed a market economy by the Council. Then, in order to enforce its "rights" as such, it must either accede to the WTO or sign an Agreement with the European Union conceding GATT−standard treatment for antidumping.[3] It should be noted, however, that in the European Union, much more obviously than in the United States, the information burden for nonmarket economies facing analogue country valuations is much lighter than that for market economies facing "regular" antidumping. Moreover, Hindley argues, there is no evidence that the lighter information requirements lead to greater arbitrariness or generate larger dumping margins. Thus he concludes that the problems faced by Central and Eastern European and CIS countries with EU antidumping stem much less from their nonmarket status than from the restrictive and arbitrary nature of its antidumping regime in general.

The Effects on Trade

Neither Ehrenhaft nor Hindley is able to offer detailed quantitative estimates of the impact of U.S. and EU contingent protection on the exports of countries in transition, but both suggest a number of ways in which the procedures used against nonmarket economies result in additional problems. Nonetheless, however, they both conclude that the nonmarket economy designation has had relatively minor effects overall. They make two points in this regard: (a) that the main protective effect is a function of the general policies of the EU and the U.S. on antidumping—not of the particular procedures used to administer it; and (b) that while contingent protection undoubtedly retarded the expansion of transition economies' exports to the European Union and the United States, the effect is likely to have been small when compared with the very rapid expansion of exports of countries in Central and Eastern Europe since 1990, and the Baltics and the CIS since 1992. Imports from these countries to the United States and European Union grew on average at a rate of 36 percent per annum compared to an overall growth of imports of 5.3 percent. Moreover, there is also little doubt that in the initial years, during which many of these countries had rather modest export growth rates, supply side constraints were the major constraint (Kaminski, Wang and Winters, 1996).

This is certainly not to argue that contingent protection had no effect on transition economies' exports, however, nor even that the differences in their treatment had no effect. The use of surrogate countries to determine dumping margins, and the additional difficulties that countries in transition have faced as a consequence of having little familiarity with administrative procedures in the United States and European Union and with international accounting practices, must have made exporting by these countries more difficult at the margin. Moreover, the procedures undoubtedly increased the risks of exporting by introducingcontinue

the possibility for arbitrariness and biases extraneous to the economic circumstances of individual firms. For example, while it may be comforting to hear that the U.S. Commerce Department has not used exchange rate considerations in the choice of the surrogate countries to bias its findings, it clearly has the opportunity to do so and the mere threat to exercise the option may be sufficient to curtail exports. Similarly the fact that Poland found it advantageous to accept the nonmarket economy methodology in determining the normal value of some of its products is as much evidence of the arbitrariness and lack of economic content of the procedures as of the advantages they offer to the countries so designated.

Perhaps the most pernicious problem is that, as Ehrenhaft noted, the nonmarket economy procedures make it easier to induce price undertakings with exporters and thus to create cartel−like arrangements. Such an undertaking was formally concluded with Russia for uranium, and a similar one was put in place informally for aluminum in 1994. The latter case illustrates well the dangers inherent in U.S. antidumping procedures and the difficulty of quantifying their effects with publicly available information. Press reports suggest that faced with the threat of antidumping actions Russian producers, whose costs were genuinely low given the state of the Russian economy, felt safer agreeing to market−sharing rules than in pursuing free trade. The U.S. parties did not even have to file antidumping actions—the threat was sufficient (Wall Street Journal, 9/6/94, "Foiled Competition"). The nonmarket methodology was arguably the key in this case because the Russians' offense was not that of selling in the U.S. at below the prices they charged at home or in third markets but rather that of driving the world price below the costs of production in the United States (and the European Union). A market economy, for which normal value would first have been determined by reference to these prices, would not have been vulnerable to accusations of dumping. A nonmarket economy, on the other hand, facing the surrogate−country methodology and the implicit threat that an unfavorable surrogate could be chosen was vulnerable and thus decided to "settle out of court."

At a time when the transition countries are facing internal difficulties in breaking down existing monopolies and introducing competitive market structures, the last thing they need is externally induced pressures for the introduction of cartel−like arrangements that limit competition and reduce efficiency. Even worse, it is possible that the Russian producers have learned to like the arrangement and, having once been anxious to see U.S. law revised, are now happy to accept it! For CIS countries whose export bundles are biased heavily toward commodity products these are important issues. Current practices not only make earning foreign exchange more difficult and more risky, thus making outward orientation harder to encourage and achieve, but they also potentially reintroduce managed trade into major areas of the economy.

The fact that, as Hindley suggests, the European Union could be more restrictive under existing regulations than has been the case so far, looks more menacing from the perspective of the previous paragraph, for it demonstrates that potential restrictions can be as effective as actual ones if the threat to use them is credible enough.

Given these findings, what are the implications for policies on contingent protection against transition countries in the future? There are several aspects to this question: first, the more general question of the future evolution of policies in the European Union and the United States toward all countries; second, the narrower question of the particular approach used to administer antidumping and countervailing duty actions; and third, whether it would be useful to move toward a multilateral approach, dealing with any remaining state trading issues within the WTO rather than on a bilateral basis.break

The Future of Antidumping

The problems inherent in the EU and U.S. use of antidumping policies are now widely recognized—see, for example, Messerlin (1990), Boltuck and Litan (1991), Tharakan (1991), and Staiger and Wolak (1994). While protection against predatory pricing may well be desirable, the evidence strongly suggests that this is not the actual motivation for initiating antidumping cases. For example, antidumping actions against foreign firms are far

more frequent than domestic actions for predatory pricing, and domestic criteria are tighter (admit fewer actions) than those on foreigners. Also, a U.S. 1916 antidumping law offering triple damages if predatory pricing can be proven provides a large incentive to initiate actions, but no case has ever been argued successfully under this law. Antidumping, in effect, is ordinary protection against highly competitive imports, a view echoed by both Ehrenhaft and Hindley. Moreover, because it blames domestic firms' problems on unfair behavior by foreigners it has an extremely attractive rhetoric. It allows firms to request, and governments to grant, protection without having to confront issues of efficiency and costs. To quote Finger (1993), "antidumping is ordinary protection with a grand public relations program."

As the European Union and United States advocate and promote trade liberalization around the world, one might hope that, over time, the use of antidumping procedures would become less attractive to them. It is true that the number of cases they have initiated has not increased recently, but it is far too early to claim a declining trend. Also, although the Uruguay Round dealt with antidumping in the "Agreement on Implementation of Article VI. . .," it addressed procedural rather than substantive issues. Thus, while many requirements are imposed on the administration of antidumping actions, the questionable economic logic continues more or less unabated. Indeed, by explicitly permitting for the first time the use of various practices provided that the reasons for using them are explained, the Agreement arguably legitimates some of the disadvantages faced by respondents. More recently, at its First Ministerial Meeting in Singapore in December 1996 the WTO decided to study "anti−competitive practices" (including antidumping procedures) under the heading of trade and competition policy. It is too early to tell how this will affect current practice, however.

It has been argued that as antidumping action spreads to developing countries—more than fifty developing countries have submitted laws to the WTO and developing country use is expanding very rapidly—the original industrial country advocates will seek and submit to tighter disciplines. This is possible, but so too is an alternative view. Messerlin (1990) suggests that since antidumping law encourages firms to raise prices, it is essentially the official means of enforcing private collusion. If so, U.S. and EU exporters may not press very hard for disciplines on developing country antidumping action, and so will not become a force to encourage negotiations that could lead to tightening the discipline in its applications.

In sum, while there is no evidence that the United States and European Union are becoming more restrictive in their use of antidumping policy, there are currently rather few reasons to believe that they will become significantly more liberal. Thus if the transition economies of Central and Eastern Europe and the CIS are to relieve their concerns over antidumping, it is not likely to be via a general attenuation of its use.

On the narrower question of the particular methodology used to determine antidumping and countervailing duties, clearly during the period of central planning both the European Union and the United States had no alternative but to use the surrogate country methodology. The question that needs to be addressed now, however, is whether the rapid progress that most transition countries have made in introducing market reforms requires a new look at the procedures for dealing with these countries.break

The Evolving Situation in Countries in Transition

It is beyond the scope of this summary to analyze in detail the nature and scope of reform in individual transition countries. However, the progress achieved in introducing market−oriented reforms in a significant number of such economies—for example, Armenia, the Baltics, Kazakstan, the Kyrgyz Republic, and Russia— raises questions as to whether they should continue to be designated nonmarket economies. In others—for example, Belarus, Turkmenistan, and Uzbekistan—progress has been considerably slower, while in others (for example, Ukraine) the situation is less clear.

The European Union has signed Europe Agreements with the Baltic countries and now considers them market economies. But the EU trade agreement with Russia signed in 1994 has no such implication, so that, like the other CIS countries, it continues to be on the nonmarket economies list.

Because in the United States the determination of market status is made on a case by case basis, it is unclear how the countries that have made significant strides in introducing market reforms will be treated. It could be argued that all of the countries named above—Armenia, Estonia, Kazakstan, the Kyrgyz Republic, Latvia, Lithuania and Russia—could be treated as market economies. They appear to meet the criteria (described earlier) for a market economy established in the U.S. law—an accomplishment that reveals progress in introducing market reforms.

First, there is little doubt that all these countries meet the test of currency convertibility, as they have been (or in the case of Armenia, are about to be) recognized by the IMF to meet obligations under Article VIII for full current account convertibility. Second, on wage determination, there are clearly no wage controls or government interference in wage setting in any of these countries. Third, there are few limitations on joint ventures—for example, only in sectors such as defense, banking, and insurance. While there has not been as much foreign investment coming in as the authorities would wish, this is not because of explicit limitations on the entry of foreign firms but because of various political and economic stresses.

Fourth, in terms of ownership, European Bank for Reconstruction and Development (EBRD) estimates suggest that as of the end of 1995, 60 percent of Russia's GDP originated in the private sector; for Estonia the total was 70 percent, and somewhat less in the other countries (EBRD, 1996). Additional enterprises have been privatized since then, so that it is reasonable to assume that perhaps as much as two thirds of Russia's and possibly more of some of the other countries' GDP originate in the private sector. This is not significantly different from the 70 to 77 percent of GDP accounted by private enterprise in several developing countries such as Egypt, Tunisia, Venezuela and Zambia—and much more than the approximately 50 percent share in such countries as Algeria and Sudan, which have not been classified as nonmarket economies (World Bank, 1997).

There are no detailed data on the proportion of international trade handled by privatized firms. However, in the Baltics there is no direct state involvement in trade, and in the other CIS countries, the overall impression regarding ownership is that the proportion of activity generated by private firms is higher in the tradable sector than in the economy as a whole, since the latter includes many public sector activities in transportation, utilities and other, mostly non−tradable, services. Perhaps the most important remaining entities that are state owned are utilities, companies engaged in the production and export of defense−related articles, and state trading enterprises that export energy and raw materials such as natural gas, oil, and cotton. There is also state involvement through trade agreements covering a portion— perhaps 10 to 30 percent—of the trade with CIS countries and Cuba (a declining portion of total trade that essentially constitutes organized barter).break

In Russia, the government owns a controlling block of shares in many companies, including in those that produce and trade natural gas, electricity, diamonds, and coal. Exports of natural gas in 1996 are estimated at $14.1 billion. Small amounts of electricity were exported and some coal was imported during the year. The total international trade turnover (exports plus imports) of state trading organizations has been estimated at about $10 billion in 1996. In addition, there is trade conducted by specialized firms (Roscontract) and with other CIS countries ($7 billion), much of which could be construed to be state trading. All this would add up to about $30 billion, or about 20 percent of Russia's total exports plus imports, that are influenced by the government or controlled by state trading enterprises, the bulk of which involves exports (Drebentsov and Michalopoulos, 1997).

But the state usually plays only a limited role in setting prices and allocating resources— even for firms or activities that are still state owned or subject to state agreements. Price controls in these countries are usually limited to utilities and local authorities' regulation of food prices at the retail level. Even in such cases as Russia's sugar−oil swaps with Cuba, the rights to import are determined through open tenders. In general, there has been a

strong tendency for the state to disengage, so that it maintains arms length pricing and exercises no control over other aspects of trade transactions even in circumstances where these transactions occur in the context of an overall state−to−state trade agreement.

All seven of the countries listed—and perhaps a number of others—have made considerable strides in introducing market reforms throughout their economies and especially in their international trade sectors. While precise quantitative information is not available, the evidence seems to suggest that they could reasonably be considered market economies under EU and U.S. classification schemes and treated as such in the context of antidumping regulation.

The World Trade Organization

The provisions of the GATT give latitude to individual countries in their domestic legislation to develop procedures regarding the determination of "normal" value in the context of antidumping. Thus, in principle there is no incompatibility between the procedures adopted by the European Union and the United States and the obligations these countries have assumed under the WTO. In any case, the centrally planned economies—with few exceptions, such as Hungary, Poland and Romania—were not members of the GATT and are not yet members of the WTO. Nonetheless, in light of the accession applications of many transition economies, a brief consideration of what the GATT has to say about state trading and about the way in which antidumping law is implemented is worthwhile.

Article XVII of the GATT is entitled "State Trading Enterprises," but its provisions were designed to deal not with centrally planned, nonmarket economies that controlled essentially all trade, but with the state trading activities of individual importing or exporting companies operating as exceptions to the overall market−based environment of GATT member states. Article XVII contains a number of disciplines, and requires the notification of state−trading companies to the WTO Secretariat. Compliance with the notification provisions has generally been weak. In the 1993 survey of members, only 11 of 105 responded (U.S. GAO, 1995). Thus to date, the Article has simply not been used by WTO members as an instrument to address possible nullification or impairment of commitments through state trading. Besides, the principal focus of Article XVII is on imports by state trading companies—that is, the fact that their behavior might replicate the effects of import barriers—rather than on exports.

As the number of previously centrally planned economies applying to accede to WTO has increased, the working parties on accession have focused on the residual of state tradingcontinue

practices in these economies. At the moment no less than fifteen transition economies are applying for accession. A number of them have already been admitted—for example, the Czech Republic, Slovenia, and Bulgaria—even though it could be argued that in Bulgaria the amount of privatization is still considerably less than that in some of the countries that are not yet members and that are designated by the European Union and United States as nonmarket economies. Nevertheless, the presumption and practice has been that transition economies acceding to the WTO do so without any special reference to or dispensation regarding state trading practices.

Following the Uruguay Round the degree of scrutiny to which country practices will be subjected appears to be increasing. The definition of state trading practices was refined, and a working party has been established to review notifications, come up with an illustrative list of relationships between enterprises and governments and the kinds of activities that are relevant for Article XVII, and revise the questionnaire used for notification purposes. Since 1995, notifications have increased with forty−five members, including many developing countries and transition economies, providing new and full notifications and sixteen members providing updates (WTO 1996). Thus, over time a degree of evolution seems likely.

Two questions arise in this regard that deserve further analysis. First, notwithstanding the significant progress that transition economies have made in introducing market−oriented reforms, it is possible that they might accede to the WTO while still retaining elements of state trading practices — more so, perhaps, than existing members. The question then arises as to whether the disciplines under Article XVII and their implementation should not be strengthened to ensure that obligations under the GATT are not compromised by state trading practices that distort patterns of trade. Second, as transition economies become members of the WTO and do so with no special conditions or reference to their state trading activities, should this not create a sufficient presumption that they are effectively market economies to remove the need for local tests in the United States and the European Union? In other words, one might argue that for relations between WTO members, the right to use surrogate country techniques is unnecessary and should be abolished. This would clearly be attractive in terms of clarifying matters for exporters in transition economies. It would not be without its own complications, however. Such a decision could make achieving accession to the WTO more arduous for new members. It may also lead to the need to establish grandfather arrangements referring to some transition countries that have already been granted admission on the current presumption that importers might continue to classify them as nonmarket economies in the context of antidumping.

Another approach that would provide a degree of internationalization of the market status decision could be the following modification to practices under Article XVII. If a country is a WTO member and is believed to have failed to notify the WTO of the state trading practices of a particular company, an importing government could be required to counter−notify such practices to the WTO before initiating antidumping procedures that employ surrogate techniques. This counter−notification and the succeeding antidumping action would, by this means, be subject to WTO review.

Both of these alternatives have advantages and disadvantages that need to be explored. However, given the need to integrate the transition economies of Central and Eastern Europe and the CIS into the world economy in a transparent and predictable way, they seem to deserve serious attention.

Turning to the implementation of antidumping law, it is worth asking whether the WTO dispute settlement procedure could reverse contingent protection decisions based on the inappropriate designation of supplying countries. This is not entirely out of the ques−soft

tion, but de facto, it seems to offer little prospect of redress. Finger (1996) makes the case clearly. First, in each of the six antidumping cases that came to GATT panels before 1994, the antidumping action was found to violate obligations to the GATT; in two cases the panels said there was no need to remove the offending action while in the other four the action remained in place despite a ruling to the contrary. Second, the Uruguay Round Agreement on the Implementation of Article VI (which deals with antidumping and countervailing duties) constrained the Dispute Settlement Body's purview of antidumping actions with respect to both what it may consider and how.

"Only issues raised in the request for a panel, and only the evidence presented or developed in the original investigation, are to be reviewed . . . In assessing the facts of the matter, the panel determines if the national authorities' establishment of the facts was proper, and evaluation of those facts objective and unbiased. If both, then 'even though the panel might have reached a different conclusion, the evaluation shall not be overturned' " (Finger, 1996).

All told, therefore, it does not seem likely that dispute settlement offers a way of tackling the designation of nonmarket economies.

Conclusions and Recommendations

1. The European Union and United States, and other members of the WTO, should consider whether the designation of nonmarket status in the context of antidumping should be terminated for countries that become members of the WTO. They should also consider abandoning practices involving price understandings and minimum price arrangements that contribute to the establishment of uncompetitive structures both internationally and in the participating countries. These would be first steps toward removing the inequities and inefficiencies imposed by their antidumping regimes on transition economies. Subsequent improvements would be for tests for dumping to be made equivalent to the domestic tests for predatory pricing and explicit account to be taken of user/consumer interests as well as producer injury in determining the case for action.

2. More immediately, the European Union and the United States should monitor carefully the progress made by individual transition economies in introducing market reforms, using all available information to ensure their fair treatment in contingent protection cases; in particular they should ensure that countries are not considered nonmarket economies when the reforms they have introduced make them at least as market oriented as countries so designated. In this regard, the criteria used in the definitions contained in the Article XVII understanding as well as the U.S. legislation provide a useful checklist of indicators to consider in making this determination. In addition, the U.S. and EU authorities should seek to provide a transparent process with rights of appeal for making this determination.

3. Transition economies need to strengthen their accounting procedures and practices so that pricing and cost structures of their firms can become more transparent. This will help to avoid the argument that the absence of appropriate cost accounting necessitates the use of surrogate countries or firms in the determination of normal value in antidumping cases. They should also, for these and other reasons, make all efforts to accelerate market reforms and eliminate remaining state trading practices.break

4. Industrial countries and international organizations should continue to provide assistance to transition economies in introducing market reforms, including the adoption of standard accounting procedures and practices.

5. Transition economies should take all necessary steps to become members of the WTO and to abide by its disciplines. Where appropriate they should be given some time following accession to bring their policies, including those on state trading, into conformity with WTO requirements.

6. All WTO members should make a greater effort to notify the WTO of state trading practices of their companies, as well as provide information to the WTO about evidence of such practices by other WTO members.

Notes

1. As noted in the Preface, Ehrenhaft and Hindley's papers were completed in late 1995 and are current to that date.

2. The countries of Central and Eastern Europe and the CIS do account for a higher proportion of EU antidumping actions than of EU imports, but so do several other countries—for example, Yugoslavia, Turkey, Korea, and Japan (see Finger 1993, Chapter 12).

3. An interesting case is Cuba, which is a member of the WTO and is not designated a nonmarket economy overall. For antidumping purposes, however, the European Union treats it as a nonmarket economy.

References

Boltuck, R., and R.E. Litan. 1991. *Down in the Dumps: Administration of the Unfair Trade Laws* , Brookings Institution, Washington, DC.

Drebentsov, V. and C. Michalopoulos. 1997. "State Trading in Russia," paper prepared for presentation at World Trade Law Forum, Berne.

European Bank for Reconstruction and Development (EBRD), *Transition Report* . London, 1996.

Ehrenhaft, P. 1978. "The Treasury's Approach to Imports for State−Controlled Economy Countries Under the Antidumping and Countervailing Duty Laws," *Interlace One* , Vol. 75, pp. 78−85.

Finger, J.M. 1993. *Antidumping: How it Works and Who Gets Hurt* , Michigan University Press, Ann Arbor, Michigan.

Finger, J.M. 1996. "Legalized Backsliding: Safeguard Provisions in GATT," Chapter 6 of Martin, W. and L.A. Winters (eds.) *The Uruguay Round and the Developing Countries* , Cambridge University Press, Cambridge, UK, pp. 316−40.

Kaminski, B., Z.K. Wang, and L.A. Winters. 1996. *Foreign Trade in the Transition: The International Environment and Domestic Policy* . Studies of Economies in Transformation No. 20, World Bank.

Messerlin, P. 1990. "Anti−Dumping Regulations or Pro−Cartel Law: The EC Chemical Cases." *The World Economy* , Vol. 13, pp. 465−92.

Prusa, T.J. 1996. "The Trade Effects of U.S. Antidumping Actions," National Bureau of Economic Research (NBER) Working Paper No. 5440.

Staiger, R.W. and F.A. Wolak. 1994. "The Trade Effects of Antidumping Investigations: Theory and Evidence," Chapter 6 of Stern, R.M. and A.V. Deardorff (eds.). *Analytical and Negotiating Issues in the Global Trading System,* Michigan University Press, Ann Arbor, Michigan, pp. 231−61

Tharakan, P.K.M. 1991. "East European State Trading Economies and Antidumping Undertakings." In Tharakan, ed., *Policy Implications of Antidumping Measures* . Amsterdam: Elsevier Science Publishers, North Holland).

U.S. General Accounting Office. 1995. *State Trading Enterprises* , GAO/GGD−95−208. Washington, DC.

Winters, L.A. 1994. "VERs and expectations: extensions and evidence," *Economic Journal* . vol 104, pp. 113−23.

World Trade Organization (WTO). 1996. *Report (1996) of the Working Party on State Trading Enterprises* , G/L/128, WTO. Geneva.break

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U.S. Policy on Imports from Economies in Transition

Peter D. Ehrenhaft

With the collapse of the Soviet Union, the end of the Cold War and the transition from command to market economies in Central and Eastern Europe and the CIS, the countries in that region are now seeking greater access to Western markets than in the forty years preceding the fall of the Berlin Wall. The countries of Central and Eastern Europe are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Slovak Republic, Slovenia, and Yugoslavia. Those of the CIS—Commonwealth of Independent States—are Armenia, Azerbaijan, Belarus, Georgia, Kazakstan, Kyrgyz Republic, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The United States and other Western economies have in principle agreed with this goal and have expressed support for the concept of greater trade with the region. But in the fashionable phrase of the day, "The devil is in the details." Efforts by these countries to sell products in the West have not had notable success.continue

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This chapter looks at the legal regime of the United States with respect to imports from those countries, which U.S. law has for the past four decades treated as nonmarket economies. (Although the term nonmarket economies also applies to China, the focus of this chapter is on the countries of Europe and Central Asia.) The laws prescribing differential treatment for the imports of these economies have not been wholly repealed. And although the countries of Central and Eastern Europe and the CIS are often characterized as economies in transition, most U.S. trade laws have taken no account of this transition process.

Is there a perception that present U.S. law creates nontariff barriers to early and meaningful trade expansion with the transition economies? For exporters in these economies, the answer is clearly "yes." But that perception may be in error. U.S. law on the subject is a product far less of conscious policy choice than of inertia, a general economic climate unfavorable to "cheap imports" that may appear to threaten U.S. jobs, and the absence of clear alternatives for dealing with imports from countries in transition. Moreover, as China illustrates, U.S. trade law is not an insurmountable barrier to expanded exports: the plethora of U.S. antidumping and similar trade law actions directed at imports from that country have not prevented it from becoming the fourth largest supplier to the U.S. market and the country with which the U.S. has its second largest trade deficit. The real obstacles to U.S. market entry for these countries are not U.S. trade laws.

Nevertheless, U.S. trade law undeniably creates problems.[1] The transition economies are no longer the nonmarket economies they were once called nor yet market economies as far as key U.S. trade statutes are concerned. Few countries or international agreements acknowledge an intermediate status for nonmarket economies, although the Uruguay Round Agreement on Subsidies and Countervailing Measures has made a pioneering breakthrough on that point. But new approaches that have been suggested or tried have too often appeared to rest on or to lead to the creation of cartel−like market−sharing agreements that are the antithesis of the market economy regime the United States claims it maintains or the transition economies claim they are trying to develop.

The U.S. Import Regime and Nonmarket Economies

A useful starting point for assessing current U.S. trade law is the Tariff Act of 1930 (6 Stat. 590 [1930]), still the principal statute governing the treatment of imports into the United States. (The Uruguay Round Agreement Act [PL 103−465, 108 Stat. 4809 (1994)], which became effective 1 January 1995, and was adopted to implement in U.S. law the agreements reached in the Uruguay Round, consists largely of amendments to this 1930 statute.) Popularly known as the Smoot−Hawley Tariff Act (after its congressional sponsors), it imposed unprecedented high tariffs on most imports.

The most protectionist aspects of the 1930 Tariff Act were eliminated for most U.S. imports after the United States acceded to the General Agreement on Tariffs and Trade (GATT). Imports from the Soviet Union and of the countries of Eastern Europe, however, which did not participate in the GATT, remained subject to the 1930 rates

of duty and did not benefit from the significant reductions in those rates achieved in successive rounds of multilateral trade negotiations under the GATT. The World Trade Organization (WTO), which began operations in January 1995 as the successor to the institutional elements of the GATT, builds on the market−opening provisions of the GATT with substantial improvements for all participants. But the only nonmarket economies in Central and Eastern Europe that are WTO members are Bulgaria, Hungary, Poland, Romania, Slovenia, and the Czech and Slovak Republics. The CIS are in the process of considering or actually applying forcontinue

membership, confident that doing so could benefit their exports. However, even now, the CIS no longer pay the high Column 2 rates initially set in 1930, but are now entitled to the column 1 MFN (most favored nation) rates of duty available to all GATT members and other countries to which the United States extended such rights, such as Taiwan (China) and Saudi Arabia.2

Trade between the United States and Eastern Europe and the Soviet Union (and China) was not significant to the U.S. economy or trade balance in the years from World War II until the 1990s, a period when political concerns dominated issues of trade with these countries. In 1949 the United States (supported internationally by the Coordinating Committee, established by the United States and its principal allies) adopted an elaborate system of export controls to deny to the Soviet bloc weapons and other technology with potential military uses. Most of these controls have now been relaxed. Although the focus here is imports into the United States, an appreciation of the control on all trade with the East bloc that pervaded U.S. law from 1945 until 1990 is essential to an understanding of the present views of U.S. policymakers on trade with today's nonmarket economies.

Trade Act of 1974

U.S. concerns with imports from nonmarket economies during the Cold War period rested on the twin assumptions that state−con−trolled economies were able to manipulate prices and output (in part for political and security reasons) and that they were hungry for hard currency at any cost. The United States therefore sought protection against feared surges of imports from such economies at cut−rate prices. One response was Title IV of the Trade Act of 1974 (PL 93−618, 88 Stat. 1978 [1975]); Section 406 of Title IV permits the President to impose duties, quotas, or other import restrictions on products from "communist countries" causing "market disruption" in the United States. The President's action is based on or confirmed by the U.S. International Trade Commission (ITC), a six−member independent regulatory agency with a similar role in antidumping and countervailing duty cases. Market disruption is defined as a rapid increase in imports that are a significant cause of material injury to U.S. producers of like or competitive products (Section 406[e][2]).

In one of the ironic turns in U.S. trade relations with the Soviet Union Section 406 was invoked by the U.S. fertilizer industry in 1979 to curtail imports of anhydrous ammonia. A component of fertilizers, anhydrous ammonia was produced in the Soviet Union under a once widely praised joint venture in which the U.S. firm providing capital and technology was paid in output of the plant. The U.S. fertilizer industry did not welcome these payments in the form of cut−rate imports. When the ITC by a three to two vote, found that the imports caused market disruption (USITC Pub. 1006 [1979]), the President nevertheless declined to take action.

Shortly thereafter the Soviet Union invaded Afghanistan. To show U.S. displeasure, the President proposed to limit Soviet imports of among other products, fertilizer, but was required to refer his decision to the ITC. In the meantime the President had replaced a Commissioner. In the new case, the new Commissioner voted with the minority in the first proceeding, with the result that the ITC now held, by a three to two vote, that imports of Russian fertilizer components did not cause market disruption in the United States (USITC Pub. 1051 [1980]). So again no action was taken.

These cases illustrate how relief for a U.S. domestic industry might be prevented under any trade remedy in which the President is permitted to act on political grounds. They spurred greater interest in nonpolitical remedies that

cannot be granted or denied on grounds other than the technical requirements of the law—remedies that permit no override oncontinue

grounds of foreign policy or public interest. This shift toward nonpolitical remedies is a major reason that Section 406 was invoked only twelve times between 1974 and 1994, with affirmative action taken only in minor cases affecting imports of clothespins, tungstate acid, and honey from China. No import from Central and Eastern Europe or the CIS has ever been subject to an order under this law.

A more highly publicized provision of the Trade Act of 1974 is Section 402, the so−called Jackson Vanik Amendment. This provision prevents the extension of MFN treatment outside the context of the GATT to imports of any communist country that does not permit free emigration. This ban can be waived for a year at a time by the President, subject to congressional rights to overrule the waiver and presidential revocation at any time. The provision was aimed at Soviet restrictions on Jewish emigration—and was protested by the Soviet government as an inappropriate intervention in its domestic affairs. But since 1990 the United States has found the emigration policies of the countries of Central and Eastern Europe and the CIS sufficiently open and so has waived the Jackson Vanik Amendment with respect to them. Such waivers have become routine.[3] The statute has remained a contentious issue only in U.S. trade relations with China as the human rights focus of the law has broadened from emigration to the rights to dissent and the treatment of dissidents.

The Jackson Vanik Amendment is a powerful, though blunt, instrument. In the sixty five years since the adoption of the Smoot−Hawley Tariff Act, U.S. rates of duty on most merchandise imports entitled to MFN treatment have declined in successive GATT rounds to an average of less than 5 percent. Imports from countries denied MFN treatment, however, are subject to the prohibitively high Column 2 rates, some set in 1930. Thus, during the period before 1990, when MFN treatment was denied to most countries of Central and Eastern Europe and the Soviet Union, most imports from these countries could not be sold competitively in the United States. And even now U.S. imports from and exports to, for example, the four Visegrad countries (Hungary, Poland, and the Czech and Slovak Republics) total less than $3.3 billion. The CIS are not much more of a factor in U.S. trade, with $3.8 billion of exports and $4.9 billion of imports in 1995.

One other feature of the 1974 Trade Act deserves mention: U.S. implementation of the Generalized System of Preferences (GSP). This system aims to stimulate the growth of developing countries and now benefits countries with a per capita GNP below levels the World Bank treats as "high income." (In 1995 this figure was about $8,500). Most imports from countries entitled to GSP enter free of duty, exempt from the MFN principle of the GATT.[4] Eligibility for GSP was denied to all nonmarket economies under the 1974 act, but has now been extended to most. A notable exception is China, whose exports to the United States are so large that it is deemed ineligible. For the same reason Taiwan (China) and the Republic of Korea were "graduated" from eligibility and Malaysia will be deemed ineligible next year. That imports from most beneficiary countries remain low reflects in part the increasingly marginal effect of duty−free treatment in a market in which customs duties otherwise payable are low and the decreasing importance of price in consumer choice (consumers here include industrial buyers of components, equipment, or services, more concerned about quality, uniformity, timeliness of delivery, and state−of−the−art technology than price).

General Import Relief Laws

While title IV of the Trade Act of 1974 focuses on imports from communist countries and other special cases, other laws apply more generally to all imports. The first of these is the escape clause, in Section 201 of the Trade Act of 1974. The GATT has always allowed signatories to safeguard their industries by withdrawing tariff concessions if goods imported as acontinue

result of those concessions cause serious injury to the domestic industry producing like merchandise (Article XIX. 1[a]). But, any such safeguard measure must be taken on an MFN basis against all importers, and is therefore frequently politically unpopular if the "culprits" are perceived to be in only a few countries.

Moreover, the test of serious injury of which imports are the principal cause has been difficult to meet. In a celebrated case in 1980 involving automobiles imported primarily from Japan, the ITC voted two to three that the imports were not the principal cause of the U.S. automobile industry's poor condition; factors such as the economic recession were no less important (*Certain Motor Vehicles and Chassis and Bodies Therefore* , 45 Fed. Reg. 85,194 ([24 December, 1980]). Relief was therefore denied.

To obtain relief, an industry not only must prove serious injury attributable primarily to the imports. It also must present a viable plan for restructuring and for adjusting to future imports—and even then a petitioner may be denied a remedy if the President decides on grounds of national economic interest to take no action (Section 201[a][2][F], Trade Act of 1974). As a result, few such cases are filed. No recent case has had particular relevance to imports from nonmarket economies.

Another general import relief is found in Section 22 of the Agricultural Adjustment Act of 1933 (48 Stat. 31 [1933]). Section 22 permits import relief in the form of duties of up to 50 percent and import quotas for agricultural products that compete with those that benefit from U.S. support programs (as many major crops do). It is thus a possible barrier for a class of goods the transition economies may well regard as among the most suitable for export to the United States. Although Section 22 has not been invoked often for imports from nonmarket economies, peanuts and cotton from China and the CIS are still under Section 22 quotas.

Because agricultural trade was largely outside strict GATT rules, Section 22 actions were not highly disciplined; moreover, the United States sought and received in 1955 an indefinite waiver from the GATT allowing it to impose market share quotas under Section 22. The Uruguay Round Agreement has obligated the United States and other members to eliminate quota systems and replace them with tariffication of all import restrictions on agricultural goods over an extended transition period—six years in the case of the United States. But, the more liberal rules do not apply to or benefit imports from countries that are not members of the WTO, such as China and the CIS. Relief under Section 22 is also predicated on presidential discretion.

Unfair Trade Remedies

Rules directed at what has been regarded by the GATT as "unfair trade" appear to be the most important legal barriers to exports to the United States by the nonmarket economies. There are four principal remedies in U.S. law against unfair trade practices: the antidumping law, the countervailing duty law, Section 301 of the Trade Act of 1974, and Section 337 of the Tariff Act of 1930. The antidumping law, the focus of the next section, is now the remedy of choice because its application neither requires nor permits presidential—that is, political—intervention.

The countervailing duty law is presently not applied to nonmarket economies. This is a result of a U.S. court decision upholding the Commerce Department's ruling that in a nonmarket economy—in which the state controls all prices and inputs in production—it is not possible to characterize any payment as a subsidy to be offset by a countervailing duty.5 But the countervailing duty law could pose a serious problem for exporters in transition economies if it were applied to them, particularly in light of the unsettled question of whether past subsidies are extinguished by the privatization of an enterprise if the new owners have not repaid the government the entire value of the subsidy.6

Section 301 of the Trade Act of 1974 permits the President to take a number of reme−soft

dial steps to respond to actions of foreign countries that the U.S. Trade Representative (a cabinet−rank officer) finds are inconsistent with trade agreements to which the United States is a party or are otherwise "unjustifiable, unreasonable, or discriminatory" and burden or restrict U.S. commerce. Among the most potent unilateral measures in U.S. trade law, Section 301 has been invoked to deal with issues not covered by the GATT, such as the failure of an exporting country to provide adequate domestic protection for U.S. owners of patents, trademarks, and copyrights or to grant U.S. suppliers access to its insurance or other service sectors.

Section 337 of the Tariff Act of 1930 is directed generically at unfair practices in the import trade. This law is administered by the ITC and, like the escape clause, is subject to presidential discretionary review. It has been invoked almost exclusively to exclude imports of products that infringe on U.S. patents, trademarks, or copyrights or for products made abroad by processes that, if used to make the product in the United States, would infringe on a U.S. patent. Imports of products from the transition economies alleged to infringe on U.S. intellectual property rights have not been significant.

The Antidumping Law: The Principal "Contingent Remedy"

Antidumping law has become the most important of the remedies available in U.S. law to restrain imports. It holds several attractions for domestic industry:

It is a remedy expressly sanctioned by the GATT, with an elaborate code (redrafted in 1994) to which most exporting countries also subscribe.

It is a remedy that the President cannot legally override on policy or any other grounds.

Although it is a remedy that entails some domestic cost, it also imposes significant costs on target companies (particularly those unfamiliar with U.S. antidumping procedure).

Once imposed, it is a remedy that is likely to remain in place for at least five years.

Concepts of Antidumping Under U.S. Law

The antidumping law permits a U.S. industry (which may be as large as twelve giant companies rolling carbon steel sheets or as small as the twelve employees of a single firm producing an exotic chemical) to seek the imposition of extra customs duties on merchandise sold in the United States at "less than fair value" if such sales cause or threaten material injury to the domestic industry producing like products. *Fair value* is equivalent to what has been called *normal value* under the new WTO Antidumping Code. For imports from market economies, normal value is determined on the basis of the producer's ex−factory prices to unrelated buyers in its home market during a period of investigation of now twelve months framing the day the petition for relief is filed. The weighted average of these home market prices is compared with the weighted average of ex−factory prices of like goods shipped for export to the United States for sale to unrelated buyers.

If home market prices are too few to provide an adequate guide to normal value, prices charged for like goods sold for export to an appropriate third country market may provide normal value. If third country prices also reflect too few transactions or, in a much more usual situation, the sales in the home or third country market generate insufficient revenue to cover the fully allocated costs of producing the merchandise sold in those markets, normal value is constructed from the costs of materials, labor, and general expenses and overhead incurred, plus an allowance for profit usual in the industry. This constructive value calcula−soft

tion of normal value is used in many antidumping investigations affecting goods from market economies.

The prices in the United States to unrelated buyers used for comparison with the normal or fair value based on foreign sales or costs are adjusted by subtracting the cost of inland freight, ocean freight, ordinary duties, and the like to make the export price comparable to the normal value ex−factory computation. Further adjustments are made to reflect physical differences in the merchandise sold in the foreign and U.S. markets and differences in the terms of sale that may affect the price in each market, such as in the speed of invoicing, warranties provided or withheld, or modes of packing, storing, or participating in the marketing of the goods.

The difference between the normal value and the export price (if the export price is lower) is called the margin of dumping and is usually expressed as a percentage of the export price of the goods. Thus if the normal value of widgets were $100 a dozen, and widgets were sold in the United States for $90 a dozen (as adjusted), the margin would be $10. This margin would usually be stated as 11.1 percent ($10 + $90 = 0 .111, or 11.1 percent). Under the antidumping law effective after 1 January 1995, these calculations should be made by comparing the weighted averages of the normal values and the export prices of the goods during the period of investigation, but may still be made by comparing the average of the normal values with the export prices on a transaction−by−transaction basis during the period. The latter practice under prior U.S. law, comparing individual export prices to an average of normal prices, gives no benefit to export prices above normal value in the computation. This practice continues for the purpose of administrative reviews (discussed below), but, at least for initial investigations has been curtailed pursuant to the new WTO Code.

If the dumping margin found is less than 2 percent, it is regarded as de minimis and is not actionable. If higher margins are found, the administering agency (now the Commerce Department) refers the matter to the International Trade Commission for a determination of whether such imports are a cause of, or threaten, material injury to the petitioning industry. The antidumping test of material injury is quite low, with material injury defined in the statute as "harm that is not inconsequential, immaterial or unimportant." (Section 771[7][A], Tariff Act of 1930, as amended). In practice, it means any injury that may be attributed to the imported merchandise, even if other causes (such as recession, changes in consumer taste, or imports from third countries not at less than fair value) may also be causing the injury. The antidumping test is purposely a lower test than that under the escape clause or market disruption statutes.

In determining whether a cause of the industry's injury is the sale of imports at less than normal value, the ITC is directed to cumulate the like imports from all exporting countries subject to investigations under the antidumping and countervailing duty law initiated by petitions filed the same day. If the imports from a particular country account for less than 3 percent of all imports of the merchandise in question, they are deemed negligible and are disregarded. But, if the imports from all countries being investigated exceed 7 percent of all imports of such merchandise, none may be deemed negligible.[7] A provision in Section 771(7)(G)(ii) of the Tariff Act of 1930, as amended, prevents this cumulation of imports from countries entitled to the benefits of the Caribbean Basin Economic Recovery Act (generally all the Caribbean countries other than Cuba and Mexico) or from countries with which the United States entered into a free trade agreement before 1987 (limited to Israel). This exception to cumulation may be of special interest to transition economies as a special benefit granted to other exporters that the U.S. has recognized have special needs and difficulties in "breaking in" to the U.S. market.break

If injury is found, an antidumping order is issued requiring each importer to pay a cash deposit on each subsequent entry of the affected goods equal to the percentage margin published for the supplier. (In a case involving many suppliers a countrywide or "all others" rate may be used.) An important feature of U.S. antidumping law is that it prohibits the absorption or reimbursement by the foreign producer or exporter of any antidumping duties paid by the importer. Absorption or reimbursement is treated as a reduction of the export price in like amount, which has the effect of doubling the duties due.

Each year, in the anniversary month of the publication of the order, the U.S. petitioning industry or any foreign exporter or U.S. importer may request an administrative review to determine, on a transaction−by−transaction

basis, whether the deposits of estimated duties during the past year were correct. If the exporter adjusted its prices, the duty deposits may have been too high, and the excess is then refunded with interest. If the deposit was too low, extra duty must be paid with interest. Each review is a new investigation and can include a hearing and on−site verification of data. If no margins are found in three successive reviews, the underlying order may be revoked. Under the new law, after an order has been in place for five years the administering authority must, at the request of an interested party, undertake a "sunset" review to determine whether revocation of the order is "likely to lead to continuation or recurrence of dumping" on a similar request the ITC must undertake a review of whether "material injury is likely to continue or recur" if the order is revoked Section 751[c], Tariff Act of 1930, as amended). Such "sunset" reviews will begin in the year 2000.

Procedural Aspects of Antidumping Law

An antidumping proceeding is denominated an "investigation" by two agencies: the Commerce Department, which determines the margins of dumping, if any, and defines the merchandise to be investigated, and the ITC, which determines the injurious effects of the imports, if any, and defines the industry within which those effects are to be examined. The investigations conducted by these two agencies are similar in many ways:

Both agencies conduct hearings in a quasi−judicial format, but do not follow the usual rules of procedure of evidence of the courts or even the rules applied to most other "adjudicatory" proceedings before administrative agencies required by the Administrative Procedures Act. Thus hearsay evidence is received, no cross examination of witnesses is permitted and informality prevails. This has both positive and negative implications for the parties on all sides.

Both agencies issue voluminous questionnaires that are time−consuming and difficult to answer completely and properly, particularly by foreign respondents not familiar with the U.S. law or U.S. accounting principles.

The time periods established by law for completing these proceedings are very short and, as a rule, cannot be extended.

Both agencies have an obligation to release, under appropriate protective orders, information collected in the investigation to at least the counsel for opposing parties (who may not divulge any confidential business information acquired under a protective order to the business personnel of a party to the proceeding).

Both agencies have the power—used particularly often by the Commerce Department—to rely on the "facts available" (FA) in making determinations.break

The "facts available" is a euphemism for data the Commerce Department may obtain from the petitioner and other sources if a respondent fails to provide data in the form and within the time limits requested by the department. The use of FA is common in cases involving nonmarket economies in part because of the unfamiliarity of the proceedings to producers in those countries and the language barriers they face in dealing with the Department's questionnaires and correspondence. Respondents must also permit Commerce Department analysts to verify all submissions through on−site inspections of the respondents' records, plants, and offices and interviews of their management, accounting, and production personnel. Failure to cooperate with these verification procedures again permits the use of adverse FA in calculating margins.

All parties are entitled to be represented by counsel throughout the proceedings (and are well advised to retain experienced lawyers in this highly specialized practice). And all final determinations by the Commerce Department or the ITC are reviewable by the U.S. Court of International Trade in New York, from which appeals may be taken to the U.S. Court of Appeals for the Federal Circuit in Washington, and ultimately the U.S. Supreme Court.

Aspects of the Antidumping Law Affecting Imports from Nonmarket Economies

Understanding how the antidumping law applies to imports from nonmarket economies requires an understanding of the curious case of *Electric Golf Carts from Poland* . In the mid−1970s the U.S. producers of electric golf carts claimed that carts from Poland were being dumped in the United States, injuring the domestic industry. Golf carts were made in Poland solely for export to the United States; so there was neither a home market nor a third country market. Moreover, only Poland and the United States produced commercial quantities of golf carts. The disposition of the case became a watershed in the trade relations between the nonmarket economies and Western GATT members.

In this case U.S. administrators adopted a novel surrogate constructed value methodology to establish fair value. They decided that whether or not products like the imports were sold in the home market of production, the local currency prices in the home market provided an unacceptable basis for calculating the fair value. Neither the inconvertible local currency nor the controlled prices of a planned economy could yield transaction prices obtained in the ordinary course of business to establish a fair value of merchandise within the meaning of antidumping law. For the same reasons it was not possible to accept the local costs (expressed in local currency) of producing the merchandise in a nonmarket economy. The costs of materials, the wages paid, and the capital charges incurred were all established by government decree, not by market forces.

Rejecting as clearly unfair the application to nonmarket economy producers of the prices charged or the costs incurred by competing producers, particularly in the importing country, the Treasury sought and used a methodology that would enable nonmarket economy producers to demonstrate their ability to produce efficiently. Under this methodology the Treasury would require a nonmarket economy producer to document its actual use of materials, labor, energy, and capital (in kilos of steel or gallons of paint; hours of manpower devoted to production, packing, and sales; kilowatt hours; and size and type of equipment) and then would value these factors of production in another, surrogate country. This surrogate would be a market economy at a level of economic development comparable to that of the nonmarket economy under investigation. Comparability would be determined on the basis of such criteria as per capita GNP, the ratio of industry to agriculture, the distribution of infrastructure, and similar traditional indicators of development. The surrogate would not have to be a producer of products similar tocontinue

those under investigation. This idea was unveiled in a speech by the author; see P.D. Ehrenhaft "The Treasury's Approach to Imports for State−Controlled Economy Countries Under the Antidumping and Countervailing Duty Laws," *Interface One* , Vol. 75 pp. 78−85, 1978.

Spain was selected by the respondent and accepted by the Treasury as a surrogate for Poland. In what was then regarded as a major breakthrough in East−West trade relations the Polish government allowed U.S. Customs Service officials to enter the producer's plant in Poland (which also produced civil aircraft for the entire East bloc) and verify the factors of production it claimed it used in making the golf carts. These factors were then valued by reference to the prices paid for similar grades of steel in Spain, the wages paid to Spanish metal industry factory workers, and the electricity charges incurred by such plants in Spain during the same period. Applying this methodology confirmed the Polish producer's claims that no sales below fair value were being made. An ITC proceeding then revoked the antidumping order on the grounds of the "changed circumstances" of the basis on which dumping was established. (USITC Pub. 1069 [1980]).

The "Polish golf cart rule" was applied by U.S. administrators of the antidumping law and made its way into the Tokyo Round Agreements under the GATT negotiated at the time that the case was pending. Curiously, the concept was not incorporated into the 1979 Antidumping Code. But it was referred to in the 1979 Code on Subsidies and Countervailing Measures: Part IV of this Code permitted signatories to apply countervailing duties on products imported from nonmarket economies. The exporters were not denominated as shippers from

nonmarket economies but were instead delicately referred to in both this Code and the Antidumping Code by citation to annex I, article VI, paragraph 1, point 2, of the GATT.8 Under the Code on Subsidies and Countervailing Measures the size of a subsidy could be determined by applying antidumping law principles, including the use of price or cost information from surrogate countries.

The "Polish golf cart rule" was not incorporated into U.S. law until 1988, in Section 1318 of the Omnibus Trade and Competitiveness Act of 1988, amending Section 773(b) of the Tariff Act of 1930 (19 U.S.C. Section 1677b). Section 1318 retains the basic idea of the Treasury's rule, but added a particularly difficult requirement—that the surrogate chosen for the valuation of the factors of production also be a producer of the merchandise. This requirement limits the selection of surrogates and often skews the comparability of the economy selected.9

Since 1 January 1980, when administration of the U.S. antidumping law was transferred from the Treasury to the Commerce Department, dozens of cases have been decided using this methodology. Most have involved imports from China. In some, the Commerce Department has considered whether a market−oriented industry exists, that is free of pervasive government control and whose costs or even prices might be acceptable in an antidumping calculation. It has also experimented with calling such industries "bubbles of capitalism" insulated from the controls of a nonmarket economy. Respondents from Central and Eastern Europe and the CIS have been unable to meet the tests however, "taking into account [their] government[s'] involvement in currency and labor markets, pricing and production and investment decisions" (*Magnesium from the Russian Federation* , 60 Fed. Reg. 16440, 16443 [30 March 1995]).

The Commerce Department will also consider a producer's claims that *de jure* and *de facto* it is not part of the state−controlled sector. Although the Department applies the nonmarket economy methodology using surrogate country values, it will calculate individual dumping margins for the producer if the producer presents acceptable records of its factors of production. The Department applies a singlecontinue

countrywide rate to all other producers not qualifying for an individual rate. This difference has been important in recent cases, including the case cited above relating to Russian magnesium. In this case, involving the first application of the principle to an exporter from a former Soviet republic, the affected exporter was found to have a 0 percent margin while all others had margins exceeding 100 percent.

The rule for determining the normal value of merchandise exported by a nonmarket economy includes no special provision for the consideration of the exchange rate. The exchange rate issue is faced in every antidumping case and does not arise more frequently or in a more arbitrary form in cases involving nonmarket economies. Sales or costs in a foreign country always need to be converted to U.S. dollars and then compared with the dollar prices of exports to the United States. Yet the exchange rate is influenced by many factors beyond the control of private parties and often determines whether dumping is found. Nevertheless, in selecting surrogate countries for valuing the inputs of producers in nonmarket economies the Department of Commerce does not take into account any possible aberration in the exchange rate between the surrogate country's currency and the U.S. dollar. The Department selects the surrogate solely on the basis of its macroeconomic similarity to the nonmarket economy and its production of merchandise similar to the goods under investigation. Nevertheless, if some of the values are deemed, as a result, to be aberrational, the Department may seek more realistic values in a second country or from an average of several surrogate countries.

Designation as a Nonmarket Economy

How do U.S. administrative authorities determine whether a country should be designated as a nonmarket economy? In 1988, Congress established six criteria to determine whether an exporting country could properly be called a nonmarket economy. (Section 771[18] of the Tariff Act of 1930, as amended):

The extent to which the currency of the country is convertible into the currency of other countries.

The extent to which wage rates are determined by free bargaining between labor and management.

The extent to which joint ventures and other investments by firms of other countries are permitted.

The extent of government ownership or control of the means of production (determined on both a de jure and a de facto basis).

The extent of government control over the allocation of resources and the price and output decisions of enterprises.

Other factors that the administering authority considers appropriate.

The last criterion, despite its open−ended−ness, has been essentially limited to the extent to which exporters are able to, and do, export their goods on terms and conditions (beyond price) that they fix without government interference and controls. With no quantitative measures, the criteria appear to be totally discretionary. This discretion is defended—probably with good reason—with the argument that the issue requires flexibility and that arbitrary numerical limits would be too difficult to support.

The Department of Commerce has been willing to permit respondents to demonstrate that on both a *de jure* and a *de facto* basis, their country ought not to be regarded as a nonmarket economy. Poland succeeded such a demonstration in the *Carbon Steel Plate from Poland* (58 Fed. Reg. 37205 [9 July 1993]). But, it did not take advantage of this determination, perhaps because it found that the results might have been even more adverse than those from its continued designation as acontinue

nonmarket economy (58 Fed. Reg. 65964 [17 Dec. 1993]).

In making a determination of whether a country is a nonmarket economy the Department of Commerce examines information from a variety of public and confidential sources. When a case is initiated, the petitioner is required to state whether or not it believes that the exporting country is a nonmarket economy. But the Department may make a determination whether or not the petitioner makes such a claim. It may also make or revoke a determination at any time. In a situation as fluid as that in the CIS, the Department is unlikely to make *a priori* determinations of nonmarket economy status. Instead it will await actual cases in which it must make a determination.

Although no formal procedures exist for designating countries as nonmarket economies, or for graduating them from that status, U.S. practice presumes that the interested parties will present whatever views are appropriate to address that issue in the context of a contested case. An interesting and unusual feature of U.S. law, however, is that a decision of the Department of Commerce to designate a country as a nonmarket economy is one of the very few rulings that is not subject to judicial review (see Section 771[18][D], Tariff Act of 1930, as amended).

Implications of the Designation as a Nonmarket Economy

Does a country's designation as a nonmarket economy make it more likely that the United States will initiate contingent protection measures against it? Experience suggests that the answer is "no." Although cases affecting Chinese imports have been among the most frequent during the past five years, Chinas status as a nonmarket economy does not appear to be the principal reason for this. The main reason is simply that many Chinese imports are at very low prices compared with competing U.S.−made goods. Most of the cases have involved items of small value and with limited markets: pencils, paper clips, sparklers (fireworks), chrome−plated lug nuts.

Not only have Chinese exports to the United States faced more antidumping cases (up to a dozen a year) than imports from other countries; these cases have led to findings of margins of dumping higher than those found in most cases involving goods from market economies. But closer examination suggests that this results less from the fact that China is considered a nonmarket economy than from the disproportionate use of the "facts available" technique for determining margins in these cases. Chinese producers have been unable or unwilling to provide the data to respond properly to Department of Commerce questionnaires. But that follows almost necessarily from the unfamiliarity of Chinese government and business officials with U.S. law, the absence of generally accepted accounting principles applied to Chinese business records, and the difficulty of translating the technical language of the questionnaires into local languages.

The impressive growth in U.S. imports from China shows, however, that the relatively large number of antidumping cases has had little adverse impact on Chinas ability to become a major supplier to the U.S. market. U.S. imports of Chinese goods surged to $45.5 billion in 1995, making China the fourth largest supplier to the U.S. market. Imports from China exceeded those from Germany by $8.7 billion, from the United Kingdom by $18.6 billion, and from oil−supplying Saudi Arabia by $37.3 billion.

Finally, it should be noted that there has been little difference in U.S. treatment of nonmarket economies that were or are members of the GATT or WTO and those that were or are not members (although there may be some difference in the application of the transitional provisions of the Code on Subsidies and Countervailing Measures). This has stemmed in part from the fact that nonmarket economies that were members of the GATT were notcontinue

automatically accorded MFN treatment, and so were subject to the special antidumping rules applicable to all nonmarket economies regardless of their GATT membership.

In antidumping cases the most fundamental difference in treatment accorded nonmarket exporters compared to shippers from market economies is the use of the factors of production methodology for the nonmarket economies to compute normal value. But applying this methodology may be no more onerous for nonmarket economy producers than the requirement imposed on market economy exporters to furnish their own cost production data. And using production statistics from a surrogate economy may be as—or more—favorable to the nonmarket economy exporter as using its own production statistics would be. For example, in the case of *Tapered Roller Bearings from Hungary* , the methodology has, over the course of eight years, yielded margins of less than 7 percent, with Yugoslavia, Portugal, and Mexico as surrogate countries in successive reviews. Informal calculations of Hungarian costs did not yield lower margins. And in a case involving Chinese chemical exports, cooperating exporters had no margins or a margin of 8.5 percent assessed, while margins assessed on the basis of the "facts available" or those not cooperating exceeded 200 percent, likely to close the U.S. market to their goods. *Manganese Sulfate from China* , 60 Fed. Reg. 26,021 (May 16, 1995).

The principal problems that arise with the factors of production methodology relate to the use of data from the surrogates selected. First, the selection of acceptable surrogates by the Commerce Department is frequently delayed until late stages of the proceeding, partly as a result of the burden of determining whether potential surrogates are also producers of the merchandise involved. Second, lack of reliable local information in surrogates available to the Department or to the parties involved in the case on which to base the valuation calculations compels the Department to resort to such data as statistics on exports to the surrogate from third countries or the United States, some of which data may be of questionable reliability. And third, the Department's unwillingness to verify surrogate country information results in its acceptance of aberrational information obtained from public sources despite its doubtful validity.

In many cases, however, use of the factors of production methodology favors nonmarket economy exporters through relief from the obligation to respond to a questionnaire on home market sales. In cases involving products

from market economies that are also regularly sold on the home market (such as basic steel shapes) these sales records are often voluminous and require extensive adjustments for credit, sale, warehousing, warranty, after−sale service, and similar arrangements that suppliers conclude with customers, often on widely varying terms. Moreover, increasingly often a respondent in a market economy is required not only to respond to an extensive home market (or third market) sales price questionnaire; it must also respond to a questionnaire probing its costs of production to address claims of petitioners that the foreign sales are below fully allocated costs and therefore cannot be used to establish normal value. If significant below cost sales are found, a market economy respondent's normal value will be based on a constructed value methodology similar to that used in nonmarket economy cases. A market economy respondent's costs would be based on its own experience in its own currency, however, while the nonmarket economy exporter's costs would be based on surrogate country valuations.

But nonmarket economy exporters face an important problem in completing factors of production questionnaires because they do not apply what is known as "Generally Accepted Accounting Principles" (GAAP) to their bookkeeping. As a result, internal records of such factors as the allocation of overhead and capital costs are often difficult to use. Even labor costs are not easily translated because of the propen−soft

sity of enterprises in nonmarket economies to value labor on the basis of productivity rather than hourly wages and to compensate workers through fringe benefits not easily identified as such (for example, the cost of a bus that brings workers to the plant). Adopting Generally Accepted Accounting Principles, as recognized in the OECD countries, would make responding to antidumping questionnaires much easier for nonmarket economy producers. (Hungary has, for example, made a significant effort to require its industries to adopt GAAP—and to train the many accountants need to apply GAAP throughout the economy.)

The other principal implication for a respondent of the designation of its country as a nonmarket economy stems from the Commerce Department's practice of treating all producers in a nonmarket economy as though they were a single enterprise. Unless a producer can demonstrate sufficient independence from government control to qualify for an individual analysis and margin (as a producer did in the cited *Magnesium from Russia* case), firms cannot take advantage of their unique efficiencies. Two other disabilities flow from this practice: First, establishing evidence of *de jure* and *de facto* independence is often difficult and always time−consuming. The statutory time constraints are important and unchangeable, and submissions are difficult to prepare for respondents that are unfamiliar with the law and whose governments also are unfamiliar with the law. Second, the quantity and quality of the evidence needed to establish independence are not well defined. Determinations of independence rely heavily on the discretion of the Commerce Department and thus lack transparency.

From the perspective of the United States, dumping by nonmarket economies has been neither a serious nor a frequent problem. Even two dozen cases a year affecting Chinese goods would not be significant to the U.S. economy—nor to China's. Cases affecting goods from Central and Eastern Europe and the CIS have been much less frequent (see Appendix A for a description of selected cases): But it is important to avoid the trap of counting cases as the prime measure of the importance of antidumping laws to trade. A recent report by the ITC examining this phenomenon found that during the period 1980 to 1993, 682 antidumping cases were filed, of which only 39.4 percent resulted in affirmative findings of dumping and injury (USITC Pub. 2900 [1995]). Of these cases, 262 involved steel products. Thus 19 cases in one year involved cold rolled sheets of carbon steel from as many countries. Another 20, covering the same products were filed six years later, after arrangements that ended the first wave expired. Other cases involved other types of steel products (hot rolled, stainless, bars, wire, pipes). The ITC report suggests that the issues relating to antidumping laws cannot be studied by the case, but should be examined by the industry; often, a large number of cases will actually apply to a single industry. For example, the report's review of bearings (the only industry examined in which cases affected exports from Central and Eastern Europe), list fifteen antidumping cases, affecting at least five separate types of products called bearings. And, a single order applicable to urea from the Soviet Union became twelve cases following the breakup of the country (see Appendix A).

More appropriate and useful in measuring the effect of the antidumping law would be to examine the value and volume of trade affected by investigations and by antidumping orders actually entered. But the necessary data for this are not available from public sources. Nevertheless, the repeated filings of the U.S. steel industry (more than 250 cases since 1980) suggest that the antidumping law may not be an effective curb on imports. The massive growth of Chinese imports in the face of the many antidumping cases filed suggests that the law lacks even a general deterrent effect.

Regardless of the U.S. perspective, from the perspective of the exporting countries the antidumping law is a bewildering and seemingly unfair law constituting a nontariff barrier.break

That the need of nonmarket economies to export in order to complete their transition to market economies can be given no favorable consideration in the administration of the law is particularly surprising and disappointing to them. Nonmarket economy respondents in antidumping proceedings complain that they are often shut out of the U.S. market by findings of high margins. But experience in China, Hungary, and Romania has shown that nonmarket economy exporters, through cooperation with the U.S. authorities and effective representation by U.S. counsel, can be successful in demonstrating no injury from their exports and thus avoiding all antidumping duties or in reducing margins significantly from those the petitioners allege.

Suspension Agreements with Nonmarket Economy Exporters

Although the administering authority of the U.S. antidumping law cannot consider foreign policy or even U.S. security interests in the administration of the law, one small possible exception to this principle exists in the availability of so−called suspension agreements. The United States traditionally has been unwilling to use price undertakings in lieu of imposing duties to settle antidumping cases. It has been even less willing to enter into suspension agreements, which in essence, impose quantitative limits on imports. It has viewed these agreements as GATT−proscribed quotas by another name, and thus as market allocation schemes contrary to a free market regime. Nevertheless, in 1988 U.S. antidumping law was amended to allow the Commerce Department to enter into agreements imposing quantitative restrictions, as a way to limit the regular and politically−charged cases affecting steel. But, the conditions for entering into such agreements for products from market economies have made it almost impossible to invoke this provision for those economies—and the Commerce Department has never done so. But the conditions for such agreements are less onerous for products from nonmarket economies, and the Commerce Department has used this authority for such economies—in the cases affecting, for example, honey from China and uranium from several members of the CIS.

A suspension agreement suspends (but does not terminate) an investigation. When it enters into force, no final determination of sales at less than fair value is made by the Commerce Department, no final determination of injury is made by the International Trade Commission, and no antidumping order imposing antidumping duties is entered. The investigation is simply suspended—ready to resume if the suspension agreement is breached or does not operate as planned. Any suspension agreement with a nonmarket economy is conditioned on the ability of the Commerce Department to claim that the agreement "is in the public interest," can be "effectively monitored," and will "prevent the suppression or undercutting of price levels of domestic products by [such] imports" (19 U.S.C. Section 1673c[l]).

Congress was nevertheless concerned about the potential for abuse by the Commerce Department of the power to suspend investigations, and foreign exporter interests have sought to retain the ability to obtain a full injury determination from the ITC (which at the time a suspension agreement is negotiated has rendered only a preliminary determination on the lower threshold standard of "reasonable indication" of injury). Therefore, the law allows interested parties to request both agencies to continue their investigations as though no agreement had been entered into, or to request the ITC to review the suspension agreement to determine whether the injurious effect would be eliminated. These provisions of U.S. law have been virtually dead letters since 1979,[10] primarily

because the Commerce Department knows that suspensions are unpopular with the major petitioning industries and are not consistent with the principles of a free and unman−aged economy.break

Suspension Agreements have nevertheless been used in the case filed in 1991 alleging that uranium from the Soviet Union was being sold at less than fair value and that such sales caused or threatened injury to the domestic industry producing uranium ore. The ITC issued a preliminary determination that there was "a reasonable indication" that a U.S. industry was materially injured by reason of the sales allege to be at less than fair value (USITC Pub. 2471 [December 1991]). And, the Department of Commerce reached a preliminary determination that the product from the Russian Federation was sold at less than fair value at a weighted average dumping margin of 115.82 percent (57 Fed. Reg. 23,380 [3 June 1992]).

The Russian Federation then entered into a suspension agreement, (57 Fed. Reg. 49,220 [30 October 1992]), later amended as discussed below (59 Fed. Reg. 15,373 [April 1994]). A suspension agreement also was signed for Uranium exports from Ukraine but then withdrawn. The Commerce Department then made its final determination of sales at less than fair value (50 Fed. Reg. 36,640 [8 July 1993]), and an antidumping order has been entered affecting such sales.

Although suspension agreements have rarely been used by the United States, they are expressly permitted by the Antidumping Code of 1994. But Article 8.3 of the Code reflects the unease with which the United States also views them, on the policy grounds mentioned above. Interestingly, despite the number of cases in both the United States and the European Union related to imports from the nonmarket economies, the new Antidumping Code again includes no express provision regarding the application of antidumping laws to this trade.11 It retains the essence of Article 15 of the 1979 Code, which only "recognizes" that "special regard" must be given to the situation of "developing country Members" and encourages the exploration of "constructive remedies provided for" in the new Code before imposing antidumping duties. These remedies presumably are the price undertakings covered by Article 8 of the Code.

Possible Initiatives to Ease the Burden of U.S. Antidumping Law for Nonmarket Economies

What could be done to ease the burden of U.S. antidumping law for nonmarket economies? The United States could consider changes in the way it applies the law to these economies. The nonmarket economies could take measures to make complying with the law easier. The World Bank could also take measures that would make compliance easier for nonmarket economies, and it could assist all parties by making data on these economies easily available.

U.S. Initiatives Must be Consistent with General U.S. Trade Law

To evaluate possible changes in the application of U.S. trade laws to imports from the transition economies, account must be taken of the U.S. government's perceptions of the problems raised by this trade. Public information and private talks with U.S. trade officials suggest that such officials hold the following views.

a. *The United States should help the nonmarket economies in transition—but it cannot compromise its trade laws to do so* . While the United States wishes to aid the nonmarket economies in their efforts to transform their economies and to obtain access to the U.S. market, it would be unwilling to compromise the overarching principle of U.S. trade laws—that they are remedial measures designed to protect U.S. workers and investors. Repealing the trade laws that apply to the nonmarket economies or simply not applying those laws in most instances is not politically feasible: neither the quantity of imports from nonmarket economies nor their qualitative significance to the United States (other than incontinue

the uranium case) would support such an effort.

b. *The United States should help the nonmarket economies in transition—but it cannot further unbalance its budget in doing so* . The United States adopted the Support for East European Democracy Act (SEED Act) in 1989 PL 101−179, 103 Stat. 1298 [1989]), pledging a variety of aid to assist the transformation of the formerly Communist states of Central and Eastern Europe into free market democracies. But, outlays under the Act have been modest, and most payments have gone to U.S. entities providing U.S. goods and services in the nonmarket economies rather than to true seed investments in production in those countries. The present budget−balancing atmosphere in the United States is unlikely to permit increased appropriations in the near future to pursue the laudable goals of the SEED Act. But nothing in this legislation contemplated exemption from antidumping duties in proper cases. Although exports from such countries do qualify for duties reduced to 0 percent under the GSP for many items, even that measure was delayed by budgetary concerns. Extension beyond May 1997 may require either new ways of "scoring" the budget impact of failing to collect duties on products that have been able to enter duty free under GSP for 25 years, or identifying revenues that can "cover" such lost duties.

c. *Although U.S. antidumping laws are not well designed for dealing with some of the real problems of the transformation of the nonmarket economies, they must be applied* . The metal ore cases largely affecting CIS grew out of economic phenomena that the unfair trade laws are not designed to address. Nevertheless, the law applies.

The antidumping law was adopted in the post−World War I era as a defense against perceived threats from such sources as the German paint and dye industry. That industry was portrayed as able and willing to sell its products in the United States at prices lower than it charged in its protected home market, with the aim of destroying its U.S. competition. It was presumed that the foreign firms once successful in this predatory practice, would raise their U.S. prices to the same monopoly levels that prevailed in their home markets, which were closed to re−imports from the United States.

U.S. producers of color television sets alleged that the Japanese producers of color TV sets pursued a similar predatory scheme in the 1970s. But, as the U.S. Supreme Court observed in a decision affirming summary judgment against the U.S. TV set producers in parallel private lawsuits they brought against the Japanese producers under U.S. antitrust statutes, it is highly improbable that any industry can pursue such predatory pricing for a sustained period. The Court agreed with the "consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." (*Matsushita Electric Industrial Co. v. Zenith Radio Corp* ., 475 U.S. 574, 589 ([986]). But such views have not convinced champions of antidumping laws.

The law was only designed to deal with exporters charging different prices in their home and export markets. It is available in situations involving relatively small amounts of merchandise, of relatively modest importance either to the exporting and importing countries. When the law is invoked with respect to exports that have no market elsewhere or are of great significance to the economy of either the exporting or the importing country, the governments concerned must—and generally do—seek alternative (and, in part, extra legal) measures to deal with the problem. Antidumpingcontinue

law provides no sensible guide for example, for the disposition of the stockpile of uranium in several CIS, which cannot be used or sold at home and which, for national security reasons, the United States wishes to have exported. Yet once the antidumping law is invoked by the U.S. uranium producing industry, the President has no power under the law to prevent the companies or unions affected from pursuing their antidumping case. That case could result in duties of more than 100 percent—duties that even U.S. government agencies (such as the Department of Energy) would be required to pay.

The phenomenon of large quantities of raw or semifinished goods, produced in a country with no domestic demand for such goods, is at least temporarily a central problem of the nonmarket economies of the CIS.

Antidumping law is not the right option for dealing with an underlying situation such as that presented by the Uranium case. In that case an imaginative and unprecedented suspension agreement was adopted to deal with the problem in a politically acceptable way. But even that arrangement may require a statutory change. President Clinton has pledged to the CIS members that he will try to obtain such a statutory change from Congress, but Congress may not agree to adopt it. If no party objects, it may remain in place in any event.

d. *The nonmarket economy classification has not been an important factor in the outcomes for nonmarket economies of the application of contingent protection measures* . A few cases have been brought under the U.S. market disruption law, but none has significantly affected imports from the nonmarket economies. The countervailing duty law has not yet been applied to imports from these countries, and Section 301 of the Trade Act and Section 337 of the Tariff Act have not been invoked against their imports. Section 22 of the Agricultural Adjustment Act has been applied to cotton and peanuts from China and some CIS countries, but does not differentiate between types of exporters.

Thus the antidumping law is the principal statute of concern for nonmarket economies. In some cases, antidumping duties have closed the market to some exporters. Not only are the duties likely to raise prices to U.S. buyers, making the merchandise unattractive to buy, but the obligation on exporters to continue to participate in administrative reviews constitutes a hidden tax on them. Even participating in the initial investigation can be an expensive undertaking. Thus it is probably as much the invocation of the process as its results that constitutes a barrier to some imports from some exporting countries.

Yet, some nonmarket economy exporters with low margins have continued to export to the United States despite antidumping duties. To some extent nonmarket economy exporters are disadvantaged compared with exporters from market economies, which can simply reduce home market prices (through not below the cost of production) to reduce or avoid dumping margins. A nonmarket economy producer, for which normal value is always determined through a cost of production analysis, has less control over the continued finding of dumping. On the other hand, nonmarket economy producers may benefit from surrogate country valuations—particularly their lower overhead rates. Thus, use of this methodology has not been insuperable for the exporters of bearings from Hungary and Romania for example.

Moreover, antidumping cases in the United States seem to have had a small impact on nonmarket economy exports in general, even for economies whose exports are often the subject of such cases. Despite the frequency of antidumping actions taken against Chinese goods, China is a highly successful supplier to the U.S. market, enjoying a trade surplus incontinue

1995 of nearly $34 billion (slightly more than half the surplus of Japan, and about twice the surplus of Canada, the next largest U.S. trading partner). Taiwan (China) also a frequent target of antidumping cases, enjoyed a trade surplus with the United States in 1995 of almost $10 billion. Thus antidumping remedies are not necessarily macroeconomic trade barriers.

Small Changes can Ease the Transition

Some small changes in U.S. law might be made to ease the transition of nonmarket economies. Some modest changes could be made to soften the antidumping remedy in the United States, building on portions of the Uruguay Round Agreements, and recognizing the special needs of the nonmarket economies and the U.S. interest in aiding their transition. These changes might include the following:

a. *Permitting judicial review of the designation of nonmarket economies and of the selection of surrogate countries* . These issues should not be insulated from the judicial review that is otherwise a hallmark of antidumping law. Permitting judicial review would be consistent with notions of transparency and due process.

b. *Articulating in regulations the basis on which nonmarket economies can graduate from that status* . The distinction in antidumping law between market and nonmarket economies is unavoidable, because such law presumes the autonomy of an exporter to set its prices both in the home market and for export. To the extent that the government of a country interferes by fixing prices and the costs of production, and to the extent that local currencies are not freely convertible, the behavior of an exporter from that country cannot be judged by ordinary rules. Nevertheless, the criteria in the U.S. antidumping law for identifying nonmarket economies and independent producers in these countries can be quantified and made more transparent.

No effort has been made to apply these standards to imports from countries other than those in Central and Eastern Europe, the CIS and China. There are probably other countries in which government control of the economy is as pervasive, and the use of neutral criteria could lead to the conclusion that they too are nonmarket economies. But because few imports from such countries have threatened, much less injured, U.S. industries, there is little incentive or interest in extending the application of the law to countries that may be nonmarket economies within the statutory definition but are not now regarded as such.

The United States has not articulated a transparent test for its determinations of the status of a country as a nonmarket economy, nor detailed the procedures that a country must follow to graduate from this status: Individual producers in nonmarket economies have been able to demonstrate that they retain sufficient autonomy to allow their own experience to be used in determining a company−specific analysis and margin of dumping. As long as the administering authority is willing to entertain case−by−case requests by producers and by countries to be classified in accordance with their de jure and de facto situation, no significant change in the statute seems likely.

Moreover, identifying products of a nonmarket economy on an a priori basis as not subject to the nonmarket economy rules is not feasible. The rationale for differentiated treatment of exports from the nonmarket economies is based not on the products in question but on the organization of the economy in which the products are made. That organization affects the prices of all or most products. While product specific QRs have been negotiated for a number of goods m including textiles, cheese, beef, tin, and coffee, and a multilateral steel agreement is under discussion—none of thesecontinue

agreements depends on the nonmarket economy status of any participant.

It would have been appropriate to include some consideration of the nonmarket economy status in the Antidumping Code. In the committee established by the Code any WTO member can raise the question of whether the present U.S. law contains sensible criteria for determining whether a country is a nonmarket economy. But, until an international consensus emerges, each importing country, has the right and obligation to make such determinations for itself, consistent with its international obligations. And, although the WTO could adopt uniform criteria for "graduation" from nonmarket economy status, the adoption of rules acceptable to the United States and Central and Eastern Europe would probably have little real world effect.

c. *Changing the test for negligible imports* . The concept of negligible imports was introduced and quantified in the new Antidumping Code. But in both the Code and the new U.S. law this concept is stated in terms of a percentage of imports. The imports of several negligible exporters will not be excluded from a determination of injury if their cumulated shipments exceed 7 percent of all imports. A softer transition remedy could focus on percentages of domestic consumption rather than of imports. For some niche market products, very small quantities could represent significant percentages of the total imports. Conversely, even a 100 percent share of imports could be a tiny fraction of U.S. consumption. For the purposes of providing a transition provision to aid the transition economies, a percentage of consumption would be a more appropriate measure.

d. *Expanding the list of countries whose imports are not cumulated* . The nonmarket economies could be added to the list of countries eligible for noncumulation of their imports in injury determinations by the ITC. This benefit has been extended to Israel and to countries eligible for participation in the Caribbean Basin Initiative; it could also apply to the nonmarket economies regarded as transition economies.

e. *Creating a larger de minimis safe harbor for nonmarket economy sales* . The new Antidumping Code and U.S. antidumping law have already increased the de minimis margin from 0.5 percent to 2.0 percent. For transition economies this safe harbor might be raised to 10 percent, particularly if the dumping margin during the period of investigation were also no more than 10 percent. In industries in which price sensitivity is critical, however, the threshold might need to be lower.

f. *Amending the criteria for selecting surrogate countries* . The antidumping statute could be amended to drop the requirement that a surrogate country selected for valuing a nonmarket economy producer's factors of production must also be a producer of the merchandise. This concept was not a part of the Treasury's original "Polish Golf Cart" rule. The requirement imposes an unnecessary limitation on the administering authority's ability to select a market economy that serves as an accurate surrogate for a nonmarket economy. It compels the Commerce Department to consider countries that may not be truly comparable, which distorts the purpose of the rule and may distort margins.

g. *Publishing lists of surrogates annually* . The Commerce Department could be required to publish annually, or at leastcontinue

immediately after a case is filed, a list of surrogate countries for nonmarket economies, allowing interested parties and governments to comment on the selections. An annual publication would identify the countries that the Commerce Department then regards as nonmarket economies, but should not affect the rights of parties to claim, in a specific case, that a country is no longer a nonmarket economy. Although annual publication of the list of surrogates might reduce opportunities to contest the selections, more advance knowledge of the selections should aid predictability for all interested parties.

h. *Translate all relevant laws, regulations and forms* . The Commerce Department could be required to translate the antidumping law, regulations, and questionnaires into the languages of the nonmarket economies, or commission another agency to do so, to remove the burden of translation for producers in the nonmarket economies.

Nonmarket Economy Measures

Current U.S. law contains only two choices: a country either is a nonmarket economy or is not. The countries of Central and Eastern Europe and the CIS will continue to be designated nonmarket economies by the United States as long as they meet the criteria stated in the U.S. law that a privatized, free economy does not exist and as long as no effort is made by their governments or exporters to seek a change in classification. If a country is designated as a nonmarket economy and cannot change its status, it must prepare for submission the data needed for calculating margins in any case that is brought. Experience has shown that these margins need not be excessive or disproportionate to those found in other cases. The real risk of market−closing findings stems from an unwillingness or inability to respond to proper investigations. Measures they may introduce to aid their transition include:

a. *Translate questionnaires and train officials* . The government of the countries of Central and Eastern Europe and the CIS could translate standard questionnaires used in the U.S. antidumping actions into the local language and designate officials to become familiar with the U.S. law.

b. *Adopt generally accepted accounting principles (GAAP)* . Larger enterprises in these countries should adopt generally accepted accounting principles to assist them in responding properly to dumping claims—as well as for their transition into the global economy in which access to capital and markets will often depend on their ability to present "acceptable" financial statements.

c. *Seek reviews of nonmarket status* . Exporters from these countries now subject to antidumping orders could seek determinations from the Department of Commerce or the International Trade Commission—or both—that a change from a previous designation as a nonmarket economy" to a market economy constitutes the type of changed circumstance warranting a review by those agencies. In such a review, the domestic industry might no longer be able to demonstrate injury from the imported merchandise, and a previous order might be revoked more expeditiously than in a normal review. The precedent of *Electric Golf Carts from Poland* could be cited.

WTO and World Bank Initiatives

The WTO committee established to oversee administration of the Antidumping Code, should initiate studies of members' procedures for designating countries as nonmarketcontinue

economies and for graduating countries from this status.

a. *The World Bank could consider assistance to nonmarket economies to help train officials with a foreign trade role in U.S. antidumping law* . These officials could then explain U.S. legal principles to exporting enterprises and assist them in completing of questionnaires and in participating in on−site verifications. The Bank could also offer technical assistance to help these countries adapt to the world trading system. Such assistance could include the advice of experts in U.S. (and other Western) antidumping law on proper translations of the documentation required in a case and on the adoption and implementation of generally accepted accounting principles by producers.

b. *The Bank could also make a valuable contribution by regularly reviewing the statistics it generates and publishes with an eye to their application to antidumping cases* . The administering authorities of many countries, including the U.S. Department of Commerce, rely on the Bank statistics in determining whether a country is a nonmarket economy and in selecting surrogate countries. Selecting market economies at a comparable level of economic development is often problematic. These selections would be improved through the availability of current, reliable statistical data from an agency such as the World Bank. The Bank could also contribute by making easily available to U.S. administering authorities and to other interested parties in antidumping cases data on input costs, wage rates, and similar facts about the nonmarket economies that the Bank collects in the course of its usual activities. All parties would benefit from the ready availability of such data from a neutral and reliable source.

Appendix A. Selected Antidumping Cases Affecting the Nonmarket Economies Since 1980

Tapered Roller Bearings from Hungary and Romania , 52 Fed. Reg. 17,428, 17,433 (8 May 1987). In these cases margins of between 7 percent and 9 percent were initially found; in subsequent annual reviews the margins were lowered but never eliminated. The surrogate countries selected shifted from year to year through initial and annual review proceedings and included Yugoslavia, Portugal, and Mexico. South Africa was proposed for a fifth annual review, but all parties withdrew their requests before this review was completed. The Hungarian producer has ceased exporting to the United States, but many factors other than the antidumping order affected its sales. The Romanian exporter ceased sales for a period, during which MFN treatment of Romanian imports was temporarily suspended because of human rights issues.

Sulfanilic Acid from Hungary . Although the ITC found margins in this case, it found no injury largely because the imports provided limited substitutability for the domestic product. The investigation was then terminated (USITC Pub. 2603 [1993]), the U.S. petitioner appealed, and the U.S. Court of International Trade remanded the case for a new determination by the commission (R−M Industries Inc. v. United States, No. 93−03−00184 [Slip. Op. 94−49], [18 March 1994]). On remand, the commission affirmed its prior determination. (USITC Pub. 2835 [November 1994]).

Ball Bearings from Poland and Hungary . No margins were even calculated in these cases, as the exporters obtained from the ITC a preliminary determination that there was "no reasonable indication" that the U.S. industry was injured by reason of these imports. The Hungarian share of the U.S. market was 0.2 percent; the Polish share was 0.1 percent.continue

Whether or not the imports were cumulated, no injury was considered possible (USITC Pub. 2374 [April 1991]). The decision was affirmed in an appeal taken by the major domestic producer (Torrington Co. v. U.S., 747 F. Supp. 744 ([Ct. Int. Tr. 1990]), affirmed, 938 F. 2d 1278 [Fed. Cir. 1991]).

Carbon Steel Plate from Poland. In this case the Commerce Department was prepared to accept Polish prices or costs to calculate fair value. But because the Polish producer failed to provide adequate data, the department used Malaysia, which also produced the product, as a surrogate country and calculated margins of nearly 62 percent (58 Fed. Reg. 37205 [9 July 1993]; 58 Fed. Reg. 65964 [17 December 1993]).

Titanium Sponge from the USSR. An antidumping order was issued in 1968 and remained in effect until 1992, when the order was divided into fifteen separate orders affecting all the CIS (57 Fed. Reg. 36,070 [12 August 1992]). In 1994 the orders applicable to eleven countries were revoked with the consent of the industry (59 Fed. Reg. 54886 [2 November 1994]). Product from Kazakstan remains under the order at a previously determined margin of 84 percent (59 Fed. Reg. 16617 [7 April 1994]).

Urea from the USSR. An antidumping order was issued in 1987, and later divided among the CIS. The Commerce Department published a proposal to revoke the order, as no party had requested an administrative review for four consecutive years. But the U.S. industry objected to a revocation, and the revocation was withdrawn (58 Fed. Reg. 51,058 [30 September 1993]). The order remains in effect but will become subject to the new "sunset" provisions under the Uruguay Round Agreement Act.

Ferrosilicon from Kazakstan and Ukraine , 58 Fed. Reg. 13,050 [9 March 1993]). In this case the Department of Commerce claimed a failure to receive adequate responses to its questionnaires and used best information available to establish a punitive margin of dumping for all producers and exporters of 104.18 percent. The data were furnished by the petitioner, based on its own U.S. factors of production and valued in Mexico as a surrogate country. The department accepted these calculations. The only issues contested in the proceeding were raised by a company that bought the merchandise from a state−owned export enterprise in the CIS. It claimed that the petitioner did not adequately represent the U.S. industry and that at issue were two different products that ought not be considered as one. Both contentions were rejected.

Uranium from the Russian Federation , 57 Fed. Reg. 23,380 (preliminary determination of sales at less than fair value, 3 June 1992). In this case a suspension agreement was concluded that established quotas for imports of the product based on the selling price of domestically produced ore in the United States; the higher the price, the greater the quantity of ore that could be sold, The use of domestic prices in the importing country to establish fair value is generally regarded as inappropriate in antidumping law. The agreement also included a grandfather clause, allowing the completion of shipments for which contracts had been previously concluded (57 Fed. Reg. 49,220 [30 October 1992]). This too was unusual, as all outstanding contracts requiring the entry of merchandise after the effective date of an affirmative preliminary determination are generally subjected to extra duties. This

system was later replaced by a new and even more unusual procedure: it permitted Russian sales only to the extent that they were matched, pound for pound, by sales of newly produced uranium by the U.S. producers (59 Fed. Reg. 15373 [1 April 1994]). The agreement appeared to be a quintessential example of managed trade, contrary to the market−driven measures that antidumping laws are intended to provide.

Pure and Alloy Magnesium from the Russian Federation , 650 Fed. Reg. 16440 (30 March 1995). This case was notable for the examina−soft

tion by the Department of Commerce of the "market reforms in the Russian Federation" to determine whether the product was produced by a "market−oriented industry." It concluded that while many state controls have been abandoned in Russia, "that does not mean functioning markets have replaced control (650 Fed. Reg. 16,443 [30 March 1995]). Nevertheless, the department found one producer sufficiently free of government ownership and control to permit calculating of a separate margin for that company. The firm was found to be 51 percent owned by workers' collectives or investment funds and free of the direct control of any government agency. Brazil was selected as a surrogate, and the producer's margin calculated at 0 percent. Other producers' margins, at the countrywide rate, were 100.25 percent.

Ferrovanadium and Nitrated Vanadium from the Russian Federation 60 Fed. Reg. 27,957 ([26 May 1995]). The Commerce Department reaffirmed its views that Russia is still a nonmarket economy. In addition, it noted that some of the producers withheld files during verification of their submissions and provided inadequate responses to questionnaires. Accordingly, for those respondents the department used best information available to calculate margins based on the highest rate in the petition. That margin was 108 percent. By contract, a cooperating producer was found to have a margin of only 3.75 percent. The department used South Africa as a surrogate, recognizing that "economic growth trends in South Africa and Russia are dissimilar. "But, it stated that it was bound by the statute to seek a surrogate that produced a similar product and could, otherwise have considered Algeria, Poland, Thailand, Tunisia, or Turkey (60 Fed. Reg. 27,960−61 [26 May 1995]).

Circular Welded NonAlloy Steel Pipe from Romania , (USITC Pub. 2899 June 1995). In this case affecting nonmarket economies the ITC rendered a four to two affirmative preliminary determination of injury despite a cumulative import penetration by the product from Romania and South Africa of 3.2 percent. (This figure is a percentage of U.S. consumption, not of total imports. The "safe harbors" for negligible imports in U.S. law are based on a percentage of imports. The share of imports in this case exceeded that measure.) The U.S. industry's market share declined from 74.3 percent to 69.6 percent, in part because of sales of other foreign suppliers not alleged to sell at less than for value. This case is one of the first to be decided since the Uruguay Round Agreement Act was adopted which requires the ITC to consider the margins alleged. The margins were alleged to be 39.58 percent for Romania, 107.87 percent to 127.81 percent for South African suppliers.

Manganese Sulfate from China , 60 Fed. Reg. 26,021 (16 May 1995). This preliminary determination by the Commerce Department reviews past practices in determining whether specific producers are entitled to company−specific margins. To establish the absence of de jure control, the department reviews statutes and regulations that purported to shift ownership of enterprises from the government to "all the people," allowing enterprise management to choose suppliers and to make purchasing and sale decisions (including exports) without government approval or supervision. To establish the absence of de facto control, the department reviews the actual exercise by the enterprise of its abilities to set prices, to sign contracts, to select management personnel, to retain the earnings from its export sales, and to dispose of its profits or finance its losses. In this case the department found two entities able to meet these tests (60 Fed. Reg. 26,023 [16 May 1995]). The surrogate country used to value these firms' factors of production was India. The two cooperating producers were found to have margins of 8.45 percent and 0 percent; all others, including some nonresponding producers, were found to have margins of 212.31 percent.

Chrome−Plated Lug Nuts from China PRC , 60 Fed. Reg. 19,720 (20 April, 1995). Thesecontinue

Table 2A.1.
Antidumping orders and suspension agreements affecting countries of Central and Eastern Europe and the former Soviet Union, 1980−95

Country	*Product*	*Margins (percent)*	*Federal Register cite and date*
Hungary	TRBs	All: 7.42	52 Fed. Reg. 23,319 19 June 1987
Poland	Cut−to−length Cold Steel Plate	All: 61.98	58 Fed. Reg. 44,166 19 Aug. 1993
Romania	Ball bearings	All: 39.61	54 Fed. Reg. 20,906 15 May 1989
Romania	Cut−to−length Cold Steel Plate	All: 75.04	58 Fed. Reg. 44,167 19 Aug. 1993
Romania	TRBs	All: 8.70	52 Fed. Reg. 23,320 19 June 1987
Romania	Urea	All: 90.71	52 Fed. Reg. 26,367 14 July 1987
Armenia	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Azerbaijan	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Belarus	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Georgia	Titanium sponge	All: 83.96.a	33 Fed. Reg. 12,138 28 Aug. 1968
Georgia	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Kazakstan	Ferrosilicon	All: 104.18	58 Fed. Reg.

			18,079 7 April 1993
Kazakstan	Titanium sponge	All: 83.96a	33 Fed. Reg. 12,138 28 Aug. 1968
Kazakstan	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Kyrgyz Republic	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 July 14, 1987

a. No margin figure was included in the original antidumping order. This figure is from the most recent final results of review (52 Fed. 9,323 27 March 1987).

(table continued on next page) break

Table 2A.1.
(continued)

Country	*Product*	*Margins (percent)*	*Federal Register cite and date*
Latvia	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Lithuania	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Moldova	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Russia	Ferrosilicon	All: 104.18	58 Fed. Reg. 34,243 24 June 1993
Russia	Titanium Sponge	All: 83.96a	33 Fed. Reg. 12,138 28 Aug. 1968
Russia	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26367 14 July 1987
Russia	Vanadium	Highest: 11.72 Lowest: 3.75 Others: 108.00	60 Fed. Reg. 35,550 10 July 1995
Tajikistan	Urea		

		Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Turkmenistan	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987
Ukraine	Ferrosilicon	All: 104.18	58 Fed. Reg. 18,079 7 April 1993
Ukraine	Titanium sponge	All: 83.96a	33 Fed. Reg. 12,138 7 Aug. 1968
Ukraine	Uranium	All Margins: 129.29	58 Fed. Reg. 45,483 Aug. 30, 1993
Ukraine	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 July 14, 1987
Uzbekistan	Urea	Highest: 68.26 Lowest: 53.23 Others: 64.93	52 Fed. Reg. 26,367 14 July 1987

a. No margin figure was included in the original antidumping order. This figure is from the most recent final results of review (52 Fed. 9,323 27 March 1987).

Table 2A.2
Suspensions

Country	*Product*	*Federal Register cite and date*
Hungary	Truck trailer axles	47 Fed. Reg. 66 4 Jan. 1982
Kazakstan	Uranium	57 Fed. Reg. 49,220 30 Oct. 1992
Kyrgyz Republic	Uranium	57 Fed. Reg. 49,220 30 Oct. 1992
Russia	Uranium	57 Fed. Reg. 49,220 30 Oct. 1992
Uzbekistan	Uranium	57 Fed. Reg. 49,220 30 Oct. 1992
Ukraine	Silicomanganese	59 Fed. Reg. 60,951 29 Nov. 1994

recent preliminary results of an annual administrative review followed the original antidumping order issued in 1992. They found that only one exporter that provided data demonstrated the necessary lack of de jure or de facto control over its operations to qualify for an individual margin analysis. India was selected as a surrogate for China, based on its current per capita GNP, the growth of per capita GNP, the national distribution of labor

between agriculture and industry, and its status as a producer of the product. The rate for the company demonstrating an absence of control was 45.44 percent. All other producers were subject to the same rate, but were found to have made no shipments during the period of review.

Notes

This chapter was completed in November 1995 and is current as of that date.

1. Other U.S. laws, from customs classification to federal and state rules and principles governing labeling, care instruction and product liability, also seem to create "nontariff barriers" to trade to NME exporters, particularly of consumer goods. These are *outside* the scope of this paper.

2. The Harmonized Tariff Schedule of the United States lists duties in three columns. Column 2 rates are in general legacies of 1930. Column 1 rates apply to goods from countries receiving MFN treatment. Column 3 lists the reduced special rates (often 0 percent) available for imports under various preferences, such as the Generalized System of Preferences or the North American Free Trade Agreement (NAFTA).

3. A minor side−effect of annual waivers of the Jackson Vanik Amendment is to maintain the application of title IV of the Trade Act of 1974 to the transition economies. As noted, this title applies only to communist countries both for the purposes of the amendment and the market disruption remedy. As long as Jackson Vanik Amendment waivers are considered necessary, it is harder to argue that the market disruption law does not apply to the transition economies.

4. The U.S. GSP program has been extended through May 1997 and further extension is probable. The per capita GNP level of the countries of Eastern Europe and the former Soviet Union, with the possible exceptions of the Czech Republic and Hungary, are well below the $8,500 level.

5. Carbon Steel Wire from Czechoslovakia, 49 Fed. Reg. 19370 (7 May 1984), affirmed in Georgetown Steel Corp. v. United States, 801 F. 2d. 1208 (Fed. Cir. 1986).

6. The Court of Appeals for the Federal Circuit held that payment of a fair market price for previously subsidized assets in a market−driven privatization did not as a matter of law, extinguish a subsidy for their acquisition for the purpose of countervailing duty law. See Saarstahl AG v. U.S., 78 F. 3d 1539 (Fed. Cir. 1996). The case was decided under prior law and is consistent by the new countervailing duty law, which provides that a change of ownership of a foreign enterprise or its assets "does not by itself require" that past subsidies be regarded as no longer coun−soft

tervailable "even if the change . . . is accomplished through an arm's length transaction" (Section 777[5][F], Tariff Act of 1930, as amended and effective as of 1 January 1995). The decision is to be made case by case. See Statement of Administrative Action accompanying the Uruguay Round Agreements Act (H. Doc. 103−316, vol. I at 928 [1994]).

7. In countervailing duty investigations affecting imports from developing countries, the 3 percent and 7 percent limits are raised to 4 percent and 9 percent. Section 771[24][B]. Developing country is defined as a country so designated by the U.S. trade representative solely for the purposes of this law (Section 771[36]).

8. The provision reads:

"It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be possible."

This provision is considerably softer than the practices of the United States, the European Union, and others applying antidumping remedies. U.S. practice has been to read the provision as though it stated:

In the case of imports from a country with substantial control over its trade and in which the prices of important commodities, utilities, and services are fixed by the state, importing parties shall disregard the domestic prices in such country for any purpose.

9. It has been argued that unless the market economy selected as a surrogate is also a producer of the merchandise, it may not reflect truly comparable conditions in its otherwise comparable macroeconomic data. If the product under investigation is produced in many countries, it may for this reason, be reasonable to require the surrogate to be a producer. But, as the case of *Methol from China* , (46 Fed. Reg. 24614 [1 May 1981] demonstrated, for products not widely produced this limitation can produce odd results. In that case Paraguay was treated as a surrogate for China, leading to questions about whether so small an economy can provide an accurate picture of the market for an economy as large as that of China.

10. In one recent case both the domestic petitioner and the foreign respondent (not a nonmarket economy) requested a continuation of the investigation even though a suspension agreement had been concluded with the respondent. In that case, the ITC then reached an affirmative final determination of injury, but the petitioner nevertheless withdrew its petition on the condition that the respondent withdraw a petition in a related case (*Portable Electric Typewriters from Singapore* , 59 Fed. Reg. 22,392 [2 May 1994] [Department of Commerce Notice of Terminated Investigation]. In the negotiation of a suspension agreement for Honey from China the U.S. industry unsuccessfully demanded that the foreign respondents waive their rights to ITC review as a condition of the U.S. industry's acceptance of the agreement. Inside U.S. Trade, No. 30, at 12 (28 July 1995).

11. "Understanding on the Implementation of Article XVII" of the GATT 94 affirms the obligations of WTO members (1) to assure that their state trading enterprises operate in a nondiscriminatory manner and (2) to notify the Council for Trade in Goods of the existence of such enterprises. While this Understanding will apply to nonmarket economies that are WTO members, it does not seem to have a major importance to the issues discussed in this paper.break

3—
The Regulation of Imports from Transition Economies by the European Union

Brian Hindley

The regulation of trade between market economies presumes that the prices of products they export reflect the costs of producing them. When the grounds for that presumption disappear—as, for example, when dumping or subsidization can be demonstrated—the World Trade Organization (WTO) authorizes corrective action by the governments of importing countries.

In a nonmarket economy a presumption that prices reflect the costs of production has no obvious basis. Prices and costs may be determined by opaque political processes and so constitute defective measures of actual costs or values as those terms are understood in market economies. The governments of market economies therefore apply different rules to their trade with nonmarket economies than to their trade with other market economies.

Recently, however, market economies' regulation of trade with nonmarket economies has changed, reflecting the radical change in political relationships since 1989.continue

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This chapter sketches the evolving system of regulation of trade with nonmarket economies by the European Community (EC).1

Designation of Nonmarket Economies

Economies that the EC regards as nonmarket economies are listed in regulations of the Council of Ministers. The latest of these is Council Regulation (EC) 519/94 *Official Journal of the European Communities* L067/89 of 10 March 1994),2 which replaces Council Regulations 1765/82 and 1766/82 (*Official Journal* L195 of 5 July 1982).

The differences between the 1994 and 1982 lists reflect two facts: the demise of the Soviet Union and the shift of economies in Eastern Europe toward market−based organization. Countries removed from the 1982 list—save the Soviet Union—are judged to have become, or to be clearly in the process of becoming, market economies. The countries added to the 1994 list are the states deriving from the breakup of the Soviet Union (table 3.1).

The European Commission may make a proposal to remove countries from the list of nonmarket economies, but only the Council of Ministers can actually do so. Voting on this issue in the Council is controlled by article 113 of the European Economic Community (EEC) Treaty, so that a qualified majority is needed to convert a proposal into law.3

EC law contains no comprehensive definition of a nonmarket economy. Informally, recognition of a country as a market economy requires that it approximate a market economy closely enough so that the prices of its products may in general be taken to reflect the true costs of production. But in practice application of that criterion is tempered by political considerations. As the removal of Bulgaria and Romania from the list of nonmarket economies suggests, the EC does not insist on a complete transition to a market economy, but also appears to use the less clear criterion of movement toward a market economy.

Every country that has been removed from the EC lists of nonmarket economies—other than the former Soviet Union—has entered into an association agreement with the EC (committing itself to, among other things, eventual free trade with the EC and to the adoption of relevant national laws approximating those of the EC). And no country that has accepted an association agreement has been left on the list of nonmarket economies. This relationship is not formalized in EC law, however, and may not persist. Although it is difficult tocontinue

Table 3.1
Economies designated as nonmarket economies by the EC, 1982 and 1994

1982	*1994*
Albania	Albania
Bulgaria	Armenia
China	Azerbaijan
Czechoslovakiaa	Belarus
Hungarya	China
Korea	Estoniab
Mongolia	Georgia
Polanda	Kazakstan
Romania	Korea
Soviet Union	Kyrgyz Republic
Vietnam	Latviab
	Lithuaniab
	Moldova
	Mongolia
	Russia
	Tajikistan
	Turkmenistan
	Ukraine
	Uzbekistan
	Vietnam

a. CSFR, Hungary, and Poland were removed from the 1982 list by Council Regulation 517/92 (*Official Journal* L56/1 of 29 February 1992.)

b. Free trade agreements between the EC and Estonia, Latvia, and Lithuania entered into force on 1 January 1995. These countries were removed from the list of nonmarket economies in Council Regulation 519/94, with effect from 1 January 1995, by Council Regulation (EC) 839/95

(*Official Journal* L85/9 of 19 April 1995).
Full−fledged Europe agreements were signed in
June 1995.

envision circumstances in which the EC offers an association agreement but continues to treat the prospective associate as a nonmarket economy, it is easy to conceive of its treating as a market economy a country it now regards as a nonmarket economy, but not offering it an association agreement.

Under U.S. law a product from what would generally be regarded as a nonmarket economy can be treated as produced in a "bubble of capitalism" and thus subject to market economy antidumping procedures (see the discussion in Hindley 1993 of the case of lug nuts from China). But under EC law a country either is or is not a nonmarket economy, and the EC applies nonmarket economy procedures to all products from a designated nonmarket economy.

Legal Structure of EC Policy Toward Nonmarket Economies

Several countries on the 1982 list of nonmarket economies were GATT contracting parties and had rights with respect to their trade with the EC deriving from that status. But no country on the 1994 list is a member of the WTO (though most are negotiating entry) and EC treatment of the economies on the list is not directly constrained by WTO rules. The legal basis for EC policy toward nonmarket economies is found in EC regulations and in treaties and bilateral agreements between the EC and individual nonmarket economies.

Safeguards and Surveillance

In the past, EC member states maintained many national policies relating to imports from nonmarket economies. These national policies have now been abandoned in favor of Council Regulation (EC) 519/94, which creates a uniform EC regime for the surveillance of, and safeguards against, imports into the EC from nonmarket economies.[4] This regulation applies to all goods except textile products, which are the subject of Council Regulation 517/94. One annex lists goods from China that are subject to quantitative restrictions (QRs), however, and another lists goods from China that are subject to surveillance. (The import regime imposed by Council Regulation 519/94 is further discussed below.) Council Regulation (EC) 519/94 is a unilateral act of the EC. Its application is modified, however, by agreements between the EC and individual nonmarket economies.

Trade Treaties and Agreements

The EC has established three types of agreements with current and former nonmarket economies in Central and Eastern Europe and the CIS. At the top of the hierarchy are the Europe (or association) Agreements. These agreements provide for reciprocal freer trade, the harmonization of legislation, and technical and political cooperation and dialogue. The EC has concluded Europe Agreements with Poland, the Czech Republic, the Slovak Republic, Hungary, Romania, Bulgaria, the Baltic states, and Slovenia.

At the bottom of the hierarchy are the partnership and cooperation agreements, which provide for, among other things, political dialogue, rights of establishment for companies, capital transfer, intellectual property regimes, and economic cooperation. In the area of trade they typically contain agreements on bilateral improvements in market access on a most−favored−nation basis and provide for including the exports of the nonmarket signatory in the EC Generalized System of Preferences (GSP). They also contain agreements on the application of quantitative restrictions, safeguards, and antidumping measures, discussed in the following section.

In between are the interim agreements, or trade and economic cooperation agreements, which consist primarily of the sections of the Europe agreements dealing with trade (see Hindley 1993; Smith and Rollo 1993; and Winters

1992). The negotiations of partnership and cooperation agreements and interim agreements between the EC and the CIS are at varying stages (box 3.1).break

Contingent Protection on Exports from Nonmarket Economies

Antidumping and safeguards probably are the principal means of contingent protection that the EC will deploy in the future against imports from nonmarket economies.5 Antidumping has been the most important, with no actions taken yet under the safeguard and surveillance provisions of Council Regulation (EC) 519/94.6 But antidumping actions may not continue to outnumber safeguard actions. EC powers under Council Regulation 519/94 are considerable, and the regulation is still relatively new. Although safeguards and antidumping are available for use against imports from both market and nonmarket economies, their application to these two groups of economies differs.

Safeguards

Article 15(1) of Council Regulation (EC) 519/94 describes the basic EC safeguard measure against imports from nonmarket economies:

Where a product is imported into the Community in such greatly increased quantities or on such terms or conditions as to cause or to threaten to cause serious injury to Community producers of like products, the Commission, in order to safeguard the interests of the Community, may, acting at the request of a member state or on its own initiative, alter the import rules for that product by providing that it may be put into free circulation only on production of an import authorization, the granting of which shall be governed by such provisions and subject to such limits as the Commission shall lay down.

The regulation also lays down the procedures for member states and EC institutions to follow when applying safeguard or surveillance measures—an accelerated procedure—for situations perceived as emergencies and a normal procedure. The steps in the normal procedure are as follows:

1. The Commission shall be informed by the member states should trends in imports appear to call for surveillance or safeguard measures . . . The Commission shall pass on this information to all the member states forthwith (article 2).

2. Consultations may be held, either at the request of a member state or on the initiative of the Commission. They shall take place within eight working days following receipt by the Commission of the information provided for in article 2 and, in any event, before the introduction of any Community surveillance or safeguard measure (article 3, emphasis added).

Consultations shall take place within an advisory committee, hereinafter called "the Committee," made up of representatives of each member state with a representative of the Commission as chairman (article 4[1]).

3. Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify an investigation, the Commission shall . . . initiate an investigation within one month of receipt of information from a member state . . . (article 511]).

4. The examination of the trend of imports, of the conditions in which they take place and of the serious injury or threat of serious injury to Community producers resulting from such imports, shall cover in particular the following factors:7

(a) the volume of imports, in particular where there has been a significantcontinue

Box 3.1
Status of trade agreements between the EC and CIS countries as of June 1995

Armenia	Negotiations for partnership and cooperation agreement started in June 1995.
Azerbaijan	Negotiations for partnership and cooperation agreement started in June 1995.
Belarus	Partnership and cooperation agreement signed in March 1995. Interim agreement initialed in April 1995, but signing postponed by the EC to allow consultations with the member states about the role of the Belarus parliament and freedom of the press in Belarus.
Georgia	Negotiations for partnership and cooperation agreement started in June 1995.
Kazakstan	Partnership and cooperation agreement signed in January 1995. Interim agreement initialed in December 1994. Following suspension of the Kazak Parliament, the European Parliament is withholding assent for the partnership and cooperation agreement until democratic elections are held.
Kyrgyz Republic	Partnership and cooperation agreement signed in February 1995. Interim agreement initialed in January 1995.
Moldova	Partnership and cooperation agreement signed in November 1994. Interim agreement initialed in April 1995 and likely to be signed soon.
Russia	Partnership and cooperation agreement signed in June 1994. Interim agreement initialed in December 1994.
Tajikistan	No agreements, no negotiations.
Turkmenistan	Exploratory discussions prior to formal negotiations for partnership and cooperation agreement initiated by the EC in June 1995.
Ukraine	Partnership and cooperation agreement signed in June 1994, and interim agreement in June 1995.
Uzbekistan	Exploratory discussions prior to formal negotiations for partnership and cooperation agreement initiated by the EC in June 1995.

increase, either in absolute terms or *relative to production or consumption in the Community* ;

(b) the price of imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community;

(c) the consequent impact on the Community producers of similar or directly competitive products as indicated by trends in certain economiccontinue

factors such as production, utilization of capacity, stocks, sales, market share, prices (i.e., depression of prices or prevention of price increases which would otherwise have occurred), profits, return on capital employed, cashflow, and employment
(article 8, emphasis added)

5. At the end of the investigation, the Commission shall submit a report on the results to the Committee . . . If the Commission considers that Community surveillance or safeguard measures are necessary, it shall take the necessary decisions . . . no later than nine months from the initiation of the investigation (article 6).

The Commission can deploy safeguard measures or surveillance without waiting for the end of this procedure, however. As article 3 suggests, the Commission can take such actions within eight days of receiving information from a member state. And article 6(4) expressly states that the rules for conducting the investigation:

shall not preclude the taking, at any time, of surveillance measures . . . or, where a critical situation, in which any delay would cause injury which it would be difficult to remedy, calls for immediate intervention, safeguard measures . . .

The Commission's authority to take safeguard measures is defined by article 15:

15(4). Where intervention has been requested by a member state, the Commission shall take a decision within a maximum of five working days of receipt of such a request.

15(5). Any decision taken by the Commission under this article shall be communicated to the Council and to the member states. Any member state may, within one month following the day of communication, refer such decision to the Council.

15(6). If a member state refers the decision taken by the Commission to the Council, the Council may, acting by a qualified majority, confirm, amend or revoke the decision of the Commission. If within three months following referral of the matter to the Council the latter has not taken a decision, the measure taken by the Commission shall be deemed revoked.

Article 16(1) elaborates the powers of the Council:

The Council may, in particular in the situation referred to in article 15(1) [that is, a situation in which safeguard measures are deemed necessary] adopt appropriate measures. It shall act by a qualified majority on a proposal from the Commission.

The regulation does not limit the duration of a safeguard measure.

Surveillance

Surveillance is authorized by article 9 of regulation 519/94. Article 9(1)(a) permits the Commission to introduce "retrospective Community surveillance" of imports, and article a(1)(b) allows it to introduce "prior Community surveillance." Although the regulation does not define retrospective Community surveillance, article 10 defines prior surveillance:

Products under prior Community surveillance may be put into free circulation only on production of an import document. Such document shall be endorsed by the competent authority designated by member states, free of charge, for any quantity requested and within a maxi−soft

mum of five working days following receipt by the national competent authority of a declaration by any Community importer, regardless of his place of business in the Community.

Article 11, however, allows the Commission:

at the request of a member state or on its own initiative, if the situation referred to in article 15 (1) [that is, a situation in which safeguards are required] is likely to arise:

to limit the period of validity of any import document required;

to make issue of this document subject to certain conditions and, as an exceptional measure, subject to insertion of a revocation clause, or, with the frequency and for the length of time indicated by the Commission, to the prior information and consultation procedure . . .

Backed by sufficient powers in reserve, surveillance of a class of imports may be enough to solve the problem that is perceived to call for surveillance. Exporters are likely to regard surveillance as a warning that they will be subject to commercially damaging tariffs or quotas unless they moderate their shipments. If they can control the aggregate sales of their product, it may never be necessary for the importing economy to call on the powers in reserve (see Winters 1994 for evidence on the trade−inhibiting effects of surveillance).

Council Regulation (EC) 519/94 provides the EC with a continuum of means of warning and protection. Article 9(2):

limits the duration of surveillance measures, however, unless otherwise stipulated they [surveillance measures] shall cease to be valid at the end of the second six−month period following the six months in which the measures were introduced.

Antidumping

According to article VI of the GATT, a dumping margin is the difference between the normal value of the product—its price in the normal course of trade in the home market of the exporter or its cost of production—and its (lower) price when sold for export. To comply with the GATT, an antidumping duty cannot exceed the dumping margin. Moreover, a country imposing an antidumping duty must show that the dumped imports have caused injury to the domestic industry producing a like product.

When dealing with alleged dumping from a market economy, the Commission determines normal value, whether based on prices or production costs, using data from the home market of the exporter. When dealing with alleged dumping from a nonmarket economy, however, it determines normal value:

On the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where these are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin [article 2(7) of the Council Regulation (EC) 3283/94 (*Official Journal* L349/1 of 22 December 1994)].

Similar provisions calling for the use of a third country, or analogue country, in calculating normal value have been part of EC antidumping law for many years. In 1987, for example, the normal value of freezers from the Soviet Union was assessed on the basis of the price in Yugoslavia of freezers manufactured in Yugoslavia (*Official Journal* L6/1, 1987) and the costs of production of electric motors incontinue

Bulgaria, Czechoslovakia, Hungary, Poland, and Romania were assessed by reference to production costs in Sweden (Hirsch 1988).

Market economy producers subject to an antidumping action typically incur heavy costs in providing the information required by the national antidumping authority taking the action. Nonmarket economy producers facing antidumping action by the United States also incur large costs: to calculate normal value for a nonmarket economy product, the U.S. Department of Commerce requires detailed information on the producer's use of all factors of production. EC procedures, however, impose very light information requirements on nonmarket economy producers. These lower requirements might not be an advantage if providing information led to less arbitrary results. But it is far from clear that the heavier informational requirements of EC procedures for market economies or U.S. procedures for nonmarket economies are accompanied by a commensurate reduction in arbitrariness.

The dumping margin established by the Commission is the difference between the normal value it determines and the price of the product when exported to the EC. Thus the choice of the analogue economy—for example, whether in the analogue economy the relevant industry is protected or open to competition from imports, monopolized or competitive—is a central factor in determining dumping margins for nonmarket economy exports.8

In many past EC cases the Commission accepted the suggestion of the EC complainants on which analogue country to chose (Tharakan 1991). More recently the criteria to be observed in choosing an analogue country were clarified by a 1991 decision of the European Court of Justice in a case involving paintbrushes from China, in which Sri Lanka was used as the analogue country.9 The Commission interpreted the ruling as requiring that:

(a) the price of the like product in the analogue country should be determined by normal market forces and should not be distorted by market isolation;

(b) the like product should be produced and sold in representative quantities in the analogue country as compared with exports to the Community from the country under investigation (a proportion of 5 percent is certainly representative, but a lower proportion may be deemed sufficient in particular circumstances);

(c) production processes and access to raw materials in the analogue country should be comparable to the country under investigation though where substantial differences exist, appropriate adjustment may be made.

In many antidumping cases involving nonmarket economy exporters before 1989 the Commission accepted undertakings from the exporters rather than imposing antidumping duties (Tharakan 1991). An undertaking is a commitment by an exporter to sell only above an agreed minimum price or, sometimes, to restrict the quantity of exports—arrangements that come close to voluntary export restraints (VERs).10

Other things equal, exporters found to have dumped in the EC could be expected to prefer undertakings to antidumping duties. In principle, antidumping duties are refunded when dumping is shown to have ceased, but exporters have sometimes had difficulty obtaining these refunds. By contrast, an undertaking permits an exporter to directly obtain the higher profit per unit sold. But the Commission maintains that refund claims are now handled expeditiously, which would reduce the preference for an undertaking.

The Effect of EC Trade Agreements on Contingent Protection

The trade agreements that the EC hascontinue

entered into with economies of Central and Eastern Europe and CIS countries emphasize consultation to seek constructive, mutually acceptable solutions to problems and introduce some GATT−style language. But they fall short of offering GATT−style protection.

Partnership and cooperation agreements (PCAs). The EC signed a partnership and cooperation agreement with the Russian Federation on 24 June 1994, followed by similar, though not identical, agreements with other CIS countries. The effect of a partnership and cooperation agreement is to introduce, by means of bilateral treaty, some of the WTO disciplines that otherwise would not regulate EC behavior toward the nonmarket economies.[11] Article 16 of the Russia−EC partnership and cooperation agreement says that:

Until Russia accedes to the GATT/WTO, the parties shall hold consultations in the Cooperation Committee on their import tariff policies, including changes in tariff protection. In particular, such consultations shall be offered prior to the increase of tariff protection.

Safeguards . Article 17, which deals with safeguards, uses some GATT−style language:

1. Where any product is being imported into the territory of one of the Parties in such increased quantities and under such conditions as to cause or threaten to cause substantial injury to domestic producers of like or directly competitive products, the Community or Russia, whichever is concerned, may take appropriate measures in accordance with the following procedures and conditions.

2. Before taking any measures, or in cases to which paragraph 4 applies as soon as possible thereafter, the Community or Russia, as the case may be, *shall supply the Cooperation Committee with all relevant information with a view to seeking a solution acceptable to both Parties. The Parties shall commence consultations promptly within the Cooperation Committee* . (Emphasis added)

3. If, as a result of the consultations, the parties do not reach agreement within 30 days of referral to the Cooperation Committee on actions to avoid the situation, the Party which requested consultations shall be free to restrict imports of the products concerned or to adopt other appropriate measures to the extent and for the time necessary to prevent or remedy the injury.

4. In critical circumstances where delay would cause damage difficult to repair, the Parties may take the measures before consultations, on the condition that consultations shall be offered immediately after taking such action.

5. In the selection of measures under this article, the Parties shall give priority to those which cause least disturbance to the achievement of the aims of this Agreement.

6. Where a safeguard measure is taken by one Party in accordance with the provisions of this article, the other party shall be free to deviate from its obligations under the Title towards the first Party in respect of substantially equivalent trade.

Such action shall not be taken before consultations have been offered by such other Party nor if agreement has been reached within 45 days following the date these consultations were offered.

7. The right of deviation from the obligation referred to in paragraph 6 shall not be exercised for the first three years thatcontinue

a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports, for the maximum period of four years, and in conformity with the provisions of this Agreement.

Despite, or perhaps because of, the GATT−like sound of these words, a "joint declaration in relation to article 17" at the end of the partnership and cooperation agreement says that "the Community and Russia declare that the text of the safeguard clause (article 17) does not grant GATT safeguard treatment." (What GATT offers that a partnership and cooperation agreement does not is discussed below, in the section on differences in the EC's treatment of market and nonmarket economies.)

Antidumping . Antidumping and countervailing duty action are the subject of article 18 of the Russia−EC partnership and cooperation agreement. Although the first paragraph of article 18 introduces GATT standards for antidumping and antisubsidy actions, the second reverts to the theme of consultation that runs through both the partnership and cooperation agreements and the Europe agreements.

Nothing in this Title, and in article 17 in particular, shall prejudice or affect in any way the taking, by either Party, of antidumping or countervailing measures in accordance with article VI of the GATT, the Agreement on implementation of article VI of the GATT, the Agreement on interpretation and application of articles VI, XVI and XVIII of the GATT (sic) or related internal legislation.

In respect of antidumping or subsidy investigations, each Party agrees to examine submissions by the other Party and to inform the interested parties concerned of the essential facts and considerations on the basis of which a final decision is to be made. *Before definitive antidumping or countervailing duties are imposed, the Parties shall do their utmost to bring about a constructive solution to the problem* . (Emphasis added)

Consultation . The agreements to seek constructive solutions to problems and to do the utmost to find mutually acceptable solutions may be innocent and useful to both parties. But they may also have less desirable effects.

As long as consultations remain in official channels, some transparency is maintained. Consultations take place only after an action has been formally initiated, and the way in which the action is discharged is publicly reported (though, in the case of undertakings, not the details).

But the injunction to consult may not always lead to consultations within official channels. The EC's strong defenses against unwanted imports mean that exporters often prefer to reach an informal accommodation with the EC, if by doing so they can avoid formal EC legal processes. They may even be willing to reach agreements with EC producers of similar products to avoid those processes. EC producers of chemical products, for example, which account for a large share of the antidumping actions targeting exports from Central and Eastern Europe and the CIS, have not always resisted the temptation to create cartels. Messerlin (1990) discusses a series of cases in which antidumping action against imports into the EC of a chemical product has been followed a few years later by an action under EC competition law against a cartel in that product.

Interim and Europe agreements . The theme of consultation to "constructively solve" trade problems continues in the interim and association agreements. Article 30 of the EC−Poland agreement, for example, permits either Poland or the EC to act against dumping, and article 31 permits either to take safeguard action. Article 34, however, provides that before taking actions permitted under articles 30 and 31, thecontinue

party contemplating the action ". . . shall supply the Association Council with all relevant information with a view to seeking a solution acceptable to the two parties." The importing party may take appropriate measures if no such solution has been reached after thirty days, or if the exporting party ". . . has not taken a decision putting an end to the difficulties" after thirty days.

The interim and Europe agreements provide no formal barrier to the EC's applying contingent protection measures to treaty partners in a hostile or trade−obstructing manner. Thus they provide a legal form for EC contingent protection, but do not foreclose any EC options.

Although EC behavior toward imports from Central and Eastern Europe appears to have improved in the past two or three years (the uncertainty stems from the lack of transparency that the EC itself has created), the improvement is primarily in performance. Improvements in legal structure lag behind. The EC has withdrawn from the frontier that law defines for contingent protection, but it has done little to alter the frontier. If conditions changed and the EC wanted to be tougher on imports from Central and Eastern Europe and the CIS, the current legal structure gives it a great deal of room for maneuver.

Differences in EC Treatment of Market and Nonmarket Economies

Countries that the EC regards as nonmarket economies differ from market economies in at least two dimensions. The first, of course, is the way in which decisions about the allocation of resources are made. The second, especially important for trade, is that no economy regarded as a nonmarket economy is a member of the WTO, while almost all economies regarded as market economies are WTO members. Differences in treatment under EC trade law may stem from either dimension.

Safeguards . Most nonmarket economies have entered into or are negotiating a partnership and cooperation agreement. For these economies the relevant legal structure for EC safeguards is the regime set forth in Council Regulation (EC) 519/94 and modified by a partnership and cooperation agreement. This regime is clearly superior to what the EC is legally obliged to offer, but clearly inferior to what it would be required to offer under Article XIX of the GATT (see Hindley 1994 for a detailed discussion of the Uruguay Round Agreement on Safeguards). For exporters the Uruguay Round Agreement on Safeguards offers several advantages over the EC arrangements for nonmarket economies.

A requirement to show that injury was caused by the imports in question. The Agreement states that "no determination of injury will be made . . . unless . . . investigation demonstrates, on the basis of objective evidence, *the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof* " (emphasis added). Article 10(1)(d) of the EC regulation controlling the application of safeguards to imports from market economies goes some way toward meeting this requirement by calling for the examination of "factors other than trends in imports which are causing or may have caused injury to the Community producers concerned." (Council Regulation (EC) 3285/94 of 22 December 1994 [*Official Journal* L349/53 of 31 December 1994]). Article 8(1) of Council Regulation 519/94 is identical to article 10(1) of its equivalent for market economies, except that it lacks any provision parallel to article 10(1)(d). Thus the mere coexistence of imports and serious injury to the EC industry producing a like product is sufficient to authorize a safeguard action if the imports come from acontinue

nonmarket economy, but not if they come from a market economy.

Limits on duration. The Agreement requires an article XIX action to be terminated within four years unless further investigation shows that the action is necessary to prevent or remedy serious injury. Actions must in any event be terminated within eight years. There is no limit on the duration of EC safeguard actions against nonmarket economies.

Progressive liberalization. Paragraph 13 of the agreement provides that "to facilitate adjustment, if the expected duration of a safeguard measure . . . is over one year, it shall be progressively liberalized at regular intervals during the period of application." There is no equivalent requirement in the EC arrangements for nonmarket economies.

The issue here for nonmarket economies then is not their status in the eyes of the EC, but their status in the WTO. Unless otherwise stated in the terms of accession, a nonmarket economy member of the WTO is entitled to the same treatment with respect to safeguards as a market economy member. Accession to the WTO is therefore

likely to improve nonmarket economies' position in this respect, even if the EC continues to treat them as nonmarket economies.

Antidumping action . For antidumping, however the problem for nonmarket economies lies largely in the GATT, and accession to the WTO is not the solution. Partnership and cooperation agreements promise treatment to GATT standards in antidumping and countervailing duty actions (see, for example, article 18 of the EC−Russia partnership and cooperation agreement, quoted above).

There is no mention of nonmarket economies in the Uruguay Round Agreement on Implementation of article VI, on antidumping. But article 2.7 of the agreement, which deals with the "determination of dumping," notes that "this article is without prejudice to the second Supplementary Provision to paragraph 1 of article VI in Annex I to GATT 1994." That provision sets out the legal basis in the GATT for the different methods of determining normal value in market economies and nonmarket economies:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability . . . and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Thus accession to the WTO of a country regarded a nonmarket economy will not in itself alter the treatment of its exporters in antidumping cases—that requires a change to market economy status. For a nonmarket economy that has concluded at least a partnership and cooperation agreement, however, a change to market economy status would be sufficient to change its antidumping treatment by the EC even without accession to the WTO.

Economic Effects of EC Treatment of Nonmarket Economies

Clearly, the European Community accords different treatment to exports from nonmarket economies than to exports from market economies. But what are the economic effects of this different treatment for nonmarket economies? Lack of experience with the safeguard and surveillance procedures of Council Regulation 519/94 precludes assessment of thecontinue

effects of those measures. But there is considerable experience with EC antidumping actions against nonmarket economies. This section therefore focuses on antidumping.

A simple point should be kept in mind in assessing the effects of the treatment accorded to nonmarket economies by the EC: this treatment is unlikely to be uniform, and it is likely to be affected by factors other than nonmarket economy status. Treatment of nonmarket economies by the EC with respect to antidumping is controlled by a single body of EC law, but that law allows the Commission substantial discretion. There is no reason to suppose that the Commission uses that discretion in exactly the same way in every antidumping case.

Before 1989, for example, the countries of Eastern Europe were part of a militarily powerful bloc hostile to the EC. After 1989, released from their reluctant partnership with the Soviet Union, they became potential partners of the EC, which offered to aid their efforts to transform their economies. Although the EC's treatment of these nonmarket economies with respect to antidumping may have been the same in both periods, there is no reason to presume that it was. Nor is there any reason to suppose that the EC treats imports from China in the same way as imports from, say, the Czech Republic.

The frequency of antidumping actions initiated by the EC against countries it now treats as market economies has declined since 1990 (table 3.2). Actions against CIS countries, however, reflect no clear trend.

Table 3.2 counts as one any actions simultaneously initiated against a product from several CIS countries. Case 3 in appendix A, for example, refers to an action against synthetic corundum from Russia and Ukraine. In the days of the Soviet Union this case would have appeared as one action, and so to preserve comparability it is counted as one action in table 3.2. On that basis the frequency of actions initiated against imports from the Soviet Union and the CIS shows no clear trend.

Appendix A lists ten cases involving at least one former Soviet republic (cases 3, 5, 8, 18, 19, 20, 21, 28, 30, and 31), and these appear in table 3.2 as the ten cases involving the Soviet Union or former Soviet Union after 1989. If the cases were counted separately for the CIS, however, there would be nineteen: nine for Russia, five for Ukraine, two for Belarus, two for Lithuania, and one for Kazakstan.

Products

EC antidumping cases involving CIS countries are narrowly focused on chemicals and simple metallurgical products (see appendix A). This focus reflects a change since the breakup of the Soviet Union. While the Soviet Union was involved in many cases relating to chemicals and simple metallurgical products, it was also involved in actions relating to manufactured products, such as deep freezers, hardboard, horticultural glass, kraftliner, wrist watches, bicycles chains, particle board, and electric motors. No such products are the subject of EC antidumping actions initiated against CIS countries.

Dumping Margins

For a product exported to the EC from a market economy, the dumping margin is the difference between the export price to the EC and the price or constructed cost of production of the product in that market economy. For a product exported to the EC from a nonmarket economy, the dumping margin is the difference between the export price to the EC and the price or constructed cost of production of the product not in that nonmarket economy, but in a market economy. This inevitably creates arbitrariness in the calculation of dumping margins for nonmarket economy products. But the calculation of dumping margins, whether for a market economy or a nonmarket economy, inevitably involves a great deal of arbitrariness from an economic standpoint. And arbitrariness in the calculation of dumping margins for nonmarket economies does not automaticallycontinue

Table 3.2
Antidumping actions initiated by the EC against nonmarket economies and former nonmarket economies, 1984−94

Economy	*1984*	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Bulgaria	2	1	0	0	2	1	0	0	0	1	0
CSFR	4	1	2	0	1	1	1	0	0	0	1
Hungary	3	1	2	0	1	1	0	1	0	0	1
Poland	4	3	0	0	1	1	0	3	0	1	0
Romania	2	2	1	2	2	2	0	0	0	0	0
Subtotal	15	8	5	2	7	6	1	4	0	2	2
Soviet Union/ former Soviet Union	4	2	2	1	2	1	2	1	3	1	3
China	2	1	2	0	6	5	5	4	5	3	3

Source: Official Journal, various issues.

translate into the proposition that the EC methodology leads to higher dumping margins for nonmarket economy products.

Appendix A lists six cases in which definitive duties have been declared in ad valorem terms and which cover exports from both market and nonmarket economies. In case 6 the duties for the market and nonmarket economy are the same, and in case 17 the duties for the nonmarket economy are only marginally higher. In case 12 one of the two nonmarket economies involved had a higher rate of duty than the analogue market economy, and the other nonmarket economy a lower rate of duty. In cases 2 and 7 the duties for the nonmarket economy fell between those duties for the market economies involved. Only in case 1 were the duties for the nonmarket economy substantially greater than those for the market economies.

Without more information on these cases, little can be inferred from these data. But this limited evidence certainly does not demonstrate that the EC methodology for calculating dumping margins for nonmarket economies generates higher margins for these economies than are calculated for market economies.

Moreover, the EC, unlike the United States, does not automatically charge a dumping duty equal to the calculated dumping margin. The EC also calculates an injury margin—the amount by which the price of imports found to have been dumped would have to rise to remove the injury to EC producers. When the EC imposes an antidumping duty, it charges the lower of these two margins. Very often that is the injury margin. Thus a reduction in the calculated dumping margin will not change the dumping duty until it is large enough to push the dumping margin below the injury margin.

Duties and Undertakings

The record of EC antidumping actions against nonmarket economies suggests a change in the way they are concluded. While before 1989 it was common practice for the EC to accept undertakings in nonmarket economy cases, now it frequently applies duties to dumped products from nonmarket economies. But the duty is often based on the extent to which actual selling prices fall below a stated minimum price (see, for example, cases 5, 8, 10, 11, 14, 15, and 22 in appendix A).

Clearly, this basis for calculating the duty gives exporters a strong incentive to charge the minimum price. If a nonmarket economy exporter does charge that price, the outcome is the same as if he had given and abided by an undertaking to sell only at prices above thecontinue

minimum. In both cases he will pay no duty and he will obtain on all of his remaining sales the difference between the EC minimum price and the lower price at which he had been selling without having to apply for a refund of antidumping duties. Alternatively, an exporter willing to sell widgets at ecu 5, but facing a minimum price of ecu 8 imposed by the EC, will in a variety of circumstances be willing to spend up to ecu 3 per widget to win EC sales.

Summary

The treatment of CIS countries as nonmarket economies in antidumping cases gives rise to many complaints. These states seek to regularize their trade relations with the EC and the United States, and they seek recognition of the hardships they have undergone in their efforts to achieve market−oriented economies. Moreover, they believe that they will be treated more fairly in trade matters, and especially in antidumping proceedings, if they are accorded the status of market economies.

That proposition is dubious, however. The elements of unfairness and arbitrariness in EC (and U.S.) antidumping procedures for nonmarket economies are naturally quite clear to the CIS countries while those in the procedures for market economies are less clear. But unfairness and arbitrariness nevertheless exist in the procedures for market economies (OECD Trade Directorate 1994 provides an account of Poland's disillusionment with treatment as a market economy in antidumping actions).

Nor does market economy status provide any guarantee of a reduction in antidumping cases. The former Yugoslavia, for example, was accorded market economy status by the EC, but EC actions against its exports were similar in number to those against nonmarket economies in Central and Eastern Europe and the CIS. (Hindley 1993).

Conclusions and Recommendations

Nonmarket economies present problems for the administration of laws dealing with dumped and subsidized imports. In an economy in which all or most markets are free, prices and costs have a significance that is lacking in an economy in which all or most markets are controlled. Methods for dealing with imports from market economies that are based on one notion of the significance of prices cannot sensibly be applied to imports from nonmarket economies.[12]

Almost inevitably, therefore, nonmarket economies will be treated differently than market economies in antidumping procedures. Moreover, given the arbitrariness of nonmarket economy prices, viewed from the standpoint of a market economy, it is difficult to see how arbitrariness in antidumping procedures for nonmarket economies can be avoided. And it is difficult to see alternatives that are clear improvements on those procedures, arbitrary as they may be.

The record of EC antidumping actions against CIS countries suggests that the EC's treatment of these economies has been moderate. There is no clear reason to suppose that nonmarket economies suffer major economic losses as a result of being treated as nonmarket economies by the EC for antidumping purposes.

A different issue arises, of course, if economies that are in fact market economies are treated as nonmarket economies. The EC could make this situation less likely by making public the criteria it applies when classifying economies as market or nonmarket economies.

Another concern with EC policy may be more important. The EC legal structure of contingent protection against nonmarket economies provides the Community with much more power than it currently uses against such economies. If the EC wanted to reduce imports from the CIS, EC law provides a great deal of scope for doing so.

That is a situation from which the CIS countries should seek to escape. Although no reversal in EC policies seems imminent, having trade relations with the EC dependent on per−soft

sonalities, moods, or lobbying groups in the EC is dearly undesirable.

In seeking to lock in their present treatment or to improve it, CIS countries can follow two principal routes. They can try to directly upgrade their status with the EC, pressing for treatment as a market economy and moving up the hierarchy of treaties. Or they can seek accession to the WTO. These routes are not mutually exclusive—indeed, they complement each other.

From an economic standpoint, moving up the EC hierarchy of treaties should clearly be an objective of the CIS. But with regard to contingent protection this movement would bring little relief (Hindley 1993). Accession to the WTO provides two clear advantages:

Entry to the GATT article XIX safeguard system. The WTO provides exporters much better protection against excessive use of safeguards than does the EC system of safeguards in trade with nonmarket economies.

Access to WTO dispute settlement procedures. With the EC a likely target for trade complaints by CIS countries (and vice versa), having available a legal system that is independent of the EC is an important advantage.

Both of these strengthen the legal position of the CIS against the EC. And both therefore strengthen their hand in behind−the−scenes bargaining with the EC.

Notes

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1. This chapter, with the exception of the title, refers to the European Union by its earlier name, "European Community" or "EC," because most of the policies and/or laws discussed here pre−date the formation of the European Union.

2. Council Regulation 519/94 nowhere uses the term nonmarket economy. Instead, it sets out an import regime for "certain third countries." Article 2(7) of the EC Basic Antidumping Regulation (Council Regulation [EC] 3283/94 [Official Journal L349/1 of 22 December 1994]) uses the term but in a context that makes it clear that the list in Council Regulation 519/94 is not exhaustive: it refers to "nonmarket economies and, in particular, those to which Council Regulation (EC) No. 519/94 applies" (emphasis added). Cuba is the odd man out: as a founding member of the GATT, it is not subject to the import regime set out in Council Regulation 519/94 but is treated by the EC as a nonmarket economy for antidumping purposes.

3. There are eighty−seven votes in the Council, distributed among the member states as follows: Germany, France, Italy, and the United Kingdom have ten each; Spain eight; Belgium, Greece, the Netherlands, and Portugal five each; Austria and Sweden four; Denmark, Finland, and Ireland three each; and Luxembourg two. A qualified majority requires sixty−two votes (and a blocking minority, therefore, twenty−six).

4. The regulation permits application of safeguards in some regions of the EC but not in others. This aspect does not seem germane to the issues at hand, however, and is not pursued here.

5. Countervailing duties are legally available, but the EC has rarely used them against either market or nonmarket economies. Nor is it likely to use them frequently against nonmarket economies in the future, in part because of the conceptual problems in defining a subsidy in a nonmarket economy and in part because it has sufficient defenses without resorting to countervailing duties.

6. Approval of an antidumping duty requires only a simple majority in the Council, however, while approval of a safeguard action faces the higher hurdle of a qualified majority (see note 2). Moreover, a safeguard action requires demonstration of serious injury to the EC industry producing a like product, whereas an antidumping action calls only for demonstration of material injury.

7. The following list is essentially identical to those in article 4(2) of the EC Basic Antidumping Regulation of 1988 (Council Regulation [EEC] 2423 of 11 July 1988) and article 10(1) of the general EC Safeguard Regulation (Council Regulation [EC] 3285/94 of 22 December 1994 [Official Journal L349/53 of 31 December 1994]). But article 10(1) has an additional clause regarding causation of injury that is missing from article 8 of Councilcontinue

Regulation 519/94. The missing clause is discussed below, in the section on differences in EC treatment of market and nonmarket economies.

8. The Russian partnership and cooperation agreement, however, contains a joint declaration in which the parties agree that ". . . when establishing normal value due account shall be taken overall, in each case on its merits, when natural comparative advantages can be shown by the manufacturers involved to be held with regard to factors such as access to raw materials, production process, proximity of production to customers and special characteristics of the product." Other partnership and cooperation agreements do not contain this provision, and its effect on antidumping cases involving Russia is uncertain.

9. Case C−16−90, Noelle v. Hauptzollamt Bremen−Freihafen (1991 ECR i−5163). The ruling is reflected in article 2(7)(a) of the 1994 Basic Antidumping Regulation, which starts: "For the purpose of this paragraph, an appropriate market economy shall be selected in a not unreasonable manner . . ." Previous versions of the Basic Antidumping Regulation contained no parallel provision.

10. Although the Commission is not required to publish the details of undertakings, a practicing Brussels lawyer has found that: "undertakings involving quantitative limitations are not uncommon" (McGovern 1990 p. 43). In a recent case, however, the Commission made it clear that it had accepted a quantitative undertaking. Noting that the Russian government, in conjunction with the state trading organization, had offered undertakings, the Commission stated that "the effect of these undertakings would be to reduce the volume of Russian silicon carbide exported to the Community to a non−injurious level" (Commission Decision 94/202/EC *Official Journal* L94/32 of 13 April 1994).

11. Countries that are neither listed in Council Regulation (EC) 519/94 nor members of the WTO—such as Taiwan, China—are subject to the safeguard procedures set out in Council Regulation (EC) 3285/95 (*Official Journal* L349/53 of 22 December 1994), which implements the Uruguay Round Agreement on Safeguards.

12. Use of the word *sensibly* in this context may raise the issue in some minds of whether any antidumping action is sensible. That is not an issue that is usefully pursued here, however: the problems of nonmarket economies with EC antidumping actions would vanish if the EC abandoned its antidumping powers, but that is not going to happen soon enough to be of interest to these economies. And even if antidumping for nonmarket economies was abandoned some other tool with its own arbitrary features − for example, safeguards—would take its place. Trade between market and nonmarket economies inevitably raises problems, antidumping procedures are just one element of them.

References

Hindley, Brian. 1993. "Helping Transition Through Trade? EC and US Policy Towards Exports from Central and Eastern Europe." EBRD Working Paper 4. (European Bank for Reconstruction and Development, London).

———. 1994. "Safeguards, VERs and Antidumping Action." In OECD, The New World Trading System. Paris

Hirsch, Seev. 1988. "Antidumping Actions in Brussels and East−West Trade." *The World Economy* Vol. 11, pp. 465−84 (December).

McGovern, Edmond. 1990. *The Anti−Dumping Report* . Globefield Press.

Messerlin, Patrick. 1990. "Anti−Dumping Regulations or Pro−Cartel Law: The EC Chemical Cases." *The World Economy* Vol. 13, pp. 465−92 (December).

OECD Trade Directorate. 1994. Analysis of the Particular Problems of Dumping During the Transition Period: Poland. Paris. TD/TC/WP(94)10.

Smith, Alasdair, and Jim Rollo. 1993. "The Political Economy of Eastern European Trade with the European Community: Why so Sensitive?" *Economic Policy* 16 (April): 139−81.

Tharakan, P.K.M. 1991. "East European State Trading Economies and Antidumping Undertakings." In Tharakan, ed., *Policy Implications of Antidumping Measures* . (Amsterdam: Elsevier Science Publishers (North−Holland).

Winters, L. Alan. 1992. "The Europe Agreements: Briefing Note for 'The Association Process: Making it Work for Europe.' " London, Center for Economic Policy Research.

———. 1994. "VERs and Expectations: Extensions and Evidence." *Economic Journal* 104 (January): 113−23.break

Appendix A:
EC Antidumping actions involving nonmarket economies initiated since 1989

Case No.	*Product and economies*	*Initiated*	*Provisional duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of du*
1.	Polyester yams—China, Taiwan (China), Indonesia, Turkey, India	OJ C80 30/3/90	L276 3/10/91		L88 3/4/92	India for China	China—23.5 Taiwan (Chi percent Indonesia—1 Turkey—10. India—7.8 pe
2.	Gas−fueled lighters—China, Japan, Korea, Thailand	OJ C89 7/4/90	L133 28/5/91 Extended L272 29/9/91	L326 28/11/91	L326 28/11/91	Thailand for China	China—16.9 Japan—35.7 Korea—22.7 Thailand—14
3.	Synthetic corundum—China, Russia, Ukraine	OJ C159 29/6/90	L275 2/10/91		L235 18/9/93	Yugoslavia	China—30.8 Ukraine—9.8 Russia—9.8
4.	Dihydrotreptomycis—China	OJ C186 27/7/90	L187 13/7/91 Extended		L362 31/12/91	Japan	Ecu 20.16 pe or difference c.i.f. price an

			L293 24/10/91			whichever is
5.	Potassium chloride—Belarus, Russia, Ukraine	OJ C274 31/10/90	L110 28/4/92 Extended L243 25/8/92	L308 24/10/92	Canada	Difference be minimum pri in regulation free at EU fr before custo clearance
6.	Ferrosilicon —Poland, Egypt	OJ C122 8/5/91	L183 3/7/92	L353 3/12/92	Egypt for Poland	Poland—32 p Egypt—32 p

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Appendix A:
(continued)

Case No.	*Product and economies*	*Initiated*	*Provisional duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of duties*
7.	Magnetic disks—China, Japan, Taiwan (China)	OJ C174 5/7/91	L95 21/4/93 Extended L196 5/5/93		L262 21/10/93	Taiwan (China) for China	Japan − 40.9 per except for impor Memorex Telex Ltd. (6.1 percent Hitachi−Maxell percent), and TD percent) Taiwan (China) percent, except f imports by CIS Technology (19. China − 39.4 per
8.	Hematite pig iron—Russia, Ukraine, Poland, Brazil	OJ C246 21/6/91	L012 15/1/94 Extended L112 3/5/94		L182 16/7/94	Brazil for Russia and Ukraine	Difference betw 149 per ton and customs value in in which the cus value is less than per ton
9.	Bicycles—China	OJ C266 12/10/91	L58 11/3/93 Extended L155 26/6/93		L228 9/9/93	Taiwan (China)	30.6 percent
10.	Dead−burned (sintered) magnesium—China	OJ C276 23/10/91	L290 6/10/92 Extended L15 23/1/93		L306 11/12/93	Turkey	Difference betw 120 per ton and at the EU frontie price is less than per ton

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Appendix A:
(continued)

Case No.	*Product and economies*	*Initiated*	*Provisiona duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of duties*
11	Magnesium oxide—China	OJ C279 26/10/91	L282 26/9/92 Extended L15 23/1/93		L145 17/6/95	Turkey	Difference betw 112 per ton and free at EU fronti before customs if that price is lo
12	Seamless pipes and tubes of iron or nonalloy steel—Hungary, Poland, Croatia	OJ C321 12/12/91	L328 14/11/92 Extended L58 11/3/93	L120 15/5/93	L120 15/5/93	Croatia for Poland and Hungary	Hungary—21.7 Poland—10.8 pe Croatia—17.4 p
13	Color televisions—China, Malaysia, Singapore, Thailand, Korea	OJ C25 25/1/92	L255 1/10/94 Extended L21 28/1/95			Singapore for China	
14	Videotapes—China	OJ C92 11/4/90	L106 26/4/91 Extended L236 24/8/91		L293 24/10/91	Hong Kong	Difference betw minimum prices the regulation an price per cassett
15	Fluorspar—China	OJ C105 25/4/92	L266 7/9/93 Extended L32 23/12/93		L62 5/3/94	South Africa	Difference betw minimum price 113.5 per ton an free at EU fronti before customs
16	Photo albums—China	OJ C120 12/5/92	L228 9/9/93		L333 31/12/93	Korea	18.6 percent

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Appendix A:
(continued)

Case No.	*Product and economies*	*Initiated*	*Provisional duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of duties*
17.	Ferrosilicon—China, South Africa	OJ C173 9/7/92	L237 22/9/93 Extended L303 10/12/93		L77 19/3/94	Norway	China—49.7 pe South Africa— percent
18	Ferrochrome with carbon	OJ C195 1/8/92	L80 2/4/93 Extended		L246 2/10/93	Zimbabwe	Ecu 0.31 per kil

	content—Russia, Ukraine, Kazakstan		L187 29/7/93				
19.	Isobutonol—Russia	OJ C239 18/9/92	L246 2/10/93 Extended L24 29/1/94		L87 31/3/94	United States	Ecu 102 per ton
20.	Ammonium nitrate—Russia, Lithuania	OJ C306 24/11/92					Terminated L12
21.	Ferrosilicon manganese—Russia, Ukraine, Brazil, South Africa	OJ C123 5/5/93	L330 21/12/94			Brazil	

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Appendix A:
continued

Case No.	*Product and economies*	*Initiated*	*Provisional duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of duties*
22	Urea ammonium nitrate solution—Bulgaria, Poland	OJ C123 5/5/93	L162 30/6/94 Extended L280 29/10/94	L350 31/12/94	L350 31/12/94	Czech and Slovak Federal Republic	Bulgaria—ecu 2 except for impo covered by unde under Commiss Decision 94/825 Poland—the dif between the mi import price of ton and the c.i.f. frontier price pl duty payable, ex imports covered undertakings
23.	Furfuraldehyde—China	OJ C208 21/7/93	L186 21/7/94 Extended L298 19/11/94		L015 21/1/95	Argentina	Ecu 352 per ton
24.	Furazolidone—China	OJ C302 9/11/93	L174 8/7/94		L285 4/11/94	India	70.6 percent
25.	Microwave ovens—China, Korea, Thailand, Malaysia	OJ C341 8/12/93					
26.	Cotton fabric—China,	OJ C17					

	India, Indonesia, Pakistan, Turkey	20/1/94
27.	Tube or pipe fittings of iron or steel—China, Croatia, Slovak Republic, Taiwan (China), Thailand	OJ C35 3/2/94

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Appendix A:
(continued)

Case No.	*Product and economies*	*Initiated*	*Provisional duties*	*Undertakings*	*Definitive duties*	*Analogue economy*	*Details of duties*
28	Grain oriented electrical sheets—Russia	OJ C138 20/5/94					
29	Coumarin—China	OJ C138 20/5/94					
30	Ammonium nitrate—Lithuania, Russia	OJ C158 3/6/94					
31	Polyester staple fiber—Belarus	OJ C212 3/8/94					
32	Certain footwear—China, Indonesia	OJ C45 22/2/95					
33	Certain footwear—China, Indonesia, Thailand	OJ C45 22/2/95					
34	Furfuryl alcohol—China	OJ C95 19/4/95					

Note : This appendix lists antidumping cases initiated since 31 December, 1989 against products from economies deemed EC at the time of initiation to be a nonmarket economy. It does not, therefore, include the 1994 case against a Hungarian e listed in Table 2: Hungary was by 1994 deemed by the EC to be a market economy.