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# Dumping of Non-Factor Services: Some Implications of Recent Experiences with Controlled-Economy Shipping

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## I. INTRODUCTION

Dumping generally brings lower prices to the consumers of the importing country, the benefit of which is dispersed throughout the economy unless it is outweighed by genuine injury to a domestic industry.<sup>1</sup> The essential element in the regulation of dumping is, therefore, the problem of determining when injury is sufficient to justify remedial action. In the United States, and in many other countries, the standards for such determination have evolved from the notion that dumping is an example of price discrimination between countries.<sup>2</sup> If a higher price in the exporting country can be traced to monopolistic control over the domestic market by the exporter,<sup>3</sup> then dumping is more clearly seen as anticompetitive behavior, and the potential injury to an industry in the importing country may be substantial.<sup>4</sup> Accord-

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<sup>1</sup> Metzger, *American Foreign Trade and Investment Policy for the 1970's: The Williams Commission Report*, 66 AM. J. INT'L L. 537, 557 (1972).

<sup>2</sup> See C. KINDLEBERGER, INTERNATIONAL ECONOMICS 258-79 (1968).

<sup>3</sup> Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85, 88 (1973). Import duties and transportation costs may also act as barriers to the reentry of dumped items.

<sup>4</sup> The type of injury here referred to is the type resulting from unfair trading practices.

ingly, antidumping regulation in the United States has placed considerable emphasis on less-than-fair-value pricing, which is a designated form of unreasonable price discrimination.<sup>5</sup>

All past significant antidumping regulatory efforts have concerned merchandise trade rather than trade in non-factor services. Article VI of the General Agreement on Tariffs and Trade states:

The contracting parties recognize that dumping, by which *products* of one country are introduced into the commerce of another country at less than the normal value of the *products*, is to be condemned if it causes or threatens material injury to an established industry in a territory of the contracting party or materially retards the establishment of a domestic industry.<sup>6</sup>

Non-factor services have always occupied a special category in international trade.<sup>7</sup> Import duties have not been applied to non-factor services in the same way as they are applied to commodities. More importantly, services pose a number of technical problems associated with the diversity of items grouped in that category, and with the difficulty of determining the quantity and fair value of such purchases from foreign sources.<sup>8</sup> It is, nevertheless, important to consider allegations of dumping in connection with non-factor services because the service industries, in general, form a rapidly growing element in international trade. In 1975, for example, they constituted about twenty percent of total world trade,<sup>9</sup> and in some regions the ratio between non-factor services and merchandise trade has already risen to forty percent.<sup>10</sup> A major concern at the moment is that they are becoming a convenient target for commercial policies aimed at countering short-term balance

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<sup>5</sup> The first to appear was the Antidumping Act of 1916, Pub. L. No. 64-271, § 801, 39 Stat. 756, 798 (codified at 15 U.S.C. §§ 71-77 (1973)).

<sup>6</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. pt. 5, 11, 58, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 258 (emphasis added).

<sup>7</sup> There are five categories of non-factor services: shipping, other transportation, travel, other private services, and other government services. "Other private services" is the least homogenous group since it includes labor and property income, not included elsewhere, as well as communication, advertising, brokerage, management, operational leasing (other than charters), processing and repairs, merchanting, and professional and technical services. For a more complete discussion, see INTERNATIONAL MONETARY FUND, *BALANCE OF PAYMENTS MANUAL* (4th ed. 1977).

<sup>8</sup> Attempts to impose duties on non-factor services would lead to enforcement problems since documents are often the only physical entities to cross national boundaries. Though difficulties are encountered with all *ad valorem* duties, merchandise trade items can be examined by customs authorities to ensure that the items have been correctly reported and appropriately valued. The use of Swiss banking services by United States residents, on the other hand, is extremely difficult to confirm.

<sup>9</sup> Sapir & Lutz, *Trade in Non-Factor Services: Past Trends and Current Issues*, WORLD BANK STAFF WORKING PAPER No. 480, at 2 (1981).

<sup>10</sup> *Id.* This dramatic ratio increase has occurred, for example, in Southern Europe.

of payments difficulties. Protectionism in the trade of non-factor services has become an important policy consideration.<sup>11</sup>

Despite rather formidable obstacles to the enforcement of antidumping regulation for services, the basic concepts associated with the statutes which are currently applied to the merchandise trade are also relevant to services from state-controlled economies. Certain procedural modifications are necessary, however, and emphasis should be placed primarily on genuine injury and secondarily on a finding of sales at less than fair value. If this change in emphasis were applied generally, it would entail an alteration in the traditional approach to antidumping regulation in the United States. While a search for a more appropriate view of dumping is merited, it is beyond the scope of this article. The views presented here are associated specifically with recent cases concerning the ocean freight services of shipping companies from the Soviet Union. Application of these concepts to other service industries may require additional modification.

## II. DEVELOPMENT OF DUMPING REGULATION

Antidumping procedures, as currently applied, have evolved from attitudes toward price discrimination, and such attitudes have complicated the enforcement procedures. Jacob Viner noted, in his major treatise on dumping, that the extensive price discrimination by trusts and cartels in the United States and in Germany during the early part of this century elevated the importance of antidumping regulation.<sup>12</sup> The major rationale at that time was the use of tariffs to promote free trade by preventing a concentration of market power through predatory pricing policies of large firms. The view still persists today, as it is frequently argued that an active enforcement of the antidumping law in the United States is import-limiting, but not protectionist. Thus, a strict stand against continuous and predatory dumping is consistent with a free trade policy.<sup>13</sup>

Nevertheless, the debate continues over the desired level of strict enforcement of antidumping laws. There is, both conceptually and practically, a fine line separating acceptable profit maximizing behavior, which may include price discrimination between markets,<sup>14</sup> and unacceptable behavior which causes injury. The antitrust approach maintains that influences arising from monopolistic control over an

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<sup>11</sup> *Id.*

<sup>12</sup> J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 51-80 (1923).

<sup>13</sup> Fisher, *supra* note 3, at 86.

<sup>14</sup> C. KINDLEBERGER, *supra* note 2, at 19.

otherwise freely operating market are almost always harmful. Attention is, therefore, directed towards the anticompetitive aspects of price discrimination, so that injury is presumed to occur upon a finding that the pricing practices constitute unfair methods of competition.

The antitrust approach is visible in the early antidumping proceedings. The Antidumping Act of 1916 made it unlawful for any person to import or sell articles within the United States at a price substantially less than the actual market value if such acts are done with the intent of destroying an industry in the United States, and, thus, have the effect of creating a dependence upon a foreign-based monopoly or cartel.<sup>15</sup> The necessity of proving intent and the difficulty in obtaining jurisdiction over foreign suppliers account for the extremely limited activity under the Act.<sup>16</sup>

In 1919, the Tariff Commission issued a report on the Antidumping Act, stating that "economic conditions are more significant in the development of dumping practices than any particular intent."<sup>17</sup> Neither the report in its definition of dumping nor the 1921 Antidumping Act as passed by the House required a determination of injury. The Act, as signed into law,<sup>18</sup> included an injury requirement in the Senate version of the bill, but the Senate Finance Committee declared that its purpose was to facilitate the administration of the law, not to restrict its operation.<sup>19</sup>

Under the 1921 Antidumping Act, an administrative determination as to sales at less than fair value is made by the Commerce Department (formerly the Bureau of Customs).<sup>20</sup> If the finding is affirmative,

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<sup>15</sup> The text of the relevant provision states:

It shall be unlawful for any person importing . . . any articles from any foreign country in to the United States . . . to import [or] sell . . . such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States in principal markets of the country of their production, or of other foreign countries to which they are commonly exported . . . [if] such acts [are] done with the intent of destroying or injuring an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Antidumping Act of 1916, 15 U.S.C. § 72 (1976).

<sup>16</sup> See Kaye & Plaia, *The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 INT'L TRADE L.J. 1, 43 n.167 (1977).

<sup>17</sup> U.S. TARIFF COMMISSION, INFORMATION CONCERNING DUMPING AND UNFAIR COMPETITION IN THE UNITED STATES AND CANADA'S ANTIDUMPING LAW 9 (1919).

<sup>18</sup> Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11, *amended by* 19 U.S.C. § 160(a) (1976), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (adding subtitle IV to the Tariff Act of 1930 at 19 U.S.C. §§ 1671-77g).

<sup>19</sup> S. REP. NO. 16, 67th Cong., 1st Sess. 10 (1921).

<sup>20</sup> The transfer of responsibility from the Bureau of Customs and the Secretary of the Treasury to the Commerce Department occurred with the passage of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

the matter is referred to the International Trade Commission for the purpose of considering the question of injury.<sup>21</sup> If less-than-fair-value sales and injury to a domestic industry are proved, the Secretary of Commerce is required to impose an antidumping duty equal to the difference between the imported price and the fair value of the product. There is no requirement for proof of predatory intent and there are no "excuse" provisions or exceptions as are provided in the Robinson-Patman Act.<sup>22</sup>

In the 1960s, the Commission explicitly applied antitrust standards by stating that sales at less than fair value are condemned only when there is an anticompetitive effect, and that only then will such less-than-fair-value sales be equated with the concept of "unfair competition."<sup>23</sup> Courts upheld the Commission's consideration of intent, even though not specifically provided for in the statute.<sup>24</sup> There are also references to antitrust standards in the legislative history of the 1921 Antidumping Act and in the administrative procedures associated with it. In 1974, the Senate Finance Committee expressed a desire for a more strict enforcement of unfair foreign trade practices, including injurious price discrimination covered by the 1921 Antidumping Act. The Committee referred to "indicators" of injury such as the suppression or depression of prices, loss of customers, and penetration of the United States market.<sup>25</sup>

Since the administrative determination of less-than-fair-value pricing precedes the quasi-judicial ruling of injury,<sup>26</sup> evidence pertaining to the former can be used in connection with the latter. Specifically, the refusal of an alleged dumper to raise the price after a "disclosure" hearing<sup>27</sup> is taken as an indication of bad faith and preda-

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<sup>21</sup> Under the provisions of the Customs Simplification Act of 1954, Pub. L. No. 83-768, 68 Stat. 1136, the injury determination was transferred from the Treasury Department to the International Trade Commission, known then as the Tariff Commission.

<sup>22</sup> See Kaye & Plaia, *supra* note 16, at 44.

<sup>23</sup> *Id.* at 50-51.

<sup>24</sup> One ruling held that "the statute refers not only to injury but also to the likelihood of injury, which clearly envisages future events and the probability of their occurrence according to someone's intent." *City Lumber Co. v. United States*, 457 F.2d 991, 997 (C.C.P.A. 1972).

<sup>25</sup> SENATE COMM. ON FINANCE, TRADE ACT OF 1974, S. REP. NO. 1298, 93d Cong., 2d Sess. 179, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7316 [hereinafter cited as TRADE ACT OF 1974, S. REP. NO. 1298].

<sup>26</sup> See *supra* notes 20 and 21 and accompanying text.

<sup>27</sup> An investigation is initiated with the publication of an Antidumping Proceeding Notice. Within six months or, in more complicated investigations, within nine months after the date of publication of the Notice, the Secretary is required to publish a Withholding of Appraisement Notice, a Notice of Tentative Negative Determination, or a Notice of Tentative Discontinuance of Antidumping Investigation. Normally, the Withholding of Appraisement Notice is issued only

tory intent.<sup>28</sup> Moreover, the Commission has expressed disapproval of anticompetitive acts such as "confidential contractual relationships,"<sup>29</sup> and has established the principle that an injury can be judged upon a showing that less-than-fair-value imports were a contributing factor, which has been held to exist merely by showing displacement of some domestic sales by the imported item.<sup>30</sup>

The relationship between the 1921 Antidumping Act and other trade practices legislation has been the subject of recent discussion.<sup>31</sup> Section 337 of the Tariff Act of 1930<sup>32</sup> is frequently mentioned as an alternative remedy for injury arising from the importation of articles into the United States. Although the Commission has never considered dumping within the meaning of the Antidumping Act of 1921 as constituting a basis for action either under Section 337 or its antecedent provision, Section 316 of the Tariff Act of 1922,<sup>33</sup> jurisdiction is arguable in cases containing mixed allegations where part of the activities complained of are within the purview of one statute and part are within the purview of the other.<sup>34</sup>

It has also been suggested that Section 337 is more broadly based, prohibiting unfair trade practices that have the effect or tendency to restrain or monopolize trade and commerce in the United States.<sup>35</sup> Even if a *de minimis* injury test<sup>36</sup> is applied in antidumping enforcement, the imposition of an antidumping duty necessarily entails the difficult problem of calculating price differences based upon market transactions. Section 337, on the other hand, permits exclusion orders

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after a "disclosure" hearing where the general findings of the investigation are revealed and both parties are requested to submit any additional information they might have.

<sup>28</sup> Steel Jacks from Canada, U.S. Tariff Comm'n Inv. No. AA 1921-49, Pub. No. 186 (Aug. 1966), 31 Fed. Reg. 11,197 (1966). In this particular case, antidumping duties were imposed even though the United States industry had increased its sales of the affected product and shown growing profits. For commentary, see Fisher, *supra* note 3, at 110.

<sup>29</sup> Steel Reinforcing Bars from Canada, U.S. Tariff Comm'n Inv. No. AA 1921-33, Pub. No. 122 (Mar. 1964), 29 Fed. Reg. 3840 (1964).

<sup>30</sup> Opinions on this point are plentiful. See Metzger, *supra* note 1, at 557; Fisher, *supra* note 3, at 104; Marks & Malmgreen, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 379-80 (1975); TRADE ACT OF 1974, S. REP. NO. 1298, *supra* note 25, at 180, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 7317.

<sup>31</sup> See Kaye & Plaia, *supra* note 16; Brandt & Zeitler, *Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing Duty and Antidumping Laws*, 12 LAW & POL'Y INT'L BUS. 95 (1980).

<sup>32</sup> 19 U.S.C. § 1337 (1976 & Supp. IV 1980).

<sup>33</sup> See Kaye & Plaia, *supra* note 16, at 11.

<sup>34</sup> This problem is discussed at length by Brandt & Zeitler, *supra* note 31.

<sup>35</sup> *Id.* at 104.

<sup>36</sup> See Fisher, *supra* note 3, at 104.

which prohibit entry of the subject articles,<sup>37</sup> and is not limited to only one industry-market and the transactions associated with it, but is concerned with the overall impact on competition. This overall impact on competition is held by some observers to be a "far more accurate barometer of disruptive behavior in the import trade and on competition in the United States."<sup>38</sup>

The existence of a parallel development in the two statutes merits additional comment. In purely conceptual terms, dumping entails no judgment concerning the anticompetitive nature of the firm's pricing policies, nor does it necessarily involve a restraint of trade in the importing country. The sale of merchandise in the United States by a foreign producer at a price which is less than that charged to purchasers in his home market or in a third country, with a United States industry injured as a result,<sup>39</sup> constitutes a *prima facie* argument for market manipulation. Such actions are particularly onerous if the United States price does not allow recovery of production and marketing costs since the producer cannot be maximizing short-run profits. Therefore, in such cases, dumping implies a potential for long-run gain and the realization of that potential may be anticompetitive, especially since the gain is more clearly understood by an eventual elimination of competitors. The purpose of the 1921 Antidumping Act is to prevent that eventuality by imposing a duty which, if properly calculated, will be just enough to allow both the foreign producer and the domestic competitor to exist in the market. It is not intended to prevent the importation of products which are produced more cheaply abroad as a result of comparative advantage. Actions relevant to the 1921 Antidumping Act, therefore, do not constitute a restraint of trade *per se*, but may do so if allowed to continue uncontrolled.

Section 337, on the other hand, is more specifically related to unfair methods of competition and unfair acts which are anticompetitive *per se*. The effect or tendency to destroy or injure substantially an "efficient and economically operated" United States industry, or to restrain or monopolize trade and commerce in the United States, is presumably stronger and more fully developed than the effect or tendency which is considered in antidumping proceedings. An affirmative finding under Section 337 is, therefore, associated with the more strin-

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<sup>37</sup> 19 U.S.C. § 1337(e) (1976).

<sup>38</sup> Brandt & Zeitler, *supra* note 31, at 105.

<sup>39</sup> The definition was reiterated in a Senate staff critique. STAFF OF SENATE COMM. ON FINANCE, 90TH CONG., 2D SESS., TEXT OF ANTIDUMPING ACT, 1921, INTERNATIONAL ANTIDUMPING CODE AND RELATED MATERIALS 56-57 (Comm. Print 1968).



gent remedy of permanently excluding entry of the products into the United States. Such an order is more closely aligned with actions judged to be anticompetitive and associated with irreparable harm.

Although the above distinction is apparently well-defined, the practical problems of determining whether lower prices of foreign products are fair or unfair are virtually the same under the two statutes. For this reason, the standards have acquired over time a considerable degree of similarity. Recent amendments have tended to reduce the differences even further. The Trade Act of 1974 broadened the exclusion-of-entry remedy, which was originally intended for unfair acts affecting property rights, such as patent or trademark infringement.<sup>40</sup> The amendment gave the Commission cease and desist order authority,<sup>41</sup> and in the Trade Agreements Act of 1979, Congress included a provision authorizing a civil penalty as an alternative to exclusion for a violation of a Commission cease and desist order.<sup>42</sup>

The development of dumping regulation in the merchandise trade of the United States is relevant to this discussion of trade in non-factor services for two reasons. First, either of the two statutes described above could be extended to include services, but neither would provide ideal coverage. The procedures in the Antidumping Act pose problems in determining the differences between domestic and foreign market prices, and, as is pointed out in the following sections, these problems are more serious in the case of trade in services with controlled-economy countries. Additionally, the administration of a duty on services would be extremely costly. Although Section 337 procedures do not include customs duties, the more extreme form of the remedy is likely to result in a preponderance of no-violation findings in order to avoid the exclusion of services which are slightly different from those available in the domestic market. Second, the emphasis on antitrust standards is not easily transferred to investigations of specific activities of state-owned enterprises, especially when those activities involve services rather than standardized products. Notwithstanding these limitations, the Antidumping Act provides a useful framework for determining when injury or the threat of injury is sufficiently great to justify an affirmative finding. The example of the liner activities of the

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<sup>40</sup> See Brandt & Zeitler, *supra* note 31, at 98.

<sup>41</sup> 19 U.S.C. § 1337(f)(1) (Supp. IV 1980) (added by Trade Act of 1974, Pub. L. No. 93-618, § 341(a), 88 Stat. 1978, 2053-54 (1975)).

<sup>42</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105(b), 93 Stat. 144, 311 (codified at 19 U.S.C. § 1337(f)(2) (Supp. IV 1980)).

Soviet Union shows that such a determination becomes relatively more important when the other major criteria are impractical.

### III. DUMPING FROM STATE-CONTROLLED ECONOMIES

Under a central planning system, internal prices are not determined on the basis of free-market costs, but are established at the command of pricing commissions. Additionally, state control generally places a priority on import needs, so that exports are planned accordingly at prices which do not necessarily reflect the resource costs of producing them. Even if the latter costs are appropriately calculated, the rate of exchange with another currency is also administered, so that it may not be an appropriate *numeraire* for converting these costs into units of foreign exchange.

The difficulties inherent in valuing products from state-controlled economies have been recognized by the Department of the Treasury.<sup>43</sup> In 1978, sections of the Customs Regulations were amended<sup>44</sup> to provide procedural assistance in maintaining the Secretary's authority to determine the foreign market value of merchandise exported from a state-controlled economy country on the basis of the normal costs, expenses, and profits for the merchandise, as reflected by the prices or the constructed value of such or similar merchandise from a similarly developed non-state-controlled economy country or countries.<sup>45</sup> The concept of constructed costs is, therefore, used as a means for valuing products whose home market is essentially not-comparable.<sup>46</sup>

There is, unfortunately, a more basic problem. The fair value concept rests firmly on the theory of comparative cost. Ideally, it permits the regulatory authority to allow imports from countries which have a comparative cost advantage in that particular commodity, and to disallow the importation if such an advantage cannot be demonstrated. With controlled-economy countries, however, the theory neither explains what is produced nor what is exported.<sup>47</sup> The use of a surrogate

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<sup>43</sup> The Commerce Department inherited the valuation problems in 1979. *See supra* note 20.

<sup>44</sup> Antidumping Investigation Procedures Under Antidumping Act, 1921, 19 C.F.R. §§ 153.17 and 153.27 (1978) (deleted, 45 Fed. Reg. 75,641 (1980)).

<sup>45</sup> This Authority, currently codified at 19 U.S.C. § 1677b(c) (Supp. IV 1980), was originally granted by the Trade Act of 1974, Pub. L. No. 93-618, § 321(d), 88 Stat. 1978, 2046-47 (1975) (adding subsection 205(c) to the Antidumping Act of 1921, 19 U.S.C. § 164(c) (Supp. II 1978)), which was repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193, and amended to the Tariff Act of 1930 at 19 U.S.C. § 1677b(c) (Supp. IV 1980).

<sup>46</sup> *See generally* Comment, *Soviet Bloc Dumping, the Revenue Act of 1916 and Economic Policy*, 27 U.C.L.A. L. REV. 1365 (1980); Comment, *Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations*, 128 U. PENN. L. REV. 217 (1979).

<sup>47</sup> One author took as his main task "to show the irrelevancy of the theory of comparative

country does not alter the failure. Rather, it establishes a pretense of maintaining a regulatory standard in situations in which the standard breaks down. It undoubtedly permits a judgment to be made which might otherwise be impossible, but, in so doing, it casts aside the assurance of maximum welfare associated with the free movement of goods according to the "law" of comparative advantage.

The increased trade between the United States and state-controlled economies is certain to test the ability of the new criteria to meet the basic objectives of the 1921 Antidumping Act. The task of selecting a *similar* product made and sold in a non-state-controlled economy that is at a *similar* state of economic development is far from straightforward. It has already led to proposed rule changes and revisions of proposals for establishing the criteria associated with "similar states of development."<sup>48</sup> If a "similar state of development" can be identified, but a similar product cannot, then a constructed value is applied using normal costs, expenses, and profits that would result if the product *were* produced in that "similar" country. If neither type of similarity is achieved, then prices and costs of any non-state-controlled economy, including the United States, can be used.<sup>49</sup> It would appear, therefore, that all contingencies are covered, but the process of eliminating insufficiently similar countries for comparison purposes is time consuming and open to challenge at each step.<sup>50</sup>

#### IV. SOVIET LINER ACTIVITIES

The only service industry discussed at the 1979 United Nations Conference on Trade and Development meeting in Manila was maritime transportation.<sup>51</sup> The issue arose from the relatively low participation in world shipping by developing countries. In 1975, for example, exports from developing countries accounted for about sixty percent of world seaborne cargo and imports comprised about twenty percent of the world total, but those countries owned only six percent of

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costs in the centrally planned economies of the Communist type." Wilcznski, *The Theory of Comparative Costs and Centrally Planned Economies*, 75 ECON. J. 63 (1965).

<sup>48</sup> One set of regulations established a hierarchy of alternatives for selecting a comparable market-economy country. Most preferred was the use of price or constructed value from market-economy countries of comparable economic development—as indicated by, *inter alia*, per capita gross national product and infrastructure development. 43 Fed. Reg. 35,265 (1978) (deleted, 45 Fed. Reg. 75,641 (1980)).

<sup>49</sup> Note, *Dumping from 'Controlled Economy' Countries: The Polish Golf Cart Case*, 11 LAW & POL'Y INT'L BUS. 777, 782 (1979).

<sup>50</sup> For commentary, see *id.* at 798-800.

<sup>51</sup> Sapir & Lutz, *supra* note 9, at 36. See also R. BALDWIN, NON TARIFF DISTORTIONS OF INTERNATIONAL TRADE 113-15 (1970).

the world fleet.<sup>52</sup> Moreover, the traditional maritime nations consider a national merchant marine to be of vital importance for economic and security reasons, so that a variety of measures exist to protect those interests.<sup>53</sup> Cargo preference schemes which reserve all or part of a country's trade for movement in its own vessels, government procurement, special tax treatment in favor of national vessels, and direct subsidies are the more common protective devices. The desire for increased participation by nonmaritime countries and the increased support by the governments of existing carriers are developments which may be repeated in other service industries.

Liner shipping<sup>54</sup> is also the only non-factor service for which substantial dumping allegations have been made, and, in this case, made specifically with respect to carriers from state-controlled economies. The Ocean Shipping Act of 1978<sup>55</sup> gave the Federal Maritime Commission (FMC)<sup>56</sup> authority to disapprove, after notice and hearing, any rates which the "controlled carrier" failed to demonstrate as just and reasonable. The Act also provided standards for the determination of the justness and reasonableness of such rates. These standards will be explained and contrasted with conventional antidumping statutes later in this discussion.

To date, the Commission has focused most of its attention on the Far Eastern Shipping Company (FESCO), a Soviet-owned shipping company. FESCO, which has traditionally served United States/Asia trades, increased its market penetration in the 1970s so that by 1978 it controlled six percent of the United States/East Asia trade.<sup>57</sup> The rate of growth was significantly greater than any of the incumbent carriers

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<sup>52</sup> United Nations Conference on Trade and Development (UNCTAD), *Merchant Fleet Development Statistical Annexes on Cargo Flows*, U.N. Doc. TD/222/Supp. 3 (Dec. 1978); UNCTAD, *Review of Maritime Transport, 1977*, U.N. Doc. TD/B/C.4/178/Rev. 1 (1979).

<sup>53</sup> DEPARTMENT OF COMMERCE (MARITIME ADMINISTRATION), *THE MARITIME AIDS OF THE SIX MAJOR MARITIME NATIONS* (1977); DEPARTMENT OF COMMERCE (MARITIME ADMINISTRATION), *MARITIME SUBSIDIES* (1978).

<sup>54</sup> Liner shipping involves ocean-going vessels which sail according to fixed, advertised schedules and charge rates which are published and cannot be increased for a fixed period (up to ninety days in the case of United States liner trades). The majority of the world's container trade moves in liner vessels.

<sup>55</sup> Pub. L. 95-483, 92 Stat. 1607 (codified as amendments to the Shipping Act of 1916 at 46 U.S.C. §§ 801, 817 (1976 & Supp. IV 1980)).

<sup>56</sup> The Federal Maritime Commission (FMC) regulates all liner trades into and out of United States ports. 46 U.S.C. § 804 (1975). The authority for such regulation is vested in various shipping statutes, primarily the Shipping Act of 1916, ch. 451, 38 Stat. 728 (codified as amended in scattered sections beginning at 46 U.S.C. § 801 (1976 & Supp. IV 1980)).

<sup>57</sup> Maritime Administration Trade Route 29. Congress has authorized the creation of necessary "trade routes." See 46 U.S.C. § 1121 (1976).

had been able to achieve. It was this factor, plus allegations of intense rate cutting, which encouraged a closer investigation of the FESCO's pricing policies. The multitude of rates contained in a shipping tariff and the large number of carriers in most trades mean that a state-controlled carrier may easily weave its rate structure so that it may not publish the lowest rates on particular commodities, but its overall rates may be so low that a profit-oriented carrier could not compete successfully.<sup>58</sup>

The legislative history of the Ocean Shipping Act of 1978 indicates that the motivation for unreasonably low rates was given considerable attention. The most convincing economic explanation for dumping from a socialist economy is the need to obtain hard currency to pay for high-priority imports from hard-currency nations. If the final selling price in hard currency produces a greater utility than the opportunity costs involved in the production of its good or service, then it would be rational to charge a price in hard currency which was less than soft currency costs. It is possible, therefore, that dumping from state-controlled economies may persist in the absence of economies of scale. The latter can be discarded as a probable cause if the products which they are accused of dumping are in short supply domestically, so that the economies, if they exist, could be realized by expanding domestic sales.<sup>59</sup>

The extent to which a socialist country will export a particular product or service at prices below domestic soft currency costs in order to acquire hard currency will depend upon their need for the imports and the alternative means of earning hard currency. As to the latter, liner shipping has been one of the Soviet Union's major sources of foreign exchange. The potential for earning foreign exchange depends upon the expenditures abroad for port services and fuel, the extent to which the vessels have to be acquired from a foreign shipbuilder, and the risk of operating with less than full utilization of the vessels in foreign-to-foreign trades.<sup>60</sup> With regard to these considerations, it is not clear whether liner shipping is superior to alternative sources of foreign exchange earnings, but it has been suggested that the Soviet Union has a disadvantage in commodity exports arising from consumer percep-

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<sup>58</sup> A rate structure is determined by examining the relationships of the numerous rates on individual commodities—such as automobiles, toys, animal hides, television sets, etc.—the total revenue associated with the aggregation of these rates and the quantities of each which are transported during a specified time period.

<sup>59</sup> Fisher, *supra* note 3, at 130.

<sup>60</sup> Cohen & Shneerson, *The Domestic Resource Costs of Establishing/Expanding a National Fleet*, 3 MAR. STUD. & MGMT. 221 (1976).

tions of inferior quality. Liner services are generally associated with a smaller range of quality variation, so that non-price competition is a less important factor. Most experts agree, however, that non-economic considerations of national security and prestige have carried considerable weight in the Soviet's decision to expand their merchant fleet.<sup>61</sup>

## V. AN ANALYSIS OF SOVIET PRICING POLICIES

If one of the goals of the state-controlled firm is to acquire hard currency, then the amount earned must be viewed on a net basis—hard currency earnings minus hard currency expenditures. For illustrative purposes, consider the case of two competing firms, one which must cover all costs of production and one which is only required to cover hard currency expenditures, such as a state-controlled carrier. Suppose also that the latter carrier incurs a portion of its expenses in hard currency, so that its average and marginal cost<sup>62</sup> curves can be depicted by vertical displacements of marginal and average cost curves of the privately-owned carrier (see figure 1). Assuming, for simplicity, that the revenue functions are identical for both firms, the state-controlled enterprise will expand its output to  $Q_c$  and charge a lower price,  $P_c$ , than the privately-owned firm.<sup>63</sup> The point is that the controlled carrier can be expected to offer a lower price and a greater output simply because part of its costs were “absorbed.” The case is, therefore, equivalent to a direct subsidy, maintained as long as the real value of the net earnings in hard currency is greater than the opportunity cost of the soft currency expenditures to produce the service.

Available evidence suggests that the analysis above is a reasonable description of current pricing considerations of state-controlled-economy firms<sup>64</sup> and indicates that socialist firms may be maximizing the real resource value of their sales, even when selling below fully allocated costs expressed in soft currency terms. The premium placed on hard currencies, therefore, creates a situation in which a state-controlled firm

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<sup>61</sup> *Soviet Maritime Activities in the U.S. Liner Trades, Hearings Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. (1977); *Ocean Shipping Act of 1978, Hearings Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. (1978).

<sup>62</sup> This requires that some of the hard currency expenses are associated with variable costs.

<sup>63</sup> Profit maximization takes place at the output level where  $MC = MR$ , which is point A for the privately-owned operator and point B for the state-controlled operator. The controlled carrier will charge a lower rate and operate at an expanded level of output. See Figure 1.

<sup>64</sup> I. CHRZANOWSKI, M. KRZYONOWSKI & K. LUKS, *SHIPPING ECONOMIES AND POLICY: A SOCIALIST VIEW* 200 (1979); Fisher, *supra* note 3, at 129; ATLANTIC COUNCIL OF THE UNITED STATES, *THE SOVIET MERCHANT MARINE: ECONOMIC AND STRATEGIC CHALLENGE TO THE WEST* 12 (1979).

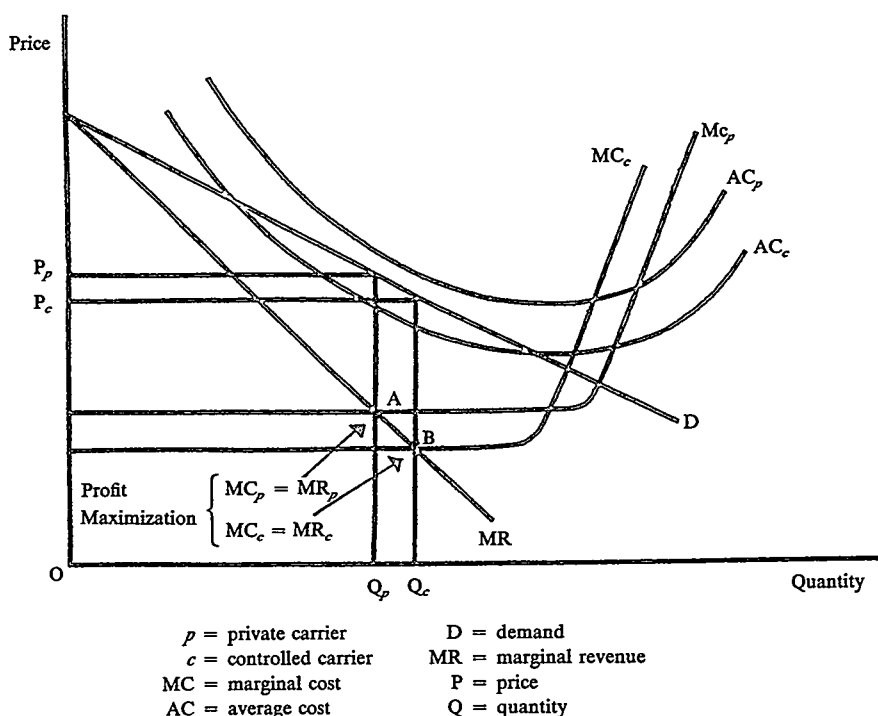


FIGURE 1

can reduce prices in hard currency markets below the aggregate cost of production and still maximize the real earnings of the state. The incidence of such pricing policies increases with the need to finance the importation of grain, capital equipment, and advanced technology. The desire to obtain critical imports has led to policies which determine import needs first and then encourage exports to obtain the currency necessary to finance those imports. Exports are viewed as a sacrifice to obtain those imports deemed necessary to fulfill the general economic plan.<sup>65</sup>

The dumping of shipping services to acquire foreign exchange may be viewed as a logical extension of state-controlled planning to the services sector.<sup>66</sup> The key indicator as to whether the merchant fleet has fulfilled its plan, and the major factor in determining crew bonuses, is the percentage relationship between operating expenditures in domestic currency and net foreign exchange income. Soviet shipping

<sup>65</sup> Wilczynski, *supra* note 47, at 64.

<sup>66</sup> For a more complete list of possible explanations for socialist dumping, see Fisher, *supra* note 3, at 129-30.

companies are given an incentive to minimize the ratio of ruble expenditures to foreign exchange earnings.<sup>67</sup> These considerations suggest that Soviet carriers are likely to operate with freight rates which are lower than those which would normally apply to non-state-controlled carriers.

## VI. FEDERAL MARITIME COMMISSION TWO-STAGE TEST

Replacing the theory of comparative costs with one which provides a better explanation of the pricing behavior of an exporting enterprise in a state-controlled economy reduces the level of generality, but yields a more practical set of principles for specifically applicable cases. Although the Congress included a constructive cost standard,<sup>68</sup> recognition was given to the difficulties in obtaining the desired degree of similarity. It was noted in particular, with respect to an amendment proposed by the Department of Justice, that: "In most instances, such identical operations would not exist, and, therefore, the constructive cost standard could never be used. The Committee believes that it is advisable to allow the [Federal Maritime] Commission greater discretion in selecting comparable vessels for cost comparison purposes. . . ."<sup>69</sup>

For various reasons, the Commission has chosen not to exercise the constructive cost option. Rather, the standard pertaining to rates the same or similar to those filed by another carrier in the same or similar trade<sup>70</sup> was the focal point in the analysis prepared by FMC economists in three proceedings concerning controlled carriers.<sup>71</sup> In

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<sup>67</sup> R. ATHAY, *THE ECONOMICS OF SOVIET MERCHANT-SHIPING POLICY* 64 (1971).

<sup>68</sup> The Ocean Shipping Act of 1978, Pub. L. No. 95-483, § 3, 92 Stat. 1607, added the following language to the Shipping Act of 1916, ch. 451, 39 Stat. 728:

For the purpose of this subsection, in determining whether rates . . . by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors, including, but not limited to, whether: (i) the rates . . . which have been filed . . . are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade; (ii) the rates . . . are the same as or similar to those filed or assessed by other carriers in the same trade; (iii) the rates . . . are required to assure movement of particular cargo in the trade; or (iv) the rates . . . are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

<sup>69</sup> 46 U.S.C. § 817(c)(2) (Supp. IV 1980). Congress substituted "constructive" for "constructed" cost.

<sup>70</sup> S. REP. NO. 1260, 95th Cong., 2d Sess. 23, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3536, 3556; H.R. REP. NO. 1381, 95th Cong., 2d Sess. 9.

<sup>71</sup> Shipping Act of 1916, 46 U.S.C. § 817(c)(2)(ii) (Supp. IV 1980).

<sup>72</sup> Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade and U.S. Gulf/Australia Trade, F.M.C. Doc. No. 80-6, *reprinted in* 20 SHIPPING REG. REP. (P & F) 460 (Oct. 3, 1980); Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Trade, F.M.C. Doc. No. 79-104, *reprinted in* 20 SHIPPING REG. REP. (P &



Docket No. 79-10, the Commission investigated 305 of FESCO's rates which appeared unreasonably low. The proceeding covered every major trade route served by FESCO, and, consequently, precluded an in-depth analysis of the circumstances surrounding individual rates. In two subsequent cases, the Commission narrowed the scope of the investigations by suspending only eight rates in Docket No. 79-104, and seven rates in Docket No. 80-6. A major consideration in these latter two cases was whether the rates charged by the controlled carrier were inflicting harm on other carriers.

As an example, the Commission ultimately found that FESCO's rates on buri and rattan furniture moving inbound from the Philippines were unreasonably low.<sup>72</sup> The disapproval of these rates hinged on the fact that FESCO's rates were considerably below those of the Conference (The Philippines North America Conference), and that these low rates were inflicting harm on the Conference and other carriers.<sup>73</sup> The harm issue was determined on the basis that the commodities at issue were of major importance to the trade (furniture items accounting for seventy-seven percent of the conference's Pacific Coast cargo), and the fact that the other carriers' shares had dwindled while FESCO increased its market penetration.<sup>74</sup> To assist the Commission in reaching a final determination, the FMC staff developed a detailed analysis showing the historical trends and levels of the commodity rates, the effect of FESCO's service in the trade on those specific commodities as it impacted on other carriers' market shares, and whether FESCO's rates were necessary to assure the movement of particular cargo.<sup>75</sup>

The criteria employed in the impact analysis appear to be evolving into a two-stage test which includes a demonstration that the controlled carriers' rates at issue are lower than a carrier selected for comparative

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F) 249 (Aug. 5, 1980); Rates of Far Eastern Shipping Co., F.M.C. Doc. No. 79-10, *reprinted in* 19 SHIPPING REG. REP. (P & F) 1536 (Apr. 1, 1980).

<sup>72</sup> Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Trade, F.M.C. Doc. No. 79-104, *reprinted in* 20 SHIPPING REG. REP. (P & F) 249 (Aug. 5, 1980).

<sup>73</sup> Conferences are cartel-like arrangements wherein member companies jointly agree upon rates. Independent lines normally do not enter into rate-fixing agreements with conference lines.

<sup>74</sup> Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade and U.S. Gulf/Australia Trade, F.M.C. Doc. No. 80-6, *reprinted in* 20 SHIPPING REG. REP. (P & F) 460 (Oct. 3, 1980); Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Trade, F.M.C. Doc. No. 79-104, *reprinted in* 20 SHIPPING REG. REP. (P & F) 249 (Aug. 5, 1980).

<sup>75</sup> Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade and U.S. Gulf/Australia Trade, F.M.C. Doc. No. 80-6, *reprinted in* 20 SHIPPING REG. REP. (P & F) 460 (Oct. 3, 1980); Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Trade, F.M.C. Doc. No. 79-104, *reprinted in* 20 SHIPPING REG. REP. (P & F) 249 (Aug. 5, 1980).

purposes, and that these low rates have inflicted material injury to non-state-controlled carriers. This approach is similar to the system used in conventional dumping cases where sales at less than fair value must be demonstrated and injury to the domestic industry must be documented. The determination of sales at less than fair value in a service industry such as liner shipping, however, is more complex than is the case where merchandise sales are involved. Ocean freight rate structures contain prices for the transportation of thousands of separate items, whereas there is normally only one established price for a commodity sold in international markets. The question, then, is how to determine whether an individual shipping rate is lower than the fair value when there exists an array of prices, some much higher than others and some much lower, even though the overall cost of transport is roughly the same for each commodity. This price differentiation, based on value-of-service characteristics, such as the elasticity of demand for the transport of various products, is a well-established principle in ocean transportation,<sup>76</sup> but it makes the investigation of fair value difficult.

The coexistence of conference and independent carriers in most United States trades, while representing less of an analytical problem than rate differentiation, nevertheless adds a further complication not present in conventional dumping cases. The usefulness of the actual or constructive cost<sup>77</sup> criteria is questionable when all carriers establish some rates at a level above fully allocated costs and other rates below fully allocated costs. It would be unfair to require a controlled carrier to have all of its rates equal to or higher than some arbitrarily determined fully allocated cost level when its competitors were free to establish a more flexible pricing regime. The only reasonable standard, therefore, is one predicated upon the comparison of prices of an individual non-state-controlled carrier. The question is which non-state-controlled carrier to select for comparison.

The 1978 amendments to the Customs Regulations,<sup>78</sup> previously mentioned, established the following ranking system for finding a price to compare with the state-controlled economy firm's price:

- (1) Prices of a non-state-controlled economy country in a comparable stage of economic development;

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<sup>76</sup> B. DEAKIN, *SHIPPING CONFERENCES: A STUDY OF THEIR ORIGINS, DEVELOPMENT AND ECONOMIC PRACTICES* ch. 5 (1973).

<sup>77</sup> Shipping Act of 1916, 46 U.S.C. § 817(c)(2)(i) (Supp. IV 1980).

<sup>78</sup> Antidumping Investigation Procedures Under Antidumping Act, 1921, 19 C.F.R. §§ 153.17, 153.27 (1978) (deleted, 45 Fed. Reg. 75,641 (1981)).

- (2) Prices of any other non-state-controlled economy country except the United States; and
- (3) Prices in the United States.

This system did not cover liner shipping, but, even if it had, the application of a similar ranking system to shipping would have created difficulties stemming from the unique international characteristics of liner shipping and the existence of shipping conferences. The international characteristics of liner shipping are such that even though a country might be identified as being at a comparable stage of economic development, the costs of operating vessels owned by nationals of that country may not represent economic values attributable to internal costs in that particular country. It would be possible, for instance, for a British-owned liner company to register its vessels in Liberia, hire multinational crews, and employ vessels which were constructed in Germany. The selection of a carrier such as this for use in a rate comparison analysis would pose great analytical problems if the test were to be one where the prices used for comparison were those of a "country in a comparable stage of economic development."

The existence of the conference system in the international shipping industry also complicates the application of existing dumping regulation to the shipping sector. The amendments to the Antidumping Act, previously mentioned, rank the selection of a foreign firm's prices above those of a United States firm. This procedure may not be transferable to shipping because of the conference system of ratemaking. Under the conference umbrella, all members can establish similar prices such that United States and non-United States members would have identical prices. Nonconference carriers, on the other hand, normally establish rates at ten to fifteen percent discounts of the conference rates. Once again, nonconference carriers can be United States or foreign-flag operators.

The critical distinction, then, is not whether the prices of the carriers selected for comparison represent those of a firm from a country at a comparable stage of economic development, but rather whether the carrier is a nonconference operator.<sup>79</sup> Ideally, the nonconference carrier selected for comparable purposes should also be one which has operated in the trade as an independent for a sustained period of time, thereby demonstrating that it can earn a reasonable rate of return with

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<sup>79</sup> Conference rates are normally the highest in the trade, so if a state-controlled carrier belonged to a conference, it would be virtually impossible to accuse it of dumping. In fact, membership in a conference would automatically exempt the vessels used in the conference trade from the application of the Ocean Shipping Act of 1978, 46 U.S.C. § 817(c)(6)(iii) (Supp. IV 1980).

its rate structure. The carrier selected for comparison should be used to analyze each rate of the state-controlled carrier to avoid the problem of rate weaving.

In the most recent cases involving formal allegations of dumping leveled against FESCO,<sup>80</sup> the FMC suspended the rates at issue whenever they were lower than the rates assessed by the carrier selected for comparative purposes, if FESCO had penetrated the market for the commodities whose rates were at issue. In those instances when FESCO's rates were lower but no cargo moved under the lower rates, the rates at issue were not suspended.

This two-stage test—first, making a finding that the rates at issue are lower than those charged by a similar carrier and, second, determining that market penetration has occurred—is somewhat analogous to the treatment of dumping allegations in the merchandise trade sector. Penetration (disruption, in FMC's words) can be interpreted as the equivalent of the material injury concept used by the International Trade Commission.

The similarity is, however, somewhat deceptive because the first stage of the test (identifying an independent carrier which the controlled carrier is underpricing) is not the precise equivalent of a determination of less-than-fair-value pricing since the costs of providing the service are not evaluated. More importantly, the Commission appears to give considerable weight to the existence of *any* market penetration (injury) whatsoever. The real test would seem to be one of material injury, with a finding that the controlled-carrier is pricing below a competitor a necessary step only to suspend a rate which has resulted in the controlled carrier gaining a share of the market. Put differently, the controlled carrier must gain its share of the market by any method except price cutting for its activity to go unchallenged.

The FMC's dilemma is, of course, that no one, including the most knowledgeable economist in socialist pricing behavior, could argue successfully that the controlled carrier's pricing techniques were merely a reflection of astute management and efficient operations; the existence of command pricing decisions invalidate any attempt to justify controlled-economy prices. Lacking certainty that the rate cutting was justified on *bona fide* economic grounds, the Commission apparently

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<sup>80</sup> Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade and U.S. Gulf/Australia Trade, F.M.C. Doc. No. 80-6, *reprinted in* 20 SHIPPING REG. REP. (P & F) 460 (Oct. 3, 1980); Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Trade, F.M.C. Doc. No. 79-104, *reprinted in* 20 SHIPPING REG. REP. (P & F) 249 (Aug. 5, 1980).

believes the test of reasonableness turns on material injury, and that it is safer to err on the side of conservatism. It should be noted that recent cases decided by the Commission relied upon an extensive analysis of comparative rate trends, commodity shares, capacity utilization, and other necessary economic information to arrive at a conclusion as to whether material injury had taken place.<sup>81</sup>

The shift of emphasis to a focus on injury appears one of practicality, not necessarily one of desirability. Nonetheless, the question inevitably arises as to why limitations could not be placed on the amount of tonnage permitted to enter United States ports rather than subject the carriers to a protracted proceeding in an attempt to uncover pricing techniques and material injury.<sup>82</sup> The advent of controlled-economy competition in both the non-factor service sector and the merchandise trade sector may ultimately result in a shift away from the concept of antidumping duties (rate increases in shipping) as a mechanism to promote free trade and a shift toward a systematic elimination of competition as material injury is inflicted upon domestic producers raising the specter of unfair competition.

## VII. CONCLUSION

The growing importance of non-factor services in international trade is certain to result in an increase in allegations of dumping similar to those which have arisen in the merchandise trade sector. Concomitant with this growth in service sector transactions has been an increase in relations between state-controlled economy countries and market-economy countries. These two events have occurred in the ocean shipping service sector as several state-controlled economy fleets, predominantly the Soviet Union's, have increased their activity in United States liner trades during the last decade.

The application of the antidumping statutes to controlled-economy dumping has resulted in a further shift of emphasis away from the antitrust approach, which entailed an analysis of price discrimination with predatory intent, to a material injury test.

The enactment of the Ocean Shipping Act of 1978, which gave the Federal Maritime Commission authority to suspend unreasonable rates

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<sup>81</sup> See *supra* note 71.

<sup>82</sup> Limitation of the amount of shipping capacity permitted in United States trades would be somewhat analogous to the imposition of quotas in the merchandise trade sector. The Commission lacks authority to impose quotas, but there is precedent for the introduction of legislation along these lines. The precedent is found in the "escape clause" mechanism in both United States and international trade legislation. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX(1)(a), 61 Stat., pt. 5, 11, 58, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 258.

charged by controlled carriers, has ultimately resulted in the FMC developing a two-stage test of reasonableness which resembles the treatment accorded allegations of dumping of merchandise, wherein both less-than-fair-value pricing and material injury must be demonstrated before remedial action is taken.

Primary emphasis, however, has been placed on injury in recent proceedings before the FMC. This shift in emphasis can be attributed to the fact that fair pricing concepts do not appear applicable to state-controlled economy prices. This factor may ultimately result in a shift of primary emphasis in the analysis and regulation of dumping of controlled-economy merchandise. An increased emphasis on injury may, in fact, result in a shift throughout the entire international trade sector, revising the concept of using the antidumping statutes to promote "fair trade," and resulting in their predominant use as a protective device.