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ARTICLES

State Trading: Its Nature and International Treatment*

*Edmond M. Ianni***

I. INTRODUCTION

At least six considerations compel a review of the international practice of state trading. First, state trading is practiced widely throughout the world and embraces at least one quarter of world trade.¹ From a domestic perspective, United States trade with state trading countries continues to grow and, therefore, is directly relevant to the United States national interest.² Second, increasing international economic interdependence has augmented the role of state trading in international trade by the inducements of economic necessity and efficiency.³ Third, recent Eastern European trends toward greater private

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¹ See R. MASON, R. MILLER & D. WEIGEL, *THE ECONOMICS OF INTERNATIONAL BUSINESS* 7 (1975); Allen, *State Trading and Economic Warfare*, 24 *LAW & CONTEMP. PROBS.* 256, 257 (1959).

² COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, *REPORT TO CONGRESS: UNITED STATES LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NON-MARKET ECONOMIES COULD BE IMPROVED* 3-4, 6 (1981) [hereinafter cited as *COMPTROLLER GENERAL'S REPORT*].

³ See R. BLACKHURST, N. MARIAN & J. TUMLIR, *TRADE LIBERALIZATION, PROTECTIONISM AND INTERDEPENDENCE* 1-5 (GATT Stud. Int'l Trade No. 5, 1977); D. MARSH, *WORLD TRADE AND INVESTMENT* 1-6 (1951).

economic autonomy⁴ have facilitated trade relations between free market countries and state trading countries, thereby fostering a stronger economic nexus between market economies and nonmarket economies.⁵ Fourth, to the extent that foreign policy making and international trade are intertwined, state trading enters the policy making calculus as a relevant factor.⁶ Fifth, current political unrest and uncertainty in state trading countries, as in Poland and the U.S.S.R. for example,⁷ have actual and potential repercussions on the financial, legal and political aspects of international trade.⁸ Sixth, state trading itself is changing in form (e.g., joint ventures and cooperation agreements) and organization (e.g., the foreign trade structure of the Soviet Union).⁹ These considerations have important implications for the legal, political and economic frameworks in which state trading is practiced.¹⁰

This article reviews some important aspects of state trading and the international context in which it is practiced. It specifically examines the nature of state trading (with illustrative focus on Eastern Europe, the Soviet Union and the People's Republic of China), the

⁴ During the past six years, the foreign trade organizations of some Eastern European countries and the Soviet Union have been reorganized, thereby giving private enterprises a relatively larger role in foreign trade. See, e.g., Lasok, *Government Intervention and State Trading*, 44 MOD. L. REV. 249, 256 (1981); Rabinovich, *The Legal Status of Soviet Foreign Trade Organizations in View of New Soviet Legislation*, 15 INT'L LAW. 233 (1981).

⁵ See U.S. TARIFF COMM'N, IMPACT OF GRANTING MOST FAVORED NATION TREATMENT TO THE COUNTRIES OF EASTERN EUROPE AND THE PEOPLE'S REPUBLIC OF CHINA 5-9A (1974) (primary author, John E. Jelacic).

⁶ See S. PISAR, COEXISTENCE AND COMMERCE 58-74 (1970). For a review of theories relating United States foreign policy making and international trade, see McGowan & Walker, *Radical and Conventional Models of U.S. Foreign Economic Policy Making*, 33 WORLD POL. 347 (1981).

⁷ See Minard & Michaels, *Why Workers won't in the Soviet Union*, FORBES, Dec. 6, 1982, at 138; Brecher, *Snuffing Out Solidarity*, NEWSWEEK, Oct. 18, 1982, at 47; Anderson, *A System that Doesn't Work*, NEWSWEEK, Apr. 12, 1982, at 36; Deming, *Warsaw's 'Operation Calm'*, NEWSWEEK, Mar. 1, 1982, at 36; Strasser, *Poland Under the Heel*, NEWSWEEK, Dec. 28, 1981, at 10.

⁸ See generally N.Y. Times, Feb. 14, 1982, § 12 (International Economic Survey).

⁹ See Brenscheidt, *The Legal Status of the Soviet Foreign Trade Monopoly in the Federal Republic of Germany*, 9 INT'L LAW. 197, 199-200 (1975); Cranston & Puri, *Government as Entrepreneur and Planner: Aspects of Recent Industrial Strategy in Britain*, 9 CAL. W. INT'L L.J. 78, 78, 83, 89-90, 92-93, 95, 99-102 (1981); George, Gullo & Stein, *Trade With the People's Republic of China: Current Status and Future Prospects*, 3 NW. J. INT'L L. & BUS. 21, 21-33 (1981). See also Starr, *The Potential for Joint Ventures in Eastern Europe*, 10 INT'L LAW. 35 (1976); Guffey, *Some Experiences of Occidental Petroleum in Negotiating Cooperation Agreements in the U.S.S.R.*, 10 INT'L LAW. 41 (1976); Conner, *Joint Ventures in Yugoslavia*, 10 INT'L LAW. 45 (1976); McElroy, *The Control Data Joint Venture in Romania*, 10 INT'L LAW. 55 (1976); *Questions and Answers Regarding Joint Ventures*, 10 INT'L LAW. 59 (1976) (questions answered by Conner, McElroy, and Starr).

¹⁰ See S. PISAR, *supra* note 6, at 180-221; R. MASON, R. MILLER & D. WEIGEL, *supra* note 1, at 3-21, 185-86. See generally Downey, *Joint Cooperation as an Instrument of East-West Trade*, in LEGAL ASPECTS OF DOING BUSINESS WITH THE U.S.S.R. AND EASTERN EUROPE 121-54 (Prac. L. Inst. Course Handbook No. 238, 1977); N.Y. Times, Feb. 14, 1982, § 12 (International Economic Survey).

problems of state trading within the international framework of the General Agreement on Tariffs and Trade¹¹ (hereinafter GATT), and, as an illustration of state trading relations outside the scope of the GATT, United States trade relations with the People's Republic of China. The article also reviews the deficiencies of the GATT's treatment of state trading, suggests improvements, and examines the comparative advantages of bilateral trade arrangements.

II. THE NATURE OF STATE TRADING

"State trading" evades precise definition because it refers to governmental conduct and control of foreign trade.¹² The definitional problem is determining how much governmental participation is required to qualify the trading activity (or organization) as state, rather than private, trade. Scholars recognize the undefinable nature of state trade and, therefore, have formulated several working descriptions.¹³ In terms of degree of governmental involvement, at least three general types of state trading may be described: (1) where the state owns the trading enterprise; (2) where the state directly controls, but does not own, a private enterprise to the extent that the enterprises trading operations or management or both are predominantly controlled by the state; and (3) where the trading enterprise is granted exclusive or special privileges by the state.¹⁴ These three situations correspond to decreasing degrees of state control: (1) ownership, (2) direct (operational) control, and (3) indirect (licensing) control. The former two descriptions are more popular among scholars than is the latter¹⁵ because the third category is overinclusive. For example, it embraces a trading enterprise that is entirely privately owned, managed and operated simply because it has received the imprimatur of the state in the form of a license. These different descriptions, nonetheless, illustrate the amorphous nature of the concept of state trade and, more importantly, imply that mere sectors¹⁶ of a national economy or the entire economy itself may be characterized as state trading, depending on the degree of gov-

¹¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

¹² Baban, *State Trading and the GATT*, 11 J. WORLD TRADE L. 334, 334 (1977).

¹³ See, e.g., Allen, *supra* note 1, at 257-59; Fensterwald, *United States Policies Toward State Trading*, 24 LAW & CONTEMP. PROBS. 369, 369-70 (1959); Baban, *supra* note 12, at 334.

¹⁴ See M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM 43-44 (1978). Some scholars simply define state trading functionally. For example, Baban, *supra* note 12, at 338, defines state trading as, *inter alia*, "simply an alternative means by which the functional equivalents of the more familiar commercial policy measures may be implemented."

¹⁵ See, e.g., Allen, *supra* note 1, at 257; Baban, *supra* note 12, at 334, 338.

¹⁶ Economic sectors may be defined according to product or geographic area or both.

ernmental control over the trading organization or activity.¹⁷

As state trading may be practiced (1) exclusively or concurrently with domestic, private traders, and (2) narrowly (e.g., in a particular product-line or geographic sector) or extensively, the appellation "state trading country" is widely applicable and has no specific meaning. Traditionally, however, the term is used to refer to countries whose foreign trade is conducted exclusively or predominantly by governmentally owned or controlled enterprises.¹⁸ These state trading countries are often referred to as "nonmarket economy" countries,¹⁹ signifying that the state rather than the free market's "invisible hand" determines domestic prices, quantities of production and distribution of goods and services.²⁰ According to this customary understanding, the primary state traders of the world are socialist and communist countries such as the Soviet Union, Poland, Romania and East Germany.²¹ The foreign trade of socialist and communist countries, however, is not necessarily conducted exclusively in the form of state trade. For example, under Hungary's recent "New Economic Mechanism," the state, though retaining ownership of the means of production, transfers them to a private trading enterprise that determines their use.²² This arrangement, therefore, combines central control with private management and exemplifies a nonexclusive form of state trading. Furthermore, socialist and communist countries are not the only countries to engage in state

¹⁷ The degree of governmental control is determined usually along the dimensions of organizational structure, objectives and financing. See M. KOSTECKI, *supra* note 14, at 43.

¹⁸ See K. DAM, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 316 (1970).

¹⁹ There are usually four basic differences between a "nonmarket economy" (particularly a "centrally planned economy") and a "market economy." Unlike a market economy, a nonmarket economy usually involves: (1) a national economic plan of the state which determines resource allocation; (2) the determination of imports and exports by national economic planning; (3) the state's fixing domestic prices, which, therefore, do not fluctuate freely in response to supply and demand; and (4) nonconvertible currencies which may neither be transferred outside the country nor freely converted into any Western currency. See K. DAM, *supra* note 18, at 318; *COMPTROLLER GENERAL'S REPORT*, *supra* note 2, at 2.

²⁰ This is a rough distinction, as some countries possess features of both "nonmarket" and "market" economies. Recent economic developments in Hungary, for example, pertaining to its "New Economic Mechanism" suggest that the Hungarian economy falls between these two categories. See Reuland, *GATT and State-Trading Countries*, 9 J. WORLD TRADE L. 318, 329-38 (1975).

²¹ Most of the Eastern bloc state trading countries are members of the Council for Mutual Economic Aid ("Comecon" or "CMEA"). Comecon presently consists of 10 members: Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, the Soviet Union, Mongolia, Vietnam and Cuba. GENERAL AGREEMENT ON TARIFFS AND TRADE, INTERNATIONAL TRADE 1978/79, at 159. For a general discussion of Comecon, see Grzybowski, *The Foreign Trade Regime in the Comecon Countries Today*, 4 N.Y.U.J. INT'L L. & POL. 183 (1971).

²² See Reuland, *supra* note 20, at 332.

trading; non-communist and non-socialist countries (e.g., the United States and the United Kingdom²³) also state trade, although to a lesser extent.

State trading takes a variety of forms.²⁴ The most common forms are: (1) state monopoly over exports or state monopsony over imports or both, (2) private trade monopolies that are conferred and closely regulated by the state, and (3) central determination of prices or quantities or both. These forms are not mutually exclusive and may be combined in practice. Recently, however, some European countries have developed a fourth instrument of state trade, *viz.*, planning agreements.²⁵

Planning agreements are usually tailor-made, quasi-contractual agreements between the government and a domestic corporation whereby public and private resources and development plans are coordinated.²⁶ The objective of such an arrangement is to develop a close relationship between government and private industry with a view toward national needs and policies. Although the form and parties of a planning agreement are domestic, its content subsumes issues of international trade.²⁷

State trading may be practiced for various purposes. Six basic objectives are common to nonmarket economy countries and market economy countries.²⁸ First, state trading may be conducted to protect domestic production from imports, to promote exports, to stabilize domestic prices or incomes, or to discriminate in favor of certain trading partners. State trading usually accomplishes these objectives through the determination of either the domestic or external prices of trade goods and the quantities imported or exported.²⁹ Second, state trading

²³ The United States engages in state trading in, for example, nuclear fuel sales, which are handled by the Nuclear Regulatory Commission and the Energy Research Development Administration. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1045, 1046 n.2 (1977). The British National Oil Corporation (BNOC) is an example of state trading engaged in by the United Kingdom. See *Why BNOC?*, *THE ECONOMIST*, Apr. 2-8, 1983, at 12. Other examples of state trading entities in market economies include the Tobacco Monopoly in France, the Food Agency in Japan and the State-Trading Corporation in India. M. KOSTECKI, *supra* note 14, at 43.

²⁴ See Baban, *supra* note 12, at 344.

²⁵ Planning agreements reflect the development of a practice in a number of European countries such as France, Italy and Great Britain. Cranston & Puri, *supra* note 9, at 100. See generally J. HAYWARD & M. WATSON, *PLANNING, POLITICS AND PUBLIC POLICY—THE BRITISH, FRENCH AND ITALIAN EXPERIENCE* (1975).

²⁶ Cranston & Puri, *supra* note 9, at 99.

²⁷ *Id.* at 101.

²⁸ See Allen, *supra* note 1, at 258; Baban, *supra* note 12, at 336-37, 344; Brenscheidt, *supra* note 9, at 198-99 (five main functions of state trading from the Soviet perspective).

²⁹ For discussions of the economics of state trading, see Humphrey, *The Economic Conse-*

may be used to improve trade terms and thereby improve the state trader's international trading position.³⁰ Third, state trading may be an instrument for improving the country's balance of payments or generally for maintaining control over the components of the trade account.³¹ Fourth, for reasons of public health and welfare, state trading may be used to control domestic consumption of items such as pharmaceuticals, tobacco and alcoholic beverages.³² Fifth, state trading may serve fiscal policy, for example, by shifting trade profits to the government.³³ Sixth, state trading may serve national security interests by retaining state control over trade in military arms and other defense items.³⁴ These various objectives clearly illustrate that state trading can be used to serve a variety of policies. In the words of one commentator, "state trading is an all-inclusive operation with political, economic, and military overtones and undercurrents."³⁵ This, therefore, gives state trading a multidimensional nature. It is perhaps the best example in international trade of a practice and process that is as political as it is economic. By definition, the principal actor in state trading is a political rather than private body. Political efficacy is, therefore, as much within the purview of state trading as economic efficiency. As one author has noted:

Economic decisions are transmuted into economic-political-military decisions, in which costs are balanced against benefits in *all aspects* of national life before transactions are concluded. This is so because when the state controls external economic relations, it must take into account the *total* interests of the state, not just its economic interests.³⁶

This multidimensional nature of state trading is important to any evaluation of the frameworks (e.g., the legal framework of GATT) in which it thrives.

State trading is simultaneously advantageous and problematic. The overall advantage is that "state trading stands alone in its power as an instrument that utilizes economic means to improve a country's rela-

quences of State Trading, 24 *LAW & CONTEMP. PROBS.* 276, 276-85 (1959); Nove, *East-West Trade*, in *INTERNATIONAL ECONOMIC RELATIONS* 100 (P. Samuelson ed. 1969); Vajda, *The Problems of East-West Trade*, *INTERNATIONAL ECONOMIC RELATIONS* 121 (P. Samuelson ed. 1969).

³⁰ Allen, *supra* note 1, at 258.

³¹ Baban, *supra* note 12, at 336-37.

³² State control in this area may involve not only the decision to exclude certain imports but also the determination of quantities imported and standards of import quality.

³³ State trading in this respect is the functional equivalent of a tax because it draws revenue for the state. See Baban, *supra* note 12, at 334, 337.

³⁴ For example, the United States reservation for itself of trade in nuclear fuels may be viewed as state trading in an item for defense.

³⁵ Fensterwald, *supra* note 13, at 382.

³⁶ Allen, *supra* note 1, at 265 (emphasis added).

tive economic, political, and military position."³⁷ A state trader enjoys two fundamental advantages over a private trader: a greater economic bargaining power and greater "translational" powers.³⁸ A state trading country enjoys the former as a consequence of its sheer size in the market, e.g., as a monopsonist of imported goods or as a monopolist of exported goods.³⁹ A state trader's translational power is the power to translate acquired economic power into other kinds of influence—political, for example—serving the state's interests. Thus, state trading "confers not only greater bargaining power, but also the ability to shift this power among the *different goals* of the state."⁴⁰ These advantages bespeak the multidimensional nature of state trading and collectively enhance the state trader's position vis-a-vis the private trader in international trade.

State trading, however, has its costs. It imposes two basic disadvantages on the country itself and its trading partners. First, state trading necessarily requires a bureaucratic structure. The bureaucracy inherently presents several actual and potential problems: (1) policy conflicts within the trader's political leadership; (2) policy conflicts and the potential for lack of coordination between the bureaucratic leadership and the implementing trading entity; (3) direct or indirect nullification of trading gains by bureaucratic delay or contradiction; and (4) practical problems of trade execution resulting from multi-tiered bureaucratic structure.⁴¹ One reporter, for example, recently described the Soviet form of economic management as follows: in theory the complex system of reporting and command allows central planners to maximize efficiency by organizing and guiding production and setting prices for periods of up to five years; in practice the planning often results in bureaucratic chaos.⁴² Unlike a state trading country such as the Soviet Union, the smaller private trader avoids these severe bureaucratic burdens in its corporate structure.

The second disadvantage of state trading—particularly from the perspective of the state's trading partners—is its instability.⁴³ Absent a

³⁷ *Id.*

³⁸ See generally *id.* at 265-66.

³⁹ In each case it has power to control price. Power over price is an important component of international bargaining power.

⁴⁰ Allen, *supra* note 1, at 266 (emphasis added).

⁴¹ For a Weberian analysis of bureaucracy, see M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1966).

⁴² H. Anderson, *supra* note 7, at 37.

⁴³ Ouin, *State Trading in Western Europe*, 24 LAW & CONTEMP. PROBS. 398, 415-16 (1959); Fensterwald, *supra* note 13, at 379 (unreliability resulting from the state trading practice of spot sales).

bilateral agreement with a state trading country, a trading partner, such as an exporter, cannot rely on firm demand in the importing state trading country because such demand is controlled by the state for noneconomic and economic reasons rather than by free market forces. Even if a bilateral agreement exists, the terms of trade that are discretionary rather than fixed are susceptible to the vagaries of political and other noneconomic policies that motivate the decision-making of the state trader.⁴⁴ In other words, the multidimensional nature of state trading can impede the stability of international trade irrespective of the existence of a bilateral trade agreement.

III. THE INTERNATIONAL REGULATION OF STATE TRADING

From the perspective of the GATT,⁴⁵ state trading may be regulated from within two general, international frameworks: the framework of the GATT which applies to state trading countries that are contracting parties thereto, and regulatory frameworks outside GATT, which apply to state traders that are not parties to GATT.

A. Within the GATT

Presently, six communist-socialist countries belong to the GATT: Cuba, Czechoslovakia, Yugoslavia, Poland, Romania and Hungary.⁴⁶ Notably, the Soviet Union and the People's Republic of China are not contracting members of the GATT. All six members, with the exception of Yugoslavia, are also members of the Council for Mutual Economic Aid ("Comecon" or "CMEA"),⁴⁷ an extra-GATT framework that regulates state trading among its members. Although this article focuses on the problems of applying the GATT to these six communist state trading members, it should be noted that they are not the only GATT members that practice state trading. Many non-communist GATT members (e.g., the United States and the United Kingdom, as

⁴⁴ The trading partner would be wise to seek political risk insurance if it perceives such risks.

⁴⁵ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. For a discussion of the history of the GATT, see R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 3-55 (1975).

⁴⁶ The dates of their accession to the GATT are: Cuba, Jan. 1, 1948; Czechoslovakia, Apr. 20, 1948; Yugoslavia, Aug. 25, 1966; Poland, Oct. 18, 1967; Romania, Nov. 14, 1971; and Hungary, Sept. 9, 1973. *THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT STATUS OF LEGAL INSTRUMENTS* 1-2.3, 3-10.1, 3-15.1, 3-18.1, 3-20.1 (1980 & Supp., Apr. 1981).

⁴⁷ For a discussion of Comecon, see *supra* note 21. Although Yugoslavia is a communist country, it is nonetheless regarded by many as having a market-type economy. *COMPTROLLER GENERAL'S REPORT, supra* note 2, at 1 n. a; Grzybowski, *supra* note 21, at 186-87.

noted earlier⁴⁸) also engage in state trading, albeit to a lesser extent.

The assumptions underlying the GATT and its orientation inappropriately address the modern practice of state trading. The GATT's free trade theory perspective is reflected in its general orientation towards a free-enterprise or "market" economy.⁴⁹ This point of view is consistent with the basic rationale underlying the GATT—the desire to remove politics at least one significant step away from the realm of economics (i.e., to "de-politicize" international trade) by eliminating nontariff trade barriers and regulating tariffs.⁵⁰ This free market orientation and de-politicization rationale are not surprising, as the GATT rules were drafted essentially with state trading *market* economies in mind.⁵¹ It simply was assumed by the drafters—as it was assumed by the conventional, international economic theory of free trade that preoccupied them⁵²—that free market trade is, and should be, the norm and that state trading is an aberration. Furthermore, it was assumed (erroneously, in hindsight) that state trading would be practiced in insignificant amounts by GATT members.⁵³ The effect of these assumptions and the GATT's orientation for state trading countries—particularly those with nonmarket economies—is that some of the GATT rules are difficult to apply to these countries and that it is very difficult to use GATT as a framework for the economic integration of the state trading communist bloc into the world economy (assuming that such integration is desirable⁵⁴).

Article XVII (entitled "State Trading Enterprises") is the central provision of the GATT dealing with state trading. That article and several other articles and interpretive notes impose four basic obligations and restrictions on state trading contracting parties. Prelimina-

⁴⁸ See *supra* note 23 and accompanying text.

⁴⁹ K. DAM, *supra* note 18, at 317-18; J. JACKSON, *supra* note 23, at 1046; Reuland, *supra* note 20, at 319.

⁵⁰ GATT, Preamble, *supra* note 45 ("directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce"). See also Baban, *supra* note 12, at 335; Reuland, *supra* note 20, at 319, 320, 324, 326.

⁵¹ Baban, *supra* note 12, at 335 ("the GATT rules were drafted essentially with state trading in MTEs [market-type economies] in mind"); V. MUHAMMAD, THE LEGAL FRAMEWORK OF WORLD TRADE 227 (1958).

⁵² See *infra* text accompanying and immediately following note 83.

⁵³ V. MUHAMMAD, *supra* note 51, at 227.

⁵⁴ It is submitted that economic integration of nonmarket economies (which are primarily communist countries) into the world economy is a desirable goal. The establishment of amicable, working trade relations between the communist bloc and noncommunist countries benefits both groups: the communist bloc is directly benefited by Western imports and the noncommunist trade partners thereby improve their trade balances. More important, however, is the resulting climate of amicable relations and cooperation which contributes to *détente* and stability in the world.

rily, it should be noted that article XVII does not define "state [trading] enterprise." The absence of a definition raises the question of what should be the criteria for a state trading enterprise—state ownership, direct state control, substantial indirect state control, or some other standard? The definitional silence of article XVII, therefore, renders its scope somewhat amorphous.

1. Nondiscriminatory Treatment

The first obligation imposed by article XVII is the duty of nondiscriminatory treatment.⁵⁵ This duty applies to contracting parties: (1) which establish or maintain a state trading enterprise (hereinafter STE), or (2) which grant to "*any* enterprise, formally or in effect, exclusive or special privileges."⁵⁶ Furthermore, the interpretive note to article XVII, paragraph 1 explicitly brings within the article's scope two types of state-established marketing boards: (1) those engaged in purchasing and selling, and (2) those which simply set regulations for private traders, but do not themselves engage in trade.⁵⁷ Though it seems reasonable to include the former type of marketing board within the meaning of an STE, inclusion of the latter type seems overinclusive for the same reason that the third proffered category of state trading, as noted earlier,⁵⁸ is often rejected. For this reason, it is submitted that article XVII's concept of an STE is stated overbroadly.

The same interpretive note to article XVII excludes from the meaning of "exclusive or special privileges" both governmental quality standards and efficiency measures, and privileges granted for the exploitation of national natural resources "which do not empower the government to exercise control over the trading activities of the enterprise in question."⁵⁹ This exclusion has the effect of permitting some internal protection by the government provided it has a nexus with quality, efficiency or indigenous resources. However, the proviso of no control by the government raises the question of what type of, and how much, control is contemplated. For example, would a joint venture between a government and one or more of its domestic producers in which the government is a passive partner be excluded? A literal application of the language suggests that it would be subject to the duty of nondiscriminatory treatment. This result is conservative because it would subject all such joint ventures to the duty of nondiscrimination

⁵⁵ GATT, art. XVII, para. 1(a), *supra* note 45.

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Id.* Ad art. XVII, para. 1.

⁵⁸ See *supra* text accompanying note 15.

⁵⁹ GATT, Ad art. XVII, para. 1(a), *supra* note 45.

without distinguishing between bona fide governmental participation and mala fide governmental involvement which uses the cloak of a joint venture to do indirectly that which it could not do directly (*viz.*, discriminate against foreign traders).⁶⁰ A better result would exclude the former but include the latter. By excluding the former cooperation between government and private enterprise for legitimate national interests would be fostered; including the latter would subject a mala fide governmental partnership to the constraints of nondiscrimination and would be consistent with the GATT's underlying rationale of de-politicizing decisions of trade.

Assuming, however, that the enterprise in question falls within the scope of article XVII, paragraph 1(a) imposes a general duty on the enterprise to "act in a manner consistent with the general principles of non-discriminatory treatment" in its import and export trade.⁶¹ Paragraph 1(b) explicitly translates this general obligation into two specific obligations: (1) to make its purchases and sales involving imports and exports "solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale," and (2) to "afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."⁶² The first obligation, requiring attention to solely commercial considerations to the exclusion of non-commercial considerations (such as political ones), is expressive of the GATT's underlying purpose of de-politicizing trade decisions. The second obligation defines the obligation further by prescribing that the enterprise afford the STE competitive opportunity (*i.e.*, the opportunity to compete on a commercial rather than a noncommercial basis).

The general obligation of nondiscriminatory treatment is qualified in three ways. First, it does not apply to imports that are for governmental use and not for resale or use in the production of goods for sale.⁶³ This exclusion implicitly recognizes a governmental versus commercial distinction as to purpose of use, and by excluding only the former, retains goods for commercial use within the reach of the nondiscrimination obligation in keeping with the GATT's philosophy. Second, a state trading country receiving a "tied loan" is permitted to

⁶⁰ Given the increased use of mixed joint ventures in international trade, this is an undesirable result.

⁶¹ GATT, art. XVII, para. 1(a), *supra* note 45.

⁶² *Id.* art. XVII, para. 1(b).

⁶³ *Id.* Ad art. XVII, para. 2. "The term goods is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services." *Id.*

take this loan into account as a "commercial consideration" when purchasing requirements abroad.⁶⁴ The effect of this qualification, therefore, is to permit a state trading country to discriminate in its selection of exporting countries on the basis of the terms of tied loans. This is consistent with the spirit of GATT because competition in the international lending industry is macroscopically economic (rather than political) in nature and, therefore, should be a relevant "commercial" consideration in a country's procurement decisions. Third, export price discrimination among foreign markets by a state trading country is not deemed a violation of the obligation of nondiscriminatory treatment, provided that the different prices for the same export in the different foreign markets are charged for commercial reasons in order to meet conditions of supply and demand in those markets.⁶⁵ One might view this exculpatory provision as a meeting-foreign-market-conditions excuse for price discrimination. As such, it is a broad standard by which an exporting state trader can color its discrimination. Furthermore, this exculpatory provision presents, by implication, an asymmetrical result: the absence of a similar provision for *import* price discrimination suggests that such discrimination is *per se* a violation of the obligation of nondiscrimination.⁶⁶

Related to article XVII's general obligation of nondiscriminatory treatment is article III's national treatment standard.⁶⁷ Whereas the meeting-foreign-market-conditions qualification of the nondiscrimination obligation addresses discrimination *among* foreign markets, the national treatment standard addresses a state trader's treatment of foreign sources *as compared to* its treatment of *domestic* sources. Article III, paragraph 4 requires that imports be accorded "treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."⁶⁸ As applied to STEs, this provision in effect prohibits them from practicing favoritism toward local suppliers.⁶⁹

2. *The Duty to Notify*

The second general obligation imposed by article XVII on a state trading country is the duty to notify all the contracting parties of the

⁶⁴ *Id.* Ad art. XVII, para. 1(b).

⁶⁵ *Id.* Ad art. XVII, para. 1.

⁶⁶ See Baban, *supra* note 12, at 340; K. DAM, *supra* note 18, at 322-23.

⁶⁷ GATT, art. III, para. 2, *supra* note 45.

⁶⁸ *Id.*

⁶⁹ See K. DAM, *supra* note 18, at 322.

products imported and exported by its STEs.⁷⁰ This obligation, however, is substantially emasculated by the provision of paragraph 4(d) that a contracting party shall not be required "to disclose confidential information which would [1] impede law enforcement or [2] otherwise be contrary to the public interest or [3] would prejudice the legitimate commercial interests of particular enterprises."⁷¹ Each of the three categories allows a subjective determination by the reporting country of the applicability of this disclosure requirement. As a result of this subjectivity, it is not surprising that in practice very little information has been disclosed by state trading members of GATT on their disclosure questionnaires.⁷² For example, in its 1972 notification, Poland listed its foreign trading agencies and described briefly its trading procedures and goals, accompanied by a cover note asserting that state trading "in the sense of Article XVII" did not exist in Poland.⁷³

Paragraph 4(b) adds to the scope of the duty to notify. It requires disclosure, upon request of another contracting party having a substantial trade in the product concerned, of the "import mark-up" on the imported product over which a contracting party has a state trading monopsony.⁷⁴ The import mark-up is defined in the interpretive note to this paragraph as the difference between the domestic resale price (charged by the importing state trader) and the landed cost of the imported product.⁷⁵ One of the problems with this calculation is the determination of the resale price in a nonmarket economy—the type of economy that is characteristic of most state trading countries. As prices are not determined by free market condition but rather by the state itself, resale price does not reflect fair market value—the concept underlying "import mark-up"—but rather a governmental decision based on factors other than market conditions. Moreover, the duty to disclose import mark-ups is also emasculated by the broad "confidential information" exception of paragraph 4(d), which explicitly applies to this duty. Thus, in effect and in practice, the broad exception undermines the entire purpose of the general duty of notification.

3. *Quantitative Restrictions and Domestic Protection*

The third and fourth general obligations imposed on state trading

⁷⁰ GATT, art. XVII, para. 4, *supra* note 45. In 1957, a standardized reporting system was established for GATT members. See Baban, *supra* note 12, at 341.

⁷¹ GATT, art. XVII, para. 4(d), *supra* note 45.

⁷² Baban, *supra* note 12, at 342.

⁷³ *Id.* at 343-44.

⁷⁴ GATT, art. XVII, para. 4(b), *supra* note 45.

⁷⁵ *Id.* Ad art. XVII, para. 4(b).

members of GATT pertain to quantitative restrictions and domestic protection. An interpretive note applying to articles XI through XIV and article XVIII laconically states that the provisions contained within those articles pertaining to import and export restrictions apply equally to such restrictions "made effective through state-trading operations."⁷⁶ One of the problems created by the note is that it provides "no indication as to how these provisions would be applied to state trading enterprises."⁷⁷ Specifically, such application is not self-evident, particularly in consideration of the fact that state trading involves state "plans" that fix prices and quantities for the long-term, as well as the short-term.

Article II, paragraph 4 contains the fourth general obligation for state trading members of GATT. With two narrow exceptions, paragraph 4 prohibits a contracting party that operates a state monopsony over imports from using its monopsony "to afford protection on the average in excess of the amount of protection provided for" in the appropriate GATT Schedule of Concessions.⁷⁸ The aim of the provision is to prevent the use of monopsonistic power over domestic resale prices from impairing or nullifying the tariff concessions in the GATT Schedules.⁷⁹ The qualification "on the average," however, is not defined and, therefore, leaves the issue of "average protection" to be disputed between the parties.⁸⁰ Because of the temporal nature of the word "average," the amount of protection (assuming it is calculable) averaged out over one year, for example, may be considerably different from the amount averaged over several years. The failure of paragraph 4 to clarify this issue opens the door to disagreement over the relevant temporal period for which this average should be calculated.

Thus, application of the obligations and restrictions imposed by the GATT on state trading members poses severe difficulties. The duty of nondiscriminatory treatment has four shortcomings: (1) it fails to define "state trading enterprise;" (2) it incorporates the overinclusive "exclusive or special privileges" criterion of state trading; (3) in application, it fails to distinguish between bona fide and mala fide governments participating in joint ventures; and (4) it asymmetrically allows export price discrimination for the purpose of meeting market condi-

⁷⁶ *Id.* Ad arts. XI-XIV, XVIII.

⁷⁷ Baban, *supra* note 12, at 341.

⁷⁸ GATT, art. II, para. 4, *supra* note 55.

⁷⁹ Baban, *supra* note 12, at 342.

⁸⁰ In 1955, an amendment was proposed that would have limited such protection by means of "(a) maximum import duty . . . or (b) any other mutually satisfactory arrangement consistent with the provisions of this Agreement." K. DAM, *supra* note 18, at 324-25. However, the proposed amendment did not take effect because Uruguay did not ratify it. See Baban, *supra* note 12, at 342.

tions without permitting import price discrimination for similar purposes. The duty of notification is effectively undermined by the broad, subjective criteria of excepted "confidential information" and fails to provide an adequate formula for determining import mark-ups in nonmarket economies. Similarly, the obligation pertaining to quantitative restrictions does not address the problem of applying those restrictions to the "plans" of state trading countries, and the prohibition against above-average domestic protection is silent on the key issue of determining the "average."

B. Outside the GATT

Although the GATT is the largest international legal framework within which state trading is explicitly regulated, regulation of the state trading activities of countries that are not GATT members (most notably the Soviet Union and the People's Republic of China) necessarily must be effected through other frameworks such as economic unions, economic communities and bilateral arrangements.⁸¹ This part of the article examines some important aspects of United States bilateral arrangements and trade relations with the People's Republic of China (hereinafter the PRC) as an illustration of the bilateral treatment of state trading.

The history of United States trade relations with the PRC is representative of the larger history of United States trade policies and practices toward state trading countries in general, and toward communist state traders in particular.⁸² At least until 1969, the United States articulated a policy that condemned state trading while extolling free trade.⁸³ The underlying reason for the condemnation was the traditional association of communism with state trading—an association that was based on the fact that nearly all of the communist countries were (and still are) state trading countries. This antagonistic view of state trading was bolstered by conventional international economic theory that views the free market as the economic norm and treats nonmarket economies as aberrations. Thus, economic theory's bias

⁸¹ See generally P. LORTIE, ECONOMIC INTEGRATION AND THE LAW OF GATT 43-63, 101-57 (1975); V. MUHAMMAD, *supra* note 51, at 242-47, 261-69; Lipsey, *The Theory of Customs Unions: A General Survey*, in XI AMERICAN ECON. ASS'N, READINGS IN INTERNATIONAL ECONOMICS 261-78 (1968).

⁸² See M. HARVEY, EAST-WEST TRADE AND UNITED STATES POLICY 97-114 (1966); George, Gullo & Stein, *supra* note 9, at 21-24, 28-33; Scott, *China's Trade Policy and Practice: Continuity and Change*, 13 J. INT'L L. & ECON. 607, 607-08, 610-17 (1979).

⁸³ See Fensterwald, *supra* note 13, at 369-70, 381-85, 396-97; Parsons, *Recent Developments in East-West Trade: The U.S. Perspective*, 37 LAW & CONTEMP. PROBS. 548, 549-52 (1972).

against state trading and the United States ideological opposition to communism converged in a foreign trade policy that rejected state trading.

Within this context, in 1950 the United States instituted an embargo on trade with Communist China in response to China's involvement in the Korean War.⁸⁴ That embargo continued until the early 1970s when the Nixon Administration renewed trade relations with the PRC. In 1979, the Carter Administration established diplomatic relations with the PRC and entered into, *inter alia*, a bilateral trade agreement with China, which took effect in 1980.⁸⁵

Among the key provisions⁸⁶ of the U.S.-PRC Trade Agreement are: (1) reciprocal extension of nondiscriminatory (i.e., Most Favored Nation) tariff treatment for imports from each country;⁸⁷ (2) protection of patents, copyrights and trademarks;⁸⁸ (3) procedures for the settlement of commercial disputes, including third party arbitration;⁸⁹ and (4) safeguards against market disruption.⁹⁰ The 1980 Trade Agreement and the other U.S.-PRC bilateral agreements that have been made since 1979 signify a normalization of trade relations between the two countries and a closer nexus between their respective market and nonmarket economies. The 1980 Trade Agreement establishes a bilateral duty of nondiscriminatory treatment, which is similar to the

⁸⁴ See M. HARVEY, *supra* note 82, at 102-04; George, Gullo & Stein, *supra* note 9, at 22.

⁸⁵ Agreement on Trade Relations, July 7, 1979, United States-China, 31 U.S.T. 4651, T.I.A.S. No. 9630, 18 I.L.M. 1041. Many other bilateral agreements with the PRC have been signed since 1979 pertaining to a variety of matters: Agreement relating to Relief from Double Income Tax on Shipping Profits, Nov. 18, 1981, United States-China, — U.S.T. —, T.I.A.S. No. —; Protocol on Cooperation in Nuclear Safety Matters, Oct. 17, 1981, United States-China, — U.S.T. —, T.I.A.S. No. —; Agreement concerning the Enlargement of Existing Consular Districts, June 16, 1981, United States-China, — U.S.T. —, T.I.A.S. No. —; Agreement concerning the Establishment of Additional Consulates General, June 16, 1981, United States-China, — U.S.T. —, T.I.A.S. No. —; Agreement relating to the Reciprocal Issuance of Visas to Crew Members of Aircraft and Vessels, Jan. 7, 1981, United States-China, — U.S.T. —, T.I.A.S. No. 9965; Agreement relating to Investment Guarantees, Oct. 30, 1980, United States-China, — U.S.T. —, T.I.A.S. No. 9924; Agreement on Marine Transport, Sept. 17, 1980, United States-China, — U.S.T. —, T.I.A.S. No. —; Agreement relating to Civil Air Transport, Sept. 17, 1980, United States-China, — U.S.T. —, T.I.A.S. No. —; Consular Convention, Sept. 17, 1980, United States-China, — U.S.T. —, T.I.A.S. No. 10209; Agreement relating to a Visa System for Export to the United States of Cotton, Wool and Man-Made Fiber Textiles and Textile Products, July 23, 25, 1980, United States-China, — U.S.T. —, T.I.A.S. No. 9836.

⁸⁶ The Trade Agreement also contained provisions covering the fostering of business activities, the establishment of private and governmental trade offices and international transactions of finance, booking and currency. See George, Gullo & Stein, *supra* note 9, at 23.

⁸⁷ Agreement on Trade Relations, art. II, para. 1(A), *supra* note 85.

⁸⁸ *Id.* art. VI.

⁸⁹ *Id.* art. VIII.

⁹⁰ *Id.* art. V.

GATT's multilateral framework. However, the 1980 Trade Agreement goes further than the GATT by establishing reciprocal obligations such as the protection of patents, copyrights and trademarks; safeguards against market disruption; and procedures for settling commercial disputes. The provisions under the 1980 Trade Agreement illustrate the basic advantage of dealing with state trading countries on a bilateral basis: specific, rather than general, obligations and responsibilities can be negotiated. This avoids ambiguous provisions and amorphous generalities—as, for example, in the GATT—that are the product of multilateral compromise and conservatism.

Furthermore, these bilateral agreements illustrate how trade relations with state trading countries can and do adjust to political change. Because the United States trade embargo of Communist China in 1950 was politically motivated, its active trade relations with the PRC, especially since 1976, have paralleled Chinese political change. The deaths of Mao Tse-tung and Chou En-lai in 1976 occasioned the rise of the post-Mao pragmatists who have been more willing to stray from Marxist orthodoxy than their predecessors.⁹¹ This political reorientation in China has led to an economic reorientation that is sympathetic to capitalism and favors closer trade relations with the non-communist West.⁹² This new economic outlook is reflected partly by China's experiment during the last three years with a "mixed" economy (i.e., a planned economy that incorporates features of a market economy) in its Sichuan Province.⁹³ Increasing numbers of private enterprises and free markets have been the hallmarks of this successful experiment, which represents a departure from the traditional forms of control and planning. Although China's state trading structure⁹⁴ has not been altered in the wake of its domestic experiment, the change in domestic climate reflects a posture that is favorable to capitalism and pervades much of China's leadership. Thus, as China has grown away from

⁹¹ See Wren, *Chinese Exhorted to Orthodoxy*, N.Y. Times, Feb. 14, 1982, § 12, at 41 (International Economic Survey); Wiley, *China's Capitalist Road*, NEWSWEEK, Apr. 12, 1982, at 42; Scott, *supra* note 82, at 608-11; Speech of J.M. George, Acting Deputy Director, Bureau of East-West Trade, U.S. Dep't of Commerce, Federal Bar Association, United States-China Trade Law Conference, Washington, D.C., Apr. 30-May 1, 1979, *printed in* U.S.-CHINA TRADE LAW CONFERENCE 22, 26 (Fed. Bar Assoc. unpublished transcripts of Conference proceedings, 1979) (a copy of the speech is on file at the offices of the Northwestern Journal of International Law & Business).

⁹² See B. SZUPROWICZ & M. SZUPROWICZ, *DOING BUSINESS WITH THE PEOPLE'S REPUBLIC OF CHINA* 10-43, 54-63 (1978).

⁹³ See Wiley, *supra* note 91.

⁹⁴ China's foreign trade is conducted by eight Foreign Trade Corporations that are state trading monopolies. The Ministry of Foreign Trade supervises China's trade and is accountable to the State Council for trade planning and execution. B. SZUPROWICZ & M. SZUPROWICZ, *supra* note 92, at 63, 65. See Scott, *supra* note 82, at 613.

Maoism politically, and economically has moved closer to capitalism, it has shed some of the political and economic "evils" that have been traditionally associated with state trading. In this way, the PRC has presented itself to the United States as a more ideologically attractive trading partner. Perceiving this, the United States has been less reluctant (than it was in 1950) to develop close trade relations with the PRC.⁹⁵

IV. CONCLUSION

The preceding review of the international regulation of state trading suggests some important implications and challenges that command attention.

Article XVII of the GATT should define "state trading enterprise" or at least provide a standard of state control which, in either case, avoids overinclusiveness. The modern need to foster commercial cooperation in an environment of economic interdependence demands a more liberal exclusion to the "exclusive or special privileges" provision of article XVII, paragraph 1(a). Specifically, the interpretive qualification to the exclusions—"which do not empower the government to exercise control over the trading activities of the enterprise"⁹⁶—should either be eliminated (the more liberal approach) or modified by replacing the criterion of "power" to control, with the criterion of "actual control" (the less liberal approach). In either case, the problem of over-inclusion would be mitigated.

The duty of notification under the GATT is vacuous as a consequence of the broad, subjective categories of the "confidential information" exemption. Although the first and third categories (impeding law enforcement and prejudicing legitimate commercial interests, respectively) seem justified, the second category, excluding information that would "otherwise be contrary to the public interest,"⁹⁷ is an overbroad excuse from the disclosure requirement. This "public interest" exemption should be tailored more narrowly, for example, by replacing it with "would directly threaten national security." This would help to restore vitality to the duty of notification. As it is presently stated, the

⁹⁵ This is indicated by the Trade Agreement of 1980 and the other bilateral trade agreements with the PRC, which were signed during that year. These treaties are cited *supra* in note 85. A similar development of United States trade relations with Hungary culminated in 1978 with a trade agreement between the two countries. Agreement on Trade Relations, Mar. 17, 1978, United States-Hungary, 29 U.S.T. 2711, T.I.A.S. No. 8967.

⁹⁶ See *supra* note 59 and accompanying text.

⁹⁷ See *supra* note 71 and accompanying text.

duty of notification easily can be shirked by a state trading country's invocation of the broad "public interest" exemption.

The fundamental assumptions underlying the GATT should be re-examined in the light of subsequent economic and political changes. Its free market orientation, which is reflected in article XVII, is incompatible with the state trading of *nonmarket* economies. The drafter's assumption that state trading would be practiced only by market economy members of GATT failed to consider how modern countries would develop economically. Article XVII should be fine-tuned in accordance with these subsequent developments.

Whatever modification, if any, is made to article XVII, the inherent tension between the GATT's basic purpose of de-politicizing international trade practices and the multidimensional nature of state trading will remain. Because state trading is political, as well as economic, in nature, the GATT's attempt to accommodate state trading enterprises within its framework focuses on trading's inherent political dimension. To the extent that the obligations and restrictions imposed on state trading members in article XVII are an attempt to de-politicize the international state trader, they are a feeble attempt.

The specificity and directness of bilateral arrangements with state trading countries, as illustrated by current U.S.-PRC trade relations, contrast sharply with the GATT's shortcomings. Unlike the multilateral GATT, a bilateral trade agreement such as the 1980 Trade Agreement between the United States and the PRC is a better international instrument for adjusting trade relations to political and economic change. The involvement of multiple contracting parties in the GATT makes the framework prone to legal ossification and resistant to needed change. By contrast, the presence of only two parties in a bilateral trade agreement provides for flexibility in both the negotiation and adjustment processes. As the record shows, the GATT has not adjusted its framework to accommodate changes in state trading as well as the United States has in its bilateral agreements.

In conclusion, if integration of nonmarket, state trading countries into the world economy is desirable or necessary, the GATT is an inadequate international legal framework within which this objective can be accomplished. Absent the equivalent of a global "economic union" or "community," bilateral agreements provide the best legal framework within which to pursue the economic integration of market and nonmarket economies.