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Joseph A. Calabrese

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MARKET DISRUPTION CAUSED BY IMPORTS FROM  
COMMUNIST COUNTRIES: ANALYSIS OF  
SECTION 406 OF THE TRADE ACT  
OF 1974

The escape clause provides emergency relief to domestic producers injured by increased import competition.<sup>1</sup> The United States currently furnishes such relief under section 201 of the Trade Act of 1974,<sup>2</sup> the successor to a line of escape clauses dating back to 1951.<sup>3</sup>

Along with section 201, Congress enacted a special escape clause, section 406 of the Trade Act of 1974,<sup>4</sup> that deals solely with market disruption caused by communist countries.<sup>5</sup> Because it uses less strenuous tests for market disruption,<sup>6</sup> section 406 provides an easier route to the imposition of trade restrictions than does section 201. Section 406 is, therefore, a ready and powerful tool for limiting imports from both developed and developing communist nations.<sup>7</sup>

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1. For a general discussion of the escape clause, see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 553-573 (1969); Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 *CORNELL INT'L L.J.* 1, 21-23 (1980).

2. Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1976).

3. Congress first enacted the escape clause in the Trade Agreements Extension Act of 1951, Pub. L. No. 78-50, § 7, 65 Stat. 72 (repealed 1962). Congress re-enacted the escape clause in the Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b)(1), 76 Stat. 872 (amended 1974). Finally, Congress amended the 1962 version in section 201 of the Trade Act of 1974, note 2 *supra*.

4. Trade Act of 1974, § 406, 19 U.S.C. § 2436 (1976).

5. Section 406 defines "Communist Country" as "[a]ny country dominated or controlled by communism." 19 U.S.C. § 2436(e)(1) (1976).

6. To successfully maintain a section 406 action, a domestic plaintiff must prove that the communist country's imports are "*increasing rapidly*, either absolutely or relatively, so as to be a *significant cause of material injury*, or a threat thereof," to a domestic industry producing a like or directly competitive product. 19 U.S.C. § 2436(e)(2) (1976) (emphasis added). To successfully maintain a section 201 action, a domestic plaintiff must prove that an article is being imported in such "*increased quantities* as to be a *substantial cause of serious injury*, or the threat thereof," to a domestic industry producing a like or directly competitive product. 19 U.S.C. § 2251(b)(1) (1976) (emphasis added). The wording of these two statutes clearly promotes the congressional intent that the section 406 tests be easier to satisfy than the section 201 tests. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 212 (1974) [hereinafter cited as SENATE REPORT], reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7343-44.

7. To date, there are only six reported cases under section 406. The cases, in chronological order, are: Certain Gloves From the People's Republic of China, U.S. Int'l Trade Comm'n Publ. No. 867 (March, 1978); Clotheshpins From the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, U.S. Int'l Trade Comm'n Publ. No. 902 (Aug., 1978); Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,006 (Oct., 1979); and Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051 (April, 1980).

This Note first probes the reasons for enacting a special escape clause to deal with imports from communist countries. Second, it analyzes the tests for market disruption under section 406 and compares them to the section 201 tests. Third, it discusses the choice of remedies available under section 406 as assessed and implemented in the cases to date. Finally, the Note evaluates the weaknesses of section 406 and suggests possible improvements in its application.

## I

## THE PURPOSE OF SECTION 406

The theory behind the escape clause is simple. Tariffs serve as a protective device for domestic producers by increasing the exporter's costs in the importing country. These additional costs make it more difficult for an exporter to undercut a domestic producer's prices. The escape clause mechanism protects domestic producers by allowing the importing country to unilaterally increase the tariff burden on imports that it finds injurious to those producers.

The United States first bargained for an escape clause in trade negotiations with Mexico in 1942.<sup>8</sup> In 1947, the escape clause concept was included in Article XIX of the General Agreement on Tariffs and Trade (GATT).<sup>9</sup> Pursuant to the GATT mandate, Congress enacted section 7 of the Trade Agreements Extension Act of 1951,<sup>10</sup> thereby implementing the escape clause into U.S. law. The United States currently furnishes escape clause relief under section 201 of the Trade Act of 1974.<sup>11</sup>

Congress feared, however, that section 201 could not adequately remedy market disruption caused by imports from communist countries.<sup>12</sup> Congress viewed such market disruption as potentially more dangerous than the disruption caused by imports from non-state-controlled economies for three reasons.

The first reason is inherent in the nature of a communist country's centrally planned economy. In a free enterprise system, private industries are motivated to allocate resources in such a way that those resources will produce maximum profits. In a communist

8. Reciprocal Trade Agreement with Mexico, *opened for signature* Dec. 23, 1942, art. XI, 57 Stat. 845 (1943), E.A.S. No. 311 (*in effect* Jan. 30, 1943).

9. *Opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The agreement has been modified in several respects since 1947. The current version is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969).

10. Pub. L. No. 78-50, § 7, 65 Stat. 72 (repealed 1962).

11. Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1976).

12. See SENATE REPORT, *supra* note 6, at 210, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7342.

country, however, resource allocation and product distribution decisions are not motivated by economic considerations alone. The state controls the manufacture of goods, the distribution process, and the price at which articles are sold. Consequently, the communist state may concentrate its resources on one particular product and direct that product's export so as to flood U.S. markets much more quickly than could a foreign private industry whose decisions are based upon economic considerations alone.<sup>13</sup>

Second, Congress evinced a concern with the inability of the government to apply the traditional antidumping statute to remedy market disruption caused by the use of unfair trade practices by communist countries.<sup>14</sup> This inability stems from the difficulty in evaluating communist economies by western market economy standards. For example, consider the typical dumping case. Dumping occurs when the exporting nation sells its products at a price lower than the fair market value of that product in the exporting country.<sup>15</sup> State-controlled economies, however, do not subscribe to market pricing, *i.e.*, prices bear little or no relation to demand or economic cost. Therefore, because it would be impossible to ascertain the fair market value of a product in a communist country, it would be equally impossible to determine whether dumping exists.<sup>16</sup> Hence, the traditional antidumping remedy was, in effect, unavailable when a communist country was the exporter.<sup>17</sup>

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13. *Id.*

14. The most prevalent unfair trade practice is dumping. For a description of dumping, see text accompanying note 15 *infra*. To offset the unfair competitive advantage achieved through dumping, the government imposes an antidumping duty upon the imports. 19 U.S.C.A. § 1673 (West 1980). For a discussion of the U.S. antidumping legislation, see Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1, 5-13 (1980).

15. See note 14 *supra*.

16. For a good example of this difficulty, see Electric Golf Carts from Poland, U.S. Int'l Trade Comm'n Publ. No. 740 (March, 1975). This difficulty has been eliminated by section 101 of the Trade Agreements Act of 1979, 19 U.S.C.A. § 1677(b) (West 1980), which sets forth tests for the determination of the fair market value of products manufactured in non-market economies. The implications of this section are explored at notes 96-100 *infra* and accompanying text.

17. A particularly illuminating description of this problem was made by Dr. Harald B. Malmgren:

Senator Fannin raised the issue by saying: 'You fellows in the Executive Branch have been thinking about this for a lot of years, and you still don't know what you're doing here; and I don't think anyone knows what we're doing here. We've got a problem, and yet you fellows think you're really smart. You've got all your lawyers and academics here. You don't know whether you want to use antidumping, countervailing, escape clause—you don't know and neither do I. So why don't we put [section 406] in, and if you can't handle them any other way they'll get clobbered by this one. We will just work it out on a case-by-case basis.'

INTERFACE ONE 67 (D. Wallace, G. Spina, & R. Rawson eds. 1980).

Finally, Congress voiced the traditional fear of dependence on a communist country for vital raw materials.<sup>18</sup> Although Congress did not wish to preclude imports of vital raw materials from communist sources, it did wish to ensure that they were held to a reasonable level. By doing so, Congress hoped to protect traditional dependable suppliers, domestic or foreign, from the threat of periodic dumping or other disruptive sales practices.<sup>19</sup> Assuring non-communist suppliers that they will always be able to compete in the U.S. market guarantees the availability of materials essential to the functioning of the U.S. economy and to the maintenance of its national defense. Whether Congress' distrust of communist imports rests on a fear for national security, on a suspicion of predatory intent, or on a combination of the two is not clear from the legislative history.

In addition to the above three reasons cited by Congress, U.S. domestic producers raised an additional reason for singling out imports from communist countries for special treatment. They argued that communist countries are generally not signatories to bi- or multi-lateral trade agreements between producers. Because signatories to such agreements bind themselves to predetermined annual increases in exports to the United States, U.S. domestic producers can accurately predict the effect of those imports on their market. They cannot, however, predict the exact level of imports from non-signatory communist countries. This makes it more difficult for domestic producers to set their own levels of production and makes them more vulnerable to market disruption from communist sources.<sup>20</sup>

The above reasons prompted Congress to enact a special escape clause, section 406 of the Trade Act of 1974,<sup>21</sup> to provide a special remedy for market disruption caused by imports from communist countries.

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18. SENATE REPORT, *supra* note 6, at 210-11, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7342-43. Congress lists oil, gas, nickel, chromium, manganese, and other examples as vital raw materials. *Id.*

19. *Id.* Although the Senate contemplated allowing foreign nations or other foreign entities to bring section 406 actions, the Conference Report expressly states that "foreign entities would not be eligible to petition for relief under either section 201 or section 406." H. CONF. REP. NO. 93-1644, 93d Cong., 2d Sess. 49 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7367, 7393.

20. Certain Gloves from the People's Republic of China, U. S. Int'l Trade Comm'n Publ. No. 867, at 18, 27-30 (March, 1978). In *Gloves*, the relevant industry trade agreement was the Multi-Fiber Agreement (MFA). Since the terms of the MFA prevented its signatories from satisfying a large amount of the increase in the U.S. demand for gloves, this demand could only be satisfied by U.S., Chinese or other non-signatory producers. In this way, U.S. producers, not knowing the level at which these non-signatory producers would increase their imports of gloves, were especially vulnerable. The effectiveness of the MFA was thereby minimized. *Id.*

21. Trade Act of 1974, § 406, 19 U.S.C. § 2436 (1976).

## II

REQUIREMENTS FOR A HOLDING OF MARKET  
DISRUPTION UNDER SECTION 406

To effectuate the purposes of section 406, Congress carefully chose words that differed from those of section 201. Section 406(a)(1) authorizes the International Trade Commission to investigate and determine whether market disruption exists.<sup>22</sup> The test for market disruption, set out in section 406(e)2, provides that:

Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.<sup>23</sup>

The major elements of this test—"increasing rapidly," "material injury," and "significant cause"—are explored separately in the discussion below.

## A. IMPORTS MUST BE INCREASING RAPIDLY

Under section 406, if a domestic plaintiff wishes to restrict the importation of a directly competitive article, he must first show that imports of that article are "increasing rapidly," in either absolute or relative terms.<sup>24</sup> This differs from section 201, which merely requires that the imports be in "increased quantities."<sup>25</sup> Hence, the increasing imports standard of section 406 differs from the comparable standard of section 201 in a surprising way: the increasing rapidly test of section 406 is *harder* to satisfy than the increased quantities standard of section 201. In this respect, a check is imposed on the otherwise more lenient granting of import relief under section 406.

The International Trade Commission interprets the increasing rapidly test as requiring both a rapid and a recent rise in the level of imports.<sup>26</sup> Congress phrased the requirement in the present tense, indicating its intent that the increase be a current one.<sup>27</sup> "Rapidly"

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22. 19 U.S.C. § 2436(a)(1) (1976).

23. 19 U.S.C. § 2436(e)(2) (1976).

24. *Id.*

25. 19 U.S.C. § 2251(b)(1) (1976).

26. Certain Gloves From the People's Republic of China, U.S. Int'l Trade Comm'n Publ. No. 867, at 11 (March, 1978); Clothespins From the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, U.S. Int'l Trade Comm'n Publ. No. 902, at 12, 18, 31-32 (Aug., 1978); Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,006, at 4 (Oct., 1979); Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051, at 23-24, 32 (April, 1980).

27. The Senate Finance Committee stated, "[t]he increase in imports required by the market disruption criteria must have occurred *during a recent period of time*, as determined by the Commission taking into account any historical trade levels which may have

is generally given its ordinary dictionary definition.<sup>28</sup> Although the Commissioners agree on the volume of imports necessary to fulfill this requirement, they have differed in their opinions of the time period in which the increase must occur.

These differences are best illustrated in *Certain Gloves From the People's Republic of China*.<sup>29</sup> In that case, Commissioner Joseph O. Parker examined the import levels year by year. Although the imports increased in some of the years between 1972-1976, Parker held that the decrease in imports in 1977 was sufficient to support a finding that the imports were not *presently* increasing rapidly at the time of the investigation.<sup>30</sup> Conversely, Commissioner Daniel Minchew, in dissent, compared the import levels of two groups of years (1973-75 and 1976-77). This grouping approach masked the 1977 decline in imports. Minchew, therefore, found that imports had increased 550% between these two periods and would have held that imports were presently increasing rapidly.<sup>31</sup>

The International Trade Commission treats the increasing rapidly requirement as the threshold issue in section 406 cases.<sup>32</sup> *Clothespins From the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania*<sup>33</sup> illustrate the importance of dealing with this requirement first. In those cases, the complainant charged that imports of clothespins from Poland, Romania, and China caused market disruption. Because Polish and Romanian imports were either close to or below the previous year's level, the Commissioners held that these imports were not increasing rapidly.<sup>34</sup> Having resolved the threshold issue in the negative, the Commission necessarily found that there was no market disruption, and consequently abandoned any examination of the remaining ele-

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existed." SENATE REPORT, *supra* note 6, at 212, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7344 (emphasis added); *Certain Gloves From the People's Republic of China*, U.S. Int'l Trade Comm'n Publ. No. 867, at 11 (March, 1978); *Clothespins From the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania*, U.S. Int'l Trade Comm'n Publ. No. 902, at 6 (Aug., 1978).

28. *Anhydrous Ammonia From the U.S.S.R.*, U.S. Int'l Trade Comm'n Publ. No. 1,051, at 23-24 (April, 1980).

29. U.S. Int'l Trade Comm'n Publ. No. 867 (March, 1978).

30. *Id.* at 11-12.

31. *Id.* at 20-22.

32. *Certain Gloves From the People's Republic of China*, U.S. Int'l Trade Comm'n Publ. No. 867 (March, 1978); *Clothespins From the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania*, U.S. Int'l Trade Comm'n Publ. No. 902 (Aug., 1978); *Anhydrous Ammonia From the U.S.S.R.*, U.S. Int'l Trade Comm'n Publ. No. 1,006 (Oct., 1979); *Anhydrous Ammonia From the U.S.S.R.*, U.S. Int'l Trade Comm'n Publ. No. 1,051 (April, 1980).

33. U.S. Int'l Trade Comm'n Publ. No. 902 (Aug., 1978).

34. *Id.* at 13.

ments of a section 406 claim.<sup>35</sup> China, however, had doubled its imports between 1976 and 1977, clearly meeting the increasing rapidly requirement.<sup>36</sup> Accordingly, the Commission proceeded to examine the other elements of section 406, and ultimately found that Chinese imports were causing market disruption.<sup>37</sup> Because the remaining two tests for market disruption are easier to satisfy than their section 201 counterparts, the domestic plaintiff greatly enhances his chances of securing a favorable decision under section 406 once he has satisfied the increasing rapidly requirement.

## B. MATERIAL INJURY

A section 406 plaintiff must next prove that he has suffered a "material injury."<sup>38</sup> Unfortunately, the legislative history of section 406 provides little guidance as to what degree of injury constitutes material injury.

In what may be viewed as a subsequent declaration of the degree of injury they intended section 406 to redress, Congress used and defined the words "material injury" in the Trade Agreements Act of 1979. The Act defines material injury as "harm which is not inconsequential, immaterial, or unimportant."<sup>39</sup> Such a definition, framed in the negative, seems to require a degree of injury quite low on the spectrum of potential injuries.

The question that arises is whether the definition of material injury in the Trade Agreements Act of 1979 likewise applies to the term material injury as used in section 406, passed some five years earlier. Section 406 addresses injuries caused by fair, but disruptive trade practices.<sup>40</sup> In contrast, the Trade Agreements Act of 1979 addresses injuries caused by unfair trade practices.<sup>41</sup> In light of this difference, any application of the Act's material injury definition to section 406 may well be erroneous.<sup>42</sup> Nonetheless, in both section

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35. *Id.*

36. *Id.* at 17-18.

37. *Id.*

38. 19 U.S.C. § 2436(e)(2) (1976).

39. 19 U.S.C.A. § 1677(7)(A) (West 1980).

40. *See* pp. 118-21 *supra*.

41. *See generally* Lowenfeld, *Fair or Unfair Trade: Does it Matter?*, 13 CORNELL INT'L L.J. 205 (1980).

42. On the other hand, there is some indication in the legislative history of section 406 that, because of the nature of a communist economy and the ability of a communist government to disproportionately focus resources on a particular product, *see* p. 119 *supra*, Congress presumed that any import competition from communist countries was *per se* unfair. *See* SENATE REPORT, *supra* note 6, at 211, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7342. This presumption seems tenable in that there is really no practical difference between the focusing of resources on a particular import, and the granting of a subsidy to the industry that manufactures the imported product. The latter



406 investigations conducted subsequent to the enactment of the Trade Agreements Act of 1979,<sup>43</sup> Commissioners Paula Stern and Bill Alberger considered the Act's definition of material injury useful in determining whether the plaintiffs in those cases had suffered a material injury.<sup>44</sup> In his concurrence to the second Anhydrous Ammonia case, however, Commissioner Michael Calhoun expressly disassociated himself from that part of the majority opinion.<sup>45</sup> Nevertheless, the mention of the Trade Agreements Act of 1979 in these recent section 406 decisions shows a willingness on the part of at least some members of the International Trade Commission to assess material injury along the lines of the "not inconsequential, immaterial, or unimportant" definition contained in the 1979 Act.

The legislative history of section 406 clearly indicates that Congress intended to make the injury test for section 406 relief easier to meet than section 201's "serious injury" test.<sup>46</sup> The Commissioners, however, have not been able to provide any additional guidance as to what degree of injury satisfies the "material" requirement. Rather, the Commissioners admit that the term "material injury" is not rigid or capable of specific measurement, and that the meaning they give this term is "necessarily a matter of judgment, dependent upon an analysis of the relevant facts with respect to the issues involved."<sup>47</sup>

The Commissioners have agreed on the factors to consider when determining the degree of injury that the plaintiff has suffered. Although section 406 contains no specific list of factors to consider for this purpose, the Commission uniformly evaluates the injury in section 406 cases according to the same factors spelled out in the injury test of section 201.<sup>48</sup> The Commission, therefore, looks to economic indicators such as the idling of productive facilities in the

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practice, subsidization, is clearly an unfair trade practice. *See generally* Lowenfeld, *supra* note 41. Consequently, the application of the material injury standard of the Trade Agreements Act of 1979 may not be as erroneous as it originally seems.

43. Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,006 (Oct., 1979); Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051 (April, 1980).

44. Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,006, at 24 (Oct., 1979); Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051, at 5 n.6 (April, 1980) (Stern and Alberger incorporate by reference their entire opinion from the first Anhydrous Ammonia case). The opinions do not make clear how much the Commissioners relied on the Trade Agreement Act's interpretation of the material injury definition.

45. *Id.* at 29.

46. SENATE REPORT, *supra* note 6, at 212, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7343-44.

47. Certain Gloves From the People's Republic of China, U. S. Int'l Trade Comm'n Publ. No. 867, at 14 (March, 1978).

48. Section 201 provides:

industry, the inability of domestic firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry.<sup>49</sup> Mindful of the legislative intent that a lower standard of injury be imposed in section 406 cases,<sup>50</sup> the Commissioners accept a lesser change in these economic indicators as sufficient for a holding of material injury under section 406 than would be sufficient under section 201.<sup>51</sup>

### C. SIGNIFICANT CAUSE

As the final element of his section 406 claim, the plaintiff must show that the increase in imports was a "significant cause" of his material injury.<sup>52</sup> Like the material injury test, Congress intended that significant cause be an easier standard to satisfy than the comparable "substantial cause" requirement of section 201.<sup>53</sup> On the other hand, Congress intended the significant cause standard to require a more direct causal relationship between the increase in imports and the injury than does the "contributes importantly" standard that must be fulfilled in order to obtain adjustment assistance under the Trade Act of 1974.<sup>54</sup> Other than establishing these param-

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(2) In making its determination under paragraph (1), the Commission shall take into account all economic factors which it considers relevant, including (but not limited to)—

(A) with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry. . . .

19 U.S.C. § 2251(b)(2)(A) (1976).

49. *Id.*

50. SENATE REPORT, *supra* note 6, at 212, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7343-44.

51. U.S. Int'l Trade Comm'n Pub. No. 867, at 6, 22 (March, 1978); U.S. Int'l Trade Comm'n Publ. No. 902, at 7, 20 (Aug., 1978); U.S. Int'l Trade Comm'n Publ. No. 1,006, at 24 (Oct., 1979); U.S. Int'l Trade Comm'n Publ. No. 1,051, at 34 (April, 1980).

52. 19 U.S.C. § 2436(e)(2) (1976).

53. SENATE REPORT, *supra* note 6, at 211-12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7343-44. Section 201(b)(2)(C) defines substantial cause as "an increase in imports . . . and a decline in the proportion of the domestic market supplied by domestic producers." 19 U.S.C. § 2251(b)(2)(C) (1976). Section 201(b)(4) defines substantial cause as "a cause which is important and not less than any other cause." 19 U.S.C. § 2251 (b)(4) (1976). This causation standard is easier to satisfy than that of section 301 of the Trade Expansion Act of 1962, section 201's direct predecessor. Section 301 required a plaintiff to prove that the increase in imports was a *major factor* in causing his injury. Trade Expansion Act of 1962, Pub.L.No. 87-794, § 301, 76 Stat. 872 (repealed 1975). Congress's dissatisfaction with this stringent causation requirement prompted it to adopt the substantial cause requirement in 1974. In doing so, however, Congress did not intend "that the escape clause criteria go from one extreme of excessive rigidity to complete laxity." SENATE REPORT, *supra* note 6, at 121, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7264.

54. SENATE REPORT, *supra* note 6, at 212, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7344. Section 251 of the Trade Act of 1974 provides for petitioning the Secretary of Commerce for adjustment assistance. 19 U.S.C. § 2341 (1976). The Secre-

eters, however, the legislative history provides no guidance on the significant cause issue. Due to this paucity of legislative guidance, the various Commissioners are not unified in their approach to the issue of causation.

In *Certain Gloves from the People's Republic of China*,<sup>55</sup> the first section 406 decision, Commissioner Parker interpreted the substantial cause requirement to mean that the causal connection between the increase in imports and the material injury must be at least "factually identifiable."<sup>56</sup> In other words, if imports from the communist country can be identified as a cause of the complainant's lost sales, the causation requirement is met.<sup>57</sup> The discussion of the causation requirement in *Gloves* was merely dicta, however, because the Commission dismissed the complaint on other grounds.<sup>58</sup> Nonetheless, the majority of Commissioners gradually adopted this vague and easily satisfied standard, as evidenced by the first decision in *Anhydrous Ammonia From the U.S.S.R.*<sup>59</sup>

An alternative and more recent interpretation of significant cause derives from the legislative history of the substantial cause requirement of section 201.<sup>60</sup> Commissioners Alberger and Minchew first developed this interpretation in their concurring opinion in *Clothespins*, by noting that "a determination of 'significant cause,' like 'substantial cause,' 'shall take into account all economic factors which [the Commission] considers relevant, including (but not limited to) . . . an increase in imports . . . and a decline in the proportion of the domestic market supplied by domestic producers.'"<sup>61</sup> Commissioners Stern and Alberger refined this economic factor test in their dissenting opinion in the first *Anhydrous Ammonia* case by elaborating upon the factors to be considered in determining whether significant cause exists.<sup>62</sup> They prescribe:

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tary shall certify a firm as eligible for such assistance if he determines that increases in imports of articles like or directly competitive with articles produced by such firm contributed importantly to a decline in that firm's sales or production. 19 U.S.C. § 2341(c) (1976). "Contributed importantly" is defined, for these purposes, to mean a "cause which is important but not necessarily more important than any other cause." *Id.*

55. U. S. Int'l Trade Comm'n Publ. No. 867 (March, 1978).

56. *Id.* at 13.

57. *Id.* at 12-18.

58. The Commissioners first found that no material injury existed. *Id.* at 7. Their discussion of the significant cause issue was, admittedly, only for the sake of argument.

59. U.S. Int'l Trade Comm'n Publ. No. 1,006, at 6 (Oct., 1979).

60. SENATE REPORT, *supra* note 6, at 120-24, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7263-67; H.R. REP. NO. 93-571, 93d Cong., 1st Sess. 111-13 (1973).

61. U.S. Int'l Trade Comm'n Publ. No. 902, at 24 (Aug., 1978) (quoting SENATE REPORT, *supra* note 6, at 212, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7263).

62. U.S. Int'l Trade Comm'n Publ. No. 1,006, at 27 (Oct., 1979).

detailed analyses of the behavior of input costs and output prices, the history and effects of expansion of domestic facilities, the character and timing of the closing of U.S. plants, the growth of the Soviet share of the market, the nature of alleged lost sales, and the recent turn-around of some important economic indicators in the face of increasing Soviet imports.<sup>63</sup>

The Commission should find that significant cause exists if, after examining all these factors, they conclude that the evidence links the imports to the injury. A majority of the Commission later adopted this more refined test in the second *Anhydrous Ammonia* opinion.<sup>64</sup>

Although the factually identifiable test for causation may still have some vitality, the refined economic factor test more fully satisfies the legislative intent that the phrase "significant cause" connotes a stronger causal relationship between imports and injury than the phrase "contributes importantly."<sup>65</sup> Clearly, a factually identifiable cause is not necessarily a greater cause than one that contributes importantly. Moreover, the economic factor approach leads to greater consistency and predictability of determinations of significant cause under section 406.

### III

#### REMEDIES UNDER SECTION 406

Section 406, like section 201, refers to sections 202 and 203 of the Trade Act of 1974<sup>66</sup> for its remedy provisions. After receiving a report from the International Trade Commission that market disruption exists, the President, in his discretion,<sup>67</sup> may: 1) increase or impose a duty on the imports;<sup>68</sup> 2) impose a tariff rate quota;<sup>69</sup> 3) modify or impose a quantitative restriction on the import of the product;<sup>70</sup> 4) negotiate orderly marketing agreements that limit the export of a product from certain countries as well as the import of that product into the United States;<sup>71</sup> or 5) take any combination of the above actions.<sup>72</sup>

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63. *Id.*

64. U.S. Int'l Trade Comm'n Publ. No. 1,051, at 10-12 (April, 1980).

65. See note 54 *supra* and accompanying text.

66. 19 U.S.C. §§ 2252-2253 (1976).

67. 19 U.S.C. § 2252(a)(1)(A) provides that, upon receiving an affirmative finding from the International Trade Commission that market disruption exists, the President shall provide import relief "unless he determines that provision of such relief is not in the national economic interest of the United States." *Id.*

68. 19 U.S.C. § 2253(a)(1) (1976).

69. 19 U.S.C. § 2253(a)(2) (1976).

70. 19 U.S.C. § 2253(a)(3) (1976).

71. 19 U.S.C. § 2253(a)(4) (1976).

72. 19 U.S.C. § 2253(a)(5) (1976).

## A. QUOTAS

The remedies available to a successful section 406 plaintiff are the same as those available under section 201. Yet, from among those available, the remedies imposed in section 406 cases have consistently differed from those imposed in section 201 cases. In fact, quotas are the only remedies imposed in section 406 cases.<sup>73</sup> This difference in remedy selection can be attributed to the inherent differences between the economies of communist and western market countries.<sup>74</sup>

Because of their stifling effect on trade in general, quota remedies are frowned upon by Congress<sup>75</sup> and by international trade commentators.<sup>76</sup> Hence, tariff, not quota, remedies are preferred in section 201 cases. Communist economies, however, do not subscribe to cost pricing.<sup>77</sup> Consequently, an increase in the communist exporter's cost by the imposition of a tariff will not necessarily be reflected in the price at which they sell their imports. Since the domestic producers will still face the lower prices attendant to disruptive market practices, they will not be able to regain some of their market share and retrench themselves for future competition if a tariff remedy is imposed. The recognition that a communist country could absorb an increased tariff cost and still maintain low import prices prompts the International Trade Commission to consistently recommend a quota-based import restriction scheme in section 406 cases.<sup>78</sup>

## B. A MORE SPEEDY RESPONSE

The fear that communist imports could cause market disruption much more quickly than could non-communist imports prompted Congress to tailor the section 406 procedures so as to effect speedier responses to communist-caused market disruption.<sup>79</sup> For example, the Commission must report the findings of a section 406 investigation to the President at the "earliest practicable time, but not later than three months" after initiating the investigation.<sup>80</sup> By contrast, section 201 allows the Commission six months to investigate and

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73. See note 78 *infra* and accompanying text.

74. See p. 119 *supra*.

75. See 19 U.S.C. § 2112 (1976).

76. See J. JACKSON, *supra* note 1, at 306-07.

77. See p. 119 *supra*.

78. U.S. Int'l Trade Comm'n Publ. No. 902, at 14-15, 26-29 (Aug., 1978); U.S. Int'l Trade Comm'n Publ. No. 1,006, at 11-12 (Oct., 1979).

79. See notes 12-13 *supra* and accompanying text.

80. 19 U.S.C. § 2436(a)(4) (1976).

report.<sup>81</sup> In addition, if the President chooses to remedy a section 406 injury by negotiating an orderly marketing agreement (option 4, above),<sup>82</sup> he must enter into such an agreement within sixty days after receiving the Commission's report.<sup>83</sup> In comparison, section 201 imposes no time limit on the completion of such an agreement.<sup>84</sup> Finally, Congress included an emergency clause in section 406 that it did not include in section 201. This clause allows the President to initiate a market disruption investigation whenever there are reasonable grounds to believe that market disruption exists with respect to an import from a communist country.<sup>85</sup> Furthermore, if he finds that emergency action is necessary, the President may proceed as if the International Trade Commission had already made an affirmative determination that market disruption exists. If the Commission ultimately finds that no market disruption exists, such emergency actions cease to apply.<sup>86</sup>

#### IV

#### INTERPRETATIONAL PROBLEMS AND THE MISUSE OF SECTION 406: ANALYSIS AND SUGGESTED IMPROVEMENTS

A quota imposed under section 406 effectively restricts imports from the communist country involved in a particular ruling. These quotas, however, have no effect on other countries exporting the same product. Such discriminatory import restrictions are possible under section 406 because it focuses not on the product causing the injury, but rather on the country of its origin. Section 201, on the other hand, restricts the importation of the product regardless of its origin. For example, if a plaintiff brings a successful section 406 action against the import of widgets from China, the International Trade Commission will restrict China's export of widgets to the United States. The import of widgets from any other communist or non-communist country, however, will remain unaffected. An

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81. 19 U.S.C. § 2251(d)(2) (1976).

82. See note 71 *supra* and accompanying text.

83. 19 U.S.C. § 2436(b)(2) (1976).

84. 19 U.S.C. § 2253(a)(4) (1976).

85. 19 U.S.C. § 2436(c) (1976). President Carter exercised this power by initiating the investigation in Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051 (April, 1980).

86. 19 U.S.C. § 2436(c) (1976). Finding emergency action necessary, the President imposed an immediate quota on imports of Soviet ammonia into the United States. *Id.* at 1; 45 Fed. Reg. 3,875 (1980). When the International Trade Commission later determined that no market disruption existed, the quota was lifted. Anhydrous Ammonia From the U.S.S.R., U.S. Int'l Trade Comm'n Publ. No. 1,051 (April, 1980).

affirmative determination under section 201, on the other hand, would restrict imports of widgets from any country. The imposition of a section 406 remedy, therefore, does not necessarily protect a domestic industry from import competition because other imports of that product may replace the restricted communist imports. Hence, it is possible that the benefit of a section 406 restriction will not inure to U.S. domestic producers, as Congress intended, but will inure to the other foreign producers who replace the restricted import. Domestic producers can only prevent this potential for replacement of the restricted communist import by other countries by combining the original section 406 action with a section 201 action against the importation of the product in general.

Besides undue expense,<sup>87</sup> such double actions bring about the imposition of unnecessary trade restrictions on communist countries. In effect, the use of section 406, even concurrently with section 201, gives rise to a hierarchy of protectionism in which communist importers are singled out for trade restrictions before any non-communist importers.<sup>88</sup> Forcing communist countries to sacrifice their market shares before other foreign producers is unnecessary from an economic viewpoint because the domestic producer will not necessarily receive any economic benefits.<sup>89</sup> This result merely seems to express Congress's political choice that non-communist imports be favored over communist imports.<sup>90</sup>

Article XIX of the GATT requires that all import restrictions imposed by signatories upon each other be multilateral, *i.e.*, product,

87. See 43 Fed. Reg. 59,445 n.4 (Dec. 20, 1978) (remarks of Commissioner Alberger).

88. This is due to the shorter time limits (three month limit for a section 406 ruling versus six month limit under section 201, see notes 80-81 *supra* and accompanying text) and easier standards of injury and causation, see notes 38-65 *supra* and accompanying text, of section 406.

89. After the section 406 restrictions are imposed, non-communist importers, who are not affected by the section 406 restrictions, would increase the volume of their imports of that product to replace the now-restricted communist imports, thereby robbing the U.S. producers of any economic benefit from the section 406 restriction. Of course, if the section 201 action eventually results in a restriction against the product (regardless of its origin), the domestic producer will enjoy an economic benefit, *i.e.*, he can increase the volume of his sales by replacing the now-restricted imports of the product from *any* country. This economic benefit, however, was not achieved through section 406—it was achieved through section 201.

90. The economic justification for section 406 stems from a non-market economy's ability to focus disproportionate amounts of the factors of production on one product for import to the U.S. market. See p. 119 *supra*. This ability, however, is also inherent in all non-communist, non-market economies. Section 406 is, therefore, underinclusive by speaking only to communist countries and ignoring the threat of speedy market disruption from all other centrally controlled economies. Therefore, even if Congress' political choice to disfavor communist imports was justified by a proper purpose, section 406, by its underinclusiveness, fails to achieve that purpose. This political choice may be justifiable in cases involving imports of vital raw materials from communist countries. See text accompanying note 101 *infra*.

not country based.<sup>91</sup> The focus of section 406 on the country of origin rather than on the product, therefore, would seemingly conflict with Article XIX when section 406 is invoked against a GATT nation. Careful negotiation of the conditions upon which socialist nations have been admitted to GATT, however, has prevented this conflict from arising. At present, there are six socialist country members of GATT: Cuba, Czechoslovakia, Yugoslavia, Poland, Romania, and Hungary.<sup>92</sup> In the Protocols of Accession to GATT for these countries,<sup>93</sup> GATT Contracting Parties agreed to gradually reduce all quantity restrictions on imports from the acceding state. As a safeguard, however, the Contracting Parties reserved the right to impose discriminatory restrictions on the acceding state's exports, if those exports cause serious injury to domestic producers.<sup>94</sup> This reservation neatly avoids the Article XIX conflict.<sup>95</sup> If communist countries are admitted to GATT in the future, their Protocols of Accession will probably include similar reservations, thereby eliminating the conflict between section 406 and Article XIX.

When it enacted section 406, Congress noted that the traditional antidumping remedy for unfair import competition was not available when dealing with communist countries because those countries do not subscribe to market pricing.<sup>96</sup> Section 101 of the Trade Agreements Act of 1979,<sup>97</sup> however, added section 773 to the Tariff

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91. 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Art. XIX.

92. Grzybowski, *Socialist Countries in GATT*, 28 AM. J. COMP. L. 539, 547 (1980). In addition, Bulgaria has been admitted as an observer to GATT since 1967. *Id.*

93. Protocol of Accession of Yugoslavia, GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (15th Supp.) (1967); Protocol for the Accession of Poland, June 30, 1967, 609 U.N.T.S. 236; Accession of Romania, GATT Doc. L/3557 (1971); Accession of Hungary, GATT Doc. W/24/B (1967). There were no Protocols of Accession for Cuba or Czechoslovakia because both countries were members of GATT prior to their conversion to socialism. Grzybowski, *supra* note 92, at 547. See note 95 *infra* for the implications of this for Cuba and Czechoslovakia.

94. *Id.* at 549.

95. It may be argued that the reservation does not resolve the potential conflict between section 406 and Article XIX for two reasons. First, because there were no Protocols of Accession for Cuba and Czechoslovakia, *see* note 93 *supra*, no such reservations were made a condition of their GATT membership. It would appear, then, that the application of section 406 to Cuba and Czechoslovakia would violate Article XIX.

Second, the reservations only allow GATT members to impose discriminatory restrictions if exports from the acceding state cause *serious* injury. Section 406 restrictions can apply, however, upon a mere showing of *material* injury. *See* notes 38-51 *supra* and accompanying text. In other words, section 406 may apply in cases where the reservation does not permit discriminatory restrictions. Such application clearly violates Article XIX.

96. *See* notes 14-17 *supra* and accompanying text.

97. Pub. L. No. 96-382, § 101, 85 Stat. 464 (1979) (codified in scattered sections of 19 U.S.C.A. (West 1980)).



Act of 1930.<sup>98</sup> This section prescribes a procedure by which the fair market value of a product in a foreign country may be computed when the ascertainment of that fair market value is otherwise impossible.<sup>99</sup> This procedure can be used to compute the fair market value of products imported from communist countries, thereby making possible the use of the traditional antidumping remedy for unfair import cases involving those countries.<sup>100</sup> The continued use of section 406, therefore, can no longer be justified by the inability of the United States to adequately evaluate the unfair trade practices of communist countries.

The only remaining valid justification for section 406, therefore, lies in its application to vital raw materials cases.<sup>101</sup> By favoring non-communist suppliers of raw materials over communist suppliers, Congress achieves an important political goal—the prevention of U.S. dependence on communist countries for these materials at the expense of our traditional, more dependable suppliers. The continuing inability to accurately assess a communist country's trade practices and the real danger of a focused effort to make the U.S. dependent upon it for vital raw materials justify the discriminatory import restrictions of section 406. Accordingly, the use of section 406 should be limited to this purpose.

### CONCLUSION

The special dangers inherent in imports from communist countries prompted Congress to enact section 406 of the Trade Act of 1974. The shorter time limits and the easier standards of section 406 make relief from market disruption easier to obtain than the relief available under section 201. A careful analysis, however, indicates that section 406 cannot be economically justified because U.S. producers do not necessarily receive any benefit from section 406. Furthermore, since the Trade Agreements Act of 1979, section 406 can no longer be justified as a means to fill the gap created by the inability to use the traditional antidumping remedy against communist countries. Therefore, the only valid justification remaining for sec-

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98. Tariff Act of 1930, § 773, 19 U.S.C.A. § 1677(b) (West 1980).

99. Section 773(e) provides a means by which the cost of a product manufactured in a communist country may be constructed. The fair market value is computed by adding the constructed cost to a prescribed profit margin. 19 U.S.C.A. § 1677b (West 1980). *See also* Electric Golf Carts from Poland, U.S. Int'l Trade Comm'n Publ. No. 740 (March, 1975); INTERFACE ONE, *supra* note 17, at 219-21 (remarks of Bruce Clubb).

100. The inability to find some cost basis for ascertaining fair market value was the only reason why the traditional antidumping remedy was unavailable to combat imports from communist countries. *See* notes 14-17 *supra* and accompanying text. Now that this basis has been statutorily provided, no such hurdle exists.

101. *See* note 19 *supra* and accompanying text.

tion 406 is its ability to assure that the United States will not become dependent upon communist countries for the supply of vital raw materials. Its use should be limited to the accomplishment of that purpose.

*Joseph A. Calabrese*

