UNCTAD/DITC/TNCD/MISC.20
9 October 2002

ORIGINAL: ENGLISH
ENGLISH AND RUSSIAN ONLY

UNITED NATIONS CONFERENCE EN TRADE AND DEVELOPMENT

"THE NON-MARKET ECONOMY" ISSUE IN INTERNATIONAL TRADE IN THE CONTEXT OF WTO ACCESSIONS

Report prepared by Alexander Polouektov

CONTENTS

Executive summary

The accessions of transition economy countries to the World Trade Organisation (WTO) that have occurred since 1995 have brought to the forefront an issue that was thought to have been definitively resolved upon the outcome of the Uruguay Round that of the heterogeneous nature of the rights and obligations of trading nations within the multilateral trading system. Not only does this situation put mutual trade relations among countries into a complicated legal context, but also for decades it legalized discrimination against those countries that for one reason or another did not share similar sets of multilateral obligations. The Marrakesh Agreement Establishing the World Trade Organization became a historical event in the sense that it established a common pattern of multilateral disciplines binding on all WTO Members, as well as obligating them to ensure the conformity of their legislation with the provisions of multilateral agreements.

However, the process of transition economies accession to the WTO has revealed a number of disturbing features that may well compromise both their participation in the WTO and the credibility of the multilateral trading system as a whole. The looseness of the WTO provisions dealing with accessions makes acceding countries hostages to the requirements, sometimes excessive, of the existing WTO Members. Moreover, in contravention of the obligations under the WTO, a number of Members retained ("grandfathered") or adopted anew the "non-market-economy" concept, thus deviating from the language of the Uruguay Round Anti-Dumping Agreement. In order not to be challenged by transition economy newcomers under the WTO dispute settlement system and, most probably, lose their cases, Accession Working Party members allegedly have no other option but to impose discriminatory terms of accession. It can reasonably be expected that these terms will be drafted in such a way as to abrogate or, at least, curtail newcomers' rights to appeal to the Dispute Settlement Body. The ongoing process of China's accession to the WTO is a significant example of such tactics.

After a decade of market-oriented reforms transition economy countries have dismantled all essential elements of their former centrally planned economy. The fact that upon accession they are prepared to subscribe to all disciplines of the WTO system based on liberal values seems to be the best testimony to this fact. The preservation in the present circumstances of the long outdated "non-market-economy" concept constitutes an intentional disregard for world realities, which risks bringing back a "second class" membership and further erosion of the fundamentals of the multilateral trade framework. The concerns of WTO Members pertaining to alleged dumping practices by some acceding countries may well be addressed through regular provisions of the Anti-Dumping Agreement or through a specific multilateral decision within the framework of the relevant Committee. This report suggests possible negotiating strategies that acceding transition economies might pursue in order to obtain general non-discriminatory terms of participation in the multilateral trading system of the WTO.

INTRODUCTION

"Anyone who reads GATT is likely to have his sanity impaired." This uncompromising observation that prefaces a well-known study of the General Agreement on Tarifs and Trade[1] is perhaps the shortest yet most comprehensive testimony to a myriad of intricacies characteristic of the legal provisions governing international trade relations. With the emergence of new challenges posed by developments in the world economy, the scope of multilateral trade rules has also been expanding, thus further contributing to the complexity of the system. The more than 200 dispute settlement cases considered since the inception of GATT in 1947 suggest that quite a number of legal gaps persisting in the international trade setting, as well as differences in interpretation of some of its provisions, still need to be addressed.

The two rounds of multilateral trade negotiations (MTNs) that preceded the Uruguay Round of MTNs the Kennedy (1964-1967) and Tokyo (1973-1979) Rounds brought to the fore yet another perplexing issue, that of the deepening heterogeneity of rights and obligations of the GATT contracting parties. This problem did exist before, since the Protocol of Provisional Application of the GATT stipulated that Part II of the General Agreement applied to its contracting parties "to the fullest extent not inconsistent with existing legislation".[2] Otherwise known as the "grandfather clause", this provision was a factor that had for decades contributed to preserving the piecemeal nature of international trade rules. However, both rounds of negotiations contributed further to the difficulty in integrating countries with different patterns of social and economic development into a common framework of rights and obligations.[3]

The Kennedy Round established a phenomenon that was described as "fragmentation" of the rights and obligations of the GATT contracting parties.[4] The first multilateral Anti-Dumping Code which came out of the Round set in effect, a new precedent in the GATT framework, since only a handful of contracting parties, exclusively developed ones, chose to sign it and abide by its provisions. The trend towards the emergence of a "multi-tier" trading system of rights and obligations under the GATT was amplified further during the Tokyo Round of MTNs, which *inter alia* resulted in the negotiation of a number of separate agreements with very limited participation. Apart from substantially complicating the working procedures of GATT, such a path of development could only compromise the integrity of the international trading system, particularly as far as GATT Articles I[5] and III[6] were concerned.

The problem of the erosion of the balance of commitments within the multilateral framework was eventually addressed in the course of the Uruguay Round of MTNs. From the institutional perspective, an important achievement of the Uruguay Round negotiations consisted in filling a profound legal lacuna in the operation of GATT, namely that relating to the differing sets of rights and obligations of its members. The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) in its Article II:2 specifically provides *inter alia* that "the agreements and associated legal instruments included in

Annexes 1, 2 and 3…are integral parts of this Agreement, *binding on all Members*".[7] This provision is also often referred to as a "single undertaking". In other words, for the first time in the history of international trade a common denominator was found for relations among the nearly 100 nations, including developing economies and a number of transition economies, that participated in the negotiations and became founding Members of the World Trade Organization (WTO).

However, the trend towards dilution of the integrity of the trading system was not arrested at that point, whereas in the post-Uruguay Round period it acquired a somewhat peculiar pattern. As the number of acceding countries has been increasing in recent years it has become clear that the lack of multilateral understandings on a number of WTO provisions, including the accession process and some aspects of GATT Article VI, may well endanger the credibility of the WTO system. This concern is due to the fact that the text of Article XII of the WTO Agreement dealing with accessions replicates to a large extent the wording of the corresponding Article XXXIII of GATT 1947, providing no further details as to what principles should guide the accession process.[8] A similar preoccupation relates also to a long outdated Note 2 *Ad* Paragraph 1 of Article VI of GATT 1947 (hereinafter the second supplementary provision to Article VI), which, instead of being dropped, was automatically been transposed into a new Agreement on Implementation of Article VI of GATT 1994 (hereinafter ADA). Moreover, the way in which this provision has been implemented gives rise to serious doubts. As a result, even after their accession to the WTO, meaningful participation by transition economies in the international trading system is far from being ensured.

It would be unfair, however, to claim that the matter of accessions has been totally ignored. In a series of documents termed "technical notes", the WTO secretariat has outlined procedures for negotiations under Article XII and provided additional useful details on various specific issues.[9] But these are reference papers with no clear legal status and for that reason they do not have binding force either for the acceding countries or for WTO Members. By the same token, the WTO secretariat could not provide its interpretation of a number of undefined issues that had not been agreed upon by the WTO Members. Discussions on the process of accession that took place both in the WTO General Council and at the Ministerial Conferences in Singapore (1996) and Geneva (1998) did not add much to the predictability of the exercise. An observation by some Members pointing out that Article XII of the WTO, like Article XXXIII of GATT 1947, places no limits on the terms which are to be developed through negotiations with current Members seems reflect this concern.[10] In sum, unlike significant advances in many other areas covered by the GATT/WTO provisions, those pertaining to the accession process, as well as to the second supplementary provision to Article VI, remain almost as vague as they were 30 or 40 years ago.

Meanwhile, with a massive wave of transition economies – Eastern European and Asian – currently acceding to the WTO, there have been clear attempts to take advantage of the looseness of these two provisions of the WTO Agreement. On the pretext of allegedly inadequate development of market relations in their economies, acceding countries, especially newly independent states and China, are confronted with Members' efforts to

impose on them specific terms of accession which may substantially impair their full-fledged participation in the WTO system. Such a development would effectively re-establish a "second class" category of WTO Members, as was the case for most developing countries before the Uruguay Round negotiations.

The general purpose of this report is to discuss certain aspects of the past that, like the ghost of Hamlet's father, hang over the WTO accession process of quite a number of transition economies. More specifically, the report will focus on a number of inconsistencies in the treatment by many WTO Members of the "non-market-economy" issue. With the entry into force of the WTO, the principles and norms of the international trading system have become so elaborate and comprehensive that the implementation of the respective commitments *in their entirety*, as required by Article II:2 of the WTO Agreement, can be achieved only by a country whose economy is substantially driven by market forces. The WTO accession process as it has evolved in recent years can guarantee that not a single detail of the acceding country's trade and economic regime will escape the attention of the Working Party members. Moreover, all crucial provisions become acceding countries' commitments enforceable through the WTO dispute settlement procedure. In return, however, newcomers must have assurances that their eventual membership of the WTO will not be compromised by discriminatory obligations that would go beyond the established legal provisions of the WTO Agreement and its annexes.

Accordingly, section I of this paper deals with the origins of the "non-market-economy" (NME)[11] versus "market-economy" issue in the international trade policy setting. It also provides a brief overview of specific provisions in the Protocols of Accession of a number of Eastern European countries that acceded to GATT in the 1960s and 1970s. Section II focuses on a peculiar feature characteristic of many WTO Members' implementation of a provision in the ADA dealing with centrally planned economies. Deviations from the language of the Agreement and replacement of a clearly defined wording concerning special cases of normal value determination by a subjective concept of "non-market economies" that took place in contravention of WTO obligations provide cause for concern. Section III analyses problems that arise for the acceding countries and for WTO Members owing to the preservation, or new adoption, of the NME concept in the national legislation of a number of WTO Members. The final section presents conclusions outlining policy implications and provides recommendations for the transition economies that are currently acceding to the WTO.

I. ORIGINS OF THE "NON-MARKET ECONOMY" ISSUE IN THE MULTILATERAL FRAMEWORK

A. GATT as a market-based institution

GATT was designed *by* market economies and *for* market economies. As a consequence, initiatives by State-controlled economies to accede to the General Agreement in the early years of its operation could only produce unusual results and policy implications. As will be discussed below, they did indeed do so.

The market-based nature of the GATT stems from the drafting history of the so-called Havana Charter that was to be the legal foundation of the abortive International Trade Organisation (ITO) and from the early years of operation of GATT. As has been extensively discussed elsewhere,[12] self-interested policies such as import quantitative restrictions, prohibitive tariffs, the manipulation of currency exchange rates and frequent changes in import regulation pursued by many Governments in the 1930s had dramatic consequences for international trade and the world economy in general. In addition, during the Second World War the necessity of strictly controlling imports and exports resulted in an expansion of State trading in countries that normally based their economy on private enterprise. Driven by those developments, at the first session of the United Nations Economic and Social Council (ECOSOC) in 1946, the United States put forward a "Suggested Charter for an International Trade Organisation" that was to deal with the factors impeding international trade, including State trading. The "Suggested Charter" served in fact as the basis for negotiations in the Preparatory Committee for the ITO that, by 1948, finally led to drafting of the Havana Charter.

At the ECOSOC's session the Soviet Union voted for the establishment of the ITO, and it was reasonably assumed that it would take part in the related negotiations on the draft Charter. Accordingly, the section on State trading of the "Suggested Charter" initially had three articles, one of which was entitled "Expansion of Trade by Complete State Monopolies of Import Trade". The article provided that a State-trading country member should negotiate with other member countries

> "an arrangement under which, in conjunction with the granting of tariff concessions by such other Members, and in consideration of the other benefits of this Chapter, it shall undertake to import in the aggregate over a period products of the other Members valued at not less than any amount to be agreed upon".[13]

The proposed methodology for dealing with countries that had a State foreign trade monopoly (in effect, the Soviet Union, the only such country at that time) was not new. This condition was similar to that which had been included in the bilateral trade agreement between the United States and the Soviet Union in 1935. It provided that in exchange for most-favoured-nation treatment the Soviet Union would accept an obligation to place orders in the United States worth at least $30 million a year.[14] A similar provision was contained in

a trade agreement of 1927 between Latvia and the Soviet Union. However, since the Soviet Union, apparently for political reasons, repeatedly declined to participate in the deliberations of the Preparatory Committee, and did not show any interest in the parallel negotiations that led to the formation of GATT, this provision was eventually dropped from the text of the General Agreement. In the course of the Preparatory Committee deliberations it was also considered appropriate to reduce the State-trading provisions concerning "mixed economies" that to a large extent were a passing phenomenon of the post-war period. Eventually, the General Agreement preserved only one of the proposed articles, which became Article XVII obligating State-trading enterprises to abide by the general principles of non-discriminatory treatment.[15] As a result of these developments, the main body of the General Agreement does not have any legal provisions aimed exclusively at dealing with the peculiarities of centrally planned economic systems.

B. The only GATT reference to State-controlled economies

In the GATT Review Session of 1954-1955 consideration was given to a proposal by Czechoslovakia to amend sub-paragraph 1(b) of GATT Article VI[16] to deal with the special problem of establishing comparable prices in the case of a country whose trade was operated by a State monopoly. GATT members were not prepared to amend Article VI in this respect, but agreed on an interpretative note to address the case.[17] The note is no more than a statement of fact providing no specific indications as to what course of action investigating authorities should take in dealing with centrally planned economy dumping. In practice, the issue was left to the discretion of the national administrations. As subsequent developments have shown, the room for flexibility has been widely used.

Admittedly, there may have been solid grounds for adopting such a decision, since the system of central planning, by completely isolating the country from the world economy, was by its very nature suited to low-cost exports to external markets.[18] By the same token, the provisions of Article VI:1(b) could not be reasonably used when dealing with such cases. However, nowadays, almost 50 years later, it is hard to understand the rationale behind the Czechoslovak proposal, since nothing seemed to immediately threaten the country's interests. The first anti-dumping legislation of the European Community (EC) came into being only in 1968, and in the United States the first traceable investigation involving dumping from a centrally planned economy (*Bicycles from Czechoslovakia*) took place in 1960.[19] In any event, this initiative reaffirmed the wisdom that "the road to hell is paved with good intentions". When raising the issue, Czechoslovakia presumably wished to elaborate on this missing aspect of GATT Article VI. As it turned out, however, a simple recognition of the "inappropriateness" of a strict comparison with domestic prices in State-trading countries has over the years evolved into a trade policy instrument that is not only absurd from the economic viewpoint, but also eminently unfair. Remote policy implications have long outlived their causes.

In this context, it is interesting to note that State-trading countries were not alone in creating difficulties for normal value determinations related to anti-dumping procedures. For

various reasons, including high domestic costs, balance-of-payments difficulties and import substitution schemes, home market prices in developing countries for domestically manufactured products were higher than those obtainable in the export markets. In order to be able to export they had to "dump" without necessarily intending to cause injury to domestic producers of the importing country. It was therefore proposed that, as far as developing countries were concerned, the determination of normal value would be based on comparable prices of products when exported to any third country.[20]

This draft decision did not materialize. However, during the Tokyo Round, negotiators, when drafting the 1979 Anti-Dumping Code, recognized that "special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code".[21] The provision was elaborated further in a noteworthy decision by the GATT Committee on Anti-Dumping Practices concerning the application and interpretation of the 1979 Agreement with respect to developing countries. It provided *inter alia* that

"Due consideration should be given to all cases where, because special economic conditions affect prices in the home market [of developing countries], these prices do not provide a commercially realistic basis for dumping calculations. In such cases the normal value…shall be determined by methods such as a comparison of the export price with the comparable price of the like product when exported to any third country or with the cost of production of the exported goods in the country of origin plus a reasonable amount for administrative, selling and other costs".[22]

The "special regard" provision was also retained in the Anti-Dumping Agreement of the Uruguay Round,[23] whereas the content of the term has apparently changed. The Committee's decision referred to above, while not officially dropped, seems to have had limited application in practice. Scrutiny of the WTO periodic notifications on anti-dumping practices suggests that, at least as far as this aspect of the normal value determinations is concerned, developing countries are generally treated the same way as developed country Members. Such an approach does not appear to be contrary to their interests, as no objections have ever been observed in this regard. At present, they would rather see their interests better served by increasing the *de minimis* thresholds, introducing progressive duties in the case of developing countries, training of national exporters, and so forth.[24]

Thus specific problems of developing countries with price comparisons that existed in the 1970s were addressed and a pragmatic multilateral solution to the issue was found. This is not yet the case, however, for countries deemed to be NMEs, whose export trade is still subject to an archaic clause and resulting arbitrary trade policy measures.

C. Precedents that have emerged at the interface of two economic systems

1. Polish case (1967)

Poland was the first "orthodox" centrally planned economy to become a GATT contracting party in 1967.[25] The Polish precedent established in the course of negotiations is particularly instructive. Not only did it foreshadow the pattern of further centrally planned economy accessions, but also, through exceptions to the general GATT rules, it provided a multilaterally defined set of complementary requirements which contracting parties felt would guarantee reciprocity on the part of Poland. In other words, these additional provisions in the Polish Protocol may well be regarded as a set of features that distinguished an "extreme" case of a NME, which at the time of accession did not even have a customs tariff, from its market economy partners. The following special provisions are characteristic of Poland's instruments of accession:

1. Poland undertook to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent annually.
2. In the case of a sudden increase in imports from Poland into the territory of a contracting party which caused serious injury to domestic producers, that contracting party, after consultations, was free to restrict imports from Poland to the extent and for such time as was necessary to prevent or remedy the injury.
3. Contracting parties applying quantitative restrictions which were inconsistent with Article XIII of the General Agreement could continue to apply them provided that the discriminatory element in these restrictions was (a) not increased and (b) progressively relaxed. A date for the termination of application of such restrictions was to be fixed in further consultations.
4. Poland reserved its position with respect to the provisions of Article XV:6 of the General Agreement, which stipulates conditions to be met in exchange matters by a contracting party not a member of the International Monetary Fund (IMF).
5. The relevance of Note 2 *Ad* Paragraph 1 of GATT Article VI in its entirety concerning imports from State trading countries was reaffirmed. Also, it was established that as the normal value for a product imported from Poland a contracting party could use the prices which prevailed generally in its home market for the same products. Alternatively, a value for that product constructed on the basis of the price for a like product originating in another country could be used.[26]

A detailed analysis of the evolution of Poland's trade relations with GATT contracting parties is beyond the scope of this study, but a few observations should be made.

The implementation by Poland of its terms of accession was to be examined in the course of annual consultations (which was yet another exception to the general rules). Over the 10-year period that consultations were held, Poland's imports from the GATT countries increasingly exceeded its related exports. Already in 1972, i.e. only five years later, the first signs of balance-of-payments problems became apparent. This imbalance seemed to result

from *inter alia* the rigid (and increasing) import commitment entered into by Poland, on the one hand, and undefined prospects for an increase in its related exports, on the other. The maintenance, during the 10 years of the Working Party deliberations, of quantitative import restrictions by a number of GATT contracting parties additionally aggravated Poland's balance-of-payment problems. Despite optimistic reports by the Polish delegations to the Working Party on Trade with Poland, by 1977 the balance-of-payment situation had allegedly got out of control, since no further consultations were ever held. In what seems to be a tacit recognition of the failure of the Polish experiment the meetings of the Working Party were abruptly discontinued. This abnormal situation continued for quite a number of years until Poland, by signing the WTO Agreement and its Annexes, in 1995 became a founding Member of the WTO. Its new status has *de facto* superseded the disastrous document which *de jure* arguably still applies.[27]

Two more comments are pertinent. First, the Polish terms of accession repealed a MFN safeguard clause under GATT Article XIX with respect to Poland and introduced selective safeguards permitting contracting parties to apply import restrictions solely against Polish goods. Second, by clarifying the procedure to be followed in the normal value determinations in the case of Poland, GATT contracting parties for the first time jointly agreed on the notorious "surrogate country" methodology in anti-dumping investigations, although its first application at the national level dates back to 1960.[28] The provision became a glaring example of how the absurdity of the centrally planned economic system was matched by an equally absurd economic approach.[29] Forty years later it is still a major headache for transition economy exporters. It must be admitted, however, that despite multiple attempts by the United States authorities to devise an economically sustainable approach to the issue of NME dumping, no workable alternatives emerged at that time.[30] Recent initiatives by the EC seem to reflect continuing efforts to deal with this problem in a pragmatic manner.[31]

2. Romanian case (1971)

When it was in the process of joining GATT, Romania drew one lesson from the Polish experience. In its quantitative import obligation, Romania committed itself "to increase its imports from the contracting parties as a whole at a rate not smaller than the growth of total Romanian imports provided for in its Five-Years Plans",[32] rather than to increase imports at a fixed rate. In all other substantive provisions the Romanian instruments of accession almost literally reproduced those of Poland. It is not surprising that the general pattern of Romania's membership of GATT largely resembles the Polish one. The last meeting of the Working Party on Trade with Romania was held in 1988 against the background of Romania's complaints about its serious monetary and financial problems and a large number of quantitative restrictions maintained by GATT contracting parties still in place.

3. Hungarian case (1973)

Unlike Poland and Romania, in 1968 Hungary introduced a customs tariff. By the time of its accession it had also taken the first steps towards relaxation of the State grip on foreign trade relations. These initiatives helped it to escape quantitative import commitments undertaken by Poland and Romania and to accede to GATT on the basis of tariff concessions. However, the substantive special provisions, i.e. the selective safeguard clause and the "surrogate country" methodology in anti-dumping investigations, remained untouched in its Protocol of Accession[33]. Again, as revealed by the minutes of the Working Party on Trade with Hungary, *sixteen years* of its deliberations were essentially devoted to discussions about when GATT contracting parties, particularly the European Community, would lift their quantitative import restrictions inconsistent with GATT Article XIII. According to an authoritative source, much of this abnormality was due to political reasons. The discriminatory quantitative restrictions against Hungary and Poland were only eliminated soon after the collapse of the Berlin Wall in 1990.[34] The elimination of quantitative restrictions on industrial goods was additionally secured within a renewed and strengthened set of rights and obligations of the WTO.

As to Bulgaria, its efforts in the 1980s to accede to GATT as a contracting party were blocked by the United States, although it did participate in the Tokyo Round negotiations as an observer. Only after Bulgaria had begun profound market-oriented reforms in the early 1990s was its application to join accepted. After a full-scale accession process, it became a Member of the WTO in December 1996.

Thus, in a pragmatic approach to the facts of life demonstrated over the past decades, GATT contracting parties have developed a number of special provisions that, in the absence of a multilateral definition of what a "market economy" is, might be taken as "gauges" of consistency with the GATT fundamentals. While the case of Yugoslavia was somewhat special because of strong political motivations on the part of GATT members with regard to its accession, it is noteworthy for the non-discriminatory terms of participation in the GATT system that the country obtained many decades ago while officially retaining a non-market ideology. The other extreme was Poland, which had to accept the most rigid and inquisitorial set of special accession terms of all. Yet despite differences in their terms of accession, what the three countries - Poland, Romania and Hungary - had in common was a "buffering mechanism",[35] i.e. a "selective" safeguard clause and a specific reference to the second complementary provision to Article VI, including a clear-cut indication concerning the methodology of normal value determinations. It is quite obvious that both elements were introduced as necessary and sufficient means of combating the trade-distorting features of centrally planned economic systems referred to at the beginning of the second complementary provision to Article VI, namely a State monopoly of foreign trade and State-controlled prices. The special safeguard provision was to deal with possible sudden inflows of imports from those countries due to planning decisions taken by State bodies. The "surrogate country" clause had to address the price comparability issue. In brief, these provisions were allegedly viewed as the only absolutely necessary prerequisites for

integrating centrally planned economies into a market-based structure of GATT. No other strings were attached at that point.

II. TRANSITION ECONOMIES VIEWED FROM THE NATIONAL PERSPECTIVES OF WTO MEMBERS

A. The ADA: a particular pattern of legislative action by WTO Members

As discussed above, the Uruguay Round of MTNs made a great leap forward in an attempt to set up a "level playing ground" in international trade relations. A specific provision of the WTO Agreement commits each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".[36] Reservations in respect of any provision of the WTO Agreement were generally prohibited with the exception of those provided for in particular multilateral agreements.[37] By the same token, the "grandfather clause" was discontinued as well. The period 1994-1995 must have been a hard time for national Parliaments, which had to revise, or adopt anew, dozens of laws in order to make national legal systems consistent with the requirements of the WTO Agreement and its Annexes, including a revised Anti-Dumping Agreement. Unlike for example GATT 1994,[38] the Anti-Dumping Agreement does not provide for any reservations, which implies that if not the *the letter*, at least *the spirit*, of the Agreement had to be entirely accommodated within the national legal systems of the WTO Members.

In the course of the Uruguay Round, the 1979 Agreement on Anti-Dumping was substantially reworked in order to make it more operational. In particular, revisions were made with respect to more detailed rules on the methods of determining dumping, the appropriate criteria in injury determinations, the procedures to be followed in conducting investigations, and the implementation and duration of anti-dumping measures. The amended agreement also elaborates on the role of dispute settlement panels in disputes relating to anti-dumping actions.

Yet the second supplementary provision to Article VI remained unattended to and, unchecked, was transferred by negotiators to a new text and linked to Article 2.7, which reaffirms its validity.[39] Thus the relevant obligation of the WTO Members is to apply a special methodology, namely a "surrogate country" approach, to "*a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State*".[40] To all intents and purposes, this would logically imply that normal value determinations with respect to countries whose economic systems no longer meet these criteria must be addressed through the regular provisions of the ADA concerning this issue, namely Articles 2.1 to 2.6.

However, a fundamental problem with the implementation of this provision as it stands results from the fact that in today's world are practically no countries that would qualify under the prescribed criteria. A handful of self-isolated regimes cannot be taken into serious consideration for this purpose. While not addressed in the multilateral framework of the Uruguay Round negotiations, not perhaps without an ulterior motive, this dubious provision had therefore to be dealt with at the national level.[41] In the face of an apparent

discrepancy between the obligations under Article 2.7 of the ADA and world realities, national administering authorities, while accommodating the Uruguay Round results, could not but give thought to possible solutions. In compliance with Article XVI:4 of the WTO Agreement the legal course of action on this issue could be to make an explicit reference to a category of countries to which, in accordance with the second supplementary provision to Article VI, special normal value determination provisions could be applied. The methodology to be applied in such cases would be left to the discretion of the respective legislative and administering authorities, since this aspect is not provided for in the Agreement. Another possible solution would be to drop this provision altogether, which would not meanwhile sacrifice the trade-remedy intent of the Agreement. However, the table below drawn up on the basis of a WTO source that lists the most active users of anti-dumping[42] suggests that, as far as this aspect of the ADA is concerned, the ingenuity of WTO Members generally went much further.

Table 1
Implementation of Article 2.7 of the ADA
in the national legislation of selected WTO Members

Country/reference (G/ADP/N/1/…) series	Exact reflection of the essence of Article 2.7 of the ADA	Substantive deviations from the essence of Article 2.7, including the introduction of the "non-market-economy" concept
Argentina (…/ARG/1/Suppl.2)	Yes	
Australia (../AUS/2 and Suppl.1)	Yes; feasible transitional provisions added	
Brazil (…/BRA/2)		Yes
Canada (…/CAN/3)	Yes	
Chile (…/CHL/1)	No provision found	
Colombia (…/COL/1)	Yes	
Ecuador (…/ECU/2)	Yes	
Egypt (…/EGY/2/Rev.1)		Yes
EC (…/EEC/2)*		Yes
India (…/IND/2/Suppl.2)		Yes
Indonesia (…/IDN/2)	No provision found	
Israel (…/ISR/1)		Yes
Korea, Rep. of (…/KOR/5)		Yes
Malaysia (…/MYS/1/Add.1)		Yes
Mexico (…/MEX/1/Suppl.1)		Yes
New Zealand (…/NZL/2)	No provision found	
Peru (…/PER/1/Suppl.2)		Yes
Philippines (…/PHL/1)	No provision found	
Poland (…/POL/2)		Yes
Singapore (…/SGP/2/Suppl.1)		Yes
South Africa (…/ZAF/1)		Yes
Thailand (…/THA/4)		Yes
Trinidad and Tobago (…/TTO/1/Corr.1)	Yes	
Turkey (…/TUR/3)		Yes
United States (…/USA/1)		Yes
Venezuela (…VEN/1)	Yes	

* Amendments to this document (Regulations No. 905/98 and No. 2238/2000) that specifically deal with transition economies, including WTO Members, are not reflected on the WTO *Documents-On-Line* website (http://docsonline.wto.org) as notified to the WTO.

As table 1 shows, a few countries appear not to have inserted a relevant provision at all. For some of them this fact may be reflective of a "common sense" approach, as well as the reluctance of the relevant authorities to overburden both normative documents and operational practices with the long outdated clause. For example, normal value determinations in anti-dumping investigations that were initiated by Chile in the late 1990s against imports of various steel products from the Russian Federation and Ukraine were

based on the home market prices in those countries. Indonesia and the Philippines seem to have taken a similar course of action. As to some other countries (e.g. New Zealand), the decisions concerning this ambiguous provision could have been taken bearing in mind the very low probability of ever using it owing to the volume and structure of mutual trade with potentially targeted countries.

Another small group of countries apparently opted for a more cautious, "legalistic" approach by introducing the relevant language of the ADA into their national legislation. The legal standing of these countries with respect to the fulfilment of the Article 2.7 obligations is unquestionable. However, the way in which the implementing administrative regulations correlate with the legislation is still to be tested in practice. This author's experience demonstrates that Russian steel mills had a hard time when trying to obtain in 1999 a "market-oriented industry" status in Canada.[43] Although that status was eventually granted, many requests for information appeared to have been made spontaneously and went beyond what is laid down in the relevant provisions of Canada's Special Import Measures Act. The volume of information requested was all the more surprising given the fact that Canada is a member of all Accession Working Parties, including that of the Russian Federation.

However, the general picture drawn from table 1 is most unfortunate. The overwhelming majority of the countries scrutinized chose to abandon the multilaterally adopted language of the Agreement and to introduce a unilateral interpretation of this sensitive provision. The transformation of the underlying features of that provision that occurred on the way from the internationally agreed instrument to national implementing pieces of legislation seems to be fraught with potentially troublesome problems both for the acceding countries and WTO Members. First, the WTO system is a set of legal obligations binding on its members and, as such, is supposed to operate on the basis of clear-cut agreed definitions, rather than unilateral subjective appraisals. Besides, one of the stated objectives of the Uruguay Round negotiations was to strengthen the role of GATT and improve the multilateral trading system based on the principles and rules of GATT.[44] As it turns out, new, ambiguous provisions have emerged instead. Second, there appears to be large-scale non-compliance by the WTO Members with one of their multilateral commitments. The fact that this non-compliance has not been challenged in the Dispute Settlement Body is perhaps explained by the WTO Member's lack of interest in the matter so far. Third, apart from a few cases discussed below, it is far from clear what requirements transition economies must satisfy in order to qualify for non-discriminatory treatment in anti-dumping procedures. Given generally very tight time-frames for providing replies to questionnaires, such a situation leaves the responding parties eventually no opportunity to defend their interests in a meaningful way. Fourth, even if these criteria are known in advance they are worded in such a general manner that it is next to impossible to meet them. Fifth, the legislative action in question is certain to put at risk the accession processes of quite a number of transition economies, since they do not seem prepared to accept easily what goes beyond the existing legal framework of the WTO. This would be a development that neither side presumably wishes to take place. Finally, such a massive shift towards a unilateral approach has nothing to do with "commercially viable terms" of accession, which are often referred to in the

Accession Working Parties. While being "commercially viable", these terms must still be within the legal framework of the WTO.

While most criteria for qualifying for "market-economy" status are either not defined or hard to find in the implementing authorities' files, a few are readily available. The situation looks even more desperate for the transition economies that are in the process of accession if the related factors that are to be considered under different national normative documents are compared within one table (table 2).

As detailed elsewhere,[45] in its decisions concerning the NME issue the United States Department of Commerce (DOC) has developed a number of other requirements that complement the set of five basic criteria (table 2, left-hand column). They fall within the purview of item (6), "Other factors". In such an investigation the DOC would generally examine the existence and operation of anti-monopoly laws and security exchange, as well as the existence of customs and anti-dumping laws, since it considers these important tests for the purposes of granting "market-economy" status.

It would appear that the comparative list of the statutory national criteria raises more questions than it provides answers.

An overview of the factors listed in table 2 suggests that because of their macroeconomic nature many of them would more appropriately belong to the IMF country reports, including those prepared in the framework of Article IV consultations, rather than in the WTO context. The established precedents of centrally planned economy accessions to GATT discussed above demonstrate that even at that time the candidates were considered on the merits of the compatibility of their economic systems with the principles and rules of the organization they were joining, i.e. GATT. It is unclear why nowadays, when all acceding transition economies are members of the IMF and provide considerable volumes of various economic and statistical information in the framework of their accession processes, quite a number of criteria falling outside the sphere of the WTO become prerequisites for receiving non-discriminatory treatment within that organization. For example, Article XV of GATT 1994 explicitly recognizes the competence of the IMF in exchange matters, the employment issues would be more appropriate in the ILO context, and so forth. This is precisely the task of the Accession Working Parties - to ensure full (and enforceable) compliance of the newcomers' trading regimes with all the principles and rules of the WTO.

It is also worth noting that the criteria outlined in table 2 give the respective administering authorities practically unlimited latitude in taking relevant decisions. As a matter of fact, the lack of definitions of such critical terms as "extent", "significant", "degree" or "freedom" can effectively guarantee that no country or even a

Table 2
Comparison of criteria for qualifying as a "market economy" country under some selected legislative systems *

USA (G/ADP/N/1/USA/1) 10.04.1995	EC (Regulation No. 905/98) 27.04.1998	Mexico (G/ADP/N/1/MEX/1/Suppl.1) 31.01.2001	Malaysia (G/ADP/Q1/MYS/6) 11.01.2001
(1) The extent to which the currency of the foreign country is convertible into the currency of other countries	(5) Exchange rate conversions are carried out at the market rate	(1) The currency of the foreign country under investigation must be generally convertible in the international currency markets	No similar provision
(4) The extent of government ownership or control of the means of production	(1) D*ecisions of firms* regarding prices, costs and inputs, including of technology and labour, output, sales and investment*, are made* in response to market signals reflecting supply and demand, and *without significant State interference* in this regard, and costs of major inputs substantially reflect market values	(3) D*ecisions* relating to prices, cost and supply of inputs, including raw materials, technology, production, sales and investment, in the sector of industry under investigation, *must be taken in response to market signals without any significant State interference*	(1) The degree of private investment, in particular whether private companies hold the majority of shares and *whether government officials are on the board or in key management positions*
(5) The extent of government control over the allocation of resources and over the price and output decisions of enterprises	Same as above	Same as above	(3) Company control over sourcing of raw materials and inputs (4) Freedom to determine export prices and export quantities
(2) The extent to which wage rates in the foreign country are determined by free bargaining between labour and management	No similar provision	(2) Salaries in the said foreign country must be established through free negotiation between workers and employers	2) Freedom to hire and fire employees and to determine their salaries
(3) The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country	No similar provision	No similar provision	No similar provisión
No similar provision	(2) Firms have one clear set of basic accounting records which are independently audited in line with international	(4) The industry under investigation must have only one set of accounting records which it uses for all purposes and which is audited according	No similar provision

	accounting standards and are applied for all purposes	to generally accepted accounting criteria	
No similar provision	(3) The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs and payment via compensation of debts	(5) The production costs and financial situation of the sector or industry under investigation must not be distorted in relation to the depreciation of assets, bad debts, barter trade and debt compensation or other factors considered relevant	No similar provision
No similar provision	(4) The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms	No similar provision	No similar provision
(6) Such other factors as the administering authority considers appropriate	No similar provision	No similar provision	No similar provisión

* Figures in brackets indicate the order in which the criteria appear in the respective national laws. For ease of comparison this order has been changed, and emphasis (in the form of italics) added.

separate industry will ever pass through such a bureaucratic exercise until and unless a *political* decision is taken to revoke NME status. The generally politicized and untransparent nature of such a test seems to be emphasized by a statutory provision in Section 771 (18) of the United States Tariff Act of 1930 to the effect that " any determination made by the administering authority…shall not be subject to judicial review in any investigation conducted under [this subtitle]". Judging by periodic national Trade Policy Reviews prepared by the WTO Secretariat, the IMF country reports, the OECD Economic Surveys and the United States Trade Representative's annual Reports on Foreign Trade Barriers, far from all established "market-economy" countries would easily qualify under the requirements listed above. Some of them would have difficulties in passing such tests on the grounds of national State-trading or price-control practices, while others, because of extensive social safety nets, would allegedly fail under the "freedom to fire and determine salaries" test, etc.[46]. The case of many developing countries would be even more embarrassing.

B. AD/CVD practices of the United States and the EC concerning NME countries

It should be kept in mind that the "non-market" versus "market" economy issue is relevant and critically important in the context of proceedings involving price comparison, i.e. anti-dumping and countervailing duty investigations. For this reason it seems appropriate

to briefly consider some particular features of practices concerning NME countries by two major WTO Members, the United States and the European Communities.

1. United States

(a) Anti-dumping issues

According to Section 771 (18) (A) of the Tariff Act of 1930, a "non-market-economy" is a foreign country that in the opinion of the DOC "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise". The statutory factors to be considered in this respect are outlined in table 2.

Interestingly, Poland was the first "non-market" economy to enter GATT on draconian terms. It was also the first country in this category to have this status revoked by the DOC in 1993 in the course of an anti-dumping investigation into cut-to-length steel plate. The insights into the DOC's rationale behind this decision are explained at length in the Memorandum Regarding Respondent's Request for Revocation of Poland's NME Status ("Memorandum"),[47] which examines the Polish economy on all six counts.

(b) The extent to which the currency of the foreign country is convertible into the currency of other countries:

In the early 1990s the Polish zloty was convertible internally, but not externally, and so the DOC's concern was to find out whether the convertibility of the Polish currency was sufficient to "link Poland's economy to world markets". The Memorandum concluded that (i) internal convertibility, in conjunction with trade reforms, linked Poland's economy to world markets; (ii) external convertibility was not necessary in order to link Poland's economy to world markets; and (iii) there were legitimate policies underlying the Government's restrictions on the external convertibility of the zloty. The trade reforms identified by the DOC were (i) the abolition of the State monopoly on foreign trade; (ii) the grant of the right to all individuals to participate in foreign trade activities; and (iii) the establishment of the customs tariff as the main trade policy instrument.

(c) The extent to which wage rates are determined by free bargaining between labour and management:

The Memorandum indicated in this regard that (i) Polish workers had the right to create and associate in trade unions, which were independent of the Government and employers; (ii) private companies set wages without government interference; (iii) the wages for workers in the remaining State-owned enterprises were set in ad hoc negotiations between unions, management and the workers' councils; and (iv) wage agreements were not required to be registered with the Government.

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

The conclusion of the Memorandum was that firms or individuals of other countries could establish joint ventures with the Government, private firms or Polish individuals. It also noted the lack of minimum investment requirements and foreign exchange balancing requirements, as well as the lack of restrictions on the percentage of foreign ownership and on the repatriation of profits, dividends and capital gains. The established requirement providing that export earnings had to be converted into the national currency was viewed by the DOC as a "nuisance, not a constraint on foreign firms", because the zloty was convertible back into foreign exchange.

(1) The extent of Government ownership or control of the means of production:

In this regard the DOC examined (i) the size of the private sector; (ii) the extent of government control over State-owned enterprises; and (iii) the reasons for continuing government ownership of the bulk of Poland's means of production. The Memorandum noted that the private sector accounted for about half of the national economy and was growing. State-owned enterprises operated independently of government control, and this was evidenced by the variation in performance among such enterprises and the increase in their number of bankruptcies. It was emphasized that the Government retained ownership of the bulk of Poland's industrial assets for the purpose of ensuring transfer of those assets into private hands in an orderly manner. Another observation made in the Memorandum was the distinction between "the government's role as facilitator and fiduciary in the privatization and industrial restructuring process" and "the State's role in traditional non-market economies". In the view of the DOC, "government ownership in this case does not manifest itself in the type of State-control exercised in traditional non-market economies".

(2) The extent of government control over the allocation of resources and over the price and output decisions of enterprises:

The DOC concluded that the Polish Government no longer controlled the allocation of resources, and this was substantiated *inter alia* by the direction of and geographical variations in resource flows. The Government liberalized virtually all producer and consumer prices and granted to all persons the right to engage in all forms of economic activity. The right to and protection of private property was guaranteed.

(3) Other factors:

The Memorandum indicated that Poland's reforms were not limited to specific geographic regions, industries or economic sectors and emphasized their overall character.

It appears from the Memorandum that the DOC *wanted* to find the necessary arguments and interpret them accordingly in order to grant Poland "market-economy" status. Otherwise, on a number of counts the DOC's interpretation of facts could have been different. For example, an intangible distinction made in the Memorandum between

"government control, exercised to ensure an orderly transition" and "government control, as exercised in a traditional non-market-economy" seems to have become a decisive one for the DOC's conclusion that Poland was no longer a non-market-economy country.

The "non-market-economy" status of the Czech Republic and of Slovakia was revoked by the DOC at the beginning of the year 2000 in the course of anti-dumping investigations.[48] Both countries were granted this status retroactively, effective from 1 January 1998. Also, for both countries positive conclusions were based on the same argument of "preponderance of evidence related to economic reforms". Hungary was reclassified as a market economy country in February 2000 in connection with a "sunset" review of an earlier anti-dumping order.[49] Latvia, which joined the WTO in 1999, received market economy status in early 2001 in the course of an anti-dumping investigation.[50] On the contrary, despite numerous attempts, neither China nor Romania, which is a WTO Member, has succeeded in passing in the United States even a "market-oriented-industry" test.[51]

(e) Countervailing duty issues

According to the provisions of the WTO Agreement on Subsidies and Countervailing Measures, in order to find the existence of a countervailable subsidy (1) there must be a financial contribution by the Government; (2) the subsidy must be directed at specific industries or sectors or at exports, i.e. it must be "specific", rather than being generally available; and (3) there must be a net benefit to the recipient and the conditions of normal competition must be adversely affected.[52]

Against this background, the DOC had to solve a difficult conceptual problem when in 1983 countervailing duty petitions were filed against textiles and apparel from China and steel wire rod from Czechoslovakia and Poland. The position eventually taken by the DOC was that in a non-market-economy environment, where the entire economy operated as a single enterprise driven by government financial intervention in accordance with a central economic plan, subsidies could not have an effect on the allocation of resources. In other words, the subsidies concept had no meaning outside the context of a market-based economic system.[53] This decision was upheld by the United States Court of Appeals for the Federal Circuit and later once again reaffirmed by the DOC, which refused to initiate a countervailing duty investigation against potash from a number of Eastern European countries. To sum up, according to an explicit legal precedent established in United States practice, "non-market-economy" status implies that subsidies cannot exist in such an environment and nor can countervailing duty investigations be initiated.[54]

2. European Communities

(a) Anti-dumping issues

Unlike the United States, which, according to its legislation, may, at least theoretically, make a "non-market" determination "with respect to any foreign country at any time",[55] the EC procedure in this respect seems to be more rigid and less transparent. The

special rules for the determination of normal value applicable to imports from "non-market-economy" countries first appeared in EC Anti-Dumping Regulation No. 1681/79 without however, providing any definition of the term. Instead, complementary regulations set out an explicit list of countries to which a special procedure was to apply.[56] In passing, it is interesting to note that the very first anti-dumping legislation of the European Communities - Council Regulation No. 459/68 and Commission Recommendation 77/329 - specifically indicated that the special procedure with regard to normal value determinations had to apply in respect of countries "where trade is on a basis of near or total monopoly and where domestic prices are fixed by the State",[57] i.e. it almost literally (a part from the omission of the word "all" dropped) reproduced the relevant text of the second supplementary provision to Article VI of the GATT.

Following the break-up of the Soviet Union and the start of liberal reforms in the countries of Central and Eastern Europe, the EC made substantial changes to its list of "non-market-economy" countries. However, because of the secretive nature of that procedure, it is not clear when exactly and according to what criteria this change occurred. It would appear, however, that political motivation played an important role in the taking of the decision, since no rationale for it has ever emerged publicly. The political component seems to be also emphasized by the fact that the list includes all the former republics of the former Soviet Union, except Latvia, Lithuania and Estonia, whose economic systems had nevertheless been subject to the same mechanisms of central planning as all the other constituent republics of the former Soviet Union. Thus a second traceable list of countries, to which special provisions for normal value determination were to apply, appeared in 1998 only when the anti-dumping Council Regulation (EC) No. 384/96 currently in force (Basic Regulation) was amended with a view to allowing producers from the Russian Federation and China to seek "market-oriented-industry" status.[58] The criteria to be satisfied by producers in such an exercise are laid down in table 2. In other words, while not deleting the Russian Federation and China entirely from the list of "non-market" economies, the EC allegedly made an attempt to relax, by introducing an "ad hoc market-economy regime", its anti-dumping practices with regard to separate industries operating in those two countries. As a consequence, in several cases Chinese exporters were successful in obtaining "market-oriented-industry" status under the new procedure.[59] As to Russian producers, to the knowledge of the author, they have so far not managed to make use of this opportunity. Other countries named in the regulation did not have that right and were unconditionally subject to special rules in the normal value determinations.[60]

A further development took place in October 2000, when the Basic Regulation was amended once again.[61] In comparison with the previous amendment the explicit list of "non-market-economy" countries has been reduced,[62] a few more countries having been added to the Russian Federation and China. These are Ukraine, Vietnam and Kazakhstan, as well as "any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation".

The latter is indeed intriguing in that it expressly provides that a country can join the WTO on general, "commercially viable" terms acceptable to WTO Members, i.e. it can

become a full-fledged party to this international institution and still not be treated as such on the basis of unilateral considerations. The far-reaching negative implications of such an approach for the integrity and smooth operation of the WTO system are hard to overestimate. In the legal sense such an Orwellian "all animals are equal, but some are more equal than others" stance is indeed unique. In the pre-Uruguay Round period differing patterns of mutual rights and obligations of the GATT contracting parties and resulting "discrimination" were predominantly due to the GATT "grandfather clause" on the one hand, and to the sovereign decisions by a number of GATT members not to join some of the Tokyo Round instruments on the other hand. However, it appears to be the first time in history of the GATT/WTO that members that have assumed all obligations under the WTO Agreement and its Annexes are openly denied their rights to non-discriminatory treatment. Future dispute settlement panels may well be expected to look into this and similar cases.

(b) Countervailing duty issues

Initially both anti-dumping and countervailing duty proceedings initiated in the EC were covered by one normative document, which *inter alia* provided that in the case of imports from "non-market-economy" countries the amount of any subsidy might be determined on an appropriate and not unreasonable basis by using the method provided for in the regulation to determine whether imports from an "non-market-economy" country are dumped.[63] The document was adopted as the EC implementing legislation of the 1979 Anti-Dumping and Subsidies Codes. Of interest is the fact that this provision appeared in the EC trade policy legislation two years after the United States Court of Appeals and the United States Department of Commerce had established a precedent of non-applicability of countervailing duty proceedings against non-market economies.

However, while accommodating the results of the Uruguay Round the EC apparently decided to follow the pattern of the Multilateral Agreements and adopted a separate legal instrument.[64] This normative document does not contain any mention of "non-market" economies in the context of countervailing duty investigations, a fact which appears to tacitly imply that, as in the United States, such cases are not to be initiated against countries that are on the EC "non-market-economy" list.

III. TRANSITION ECONOMY ACCESSIONS: OVERVIEW OF PRECEDENTS

A. Completed cases

Since 1995, the year in which of the WTO came into being, 14 more countries have become Members, including 10 transition economies.[65] In their Protocols of Accession all of them, i.e. Mongolia (17), Bulgaria (26), the Kyrgyz Republic (29), Latvia (22), Estonia (24), Albania (29), Croatia (27), Georgia (29), Lithuania (28) and Moldova (28), undertook numerous clearly defined commitments.[66]

Without going into details of each country's commitments it should be pointed out that in the course of the accession negotiations all transition economies undertook specific obligations, or reaffirmed those under the IMF Articles, on such issues as (1) foreign exchange and payments; (2) State ownership and privatization; (3) pricing policies; (4) trading rights; (5) anti-dumping, countervailing, and safeguard regimes; (6) export subsidies; (7) industrial policy, including subsidies; (8) State trading entities; and (9) transparency. In addition, members of the Accession Working Parties took note of the information they had received on such issues as national competition policies and investment regimes. While a number of particular details of the countries' commitments naturally differ, the general substance of the obligations is very similar in all cases:

Foreign exchange and payments:

As members of the IMF, the countries followed internationally accepted monetary rules, including the obligations of Article VIII of the IMF Articles of Agreement that provide for currency convertibility for current international transactions;

State ownership and privatization:

All countries were implementing large-scale privatization programmes and undertook obligations to provide periodic reports to the WTO on related developments;

Pricing policies:

All countries stated that, apart from State control over pricing policies of a number of natural monopolies, which had been listed in the accession documents, all other prices for goods and services were determined by market forces;

All price controls would be applied in a WTO-consistent fashion, and would take account of the interests of exporting WTO Members as provided for in Article III.9 of the GATT 1994;

Trading rights:

All countries reaffirmed that the former State monopoly in foreign trade had been abolished and that no restrictions existed on the right of foreign and domestic individuals or firms to import or export based on their registered scope of business;

Anti-dumping, countervailing, and safeguard regimes:

All countries committed themselves to apply any anti-dumping duties, countervailing duties and safeguard measures in full conformity with the relevant WTO provisions;

Export subsidies:

Nearly all countries stated that they either did not maintain or would not maintain from the date of accession any subsidies, including export subsidies, which met a definition of a prohibited subsidy within the meaning of Article 3 of the Agreement on Subsidies and Countervailing Measures, and would not introduce such prohibited subsidies from the date of accession; a few countries (e.g. Bulgaria and the Kyrgyz Republic) would have eliminated such subsidies by 31 December 2002, i.e. by the date provided for in Article 29 of the Subsidies Agreement;

Industrial policy, including subsidies:

Acceding countries confirmed that any subsidy programmes would be administered in line with the Agreement on Subsidies and Countervailing Measures and that all necessary information on notifiable programmes would be notified in accordance with the relevant provisions of the Agreement;

State trading entities:

All countries undertook that, after accession, they would observe the provisions of Article XVII of the GATT 1994, the WTO Understanding on that Article and Article VIII of the GATS, in particular abiding by the provisions for notification, non-discrimination and the application of commercial considerations for trade transactions;

Transparency:

Countries confirmed that from the date of accession all laws and other normative acts related to trade would be published in the respective Official Gazettes and that no law or other normative act would become effective prior to such publication;

All initial notifications required by any Agreement constituting part of the WTO Agreement would also be submitted upon entry into force of the respective Protocols of Accession.

The Accession Working Parties took note of these commitments, which thereby became clearly defined and enforceable obligations. When undertaking an obligation to comply, *inter alia*, with the anti-dumping provisions of the WTO the newly acceded transition economies had, like other WTO Members, to take a stance on how the second supplementary provision to Article VI should be dealt with in the national legislation. At the time of writing the legislation of Bulgaria, the Kyrgyz Republic and Croatia does not have any non-market-economy exceptions whatsoever, while Latvia's legislation mentions a "non-market-economy" provision in passing. Other countries have either informed the WTO secretariat that they are in the process of drafting such legislation, or have not yet submitted relevant notifications.

It should be pointed out that all transition economies that have acceded to the WTO so far have been required to regularly provide information on their privatization programmes, i.e. to make a commitment that is not envisaged in WTO Multilateral Agreements. In this sense such a requirement does not sit easily with the general most-favoured-nation clause, as no other WTO Members have a similar obligation. Yet this commitment appears to be more of a nuisance, which will contribute to the administrative burden of participating in WTO activities, rather than an obligation of substance. Moreover, in most cases this obligation is of

a temporary nature, which will terminate as soon as privatization programmes cease to exist. Apart from that, no other special rules provisions, including a "buffering mechanism", have been resorted to by the Accession Working Parties. In other words, by negotiating and accepting specific rules commitments relating to all WTO disciplines, including trading rights, pricing policies, State trading or subsidies, WTO Members explicitly recognized that the countries in question were no longer "state-trading countries" within the meaning of the second supplementary provision to Article VI. The legal implication of this fact must be unconditional application to the newcomers, if the case arises, of all general disciplines and practices stemming from the ADA.

However, while at the *multilateral* level nothing of substance appears to compromise these countries' equal rights participation in the WTO system, in the *bilateral* context the situation looks far more perplexing. The preservation in (in the case of the United States or the EC), or introduction into, as the case may be for many other WTO Members, the national legislation of the "non-market-economy" concept in disregard of the ADA language may either result in dispute settlement cases or lead to legal conflicts at the implementation level. In this connection, the examples of the United States and the EC seem to be particularly striking.

By holding negotiations on, and agreeing to, specific commitments on industrial and agricultural subsidies, the United States explicitly admitted that subsidies were a discernible and operating mechanism of the transition countries' economic systems, which, if unaddressed, might well become a distorting factor both in production and in trade. While Article 29 of the Subsidies Agreement dealing with the transition economies provides for a seven-year phase-out period for subsidy programmes otherwise prohibited, this grace period does not apply to countervailing duty actions with respect to other actionable subsidies. In any case, only a limited number of acceding countries reserved the right of using the permitted phase-out period, which expires in December 2002. For most other countries normal subsidy rules apply from the respective dates of accession to the WTO.

As discussed above, according to the precedents established by the Court of Appeals and DOC decisions, countervailing duty investigations are irrelevant in the "non-market" environment. If, in the meantime, a transition economy newcomer is caught applying prohibited or actionable subsidy programmes, the legal course of action that the United States administering authorities might reasonably take is highly unclear, since owing to their centrally planned economy past all countries in question (except Latvia) are deemed to be "non-market". To put the situation briefly, while admitting in the multilateral framework that exports of the WTO transition economy Members may be countervailed, at the national level the United States has no legal means to take an appropriate action. If such a case does emerge, an easier way out would perhaps to be examine it in a WTO dispute settlement panel.

The other feasible option, that of reconsidering the standing United States Court of Appeals and DOC relevant decisions, may well be potentially burdened with countervailing duty petitions against State subsidies conferred on the newly privatized enterprises of the countries in question, especially if their exports start to hurt. In this connection, one may

recall a WTO dispute settlement case where the DOC practice of countervailing subsidies that, as a result of privatization, had "passed through" from the Government to a privatized enterprise was successfully challenged in both the Panel and the Appellate Body.[67] It should be noted, however, that both parties to the dispute did agree that the privatization in question had been effected at arm's length and for fair market value, and was consistent with commercial considerations. In the circumstances of large-scale privatization programmes that have been taking place in all transition economy countries one can always find arguments to substantiate a claim to the contrary. Such United States industries as steel and chemicals producers, with their long and aggressive history of anti-dumping and countervailing duty complaints, will hardly resist the temptation to flood the DOC with countervailing duty petitions against subsidies allegedly dragged over from the State-controlled past of those countries. By the same token, any countervailing duty petition that with reference to respective multilateral subsidy obligations of new Members might be filed by an EC industry against "non-market" WTO Members would also become a legal puzzle for the EC authorities, since no provision exists in EC legislation to act upon such cases. In order to deal with the issue the EC will presumably have to first make changes in its list of "non-market" economies or, alternatively, resort to a dispute settlement procedure.

The situation pertaining to anti-dumping investigations in the cases of the United States and the EC seems to be no less dubious. Any anti-dumping investigation initiated against most newly acceded transition economies risks triggering a WTO dispute settlement case on the grounds of a challengeable normal value determination methodology unless a prior reclassification to a "market-economy" country takes place.

Table 3 provides examples of how newly acceded WTO transition economy Members are currently treated at the multilateral level of the WTO and in the national legislation of the United States and the EC.

Table 3
Status of newly acceded WTO Members transition economy under selected legal provisions

Country	Exceptions or reservations in the WTO Accession documents	Status under the United States AD legislation	Status under the EC AD legislation
Bulgaria	No	Non-market	Market
Mongolia	No	Non-market	Non-market
Kyrgyz republic	No	Non-market	Non-market
Latvia	No	Market	Market
Estonia	No	Non-market	Market
Albania	No	Non-market	Non-market
Croatia	No	Non-market	Market
Georgia	No	Non-market	Non-market
Lithuania	No	Non-market	Market
Moldova	No	Non-market	Non-market

Looking at table 3, one would strongly argue that its data would more appropriately belong to the "Alice in Wonderland" context, rather than to a binding framework of legal rights and obligations. Indeed, on the one hand, the countries in question are full-fledged Members of the WTO that must enjoy the privilege of non-discriminatory treatment stemming from membership of this international organization. On the other hand, owing to the *de facto* "grandfathering" in the United States and EC legislation of the non-market-economy provisions, transition economies' export trade remains hostage to unilateral policy decisions by their trading partners. Moreover, depending on the investigating authority and the criteria applied, the same country at the same time may well be considered both a "market" and an "non-market" economy. Given the number of WTO Members that in their anti-dumping legislation have adopted a similar approach, opposing conclusions that may well result from such an exercise cast serious doubts on the economic sanity of the non-market-economy concept. As discussed above, because of the lack of criteria known in advance and short time-lines, newcomers' rights to non-discriminatory treatment in the markets of many other WTO Members listed in table 1 are even less certain.

In any event, the situation that has already emerged when only a few small transition economies have completed their accession negotiations is certainly far from what was heralded when the WTO Agreement was signed in Marrakesh. Only a few years after a dramatic breakthrough had been achieved in eliminating most illegitimate causes of discrimination in international trade new imaginative obstacles to trade are being erected with the resulting "second-class" membership regaining ground. It is noteworthy that among those who are obviously trying to take advantage of the loose nature of the WTO accession procedures developing countries plays a role that should not be neglected. Yet the situation described above refers to relatively small economies with eventually no history of anti-

dumping cases against them and for this reason with presumably no particular interest in pursuing the issue of normal value determinations multilaterally. Perhaps this fact might explain why these countries were admitted to the WTO with only symbolic exceptions to the general rules. However, developments may become more troublesome in the case of such large countries as China, which concluded its accession negotiations in September 2001, or the Russian Federation, Ukraine and Kazakhstan, which are still negotiating their accession. All of them have substantial record of anti-dumping cases against them.

B. Pending cases

It is not the purpose of this paper to enter into a "chicken and egg" type of argument regarding the underlying causes of the great proliferation of anti-dumping investigations against some "non-market" economies. Some believe that, for a number of reasons, these countries' exporters are engaged in large-scale unfair trade practices, and that the non-market-economy methodology not only addresses imperfect market conditions in transition economies, but also helps to contain effectively the inflows of low-cost imports from these sources. There are opposing opinions, however, to the effect that the methodology provides administering authorities with nearly unlimited discretion to detect dumping where none exists and calculate related dumping margins at their will. Nearly every product imported from "non-market" economies is potentially vulnerable to dumping accusations and calculations of inflated dumping margins. Thus the methodology makes large transition economy countries, depending on the volumes and structure of their export trade, the primary targets of such actions.

Whatever the arguments, the fact is that, according to WTO sources, among countries subject to anti-dumping investigations in the period from January to June 1999 China occupied the third position, the Russian Federation was in fifth place and Ukraine was in the first dozen. In the period from 1 July 1999 to 30 June 2000 China moved up to second place, the Russian Federation and Ukraine remained in the first dozen, and Kazakhstan appeared in the table[68]. It appears that the above statistics may well foreshadow and explain the anticipated negotiating strategies of the respective Accession Working Party members.

Indeed, with the above developments in mind, it can be reasonably presumed that the "trade-harassment" effects of anti-dumping actions, additionally amplified by the non-market-economy methodology, may be a strong incentive for WTO Members to preserve the existing status quo with regard to the large transition economy countries even after their accession. Such a presumption is additionally substantiated by a large-scale shift away from the language of the ADA that was observed in a previous section. This implies that WTO Members will allegedly be seeking exceptions to the general terms of membership substantial enough to curtail the acceding countries' rights under the WTO dispute settlement mechanism. If these countries are admitted to the WTO with approximately the same set of rules obligations as was the case for small transition economies, this would risk depriving WTO Members of the opportunity of using the non-market-economy methodology, since,

because of the substance of the second supplementary provision to Article VI, any such action would inevitably end up in a WTO dispute settlement panel.

In this regard China's accession is particularly instructive, since having completed negotiations, it has in fact set out a precedent for a strategy that is likely to be pursued by WTO Members in respect of all other large transition economy countries. It may be recalled that in its bilateral Protocol with the United States, China, as far as the rules obligations are concerned, had to accept the inclusion of a "buffering mechanism" largely modelled on the special provisions that were imposed on Eastern European centrally planned economies a few decades ago. More specifically, this part of China's commitments gives WTO Members practically unlimited latitude to treat China as a non-market-economy for a 15-year period. Chinese prices or costs for the industry under investigation may be used, however, if "the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product"[69]. Bearing in mind the "market-economy" criteria outlined above, as well as the generally politicized nature of anti-dumping investigations conducted in the United States and other countries, the operational value of this provision is highly questionable.

Also, for 12 years China will be subject to a product-specific safeguard provision for products of Chinese origin. This mechanism will be triggered as soon as goods "are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products".[70] In sum, by negotiating such terms with China the United States seems to have achieved a number of important trade-policy goals. Apart from securing its domestic market against unwelcome trade developments, it also for quite a few years effectively precludes China from using the WTO dispute settlement mechanism for addressing the issue of non-compliance with multilateral obligations under the provisions of the WTO Agreement (Articles XVI:4 and XVI:5) and the ADA (Article 2.7). While China apparently will be able to address under the Dispute Settlement Understanding a number of other issues arising in an anti-dumping proceeding (e.g. initiation, injury determinations, "sunset" provisions), it is effectively precluded from challenging the issue of substance, namely the methodology of price comparisons.

A similar line of action seems to be taking shape with regard to a number of other acceding transition economies. As far as one can judge, these countries' negotiations are still mostly focused on bilateral market access issues and have not yet reached the stage of substantive discussions of the Accession Protocols provisions. In the meantime, special interest groups have been formulating their stance with respect to these candidates. For instance, in a special press release, the American Iron and Steel Institute (AISI), an influential trade association of the United States steel industry, set out its position in respect of the ongoing negotiations as follows:

> "We support the accession of Russia, Ukraine and other NMEs (such as China) to the disciplines of the WTO. This accession, however, must be on a non-discriminatory basis and on commercially viable terms…We also support

> the inclusion of language in proposed WTO accession protocols for Russia, China and other NMEs that would clarify that WTO members, including NAFTA countries, can continue to apply existing nonmarket economy antidumping rules to dumped imports from NMEs until the transition of these countries to fully open markets has been achieved"[71].

Judging by the Chinese case, these kinds of opinions have been expressed, which does not promise to make other countries' accession negotiations any easier. In sum, the background against which a number of large transition economy countries have to hold accession negotiations does not look propitious for an early achievement of general non-discriminatory terms of participation in the WTO system. Given that a large number of WTO Members have *de jure* moved to a unilateral interpretation of a WTO provision which is of paramount importance to acceding transition economies, there may be no painless solutions as far as the negotiation of a mutually beneficial balance of rights and obligations is concerned. The final section of this report will propose possible negotiating options that acceding transition economy countries may wish to consider.

CONCLUSIONS AND POLICY RECOMMENDATIONS

When acceding to the WTO each country obviously pursues its own policy objectives. The predominant aim of all acceding countries seems, however, to be to ensure stable and predictable conditions for their exports of goods and services in the markets of other countries. For transition economies membership of the WTO is also a powerful incentive to adapt their legislative and operational practices to international requirements, thus giving an additional impetus to the consolidation and fine-tuning of the market environment. Commenting on the issues of accession, the WTO secretariat staled as follows in its most recent overview of WTO activities:

> "Each accession has the same "win-win" quality for the WTO. The acceding party operates a more transparent and predictable trade regime, by assuming WTO obligations on goods, services, and intellectual property protection… It opens its markets for goods and services to its trading partners, and thus locks in reforms and gains the benefit of more competitively-priced imports. *In turn, the new WTO Member gains the right to similar rights and terms of access on the markets of other WTO Members*".[72]

This is what the accession process should undoubtedly be about. However, the real world is not as straightforward as that. The lack of whatever specific multilateral principles and rules that would put the accession process into any predictable perspective makes acceding countries hostages to the ingenuity of Accession Working Party members. As a result, all countries that have acceded to the WTO since 1995 had to undertake obligations which in a number of cases exceeded those of many WTO Members themselves. This tendency has already come to be known as "WTO plus".

For a number of still acceding transition economies the process promises to be even more challenging. Apart from negotiating market access commitments in goods and services, as well as rules obligations that would be sustainable economically and socially, they have to address yet another issue, that of the NME methodology in anti-dumping investigations. It appears that along with other incentives to join the WTO, this task was also placed on the priority list by many countries in transition when decisions to accede to the WTO were being taken. Such a goal was not regarded as wishful thinking, since it was set on the understanding that a country that joins the WTO and subscribes to all its disciplines is in return entitled to all relevant rights, including non-discriminatory treatment in anti-dumping investigations.

Both the developments observed earlier in this paper and the Chinese case may well discourage these expectations. It appears that much of what was eventually stipulated in the Chinese terms of accession is due to misgivings by a large number of WTO Members about their trade policy instruments being weakened and about remain defenceless in the face of a huge new Member. Judging by the fact that many WTO Members "grandfathered" or adopted anew the NME concept rather than sticking to the language of the ADA, such a

discriminatory scenario was thought of well in advance. This was done even at the cost of violating obligations under the WTO, since there was eventually no risk of being challenged under the dispute settlement procedure owing to the lack of members whose rights would be impaired or nullified by such legislative action. Unless these discriminatory terms had been negotiated with China, the NME concept would have certainly been called in question under the Dispute Settlement Understanding.

It would appear that against the current background outlined above possible solutions should be sought by acceding countries both at the multilateral and bilateral levels.

Multilateral framework

1. As a matter of principle, the issue of the second supplementary provision to Article VI must be put on the agenda for the eventual new round of MTNs. Among dozens of proposals on the clarification, modification or amendment of the ADA's provisions that were put forward in connection with the Ministerial Meeting in Seattle (1999), none dealt with the NME issue. This fact is presumably explained either by the lack of interest in the matter or the preference for bilateral solutions. As a consequence, this topic may not gather sufficient support. In addition, the United States resolutely opposes any possible reconsideration of the Agreement as such, fearing perhaps possible repercussions of such discussions for its anti-dumping practices. In any event, for the time being this is only a hypothetical assumption due to the lack of clarity on when a new round might be launched, as well as on whether interested transition economies will have become WTO Members by that time.

2. In the meantime, as far as transition economies are concerned the WTO Committee on Anti-Dumping Practices might wish to work out a decision along the lines of that referred to above in respect of developing countries, which was adopted in 1980. Such a move would have several positive policy implications.

First, the decision would give multilateral legality to the practices the WTO Members may wish to adopt thus arresting a further slide to unilateralism, discrimination and erosion of the international trade setting. The decision could be complemented by an understanding that the discriminatory elements in the national anti-dumping legislation of WTO Members would not be challenged by transition economy newcomers under the Dispute Settlement Understanding.

Second, such a decision may be drafted in such a way as to address concerns that WTO Members may still have with regard to transition countries' economic realities. For example, while, as a general approach, internal costs of production and prices should be taken as the basis for comparisons, in some particular cases (e.g. instances of barter operations) export prices to third countries will be used.

Third, such an initiative would effectively substantiate statements routinely made by WTO Members in support of transition economies' accession and constitute a practical contribution to early completion of the process.

Finally, this way of further action would make it possible to avoid a potentially deadlocked situation in the accession negotiations, which is quite likely to emerge given the current general background described above.

It must be pointed out, however, that the proposed option may create certain problems for a number of WTO Members that in their anti-dumping proceedings adopt a "black or white", "non-market or market" approach, for example the United States. Without a special amendment to Section 771 (18) of the Tariff Act of 1930 the DOC will have no means of implementing any eventual decision. It will need a legislative initiative on the part of the Executive in order to amend this provision of United States law. It may be recalled, however, that on several occasions attempts of this kind were made by the United States administration, including a proposal asking Congress to include an "economies in transition" provision in the implementing legislation for the Uruguay Round.[73]

Until a consensus on such an approach is reached, multilateral initiatives should be complemented through bilateral efforts. Since it may take quite some time to find a compromise solution, negotiations on the rules obligations, including the issue of normal value determinations, should be held in parallel with market access negotiations, and not be postponed until the last minute. In any event, the NME issue must be high on the agenda of bilateral negotiations. It is important that discussion of this issue be initiated by acceding transition economies, since Accession Working Party members will presumably be using delaying tactics. Attention should be focused on clarifying all points that may give rise to concerns among trade partners with regard to the price comparison methodology. Depending on the positions taken by Accession Working Party members and the amount of progress in bilateral contacts, the options set out below might be envisaged.

Bilateral context

In bilateral contacts acceding transition economies should strive to work towards forging a multilateral consensus within the Committee on Anti-Dumping Practices. A relevant draft decision by the Committee should be negotiated as early as possible.

Given the precedent of Poland's reclassification as a "market economy" considered above, the issue of reclassification should be explored with the negotiating partners. Analysis of the Accession Protocols points to a great similarity between the commitments undertaken by newly acceded countries and the criteria used, for example, by the United States in the Polish case. It would appear, however, that this issue may be resolved as a result of political "horse-trading" rather than by economic and technical arguments.

Because of a very fragile justification for the NME concept, acceding countries, as a precondition for continuing negotiations, may put forward a requirement to drop the NME concept and bring the relevant legislation into conformity with the WTO provisions. However, it must be realized that whatever solid grounds there may be for such a requirement, it will bring the negotiations to a halt for an indefinite period.

Acceding countries may agree to a short transition period for still being considered NMEs. This period should be used by WTO Members to bring their legislation into conformity with the obligations under the WTO Agreement and the ADA or, alternatively, to amend the relevant administrative regulations. If this agreement is not complied with, after the expiration of the transition period the countries concerned will be free to initiate dispute settlement cases. However, there is a risk that, as was the case for Eastern European countries in GATT, such a compromise may lead to the *de facto* perpetuation of the discriminatory treatment.

If the acceding transition economies are for whatever reasons compelled to accept a pattern of rules obligations along the lines of the Chinese precedent, they may wish to consider the adoption of “mirror” anti-dumping legislation or implementing regulations that would also contain NME provisions. In this case, a set of criteria for a country to be considered a “market economy” will have to be drafted with account taken of practices by other WTO Members.

In general, the situation that seems to be emerging in respect of large transition economies in connection with their accession to the WTO strikingly resembles the situation regarding the accession of Eastern European countries to GATT in the 1960s and 1970s. Those countries acceded on the understanding that illegal quantitative restrictions on their exports would be eliminated after they had become GATT members. Although such a provision was continued in the accession documents, this did not happen. Now, in anticipation of a number of large transition economies’ accession, new illegal discriminatory instruments have again been introduced. An old pattern of developments seems to be taking place in new historical circumstances. Decades ago the *economic* issue of eliminating illegal quantitative restrictions was eventually settled only after a dramatic *political* event had taken place. Today there is no Berlin Wall to come crashing down, although remnants of it exist perhaps in some people’s minds. In his “The Spirit of Law”, published more than two hundred years ago, Montesquieu made a remark to the effect that “commerce is a cure for the most destructive prejudices”. This observation, which was true two centuries ago, is even more so today in our globalizing interdependent world. The question of whether transition economies will eventually be allowed to enjoy full-fledged and non-discriminatory participation in the multilateral trading system remains open for the time being. The answer lies with the WTO Members, acting individually and jointly.

NOTES

[1] Senator Millikin on GATT, at the 1951 Senate Hearings, Senate Finance Committee, p. 92. Cited in: John H. Jackson *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill, 1969.
[2] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, para.1(b), "The Text of the General Agreement on Tariffs and Trade", Geneva, July 1986, p. 77.
[3] By 1963, the original GATT membership of 23 countries had increased by only a few new contracting parties, predominantly developed ones. Only one country, Japan, joined the General Agreement in 1955 after special accession negotiations not related to periodic rounds of tariff negotiations, as was the case for all other new members. A breakthrough, as far as a greater participation by developing countries was concerned, came only in 1963 with the start, at the Ministerial meeting held that year, of negotiations aimed at amending the General Agreement to introduce a Part IV. The Protocol Amending the GATT to Introduce a Part IV on Trade and Development entered into force in June 1966 (GATT, BISD, 13S/2).
[4] "Trade Policies for a Better Future" (Proposals for Action), GATT, Geneva, 1985, p. 21.
[5] "General Most-Favoured-Nation Treatment".
[6] "National Treatment on Internal Taxation and Regulation".
[7] "The Results of the Uruguay Round of Multilateral Trade Negotiations", GATT Secretariat, Geneva, 1994, p. 7 (emphasis added).
[8] "Any State or separate customs territory possessing full autonomy in the conduct of its external commerce relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto" (Marrakesh Agreement Establishing the World Trade Organization, Article XII)
[9] WTO document WT/ACC/1, 24 March 1995. See also technical notes on the amount of information to be provided on such issues as domestic support and export subsidies in agriculture (WT/ACC/4), policy measures affecting trade in services (WT/ACC/5), SPS and TBT issues (WT/ACC/8), and implementation of the TRIPs Agreement (WT/ACC/9).
[10] WTO document WT/ACC/7/Rev.2, 1 November 2000, p. 6.
[11] The term "non-market-economy" (NME) had a peculiar genesis. In the post-war period, while addressing the non-market phenomenon, both official documents and economic texts employed the term "State-trading countries". Apparently this was due to the overwhelming role that the State played in the foreign trade of a group of countries, predominantly Eastern European. Following progressive liberalization of foreign trade relations and a related dilution of an absolute State monopoly on foreign trade transactions, the emphasis of economists and politicians shifted to yet another feature of the "non-market" economic systems, namely central planning in whatever form. Accordingly, there emerged the term "centrally planned economies", which has to a large extent superseded the previous one. In the United States Customs Regulation of 1973 the term "controlled-economy country" appeared. At the same time, on the other side of the ideological divide the term "socialist country" was preferred. With the start of profound market reforms in nearly all centrally planned economies in the late 1980s and early 1990s, this phenomenon became universally known as "transition to a market economy". However, along with the rather definite notion of "transition countries" the term "non-market economies" has been used, which appears to have a philosophical connotation rather than an economic or legal one. It is the general purpose of this paper to argue that, as far as international trade relations are concerned, emotional appraisals must not be a substitute for legal and economic arguments.
[12] Jackson, Op.cit., paras. 1.3 - 1.7.
[13] "Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment", London, 1946, p. 59.
[14] "The Prospects of Soviet-American Trade Relations", Bulletin No. 39 of the Institute of International Finance of New York University, August 27, 1945.

[15] For a more detailed discussion origins of GATT, see generally: Jackson, Op .cit.; Karin Kock, "International Trade Policy and the GATT, 1947-1967", Almquist & Wiksell, Stockholm, 1969; Kenneth W. Dam, "The GATT: Law and International Economic Organization", University of Chicago Press, 1970.

[16] Sub-paragraph 1(b) of GATT Article VI provides the second- and third-best options in an anti-dumping investigation in a situation when a comparable domestic price is absent. These are: (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade; or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

[17] "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate." (Note 2 *Ad* Paragraph 1 of Article VI), "General Agreement on Tariffs and Trade, Text of the General Agreement", GATT, Geneva, July 1986.

[18] Alexander Polouektov, "This tenacious Russian dumping (in Russian), *EKO*, No. 6, Novosibirsk, 1991.

[19] Gary Horlick and Shannon Shuman, "Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws" in *The International Lawyer*, Vol. 18, No. 4, Fall 1984, p. 808.

[20] "Report of the Working Party on Acceptance of the Anti-Dumping Code adopted on 21 November 1975", BISD, 22S/29.

[21] BISD, 26S/184.

[22] ADP/2, Decisions of 5 May 1980, 27S/16, 17

[23] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 15 ("The Results of the Uruguay Round of Multilateral Trade Negotiations", Geneva, 1994).

[24] See, for example, "The Impact of Anti-Dumping and Countervailing Duty Actions on the Trade of Member States, In Particular Developing Countries. Main Issues and Areas of Concern that Need to Be Addressed in the Light of Concrete Experiences Presented by National Experts", Outcome of the Expert Meeting, UNCTAD (TD/B/COM.1/EM.14/L.1, 12 December 2000, p. 9).

[25] Strictly speaking, this statement is not entirely correct. Czechoslovakia participated in the deliberations of the Preparatory Committee and became a founding contracting party of GATT. The decision in 1948 by the new communist Government to ratify the General Agreement was, in fact, one of its first measures in the international field, and this decision was taken at a time when preparations had already been started for the setting up of a complete import monopoly. Interestingly, this did not dramatically affect the terms of its participation in GATT. Two traceable consequences of this fact were a mutual suspension of GATT obligations (Article XXXV) between the United States and Czechoslovakia in 1951 (BISD, Vol. II, p. 36) and a waiver granted to Czechoslovakia in 1955 of the provisions of Article XV:6, which generally obligates GATT contracting parties to become members of the IMF (BISD, 3S/43; BISD, 6S/28). The former was terminated only in 1992 (BISD, 39S/302). As to Yugoslavia, despite a communist Government in power, it joined GATT in 1966 on perfectly "market" terms, i.e. without any special reservations in the Protocol of Accession. This fact appears to be due to a much more "pro-market" orientation of its economic system that it sought to develop, including the abandonment of central planning. However, against the backdrop of East-West relations during the Cold War era, it may well be conceivable that, by agreeing to such terms, GATT contracting parties also wished to give "credit" to Yugoslavia's intended move from one type of economic system to another. For those reasons, the paper will focus only on particular cases of NME accessions to GATT.

[26] For Poland's terms of Accession to GATT, see BISD, 15S/46, 109

[27] "General Agreement on Tariffs and Trade 1994", para. 1(b) (ii), "The Results of the Uruguay Round of Multilateral Trade Negotiations", Geneva, 1994.

[28] This methodology was first used by the United States Treasury Department in the *Bicycles from Czechoslovakia* investigation, 25 FR 5657 (1960)

[29] In an investigation dealing with a "State-trading" country, United States administration authorities would normally take physical amounts of its input components (parts, energy and water supplies, labour, overheads, etc.) and value them at prices prevailing in a "surrogate" market-economy country, which is at "approximately the same level of economic development" as the country under investigation. For its part, the EC does not recognize even quantitative data for input components and uses instead the respective figures in a "surrogate" country. According to the or World Bank sources, the "level of economic development" is a complex indicator involving dozens of parameters. It is not therefore always clear what set of factors becomes decisive and why when a "surrogate" country is being chosen. Besides, not being parties to the ongoing investigation, "surrogate" country producers have little incentive to cooperate and, apart from revealing sensitive commercial information, take on an unnecessary financial and administrative burden. As a result, the investigating authorities not infrequent have to use a third- or even a fourth-best option. It is easy to work out to what extent the resulting virtual values calculated in this way correlate with those of the responding country. The usual result of such a methodology is that on average dumping margins calculated for goods imported from "non-market" economies are times higher than those for "market-economy" countries. A comparative table contained in an authoritative study of the EC anti-dumping law shows that in investigations involving "non-market economies" the Soviet Union, for example, was on various occasions compared with Yugoslavia, Spain, Japan, Norway, the United States, Brazil, Austria or Sweden. For China "surrogate" countries were Yugoslavia, Japan, Norway, India, Turkey, Argentina, the United States and Brazil. The reader may wish to reflect on what all the "surrogate" countries listed have in common as far as the "level of economic development" is concerned. See also Edwin Vermulst and Paul Waer, "E.C. Anti-Dumping Law and Practice", Sweet & Maxwell, 1996, Annex 5, p. 503.

[30] For a detailed discussion of the United States legislative history dealing with the issue of NME dumping, see generally Horlick and Shuman, Op. cit.

[31] See Council Regulation (EC) No 905/98 of 27 April 1998, OJ L 128/18, 30.4.98; Council Regulation (EC) No 2238/2000 of 9 October 2000, OJ L 257/2, 11.10.2000.

[32] BISD, 27S/10.

[33] BISD, 20S/3, 34.

[34] Peter Naray, "Russia and the World Trade Organization", Palgrave, 2001, p. 9.

[35] John H.Jackson, *The World Trading System. Law and Policy of International Economic Relations*, MIT Press, 1997, p. 331.

[36] Marrakesh Agreement Establishing the World Trade Organization, Article XVI:4 ("The Results of the Uruguay Round of Multilateral Trade Negotiations", Geneva, 1994).

[37] Ibid., Article XVI:5.

[38] Paragraph 3 of GATT 1994 reserves the right of the United States not to repeal the "Johnson Act", which discriminates against foreign maritime shippers.

[39] "This Article [Article 2 of the ADA] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994." ("The Results of the Uruguay Round of Multilateral Trade Negotiations", Geneva, 1994).

[40] See note 17, emphasis added.

[41] Interestingly, at one of the first meetings of the Ad Hoc Group on Implementation established within the new Committee on Anti-Dumping in 1995 the delegate of Israel suggested that the issue of dealing with "non-market economies" be put on the agenda for discussions. The United States delegate responded that this was not the proper place for that topic. He, however, did not specify *what* was an appropriate place to discuss the issue. (Author's information)

[42] "WTO Annual Report 2001", Table IV.5, "Summary of Anti-Dumping Actions, 1 July 1999 – 30 June 2000" (World Trade Organization, Geneva, 2001), p. 65.

[43] Canada Customs and Revenue Agency, *Final Determination – Certain Cold-Rolled Steel Sheet, Originating in Or Exported from Argentina, Belgium, New Zealand, the Russian Federation, the*

Slovak Republic, Spain and Turkey, 28 July, 1999, p. 8, Internet website: http://www.ccra-adrc.gc.ca/customs/business/sima

[44] "Ministerial Declaration on the Uruguay Round, Part I (A) (ii)", BISD, 33S/20.

[45] Scott Andersen, "Significant Changes or Status Quo? Impact of China Draft Protocol Provisions on Anti-Dumping and Special Product and Textile Safeguards on Chinese Producers and Exporters in Proceedings Before the U.S. Department of Commerce", paper prepared for World Bank Seminar, Beijing, China, 25 October, 2000, p. 20

[46] See, for example: "Pour l'OCDE, l'économie suisse n'est pas assez libérale", *Le Temps*, 15 December 2000.

[47] Andersen, Op.cit., pp. 14-20.

[48] Notice of Preliminary Determination of Sales at Less Than Fair Value: *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From the Czech Republic*, 65 FR 5599 (2000); Notice of Preliminary Determination of Sales at Less Than Fair Value: *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Slovakia*, 65 FR 1110 (2000).

[49] Rescission of Anti-Dumping Administrative Review: *Tapered Roller Bearings from Hungary*, 65 FR 35610 (2000).

[50] Notice of Preliminary Determination of Sales at Less Than Fair Value: *Steel Concrete Reinforcing Bars from Latvia*, 66 FR 8323 (2001).

[51] See, for example, Notice of Preliminary Determination of Sales at Less Than Fair Value: *Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania*, 65 FR 5594 (2000); Notice of Preliminary Determination of Sales at Less Than Fair Value: *Synthetic Indigo from the People's Republic of China*, 64 FR 69723 (1999).

[52] "Agreement on Subsidies and Countervailing Measures", Articles 1.1, 1.2 and 5 ("The Results of the Uruguay Round of Multilateral Trade Negotiations", Geneva, 1994).

[53] Termination of Countervailing Duty Investigation: *Textile, apparel and related products from the People's Republic of China*, 48 FR 55492 (1983); Final Negative Countervailing Duty Determination: *Carbon Steel Wire Rod from Czechoslovakia*, 49 FR 19370 (1984); Final Negative Countervailing Duty Determination: *Carbon Steel Wire Rod from Poland*, 49 FR 19474 (1984).

[54] For a detailed discussion of this issue, see Horlick and Shuman, Op .cit., pp. 828-830; David Richardson and Robert Nielsen, "Recent Developments in the Treatment of Nonmarket Economies under the AD/CVD Laws", in "The Commerce Department Speaks, 1992; Developments in Import Administration", Practising Law Institute, Washington, D.C., 1992.

[55] Tariff Act of 1930, Title VII, Sec.771(18)(C)(ii) (WTO document G/ADP/N/1/USA/1, G/SCM/N/1/USA/1 of 10 April 1995, p. 90).

[56] Bulgaria, Hungary, Poland, Romania, Czechoslovakia, GDR, USSR, Albania, Vietnam, North Korea, Mongolia, and People's Republic of China. See Council Regulation (EEC) No 925/79 of 8 May 1979, OJ L 131/1, 29.5.1979; Council Regulation (EEC) No 2532/78 of 16 October 1978, OJ L 306/1, 31.10.78.

[57] Commission Recommendation No 77/329/ECSC of 15 April 1977, OJ L 114/6, 5.5.77.

[58] Council Regulation (EC) No 905/98 of 27 April 1998, OJ L 128/18, 30.4.98.

[59] See, for example, Commission Regulation (EC) No. 255/2001 of 7 February 2001 imposing a provisional anti-dumping duty on imports of integrated electronic compact fluorescent lamps originating in the People's Republic of China, OJ L 38/8, 8.2.2001.

[60] Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldavia, Mongolia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Vietnam.

[61] Council Regulation (EC) No 2238/2000 of 9 October 2000, OJ L 257/2, 11.10.2000.

[62] Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan, Uzbekistan.

[63] Council Regulation (EEC) No 2423/88 of 11 July 1988, OJ L 209/1, 2.8.88, Arts. 2(5) and 3(4)(d).

[64] Council Regulation (EC) No 2026/97 of 6 October 1997, OJ L 288/1, 21.10.97.

[65] Bulgaria (1996), Mongolia (1997), Kyrgyzstan (1998), Latvia (1999), Estonia (1999), Albania (2000), Croatia (2000), Georgia (2000), Lithuania (2001) and Moldova (2001). In addition, China and Taiwan formally completed their accession negotiations in September 2001.

[66] WTO documents WT/ACC/7/Rev.2 of 1 November 2000, p. 22; WT/ACC/LTU/52 of 7 November 2000; WT/ACC/MOL/37 of 11 January 2001.

[67] "United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom", Report of the Panel (WT/DS138/R of 23 December 1999); Report of the Appellate Body (WT/DS138/AB/R of 10 May 2000).

[68] "WTO Annual Report, 2000", Table IV.7, World Trade Organization, Geneva, 2000, p. 48; "WTO Annual Report, 2001", Table IV.6, World Trade Organization, Geneva, 2001, p. 66

[69] "U.S-China WTO Market Access Agreement" of 15 November 1999, United States-China Business Council, Internet website: http://www.uschina.org.

[70] Ibid.; The above provisions have also been reproduced in the Draft Protocol on the Accession of China to the WTO (WT/ACC/SPEC/CHN/1/Rev.8 of 31 July 2001), Sections 15 and 16, respectively.

[71] "AISI Public Policy – International Trade: North America's Steel Trade Problem With Former East Bloc and Other Nonmarket Economy (NME) Countries", 6 July 2000, pp. 2-3, Internet website: http://www.steel.org/policy2/trade/x-nme.htm

[72] "WTO Annual Report 2001", World Trade Organization, Geneva, 2001, p. 28, emphasis added.

[73] Craig Van Grasstek, "Statutes and Policies Relevant to the Participation of the United States of America in the Negotiations for the Accession of the Russian Federation to the General Agreement on Tariffs and Trade", report prepared under UNCTAD/UNDP Project "Support of Negotiations on Accession to the GATT" (RUS/93/001), November 1994, p. 38.