Michigan Law Review

Volume 66 | Issue 1

1967

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Recommended Citation

Peter B. Feller, *The Antidumping Act and the Future of East-West Trade*, 66 MICH. L. REV. 115 (1967).
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THE ANTIDUMPING ACT AND THE FUTURE OF EAST-WEST TRADE

Peter Buck Feller*

INTRODUCTION

THERE has been in recent years a marked change in American attitudes, both official and private, toward expanded trade relations with the communist countries of Eastern Europe.¹ As a result the United States has taken a series of significant steps to achieve a meaningful commercial *rapprochement* with Soviet bloc nations. In 1960, for example, the United States extended most-favored-nation treatment to importations from Poland,² and in 1964 negotiations with Rumania produced an accord which permitted freer Rumanian access to the United States market for purchases of industrial goods³ and made available credit guarantees through the Export-Import Bank to finance such purchases.⁴ During the same period the Government paved the way for the sale of 140 million dollars worth of American wheat to the U.S.S.R.⁵

Developments in 1966 were even more dramatic. In May the Administration submitted an East-West trade bill⁶ to Congress to authorize the President to grant trade concessions, particularly most-favored-nation tariff status, to Soviet bloc countries on an individual basis and under circumstances advantageous to the United States.

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1. "Eastern Europe," "the East," "Soviet bloc" and similar terms are generally used in this study to refer to the Soviet Union, Poland, Czechoslovakia, Bulgaria, East Germany, Rumania, and Hungary. Albania is excluded, because of its current alignment with Red China; Yugoslavia is excluded because of its independence from the Soviet bloc. Terms, such as "the West" and "the industrial West," refer to the membership of the Organization for Economic Cooperation and Development (OECD): Austria, Belgium, Canada, Denmark, France, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, The United Kingdom and The United States.

2. *Hearings Before the Senate Foreign Relations Comm. on East-West Trade*, 89th Cong., 1st Sess., pt. 2, at 275 (1965) [hereinafter cited as *East-West Trade Hearings*].

3. Szulc, *U.S. Acts To Spur Rumanian Trade*, New York Times, June 2, 1964, at 1, col. 6.

4. *East-West Trade Hearings* 129.

5. Hess, *First \$25 Million in Grain Is Reported Sold to Soviet*, New York Times, January 3, 1964, at 1, col. 6.

6. Identical bills were introduced and referred to the Senate Finance Committee and the House Ways and Means Committee. S. 3363, 89th Cong., 2d Sess. (1966); H.R. 15212, 89th Cong., 2d Sess. (1966). Albania and East Germany would not be eligible for trade concessions under the East-West Trade bill.

Several months later the President announced the substantial reduction of export controls on nonstrategic items,⁷ as well as other measures designed to develop and strengthen economic ties with Eastern Europe.⁸

To some extent the East-West trade ferment in the United States reflects approval of the much-publicized economic reform movement in the Soviet Union and its bloc partners⁹ which, with certain exceptions, has been characterized by decentralization of management,¹⁰ rekindled cost consciousness, and a growing interest in consumer production.¹¹ The sweep of Soviet economic reappraisal has, among other things, called into question the role of foreign trade in the Soviet economy. In that connection export planners were urged during the 23rd Party Congress to develop marketing techniques which would attract customers in the West.¹² The Soviet Union, therefore, shows modest but unmistakable signs of emerging from its tradition of autarchic remoteness vis-à-vis the industrial West, as evidenced by the fact that its trade turnover with the West increased by 126% between 1959 and 1964, while the total volume of its international trade over the same period increased by only 78%.¹³ Soviet trade with the United States, although remaining at a comparatively low level, nevertheless rose from 66 million dollars in 1961 to 87 million dollars in 1965.¹⁴

The possibility of a substantial increase in trade between the United States and East European countries other than the U.S.S.R.

7. Approximately 400 items which previously could be shipped to communist nations only under a validated export license were approved for inclusion on the general license list maintained by the Department of Commerce under the Export Control Act of 1949 §§ 1-12, 50 U.S.C. §§ 2021-32 (Supp. 1965), formerly 63 Stat. 7 (1949).

8. Bigart, *Johnson Acts To Improve U.S. Ties to East Europe—Steps Are Outlined for Easing Curbs on Trade and Travel*, New York Times, October 8, 1966, at 1, col. 8.

9. "Present trends toward decentralization of the economic systems of some of the Eastern countries deserve a positive response from the West." COMMITTEE FOR ECONOMIC DEVELOPMENT, *EAST-WEST TRADE: A COMMON POLICY FOR THE WEST* 18 (1965). *NEW DIRECTIONS IN THE SOVIET ECONOMY*, a four-part study prepared for the FOREIGN ECONOMIC POLICY SUBCOMM. OF THE JOINT ECONOMIC COMM., 89TH CONG., 2D SESS., pt. 4, 873-1093 (Comm. Print 1966) [hereinafter cited as *NEW DIRECTIONS*]. See also remarks of A. E. Albright, trustee of the Foreign Policy Association, reprinted in 113 CONG. REC. 6630 (daily ed. June 5, 1967): "At the beginning of 1967 Czechoslovakia took steps to free itself from the Soviet economic prison of central planning and adopted a near-capitalistic credo which calls for an individual enterprise to be measured by profits arising from actual sales to customers."

10. See Burck, *The Toughest Management Job in the World*, FORTUNE, July 1, 1966, at 73.

11. Burck, *The Auspicious Rise of the Soviet Consumer*, FORTUNE, Aug. 1966, at 130.

12. *NEW DIRECTIONS* 919, 937.

13. *Id.* at 939.

14. *Id.* at 925.

appears particularly promising in view of the progressive loosening of Soviet domination over its bloc partners.¹⁵ Having embarked on a course of relative political and economic independence, several bloc countries have adopted important measures for stimulating exports to the West in order to finance Western imports, especially imports of modern equipment and technology.¹⁶ Rumania has accordingly increased the West's share of her foreign trade from 20% in 1958 to 32% in the 1961-1964 period,¹⁷ while the over-all volume of trade between the United States and Czechoslovakia in 1965 reached 40 million dollars, an increase of 66% over its 1964 level.¹⁸

It must be recognized, however, that where the United States is concerned there are many technical and legal problems which beset the prospects for advancing East-West trade. Among these, few are as confounding as the application of the antidumping law to importations from state-controlled economies.

Dumping, which may be defined as "price discrimination between national markets,"¹⁹ is a trade practice condemned by virtually all nations having market economies.²⁰ Under United States law the practice of dumping is countered by the imposition of an additional duty against the tainted imports, based upon a comparison made between the export price of the commodity in question and its domestic price in the exporting country. If the export price is lower, a dumping margin is said to exist, and upon a determination that the price differential causes injury to American industry, a dumping duty equal to the price differential is levied.

Because of the peculiarities of price formation in Communist

15. See Prasad, *Prague Goes Pragmatic*, 11 COLUM. J. OF WORLD BUS. 73 (1967) for the observation: "As of the beginning of this year, Czechoslovakia became the first communist country apart from maverick Yugoslavia to try to disjoin its economic system from the straitjacket of Soviet-type central planning."

16. *Id.* at 919-20. See report of interview with Harold Francis Linder, Chairman of the Export-Import Bank, in *That Trade Bridge to the East*, FINANCE, March 1967, at 19.

17. NEW DIRECTIONS 910.

18. Hamouz, Czechoslovakian Minister of Foreign Trade, *International Trade Without Barriers* appearing in a special New York Times supplement entitled *Czechoslovakia an Interesting Country for Travel . . . for Trade*, N.Y. Times, Oct. 9, 1966, § 11 at 2, col. 3.

19. J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (1923).

20 "[D]umping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned . . ." General Agreements on Tariffs and Trade, art. VI, para. 1 [hereinafter referred to as GATT]. The GATT in its original form may be found in 61 Stat. pts. 5-6 (1947), 55 U.N.T.S. 194 (1950). For lists of the numerous protocols and treaties since 1947 which have amended or affected the GATT, see U.N. Doc. ST/LEG/3, Rev. 1 (1963); GATT, Status of Multilateral Protocols, PROT/2/Rev. 2 (Aug. 1966).

countries, both with regard to export commodities and those intended for domestic consumption, the applicability of traditional antidumping concepts to communist price discrimination, and the usefulness of the Antidumping Act of 1921²¹ in coping with it, are questions which should be examined and resolved before moves toward freer trade between East and West reach full stride.²² The essence of the problem was captured in a 1963 statement by the then Senator Humphrey: "The present act is ineffective in preventing dumping from communist countries, which can control their home prices by state fiat."²³

It is the purpose of this study to illustrate and explore various aspects of the problem and to offer alternative methods of dealing with it.

I. PRICING IN THE COMMAND ECONOMY

For the most part domestic prices are fixed in Soviet bloc countries by a central planning authority according to certain economic precepts which vary somewhat from country to country.²⁴ Price levels generally reflect the planners' calculations of market equilibrium as between arbitrary production or import goals, on the one hand, and projected demand elasticity, on the other. Domestic prices, therefore, ordinarily bear no relation to cost of production. If a particular commodity price exceeds the cost of production and distribution, the differential corresponds in a general way to the incidence of taxation and profit as known in the West. Conversely, a price below the cost of production and distribution may be considered as subsidized.²⁵

Foreign trade in the communist countries of Eastern Europe is conducted through state agencies organized as legal corporations, each of which is given monopoly jurisdiction in specified commodity

21. 19 U.S.C. §§ 160-73 (1964).

22. See Report to the President of the Special Committee on U.S. Trade Relations with East European Countries and the Soviet Union 17 (April 29, 1965).

23. 109 CONG. REC. 6444 (1963). Professor Harold Berman, testifying before the Senate Foreign Relations Committee in 1965, observed: "[T]here is a special difficulty in preventing dumping by Communist countries due to the artificiality of their domestic price systems. It is virtually impossible to compare Soviet ruble costs of production of tin, for example, with the dollar or pound price obtained abroad. We need a new definition of dumping that would be applicable to this situation . . ." *East-West Trade Hearings* 131.

24. United Nations Conference on Trade and Development, *Trade Problems Between Countries Having Different Economic and Social Systems*, U.N. Doc. E/CONF. 46/34, at 26 (1964).

25. *Id.* at 27, 28.

categories.²⁶ The function of these agencies is to implement the planned import and export targets of the state under the general supervision of the ministry of foreign trade. In that connection, the state trading agencies have independent contractual capacity to deal with foreign business entities.²⁷

Goods purchased abroad by the state agencies for domestic consumption are usually resold in the home market at a price set by the planning authority to coincide with that of like commodities domestically produced. In this way the internal price structure tends to remain insulated from the influence of outside economic conditions. For the same reason, export prices are set by the state agencies without regard to cost of production calculations or to domestic price levels. Instead, export prices are governed by average world market prices for the commodities concerned.²⁸

The prices (converted to domestic currency) paid by the state trading corporation for commodity imports are registered in the accounts of the corporation, together with the domestic prices assigned by the planning authority for such commodities. Any gain or loss resulting from a comparison of these two figures is borne by the central budget of the government. Similarly, commodities destined for export are accounted to the corporation at their domestic price, and also at their sales price in realized foreign exchange value (converted to domestic currency). Again, the central budget registers any loss or "profit" resulting from export sales.²⁹

II. THE CAUSES OF DUMPING—EAST AND WEST

The factors which cause an exporter in a market economy to engage in dumping activities differ somewhat from those influencing a state trading agency. Although dumping may occur for a variety of reasons, the classic dumping situation, to which antidumping

26. An excellent compendium of articles probing various legal, economic and political issues related to state trading appears in (pts. 1 & 2), 24 *LAW & CONTEMP. PROB.* 241, 367 (1959).

27. Prepared by LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS for the SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 1ST SESS., *BACKGROUND STUDY ON EAST-WEST TRADE* 44, 45 (Comm. Print 1965).

28. *Id.*

29. United Nations Conference, *supra* note 24, at 29. See generally H. KÖHLER, *ECONOMIC INTEGRATION IN THE SOVIET BLOC* (1965); J. MONTIAS, *CENTRAL PLANNING IN POLAND* (1962); G. PATTERSON, *DISCRIMINATION IN INTERNATIONAL TRADE: THE POLICY ISSUES 1945-1965* (1966); F. PRYOR, *THE COMMUNIST FOREIGN TRADE SYSTEM* (1963); Holzman, *Foreign Trade Behavior of Planned Economies*, reproduced in a collection of essays honoring Alexander Gerschenkron, entitled *INDUSTRIALIZATION IN TWO SYSTEMS* 237 (Rosovsky ed. 1966).

legislation is primarily directed, involves a foreign monopoly or cartel which enjoys a degree of market leverage in its own region sufficient to enable it to finance low-priced exports through artificially high prices at home for the predatory purpose of subduing competition in the importing country. A successfully-waged price war in this context will bring market dominance to the dumper and thereafter permit him to exact a monopoly price in the importing country in order to recoup losses and maximize profits.³⁰ There may, however, be other reasons for an exporter in a market economy to engage in dumping. For example, a producer may be faced at the end of a business season with a casual over-stock of goods resulting from miscalculations of domestic demand.³¹ Rather than undercut his own price in established markets, he may prefer to sell the surplus in an untried or occasional market abroad at a low price calculated to give him an immediate turnover and thereby free his facilities for production runs of new models or lines. Although this type of dumping does not normally involve predatory intent, it must nevertheless be considered a trade evil to the extent that it threatens market stability.³² Accidental production surpluses may also occur in communist countries and similarly may give rise to dumping export prices.

A producer in a market economy may also wish to enter a foreign market already saturated by existing competitors, both native and foreign. To obtain customer familiarity and acceptance, he may feel it necessary to lower his normal price on a temporary basis in order to overcome his "newcomer" disadvantage. His purpose is to gain a foothold in the foreign market, rather than to dominate or monopolize it. As such, his purpose would not ordinarily be considered predatory, since he will presumably increase his price to a competitive level once market entry is achieved. State trading agencies, like market economy exporters, will probably also be influenced by market entry handicaps in pricing commodities for export. Price cutting to compensate for such disadvantages, in fact, is likely to be more extensive where communist countries are concerned, since in addition to the usual "newcomer" handicap, a state agency may have to overcome the absence of a servicing or distribution organization; lack of spare parts; uncertainty on the part of a prospective

30. See Yntema, *The Influence of Dumping on Monopoly Price*, 36 J. OF POL. ECON. 686 (1928).

31. VINER, *supra* note 19, at 23-34.

32. *Id.*

purchaser as to continued supply, or his fear of blacklisting; or anticommunist attitudes in general.³³

Other considerations which affect the pattern of export pricing in planned economies have no counterpart in the industrial nations of the West. Managers of the state trading agencies, for instance, tend to emphasize export quota fulfillment as the measurement of success for the state-planned export program. The incentive, therefore, is to sacrifice "profits," as known in the West, by cutting prices to insure the sale of commodities earmarked for export.³⁴

Communist states may also practice price discrimination to obtain hard currency to finance the importation of needed goods, or to maintain trade relations with underdeveloped nations, in which the trade balance is usually unfavorable. Abnormally low export prices, therefore, may reflect nothing more than the fact that a premium is placed on the acquisition of hard currency to offset a drain on the state's hard currency and gold reserves.³⁵ Many experts believe that of the past occurrences of communist dumping, especially by the U.S.S.R., the bulk have been caused by an acute need for convertible currency.³⁶

Inasmuch as state trading corporations generally attempt to price exports in line with the average world market price for like commodities, some dumped shipments may be explained by inadequate price information available to, or collected by, these corporations. While, theoretically, a communist state could set export prices at dumping levels in order to drive out competition in a foreign market, as in the classic Western dumping situation previously discussed, there is no evidence that this has ever been done or that it is likely to motivate bloc countries.³⁷ It is true that all the resources of the state would be available to finance such a venture, which would generate a degree of market power far in excess of that which

33. Wilczynski, *Dumping and Central Planning*, 74 J. OF POL. ECON. 250, 258 (1966).

34. Nove, *The Problem of "Success Indicators" in Soviet Industry*, 25 ECONOMICA 1 (New Series 1958).

35. Wilczynski, *supra* note 33, at 252.

36. *East-West Trade Hearings* 131 (Berman):

The problem of dumping occasionally arises in connection with the Communist system of foreign trade, not because the Communist countries wish to disrupt world markets but because they sometimes face acute temporary shortages of foreign exchange and therefore must sell their goods quickly or because they must undersell others in order to get a share of the market.

See Hazard, *State Trading in History and Theory*, 24 LAW & CONTEMP. PROB. 243, 246 (1959).

37. Wilczynski, *supra* note 33, at 259.

the average Western monopoly could muster.³⁸ Nevertheless, the long-run interests of bloc countries, from a strictly economic standpoint, are better served by the avoidance of dumping and the political and economic countermoves which it might bring.³⁹

It must be recognized, however, that, apart from economic considerations, market disruption may serve the political objectives of communist states. Chairman Khrushchev made this quite clear in 1955 when he admitted that "we value trade least for economic reasons and most for political reasons."⁴⁰ Though a decade has passed and Khrushchev has been ousted, it should not be assumed that this dictum has been entirely abandoned as a principle of trade in the Soviet world. Economic warfare, therefore, may give rise to predatory dumping of a primarily political, rather than economic, nature. On the other side of the ledger, although Western nations have on occasion complained that bloc countries have engaged in this kind of economic warfare, the supporting evidence is by no means clear; some experts consider that dumping by Soviet bloc nations for purposes of market disruption has been minimal.⁴¹ Nevertheless, the potential for politically-motivated dumping should not be overlooked or underestimated.⁴²

38. LEAGUE OF NATIONS, *TRADE RELATIONS BETWEEN FREE-MARKET AND CONTROLLED ECONOMIES* 13 (1943) (memorandum by Jacob Viner).

39. "It should be emphasized also that it can hardly be in the interests of the Eastern planned economies, other than in exceptional cases, to price their exports to any great extent below the real costs." COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 9, at 25. "It is reasonable to suppose that the Soviet leaders recognize that, on the whole, a disruption of world markets is not to their own interests both because the Soviet economy depends on such markets and because a deliberate policy of large-scale dumping would stimulate retaliatory measures on the part of other governments." Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 *LAW & CONTEMP. PROB.* 482, 504 (1959).

40. Quoted in *East-West Trade Hearings* 97 (Dobriansky).

41. "The centralization of decisions in the monolithic state and the institutional framework under which foreign trade is conducted, no doubt, provide an ideal setup for waging economic warfare in peacetime. What is surprising is how little advantage of this the bloc countries have taken so far, even though there were many golden opportunities . . ." Wilczynski, *supra* note 33, at 261. "From the examination which I have made of the charges of dumping that have been levied against the Soviets, it has seemed to me that it has not been their intent to disrupt world markets." *East-West Trade Hearings* 122 (Berman). See also GERSCHENKRON, *ECONOMIC RELATIONS WITH THE U.S.S.R.* 44 (1945) (papers submitted to the Comm. on International Economic Policy by its Advisory Comm. on Economics).

42. "State trading is unique in its relation to economic warfare, in that it is the only commercial policy by which the economic, political and military interests of the state are automatically and simultaneously considered in making decisions about commercial transactions." Allen, *State Trading and Economic Warfare*, 24 *LAW & CONTEMP. PROB.* 257, 274 (1959). "In the case of tin, Soviet dumping kicked the bottom out of free-world tin prices this past fall. . . . The Soviets could easily have based their activities on a combination of a need for dollars and a surplus of tin and

III. THE UNITED STATES ANTIDUMPING ACT

With the passage of the Sherman Act in 1890 the United States adopted a national antitrust policy which has been enlarged and refined by subsequent legislation, administrative practice, and judicial interpretation, and now boasts an impressive array of weapons to protect the competitive nature of the domestic market from those forces which would restrict it. It became apparent during the first quarter of this century that the concentration of economic power in foreign cartels also posed a threat to the maintenance of healthy competition in the United States. The Antidumping Act⁴³ was therefore added to the antitrust arsenal in 1921 to counteract what was conceived to be the international equivalent of predatory price discrimination at home.⁴⁴

It is not price discrimination per se which the Act seeks to counter, but rather *injurious* price discrimination in the commercial importation of merchandise into the United States. The Act, consequently, reflects a traditional protectionist impulse as well as an antitrust purpose.⁴⁵ Responsibility for determining the two substantive issues is divided between the Treasury Department, which makes determinations concerning price discrimination, and the Tariff Commission, which handles the injury questions.⁴⁶ If investigation by

aluminum; political objectives could have been secondary. But this might have also been a 'show of strength'." Fensterwald, *United States Policies Toward State Trading*, 24 LAW & CONTEMP. PROB. 369, 379 (1959). "The idea of foreign trade and investment for mutual economic gain conducted within a framework of political neutrality is foreign to communist ideology." Mikesell & Wells, *State Trading in the Sino-Soviet Bloc*, 24 LAW & CONTEMP. PROB. 435, 450 (1959).

43. For general discussions of the Antidumping Act see Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409 (1965); Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189 (1965); Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958); Hendrick, *The United States Antidumping Act*, 58 AM. J. INT'L. L. 914 (1964); Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407 (1962).

44. Adams & Dirlam, *Dumping, Antitrust Policy, and Economic Power*, 14 BUS. TOPICS 20 (Spring 1966). See also *Hearings Before the Foreign Economic Policy Subcomm. of the Joint Comm. on the Economic Report*, 84th Cong., 1st Sess., 160 (1955) ("The Anti-Dumping Act, fundamentally is to foreign trade what the Robinson-Patman Act is to domestic trade." Statement of W. J. Barnhard).

45. See Comment, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707 (1965). See also Prosterman, *Withholding of Appraisal Under the United States Anti-Dumping Act: Protectionism or Unfair-Competition Law?*, 41 WASH. L. REV. 315 (1966).

46. Before 1954 the Treasury Department alone administered the Act. The present procedure was established by the Customs Simplification Act, 19 U.S.C. § 160 (1954).

both agencies discloses that injurious price discrimination exists, the Secretary of the Treasury publishes a dumping finding in the Federal Register. Subsequent importations of the type of merchandise covered by the findings undergo a special appraisement process, in addition to normal customs appraisement, to determine in each case whether there is a dumping margin. If the export price is found to be a dumped one, a special dumping duty is assessed.⁴⁷

During the first stage in the processing of a dumping case the Treasury Department, through the Bureau of Customs, conducts an inquiry as to whether "sales below fair value" of the imported goods in question exist or are threatened. While the key term "fair value" is nowhere defined in the statute, the Treasury Department, as a matter of practice, regards it as the mathematical equivalent of the value established by the application of one of several criteria set out in the Act, although these statutory criteria were intended to be used as a means of calculating the special dumping duty after formal finding of dumping (price discrimination plus injury) had been made. There is some dispute as to whether this interpretation of the term "fair value" is not unduly restrictive;⁴⁸ nevertheless, it is sufficient for the purposes of this study to state that the issue of price discrimination is ordinarily settled by the application of a somewhat mechanical price comparison test.⁴⁹

The price comparison may be thought of as a weight scale. On one side is the "purchase price" or, under certain circumstances, the "exporter's sales price." On the other side is the "fair value" standard. When the two sides are in balance, there is no dumping margin. If "purchase price" or "exporter's sales price" is determined to be less than this standard, a dumping margin exists to the extent of the differential. Ordinarily, the "fair value" standard is the "foreign market value" of merchandise identical to or similar to the imported merchandise. Where the "foreign market value" cannot be used, the "constructed value" of the goods becomes the measure of "fair value."

"Purchase price" is defined as the price at which imported merchandise has been purchased or agreed to be purchased prior to the time of exportation.⁵⁰ A number of adjustments may, however, be necessary to arrive at a suitable price for comparison purposes.

47. The pertinent regulations are found in 19 C.F.R. §§ 14.6-13, 16.21-22 (1963)

48. Ehrenhaft, *supra* note 43, at 66-67; Kohn, *supra* note 43, at 415-16.

49. 19 C.F.R. § 14.7 (1967).

50. 19 U.S.C. § 162 (1967).

Where the price of the merchandise does not include, for example, the cost of containers or other expenses incident to preparing the merchandise for shipment to the United States, these cost items are added. Any duties or taxes on the manufacturer, producer, or seller imposed by the exporting country, but rebated or not collected by reason of the exportation, are also added to the price of the merchandise. On the other hand, certain items representing differences in the circumstances of sale may be subtracted from the price of the imported merchandise to produce a properly adjusted purchase price.

"Exporter's sales price" is used in lieu of purchase price when the exporter and importer are related in ways specified in the Act. The term is defined as the price at which the merchandise is sold or agreed to be sold by the exporter or for his account, whether before or after importation.⁵¹ Adjustments, similar to those provided with respect to "purchase price," are also applicable here.

"Foreign market value," as defined in the Act, may be either of two prices.⁵² The preferred and usual determinant of foreign market value is "home market price," which is the price at which the goods in question, or similar ones, are sold or offered for sale for home consumption in the principal markets of the exporting country, in the usual wholesale quantities, and in the ordinary course of trade. This comparison price must be determined as of the time the merchandise is exported to the United States, unless the importer has previously purchased or agreed to purchase it, in which case the earlier date is the appropriate time reference. If the cost of containers and coverings and any other costs, charges, or expenses incident to readying the merchandise for shipment to the United States are not already included in the home market price, they are added.

The alternate measure of "foreign market value," called "third-country price," is used whenever sales in the home market are insufficient in quantity to form a meaningful basis for comparison,⁵³ or when sales or offers for sale in the home market are not "in the ordinary course of trade." Third-country price is the price at which the merchandise is sold or offered for sale for export to a third country; to this figure are added packing and related costs, when they are not already included. Where there are export sales to sev-

51. *Id.* § 163.

52. *Id.* § 164.

53. Home market sales which are less than 25% of all sales made, except those to the United States, are ordinarily considered insufficient for this purpose. See example given in 19 C.F.R. § 14.7, n.15 (1967).

eral countries other than the United States, third-country price becomes either the price in that country to which the preponderance of sales are made or the weighted average of sales to all third countries, depending on which course of action seems more reasonable under the facts of each case.⁵⁴

If neither home market price nor third-country price can be used to find "fair value," the Act provides a formula under which a "constructed value" for the merchandise may be obtained.⁵⁵ Resort to the constructed value formula would be proper, for example, when a foreign producer sells exclusively for export to the United States. Essentially, the constructed value provision permits the determination of the cost of production, to which is added amounts representing reasonable profit, general expenses, and those costs and expenses which relate to preparing the merchandise for shipment to the United States. In determining the cost of production, the Act also permits the Treasury Department to disregard individual transactions which would ordinarily be utilized to establish one or more of the cost elements when the parties to those transactions are related. Since the figures arising from such transactions are presumptively distorted, the Act authorizes consideration instead of the "best evidence available." It is this standard which the Treasury employs to measure the fair value of communist exports.

IV. APPLICATION TO COMMUNIST IMPORTS

The Antidumping Act's price comparison tests were adopted with apparently no thought given to the problem of determining the fair value of goods imported from countries having controlled economies. The tests were designed to operate within a free enterprise context, where pricing decisions are determined by private, microeconomic values. Prices in the command economy, however, tend to be based on macroeconomic factors, which include such items as estimated social cost and value.⁵⁶ Since export prices do not serve the same social and economic engineering functions as those served by domestic prices, it is clear that these two price levels in general are not in mutual communication, as the framers of the Act evidently assumed would universally be the case.⁵⁷ Consequently,

54. Hendrick, *supra* note 43, at 916.

55. 19 U.S.C. § 165 (1964).

56. Wilczynski, *supra* note 33, at 254.

57. While the Antidumping Act was being considered in Congress and at the time of its passage in 1921, Soviet foreign trade was virtually nonexistent. The possibility of trade relations with the U.S.S.R. undoubtedly seemed remote.

neither the foreign market value nor the constructed value criteria form a completely reliable standard of fair value when brought to bear on the products of a command economy.⁵⁸

Consider, for example, the following hypothetical case. An American manufacturer of toy tops files a complaint with the Bureau of Customs contending that toy tops from Bulgaria are being sold in the United States at less than fair value. Investigation discloses that the importer's f.o.b. factory purchase price is \$5.00 per dozen. Under normal circumstances the purchase price would be compared with the wholesale, ex factory price of the merchandise sold in the home market for home consumption. Assume that the home market price is found to be \$5.00. A comparison of these two prices would show that no dumping margin exists.

It is clear, however, that the Antidumping Act would be easily circumvented if this case were summarily to be closed with a determination that there were "no sales below fair value." Since both domestic and export prices are manipulated according to a state economic plan, and since the exchange rate between local currency and dollars is artificial, the comparison is largely meaningless. Indeed, the same would be true where the home market price is higher than the export price—the more typical situation for consumer products. A superficial dumping margin would exist, but a determination solely on this basis would be founded on the faulty premise that commodity prices serve the same function in a command economy as in a free economy. Home market price, therefore, fails to furnish a suitable indicator of fair value in a command economy. Accordingly, the Treasury Department has abandoned reference to home market sales where communist imports are concerned, on the basis that domestic sales behind the Iron Curtain do not qualify as sales "in the ordinary course of trade," as required by the statute.⁵⁹ This interpretation of the phrase is supported by the decision of the Court of Customs and Patent Appeals in *J. H. Cottman & Co. v. United States*,⁶⁰ a case involving domestic sales by an agency of the government of

Civil war and inflation, the general disruption of the whole economy, the maintenance of the allied blockade of Russia till 1920, unwillingness to trade with Russia, the uncertainty of the Russian international status, the vexing question of Russian public debts and alien property in Russia—all these reduced trade relations with Russia to zero.

GERSCHENKRON *supra* note 41, at 14.

58. "The truth is that when Russia conducts normal profitable trade it looks as if she were dumping . . ." *Id.* at 46.

59. Portland Cement from Poland, 28 Fed. Reg. 6660 (1963).

60. 20 C.C.P.A. 344 (1932).

Morocco which owned and controlled all rock phosphate mining operations in that country, then a French protectorate. The pertinent sales were to the only refining factory in Morocco, which conducted business under a contract approved by the Moroccan Government under restrictive terms and conditions. Sales of the crude phosphate were made to the factory at a price which did not include the cost of material. The court held that the term "foreign-market value," as used in the Act, referred to conditions existing in a free, open, and unrestricted market where competitive forces are permitted to operate. Domestic sales, therefore, could not be considered as being made in the ordinary course of trade, since the domestic sales market was controlled as to the use which could be made of the commodity sold. The court pointed out that it could see no real distinction between markets controlled as to price and those controlled as to product use.

Under the statutory scheme, abandonment of the home market price provision calls for the use of third-country price as the next preferred test of fair value. A price comparison based on the export price to a country or countries other than the United States suffers to some extent from the same infirmity as does home market price, since export prices to third countries may themselves have been set at abnormally low figures to accomplish a peculiarly governmental objective. The Treasury consequently rejects third-country price as a measure of the fair value of communist exports.⁶¹

There are, however, important differences between home market and third-country price situations, which call into question the validity of the Treasury's apparently categorical disregard of third-country price as a required or appropriate measure of fair value. While domestic sales in a communist country are for the most part clearly not in the "ordinary course of trade," because the government exercises control over both parties to a transaction and, in effect, dictates the terms of the transaction, including price, the same rationale does not generally hold true with respect to third-country sales. The third-country buyer, in a market economy, will normally be a free bargaining entity. Since the primary interest of communist foreign trade activities is usually the acquisition of hard currencies with which to finance needed imports, the foreign trade agencies would naturally seek to sell their wares at the highest possible price, just as would an exporter in a market economy.

61. *Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia*, 27 Fed. Reg. 8457 (1962).

There are additional considerations which support the view that the Treasury errs in rejecting third-country price. In the *Cottman* case the Government contended that third-country price was the proper basis for determining fair value. The court rejected this argument on the ground that the third-country purchasers' use of phosphates was restricted by contract. For most third-country buyers, the sales contract required that the phosphates be consumed by the buyer and prohibited their resale. As to Japan, Australia, and New Zealand, the buyers were permitted to resell the crude phosphate, but only for domestic consumption. Impliedly, had there been no restrictive provisions on the use of the product, the court would have allowed third-country sales by a state trading agency to qualify as transactions in the "ordinary course of trade." In addition, the Antidumping Act was amended in 1958 to permit "foreign market value" to be calculated on the basis of sales or offers "irrespective of restrictions."⁶² Accordingly, it now appears that the Act requires that fair value with respect to communist country dumping investigations be determined on the basis of third-country price. Communist sales to industrialized nations of the West would appear to provide an appropriate and reasonably safe foundation for price comparison, except when dumping might be engaged in on a worldwide basis in which case sales to third countries would also be abnormally low.

The Treasury Department measures the fair value of communist exports under the last alternative of the Act, the constructed value provision. Since the primary elements in this computation are the costs of materials, labor, and fabrication, and since these elements are fixed by the state at a value not necessarily reflective of true economic value, the Treasury computes the constructed value on the "best evidence available," an alternative method permitted by the constructed value provision when the evidence of constructed value derives from transactions directly or indirectly entered into between *related* individuals or businesses.⁶³ There has apparently

62. 72 Stat. 585 (1958).

63. 19 U.S.C. § 165(b) (1964) provides:

For the purposes of this section, a transaction directly or indirectly between persons specified in any one of the paragraphs in subsection (c) of this section may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the paragraphs in subsection (c) of this section.

been no public statement of the theory upon which the Treasury Department justifies its use of this approach under the terms of the statute. It seems plain, however, that typical transactions in communist countries, which would ordinarily be regarded as establishing the various elements of constructed value, are not transactions between related parties within the meaning of the Antidumping Act.⁶⁴

In administering the Act on this basis the Treasury Department refers to the production of similar articles in Western Europe as the best evidence available.⁶⁵ Accordingly, an article manufactured in a nearby West European country is selected as a substitute for the article in question. In practice, the purchase price of the substitute article sold to the United States market has usually been adopted as the fair value standard after it has been adjusted to an ex factory price in the chosen West European country. Adjustment is also made for measurable differences in quality and production efficiency between the communist country and the manufacturer in Western Europe. The purchase price of the communist article has then been measured against the adjusted price of the West European article to determine whether price discrimination exists.⁶⁶

Taking, for purposes of illustration, our hypothetical case involving Bulgarian toy tops, suppose that Sweden was the only West European country which produced toy tops for the United States market which were roughly similar in size, quality, and other char-

64. See Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189, 226 (1965) for the view that the Treasury Department is not free to disregard costs of production transactions, because § (b) encompasses only "customs transactions." While Mr. Coudert's conclusion as to the Treasury's authority may be correct, his reasoning would seem to be in error inasmuch as (1) the purpose of the provision is to construct a home market price (a price in which no customs transactions would be involved) and (2) § (b) on its face declares that transactions between related parties are to be disregarded "in the case of any element of value required to be considered [under § (a) which does in fact encompass cost of production transactions]." (Bracketed material added.)

65. This practice was instituted in 1960 in *Bicycles from Czechoslovakia*, 25 Fed. Reg. 6657 (1960), the first communist country dumping case to result in a determination of price discrimination. It should be noted, however, that the Treasury's approach to the problem is not without precedent among trading nations. A 1958 GATT report states: "In practice, countries levying anti-dumping or countervailing duties on imports from state-trading economies very often rely on the price situation in comparable third markets . . ." GATT, *Anti-Dumping and Countervailing Duties* 15 (1958).

66. It should be noted, however, that if the home market price of the substitute article were considered the "best evidence," which logically it is, since 19 U.S.C. § 164(b) (1964) was designed to construct a home market price, the Treasury Department would be faced with certain administrative burdens not otherwise present. For example, a West European manufacturer would not normally have real incentive to cooperate with investigators of the Bureau of Customs in supplying price lists and so forth, since he is not actually the subject of the investigation.

acteristics. Suppose further that the price of Swedish toy tops for export sale to the United States (purchase price) is \$6.00 per dozen. Investigation shows that the Swedish tops are of somewhat better quality, since they are painted with a comparatively high-grade enamel, whereas their Bulgarian counterparts are painted with a cheaper grade of paint. The Treasury Department, let us say, quantifies the difference at 2¢ per top or 24¢ to the dozen and adjusts the Swedish purchase price accordingly. The resulting price, \$5.76 per dozen (assuming no other adjustments are in order) is taken by the Treasury Department as the fair value standard against which the purchase price of the Bulgarian toy tops is measured to determine whether price discrimination exists. Since the Bulgarian purchase price is \$5.00 per dozen, a comparison reveals a dumping margin of 76¢ for each dozen Bulgarian toy tops exported to the United States.

While it may not conform in all respects to the letter of the law, the administrative treatment of communist country dumping cases attempts to deal with the problem realistically in order to accomplish the primary objective of the law—the prevention of dumping. There is, however, serious doubt whether the present Treasury practice in fact accomplishes that objective satisfactorily. Thus, by comparing the purchase price of the communist importation with an adjusted price for the West European article based on its price to the United States market, rather than its price in the home market, the result may still not be an accurate measure of fair value. The reason is that the price for the West European article might itself be an abnormally low, or dumped price. The Treasury Department, generally speaking, would not know this, unless a complaint had been received as to that West European article, or the fact was otherwise brought to its attention. Therefore, what may actually be a dumping price would appear non-discriminatory on the basis of this comparison.

In addition, an appropriate substitute article may not be manufactured in a non-communist country. This was evidently the situation in a case involving wooden headboards imported from Yugoslavia.⁶⁷ As it turned out, however, the investigation revealed that the Yugoslav Government had permitted this particular industry to operate on an experimental, profit motive basis. It was decided that the usual fair value tests could suitably be applied.

67. Headboards from Yugoslavia (Notice of Tentative Determination of No Sales Below Fair Value), 30 Fed. Reg. 8016 (1965) ("It was also determined that neither such nor similar headboards are imported from other countries.").

Another difficulty may inhere in differences in economic characteristics between the exporting country and the West European country in which the substitute article is produced. In circumstances in which the article in question, or one similar to it, is produced in several non-communist countries, it is to be expected that the one to be chosen for comparison purposes will be the one most closely approximating the communist country in industrial development, standard of living, level of market demand, and so forth. Investigation in a particular case might disclose, however, that there is no economically comparable country producing a substitutable article.⁶⁸ While adjustments could be made for the more immediate and measurable differences in efficiency between the plants concerned, it is uncertain whether this would be enough to yield an accurate picture.

It would be difficult to deny that the legal, as well as conceptual, framework for dealing with dumped communist imports is less than satisfactory, and needs to be re-cast in anticipation of an increased volume of imports from East Europe. Fortunately, past communist dumping cases have been relatively few in number, a fact which accounts for the absence heretofore of a full-blown controversy on this issue. From 1934 through March 1967 there were approximately 557 dumping investigations, of which fifty-two involved communist countries. In only ten of these instances did the Treasury Department determine that the merchandise was being sold to the United States market at less than fair value.⁶⁹ The Tariff Commission subsequently determined that in eight of these cases no injury or threat of injury resulted from communist imports at discriminatory prices.⁷⁰ The first dumping finding against communist imports was issued in 1960

68. See, e.g., *Fishery Products from U.S.S.R.* (Determination of Sales at Not Less Than Fair Value), 32 Fed. Reg. 5375 (1967), in which fishery products from the Sheikdom of Kuwait were relied on to establish the fair value standard.

69. Information obtained from the Bureau of Customs, Washington, D.C.

70. The Tariff Commission has experienced difficulty in handling the injury aspect of communist country dumping cases. See 1 S. Metzger, *LAW OF INTERNATIONAL TRADE* 765, 766 (1966), quoting an excerpt from a Treasury Department memorandum on the administration of the Antidumping law, as follows:

In an early 1955 decision involving East German potash, three Commissioners indicated in their judgment that any sale by a Communist country was in and of itself injurious. The other three Commissioners concluded there was no injury, and since this was before the 1958 amendment to the law directing that equally divided opinions of the Commission were to be considered as positive injury determinations, the case was closed on a determination of no dumping. Subsequent cases involving Communist or Communist sympathizing countries have been decided without reference to political philosophy, as indicated by no-injury determinations in the Czech montan wax and Cuban rayon staple fiber cases and the injury decision explained purely on economic grounds in the Czech bicycle case.

against bicycles from Czechoslovakia. That finding was revoked in 1964, and at present there is only one communist country decision outstanding.⁷¹

V. OTHER APPROACHES TO COMMUNIST DUMPING

A. *Countervailing Duties*

Under the United States countervailing duty law, foreign commodities which receive upon production, manufacture, or export a bounty or grant from the government of the exporting country, or any instrument thereof, are subject to the assessment of a countervailing duty equal to the amount of the subsidy.⁷² Unlike the Anti-dumping Act, comparative price levels and the question of injury are immaterial.⁷³ Countervailing duties could be imposed even if the export price were too high to be competitive in the United States market or if the volume were too small to injure or threaten to injure domestic industry. As previously brought out, export sales prices in the communist state are fixed as a rule at the going world market price, without regard either to domestic price or the cost of production.⁷⁴ To the extent that such prices fall below the aggregate of cost of production, transportation, and related expenses, the commodities involved may properly be considered subsidized, since the state must bear the loss. There is reason to believe that a substantial quantity of exports from European state trading countries are bounty-fed in this way. According to a United Nations report, issued in 1958, Hungarian and East German exports, for example, were found to be heavily subsidized.⁷⁵

71. Cast Iron Soil Pipe from Poland, 32 Fed. Reg. 12925 (1967) (the Tariff Commission's determination of injury). At the time of this writing the formal "dumping finding" had not been published.

72. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1964); 19 C.F.R. 16.24 (1967).

73. Article VI, para. 6(a) of Part II of the GATT provides that no countervailing duty shall be imposed unless the effect of the subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. The United States, however, expressly reserved its accession to Part II of the GATT to permit administration of the countervailing duty law without regard to the question of injury:

Subject to the reservation that the amendments contained herein to Part II of the General Agreement will not be applied except to the fullest extent not inconsistent with legislation which existed on October 30, 1947 and reserving the right to accept the General Agreement on Tariffs and Trade subject to a reservation that Part II thereof will be applied to the fullest extent not inconsistent with legislation which existed on October 30, 1947.

GATT, Status of Multilateral Protocols, PROT/2/Rev. 2, at 6.03 (Aug. 1964).

74. Text accompanying note 28 *supra*.

75. United Nations, *Economic Survey of Europe 1957*, VI, at 22-29 (1958).

It seems clear, then, that underpriced communist exports to the United States could be countered by invoking the existing countervailing duty statute. Surprisingly enough, there has never been a countervailing duty investigation involving communist imports, although it is patently advantageous for a domestic producer, who seeks to discourage foreign competition, to file an appropriate complaint with the Bureau of Customs for the purpose of having such an investigation initiated. The explanation probably has its roots in the history of the Great Depression, when the Soviets flooded the world markets in 1930 and 1931 with large quantities of grain, lumber, and several other commodities at disruptively low prices resulting in the "Russian dumping debates."⁷⁶ They acquired thereafter a reputation for dumping which lingers and colors Western attitudes toward Soviet trade, and communist trade in general, whenever the subject is considered, and which tends to inhibit fresh approaches to the problem.

Unquestionably, there would be some administrative difficulty in determining the amount of governmental subsidy in bloc countries, given the complexity of their pricing structure and the probable difficulty of obtaining pertinent information. However, the fact that the statute leaves considerable room for the exercise of administrative judgment as to the *amount*, as opposed to the *existence*, of a bounty or grant tends to minimize the problem. Fixing the amount of export subsidy might, indeed, be an easier administrative task than determining fair value according to the standards now employed under the Antidumping Act.⁷⁷ In addition, treating low-priced imports under the countervailing duty statute would, in the absence of an injury requirement, relieve the Government of the cost and inconvenience associated with an injury investigation conducted by the Tariff Commission.

An additional argument in favor of a countervailing duty approach stems from the view that it is less stigmatic than a finding of dumping. When applied to a state trading agency, a dumping order is tantamount to a finding that the government of that state is guilty of an "offense against the legal order," involving unfair and discriminatory practices.⁷⁸ Important political and diplomatic ramifications,

76. Gerschenkron, *supra* note 41, at 31.

77. The pertinent part of 19 U.S.C. § 1303 (1964) provides: "The Secretary of the Treasury shall from time to time ascertain and determine, *or estimate*, the net amount of each such bounty or grant, and shall declare the net amount so determined *or estimated*." (Emphasis added.)

78. Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428,

not ordinarily present when a market economy exporter is the subject of a dumping finding, are obviously involved in such circumstances. The Soviet Union, particularly, appears to be intent upon establishing itself in international public opinion as a normal trader, and has been sensitive to dumping charges for that reason.⁷⁹ On the other hand, a finding that a bounty or grant has been bestowed on the exports of a particular country, thereby calling for the imposition of countervailing duties, will not usually have the same political and diplomatic consequences, since a countervailing duty provision is generally regarded as one of many measures forming a nation's purely protective tariff policy, as opposed to its antitrust policy, and as such does not embody—at least not to the same degree—what is essentially a reproach for engaging in a wrongful, perhaps predatory, trade practice.

Militating against the use of the countervailing duty law in its present form is the probability that it would serve to stifle, rather than encourage, East-West trade contacts. Inasmuch as a great many, if not most, of the commodities exported from communist countries receive a state subsidy, and since the subsidized price as a general rule is only intended to match the world market price, the imposition of a surtax would effectively cut off the bulk of bloc exports from competition in the United States. Certain refinements, however, if added to the United States countervailing duty law as applied to state trading economies, might remedy this complaint. The imposition of the duty might be conditioned, for instance, upon a showing of injury to American industry, as in the Antidumping Act, or a showing that the subsidized price was below the average American domestic price for similar goods sold under similar conditions.

B. *The Price Floor Approach*

Belgium deals with low-priced imports from *state trading economies* by applying a standard which has both countervailing and antidumping duty characteristics.⁸⁰ Under this standard, the export

1439 (1966). Professor Davis characterizes dumping practices as having a "tortious or quasi-criminal quality." *Id.* at 1439.

79. *East-West Trade Hearings* 146 (Frank).

80. Antidumping and countervailing duties are generally thought to be closely related in theory, as illustrated by the description of countervailing duty provisions contained in a 1926 memorandum of the Economic and Financial Section of the League of Nations, *viz.* as measures designed to counteract "bounty dumping." Trendelenburg, *Memorandum on the Legislation of Different States for the Prevention of Dumping, With Special Reference to Exchange Dumping*, PREPARATORY COMM. FOR THE INT'L ECONOMIC CONF.—DOCUMENTATION, Doc. No. E.C.I. 7, at 6 (1927).

price of a particular good is compared with the lowest average price (the price floor) for similar merchandise either produced in Belgium or imported from a free market country and sold or offered for sale in the Belgian domestic market. If the export price is lower than the price floor, a special duty equal to the difference between the two is levied on the good when it enters Belgium.⁸¹ This difference may result, in whole or in part, from either government subsidy or from the type of price discrimination condemned in our Antidumping Act; in either case, the evil is remedied by the imposition of the special duty. The Belgian approach, unlike that of the United States' countervailing duty law, does not reach those subsidized exports priced above the Belgian competitive market. It has additional merits from the standpoint of administrative ease, certainty, and protective effect. Nevertheless, its flaw is that it does not recognize the possibility of genuine low-cost production in a communist society. Even though the low price of a particular article might in fact reflect efficient production techniques, rather than state subsidization or price discrimination, that part of the export price which falls below the price floor would still be brought up to standard by the imposition of the special duty.

C. *Bilateral Trade Agreements*

In recognition of both the difficulties and the dangers of trading with communist nations, many West European countries have entered bilateral intergovernmental trade arrangements with bloc members. Bilateral "programmed trade agreements" are in fact the preferred means by which communist states conduct their foreign trade. This approach, if adopted in the United States, would have the virtue of restricting imports to a volume which would not materially injure domestic industry.⁸² It has been suggested that among their terms such trade agreements could contain prohibitions against dumping and provisions for panels to arbitrate and settle dumping disputes. Trade agreements would also obviate any dangers to our national security posed by the following possibility:

the communist state trading agency or agencies may buy from us huge quantities of industrial machinery, plant and equipment, and the like that would contribute substantially to their own economic and military power while selling to us caviar, vodka, and mink,

81. GATT, ANTI-DUMPING AND COUNTERVAILING DUTIES 46, 49 (1958).

82. *East-West Trade Hearings* 107 (Berman).

thereby contributing to our luxuries and distracting us from our necessities.⁸³

Bilateral agreements, however, are themselves vehicles for discrimination in international trade, and as such negate the principle of equality in trading opportunity traditionally followed by the United States; the adoption of this approach would serve to cement the respectability of bilateralism, to perpetuate state trading, and to undercut our basic commitment to multilateral trading, whereby a country is able to buy where the cost of production is cheapest and sell to those markets offering the highest price.⁸⁴

D. *Multilateral Adoption of Antidumping Rules*

A number of proposals have recently been made to the effect that rules governing dumping activities by communist countries should be agreed upon and adopted by Western trading nations. In that connection it has been suggested that the policy of NATO countries toward East-West trade be unified in the form of a code of fair trade practices governing commercial dealings with the Soviet bloc.⁸⁵ Among other things, such a code would call for agreement by bloc members to observe the GATT rules on dumping. Neither the Soviet bloc nor the West, however, are likely to find much guidance in the GATT, which merely sets down general guidelines for the conduct of a state trading enterprise without providing any specific procedures for regulating dumping by such an enterprise.⁸⁶ A fair practice code would only beg the dumping question unless it actually spelled out workable techniques for dealing with the problem.

Negotiations to establish an International Antidumping Code were entered into at Geneva in 1966 under the auspices of the GATT.⁸⁷ While these proceedings afforded an especially propitious

83. *Id.*

84. A bill was introduced in the 86th Congress to establish a United States Trading Corporation for the purpose of meeting the threat of Soviet economic warfare which appeared acute at that time. Among other things, this would have created an effective, though somewhat extreme, remedy for the dumping problem with respect to imports from state trading nations. H.R. 2159, 86th Cong., 1st Sess. 274, 450, 453, 496 (1959).

85. *East-West Trade Hearings* 2 (Senator Javits).

86. GATT, art. XVII. See C. KINDLEBERGER, *FOREIGN TRADE AND THE NATIONAL ECONOMY* 172 (1962) for the observation that:

Attempts to work out criteria by which to determine the presence of dumping in the General Agreements on Tariffs and Trade were met by a statement of Czechoslovakia . . . that different criteria were needed for socialist than for capitalist countries. No progress was made in developing such criteria, however, in the absence of information on production costs.

87. *United States Submits Paper on Dumping Code*, J. OF COMMERCE, Jan. 27, 1966, at 1. See CONG. REC. 6496 (daily ed. May 9, 1967) (remarks of Senator Hartke to the effect that the U.S. Antidumping Act can only be made to conform to the pending International Dumping Code by legislative action).

opportunity for members of the GATT to meet squarely the problem of state trading, the subject was apparently not seriously broached. The final version of this code does not deal with the problem, although subsequent amendment to the code in this respect is not inconceivable. In addition, an appropriate international forum for the resolution of this problem is afforded in connection with the current negotiations for Polish accession to the GATT.⁸⁸ A comparatively detailed provision as to the treatment of dumping complaints involving Poland would provide a welcome precedent for dealing with imports from state trading countries in general.

The proposal has also been advanced that the Organization for Economic Cooperation and Development (OECD) should take the initiative in facilitating and boosting trade with Eastern Europe on a multilateral basis, and incidentally to formulate a unified antidumping policy for the relatively advanced free world countries which comprise its membership. The proposal is sound, but it remains to be seen what fruit it will bear.

E. *World or Regional Market Price*

In principle, it is hard to view the claimed practice of state trading corporations in fixing export prices to conform to world market prices as per se unfair or inappropriate in commerce with free market countries. It would appear, therefore, that adoption of a price averaging technique as an emblem of fair value, would provide, in most instances, a workable approach to the administration of antidumping measures where communist imports are concerned. Rather than an average world market price, however, a weighted average of prices for similar commodities in the markets of the industrial West or Western Europe alone, adjusted for differences in circumstances of sale, would not only furnish a more easily accessible source for price figures, but would also establish a more realistic "fair value" standard under the United States Antidumping Act. Prices for similar articles produced in less developed countries, especially if produced primarily for domestic consumption, might be distorted or otherwise not adequately reflective of the stage of economic and industrial development reached by the East European country concerned. These prices should probably be excluded from the mix.

There are those who maintain that the concept of dumping

88. Declaration on Relations Between Contracting Parties to the GATT and the Government of the Polish People's Republic, PROT/2/Rev. 2, at 36 (Aug. 1966).

is not relevant in the context of East-West trade because of the discordant price systems involved, and that the issue of "market disruption" or "injury" alone should govern our treatment of communist imports.⁸⁹ Whether or not the application of the dumping law to communist imports creates a conceptual malocclusion, it is capable in its present form of preventing market disruption, once it has been determined that the price of the imported merchandise is unfairly low. The adoption of a regional market price (that is, adjusted world market price) as the standard of fair value would appear to be a reasonable cure to the present price comparison defects, and would re-vitalize the Antidumping Act as a serviceable and effective guardian against injurious, low-priced imports from Eastern Europe.

Moreover, it would appear that the regional market price concept could be adopted by administrative interpretation within the existing statutory framework. Under the Antidumping Act the absence of home market sales in the ordinary course of trade requires consideration of the price at which the merchandise is sold in the ordinary course of trade to countries other than the United States. Since communist countries claim that their export prices are set to mirror average world prices for like or similar merchandise, it follows that the prices for communist exports to third countries may reasonably be equated with world prices. On that basis the world price (subject to customary adjustments) would constitute a valid third-country price under the Act. The Bureau of Customs, following its usual practice, would make an independent calculation of average world price for purposes of verification of the price figures furnished by the state traders. It is, of course, a matter of administrative discretion as to the methods used to establish an appropriate world price. Any difference between the figure submitted by the exporter and that found to be proper by Customs might, for example, be attributed to an adjustment in price not recognized under the statute (where the communist export price is actually lower than the adjusted world price) and, therefore, disallowed as a deduction from the presumptive third-country price (world price).

CONCLUSION

The prospect of enlarging United States trade relations with the Soviet bloc undoubtedly causes some trepidation in the business

89. GERSCHENKRON, *supra* note 41, at 46.

community, at the same time that the promise of new market outlets attracts it. The need for proper protection against unfair competition, and for accommodation of a disparate economic system to make trade possible, calls for fundamental changes in the present treatment of communist country imports under the Antidumping Act and the administrative practices which have grown up under it. As presently conceived and applied the antidumping law is too narrow in concept to constitute an adequate legal instrument for coping with low-priced imports from command economies.

It is important to note in this connection that a number of bills to amend the Antidumping Act have been introduced in the past few years. The chief proponent for such changes is Senator Hartke whose bill, S. 1726, introduced in the 90th Congress would give the United States antidumping law a decidedly protectionist character, raising a non-tariff trade barrier at a time when the principal foreign trade policy of the United States is trade expansion.⁹⁰ For the purpose of this study, however, the significant feature of these legislative proposals⁹¹ is that they would in effect adopt or ratify the present Treasury Department practice with respect to imports from communist countries, a practice which, according to the foregoing analysis, must be considered an inadequate solution for anything other than a small volume of trade with the East.

90. See Adams & Dirlam, *supra* note 44, at 28.

91. In the 90th Congress Senator Hartke has introduced S. 1726 for the purpose of amending the Antidumping Act. The bill is virtually identical to S. 2045 which he introduced in 1965 in the 89th Congress.