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THE APPLICATION OF U. S. ANTIDUMPING LAW TO THE IMPORTS FROM THE PEOPLE'S REPUBLIC OF CHINA:
REVIEW OF EVOLUTION AND NEED FOR REVOLUTION

by

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B.A., Liaoning University, Shenyang, China, 1982
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Chairman, Reading Committee

Date 7-30-93
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I. INTRODUCTION

Since the normalization of relations between the People's Republic of China and the United States in 1979, trade between China and the United States has been growing rapidly. Two-way trade increased from $2.3 billion in 1979 to $25.3 billion in 1991, a tenfold expansion. As a result, China became the United States' ninth largest trading partner, up from 35th in 1979. In the first 11 months of 1992, two-way trade reached $30.3 billion, an increase of 31 percent over the same period in 1991. In 1991, China was the 16th largest foreign market for U.S. products and took a 1.5 percent of U.S. total exports. One-fifth of total U.S. wheat and one-sixth of phosphate fertilizer exports go to China. Chinese statistics indicate that U.S. products made up 12.6 percent of China's imports in 1991, making the United States China's third largest supplier after Hong Kong and Japan. At the same time, China supplies 31 percent of total U.S. toy imports, 45 percent of shoes, 26 percent of its textile and garments and 40 percent of all gift boxes and bags.

Sino-U.S. trade, however, not always runs smoothly. Bilateral trade has been affected not only by political and economic friction between the two countries but also by the galaxy of import regulations which the United States
has build up over the years. When accessing the United States' domestic market, China is confronted with three laws intended to protect domestic producers under certain circumstances from the effects of foreign competition: (1) Antidumping Law; (2) Escape Clause and Market Disruption Regulation; (3) Countervailing Duty Law.

The antidumping law is intended to remedy price discrimination between national markets. It authorizes the imposition of an antidumping duty on imported merchandise that the Department of Commerce ("Commerce" or "DOC") determines is being sold in the United States at "less than fair value" ("LTFV"), provided that the U.S. International Trade Commission ("ITC") also determines that a U.S. industry is "materially injured" by "reason of imports of that merchandise." The Escape clause under section 406(a) of the Trade Act of 1974 is designed to remedy serious injury to a U.S. industry substantially caused by increasing quantities of imports. Under section 406 the ITC is required to investigate whether

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12. Id.
"rapidly increasing imports" from a "communist country"\textsuperscript{14} are a "significant cause" of material injury\textsuperscript{15} to a domestic industry producing a like or directly competitive article." The President is authorized by this section to impose or increase duties, or order other import restrictions.\textsuperscript{16} The purposes of the countervailing duty law is to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsides paid by their governments. While the law requires an internal market-oriented benchmark to determine whether subsidization has occurred, it has been argued that in centrally planned economies there are no such internal market-oriented benchmarks. Thus, in 1984, the Department of Commerce took the position that the countervailing duty (CVD) law could not be applied to NME countries. In 1986, the Court of Appeal for the Federal Circuit held in Georgetown Steel v. U.S.\textsuperscript{17} that the countervailing duty law is inapplicable to non-market economics.\textsuperscript{18}

In the long term, although many hurdles exist for the development of Sino-U.S. trade relations, the antidumping law may well be one of the serious


\textsuperscript{16} 19 U.S.C. § 2436(a)(3) (1976). Escape clause cases "involve a substantial political effort". (see Garfinkel \textit{supra} note 5, at 245) As a result, section 406 is rarely invoked, and only one case has ever been successfully prosecuted under it. (see Charlene Barshefsky, "Non-Market-Economies in Transition and the U.S. Antidumping Law: Remarks on the Need for Revaluation," 8 Boston University Int'l L. J. 373 (1990).

\textsuperscript{17} Georgetown v. U.S., 801 F. 2d 1308 (Fed. Cir. 1986).

barriers to trade in the foreseeable future.¹⁹ This thesis will discuss the current state of U.S. antidumping law. It examines the cases decided and pending, which have risen between the United States and China, and the key issues which have emerged in such proceedings. While the dilemma of U.S. antidumping law results from the deficit of the methodologies of antidumping regulations, the complexity of transitional economies of the NMEs, particularly China, is an important element. Thus it is essential to understand the real process of China's economic reforms. and these discrete transitions in China's economy is critically analyzed. After showing that these changes in the Omnibus Trade and Competitiveness Act of 1988²⁰ fail to resolve the problems in NME antidumping investigations, it explores proposed alternatives to current law.

II. THE TREATMENT OF NMEs UNDER U.S. ANTIDUMPING LAW

A. The Operation of The Antidumping Law

The antidumping law of the U.S. imposes duties on imports that are sold at less than foreign market value when such sales cause injury to U.S. industry. Any interested party that qualified as a domestic producer, manufacture, or wholesaler, or as a trade or business association may file a petition with the Commerce Department ("Commerce") and the International Trade Commission ("ITC") simultaneously. Under U.S. law, the Commerce Department is responsible for determining whether goods have been sold in the United States at a price below fair value. The ITC, a semi-independent agency whose members are appointed by the President, is charged with determining whether those sales below fair value have caused or are threatening to cause material injury to the domestic industry. Within 16 days of the filing of a petition (or 210 days if the case is deemed to be "extremely complicated"), Commerce shall make a preliminary determination as to whether the goods in question have been

21. The United States government has not been entirely consistent in its terminology. U.S. antidumping law and the pertinent regulations use different words in different situation. For example, section 406 of the Trade Act of 1974 (the "Trade Act") uses the term "communist countries". A "communist country" is defined as any country "dominated or controlled" by communism. (S. Rep. No. 1298, 93d Cong., 2d Sess. 2, 13, reprinted in 1974 Trade Act). The Trade Agreement Act of 1979 (S. Rep. 249, 96th Cong., 1st Sess. reprinted in 1979 U.S. CODE CONG. & AD, NEWS 381 et Seq.) uses the term "state-controlled economy country" instead of "communist country." Commerce Department decisions use the terms "market economy country" and "non-market economy country"(NME) which emphasis on an economic, rather than a political basis.

22. Trade Agreement of Act of 1979, Pub. L. No. 96-30, § 732(b) and § 771(9)(C), (D), and (E), (1979)(codified at 19 U.S.C. § 1673 (1976)).
sold in the United States below their fair value. If that determination is negative, the case proceeds no further. If that determination and the preliminary determination of the ITC are affirmative, Commerce is obligated to reach a final determination within 75 days after its preliminary determination. In exceptional cases, that period can be extended another 60 days. If affirmative final determinations are reached by both Commerce and the ITC, Commerce shall order the United States Customs Service to assess an antidumping duty equal to the margin by which the goods in question are sold below fair value. Such duties are in addition to whatever routine and valorem duties may be owned on the merchandise involved.

When a U.S. petitioner files an antidumping case against producer from a market economy country, Commerce determines whether the merchandise is being dumped by measuring the foreign market value of the imported merchandise. The foreign market value is calculated according to a methodological hierarchy. Commerce looks first to the home market price, which is the adjusted price the foreign manufacturer charges to customers in the country of export. Second, Commerce looks to the price of exports to customers in other countries other than the United States. Finally, Commerce will construct the value of such goods based on adjusted material costs plus general expenses and profits. If a producer sells merchandise in the United States at a price lower than the foreign market value, the producer is dumping. The dumping margin is the difference between the two prices. If a petition is filed against a non-market country, such as China, the exercise is

24. See id. § 353.44.
27. Id. § 1677b(a)(1)(B).
28. Id. § 1677b(a)(2)(e).
similar. However, these three methods for determining the foreign market value of imports are inadequate because the necessary costs and prices are unavailable. Thus, a fourth method of calculation of less than fair value specifically for NME import is employed, that calculates a theoretical cost of production in any "surrogate" market economy judged to be economically comparable to the NME in question. This special approach for NME was codified by Congress. It was carried forward into Commerce regulations and is currently in practice and in controversy.

B. Background


The original Antidumping Act of 1921 (Antidumping Act) had no provision dealing specially with nonmarket economy dumping. The Antidumping Act provided that the existence of sales of merchandise at LTFV should be determined by a comparison of the United States import price and foreign market value, or in the absence of such value, the

33. The Antidumping Act defined foreign market value as:
the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not sold or offered for sale for home consumption, of if the Secretary determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States)....

constructed value. Constructed value, which was to be used in the event that foreign value could not be determined, was measured by the sum of the cost of material and fabrication plus an amount for expenses and profit.

The preferred sources for determining foreign market value of imports were: (1) home market sales, (2) sales to third countries, or (3) constructed value (based on costs in the home economy). The regulations based on this statute, which were promulgated by the Department of Treasury ("Treasury"), which was at that time responsible for conducting antidumping investigations, did not specifically address nonmarket economy dumping either. In *Bicycles from Czechoslovakia*, the first NME dumping case to result in a determination of sales at less than fair value, the Treasury Department adopted the practice of referring to the domestic or export prices of similar articles manufactured in non-communist market countries as the best evidence available of fair value. Treasury, thus, used both home market price and constructed value and found the United States price to be lower than either.

In *Fur Felt Hoods, Bodies, and Caps from Czechoslovakia*, Treasury used a test that compared the United States price with the prices at which similar merchandise from competing third countries was sold to the United States. In this "third country price" test, Treasury used the price of similar merchandise sold to the United States from third countries, rather than the price at which similar merchandise was sold to other countries from

34. Id.
37. Id.
39. Id.
the Treasury reaffirmed this practice by refusing to rely on the price of NME export to other countries. A year later, in *Portland Cement From Poland*, the Treasury rejected home market sales because such sales were "not made in the ordinary course of trade within the meaning of the section 205(a) of the Antidumping Act of 1921." In this cement case, Treasury relied upon the prices of Western European cement exported to the United States as the basis for fair value.

In the nonmarket economy cases that followed Treasury continued to use the third country price test. This practice of using the market-economy price as a surrogate foreign-market value was formally adopted by Treasury in a new provision dealing explicitly with state-controlled economies (hereinafter "SCE") in 1968 which provide:

*Merchandise from controlled economy country.* Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to an extent that sales or offers of sales of such or similar merchandise in that country or countries other than the United States do not permit a determination of fair value under § 53.3 or § 53.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses and profit as reflected by the prices at which such or similar merchandise is sold by a non-state-controlled economy country either (1) for consumption in its

43. 19 C.F.R. § 53.5(b) (1969).
own market; or (2) to other countries, including the United States.\textsuperscript{44}

In cases arising after the 1968 amendments to the Treasury regulations and before the statutory reform in 1974 Treasury followed this third country price test.\textsuperscript{45}

The Trade Act of 1974 created the first statutory provisions specifically addressing domestic relief from NME imports. These were section 205(c) of the Antidumping Act\textsuperscript{46} and section 405 of the Trade Act of 1974.\textsuperscript{47} The new provisions affirmed the Treasury regulations and gave Treasury additional alternatives. Treasury’s options now were all third country prices: home market, export or constructed value.

\textit{Electric Golf Cars From Poland}\textsuperscript{48} challenged the regulatory and statutory provisions involving imports from NMEs and promoted their amendment.\textsuperscript{49} Golf cars were produced in Poland solely for export to the

\begin{footnotes}
\item[44] Id. (Neither United States law nor the Commerce regulations enumerate the countries, the economies of which are considered to be state-controlled for the purpose of the law. Instead, the character of the economy of the country from which the imports under investigation are exported, is determined on a case-by-case basis. See Edwin A. Vermulst, Antidumping Law and Practice in the United States and the European Communities, North-Holland, 1987, at 352.) Before promulgation of the Omnibus Trade and Competitive Act of 1988 (19 U.S.C. §1677), the following countries had consistently been treated as state-controlled economy countries: the People’s Republic of China, Czechoslovakia, former East Germany, Hungary, Poland, Romania and former U.S.S.R. State-controlled economy country is the statutory term. It is for all intents and purposes the same as non-market economy country. (See Vermulst, supra at 399.)

\item[45] Throughout the 1960s, Treasury, in cases involving imports from Yugoslavia, generally relied upon Yugoslavia home market economy on the basis: (1) there was an established buying rate for Yugoslavia currency; (2) the Customs Service could verify all information submitted by the Yugoslavia government and manufacture, and (3) at least for some product, the Yugoslavia home market prices reflected the economic forces of supply and demand. (42 Fed. Reg. 34,288, 1977).


\item[49] See Note, \textit{Dumping from “Controlled Economy Countries: " the Polish Golf Car Case, 11 Law & Pol'y in Int'l Bus. 777 (1979) [hereinafter cited as “Dumping from Controlled Economy countries”].
\end{footnotes}
U.S. No domestic or foreign sales were made. Treasury used the constructed value of golf cars in Canada to determine the foreign market value of the Polish golf cars. However, Treasury had to find a new standard when the Canadian producer ceased to manufacture golf cars. No other third country value could be used because the only other larger-sale producers of golf cars were in the United States. In order to avoid using U.S. prices or costs for fair value, which would effectively preclude Polish from the United States, Treasury created a new method for measuring constructed value by using Polish company's physical inputs required to produce the cars valued at prices prevailing in Spain - a country chosen by Treasury to be at a comparable level of economic development to Poland.

This new approach of determining foreign market value was adopted by Treasury regulation in 1978, which set up (1) most preferred are either home market prices or constructed value in a non-SCE country which produces merchandise similar to that in question, and which is at a stage of economic development comparable to that of the SCE country; (2) if no non-state-controlled economy country of comparable economic development produces such or similar merchandise, use may be made of a constructed value determined by costs, in the SCE, of specific objective components or factors of production; and (3) as a last resort, United States price or constructed value of such similar merchandise may be considered.

51. See Dumping from 'Controlled Economy' Countries, id..
54. Such components or factors include hours of labor required, quantities of raw materials employed, and amounts of energy consumed. Id. at § 353.8 (c).
55. Id. at § 353.8(b)(3).
The Trade Agreement Act of 1979 further defined the calculation of foreign market value ("FMV") for "state-controlled economies." If Treasury found that the exporting country was "state-controlled" to the extent that sales did not permit a determination of FMV under the normal methodologies, then FMV would be calculated on the basis of either: (a) the prices of similar merchandise of a non-state-controlled economy countries; or (b) the constructed value of such or similar merchandise in a non-state-controlled economy country or countries.56

2. Recent Changes in the Law and Practice

The applicability and means of implementation of the SCE provisions were challenged by three cases in the beginning of 1980s.57 Respondents in Natural Menthol (this case will be discussed further in the next chapter) tried to single out a particular sector or industry and find it to be market-oriented despite the fact that the larger economy was not market-oriented, which has been the main theme of argument and dynamics for the reforms of the law since then. They argued that the production and sale of menthol in China is essentially far from state control and the agricultural sector is subject limited state influence with no significant state intervention in the production and pricing of nonessential products, including menthol. Thus the "normal" market economy methodology should be used to calculate the fair value of

their merchandise.\textsuperscript{58} Department of Commerce ("Commerce")\textsuperscript{59} announced, however, that it would reach the same conclusion whether it looked at the particular sector or the economy at large - it found that it could not use the PRC menthol producer's price or costs.

Following the menthol controversy, the next case in which the Commerce faced a sectoral analysis involved trailer axles from Hungary.\textsuperscript{60} In this case, the producer of the merchandise, Hungarian Railway Carriage and Machine Works ("RABA"), like respondent in the menthol case, suggested that the Hungary's economy in the past decade supported the argument that immediate industries like truck trailer axle producers operated in the least controlled sector of Hungary's economy. Therefore, a sectoral approach should apply.\textsuperscript{61}

Commerce rejected the suggestion of using the normal market economy version of foreign market value. The factors upon which the determination was based included:

(i) Hungarian government controls on wage increases. (Excessive increases were taxed.)

(ii) Hungarian government controls on investment. (Internally-generated funds were controlled via taxes. External capital was obtained from state-owned banks.)

\textsuperscript{58} See Statement, Affidavits and Memoranda filled by Chinese National Native Produce and Animal By Products Import & Export Corporation (CNEC) with Department of Commerce (Oct. 16, 1980, and Nov. 1980 [hereinafter cited as CNEC papers]).

\textsuperscript{59} On January 2, 1980 the President transferred responsibility for conducting investigations into whether goods had been sold in the United States at less than fair value from the Treasury Department to the Commerce Department.

\textsuperscript{60} Trailer Axle from Hungary, \textit{id}.

(iii) Transactions with hard currency countries were controlled through import licenses and a foreign exchange system. (The Hungarian forint was not convertible.)

(iv) The government's power to appoint industrial management, determine management bonuses, develop sectoral plans, and control capital investment.62

While Commerce's SCE finding was decisive, it, in a separate letter to RABA's counsel announcing the SCE determination, was almost apologetic for the uncertainty generated by the current statute: "As you know, the Congress is at present considering changes in this area of the trade laws, and perhaps there will be more definite statutory guidance in the future."63

There were 28 antidumping investigations involving imports from state-controlled economy countries between 1980 and 1985.64 During the same period Commerce reached a determination concerning the basis for FMV in 18 determinations65 The basis used in these 18 cases were:

- Home market sales of surrogate producers: 4 times

63. Letter from Lawrence J. Brady, Assistant Secretary for Trade Administration, to Arthur T. Downey, counsel for RABA (July 31, 1981).
65. See Vermulst id. at Note 114 (The determinations are final determinations, unless no final determinations were issued. Therefore no data on preliminary methods were included.)
- Export sales of surrogate producers: 2 times
- Exports to U.S. of surrogate producers: 4 times
- Simulated constructed value: 6 times
- Data in the petition: 3 times\(^{66}\)

Analysis of the state-controlled economy cases investigated before 1988 indicates that Commerce has generally relied upon the surrogate methodology which has been criticized as an unpredictable, unfair and unworkable method.

As a result of heavy criticism on its methodologies applied to imports from SCE countries on one hand, and knowing that applying these methodologies was difficult on another hand, Commerce amended the SCE provision in the Omnibus Trade and Competitive Act of 1988 to "overcome this reliance on information that is extremely difficult to obtain, and to provide greater certainty and predictability in the administration of the antidumping duty law as it applies to non-market economy countries."\(^{67}\)

The Omnibus Trade and Competitiveness Act of 1988 ("Trade Act of 1988" or "1988 Trade Act") was introduced in the House of Representatives as H. R. 3 on January 6, 1987.\(^{68}\) The portion containing the antidumping amendments is section 1316 entitled "Dumping by Nonmarket Economy Countries."\(^{69}\)

Before 1988 Trade Act the Commerce Department developed three methods to determine the dumping margin. As discussed above, these methods are: (1) the "surrogate country" method, (2) the "standard

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\(^{66}\) See Vermulst \textit{id.} at 361.


\(^{68}\) Int'l Trade Rep. (BNA) 20, January 1987.

constructed value” approach, and (3) the “factors of production” method. All three methods use a surrogate country market.\textsuperscript{70}

1988 Trade Act adopted an approach that is similar to prior law but reverses the order of preference of the methods that Commerce is to consider in making its foreign market value determination.

Pursuant to the 1988 Trade Act, section 773(c) of the Tariff Act of 1930, 19 U.S.C. § 1677b(c), now directs Commerce to determine whether (1) the subject merchandise is exported from a NME;\textsuperscript{71} and (2) available information does not permit calculation of FMV using the normal methodologies as defined in section 773(a) (i.e., home market prices, third country prices or constructed value).\textsuperscript{72} If these two conditions exist, then the Commerce shall determine the foreign market value of the merchandise on the basis of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses....\textsuperscript{73}

Commerce is required to value the NME factors of production, to the extent possible, on the basis of prices or costs for the factors in one or more market economy countries which are significant producers of comparable merchandise and which are at a level of economic development comparable to the NME.\textsuperscript{74} Once Commerce finds that the country of export is an NME

\textsuperscript{70} 19 U.S.C. §1677(c) (West Supp. 1988).
\textsuperscript{71} 1988 Trade Act changes the terminology from “state-controlled-economy country” to “nonmarket economy.” “Nonmarket economy country” is any country which Commerce finds “does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” (19 U.S.C. § 1677(18)(A) (1988)).
\textsuperscript{72} 19 U.S.C. § 1677b(1)(A)-(B).
\textsuperscript{73} Id. at 1677b(c)(1) (emphasis added).
\textsuperscript{74} Id. § 1677b(c)(4).
and normal FMV calculations cannot be used, it must calculate FMV based on
the surrogate country value of the NME factors of production.\footnote{Id.}

Thus, under the 1988 Trade Act, Commerce is required to give first
preference to a calculation of the “value of the factors of production,” and
give second preference to the price of good from a surrogate country sold in
other countries of imported into the United States.

Commerce did not establish any predictable administrative practice
with respect to the calculation of FMV in NMEs until \textit{Sparklers from China}
on May 1991.\footnote{Sparklers from the People’s Republic of China, 55 Fed Reg., 21,051, 21,052 (1990).} In \textit{Sparklers} (this case will be discussed at greater length
below), Commerce values some of Chinese producer’s actual acquisition
prices. Commerce based the value of one production factor on the actual
price paid by Chinese producer for an input that was imported from a market
economy country.

In \textit{Oscillating Fans and Ceiling Fans From the People’s Republic of
China (“Fans”)},\footnote{56 Fed Reg. 25,664 (1991).} Commerce again used the so-called “mix and match”
approach. Having found that available information did not permit the
calculation of FMV pursuant to normal methods because all Chinese
production inputs were not acquired at market-based prices, Commerce, like
in \textit{Sparklers}, mixed actual acquisition prices for inputs imported from market
economy countries with surrogate value in order to calculate FMV.\footnote{Id.}

Like other NME methodologies, the factors of production approach has
been the subject of controversy. Commerce views the approach as the most
accurate method for calculating FMV in an NME because acquisition prices of
input imported from market economy countries reflect the NME producer’s

\begin{footnotes}
\footnote{Id.}
\footnote{Sparklers from the People’s Republic of China, 55 Fed Reg., 21,051, 21,052 (1990).}
\footnote{56 Fed Reg. 25,664 (1991).}
\footnote{Id.}
\end{footnotes}
actual costs. On the contrary, some view it as more arbitrary than the one it replaced. As one commentator reviewed:

"There are three problems with the factors of production approach to NME cases: (1) the approach provides little predictability of result, the fundamental problem with the surrogate methodology; (2) it often ignores the comparative advantage the NME may enjoy; and (3) it calls upon NMEs to reveal their most sensitive information to the Commerce Department." 79

Since the antidumping amendments in 1988 until the present, Commerce have applied a few tests to determine the existence or absence of NME price distortion. In Fans80 Commerce first developed the so-called "bubbles of capitalism" test. It was subsequently incorporated into the final determination of Lug Nuts from China81 ("Lug Nuts"). The test also was known as the 100% test, which required that every input into the product under investigation be purchased at a market-determined price in order for fair value to be on the nonmarket economy producer's own costs. If Commerce determined that 100% of the NME values of the factors of production were "market driven," i.e., free of NME distortion, then Commerce would find the industrial sector under investigation to be operating within a bubble of capitalism. The Commerce could then use the reported market driven NME values in its FMV calculation under the market economy methodology. If Commerce found that 95% of the inputs were market driven value and 5% were nonmarket driven, it would not determine that a bubble of capitalism existed in the sector.

80. Id.
This market-driven factor cost methodology existed for a very short period. In its Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People’s Republic of China, Commerce developed an entirely new standard: the “market-oriented industry” (“MOI”) test. According to Commerce, the MOI test is designed to take into account both the direct and indirect effect of central government planning in the determination of whether an industry is market-oriented.

With the adoption of the MOI test, Commerce has now effectively reverted to former precedent for dealing with nonmarket economy countries, which demands proof that an entire industry sector is market-oriented. So it is natural that this new methodology faces criticism from both petitioners and responding parties.

It is noteworthy that Commerce has not yet identified any MOIs under this new methodology in NME antidumping cases to date.

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III. CHINESE DUMPING CASES

China has been one of the main targets of U.S. antidumping petitions. The number of dumping duty actions against imports from China is currently 37, second only to Japan (See Appendix A and Table I). Considering that of the 37 cases, 21 have been made since 1989, the increasing rate is higher than that for any other countries.

Commerce consistently treated China as an nonmarket economy country under U.S. antidumping law and applied specific NME methodologies of the law to imports from China, which has been challenged for its rationality, applicability and accuracy by the deepening economic reforms in China which is leading China toward market economy. At the same time, numerous antidumping investigations involving China hastened the search for new methodologies for determining FMV with respect to nonmarket economies. 84

A. China - An Easy Target

Until 1981 there were no antidumping cases against Chinese imports, probably because Chinese products constituted no threat to US producers. However, since 1981 there has been an upsurge of dumping charges against China. Of the 164 dumping charges published by the United States Department of Commerce between January 1981 and October 1991, (see

84. See e.g., Fans from China ("bubbles of capitalism") and Lug Nuts from China ("mini-bubble test and "MOI" test).
Appendix A) 27 involved imports from non-market economic countries. Of these 19 concerned China. Chinese cases accounted 70.3 percent of all U.S. antidumping actions against NMEs, and 11.5 percent of all United States' antidumping actions, while Chinese imports accounted for only about 3.9 percent of U.S. total imports. An additional 18 determinations involving China were made since then (see Table I). Thus, a total of 37 cases have involved China up to the present time, which reflects that China is one of the main targets of U.S. antidumping proceedings.

Table I: Antidumping Investigations Against Chinese Exports, 1980-93

<table>
<thead>
<tr>
<th>Product</th>
<th>Date initiated</th>
<th>Action taken</th>
</tr>
</thead>
<tbody>
<tr>
<td>Natural menthol</td>
<td>7/80</td>
<td>Affirmative preliminary injury and LTFV determinations, cash deposit 14% f.o.b. value (1/14/81); negative final injury determination, case terminated (6/17/81)</td>
</tr>
<tr>
<td>Greige polyester/cotton printcloth</td>
<td>8/82</td>
<td>Affirmative final LTFV and injury determinations, suspension of liquidation continued (9/6/83); average duty of 22% (2/12/83)</td>
</tr>
<tr>
<td>Shop towels of cotton</td>
<td>8/82</td>
<td>Affirmative final LTFV and injury determinations, cash deposit on case-by-case basis (10/5/83); final review: cash deposit on case-by-case basis (6/24/85)</td>
</tr>
<tr>
<td>Canned mushrooms</td>
<td>10/82</td>
<td>Affirmative preliminary injury and LTFV determinations, duty 7% ad valorem (5/20/83); negative final injury and LTFV determinations, case terminated (10/5/83)</td>
</tr>
<tr>
<td>Potassium permanganate</td>
<td>2/83</td>
<td>Affirmative final LTFV and injury determinations, average duty of 40% ad valorem (1/25/84)</td>
</tr>
<tr>
<td>Chloropicrin</td>
<td>4/83</td>
<td>Affirmative final injury and LTFV determinations, suspension of liquidation, average duty of 58% ad valorem (3/22/84); cash deposit of 58% (1/22/85); Commerce notified intent to</td>
</tr>
<tr>
<td>Product</td>
<td>Date initiated</td>
<td>Action taken</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
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<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Barium chloride</td>
<td>10/83</td>
<td>Revoke antidumping duty order (2/26/93)</td>
</tr>
<tr>
<td>Barium carbonate</td>
<td>10/83</td>
<td>Affirmative final LTFV and injury determinations, cash deposit 15% (10/17/84)</td>
</tr>
<tr>
<td>Natural bristle paint brushes</td>
<td>2/85</td>
<td>Negative final LTFV determination, case terminated (8/27/84)</td>
</tr>
<tr>
<td>Iron construction castings</td>
<td>5/85</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 211% (8/2/85); affirmative final injury and LTFV determinations, weighted average margin 127% (2/14/86); case terminated because petitioner withdrew requests for review</td>
</tr>
<tr>
<td>Certain steel wire nails</td>
<td>6/85</td>
<td>Affirmative preliminary injury and LTFV determinations, suspension of liquidation, average duty of 25.5% (10/28/85); affirmative final LTFV determination, duty of 11.7% ad valorem (3/19/85)</td>
</tr>
<tr>
<td>Petroleum wax candles</td>
<td>9/85</td>
<td>Affirmative preliminary injury and LTFV determinations, suspension of liquidation, average duty of 8% ad valorem (1/9/86); affirmative final LTFV determination, average duty of 6.3% (3/25/86)</td>
</tr>
<tr>
<td>Certain welded carbon steel pipes and tubes</td>
<td>11/85</td>
<td>Affirmative preliminary injury and LTFV determinations, average duty of 135% ad valorem (3/7/86); affirmative final injury and LTFV determinations, final LTFV ruling shows weighted average margin 54.21%, antidumping duty order issued(6/10/86)</td>
</tr>
<tr>
<td>Porcelain on steel cooking ware</td>
<td>12/85</td>
<td>Affirmative preliminary injury and LTFV determination (1/30/86); affirmative final injury and LTFV determinations, final LTFV ruling</td>
</tr>
<tr>
<td>Product</td>
<td>Date initiated</td>
<td>Action taken</td>
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<tr>
<td>-------------------------------------------</td>
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<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Tapered roller bearings and parts</td>
<td>9/86</td>
<td>Action taken shows weighted average margin 66.65%, antidumping order issued (10/10/86)</td>
</tr>
<tr>
<td>Sewn cloth head ware</td>
<td>6/88</td>
<td>Case terminated because no injury found</td>
</tr>
<tr>
<td>Industrial nitrocellulose</td>
<td>10/89</td>
<td>Affirmative preliminary injury and LTFV determinations</td>
</tr>
<tr>
<td>Heavy forged handtools injury</td>
<td>4/90</td>
<td>Affirmative preliminary and final LTFV determinations</td>
</tr>
<tr>
<td>Sparklers</td>
<td>7/90</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 103.71% (12/7/90); affirmative final injury and LTFV determinations, antidumping duty order issued</td>
</tr>
<tr>
<td>Sodium sulfur compounds</td>
<td>7/90</td>
<td>Affirmative preliminary and final LTFV determinations</td>
</tr>
<tr>
<td>Silicon metal</td>
<td>8/90</td>
<td>Affirmative final injury and LTFV determinations, weighted average margin 139.40% (9/26/91)</td>
</tr>
<tr>
<td>Steel wire rope</td>
<td>11/90</td>
<td>Affirmative preliminary injury and LTFV determinations; final LTFV shows margin 47.54%; negative final injury determination, case terminated (10/16/91)</td>
</tr>
<tr>
<td>Electric fans (oscillating and ceiling fans)</td>
<td>11/90</td>
<td>Affirmative final injury and LTFV determinations, which shows margins of 2.70% (10/25/91); antidumping duty order issued (12/9/91), finally revoked (1/29/93)</td>
</tr>
<tr>
<td>Chrome-plated lug nuts</td>
<td>11/90</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 66.94% (4/18/91); affirmative final injury and LTFV determinations, weighted average margin 4.24% (9/10/91); amended final weighted average margin 42.42% (4/24/92)</td>
</tr>
<tr>
<td>Product</td>
<td>Date initiated</td>
<td>Action taken</td>
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<tr>
<td>----------------------------------------------</td>
<td>----------------</td>
<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Shopping carts</td>
<td>1/91</td>
<td>Case terminated because petition withdrawn (1/91)</td>
</tr>
<tr>
<td>Tungsten ore concentrates</td>
<td>2/91</td>
<td>Affirmative final LTFV and injury determinations, weighted average margin 151%, antidumping duty order issued (9/20/91)</td>
</tr>
<tr>
<td>Sodium sulfur compounds</td>
<td>2/91</td>
<td>Affirmative preliminary and final injury determinations, final LTFV ruling shows weighted average margin 25.57% (1/25/91)</td>
</tr>
<tr>
<td>Ball bearings (mounted or unmounted)</td>
<td>3/91</td>
<td>Case terminated because no injury found</td>
</tr>
<tr>
<td>Refined antimony trioxide</td>
<td>5/91</td>
<td>Affirmative preliminary injury and LTFV determinations; weighted average margin 3.18% (11/5/91); negative final injury determination, case terminated (4/92)</td>
</tr>
<tr>
<td>Carbon steel butt-weld pipe fittings</td>
<td>6/91</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin over 100% (12/26/91); affirmative final injury and LTFV determinations, final LTFV ruling shows margins over 182.90%; antidumping duty order issued (7/6/92)</td>
</tr>
<tr>
<td>Sulfanilic acid</td>
<td>10/91</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 85.29% (3/18/92); affirmative final injury and LTFV determinations, antidumping order issued (8/19/92)</td>
</tr>
<tr>
<td>Sulfur dyes</td>
<td>3/92</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 210.35% (9/24/92); final LTFV ruling shows margin 213.10%; negative final injury determination, case terminated (2/24/93)</td>
</tr>
<tr>
<td>Ferrosolicon</td>
<td>4/92</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 137.73%; affirmative final injury and LTFV determinations, antidumping duty order issued (3/11/93)</td>
</tr>
<tr>
<td>Product</td>
<td>Date initiated</td>
<td>Action taken</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>----------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Compact ductile iron waterworks fittings</td>
<td>6/92</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 127.38%; affirmative injury determination (3/10/93), final Commerce's determination due 6/18/93</td>
</tr>
<tr>
<td>Hair brushes and certain parts and components</td>
<td>8/92</td>
<td>Petition withdrawn and case terminated (9/8/92)</td>
</tr>
<tr>
<td>Certain helical spring lockwashers</td>
<td>9/92</td>
<td>Affirmative preliminary injury and LTFV determinations, weighted average margin 128.6% (4/30/93); waiting Commerce's final LTFV and ITC's final injury determination</td>
</tr>
<tr>
<td>Nitromethane</td>
<td>6/93</td>
<td></td>
</tr>
</tbody>
</table>

The growing number of dumping cases against China result from (1) the very rapidly growing trade between China and the United States, especially the rapidly increasing competitiveness of Chinese industries, which created problems of adjustment for the domestic producers of the United States; (2) the overall trade relations of China and United States; and (3) the conceptual problems and inefficiency of methodologies that arise from applying U.S. antidumping laws to China and other NMEs.

1. Rapidly Growing Trade Between China and the United States

Direct trade between China and the United States dates back to 1784, when a U.S. ship made its first trip to Canton.\(^{85}\) Even after 1949, when the PRC was established, trade between the two countries still continued for some time, amounting in 1950 to $230 million.\(^{86}\) However, it was only after President Nixon visited China in 1972 that China and United States resumed

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\(^{85}\) In 1984, people from both sides of the pacific joined together in that city (called Guangzhou) in order to commemorate that occasion.

trade after a 20-year hiatus. The turnover, bilateral trade was a modest $5 million. Two-way trade volume reached $2.3 billion in 1979 when the two countries established diplomatic relations. Trade grew rapidly since then. It increased from $2.3 billion in 1979 to $46 billion in 1984, $13 billion in 1988, $25.3 billion in 1991 and $30.3 billion in the first 11 months of 1992, a more than ten-fold expansion. Moreover, the U.S. imports component of this total increased at an even greater rate, from $593 million in 1979 to $19 billion in 1991, an increased of 31-fold during the 12-year period.87

A rapid rise in U.S imports from China, coupled with relatively slow growth in U.S. exports to China has led to a large and growing U.S. trade imbalance with China.88 During the four year period from 1977 to 1981, the United States enjoyed a trade surplus with China, primarily attributed to U.S. agricultural exports. For 1982, trade had been estimated to remain at the 1981 level of $5.4 billion.89 However, the U.S. trade surplus fell from $2.7 billion in 1980 to $1.7 billion in 1981, and to $628.4 million in 1982.90 The U.S. trade with China turned from a surplus to a deficit of $71 million in 1983, but the deficit declined slightly in 1984. It then increased from $51.9 million in 1984 to $67.2 million in 1985, $1.6 billion in 1986, $2.8 billion in 1987, $3.4 billion in 1988, $6.1 billion in 1989, $10.3 billion in 1990, $12.6 billion in 1991, and $18.08 billion in 1992, second only to the U.S.-Japan trade deficit.91

87. Nai Ruenn Chen, supra.
89. Id.
91. See USITC, publication No. 2375. But in the view of Chinese, the issue arises in part because of trade accounting differences between the two countries. The United States, in calculating its trade figures, includes all goods manufactured in China as Chinese exports, regardless of whether shipped to the United States directly or indirectly through Hong Kong, Macao, or another entrepot. China argued that Chinese firms add only 7-8 percent in value to such processed goods, and insisted that U.S. bound goods shipped first to a third country or third territory - like Hong Kong - where value may be added through finishing, packing, marketing,
In any developing trade relationship, one commentator said,\textsuperscript{92} problems are a natural and the normal corollary of anticipate growth, and U.S.-China trade is no exception.\textsuperscript{93} Sullivan said that one of the most important problems is that expanding trade creates difficulties, especially when the rate of expansion is rapid.

"Under the best circumstances, a competitive new entrant to a U.S. market will create problems of adjustment for domestic producers and may, if the new entrant is the more efficient producer, or engages in unfair trade practices, harm one or more domestic entities.\textsuperscript{94}\)

China's growing competitiveness especially alarmed some U.S. domestic producers, like the textile and apparel industries. They view China as a threat to their existence. They fight China by throwing their enormous political weight behind congressional efforts to revoke special duty privilege on imports from China and by resorting to antidumping duty laws on Chinese goods.

2. China-U.S. Economic Relations

In July 1979 the United States and China signed an agreement to promote and expand trade between them.\textsuperscript{95} In this agreement, the United

\textsuperscript{92} John J. Sullivan, supra at 140.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 135
\textsuperscript{95} See Agreement on Trade Relations, July 7, 1979, id.
States and China undertook "to adopt all appropriate measures to create the most favorable conditions for strengthening, in all aspects, economic and trade relations between the two countries so as to promote the continuous, long-term development of trade between the two countries." They further agreed to "make every effort to foster the mutual expansion of their reciprocal trade and to contribute, each by its own means, to attaining the harmonious development of such trade."

Almost fourteen years have past since then, and trade between the United States and China is growing rapidly. This does not mean, however, that the United States and China have resolved all their differences. Remaining problems not only have their root in 20 years mutual hostility, but also stem from the rapidly changing world situation.

Sino-U.S. relationships based on the old world order after the World War II is facing a severe test with the collapse of the Berlin Wall, the disintegrate of Easter European Bloc and the disappearance of the former Soviet Union. "Gone now is the Soviet threat, the issue that brought together the United States and China despite enormous differences in economic systems and ideologies."

The relationship between the United States and China is "floating without direction." A sharply widened trade deficit since the late of the 80s combined with the allegation that China uses prison labor in its export industries, and the argument concerning the human rights and weapon proliferation make up the main sources of the current

96. Id.
97. Id. art. 1, § 2.
friction and put China and the United States on a collision course over trade.¹⁰⁰

Antidumping duty investigation in some sense is highly political. It is affected dramatically by the U.S. political and economic relations with certain target countries. Between May 1989 and May 1990, coinciding with growing bilateral political and trade tension, U.S companies filled 11 dumping cases against Chinese, compared to only 16 cases filed in the prior 11 years.¹⁰¹ In the same period only 7 cases were filed against Japan and 4 against Germany, even though these countries export far more to the United States than China does.¹⁰²

3. Unfavorable Dumping Duties Against China

What emerges from Table I is that the antidumping margins imposed against Chinese exports are surprisingly high. In Potassium Permanganate¹⁰³ the average duty of 40 percent ad valorem was charged to the Chinese. In Chloropicrin¹⁰⁴ an average 58 percent ad valorem was charged. In Natural Bristle Paint Brushes¹⁰⁵ weighted average margin was 127 percent. In Silicon Metal¹⁰⁶ initial margin reached 139.49 percent. The weighted average margin in Sulfur Dyes was as high as 213.10 percent.¹⁰⁷

The unfavorable high dumping margins imposed against Chinese exports and the "perception that DOC is unlikely to rule in China's favor in

¹⁰⁰ Lena Sun and John Burgess, U.S. Reexamining Trade Relationship with China, Washington Post, April 23' 91 pD1 col 1.
¹⁰² Id. at 36.
the current political and trade environment;" make China an "easy target" for dumping duties and make dumping filing an effective weapon to fight Chinese break.

B. The Evolution of the Application of the Antidumping Law to Imports From China

1. Natural Menthol - Sectoral v. General Analysis

   Natural Menthol was the first antidumping action brought by a U.S. producer against an import from China. It was also the first time that Commerce dealt with the sectoral and general analysis controversy, which has been the main source of argument and still remains unresolved.

   a. Background

   Imports of natural menthol from China began increasing dramatically since 1977. Total U.S. natural menthol imports increased in 1978 when imports of natural menthol from China totaled $6.7 million, 36% of the U.S. market. China's high sales and low prices, which created great pressure on the new synthetic menthol industry, prompted the call for protective action.

   b. The Domestic Menthol Industry

   There are, generally speaking, two kinds of menthol products in the United States market - natural menthol and synthetic menthol. Brazil was the dominate natural menthol supplier before the Chinese entered this

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108. Griffith supra at 36.
110. Natural Menthol, id.
111. Richards, supra, note 20, at 13.
market. Haarmann & Reimer Corporation ("H&R") and SCM Corporation ("SCM") composed the U.S. domestic industry. Both of them mainly produce synthetic menthol. H&R, a New Jersey based and the largest domestic producer and petitioner in Natural Menthol, opened its South Carolina menthol plant in 1978. The decision to build was made during a period of unusually high menthol prices owing to Brazil's crop failures in 1973-1974.

With China in the market, the menthol price returned to more characteristic levels, which created great pressure on the new synthetic menthol industry, and led to the initiation of an antidumping proceeding against the Chinese in 1980.

c. Sectoral v. General Economy Approach

On June 11, 1980, less than five months after the United States granted China the most-favored-nation status of February 1, 1980, H&R filed a petition with Commerce requesting the imposition of an antidumping duty on natural menthol from China. In its petition H&R alleged that China natural menthol was being sold at LTFV and that the domestic industry was, or was threatened with being, materially injured by reason of those imports. That petition confronted Commerce with the problem of determining whether China’s economy was state-controlled to the extent that its home market prices could not be used in a fair value comparison with the prices at which Chinese menthol was being sold in the Unite States.

Based on reforms in China’s agricultural sector, the China National Native Produce and Animal By-Products Import & Export Corporation ("CNEC"), the Chinese exporter, in its filings with the Commerce Department

asserted that the normal market economy methodology should be used to calculate the fair value of their merchandise. They asserted that (1) the production and sale of menthol in China was essentially free from state control; (2) the perception of China's economy as totally dominated by the central government was inaccurate, particularly in light of recent reforms; and (3) the agricultural sector, comprising approximately eighty percent of China's economy, is subject to limited state influence with no state intervention in the production and pricing of nonessential products such as menthol. Further, they argued that there was persuasive evidence showing that the purchases and sales of menthol in China essentially are based on market considerations. Transaction prices appear to be largely based on negotiations between buyer and seller within the PRC. In purchasing menthol for resale to foreign markets, the respondent had to compete with purchasers in the PRC who intended to use menthol domestically. Furthermore, there appeared to be no direct controls (e.g., production quotas or special production incentives) on the production of menthol or peppermint oil (the primary raw material used in producing menthol).

The respondent tried to single out a particular sector and show it to be market-oriented. Conversely, petitioner, H&R, emphasized the evidence of general intervention of the Chinese government in the nation's economy and regional planning in industry and in essential agricultural goods.

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116. See Cueno & Manuel, Roadblock to Trade: The State Controlled Economy Issue in Antidumping law Administration, 5 Fordham Int'l L. J. at 297, citing statements, Affidavits and Memoranda filed by CNEC with Commerce on October 16 and November 25, 1980.
117. Menthol, at 3259-60.
118. See Letter from Eugene L. Stewart (special counsel to H&R) to Mary S. Clapp, Supervisory Import Administration Specialist, Department of Commerce (November 17, 1980).
Commerce announced that it would reach the same conclusion whether it looked at the particular sector or the economy at large - it found that it could not use Chinese menthol producer's figures on costs.

Commerce's reasoning went as follows:

"A threshold question is raised by respondent's contention that the special rules of section 773(c) apply only if the effects of state economic controls on the particular sector in question are such that a fair value determination under normal procedures cannot be made. Respondent finds support for its position in the language of the statute, which is drafted in terms of whether a exporting country being state-controlled 'to an extent that sales or offers of sales of such or similar merchandise' do not permit normal foreign market value calculation. Respondent also finds support for its position in a number of antidumping determinations by the Treasury Department in the 1960s.

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

In reaching our conclusion in this preliminary determination, we have examined (and discussed below) both the degree of control exercised by the state over the PRC economy generally and the impact of state control on the production and sale of menthol. Since our conclusion would be the same under either petitioner's or respondent's interpretation of the statute, we need not specifically decide the issue at this time. We do, however, note that in our view, respondent has to be given very careful consideration where different conclusion would have resulted depending upon the approach taken."119

The finding is quoted at length because it identifies certain themes that are important in later analyses. It also begins to raise questions Commerce would have to deal with not only in this case but also in the cases that followed. The most prominent question is that, as discussed above, if there is convincing

evidence to support that a sector of production in a NME country is free from
government intervention and operates according to market principles,
should its home market price be used as a base for FMV calculation?

Commerce analysis focused first on the producers of the merchandise
under investigation. It found that there appeared to be no government
involvement in sales of menthol, domestically or for export. Second,
Commerce focused on the inputs into the product under investigation, e.g.,
peppermint/peppermint oil. Like menthol, there was no any direct
government intervention and the production units could charge whatever
prices they want for their peppermint/peppermint oil and there were no
quotas for the production of this product. And then Commerce put emphasis
on the inputs used by the producer under investigation and made its
conclusion that PRC home market prices for menthol could not be accepted as
a measure of fair value not because of the presence or absence of direct
controls over the production and distribution of menthol but because of
general limitations on the transferability of land and labor in the PRC and
indirect effect that pervasive controls on other agricultural products
necessarily have on menthol production.

The two most important factors in the production of menthol
are the land and labors needed to grow peppermint. While
respondents have presented evidence indicating that 'quasi-
markets' exist for both (e.g., the use of surplus land and labor can
be treated to neighboring production unites). We cannot
conclude, based on the information we have received that there
is a genuine market for either. The extent of 'quasi-market'
transactions appears to be small and, even where they occur,
land cannot be sold and the restrictions on labor mobility remain
substantial. Without an active market for land and labor, it is
difficult to find that production and pricing decisions reflect
market forces and accurate valuation of inputs.\textsuperscript{120}

\begin{footnotesize}
\textsuperscript{120} Id.
\end{footnotesize}
Notwithstanding the foregoing evidence, i.e. menthol itself is subject to very little direct state control in China and the purchases and sales of menthol in the PRC essentially are based on market considerations, Commerce concluded that the general limitations on the transferability for land and labor, the indirect effects that pervasive have on menthol production made Chinese home market menthol prices inappropriate for use.

d. Surrogate Argument

Having concluded that the Chinese home market menthol price could not be used, Commerce decided, according to its regulations,\textsuperscript{121} to find a surrogate market economy nation whose home market menthol prices could be used as if these were Chinese home prices.

The problem is that the existing regulations offered little guidance as to how such a surrogate should be selected. These regulations require Commerce to find a "non-state controlled economy country...at a stage of economic development comparable to the state-controlled economy (in question)." The statutory standard for determining which market economy countries are acceptable surrogates sets two conditions. First, the market economy country must be "at a level of economic development comparable to that of NME country. Second, the market economy country must be a significant producer of comparable merchandise. Comparability is determined by reference to "generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)."\textsuperscript{122}

In practice Commerce enjoys a great discretion in its surrogate selection. The range of candidates in this case was very limited since apart

\textsuperscript{121}. See, i.e. 19 C.F.R. § 153.7 (1979).
\textsuperscript{122}. Id.
from the United States and China, only Brazil, Japan and Paraguay had viable menthol industries. CNEC suggested that since menthol is brought and sold through an international market based in London, such a free market would furnish a reliable indicator of foreign market value. H&R preferred Brazil home market prices for menthol as the basis for the fair value determination. Commerce rejected both suggestions and chose Paraguay, which, it deemed, was most close to China in its overall level of economic development.

Based on Paraguayan home market pricing data obtained by Commerce through one or two telephone inquires to a United States importer of Paraguayan menthol, Commerce found in its preliminary determination, that Chinese menthol was being sold in the U.S. at prices 13.5% below fair value. Commerce immediately suspended liquidation of all entries or withdrawals of merchandise from warehouse for consumption and required China to post a cash deposit, bond or other security in the amount of 13.5% of the f.o.b. value of natural menthol. Ironically Commerce's final LTFV determination, made after giving consideration to a number of statutory required adjustments, however, showed average margins of only 2.5% below fair value.

126. Id.
127. See Cuneo & Manuel, supra note 62, at 300.
The menthol case terminated because ITC in its final ITC decision\footnote{USITC Pub. No. 1151, Investigation No. 731-TA-28 (June, 1981).} unanimously determined in June 1981 that the United States menthol industry had not been materially injured or threatened with materially injury by reason of Chinese menthol imports.\footnote{46 Fed. Reg. 31,796 (1981).} However, questions raised in this case, such as criteria for NME determination, sectoral and general analysis, surrogate country selection, and economic transition in NMEs etc. are still unresolved and they are the main challenges faced by Commerce again and again in the cases involving NME countries subsequently.

e. The Meaning of Menthol Case

In Natural Menthol, CNEC failed to prevail on the crucial legal issue of whether China's economy is SCE to such an extent that the home market prices are unreliable as a basis for determining foreign value in an LTFV investigation. "This set a precedent for application of the special provision of the antidumping law requiring foreign market value to be determined by use of, among other means, a surrogate market economy."\footnote{John Sullivan, \textit{supra}, at 143.} It also established a precedent for applying the SCE provision of the antidumping law to most, if not all, products from China.\footnote{Natural Menthol, 46 Fed. Reg. 3,259 (1981).} However, the case left open the issue of whether the SCE provision should be applied whenever the overall economy is generally state controlled, or only when the effects of state control on the particular sector in question render foreign market value unreliable using the normal procedures.\footnote{See Cuneo, \textit{supra} note 17, at 298-300.}
2. Candles and Headwear: Challenging SCE Methodology

After Menthol, Commerce encountered no challenge for its treatment of China as a SCE country until Candles and Headwear.134

Extensive economic reforms since 1979, especially 1984, have been introduced in China. Market factors emerged in some areas of China, such as Special Economic Zones, some rural area, and in some sectors of industries, which led respondents in Candles and Headwear to claimed that they were entitled to be treated as market economy producers under antidumping law.

Candles

On September 4, 1985, National Candle Association, an organization of domestic manufacturers of petroleum wax candles in the United States, filed with Commerce a petition alleging that imports of the subject merchandise from the PRC were being, or were likely to be, sold in the United States at less than fair value and causing material injury, or threaten material injury, to a United States industry.

Respondent claimed that the PRC candle sector is not state-controlled and, therefore, Commerce should base foreign market value on prices or costs in the home market. It argued that the candle producers were those of rural-based industrial enterprises that operated largely outside centralized control. First, their inputs were not supplied under quota, nor were the prices they paid for their inputs set directly by the central government. Second, their output was not subject to quotas or price controls.135

In analyzing whether an economy is state-controlled, Commerce set out four factors in this case it would consider in this regard:

(1) the degree of government ownership of the means of production,
(2) the degree of centralized government control over allocation of resources or inputs,
(3) the degree of centralized government control over output and
(4) the relative convertibility of the country's currency and the degree of government control over trade.\textsuperscript{136}

The second factor, government control over inputs, was of primary importance in leading Commerce to conclude that the candle sector could not be treated as non-state-controlled and the PRC prices or costs could not be used to determine the fair value of the merchandise. The major input into candles, paraffin wax, at the time of investigation was a quota product. That meant, according to Commerce, that "it is produced by state-owned petroleum firms facing centrally set prices and quotas."\textsuperscript{137}

Despite the fact that candle producers did not receive any of their quota paraffin wax, and they purchased non-quota wax, i.e., after a wax producer had fulfilled its quota obligations, any additional wax it produced could be sold "in the market". The only restriction on non-quota sales was that the price had to be within 20 percent of the centrally-set price for quota wax. Commerce concluded:

"While the central government does not directly establish the price of wax to candle producers or the amount of wax that is to go into candle production, its decisions on the magnitude of the quota for wax production and the price for quota wax effectively determine the supply and price range for the 'uncontrolled' portion."\textsuperscript{138}

\textsuperscript{136. Id.}
\textsuperscript{137. Id.}
\textsuperscript{138. Id.}
Commerce's second consideration was that there were some factors that insulated the candle producers in the PRC from external market factors. These factors were (1) the government employs extensive foreign exchange controls. Under this situation, Candle producers did not and could not receive the foreign exchange from their export. And (2) licenses were required for all imports and many exports. This could potentially limit competition by similar or competing imports. It could also insulate supplies to candle producers from external market sources. "This 'layer' of government potentially creates a buffer between the internal PRC market and the external world market."140

Headwear

Commerce continued in this case to use the criteria that it set up in Candles as the basis for determining whether China is a state-controlled country. Respondents, the PRC trading companies, argued that "as a result of economic reforms in the PRC, particularly with respect to the headwear industry, state control is not so great as to preclude the determination of foreign market value under section 773(a)."141

With regard to first factor, the degree of government ownership of the means of production, the trading company respondents asserted that as local branches of the state-owned trading entities they operated as autonomous entities since January 1, 1988 and are now responsible for their own profit and losses. Of 26 factories producing headwear for the United States market, 16

139. Id. (In the view of Commerce, "while controls in foreign exchange and imports and exports are not dispositive on the issue of state-control, they are important criteria to consider in countries that are moving from highly centralized system by introducing certain market-like mechanisms." "This is because such controls are traditionally employed by nonmarket economies to maintain economically irrational prices by protesting their internal prices from external market forces").
140. Id.
were collective-owned, six were foreign-owned and only four were state-owned enterprises. Management in state-owned factories is usually selected by the workers, sometimes with formal approval by the local government. Management in the collective-owned firms is selected by the collective. Foreign owners appoint the management of the foreign-owned factories.

With regard to the degree of government control over the input markets, respondents stated that the major physical inputs used in producing the headwear under investigation are cotton and polyester. The prices of these materials between factories and their suppliers were set through "arm's length negotiation and the quantities supplied are determined by the parties." "There are no government policy directives applying to these decisions." As to labor, an important non-physical input, according to respondents, wages were established by the factory owners and there are no general restrictions on hiring and firing employees.

With regard to the degree of government control over output markets, the respondents stated that there are three types of prices in the PRC: state-controlled (set by government), guidance prices (prices which are permitted to fluctuate within a band around a state-controlled price), and market prices (set without government intervention). Respondents' submissions stated that all headwear produced for domestic sale in the PRC falls into the third category. Decisions by the factories on what merchandise to produce were not subject to government direction. Export sales by the trading companies depended on foreign demand. The trading companies decisions were not subject to government review and no policy directions applied to these decisions.

As to currency convertibility and the degree of government control over trade, respondents asserted that the PRC has an official exchange rate

142. Id.
and a market exchange rate. The official rate applies to foreign exchange remitted to the central government. The market rate refers to the foreign currency adjustment price negotiated by buyers and sellers in the recently opened foreign exchange adjustment centers. Moreover, all state-owned, collective-owned and foreign-owned enterprises have access to these centers.

Realizing the complexity of the issue and the difficulty of China’s economic analysis, Commerce avoided to address whether section 773(c) required it to examine an economy in general or analyze a section in particular. Commerce made its affirmative determination by alleging that raw cotton appears to be purchased under contract between the growers and the government. Therefore, the prices and quantities supplied for a major input into headwear may be heavily influenced by direct government involvement in its distribution, and the trading companies may be subject to foreign exchange targets.143

Commerce’s opinion in its final determination144 reflected that Commerce was confronting a dilemma. On one hand Commerce “believes that the Chinese foreign trade system is in transition. In many ways it is like a developing market economy country.”145 On the other hand, Commerce was uncertain to what extent that the reforms could lead the PRC home price to be used to calculate FMV. Consequently, Commerce found that it was facing a series of mixed pictures.

(1) Since January 1, 1988, the branches of the national trading companies have operated as autonomous entities. Neither the trading companies nor the factories report their business or production plans to the

143. Id.
145. Id.
State. The decisions to invest assets in production and exportation of headwear are guided more by economic consideration than by the direction of the government.

Despite the reforms that have led to reductions of state-control, the Chinese government continues to own most of the assets in the Chinese economy.

(2) Headwear producers purchased their cotton textiles from outside government plans and were, therefore, able to choose their suppliers and negotiate prices with that suppliers, although the government provided suggested prices for informational purposes.

Most of the cotton used in headwear manufacturing is grown in the PRC and there is heavy government involvement in the production of cotton cloth. Not only is the State the largest purchaser of raw cotton (90 percent) but it is also the major consumer of cotton cloth (50 percent). "The large presence of the government in the production of cotton cloth would indicate that its actions affect the prices and quantities available for outside the plan." 146

(3) The Chinese trading companies are able to export the products they choose and to negotiate the prices they receive. The factories also appear capable of changing the products they produce and to negotiate the price they receive from the trading companies.

The decision to export headwear remains in the hands of the government because trade continues to be a state monopoly.

(4) Headwear is imported into the PRC and, therefore, the state monopoly in trade does not appear to shield domestic PRC producers from international competition. Moreover, one of the goals of the recently

146. Id.
introduced reforms in the headwear sector is that the trading companies will perform more as agent acting on behalf of PRC manufacturers, with the result that the manufacturing entities will be more directly involved in international trade.

The Chinese government continues to maintain a monopoly in foreign trade.

Although contradictions obviously exist, Commerce still reached an affirmative determination, and concluded that the PRC is a state-controlled economy and the headwear sector is state-controlled for the purpose of this investigation. However, Commerce hesitated to make this conclusion as is evidenced by its statement in its final determination:

"With respect to currency convertibility and government control over international trade, the government continues to maintain a monopoly in foreign trade, as noted above. This, in and of itself, does not necessarily mean that the PRC should be treated as a state-controlled economy, especially in light of the growing autonomy of the trading companies and the reduced import licensing requirements." 147

It is noteworthy that Commerce explicitly expressed its willingness to take China's ongoing economic transition into account:

Headwear sector is state-controlled...such evidence of control is indicated by state mandated after-tax outlays and foreign exchange earning targets, the state monopoly of foreign trade, currency quota allocation, the involvement of the government in the cotton market as well as the limited convertibility of the currency. However, if future changes occur in these area as a result of diminished government control, the Department will be willing to reconsider its conclusion in any future review, should this investigation result in an antidumping duty order." 148

147. Id.
148. Id.
Commerce's attitude left open the possibility of using the Chinese home price rather than surrogate costs for FMV calculation, which finally partly realized in Fans and Lug Nuts in 1991.

3. Sparklers and The Mix & Match Approach

a. Best Information Available

Between enactment of the 1988 amendments to the NME provision and May 1991, most cases involving imports from the PRC were decided pursuant to "best information available" with only one exception, i.e., Headwear from China.

In order to complete an investigation of dumping, Commerce typically sends a questionnaire to foreign manufacturers, exporters and importers asking for details of their pricing. The questionnaire and response procedure require the cooperation of the exporters, importers and manufacturers. However, as evidenced by recent cases, the reluctance of foreign manufacturers and importers to cooperate is not uncommon. A statement of Treasury position in this regard appears in Carbon Steel from Japan:

There is no question that responding to request for information concerning costs of production may be time-consuming and costly and that its delivering creates a possible risk of its release to competitors or other parties. However, neither (sic) of this factors can be an acceptable basis to the Secretary for declining to investigate allegation based upon a prima facie showing as made by the complaint in this case. In that connection, it is imperative to underscore, first that the mere investigation of the facts does not in any way suggest that the outcome of the inquiry has been predetermined, on the contrary, an effort is made to obtain the most complete factual picture necessary to reach the required decisions within the time constraints of the law. Second the respondents are generally best able to provide the type of

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150. See Headwear supra.
information requested. However, this refusal to provide it cannot prevent the Secretary from applying the Act on the basis of whatever evidence has available, including that furnished solely by the complaint.\(^\text{151}\)

Usually the only information available is the information contained in the allegations of the complaining United States industry. Practically these allegations yield extremely high dumping margins.

\textit{b. Mix and Match Approach}

As discussed above, while respondents of China have argued that economic reform should entitle them to normal antidumping treatment, thus far, none of these arguments has persuaded Commerce that the NME antidumping regulation should cease to apply. Commerce did not devise any test to analyze the specific market characteristics in a NME country, such as China, until 1990. Then in \textit{Sparklers}, Commerce for the first time used the so-called “mix and match” FMV calculation methodology in which Commerce valued some of Chinese sparkler producer’s production factors in a surrogate country and valued other factors on the basis of Chinese sparkler producer’s actual acquisition prices. Commerce based the price paid by the Chinese producer for an input that was imported from a market economy country.

At the beginning of investigation, Commerce affirmed the justification of treating the PRC as a nonmarket economy country. As a result, Commerce decided to value the factors of production in one or more market economy countries. Of countries known to produce sparklers, Commerce determined that India was the most comparable surrogate on the basis of the per capita GNP, the national distribution of labor and growth rate in per capita GNP.

\footnote{151. 43 Fed. Reg. 2,033 (1978).}
Petitioner contended that Commerce should use the United States as a surrogate country because the three countries selected as appropriate surrogate countries\textsuperscript{152} were not significant sparkler producers. Petitioner proposed its own information as appropriate for valuing factors of production in the United States.\textsuperscript{153} Having rejected petitioner's proposition, Commerce mixed some factors on actual prices paid by the PRC manufacturers for inputs that were imported from market economy countries with surrogate values in order to calculate FMV.

"For factors for which data were available from none of the three countries\textsuperscript{154} we used prices of factors similar to the PRC factors. Where possible we made price adjustments to account for differences in the factors. We also based value for some factors on actual prices paid by the PRC manufacturers for input that were imported from countries with market economies. Where appropriate, the factor values were inflated to POI levels using wholesale prices published by the international Monetary Fund.\textsuperscript{155}

It is noteworthy that Commerce in its final determination stated that without further explanation that it generally seeks to use the actual prices paid for imports from market economy countries as its preferred method of valuing an NME producer's factors of production.\textsuperscript{156}

\textit{Sparklers} was Commerce's first use of this mix and match approach other than in the content of "best information available." Following this case Commerce continued using this approach in its preliminary determination in \textit{Oscillating Fans and Ceiling Fans From China} ("Fans")\textsuperscript{157} and in Chrome-\

\begin{footnotesize}
\begin{enumerate}
\item[152.] These three countries are India, Pakistan and Philippines. \textit{See} 55 Fed Reg. 51743.
\item[153.] 56 Fed. Reg. 20,588.
\item[154.] See note 153 supra.
\item[155.] See note 154 supra.
\item[156.] Id.
\item[157.] See Fans supra.
\end{enumerate}
\end{footnotesize}
Plated Lug Nuts From China (Lug Nuts”), and developed “bubbles of capitalism” and “MOI” tests.


a. “Bubbles of Capitalism” Test

The bubbles of capitalism test was first developed in Fans and then incorporated into the final determination of Lug Nuts from China. A bubble of capitalism is a sector within a generally-planned economy in which reforms have progressed to the point that all prices and costs faced by the producer in that sector are determined by the market. Presumably, upon finding such a “bubble”, Commerce would abandon traditional nonmarket economy country methodology and treat that sector as market-oriented for purpose of FMV calculation.

Fans

Commerce originally investigated the PRC fans producers in response to antidumping duty petition filed in November 1990. The PRC fans sector, at least those companies exporting to the United States, were largely foreign invested or collectively-owned. Of the thirteen companies identified as exporting to the United States, only two were state-owned enterprises. Given the characteristics of their enterprises, respondents claimed that available information permitted the use of section 773(a) of the Act to calculate FMV.

158. See Lug Nuts supra.
159. See Fans and Lug Nuts supra.
161. See “Respondent Party’s Perspective”, supra
Respondents Esteem and Durable, foreign invested oscillating fan manufacturers, claimed that the oscillating fans sector (or individual firm) was not sufficiently state controlled to allow the use of factors of production for FMV. Citing the criteria of section 771(18) of the Act, they contended that Commerce should find that the industrial sector (or individual firm) producing oscillating fan was sufficiently free of state control to allow calculation of FMV based on market economy methodology, i.e., home market sales, third country sales or constructed value, as appropriate. And they argued that their location in an NME does not distort their costs of production in such a manner that FMV cannot accurately be determined based on their own prices or cost structures.

In order to persuade Commerce, Esteem and Durable cited the following as evidence of a lack of distortion of costs and the reasonableness of using their third country prices for FMV:

- The companies were privately owned and operated on market principles without interference from the state;
- The overwhelming majority of material inputs were sourced from abroad or from other foreign investment projects in southern China;
- All output was sold outside the PRC; and
- The labor market in southern China was competitive.

Based on the above facts they argued that the Act permits Commerce to make its determination under section 773(c)(1)(B) on a factory-by-factory basis, and if Commerce confines its analysis to an industry sector, the sector should be determined as foreign investment factories producing oscillating fans.

162. Esteem Industries Ltd./Holmes Products Corp./HASM Manufacturing Co. Ltd. ("Esteem"), Durable Electrical Fan Factory Ltd./Parawin Ltd./Paragon Industries ("Durable").
164. Id.
Respondents CEC Electrical Manufacturing (Int'l) Company, Ltd./CEC Industries (Shenzhen) Ltd./CEC (USA) Texas Group, Inc. ("CEC") and Wing Tat Electric Manufacturing Co. Ltd./China Miler Co. Ltd. ("Wing Tat") cited the criteria set forth in Headwear and argued that the industrial sector producing fans was nonstate controlled. They contended that in at least one investigation\(^{165}\) Commerce concluded that, while the economy of the country under investigation exhibited elements of state control, the economy was not controlled for purposes of the industry in question. Accordingly, these respondents contended that FMV should be measured based on their third country prices or constructed value.

Citing four criteria set forth in Headwear for Commerce to examine whether a particular sector is not state-controlled,\(^ {166}\) CEC and Wing Tat argued that:

- They are foreign-owned;
- The PRC government has no control over type or volume of production, prices charged, or distribution of profits;
  - The vast majority of inputs are sourced in market economies;
  - PRC-sourced inputs are purchased at market prices negotiated at arm's length;
- The government exercise no control over input prices;
- Labor is essentially free of government involvement;
- The companies are free to hire, fire, and contract freely with employees;
- The government does not restrict the companies' rights to obtain, use, or dispose of capital;

\(^{165}\) See *i.e.*, Certain Steel Wire Nails from Yugoslavia, 50 Fed Reg. 47,788, (Feb. 3, 1986).
\(^{166}\) See Headwear *supra*.  
• The companies purchase electricity at a rate which is higher than the rate in Hong Kong; and

• There are no foreign exchange controls imposed on the companies.\textsuperscript{167}

Thus, the question that confronted Commerce is how any industrial sector or any commercial entity in any NME can be said to be operating on market principles such that costs and prices are acceptable, reliable measures of FMV. The legislative history of section 773(c)(1)(B) of the Act provides no additional guidance in interpretation and application, however. Commerce made its preliminary determination on the following basis:

"While some respondents report that they source substantially all of their inputs from market economies, significant input such as labor and the subcomponents of overhead are obtained from sources in the PRC. The available information does not permit us to determine that these domestic inputs are market-based. Regarding labor for example, which some respondents have alleged that they are free to hire, fire, and set wages, government control on labor mobility and other restrictions in the PRC indicate that labor rates are substantially less free than in market economies. There is also evidence on the record in these investigation that some of the foreign-owned respondents are prohibited from selling their products, parts, or raw materials in the local PRC markets...."\textsuperscript{168}

Based on above reasons, Commerce concluded that because all inputs were not market based, respondents' cost and prices were not accurate, reliable measures of FMV. Therefore, Commerce decided using factors of production to determine FMV.

Relying on \textit{Sparklers}, Commerce again mixed actual acquisition prices for inputs imported from market economy countries with surrogate values in order to calculate FMV. However, unlike \textit{Sparklers}, where only one production factor was valued in this manner, Commerce valued a large

\textsuperscript{167} Id.
\textsuperscript{168} Id.
number of Chinese production inputs using acquisition costs of inputs from market economy countries such as Hong Kong, Japan, and the United States.169

More significantly, Commerce emphasized for the first time that it may be willing to value factor of production inputs at actual acquisition prices in an NME, rather than relying on surrogate country values, if those inputs were purchased at market prices:

"It is the Department's practice to value factor of production inputs at actual acquisition prices if it can be established that those inputs are purchased from a market economy country. (See, e.g. Sparklers, at supra). If a party is able to establish that inputs purchased in an NME are purchased at market-oriented prices, we may likewise be able to accept them for purpose of factors of production analysis."170

The bubbles of capitalism test set forth in Fans also is known as the 100% test. The standard of the test is very high. It is also called as "all or nothing" standard. That means all of the prices of the NME inputs must be market driven. If not, then no bubble would exist. So the problem of this test is that it does not take into consideration any progress that the transitional economies have made toward market orientation.171 However, preliminary determination of fans "opened the door to a new perception of treatment of nonmarket economies."172

Lug Nuts

As discussed above, Commerce developed the bubbles of capitalism test in Fans. Shortly thereafter in Lug Nuts, Commerce went further and articulated a new methodology for valuing FMV in antidumping

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169. Id.
investigations involving NMEs. Relying on its preliminary determination in *Fans*, Commerce, extended the mix and match methodology to prices paid for production inputs sourced inside the PRC, i.e., Commerce used the actual prices paid by the Chinese producers for its Chinese-sourced steel and chemical inputs to calculate FMV. The test now became the "minibubbles test".173 The aim of this test was to be more responsive to transitional NME economies. Under this approach, Commerce would use individual NME input values if respondents were able to demonstrate that they were market driven. For the remaining NME values, Commerce would resort to surrogate market economy country values.

A threshold question of the case is that under section 773(c)(1) whenever the merchandise under investigation is exported from a nonmarket economy country and available information does not permit the foreign market value of the merchandise to be determined under normal methodologies, Commerce shall use of a blanket surrogate factors of production methodology. But how Commerce will calculate FMV when the conditions are not met?

Commerce concluded in its final determination that if both conditions were not met, foreign market value must be based on the foreign producer’s prices or costs that were determined to be market driven:

"In order for us to find a 'bubble of capitalism' and to treat the NME producer as if it were a market economy producer despite the fact that the economy in which it operates is nonmarket, we will have to be persuaded that all prices and costs faced by the individual producer are market determined. Alternatively, in those situations were some but not all, inputs are not market-determined, we will rely on the surrogate values for those

inputs, but will utilize all NME input costs that are determined to be market driven...

We recognize that for certain inputs into the production process, market forces are at work in determining the prices for locally-sourced goods in the non-market economy. Where this occur, those prices in lieu of values of a surrogate, market-economy producer, because they are market driven prices and they reflect the producer's actual experience. There is nothing to be predictability in using surrogate values when market-determined values exists in the NME country. Indeed, where we can determine that a NME producer's input prices are market-determined, accuracy, fairness, and predictability are enhanced by using these prices.174

Commerce found support in the legislative history of the Act for its determination to use individual market-driven factor costs:

"We note, however, that from the legislative history, the principal concern expressed by Congress for not basing FMV on prices in a NME is that the antidumping duty law is inherently designed to address LTFV issues in terms of market prices.

With the individual factor input methodology described above, we believe that we are addressing the paramount concern expressed by Congress for not using NME prices to determine FMV, while at the same tome recognizing that a NME country that is undergoing a transition to a market-oriented economy may contain sectors within its overall economic structure where market forces have already come into play. When the Department is able to verify the existence of such conditions, we believe it is appropriate to use those prices to determine FMV."

The meaning of Lug Nuts is significant. First, "it provides the first real glimmer of hope for successful defense against the onslaught of dumping cases filed against Chinese products in the last two years." It is a "dumping breakthrough."175 Second, it acknowledges China's ongoing market reform by accepting actual costs for inputs in China, rather than assigning surrogate country costs to these good. Third, it leads to reduce dumping margin

174. Id.
175. See Neeley, A Dumping Breakthrough? supra.
imposed on Chinese goods. For example, in *Lug Nuts*, by using surrogate prices, Commerce found a 66% dumping margin in its preliminary determination. However, by accepting the Chinese prices in final determination, Commerce found only a 4% dumping margin. And fourth, despite the positive precedent set by Commerce in this case, it exposes China traders to countervailing duty investigations. So in a sense, it was described as a “Pyrrhic victory” because it opened a “Pandora’s box.”

Following the Lug Nuts Final Determination, Commerce applied its new methodology in the *Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People’s Republic of China*. Commerce ruled that no respondents had overcome this presumption stated in the preliminary determination, i.e., no domestic production factor was valued on market principles and that all NME factors must be valued in the surrogate market once Commerce find that a country is an NME. But, this presumption can be overcome for individual factors by individual respondents with a showing that a particular NME value is market driven, however. Commerce relied on the actual costs of production inputs imported by the Chinese producers from market economy countries paid for in hard currency. For some of the Chinese fans producers, all of the material inputs were imported and hence accepted by Commerce as market prices in the FMV calculations.

In response to petitioner’s argument that Commerce’s methodology, which utilized respondents’ actual prices for inputs produced in market economy countries and paid for in market economy currencies, is contrary to

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law, Commerce stated that the provision of section 773(c)(4) of the Act for the valuation of factors of production was intended to be used when the NME values for individual input factors as unreliable, i.e., not market based. See e.g., S. Rep. No. 93-1298, 93d Cong, 2d Sess. 174 (1974). "If an NME producer exports prices that are market-based, it is appropriate to use those prices instead of a surrogate value."179

Commerce asserted that this approach is rational because:

"In general, the purpose of the antidumping statute is to determine margins as accurately as possible.'

...More specially, in the case of a firm operating in an NME, the purpose of the section 773(c) is to determine what the firm's prices or costs would be if such prices or costs were determined by market forces. Requiring the use of surrogate value in a situation where actual market-based prices incurred by a particular firm are available would be contrary to the statutory purpose. Where we can determine that an NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law.

Commerce further noted that:

The fact that it is more accurate to use and actual input value for merchandise sourced from a third country should not change simply because the country under investigation is an NME. Different treatment of an imported input based solely on whether the input is imported into a market or nonmarket economy country is illogical."180

b. Amendment to Final Lug Nuts Determination and "MOI" Test

Commerce's final determination and its new "bubble of capitalism" test was challenged by petitioner in the U.S. Court of International Trade.181

179. Id.
180. Id.
181. See Consolidated International Automotive, Inc. v. United States, Court No. 91-09-00700.
Subsequent to that challenge, Commerce sought a voluntary remand, arguing that it could not defend the original final determination. Failing to account for indirect NME distortion, Commerce decided, was a significant flaw in the test (of bubble of capitalism).182

During the remand, Commerce abandoned its previous test that relies on domestically sourced input costs shown to be market-driven to calculate FMV. Thus, Commerce adopted an entirely new test: the market-oriented industry ("MOI") test. Commerce explained the MOI test as following:

"In determining whether a market-oriented industry exists, the factors to be considered, but are not limited to:

• For merchandise under investigation, there must be virtually no government involvement in setting prices or amounts to be produced. For example, state-required production or allocation of production of the merchandise, whether for export or domestic consumption in the nonmarket economy country would be an almost insuperable barrier to finding a market-oriented industry.

• The industry producing the merchandise under investigation should be characterized by private or collective ownership. There may be state-owned enterprises in the industry but substantial state ownership would weight heavily against finding a market-oriented industry.

• Market-determined prices must be paid for all significant inputs, whether material or non-material (e.g., labor and overhead), and for all but insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation. For example, an input price will not be considered market-determined if the producers of the merchandise under investigation pay a state-set price for the input or if the input is supplied to the producers at government direction. Moreover, if there is any state-required production in the industry producing the input, the share of state-required production must be insignificant.

182. See Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed Reg. 16,052 (1992).
If these conditions are not met, the producers of the merchandise under investigation will be treated as nonmarket economy producers and the foreign market value will be calculated in accordance with section 773(c)(3) and (4).”183

According to Commerce, the MOI test is designed to take into account both the direct and indirect effects of central government planning in the determination of whether an industry is market-oriented. Thus, Commerce in its amendment admitted that the scope of inquiry in the bubbles of capitalism test was too narrow. It argued that the absence of explicit government involvement in these transactions was not sufficient to warrant the conclusion that the prices for these inputs were market driven and it was necessary to look beyond direct state involvement in the specific transactions between the manufacturer under investigation and its suppliers to ascertain whether market forces were actually at work in determining the input prices. Given these considerations, Commerce found that the PRC lug nuts industry was not market-oriented and steel was not purchased at a market-determined price because the extent of state-required production in the steel industry as a whole.

The PRC lug nuts industry investigated by Commerce was comprised one producer, the Lu Dong Grease Gun Factory, (“Lu Dong”). Its merchandise was exported by a trading company, China National Machinery & Equipment Import and Export Corporation, Jiangsu Co. Ltd. (“CMEC Jiangsu”). Lu Dong was collective-owned. Its output was not sold in-plan, nor did it obtain any inputs via in-plan government allocations.184

183. Id.
Lu Dong's major steel supplier was Beijing Iron and Steel Company (BISC), a state-owned company. While BISC was required to sell 45 percent of its production to buyers named by the government at state-controlled prices, the remaining production was sold on the "open market" (i.e., the government did not direct BISC to sell to any particular party, nor did it mandate any particular price). Lu Dong purchased steel from BISE through the open market. In its original final determination, Commerce stated that it did not find any evidence that these supplies were influenced by the state in making business decisions. Therefore, Commerce decided that the presumption of state control has been overcome for the steel purchased for use in the production of chrome-plated lug nuts and used the PRC price for steel in the factors of production analysis.\(^{185}\)

Applying the MOI test to the same input, however, Commerce found that steel, a significant input, was not purchased at a market-determined price because of the extent of state-required production of that input. Commerce argued that it found no direct government involvement in the transaction between Lu Dong and its steel suppliers. But the absence of direct government involvement in specific transactions between buyers and suppliers did not mean that the terms of those transactions reflected market-determined prices or values. Looking beyond the specific transaction between lug nuts producer and its suppliers, the state did play a significant role in determining the amount to be charged for steel in the PRC. Moreover, Commerce cited the fact that 25-50 percent of national steel production may be required by the state and concluded that forces other than market forces were at work in determining the prices for steel sold outside the plan.\(^{186}\)

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\(^{186}\) See "Memo" supra and 57 Fed. Reg. 15,052.
5. Application of the MOI Test in the Post-Lug Nuts Era

Since *Lug Nuts*, the MOI test has been applied to four Chinese industries. These are: pipe fittings, sulfur dyes, sulfanilic acid and spring lock washers. This section outlines the facts presented in the investigations of those products and how Commerce applied the MOI test in these cases.

Pipe Fittings: 187

This is the first time that Commerce applied its new designed MOI test to Chinese product after *Lug Nuts*. In the view of Commerce, steel was a significant input into the merchandise under investigation. Therefore, despite the assertion of the seven participating respondents that many of the inputs were purchased at market-driven prices and the fact that pipe fittings were not an in-plan product and received no in-plan allocation of steel, Commerce determined that the third test of the MOI was violated, i.e., market-determined prices were not paid for steel by any respondent. 188

One respondent, Billiongold, argued that Commerce could not reject the prices that Billiongold paid for its steel in the PRC on the ground that such prices were not market-determined. Specifically, Commerce could not assume, as it had, that in-plan production of one type of steel prevented the existence of market-based prices for other types of steel. Second, even if steel could be viewed as a fungible commodity, the effect of in-plan production of certain types of steel was that a certain amount steel was removed from the market, with no effect on the prices of out-of-plan steel. This result could be demonstrated through the use of a "kinked supply function. Finally, Billiongold argued that the effect of in-plan production is to force the supply

188. 57 Fed. Reg. 21,058 (Final).
function for out-of-plan steel to assume a sharpened slope, thereby resulting in a higher price for any given level of demand.\textsuperscript{189}

In the view of Commerce, the "market" for input could not be segregated from the "market" for other steel products, nor was it possible to look at steel in isolation.

With respect to the second argument, Commerce disagreed with Billiongold's modelling of the effect of in-plan production when steel is treated as a fungible commodity. Instead of a kinked supply curve, Commerce argued that the aggregate supply curve would be a summation of the supply curves for various steel products. Some of these supply functions (those for products where all production is in-plan) would be inelastic over their entire range. Therefore, rather than producing a kinked supply function for steel generally, in-plan production affects the shape of the supply curve along its entire length.

With respect to Billiongold's argument either that out-of-plan production must absorb some of the costs incurred to produce in-plan steel or that without state-required production there would be an increase in steel supplied in the market, Commerce asserted that under the former, there is no reason to expect that revenues from out-of-plan sales are used to cover the costs of in-plan sales. And with respect to the latter, Billiongold ignored that there would also be an increase in demand as customers who once purchased in-plan steel would now have to purchase steel in the market. Thus, there is no basis to conclude that the presence of in-plan steel increases the price of out-of-plan steel.\textsuperscript{190}

\textsuperscript{189} Id.
\textsuperscript{190} Id.
Sulfanilic Acid: The industry investigated by Commerce is the sulfanilic acid industry in the PRC. Baoding No. 3 factory, a state-owned enterprise, is the single producer of this product in China that exported to the United States during the period of investigation. Respondent maintained that the sulfanilic acid industry in the PRC was sufficiently market-oriented and that the PRC prices for all inputs used to produce the subject merchandise should be used to calculate the FMV. Respondent claimed that Commerce should find that the PRC prices for input used to produce sulfanilic acid were market-oriented and an insignificant amount of the inputs were subject to mandatory in-plan production. Furthermore, respondent argued that the input prices were freely negotiated between the factories that use the inputs to produce sulfanilic acid and the suppliers that provide the inputs to the sulfanilic factories. Therefore, respondent concluded that Commerce should find that the sulfanilic acid industry in the PRC was sufficiently market-oriented, and, as a result, Commerce should use the PRC prices instead of the surrogate values for calculating FMV.

In its final determination, Commerce again focused on the third prong of the MOI test, i.e., market-determined prices must be paid for all significant inputs. Based on a general presumption that in-plan production of an input is significant unless other demonstrated, Commerce claimed that lacking the information necessary it cannot evaluate whether or not the aniline prices, a significant material input, are market-determined in the PRC. Commerce’s reasoning went as follows:

"In applying the MOI criteria to the sulfanilic acid industry in the PRC, we find that aniline is a significant material input used

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to produce sulfanilic acid. We have also found that aniline is a derivative of oil, which is a category one product centrally-controlled by the PRC government. Without the use of aniline, sulfanilic acid cannot be produced. We were told at verification that aniline is subject to state-required production. Because we requested but did not receive quantifiable data from the PRC government which might have established the extent of state-required production for this input, we lack the information necessary to evaluate whether or not the aniline prices are market-determined in the PRC.”

“As a result, in this investigation, respondent did not overcome the presumption that a significant material input (aniline) is subject to significant state required production. Therefore, respondent has not met the MOI criteria as set forth in the preliminary determination of Sulfanilic Acid for determining whether or not the sulfanilic acid industry is an MOI.”192

Respondent raised another question concerning the distinction of the PRC prices for those inputs which Commerce found were not subject to state plan and for which market prices were paid from those which Commerce found were subject to state plan. Respondent argued that Commerce should still use the former price even if it found that some of the input do not meet the MOI criteria. Respondent maintained that Commerce should restrict its analysis to only determining the proper price to use (i.e., surrogate value of NME value) on an input by input basis, and that Commerce should not ignore the price of a particular input found to be market-determined simply because a price for another input is found not to be market-determined.193

Commerce rejected respondent’s claim by asserting that if they have found that an industry does not qualify as an MOI, Commerce is obligated to apply section 773(c) of the Act. Under this provision, Commerce must use the

192. 57 Fed. Reg. 29,705.
193. Id.
factor value from a market economy country. Thus, it cannot use the NME
domestic price for any inputs.\textsuperscript{194}

\textit{Sulfur Dyes:}\textsuperscript{195}

Respondents, three trading companies and three factories, account for
approximately 35 percent of PRC production and 30 percent of exports to the
United States during the period of investigation, claimed that their raw
materials and labor inputs used in the production of subject merchandise
were market driven, and, therefore, that the sulfur dyes, including sulfur vat
dyes, industry in the PRC was a market-oriented industry. Respondents
further maintained that the prices at which the factories purchased their
inputs for sulfur dyes were not subject to state control and were market
driven. They stated that there were no restrictions on any of inputs used to
make the subject merchandise, that prices and quantities were freely
negotiated for all inputs, and that there were no ceiling or guidance price for
any of the inputs. Respondents asserted that their suppliers retained their
profit, that factory decisions were not subject to review by any government
entity, that loans were obtained at market rates, and that there were no
restrictions on labor.\textsuperscript{196}

Commerce rejected respondents' claim based on the following reasons:
First, "a respondent asserting that it purchase inputs at market-oriented prices
must provide significant documentary evidence and also show that market
prices are at work to overcome this presumption." "An absence of
government control alone is not sufficient to warrant a conclusion that prices
for inputs are market driven. We must also conclude by application of the

\textsuperscript{194} Id.
\textsuperscript{195} See Sulfur Dyes, Including Sulfur Vat Dyes From China, 57 Fed. Reg. 44,165 (Sept..
\textsuperscript{196} 57 Fed. Reg. 44,165.
criteria that market forces are at work in determining the prices of these inputs within the PRC.”

Second, “the PRC government’s lack of timely and complete cooperation has left us with insufficient information to reasonably evaluate the market orientation of the PRC sulfur dye industry as whole.” “We determined that it would not be possible to adequately evaluate an MOI claim without full government cooperation.”

What is evident from these cases is that without the PRC government’s “timely and complete cooperation”, i.e., providing detailed information to Commerce’s questionnaire, the Chinese respondents can never persuade Commerce by even convincing evidence showing that market forces are at work in their production. Thus, the fate of the Chinese respondents is now much more unpredictable than it was before. Commerce kicks the ball to the Chinese government. The latter, however, has never been enthusiastic in this matter. For example, Preliminary Determination of Sales at Less Than Fair Value: Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof From the People’s Republic of China, 58, Fed. Reg. 8,930 (Feb. 18, 1993), Commerce rejected the respondent’s MOI claim by the same reason, lacking of the PRC government’s cooperation. Consequently, Commerce decided to use information provided by petitioner as the best information available to calculate FMV.

Helical Spring Lock Washers:

The final industry of China investigated by Commerce to date is the helical spring lock washers industry. Respondent, Hangzhou Spring Washer

197. 58 Fed. Reg. 7,537 (Final).
Plant ("Hangzhou"), a state-owned enterprise, argued that Commerce should consider the Chinese lock washer industry as a market oriented industry. In its preliminary determination, Commerce again simply summarized that neither respondent nor Chinese government provided sufficient documentary evidence to support the MOI assertion, and as a consequence it concluded that home market price could not be used to calculate FMV.199

Above all, the characteristics of Commerce’s ruling in the pro-Lug Nuts cases concerning imports from the PRC are first, Commerce applied a general presumption that in-plan production of an input was significant unless otherwise demonstrated. Second, Commerce simply denied the Chinese respondents’ claim that a certain industry under investigation was an MOI based on a common reason that without full cooperation of the Chinese government in answering to Commerce’s questionnaire, Commerce could not evaluate whether or not an industry under investigation is an MOI. Third, in most of these cases, Commerce calculated FMV on the basis of best information available, usually information contained in a petitioner’s allegation, which consequently led to extremely high dumping margins. For example, the weighted average margin for pipe fitting was 182.9%; for sulfanilic acid was 85.2%; for sulfur dyes was 213.16% and for spring lock washers was 128.63%.200 And finally, most of these cases resulted in an affirmative critical circumstances determinations.201 For example in Pipe

199. Id.
200. See Table I.
201. Under section 733(e)(1) of the Act, Commerce will determine that critical circumstances exist if Commerce determine that there is a reasonable basis to believe or suspect that (A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and (B) they have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relative short period.
Fittings, Sulfur Dyes, and Spring Lock Washers. Commerce made affirmative critical circumstances determinations. Consequently, liquidation was suspended with respect to all unliquidated entries of the subject merchandise which were entered or withdrawn from the warehouse.

6. A Brief Evaluation of the MOI Test

What the application of the MOI test illustrates is that instead of bringing greater accuracy, fairness and reliability to determinations of FMV in nonmarket antidumping investigations, the MOI test has generated greater unpredictability for both petitioner and respondent. For example, the third element of the test, “market determined prices must be paid for all significant inputs...,” has created the most controversy.

Under this test, an individual input value is found to be market determined based on an evaluation of the circumstances under which the input purchases were made and whether the producer of the input participated in the economic plans of the country, i.e., had in-plan production. Therefore, even if the respondent purchased an input from the out-of-plan production of an NME input supplier, the fact that the input supplier has in-plan production would mitigate against a finding that the input producer was selling at a market driven price.202 The issue raised is the determination of whether an input is significant. The MOI test itself provides no guidance as to the meaning of “significant.” The determination of whether or not an input is significant is crucial. Under the MOI test, once a “significant” input is found to be subject to nonmarket influences, Commerce will not examine any other domestic sourced inputs. So far, Commerce has found six inputs to be significant, but it has not yet told us how. In practice,

202. See Richardson and Nielsen, supra.
Commerce looks at all the “significant” inputs, finds one where in-plan production exists, finds or presumes the amount of in-plan production to be significant, and determines that an MOI does not exist. As discussed above, this element, market-driven prices for all significant production inputs, has proved to be virtually impossible to satisfy. This element has yet to be satisfied by any NME industry which Commerce has investigated. Given the reason that an industrial sector in an NME cannot be isolated from the macro-economic effects of government control, “Commerce will likely never find that such significant production inputs as labor, rent, utilities, and elements of factory overhead acquired at market-driven prices.”

The MOI test indicates that Commerce has abandoned its previous practice of accepting actual factor costs domestically sourced in an NME, where such cost can be verified to be truly market-determined, and converts to apply the same “all or nothing” litmus test imposed on the macro NME determination by section 771(18) of the Act, 19 U.S.C. § 1677 (18), which Commerce stated as an inappropriate approach to apply to an NME where a particular sector in a nonmarket economy is market-oriented. In its final Lug Nuts determination, Commerce left no doubt that criteria in section 771(18) of the Act would be inappropriate to apply to a particular transition sector because these criteria are designed only to be applied on an economy-wide basis.

This “all or nothing” approach is fundamentally inconsistent with the purpose of the antidumping law in general and of the NME provisions in the statute in particular. In light of the overall purpose of the antidumping statutes, as evidenced by their statutory language and congressional intent,

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203. See Bogard and Menghetti, supra.
204. See Lug Nuts supra, see also “Respondent Party’ Perspective” supra.
reflected in their legislative histories, Commerce should apply the antidumping law to encourage further transitions to market-based economic systems, which at the same time afford U.S. industry the degree of remedial protection from unfairly dumped imports these statutes were designed to provide.\textsuperscript{205}

As a matter of fact, with adoption the MOI test Commerce has applied a rather strict test to a transitioning economy that is experiencing changes from a nonmarket economy to a market economy. The MOI test has been applied to six Chinese industries or sectors to date. All have failed unfortunately. Commerce has not yet identified any MOIs under this new approach. There appears to be little chance that many MOIs will be identified under this test. In a sense, the MOI test blocks the way to single out a particular sector or industry and find it to be market-oriented, which has been the effort of Chinese respondents ever since the early beginning of 1980s in the antidumping duty investigation of \textit{Natural Menthol from China}.

\textsuperscript{205} See Richardson and Nielsen, \textit{supra}.
IV. CHINA'S ECONOMY IN TRANSITION AND THE NEED FOR CHANGES IN U.S. ANTIDUMPING LAWS

In most, if not all, antidumping investigations concerning imports from the PRC, the central issue has been whether economic reforms entitled the Chinese home market prices be used to calculate FMV. Thus, it is essential to understand the ongoing transition of China's economy before answering the question of whether the United States' antidumping laws need to change as they apply to the PRC, which is in transition to a market-oriented economy.

A. Evaluation of China's Economic Reforms

1. The 1988-89 Department of Commerce Study of China's New Market Orientation and U.S. Trade Laws

In August 1989, Commerce transmitted to Congress its Study of China's New Market Orientation and U.S. Trade Laws, which was mandated by section 1336(a) of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Trade Act").

The 1988 Trade Act provided that:

The Secretary of Commerce, in consultation with the heads of other appropriate Federal agencies, shall undertake a study regarding the new market orientation of the People's Republic of China. The study shall address but not be limited to-

(1) the effect of the orientation of Chinese market policies and price structure, and the relationship between domestic Chinese prices and world prices.
(2) the extent to which United States trade law practices can accommodate the increased market orientation of the Chinese economy; and

(3) the possible need for change in United States antidumping laws as they apply to foreign countries, such as China, which are in transition to a more market-oriented economy.

The purpose of the study from the language of statute was to answer whether, and how, the antidumping law can or should take into account economic and structural changes in China in the last decade.

Commerce Study was affected greatly by "a widespread, though inaccurate, belief in late 1989 that China's leaders had decided to halt economic, not to mention political, reform," and that "there is an indication that a retrenchment is taking place both economically and politically in China, leaving the future of many key elements of reform uncertain at best." As a result, while Commerce acknowledged that reforms in China over the last ten years have taken many forms and affected many aspects of economic life, that reforms have affected the management of state enterprises and the ownership system as a whole; the role of markets and prices have changed; the use of and access to foreign exchange have changed; and foreign trade regulation has also undergone numerous changes, it concluded that the market elements are not so pervasive as to see predominant in China although present-day China is obviously not the classical model of non-market economy, Commerce stated that in the present climate, China may increasingly rely on administrative measures to regulate the domestic economy and to control its foreign trade.


In responding to the question: should the antidumping law be changed to accommodate China's transitional economy, the Commerce study concluded that the antidumping law should not change now in order to accommodate economies, such as China, which may be "in transition" from a nonmarket structure to a market orientation.

Besides the perception triggered by the suppression of the demonstration in Beijing, the mixed performance of the Chinese economy under the various 1988 Trade Act criteria for assessing market orientation serves as one of main reasons for Commerce's conclusion.

The criteria set forth in 1988 Trade Act are:

(1) the extent to which the currency of the foreign country is convertible into the currency of other countries;

(2) the extent to which wages rates in the foreign country are determined by free bargaining between labor and management;

(3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;

(4) the extent of government ownership or control of the means of production;

(5) the extent of government control over the price and output decisions of enterprises; and

(6) such other factors as the (Commerce Department) considers appropriate.

In the view of Commerce, because China is in a transition period, the situation is such that neither a traditional monolithic centrally controlled economy nor a market economy exists in that country. And also because this transitional economy tends to exhibit elements of both market and nonmarket economies, it is difficult for Commerce to assign weight to various factors for balancing evaluation.
One significant aspect of the China study, however, is that Commerce emphasizes the need to leave to open the possibility of flexible application of the criteria in future cases. This can be seen in Sparklers, where Commerce valued some of China’s sparkler producer’s production factors in a surrogate country and valued other factors on the basis of Chinese sparkler producer’s actual acquisition prices (“mix and match” approach); in Fans and Lug Nuts, where Commerce looked at the possibility of using sectoral, or “bubble of capitalism” approach to calculate FMV; and finally, in its Amendment to Final Lug Nuts Determination, Commerce abandoned these flexible methods and articulated a new “market-oriented industry” methodology, which emphasizes to look at transitional economy as a whole and the indirect affect of the government.

2. China’s Economy in Transition

Change in China will be one of the greatest challenges facing American antidumping law when applied to nonmarket economy countries, such as China, which are in transition to a more market-oriented economy in the coming years.

China’s economic reforms began in the late 1970s with the introduction of the production “responsibility system” in the countryside. Soon, the economic reforms spread like wildfire over the country. While there was a retrenchment in the 1988-91 period, economic reforms did not cease. Since 1990, economic reform initiatives have advanced in several important areas, but it has only been since 1992 when Deng Xiao-ping took a tour of south China and called for still bolder steps to open up China to the west which have created even greater euphoria than that which existed during 1988.

a. From Planned to Market Economy
Fourteen years of reform have eventually shaken the planned economy, which has been regarded as the cornerstone of socialism. The planned economy has finally lost its dominance in China after four decades when the First Session of the Eight National People’s Congress (NPC), held March 15-31, 1993, passed amendments to the existing Constitution. Among other revisions involving political, economic and legal aspects of society, for the first time in the history of the PRC, a socialist market economy was written into the Constitution, beginning the historic transformation from a planned to a market economy.

The decision to create a “socialist market economy” indicates that China recognizes the market not central planning, as the primary mechanism of economic activity. As such, it has created a watershed in China’s economic theories.

The existing Constitution promulgated in 1982 proclaims that the state practices a planned economy on the basis of socialist public ownership, and ensures the growth of the national economy through overall economic planning with a supplementary role for market regulation. This was followed by the policies of building a system that “integrates planning with the market.”208

With the emergence of diversified forms of economies - private, collective and shareholding, state-run economy has become history, and has been replaced by “state-owned economy” since a state-owned enterprise is not necessarily run by the state. This change aims to accelerate the separation of ownership and management in state owned enterprises.209

209. According to statistics, China now has over 105,000 state enterprises, of which 10,000 are large or medium-sized which make up nearly 50 percent of China’s total industrial output value and 67 percent of the national revenues.
The existing Constitution says that "state enterprises have decision-making power with regard to operation and management within the limits prescribed by law, on condition that they submit to unified leadership by the state and fulfill all their obligations under the state plan." The amendments to the existing Constitution simplify this to "state-owned enterprises have decision-making power in operation and management within the limits prescribed by law."

The law that governs the operation and management of state-owned enterprises is the Law Concerning State-Owned Industrial Enterprises ("SOIE Law"), which was issued on April 13, 1988. On July 24, 1992, China State Council promulgated the Regulation Concerning Management Mechanism Transformation of State-Owned Industrial Enterprises, which set out specifics covered more generally in SOIE Law. The regulations outline 14 kinds of powers to provide self-management and to free state-owned industries from centralized control by pushing them further into the competition of the market. Among these 14 kinds of powers, the main powers enjoyed by state-owned enterprises are:

- Production management power. "Enterprises may decide to adjust the scope of their production and business in and out their trade." This guarantees enterprises the right to move away from government dependence and become independent producers and managers. One of the most significant aspects of the regulations is that enterprises, when required to meet mandatory production plans, have the power to demand contracts with customers signed under the auspices of government department concerned; otherwise they shall make no arrangement for production. Previously only the government could exercise such contracts, but now enterprises may also impose restrictions on the government, a big step forward.
• Power to price products and services. According to the new regulations, industrial enterprises may, except in special circumstances, set prices for their products for daily use, means of production and services they provide, such as processing, repairs and technical co-operation.

• Import and export power. Enterprises have in the past only been able to import and export goods through state-designated foreign trade institutions. Under the new regulations, however, "enterprises may choose any foreign trade institution in China to do import and export for them and have power to participate in negotiations with foreign businesses."

"Enterprises may determine their own foreign currency reserve expenditures and transactions within guidelines set by relevant state regulations on foreign currency control."

• Power to make investment decisions. Handicapped by the subordinate relationship between central and local governments, enterprises were not previously allowed to adjust investment strategies according to market changes and lost many good opportunities. Under the new regulations, enterprises may undertake production projects in light of the state industrial policy and industrial or regional development plans.

• Power to determine workforce. The regulations allow enterprises "to decide the time, conditions, methods and numbers when hiring new employees," "enterprises may adopt the contracted management or all-personnel labor contract system."

• Personnel management power. Under the regulations, enterprises have the power to adopt the system of hiring through examination. Enterprises also enjoy the power, with approval from relevant departments, to solicit managerial and technical staff from abroad. This article is quite noteworthy as it has never before been put into effect.
• Power of wage and bonus distribution. The regulations stipulate that enterprises have the power to determine their total wages according to the government stipulations and their own economy performances. Each enterprise will determine how the total is to divided among its staff and workers as wages and bonuses.

As a part of an effort to intensify industrial reform, the new regulations require that the Chinese government uses relevant laws to protect industrial enterprises and their management from official interference in four aspects. First, it should establish a macro-control management system to facilitate economic operation. Second, it should help cultivate and improve the market system, giving full play to the role of market regulation. Third, it should establish and improve the social security system. And fourth, the government should further develop public facilities, welfare institutions and reduce the burdens that constraint enterprises. To reduce administrative intervention, the regulations also stipulate that government departments that violate the new regulations by forcing enterprises to exercise mandatory planning tasks, or by encroaching on the operational rights of enterprises, will bear crime responsibility.

Progress has been made in the reform of state macro-control system. For example, the State Planning Commission has determined to cut state mandatory planning in scale and quantity. In 1993, the state plans to start ordering of materials and goods such as tires, rubber, cars, aluminum, copper, and pig iron. It will reduce the scale of mandatory purchases and allotment of cotton and wool, and list edible vegetable oil, pig and sugar whose purchase and allocation were formally under state mandatory planning among guided
categories. The government has said that central plan will cover only just percent of industrial production this year.210

Integrating socialism with the market economy does not mean putting a political label on the market. Instead, it marks a milestone in China’s market-oriented economic reform. It is also a logical conclusion drawn from China’s persistence in making the public economy the leading factor, drastically cutting mandatory planning, constantly strengthening the role of market forces and rapidly developing the economy during the past 14 years: “In some sense, the term ‘socialist market economy’ already reflects the reality of the Chinese economy, since more than two-third of current economic activities taken place outside the State system.”211

b. Price Reform

Price reform has been the cornerstone of China’s economic reforms. Since 1978, with the deepening of economic reforms, profound changes have taken place in the price management system. According to statistics of the State Pricing Administration, 97 percent of all retail goods were brought at prices set by the government in 1978, the first year of reform (see Table II). This left only 3 percent subject to market regulation. Among agricultural and sideline products purchased by the state, 92.6 percent were sold at the fixed prices, 1.8 percent at government guided prices, and 5.6 percent at market regulatory prices. By 1991, the percentage of retail goods sold at prices fixed by the government had fallen to 20.9. Government guidance plans covered 10.3 percent of retail prices, and the percentage subject to market regulation had increased to 68.8 percent. The same year, purchases of agricultural and

sideline products at prices set by the government dropped to 22.2 percent, while those at prices set according to government guidance plans rose to 20 percent, and sales at market regulatory prices to 57.8 percent.

Table II: Percentage Changes in Prices for Retail Good, Agricultural and Sideline Products

<table>
<thead>
<tr>
<th>Year</th>
<th>Government Fixed Prices</th>
<th>Government Guided Price</th>
<th>Market Regulatory Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>97</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td>47.0</td>
<td>19.0</td>
<td>34.0</td>
</tr>
<tr>
<td>1980</td>
<td>35.0</td>
<td>25.0</td>
<td>40.0</td>
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<tr>
<td>1981</td>
<td>33.7</td>
<td>28.0</td>
<td>38.3</td>
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<tr>
<td>1982</td>
<td>28.9</td>
<td>21.8</td>
<td>49.3</td>
</tr>
<tr>
<td>1983</td>
<td>31.3</td>
<td>23.2</td>
<td>45.5</td>
</tr>
<tr>
<td>1984</td>
<td>29.8</td>
<td>17.2</td>
<td>53.0</td>
</tr>
<tr>
<td>1985</td>
<td>20.9</td>
<td>10.3</td>
<td>68.8</td>
</tr>
</tbody>
</table>

Total Purchases of Agricultural and Sideline Products

<table>
<thead>
<tr>
<th>Year</th>
<th>Government Fixed Price</th>
<th>Government Guided Price</th>
<th>Market Regulatory Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>92.6</td>
<td>1.8</td>
<td>5.6</td>
</tr>
<tr>
<td>1979</td>
<td>88.4</td>
<td>4.9</td>
<td>6.7</td>
</tr>
<tr>
<td>1980</td>
<td>82.3</td>
<td>9.5</td>
<td>8.2</td>
</tr>
<tr>
<td>1981</td>
<td>79.1</td>
<td>11.5</td>
<td>9.4</td>
</tr>
<tr>
<td>1982</td>
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<tr>
<td>1983</td>
<td>76.1</td>
<td>13.4</td>
<td>10.5</td>
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<tr>
<td>1984</td>
<td>67.5</td>
<td>14.4</td>
<td>18.1</td>
</tr>
<tr>
<td>1985</td>
<td>37.0</td>
<td>23.0</td>
<td>40.0</td>
</tr>
<tr>
<td>1986</td>
<td>35.3</td>
<td>21.0</td>
<td>43.7</td>
</tr>
<tr>
<td>1987</td>
<td>29.4</td>
<td>16.8</td>
<td>53.8</td>
</tr>
<tr>
<td>1988</td>
<td>24.0</td>
<td>19.0</td>
<td>57.0</td>
</tr>
<tr>
<td>1989</td>
<td>35.3</td>
<td>24.3</td>
<td>40.4</td>
</tr>
<tr>
<td>1990</td>
<td>25.0</td>
<td>23.4</td>
<td>51.6</td>
</tr>
<tr>
<td>1991</td>
<td>22.2</td>
<td>20.0</td>
<td>57.8</td>
</tr>
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</table>
Concerning means of production, 36 percent of 1991 sales were at prices fixed by the government, a drop of 8.6 percentage point from 1990. Sales of goods priced according to government guidance plans made up 18.3 percent, 0.7 percent point below that of the previous year, and market regulatory prices took 45.7 percent, an increase of 9.3 percentage point over 1990.

These figures show that over the past decade, the scope and scale of prices fixed by the government have diminished, while the proportion of goods with prices set by the market has increased. In 1991, the government fixed the retail prices of only one-fifth of the agricultural and sideline products, and ex-factory prices of only one-third of means of production were set by the government.

In 1992, the State Council issued the Regulations Concerning the Transformation of the Operational Mechanism of Industrial Enterprises Owned by the Whole People, which stipulates that except for a small number of industrial goods for daily use and means of production whose prices will continue to be set by the government, prices of other products and labor fees for such services as processing, repairs and technical co-operation will be set by enterprises themselves. Today, the prices of only six products - grain, cotton, tobacco, raw silk, tea and timber - are still set by the state, and they are all very close to market prices. Economists estimate that about 80 percent of commodities in China now sell at rates determined by the market. Three years ago, the figure was only 50 percent.

c. Reforms in Foreign Trade System

China's foreign trade has made great advances since economic reforms began in the late 1970s. In some sense, foreign trade has become a powerful
engine of growth, accelerating not only the speed of domestic development but the pace of structural and technical transformation as well.\textsuperscript{212}

Like most part of the Chinese economy, initially, foreign trade was heavily controlled by the government. The state set the foreign trade plans, which were fulfilled by state-run trading companies. In a word, the state monopolized China's foreign trade. However, from the mid-1980s onward this was gradually displaced by a more market determined pattern of trade.

The main contents of reform in the foreign trade system in the mid-1980s were decentralization of decision-making in foreign trade, reforms in the pricing of traded goods and the abandonment of an over-valued exchange rate.

Trade reforms, especially decentralization of foreign trade in the mid-1980s eventually shook the government's monopoly in foreign trade as evidenced by the growing number of foreign trade corporations and the declining scope of the foreign trade plans. The State Council, in a major foreign trade reform document issued in September 1984, called for an end to the monopoly power of state-run foreign trade companies and creating a large number of small and medium-sized trading companies.\textsuperscript{213} Consequently, more than 800 separate import and export corporations were created. By the late 1980s, the number of companies had reached more than 5,000.\textsuperscript{214}

\textsuperscript{212} Nicholas R. Lardy, \textit{Chinese Foreign Trade}, The China Quarterly, 1992, at 691.
\textsuperscript{214} After the campaign to examine the foreign trade companies that took place in May 1988 and March and November 1989, 1,402 had been closed or forced to merge, leaving China with 3,673 foreign trade corporations. The reason for this campaign was the poor performance of some trade companies that lacking adequate experience and funding. See Report, \textit{We must Firmly Grasp and Carry out the Work of Rectifying the Various Kinds of Foreign Trade Corporations}, International Business, March 21, 1990, at 1.
The scope of foreign trade planning was reduced greatly. The number of planned export commodities fell from 3,000 in the pre-reform era to 112 by 1988.\textsuperscript{215} From 1985, the foreign trade plan was divided into two categories: mandatory and guidance. Mandatory plan imports and exports were specified in quantitative terms and were usually the responsibility of the head offices of the national foreign trade companies. Guidance plan imports and exports were generally specified in value terms, which give local trading corporations more flexibility. This allowed them to take economic factors into account when determining their import and export plans.

In 1991, China made another important reform of its foreign trade system, characterized by lifting export subsidies and making enterprises responsible for their own profit and loses. These reforms stimulated the development and created the conditions in which decentralized trade based on economic incentives could accelerate foreign trade greatly.

The most important aspect of China's foreign trade reforms does not lie on stunning growing in import and export volume, but on the growing shares of China's exports produced by rural township and village enterprises, joint venture and foreign-funded enterprises. Generally these enterprises are free from government direction. They operate primarily according to market principles. Rural enterprises exports jumped from about four to more than 12 billion dollars between 1985 and 1990, joint venture exports from around a quarter of a million dollars in 1985 to 12 billion dollars in 1991. Foreign-funded enterprises' export proportion of China total exports increased to 16.7 percent from 12.6 percent in 1990.\textsuperscript{216}


\textsuperscript{216} For rural enterprises and joint venture exports: N. Lardy, supra, at 711. For foreign-funded enterprises exports: Xiao Qiang, Foreign-Funded Enterprises-A Main Force in Foreign Trade, China's Foreign Trade, June 1992, at 37.
The rapidly growing share of China's exports produced by these three most decentralized sectors of the Chinese economy is significant. These enterprises, especially foreign-funded enterprises are self-responsible for their business, they can define their production plans and products according to market needs. In a word, their activities are market-driven or market-oriented. Thus, they constitute the greatest challenge facing by the U.S. antidumping law.

B. The Need For Change in the United States Antidumping Law

1. Flaws of U.S. Antidumping Law

The U.S. antidumping law has long been criticized for its arbitrariness, inaccuracy, unpredictability and unfairness, which is evidenced by its surrogate methodology. As discussed above, the statute and regulation provide little guidance as to which market economy country is to serve as the surrogate other than to indicate that it must be at a level of economic development comparable to that of the NME and, under the 1988 Trade Act, must also be a significant producer of the merchandise. Thus, Commerce, in practice, enjoys great discretion in applying the surrogate country criteria. For

example, in its 1983 *Cotton Shop Towels from China* investigation, Commerce in its first administrative review compared the selling price of Chinese-made towels to the United States to that of U.S. made towels. In the second review, Commerce compared the Chinese price to the average unité value of U.S. imports of shop towels from Hong Kong. In the third review, Commerce compared the Chinese price to an amalgamated cost of production based on Pakistani yarn cost, Indian labor cost, and Indonesian overhead and profit figures. Each administrative review in the *Cotton Shop Towels* has relied on an entirely different set of surrogate foreign market valuation and got different margin results.\(^{218}\)

The range of potential surrogates for China has included Argentina, Columbia, the Dominican Republic, Egypt, Hong Kong, India, Indonesia, Malaysia, Morocco, Paraguay, the Philippines, Spain, Singapore, South Korea, Sri Lanka, Thailand and even a basket of prices from France, Canada, Japan, Switzerland, the FRG and the Netherlands.

The results of each case are absolutely unpredictable. There is no way to know in advance which country will be selected as the surrogate. The identity of the surrogate remains unknown until the antidumping investigation starts and the choice may very well determine the outcome of the investigation. Consequently, the Chinese exporters has no control over the selection of surrogate country, and therefore no control over its dumping margins, i.e., the exporter cannot price goods to avoid dumping. From the importer's perspective it is impossible to forecast what, if any, additional cost might be added to the imported goods in the form of an antidumping duty.

Because there is no way by which the exporter can know ahead of time what surrogate country will be chosen so that the exporter can know in

\(^{218}\) See David L. Simon, *Open Dumping Season on China?* supra.
advance what standard it must meet in order to price fairly, the surrogate methodology is unfair at all. Even if there were some way in which the surrogate country could be know ahead of time, this methodology would be unfair because, it is rarely possible for exporters in one country to obtain the necessary price information from producers in another country. One commentator has given a vivid description of the flaw of the U.S. antidumping laws, “The system is the equivalent of charging a driver with speeding on a road with no posted limits, based upon the limits posted on some other road - a road that would be chosen only after the driver has been stopped by the police.”

2. Alternative Proposals

Many suggestions have been made by people from different fields including legislators, scholars and people engaging in import and export trade.

In 1987, three alternatives were proposed to Congress. These were the Heinz Bill, Representative Schultze’s section 406 proposal, and the Committee for a Fair Trade with China proposal.

The proposal offered within the Heinz Bill suggests a benchmark, an alternative approach for determining foreign market value. This benchmark sets the foreign market value of the product at the average price of like products imported from the highest volume market economy producer, excluding United States producers and those other producers who may be

222. See Committee for a Fair Trade with China, Proposal for a Bill (Mar. 6, 1987) (hereinafter “CFTC Proposal”). The CFTC is a group of American corporations which is seeking Congressional and Administrative approval for trade policies and regulations to encourage two-way trade between the United States and China.
dumping or benefiting from subsidies.\textsuperscript{223} If Commerce determines that there is no eligible market economy country, the foreign market value of the merchandise shall be the constructed value of comparable merchandise in any country other than a nonmarket economy country.\textsuperscript{224} Proponents of the Heinz Bill emphasized its certainty and predictability. The prices at which imports are coming into the United States constitute known information. Thus both the nonmarket economy producers and the U.S. importers can accurately determine the benchmark valuation and engage in fair trade accordingly.\textsuperscript{225}

One category of opponents to the Bill, the nonmarket economy producers, argued that the benchmark approach would effectively freeze new nonmarket economy products out of the United States market. They claimed that for a new product to compete, it must be priced lower than any other products of its kind currently on the market. The approach would necessarily preclude this competitive pricing.\textsuperscript{226} Other opponents to the Bill, United States domestic industry, argued that the approach wrongly assumes that the nonmarket economy producers of a particular product are as efficient as the free market producers who sell the same product at the benchmark price. In actuality, the cost for the nonmarket economy producer maybe higher than the benchmark price. The approach may, therefore, allow dumping in the truest sense of the term.\textsuperscript{227}

The Committee for Fair Trade with China ("CFTC") proposal addresses the preliminary issue of whether to treat the imports in question as being

\textsuperscript{223} Heinz Bill, \textit{id}..  
\textsuperscript{224} \textit{id}..  
\textsuperscript{226} Letter From Edward W. Furia, Co-Chairman of the CFTC, to Sam M. Gibbons, Chairman of the Subcom. on Way and Means (Mar. 11, 1987).  
\textsuperscript{227} See Horlick & Shuman, Nonmarket Economy Trade and U.S. AD/CVD Laws, \textit{supra} at 835.
produced by either a market economy or a nonmarket economy and the question of whether the nonmarket economy should be evaluated at the sectoral or general economy level. The CFTC proposal anticipates the creation of a new category of exporting country called “Planned Market Economy Countries.” Such a country is defined as a nation implementing economic reforms that will eventually enable the foreign country’s economy to operate as a market economy.\footnote{Factors to be considered in determining whether a nation qualifies are whether the nation (1) affords market access to United States goods and services, (2) provides patent and copyright protection and (3) is moving toward fulfilling GATT principles.} 228 A country that meets the planned market economy requirements would be allowed to prove to Commerce that the price or cost of the import or components of the import under investigation were set by market forces.\footnote{Id.} 229 Commerce is then required to substitute a “representative world price” value to any component that was not to be proven to be based upon market factors. After these adjustments, the planned market economy would be subject to the normal market economy antidumping laws. If a planned market economy failed to provide adequate proof that the relevant prices or costs were set by market forces, the regular nonmarket economy laws would apply.

In the view of those in favor of the CFTC proposal, by creating the new category of “planned market economy country”, the United States would be recognizing the sweeping political reforms occurring in countries such as China. Its implementation will be politically advantageous for the United States.\footnote{See supra note 87, 121.} 230 Opponents of the CFTC proposal argue that it is cumbersome and not easily workable. Determining whether the cost of each component was established by market factors promises to be a lengthy and tedious process. Substituting a “representative world price” for each nonmarket-determined
component is also awkward and reminiscent of the difficulties encountered in determining a hypothetical constructed value.\textsuperscript{231}

While section 1336(a) of the 1988 Trade Act was, in effect, the outcome of these lengthy debates over the application of the United States antidumping laws to nonmarket economies especially the PRC, it did not provide further constructive and clear ways leading to the step to resolve the dilemma of nonmarket economy methodologies.

The dilemma of the nonmarket economy methodologies stems from the fundamental conceptual problems that requires the black-or-white categorization of a country as either free-market or non-market. This dichotomy is based upon simplistic theoretical distinction defined as follows:

\begin{quote}
[I]n a market economy international trade is driven by the independent decisions of buyers and sellers acting out of economic self-interest. Prices set by the market are used for allocating scarce resources. These scarce resources are in turn channeled into their most efficient uses by the market forces of supply and demand. Consequently, prices act as rationing and signaling mechanisms by which goods are trade consistently with buyer preferences. In nonmarket economies...international trade is regulated by state planning and control which set the prices and output of goods, with scant consideration given to factors such as cost and efficiency. Resources are not regulated by a market, but instead by central planning; the NME government does not interfere with the market process, but instead replaces it....

[P]rices do not reflect relative scarcity nor are they related to market forces....

[P]rodutive resources are allocated in accordance with the central plan, with incentives encouraging compliance with the plan. Profit does not have the same meaning in an NME country...given that NME enterprises are not profit-maximizing. Instead, through central planning and the incentive structure, NME enterprises carry out the central planner's directives....
\end{quote}

\textsuperscript{231}. See supra, note 49-57.
Finally, central planned economies conduct foreign trade through state trading organizations which have a trade monopoly over product groups. This bureaucratic shield hinders manufactures' ability to respond to demands from foreign purchasers for their products.232

The unarguable fact is that in reality no country in the world fits the definition of either free-market economy or non-market economy in its pure form. As Senator Hecht recognized, all national governments act in a host of ways to define and order their markets, and if a sharp and legally consequential line is to be drawn between market and nonmarket economies, there is a need to articulate why government action is acceptable in some context and not in other.233 The most problematic aspect of this simple two-part taxonomy for the world's nations, especially for those nonmarket economies, is that the characterization seems to be based more upon a preconceived view of a country's political system and ideological orientation than on its economic structure. Essentially, countries with a communist system of government are classified as non-market while countries with any other system of government are regarded as free-market.234 Thus "Brazil is considered a market economy, right along with the UK, Japan and our European allies. China and Hungary, on the other hand, are still thrown in with the straight-jacked economies of Czechoslovakia and Cuba. In other words, it is the process of categorizing nations before one applies the antidumping test that involves the exercise of discretion - and more than a little bit of politics and policy."235

234. CFTC, Comments on S. 490 Antidumping and Countervailing Duty Provisions 1 (unpublished paper available through CFTC) [hereinafter CFTC Comments].
235. CFTC Comments, supra note 116, at 5 (emphasis in original).
The NME antidumping law is essentially politics and policy. It is a product of Cold War policies. Thus, we cannot expect that Commerce will apply NME provisions more flexibly before the United States government changes its foreign policies toward nonmarket economy countries based on Cold War philosophy.

What we can expect is that Commerce will adopt a more realistic approach to those economic sectors like private, collective, joint venture, foreign-funded enterprises and other market entities within NMEs. By recognizing these market factors, the United States supposedly encourages additional market-oriented reforms. This is one of the objectives of NME provisions. In return, such reforms are politically and economically beneficial to the United States.

236. Alford, When is China Paraguay? supra, at 118.
V. CONCLUSION

China’s so-called non-market economy, its low wage rate and its lack of cost accounting make it particularly vulnerable to charges of unfair trade practices. Along with rapidly increasing exports to the United States, especially in areas where U.S. domestic industry is faltering, more and more manufacturers are likely to resort to antidumping law for relief.

The application of antidumping law to imports from China is significantly affected by the overall political and economic relations between the United States and the PRC. Under the present climate, the number of antidumping investigations involving the Chinese producers is unlikely to decline in the foreseeable future.

Change in China will be one of the greatest challenges facing NME antidumping provisions and methodologies in the coming years. In order to adopt a more realistic approach Commerce needs to make more careful and more detailed studies on China’s ongoing reforms, especially those changes in the past three years.

There is a strong consensus that the present laws regulating imports from NMEs have fundamental economic and legal flaws. Change is necessary and inevitable. However, fundamental changes can only be expected under the circumstances in which the United States formulates new
international politics and policy based on changing world situations that have little relationship with the Cold War era.
APPENDIX 1:

ANTIDUMPING ORDERS AND FINDINGS
IN EFFECT AS OF OCTOBER 1, 1991

<table>
<thead>
<tr>
<th>Country</th>
<th>Product</th>
<th>Date of Original Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>Silicon metal</td>
<td>09/26/91</td>
</tr>
<tr>
<td></td>
<td>Light-walled welded rectangular carbon steel tubing</td>
<td>04/06/89</td>
</tr>
<tr>
<td></td>
<td>Carbon steel wire rod</td>
<td>11/23/84</td>
</tr>
<tr>
<td></td>
<td>Barbed wire</td>
<td>11/13/83</td>
</tr>
<tr>
<td>Australia</td>
<td>Canned barlett pears</td>
<td>03/23/73</td>
</tr>
<tr>
<td>Austria</td>
<td>Railway track equipment</td>
<td>02/17/78</td>
</tr>
<tr>
<td>Belgium</td>
<td>Phosphoric acid</td>
<td>08/20/87</td>
</tr>
<tr>
<td></td>
<td>Sugar</td>
<td>06/13/79</td>
</tr>
<tr>
<td>Brazil</td>
<td>Silicon metal</td>
<td>07/31/91</td>
</tr>
<tr>
<td></td>
<td>Nitrocellulose</td>
<td>07/10/90</td>
</tr>
<tr>
<td></td>
<td>Disk wheel</td>
<td>05/28/87</td>
</tr>
<tr>
<td></td>
<td>Orange juice</td>
<td>05/05/87</td>
</tr>
<tr>
<td></td>
<td>Brass sheet and strip</td>
<td>01/12/87</td>
</tr>
<tr>
<td></td>
<td>Butt-weld pipe fittings</td>
<td>12/07/86</td>
</tr>
<tr>
<td></td>
<td>Pipe fittings</td>
<td>05/21/86</td>
</tr>
<tr>
<td></td>
<td>Construction castings</td>
<td>05/09/86</td>
</tr>
<tr>
<td>Canada</td>
<td>Steel rail</td>
<td>09/15/89</td>
</tr>
<tr>
<td></td>
<td>Color picture tubes</td>
<td>01/07/88</td>
</tr>
<tr>
<td></td>
<td>Fresh cut flowers</td>
<td>03/18/87</td>
</tr>
<tr>
<td></td>
<td>Brass sheet and strip</td>
<td>01/12/87</td>
</tr>
<tr>
<td></td>
<td>Oil country tubular goods</td>
<td>07/16/86</td>
</tr>
<tr>
<td></td>
<td>Construction casting</td>
<td>03/05/86</td>
</tr>
<tr>
<td></td>
<td>Raspberries</td>
<td>06/24/85</td>
</tr>
<tr>
<td></td>
<td>Sugar and syrups</td>
<td>04/09/80</td>
</tr>
</tbody>
</table>

* Compiled from the semiannual reports on countervailing duty actions submitted by the United States Department of Commerce to the GATT Committee on Subsidies and Countervailing Measures pursuant to Article 2, Section 16 of the GATT Subsidies Agreement. (Release #6, 4/92).
<table>
<thead>
<tr>
<th>Country</th>
<th>Product</th>
<th>Date of Original Action</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Paving equipment</td>
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<tr>
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<tr>
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<td>Sparklers</td>
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<tr>
<td></td>
<td>Silicon metal</td>
<td>06/10/91</td>
</tr>
<tr>
<td></td>
<td>Axes/adzes</td>
<td>02/19/91</td>
</tr>
<tr>
<td></td>
<td>Hammers/sledges</td>
<td>02/19/91</td>
</tr>
<tr>
<td></td>
<td>Bars/wedges</td>
<td>02/19/91</td>
</tr>
<tr>
<td></td>
<td>Picks/mattocks</td>
<td>02/19/91</td>
</tr>
<tr>
<td></td>
<td>Sodium thiosulfate</td>
<td>02/19/91</td>
</tr>
<tr>
<td></td>
<td>Nitrocellulose</td>
<td>07/10/90</td>
</tr>
<tr>
<td></td>
<td>Tapered roller bearing</td>
<td>06/15/87</td>
</tr>
<tr>
<td></td>
<td>Cookware</td>
<td>12/06/86</td>
</tr>
<tr>
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<td>Candles</td>
<td>08/28/86</td>
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<td>Construction castings</td>
<td>05/09/86</td>
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<tr>
<td></td>
<td>Paint brushes</td>
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<td>Finland</td>
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<td>France</td>
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<td>Sugar</td>
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<td>Large power transformers</td>
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<td>India</td>
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<td>Iran</td>
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<td>tubular goods</td>
<td>03/06/87</td>
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<tr>
<td>Italy</td>
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<tr>
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<td>Light scattering instruments and parts thereof</td>
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APPENDIX B:

Selected Bibliography

United States

Books and Articles
Horwarth and Breslow, Trading with China -An Overview of Import Regulation, PLI/Comm. 389.
Sun & Burges, U.S. Reexamining Trade Relationship with China, Washington Post, April 23 '91, pD1 col 1.


China

Articles


Reports and Comments

China Accelerating Foreign Trade, China's Foreign Trade, Aug. (1992) 2.