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In a reproachful dissent in *United States v. Columbia Steel*,[1] the late Justice Douglas sought to remind his brethren what the antitrust laws of the United States are all about:

> [A]ll power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. . . . That is the philosophy and the command of the Sherman Act.

It is no small irony that the same distrust of industrial concentration in private hands that animates the Sherman Act[2] also underlies the organization of the state-controlled economy. In the words of Justice Douglas, this distrust amounts to "a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it."[3] In the United States, the Sherman Act and other antitrust laws resulted from this distrust of industrial concentration. Other nations, fearing the excesses of private power, have created state-controlled economies, making industry part of government. As economic barriers between relatively free market economies and controlled economies fall, their component commercial and industrial enterprises face competitors who are as alien in their business practices and economic origins as in their nationality.

The official foreign trade monopolies of a state-controlled economy must conduct business within the constraints of a central economic, political, and social plan. Trade with market economies is potentially disruptive, because Western[4] pricing policies, delivery schedules, and financing arrangements

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may not dovetail with the internal goals of the planned economy.[5] These same goals, and the centralization required to pursue them, can be equally unsettling to market economies and their unordered constellations of businesses. In free market economies, controlled economy enterprises (CEEs) threaten to upset uncontrolled markets that function on the premise that businesses operate for private profit. When goods from a planned economy are marketed in an unplanned economy, there is a potential for intentional or unwitting disruption of the market when foreign government planners change production priorities or pricing policies. In the late 1950s, for example, Soviet planners decided to dispose of surplus aluminum and tin. Using contracts with deescalation clauses, the Soviets were able to undercut the international price whenever it fell. In this manner, they disposed of their surplus, causing the world aluminum and tin prices to collapse. The difficulty of characterizing such behavior was raised by a witness at a 1974 Senate hearing on East-West trade and the antitrust laws: "Is it dumping? Is it competition? We are on a very fine line here. If it's dumping it should be curbed. If it's competition, it should be encouraged."[6]

Any such line drawn to mark out areas of behavior by CEEs should not stop at the difference between "dumping" and "competition," for the absence of a statutory dumping violation does not necessarily indicate competition. Indeed, competition, a difficult enough standard to use in evaluating the behavior of free market firms, is a concept encountering even greater difficulty in discussions and evaluations of behavior by firms from controlled economies.

In a market economy, some goods may enjoy a "natural competitive advantage"[7] stemming from lower costs of capital, labor, or materials, for example, or from efficient business practices. Firms with such advantages can undersell their competitors, if they choose, or make other business decisions exploiting their competitive advantages and successes. The greatest "natural competitive advantage" enjoyed by a market firm, however, does not release that firm from the exigency of showing a profit. By contrast, a CEE need not turn a profit to survive. Any disparity between a low price and the higher value of the resources that go into a particular good produced or marketed by a CEE is compensated for by other components of the state economic plan. To characterize this central allocation of resources in the same manner as cheap labor or efficient private management seems inappropriate. The market economy notion of a "natural competitive advantage" is not easily applied to goods from a planned economy, where government planners set a low price in accordance with national objectives. Firms from planned economies, as instrumentalities of their governments, enjoy a variety of other advantages *vis-à-vis* their free market counterparts. Governments may be willing, through state enterprises, to enter new product markets or geographic markets, when private companies would be deterred by the lack of private returns. Governments and their enterprises, seeking social returns and buttressed by other sectors of the economy, may forge ahead despite the absence of profits. State enterprises may establish coordinated marketing for exports and may take advantage of territorial monopolies of materials—in both instances bringing substantial power to the markets they enter.[8]

In short, "free marketers" in the United States face a competitor unrestrained by the unruly "rules" of competition. Traditionally, the disruption wrought by CEEs has been addressed in the United States as a problem of international trade regulation.[9] But the threat to competition posed by the trading activities of state monopolies in United States markets makes a Sherman Act response one that ought to be explored.[10] The first reason for such a response has already been suggested: the absence of a dumping or other statutory international trade regulation offense does not necessarily indicate that all is well in the market. Controlled economy enterprises, as government-supported monopolies, bring concentrated power to bear in United States markets, and engage in trading practices susceptible of predatory manipulation. Such power is of a dimension that the Sherman Act (the Act) was meant to control; such practices, used to capture markets, are the sort the Act condemns. A state trader can use its monopoly position at home to gain monopoly power in other markets, without violating the letter of the international trade regulation statutes. If, however, the Sherman Act is meant to protect U.S. markets from the evils of monopolies, and if monopoly is what a state trader is all about, a trade regulation response might miss the point. Moreover, statutory international trade regulation remedies by nature emphasize governmental or international trade interests, rather than the interests and complaints of the individual domestic businesses affected by state monopoly power. While courts like to remind litigants that the antitrust laws protect competition rather than competitors,[11] antitrust laws do in fact protect individual firms, affording relief in the form of treble damages to harmed "competitors." Relief of that sort is not generally available through the trade regulation statutes. A treble damage private action for dumping is authorized by § 801 of the Revenue Act of 1916, but the action does not encompass cases where there is no home market and no other countries to which the product in question is exported from which to calculate a price floor for the purpose of identifying dumping. A § 801 violation is predicated on imports priced below prices "in the principal markets of the country of their production, or other foreign countries to which they are commonly exported." But a dumping case against a CEE is likely to require constructed or substituted price or value to establish dumping, given the absence of sales (and thus comparable prices) of the product in the home country, or the artificiality of those prices that are established, or the lack of other countries of export. Such a cause of action against single-market export activity, with the price of the allegedly dumped goods measured against a constructed or substituted value, was cognizable under the Antidumping Act of 1921 and remains so under the Tariff Act of 1930, § 773(c) (as amended by the Trade Agreements Act of 1979, § 101), but neither statute authorizes a private suit.[12]

Quite apart from the private remedy gap in existing international trade law is a more fundamental problem. There is a reluctance to characterize marketing techniques of foreign government exporters as trade regulation offenses. It has been argued by two Department of Justice officials that the antitrust laws "provide adequate remedies if true predation can be proved."[13] Yet the Department of Justice has indicated in its *Guide for International Operations* that predatory or unfair marketing by CEEs is within the province of the international trade laws.[14] While it would be premature to conclude that predatory practices by CEEs marketing in the United States will slip unnoticed or unabated through the cracks between U.S. antitrust and international trade laws, and that the power of CEEs in U.S. markets will grow to alarming magnitudes, it is not too early to examine the relevance and possible application of the Sherman Act to the power and practices of CEEs. In the first case to present these issues, *Outboard Marine Corp. v. Pezetel,*[15] the court did not face up to the challenges posed to the free market by CEEs, denying that the Sherman Act could be used to meet those challenges. But although Sherman Act analysis must take account of the special problems posed by the CEEs, the policies underlying the Act are indeed relevant to the practices and power, including the potential power, of these firms.

THE CASE OF THE POLISH GOLF CARTS: ONE COURT'S RESPONSE TO THE CONTROLLED ECONOMY ENTERPRISE

Pezetel Foreign Trade Enterprise of the Aviation Industry, an agency of the People's Republic of Poland, began in 1970 to manufacture "Melex" (named for Mielec, Poland, site of Pezetel's factory) electric golf carts solely for export to the United States, under an agreement with a U.S. company providing the specifications for the carts.[16] From eight carts in that year, the imports burgeoned to 8,040 by 1974, amounting to 19 percent of the U.S. electric golf cart market. Figures for the first few months of 1975 indicated a 35 percent market share. As the market share of Melex carts increased, sales of Cushman golf carts, manufactured by Outboard Marine Corporation (OMC), dwindled. OMC could not meet Pezetel's low price. Together with other U.S. manufacturers, OMC brought charges against Pezetel under the Antidumping Act of 1921,[17] but by the end of 1975 it was forced to cease production of its Cushman line. In 1977, OMC filed suit in federal district court in Delaware, where Pezetel had incorporated a subsidiary, also known as Melex, advancing, *inter alia,* several Sherman Act claims, supported in part by theories of liability based on practices and advantages of Pezetel inherent in its organization as a Communist state monopoly.

Count 1 of the complaint alleged that Pezetel, Melex, and the defendant distributors of Melex carts violated Section 1 of the Sherman Act by conspiring to restrain interstate and foreign trade; Count 2 alleged a Section 2 violation consisting of monopolization or attempted monopolization of the manufacture, sale, and distribution of carts. Counts 3 and 4 were Wilson Tariff Act[18] and Antidumping Act of 1916[19] claims, respectively.[20]

OMC claimed that Pezetel's pricing practices were predatory and, as such, actionable under Section 1 as elements of a plan to restrain trade, and under Section 2 as culpable behavior leading to attempted or actual monopolization. The plaintiff did not allege below-cost pricing, arguing that this standard had no meaning in a suit against an enterprise from a state-controlled economy, where "the costs of materials, labor and capital even if shown in books and records, reflect the value judgments not of the marketplace, but of central government planners."[21] Predatory pricing was demonstrated, according to OMC, by Pezetel's practice of setting the price of Melex golf carts "far below the floor of the marketplace" in an exercise of "raw economic power."[22]

OMC also urged the court, for purposes of the monopolization charge, to look beyond a mathematical calculation of market share in determining whether Pezetel had achieved monopoly power. In calculating monopoly power, OMC argued, the court should take into account the support afforded Pezetel by the Polish government. The state monopoly could maintain its prices because it was backed by vast—nationally-scaled—financial resources far greater than those available to free market competitors. Unconstrained by the need to show a profit, Pezetel was said to enjoy market power not measurable by a concentration ratio. Finally, OMC argued that Pezetel had forced the five largest firms in the industry into a loss position, thereby demonstrating its monopoly position in the U.S. market.[23]

Ruling on a motion to dismiss for failure to state a claim, Judge Schwartz was sensitive to OMC's quandary. He noted that its grave injury was undisputed, but questioned whether the loss was cognizable under the Sherman Act.[24] His answer, in large part, was negative. All that survived of the Sherman Act claims was a count of attempted monopolization predicated on Pezetel's alleged 35 percent market share and the alleged use of territorial restraints among its distributors to perpetuate that share[25]—a claim that did not rest on Pezetel's state-controlled characteristics, but that could have arisen against any species of business enterprise.[26]

THE SECTION 1 COMPLAINT: PREDATION IN RESTRAINT OF TRADE AND THE BELOW-COST PRICE TEST

Although the court found the concerted action element of Section 1 of the Sherman Act satisfied by OMC's allegations regarding agreements between Pezetel and Melex distributors, it rejected the allegation that the Melex pricing strategy was predatory and thus an unlawful restraint of trade. Predatory pricing, the court said, is an offense "generally manifested by selling below one's own cost for the purpose of effectuating long term domination of the market."[27] By this standard, OMC's allegations of "predatory and unfair" prices were deficient: "Notably absent are allegations that the prices are below cost or that any of the defendants are foregoing a profit."[28] The court held that the below-cost predatory pricing standard was not subject to variations; to devise a new test or to allow OMC to prove the predatoriness of Pezetel's pricing by evidence other than that bearing on costs and profits of the defendant would "usurp Congress" and amount to nothing less than "a perversion of both the judicial function and the antitrust laws."[29] In Judge Schwartz's view, OMC was attempting to set up the antitrust laws as a "sanctuary for those who cannot compete against lower prices be they the result of simple efficiency, economies of scale, cheap labor, technological expertise or anything other than commercially mischievous conduct."[30] With respect to pricing policies, commercially mischievous conduct can apparently take just one form: namely, setting prices below costs.

THE SECTION 2 COMPLAINT

Judge Schwartz swiftly disposed of the allegation of monopolization, in a sentence and a footnote. Relying solely on market concentration to the exclusion of all other indicators of monopoly power, he determined that under *United States v. Aluminum Company of America*,[31] Pezetel's 35 percent market share failed, as a matter of law, to establish monopolization. Acknowledging that the ability to control prices in the market was another usual test of monopoly power, the court nonetheless held that market share alone was the proper test for gauging the power of a CEE in a U.S. market.

> In measuring the market power of a more conventional competitor—one not benefited by a government subsidy—ability to control price would be the focal point of the analysis. . . . Here, the presence of a controlled economy conferred upon the defendants power over price that another competitor might have achieved only through unlawful anticompetitive conduct.[32]

The court accepted the allegation that Pezetel's 35 percent market share constituted a "reasonable probability of success" of monopolization sufficient to show an attempt to monopolize if the "critical element" of specific intent were shown.[33] But in another narrow interpretation, Judge Schwartz held that he could not infer the requisite specific intent from Pezetel's pricing practices. The plaintiff, Judge Schwartz stated, must allege conduct that is not a "normal, industrial response to market opportunities," but rather that is intended to limit the opportunities of competitors to drive them out of the market.[34] OMC's complaint regarding the low prices offered by Pezetel to

Melex dealers did not meet this test, according to Judge Schwartz: "As earlier emphasized, the low prices offered to Melex dealers by defendant manufacturer or defendant importer are not alleged to be below Pezetel's costs or otherwise predatory."[35] Of course, OMC did allege that the prices were predatory, and earlier in the opinion Judge Schwartz noted that they were described by the plaintiff as "predatory and unfair."[36] The point was not that OMC failed to allege either below-cost pricing or pricing practices that were "otherwise predatory," but that the court failed to accept a theory of predatory pricing that departed from the "below-cost" test.

Judge Schwartz based his rejection on *United States v. Grinnell Corp.*,[37] where the Supreme Court had identified the hallmark of monopolization as "the willful acquisition or maintenance" of monopoly power in contradistinction to growth or development resulting from a superior product, business acumen, or historic accident. *Grinnell* was not an attempted monopolization case, but rather a case of monopolization. To find it controlling of the case before him, Judge Schwartz must have assumed that the distinction between willfulness of acquisition and innocent acquisition of power was instructive of the distinction between behavior from which one could infer an intent to acquire monopoly power, and behavior implying only innocent motives. Defendants in *Grinnell,* with 87 percent of the accredited central station service business (involving the sales of burglar alarms, fire alarms, and sprinkler systems) were deemed to hold monopoly power. "Willful acquisition" was hardly in question, given the defendants' participation in restrictive agreements, pricing practices, and takeovers. The question before the Supreme Court was one of the relevant market for the purpose of the antitrust offense. Nevertheless, Judge Schwartz adopted "the language of *Grinnell*" as his own:

> That Pezetel's competitive advantage results from a government subsidy by a controlled economy that permits defendant to offer virtually identical products at a cheaper price is not actionable under Sherman Act § 2. Employing the language of *Grinnell,* such a product may be considered superior to another comparable product available only at a higher price. Certainly a firm that exploits the opportunity through technology, cheap labor or a government subsidy to offer the same product at a reduced price can be said to be responding normally to market opportunities. As such, defendants [sic] use of low prices appears to fall with the *Grinnell* exception and therefore is not considered mischievous conduct from which § 2 intent can be inferred.[38]

In effect, the court fused a cost-based predatory pricing standard with the *Grinnell* statement to conclude that a CEE which exploited its government subsidy and management to offer the same product as its free market enterprise counterparts at a reduced price was no different from any competitor exploiting the advantages with which it was blessed.

PREDATION AND POWER: SHERMAN ACT APPLICATIONS TO THE CONTROLLED ECONOMY ENTERPRISE

The Sherman Act is flexible enough to take notice of the special problems posed to U.S. markets by East-West trade. Judge Schwartz's narrow reading of the Sherman Act in this context may have resulted from a concern that the plaintiff was seeking to convert the antitrust laws into a powerful instrument of protectionism. Such protectionism, which would afford particularized benefits in the form of treble damages to complaining U.S. firms, would plainly be offensive to a system of international trade in a way that the usual international trade regulation remedies are not. The latter, after all, are admittedly protective of U.S. industry. Their use against practices deemed unfair engenders none of the apparent hypocrisy that would attach to similar use of the Sherman Act, with its philosophy of invigorating competition and safeguarding for consumers a diverse market. Moreover, international trade regulations, insofar as they are premised on price adjustments through tariff levies, reflect a willingness to accommodate the disparate national economic values of both the importing and exporting governments. This method of economic regulation appears more palatable to foreign sovereigns than does antitrust regulation that, through its treble damage provision, necessarily conveys a punitive message as well as an indictment of foreign national economic views. Conceding the risk that the Sherman Act might serve as a disguised form of protectionism, the fact remains that the policies underlying the Act are decidedly relevant to the challenges CEEs may present in the U.S. market. More importantly, these policies, if thoughtfully wielded, are susceptible of fair and nonprotectionist applications to state-controlled firms.

PREDATION: ASSIMILATING INTERNATIONAL RULES IN A SHERMAN ACT ANALYSIS

Under Section 1, predatory pricing is a substantive offense, complete in itself if joined by the required complicity, rather than, as in Section 2, conduct from which inferences may be drawn about an intent to monopolize. If the offense were defined exclusively in terms of below-cost pricing, judicial refinements might indeed pervert the statute. But the statute's concern is not, in fact, so narrow. In analyzing a challenged pricing policy,

> It is . . . important to determine whether the price-cutter possesses an adventitious or meretricious advantage, unrelated to competitive merits, either by reason of doing business in a multiterritorial market, where the local price-cutting can be recouped by monopolistic profits elsewhere, or by reason of being able to subsidize a losing operation by the profits from a different line of business. . . .[39]

This unrestrictive characterization of predatory pricing in restraint of trade avoids stressing the exact mechanism and mathematics behind price-cutting. Even the *Pezetel* court used a subjective concept, "commercially mischievous conduct," to describe the Section 1 evil. But the court simply refused to find mischief in any pricing policy other than one involving the setting of prices below marginal costs. Given the advantages it enjoys, a CEE may well be able to set prices that are predatory in a meaningful sense, and in restraint of trade, even if the prices are not measurably below costs. By insisting on an allegation of below-cost pricing—an allegation that OMC was evidently unable to make against a CEE, whose costs of production are arguably as artificial as its product prices—the court cut off the inquiry without giving the plaintiff an opportunity to prove that Pezetel's pricing policies involved the very sort of mischief at which Section 1 is directed.

In like fashion the court's refusal to entertain OMC's argument that Pezetel's intent to monopolize could be inferred from the defendant's prices circumvented a thorough examination of the nature and purpose of the pricing policies, giving short shrift the underlying principle of *Swift & Co. v. United States*,[40] that the character of actions and plans are crucial in Sherman Act analysis. Specifically, by shrinking from the task of assaying Pezetel's admixture of business and government, the court gave voice to a contradictory judgment: that a CEE can be said to respond normally to the "market" opportunity of its government-planned and government-proffered subsidy monopoly.

The formula of normal behavior originated in the *Standard Oil* case,[41] where Justice White contrasted legitimate market ascendancy by "normal methods of industrial development" with unlawful "new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed."[42] The usefulness and meaning of this distinction diminish when transposed into a case involving a CEE. Even its reformulation in *Grinnell*, where "historic accident" had a place among the nonactionable sources of monopoly power, is of limited relevance to a CEE case. Surely the Court was not there delivering an opinion on the "historic accident" of centrally run economies. The Sherman Act accountabilities of enterprises that benefit from the economic organization of their home states were not before the Court, not even by analogy.

Despite the inappositeness of the "below-cost" and "market opportunity" tests, Section 2 case law provides some insight into the problem of reconciling antimonopolization policy with CEE practices. Monopolization is an offense involving the possession of monopoly power acquired by unlawful conduct. The conduct is either evaluated independently, against some standard of unlawful activity, or examined as the basis from which an unlawful monopolistic intent can be inferred. If a firm does not achieve monopoly power, it may nonetheless be guilty of an attempt to monopolize, if it acts with the intent to garner that power and comes within a "dangerous probability" of success.[43] A firm may unlawfully exploit otherwise lawful advantages under

Section 2: intent, modes of operation, and market preeminence may combine to create culpability.[44]

In *Times-Picayune Publishing Co. v. United States*[45] the Supreme Court elaborated on the type of proof required in an attempt case. While subjective intent to injure competition is required, evidence about the defendant's state of mind is not. The unlawful intent can be inferred from various evidentiary sources—most importantly, from conduct.[46] Whatever the difficulties of formulating definitions of monopolistic conduct or intent, the fact that such conduct and intent are the focal points of a Section 2 inquiry is crucial to the problem of how the pricing practices of CEEs might fit into the framework of law.

These focal points should not be obfuscated by tests and formulae that may not reveal anything about monopolization or attempted monopolization. The purpose of identifying predatory practices and setting them up as tools of analysis is to identify a broader offense—the intentional and unreasonable control of competition. Unbending adherence to inflexible tests such as a "cost-based predatory pricing analysis" may arrest the judicial function in Section 2 of discerning unlawful conduct and intent. As Professor Lawrence Sullivan has insisted in response to a sophisticated economic analysis identifying instances of predatory pricing,[47] functional and objective standards are useful, but are not "*the* way . . . to get at predatoriness."[48]

Flexibility in ferreting out predation by state traders carries costs and risks. If U.S. courts were to develop standards of predation that would transform the Sherman Act into an amorphous international "fair trade" regime activated at the suggestion of market predominance by a state trader and aimed directly at practices likely to be commonplace to CEEs, international trading relations, as well as general U.S. foreign relations, would be imperiled. Other "flexible" remedies that might be achieved through modifications to existing import regulations would run the same risks. It might be possible to expand the 1916 Antidumping Act[49] to allow treble damage actions against the type of single market export activity at issue in *Pezetel*, where there is neither a home market, nor any other export market from which to calculate a price floor for the purpose of identifying dumping. Alternatively, a private antidumping remedy might be added to the Tariff Act of 1930,[50] which authorizes only government action against single-market trading situations, with the prices of the allegedly dumped goods measured against a constructed or substituted value. A private recovery remedy could be built into the market disruption provisions of the Trade Act of 1974,[51] or selected international trade regulation laws could be incorporated into the "antitrust laws" covered by the private action provision of the Clayton Act.[52]

Such revisions would certainly cheapen the antitrust laws and contribute nothing substantial to the meaning of predation or monopoly power. If tacked onto the body of traditional antitrust law, these amendments would graft a policy having little to do with monopoly onto statutes having everything to do with monopoly. The resultant legal structure of "antitrust" law would be hobbled by an anomalous appendage that could strike against foreign marketers who have nowhere near a monopoly position, although they may indeed have violated rules of fair trade. If patterned after antitrust laws, but kept statutorily separate from them, these modifications of international trade regulation laws would mark significant departures from the tendency to treat international trade regulation at the governmental level, departures that would transform protectionist laws into offensive weapons in the hand of private U.S. firms.

The more realistic and difficult task is to adhere to standards of predation that will preserve the economic environment mandated by the Sherman Act without interfering with international trade or political relations. To be avoided are condemnations of a CEE's home organization, which could stir up international animosities; unfair presumptive tests applied exclusively to CEEs; and impossible requirements demanded of controlled economies regarding the way they conduct their foreign trade. To devise standards in keeping with considerations of international relations, judges should turn to international referents. They must identify conduct that is internationally recognized as predatory and that is also of the same quality or that effects the same evils as traditional Sherman Act predatory practices.

The General Agreement on Trade and Tariffs,[53] for example, grapples with state trading in a general manner, with respect to all the state parties, and in a specific way, with provisions formulated for centrally planned states. The antisubsidies provisions address a variant of the price advantage issue seen in *Pezetel*, Article XVI prohibiting government subsidies that produce lower export than domestic prices of goods, and Article VI allowing the importing state to assess a countervailing duty if injury to a potential or established industry is threatened or caused. Article XVII treats state trading specifically, admonishing state enterprises to make purchases and sales

> . . . solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchases or sales, and . . . [to] afford the enterprises of the other contracting parties adequate opportunities, in accordance with customary business practice, to compete for participation in such purchases or sales.[54]

The accession agreements of Poland, Romania, and Hungary, in acknowledgment of the special problems posed regarding freer international trade by planned economies, commit those states to affirmative action to increase imports, provide for special valuation treatment of their exports, and devise safeguards for importing states against the three countries' export prices.[55] While all these directives and declarations are subject to varied interpretations, and while they have not bound the acceding states to a regime of completely fair, free, and competitive international trade, they do indicate common, if somewhat fuzzy, agreement about proper trade behavior.

Norms of conduct have been established; material deviations are unfair and predatory.

The Treaty of Rome[56] also deals with state enterprises established by the contracting parties, recognizing, like GATT, their obstructionist potential. Unlike GATT's Article XVII rule of conduct, the Treaty of Rome's Article 37 required an adjustment of state trading monopolies "so as to ensure that, when the transitional period expires, no discrimination exists between the nationals of Member States as regards the supply or marketing of goods."[57] This adjustment was part of the more fundamental task of the EEC, that of establishing a unified system of undistorted competition for public and private enterprises, with both types of enterprise subject to the rules of competition.[58] Again, a standard of commercial conduct has been established among nations. Agreement can also be reached bilaterally: when the United States extends nondiscriminatory tariff treatment to a Communist country, it includes in the bilateral agreement "safeguard arrangements" providing for consultation when prospective or actual imports threaten or produce market disruption.[59] The 1974 Trade Act also authorizes import restrictions to prevent such disruption.[60] Even if not indicating consensus on norms, the bilateral agreements indicate commitments to adhere to certain modes of behavior or to submit to remedial consequences.

Agreements to preserve competition in East-West or public-private trade have been framed consonant with sovereign interests and national goals. There has been no effort to write state trading out of existence; there have been varied and experimental efforts aimed at integrating state trading into the international system. Poland was not asked to rid herself of her trade monopoly before joining GATT; similarly, the state enterprises of the EEC countries, though "adjusted" for competition's sake, are accorded deference for the sake of politics. Article 90 of the Treaty of Rome qualifies the general rule that public enterprises are subject to antitrust, antidumping, and antisubsidies rules with the statement that public undertakings "entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly" are subject to the trade rules only to the extent the application does not interfere with their functions.[61] In sum, there has evolved an amalgam of deference to the political impulses animating state enterprises and submission by these enterprises to standards of fair trade and competition.

Of course, rules or standards of international law are rarely universally agreed upon. Further, rules or standards to which a state binds itself in a multilateral agreement such as GATT, or in a bilateral agreement, such as one entered into under the Trade Act of 1974 extending nondiscriminatory tariff treatment to a state-controlled economy, are not necessarily transferable to other legal contexts such as the Sherman Act. To make more difficult the question for "international" standards applicable to the type of transaction at issue in *Pezetel*, only six Communist or Socialist countries are members of GATT and thus bound to its rules on export sales;[62] moreover, U.S. bilateral treaties, with rules against predatory export practices, do not span the controlled economy globe.[63] Therefore, even if one agreed that the standards regarding market disruption and unremunerative pricing expressed in these international documents help identify predatory practices in the context of the Sherman Act, a great many nations would remain uncovered by any such standards. This limited coverage would be politically unpalatable, as nations with which the United States has come to a trading *modus vivendi* through negotiations and treaties would be at a comparative disadvantage to those nations without this status and its attendant obligations.

The discrepancy could be avoided by applying the relevant standards without discrimination. Such uniform application seems unobjectionable for the same reasons that transferring international standards contained in conventions should not be seen as violating principles of treaty law and interpretation: the courts would not be spuriously creating or expanding international responsibilities or liabilities out of arbitrarily selected conventional provisions. Their use of international behavioral criteria would in fact manifest a sensitivity to foreign interests, while at the same time this use would serve legitimate domestic competition policy. Nothing in international law constrains U.S. courts from finding predation and attaching liability under domestic laws to any number of practices engaged in by foreign firms, whether free market or state-controlled. What this flexible (and necessarily imprecise) transfer of international standards would signify is the recognition that while state trading might present myriad instances of practices that seem vaguely unfair, and fewer examples of practices that seem undesirable (and thus possibly actionable under the Sherman Act if present in conjunction with other elements proscribed by the law), U.S. judges will not depend on parochial notions of commercial mischief. Neither, however, will they close their eyes to all predation that stems from state planning by woodenly adhering to tests for predation that could never be applied to CEEs. Such rigidity would ignore the possibilities of law and accommodation. As John Zysman mused, looking to the future,

> These state traders confront the advanced capitalist countries with new conditions of trade competition. The question is whether this layer of trade surrounding the core of the principal OECD countries is cut off from private trade, incorporated within present arrangements for conducting private trade, or has altered the system of private trade itself.[64]

The Sherman Act need not be irrelevant to the marketing practices in this country of commercial enterprises from controlled economies, and international rules of trade, however imperfectly formulated and incompletely adopted, need not be irrelevant to antitrust analysis. The former can find useful and fair standards in the latter, and the latter can find expression and advancement within a domestic legal framework constructed to keep intact a social and economic environment to which the United States is committed.[65]

ASSESSING THE MONOPOLY POWER OF CONTROLLED ECONOMY ENTERPRISES

In ascertaining the power an enterprise holds in a market and in determining whether that power amounts to monopoly power, courts would find little guidance in rules and standards set out in international trade agreements. Rules of conduct do not speak to de facto states of affairs, however carefully the rules may be designed to promote or deter certain future balances and distributions. Yet the characterization of market power is as much a part of Section 2 of the Sherman Act analysis as the characterization of behavior, and the state trader may bring to a free market very great power by virtue of its government-sanctioned monopoly and national deep pocket.

The *Alcoa* 30-60-90 test is not the last word on monopoly power, and it was probably not intended to be. Indeed, given the circumstances in which it was formulated, the argument can be made that it is particularly inappropriate for generalized use. Judge Hand did not arrive at the ratios in a deductive manner; rather, the fractions were presented to him as operative facts of the case and he analyzed them in that context. To adopt these ratios—which, as the difference between the lower court's and Judge Hand's calculations indicates, were highly susceptible to manipulation—as generally significant overlooks the historical setting and binds post-*Alcoa* cases to an amalgamation of market statistics and corporate behavior that happened to emerge in that case. Unquestioning adoption of the *Alcoa* test rests the determination of monopoly power on market share analysis which fortuitously occupied Judge Hand's opinion.

Closer scrutiny of *Alcoa* reveals that Judge Hand himself did not rely solely on the concentration ratio in determining whether Alcoa held monopoly power. He emphasized that the reason Alcoa's proportion of the market was significant was that it gave the company virtually complete control in the market.[66] While he acknowledged his focus on the concentration of producing power, he reiterated that a root evil was the "possession of unchallenged economic power." If that power existed, it was "irrelevant" that the possessor reaped only a fair profit.[67]

In *United States v. United Shoe Machinery Corp.*,[68] Judge Wyzanski brought to "exfoliation," as he later put it,[69] the inherencies in the seeds of *Alcoa*. These inherencies, according to Judge Wyzanski, who was Judge Hand's law clerk when the latter handed down the *Alcoa* decision, amounted to a market structure analysis for Section 2 monopolization. In estimating a defendant's strength under such an analysis, Judge Wyzanski gave some weight to its percentage of the market, but he also felt it proper to examine its pricing policies, to compare the defendant and its competitors in terms of financial resources, facilities, accumulated experience, and variety of products offered, and to take note of the market barriers erected by the defendant.[70]

The list of monopoly power indicia can be amended as new market situations arise. If a firm acts as though it has preponderant market power, a tentative inference of monopoly power can be drawn. If a firm performs as if it has dominant market power, a similar inference can be drawn. Although one usually thinks of exorbitant profits as the main act of a monopolist performance, the performance may entail whatever activities the monopolist wishes to pursue and is able to pursue thanks to its release from the worries of competition: maximization of sales volume, maximization of cash flow, or even the achievement of a favorable image.[71] While not determinative, "size is itself an earmark of monopoly power,"[72] and cannot be ignored as a red flag marking monopoly power. Where "market power" may appear absent by market concentration standards, "monopoly power" may nonetheless exist in terms of vast aggregations of wealth that can underwrite a ruthless ascent to market predominance. One might test for this monopoly power by surveying the financial resources available to the firm under scrutiny.[73]

Distinguishing the particularized finding in the *Alcoa* case from the general theory underlying those finding leads one to a rather broad lesson that has been largely ignored in Section 2 cases. Judge Hand recognized that a finder of fact would come out differently in the case if he began with a different opinion regarding what goods and productive capacity were competing in the market. The inquiry central to identifying monopoly power concerns what a firm brings to the market and whether what it brings can crush its competitors. The power that a CEE brings to the market in question—assets, state management, longevity while maintaining unremunerative prices—is not reflected in a concentration ratio. It should, however, factor heavily in a realistic evaluation of its power in the market.

In this area, as in that of predatory practices, judges may subject the Sherman Act to hostile criticism by applying novel tests to CEEs when commonplace standards yield no useful information. Here again, however, as in the predation field, the inquiry suggested is consistent with (and in fact no departure from) that which is normally undertaken in Section 2 analysis. Courts generally determine the existence of monopoly power by employing a flexible calculus embodying a wide spectrum of indicia. It happens that when judges deal (as they always have) with free market firms, a large percentage of sales that a firm is able to capture in the market is particularly persuasive evidence of monopoly power. When dealing with CEEs, the other indicia should gain in significance. A court has a duty under the Sherman Act to discern monopoly power. It can do little with tests that measure the concern of the statute incompletely, if not misleadingly.

However consistent with Sherman Act policy (and even necessary for Sherman Act enforcement) one considers this means of discerning monopoly power, the problems attendant to its actual application cannot be wished away or muffled by good intentions. Courts may come dangerously close to banning CEEs from the U.S. market for the concomitants of their very nature: size and freedom of action in formulating market strategies. The suggestion has been made that smallness is a virtue in industrial organization, and that the antitrust laws exist in part as tools to prevent the absolute size of a firm from reaching gargantuan proportions.[74] Whether this belief or commitment is truly part of Sherman Act policy, it should have no voice in proceedings against CEEs. These enterprises embody the economic and social policy of another sovereign, and the requirement to comply with U.S. law should not grow into an insistence that the foreign sovereign revamp its internal organization. The doctrine of comity cautions against judicial zealousness when a controversy reaches deeply into the interests of a foreign sovereign. There are also political limits to what the adversary process can accomplish with respect to monopoly power, domestic or foreign, and the evils it wreaks on consumers and on social and economic structures.

CONCLUSION

One should recall the irony presented at the beginning of this article, that U.S. antitrust laws and centrally planned economies have addressed the same problem and come up with widely differing solutions: a system of maximum competition among private actors and a regime of public monopolies. If the issue of monopoly power were merely one of economic power, a CEE would have no unique cause for complaint upon being told by a U.S. court that its power in a U.S. market was at an unacceptable level. But the issue is more fundamental, reaching into general questions of power; a centrally planned government might perceive any U.S. court judgment against the strength of its foreign trade organizations as an attack upon its vital economic and political interests. Power is quintessentially politics. The danger faced by courts in considering allegations of predatory practices by CEEs is one of purposefully or inadvertently honoring protectionist protestations having nothing to do with Sherman Act policy. The danger posed at this juncture with respect to monopoly power is that judges will make determinations having too much to do with the essence of the Sherman Act—that is, U.S. judges may intrude into the arena of core governmental concerns. The judicial function in domestic antitrust cases naturally enough includes the enforcement of antitrust claims against privately owned corporations. Inevitably, this involves an acceptable, albeit significant, judicial intrusion into the behavior and structure of U.S. enterprises. The acceptability of this function diminishes when judges assume a similar role in policing the activities and structure of CEEs, necessarily implicating foreign sovereign interests and decision making.

But the difficulties should not deter judges who are presented with monopolization cases against CEEs from fulfilling the purposes of the Sherman Act by seeking out monopoly power, just as the fine line that separates predation from competition in the range of CEE marketing practices should not discourage judges from uncovering truly predatory activities in Section 1 and 2 cases. As the tests already outlined suggest, courts can apply the Sherman Act with meaning to both the practices and power of CEEs, provided they unchain themselves from formulae that are largely irrelevant to CEEs. Courts can couple enforcement with fair-mindedness and tolerance of international diversity if they tailor their new test of CEE predation to international standards and if they observe the political limits on the judicial process in their evaluations of the power the state traders bring to U.S. markets.

NOTES

1. 334 U.S. 495, 536 (1948).
2. 15 U.S.C. §§ 1–2 (1976).
3. 334 U.S. at 536 (1948).
4. Although controlled economies or Socialist states are not confined to Eastern Europe, and free market economies are not inevitably "Western," "East-West trade" is convenient shorthand for free market/controlled economy trade.
5. The disruptions are dealt with in part through contract terms and conditions. For example, Soviet Foreign Trade Organizations are directed to purchase at the lowest world price and to sell Soviet goods at prevailing world prices, or, if none are discernible, at some minimum figure. In so-called compensation or buy-back agreements, that price is calculated to ensure that exports will cover the cost of Western-supplied technology or equipment used to produce those exports. If the Western seller has no need for the product, it may often assign the purchase contract to another party satisfactory to the Eastern party. Another mechanism by which the state-controlled economy avoids unsettling effects is the license agreement. The Eastern licensee of Western technology must earn convertible currency in order to pay the licensor, and that need often translates into a license provision that a licensor might wish to avoid: the licensee gets the right to sell output from the licensed technology in Western (convertible currency) markets. For an overview of the adaptive mechanisms of Eastern European countries to East-West trade problems, *see* J. Connor, Jr., Legal Aspects of Doing Business with the USSR and Eastern Europe (1977).
6. *International Aspects of Antitrust Laws: Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.* 93d Cong., 1st and 2d Sess. 114 (1973–74) (statement of Samuel Pisar).
7. Parsons, *Recent Developments in East-West Trade: The U.S. Perspective,* East West Trade 165 (1973).
8. For a catalogue of state trading advantages, *see* Kostecki, *State Trading in Industrialized and Developing Countries,* 12 J. World Trade L. 187 (1978).
9. *See, e.g.,* Revenue Act of 1916 § 801, 15 U.S.C. § 72 (1976) (antidumping); Tariff Act of 1930 § 303, 19 U.S.C. § 1303 (Supp. III 1979) (countervailing duties); Trade Act of 1974 § 337, 19 U.S.C. § 1337 (1976) (unfair import trade practices); Trade Act of 1974 § 406, 19 U.S.C. § 2436 (Supp. III 1979) (disruption of markets by Communist imports); Tariff Act of 1930, tit. VII, *as amended by* Trade Agreements Act of 1979, §101, 19 U.S.C. §§1671–77g (Supp. III 1979) (countervailing and antidumping duties); Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.* (1976) (repealed by the

Trade Agreements Act of 1979 § 106(a), 93 stat. 193).

See also Grzybowski, *East-West Trade Regulation in the United States: The 1974 U.S. Trade Act, Title IV*, 11 J. World Trade L. 501 (1977). A recent symposium integrated international trade regulation with antitrust analysis in examining § 337 of the Trade Act of 1974, a provision that is a cross between an antitrust and a trade regulation statute. *See Symposium, Section 337 of the Trade Act of 1974*, 8 Ga. J. Int'l & Comp. L. 27 (1978).

10. "State monopolies" or "state trading" can denote anything from trading units maintained by governments acting as entrepreneurs to trading units distinct from governments but owned by them. It can exist in industrialized free market Western economies as well as in Communist and Socialist systems. *See generally* Kostecki, *supra* note 8. *See also* Baban, *State Trading and the GATT*, 11 J. World Trade L. 334 (1977); Reuland, *GATT and State-Trading Countries*, 9 J. World Trade L. 318 (1975); Zysman, *The State as Trader*, 54 Int'l Aff. 264 (1978).

Kostecki has predicted that "the existence of state trading may considerably eliminate the role of competition in international markets and consequently call for a new analytical framework to explain the patterns of state-traded imports and exports." *Supra*, note 8, at 207. This forecast was prompted by an observation of the effects of state trading on the international market and how those effects are achieved. States engage in state trading to achieve a variety of objectives. Domestic objectives include price and distribution policy, the integration of foreign trade into a central economic and/or social plan, revenue-raising for the government, and health and strategic control. External objectives include the desire for international bargaining power, export expansion, the fulfillment of international obligations, and the linkage of trade with politics.

The following discussion will center on state trading by centrally planned economies only—but it is just this category that embraces the broadest descriptions of the ways, means, ends, and effects of state trading.

11. *See, e.g.*, Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 400 (D. Del. 1978) discussed *infra*.
12. *See* Revenue Act of 1916 § 801, 15 U.S.C. § 72 (1976); Tariff Act of 1930 § 773(c), 19 U.S.C. § 1677b(c) (Supp. III 1979).
13. Rosenthal & Sheldon, *Section 337: A View From Two Within the Department of Justice*, 8 Ga. J. Int'l & Comp. L. 47, 51 (1978).
14. Justice believes that an American licenser of a CEE is adequately protected against any "unfair advantage" the CEE may enjoy in the licenser's domestic markets by international trade laws. *See* Antitrust Division U.S. Dep't of Justice, Guide for International Operations 40–41 (1977).
15. 461 F. Supp. 384 (D. Del. 1978).
16. Pezetel's predecessor, Elektrim Foreign Trade Company for Electrical Equipment, Ltd., made the initial agreement with Products International, which acted as importer of the Melex carts until 1973. At that time, Pezetel succeeded Elektrim as the Polish manufacturer, and purchased Products International's inventory and existing contracts with U.S. distributors. It formed Melex USA, Inc., a wholly owned Delaware corporation, and entered directly into exclusive sales and distributorship agreements

with several concerns, which became codefendants in the case. *See* 461 F. Supp. at 389; Defendant Melex USA, Inc.'s Brief in Support of its Motion to Dismiss at 1–3, Outboard Marine Corp. v. Pezetel.

17. 19 U.S.C. § 160 *et seq.* (1976) (repealed in 1979). The Department of the Treasury found that Melex sales in 1973–74 were at "less than fair value," and the International Trade Commission found that these sales resulted in injury to domestic producers. Treasury arrived at "foreign market value" by determining the prices charged for carts in Canada. The practice of using as a guideline prices charged for similar goods in a free market third country or of arriving at a constructed value was subsequently codified in § 205(c) of the Trade Act of 1974, 19 U.S.C. § 164(c) (1976), repealed by the Trade Agreements Act of 1979 § 106(a) and reenacted by the Trade Agreements Act of 1979 § 101. *See* Tariff Act of 1930, § 773(c), 19 U.S.C. § 1677b(c) (Supp. III 1979). *See generally* 43 Fed. Reg. 35,263 (1978); 19 C.F.R. § 153.7. The antidumping proceeding has a complicated history, with much of the argument centered on the question of valuation. *See also* 461 F. Supp. at 390; *Oversight of the Antidumping Act of 1921: Hearings on the Adequacy and the Administration of the Antidumping Act of 1921 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong. 2d Sess. 106 (1977) (statement of Donald A. Webster).
18. 15 U.S.C. § 8 (1976).
19. 15 U.S.C. § 72 (1976).
20. 461 F. Supp. at 390.
21. Brief of Plaintiff Outboard Marine Corp. in Opposition to Defendants' Motions to Dismiss Complaint at 43.
22. *Id.* at 48. As the defendants' consolidated reply emphasized, OMC complained only that Pezetel's prices were below the costs of "most" U.S. manufacturers. Defendants Pezetel and Melex's Consolidated Reply to Outboard Marine Corporation's Brief at 5–6.
23. Brief of OMC, *supra* note 21, at 33–42, 46–47.
24. 461 F. Supp. at 388, 391.
25. *Id.* at 405–6, 410.
26. Although this Note will not discuss it, the most frequently debated issue regarding suits, antitrust or otherwise, against CEEs is that of sovereign immunity. *See, e.g.*, P. SHEPHARD, SOVEREIGNTY AND STATE-OWNED COMMERCIAL ENTITIES (1951); S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1950); Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wanderings On The Road to Mecca,* 61 CORNELL L. REV. 11 (1976); Brower, Bistline, and Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice,* 73 AM. J. INT'L L. 200 (1979); Joelson and Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617 (1975); Note, *American Antitrust Liability of Foreign State Instrumentalities: A New Application of the Parker Doctrine,* 11 CORNELL INT'L L.J. 305 (1978).

The Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1330, 1332, 1391, 1441, and 1602–11 (1976)) (FSIA), has not put to rest discussion about what entity qualifies as a foreign state or instrumentality; what activity qualifies as political (and immune) and what is commercial; and what the relationship is between the so-called *Parker* doctrine (from Parker v. Brown, 317

U.S. 341 (1943), an antitrust exemption for certain state action or state-induced action) and the FSIA in antitrust suits against state enterprises. Regarding refinements in the *Parker* doctrine, *see* City of Lafayette v. La. Power & Light Co., 98 S. Ct. 1123 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

For an example of a court displacing the FSIA's political-commercial test of immunity in an antitrust suit by the *Parker* doctrine immunity test, *see* New Mexico v. Amer. Petrofina, 501 F.2d 363 (9th Cir. 1974).

For his part, Judge Schwartz had little difficulty finding Pezetel amenable to suit under the FSIA and Section 4 of the Clayton Act. 15 U.S.C. § 15. Regarding the *Parker* doctrine exemption, he noted, 461 F. Supp. at 397, that the exemption depends on a full consideration of all facts and circumstances, and thus was not appropriately addressed in a motion to dismiss. This inconclusiveness suggests that in a given antitrust suit a given CEE may well be deemed subject to the jurisdiction of the court. While the questions and problems of suing state enterprises for antitrust violations are unsettled and for that reason interesting, they ought not preclude examination of further issues that arise once a CEE is brought under a court's jurisdiction.

27. 461 F. Supp. at 400.
28. *Id.*
29. *Id.*
30. *Id.*
31. 148 F.2d 416 (2d Cir. 1945). Judge Hand pointed to Alcoa's 90 percent share of the relevant market as evidence of the possession of monopoly power; he then went on to speculate that two-thirds of the market would indicate a doubtful case of monopoly power, while one-third would fall short of monopoly power. *Id.* at 424.
32. 461 F. Supp. at 404 n. 38.
33. 461 F. Supp. at 404.
34. *Id.*, citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 99 (1977).
35. 461 F. Supp. at 404.
36. 461 F. Supp. at 400.
37. 384 U.S. 563 (1966).
38. 461 F. Supp. at 405.
39. Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 459 (W.D. Pa. 1968), *aff'd per curiam,* 417 F.2d 622 (2d Cir. 1969). In theory, a restraint of trade is not lessened by the fact that consumers reap an initial benefit of low prices, but, "[p]erhaps the greatest problem with winning even true predation cases is that judges and juries are reluctant to find that low prices today may injure the ultimate consumer tomorrow." Rosenthal & Sheldon, *supra* note 13, at 51.
40. 196 U.S. 375 (1905).
41. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).
42. *Id.* at 75.
43. 196 U.S. at 396.
44. *Id.*
45. 345 U.S. 594 (1953).
46. *See* Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 656–57 (9thCir.), *cert. denied,* 375 U.S. 922 (1963); United States v. American Oil Co., 249 F. Supp. 599, 809 (D.N.H. 1966); L. SULLIVAN, *supra* note 34, at 135.
47. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975).
48. L. SULLIVAN, *supra* note 31, at 110. *If there is one task that judges and juries, informed through the adversary system, may really be good at, it is identifying the pernicious in*

human affairs. To contend that the conventional formulation which looks, in a sense, for evil, ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of the more humanistic modes of inquiry.

. . . .

The best course . . . is to leave the avenues of inquiry as open as may be. Objective data, such as that stressed by Areeda and Turner, could then be used either to attack or defend, but also could any other evidence indicative of predatory intent.

49. 15 U.S.C. § 72 (1976).
50. Tariff Act of 1930 § 731 *et seq.*, 19 U.S.C. § 1673 *et seq.* (Supp. III 1979).
51. 19 U.S.C. § 2436 (Supp. III 1979).
52. 15 U.S.C. § 12 (1976).
53. General Agreement on Tariffs and Trade, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD), "Text of the General Agreement," 55 U.N.T.S. 174.
54. *Id.* at 252.
55. See GATT, "Protocol for the Accession of Hungary to the GATT," BISD (20th Supplement, 1974) at 3–8; GATT, "Protocol for the Accession of Romania to the GATT," BISD (18th Supplement, 1972), at 5–10; GATT, "Protocol for the Accession of Poland," BISD (15th Supplement, 1968), at 46–52.
56. Treaty Establishing the European Economic Community, 298 U.N.T.S. 4300 (1958) (EEC Treaty).
57. *Id.* at art. 37.
58. Mestmäcker, *State Trading Monopolies in the European Economic Community*, 20 VAND. L. REV. 321, 325, 353 (1967).
59. 19 U.S.C. § 2435 (1976).
60. 19 U.S.C. § 2435(b)(3) (1976).
61. EEC Treaty, *supra* note 56; at art. 90.
62. Czechoslovakia, Cuba (original members), Hungary, Poland, Romania, and Yugoslavia.
63. General headnote 3(e) of the Tariff Schedules of the United States, 19 U.S.C § 1202 (West Supp. 1980) identifies Communist countries not entitled to most-favored-nation customs rates: Albania, Bulgaria, Cuba, Czechoslovakia, Estonia, East Germany (and East Berlin), Hungary, Communist Indochina, Communist Korea, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Southern Sakhalin, Tanna Tuva, Tibet, and the USSR.
64. Zysman, *supra* note 10, at 267.
65. As one of the U.S. negotiators at the Tokyo Round of Multilateral Trade Negotiations wrote,

    Systems of international rules such as the GATT may encourage compliance . . . [U]nless the system is a dead letter, its mere existence influences the policy decisions of member governments, who would be reluctant to violate the system's rules openly . . . [O]ne of the primary but unspoken purposes of the many parts of the MTN [multilateral trade negotiations] is to assure the system's conformity with the norms of its members so that it can again exercise a degree of moral authority.

    Graham, *Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage*, 12 CORNELL INT'L L.J. 1, 28 (1979).
66. 148 F.2d at 424.
67. *Id.* at 427.
68. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).
69. Wyzanski, *Closing Remarks, Antitrust Symposium: Section 2 of the*

Sherman Act, 10 Sw. U.L. REV. 131, 133 (1978).

70. 110 F. Supp. at 343.
71. SULLIVAN, *supra* note 34, at 80–87.
72. United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).
73. Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 MICH. L. REV. 373, 380 n. 20 (1974).
74. 148 F.2d at 428–29; W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 85–95 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 180–229 (1955).