S. HRG. 99-745

TRADE ISSUES RAISED BY S. 1860

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

MAY 15, 1986

Nonmarket Economy Dumping

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THURSDAY, MAY 15, 1986

SUBCOMMITTEE ON INTERNATIONAL TRADE,
COMMITTEE ON FINANCE,
Washington, DC.

The committee met, pursuant to notice, at 9:39 a.m., in room SD-215, Dirksen Senate Office Building, Hon. John C. Danforth (chairman) presiding.

Present: Senators Danforth, Heinz, and Grassley.

[The press release announcing the hearing and the prepared statement of Senator Heinz follow:]

[Press Release No. 86-040]

COMMITTEE ON FINANCE SETS HEARINGS ON TRADE ISSUES RAISED BY S. 1860

Senator Bob Packwod (R-Oregon), Chairman of the Committee on Finance, announced today the scheduling of four hearings of the Subcommittee on International Trade on May 13, 14, and 15, 1986. Senator John C. Danforth (R-Missouri), Chairman of the Finance Committee's Subcommittee on International Trade will preside at these hearings. All the hearings will be held in Room SD-215 of the Dirksen Senate Office Building.

Senator Packwood noted that a number of important issues are raised by S. 1860, sponsored by Senators Danforth, Moynihan, Dole, Bradley and others. This series of hearings will afford an opportunity to examine the merits of S. 1860 and other bills which share its themes, Chairman Packwood stated.

On May 15, 1986 at 9:30 a.m., the Subcommittee will take up non-market economy dumping. The hearing will focus primarily on S. 1868, principally sponsored by Senator Heinz, along with other proposals for dealing with non-market economies in the context of unfair trade cases.

SENATOR JOHN HEINZ

HEARING ON S. 1868, UNFAIR TRADE PRACTICES BY NONMARKET ECONOMIES

MAY 15, 1986

OPENING STATEMENT

It is tempting to begin this hearing by saying, "Well, Mr. Chairman, here we are again." This is the seventh year and third hearing since I introduced my first bill on nonmarket economy trade practices; yet I doubt we are any closer to a solution today than we were in 1979.

I do not say that to blame anyone. The Committee, the Administration, and the private sector, have all labored diligently to develop a solution. Our collective failure is a sign of the problem's intractability, not of our lack of effort.

Rather than summarize the latest version of my bill at this point, I would like to instead suggest some general principles that ought to guide all of us in our effort to develop nonmarket economy legislation.

First, there is no perfect solution to the problem. Every proposal that has been made, including those I know our witnesses will make today, is subject to valid criticism. My worry is that in our search for the perfect we ignore the good.

Second, we should seek to treat nonmarket economies as much like market economies as we can. A corollary of that is that

nonmarket economies are as capable of engaging in unfair trade practices as market economies. In my judgment we should maintain the distinction between fair and unfair trading practices, lest we fall into the trap of effectively giving nonmarket economies beneficial treatment compared to our allies.

Third, our policy goal should not be to knock them out of the market but rather in some sense to force them to stop price undercutting and instead price "normally", recognizing that that may be difficult to determine.

Finally, I agree with the objectives the administrators of this law have recommended on several occasions -- that the law should be predictable, efficient, and non-discretionary. This is in the interest of both foreign and domestic parties in any case.

These principles, of course, have certain implications for our deliberations in the Committee. The absence of a perfect solution means there will be opposition to every option. We need to understand that this is one of those issues that we may not be able to "work out", to use a phrase popular among Committee members.

Second, parallel treatment for market economies and nonmarket economies means an unfair trade practice statute for the latter similar to our dumping and countervailing duty laws, not our escape clause provisions. I have not yet given up on a price-based standard and specifically a foreign price-based standard. A standard based on the U.S. price, in my judgment, is neither fair nor logical.

Third, parallel treatment should apply with respect to injury as well as determination of an unfair practice. A new nonmarket provision will likely replace current law's application of both the dumping and countervailing duty laws to those economies. Application of the latter is currently under review by the Court of Appeals for the Federal Circuit, and I hope that decision will come in time for the Committee's consideration of S. 1868. Regardless of that decision, however, it will be difficult for me to accept the idea that we should extend the injury test and thereby provide more favorable treatment to nonmarket economies than we do to a number of our Western trading partners.

Mr. Chairman, we may not even be able to agree on these principles, but I offer them as a starting point for today's discussion. They also demonstrate that while I am not wedded to the text of S. 1868 and welcome new approaches, we should confine ourselves within the parameters I have outlined in order to insure we are providing parallel treatment for market and nonmarket economies.

United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510

May 14, 1986

MEMO

TO: FINANCE COMMITTEE MEMBERS

FROM: FINANCE COMMITTEE TRADE STAFF
(JOSHUA BOLTEN 4-5472)

SUBJECT: MAY 15, 1986 TRADE SUBCOMMITTEE HEARING ON NON-MARKET ECONOMY DUMPING

On Thursday, May 15, 1986 at 9:30 a.m. in Room SD-215, the International Trade Subcommittee will hold a hearing on non-market economy dumping. The hearing will focus primarily on S. 1868, sponsored by Senator Heinz and others, as well as on other proposals for handling producers from non-market countries in the context of unfair trade complaints.

A witness list is attached. The panel of private sector witnesses will be presented roughly in the format of a debate. In lieu of prepared statements, each will be asked to respond in turn to three questions and to defend his answer against those of the other panelists. The text of the questions is attached.

A. Background

United States trade with non-market economy (NME) countries (i.e., those with state-controlled economies) has grown substantially since the early 1970's, approximately tripling during the period. Total U.S. exports to NME's last year fell to

$7.1 billion, while imports from NME rose to $6.3 billion. Many of the imports entering the United States from NME's tend to be lower priced than their domestic counterparts--and lower priced even than comparable imports from other countries--raising concern among several different domestic industries that NME imports are unfairly traded.

Title VII of the 1930 Tariff Act sets out two remedies against unfairly traded imports: countervailing duties, for unfairly subsidized imports, and antidumping duties, for imports sold at less-than-fair value. The application of both of these laws to imports from NME countries is highly problematic. Because prices in these countries often do not reflect market value, it may be difficult or impossible to determine if a particular product has been subsidized or dumped.

The current method for determining when imports from NME's are unfairly traded has produced some peculiar results and has been much criticized. None of the several proposed alternatives, however, has yet emerged as a consensus favorite.

B. Current Law

1. Antidumping duties.

Antidumping duties may be imposed on imports that the Commerce Department determines were sold in the U.S. at less-than-fair value (LTFV). The import's U.S. price is normally considered less-than-fair if it is below:

a. the home market price (that is, the price charged for the same product in the exporter's home market);

b. a third-country price (that is, the price charged by the exporter in a market other than its home or the U.S.), or

c. constructed value (that is, the exporter's cost of producing the goods, plus general expenses and profits).

(These benchmarks for fair value are listed in declining order of preference. Commerce will move to a less-preferred benchmark only if the preceding benchmark is inapplicable or inappropriate.) Thus, for example, if a Korean TV sells in Korea for $100, but in the U.S. for $80, Commerce will find a dumping margin of $20.

If, however, the example is changed to Bulgaria, a state-controlled economy, the $100 benchmark home-market price may be meaningless to a fair-value determination. In a truly controlled economy, not only would the home sales price not reflect market valuations, but neither would the producers' costs of inputs in making the product.

Therefore, in order to circumvent this problem of finding a "fair-value" in the sales price of a NME product, section 773(c) of the statute directs that Commerce look instead at the price (or cost) of the same product produced

in a "surrogate" market economy country. The surrogate is to be chosen for its similarity to the NME in relevant real costs and level of development.

Thus, in the TV example above, if Bulgarian prices are unusable because the economy is state-controlled, then Commerce might investigate instead the prices of a comparable TV manufacturer in, say, Greece. If the Greek producer's price in Greece is greater than the Bulgarian producer's price in the U.S. -- then the Bulgarian producer will be deemed to be dumping by the difference.

This surrogate methodology has been severely criticized as unworkable, because it requires that producers in surrogate countries cooperate by voluntarily opening their books; as enormously cumbersome, because the search for a willing surrogate consumes a large portion of the investigatory period; and as arbitrary, because the conditions in any surrogate country are likely to be at best a rough approximation of those in the NME.

2. Countervailing duties.

Similar problems arise in trying to determine whether an import from a NME country has benefitted from a countervailable subsidy. A subsidy may be defined as governmental intervention in the economy, on behalf of a specific industry, distorting the allocation of resources that would normally result from unrestricted operation of the

market. But state intervention may be so pervasive that it is impossible to tell how resources would have been allocated had the market operated.

Commerce has found the difficulties inherent in applying the countervailing duty laws to NME's to be so great that it concluded that these laws could not have been intended to apply to NME's. Commerce's 1984 refusal to entertain a subsidy complaint against a NME producer was appealed to the Court of International Trade, which in 1985 reversed Commerce's ruling. The matter is currently on appeal before the Court of Appeals for the Federal Circuit.

3. Section 406.

A third provision of U.S. law, although not as such an "unfair trade" statute, is relevant to the present discussion. Section 406 of the 1974 Trade Act, corresponding roughly to section 201 proceedings, makes import relief available to domestic industries that are victims of market disruptions caused by imports from Communist countries. No unfair trading needs to be established. If the International Trade Commission (ITC) finds that imports from Communist countries are increasing rapidly so as to be a cause of material injury to the domestic industry, then the ITC recommends import relief. The President may then impose tariffs, quotas, or other restrictions on the Communist imports, but need not do so.

No import relief has ever been obtained under Section 406.

C. S. 1868

On the central question of the benchmark to be used in determining the fair value of a NME product, S. 1868 rejects the primacy of the current "surrogate" methodology. Instead, S. 1868 directs Commerce first to use a price-based benchmark drawn from the trade-weighted average price of fairly traded imports of the like product from market countries. That is, Commerce would determine "fair value" by taking the average price of all imports of the same product, excluding imports that come from other NMEs or that have been found to be dumped or subsidized.

In the event that an average import price is unavailable (due, for example, to a lack of Customs price data adequately isolating the product in question), Commerce may look to surrogate market economy producers. In the event that there is no market economy producer available, Commerce may construct a value in a market economy country.

In order to avoid extended arguments in each case on whether the country exporting the allegedly dumped goods is, in fact, a non-market economy country, S. 1868 directs Commerce to prepare an annual list of NMEs. The determination is to be based on several economic (not political) criteria. As under current law, if verifiable information is available on real market values in a NME with respect to the particular product under investigation,

then this "artificial pricing" standard need not be used and the normal, actual price standards may be used.

Finally, S. 1868 is directed solely at dumping; it eschews any amendment to the countervailing duty law. Thus, if the Court of International Trade's (CIT) ruling (that the countervailing duty law does apply to NMEs) is upheld on appeal, then existing law would continue to apply to cases of alleged NME subsidization. Proponents of S. 1868 argue that, at least with respect to export subsidies, artificial mechanisms may not be necessary for contervailing cases. If, on the other hand, the CIT's ruling is overturned on appeal, then S. 1868's average-import-price dumping mechanism would become the sole unfair trade remedy.

D. Other Proposed Benchmarks

S. 1868's average-import-price benchmark is far from the only proposed alternative to the current surrogate methodology.

1. Lowest average import price.

A variant of S. 1868's average import price, this approach was embodied in a bill introduced last Congress by Senator Heinz. (A standard like S. 1868's average import price was actually adopted by the Senate, but dropped in conference.) It would use as the fair-value benchmark the import price of the lowest-priced suitable producer from a market economy country. In the Bulgarian TV example, Commerce might look for its benchmark to Korean producer

Samsung, as the lowest-priced suitable producer of comparable TV imports.

This standard has been criticized as potentially capricious, particularly in allowing only one producer to set the minimum price for imports. That one producer may be unusually efficient, and its low price may not accurately reflect fair value for most other producers--especially notoriously inefficient NME producers. One the other hand, the lowest-average-import-price benchmark overcomes one of the major objections to S. 1868's overall average-import-price benchmark: the difficulty, when using aggregate Customs price statistics, of ensuring that the products included in the overall average price are truly comparable to the NME product under investigation. If only one major producer's prices are investigated, as in the lowest-average-import-price benchmark, it is much easier to ensure the similarity of products being compared.

Two years ago, the Administration expressed some support for a variant of this lowest-average-import-price approach. The Administration has not yet taken a position this year.

2. U.S. price.

This approach would set the fair-value benchmark at the average U.S. price for the product, minus a certain percentage (say, 15%). As in the above approach, a variant would be to use instead the lowest-priced suitable U.S.

producer, or the highest-volume suitable U.S. producer. This U.S. price approach has been criticized as bad trade policy, in relying solely on domestic prices, and as unworkable, because domestic price data are significantly more difficult to get than import price data.

3. Combinations

A variety of combinations of price benchmarks have been suggested. For example, one proposal suggests that fair value be set at the higher of:

a. the import price of the lowest priced market economy producer;

b. the average price of the highest volume U.S. producer, minus 15%.

Another proposal is to give Commerce its choice among a menu of methodologies--including surrogate, constructed value, and import prices--coupled with a requirement that Commerce choose what it considers the most appropriate one early in the investigation.

Such combination or menu approaches have the advantage of limiting the arbitrariness or peculiarity that arises when a single methodology must be applied to an incompatible set of facts. However, they may also have the disadvantage of reducing predictability--widely considered an important element in deterring dumping.

4. Section 406

An entirely different approach, which has gained support lately, would be not to apply any price benchmark at all. Instead, Section 406 would be made the sole remedy against imports. The proof required from the domestic industry would be relaxed somewhat, so that the standard of injury caused by NME imports would be lower than the current one, but still higher than is required in normal unfair trade cases. Most of these proposals also suggest limiting (or even eliminating) the President's discretion to deny relief, if the ITC finds the requisite level of injury.

Proponents of this approach argue that all of the price-based criteria for relief from NME imports are essentially unworkable. Where an industry genuinely is injured by NME imports, we do better to move toward the negotiated solutions that would become common under an injury-only benchmark, than to continue inevitably unsuccessful efforts to concoct artificial price levels.

The Ways and Means omnibus trade bill, reported earlier this month, adopts the approach of loosening somewhat the requirements for 406 relief. However, that bill does not at the same time eliminate either dumping or countervail remedies against NME imports. It therefore probably leaves the situation with respect to unfair trade complaints against NME imports relatively unchanged.

SUBCOMMITTEE ON INTERNATIONAL TRADE HEARING
ON NON-MARKET ECONOMY DUMPING
MAY 14, 1986

Questions for Panelists

1. What should be the objectives of U.S. policy on East-West trade, and how should they be reflected in our unfair trade laws?

2. Should the standard for determining whether goods from NME countries are being sold at less-than-fair value be based on price or solely injury to the domestic industry?

3. Assuming a price-based standard:

   (a) What benchmark should be used to determine the fair price?

   (b) Should this be the exclusive remedy against imports from NME countries?

   (c) Under what circumstances should imports from a NME country be entitled to the injury test?

mm100

W/L 86-107

COMMITTEE ON FINANCE
Subcommittee on International Trade

Public Hearing on Non-Market Economy Dumping

Thursday, May, 15, 1986; 9:30 a.m.
Room SD-215, Dirksen Senate Office Building

WITNESS LIST

I. Gilbert Kaplan, Deputy Assistant Secretary for Import Administration, International Trade Administration, Department of Commerce, Washington, D.C.

II. The Honorable Paula Stern, Chairwoman, International Trade Commission, Washington, D.C.

III. A panel consisting of:

Peter Suchman, American Association of Exporters and Importers; and Partner, Sharretts, Paley Carter & Blauvelt, Washington, D.C.

Richard O. Cunningham, Partner, Steptoe and Johnson, Washington, D.C.

Charles Owen Verrill, Jr., Partner, Wiley and Rein, Washington, D.C.

Arthur T. Downey, Chairman, Task Force on Trade with Nonmarket Economies, U.S. Chamber of Commerce, Washington, D.C.

W/L 86-107 (mm094)

Senator DANFORTH. This is the fourth hearing on various aspects of S. 1860. This particular hearing deals with the problem of how to determine pricing by nonmarket economies for the purpose of dumping cases.

There is a general recognition that the present system is not workable. We have today a group of people who have given a lot of thought to this problem. Senator Heinz is going to, I believe, be here later. He has clearly been the leader in the Senate in addressing this issue.

We are also pleased to have Senator Domenici with us this morning. Senator?

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman. I won't take a lot of your time. Mr. Chairman, you have been to my State with me when we discussed the issue of copper, and I was pleased that you had an opportunity first hand to view the problem there. We have another situation where New Mexico has an extracted industry that is very interested in this definition. It is potash, which is geographically at the opposite end of the State, east-west, from where the copper is.

It has been a very difficult situation for potash, even though we are almost America's sole producer. There is a little potash somewhere else, but we have most of it. Canada has been the principal competition, and that problem has been a serious one; but we have had a couple of episodes, even in the last 5 or 6 years, when nonmarket producers bring potash into the United States. We had a very serious problem about 2½ to 3 years ago.

And we know the bill you are trying to draft is not for a year or two, but rather trying to do the best we can, and surely you are, to establish some rules that would take into effect changes that might occur at any time in the next decade or two. So, I have a genuine interest in this issue because the Soviet Union is a very large producer of potash. There are some other Communist bloc countries that produce potash; and clearly, as you well know, their urgent need for capital and cash, currency exchange, brings them into new markets from time to time. And we think we are kind of a sitting duck.

I have a prepared statement, but let me just share with you the one thought that I have. As I understand it, you are working with a definition for products, including things like potash, but it is really not limited to that—all kinds of products—including manufactured products that would come from nonmarketplace countries, Communist-type countries; and you use the definition "trade-weighted average."

I have looked at that, and I understand it; and clearly, it is a difficult concept, but I am not here to make any suggestions about it. You probably will have others who can do far better and know more about it than I. What concerns me is that you are using a definition, once you have the trade-weighted average, of the landed price. And I would like to discuss with you from the standpoint of

products like potash, which are mined—I would like to suggest that you seriously consider using a different definition.

Let me just use my own example. If you use the trade weighted average and the landed price, what you have done, as far as the Soviet Union is concerned—just to use them as an example—you have given them basically the opportunity to take 4,500 miles, which is the distance from their mine to a reasonable American competitive port, and you have sort of given them that free. I understand on the factory-type assessment that you have a difficulty with anything other than landed. I hope you will find a way to not use landed on anything; but let me suggest for mined products, where there is a mining site, that a great deal of information is available worldwide by experts about the quality of the reserves and the quality of the mine.

As a matter of fact, our Bureau of Mines, Mr. Chairman, knows as much as any institution or entity in the world about all—just taking my product—I believe that you and your staff will find that it is the same on almost all mined and mining products and activities. They know the nature of the site; they know the nature of the reserves, the quality of the reserves, and the quantity of the reserves. And that has a direct relationship, obviously, on the price.

We believe it would be much fairer if you would, on mined products, use the mining site rather than the landed site in the definition. We think there is enough information to do that in the case of potash. And I am sure that, as you proceed through with others, if the goal—and I understand having been with you and having heard you on this issue—that clearly we are trying to make this as fair as possible.

We are not trying here to give the Soviet Union or one of the Soviet Union satellites, after we get through with the definition, an advantage by weight of the freight rates. That would be very nice; we would get a cheaper product; but in essence, you are trying to make as level a field as you can.

In my testimony, which I would submit to you, as to a product like potash, when you tie it into this continent and the fact that the largest producer is Canada and you talk about the landed site here, it will give an inordinate competitive edge to someone like the Soviet Union, if you cannot back that up and go to the mined site.

Now, clearly, if I am in error with reference to available information of an objective nature regarding the sites and the relationship of sites to price, then obviously what I am talking about does not make too much sense; but I do believe, having talked to the Bureau of Mines and others, that a great deal of information is known. It is relevant; it has to do with what their reasonable costs ought to be and their competitive advantage or disadvantage.

And I urge that, if you do not change the landed definition for all things, that at least you would seriously consider treating mined products and mining sites differently. I ask that my statement be made a part of the record.

Senator DANFORTH. It will be, and Senator Domenici, thank you for your testimony. You have called to our attention, I would say, a frequently overlooked aspect of a much neglected subject.

Senator DOMENICI. I thank you, Senator.

Senator DANFORTH. You have focused our attention on something that may have escaped attention otherwise, and I think you have done a great service for your constituents.

Senator DOMENICI. It is nice to be somewhat useful sometimes. [Laughter.]

Senator DANFORTH. Let me say that you have done something other than give us sweeping generalities, which is my general approach when testifying before committees.

Senator DOMENICI. Thank you very much, Mr. Chairman.

Senator DANFORTH. Thank you, Senator.

Senator HEINZ. I just want to say that, although I did not hear every word of his testimony—I was somewhat late—I thought you gave very detailed specifics on a specific detail.

Senator DOMENICI. Thank you. [Laughter.]

Senator HEINZ. That needed to be focused on.

Senator DOMENICI. Thank you. You really didn't miss very much, but [laughter]——

Senator HEINZ. Let me just say to my friend from New Mexico that he has pointed out with respect to a specific and unique commodity, which we bring in mainly from one producer, Canada——

Senator DOMENICI. That is right.

Senator HEINZ. Which virtually sets the price, a very significant real-world problem, which is that Canada is near and the Soviet Union is far away, and transportation rates are a significant factor in that.

Senator DOMENICI. That is right. It is very, very significant, and we really ought not—with reference to them or to East Germany and a few others—we ought not give the transportation away in the definition right up front, it seems to me. Thank you very much.

Senator DANFORTH. Thank you very much, Senator Domenici.

Senator Heinz, you had a comment?

Senator HEINZ. Mr. Chairman, first I would like to ask unanimous consent that my opening statement be placed in the record at the appropriate point.

Senator DANFORTH. It will be.

[The prepared written statement of Senator Domenici follows:]

TESTIMONY OF SENATOR PETE V. DOMENICI
Before the International Trade Subcommittee
Non-Market Economy legislation

I want to commend you for holding hearings on this very important legislation and for your interest and concern about the trade problems New Mexico's mining industry has faced in the past and continues to face.

The trade issues regarding the non-market economies are particularly intriguing, both because of their subject matter and the complexity of trying to apply free market concepts to planned economies.

Non-market economy dumping cases are not prevalent, however, as trade increases with China and the U.S.S.R. the issue of non-market economies will become more and more important. For this reason I think Senator Heinz should be recognized and thanked for his foresight in developing reforms in this area.

New Mexico produces 97 percent of the U.S. potash. Two years ago the domestic producers brought both a dumping and countervailing duty case against the U.S.S.R and East Germany. At one stage of the proceedings it wasn't even clear whether certain aspects of our countervailing duty laws would apply to

non-market economies. This issue is still under appeal with the Court of Appeals for the Federal Circuit.

I think we all agree that our dumping laws as they relate to non-market economies have to be changed. The approach taken in S. 1868 is simplification and reform combined.

The bill as written gives nonmarket economies countries the opportunity to be treated like free market economies. The respondent county would provide information about its costs, pricing and marketing practices. This information would be analyzed to determine if the country was selling at less than fair value.

In those cases where the nonmarket economy will not or cannnot provide the necessary information, preventing the complaint from being handled in a "normal" way, a different standard would be employed. In most cases the standard would be the "trade weighted average price" of foreign market economy producers, excluding those who have been found to be dumping or benefiting from subsidies. U.S. producers are omitted from this average. "Price" would be defined as "landed price" which is the price of the commodity at the U.S. border.

Since I am not an expert in this very complicated area,

I will stick to what I know about and that is potash. Since Canada dominates the potash market, any trade weighted average would be tantamount to the Canadian price at the border. Since Canada is the low-cost producer in the world the formula at this stage gives nonmarket economies the benefit of Canada's efficiency while in reality the nonmarket economies are notoriously inefficient when it comes to mining.

My main concern, however, is with using the "landed price." I would suggest that the Committee consider the use of an at-the-factory price (ex-factory) and an at-the-mine price (ex-mine price in all cases. Alternatively, I would recommend an extractive industry provision that defines price for extractive industries as "f.o.b. mine or plant."

This is necessary because for many mineable commodities freight is as expensive as the product. The use of a landed price ignores the thousands and thousand of miles across which these very heavy, bulky commodities must be transported.

Since Canada is our neighbor to the North, using the landed price for potash coming from the Soviet Union ignores the 4,500-miles that Russian potash must travel to reach our ports.

The landed price is doubly troublesome because it would not only put U.S. producers at a disadvantage when they try to prove dumping, but it would also put Canadian producers at a

disadvantage when trying to compete with a non-market economy producer in the U.S. The Russian potash could come in and undercut Canadian prices, on the West coast, the Gulf or even along the Mississippi River. As lon as the Russian price was equivalent to the Canadian price at the border there would be no dumping under the formula in the bill.

Russia could undersell Canada because Russia could deliver the potash at a price equal to Canada's at the border and not be dumping under the formula. However, in the real world Canada would still have to pay freight to get the potash to the U.S. market in Florida or the West coast. The Russians could just deliver to a U.S. port, charge the Canadian border price, not incur any freight charges within the U.S. and be able to sell the potash cheaper than the world's lowest cost producers and still not be dumping.

The second problem with using landed price based on the formula is that it builds into the formula an assumption that the nonmaraket economies are as efficient as the most efficient producers. Bureau of Mines data strongly suggest that this is universally untrue for non-market production of extractive minerals.

I have been told that the reason the legislation was drafted using "landed price" was for ease in administration and because the data was more readily available at the border. I have not

doubt that this is true for manufacturing. But for mining, the ex-mine price data is as readily available. In fact, the Bureau of Mines keeps track of many commodities, studies technology and ore bodies around the world. In view of the data they have available, I would recommend using the ex-mine price which is consistent with their data gathering methods.

I think this small adjustment for mining would make this legislation fairer and more workable.

I want to thank you for your consideration, and wish you good luck in moving the omnibus trade bill to the floor.

Thank you Mr. Chairman.

Senator HEINZ. I want to commend you on holding these hearings. I am a little tempted to say, well, here we go again, with no pejorative connotation, Mr. Chairman, because you have been particularly helpful and persistent in pursuing nonmarket economies legislation; but this is the seventh year and the third hearing since I introduced my first bill back in 1979. And I am not sure we are closer to getting a consensus on a solution—everybody wants a solution, at least almost everybody. I don't blame anybody for our failure to get a solution—not the administration or the committee or the private sector.

I think they have all worked very hard; and rather than detail the bill I introduced most recently—last year—I would suggest that there are several general principles that ought to guide us in our effort to develop nonmarket economy legislation, if we want nonmarket economy legislation.

The first principle, I think, Mr. Chairman, is there is no perfect solution to the problem. Every proposal that has been made, including some of those our witnesses are going to make today, is subject to some valid criticism. My worry is that in searching for the perfect, we are going to overlook the good.

Second, as a principle, we should seek to treat nonmarket economies as much like market economies as we can; and a corollary of that is that nonmarket economies are as capable as market economies of engaging in unfair foreign trade practices. And so, in my judgment, we should maintain the distinction between fair and unfair trading practices, and not fall into the trap of giving nonmarket economies beneficial treatment compared to our allies.

A third principle is that our policy goal should not be to knock nonmarket economies out of the market, but rather, in some sense, to force them to stop price undercutting and instead—what I would call normally—price, recognizing that that may be difficult to determine but not impossible to do in some reasonable way.

Finally, and here I want to agree with the objectives of the administrators of this law and what they have recommended on several occasions, and that is that this law should be predictable. It should be efficient; it should be nondiscretionary. And that is in the interest of both foreign and domestic parties in any case.

I think these principles have some implications for our deliberations in the committee. One is that I expect that there is going to be opposition to just about every option. Wc need to understand that this is one of those issues where we may not be able to work out all our differences. Second, I suspect that parallel treatment for market economies and nonmarket economies means an unfair trade practice statute for the latter, similar to dumping and countervaling duties, and not our escape clause provisions.

I have not yet given up on a price based standard and, specifically, a foreign price based standard. A standard based on the U.S. price, however, is neither fair nor logical.

And third, parallel treatment should apply with respect to injury as well as determination of unfair trade practices. A new nonmarket provision will likely replace current law's application of both dumping and countervailing duty laws for those economies. Application of the latter is currently under review in the court of ap-

peals for the Federal circuit; and I hope that that decision will come in time for the committee's consideration of S. 1868.

But regardless of that decision, it is going to be difficult for me to accept the idea that we should extend the injury test and thereby provide more favorable treatment to nonmarket economies than we do to a number of our Western trading partners.

Mr. Chairman, I am not even sure we are going to reach agreement on the principles that I have enumerated. I hope we can reach some agreement on those principles because I suggest that, if we can, they will serve as a useful starting point, first, for today's discussion and, second, as we mark up any legislation.

I also want to say that I am not wedded exact language of S. 1868. I have an open mind to new approaches, but I do think that we should limit ourselves—confine ourselves—within the parameters I have outlined in order to ensure that we are providing parallel treatment for market and nonmarket economies. Mr. Chairman, I thank you for holding this hearing, and I hope that we can use it as a vehicle to narrow down those areas of disagreement and then make some decisions. Thank you.

Senator DANFORTH. Thank you, Senator Heinz. I would like, if it is all right with the witnesses, for Deputy Assistant Secretary Kaplan and Chairperson Stern to testify together as a panel, if that is satisfactory with the two of you.

Mr. Kaplan is Deputy Assistant Secretary for Import Administration of the International Trade Administration, Department of Commerce. Ms. Stern is the Chairwoman of the International Trade Commission.

Mr. Kaplan, would you like to begin?

STATEMENT OF GILBERT KAPLAN, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, INTERNATIONAL TRADE ADMINISTRATION, DEPARTMENT OF COMMERCE, WASHINGTON, DC

Mr. KAPLAN. Thank you, Mr. Chairman. I am pleased to appear here today and have the opportunity to discuss with you the application of the unfair trade laws to nonmarket economies. As you know, the President in his September 1985 trade policy statement emphasized this area as one in which we wanted to see significant legislative reform; and we would be pleased to work with this committee in trying to accomplish a solution to this problem at long last.

I think Senator Heinz was correct when he focused on the analytic and intellectual problem we are facing, which is the merger of two different systems of economic regulation. We, as you know, have a market economy which is based primarily on market principles; nonmarket economies have central plans. They do not respond internally to the same market pressures that we are faced with here.

And therefore, concepts such as dumping and subsidization really do not make a great deal of sense when you are trying to look at the internal workings of a nonmarket economy.

We have tried to do that for many years, both with the current dumping law and countervailing duty law; and, with several new

approaches, we have tried administratively to solve some of the problems with the law. The problems we are facing now are perhaps even greater than they were when the administration last testified here 2 two years ago.

I would just like to bring you up to date, I guess, on what has happened in the last few years and how our difficulties have increased. On the whole, we cannot get any surrogate cooperation any more. Almost any country we go to and ask to voluntarily submit to rigorous review by Department of Commerce officials tends to ask the very logical question, which is: Why should we do this? And they are probably making a fairly sound judgment.

In the case of Finland—steel—in which we once got their surrogate cooperation, several years later U.S. Steel filed a petition against Finland and used some of the data which had come up in their surrogate response. And that was data we felt legally we had to take into account. We could not just say: "You can't use it"; because it was there; it was publicly available, and we felt we had to start a case on the basis of it.

As a result of that and similar experiences, we just don't get surrogate cooperation. Administratively, in my prior job as Director of the Office of Investigations, I tried using the averaging approach, which has been Senator Heinz' approach and an approach which a lot of people around town have thought of over the years. We tried it in the steel cases that were filed several years ago by U.S. Steel on GDR, Poland, Romania, and several other countries.

There are some real problems in using a trade-weighted average of imports as a benchmark—perhaps not insurmountable, but still there are problems. I think the major problem is that there is an overwhelming amount of data to average; and the data is fairly imprecise. What you have on Customs entry forms, or even on the underlying commercial invoices that accompany those forms, is really summary data.

In one case I recall on carbon steel wire rod, we didn't know the carbon content of the wire rod, which changes the price by 30 to 40 percent. So, if you don't happen to know that, you can get the margin totally wrong. The nonmarket economy could be selling at a perfectly reasonable price, and there is no way you can make that adjustment; and that data does not appear on the face of the invoices.

I hesitate to go through particularly problematic cases because they just show perhaps that we are not doing our job; but I think I have to bring them to the fore because they show the law isn't working as well.

On wax candles from the People's Republic of China, which is a case that is currently in process, we recently had a preliminary where we tried to use weighted-average data. We went out and got data from Customs which showed candle prices from Guinea, Malaysia, and Jamaica. The petitioners protested vigorously that Jamaican candles were really not the same as PRC candles. They were a common candle. The PRC candles were much more elaborate and, therefore, more expensive; and we shouldn't make that comparison.

We concurred with that, so we cut out the Jamaican candles. That left only two potential countries we could use for averaging.

One was Malaysia and the other was Guinea; so we averaged those and got a margin of about 63 percent. Then the petitioners went and dug out the underlying data and found out that the Guinea data had been miscoded and was actually from some other country.

So, we ended up not being able to use that, and we had to adjust our margin to 136 percent very quickly.

The point of this really is that the commonly available average import data is simply not reliable. You can't get it specific enough, and you can't get it reliable enough from generally available sources. We have to have some other basis for getting average import data, if we are going to use that approach.

I think there are really four or five different approaches to this problem, which have been discussed over the years. One is some kind of an average import price or lowest average import price approach. The second is something related to the U.S. price as a benchmark. The third is an injury-based approach. The fourth is something related to cost of production. And the fifth, I guess, is the current approach relating to surrogates.

We have gone through all these, as have many other people who will testify before you today; and we repeat our original view that the lowest import price is the appropriate model to use in trying to derive a solution. This relates quite closely to S. 1868, which we think is a good starting point, but we would like to work with the committee to refine the methodology to some extent in that bill.

I think that Senator Heinz' point that one thing we want to do and accomplish that is very important is to provide some predictability. I have met regularly over the last 2 years with representatives of the Chinese, the Soviets, the Poles—most nonmarket economy countries—and they come in and very honestly say: "What do we do to comply with your law? How can we avoid these terrible dumping margins that you are always throwing on our shoulders?"

I think that is a very legitimate question; and any solution we come up with should provide them with some way to comply with these laws. I think the lowest-priced imports would basically achieve this result. Most nonmarket economies can discuss with their representatives at what prices imports are coming into this country. That is something which is known in the marketplace. They can find that out. They can determine an appropriate benchmark within a certain degree of accuracy; and then, they can sell at that level and be able to sell in this country without incurring enormous duties.

The two major changes I think we would make, or propose to make, in S. 1868 are, first, we would like to see information obtained directly from importers, at least in some instances; not publicly available data. Second, we would like to be able to make adjustments to that data for differences in quality and in terms of sales, such as credit terms and level of trade, and things like that.

We also believe that any bill should be a substitute both for the dumping law and the countervailing duty law. I led the verification team to Poland the first verification in a countervailing duty case involving a nonmarket economy; and that was a very interesting experience. You cannot readily find subsidies in a nonmarket economy. You can look very hard and find all kinds of market distortions; but, as we concluded, almost every government intervention

in a nonmarket economy is either a subsidy or a tax. And it is almost impossible to tell which is which.

We would also like the flexibility to pursue a complaint as a normal dumping or countervailing duty case even if it is originally filed as an artificial pricing case or whatever this remedy would be called. That would permit us to make changes during the course of the case. For example, in the case of the PRC, they have been trying to achieve more market-oriented approaches in some sectors; and that may be an appropriate time to change the approach.

And finally, we would seek to extend an injury test to all cases involving nonmarket economies. In conclusion, let me just say that we are hopeful that we will work with this committee and finally derive a solution to this problem in the near future. Thank you, Mr. Chairman.

Senator DANFORTH. Thank you, Mr. Kaplan. Ms. Stern?

[The prepared written statement of Mr. Kaplan follows:]

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Testimony of
Gilbert B. Kaplan
Deputy Assistant Secretary
for Import Administration
U. S. Department of Commerce
before the
Senate Finance Committee
May 15, 1986

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to talk about the application of the unfair trade laws to nonmarket economy countries (NMEs), sometimes referred to as state-controlled economies. Just over two years ago the Administration addressed you on the same subject. In that testimony we described the difficulties we faced in applying the antidumping duty law to NMEs and our finding that the countervailing duty law cannot be applied to those countries. We also commended the proposed bill that was before the Subcommittee creating an artificial pricing remedy for NME imports.

Today we are facing perhaps even greater difficulties in applying the antidumping law to NMEs than two years ago. Last fall, the President singled out the unfair trade laws as they apply to NMEs as one area of our trade laws needing reform. I am here today to tell you that the Administration wants to work with the Congress in putting together a bill that is fair, administrable and offers predictable results.

Application of the AD Law to NMEs

The antidumping duty law offers relief to U.S. industries being injured by foreign producers who sell in the U.S. at less than fair value. Fair value is defined as the foreign producer's home market or third country export prices or his cost of production. Quite simply, it is internationally accepted that it is unfair for a market economy producer to price discriminate or sell below cost, if those sales injure the industry in the importing country.

This definition of fair value and dumping is rooted in the context of a market economy and the play of market forces. Clearly, these market forces do not exist or, if they exist, are not dominant in nonmarket economies. When NMEs export to the United States we have a meeting of two totally different systems. The problems that those exports cause do not lend themselves to normal antidumping or countervailing duty calculations. Instead, trade laws for NME imports have to bridge the gap between the two systems.

An NME producer's prices or costs may not be an accurate measure of fair value because they are often set without regard to market forces. Congress recognized this in 1974 and enacted a special provision for determining fair value in NME cases. Thus, for NMEs, we determine fair value by reference to a surrogate, a market economy producer's price or cost of manufacturing the same merchandise.

Under our regulations we first seek the home market price in a market economy that is at a level of economic development comparable to that of the NME in question. Therefore, as soon as a case is filed, we identify market economies that are comparable to the NME and send questionnaires to producers in those countries asking about their home market prices.

We seldom receive replies.

In the last two years, 17 cases have been filed against imports from NMEs. In only two of those were we able to find a surrogate producer willing to provide us with the data necessary to calculate fair value.

While the use of a surrogate's home market prices is the preferred method for determining fair value, this approach has its flaws. For example, we may identify surrogate producers in two or three countries that have economies comparable to that of the NME. However, the outcome of the case can vary as much as 100 percent depending on which of the producers we choose as the surrogate and in fact agrees to cooperate as a surrogate.

In those cases where we have been unable to find a willing surrogate, we have relied on the prices of imports into the United States from market economies for determining fair value. We have been forced to do this because obtaining prices and costs in a foreign country requires the cooperation of producers who have no incentive to cooperate.

Using import data to calculate the fair value benchmark avoids the problem of seeking cooperation from foreign producers. It has not, however, solved all the problems. The quality and availability of the data vary from product to product and, therefore, so do our results.

Let me use the current investigation of petroleum wax candles from the People's Republic of China as an example. After sending questionnaires to producers in seven comparable surrogate countries and receiving no replies that we could use for our preliminary determination, we used publicly available data to find the prices at which comparable or reasonably comparable countries were selling candles in the United States. We did not use certain countries' prices because, based on previous investigations of other products, their shipments may have benefitted from export subsidies. Then we excluded the prices of imports from Jamaica because they were shipping a different type of candle than the PRC. Thus, for the preliminary determination, we used prices of imports from Guinea and Malaysia to calculate fair value. The resulting dumping margin was 60.66 percent for PRC candles.

Shortly after publication of the preliminary determination we learned that there was an error in the reporting of the Malaysian numbers. We also learned that the imports reported as having been from Guinea were in fact from the PRC. Correcting for these mistakes, the margin shot up to 135.73 percent.

We have had other problems using averages of import prices as the benchmark. For example, in the cases filed against steel products from various Eastern European countries, we had literally thousands of entries of imports from numerous market economy countries. Calculating an average would have been a Herculean task. Therefore, we took a sample of the import prices and calculated a simple average price for our benchmark. I would anticipate that we would face similar problems for any product that is widely traded.

I could describe other problems with this approach but I think you've heard enough to understand our frustration with relying on publicly available import data for calculating fair value. Recalling that we are driven to this approach because we cannot usually obtain the cooperation of surrogate producers leads to only one conclusion: The current law and procedures do not work well and we seek legislative change.

Inapplicability of the Countervailing Duty Law to NMEs

In May 1984, we announced our finding that the countervailing duty law cannot be applied to nonmarket economy countries. We reached this conclusion in investigations involving carbon steel wire rod from Poland and Czechoslavakia. I participated in the Polish verification and, therefore, can attest from first hand experience, that government intervention in that country's economy is the rule rather than the exception.

It is because government intervention is so pervasive in NMEs that we cannot identify preferential treatment of individual firms or products. Since those governments effectively control production, pricing and marketing, it is impossible to isolate a single government action as a subsidy. Moreover, we do not know how resouces would have been allocated in the absence of government control. It is impossible in these circumstances to identify and value subsidies.

Lowest Import Price

As I noted earlier, one of the areas singled out by the President last fall, in announcing his Trade Policy Action Plan, was reform of the unfair trade laws as they apply to nonmarket economies. We would like a law that offers predictable and fair results. U.S. industries should know what the benchmark for measuring the unfairness of NME prices will be so they can know whether it will be worthwhile to undertake the expense of filing a complaint. Importers would benefit because they could avoid buying products likely to be found unfairly traded.

NMEs are also seeking greater predictability. I have met often with Chinese, Soviet and Eastern European representatives who want to know how they can set fair prices for their exports to the United States. Any legislative solution to the problem of NME imports has to yield an answer to this question.

S. 1868 includes a provision to amend the antidumping duty law as it applies to NMEs. We see this as a good starting point and want to work with the Committee to arrive at a bill which promotes certainty and fairness in the processing of cases against NME imports.

We urge the Committee to adopt as a benchmark the lowest-priced imports from a market economy which are not subject to countervailing or dumping proceedings. We believe this benchmark will best protect U.S. industries from unreasonably priced NME imports. We recommend lowest import price because for many products NMEs will not be able to compete with similarly priced imports from market economies. This is not a reflection of unfair pricing, but of differences buyers see in the quality and reliability of supply of the NME import.

Having had several years to consider the use of a benchmark based on import prices, we have other suggestions which we feel would make the provision more administrable. For example, in determining which are the lowest priced imports, we would like to use information obtained directly from importers.

Along the same lines, we would want to have the authority to make adjustments to the benchmark price to account for differences in quality and the terms of sale. These adjustments, like the use of data gathered directly from importers, will lead to more accurate and fairer results.

We also believe the proposal should make clear that its remedies are a substitute for both the countervail and dumping laws as to NMEs. We do not believe there is a rational way to distinguish subsidies from other government actions in state-controlled economies. Since the benchmark under the proposal is the lowest price of imports that are not subsidized and not dumped, the bill would neutralize the nonmarket economy's unfair trade practice.

By the same token, we would like the flexibility to pursue a complaint as a normal antidumping or countervailing duty case, if the circumstances so warrant. The Committee's proposal does not permit case by case determinations. As the PRC, for example, relaxes central control of production decisions, it may become possible to identify subsidies or use home market prices or costs for determining fair value. Earlier versions of this proposal have allowed us this flexibility and we hope that the Committee would consider reintroducing it into its current bill.

Finally, we think it is essential to extend an injury test in all cases involving NME imports. Currently, each NME is entitled to an injury test under the antidumping duty law, the law we believe to be most suited to these cases.

In conclusion, let me reiterate our desire to work closely with the Congress in drafting a bill to deal with NME imports that is fair, administrable and offers predictable results.

STATEMENT OF HON. PAULA STERN, CHAIRWOMAN, INTERNATIONAL TRADE COMMISSION, WASHINGTON, DC

Dr. STERN. Thank you, Mr. Chairman. I am going for the hat trick this week.

Senator DANFORTH. You are? You have made it.

Dr. STERN. We will see.

Senator DANFORTH. You are the most regular attender of the Finance Committee.

Dr. STERN. After you. [Laughter.]

I am speaking for myself here today in relating my testimony to your concerns this morning. Our current statutes reflect a confusion of political and economic categories—the schizophrenic use of terms like "nonmarket economies" and "Communist countries." The root of the problem is clear.

Congress has long sought to provide American industry with access to relief, free of political interference; while, on the other hand, the President has jealously guarded against losing flexibility in dealing with difficult diplomatic situations. Both motivations are correct, but I think we can do better by each.

There have been numerous successful dumping investigations of imports from Communist countries, but the statistics which are in my larger testimony do not imply that all is well with title VII. The surrogate country methodology was developed as a substitute for artificial home market prices in dumping cases involving nonmarket economies, and as you have heard from Mr. Kaplan, the difficulties that are involved there.

The Polish golf cart case—an antidumping case which came back for review by the Commission—provided the entire trade community with a view of the labyrinthian state to which Commission and Commerce can fall with nonmarket economies and our existing trade laws.

The route out of this quagmire, I believe, is to develop a separate title VII track for nonmarket economies which deals with observable, accessible market information, rather than with hypothetical constructed values for surrogate economies. What I have in mind is a new section, parallel in structure to section 701 and section 731, which would provide for special duties to remedy material injury caused or threatened by increased imports from nonmarket economies by reason of substantial underpricing relative to the prevailing market price for like products from market economies in the U.S. market.

The degree of underselling and the prevailing market price would be determined by price surveys which the Commission already conducts in all of its investigations.

There would be a difficult, but I think practicable, adjustment for such factors as location, quality, and level of distribution in order to obtain truly comparable prices. We would have actual sales records, and we would not be using the Customs invoices as Commerce is doing.

In the event of an affirmative determination by the Commission, a duty would be collected equal to this margin of underselling. Which countries would be subjected to this new third track? I believe we would best start with the existing list of Communist coun-

tries subject to section 406; but there would be an objective market standard which would allow for graduation to the normal title VII tracks.

Now, turning to section 406, it is not without problems either. It is part of title IV, and it was enacted back in 1974 to allow for relief for U.S. industries which might be injured as a result of rapidly increasing imports from Communist countries. The Commission has conducted only 10 market disruption investigations since the 1974 act.

We made affirmative determinations in two and a tie finding in the third. And in these three instances, the President decided to provide no relief. The problem in 406 does not lie in the statutory standards. It is my reading that not 1 of the 10 cases was decided on this technicality; and the small number of cases is not in itself a measure of trouble. I think title IV is best construed in political terms and not economic terms.

It should deal with Communist countries. We need many tools in dealing with both adversaries and allies—carrots and sticks, big and small. A greater range of tools is helpful. For instance, the President could be given the authority, when in the national interest, to exclude for a 2-year trial period, any Communist country from 406 coverage. Of course, such exclusion would not affect the country's status for the nonmarket track that I described in title VII.

Thus, the protection for American industry from unfair pricing of nonmarket imports would continue and would remain protected from political interference.

So, to sum up, I believe there are some relatively straight-forward ways for us to improve American trade laws regarding nonmarket economies and Communist countries.

No. 1, title VII should be used to respond to nonmarket economy import problems with economic standards that are readily observable, rather than hypothetical. There should be a graduation provision which would respond to marketlike changes in these economies.

And second, section 406 would benefit from a politically rooted graduation standard that would increase the Executive's flexibility in dealing with Communist countries. My written submission expands on my oral testimony and includes background material on the relevant statutes and on the Commission's practice. If the subcommittee is interested in converting these ideas to legislative language, we at the Commission are most willing to work with you and your staff. I thank you.

Senator DANFORTH. Thank you.

[The prepared written statement of Dr. Stern follows:]

DR. PAULA STERN, CHAIRWOMAN
U.S. INTERNATIONAL TRADE COMMISSION

STATEMENT FOR THE SUBCOMMITTEE ON TRADE
SENATE FINANCE COMMITTEE
MAY 15, 1986

NON-MARKET AND COMMUNIST COUNTRIES IN U.S. TRADE LAW

Mr. Chairman:

I am pleased to have the opportunity to offer some ideas and suggestions on the appropriate treatment in U.S. trade law for imports from non-market economies and/or communist countries. I say 'ideas' and 'suggestions' because I will have no direct comments to offer in my prepared testimony on legislative proposals coming from either the House or Senate side. What I can offer you is a conceptual framework that may help resolve problems that are almost universally acknowledged to exist with the present provisions, whether one talks with the Congress, the administering authorities in the Executive, domestic industries, or the trade bar. In that sense, this is one aspect of trade where all the horses seem to be pulling in the same direction.

The present system for dealing with trade problems with Communist nations includes section 406 of the Trade Act of 1974 as well as Title VII of the Tariff Act of 1930, principally section 731 which provides for antidumping duties.

Conceptually, section 406 is an adjunct to the import relief provisions for U.S. industries set forth in sections 201-203 of the Trade Act. It provides for certain types of import relief when imports from a Communist country cause market disruption with respect to an article produced by a domestic industry. Title IV of the Act is entitled, "Trade Relations with Countries Not Currently Receiving Non-discriminatory Treatment." The placement of section 406 in this title indicates that its purpose in part was to provide relief for U.S. industries which might be injured as a result of rapidly increasing imports from Communist countries in the event most-favored-nation (MFN) status were to be conferred under other provisions in Title IV.

The special relief of section 406 recognized the possibility that Communist nations, through their control of the distribution process and the price at which articles are sold, could "flood" domestic markets with imports within a shorter period of time than could occur under free market conditions. (Trade Reform Act of 1974: Report of the Committee on Finance, S. Rept. No. 93-1298, 93d Cong., 2d Sess. (1974), at 210)However, its remedies are available in response to imports from a Communist country causing market disruption even if that country has not been extended MFN treatment. Procedures for obtaining relief are similar to those under section 201.

In recent years, section 406 has been criticized as being ineffective. Some of the criticism may be misplaced for two reasons. First, trade with Communist countries has not expanded at the rate envisioned by many in 1974, and in addition, consists in large part either of raw materials or articles not manufactured in the United States in significant quantities. Second, imports from most Communist countries are dutiable at the relatively high column 2 rates in the Tariff Schedules of the United States (T.S.U.S.) effectively discouraging imports of many articles like or directly competitive with domestic articles.

This explains in large part the relatively small number of peitions filed under this provision since 1974. The Commission has conducted only ten investigations under section 406 in the twelve years it has been on the law books. The ITC made an affirmative determination in only two, was equally divided in a third, and voted negatively in the remaining seven. In the three cases in which the Commission made affirmative or tie determinations, the President provided relief in none. It is my reading of these ten cases that the Commission's findings have never depended, one way or the other, on minor definitional points of statutory terms like rapidly increasing imports, material injury, significant cause, etc. In my written testimony, I have attached an appendix which analyzes the statutory provisions and past investigations.

By contrast, the antidumping provisions of section 731 of Title VII of the Trade Act have been a far more popular, if one may use that word, route for dealing with imports from Communist countries. Since 1980, the Commission has conducted thirty-eight preliminary investigations, thirty-six of which have resulted in affirmative findings. Of those, twenty were terminated by the Department of Commerce, three on the basis of suspension agreements. One was terminated at the Commission following withdrawal by the U.S. firm of its petition. Of the twelve investigations on which the Commission made final determinations, nine were affirmative. Three investigations are still pending. Details of all these cases are included in appendix II of my written testimony.

One should not read these statistics to imply that all is well with Title VII. The administering authority, since 1979 the Commerce Department, is on record as having concluded that the "surrogate country" methodology--developed by Congress as an alternative for home market prices in Non-Market Economies (NME's)--is extremely difficult and time-consuming to use.

Polish golf cars, an antidumping case which came back for review by the Commission in 1980, provided the entire trade community with a view of the labyrinthian state into which Commission and Commerce art can fall when confronted with NME's

and our existing trade laws. In the review case, the Commerce Department was charged with the task of considering the inflation of the constructed value of Polish golf carts. Canada had been used in the first case. But the Canadian manufacturer put a spanner in the works by halting production before the second case. So Spain -- a country without any golf car production--was used. The Commission then had to examine whether material injury would result from the withdrawal of the dumping duties given the hypothetical changes in the orginial hypothetical situation. It was not an easy process. And it subjected U.S. trade law, which should be taken seriously, to some ridicule.

It has been Commerce's position that the countervailing duty law of section 701 is inapplicable to NME's, though this has been indirectly opened to question by the Court of International Trade's decision in Continental Steel Corp. v. U.S. F Supp. 548 (CIT 1985). The Commission has never had any countervailing duty cases involving NME's because the five cases brought to Commerce in 1983 and 1984 were all terminated or decided negatively at Commerce.

From these bare facts, there are many possible routes to an improved trade regime for handling non-market economy imports. There are certain principles which I believe should first be acknowledged.

(1) Constructing surrogate market prices for NME's is a task not even I, from my independent position at the ITC, would wish on Commerce or any other department.

(2) We need a practical, accessible way for dealing with alleged material injury due to unfair trade practices by NME's.

(3) Trade with Communist nations is a process inextricably imbedded in the political world, and to some extent our trade law must reflect this reality. But there should be clear demarcation between political and economic standards.

I will now offer in bare skeleton form an outline of an approach that reflects these three principles and offers possible improvements over the present situation.

Title IV -- in contrast to Title VII --reflects a recognition of the special political as well as economic problems that we may encounter in trade with Communist countries. However, it was never intended to solve the problems of dumping and/or subsidization by those countries. I do not believe that ammending section 406 is the most effective route to come up with the equivalent of a dumping duty for a Communist country. That is a Title VII type problem and could be most easily handled there.

Title IV does have problems which stem from a schizophrenia over whether it is designed for the economic problems introduced by non-market economies or the political problems of Communist countries. Thus from one section to the next the terminology varies. Section 406 speaks of "Communist" countries while section 410, which provides for monitoring reports to keep us abreast of developments which could be of interest in 406, speaks of "non-market economies". I think that the reason why various countries are the subject of Title IV are best construed in political rather than economic terms.

There are problems that can result from the present inflexibility in the list of countries covered by section 406, a list with political origins in the first years of the Cold War period. The provision would benefit from a graduation procedure based on good behavior over which the President would have control. Good behavior with respect to section 406 could be demonstrated in terms of political standards best left to the Executive.

For instance, the President could be given the authority, when in the national interest, to exclude for a two-year trial period any communist country from 406 coverage. At the end of two years, a public hearing and report could be required from the Commission. This could form the basis of a final Presidential determination whether to exclude such a country from 406 coverage. Of course, a nation could be added to the 406 list by legislation at any time.

Such increased flexibility could provide the Executive with an additional tool in conducting foreign policy. It would not of course solve the economic question of how to deal with the potentially pernicious pricing practices of non-market economies. That task could be accomplished by turning to Title VII and establishing a third track for non-market economies, totally separate from the existing antidumping and countervailing duty sections which work better in a market environment.

What I have in mind is a new section, parallel in structure to sections 701 and 731, which provides for special duties to remedy material injury caused or threatened by increased imports from non-market economies by reason of substantial underpricing relative to the prevailing market price for like products from market economies in the U.S. market. The degree of underselling and the prevailing market price would be determined by price surveys, and should adjust for such factors as location, quality, and level of distribution.

The adjustments necessary to determine the prevailing prices for comparble goods would be difficult. But they would be based solely on detailed, hard data already collected by the Commission in its questionnaires in every investigation. This standard moves from constructed surrogates toward observables

in the U.S. market. It would expose determinations to the healthy daylight of ITC hearings at which all parties could present relevant information.

Note that in this special third track the duty would be based on the margin between the weighted average entry price for the non-market imports and the prevailing U.S. price for like products produced in market economies. This determination could either be made at the ITC or at Commerce on the basis of the price data collected by the ITC.

Which countries should be subjected to this new third track? I believe we would best start with the existing list of NME's which are subject to section 406. But here also, we could benefit from a graduation procedure for good behavior. But in the economic, non-political world of Title VII, the standard should be few or no recent affirmative findings instead of the political standard I suggested for graduation from section 406. To elaborate, the President could be allowed to request the Commission to conduct a six-month study of all the information relevant to a determination of whether the bulk of the U.S. imports from the subject country were produced under market-like conditions. On the basis of that report, the President could determine within

three months whether market conditions prevailed which would allow the country to be removed from the special title VII track for non-market economies and subjected instead to sections 701 and 731. A two-year trial period could then be followed by another ITC report and a final Presidential determination. Provision could be made for the reverse procedure--addition to the special track list--to be initiated by the President in a similar fashion.

While some of these ideas might sound novel, they establish a clear line between our political and economic considerations when dealing with communist countries. They offer the President what could be useful leverage in situations where the present tools might either be too blunt or too weak. They replace the barbarous thickets of determining constructed value with a more straight forward study of conditions of competition in our own market and much more readily accessible price information.

Although these suggestions are no panacea, I hope they provide a coherent vehicle for achieving several objectives which I understand this committee is presently studying.

If the subcommittee is interested in converting these ideas to legislative language, we at the International Trade Commission are most willing to work with your staff. Thank you.

APPENDICES

APPENDIX I: STATUTORY CRITERIA UNDER SECTION 406 OF THE TRADE ACT OF 1974 AND PAST COMMISSION AND PRESIDENTIAL PRACTICE

Contents

A. Introduction

This appendix contains a discussion of the statutory criteria in section 406 of the Trade Act of 1974 (19 U.S.C. 2436), Commission practice in the 10 section 406 cases in the context of these criteria, and Commission recommendations and Presidential actions regarding relief.

At the outset it should be noted that section 406 has been criticized in recent years as being ineffective. Some of this criticism appears to be misplaced for two reasons. First, trade with Communist countries has not expanded at the rate envisioned by many in 1974 and, in addition, consists in large part either of raw materials or articles not manufactured in the United States in significant quantities. This explains in part the relatively small number of petitions filed under this provision since 1974. Second, imports from most Communist countries are dutiable at relatively high column 2 rates,

effectively discouraging imports of many articles for which there are like or directly competitive domestic counterparts.

The Commission has conducted 10 investigations under section 406. It has made an affirmative determination in only two, investigation No. TA-406-2, Clothespins from the PRC, and investigation No. TA-406-5, Anhydrous Ammonia from the USSR. It was equally divided in a third, investigation No. TA-406-9, Canned Mushrooms from the PRC. It was negative in the remaining seven investigations. In the seven investigations in which it made a negative determination, the Commission based its negative decision on a finding of no rapid increase in imports in three cases and no significant cause in four cases. None of the seven cases turned on a finding of no material injury or threat. However, in the case in which the Commission was equally divided (mushrooms from the PRC), the two Commissioners finding in the negative (Stern and Eckes) made negative findings regarding both material injury and significant cause.

The Commission completed its most recent section 406 investigation in February 1984 (investigation No. TA-406-10, Ferrosilicon from the USSR). There are no section 406 investigations pending at the present time.

B. Purpose of section 406 and relationship to section 201 of the Trade Act

Section 406 of the Trade Act is an adjunct provision to the import relief provision set forth in sections 201-203 of the Trade Act, the so-called escape clause law. Section 406 provides for the granting of certain types of import relief where imports from a Communist country are causing market disruption with respect to an article produced by a domestic industry, whereas section

201 provides for the granting of relief against imports from all countries, including Communist countries.

As its placement in title IV of the act indicates, 3/ section 406 was enacted in part to provide relief for domestic industries which might be injured as a result of rapidly increasing imports from Communist countries in the event most-favored-nation status is extended to them under the authority of title IV, thereby permitting their goods to enter the United States at the so-called trade-agreement rates of duty set forth in TSUS rate column number 1. The special relief of section 406 was provided in recognition of the fact that Communist countries, through their control of the distribution process and the price at which articles are sold, could "flood" domestic markets with imports within a shorter time period than could occur under free market conditions. 4/ Although, as indicated, section 406 was enacted largely in anticipation of agreements negotiated under title IV extending MFN treatment to Communist countries, its remedies are available to imports from a Communist country causing market disruption even if MFN treatment is not extended to such country.

Procedures for securing relief are similar, and in some instances identical, to those for securing relief under sections 201-203. The process is started, as with filing for import relief under section 201(a), with the filing of a petition with the Commission by a representative of a U.S.

3/ Title IV is entitled: "Trade Relations with Countries Not Currently Receiving Non-discriminatory Treatment".

4/ Trade Reform Act of 1974: Report of the Committee on Finance . . ., S. Rept. No. 93-1298, 93d Cong., 2d Sess. (1974), at 210 (hereinafter Finance Committee Report).

industry or upon the request of the President, U.S. Trade Representative, House Committee on Ways and Means, or Senate Committee on Finance. As under section 201, the Commission may also investigate on its own motion. As to the content of petitions, the same basic considerations apply as with section 201(b) petitions. Section 406(a)(2) specifically makes applicable the provisions of section 201(a)(2) (the transmission of copies of the petition to USTR and other agencies directly concerned), section 201(b)(3) (considerations involved in determining the domestic industry concerned), and section 201(c) (the requirement for public hearings).

"Market disruption" as defined by section 406(e)(2)—

> exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

While the criteria for finding market disruption are formulated along lines similar to those for import relief under section 201 of the act, the market disruption test is intended to be more easily met than the import relief test of section 201. 5/

C. Statutory criteria

Section 406(e)(2), quoted above, requires that each of three conditions be satisfied in order for the Commission to make an affirmative determination and reach the issue of relief. First, imports must be increasing rapidly, either absolutely or relatively. Second, the domestic industry producing an article like or directly competitive with the imported article must be materially injured or threatened with material injury. And third, the rapidly increasing

5/ Finance Committee Report, at 212.

imports must be a significant cause of the material injury or threat. Each of these criteria is discussed below.

Increasing rapidly.—Under the market disruption criteria, imports are to be "increasing rapidly, either absolutely or relatively". No definition is given for the meaning of the term "rapidly," but most likely this term refers to the frame of time over which the increase in imports is occurring. The report of the Senate Finance Committee states, at p. 212, that the increase in imports "must have occurred during a recent period of time, as determined by the Commission taking into account any historical trade levels which may have existed." The import relief provisions of section 201 of the act do not contain the "rapidly" requirement. Presumably, section 406 requires a faster and more dramatic increase in imports than section 201 for an affirmative determination.

The provision of section 406(e)(2) that the increase may be "either absolutely or relatively" differs semantically from the similar provision of section 201 which provides that the increase be "either actual or relative to domestic production." The Conference Report (No. 93-1644, 93d Cong., 2d sess. (1974)), at amendment No. 389, page 48, indicates that the differences in language are mere semantic differences and that "absolutely or relatively" means the same as "actual or relative to domestic production" used in section 201:

> market disruption [exists] whenever imports of a like or directly competitive article are increasing rapidly both absolutely and as a proportion of total domestic consumption . . . 6/

6/ Presumably the words "both" and "and" (two words later) should be "either" and "or". Use of the term "domestic consumption" in this context is probably an error since consumption includes imports consumed and excludes domestic production exported.

In three of the seven section 406 investigations in which the Commission made a negative determination, the Commission majority found that imports were not increasing rapidly. Thus, petitioners have had some difficulty satisfying this criterion.

In determining whether imports are increasing rapidly, the Commission generally has compared imports during the most recent 2 or 3 years with imports in prior years. In section 201 cases, on the other hand, the Commission generally has examined import trends over the most recent 5 years to determine whether imports have increased.

The Commission has conducted only 10 section 406 investigations (vs. 60 section 201 investigations, including three currently underway) and thus has had only limited opportunity to consider the time frame issue in the section 406 context. Furthermore, of the ten investigations, two involved the same product and country and were conducted 6 months apart (Nos. TA-406-5 and TA-406-6, Ammonia from the U.S.S.R.), three were conducted simultaneously and involved the same product but three countries (Nos. TA-406-2, TA-406-3, and TA-406-4, Clothespins from China, Poland, and Romania), and seven involved virtually brand-new trade where trade in the product between the Communist country and the United States had been either negligible or nil 2 or 3 years prior to the investigation (No. TA-406-1, Work Gloves from China, No. TA-406-2, Clothespins from China, and Nos. TA-406-5 and TA-406-6, Ammonia from the U.S.S.R., No. TA-406-8, Certain Ceramic Kitchenware and Tableware from China, No. TA-406-9, Canned Mushrooms from the PRC, and No. TA-406-10, Ferrosilicon from the USSR).

In the first investigation, No. TA-406-1, Work Gloves from China, Commissioners considered import data for the years 1972-77, and three (Moore,

Minchew, and Ablondi) considered the surge in 1976 and slightly lower level in 1977 (as compared with a negligible level in 1972-75) to constitute rapidly increasing imports. 7/ Two Commissioners (Bedell and Alberger) concluded that the facts suggested a finding of rapidly increasing imports but made no specific con ion, having gone negative on another criterion. 8/ The sixth (Parker) discussed imports but made no finding, having gone negative on another criterion. 9/

In the second investigation, No. TA-406-2, Clothespins from China, the Commission considered the period 1973-77 and unanimously concluded that an increase in China's share of the U.S. clothespin market from a negligible level in 1975 to over 20 percent in 1977 constituted rapidly increasing imports. 10/ However, in the third and fourth investigations, which involved imports of clothespins from Poland and Romania (and which were conducted simultaneously with and were part of the same report as the second investigation), the Commission concluded, by a vote of 5-1 in the case of Polish imports and unanimously in the case of Romanian imports, that imports were not rapidly increasing. Imports from Poland increased "at only a moderate rate" during the period 1975-77. 11/ Imports from Romania "fluctuated" during the period 1973-77, increasing irregularly during the

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7/ Certain Gloves from the People's Republic of China: Report to the President on Investigation No. TA-406-1 . . ., USITC Publication 867, March 1978, at 5, 20-21, 26-27.

8/ Id., at 5.

9/ Id., at 11-12.

10/ Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania: Report to the President on Investigation Nos. TA-406-2, TA-406-3, and TA-406-4 . . ., USITC Publication 902, August 1978, at 7, 18, 32.

11/ Id., at 13, 19, 32.

period, but the 1977 level was 21 percent below the 1976 level and 12 percent below the 1974 level. 12/

In the fifth and sixth investigations, Nos. TA-406-5 and TA-406-6, Anhydrous Ammonia from the U.S.S.R., the Commission found (unanimously in the first of the two cases) that imports had been nil and negligible in 1977 and 1978, respectively, but that, because of imports in 1979 and imports projected for 1980 and later years, imports were rapidly increasing. 13/ However, two Commissioners (Alberger and Stern) found that the "increasing rapidly" test was only "minimally" met. 14/ A third Commissioner (Calhoun) found in the second case that the increase, while "modest," was not rapid (Mr. Calhoun was not a member of the Commission at the time of the first decision). 15/

In the seventh investigation, No. TA-406-7, Unrefined Montan Wax from East Germany, the Commission reviewed 1977-September 1980 data in the context of import data dating back to 1925. The Commission found in the negative by a vote of 4-1 (Alberger, Calhoun, Stern, and Eckes in the majority, with Frank dissenting) that imports were not rapidly increasing. The majority noted that the United States had imported such wax from East German and its precedessor states since 1907, that imports exceeded 1980 and 1981 levels in a number of earlier years, that imports averaged 5.1 million pounds in 1971-75 but only 4.3 million pounds in 1976-80, and that imports substantially declined (by 27 percent) in January-September 1981 from the year earlier period. 16/

12/ Id., at 13, 18.

13/ Anhydrous Ammonia from the USSR: Report to the President on Investigation No. TA-406-5 . . ., USITC Publication 1006, October 1979, at 5, 24.

14/ Id., at 24.

15/ Anhydrous Ammonia from the U.S.S.R.: Report to the President on Investigation No. TA-406-6 . . ., USITC Publication 1051, April 1980, at 26-27.

16/ Unrefined Montan Wax from East Germany: Report to the President on investigation No. TA-406-7 . . ., USITC Publication 1214, January 1982, at 4-6.

In investigation No. TA-406-8, Certain Ceramic Kitchenware and Tableware from the People's Republic of China, the Commission focused on 1979-March 1982 data, even though it had data back to 1977. The Commission majority (Eckes, Stern, Calhoun, and Haggart) went negative on the causal criterion and only one of the four Commissioners voting in the majority reached the issue of rapidly increasing imports (Commissioner Haggart found the test to be satisfied). 17/

In investigation No. TA-406-10, Ferrosilicon from the Soviet Union, in which the Commission majority went negative on the causation criterion, the Commission found a rapid increase in imports based on imports during the period June-November 1983. The Commission noted that there were no imports of Soviet ferrosilicon prior to June 1983. 18/ The report was submitted to the President in February 1984.

Material injury.—The term "material injury" is not expressly defined either in the Trade Act or its legislative history. However, the Finance Committee Report states that the term "material injury" in section 406 is intended to represent a lesser degree of injury than the term "serious injury" in section 201. 19/ Section 201 does not expressly define "serious injury." However, section 201(b)(2)(A) provides guidelines which the Commission is directed to consider in determining whether serious injury exists. To

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17/ Certain Ceramic Kitchenware and Tableware from the People's Republic of China: Report to the President on investigation No. TA-406-8 . . ., USITC Publication 1279, August 1982, at 9-11.

18/ Ferrosilicon from the Union of Soviet Socialist Republics: Report to the President on investigation No. TA-406-10 . . ., USITC Publication 1484, February 1984, at 9.

19/ Report, at 212.

determine serious injury, the Commission is to consider, among other factors which it considers relevant--

> significant idling of productive facilities in the industry, the ability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry.

These factors were also contained in the Trade Expansion Act of 1962. 20/ The Trade Act lists additional factors to be considered by the Commission in determining whether the threat of serious injury exists. 21/

The Finance Committee Report states, with respect to section 201, that "It is not intended that a mathematical test be applied by the Commission." 22/ Accordingly, the mix of factors considered under section 201 may differ from case to case and still be consistent with the requirements of the law. In order to satisfy the material injury test of section 406, factors "less egregious" than the effects indicating serious injury under section 201 presumably suffice.

Section 406 employs the same basic injury standard set forth in the present antidumping and countervailing duty law provisions (title VII of the Tariff Act of 1930) and implied in the predecessor antidumping law, the Antidumping Act, 1921. The history of the 1921 antidumping law, which was in effect at the time section 406 was drafted and enacted, indicated that injury or the likelihood of injury under the act must be "material" for the Commission's determination to be affirmative. The contracting parties to the GATT provided for a material injury standard in Article VI of the 1947

20/ See sec. 301(b)(2) of the Trade Expansion Act of 1962, 76 Stat. 872.
21/ Sec. 201(b)(2)(B).
22/ Finance Committee Report, at 121.

agreement. 23/ Although this standard was not binding on the United States, 24/ the Treasury Department, which administered the injury provisions of the act until 1954, adopted the material injury standard as the proper interpretation of the Antidumping Act, 1921. 25/

During the congressional hearings concerning the transfer of the administration of the injury provisions from the Treasury Department to the Tariff Commission, the Commission's General Counsel testified that: 26/

> It is our understanding that the Treasury in administering the dumping statute has interpreted the word 'injury' as meaning material injury. If the Congress desires that this term be given any different interpretation, it should clearly express its intent.

In the administration of the injury provisions, Treasury had also adopted the principle of the de minimis rule. 27/ There was congressional acquiescence to this practice 28/ and the Commission continued, on occasion, to consider this principle in its administration of the injury provisions of the act. 29/ Although decisions of the Commission generally did not characterize the injury requirement of the Antidumping Act as "material injury" or the de minimis rule

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23/ Article VI—Antidumping and Countervailing Duties.

24/ Because Article VI is in Part II of the GATT, it does not, in light of the Protocol of Provisional Application, invalidate inconsistent provisions of domestic legislation enacted prior to the effective date of the agreement.

25/ See, e.g., testimony of the Assistant General Counsel of the Treasury Department, Philip Nichols, Jr., concerning a Treasury Department proposal (H.R. 1535, section 2(a), 82d Cong., 1st Sess.) to amend the 1921 Act by inserting the word "materially" before the word "injured". U.S. Cong. House Comm. on Ways and Means, Hearings on the Simplification of Customs administration, 82d Cong., 1st Sess. 1951, at 53.

26/ Statement of Paul Kaplowitz, General Counsel of the U.S. Tariff Commission. Hearings of H.R. 9476 before the Committee on Ways and Means, 83rd Cong., 2d. Sess. 35 (1954).

27/ See, testimony of Philip Nichols, Jr., supra, note 17.

28/ U.S. Cong. House Comm. on Ways and Means. Simplifying Customs Administration and Procedures. Rept. No. 1089 (to accompany H.R. 5505), 82d Cong., 1st Sess., 1951, at 7.

as encompassing "immaterial injury," the background of these concepts in the administration of the act indicates that the standard of injury employed in the Antidumping Act and now used in title VII of the Tariff Act of 1930 may be an appropriate one for application to market disruption in section 406. 30/

None of the section 406 cases has turned directly on the question of material injury and Commissioners have given it the least attention in their views of the three criteria. Commissioners sometimes have not addressed the criterion when going negative on the rapidly increasing criterion (e.g., investigation Nos. TA-406-3, TA-406-4, and TA-406-7, Clothespins from Poland, Clothespins from Romania, and Unrefined Montan Wax from East Germany), or have found the criterion satisfied arguendo when going negative on the significant cause criterion (e.g., investigtion No. TA-406-1, Certain Gloves from the People's Republic of China), or have discussed the data but made no finding and then proceeded to the causal criterion (e.g., Commissioners Eckes and Calhoun in investigation No. TA-406-8, Certain Ceramic Kitchenware and Tableware from the People's Republic of China).

In investigation No. TA-406-1 (Gloves from China), the Commission majority (Commissioners Moore, Bedell, and Alberger) found a slight increase in domestic shipments and manhours worked coupled with declining but above-average profit ratios to make it questionable whether an industry was materially injured. 31/ In investigation No. TA-406-3 (Clothespins from

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29/ See, for example, Cast Iron Soil Pipe from Poland, inv. No. AA1921-50 (USITC Pub. 214, Sept. 1967), esp. the views of Commissioner Sutton, at 6, and Commissioner Clubb, at 17-18.

30/ For further discussion of the relationship between the material injury standard of sec. 406 and the injury standard of the Antidumping Act, 1921, see memoranda from the Commission's General Counsel to the Commission of Feb. 28, 1978, and July 18, 1978 (GC-8-061 and GC-8-160, respectively).

31/ Report, at 6.

Poland), the Commission, in two separate sets of views, found a decline in capacity utilization from 50 percent in 1973 to 33 percent in the first quarter of 1978, a decline in the profit ratio from 8.3 percent to 0.7 percent, a decline in employment from 429 workers to 387, and a decline in shipments from 5.3 million gross in 1973 to 4.2 million gross in 1977 (a decline of 21 percent) to constitute material injury. 32/ In investigation No. TA-406-5 (Anhydrous Ammonia from the U.S.S.R.), a 3-2 affirmative determination, all five Commissioners found material injury based largely on the industry's loss of $4 million in January-June 1979 (vs. a $30 million profit in January-June 1978 and $10 million profit for all of 1978). 33/ The majority (Commissioners Moore, Bedell, and Parker) did not further discuss injury, but the minority (Commissioners Alberger and Stern) noted an irregular decline in capacity utilization from 91 percent in 1974 to 86 percent in January-June 1978, and an irregular decline in employment and increase in production. 34/

In investigation No. TA-406-8 (Ceramic Kitchenware and Tableware from China), a 4-1 negative determination turning on the significant cause criterion, the majority (Commissioners Eckes, Stern, Calhoun, and Haggart) found that a decline in domestic earthenware production from 11.3 million dozen pieces in 1977 to 8.3 million dozen pieces in 1981, a corresponding decline in shipments, a decline in capacity utilization from 65.5 percent in 1977 to 38.0 percent in January-March 1982, a decline in employment from 3982 persons in 1977 to 3009 in January-March 1982, and an irregular decline in the

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32/ Report, at 7-8, 20-21.
33/ Report, at 6-7, 26.
34/ Id., at 25-26.

profit ratio from 5.3 percent in 1977 to 1.1 percent in 1981, with four of eight producers operating at a loss in 1981, indicated domestic producers were "experiencing difficulties." 35/ Stern and Haggart also concluded that the industry was experiencing material injury.

In investigation No. TA-406-9, Canned Mushrooms from the PRC, the Commission was equally divided on the question of material injury. Commissioners Frank and Haggart found that industry capacity utilization had declined, that its profit level was low and below that of the canned and dried fruit and vegetable industry, that inventories had increased, and that employment, production, and sales data had not changed significantly since the time the Commission had made an affirmative determination 2 years earlier in a section 201 case. 36/ Commissioners Eckes and Stern, however, found that while "[a]t first glance . . . some negative indicators are apparent", a closer look showed that there was no material injury that could be linked to imports from China. They noted that unusually high domestic production in 1980 and productivity gains were responsible for a decline in production in 1981 and a slight decline in employment. They noted that domestic producers sales were up in the first half of 1982 and that industry capacity had increased. They also found industry profit data to have been relatively stable during the period 1979-81 and to have improved significantly during the interim period January-June 1982. Efforts to confirm allegations of lost sales were inconclusive. 37/

35/ Report, at. 12-13.
36/ Canned Mushrooms from the People's Republic of China: Report to the President on Investigation No. TA-406-9 . . ., USITC Publication 1293, September 1982, at 13-15.
37/ Id., at 26-28.

Significant cause.—The term "significant cause" is not expressly defined either in the statute or in the legislative history. However, the Finance Committee report indicates that the "significant cause" requirement was intended to be an easier standard to satisfy than the "substantial cause" requirement in section 201. 38/ "Substantial cause" is defined in section 201(b)(4) of the act to mean "a cause which is important and not less than any other cause." Thus, presumably rapidly increasing imports could be a less important cause of material injury than some other cause and still be a significant cause of material injury. The Finance Committee also stated that "the term 'significant cause' is meant to require a more direct causal relationship between increased imports and injury" than the standard used in the adjustment assistance provisions of the act. 39/ The standard in the adjustment assistance provisions—"contribute importantly"—is, in turn, described by the Finance Committee as a cause which may have contributed less than another cause but must have been more than a de minimis source of causation. Thus, rapidly increasing imports must be a direct and important cause of material injury and something more than a contributing cause.

The Commission majority has addressed the significant cause question in six of the ten section 406 investigations, twice in the context of an affirmative determination and four times in the context of a negative determination. The issue was also addressed by both sides in a seventh investigation in which the Commissioners were equally divided (mushrooms from the PRC). The issue was not reached in the three investigations in which the

38/ Finance Committee Report, at 212.
39/ Id.

Commission went negative based on a finding that imports were not increasing rapidly.

In investigation No. TA-406-1, Gloves from China, the Commission majority (Moore Bedell, and Alberger) found, after assuming the first two criteria to be satisfied (assumptions they found to be somewhat questionable), that such imports were not a significant cause of such injury in view of the fact that 60 percent of the cotton work gloves from China were imported by U.S. cotton work glove producers; that if Chinese gloves were unavailable, U.S. producers would import such gloves from other foreign sources; that Hong Kong was a more important source of imports than China (40 percent of imports vs. 20 percent for China); and that there was only one verifiable lost sale by U.S. producers to imports from China. 40/

In investigation No. TA-406-2, Clothespins from China, an affirmative case, the Commission majority (Moore, Bedell, and Ablondi in one opinion and Alberger and Minchew in a second) cited the facts that imports from China increased from a negligible share of the U.S. market to 12 percent in 3 years, that low import prices forced U.S. producers to hold prices steady or decrease them while costs were rising 8 percent; and that the Commission staff was able to verify lost sales directly attributable to lower priced Chinese imports. 41/

In investigation Nos. TA-406-5 and TA-406-6, Anhydrous Ammonia from the U.S.S.R., in which the Commissioners voted 3-2 affirmatively and 3-2 negatively, respectively, all five Commissioners focused, at least in part, on significant cause. Commissioners Parker, Moore, and Bedell, who constituted

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40/ Report, at 7-8.
41/ Report, at 8-9, 23-24.

the affirmative majority in the first investigation, and Commissioners Moore and Bedell, who constituted the affirmative minority in the second investigation (Commissioner Parker having left the Commission), focused on the forward pricing of the Soviet ammonia as a result of long-term pricing contracts and the ability of Soviet ammonia to penetrate the U.S. market "to an unlimited extent" at a time when U.S. and world gas prices were rising (ammonia is made from natural gas); the doubling of Soviet ammonia production capacity over a 5-year period, which would have a destabilizing effect on the world market; and the potential dependency on the U.S.S.R. for a vital raw material. 42/ Commissioners Stern and Alberger, who found in the negative in both cases, found the significant causes of injury to the industry to have been temporary but substantial overexpansion, declining demand, and consequently lower prices current with a surge in natural gas costs. 43/ They found that Soviet ammonia imports, which accounted for 2.6 percent of the U.S. market in January-June 1979 and were projected at 5.0 percent in all of 1979, were "not a factor worthy of mention" in relation to these causes, and further, that the U.S. market and prices were on the upswing and inventories were falling. 44/

In investigation No. TA-406-8, Ceramic Kitchenware and Tableware from China, the Commission majority (Commissioners Eckes, Stern, Calhoun, and Haggart) found that there was "no demonstrable direct and significant causal link" between rapidly increasing imports and economic problems faced by the

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42/ Report on Inv. No. TA-406-5, at 6-7; and report on inv. No. TA-406-6, at 36-38.

43/ Report on Inv. No. TA-406-5, at 31.

44/ Id., at 23, 31.

domestic industry. 45/ Increases in imports from China did not correlate with downturns in industry profits, much of the increase in imports from China supplanted imports from other sources, and much of the imported chinaware was not even directly competitive with the domestic product. 46/

In investigation No. TA-406-9, Canned Mushrooms from the PRC, in which the Commissioners were equally divided, Commissioners Eckes and Stern, who found in the negative, found that imports from China appeared "to be largely at the expense of other foreign sources rather than U.S. canners." 47/

In investigation No. TA-406-10, Ferrosilicon from the USSR, the Commission majority (Commissioners Stern, Haggart, and Lodwick) found that the problems being experienced by the domestic industry antedated Soviet imports, which had begun only in June 1983 (the report was transmitted to the President in February 1984). They cited two factors as being more important causes of injury than Soviet imports—(1) a substantial decline in demand for ferrosilicon as a result of a severe decline in domestic production of steel, and (2) a substantial increase in imports from other foreign sources. 48/

D. Commission recommendations and Presidential actions regarding relief

In the event the Commission finds market disruption to exist or is equally divided on the question of market disruption, section 406(b)(3) requires that it find and report to the President—

> the amount of the increase in, or imposition of, any duty or other import restriction on such article which is necessary to prevent or remedy such market disruption . . . .

45/ Report, at 17.
46/ Id., at 15-19.
47/ Report, at 29.
48/ Report, at 12.

As a general rule, the Commission would recommend the same kind of relief that it could recommend under section 201, except that it could not recommend relief in the form of adjustment assistance and the relief would apply only to the Communist country or countries the subject of the investigation. The Commission would recommend only such relief as the President is authorized to provide. Section 406(b) provides that the President's authority to provide relief is generally the same as under sections 202 and 203 of the Trade Act. Section 203, among other things, limits any tariff increase to a level not to exceed 50 percent ad valorem above the prevailing rate and requires that any quantitative restriction allow importation of at least that quantity or value of the article entered during the most recent period which the President determines is representative of such imports.

Section 406(c) authorizes the President to request the Commission to undertake an investigation whenever he finds that there are "reasonable grounds to believe" that market disruption exists and to take emergency action under sections 202 and 203 of the Trade Act pending completion of the Commission's investigation. Such emergency action would be superseded by more permanent action after the President received a report containing an affirmative or equally divided Commission determination. It would cease to apply if the Commission made a negative determination.

As stated above, the Commission made affirmative determinations in two of the ten investigations, investigation No. TA-406-2, Clothespins from the PRC, and investigation No. TA-406-5, Anhydrous Ammonia from the USSR. The Commission was equally divided in investigation No. TA-406-9, Canned Mushrooms from the PRC. The President did not provide relief in any of those three

instances. However, shortly after his decision not to provide relief on imports of anhydrous ammonia, the President in effect reversed himself and imposed emergency quotas on Soviet imports of anhydrous ammonia and requested that the Commission conduct a new investigation. Each of these actions is discussed immediately below.

The Commission reported its findings in the clothespins case to the President in August 1978 and recommended that the President impose quotas on imports of clothespins from the PRC. Just prior to forwarding its recommendation, the Commission self-initiated a section 201 investigation on clothespins at the request of the petitioners in the section 406 case. It had become clear in the course of the section 406 investigation that increased imports from non-communist sources were as great if not greater a factor in causing injury. In October 1978, President Carter announced that he would not provide relief under section 406. He noted, among other things, that other foreign sources accounted for 73 percent of imports in 1977 and that these other foreign sources were likely to fill any excess U.S. demand resulting from a limitation of any kind on imports of clothespins from the PRC. He also noted that the Commission was conducting an investigation under section 201 which covered imports from all foreign sources and stated that the import problems of the domestic clothespin industry would be considered further within the context of that case. 49/ (The Commission subsequently made an affirmative determination in the section 201 case (investigation No. TA-201-36) and import relief in the form of quotas was provided.)

49/ Memorandum from the President, Oct. 2, 1978.

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In the first ammonia case, investigation No. TA-406-5, completed in October 1979, the Commission found market disruption by a vote of 3-2. It recommended that the President impose a quota. However, on December 11, 1979, President Carter announced that he had concluded that the provision of relief was not in the "national economic interest" and that he would not provide relief. 50/ In late December the Soviet Union invaded Afghanistan. On January 18, 1980, President Carter took emergency action under section 406(c) and imposed a temporary quota on ammonia imports from the USSR and requested that the Commission conduct a new section 406 investigation. 51/

The Commission completed the new investigation, No. TA-406-6, in February 1980 and made a negative determination by a vote of 3-2. (The term of one of the Commissioners who had made an affirmative determination in the earlier case expired during the interim period and his successor made a negative determination; the votes of the other four Commissioners remained the same.) As a result of the negative determination, the import quota was terminated.

In the canned mushroom case, the President accepted the determination of the two Commissioners voting in the negative as the determination of the Commission, as he is authorized to do under section 330(d) of the Tariff Act of 1930. The President therefore did not need to reach the remedy issue.

50/ Memorandum for the Special Representative for Trade Negotiations, Dec. 11, 1979, published in the Federal Register of Dec. 12, 1979 (44 F.R. 71809).
51/ Proclamation 4714 of Jan. 18, 1980, published in the Federal Register of Jan. 21, 1980 (45 F.R. 3876).

APPENDIX II: TITLE VII and the Non-Market Economies

Contents

The following material is included:

A) Summary of Results of all Title VII NME Investigations.

B) List of all Title VII NME Investigations.

C) The CIT's decision in Continental Steel.

D) Summary of Polish Golf Car Investigations

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A. Summary of Results of All Title VII NME Investigations

Antidumping Investigations Involving NME's

The table below lists the total number of preliminary and final antidumping investigations done by the Commission. It also lists whether the Commission voted affirmatively (A) or negatively (N). The table also shows the number of investigations that were terminated by the Department of Commerce.

Country	ITC Prelim.			Term. by Commerce	ITC Finals		
	No.	A	N		No.	A	N
China	14	14	0	2	9	8	1
Czechoslovakia	2	2	0	2	0	0	0
East Germany	6	5	1	4	1	1	0
Hungary	3	3	0	3 1/	0	0	0
Poland	6	6	0	4 2/	1	0	1
Romania	6	5	1	5 3/	0	0	0
USSR	1	1	0	0	1	0	1
Total 4/	38	36	2	20 5/	12	9	3

1/ Includes 1 termination based on a suspension agreement.
2/ ITC Inv. No. 731-TA-210 (Final) was terminated by the Commission after the petitioner withdrew its petition during the final investigation.
3/ Includes 2 terminations based on a suspension agreement.
4/ Three investigations are still pending.
5/ Includes 3 terminations based on a suspension agreement.

CVD Investigations Involving NME's

The Commission has not had any CVD investigations involving NME's.

B. List of All Title VII NME Investigations

The following tables list all the investigations involving NME's. The ITC investigation number is listed on the right side of each table. The actions taken by the Commission and the Department of Commerce are also listed.

Antidumping Investigations

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Antidumping cases under sec. 731
(Report form ALLAD-CASIS Database)
codes used for outcomes: affirmative (A), negative (N)
affirmative on some products(P), terminated(T), withdrawn(W)

ITC Inv No.	Subject	Country	Date of ITC Preliminary: Petition/ Decision	ITC Pre. Dec/ Rept	ITA Init.date/ FR Notice	ITA Pre. Decision/ Date/ FR Notice	ITA Final Decision/ Date/ FR Notice	ITA Susp Date/ FR Notice	Date of ITC Final: Petition/ Decision	ITC Fin. Dec/ Rept
28	Menthol	China	06/11/80 07/28/80	A 1087	07/02/80 45FR44976	A 01/14/81 46FR3258	A 05/01/81 46FR24614	/ /	01/07/81 06/05/81	N 1153
101	Greige polyester cotton printcloth	China	08/05/82 09/20/82	A 1289	09/01/82 47FR38569	A 05/20/83 48FR22770	A 07/28/83 48FR34312	/ /	03/09/83 09/06/83	A 1421
103	Cotton shop towels	China	08/24/82 10/08/82	A 1296	09/17/82 47FR41149	A 03/28/83 48FR12764	A 09/16/83 48FR41614	/ /	03/28/83 09/23/83	A 1431
115	Canned mushrooms	China	10/18/82 12/02/82	A 1324	11/16/82 47FR51604	A 05/20/83 48FR22768	N 10/06/83 48FR45445	/ /	05/20/83 09/30/83	T
125	Potassium permanganate	China	02/22/83 04/08/83	A 1369	03/18/83 48FR11481	A 09/09/83 48FR36175	A 12/29/83 48FR57347	/ /	08/09/83 01/20/84	A 1480
130	Chloropicrin	China	04/06/83 05/23/83	A 1385	04/02/83 48FR19765	A 09/19/83 48FR41799	A 02/16/84 49FR5982	/ /	09/19/83 03/19/84	A 1505
149	Barium chloride	China	10/25/83 12/09/83	A 1458	11/18/83 48FR52494	A 04/06/84 49FR13728	A 08/27/83 49FR33913	/ /	04/06/84 10/11/84	A 1584
150	Barium carbonate	China	10/25/83 12/09/83	A 1458	11/18/83 48FR52494	A 04/06/84 49FR13728	N 05/29/84 49FR33913	/ /	/ / / /	
244	Natural bristle paint brushes	China	02/19/85 04/05/85	A 1674	03/15/85 50FR10523	A 08/05/85 50FR31636	A 12/26/85 50FR52812	/ /	08/05/85 01/27/86	A 1805
265	Iron construction castings	China	05/13/85 06/27/85	A 1720	06/10/85 50FR24264	A 10/28/85 50FR43595	A 03/19/86 51FR9483	/ /	10/28/85 04/25/86	A

Antidumping cases under sec. 731
(Report form ALLAD-CASIS Database)
codes used for outcomes: affirmative (A), negative (N)
affirmative on some products(P), terminated(T), withdrawn(W)

ITC Inv No.	Subject	Country	Date of ITC Preliminary: Petition/ Decision	ITC Pre. Dec/ Rept	ITA Init.date/ FR Notice	ITA Pre. Decision/ Date/ FR Notice	ITA Final Decision/ Date/ FR Notice	ITA Susp Date/ FR Notice	Date of ITC Final: Petition/ Decision	ITC Fin. Dec/ Rept
266	Steel wire nails	China	06/05/85 07/22/85	A 1730	07/03/85 50FR27475	A 01/09/86 51FR1025	A 03/25/86 51FR10247	/ /	01/09/86 / /	A
282	Candles	China	09/04/85 10/21/85	A 1768	09/30/85 50FR39743	A 02/19/86 51FR6016	/ /	/ /	02/19/86 / /	
292	Standard welded carbon steel pipe and tube	China	11/13/85 12/30/85	A 1796	12/16/85 50FR51273	/ /	/ /	/ /	/ / / /	
298	Porcelain-on-steel cooking ware	China	12/04/85 01/21/86	A 1800	12/31/85 50FR53353	/ /	/ /	/ /	/ / / /	
213	Carbon steel plate whether or not in coils	Czechoslovakia	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	T 06/04/85 50FR23484	/ /	/ /	/ / / /	
225	Cold-rolled carbon steel plate and sheet	Czechoslovakia	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	T 06/04/85 50FR23484	/ /	/ /	/ / / /	
30	Montan wax	East Germany	09/08/80 10/23/80	A 1103	09/30/80 45FR64611	A 03/12/81 46FR116287	A 07/28/81 46FR38555	/ /	03/04/81 08/31/81	A 1180
184	Potassium chloride	East Germany	03/30/84 05/14/84	A 1529	04/26/84 49FR18003	A 09/12/84 49FR35845	T 01/31/85 50FR4559	/ /	09/12/84 11/20/85	T
205	Carbon steel wire rod	East Germany	09/26/84 11/13/84	A 1607	10/24/84 49FR42773	A 03/12/85 50FR9815	T 08/01/85 50FR31213	/ /	03/12/85 07/30/85	T
214	Carbon steel plate whether or not in coils	East Germany	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23329	T 08/19/85 50FR33368	/ /	06/03/85 08/12/85	T

Antidumping cases under sec. 731
(Report form ALLAD-CASIS Database)
codes used for outcomes: affirmative (A), negative (N)
affirmative on some products(P), terminated(T), withdrawn(W)

ITC Inv No.	Subject	Country	Date of ITC Preliminary Petition/ Decision	ITC Pre. Dec/ Rept	ITA Init.date/ FR Notice	ITA Pre. Decision/ Date/ FR Notice	ITA Final Decision/ Date/ FR Notice	ITA Susp Date/ FR Notice	Date of ITC Final: Petition/ Decision	ITC Fin. Dec/ Rept
226	Cold-rolled carbon steel plate and sheet	East Germany	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23330	T 08/19/85 50FR33368	/ / 	06/03/85 08/14/85	T
231	Galvanized carbon steel sheet	East Germany	12/19/84 02/04/85	N 1642	01/16/85 50FR2317	T 02/04/85	/ / 	/ / 	/ / / /	
38	Truck trailer axle-and-brake assemblies	Hungary	02/12/81 03/30/81	A 1135	03/11/81 46FR16109	A 09/17/81 46FR46152	S 01/04/82 47FR66	01/04/82 47FR66	09/17/81 01/13/82	T
215	Carbon steel plate whether or not in coils	Hungary	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	T 06/04/85 50FR23484	/ / 	/ / 	/ / / /	
221	Hot-rolled carbon steel sheet	Hungary	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	T 06/04/85 50FR23484	/ / 	/ / 	/ / / /	
159	Carbon steel wire rod	Poland	11/23/83 01/09/84	A 1476	12/30/84 48FR57580	A 05/08/84 49FR19545	A 07/20/84 49FR29434	/ / 	05/08/84 09/04/84	N 1574
210	Barbed wire and barbless wire strand	Poland	11/19/84 01/03/85	A 1631	12/18/84 49FR49126	A 05/03/85 50FR18906	A 07/22/85 50FR29711	/ / 	05/02/85 07/16/85	T
216	Carbon steel plate whether or not in coils	Poland	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23340	T 08/08/85 50FR32101	/ / 	06/03/85 08/12/85	T
235	Carbon steel structural shapes	Poland	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23341	T 08/08/85 50FR32101	/ / 	06/03/85 07/30/85	T
256	Carbon steel wire rod	Poland	04/08/85 05/23/85	A 1701	05/03/85 59FR18900	T 09/18/85 50FR37888	/ / 	/ / 	/ / / /	

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Antidumping cases under sec. 731
(Report form ALLAD-CASIS Database)
codes used for outcomes: affirmative (A), negative (N)
affirmative on some products(P), terminated(T), withdrawn(W)

ITC Inv No.	Subject	Country	Date of ITC Preliminary Petition/ Decision	ITC Pre. Dec/ Rept	ITA Init.date/ FR Notice	ITA Pre. Decision/ Date/ FR Notice	ITA Final Decision/ Date/ FR Notice	ITA Susp Date/ FR Notice	Date of ITC Final Petition/ Decision	ITC Fin Dec/ Rept
20[illegible]	Steel wire nails	Poland	06/05/85 07/22/85	A 1730	07/03/85 50FR27479	T 08/30/85 50FR35283	/ / / /	/ /	/ / / /	
51	Hot-rolled carbon steel plate	Romania	11/18/81 01/04/82	A 1207	02/08/82 47FR5752	A 08/16/82 47FR35666	S 01/04/83 48FR317	01/04/83 48FR317	/ / / /	
58	Hot-rolled carbon steel plate	Romania	01/11/82 02/25/82	A 1221	02/08/82 47FR5752	A 08/16/82 47FR35666	S 01/04/83 48FR317	01/04/83 48FR317	03/12/85 07/03/85	T
222	Hot-rolled carbon steel sheet	Romania	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23332	T 07/19/85 50FR29459	/ /	06/03/85 07/19/85	T
28	Cold-rolled carbon steel plate and sheet	Romania	12/19/84 02/04/85	A 1642	01/16/85 50FR2317	A 06/03/85 50FR23333	T 07/19/85 50FR29460	/ /	06/03/85 07/19/85	T
232	Galvanized carbon steel sheet	Romania	12/19/84 02/04/85	N 1642	01/16/85 50FR2317	T 02/04/85	/ /	/ /	/ / / /	
250	Oil country tubular goods	Romania	02/28/85 04/15/85	A 1679	03/27/85 50FR12070	T 08/12/85 50FR32458	/ /	/ /	/ / / /	
187	Potassium chloride	U.S.S.R	03/30/84 05/14/84	A 1529	04/26/84 49FR18005	A 09/12/84 49FR35848	A 01/31/85 50FR4562	/ /	09/12/84 03/11/85	N 1656

Countervailing-duty cases
(Report form ALLCVD-CASIS Database)
codes used for outcomes: affirmative (A), negative (N),
affirmative on some products(P), terminated(T), withdrawn(W)

ITC Inv No.	Subject	Country	Date of ITC Preliminary: Petition/ Decision	ITC Pre. Dec/ Rept	ITA Init.date/ FR Notice	ITA Pre. Decision/ Date/ FR Notice	ITA Final Decision/ Date/ FR Notice	ITA Susp Date/ FR Notice	Date of ITC Final: Petition/ Decision	ITC Fin. Dec/ Rept
	Textile mill products and apparel	China	/ / / /		10/13/83 48FR46600	T 12/13/83 48FR55492	/ /	/ /	/ / / /	
	Carbon steel wire rod	Czechoslovakia	/ / / /		12/21/83 48FR56419	N 02/23/84 49FR6773	N 05/07/84 49FR19370	/ /	/ / / /	
	Potassium chloride	East Germany	/ / / /		04/26/84 49FR18000	T 06/06/84 49FR23428	/ /	/ /	/ / / /	
	Carbon steel wire rod	Poland	/ / / /		12/21/83 48FR56419	N 02/23/84 49FR6768	N 05/07/84 49FR19374	/ /	/ / / /	
	Potassium chloride	U.S.S.R.	/ / / /		04/16/84 49FR18002	T 06/06/84 49FR23428	/ /	/ /	/ / / /	

C. CIT's Opinion on CVD Investigations and NME's

On July 30, 1985, the Court of International Trade (CIT) decided Continental Steel Corp. v. United States, 614 F. Supp. 548 (CIT 1985). That case involved a Commerce decision that carbon steel wire rod from Czechoslovakia and Poland could not be subsidized because those two countries were NME's. Contrary to Commerce's dtermination, Judge Watson decided that NME's could have subsidies that were cognizable under § 303 (19 U.S.C. § 1303). Moreover, in the opinion, the court explicitly rejected the notion that the existence of § 406 precluded the use of § 303. 614 F Supp at 555.

The decision, however, is based on the language of § 303, and did not affect any interpretation of Title VII.

D. Summary of the Investigations Involving Electric Golf Cars from Poland

The International Trade Commission has conducted two investigations involving electric golf cars from Poland. The first investigation was conducted in 1975 under the Antidumping Act of 1921. 1/ The second investigation took place in 1980 pursuant to the review prevision of Title VII. 2/ Each of these investigations will be discussed briefly below.

Golf Cars I

The Commission instituted the original investigation following a notice from the Department of the Treasury ("Treasury") that imports of electric golf cars from Poland were, or were likely to be, sold in the United States at less than fair value (LTFV). 3/ In calculating the LTFV margins, Treasury used the difference between the purchase price of the Polish golf cars and a constructed value based upon golf cars produced in Canada by Marathon Golf Car Co. ("Marathon"). 4/ At that time Marathon produced only 250 golf cars annually, while the Polish manufacturer had a production capacity of

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1/ See Electric Golf Cars From Poland, Inv. No. AA1921-147, USITC Pub. 740 (1975) (hereinafter "Golf Cars I").
2/ See Electric Golf Cars From Poland, Inv. No. 751-TA-1, USITC Pub. 1069 (1980) (hereinafter "Golf Cars II").
3/ Golf Cars I, at 1.
4/ Golf Cars I, at 4 n.1.

10,000 golf cars. 5/ Based on this comparison, Treasury found LTFV margins of about 20 percent. 6/

The Commission determined by a 5 to 1 vote that an industry in the United States was being injured by reason of the imports of electric golf cars from Poland. 7/ Subsequently, the determination was published and the appropriate duties were assessed on imported Polish Golf Cars. 8/

Golf Cars II

In 1980, the Commission instituted a review investigation under section 751 of the Tariff Act of 1930, 9/ to review the earlier dumping order. For the purposes of the second investigation, the Department of Commerce ("Commerce") had to recalculate the LTFV margins. 10/ Since Marathon no longer sold Golf Cars, Commerce used an independent consulting firm to calculate the LTFV margins. 11/ To calculate the margins, Spain was used as the country with a free-market economy at a stage of development comparable to that for Poland. A constructed value for the cost of production of the Polish Golf Cars was determined by using Polish production factors such as raw materials

5/ See Golf Cars II, at A-4.
6/ Golf Cars I, at 4.
7/ Golf Cars I, at 2.
8/ Because Marathon stopped producing golf cars in 1975, the exact duty imposed fluctuated over the next several years because of the difficulties involved in trying to calculate the exact duty that should have been imposed. See Golf Cars II, at A-4 to A-5.
9/ 19 U.S.C. § 1751.
10/ Following the enactment of the Trade Agreements Act of 1979, Commerce rather than Treasury was charged with calculating LTFV margins.
11/ Golf Cars II, at A-5, A-52.

used, labor hours, and utilities and then calculating what those particular items would cost in Spain. 12/ Figures for 1977 were originally used and the resulting figures were then increased by the corresponding Spanish inflation rate. 13/ Based on these calculations, Commerce determined that there were no LTFV sales of Polish golf cars in the United States.

Subsequently, in February 1980 the Commission determined that changed circumstances existed that indicated that an industry in the United States would not be threatened with material injury if the antidumping finding concerning electric golf cars from Poland was revoked. The Commissioners filed three separate opinions in support of that determination. 14/

12/ Direct comparison with Spain was impossible because Spain did not produce golf cars.
13/ Golf Cars II, at A-52.
14/ See Golf Cars II, at 3 (views of Chairman Bedell and Commissioner Moore); id. at 10 (views of Vice Chairman Alberger and Commissioner Calhoun); and id. at 21 (views of Commissioner Stern).

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Investigations Involving NME's under the Antidumping Act of 1921

The table below lists all the antidumping investigations involving NME's that were done pursuant to the Antidumping Act of 1921. All of the investigations listed below were final investigations, with the exception of the investigation involving light bulbs from Hungary.

Inv. No.	Subject	Country	ITC Determination	Date	Pub. No.
AA1921-53	Pig Iron	Czechoslovakia	Affirmative	1968	265
AA1921-52	Pig Iron	East Germany	Affirmative	1968	265
AA1921-Inq.-18	Light Bulbs	Hungary	Negative	1978	912
AA1921-147	Golf Cars	Poland	Affirmative 1/	1974	1069
AA1921-54	Pig Iron	Romania	Affirmative	1968	265
AA1921-51	Titanium Sponge	USSR	Affirmative	1968	255
AA1921-55	Pig Iron	USSR	Affirmative	1968	265

1/ The determination was reviewed in Electric Golf Cars from Poland, 751-TA-1 (1980).

Senator DANFORTH. Both of you agree that the present system is unworkable?

Dr. STERN. Yes.

Mr. KAPLAN. Yes.

Senator DANFORTH. We have no place to go but up?

Mr. KAPLAN. To some extent; yes. I think there are some things we can do under the present system to make it work better, and we are trying to do those things because that is the system we have right now.

Senator DANFORTH. But we clearly need legislation; is that right?

Mr. KAPLAN. Yes; we do.

Senator DANFORTH. Yes. And also, we clearly need some sort of artificial system to determine price?

Mr. KAPLAN. I don't know exactly what you mean by "artificial." We do need a different system, I think.

Senator DANFORTH. Well, the surrogate system is clearly artificial.

Mr. KAPLAN. Yes.

Senator DANFORTH. Averaging. I mean, it is an attempt to guess what the price should be, if there were a pricing system.

Mr. KAPLAN. Yes. That is right.

Dr. STERN. I would not go into hypotheticals or guessing. I would look at the observable average market price here in the United States and see what the difference is between the nonmarket economy's price and that observable price which we do every day at the Commission. So, I don't consider that a hypothetical or an artificial construction.

I am not going along with finding the lowest price, as was suggested by Mr. Kaplan, if I understand his testimony.

Mr. KAPLAN. Yes. That is right.

Dr. STERN. Because I think it is very hard ever to know who has the lowest price in the market.

Senator DANFORTH. Do you think the lowest priced system is the easiest to administer? Mr. Kaplan?

Mr. KAPLAN. I think it would be easier than any kind of average. Yes. It is not foolproof. It would be easier.

You would choose one. I think the way you would do it is look at the 6-month period we generally look at for prices. You would get your Customs data and somehow select the two or three lowest import countries; and then you would get specific data from them and use the one which was actually lowest and was in the ordinary course of trade.

Senator DANFORTH. Would you be able to get specific data, though? Or would you be back to Finnish steel?

Mr. KAPLAN. Well, I think you would be able, under some circumstances, to get data from importers. Yes. It raises some problems. One thing that has been suggested—and we are looking at it—is subpoena power in some instances—but——

Senator DANFORTH. If we do that, though, would you go to Finland and say: Here we are with our subpoena?

Mr. KAPLAN. You can't go to Finland. You would have to go to the importer.

Senator DANFORTH. And you would say to the importer: Please give us information with respect to the costs of producing these goods in Finland?

Mr. KAPLAN. Just the price, the price they are paying. We wouldn't need cost data.

Senator DANFORTH. Just the price that they are paying?

Mr. KAPLAN. Well, the price they are paying from the Finnish exporter. They are paying it to the Finnish exporter, say, and the price they are charging to their United States customer; that data the importer would have. It is the same data, I believe, that——

Dr. STERN. No; We do not use that. We actually go out and survey the prices in the market and take into account exactly where the product is meeting head-to-head with the incoming product. We use Customs data, but mostly the basis of our data is our own surveys.

And I would just simply say that—shifting a little bit—on the lowest price, I wouldn't presume for example that the GDR necessarily is going to have the lowest price because it is the 10th largest economy in the world. It is not a Third World economy. And I would also say, in terms of efficiency, I wouldn't assume that nonmarket economy exports would be representing the most efficiently produced good and therefore the lowest price. So, I think you are kind of giving the leg up to the nonmarket economies, which I wouldn't presume to be based in economic realities.

That is the reason why I say look at the average market price as it is fetched in the United States, in the U.S. marketplace.

Senator DANFORTH. Is your approach the same as Senator Heinz' approach?

Dr. STERN. Mine is closer to Senator Heinz' approach. It very definitely is.

Senator DANFORTH. And you think that that information is readily ascertainable?

Dr. STERN. I think to the extent that we have to go in every one of our dumping and CVD cases do an underselling exercise and have to do these data collections, yes. There are problems. It is difficult. We have to make adjustments, as I said.

Senator DANFORTH. It is difficult to determine what is the relevant market. Or what is the relevant product?

Dr. STERN. Well, that is always an issue. You are not going to get away from that today.

Senator DANFORTH. Whatever we do?

Dr. STERN. I mean, that is in our dumping cases every day. What is the industry? What is the like product? What we are talking about here is trying to adjust these nonmarket economies to our market situation; and I say, look, the only way you can tell that there is injury is by looking at their sales price and seeing if the imports are increasing and seeing what the difference is between the average market price in this country and the price that they are fetching. And that would be your dumping duty that you would apply.

So, in a sense, it is a collapsing of the unfair and the injury discussion, but I think it is necessary. I don't think you can apply the market standards which are inherent in our trade laws to nonmarket economies.

Senator DANFORTH. All right. Senator Heinz?

Senator HEINZ. Mr. Chairman, let me just test one other hypothesis out on our two witnesses who have been very helpful. That is, do you both agree that whatever it is we do, we should try to get a system that encourages nonmarket economies over time to behave as much like market economies as possible with the ultimate goal that they do behave like nonmarket economies?

Dr. STERN. That is the reason why I have this kind of graduation suggestion in there.

Senator HEINZ. Mr. Kaplan, do you agree with that? That is kind of an overriding goal of our trade policy, vis-a-vis nonmarket economies?

Mr. KAPLAN. Yes. I think we would like to achieve that. I don't know that what we do on our own unfair trade laws is really going to encourage internal changes in these systems that much; but I think that is something that would be desirable.

Senator HEINZ. And so, it is desirable to, first, give them a system where they can graduate and just be treated the way anybody would be treated under antidumping or countervaling duties?

Mr. KAPLAN. Yes.

Senator HEINZ. And you both, one way or another, subscribe to that?

Mr. KAPLAN. Yes.

Senator HEINZ. Now, you both suggest that we should use a price based standard. There is a difference between you, as I understand your testimony. Mr. Kaplan, you are saying it should be a lowest price standard?

Mr. KAPLAN. A lowest import price. Yes.

Senator HEINZ. Dr. Stern, you are saying it should be some kind of an average trade-weighted price standard?

Dr. STERN. Average market price.

Senator HEINZ. Market price.

Dr. STERN. What the price is——

Senator HEINZ. And this is an exporter's price?

Mr. KAPLAN. Exporter's price. Yes.

Senator HEINZ. Could one or the other of you tell me about the disadvantages of the other's approach? Why do you disagree on that?

Mr. Kaplan, we will let you go first, and Dr. Stern, we will let you——

Dr. STERN. I think I already did it.

Senator HEINZ. I think you did.

Mr. KAPLAN. I think there are two or three problems with an average market approach. One is that we have found at least in steel——

Senator HEINZ. Let's do two things. First, leaving aside the question of whether it is an average as opposed to a lowest, just deal first with the issue of a market price versus your exporter's price approach. And why you think yours is superior to Dr. Stern's.

Mr. KAPLAN. I don't think a lot of nonmarket economies are going to be able to sell at an average market price, at least in steel where I have looked at a lot of numbers over the last year or two. They cannot sell at the average market price, or a market price—

however you do it. That would be a price that would include U.S. sellers and importers.

Now, the average steel importer can't sell anything if he has to sell at the U.S. price. An importer, by rule of thumb, has——

Senator HEINZ. Let me interrupt you and clarify something that Dr. Stern said, because maybe I didn't catch it. Dr. Stern, were you advocating a trade-weighted price including or excluding U.S. prices?

Dr. STERN. Including United States prices.

Senator HEINZ. Including. All right.

Dr. STERN. Because there may be a time—and there have been—when we haven't had other countries that were market economies that were supplying the United States. And you have to have the possibility to turn to a U.S. price to compare and to see if there is that underselling again, which is part of your material injury finding.

Senator HEINZ. Would you agree, nonetheless, with Mr. Kaplan's hypothesis that using a U.S. price, which sometimes can be just a massive dominating factor, kind of loads the cannon against the exporting nation?

Dr. STERN. Well, I think the whole idea is that if they are in the U.S. market, and if they are underselling, they are trying to set your market price. I mean, that is the whole idea. So, they have to be competing.

I guess I am not saying that they can't compete.

Mr. KAPLAN. I think they are underselling on the whole what would be the average market price.

Dr. STERN. Well, there are adjustments—quality adjustments, for example—that need to be made for steel for some nonmarket economies, and you would do those kind of quality adjustments when we are doing our price analysis and our price survey.

Mr. KAPLAN. I think even with those quality adjustments, you would not be able to sell Polish steel, for example, in the United States if you have to sell at the market price in the United States, however you established it. On the whole, the rule of thumb, for most importers is that nonmarket economy steel has to come in at 15, 20, or 25 percent below the average U.S. price.

Dr. STERN. We do these quality adjustments every day when we do our injury analysis, when we are looking at our pricing data. We also adjust for, the other point that you made, the level of distribution because instead of just looking at the Customs invoices where people cheat when they file those Customs invoices, we would have access to sales prices of the importers to the distributors, and then the distributors to the third parties. And therefore, we have more flexible sources in order to get the actual pricing that is going on.

I feel that this is the job that the Commission does every day when we do our pricing analysis.

Senator HEINZ. My time has expired.

Senator DANFORTH. Do you have other questions? We don't exactly have a line of Senators waiting to ask questions. [Laughter.]

Senator HEINZ. We have two very expert witnesses, Mr. Chairman. I would hope we could keep them around for a few more minutes.

Senator DANFORTH. Surely.

Senator HEINZ. With your permission?

Senator DANFORTH. Yes.

Dr. STERN. May I just add, so that we are comparing apples and apples, that I have been talking about an average market price, but I have also been saying that there would be increasing imports and that there would be, in that case, not just any frivilous case. Any volumes that came in, you would actually have to have increasing imports as part of the standard as well for the causation of injury standard.

Senator HEINZ. I think I understand your differences on average prices and low prices. I think we understand at least in principle the decision as to whether or not and to what extent we should include the United States in any average. I think we probably have a fairly good idea of the extent to which—I mean, there is no disagreement, at least between the two of you—but we will probably hear some other witnesses today as to whether we should use a price base to average, whether it is based on the market or the exporters' price. Let me come back to something that both of you, I think have said. Unless I have misunderstood your testimony, Mr. Kaplan, basically you want to extend an injury test to nonmarket economies whether or not—well, in all circumstances.

Now, obviously, our antidumping law in effect requires an injury test for any dumping. Our countervailing duty law—explicity states that unless a country has assumed its responsibility under the agreement, it is not to be entitled to an injury test.

If you are saying that nonmarket economies should always in any of these kinds of cases get an injury test, why aren't you in effect treating nonmarket economies favorably compared to market economies? And if you are, how do you justify that?

Mr. KAPLAN. I think to some extent you probably are. The reason the administration favors an injury test in this kind of remedy is, first of all, it is basically a pricing type remedy. It is based on pricing; it correlates fairly closely to the dumping law. It is replacing de facto the dumping law because that is, at the moment, the only law that we are applying to nonmarket economies; and we feel it is appropriate to continue that application of the injury test in any replacement for the dumping law.

Also, if you are looking at pricing kinds of tests exclusively, it seems appropriate to link an injury test to it also. Underselling per se under most unfair trade laws is not a heinous wrong. Underselling coupled with injury is something we think there ought to be a remedy for; and we see these two together as essential for finding a reason to put on a duty. And finally, more generally, we have favored the use of injury tests to protect consumers from putting on duties where it is not really causing any injury to the U.S. industries.

Senator HEINZ. Leaving aside the political problem of the administration going on record asking for more favorable treatment for nonmarket economies and the Soviet Union than our allies—we do still have some allies, I guess—I was just thinking through the list. [Laughter.]

Canada is still an ally, I think. Maybe not of us, but we of them. But apart from that obvious political problem, how would you square extending nonmarket economies an injury test with the

idea that they should graduate from that and come nose to nose with the countervailing duty law which says, well, unless you are a member of the GATT, a signatory to the subsidies code, and so on and so forth, you are not going to get an injury test. I mean, isn't that a disincentive? Isn't your position a disincentive for them to move into the big leagues?

Mr. KAPLAN. You would think it would be. It is interesting. Right now, we have a number of Chinese cases, and the Chinese are trying to prove very hard they are not a nonmarket economy for purposes of the application of the dumping law. And we say to them, well, you know that means we are going to have to apply the countervailing duty law to you. And they say, well, we don't have any subsidies; so, you can go ahead and do that.

I suppose the other answer is: If they are going to graduate into a market economy system, then they have got to play by the rules of that system and begin to eliminate those subsidies they do have over time. So, it could be some disincentive; but if market economies really do work better, they have to accept that perhaps minor disincentive and learn to play by our rules, which would not permit them to have subsidies unless they want to pay countervailing duties.

Senator HEINZ. Let me just ask one last question. We have all talked about nonmarket economies, and we all, I think, agree that the standard should be an economic standard, not a political standard. Is that right? Dr. Stern, do you agree?

Dr. STERN. I think it should be an economic standard.

Senator HEINZ. An economic standard? Do you agree with that, Mr. Kaplan?

Mr. KAPLAN. Yes.

Senator HEINZ. Now, that is important for two reasons. First, it is important so that we identify who we are going to apply the law to. Second, it is important because those who are not nonmarket economies are going to be the people, if we adopt a price-based standard, that we are going to be using for the basis of constructing some hurdle that will be the test of the nonmarket economy.

In my bill, we have a procedure for creating a list. Is there anything wrong with the idea of a list?

Mr. KAPLAN. We are looking at that question, and we will get back to you with a specific answer, I think. Right now, I think there may be other ways to achieve the same thing. I am not sure you can decide up front for any extended period of time whether some country is or is not a nonmarket economy, particularly if you are going to look at sectors or sector analysis to some extent and decide whether a particular sector may have enough market aspects to qualify as a market economy, in effect.

Dr. STERN. I would have to study your list. In my proposal, what I have is a graduation, and a list of those who would initially be subject to this third track would be those that came from the 406 list. But I would have to get back to you on that with an answer.

Senator HEINZ. Very well. Mr. Chairman, thank you very much. That concludes my questions.

Senator DANFORTH. Thank you, Senator Heinz. What do other countries do about this problem? Do we know? Do other countries

have the same problem with dumping from nonmarket economy countries?

Mr. KAPLAN. The EC has a lot of these problems. They are obviously much closer to a lot of nonmarket economies and there is substantial trade with the Eastern bloc. They use a surrogate approach, but the bulk of the cases are solved by some kind of undertaking, which is either a price undertaking or a quantitative restraint agreement. In other words, they start the case, and then they do a sort of deal.

Dr. STERN. A settlement.

Senator HEINZ. They have a trade policy. [Laughter.]

Senator DANFORTH. We could do that, too, couldn't we, under present law?

Mr. KAPLAN. Yes, we could, and we have done it twice on Hungarian axles and Romanian steel plate. We cannot do a quantitative restraint under current law.

Senator DANFORTH. Following up on what Senator Heinz asked, I guess the question is: What is a nonmarket economy? Are we agreed on that? I am told that actually what happens in these cases is that there is an enormous amount of time and energy and lawyers' fees expended trying to determine whether the product involved is a product to which this law applies.

Mr. KAPLAN. Expended, and one might say wasted because I think there have been very few cases where we have switched in the middle. People have tried to show in some instances that Poland or other countries are not market economies. We have on record what countries we think are market economies and which are not.

Senator DANFORTH. So, there should be a list?

Mr. KAPLAN. Well, I think there is de facto a list.

Senator DANFORTH. Yes.

Mr. KAPLAN. We are not sure we want to label right up front certain countries as market and certain as nonmarket because I think it might discourage the graduation process, in effect.

Senator DANFORTH. Is Yugoslavia a nonmarket economy?

Mr. KAPLAN. We don't think so.

Senator DANFORTH. What do you think, Dr. Stern?

Dr. STERN. In fact, we in common agreement with the Executive and Congress removed Yugoslavia from our list of nonmarket economies that we have to report on to you folks.

Senator DANFORTH. But it is hard to tell, isn't it? I guess you know them when you see them, but——

Mr. KAPLAN. You are exactly right. Yes.

Senator DANFORTH. Let me just give you a question. I mean, obviously this is a hypothetical question because Yugoslavia is not on the list; but Yugoslavia makes this little automobile, and it sells it here very, very cheaply. I guess the first question would be to determine whether or not Yugoslavia is a nonmarket economy; you have said it isn't, but on the hypothetical question, you say you believe it is. Then, the question is: What is the product? How do you compare this Yugo with anything else in the world?

Mr. KAPLAN. Somebody said to me that——

Senator DANFORTH. I mean, it is not a Mercedes.

Mr. KAPLAN. It is not a Mercedes.

Senator DANFORTH. It is not a Jaguar.

Mr. KAPLAN. Yes.

Senator DANFORTH. What is it?

Mr. KAPLAN. It is not a Toyota Camry. Somebody talked to me about that and said it is very similar to some Italian car. I am not sure what. So, maybe we would go find that Italian car and look at that market price and make a comparison.

Senator DANFORTH. Yes. And then, if we solve this problem, we haven't solved the problem of what we would not call nonmarket economies, but countries which would have some of the same characteristics. Correct? Take, for example, automobiles. In France, the Government, doesn't it own Fiat? Am I wrong on that? I think that is correct.

Mr. KAPLAN. Maybe Renault. I think there are a lot of government-owned sectors. Brazil is a case where we have been asked repeatedly to call the steel sector a nonmarket economy sector. It is owned very substantially by Siderbras, which is a government-owned holding company. Prices on the home market on the whole are controlled; and there are all kinds of reasons you might call that a nonmarket economy sector. So, yes; it is all a question of degrees. That is the problem.

Senator DANFORTH. If we were to have a list in the legislation, as we do in this bill, I suppose there should be an opportunity for people to come in and prove that—or should there? I mean, maybe that would defeat the purpose of having a list. But it would seem that people should have an opportunity to prove that, notwithstanding the fact that a certain product is not produced by a country that is on the list, that product still has all the characteristics of a nonmarket economy product.

Mr. KAPLAN. I guess when I think about—and this isn't really an administration position that we are still looking at—a list might be more trouble than it is worth because you have got to have a graduation procedure for the list. So, presumably, in any case, or at the beginning of each year, everyone could come in and argue they should or should not be graduated. I think it might be easier to do in the context of a particular case and do early in each case. Let people within the first 30 days, if they want, make some arguments about the market or nonmarket economy aspects of the country or the sector; and we would make a decision right then.

Dr. STERN. May I?

Senator DANFORTH. Yes.

Dr. STERN. I think that you ought to start with the old list that we have now with NMEs and then Congress could add to the list if necessary by legislation; but the list should be based substantially on all exports to the United States because we are talking about nonmarket economy, not a particular sector or a particular product.

If we are interested in encouraging countries to become market economies, then the standard should be based on a look at their entire economy.

Senator DANFORTH. Senator Bentsen has taken the lead on this committee in getting into the whole question of State trading, which is a broader question than nonmarket economies. Do you think we should get into that?

Mr. KAPLAN. I think it is probably a valid subject to consider. I am not sure exactly where the administration would stand on it right now.

Senator DANFORTH. Normally, I assume the administration is against whatever——

Mr. KAPLAN. No. We support the concept of reform of the dumping laws.

Senator DANFORTH. I am told it is one of their objectives in the new round.

Mr. KAPLAN. We are looking at it. It is something we are concerned about.

Dr. STERN. I think I will stay out of this one.

Senator DANFORTH. Thank you both very much.

Dr. STERN. Thank you.

Senator DANFORTH. Now, we have a panel, and the panel is going to be using a different operational format than the usual.

Richard Cunningham, partner, Steptoe & Johnson; Charles Verrill, partner, Wiley & Rein; Arthur Downey, chairman of the Task Force on Trade with Non-market Economies of the U.S. Chamber of Commerce; and Peter Suchman, American Association of Exporters & Importers, and partner, Sharretts, Paley Carter & Blauvelt.

Under this format, the members of the panel have been given an advance three questions to which we would like them to respond. And they have also been given time periods for the answers. They are very articulate, fast-talking people; and we know that you can stick with the timetable.

Senator HEINZ. Will both articulateness and brevity of answers be graded by the chairman?

Senator DANFORTH. They will be smiled upon by the chairman.

Gentlemen, thank you very much for your participation. The first question is before you. I will tell you what we will do. We will go from left to right; we will start with Mr. Suchman and go down to Mr. Cunningham. And then, for the second question, we will start with Mr. Downey; and the third question, we will start with Mr. Verrill. So, Mr. Suchman, what should be the objectives of U.S. policy on East-West trade, and how should they be reflected in our unfair trade laws?

TESTIMONY OF PETER SUCHMAN, AMERICAN ASSOCIATION OF EXPORTERS & IMPORTERS; AND PARTNER, SHARRETTS, PALEY CARTER & BLAUVELT, WASHINGTON, DC

Mr. SUCHMAN. I can give a very brief answer to that, Mr. Chairman. The objective should be to permit trade to develop as freely and as unemcumbered by Government interference as is commensurate with national security and the peculiar circumstances inherent in State trading situations. I think the law should recognize the potential harm centrally planned decisions can have on market-driven domestic producers, but without offering an unwarranted and anticompetitive legal protectionism, which is a neat trick; but I think maybe we will get into some suggestions as to how that can be accomplished.

Senator DANFORTH. Mr. Downey?

TESTIMONY OF ARTHUR T. DOWNEY, CHAIRMAN, TASK FORCE ON TRADE WITH NONMARKET ECONOMIES, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC

Mr. DOWNEY. Yes, sir. We would agree with that statement. The objective of our East-West trade policy should be and is enshrined in the law to encourage nonstrategic trade. Nonstrategic trade with the Eastern countries—ideologically Eastern countries—means not only exports but a willingness to accept imports. That then must be reflected in our trade law to ensure that we do not have any unnecessary or unfair impediments to those imports.

In my judgment, section 406, the market disruption, has no economic base and is ideologically based and should be removed. Nobody supports the continued life of section 406, and it should go.

For those countries in East-West trade, which was your question, who are also nonmarket economy countries—and your debate earlier was illuminating about Yugoslavia or Hungary or sectors in China—and we should keep that in mind, and I think it is a job of the committee to assist the administration in offering factors as to how to distinguish between a nonmarket economy country and not.

But our goal should be to find a simple way to protect American industries against trade which, by definition, we cannot know is fair or unfair because our system of fairness or unfairness in our trade law is based on price. Since by definition, we can't know price in those countries, we have to protect our industries without knowing if the pricing or the trade is fair or not.

The goal should be as simple as possible, as predictable as possible.

Senator DANFORTH. Thank you. Mr. Verrill?

TESTIMONY OF CHARLES OWEN VERRILL, JR., PARTNER, WILEY & REIN, WASHINGTON, DC

Mr. VERRILL. Thank you, Mr. Chairman. Twenty years ago the United States abandoned the post-World War II policy of economic isolation of the so-called nonmarket economy countries in favor of a policy that increased trade in nonsensitive products would induce trade interdependence, and therefore increase national security.

Despite what I regard as a commendable change in our policy on trade with the nonmarket economies, that trade has not materially increased over the last 20 years or so.

The reason for that lack of growth, however, in my opinion, has nothing to do with the trade laws, particularly with the way we administer the antidumping law. This is clear from the fact that the European Community has significantly expanded its East-West trade while, at the same time, administering and enforcing an antidumping law that is very similar in almost every respect to ours, albeit with a greater emphasis on settlements.

Trade with the nonmarket economies has suffered from denial of MFN to Poland, from embargoes and the like; but these are diplomatic responses to political decisions and have nothing to do with the trade law. Should these trade impediments be removed in favor of the original policy of enhanced trade relationships, I believe the trade laws that we have now should be refined with an emphasis on resolving disputes in accordance with the GATT principles.

These lows are not fundamentally flowed—the EC experience proves otherwise—and with procedural and substantial amendments can be expected to work quite well to resolve the disputes likely to arise as trade expands. I also think that the United States ought to consider very seriously negotiations that would give substance to the obligations of GATT, Acticle 17, which requires the trading enterprises in market economies and nonmarket economies alike to sell and buy their products in accordance with commercial considerations. Thank you.

Senator DANFORTH. Thank you, sir. Mr. Cunningham?

TESTIMONY OF RICHARD O. CUNNINGHAM, PARTNER, STEPTOE & JOHNSON, WASHINGTON, DC

Mr. CUNNINGHAM. I would like to emphasize the point made by Dr. Stern earlier today that our regulation of East-West trade and our trade with nonmarket economies and our policy on East-West trade should focus on economic issues and eliminate the political intrusion that, in my view, has colored every nonmarket economy case to date.

I think our policy should focus on encouraging such trade with the limitation that we must understand that there is a particular danger from nonmarket economy trade; and that is the danger of uneconomic pricing. Therefore, our two guiding principles should be: Focus our regulation on the pricing of nonmarket economy imports and, second, eliminate to the maximum extent possible discretion from the laws that govern nonmarket economy imports.

Senator DANFORTH. All right. Thank you. The second question, we will start with Mr. Downey: Should we abandon a price-based standard for dealing with dumping from nonmarket economies and simply provide relief based on a showing of injury?

I think you answered that question in our first go-around.

Mr. DOWNEY. And perhaps that will give me an opportunity to elaborate on it a bit.

Senator DANFORTH. And strengthen it a little bit.

Mr. DOWNEY. I suspect that we will be alone among my colleagues in offering this. I speak as a representative of the chamber, although I am not employed by the chamber. I am an attorney, and I have dealt with my colleagues on opposite sides of the table in nonmarket economy cases. But I think the chamber should be commended for coming out with a rather bold move.

We are suggesting a fundamental change in the approach. We believe, and I think most people around the table agree, that the price-based systems—certainly the surrogate system—doesn't work. One can feel comfortable and have great confidence in reaching a precise conclusion. You can make it work. You can reach a margin of dumping 18.76 percent, but you are lulled into that because the margin of error in reaching that price is so wide that it becomes, in the words of a former administrator of that, a "crap shoot."

You can select any number you want at the end; the process doesn't work properly. We believe that it is sufficient to rely on an injury-based standard, coupled with the Common Market type approach of, as Mr. Kaplan said before, doing a deal. We propose an injury standard that would be somewhere between the injury

standard for fair trade and unfair trade because we cannot know if this trade is fair or unfair because we don't know the pricing. By definition, you can't understand the pricing.

And we believe that the American industry is concerned not so much with the exquisite detail of pricing but of injury. If they are injured, they want help and need help.

We would suggest that, after an ITC determination, whether that standard of injury has been met, the USTR would be authorized to negotiate a deal with the foreign country involved and employ quotas or price adjustments as fits. If a deal isn't reached, it goes back to the ITC, and the ITC can impose a deal. We think that will assist the process. An injury-only standard is not a concession to the nonmarket economy country. One could argue that you have also the reverse situation.

In a normal case, you can find less than fair value sales but no injury; and the foreign exporters are free. In the injury-only standard, that must be met; and one could therefore argue it is harder on the nonmarket economy country because, even if it is not selling at less than fair value, it is still impeded if it causes injury.

In your example, Senator, of the Yugo—the car—I think we would say: Let them come in; let the consumer enjoy the benefit of a lower priced car, assuming Yugoslavia was a nonmarket economy here and you can't know the prices, until it injures an American industry. When that happens, say "no"; from now on, you increase your price or you have a quota, or some combination to protect the American industry.

To deal with a price undercutting issue, you have a problem. Once you introduce price undercutting or price in any form, either in the formation of less than fair value or in the injury standard exclusively, as Dr. Stern was talking about, you run into the problem of either assuming that the nonmarket economy is never the most efficient producer or is always the most efficient producer. And with the lowest import price, you are assuming it is always the most efficient. In the average, you are assuming it is never the most efficient. Let us do away entirely with that system.

Let's try something different for the first time in a long time and give it a chance. Thank you.

Senator DANFORTH. Thank you. Mr. Verrill.

Mr. VERRILL. Thank you. I do not believe we should replace the current system with an injury-only standard. We have had an injury-only remedy on the books for 12 years now, and it has never been successfully utilized. This is in the context of a period of time—a dozen years—when there have been a number of antidumping cases resolved under the current system, albeit in some cases with difficulty and in other cases with unsureness about the finality of the result.

But nevertheless, it has worked; and I don't think that the amendments that are proposed for section 406 would cure this deficiency. There seems to me an institutional bias against injury-only remedies both in the GATT and in U.S. practice. As a consequence, there will be an inevitable and probably unending controversy over an injury causation standard that I am told would be defined somewhere between the antidumping level and the section 201 substantial cause formulation.

As a practitioner, I can tell you that is going to be extraordinarily if not impossible to prove. Moreover, an injury-only remedy will inevitably involve Presidential discretion, and the final result will always invite replication of the topsy-turvy results satisfactory to no one that occurred in the Occidental Petroleum section 406 case.

Finally, the easiest and most predictable result of an injury-only remedy is a quantitative restraint, and quotas cannot and will not address the price issue, which is the principal issue, in my judgment, with nonmarket economy imports. While the antidumpting law does have deficiencies, which I am convinced can be cured, it does deal directly with the price issue, which is the principal reason why these disputes arise in the first place.

Over the years, the nonmarket economy antidumping proceedings have become encumbered by the search for willing and cooperative surrogates, and on a department preference for price reference in market economies. This has led to uncertainty and unpredicability, which I am convinced could be remedied by adoping a fair value method appropriate to the unique circumstances of each case, whether it be surrogate prices, import prices or a value constructed from the factors of production.

These options would provide the parties a day in court in which to debate the fair value issues peculiar to each investigation. The fact that the results of these deliberations are not fully predictable is not, in my opinion, unfair or trade disruptive. The antidumping remedy is prospective. Sales at less than fair value prior to a preliminary determination are not ordinarily penalized.

After the preliminary determination, there is opportunity to adjust prices to the fair value and to ameliorate the effects of an affirmative finding.

I think also the antidumping procedures that we have now provide a unique opportunity to settle disputes through the suspension of investigation procedures. This procedure has been used in trailer axles from Hungary and steel from Romania and permits a way of directly addressing the price issue without getting involved in quantitative restraints.

This is also a consistent procedure with the GATT antidumping code. It is consistent with European practice. And I think we should encourage its use in the United States. Thank you.

Senator DANFORTH. Thank you, sir. Mr. Cunningham.

Mr. CUNNINGHAM. Since I began today by saying that I think pricing is the real problem here, I think my answer to the question is pretty obvious. Far from thinking that we should abandon the dumping or price analysis approach and go to an injury-only approach, I think we ought to go in exactly the opposite direction. I think we ought to repeal section 406, abandon the discretionary injury-only approach where politics and diplomacy inevitably overwhelm the merits, as the Occidental Petroleum case indicates, as the cases involving China, indicate where China threatens to retaliate on our grain sales if we do anything to them in an unfair practices case.

Those issues, outside the merits of the case, overwhelm any case that is even remotely discretionary. We ought to get rid of section 406 for that reason.

I don't think the amendments proposed by Representative Schulze on the House side really do much to cure the problem. They are aimed at focusing the President on "economic issues" and limiting his discretion to those issues. Think, if you will, of the China situation. All China has to do is threaten retaliation on grain, and by God, that certainly is an economic issue; and the President is going to use his discretion motivated by an issue entirely outside the merits of the case, and I think that is just what you don't want.

I would also like to say that I disagree several hundred percent with the approach advocated by Mr. Downey, a not unprecedented event in our dialog on these issues. [Laughter.]

It strikes me that when you have a problem that everybody can see is generated by Government intervention in the marketplace, that is, nonmarket economy governments distorting costs and prices, you don't solve it by saying: OK, we will have the two governments sit down and rig the marketplace by working out a deal. That is not the way to get back to the free market; that is not the way to achieve what U.S. producers really want, which is an opportunity to compete free of uneconomic pricing by their competitors.

Senator DANFORTH. Thank you, sir; and Mr. Suchman.

Mr. SUCHMAN. I guess I get the rebuttal because I agree with Mr. Downey and disagree 200 percent with Mr. Cunningham, which is also not unprecedented. [Laughter.]

The difficulty with the present law is the same difficulty that exists with all of the things that have been proposed to replace it, with the exception of an injury-based standard. And that is nobody knows or can tell what fair value is when you are dealing with nonmarket economy imports. Mr. Cunningham confuses comparisons with U.S. prices, I think, with the concept of fair value.

As originally conceived, fair value has to do with prices—price discrimination—in national markets, and we all acknowledge that there is absolutely no way of telling what prices are in nonmarket economy home markets. We agree that there is no way of determining costs in those countries. And to then say, well, we won't use those, we are going to somehow use prices in the United States, whether they are import prices or prices of American producers or prices of the two combined, ignores the difficulties that the Commerce Department and, before, the Treasury have had in determining those prices.

I don't think that Dr. Stern's solution adds anything because it is notorious among practitioners that the so-called surveys conducted by the Commission are totally unverified and are an open field for domestic companies to say whatever they want to about their prices. And in fact, they have the added incentive in a method such as that which has been proposed of trying to knock their overseas competitors out of the market by rigging that comparison.

So, whether we like it or not, there isn't any way of determining what is fair or unfair in nonmarket economy countries. And I don't believe that we should throw up our hands and say that there is no way to structure a market disruption or an adverse impact statute to remove it from political pressures and discretion by the executive branch.

The Congress has seen fit to give the executive branch the administration of the dumping and the countervailing duty laws; and believe me, having administered those, I know that there are many discretionary decisions that are made. There is no way of arriving at a dumping margin without exercising discretion. Do you use this test, or do you use that test? Does this product fit here or does it fit there?

So, unless, I guess, the Congress is going to administer the statute, there is going to have to be some discretion in the executive branch; but I think we ought to abandon the idea that we are going to establish a benchmark which inevitably is based on an artificial calculation and, as Mr. Downey has said, focus on what is really important. What is the adverse effect? Or is there an adverse effect on American producers?

I am not willing, on behalf of the AAEI, to necessarily support the scheme that he and the chamber have proposed; but something along those lines certainly is worth considering.

Senator DANFORTH. All right. For the final question, we will start with Mr. Verrill.

Mr. VERRILL. Thank you, Mr. Chairman. Would you like me to answer (a) and (b) together?

Senator DANFORTH. Yes. Why don't I just read them so everybody can know what we are talking about?

Assuming a price-based standard is adopted; (a) What benchmark should be used to determine the fair price; and (b) Should this be the exclusive remedy against imports from nonmarket economy countries?

Mr. VERRILL. Thank you. In my view, which differs entirely from Mr. Downey and Mr. Suchman, there are ways in which to determine a fair value——

Senator DANFORTH. 200 degrees? 250? [Laughter.]

Mr. VERRILL. Maybe 300. There is a way to find a fair value in these investigations, which is sufficiently precise for the kind of purpose that we are developing a fair value. There is in my view, though, no single benchmark that will yield a satisfactory result in all nonmarket economy cases. The products from these economies are likely to be too diverse, the conditions of trade too varied, and the potential adjustments in the various products involved in a comparison too numerous to permit rational dispute resolution in every case by resort to a single benchmark.

This, in fact, is the problem under the existing procedure where the search for a surrogate price often leads the parties to an investigation and the Department on a merry chase for a willing and cooperative surrogate that consumes much, if not all, of the investigatory period and leaves little or no time during the statutory time constraints for serious debate on the critical issues such as adjustments of the products involved and the comparison alike.

Are there other kinds of circumstances of sale that are to be taken into account? In my view, though, the remedy to this problem is not to mandate a single benchmark, but rather to require procedural changes that would ensure in every case involving nonmarket economies an early selection of valuation methodology. This early selection procedure would give all the parties to an investigation an opportunity to litigate the issues involved and to

bring to bear the fruits of advocacy which, as I understand it, was one of the objectives that Congress adopted in 1974 and 1979 when procedural requirements were significantly enhanced.

I advocate this position of an early decision and a combination of benchmarks because my experience with these cases has convinced me that an array of valuation options is essential to rationally resolve these cases. This array is already generally authorized in the law, which refers to three benchmarks—surrogate prices, import prices, or constructed values.

I believe that there are cases where a surrogate price will be available and where that is a good option. Europe uses this system extensively, and it has worked there; and it has worked here in the past, too.

There are also cases where a basket of import prices will be a viable alternative. In steel products, there are special steel summary invoices that contain very specific data that could be used in appropriate cases as benchmarks. This is not, however, the case with all products where you have generally available Customs data that is too diverse for any meaningful comparison.

I think there are inevitably going to be cases where the most cogent result may well be based on a value constructed, from a market economy cost base or from the nonmarket economy factors of production, including capital as valued in a market economy where, for example, a product under investigation is a commodity, where worldwide excess capacity has depressed prices everywhere to unacceptably low levels. Then, the use of import prices or surrogate prices would not be appropriate.

This was, in my view, probably the case in the steel industry a few years ago when worldwide prices for steel were depressed everywhere because of the capacity excesses throughout the world. I think these examples demonstrate why a single benchmark is not appropriate and why there ought to be an array of opportunities available to the Department.

I would like to comment on the notion of the lowest import price or the notion that we use the U.S. price less some percentage. These solutions have always bothered me because they assume the nonmarket economy producer is as efficient as the most efficient producers in the world, or the U.S. producer, which I don't believe is consistent with most experience or knowledge of nonmarket economy production. Moreover, these solutions give the nonmarket economy, it seems to me, a pricing advantage in the United States markets that we deny producers in Mexico and Venezuela or any other market economy.

No producer in those countries has the advantage of the lowest import price as its benchmark. Instead, they have to live with the antidumping law as we have it. I don't think we can justify, as a matter of trade policy, such differential treatment for our friendliest trade partners.

The second part of this question is whether the antidumping act, with a price-based remedy, should be the only one. I believe it should not. I believe that the decision of the Court of Appeals or the Court of International Trade in the Continental Steel case, in which I acted as counsel for the domestic interest, was correct.

I think that the information that was verified by Mr. Kaplan when he went to Poland demonstrates that you can identify export subsidies with clarity and precision in nonmarket economies, and the information in my prepared statement, which I submit for the record, is derived from that record. And I believe that that demonstrates clearly that where you have subsidies that are clearly within the definition of our law and they can be quantified, why make any exception for nonmarket economies? Thank you.

Senator DANFORTH. Thank you, sir. Mr. Cunningham.

Mr. CUNNINGHAM. Mr. Chairman, let me deal with the question, with (a) and (b) in reverse order and answer (b) "yes." I think it should be the exclusive remedy.

And let me begin my discussion of that with the point that you yourself made. I think you are quite perceptive when you note that whatever we have been doing throughout the history of our regulating trade with nonmarket economies has been artificial, in one form or another, and there is a very good reason for that. We have a market economy here in the United States. From the standpoint of our economy and competition in that economy, a foreign country from which these goods emanate has done something artificial. It has created an artificial, from our standpoint, set of rules.

That necessitates an artificial test for the entry into our economy under fair competitive standards of goods from that nonmarket economy. You are really talking one type of analysis. You are not talking a separate type of analysis for subsidies and for dumping, when you are dealing with a nonmarket economy. It is really all one question, and the government of that country has made it an artificial question by its own actions. And that is why I think a single test is appropriate. That test in my view should meet three standards.

First, it should be administrable. I underline that because I think the bill before you now needs the change in that regard. An administrable test as Mr. Kaplan testified earlier today must focus on single producer standards, not averages of prices from a number of producers.

And as you think through that issue, please don't think steel; don't think ammonia; don't think grain or some other fungible commodity. Think video cassette recorders; think, as you yourself pointed out, automobiles; differentiated products sold also on widely varying commercial terms. Think of the financing term differences in sales of automobiles—these pose massive difficulties in establishment of a really meaningful average standard.

Now, that use of a single producer standard, though, gets you to a problem with the next criterion that I want to deal with.

Your statute should strike a reasonable compromise between the need to protect against uneconomically low prices from the NME country and the desire not to penalize unduly a nonmarket economy producer simply because he happens to be in a nonmarket economy; and Art Downey phrased the problem very well. You don't want to be choosing between the question whether the nonmarket economy is the most efficient or the least efficient in the world.

I propose a test in the alternative which deals with that problem, and that is that you start where Commerce starts with the normal

test being the price charged in the U.S. economy by the lowest priced importer, but you say to yourself that that might be an abnormally low price. That might be a price that is way below any reasonable estimate of what the nonmarket economy producer's costs and prices should be. So, let's put a governor on it.

Let's put a limit on it, and let's say that we will use that price only if it is no more than—and I took a figure out of the air—15 percent below the price of the largest volume U.S. producer. Alternatively, one could take the largest volume importer as another governor. But the idea would be that in each case you would look at a single producer test, but ensure that the one you ended up with was not an outrageously or abnormally low one.

That also, it seems to me, brings you to the satisfaction of what I think is the third major important criterion here; and that is that you need a standard that lets a U.S. industry know whether it is going to have a winnable case when it brings a case under the statute or whether it is throwing $200,000 to $500,000 in legal fees down the drain for no benefit. You need to let both U.S. businessmen who deal with nonmarket economies and exporters in nonmarket economies have a basis for saying: When we set up our deal, are we going to be in violation of this law or not?

This standard is predictable and ascertainable. I think those are important criteria. I would like very much to work with the committee staff on achieving those goals in the statute.

Senator DANFORTH. Thank you, sir. Mr. Suchman?

Mr. SUCHMAN. You know, Mr. Chairman, I am sitting here listening to this, and I can't help but wonder whether or not Mr. Downey's and my position, as opposed to Mr. Cunningham and Mr. Verrill's, might not have been determined by the fact that both Mr. Downey and I spent considerable time in the U.S. Government trying to administer these statutes; and therefore, we have developed a certain cynicism about their administrability that Mr. Cunningham was just talking about.

But to pass on specifically to your question, if we are to assume a price-based tests as far as I am concerned, the one that is least arbitrary would be one that Mr. Verrill touched upon, that is, a cost of production analysis which uses the factors of production in the country of production but prices them in some market economy country.

The problem I have with it is that under current law it falls under the constructed value provision which, as you know, contains some very arbitrary add-ons for general selling and administrative expenses and profit which almost guarantee that any poor soul who finds himself in a constructed value situation is going to be found to be dumping.

So, if you are asking me what would be the perfect price-based test, I would say do a cost of production, leaving out these arbitrary—or constructed value, leaving out these arbitrary 10 and 8 percent add-ons.

But I again reiterate, I don't think that is the way we ought to go.

Passing on to your second question, I guess that if you leave the present law in place or you make the kinds of amendments that have thus far been seriously considered, you don't need to worry

about whether or not it is going to be the only remedy because it is going to be the one that is going to be used. Nobody is going to use 406 when they have a dumping statute with a much lower standard of injury and with a requirement for showing unfairness, which is relatively easy to show, where you get PRC candles with 135 percent dumping margins.

My feeling is, as I said before, that we need to rethink the whole thing, that we need to come up with a market disruption standard which is not so simple as to simply throw out the unfair trade practice test in the present dumping and countervale laws and leave the material injury, but not so difficult as the present 406 or 201 which, with the amount of discretion and susceptibility to influence that there is, makes it very unattractive to potential petitioners.

Senator DANFORTH. Thank you. Mr. Downey.

Mr. DOWNEY. Thank you, Mr. Chairman. As you know, the chamber does not favor any price-based approach or standard. So, answering this third question, is awkward.

As Mr. Cunningham did, let me address the second part of it first. Should there be an exclusive remedy? Yes, there should be. He is correct. It makes no sense to have multiple remedies when the issue is singular.

On the first part, what should be the benchmark? I believe Mr. Suchman is correct, and I think others would agree. Theoretically, the most pure answer, once you are in the nonsense of trying to find price, the most pure answer is the Polish golf cart type situation. Take the factors of production from Poland, employ them in Spain, and that will give you the nearest approximate identification of what it would cost in Poland to make a golf cart if it was a market economy. You get a relatively precise answer with a relative amount of fairness, but it is nonsense.

It is nonsense because it is cumbersome; it is very elaborate. You have the add-on problems that Mr. Suchman addressed. It is just an exquisite—exquisite—result and process, theoretically brilliant, but makes no sense in the real world. The other approaches of using import price, average import price, lowest import price, don't work either, I believe, in part for the reasons Mr. Cunningham said. Try not to think about steel or a fungible product. It gets very cumbersome when you are dealing with differentiated products, or when your array of importers is very small.

Chinese candles and German candles are the two candle exporters to the United States. How are you going to deal with the average import price or the lowest price? Do you therefore assume that Germany is like China? No; it doesn't make sense. This is the problem—the essential problem—of trying to deal with a price system.

I cannot agree with my colleague, Mr. Verrill, on the desire for flexibility. We all would like to have the flexibility, but it runs right in the face of an important principle that I think we all agree on and that Mr. Cunningham stressed: Predictability. Let the U.S. industry know if it has a winnable case. Let the foreign exporter know that it can make the deal with the American importer, and it will work. You can't do it if you achieve this golden flexibility, which means you don't know if you are going to have a surrogate, you don't know if China is going to be equated with Paraguay, you

don't know if you are going to use a basket of prices—lowest import or whatever.

You can't understand that in advance. International trade travels on predictability. This kind of flexibility runs in the face of that. An injury-only standard is something that is as predictable as anything else. Thank you.

Senator DANFORTH. Thank you, sir. And now, to weave these threads into the fabric of the trade laws. Senator Heinz? [Laughter.]

Senator HEINZ. Is this going to result in some kind of rope? We hope. One question I would like to ask Mr. Suchman and Mr. Downey, who have been on the inside looking out: We had someone earlier who was on the inside looking out currently, namely Mr. Kaplan with the administration. He has to administer this kind of thing and says that a pricing standard is administrable.

Where does he go wrong if he is in that hot seat right now, where you allegedly spent long steaming hours?

Mr. SUCHMAN. With all due respect to Mr. Kaplan, I suppose that when I had the job, if I had been here testifying, I probably would have said the same thing. Your perspective tends to change when you are no longer constrained by the interagency process and all of the pressures that applies to one. I think that if you were to canvas——

Senator HEINZ. So, he is mouthing the State Department?

Mr. SUCHMAN. I wouldn't say that. If you were to canvas all of the former Deputy Assistant Secretaries who have administered the statute, I think that you would find, if not unanimity, certainly a large majority would agree with me.

Senator HEINZ. I don't think there is any disagreement that—as Mr. Downey explained about the constructing of the Polish golf cart in Spain—was something of an exquisite torture as well as an exquisite intellectual exercise; but have we ever tried to use the price-based standards of the lowest free market producer, whether or not it is constrained, as Mr. Cunningham suggests? Was that ever an option?

Mr. SUCHMAN. Obviously not because the statute wouldn't have authorized you to go out and simply find the lowest of anything or the average of anything you had. You had to find a surrogate, and usually the problem was to find one who was producing the product, was in a similar stage of development, and had a producer who was willing to give you the information. The problem with all of these schemes, however, from an adminstrable point of view—leaving aside the equity of it—is that you have to find the information and you have to verify it; and you have to get someone who is willing to give it to you.

I do not believe that it is possible to use import data—raw import data—in a dumping analysis, not if you are going to do it in any kind of an equitable way. You have to get the cooperation of the producer.

Senator HEINZ. Let me ask Mr. Downey: Do you have a comment on this question, Mr. Downey?

Mr. DOWNEY. I thought you were asking me the same question.

Senator HEINZ. I would be happy to have your answer.

Mr. DOWNEY. I will give you a very, very short answer, on the administrability first. A year and a half ago, the chamber arranged an inhouse, off-the-record conference at which members of your staff were also present, and all of these gentlemen were present.

We can't give you the transcript because it was off the record, but I can assure you that, as Peter Suchman said, every single former administrator of this system said it is not administrable fairly. That is the point. You can administer any law, but is it fair? Is it predictable?

Everyone of them said "no"; and literally, my quotation before of a "crap shoot" was a quotation out of that conference. You can select a number. The margin of error is so wide, though, in picking a comparable country, how close is Poland to Spain? All right, you have a margin of error of 15 percent when you are dealing with a product; there is so much differentiation in quality and all the terms. You have to make adjustments, and you are comparing all of those; and you get another margin of error of 10 to 15 percent. And yet, you end up with a 14.76-percent margin. It makes no sense.

So, I do not believe it is administrable. All those who have administered it—and some have been inventive. You know, the Polish golf cart sequence was brilliant theory; creative people worked on it, but it is not administrable fairly.

Mr. SUCHMAN. Senator, if I could——

Senator HEINZ. I am about to run out of time. Let me ask one other question, and then maybe there will be time for a second round. I want to ask Mr. Cunningham about something Mr. Verrill said. Mr. Verrill suggested that you needed a number of methodologies, and you have got basically three in the law now.

Suppose we simply added—and not necessarily for this—another standard to the law which was either an average or a lowest or a free market country import price? We would not argue over the average one, which is in the bill, or the lowest, which the administration wants; but we just add to that a fourth methodology for use? What would you think of that?

Mr. CUNNINGHAM. My problem with that is that it would aggravate what I see as one of the great dangers in nonmarket economy trade cases, which is that when you introduce discretion—and that would be a way of introducing discretion because you allow them to pick among methodologies—when you introduce discretion, you provide a vehicle by which the tendency that exists for the politics to overwhelm the merits of the case can take effect, and you don't get a result based on the merits.

Back in the Polish golf cart case, as Mr. Verrill knows well because he dug up the papers from the State Department that demonstrated this, the administration inquired all around the world to try to find a surrogate producer which would meet a standard they had in mind. What standard was that? One that would have a price low enough to show no dumping. What you want is a standard that does not allow the administrator to pick and choose, that tells them: You have got to do something. And once you have done that, let the chips fall where they may.

Senator HEINZ. I would like to follow up on that, but my time has expired.

Senator DANFORTH. Go ahead.

Senator HEINZ. Thank you, Mr. Chairman. I will be brief.

Mr. VERRILL. Senator Heinz, could I make a comment on that? I am the proponent of the array of valuation methodologies. I was also involved in the Polish golf cart case from the very beginning.

Senator HEINZ. Is there anybody who hasn't been involved? [Laughter.]

I understand it was lengthy and complicated.

Mr. VERRILL. I can lay claim to having filed it and probably caused all this trouble; but I think that adding an additional standard would not be a bad idea. I am aware that adding discretion to the Commerce Department raises the scepter of intervention politically, and I know that is the possibility. I think it is going to happen if the issues are sufficiently serious, no matter what kind of constraints we impose. I do believe that the Commerce Department is an administering authority; and I think, with guidelines, it can administer a statute that does provide for discretion.

I also think, and my prepared testimony articulates this in more detail, that there ought to be a procedure at the outset of an investigation where these issues could be ventilated, an early decision procedure that would permit all the parties to an investigation to get together at the outset and resolve the issue of what is the proper methodology.

I know there are objections to this, based on practicality and the like; but I think they are solvable problems and, with some modification of procedures, could be made even more solvable.

Senator HEINZ. Let me ask Mr. Downey and Mr. Suchman this Are you basically for these kinds of issues being settled on a political basis? As you have described your solutions which have very large elements of discretion in them, I can't see any other basis on which they are going to be settled? And second, since they are going to be done—if I am right—on a political basis, you are going to end up with quantitative restraints, which kind of settles nothing. And it makes somebody either happy or less happy as the case may be. Mr. Downey.

Mr. DOWNEY. Senator, I've failed to explain our proposal. I didn't hope to persuade you, but I have just failed to explain it.

What we are suggesting does not involve politics, quite to the contrary. What we suggest is a system that is virtually nondiscretionary by the President or USTR. When a U.S. industry has a complaint, industry standard, after a preliminary determination that there are reasonable grounds to find some injury, then USTR is given the task to go fix the problem. The result may be an increased tariff, or it may be——

Senator HEINZ. No. I understood your proposal; but the problem is, if you are going to go any of the pricing routes, you are back to your point that, if I understood you correctly, you can't do any of those. So, even though your proposition sounds on its surface like there are a variety of remedies—you can have a countervailing duty or an antidumping duty—isn't the practical effect of it in the real world a quantitative restraint?

Mr. DOWNEY. No, sir, because USTR and the foreign exporter would agree, hopefully, on a remedy, whether it would be a quota

or a price-based system, a tariff, or a combination. Something that will fix.

If the U.S. industry is uncomfortable with that and it feels that it can't resolve it and it can't live that way, and it will be still injured, it can go to the ITC, nondiscretionary, and the ITC will make that remedy sufficient to satisfy the U.S. industry.

Senator HEINZ. So, you have two political appointees, the Secretary of Commerce and the USTR——

Mr. DOWNEY. The Secretary of Commerce is not involved. It would be USTR; and if USTR cannot reach an agreement with the foreign country, then it is the ITC that makes the decision.

Senator HEINZ. I misunderstood you. I thought that at some point when a remedy was about to be adopted, that somebody decided, well, we will try and do a quota or a duty or something. Who does that?

Mr. DOWNEY. The USTR, which is familiar with negotiating trade arrangements, would try to reach an agreement with the foreign exporter on a remedy that would satisfy the American industry and protect it and sufficiently.

Senator HEINZ. And the foreign exporter says: Heck, I really like the situation the way it is.

Mr. DOWNEY. Then, USTR says OK; if you don't want to make a deal, then we go back to the ITC and say: Sorry we could not fashion a remedy. Then you—ITC—will fashion a remedy that will protect the American industry.

And the President or USTR has no discretion to play foreign policy in this. That remedy——

Senator HEINZ. You would eliminate any Presidential discretion in the application of the remedy recommended by the International Trade Commission?

Mr. DOWNEY. Then you may have to have an ultimate serious——

Senator HEINZ. I am just asking what your proposal is. Either there is discretion or there isn't. Which is it?

Mr. DOWNEY. We have proposed only extreme national emergency discretion, far less than is present now; very close to what it is in dumping and not like it is in 406. Just only for emergencies—serious national concerns—but otherwise, no discretion. It would be the ITC remedy that ought to satisfy the domestic industry. No, it is not a foreign policy game playing at all. There is no administration involvement.

Senator HEINZ. Thank you, Mr. Chairman.

Senator DANFORTH. Gentlemen, thank you very much for your testimony.

[The prepared written statements of Messrs. Cunningham, Verrill, Downey, and Suchman follow:]

STATEMENT OF

RICHARD O. CUNNINGHAM

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

May 15, 1986

STATEMENT OF RICHARD O. CUNNINGHAM

My name is Richard O. Cunningham. I am a partner in the law firm of Steptoe & Johnson, and I am appearing on my own behalf. I have been working in the area of trade law for eighteen years, and in my practice I have represented both American companies seeking relief and foreign companies defending such cases. In representing these various clients, I have had extensive experience with the U.S. laws dealing with trade with nonmarket economy countries (NMEs). I am testifying, however, not to present the views of any of these clients or of the firm, but rather to present my own views as a practitioner concerned about the failures of the present trade laws in this area. From my experiences I have reached the conclusion that reform of these laws is badly needed, and the artificial pricing concept embodied in S. 1868 constitutes an important step in the right direction.

Both section 406 and the present provisions in the antidumping law and regulations dealing with trade with nonmarket economy countries are in major need of reform. I have recommended, and continue to recommend, the adoption of an artificial pricing test as the fairest and most effective standard for preventing unfairly low pricing of NME imports. The present statutory mechanisms are unworkable and yield wholly unpredictable results. They provide neither an adequate vehicle for U.S. industries to obtain relief nor meaningful guidance to U.S. businesses that wish to trade with nonmarket economy countries.

The important virtue of a properly drafted artificial pricing approach is that it sets forth a clear, objective standard for determining whether relief from nonmarket economy imports is appropriate. It can provide what current law lacks: guidance for U.S. businessmen as to when a viable case can be brought and as to how trade arrangements should be structured. It has the further benefit of enabling nonmarket economy exporters to understand clearly the rules that apply to U.S. trade with their countries.

My testimony today will discuss some of the special problems posed by trade with nonmarket economy countries and will analyze the inadequacy of present U.S. laws in dealing with those problems. Finally, I will discuss the ways in which the artificial pricing concept adopted in S. 1868 would deal more fairly and effectively with the problems that arise from NME trade and will propose several changes to S. 1868.

THE SPECIAL PROBLEMS OF TRADE
WITH NONMARKET ECONOMIES

Trade with nonmarket economies is neither inherently undesirable, nor something that should be discouraged. Rather, such trade offers potential economic and political benefits for the United States, provided we recognize and deal both fairly and objectively with certain problems and risks inherent in that trade. Those problems and risks can be grouped into two basic categories:

-- First, the risk that the nonmarket economy government may engage in deliberate and predatory practices aimed at markets or industries in the United States.

-- Second, the possibility that the normal operation of the nonmarket economy may confer upon its exporters certain "artificial" advantages -- "artificial" in the sense that such benefits are not available to U.S. firms which must compete against imports from the nonmarket producers.

The danger of predatory practices in exports to the United States by nonmarket economies was dealt with at considerable length in this Subcommittee's Report on Section 406 of the Trade Act of 1974. In that report, the Subcommittee expressed concern about two possible types of predatory export practices:

First, it was pointed out that the government's control of the factors of production in a nonmarket economy gives that government the ability, if it so chooses, to marshal the resources of that economy rapidly and to concentrate them on a flooding of an export target market, with the resultant destruction of the domestic industry in the target country. I must confess, however, that I would be hard-put to cite a specific instance in which such a flooding of a United States market has occurred. Be that as it may, there are ample weapons in the arsenal of U.S. trade laws, even apart from the present section 406, which are capable of dealing with such a threat if it should materialize. These include the Escape Clause and the "critical circumstances" provision of the antidumping law (which would also be applicable to a proceeding challenging "artificial pricing" under S. 1868). This latter "critical circumstances" provision is particularly important in dealing with the threat of a "flooding" of a U.S. market, since these provisions appear in our statutes dealing with unfairly

low import pricing. I doubt very much that a "flooding" would ever occur -- or indeed could ever occur -- unless the flooding were accomplished by means of unfairly low export pricing.

This brings me to the second danger foreseen in the Subcommittee's report on section 406. A nonmarket economy exporter, the report noted, is not governed by the same profit motivation as are its U.S. competitors. Accordingly, the potential exists for the nonmarket exporter to sell into the United States at unreasonably low prices that bear no relationship to realistic costs for the purpose of putting its U.S. competitors out of business or dominating U.S. markets. If there is a real threat of predatory practices by nonmarket exporters, it seems to me that the threat lies in the area of unrealistic pricing, rather than solely in the area of volume of imports.

Moreover, the problem of unrealistic pricing of nonmarket economy imports goes beyond those instances where such pricing would arise from predatory motivation. Much more frequent is the situation where the normal, everyday operation of the nonmarket economy may produce export prices that are artificially low. In a nonmarket economy, numerous factors may operate to bring about this result. For example, there is the previously-mentioned absence of a profit motivation for nonmarket economy firms. The government of the nonmarket country may desire exports as a means of maintaining or increasing employment levels, or of earning hard currency to buy needed imports.

Even where nonmarket economy firms seek profits, moreover, their cost structure may be unrealistically low because of the intervention of the government in the economy. Wages, or perhaps the cost of raw materials, may be priced by the state at unrealistically low levels. Energy prices are another major cost factor that may be kept artificially low by the state. In addition, the influence of state planning may result in the construction of manufacturing facilities that are much more highly automated than could be justified in a market economy with the same low labor costs. For all of these reasons, U.S. producers may legitimately complain that the prices charged for imports from the nonmarket economy are artificially low because they are not based upon the same free market considerations with which a U.S. producer must deal.

Thus, the true nature of the problem with which the United States must deal in trading with nonmarket economies is pricing -- the fact that those economies operate in a different manner from ours, a manner which can produce artificially or unrealistically low prices. What is needed is a statute that governs pricing conduct in imports from such countries. Any such statute should satisfy the following requirements:

1. It should establish pricing criteria that are clear and objective, so the foreign exporter knows how to price its U.S. sales and the affected U.S. industry knows when it does or does not have a meritorious case to bring.

2. It should be nondiscretionary, so the results of trade proceedings will be determined on the merits, and not by domestic or international political considerations.

3. It should be administerable. The pricing standard should be constructed in such a manner that it can be investigated and determined by the administering authority within a reasonable time period, using the resources available to the administering authority, and with a high degree of confidence the results obtained in that investigation will be accurate.

4. Finally, it should be a standard that, while ensuring against artificial pricing, will not in itself be an "artificial" standard. It should be based upon real world considerations, and it should not be a standard that will automatically exclude nonmarket imports from the United States.

I support the concept of S. 1868. With certain important modifications, which I will enumerate today, this legislation would meet the criteria I have just listed. As discussed below, neither the present section 406 nor current application of the antidumping law to nonmarket economies meet these tests.

II. INADEQUACY OF PRESENT U.S. LAWS TO DEAL WITH TRADE FROM NONMARKET ECONOMY COUNTRIES

A. Section 406

While section 406 of the Trade Act of 1974 was enacted to provide an additional mechanism for relief to

domestic industries if rapidly increasing imports from Communist countries disrupt domestic markets, no relief has been granted in the history of that provision. Section 406 has been equally unhelpful to U.S. importers, because neither the statutory provisions nor the ITC decisions under section 406 set forth any standards to enable the importer to know that its transactions with nonmarket economy countries comply with U.S. trade laws. Finally, proceedings under section 406 are very unpredictable, extremely costly, and heavily influenced by political and international policy considerations purportedly outside the scope of the statute.

The section 406 cases have dramatized the impracticality of dealing with Communist country imports by means of a law that makes the ultimate decision discretionary and in which a meaningful standard is absent. The fact of life is that politics and diplomacy overwhelm economics and trade policy where discretionary decisions are made on Communist country imports. But these are improper considerations in the decision of trade relief cases. If the President feels that economic sanctions are necessary for security reasons, he should invoke the National Security Amendment rather than pretend to apply section 406. Yet as long as discretionary trade relief laws are available, the reality is that the Executive Branch will twist those cases to serve diplomatic ends rather than their true statutory goals.

At one point during my representation of Occidental Petroleum in the Russian Ammonia investigation under section 406, I asked myself: How would one advise a client who wanted to structure a trade agreement with a Communist country in such a way as to comply with U.S. law and insulate himself against import restrictions? I came up with the following list of recommendations:

-- Have the agreement reviewed in advance by all relevant U.S. agencies.

-- Obtain the approval of all relevant agencies.

-- If possible, get the endorsement of the President himself.

-- Sell the imported product consistently at or above U.S. market prices.

-- Look for customers who, because of their peculiar situations, need an offshore source of supply and would not in any event buy from U.S. producers.

The problem is that Occidental did all of this. Yet its agreement was still challenged and came within inches of being destroyed by a section 406 case. There must be a better way of dealing with nonmarket economy imports.

In summary, the cases have demonstrated that proceedings under section 406 are subjective and likely to be extraordinarily influenced by foreign policy considerations. Moreover, these very costly proceedings have never provided any relief to domestic producers, while at the same time they have made U.S. companies wary of entering into legitimate transactions with nonmarket economy countries. Section 406 should be repealed.

B. The Antidumping Law

The antidumping law, as currently applied to state-controlled economies, is neither fair nor effective in dealing with the unique problems posed by trade with such countries. The methodology for determining fair market value set forth in the present regulations is ambiguous, vague and impractical in concept. The result is that the law is difficult to administer, provides no guidance to the U.S. businesses seeking to structure trade with nonmarket economy countries, and enables the administering authority to reach whatever result it wishes in any given case.

The current methodology for determining fair value departs sharply from the traditional (pre-1978) practice of the Treasury Department. Instead of looking to the distorted prices or costs of the producer in the nonmarket economy, Treasury prior to 1978 determined foreign value based on the prices or costs of the free-market producer most similar to the nonmarket economy producer in terms of items produced, degree of technological sophistication, and volume of production.

The current regulation rejects this "comparable producer" test and seeks to determine prices or costs based on those in a nonmarket third country which is deemed to be at "a level of economic development" comparable to the nonmarket economy. The only guidance in the regulation for identifying such a country is that comparability is to be determined by "generally recognized criteria, including per capita gross national product and infrastructure development."

The hierarchy of approaches to be used to determine fair value is by no means clear from the regulation, and Commerce Department practice has done little to clarify this point. Apparently, if no comparable country can be identified, the prices or constructed value are to be determined from another market-economy country, "suitably adjusted for known

differences in the costs of material and labor." If, however, a comparable country can be identified but similar merchandise to that under investigation is not produced there, a constructed value approach based on hypothetical costs of production is to be employed. Apart from the ambiguity of the regulation, it provides no objective standards by which a "comparable country" is to be selected and thus allows the administering authority unfettered discretion in making that determination.

Not only does the vagueness in the regulation increase the likelihood of influence from foreign governments upon the restricted decision-making of the administering authority, but the effect of the "comparable country" methodology in the regulation is affirmatively to favor importers from nonmarket economy countries. The reason that the methodology in the regulation has this effect requires a bit of explanation. The country where you will find an exporter comparable in size and sophistication to the Communist exporter is likely to be a country that is more advanced -- and therefore where prices are higher -- than a country "comparable in terms of economic development" to the Communist country. The reason is that the Communist country government often creates an exporter which is larger and more sophisticated than one would normally expect to find in that country. The goal is to earn hard currency by increasing exports, and therefore the government wants as large and as sophisticated a producer as possible. In a free-market economy comparable in economic development to the Communist country, on the other hand, producers would tend to be smaller and less sophisticated, both because the size of the domestic market would not justify a large-scale producer and because low labor rates would make a high degree of automation unnecessary.

Thus, what Commerce relies upon under this regulation is not the normal prices and costs that would exist if the exporter were located in a non-state-controlled-economy country. Instead, Commerce uses the significantly lower prices that prevail in a country where the exporter in question would not normally be located. The net effect of this is to produce a price comparison that is more beneficial for the exporter -- more beneficial precisely because of the involvement of the government.

The second approach in the regulation, which is to be applied when a comparable country cannot be identified, ignores the economic realities of the nonmarket system. Under this approach, the prices of a surrogate producer in a non-comparable economy are to be adjusted for known differences between the nonmarket economy production. This is impossible to apply for the same reason that the traditional antidumping analysis cannot apply to imports from nonmarket economy countries. Because of cost distortions due to government

involvement in the activities of the nonmarket economy producer, its true costs are not known.

In recent years, yet a further difficulty has arisen, one which makes it extremely difficult for Commerce to utilize the prices of any surrogate producer. Exporters in free-market countries have come to realize that giving their home market price data to Commerce for surrogate use in an NME dumping case creates a possibility that a dumping case based on the same data might be brought against that free-market exporter. This actually happened a few years ago, when a Finnish steel producer which had agreed to be the surrogate in a case against Romania found itself subjected to dumping duties based on the surrogate data it had provided. In at least one subsequent case in which I participated, a foreign exporter cited the Finnish situation as its reason for refusing to cooperate as a surrogate.

This problem is fundamental -- and, in my view, fatal -- to the current surrogate methdology. The only surrogates which can feel safe in providing data to Commerce are those which either have no intention of exporting to the United States (rarely to be found) or those whose home market prices are as low as the prices prevailing in the U.S. import market. But the latter company's prices would show no dumping in the NME case. Ironically, we have reached the point where Commerce has great difficulty finding any willing surrogate other than one whose prices will yield a no-dumping result in the NME case.

The now-insuperable difficulties with the surrogate producer approach are especially serious because the hypothetical cost analysis required by the present regulation for determining constructed value (when a surrogate producer cannot be found) is equally unworkable and illogical. Under the regulation, constructed value is based on the costs of producing the merchandise in a "non-state-controlled-economy country determined to be reasonably comparable in economic development" to the state-controlled-economy country if the specific "objective components or factors of production" incurred in producing the merchandise in the latter country were used. In other words, constructed value is based on "objective components or factors of production" valued in the surrogate country.

In addition to the obvious difficulties in applying this analysis, the analysis itself is fundamentally flawed. It is based on the incorrect assumption that the supply and demand and relative scarcity of the various cost components in the surrogate and state-controlled-economy countries are identical. Indeed, precisely because of the cost distortions due to government intervention in state-controlled-economy countries, the relative costs of components are not likely to be the same.

In summary, the antidumping provisions applicable to state-controlled-economy countries are simply unworkable. Because of the vagueness of the law, the cases are increasingly vulnerable to diplomatic pressures that tend to influence greatly the outcomes. While the vagueness and the current methodology inure to the detriment of the domestic producer, it also prevents the U.S. business community from knowing how to structure agreements with nonmarket economy countries. A new approach is badly needed.

III. AN ARTIFICIAL PRICING STATUTE SHOULD BE ENACTED, BUT S. 1868 MUST BE CHANGED IN SEVERAL IMPORTANT RESPECTS

While I would propose several changes to S. 1868, I believe that the artificial pricing concept adopted in S. 1868 is the best means of addressing NME dumping. It offers an objective standard that is tailored to the threat posed by NME imports -- uneconomically low pricing. Moreover, this type of approach can be drafted to give a better indication to the NME exporter of the price levels that the U.S. government may find to constitute dumping.

While I endorse the artificial pricing concept in S. 1868, I would like to propose a different benchmark for determining artificial pricing. In this regard, I submit that there are two initial considerations:

-- First, the standard should strike a balance between the need to guard against an uneconomically low price and the possibility that the NME producer might in fact, if its costs could be analyzed, be a relatively low cost producer.

-- Second, the standard must be one which can be administered effectively.

The standard in S. 1868, unfortunately, fails the second test. The reason is that it is keyed to an averaging of the prices of all "eligible" foreign exporters which sell into the U.S. market. While it might be possible to compute such a multi-producer average in the case of an absolutely fungible product (although even the differences in terms of sale would create serious problems), the computation is literally impossible in the case of manufactured products with differentiated features. Therefore, a single-producer standard is essential.

In the past, I have urged that the standard be keyed to the foreign free-market producer whose exports to the U.S. are lowest in price -- Senator Heinz's original bill. Others have argued that this gives the NME exporter too much "benefit of the doubt," failing to take account of the likelihood that -- absent NME government aid -- the NME producer would have relatively high costs.

Accordingly, let me propose a test in the alternative: The higher of (a) the weighted average of the import prices of the lowest-priced free market country exporter, or (b) a price 15 percent below the weighted average of the prices charged by the largest-volume U.S. producer. There are several benefits to this approach:

-- First, it preserves the focus on the single foreign producer with the lowest-priced exports to the U.S., but ensures that this standard will not be overly generous to the NME exporter or significantly out of line with pricing conditions in the U.S. market as a whole.

-- Second, the choice of the largest-volume U.S. producer ensures a relatively efficient producer and one whose prices reflect U.S. market conditions.

-- Third, the 15 percent differential is necessary to avoid the antitrust and protectionist dangers of requiring an importer's prices to equal or exceed those of U.S. producers.

-- Fourth, both standards are administerable, since each focuses on the prices of a single producer.

-- Finally, this test is consistent with the GATT Subsidies Code, which provides that the "method of comparison" for determining the margin of dumping by, or the amount of the subsidy from, NME imports must be "appropriate and not unreasonable." Moreover, the use of U.S. producer prices as a potential benchmark is permissible under the NME antidumping law and regulations. Both the legislative history to the Trade Act of 1974 (when an antidumping provision for NME imports was first

enacted) and Department of Commerce regulations explicitly permit reference to U.S. producers' prices as a basis for measuring foreign market value under certain circumstances.

If an artificial pricing standard is adopted, I strongly urge that it be made the exclusive standard of fairness for NME imports, replacing both the antidumping and countervailing duty laws. In an NME, the issues of dumping and subsidy are, in all meaningful senses, interchangeable and inseparable. Since the dumping and the countervailing duty laws were designed to measure deviations from the market economy standard, it is impossible to adapt them in a meaningful way to an NME. Accordingly, whether done by legislation or by the courts, I would urge that both the current dumping law and the current countervailing duty law be declared inapplicable to NME imports and that both be replaced by an artificial pricing remedy.

TESTIMONY BEFORE THE SENATE FINANCE COMMITTEE
MAY 15, 1986

CHARLES OWEN VERRILL, JR.*

I am pleased to appear before the Committee today to offer views on the application of the United States trade laws to imports from nonmarket economies ("NME") and to propose refinements to improve the procedural and substantive results of those investigations.

In my law practice, I have participated in a number of import relief proceedings involving both state enterprises and nonmarket economies, generally as counsel for United States interests. I am also adjunct professor of international trade law and regulation at Georgetown University Law Center. As a practitioner and adjunct professor I have heard, and myself expressed, criticism of the trade laws as they apply to the nonmarket economies and have examined numerous proposed alternatives. Many of these alternatives have been advanced in search of an "innovative," "simple" or "predictable" solution. In my judgment, however, these objectives while laudable, are incompatible with the complex issues raised by nonmarket economy trade. Such complexity is not, however, unique to nonmarket economy imports. Over the last century, Congress has adopted at least seven remedial statutes to deal with market economy imports. This array of

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remedies is designed in overall conformity with the General Agreements on Tariff and Trade ("GATT") to provide discrete import relief tailored to specific bilateral or multilateral trade factors that impact U.S. trade. Nonmarket economy imports require, in my opinion, the same diverse remedial opportunities.

For all of its deficiencies, the antidumping law directly addresses import pricing which is the principal domestic industry objection to nonmarket economy imports. It is a commercial fact of life that products from such countries are invariably sold at prices that are significantly below U.S. prices for the like product. Where such imports are injurious, the antidumping law provides a remedy that confronts the price issue head-on and strives to achieve a "fair-value" that once determined allows the nonmarket economy producer to sell without any quantitative restraint. And, because the remedy is prospective it does not punish pricing conduct prior to the initiation of proceedings.

There are conceded difficulties with the antidumping law, but I am persuaded that refinement of the fair value calculation, modification of the procedures and expanded use of the present settlement mechanism will eliminate much of the uncertainty and perceived arbitrariness that now characterizes these investigations. These changes would, moreover, continue the desirable policy of dealing with nonmarket

economy imports within the general framework of GATT Article VI.

An injury-only remedy, such as Section 406, is inadequate to deal -- in all cases -- with nonmarket economy imports. While increased tariffs are a possible mechanism for relief when the Section 406 criteria are satisfied (which has never happened), the natural and easier course is always a quantitative restraint. Quantitative restraints (quotas) do not address the price issue except indirectly for the simple reason that quotas usually become entitlements and selling the allotted volume becomes the objective whatever the price. This is illustrated by the fact that structural steel prices from the European Community declined dramatically (far faster than the dollar appreciation) after the EC countries agreed to limit exports to the U.S. in 1982. In order to fill their annual entitlement, EC producers became price leaders apparently choosing to reduce price rather than the volume of shipments.[1] Nonmarket economy producers are even more likely to follow this pattern given the general perception of the quality of their goods.

An injury-only test will invariably involve entanglement in such esoteric issues as the search for meaning in a causa-

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1. The U.S.-Japan automobile quota is an obvious exception that can be readily explained by the customer preference for the quality of Japanese cars whatever the price. This is unlikely to be the case where a commodity -- such as steel -- is subject to restraint or when imports of a nonmarket economy product of any type is restrained by quotas.

tion requirement that is "midway" between "a" cause (the antidumping standard) and the "substantial" causation requirement of Section 201. Moreover, since injury only remedies are antithetical to GATT principles, Section 406 necessarily confronts the domestic petitioner with the unpredictable role of Presidential discretion and the involvement of diplomatic and political considerations. This runs counter to the Congressional determination in 1979 to minimize the effect of these considerations in import relief proceedings. Congressman Vanik put the Congressional objective bluntly: "It is my hope that in the trade policies and actions of this Congress one of the things we do is take away these decisions from the silk hat crowd in the diplomatic department . . . ."[2] Since an injury only remedy in the end will always be influenced by the "diplomatic department" it should be a last resort.

Over the longer term, the United States should adopt as an objective the negotiation of a code that would give meaning to the GATT Article XVII requirement that state enterprises operate according to commercial considerations. State trading by market economy enterprises has become increasingly distortive of world trade and has similar characteristics to the trade by enterprises in nonmarket economies. GATT

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2. Cong. Record, July 10, 1979, at H 5551-5552; cited in Recent Developments in Countervailing Duty Law and Policy, a paper by Shannon Stock Shuman and Charles Owen Verrill, Jr., National Bureau of Economic Research Conference Report at 103 (1984).

Article XVII was designed to deal with both and should now be implemented.

I. THE ANTIDUMPING LAW SHOULD BE RETAINED BUT MODIFIED

The principal trade law remedy relied on to regulate the importation of goods from nonmarket economy countries[3] is the antidumping law. In these investigations, the International Trade Administration ("ITA") of the Department of Commerce ordinarily compares the U.S. import price of the nonmarket economy product with a "fair value" derived from the home market price of the same product in a market economy surrogate. For example, in the seminal Polish golf car case, where I was counsel to the domestic producers, the "fair value" of the Polish imports was derived by calculating the home market price of golf cars manufactured in Canada. Because the Polish price on sales of golf cars to U.S. customers was lower than this "fair value," the Treasury made an affirmative finding of dumping, or sales at "less than fair value."[4]

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3. The use of the phrase "nonmarket economy" is not intended to be pejorative: it describes these countries generally characterized as "state-controlled-economies" pursuant to Section 773(c) of the 1979 Trade Agreements Act, 19 U.S.C. § 1677b(c).

4. During a subsequent administrative review, Treasury abandoned the surrogate method and adopted the factors of production analysis described subsequently in these comments.

Over the years, commentators have criticized the surrogate methodology as an unrealistic -- even arbitrary -- benchmark. Difficulties in locating cooperative surrogates have multiplied, complicating investigations and diluting the procedural safeguards Congress carefully crafted in the 1974 and 1979 trade legislation. The question this Committee must address, therefore, is whether the current law should be abandoned or whether there are changes that could cure the major deficiencies without creating new problems of policy and implementation. In my view, the current system of establishing a fair value for nonmarket imports is neither so inequitable or unpredictable that it should be abandoned. Instead, there are refinements in the fair value methodology and the investigatory procedures that will in my opinion enhance the predictability of decisions and contribute to a rational resolution of these disputes.

A. Foreign Market Value

Section 773(c) currently provides that fair value in nonmarket economy investigations shall be determined by either: "(1) the prices . . . at which such or similar merchandise of a non-State-controlled-economy country . . . is sold either (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States, or (2) the constructed value of such or similar merchandise in a non-State-controlled-economy country

or countries . . . ."[5] The Department interprets section 773(c) to require that first preference be given to the price of the "like product" charged in a market economy country as the surrogate or benchmark.[6] Alternatively, the Department looks to prices charged in sales from a market economy to third countries. A third methodology, seldom utilized but nevertheless available, is to construct the value of the like product when manufactured by a producer in a surrogate country.

These referents have a common failing: they each require the identification and cooperation of a surrogate producer in the market economy country selected. This complicates the process of developing fair value because much of the time the Department has available to conduct investigations is consumed in the search for the surrogate. Cooperation is difficult to obtain because market economy producers are often unwilling to open their books to the Department's investigators and indeed run the risk that their own sales to the U.S. will be the subject of an antidumping investigation, which happened to a Finnish producer that agreed to be a surrogate. For these and other reasons, surrogates are often found only at the last moment, frequently after the preliminary determination, with the result that none of the participants in the investigation have an adequate opportunity for

5. 19 U.S.C. § 1677b(c).

6. See 19 C.F.R. § 353.8.

advocacy and the final determination is a surprise to everybody.

It has become increasingly apparent to me that the search for willing and cooperative surrogates has become so cumbersome that it is time to abandon the surrogate price as the preferred reference despite the theoretical appeal of a market-selling-price-based methodology. Instead, I urge the Committee to make it clear that surrogate prices are but one of several alternative benchmarks for determining fair value to be used only where it is clear early in an investigation that this methodology is practical. Alternative valuation methodologies would provide the flexibility needed to deal with the variety of factual situations these investigations necessarily involve. If this proposal is coupled with an "early decision" procedure that I describe later in these comments, much of the uncertainty and unpredictability of fair value determinations could be eliminated.

One alternative valuation method is the proposal advanced by Senator Heinz years ago (and now incorporated in S.1860) to base fair value on import prices into the United States of the like product from market economies. This idea has merit, albeit not as the sole solution, and in fact, is occasionally utilized by the Department under existing law.[7]

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7. For example, in Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 29,434 (1984), the fair value was derived from the U.S. import price of comparable wire rod imported from Australia. This information is readily available from Customs data and does not require cooperation from the

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Import prices should not, however, be the only reference available to the Department. Import prices of a specific product are often difficult to derive from customs statistics because of the mix of products, and the consequent varying prices, that occur in most TSUS items.[8] The ambiguity of generally available statistical data on import prices is especially pronounced where the product from the nonmarket economy is not fungible with the products imported from market economies. In these circumstances, numerous adjustments are necessary to achieve comparability which, of course, significantly impairs the utility of publicly available data as a harbinger of fair value.

For these reasons, I recommend that the Committee clarify that import prices may be used as the benchmark but only as one of the alternatives available for consideration. However, I would not restrict the Department to a "lowest import price" or to the import price less some percentage.[9] These arbitrary constraints would unnecessarily inhibit the

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(footnote continued from previous page)
Australian producer.

8. For example, TSUS 607.17 includes wire rods of various chemistry and quality with selling prices that range from $200 per ton to as much as $900 per ton. Since the entries from any country will almost always involve a mix of these products, the average Customs value is not a reliable guide to the import price of a given grade or type of wire rod.

9. Another recent proposal would base fair value on the U.S. price less a percentage. This would be questionable trade policy and difficult to administer since transaction prices are often closely held information.

Department's determination of an appropriate benchmark. Instead, the import price or even a basket of import prices should be an available alternative where there is a convincing showing that the imported products are like those under investigation and, in the circumstances of a specific investigation, are an appropriate benchmark.

Secondly, the Committee should endorse the factors of production methodology adopted by the Treasury in regulations developed as a consequence of reference problems that arose in the Polish Golf Car case. There, after the Canadian producer discontinued production, the Department was faced with calculating fair value based on U.S. prices because golf cars were not produced in any market economy country, thus ruling out surrogate prices or constructed value as benchmarks. To resolve this problem, Treasury calculated the fair value by pricing Polish labor and material inputs in a market economy.

While I objected to this methodology at the time, I am now convinced that in appropriate circumstances the factors of production approach has merit. In applying this methodology, the Department determines the hours of labor utilized in producing the product in the nonmarket economy, the number of electrical units utilized, the amount of raw material employed, etc., and values those "factors of production" in a market economy. Because labor costs, electric rates and material costs can be determined from publicly available

data, cooperation by a surrogate producer in the market economy is not necessary thus eliminating a major difficulty in present procedures. This infrequently used methodology, with certain amendments, is a rational alternative method of deriving a fair value particularly where the product involved has unique physical characteristics. A Polish golf car, for example, is likely to be sufficiently different from those produced in other countries that numerous adjustments will be required if the home market price of a golf car produced in a market economy is used as the surrogate.

To be viable, however, the factors of production method should be modified to require the Department to take into account the cost of capital and depreciation. These costs are not currently considered in computing fair value in factors of production analysis except under the general expenses category. This limitation is unrealistic since capital and depreciation are real costs that can easily be derived from market economy equity rates of return and the useful life of plant and equipment. Moreover, the factor values do not need to be calculated in only one country. Why not value labor in one country and materials in another?

In summary, the law should authorize the Department to examine a variety of criteria in determining the fair value of nonmarket economy imports. These could include: (i) market economy prices or constructed value where a cooperative surrogate is available, (ii) import (i.e., artificial) prices

if sufficiently discrete to permit a rational reference price without unduly complex adjustments, or (iii) the factors of production, amended to include costs of capital, where the available information in a specific product investigation permit such valuation. Further the law should specify that the Department is to make a determination in each case based on the unique characteristics of the product under investigation without any institutional policy preference for one of these methodologies.

I recognize that removal of the preference for prices in market economies as a valuation criteria would increase the Department's discretion, but this is precisely why an "administering authority" is needed to deal with the infinite variety of fact situations that are likely to occur and which defy a universal or predictable solution. This increased discretion should, however, be coupled with a requirement that the Department establish procedures at the outset of an investigation to identify the surrogate and fair value procedure to be utilized. Dealing with the parameters of this complexity early in an investigation would cure the uncertainty under current law where the selection of a surrogate or even the methodology to be utilized is often not made until late in the proceeding.[10] For example, procedures

10. This uncertainty is even more pronounced under Section 406 when proof of the statutory elements still leaves the parties in the dark about the outcome pending the President's decision.

could be adopted that would require the petitioner to identify in the petition a proposed fair value criteria and state the reasons why that criteria is preferred. During the initial forty-five day period after filing the petition, the parties to the investigation would brief the issues, inquiries would be made about possible surrogates by the Department and a decision could be reached on methodology from the choices available (surrogate or import prices, constructed value or factors of production).

The objections to this "early decision" procedure are likely to be practical. The Department will surely question whether surrogates can be located, or cooperation secured, in forty-five days. Questions concerning the product characteristics and production methods will be difficult to resolve in this period. I am convinced, however, that these problems are surmountable. If petitioners know they will be held to the early decision, prefiling practice will be relied on to parse out many of the problems likely to arise. In fact, the Department could adopt an "intention to file" procedure that would permit review of alternatives, with participation by counsel for the nonmarket economy producer, prior to the formal filing of a petition and initiation of an investigation. Informal pre-filing consultation with the Department is now routine and there is no legal objection that I can see to a more formal procedure. The adoption of an "early decision" would provide the parties -- petitioner and the foreign

producer -- with a far more realistic opportunity to debate the issues during the investigation without concern that a change in methodology or surrogate late in the investigation will lead to unexpected results.

These proposals will not satisfy those who long for a "predictable" pricing methodology that will serve as a guide to nonmarket economy producers that seek to enter the U.S. markets. While there is a certain appeal to predictability as a policy goal, I believe the arguments based on this notion fail to take into account the commercial realities of import pricing or the fact that even market economy exporters can never predict with certainty what would be the result of a dumping investigation of sales to the United States.

First of all, the only predictably "safe" price for an imported product from any economy is one that equals or exceeds U.S. prices which, of course, will rarely result in any market success. Therefore, the primary consideration in pricing imported products is the identification of a price sufficiently below the U.S. price to induce customer acceptance. If the price selected is below home market prices in the producing country, there is the risk of dumping charges. However, I doubt this is a prime consideration in the price setting decision. There are simply too many variables in the Department's calculation of fair value and U.S. price. Moreover, the multitude of adjustments in the fair value deter-

mination defy assurance that the price charged will not be challenged.

This is the same choice a nonmarket economy producer must make in setting U.S. prices. Of paramount importance is the selection of a price that will result in sales. If that price is below those charged by U.S. producers, there is always the risk of antidumping charges with the attendant uncertainty of result. But the risk is not entirely or hopelessly unassessable. Even under current practice, the risk can be evaluated by comparing the price to be charged with prices in other countries. In today's commerce, I find it hard to believe that a nonmarket economy producer could not get some idea of prevailing prices for a product in sales around the world and from that be able to assess the risk of antidumping charges being brought on sales to the Untied States.

Moreover, it is important to bear in mind that antidumping remedies are prospective: dumping prior to initiation of an investigation is not penalized. The filing of a petition serves to put the foreign producer on notice that there is a question about the pricing utilized, but no remedial action is taken until the preliminary determination which occurs a number of months later (in rare circumstances it is retroactive ninety days) which is certainly adequate time to adjust pricing or discontinue shipments to the United States. While it is true that a dumping finding establishes a margin

based on sales prior to the initiation of the investigation, the duty deposited is merely an estimate that is subsequently modified to reflect the actual differences between the fair value and the selling price at the time of sale. If the selling price is adjusted to fair value after the preliminary determination, there is no liability for dumping duties and estimated deposits are returned with interest.

Moreover, the Department has authority under Section 736(c)[11] to adjust the estimated margin during the ninety day period after the final determination if there is evidence that there has been a change in pricing to the "fair value." This procedure provides a means for avoiding the adverse consequences of a final less than fair value determination that is available to those exporters that are willing to adjust their prices to the fair value. There is legitimate domestic industry concern that this procedure fails to provide assurance that adjustments after the preliminary determination are permanent, but the fact remains that in a proper case a nonmarket economy producer can ameliorate the impact of an antidumping finding by adjustment of prices after the fair value is determined in an adversary proceeding.

The predictability argument is, therefore, a makeweight that ignores both the prospective nature of the antidumping remedy and the opportunities to adjust prices to offset any adverse consequences of a final less than fair value deter-

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11. 19 U.S.C. § 1673e(c).

mination that are already available. And, of course, even where there is a finding of less than fair value selling, a remedy is only imposed when the dumped imports are found to be a cause of injury to the domestic industry.

B. The Expanded Use of Settlement Procedures Would Enhance the Current Law

Current law provides an opportunity to settle antidumping investigations that is uniquely suited to resolution of nonmarket economy import trade disputes.[12] This potential is illustrated by the use of the statutory suspension procedures to resolve a 1981 antidumping investigation involving trailer axles from Hungary in which I was counsel for the domestic petitioner. The investigation was initiated after Rockwell International Corporation alleged in an antidumping petition that Hungarian trailer axles were being sold at less than fair value and were a cause of injury to the domestic trailer axle industry.[13] At the outset of the investigation, the Department selected an Italian producer as the surrogate,[14]

12. The comments in this section are elaborated in a paper I gave at Interface V, an International Law Institute Conference held in Pecs, Hungary, April 24-25, 1985, and soon to be published in the Conference Proceedings.

13. Truck Trailer Axle-and-Brake Assemblies from the Hungarian People's Republic (ITA Initiation Notice), 46 Fed. Reg. 46,152 (1981). Trailer axles are the passive axles on tractor-trailer combinations.

14. This early selection of a methodology and surrogate greatly enhanced the advocacy possibilities for both parties and opened the way for serious and informed debate on adjustments for differences in products and production processes.

which led to a preliminary determination that the U.S. price of the Hungarian axle was substantially below the adjusted Italian home market price by a less than fair value margin of 68.1 percent.[15]

After this decision was announced, counsel for the Hungarian producer initiated discussions with the objective of a "suspension of the investigation," under the antidumping "settlement" procedures that had been adopted in the 1979 Trade Agreements Act.[16] These procedures contemplate that the investigation may be suspended after the preliminary determination where the foreign producer agrees to offset completely the antidumping margin, or to cease imports or (in special cases) to reduce the margin by an amount sufficient to offset the injury.[17] Rather elaborate consultations are required in order to ensure U.S. industry participation in the process while at the same time limiting negotiations to direct contact between the U.S. government and the foreign producer.[18]

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15. 46 Fed. Reg. at 46,154.

16. See Section 734 of the 1979 Trade Agreements Act, 19 U.S.C. § 1673c. The implementing regulations are in 19 C.F.R. § 353.42.

17. Section 734(c), 19 U.S.C. § 1673c(c).

20. Section 734(e), 19 U.S.C. § 1673c(e). Absent U.S. government participation as the negotiating intermediary, there would be a clear risk of violation of the antitrust laws if a U.S. producer agreed on a price adjustment with a foreign competitor.

In the Trailer Axles investigation, the Hungarian producer offered to adjust prices upward to the "fair value" which was based on the Italian home market price. Accepting this proposal, ITA "suspended the investigation," finding that the agreement was in the public interest. Since the suspension became effective in the fall of 1981, the Hungarian producer has continued to file quarterly compliance reports which are monitored by the Department thus ensuring compliance with the pricing commitment made in the agreement. Having adjusted prices to the "fair value," the Hungarian exporter was free to sell axles without quantitative restraint and has in fact continued to ship substantial volumes.

This resolution, which directly addressed the pricing problem, is consistent with Article 7 of the GATT Antidumping Code[19] which provides for suspension of investigations without imposition of antidumping duties

> upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping.

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19. Antidumping Code, Article 7, paragraph 1. This Code is entitled: "The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to Antidumping Measures)." The Code was approved by Congress in the 1979 Trade Agreements Act. See 19 U.S.C. § 2503(c)(6). The "resolution" method has been extensively utilized in the European Community pursuant to the EC Antidumping Regulations. EEC Council Regulation No. 2176/84, Art. 10 (1984).

This paragraph is almost -- but not quite -- cloned in the U.S. antidumping law which requires either (i) complete cessation of imports, (ii) elimination of the margin by price increase, or (iii) reduction of the margin to eliminate injurious effects subject, however, to a very precise limit on the margin by which selling prices are permitted below fair value.[20]

The utility of the suspension procedures in U.S. practice is probably limited (inhibited?) by the restriction on acceptance of undertakings that eliminate injurious effects which is the one substantive difference between U.S. law and the Code. In my judgment, U.S. law should be revised to reflect more concisely the Article 7, Paragraph 1 obligation. An amended U.S. law would allow far more latitude in establishing an appropriate price level that would eliminate the injurious effect of dumping, thus enhancing the resolution of disputes, than is now the case. While this would enlarge the Department's discretion, the law now requires that there must be assurance that the price adopted will not lead to price undercutting or supression of U.S. prices[21] which is a far

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20. Section 734(c)(B), 19 U.S.C. § 1673c(c)(B), provides that the price adjustment must (i) prevent price undercutting or suppression and (ii) "for each entry for each exporter the amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries of the exporter examined during the course of the investigation."

21. See Section 734(c)(B), 19 U.S.C. § 1673c(c)(B), quoted (footnote continued)

more important protection than the mechanistic limitation based on a percentage of the fair value margin.

The conclusion that U.S. law could be revised to enhance settlement of nonmarket economy antidumping investigations seems compelling [22] Preservation of the "fair value" procedure in Section 734 as the predicate to settlement is necessary to establish the environment in which a negotiation can take place, but a greater degree of flexibility in ascertaining the level of import prices that would eliminate injurious effects (and would prevent undercutting or suppression of U.S. prices) would advantage petitioners and exporters because it would reduce the uncertainty that surrounds the surrogate procedure when carried to its conclusion. Of course, that procedure would remain available as an alternative when the parties to an investigation are unwilling or unable to utilize the suspension procedures.

II. AMENDMENT OF SECTION 406 IS DESIRABLE BUT IT SHOULD NOT BE THE EXCLUSIVE REMEDY

As I have argued in these comments, a reformed fair value methodology, "early decision" procedures and enhanced use of suspension agreements would best address the key pricing issue raised by nonmarket economy imports. While I

(footnote continued from previous page)
in note 26, supra.

22. The settlement procedures should also contain the option to utilize quantitative restraints in those situations where a quota would achieve an equitable result.

recognize that this system may not lead to an ideal solution in every case, I am convinced that these established procedures should not be abandoned for a remedy that provides relief based solely on a finding of injury. There is an institutional discomfort with "injury-only" remedies which is evidenced by the fact that Section 406 has been a dismal failure since enactment twelve years ago.

The amendments to Section 406 adopted by the House Ways and Means Committee -- while interesting -- do not give me any confidence that the amended remedy would be any more likely to effectively deal with nonmarket economy imports than has been the case in the past. The concepts proposed are untested and could lead to even more uncertainty and lack of predictability than at present. For example, imports would be disruptive if they are found to be an "important" cause of injury. This suggests that the nonmarket economy imports would have to be more than "a" cause but less than "a cause as important as" all other causes. How to objectively measure this level of causation seems likely to evade detection pending extensive litigation at the Commission and subsequent review by the Court of International Trade. The risk here, of course, is that the endless debate over the meaning of "rapidly increasing" in current Section 406 would be replicated as the Commission attempts to refine a new standard of injury and causation "midway" between the anti-

dumping/countervailing duty standard and that applicable in escape clause investigations.

Moreover, because of ultimate Presidential discretion over the result in Section 406, one can readily predict recurrence of the topsy-turvy results in a famous Section 406 case involving ammonia from the Soviet Union.[23] There, the ITC found injury to the domestic industry by a three to two vote. The President rejected the recommendation presumably because of domestic political considerations. (The Executive Order found that imports of low priced fertilizer were "critical" for domestic farmers.) A month later, however, the Soviets invaded Afghanistan and President Carter, seeking a means of taking action to demonstrate displeasure, tentatively adopted the recommendation of the ITC as a temporary measure and requested the ITC to make another finding of injury which would be necessary to full implementation of the restraints. However, this time the ITC, following a change in Commissioners, voted three to two that there was no evidence of injury under Section 406 even though the factual record was essentially unchanged.[24] This bizarre result is hardly a satisfactory way to either resolve trade disputes or as a diplomatic response to foreign government military adventures and can be expected to recur time and again.

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23. Anhydrous Ammonia from the U.S.S.R., Inves. No. TA-406-5, USITC Pub. No. 1006 (Oct. 1979).

24. Anhydrous Ammonia from the U.S.S.R., Inves. No. TA-406-6, USITC Pub. No. 1051 (Apr. 1980).

III. GATT ARTICLE XVII, WHICH REQUIRES STATE ENTERPRISES TO BUY AND SELL ACCORDING TO COMMERCIAL CONSIDERATIONS, SHOULD BE IMPLEMENTED

An unexplored mechanism for dealing with imports from nonmarket economy countries is the obligation under GATT Article XVII which requires signatories to insure that state trading enterprises make purchases and sales in accordance with commercial considerations. In other words, Article XVII requires that state enterprises buy -- and more important -- sell their products at prices that are consistent with private enterprise pricing. This commercial obligation, which is applicable to state trading in market and nonmarket economy countries that are GATT members, is uniquely suited to dealing with imports from nonmarket economies where most enterprises clearly fit the definition of "state trading enterprises." In fact, Article XVII was originally intended by the framers of GATT to deal with this specific problem.

While the term "state enterprise" is not expressly defined in Article XVII, it is clear both from the records of the ITO/GATT negotiating sessions and from subsequent GATT panel reports that Article XVII was designed to apply to trading organizations subject to varying degrees of government influence and control. For example, a report of the Havana conference (at which the final draft of GATT was completed) states that the term "state enterprise" was generally understood to include "any agency of government

that engages in purchasing or selling."[25] A GATT panel organized to review Article XVII later reported that "not only state enterprises are covered by the provisions of Article XVII, but all enterprises which enjoy exclusive or special privileges . . . ." Summing up, this panel defined "enterprise" as follows:

> The term "enterprise" was used to refer either to an instrumentality of government which has the power to buy or sell or to a nongovernmental body with such power and to which the government has granted exclusive or special privileges.[26]

These documents clearly indicate the intention of GATT to encompass state controlled entities (including "agencies that engage in purchasing or selling") as well as enterprises in the corporate form which are controlled by the government or private firms which enjoy "special privilege."

It is also clear that the original GATT delegates intended to develop a set of rules under Article XVII that would be applicable to all type of economies. For example, the delegate from France stated in 1946:

> France wishes to see that the organization which we are planning here extends to the rest of the world . . . . There does not exist, in our opinion, any necessary connection between the form of the productive regime and the internal exchanges in one nation, on the one hand, and on her foreign economic policy on the other. The United States may very well continue to follow the principal, the more orthodox principal, of private

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25. U.N. Doc. ICITO/1/8 114 (1948).

26. GATT, 9th Supp. BISD 179, 183-84 (1961).

> initiative. France and other European countries may turn towards planned economy. The USSR may uphold and maintain the Marxist ideal of collectivism without our having to refuse to be in favor of a policy of international organization 27

This perspective was mirrored in a 1947 State Department comment on Article XVII:

> To a greater extent than ever before, governments are participating directly in foreign trade. Some, like the Soviet Union, have a complete government monopoly of foreign trade. More often, the government has a monopoly of trade in a particular product. A third form of state trading occurs when the government owns an enterprise which engages in foreign trade even though it is not a monopoly.
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> The purpose of [the State Trading] Articles . . . is to establish rules for state trading activities that will produce, as nearly as possible, the same effect intended by the rules in the rest of the Charter governing other businesses. The key to the approach is Article 31 (now GATT Article XVII) which provides that all state trading enterprises should conduct themselves along commercial lines. . . .28

Indeed, the delegates charged with revising these provisions reported that "[i]n revising the draft . . . the Subcommittee has aimed at producing a text sufficiently flexible to permit

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27. U.N. Doc. E/PC/T/PV.3 at 18 (1946).

28. Office of Public Affairs, U.S. Department of State, Informal Commentary to Accompany Preliminary Draft of Articles of a Charter for an International Trade Organization of the United Nations (1947) (emphasis added).

any negotiations with a Member which maintains a complete or substantially complete monopoly of its external trade."[29]

While there is no room for dispute that Article XVII was intended to apply to market and nonmarket economy enterprises, the definition of "commercial considerations" in the conduct of state trading operations has yet to be resolved. The earliest GATT consideration of the scope of the state trading obligation of Article XVII occurred in 1955, with the addition of the provision requiring notification of the trade conducted by such operations.[30] At the first full session in 1958, a panel was appointed to examine the phenomenon of state trading in greater detail.[31] As noted by one GATT observer, "it was realized that with fully state-trading economies participating in the work of GATT, the importance of precise and close supervision of the existing rules would become of overall importance."[32] Although the panel clarified the definition of state trading enterprises, improved notification procedures, and obtained assurances that a thorough investigation of state trading activities would be

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29. U.N. Doc. E/PC/T/160 at 8.

30. G. Curzon, Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques (1965) at 293.

31. Id. at 293-294.

32. Id. at 294.

conducted every three years, no action was taken to define the scope of the Article XVII commercial obligation.[33]

While the U.S. has recognized from the beginning that the key to Article XVII is the requirement that "state trading enterprises should conduct themselves along commercial lines . . ."[34] there is still no agreement on the meaning of these provisions. Yet it is clear that there is a need for action to give these provisions substance, not only in the context of nonmarket economies but also state trading in general. In both cases the problem is the same -- the failure to operate in accordance with commercial considerations and the escalation of government goals (employment, etc.) as the primary factor in production decisions.

State trading and the impact on U.S. markets is a relatively recent development which may well explain the lack of urgency in giving meaning to the commercial obligation of Article XVII. The growing role of state trading by market and nonmarket economies, however, is an increasing problem that Professors Walters and Monsen explored in the Harvard Business Review:

> Although foreign state-owned companies have not in the past posed a serious competitive challenge to U.S business, the spread of state ownership during the 1970s is rapidly changing the rules of the game in international competition.35

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33. K. Dam, supra note 37, at 329-330.

34. See note 35, supra and accompanying text.

35. Kenneth D. Walters and R. Joseph Munson, State-Owned
(footnote continued)

In Europe, in particular, "the 1970s have seen a new wave of government ownership sweep through European industry."[36] The motivations for this "new wave" are, according to Walters and Monsen, rescue takeovers of faltering enterprises, diversification of existing state-owned enterprises and promotion of high-risk ventures.

Walters and Monsen perceive this trend as a challenge to U.S. business because of the competitive advantages that are (in their judgment) the handmaidens of state ownership. These advantages, which directly or indirectly are likely to have an effect on prices, are said to include:

-- No need to earn profit (citing particularly the European steel industry which has lost billions in recent years)

-- No fear of loss or bankruptcy ("state ownership confers immortality on enterprise")

-- Preferential access to state financing ("employment, not profitability, is the dominant concern in deciding where new investments funds are to go")

-- Built-in markets (citing as an example the French government's "persuasion" of Air France to purchase from a state-owned firm despite the carrier's preference for U.S. aircraft).37

-- In sum, state trading enterprises have advantages in their home markets. They are arms of the state, with special preferences in dealing with their owner, the government. They are used to support and subsidize local enterprises. And, most impor-

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Business Abroad: New Competitive Threat, Harvard Business Review, March-April 1979 at 160. [Hereinafter cited as Walters and Monsen.]

36. Id. at 162.

37. Id. at 164-167.

> tant of all, they operate at home and abroad without the need to earn profits, which governs the private sector. Losses and new investment needs are financed from a seemingly bottomless cornucopia of government grants, subsidies, and loans (sometimes at favorable low interest rates).38

These "advantages" would appear to have the same trade distorting effect whatever the nature of the economy. Therefore, there is a sound rationale for dealing with state trading without distinguishing between market and nonmarket economies.

To give substance to the Article XVII commercial obligation, I suggest that interpretation of this Article be a major objective in the next round of GATT negotiations. In the meantime, Congress should direct the U.S.T.R. to explore the feasibility of using Section 301 to define as unreasonable state trading -- by any economy -- that is not consistent with commercial considerations.

III. APPLICATION OF THE COUNTERVAILING TO THE NONMARKET ECONOMIES

The Department of Commerce has concluded that the countervailing duty law cannot be applied to the nonmarket economies. This decision was appealed to the Court of International Trade which reversed the Department's decision arguing that the law makes no provision for an exception for those economies.[39] In its opinion, the Court emphasized the

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38 Id. at 168.

39. See Carbon Steel Wire Rod from Poland and Czechoslo- (footnote continued)

fact that the law applies to "any country" and that where a practice meets the definition of subsidy in United States law then there is no authority on the part of the Commerce Department to carve out an exception for the nonmarket economies. This decision has now been appealed to the Court of Appeals for the Federal Circuit which has the decision under review. Because I am counsel for the domestic petitioners in that case, I will limit my comments to a few observations on facts developed by the Department.

To date, the Department has only conducted one investigation of subsidies in a nonmarket economy where the foreign government and producer participated and responses to questionnaires were verified. Since the petition in that investigation only alleged export subsidies, domestic subsidies were not at issue and have not been factually investigated by the Department.

In summary, Poland acquired a large foreign debt in the late 1970's which became increasingly difficult to service, thus creating an urgent need to generate foreign exchange from export earnings. To resolve this crisis, Poland adopted a law on financial regulation of state enterprises on February 26, 1982, which "relies on economic mechanisms, instead of 'directives' to stimulate exports." The most important

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vakia, 49 Fed. Reg. 19,370 and 19,374 (1984); Continental Steel Corp., et al. v. United States, Consol. Ct. No. 84-05-00728, No. 85-77 (C.I.T. July 30, 1985).

"stimulator" is Article XXIX which provides that an enterprise may "retain part of hard currency earnings from its exports of goods and services." These earnings may be accumulated in a special account in domestic Polish banks and "may be used by the enterprise for financing of imports." Similarly, an enterprise may "cede a portion of foreign exchange resources accumulated on special accounts" to other enterprises. At the end of 1983, Poland expanded the currency retention scheme "to include the option of depositing the accumulated foreign currency funds in interest carrying long term bank accounts."

Currency retention accounts are described as export subsidies in Annex A to the Subsidies Code which is incorporated in the statutory definition of countervailable subsidy adopted by Congress in the 1979 Trade Agreements Act. There is no question but that the Polish currency retention system exactly matches the description in Annex A and is comparable in all material respects to currency retention account programs that have been countervailed by the United States in numerous cases, most recently in an investigation involving pistachio nuts from Iran. Moreover, the Polish currency retention program has been successful.

According to the Polish questionnaire response, "as many as 1,621 manufacturing enterprises have joined the retention program" since its adoption the year before and the funds credited to retention accounts totaled $1,041.9 million, of

which half had been used for imports and the balance remained "at the disposal of the account owners." According to a report of the Polish Minister for Economic Affairs, under the automatic system of allocation of foreign exchange, the rights of manufacturers "to spend hard currency on imported merchandise depend on the amount of hard currency earnings from exports accumulated on the account according to the fixed retention rate."

This currency retention program has been described by the Polish authorities as the most important "stimulator of exports." Its value can be demonstrated by the fact that enterprises that do not export have to rely on allocations from the central bank or participate in a foreign exchange auction that was acknowledged in Polish testimony at the Department. Retention accounts thus have a tangible value because those enterprises that lack such accounts, because they do not export, have to participate in an auction in order to obtain foreign exchange.

One indicia of the program's success is the fact that wire rod exports from Poland to the United States increased from zero in 1981, the year before the program was inaugurated, to 8,000 tons in 1982. In 1983, the same year in which 1,621 enterprises signed up for retention accounts, 20,000 tons of wire rod were exported to the United States in just nine months. Overall, Polish exports increased 27.3 percent in the first half of 1983 as compared with the first

half of 1982 and increased 27 percent in comparison with the second half of 1981.

The reason for the success of these programs lies in the fact that Polish enterprises -- in common with those in other nonmarket economies -- compensate employees through a system of incentives that rewards performance that meets or exceeds plan goals. That is, employees and managers that achieve higher exports have measurable personal gains as a reward. Export incentives, therefore, perform precisely the same role in nonmarket economies as they do in Iran, Yugoslavia or Brazil.

The incentive role of Polish subsidies is also illustrated by the other export promotion program adopted by Poland in 1982 and which is described in official Polish documents as the second most important stimulator of exports. This "stimulator" is the exemption of income from foreign sales from certain income tax and payments to unemployment funds. Essentially this exemption means that bonuses and payments to managers and employees carry less tax burden if the employer exports than if the enterprise sells in the home market. As described by Poland sources, the "amount of bonuses free from FAZ [the national reemployment fund] taxation is increased by the equivalent of 20 percent of export related income tax rebate." Obviously the incentive provided by this measurable exemption is within the four walls of the export subsidy for income tax exemptions that is described in

the Annex to the Subsidies Code. There is no meaningful or, indeed, discernible difference between the Polish exemption of foreign sales earnings sales from certain taxes and those export earning tax exemptions provided by other countries which have been countervailed by the United States. In fact, the Polish tax exemption is substantively indistinguishable from the U.S. DISC which was recently held to be in violation of GATT Article VI and the Subsidies Code, and, as a result, substantially modified by Congress.

CONCLUSION

The laws regulating nonmarket economy imports are not a failure, are not uniquely unpredictable, and are not unworkable. Such imports do pose complex questions of policy and administration of the trade remedy laws and for this very reason preclude a simple or ubiquitous solution. Since a goal of trade law should be to bring nonmarket economies into the discipline of the GATT, which is implemented by U.S. trade remedies including the antidumpting and countervailing duty laws, the objective of this Committee should be to refine these laws in their application to the nonmarket economies rather than a search for an all-embracing alternative which would, if enacted, only serve to isolate those countries from the GATT system.

STATEMENT
on
REVISING U.S. IMPORT LAW REGULATING NONMARKET ECONOMY IMPORTS
before the
SUBCOMMITTEE ON INTERNATIONAL TRADE
of the
SENATE COMMITTEE ON FINANCE
for the
U.S. CHAMBER OF COMMERCE
by
Arthur T. Downey
May 15, 1986

Mr. Chairman, I am Arthur T. Downey, partner in the Washington office of the law firm of Sutherland, Asbill and Brennan. I am appearing this morning in my capacity as Chairman of the U.S. Chamber of Commerce's Task Force on Trade with the Nonmarket Economies. From 1975 through 1977, I served as Deputy Assistant Secretary of Commerce for East-West Trade. For the past seven years, I have served as an Adjunct Professor at the Law Center of Georgetown University. With me today is Donald Hasfurther, Director for East-West Trade at the Chamber.

On September 23, 1985, President Reagan indicated that one of the trade policy priorities of this Administration would be reform of U.S. antidumping and countervailing duty laws relative to nonmarket economies (NMEs). The President called for predictable laws to protect U.S. industry from injurious imports from NMEs. The Chamber is in full agreement with this objective.

The Chamber has devoted considerable attention and thought to the problems associated with this body of trade law. In July, 1984, the Chamber held a comprehensive roundtable conference to examine possible reforms to the law. Participating in the conference was a cross section of U.S. industry, including representatives from the import sector and domestic manufacturing concerns, as well as officials from the Administration and Congress and past administrators of the law.

While many differences of opinion were expressed at the roundtable conference and subsequently, there was then, and there is now, a clear consensus among business and government officials that present law is inadequate. The surrogate country/constructed value approach for determining dumping is unpredictable and inequitable. Also, Section 406 of the Trade Act of 1974, on market disruption caused by Communist countries, has not been a useful tool in the import administration process.

With respect to current U.S. antidumping duty law, NME producers and U.S. importers are uncertain as to what price levels they should market their goods in the United States so as to avoid legitimate dumping allegations. Whereas a foreign market economy producer would make this judgment based upon its own costs of production and home market sales, an NME has no idea what country will be chosen as a surrogate country, at a similar level of economic development, for purposes of value comparison. This is also the case for the domestic producer, which may be considering filing a dumping petition.

An illustration of the problem can be found in a 1981 case involving menthol from the People's Republic of China (PRC). Paraguay, with a population of 3.5 million and a GNP of less than $7 billion, finally was chosen to serve as a surrogate for China, which had a population of nearly a billion people and a GNP of some $292 billion at the time the petition was filed; and thus the home market value of menthol sales in Paraguay was used as the surrogate for Chinese home market values. While the case may represent an extreme example of the difficulties of predicting a surrogate, it is hardly unique.

A 1983 dumping case involving imports of carbon steel plate from Romania is illustrative of other problems of the surrogate approach. In that case, home market prices in Finland were used as the surrogate for determining less than fair value sales. Shortly after conclusion of the case, U.S. industry filed an antidumping duty petition against the Finnish company that had cooperated in the Romanian case, based in part upon the price information provided by the Finnish company. Needless to say, the Department of Commerce has had increasing difficulty in persuading other countries to cooperate as surrogates since the Romanian carbon steel plate case.

No less satisfying from the standpoint of U.S. industry and NME exporters has been Section 406 of the Trade Act of 1974. Of the 10 market disruption investigations initiated since the enactment of the Trade Act, none has resulted in import relief for the U.S. petitioner. The procedure has proven ineffective, in part, because of the President's broad discretionary authority to accept or reject the recommendations of the International Trade Commission (ITC) for relief.

Perhaps the best publicized Section 406 case to date involved Soviet ammonia imports. In 1979, the ITC found ammonia imports to be disrupting the U.S. market and recommended that quotas be placed on the Soviet product. For foreign economic policy reasons, President Carter determined that quotas would not be in the national interest. However, months later, following the Soviet invasion of Afghanistan in December of that year, the President determined that action should be taken against the Soviets and asked the ITC to impose restraints on Soviet ammonia imports.

To his credit, Senator Heinz began working for reform in this area well before many even recognized that there was a problem with this body of trade law. His criticism of the surrogate country approach to dumping helped to focus attention on the weaknesses of present law and motivated such organizations as the Chamber to consider reform possibilities.

S. 1868, which is currently before this Subcommittee for consideration represents an attempt to get away from the surrogate country approach. The bill establishes as its benchmark for determining less than fair value sales the average import price of the same or similar products from market economy producers sold at arms length in the United States.

One major problem with this approach relates to the comparability of product. While fungible goods may be more easily comparable, manufactured goods of a like nature may vary significantly in terms of quality and usage.

The recent Department of Commerce dumping action against iron construction castings from the People's Republic of China illustrates this problem. In this case, there was even disagreement over which tariff classification was the appropriate one from which to take the trade-weighted average price.

The Department of Commerce determination in the iron construction castings case reveals other weaknesses of the weighted-average import price approach. Those market economies that Commerce determined to be exporting castings to the United States either were not economically comparable to the PRC or were under investigation themselves in antidumping duty actions. Moreover, a number of the countries exporting castings to the United States were found to charge "aberrational" prices for their castings. In its final determination, Commerce employed the weighted-average price of casting imports from Italy, Japan, Switzerland, Taiwan, and the United Kingdom.

The weighted-average price approach also must contend with the complexities derived from price adjustments. These include currency exchange rate and "circumstances of sale" adjustments related to such issues as credit and payment terms of sale. The more countries involved in an investigation, naturally the more complicated these adjustments become.

Finally, and perhaps most importantly, the weighted-average price approach is based upon a major assumption that the NMEs are not among the world's more efficient producers of any products. Legislating such an assumption unfairly would exclude a significant number of NME products from the U.S. market.

For these reasons, the Chamber believes that the weighted-average import price approach to determining dumping fails to bring needed fairness and simplicity to the import administration process. As an alternative to this approach, the Chamber is recommending a proposal that is based upon the premise that there is no predictable and equitable way for measuring the fair market value of NME imports, since NME prices are, by the nature of these economies, artificial.

The Chamber strongly believes that the present dumping and Section 406 laws should be replaced by a single new law.* The law should be nonideological, applicable to NME countries rather than "Communist countries." The new law also should provide clearer guidelines as to what constitutes a "nonmarket economy country" rather than require an annual list of NMEs.

* A July 1985 ruling of the U.S. Court of International Trade that U.S. countervailing duty law is applicable to NME imports has added a new element of uncertainty to the process. The ruling, which is currently under appeal, overturns an earlier Department of Commerce ruling that the law does not apply to NMEs, as well as decades of practice. Should the court ruling be upheld, U.S. countervailing duty law may be another area in need of legislative remedial action.

The law also should permit an industry or sector within an otherwise NME to be judged market-oriented for purposes of antidumping duty investigations if, for example, that industry or sector is able to function reasonably independently of state control in establishing production levels and product price determinations. Such a provision would serve as an encouragement to a foreign industry to provide U.S. investigators with meaningful and verifiable production data. On the other hand, the law should not apply to state-controlled industries in market economy countries.

With the premise that an equitable price-based law is not achievable, the Chamber believes that an injury determination should be the sole requirement for import relief in the case of NME products. As there will be no way to know whether an unfair trade practice exists under such a procedure, the injury standard should be higher than currently is the case under U.S. antidumping duty law, which relates to unfair trade practices, but lower than the "escape clause" standard of Section 201 of the Trade Act of 1974, where there is no unfair trade.

The period for relief under the Chamber proposal would be shorter than under the present dumping procedures. Such accelerated relief should afford fair protection to domestic industry and also should lower the costs involved relative to dumping proceedings.

Like current law, a petition for import relief could be filed with the ITC by an entity, including a manufacturer, a trade association, a union or group of workers, which is representative of an industry. Once received, the ITC would begin an investigation to determine injury. As is currently the case in Section 201, the ITC should be required to address certain economic factors during its investigation.

In the event that the ITC finds the appropriate level of injury, the Office of the U.S. Trade Representative (USTR) would be empowered to negotiate within a reasonable period an arrangement with the NME, through price increases and/or quotas, to remedy the injury. If USTR should fail to reach such an arrangement with the NME, USTR would still have the authority to recommend to the ITC a remedy for domestic industry.

Consideration also should be given to an appeal mechanism, whereby the affected domestic industry would have recourse if it should find the USTR-negotiated arrangement unacceptable. A procedure whereby the industry might appeal to the ITC to determine whether the arrangement would be adequate to remove the injury would be analogous to current law (Section 734 (h) of the Trade Agreements Act of 1979), whereby the ITC may be requested to review a suspension agreement negotiated by the Department of Commerce to determine whether the injurious effect of the imports is eliminated completely by the agreement. There should be some Presidential discretion with regard to implementing the final ITC decision, but the discretion must be limited to very serious reasons and should be clearly less than under the current market disruption provisions.

The approach being recommended by the Chamber is designed to provide simplicity, to lower costs, and to remove the random nature of the present system. It eliminates price-based determinations, because these are, by definition, not achievable with an NME. In its reliance on injury as the sole test for relief, the approach reflects compromise. The standard is set between current dumping and escape clause provisions. Such a median level of injury standard is appropriate since there is no way to determine whether an unfair trade action is present: a lesser standard would invite so many petitions as to retard trade; a greater standard would not protect adequately domestic industry.

By providing the ITC with the authority to review a USTR-negotiated settlement or make relief recommendations of its own in the event the USTR fails to reach agreement with the NME in question, the Chamber approach ensures domestic industry objective consideration of its situation. The accelerated pace of this new approach also should be appealing to U.S. industry, since under current, more time-consuming procedures, relief often arrives after the injury was most severe.

As there have been some concerns expressed about our proposal, I would like to underline the fact that we are recommending a repeal of Section 406, not a rewrite of that law.** As such, we are not seeking language restricting relief to cases of "rapidly increasing" imports. The Section 406 market disruption provisions were included in the Trade Act of 1974 to ease fears of that period that there would be a tremendous surge in NME imports, particularly associated with the anticipated extension of U.S. Most-Favored-Nation tariff treatment to many of these countries. Such a surge never materialized.

By our recommendation that an injury standard be established midway between the antidumping duty standard and that found in the Section 201 "escape clause," we are not suggesting that the standard remain ambiguous and subject to ITC interpretation. We merely wish to give the legislative framers flexibility in arriving at an appropriate standard. We would be most ready to accept the current Section 406 standard, "a significant cause of material injury" in a new single-recourse bill.

Questions also have been raised relative to the provision in the Chamber proposal authorizing the USTR to negotiate an arrangement with the nonmarket economy to eliminate the injury to domestic industry. Specifically, some have asked what motivations there would be for the NME to negotiate such an arrangement. Under the Chamber proposal, the USTR still would have the authority to recommend to the ITC a remedy for domestic industry if it were to fail in its negotiations. Failure on the part of the NME to reach an agreement with the USTR would leave the NME in the position of having a remedy imposed on it by the ITC. The NME's failure to reach an agreement with the USTR certainly would be taken into consideration by the ITC during its decision-making activities.

** Legislative language has been devised by the House Committee on Ways and Means to amend Section 406. This language totally fails to address the problems related to U.S. antidumping and countervailing duty law. In its present form, it would have a chilling impact on trade with the NMEs.

We would be pleased to respond to your questions. More importantly, we stand ready to assist you and your staff in moving this recommendation through the legislative process.

Thank you for your consideration.

STATEMENT OF

THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

BY PETER O. SUCHMAN

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

SENATE COMMITTEE ON FINANCE

ON

LEGISLATIVE PROPOSALS REGARDING NON-MARKET ECONOMY IMPORTS
(S. 1868)

THURSDAY, MAY 15, 1986

American Association of
Exporters *and*
Importers *11 West 42nd Street, New York, N.Y. 10036 (212) 944-2230*

The Association welcomes this opportunity to share with you our concerns about the proposal, offered by Senator Heinz in S. 1868 (and incorporated as Title VII of S. 1860) to amend the provisions of the antidumping statute regarding non-market economies ("NMEs"). S. 1868 would introduce a new artificial pricing standard into Title VII of the Tariff Act of 1930, as amended, for purposes of making foreign market value determinations in antidumping investigations involving imports from nonmarket economies and would create a set of criteria against which foreign economies would be measured in determining whether they are NMEs for purposes of the antidumping statute.

AAEI represents more than 1,000 U.S. firms nationwide which are involved in the export, import and distribution of goods and services worldwide. The interests of AAEI's members lie in an international system of open and free trade.

A necessary part of such a system is the provision of means for industries to obtain relief when injured by imports from other market or nonmarket economy countries. Current U.S. laws provide such means. The U.S. antidumping law contains special provisions for investigating complaints about unfair imports from state-controlled economy countries. Provisions for determining the value of imports from NMEs, the so-called "surrogate country" method, have been part of the administering agency's regulations since 1968 and were added to the law by the Trade Act of 1974. Section 406 of the Trade Act of 1974 also contains special rules applicable to NMEs which are Communist countries. U.S. industries have successfully obtained relief under the antidumping statute on numerous occasions.

It is the Association's view, having watched and participated as a representative of the U.S. business community in the making and remaking of U.S. trade laws since 1921, that piecemeal efforts at re-writing a section here, a section there -- often in ways that blurred important distinctions of purpose -- rarely produce positive effects for the country as a whole. There were major and comprehensive changes in the trade laws -- in 1974, in 1979, and again in 1984. After having undergone extensive changes three times in less than 12 years, most recently less than 18 months ago, AAEI recommends that the laws not be revised again so soon. Constantly changing the trade laws creates uncertainty for business people and considerable difficulty for administering agencies trying to develop implementing regulations.

This does not mean that there can be no creative solutions to persisting problems -- only that decisions to revamp the laws themselves should be made only when there is a need that cannot be otherwise met, and there is no potential for a more negative outcome than the current law presents.

In AAEI's judgement, the proposals in S. 1868 do not pass either test. They do not help to solve the problem -- how to deal sensibly with imports from non-market economies if they adversely affect a domestic industry. They do pose the real threat that their adoption would undermine a basic principle at the heart of the very discourse on trade relations that is taking place in this Committee and around the country -- namely "fairness".

There is no question that investigations involving NME imports pose unique challenges -- and that the antidumping law's current provisions, calling for the use of the price or cost of production of a producer in a market economy that agrees to cooperate, are less than entirely satisfactory. The identification of a market economy at a comparable level of economic development is time consuming, and the use by the Commerce Department of price or cost information obtained from a "volunteer" competitor of the nonmarket economy respondents can be frustrating and disadvantageous to the interests of those respondents.

Nevertheless, the current law has sufficient flexibility to permit some reasonable judgements to be made. It probably works as well as it can, given that the very concept of an "unfair" trade practice is meaningful only in the context of deviations from a market setting norm (which does not exist in a nonmarket economy). In the last analysis, substituting one arbitrary formula for another will still be an exercise in trying to put a round peg in a square hole.

AAEI cannot support the solution recommended in S. 1868 for a number of reasons:

. First, the "trade-weighted-average price" is no more easily arrived at than the price derived from the "surrogate" method in the current law. Indeed, trade weighting the numbers will entail even more complex information gathering, from greater numbers of producers, and more complicated adjustments for different trade volume conditions. The method is also likely to distort the true price of the product in an NME. Depending upon the volumes of trade involved, a low cost producer in a non-market economy might not end up even in the lower <u>half</u> of the average.

. Second, use of U.S. sales as a benchmark (as proposed) is anticompetitive, on its face, because it unfairly and conclusively presumes that no NME exporter can ever be the lowest-priced seller in the U.S. market on a fair competitive basis. There is no valid reason why selling a product below the U.S. price be should. The comparative standard applied in determining whether goods from market economies are fairly or unfairly traded is the relationship of the price of the product in the foreign market as against its price in the <u>home</u> market. Because it is difficult to determine the latter is not a valid reason to substitute a wholly arbitrary unrelated standard.

Using the trade-weighted average price approach or the U.S. sales price comparison does not really avoid the problem of getting data from a surrogate. All you are doing is changing the surrogate. Verifiability will always be a problem when foreign producers are asked to confirm information or to open their books to U.S. government investigators. You will still have to get enough data to make adjustments for circumstances of sale in different countries, for differences in merchandise, and for all the other modifications to raw prices required to make a fair value comparison.

As for the validity of the information gathered from U.S. and other market economy producers competing against NME suppliers in the U.S. market, we seriously question what incentive companies have to give unenhanced price or cost data when their information can directly diminish their NME competitors' ability to compete.

. Third, excluding from the group of eligible market economy producers those who are subject to an antidumping or countervailing duty order overlooks the fact that appeals from such orders can take years and the prices in effect at the time of the initial order (against a market economy producer) may be very different from what they are at the time of the NME investigation.

. Fourth, requiring the Commerce Department to undertake an annual analysis of the economies of all foreign countries (there are some 156 economies outside the U.S.), and to designate whether each economy operates on market principles or not -- in advance of any particular antidumping investigation -- poses an enormous and unnecessary burden on the government in a time when resources must be carefully husbanded. In view of the relatively small percentage of trade that imports from the NMEs represents, relative to total imports, it would seem a particularly wasteful use of resources. Even if the requirement could be fulfilled -- and we cannot see how the Department could meet a 90-day deadline for the first report -- it is not clear that the designations would help in making determinations about prices in nonmarket economies.

. Fifth, the criteria against which countries' economies would be assessed in determining whether they are market or nonmarket economies are arbitrary and arguably uninstructive or inconclusive. Whether or not joint ventures are permitted in any or all industries or whether wage rates are freely arrived at between labor and management are poor guides for identifying non-market economies. There are too many exceptions. Trying to identify specific factors might put too much weight on them. Assessing whether countries have non-market economies requires a comprehensive study of them as a whole. In the case of "such other factors as the administering authority considers appropriate," the standard is simply subjective and unknowable, and creates still more uncertainty than already exists.

Up till now, the law permits the Commerce Department to find that in certain industries in an NME country market conditions exist and the information available is therefore adequate on which to make a straight forward judgment on

foreign market value. If application of a set of criteria -- and publication of a list of countries identified as non-market economies -- would preclude such findings, making such a list would be counterproductive.

In the last anaylsis, rather than create still other artificial methods to translate commercial activity in a market economy into a non-market context, AAEI believes it would be more fruitful to take a comprehensive look at the antidumping law and Section 406 (for market disruption) with the realities of State-controlled economies in mind, and to develop a wholly different mechanism which can meet the need to help domestic industries which are seriously damaged by imports from non-market economies while protecting the rights and interests of U.S. importers.

Surely the interests of all parties are better served by adoption of a more responsive, certain, and expeditious method of dealing with non-market economy imports than now exists, or than would exist if the cumbersome and unfair procedures in S. 1868 were enacted.

Respectfully Submitted,

Peter O. Suchman
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[Whereupon, at 11:34 a.m., the hearing was adjourned.]

[By direction of the chairman the following communications were made a part of the hearing record:]

Commercial Metals Company P O Box 1046 Dallas Texas 75221 1046

Written Statement of Stanley A. Rabin,
President and Chief Executive Officer
of Commercial Metals Company
Regarding Proposals for Dealing with Nonmarket
Economies in the Context of Unfair Trade Practices
Presented to the Senate Committee on Finance,
Subcommittee on International Trade
Hearing Held on May 15, 1986

My name is Stanley A. Rabin. I am the President and Chief Executive Officer of Commercial Metals Company and am submitting this written statement as testimony to the Senate Committee on Finance with regard to the hearings held by the Subcommittee on International Trade to consider proposals relating to the Revision of Standards applicable to nonmarket economies.

Commercial Metals Company is engaged in the manufacturing, processing, fabrication, trading and distribution of steel, primary and secondary metals and numerous industrial raw materials. The Company has its headquarters in Dallas, Texas and is listed on the New York Stock Exchange. Our manufacturing, processing, and fabrication activities are conducted in the United States.

Through the years, Commercial Metals has conducted a sizeable amount of business with what is referred to as "nonmarket economy" countries, including the purchases of metals and raw materials which are not readily available in the United States. U.S. imports and exports with these countries is only a small fraction of the total United States foreign trade and, therefore, does not represent a threat to our domestic industries. At the same time, providing nonmarket countries with the opportunity to trade with the United States encourages many of them to pursue policies at home which are more flexible in terms of allowing free-market forces to regulate their economies. Hungary, for example, has embarked on such a course, however gradual, as is attested to in a study entitled "Economic Reform in Hungary From Central Planning to Regulated Market" which appears in Volume 3 of Selected Papers on Eastern European Economies submitted to the Joint Economic Committee, Congress of the United States, March 28, 1986. That Hungary has been making attempts in the direction of market-orientation has also been the impression of Commercial Metals personnel who have visited there.

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There is almost unanimous agreement that the present benchmark standard for determining unfair trade practice with nonmarket economies is inadequate and unworkable. I welcome Senator Heinz's interest in reforming this standard but concur with the objections to Bill S.1868 which he is sponsoring raised by several of the witnesses testifying at the May 15, 1986 hearings of the Subcommittee on International Trade. First, the benchmark as delineated in S.1868 cannot be adequately determined, especially for complex manufactured products and where specifications vary greatly. Second, the benchmark in Senator Heinz's bill is based on the assumption that imports from market and nonmarket economies are consistently of equal quality. In fact, when goods from nonmarket economies are priced lower, it may not reflect unfair pricing, but rather lower quality. Third, the Bill does not adequately reflect the fact that variations exist in the levels of economic development in different countries; such differences make the use of general classifications unreliable and inequitable. It should also be noted that many countries which are considered to be "market economies," in fact, have either nationalized or subsidized economic sectors which in the United States are privately-owned and operated. Therefore, establishing a list of nonmarket economies would be an oversimplification.

We feel that Bill S.1868 does not adequately address the many complexities involved with regard to nonmarket economies and believe an alternate formula needs to be found. We support the efforts on the part of Congress to enact a new benchmark for nonmarket economies which would be both equitable and practical in its application and would bring benefit not only to the United States, but the international trade community as well.

Statement Of

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(202) 289-6100

on behalf of

Polfoods, Inc., New York, New York
And Other Importers of Products from the
Polish People's Republic

on

Trade Reform Legislation

Before the Subcommittee on Trade
of the House Ways and Means Committee
99th Cong., 2d Sess. (1986)

April 15, 1986
9:30 a.m.

Statement of
Peter D. Ehrenhaft
Submitted on behalf of
Importers of Products from the
Polish People's Republic
on
Trade Reform Legislation

99th Cong., 2d Sess. (1986)
Before the Subcommittee on Trade
of the House Ways & Means Committee

April 15, 1986

I am Peter Ehrenhaft, a partner in the firm of Bryan, Cave, McPheeters & McRoberts. From 1977 through 1979, I was the Deputy Assistant Secretary of the Treasury responsible for the administration of the antidumping and countervailing duty laws.

In my private practice since my tenure with the Treasury Department, I have had the privilege of counseling certain importers of Polish products, in particular, Polfoods, Inc. in New York City. It is on behalf of Polfoods and other importers of Polish products that I present this statement.

My testimony will present three main points:

1. You have no evidence that imports from nonmarket economies are a significant threat to any U.S. industry. They are no threat today and are a most unlikely threat tomorrow. The total imports from all the nonmarket economy countries in 1985 was $5.8 billion of which 26% was oil. Exclude oil, and they amount to only 1.2% of the $343 billion worth of total U.S. imports last year. And note that the United States has a trade surplus with the NME's of $1.2 billion.

2. You have no evidence that even if there were a threat, the present laws could not adequately deal with it. The problems with the present laws are not in their text, but in their administration. Given a fair reading and proper application, they could do the job.

3. The legislative proposals before you do not solve the "problems" presented by imports from nonmarket economies. If adopted, they would violate the GATT and further strain our relations with the NMEs for no good reason.

A. Recent History

Since the 1974 Trade Act, Congress has been preoccupied with what it styles "trade reform." As many of the members of this Subcommittee will recall, I have come before you on several occasions to address various pieces of legislation then believed to be the reform needed to correct the perceived imbalances. During the period since 1974, U.S. trade has grown in absolute terms. But the U.S. percentage of world trade is shrinking while our balance of trade -- and now even our balance of payments -- have been in deficit and growing in that direction. Perceptions abound that the shrinking U.S. piece of the world trade pie and our mounting trade deficits are the results of the "unfair" trade practices of our trading partners. The United States has responded to these problems on several fronts:

-- Congress has attempted to "strengthen" the U.S. trade laws by making antidumping and countervailing duty procedures more "judicial" and on a faster track;

-- The U.S. Trade Representative has been an active wielder of carrots and sticks, promoting new agreements on trade practices to resolve trade disputes and initiating unprecedented numbers of claims that our trading partners are not behaving in accordance with the internationally agreed rules;

-- Both the Congress and the President have sought new ways to take measures against the "unfair" practices of our trading partners and to secure access in foreign markets for our goods.

Now in the 99th Congress, numerous "trade reform" proposals have been introduced, and this Subcommittee is considering the preparation of yet another "omnibus trade reform bill." Part of that package may include new measures to apply the trade laws more "effectively" to imports from nonmarket economies.

My testimony today will repeat themes I have advocated in past appearances before this and other Committees of the Congress. I will not provide you with suggestions for sweeping reform. In fact, my message is quite simple. The trade laws now in place, if properly applied, provide a viable mechanism for dealing with imports from nonmarket economies.

B. Imports from nonmarket economies are not a significant threat to any U.S. industry.

Quite in contrast with its trade with "market" economy countries, the United States enjoys a trade surplus with

nonmarket countries as a group, and evidence from Commerce Department statistics suggests that this status will continue.

The 1974 Trade Act assigned to the ITC the responsibility of monitoring imports from the nonmarket economies. As you are aware, since 1982 the Commission has been using an automated trade monitoring system designed to identify nonmarket economy imports that grow rapidly and, by measuring market penetration, those that are likely to cause disruption in U.S. industries. In its most recent analysis, the ITC identified only eighteen products that met the combined criterion of at least one percent penetration from a NME source and at least ten percent penetration from all sources. Of those eighteen products, only four met the ITC's "growth criterion" of at least a fifteen percent increase in value.

A look at the statistics in a broader historical context reveals that trade between the United States and nonmarket economies excluding China is not significantly higher than -- indeed it is at almost identical levels as -- trade between the United States and these countries in the late 1970s. The small number of antidumping cases involving NME imports as a percentage of all antidumping cases initiated by domestic interests further illustrates this point.

These statistics amply demonstrate that the "problem" of nonmarket economy imports is no problem. There are no significant import penetration levels; no staggering increases in products imported from any one nonmarket economy -- or for that matter all nonmarket economies as a group.

C. The existing system of trade laws is capable of accommodating the special issues presented by imports from nonmarket economies.

The U.S. trade laws should promote a policy of nondiscriminatory treatment of its trading partners. Such was the intention of the drafters of the MTN Codes, and the importers of Polish products I represent urge this Subcommittee to keep that policy uppermost in its consideration of trade legislation before it. We believe trade can be conducted between Poland and the United States on an apolitical basis and that sensible -- albeit occasionally "special" -- rules may and can be applied to facilitate the process, recognizing the difference between the two countries' economic systems.

1. Section 406.

Although a persuasive case has yet to be made that a special law is needed to deal with imports from nonmarket economies, Section 406 of the Trade Act of 1974 is in place to remedy any "market disruption" from "Communist countries." In fact, Section 406 has rarely been invoked. I suggest to you

that Section 406 is based on the improbable hypothesis that an otherwise struggling economy could and would marshal the resources necessary to effect a rapid surge of imports significant enough to disrupt a U.S. market.

This phenomenon has rarely, if ever, been observed in the real world. In the single Section 406 case in which Polish goods were involved, the ITC found 5-1 that no "market disruption" within the meaning of the law occurred.

It seems clear that Section 406 is based on politics, not economics. The law applies not to "nonmarket economy" countries generally, but to "Communist countries." Moreover, its terms are loosely stated and its effects are uncertain. We believe that Sections 201 and 301 are more than adequate to deal with surges of imports from any country, and we would prefer to see Section 406 eliminated altogether. But the Subcommittee knows that Section 406 is nevertheless on the books and may be invoked in the unlikely event that it is needed to ensure relief for a domestic industry "disrupted" by a surge of imports from a "Communist country".

2. Antidumping Law.

This Subcommittee has heard proposed fundamental changes to the U.S. antidumping law as it applies to nonmarket economies. Having myself wrestled with the problem of applying the antidumping law to imports from Poland, I was responsible in large part for the adoption of what is wryly called the "Golf Cart Rule." I can, thus, fully appreciate the frustration in dealing with this problem. Nevertheless, I stand by the approach contemplated by the "Golf Cart Rule" and reiterate my opinion that the Department of Commerce should implement the rule we adopted at Treasury -- and which the GAO has endorsed as the most viable of the alternatives.

The rule that emerged from the Polish Golf Cart case responded to our conviction that the antidumping law and the Treasury Department's handling of the problem before 1977 were not adequately thought through. At the time, efforts were made to obtain the "fair market" value of the Polish golf carts from the prices at which an obscure Canadian producer sold a small quantity of vaguely comparable factory carts. The Polish product, however, was made and shipped by an enterprise whose sole commercial market was golf course operators in the United States. There were no golf courses in Poland and no real sales elsewhere. The results of the investigation, using the Canadian prices, were unsatisfying to every participant in the case. And when the Canadian producer went out of business, it was, in any event, necessary to try a new approach. Treasury determined that any new rule had to be

- fair to, and non-discriminatory against "state-controlled economies";

- consistent with existing principles of the antidumping law; and

- perhaps most crucial, "administrable" by government officials (and, of course, the parties concerned).

The rule adopted by Treasury met these tests -- at least based on a "least worst" criterion. It allows a producer in a state-controlled economy to utilize its own factors of production and to value them in a market economy of comparable economic development to develop a "constructed value," as that term is generally understood under the antidumping law. The rule currently applied by the Commerce Department, however, permits this constructed value approach to be used only if more "traditional" techniques in calculating fair value, albeit through surrogates in market economies of comparable development, are inadequate or unsuitable.

The result has been that in almost all of the cases decided since 1979 in the initial stages, the prices and costs of third companies, in countries other than those in which the goods were produced, were used to establish the "fair value" of the merchandise under investigation. And in some cases, the fair value was determined by averaging import prices from all third country suppliers.

In my judgment, this is not sensible policy. It flies in the face of legislation enacted as a part of the Trade Act of 1974 with respect to antidumping investigations concerning merchandise from other than the so-called state-controlled economies. Then, Congress specifically rejected as appropriate the utilization of third party prices and costs for establishing the "fair value" of a particular respondent's merchandise. It recognized the inability of the respondent to exercise any control over the prices and costs of the third party being used. Congress wanted to preserve for the respondent the ability to assure itself that it is not dumping (without forcing the respondent to retreat from the market entirely -- which is surely not the aim of the law). Use of a "third party price or cost" rule is no less inappropriate for NME exporters.

Not only is the application of third party pricing or costs to a respondent unfair to the exporter from the state-controlled economy (and thus violative of what I think is the first principle of "fairness" that ought to apply), it is also in many cases absurdly difficult to implement by the government. A report from the GAO amply documents this fact. I can also attest to it from personal experience: When I was at Treasury we sought the prices of the U.S. manufacturers of

golf carts -- presumably the parties with the greatest interest in furnishing that data and most familiar with the reasons why it was needed and how it would be safeguarded and used. But even they were reluctant to give the government those facts. How much harder and more frustrating it is to search around the world for producers in other countries to supply facts about their sales and costs for a proceeding in which they have no direct involvement or even interest. Moreover, in one such proceeding, cost and price information was supplied by cooperative Finnish producers who thereafter found themselves subject to an antidumping petition based on the data they had provided. How many more cooperative surrogates does Commerce now expect to find? The use of third party prices and costs has become, if it was not earlier, unadmissible. It ought to be scrapped.

If it were scrapped in favor of the simulated constructed value approach that Treasury proposed, and that the GAO has endorsed, is that a rule that meets the principles I mentioned earlier? I suggest that it does. It fairly allows a particular producer to attempt to demonstrate that its prices are not below its costs, and thereby gives that party some ability to control its market behavior. It also allows the producer from the state-controlled economy to try to show that it has a comparative advantage in making and selling the goods or services in question. Verification of input factors is no more difficult than the verification of other information routinely reviewed by Commerce or Customs officials in antidumping and other cases. And "pricing" these factors in a surrogate economy is not necessarily a difficult task - particularly if the burden is placed on the respondent to demonstrate a technique and selection process.

If it is a sensible rule, why is it not being adopted? Criticism, most notably from my successors, has focused, first, on the notion that a market economy of "comparable economic development" can be found in which the pricing aspect of the exercise is "reliable." I suggest this criticism misses the point. It is not necessary that the Administering Authority be satisfied that every criterion of "market development" be identical or even similar for the purpose in question. A rough comparability, to which most responsible economists would agree, is sufficient and, indeed, exists. The countries of Eastern Europe are, in many ways, at a stage of economic development not dissimilar to some of the market economies of the Mediterranean basin. Comparisons of the costs of labor and energy and capital in those lands provide an adequate guide to market economy costs of those same factors in Poland or Hungary. Moreover, to the extent that some of the inputs a particular state-controlled enterprise buys are obtained on world markets in convertible currency, there is no reason not to price those inputs at their actual prices. And as the economies of some of these countries move

toward a "reform model," with less rigid central planning and even more freely convertible currencies, it may even be possible to use all of the internal prices and costs of those producers.

Criticism of the rule has also focused on the alleged difficulty petitioners would have in stating an adequate case of dumping if they were compelled to develop the imagined costs of an Eastern European producer and then to "price" those costs in some undetermined third country. In fact, I suggest that the petitioner has, in some respects, an easier time in attempting to establish sales at less than fair value in such cases than in situations in which he must seek price data on foreign home market transactions. A projection of his own costs and factors inputs, suitably adjusted for the foreign locale from published information, is precisely what the existing regulations contemplate for such cases. It ought not to be more difficult to apply in the case of Polish wares than in the case of Swiss or French merchandise.

A third criticism of the simulated constructed value rule stems from fears that the records of producers in state-controlled economies will either be unavailable for inspection by U.S. Government verifiers or will be unreliable even if examined. To the extent a producer (or its government) declines to permit access, the law and regulations have an ample answer: the "best evidence rule." The situation is no different than any other in which cooperation from respondents is not forthcoming. With respect to reliability, no published reports suggest experience with untrustworthy records in such countries. However, it can be said that in at least two cases in which the input records of the state-controlled economy producers were meticulously reviewed by Treasury and Commerce personnel - Golf Carts from Poland and Montan Wax from the German Democratic Republic - the records were found to be more than adequate.

A fourth objection suggests that since the state-controlled economy may attempt to foster one type of production rather than another, it may "unfairly" be able to demonstrate real comparative advantage in the favored industry. But why is this unfair? Our entire trading system is supposed to be based on comparative advantage. We should encourage it. It is sensible for the Hondurans to grow bananas, just as it is unreasonable for Icelanders to try to do so. As I have said before, only to the extent that nonmarket economy producers are, in effect, growing bananas on the ice cap in a hot house subsidized by tax revenues, do we have cause to complain. But then there is ample scope in the administration of our existing law (even without the use of the countervailing duties law) to find margins of dumping, since obviously, their total production costs will be excessive. If, however, they do have

a comparative advantage, why should American consumers be denied the ability to buy their goods? If there is any "unfairness," it is to our own people!

Finally, the rule is criticized as too hard to administer. There may be situations in which the search for input factors becomes difficult. But the solution to ease of administration should not be the adoption of the rule suggested by some for finding as "fair value" the average price of all of the suppliers to the U.S. market, whether foreign or domestic. Clearly, if ascertainable, that price might be a convenient bench mark for exporters in, say, Poland, to follow. We should even support its adoption, as long as the exporter would have the option to try to prove a lower "simulated constructed value." Unfortunately, I do not have much confidence that it will be easy -- or even possible -- to find the "average price", and that is one reason I find the proposed legislation troubling in its exclusive reliance on this principle.

To the extent that merchandise is truly fungible -- the way bulk chemicals or other commodities may be -- the rule may well be workable. But even with respect to such goods, there are differences in grade, packing, terms of delivery, length of contract and the like that may make direct price comparisons with imported merchandise difficult -- at least without making a number of what inevitably become arbitrary adjustments. But as one deals with more fabricated and differentiated merchandise, the notion that one can find the "average price" in the U.S. market becomes virtually impossible. One might find ranges of prices describing classes of roughly similar goods. But even with respect to a canned ham, there are differences in quality -- of water content, of fat, of the "taste" based on the solution in which it was cured or the food eaten by the swine from which it was made -- that affect price. And with manufactured items there are often non-functional differences in appearance and style, in warranty and after-sale service terms, in delivery times and spare part availability, just to name a few, that make the contemplated "to-the-penny" comparison untenable.

There is also the question of fairness. To impose such a rule on nonmarket economies is to render it impossible for them to ever know if their sales may be subject to antidumping duties without a constant review of facts about the U.S. marketplace that are either not known or not knowable. Moreover, the rule assumes that no nonmarket economy producer can ever properly be the lowest-price supplier to this market. The Golf-Cart case, alone, showed this was an untenable position. This notion gives rise to our final objection: imposing such a rule may well be GATT violative by imposing different -- and more difficult -- standards on some, but not other, trading partners.

In sum, I suggest the Committee defer any action on this issue.

3. Countervailing Duty Law.

Pending proposals for "reform" of the countervailing duty laws as they apply -- or don't apply -- to imports from nonmarket economies, are likewise premature and, for that reason, inappropriate. We recognize the uncertainty created by the Commerce Department in the Czechoslovakia Carbon Steel Wire Rod countervailing duty case. We are also sensitive to the dissatisfaction of many, myself included, with the subsequent opinion of the Court of International Trade in this matter.

It is not unfair to suggest that no one knows better the frustration of this state of flux than the importers of Polish products on whose behalf I am speaking today. But as we meet today, the Continental Steel case is pending on appeal before the Federal Circuit Court of Appeals. That court has yet to issue its opinion on this case and it should be given the opportunity to do so.

The Department of Commerce, in its final determination in the Czechoslovakian Wire Rod case, found that, as matter of law, "subsidies" cannot be found in nonmarket economies. Therefore, countervailing duties cannot be assessed against imports from those countries. Commerce conceded, however, that because of the express language of the statute, countries with nonmarket economies were not exempt from the countervailing duty law.

In an opinion that can at best be described as unresponsive, the Court of International Trade reversed the Commerce Department and remanded the determination for further action. The court relied heavily on the literal language of the statute and its obvious lack of any express exception for imports from nonmarket economy countries. But it ignored the realities of what it termed "nothing more than general economic characteristics" of nonmarket economies. In so doing, it failed to provide any guidance to the administrators on the very issue in controversy. It failed to suggest how a subsidy could be calculated in an NME setting.

While I may agree with the result reached by the Department of Commerce in the Wire Rod case -- indeed this has been the premise of my proposal for adjustment in the application of the countervailing duty laws to these countries -- I believe a change in the law at this time is inappropriate. This Subcommittee should adopt a "wait and see" approach pending the outcome of the Continental Steel case on appeal.

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These hearings evidence the frenzy of effort to "do something" to vent the frustration of this country with mounting U.S. trade deficits. Few people speak up on behalf of nonmarket economy countries, making their imports too easy a target for the "do something" proponents. But the facts simply do not support a need for change in the laws as they are applied to nonmarket economy imports. Excluding oil imports -- which is altogether another subject -- they amount to less than 1.5 percent of all U.S. imports. This country already enjoys surplus trade margins with its NME trading partners. If the aim of this Subcommittee is to somehow reduce the threatening levels of the U.S. trade deficit, then you have sound economic reasons, not to mention political reasons, to foster good relations with our NME trading partners. To further burden those relations would be counterproductive, would serve no general political purposes and would yield no tangible results. There is precious little -- if any -- evidence that the present laws, if fairly read and properly applied, cannot adequately do the job.

Statement Accompanying
the Prepared Statement of
Peter D. Ehrenhaft

April 15, 1986

Peter D. Ehrenhaft is registered with the Department of Justice under the Foreign Agents Registration Act of 1938, as amended (the Act), as an agent of Polfoods, Inc., 666 Fifth Avenue, New York, New York.