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Economic Advantage in East-West Trade: Abandoning Market Fictions in Trade with Nonmarket Economy Countries

William Mock*

"One law for the lion and the lamb is tyranny."**

I. Introduction

Current U.S. regulation of East-West trade1 shows the futility of smashing a square peg into a round hole. It can be done, but not without considerable effort and a distortion of at least one basic premise of the exercise.

East-West trade, or trade between the United States and countries with nonmarket economies (NME’s),2 has been regulated under

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** William Blake, The Marriage of Heaven and Hell (1790-93).

1 In this Article, “East-West trade” denotes trade between nonmarket economy countries and market economy countries, particularly the United States. For further discussion of nonmarket economies, see infra note 2.

2 Nonmarket economies (NME’s) can be identified by the characteristics of: (1) planned resource allocation; (2) administratively established domestic prices; and (3) non-convertible currency. Comptroller General, Report to the Congress: U.S. Laws and Regulations Applicable to Imports from Nonmarket Economies Could Be Improved 2 (1981) (Su Doc. GA 1.13: ID-81-35) [hereinafter Comptroller General’s Report].

Under these economic systems, profitability and efficiency in a market sense cannot be directly measured. Enterprises may appear either profitable or unprofitable merely because their products are priced very high or very low. Apparent profits are heavily taxed, while apparent losses are underwritten by the central government with the aim of maximizing social benefits.

Id. Terms which are used synonymously with “nonmarket economy” in U.S. trade law, as well as in this Article, include “state-controlled economy country,” see 19 U.S.C. § 1677b(c) (1982); and “Communist country,” see id. § 2436(c) (1982). The Omnibus Trade and Competitive Act of 1988 also defines “nonmarket economy country”: “any foreign country that the administering authority [i.e., the International Trade Administration of the United States Department of Commerce] determines 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.” Pub. L. No. 100-418, § 1316(b), 102 Stat. 1107, 1187 (to be codified at 19 U.S.C. § 1677 (18)(A)); see also id., 102 Stat. at 1107 (to be codified at 19 U.S.C. § 1677(18)(B)) (establishing specific factors to be considered in making the determination).

One commentator in particular makes a strong argument that the entire market/nonmarket distinction is a spurious dichotomy in a world where every nation engages in a wide variety of economic planning, market intervention, and commercial regulation.
a variety of U.S. trade laws. Most U.S. trade laws have been designed to apply to trade with market-based economies. The concepts that underlie these laws are inapposite to East-West trade. Despite this fact, U.S. trade laws have been applied to trade with NME's, and have consequently made domestic regulation of East-West trade convoluted, intellectually unsatisfying, and unresponsive to the realities of NME trade.

For the most part, U.S. trade laws are based upon the premise that free trade is ideal, as long as such trade is fair. The prevailing scheme of trade law in the United States recognizes the benefits of free trade, and it is only when market participants take unfair advantage of the trading system that the system of trading should be restricted in some way. The problem with applying this theory to NME's arises in defining what trade is fair and what trade is foul. Without such a definition, much of U.S. trade law is inapplicable to NME trade and therefore some other analytic premise must be applied.

Currently, two major areas of U.S. law regulate trade in goods flowing from NME's to the United States: antidumping and market disruption law. In addition, some have argued that countervailing duty law should apply to NME trade. But of all of these areas, only market disruption law was designed with NME's in mind. This Article proposes excluding NME's from the scope of the antidumping and countervailing duty laws and developing an entirely new legal regime of trade regulation, including a slightly modified market disruption law. Such a new legal regime would be based upon the concept of taking maximum economic advantage of the inefficiencies of NME's. While enjoying this advantage, the new regime would have to preserve the flexibility needed to respond to the special threats such an economy can present to market-based economies.

First, this Article summarizes the economic theory of comparative advantage, which provides the intellectual basis for any discussion of fair trade. Next, the Article considers antidumping law, countervailing duty law, and market disruption law in the context of imports from NME's. Recent changes in trade law brought about by the Omnibus Trade and Competitiveness Act of 1988 are reviewed in this context. The purposes of each area of law and the underlying economic premises of each area are considered. Serious doubts are raised as to whether antidumping law and countervailing duty law should be applied in any way to trade with NME's. Market disruption law, having been designed for such trade, fares somewhat better.


This Article then considers the question of whether the concept of "fair trade" has any meaning in trade with NME's. Concluding that it does not, this Article proposes a different, more rational basis for ordering such trade relations. That basis is "economic advantage," whereby underpriced imports from NME's are permitted to enter the United States without special import restrictions or tariffs, provided certain special circumstances are absent. This Article identifies some special circumstances that warrant import restrictions in short-term derogation of the principle of economic advantage. The Article concludes with a call for further consideration of abandoning market fictions in trade with NME's.

II. Comparative Advantage

The basic premise for international trade is the economic theory of comparative advantage. Under that theory, if each nation produces and exports those products for which it has a comparative advantage in production, more goods will be produced globally for the same or less cost than if no nations traded. As a consequence, each nation should export those products for which it has cheaper raw materials, lower wage rates, better capital and infrastructural components, and more efficient production. Similarly, each nation should import those products for which other nations have these advantages.

This theory was first formulated by David Ricardo in the early 19th century, who built upon Adam Smith's analysis of absolute advantage as a basis for international trade. Ricardo's example of comparative advantage in action is still the most widely recited:

England may be so circumscribed that to produce . . . cloth may

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5 Comparative advantage is commonly understood to mean the "special ability of a country to provide one product or service relatively more cheaply than other products or services." The McGraw-Hill Dictionary of Modern Economics 110 (2d ed. 1973).

[T]he fundamental point [of the theory of comparative advantage is] that the beneficilay of international trade depends in no way on the absolute levels of economic efficiency or "stages of economic development" of the trading partners but only on differences in their relative costs of production in the absence of trade. . . . [W]hat matters is the differences in the alternative opportunity costs of commodities in the absence of trade.

6 The theory of comparative advantage states that "each country should export the products of its relatively efficient industries. If an industry combines low wages with high technology, then that industry will be a relatively efficient industry in that country." Interface One: Conference Proceedings on the Application of U.S. Antidumping and Countervailing Duty Laws to Imports from State-Controlled Economies and State-Owned Enterprises 208-09 (D. Wallace, G. Spina, R. Rawson, & B. McGill eds. 1980) (statement of Professor Paul Marer) [hereinafter Interface I].


8 See generally A. Smith, The Wealth of Nations (1776).
require the labour of 100 men for one year; and if she attempted to make . . . wine, it might require the labour of 120 men for the same time.

To produce the wine in Portugal might require the labour of only 80 men for one year, and to produce the cloth in the same country might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place notwithstanding that the commodity produced by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous for her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the manufacture of cloth.⁹

Subsequent writers have greatly refined this theory, carrying it far beyond its initial assumptions of two countries, two commodities, and simple labor-productivity cost analysis.¹⁰ Of greatest relevance to this Article are the works of Eli Heckscher,¹¹ Bertil Ohlin,¹² and Paul Samuelson¹³ in shifting the emphasis of attention from productivity differences to endowment differences. Their line of analysis established that comparative advantages in endowments of basic production factors, including labor and capita,¹⁴ drives international trade as effectively as comparative advantages in labor productivity. In particular, each country should and, if market forces operate freely, will export those goods as to which the country has a relative abundance of low-priced factor endowments.¹⁵ Most simply put, labor-rich countries tend to ship products with a high labor input to labor-scarce countries. Essentially the same statements could be made with respect to capital-rich, technology-rich, and resource-rich countries. If trade is permitted to take place on such a basis, then more goods will be produced and distributed to those desiring them than if each country were to rely solely upon its own resources for meeting internal demand. This is the essence of the argument for global free trade.

Nevertheless, there are some costs associated with such trade.

¹⁰ See D. Greenaway, supra note 4, at 13ff.
¹² See generally B. Ohlin, Interregional and International Trade (1935).
¹⁴ This Article uses capital to denote any immobile investment already made in plants, equipment, and the like, not free-flowing financial capital.
¹⁵ D. Greenaway, supra note 4, at 14.
In particular, one assumption of comparative advantage theory is that labor and capital are mobile enough to flow without cost from sectors declining because of import displacement into developing export sectors. Such cost-free mobility is, of course, not reality. In reality, trade should only occur to the extent that the benefits from such trade outweigh the adjustment costs associated with the trade. Such costs are likely to be highest when trade patterns shift rapidly.\footnote{See infra notes 82-101 and accompanying text (discussing market disruption law); infra notes 117-18 and accompanying text (discussing the effects of economic disruption).}

Similarly, where the free flow of labor and capital is not possible, the full benefits of free trade may not be available. Such a situation arises when an industry has high barriers to entry, whether through natural scarcity of resources, government monopoly, or economic disincentives.\footnote{See R. Posner, Economic Analysis of Law §§ 9.5, 10.5 (3d. ed. 1986).} Once a firm or nation has established itself as a major producer in such an industry, it may be difficult for other firms or nations to adjust if production falls out of line with the ideals of comparative advantage. In the simplest case, a producer that succeeds in driving out its competition may begin to act as a monopolist, charging exorbitant prices and dipping below optimal production.\footnote{See id. at chs. 9, 10.}

Finally, consumption and trade are not the only public goods a nation must seek to supply. Security is also a basic desideratum, and trade cannot prosper without peace.\footnote{See generally R. Rosenrance, The Rise of the Trading State (1986). In this book, Rosenrance discusses the conflict between the military-political view of territorial aims and the trading-world view of economic gains. He states that these two views will continue to co-exist, but are essentially incompatible: One of the difficulties facing the trading system throughout history is its inability to gain universal adherence so long as important and powerful states are still primarily devoted to the territorial system. Unchecked gains by territorial nations would lead even to the most conspicuous protagonists of trade to reconsider their position and, ultimately, to renew their territorial defenses. Thus the territorial system could always nibble away at the fringes of the trading system and sometimes overturn it entirely as it did during World War I. Id. at 18.} Even the increased prosperity produced by free trade is unwarranted where such trade undermines national security. Such a situation could arise where an unfriendly nation became a significant supplier of something essential to national defense, or where an industry essential to national defense is threatened with serious damage.\footnote{See infra note 119 and accompanying text.}

The theory of comparative advantage is basic to an understanding of arguments for free trade and underlies most U.S. trade laws dealing with fair trade. As will be shown, this theory has serious drawbacks in ordering trade with NME's. Further discussion of this point must, however, await a brief presentation of those U.S. trade laws.
III. Current United States Trade Law

A. Antidumping Law

U.S. law protects domestic industries against foreign parties who sell goods in the United States for less than “fair value.” This process of selling in the United States for less than fair value is called dumping. If the International Trade Administration of the U.S. Department of Commerce (ITA) finds that dumping has occurred and the U.S. International Trade Commission (ITC) determines that the dumping has caused or threatens to cause material injury to a domestic industry then extra duties equal to the level of underselling are assessed on the goods to remedy the price imbalance. Although an antidumping case can take a long time to bring to a conclusion, relief is automatic once dumping and injury have been found.

For purposes of this Article, it is the ITA’s dumping investigation that is relevant. Dumping is found whenever it is determined that the product in question sells for less than fair value in the United States. The ITA compares fair value, or “foreign market value,” to the United States price, and if the former exceeds the latter, then dumping has occurred. It is the concept of fair value that creates problems in trade with NME’s.

For dumping analysis to apply, even in theory, there must be some home or third-country market from which to derive fair value. Efforts to fit this market economy concept of fair value into an analysis of trade with NME’s have led to some amazing contortions of legal analysis. Both the regulations which have been promulgated to define fair value in the NME context and efforts to apply those regulations reveal the agility of legal minds seeking to accomplish the impossible. Furthermore, legislative proposals for reform of this area of law reveal the impossibility of applying dumping concepts to NME situations at all.

1. Fair Value Under Current Law

For market economy countries, there exists a hierarchy of methods for calculating fair value. The usual method is to use, with certain adjustments, the price for which the same or similar goods sell in the home market. If such a figure is unattainable or unreliable,

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21 The term “material injury” is defined as “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A) (1982).
23 INTERFACE I, supra note 6, at 154 (statement of Harvey M. Applebaum, Esq.).
the next method is to use the price of the same product, from the
same source, in a third-country market.\textsuperscript{27} The third method is to
construct a figure for fair value. This “constructed value” is based
upon a calculation of production costs and profits in the country of
origin.\textsuperscript{28}

These approaches are analytically consistent. Each method of
calculation upholds the basic premise of antidumping law that it is an
unfair distortion of markets to support low-price sales to the United
States with higher priced sales at home or in some other export mar-
ket. Such price discrimination between markets frustrates adjust-
ment of international trade patterns according to each nation’s
comparative economic advantage.\textsuperscript{29} Furthermore, each method uses
actual prices or a sum of actual factor prices to compare with the U.S.
price.

There is also a hierarchy of methods for calculating fair value for
imports from NME’s. The primary method after enactment of the
1988 Act is to develop a constructed value for the NME goods.\textsuperscript{30} As
is true with a constructed value analysis involving goods from a mar-
etomy country, the ITA aims to determine a fair value for the
merchandise, where circumstances prevent the home market price
from being a reliable indicator of value. A major distinction between
NME constructed value and market economy constructed value,
however, is that the process of constructing a value for NME goods
does not generate actual price figures. Instead, hypothetical prices
from surrogate countries are utilized.

In general, the ITA calculates a constructed value by adding to-
gether the cost of all materials and processing necessary to make the
product, packing and containers needed to ship the goods, and sums
for general selling and administrative expenses and profit.\textsuperscript{31} In con-
structing a value for goods from a market economy, the ITA com-
bines production factors and prices from the home country of the
merchandise. In constructing a value for merchandise from a NME,
the process becomes more complicated. First, the ITA determines
the input factors of the merchandise from the actual production pro-
cess in the NME. Next, the ITA identifies a surrogate market econ-

\textsuperscript{26} For example, if all sales in the home market are made below the cost of produc-
tion. See Toho Titanium Co. v. United States, 657 F. Supp. 1280 (1987); Toho Titanium
Co. v. United States, 670 F. Supp. 1019 (1987); Toho Titanium Co., Ltd. v. United States,
\textsuperscript{27} 19 C.F.R. §§ 353.4 to .5 (1988).
\textsuperscript{28} Id., § 353.6 (1988).
\textsuperscript{29} See supra notes 4-20 and accompanying text (discussing comparative advantage);
intra notes 102-115 and accompanying text (discussing the inapplicability of comparative
advantage to NME trade).
\textsuperscript{30} See 1988 Trade Act, supra note 3, § 1316(a), 102 Stat. 1107, 1186 (1988) (to be
codified at 19 U.S.C. § 1677b(c)(l)).
\textsuperscript{31} 19 C.F.R. § 353.6(a) (1988).
omy country at "a level of economic development comparable to that of the nonmarket economy country." The ITA makes this determination on the basis of a range of economic factors including per capita gross national product and infrastructure development. The input factors from the NME are then priced out in the market of the surrogate country. Finally, the ITA makes any necessary adjustments and currency conversions to achieve the final figure for constructed value.

Thus, with products from NME's, the ITA determines and values the factors in different economic systems. Factors of production are determined in the NME producing the merchandise. Values are then assigned to those factors based upon the values of such factors of production in surrogate market economy countries.

If the ITA is unable to make such a constructed value analysis because the available information is inadequate, then the foreign market value must be determined by another method. That method is to use the foreign market value of comparable merchandise produced by surrogate producers. Those producers must be located in one or more market economy countries at comparable levels of development to the NME including, if appropriate, the United States.

Prior to enactment of the 1988 Act, the hierarchy of methods was different. The preferred method was to use the price at which similar merchandise produced by a surrogate producer in a market economy country was sold in its home market. The second method was to use the price at which such surrogate producer merchandise was sold to other countries, including the United States. The final method was to construct a value for the same or similar merchandise in a surrogate country with a market economy.

These, then, are the methods that have been devised to calculate fair value when traditional market-based statistics are not available. Unfortunately, these methods do little to answer the basic objection that no effort to approximate market realities in NME's produces meaningful figures.

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32 1988 Trade Act, supra note 3, § 1316(a), 102 Stat. at 1186-87 (to be codified at 19 U.S.C. § 1677b(c)(4)).

33 The ITA "has routinely utilized World Bank figures [for GNP], even though the compilers of that data have stressed their information is not reliable for such comparisons." See Alford, supra note 2, at 91 (citing THE WORLD BANK, WORLD BANK ATLAS 16 (1980)).

34 Id. See also infra text following note 51 (further discussing "comparable economy").

35 1988 Trade Act, supra note 3, § 1316(a), 102 Stat. at 1186 (to be codified at 19 U.S.C. § 1677b(c)(2)).


37 Id. § 353.8(a)(1)(ii) (1988).

38 Id. § 353.8(a)(2) (1988).
2. Objections to Current Law

Severe analytic and practical difficulties arise whenever antidumping law is applied to NME’s. First, it is unclear what unfair trade practice is occurring when NME dumping is found. Second, practical limitations make it impossible to determine fair value in any predictable fashion, placing NME producers and U.S. importers of NME products in positions where they are helpless to adjust their pricing to avoid violations of the law. Third, the suggested means of applying antidumping law to NME’s appears to do away with the concept of comparative advantage in such trade.

According to some NME authorities, NME’s have no incentive to dump.\textsuperscript{39} In effect, NME’s are merely seeking to obtain hard currency and have abandoned the traditional mercantile incentives to dump.\textsuperscript{40} Therefore, NME’s generally seek the highest possible revenues for their exports to market economy countries.\textsuperscript{41} NME producers may certainly have some traditional market-economy incentives to sell their products abroad at low prices, such as to dispose of excess inventory. However, it is unclear even in those situations whether the NME is selling at less than an economically “fair” price, because that fair price would have to be determined in a market context that doesn’t exist within a NME.

The ITA is forced to seek the cooperation of market economy producers to act as surrogates for NME producers. Market economy producers often refuse to cooperate with U.S. antidumping investigations where cooperation would require that they open their books and plants to investigators seeking to construct a fair value for a NME product.\textsuperscript{42} In its investigation of alleged dumping of certain iron construction castings from the People’s Republic of China, the ITA had tremendous difficulties of this kind:

For its final determination, [the ITA] identified eight potential surrogate countries: Egypt, India, Indonesia, Morocco, Pakistan, the Philippines, Sri Lanka, and Thailand. However, when requested to complete the questionnaires supplied by [the Department of] Commerce each country refused to cooperate except Indonesia, whose responses were inadequate.\textsuperscript{43}

\textsuperscript{39} For example, some NME officials contend that NME’s would never engage in dumping due to the practice’s impact on international worker solidarity. \textit{See} Alford, \textit{supra} note 2, at 133 n.273.
\textsuperscript{40} \textit{INTERFACE} I, \textit{supra} note 6, at 226 (statement of Mr. Meyer Rashish).
\textsuperscript{41} Speaking of Poland, one former Polish government official stated, “We have no policy of setting a price lower than the market price.” \textit{INTERFACE} I, \textit{supra} note 6, at 223-24 (statement of Dr. Andrzej T. Werner).
\textsuperscript{42} In addition, some governments openly discourage their firms from cooperating with United States antidumping investigations. And some foreign firms simply refuse to cooperate and others may intentionally distort data for their own economic interests. \textit{COMPTROLLER GENERAL’S REPORT, supra} note 2, at 14-15.
The Indian government, for example, refused to cooperate because of differences in industrial base, infrastructural facilities, relative factor endowments, political and economic management, and different priorities in industrial development.\textsuperscript{44} For whatever reasons, India has regularly refused to serve as a surrogate for China,\textsuperscript{45} except on one occasion where no comparable product was manufactured in India itself.\textsuperscript{46}

Even where such cooperation has been forthcoming, the results have been unsatisfactory. In one case involving potassium fertilizers from the Soviet Union, a preliminary dumping margin of 187 percent was found by choosing a West German company as the surrogate producer.\textsuperscript{47} For the final determination, a Canadian company was used as the surrogate producer, and the dumping margin had fallen to 1.7 percent.\textsuperscript{48} This is not a mere ministerial determination of comparability, leading to a rational calculation of dumping margin; the surrogate producer issue essentially controlled the entire outcome of the case.\textsuperscript{49} In one case involving a surrogate country, values for Polish golf carts were constructed using Spanish values for Polish input factors. This produced a peseta "fair value" which was

\textsuperscript{44} Id. at 1484.


\textsuperscript{46} For the occasion when India did cooperate in a creation of a constructed value for a product not produced in India, see Chloropicrin from the People's Republic of China, 49 Fed. Reg. 5,982 (1984). Even when a country that is not a producer is requested to act as a surrogate there is little, if any, incentive for their producers to provide us with the detailed information we require and to allow us to verify it by examining their books and records. For example, in 1982 we persuaded Finnish carbon steel plate producers to serve as our surrogate in investigating plate from Romania. The Finns provided us information and let us verify it. Then on February 10, 1984, United States Steel Corporation filed an antidumping petition on plate from Finland, using the very same information obtained in the Romanian investigation. You can imagine how dismayed the Finns were with the results of their cooperation; and how that experience has made it difficult to find cooperative surrogates in other NME antidumping investigations.


\textsuperscript{49} See COMPTROLLER GENERAL'S REPORT, supra note 2, at 15-16.
then converted into dollars for purposes of comparison with the U.S.
value to determine a dumping margin. Whatever such an exercise signified, it did not reveal anything about the genuine advantages Poland may have had in factor endowments. As one observer put it, surrogacy (and, a fortiori, constructed value analysis) produces nothing but a "mythical cost." Under a constructed value analysis, the comparative advantage of the NME is rendered irrelevant. The merchandise input values that, ideally, should reflect the NME's comparative advantage are rejected because of an internal failure of market mechanisms. In their place, the ITA substitutes the input values of comparable merchandise in a surrogate country. Those values will naturally reflect the surrogate country's own comparative advantage. The fact that the surrogate country is one "at a comparable level of development" does not answer this complaint. Two nations at comparable levels of development could easily have differing values attached to specific raw materials, particular kinds of labor, and capital. Similarity of gross domestic product per capita and infrastructural development does not even begin to suggest comparable input factor values, for the macroeconomic does not necessarily reflect the microeconomic. Thus, constructed value analysis pushes NME's to price their products, and find market niches, appropriate to third-country endowment factors and third-country comparative advantage. Further, whose comparative advantage a NME must be held to is not known until after marketing has occurred.

3. "Artificial Pricing" and other proposals

In each of the last several Congresses, proposals have been made to amend the unfair trade laws to acknowledge that the market economy concepts behind U.S. antidumping laws do not apply to NME's. These efforts, largely associated with Senator John Heinz, Republican from Pennsylvania, have used a concept which has come to be known as "artificial pricing." Under these artificial pricing

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50 Letter from John D. Greenwald, I.T.A. Dept. Assistant Secretary for Import Administration, to Catherine Bedell, I.T.C. Chairman (May 9, 1980), reprinted in Electric Golf Cars from Poland, USITC Pub. 1069, Inv. No. AA1921-147(A), at App. C (1980). This was a method employed to determine fair value for electric golf cars from Poland that had previously been determined to have been sold at less than fair value under another method. The previous method was unavailable due to changes in facts between the initial determination and the date of the new imports. See id. at A-4. For a fine summary of the legal contortions undergone by the administering authority in trying to construct a value for Polish golf carts made in a hypothetical Spanish factory, see Note, Dumping from 'Controlled Economy' Countries: The Polish Golf Cart Case, 11 L. & POL'Y INT'L BUS. 777 (1979).

51 INTERFACE I, supra note 6, at 219 (statement of Bruce E. Clubb, Esq.)


53 The artificial pricing theory "presumes that there is no reasonable method to eval-
proposals, antidumping law or market disruption law,\textsuperscript{54} or both\textsuperscript{55} would be amended to remove any requirement that the ITA investigate either costs or factors of production of goods within the NME.

Under these artificial pricing proposals, a minimum allowable import price for each NME product would be established.\textsuperscript{56} Any time the import price of a NME product exceeded the minimum allowable import price, an extra duty would be imposed on the import.\textsuperscript{57} The minimum allowable import price would be calculated according to one of a number of formulae under the proposed legislation.\textsuperscript{58} What these formulae have in common is that the floor price for "fairly traded" NME imports would be the price for the same product from a market economy competitor.

Proponents of an artificial pricing approach seem to acknowledge, as does this Article, that antidumping theory is inapplicable to NME imports. They argue that use of antidumping law to limit NME imports lacks the predictability, ease of administration, and essential competitive fairness needed to promote free trade without exposing domestic industries to undue and unfair risks from foreign competition.\textsuperscript{59} Current means of applying unfair trade laws to NME trade are elaborate in procedure and unpredictable in result. Indeed, the procedures themselves are sometimes cited as examples of unwarranted trade barriers.\textsuperscript{60}

\textsuperscript{54} See infra notes 82-101 and accompanying text (discussing market disruption law).

\textsuperscript{55} See S. 1351, 98th Cong., 1st Sess. (1983) (seeking to amend the antidumping laws); S. 958, 97th Cong. 1st Sess. (1981) (seeking to amend the market disruption laws); S. 1966, 96th Cong., 1st Sess. (1979) (seeking to amend both). This series of proposed legislation suggests, at the least, some uncertainty as to the proper application of the theory behind the antidumping laws to NME trade.

\textsuperscript{56} Firestone, supra note 53, at 82-84.

\textsuperscript{57} Id.

\textsuperscript{58} For example, S. 1966 required resort to any producer or aggregate of producers in a free-market country, including the United States, supplying more than 5% of apparent domestic consumption. See S. 1966, 96th Cong., 1st Sess., § 1(b) (1979). S. 958 dropped the 5% figure in favor of a requirement that the producers chosen produce a sufficient volume to establish a representative price. See S. 958, 97th Cong., 1st Sess., § 1(a) (1981). And S. 1351 merely required that the administering authority select the "most suitable" free market economy producer, including one in the United States. See S. 1351, 98th Cong., 1st Sess., § 2(d) (1983).

\textsuperscript{59} Firestone, supra note 53, at 79-82.

Nevertheless, these proponents attempt to remedy this problem by creating an unfair trade law to be applied to NME's without reference to the concept of fairness. Artificial pricing fails to take into account any conception of comparative advantage, because it sets a floor price for imports that is totally unrelated to any production input factors within the source country itself. In effect, all low-priced trade threatens being labelled as “unfair” and countered by increased duties.

B. Countervailing Duty Law

Under U.S. law, a domestic industry may obtain tariff protection from imports being subsidized in the country of production. Because such subsidies distort the international allocation of resources, the law imposes countervailing duties, designed to counter the effect of the subsidy. Once again, concerns that goods are being introduced too cheaply into the U.S. market have led to the creation of trade barriers. Essentially, countervailing duties are designed “to protect American firms from what [Congress] viewed as the unfair competitive advantage a foreign producer would have in selling in the American market if that producer’s government in effect assumed part of the producer’s expenses of selling here.”

Proponents of applying countervailing duty law to NME trade argue, first, that the “only purpose of the countervailing duty law is to extract the subsidies contained in merchandise entering the commerce of the United States in order to protect domestic industry from their effect.” In so doing, they deny that countervailing duty law has anything to do with comparative advantage or “the diminution of world wealth.”


62 Most NME’s would not be entitled to an injury determination in a countervailing duty investigation because they are not GATT signatories and have not received equivalent rights under any other provision of U.S. law. For that reason, most NME’s would, if at all, be subject to countervailing duty investigations under section 303 of the Tariff Act of 1930, which does not provide for an injury investigation. See Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1982). Because this Article concentrates on the nature of the foreign acts, not the degree of the injury such acts may cause, the distinction is not of immediate significance.


64 Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1315 (Fed. Cir. 1986); see also Zenith Radio Corp. v. United States, 437 U.S. 443, 455-56 (1978).


66 Id.
In countering this view, the Court of Appeals for the Federal Circuit noted that the purpose of countervailing duty law was "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."\(^\text{67}\)

In a market economy, a subsidy operates to encourage a seller to export when it would not otherwise be in his interest to do so. This would, in a free market setting, distort decision making on issues of resource allocation and production of goods. This kind of "unfair" competition, the court reasoned, could not arise in the context of exports from a NME.\(^\text{68}\)

Second, proponents argue that it is unnecessary to have a market-oriented system in order to encourage exports by means of special economic preferences. Although normal central control of the economy would not be countervailable, exceptional economic incentives would accomplish the same export objectives as would a subsidy in a market economy, and hence would be countervailable.\(^\text{69}\)

Such proponents argue that the difficulty lies not in the theoretical application of countervailing duty law to NME's, but in measuring what economic incentives are sufficiently exceptional to warrant countervailing action.\(^\text{70}\)

It is true that a major difficulty in this view lies in distinguishing between "normal" and "extraordinary" economic incentives in a system grounded upon an entire system of noneconomic incentives. The reason for this difficulty lies in the incompatibility of countervailing duty law and NME's.\(^\text{71}\)

In market economies, pervasive infrastructure benefits (such as government development of roads and ports) are not countervailable.\(^\text{72}\)

In a NME, such benefits cover a massive range of the economy, so that either everything about a NME product would be subject to countervailing duties, or nothing would be. Any line between would be arbitrary. If subsidies are derogations from market mechanisms then every aspect of a NME's central economic planning would be a subsidy.\(^\text{73}\)

Third, proponents note that countervailing duty law has been applied to nonmarket sectors of market economies.\(^\text{74}\)

\(^{67}\) *Georgetown Steel*, 801 F.2d at 1315 (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978)).

\(^{68}\) Id. at 1315.

\(^{69}\) *Continental Steel*, 614 F. Supp. at 552-54.

\(^{70}\) Id. at 554 (emphasis in original).

\(^{71}\) The court in *Georgetown Steel* found, in effect, that theoretical, not ministerial, difficulties underlay any attempt to apply countervailing duty law to NME trade.


\(^{73}\) Some NME derogations from market mechanisms could, of course, have negative effects upon enterprises within the country. These could be viewed as taxes, using the same logic that views all beneficial derogations as subsidies.

controlled sugar industry in Tsarist Russia, and several administrative decisions applied countervailing duty law to goods from the heavily state-controlled economy of Nazi Germany. By analogy, proponents argue, there should be no theoretical objection to applying the same law to nonmarket sectors of NMEs. Indeed, not to do so would result in absolving nations only when their interference in the marketplace becomes complete, rather than selective.

Nevertheless, an alleged NME subsidy is a payment that the government is making to itself, and one which would not enable additional exports to take place because of some new market distortion. By contrast, a subsidy granted to a state-controlled enterprise in a market economy would produce distortions in the otherwise market-oriented forces of that economy. Those distortions could be measured against the background of those normal market forces.

Finally, proponents draw an analogy to antidumping law. Any objections to the application of countervailing duty law to NME trade should apply even more strongly as to antidumping law. As noted earlier, antidumping law requires calculation of a home market value for the merchandise being imported. If there is no home country market, and no home market value is even theoretically calculable, it would seem that antidumping law is analytically inapplicable to NME products. Yet Congress and the ITA found a way to construct a home market value by reference to surrogate countries. If the theoretical hurdle of applicability has been cleared with respect to antidumping laws, proponents argue that it should also be cleared with respect to countervailing duty laws.
This Article is in full agreement with the foregoing final argument. The conclusion to be drawn from this argument, however, is not that countervailing duty law should apply to NME's. Rather, the proper conclusion is that antidumping law should not apply to NME's. If the inefficiencies of a nonmarket system cause the NME's products' prices to be "too low" in a market economy country market, such as the United States market, then the NME is, in effect, subsidizing the market economy country. If, on the other hand, the control capabilities of the NME allow it to take advantage of its ability to allocate resources and direct output so as to threaten some portion of the market economy country, then the NME is engaging in predatory pricing, not subsidizing the exported goods. Any system of unfair trade practice law applicable to NME's should permit such countries to grant boons to the United States, but should not allow the NME to feed off of the vulnerabilities inherent in a market-based economic system.

C. Market Disruption Law

Market disruption occurs whenever rapidly increasing imports from a country dominated or controlled by Communism cause material injury to a domestic industry.82 When each of these elements is found by the appropriate federal agency, the President is empowered to impose quotas or increased tariffs, order the award of trade adjustment assistance, or negotiate orderly marketing agreements.83 Any relief imposed relates only to the countries under investigation before the federal agencies.84

The market disruption statute, codified as section 406 of the Trade Act of 1974, was designed to provide an effective remedy against injury that could be brought about by the rapid shift of nonmarket resources from one industry to another, so as to injure a


(a)(1) [T]he International Trade Commission . . . shall promptly make an investigation to determine, with respect to imports of an article which is the product of a Communist country, whether market disruption exists with respect to an article produced by a domestic industry.

(e) For purposes of this section—

(1) The term "Communist country" means any country dominated or controlled by communism.

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

83 Id.
84 Id.
U.S. industry. This design clearly recognizes that different forces are at work in a NME than are at work in a market economy. Furthermore, it specifically addresses the predatory effect of rapid pricing shifts, which is the threat that a NME poses to market-based systems.

Two elements of a market disruption investigation deserve special attention. They are the range of countries covered by the statute and the definition of rapid increase. In addition, the application of the market disruption statute to overdependence of the United States on foreign supplies of strategic materials should be considered.

Section 406 of the Trade Act of 1974 specifically relates only to imports from "Communist countries." Nevertheless, section 406 forms part of Title IV of the Trade Act of 1974, and throughout the rest of this title, reference is made to NME countries. This could raise a presumption that the two terms are meant to be synonymous, or could signify that somewhat different coverage is sought within section 406. The issue has been raised, but not resolved, in ITC deliberations. Any new legal structure to deal with East-West trade should resolve this ambiguity legislatively.

In order for market disruption to exist, imports must be undergoing a rapid increase in either quantity or U.S. market share. It is this act of rapid increase, rather than any unfair trade practice, that forms the basis for a market disruption sanction. Implicit in this is the recognition that rapid shifts in production within a NME are not necessarily unfair. Indeed, it is unlikely that the term "fair" applies at all to this aspect of East-West trade.

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86 See infra notes 118-119 and accompanying text (discussing economic disruption).
87 Analyses of material injury and causation are similar to those used under the antidumping statute. For an analysis of material injury, see Anhydrous Ammonia from the Union of Soviet Socialist Republics, USITC Pub. 1006, Inv. No. TA-406-5 (1979). See also Ceramic Kitchenware and Tableware from the People's Republic of China, USITC Pub. 1279, Inv. No. TA-406-8 (1982); Canned Mushrooms from the People's Republic of China, USITC Pub. 1293, Inv. No. TA-406-9 (1982). In determining causation, the standard of "significant cause" is harder to satisfy than is the simple causation standard of the antidumping laws and imposes certain new issues of alternate causation. However, the essential thrust and techniques of analysis are sufficiently comparable to satisfy the interests of this Article.
88 See infra note 121 and accompanying and following text (discussing national defense concerns).
89 "[I]t is possible to conceive of a market economy run by a government formed by a communist country; likewise, it is also possible to conceive of a basically non-market economy whose government is non-communist." Anhydrous Ammonia from the Union of Soviet Socialist Republics, USITC Pub. 1006, Inv. No. TA-406-5, at 20 (1979).
90 Indeed, Congress explicitly recognized that imports from Communist countries could enter the United States without damaging any United States industry or national interest, provided the quantity were reasonable in light of recent trade history. See S. REP. No. 1298, 93d Cong., 2d Sess. 211 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN.
becomes the key.

On occasion, the ITC has addressed the question of U.S. overdependence upon Communist country sources for strategic materials, within the context of determining material injury or threat thereof. The Senate considered this issue of overdependence important when considering the Trade Act of 1974. Unfortunately, neither the statute itself nor the House deliberations deal with this overdependence issue at all, and ITC deliberations have been inconclusive. An important aspect of East-West trade is thus left in limbo.

Historically, the NME market disruption statute has not proven very effective in protecting domestic industries from NME imports. Of eleven market disruption petitions brought before the ITC, seven have resulted in findings of no disruption. One has produced a split decision, resulting in a recommendation to the President that import relief be imposed. Three have resulted in findings of market disruption. None has resulted in any import relief, as the President has exercised his discretionary power to reject the ITC's recommendation.

Such results have led some to argue that section 406 is totally inadequate for protecting domestic industries from non-market predation. It has led others to argue that the basic premise of section

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News 7186, 7342. This implies that the potential disruptive effect of nonmarket-based shifts in trade patterns, rather than any particular level of East-West trade, concerned Congress.


93 This concern of strategic overdependence has been left in limbo in the trade laws, but is implicit in other aspects of governmental response to NME trade. The author suspects that the irony of "NME" and "enemy" being homonyms has not gone unnoted.


97 Cuneo & Manuel, Roadblock to Trade: The State-Controlled Economy Issue in Antidumping Law Administration, 5 Fordham Int'l L.J. 277, 307 (1982); Potter, East-West Countertrade;
406 is fine, but that too much discretion is given to the President to reject ITC recommendations of import relief.\textsuperscript{98} Language was introduced during consideration of the 1988 Act to limit Presidential discretion to overturn such recommendations,\textsuperscript{99} but did not become part of the final law. Despite these concerns, market disruption law has been recommended as the only reasonable approach to regulating trade with NME countries.\textsuperscript{100}

In sum, the market disruption statute is the only statute designed specifically with NME trade in mind.\textsuperscript{101} As such, it approaches East-West trade issues from the standpoint of preventing one type of evil made possible by the existence of nonmarket decision makers—disruption of the orderly development of market forces and allocations by reason of abrupt alterations of production or price from a NME. The market disruption statute provides a very useful tool in dealing with East-West trade. In that it deals with only one aspect of East-West trade directly, and perhaps deals peripherally with the issue of strategic overdependence on non-market sources, the market disruption statute should be only one level of a multitiered approach to nonmarket trade.\textsuperscript{102}

IV. Proposals For Change

A. The Failure of Market Conceptions

Neither "fair trade" nor "comparative advantage" is a meaningful concept in East-West trade. Fair trade, if such a term is to make


\textsuperscript{98} \textit{INTERFACE I, supra note 6, at 196-97.}

\textsuperscript{99} Section 135 of H.R. 3, as passed by the House of Representatives, limited executive branch discretion to reject an ITC recommendation under the market disruption statute to circumstances where the United States Trade Representative determines that the proposed import relief would have "a serious negative impact" upon the economy of the United States. During conference with the Senate, the House conceded this provision. H. REP. No. 576, 100th Cong., 2d Sess. 692 (1988) (conference report of the 1988 Trade Act, see supra note 2), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1725. Similarly, § 201 of the Senate amendment to H.R. 3 limited Presidential discretion to reject an ITC recommendation under the escape clause statute to circumstances involving a threat to national security, a serious injury to a consuming industry in the United States, a likelihood of more jobs lost than created or preserved, or a burden on the poor or U.S. agriculture. This provision also failed to become part of the bill finally enacted. See id. at 661-62, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 1694-95.

\textsuperscript{100} \textit{INTERFACE I, supra note 6, at 235-34 (statement of David P. Houlihan, Esq.). Similar remarks have been made about possible use or extension of the escape clause law set forth in section 201 of the Trade Act of 1974 (codified at 19 U.S.C. § 2251 (1982)), a market economy counterpart to the market disruption law. INTERFACE I, supra note 6, at 197 (statement of F. David Foster, Esq.), 216 (statement of Robert A. Cornell), 243 (statement of Professor John J. Barcelo).

\textsuperscript{101} The 1988 Act amended antidumping law with respect to NME’s, but did not alter the market presumptions underlying the existing statutory scheme.

\textsuperscript{102} See infra notes 118-120 and accompanying text. This Article will not address issues relating to the exportation of goods to NME's, COMECON, and United States export licensing programs.
sense at all, requires an economic openness that permits free competition between the various actors in the marketplace. Such competition can take place between producers or between nations.

For competition underlying free trade to take place on a producer level, governmental interference must be too low to change marketplace realities and to divert resources and alter the decisions of the actors in the marketplace. It is possible to indulge in a fiction that such absence of governmental interference exists in most of the economies of the Western, market-oriented world. It is not possible to indulge in such a fiction in the overtly intrusive NME world.

In NME's, government interference has reduced market forces to relative insignificance in determining allocation of resources, prices, and business and consumer decisions. Let us consider the heavily studied Soviet economy as an example. Studies have shown that Soviet trade has been rational in the broad sense of exporting to most countries those products as to which the Soviet Union has relatively abundant factor endowments. In that broad sense, a limited kind of comparative advantage may be at work in determining Soviet foreign trade patterns. Nevertheless, a number of factors besides comparative advantage have been found to be major determinants of Soviet foreign trade patterns. Among these are "historical priority of sector, . . . the probability of plan fulfillment, the institution of . . .

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103 I suggest that what we're really concerned about with respect to unfair competition versus fair competition is that the former lacks durability. It is unfair because the trade practice is based upon price discrimination, subvention of exports, or nondurable resource allocation. It is not the kind of trade that an importing country is willing to accept [due to] the social and economic costs involved in making the resource reallocations required by the importing country. . . . Imports displace domestic production. The resources have to go somewhere else: and if the trade is not going to be durable and continual, even in this dynamic, changing world, there's no sense in undertaking the adjustment that is involved.

INTERFACE I, supra note 6, at 212 (statement of Mr. Meyer Rashish).

104 For a discussion of whether state-owned enterprises (SOE's) within market economics should be treated in the same manner as NME's, see INTERFACE I, supra note 6, at 201-08. Unlike market data with respect to NME's, reliable market data does exist with respect to the economic framework within which SOE's operate. Such data permits reasonable calculations of fair value for antidumping purposes. See id. at 204 (statement of Professor Robert E. Hudec); id. at 208 (statement of Samuel A. Stern, Esq.). The existence of such data has led one authority on trade to conclude that SOE's should be covered by the countervailing duty law. See id. at 178 (statement of Peter Buck Feller, Esq.).

105 For a well-reasoned argument stating that essentially all governments interfere in markets to such an extent that comparative advantage "normalcy" is indeterminable, see generally Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 HARV. L. REV. 546 (1987). Such an argument is in accord with, but proceeds far beyond, the thrust of this Article.

106 However, such interference may become less in the future if recent free market developments in the Soviet Union, China, and some of Eastern Europe continue.

"Soviet agriculture," and the trade pattern of bilateralized trading partners." The result of Soviet decision making based upon such nonmarket factors is a substantial irrationality, in comparative advantage terms, in Soviet trade. Indeed, one scholar studying 1959 Soviet trade found that such trade, far from being rational, imposed a net cost on the Soviet economy. Another scholar found the same result in 1966 Soviet trade with East Germany. Although the Soviets have attempted to improve this situation, substantial irrationality in trade continues.

That is not to say that market forces are insignificant in such societies. Clearly, market forces are a considerable factor in the overall costs the society must bear to maintain a nonmarket system. In theory, one may determine the degree of market distortion, and hence the hidden costs of the system, by comparing the actual economy with a hypothetical free market system with the same endowment factors. Nevertheless, in the real world of NME economic systems, market forces are sufficiently undermined that private competition provides no conceptual underpinnings for the concept of fair trade.

On the international level, the analysis is different. If each nation is taken as an independent actor in a world marketplace, then the internal inefficiencies within a country do no more to undermine competition, and therefore free trade, than do inefficiencies of decision-making by an individual participant in the private marketplace. It is inherent in the market system that individual participants make

111 See generally Gardner, supra note 107, at 143-44.
112 Id. at 144-52.
113 Indeed, in some unusual circumstances, market style joint ventures have been established within the economies of NME's:
   An American joint venture in Romania, for example, might start to sell its computer commercially in the United States allegedly at dumping prices. Because that joint company in Romania keeps accounts in hard currency, because it has a profit motive, and because the wages are paid at world scale and the land is leased at world scale, there is in effect a private market-economy company operating in a [NME]. Perhaps, then, [NME] dumping rules should not be applicable in this unusual situation.
114 Fairness is a meaningless concept in NME trade. INTERFACE I, supra note 6, at 224 (statement of Arthur Downey, Esq.). Similarly, the conclusions of this Article may be inapplicable to such unusual market style joint ventures.
115 Fairness is a meaningless concept in NME trade. INTERFACE I, supra note 6, at 215 (statement of Robert A. Cornell); id. at 220 (statement of Bruce E. Clubb, Esq.); 226 (statement of Meyer Rashish); id. at 233 (statement of David P. Houlihan, Esq.). If NME resources are irrationally allocated, then the concept of comparative advantage is meaningless in this context. Id. at 218 (statement of Dr. Martin J. Kohn).
different decisions. The market generally rewards those who make the best decisions, and all others either reform their decisions or are winnowed out of the market. What matters in the international marketplace is no different; internal decisions are irrelevant and it is only the actions of the participants that matter. A free market between nations is therefore possible in theory despite massive governmental interference within the markets of individual nations.\textsuperscript{115}

If each nation were to produce the goods in which it had a comparative production advantage, then the world would, as a whole, be a better place. In this sense, comparative advantage is served by the old-fashioned method of letting the international market move inefficient nation-producers aside. Thus, NME producers would have two choices. They could find that their prices make no real economic sense, within the meaning of comparative advantage, and would amend their prices. In the alternative, they could continue to subsidize market economy nations. NME producers can not do the latter indefinitely, but while they do so, market economy nations have no reason to complain, unless special circumstances exist that give rise to a need for intervention in the workings of the free international marketplace. What this approach will achieve is movement towards a trading system based upon genuine comparative advantage.

It is extraordinarily difficult to anticipate just what the details of an East-West trading system based upon true comparative advantage would be. How is an economic observer looking down over the world marketplace to determine whether one nation or another has a comparative advantage without looking within each country to determine factor costs for each item produced? How can such factor costs be determined without reference to elements of the internal market of each producing country?\textsuperscript{116} Because of the complete obscurity of market-style information in NME's, such questions are unanswerable.

Because the structure of an East-West trading system based on comparative advantage can not be anticipated, derogations from such a system by NME's are unascertainable. In other words, although it is possible to move towards a system of comparative advantage in East-West trade, it is impossible to manipulate or "correct" the market to bring about a system truly based on comparative advantage. \textit{A fortiori}, fine tuning on the level of antidumping and

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\textsuperscript{115} Such a free market will not produce optimal allocations of production as compared with a free market composed of totally informed and rational players, but will produce far better results than will a restricted marketplace of relatively uninformed and irrational players. In other words, optimal benefits of comparative advantage may not be achieved, but they may not be available anyway in a world having massive governmental interference with markets.

\textsuperscript{116} Wages, for example, are essentially incalculable in a NME. \textit{See} \textit{INTERFACE I, supra} note 6, at 212 (statement of Meyer Rashish).
countervailing duty determinations achieve nothing that is economically meaningful.

B. Economic Advantage

If comparative advantage is indeterminable in East-West trade, then another premise must be found upon which to organize trade relationships between the United States and NME's. Economic advantage provides such a premise. To the extent that a NME operates efficiently, it merely provides competition comparable to that provided by market economy competitors. To the extent that it operates inefficiently, it provides some goods at too high a price and others at too low a price to the world markets. Those priced too high compared to available alternatives can be ignored. Those priced too low can be obtained at a price which amounts to a net wealth transfer between the NME and the economy of the United States. Absent special circumstances, there is no reason not to accept such a transfer.\textsuperscript{117}

Therefore, unless special circumstances dictate otherwise, it is in the national economic interest to organize trade relations with NME's so as to take maximum economic advantage of the inefficiencies of foreign government intervention. This will eventually have the effect of driving the NME towards more rational, market-oriented economic decision making. Until it does so, this approach to East-West trade relations will have the effect of benefiting the citizens of those countries which do follow relatively market-oriented economic principles. The market forces themselves will, if permitted to operate fully, create an economic drain upon the inefficient NME, eventually moving it towards more rational allocation of its factors of production and increasing the global trading system's approximation to a system based upon comparative advantage. In the long term, this will tend to benefit the nation whose economy is based upon market principles.

C. Exceptions to Economic Advantage

Special circumstances could make this broad statement of laissez-faire economic advantage inapplicable. Such circumstances can arise in areas of economic disruption, industry predation, and noneconomic concerns of national security.

\textsuperscript{117} "It's largely in the public interest to have low prices on imports coming into the United States. It doesn't really matter why the prices are low. On the other hand, there might well be some public interest in looking carefully at cases where imports cause injury to the domestic industry." \textit{INTERFACE} I, \textit{supra} note 6, at 243 (remarks of Professor John J. Barcelo, III).
1. Economic disruption

Economic disruption could arise where shifts in market factors occur without a basis in marketplace realities. One advantage of a centrally controlled system is that it is capable of rapid shifts in production and pricing of goods.\textsuperscript{118} That such shifts produce additional, perhaps hidden, economic costs is either unrecognized or accepted as a price of having a nonmarket system. As such changes occur, market participants in other nations adjust to these shifts, but they also suffer costs. Even though the benefits to the market-oriented system, as a whole, of taking advantage of any increased inefficiencies in the NME will exceed such costs, the benefits may not be distributed precisely to offset such costs. In the simplest example, the benefits could fall to one sector of the economy (and, eventually, be received by society as a whole), but the costs could be borne by another sector totally. The more rapid such shifts, the greater the economic costs of adjustment.

Where these costs of adjustment are relatively low, a strong trade adjustment assistance program should be adequate to ensure that one sector or segment of society does not bear a heavy burden in providing national economic benefits.\textsuperscript{119} Where the costs of adjustment are relatively high, such an approach might prove inadequate. If that is so, then a valid reason exists to impose a tariff, quota, or ban on the NME imports, in order to preserve domestic economic stability.

2. Industry predation

Industry predation occurs when a NME targets an industry or sector. Sustained pricing below prevailing market prices could drive free market participants out of business in that industry or sector. If all significant free market participants are driven from the marketplace, and if barriers to reentry or new entry are significant, then the NME could obtain uneconomically high profits through monopoly or oligopoly pricing. That would provide an appropriate basis for establishing higher tariffs on the NME product, refusing a short-term economic gain in order to forestall a longer-term economic loss.

3. National Security

Threats to national security arise because market and nonmarket economies compete on many levels. If a NME were to become a major U.S. supplier in a militarily or geopolitically strategic sector, such


\textsuperscript{119} The 1988 Act contains provisions designed to enhance the operation of the trade adjustment assistance program. See 1988 Trade Act, supra note 3, §§ 1421-30 (to be codified as amended in scattered sections of 19 U.S.C.).
as raw materials, technology, or know-how, then no degree of economic benefit to the United States would be sufficient recompense. Short-term profits would be more than overcome by longer-term risks. Such a situation would warrant tariffs, quotas, or bans to prevent dependence from developing.

If the special circumstances of economic disruption, industry predation, or threat to national security arise, then the general principle of taking economic advantage of the inefficiencies of NME traders must give way. Any system of regulating trade with nonmarket economies must contain methods of handling these circumstances as they arise. Absent such circumstances, economic advantage dictates that trade with nonmarket economies be as unencumbered with barriers as possible.

V. Conclusion

Current U.S. trade law regarding trade with NME countries is replete with oddities and complexities that arise out of an attempt to apply market-oriented economic principles to a nonmarket setting. This attempt distorts the meaning of protective statutes designed to assure "fair trade" between the United States and other free-market traders in the world. In particular, when federal agencies and Congress have acted to bring NME countries within the scope of the antidumping laws, they have created a technical nightmare that fails to achieve rational objectives in this area of trade. Only the market disruption statute, specifically designed with nonmarket economies in mind, addresses trade with such countries in a sensible manner.

In contrast with concepts of "fair trade," concepts appropriate to any analysis of trade between free-market economies, economic relations with NME countries should be built around the concept of "economic advantage." Economic advantage directs the United States to import products from NME's at prices that appear commercially low. By accepting such products, the United States will be exploiting the structural inadequacies of the NME and receiving a net benefit from it. Either the United States will continue to have some of its costs underwritten by the NME or the NME will be forced to move towards market principles in its economic relations and, presumably, in its internal economic workings. In order to facilitate

120 The only remaining valid justification for section 406 ... lies in its application to vital raw materials cases. By favoring non-communist suppliers of raw materials over communist suppliers, Congress achieves an important political goal—the prevention of U.S. dependence on communist countries for these materials at the expense of our traditional, more dependable suppliers. Calabrese, Market Disruption Caused by Imports from Communist Countries: Analysis of Section 406 of the Trade Act of 1974, 14 CORNELL INT'L L.J. 117, 132 (1981).

121 See supra text following note 88 (discussing the statutory use of "Communist country" in contrast to this article's use of "NME").

122 Many observers have noted that both China and the U.S.S.R. appear to be moving
taking economic advantage of NME trade, strong adjustment assistance programs must be available to workers who have been disproportionately injured by such trade.

Certain special circumstances might make it inappropriate to accept low priced goods. If the low-priced goods come at a high cost in market adjustment, anticompetitive effect, or national security, they should not be welcomed. In particular, if the NME goods are entering the U.S. economy in a commercially disruptive manner, or so as to drive domestic participants out of a high-entry-barrier industry, or so as to establish the NME as a prime source for strategic materials, then preventive action must be taken. Accepting these exceptions to the principle of economic advantage would permit more rational regulation of trade with NME's.\(^\text{123}\)

\(^{123}\) Certainly, much remains to be considered about, for example, the precise nature of the triggering importations under the enumerated exceptions to economic advantage, the application of economic advantage to those NME's already receiving MFN treatment from the United States, and the remedial actions to be taken if one of the exceptional circumstances has been found. Nevertheless, the basic principles of this Article should provide the foundation for consideration of those issues.