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mind that both American and Chinese companies must refrain from becoming caught up in the euphoria or disappointment of a moment. Reality calls for great patience and creativity. Great prospects for the twenty-first century spur both sides of the Pacific to go further, despite the hardship and uncertainty in the near future.

Import Relief on Imports from the People's Republic of China

SUSAN W. LIEBELER*

I. INTRODUCTION

In recent years, trade between the United States and the People's Republic of China ("China") has grown.¹ Coincident with the rise in imports from China has been an increase in trade cases filed against imports from China. Both of these trends are likely to continue. As trade between the United States and China increases, import-competing domestic producers are likely to file more petitions against China, and the United States trade laws will play an even larger role in regulating trade between the two countries.² Consequently, anyone who either imports merchandise from China or manufactures merchandise in China for export to the United States should be familiar with U.S. trade laws.

The United States International Trade Commission ("Commission") administers four important trade statutes of concern to importers of Chinese merchandise. They are: the GATT Escape Clause,

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1. Trade between China and the United States totalled \$13.4 billion in 1988, up from \$9.7 billion in 1987. This paper was written before the events in Tiananmen Square last June. What those events mean for United States-China trade remains to be seen.

2. China is one of the few communist countries that the United States gives most-favored-nation ("MFN") treatment. Under U.S. law, communist countries that impose restrictions on their citizens' ability to emigrate cannot receive MFN treatment. However, under Section 402 of the Trade Act of 1974, (19 U.S.C. § 2432(4) (1988)), the President has the authority to waive this provision of U.S. law. This waiver has been extended to several countries, including China. Imports from countries that receive MFN treatment are subject to reduced tariff rates. MFN treatment makes it easier for China to expand its exports to the United States. Such an expansion of trade is likely to lead to more litigation.

codified in Section 201 of the Trade Act of 1974; Section 406 of the Trade Act of 1974, concerning market disruption caused by communist country imports; unfair import practices under Section 337 of the Tariff Act of 1930; and finally the antidumping law under Title VII of the Tariff Act of 1930. Each of these statutes is described further in the following sections.

The application of the trade laws is generally the same for market economies and nonmarket economies, such as China. There are, however, three important differences. First, Section 406 of the Trade Act of 1974 applies only to imports from communist countries. Second, the countervailing duty law does not apply to nonmarket economies and finally, a special methodology is used to determine whether imports from nonmarket economies are being "dumped" in the United States.

II. THE GATT ESCAPE CLAUSE

The United States is a member of the General Agreement on Tariffs and Trade ("GATT"). Through GATT, each member state is obligated to neither raise tariffs nor impose additional quantitative restrictions on imports from other member states. GATT, however, contains a number of exceptions from this obligation. One of these exceptions is Article XIX, the GATT Escape Clause, transposed into United States law as Section 201 of the Trade Act of 1974 ("Section 201").³ Section 201 allows the President to provide temporary relief for a U.S. industry that is seriously injured or threatened with serious injury by increased imports from all sources.

Under Section 201, the Commission must determine whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."⁴ If the Commission finds that the statutory injury standard is met, it will make a relief recommendation to the President, who can either accept or reject the recommendation. The statute allows the President to provide temporary import relief to the domestic industry for a period of up to eight years. The

3. 19 U.S.C. § 2251 (1988). Although the United States is a member of GATT, China is not. China resigned in 1950. Since China is not a member of GATT, the United States is not barred by GATT from either raising tariffs or imposing quantitative restrictions on imports from China. Nonetheless, Section 201 is applied to imports from all countries, including China.

4. 19 U.S.C. § 2251(2)(b)(1) (1988).

temporary relief can take the form of an increased tariff, a quota, a tariff-rate quota,⁵ or an orderly marketing agreement. Import relief granted under Section 201 is sweeping. The relief applies to all imports from all sources. The Commission can also recommend the provision of adjustment assistance to the affected industry.

A Section 201 investigation begins with the filing of a petition by a domestic industry with the Commission.⁶ Subsequently, the Commission conducts an investigation with the goal of making a statutory determination. The Commission has 120 days to make its determination; 150 days if the investigation is extraordinarily complicated. If the Commission reaches an affirmative determination, it has an additional 60 days to make a remedy recommendation and to transmit its report to the President.

In making its injury determination, the Commission usually begins with the domestic industry that most directly competes with the imports. Three elements comprise a Section 201 injury determination: (1) increased imports, (2) serious injury, and (3) substantial cause. The Commission is divided on whether the increased imports requirement can be satisfied by an increase in imports relative to domestic production or whether there has to be an absolute increase in imports. Serious injury has been interpreted by the Commission to imply a high degree of harm. A substantial cause is a cause that is at least as great as any other cause. Together, the three prongs of the Section 201 statutory determination make a difficult test for a petitioning industry to meet. Furthermore, only if the Commission makes an affirmative determination during the injury phase of the investigation, will the Commission begin the relief phase.

As a result of a change in the law brought about by The Omnibus Trade and Competitiveness Act of 1988 (the "Trade Act"),⁷ the Commission is required to recommend the relief that would address the serious injury, or threat thereof, to the domestic industry. This relief must be effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition. The Commission has not yet had the opportunity to interpret this new statutory lan-

5. A tariff-rate quota is a multi-tiered tariff in which imports that enter the United States after the quota is reached are subject to an additional tariff besides the normal tariff; imports that enter the United States before the quota is reached are subject to the normal tariff only.

6. The petition can be filed by an entity that is the representative of an industry, which includes a firm, a trade association, a union or a group of workers. 19 U.S.C. § 2252(a) (1988).

7. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

guage. Prior to the passage of the Trade Act, the Commission was required to recommend the relief that would facilitate the adjustment of the industry to import competition. In practice, the Commission has always recommended relief designed to reduce the imports to their level in prior years.

Prior to the Trade Act, the President could reject the Commission's relief recommendation from the Commission. The President's discretion was limited by the Trade Act. The statute now allows the President to deny relief only if the cost of relief would exceed its economic and social benefits. Nevertheless, for a petitioner to succeed at the executive level, the petitioner must have a politically strong case.

Most Section 201 petitions fail either before the Commission or the Executive Branch. To date, sixty-one investigations have been instituted under Section 201. In twenty-eight of these investigations, the Commission made a negative determination in the injury phase of the investigation, and thus made no relief recommendation to the President. In thirty of these investigations, the Commission made an affirmative determination, and in three cases it was evenly divided. Of the thirty-three affirmative and split recommendations that the Commission forwarded to the President, import relief was granted in twelve cases. Thus, fewer than twenty percent of Section 201 investigations have resulted in import relief. In six cases the President granted the petitioners adjustment assistance, and in one case, the President granted the petitioners domestic price supports. Thus, petitioners have received relief of some kind in just over thirty percent of all Section 201 cases.

Imports from China were involved in a recent Section 201 investigation, *Knives*.⁸ In this investigation, involving imports from more than a dozen countries, imports from China accounted for about five percent of the knives subject to investigation. In reaching a unanimous negative determination, the Commission found that the domestic industry producing knives was neither seriously injured nor threatened with serious injury. Because the Commission made a negative determination in the injury phase of the investigation, it did not have the opportunity to consider a remedy.

Although the Commission made a negative determination in *Knives*, this investigation illustrates one of the major risks to importers from a Section 201 investigation. The risk is that a small producer will get caught in an investigation targeted mainly at other, larger

8. USITC Pub. 2107, Inv. No. TA-201-61 (1988).

producers. If relief is granted, the small producer is likely to suffer a reduction in imports in proportion to the reduction suffered by the larger producers. Thus, in a Section 201 investigation, there is a substantial risk that a foreign producer's fate will depend on considerations beyond its control and unrelated to its actions.

III. MARKET DISRUPTION CAUSED BY COMMUNIST COUNTRY IMPORTS

There is a special provision, also administered by the Commission, modeled after Section 201 that applies to imports from communist countries only. This provision, codified as Section 406 of the Trade Act of 1974 ("Section 406"), is directed at market disruption caused by imports from communist countries.⁹ The most important difference between Section 201 and Section 406 is that Section 406 is directed only at imports of merchandise from a specific communist country or countries, instead of all countries that produce the merchandise. A second difference is that the injury standard under Section 406 is less severe than the standard under Section 201.

Four investigations under Section 406 have involved imports from China. The first two investigations occurred in 1978 and involved gloves¹⁰ and clothespins;¹¹ the third investigation covering kitchenware and tableware¹² took place in 1982; and the most recent investigation in 1987 involved imports of ammonium paratungstate and tungstic acid.¹³ Relief was granted only in the last investigation. The President instructed the United States Trade Representative ("USTR") to negotiate an orderly marketing agreement with China. As trade with China expands, it is likely that the Section 406 remedy will become more important.

IV. UNFAIR IMPORT PRACTICES

Section 337 of the Tariff Act of 1930 ("Section 337")¹⁴ authorizes

9. 19 U.S.C. § 2436 (1988).

10. Certain Gloves from the People's Republic of China, USITC Pub. No. 867, Inv. No. TA-406-1 (1978).

11. Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, USITC Pub. No. 902, Inv. Nos. TA-406-2 to -4 (1978).

12. Certain Ceramic Kitchenware and Tableware from the People's Republic of China, USITC Pub. No. 1279, Inv. No. TA 406-8 (1982).

13. Ammonium Paratungstate and Tungstic Acid from the People's Republic of China, USITC Pub. No. 1982, Inv. No. TA-406-11 (1987).

14. 19 U.S.C. § 1337 (1988).

the Commission to provide a remedy against unfair import practices other than dumping and government subsidies.¹⁵ Although Section 337 applies to antitrust violations and unfair methods of competition, such as false advertising and passing off, it is primarily directed at infringement of intellectual property rights (i.e. patents, copyrights, trademarks, and semiconductor chip mask works).

Like the remedies under Section 201, the remedies under Section 337 are extremely broad. The Commission, has the authority to order all infringing imports excluded from the United States. Such an order, called a general exclusion order, is enforced by the United States Customs Service ("Customs"). Once a general exclusion order has been issued, Customs will prevent infringing imports from all sources from entering the United States at the border. Alternatively, the Commission can issue a limited exclusion order, which directs Customs to prevent the importation of infringing merchandise of the named respondents only. The Commission also has the authority to issue cease and desist orders, which are backed by large monetary penalties.

Section 337 is an especially effective remedy against infringing imports for several reasons. First, it is an expedited process. The investigation must be completed within one year, or eighteen months in a more complicated case. A similar procedure in federal district court can take several years. Second, in order to conduct an investigation and issue an order, the Commission is not required to have personal jurisdiction over either the manufacturer of the infringing product or the importer. To issue an order, the Commission only needs jurisdiction over the imports, which it has because the goods are imported into the United States. Third, the Commission's remedy of a general exclusion order is a very effective remedy against infringing imports, because it absolutely bars the item causing the alleged harm.

The United States' Section 337 remedy in patent-based cases has been challenged through GATT by the European Community. A GATT dispute resolution panel has found that Section 337 violates GATT because it subjects imports to less favorable treatment than domestic goods. This is in violation of GATT Article III:4 and cannot be justified as a measure necessary to secure compliance with United States patent law. Such necessity would be sufficient under Article XX(d) of GATT. The panel stated that both the speed of the

15. For treatment of dumping and government subsidies, see *infra* Section V.

procedure and the remedy of a general exclusion order are inconsistent with GATT.

On November 7, 1989, the panel report was adopted by the GATT Council. Ambassador Hills stated that although the United States did not block adoption of the panel report by the GATT Council, the United States did not join that consensus or accept the report's findings.¹⁶ She indicated, however, that legislative change would be tied to multilateral improvements in intellectual property standards and enforcement procedures negotiated in the Uruguay Round.

In a simultaneous release, President Bush set forth the Administration's policy regarding Presidential review of ITC orders under Section 337. He made it clear that the GATT panel report would not provide a basis for exercising Presidential disapproval of ITC orders and suggested that amendments to Section 337 would be made through Uruguay Round implementing legislation.¹⁷

Section 337 provides for presidential review of any relief granted by the Commission. The Commission does not simply make a relief recommendation, as it does in a Section 201 investigation. Rather, it issues an order granting relief. Once the Commission has issued such an order, the President has sixty days to reject the Commission's decision for policy reasons. If the President declines to act, the Commission's order becomes final and the remedy is put into effect. However, if the President rejects the Commission's order, the order is without legal effect. The President has rarely disapproved an order by the Commission.¹⁸

A Section 337 investigation begins with the filing of a petition with the Commission. Shortly after a petition is filed, the Commission will decide whether or not to institute an investigation. If it does decide to institute an investigation, which it almost always does, the Commission will refer the case to an administrative law judge ("ALJ"). The ALJ will conduct a hearing and review the briefs sub-

16. Statement from the Office of the United States Trade Representative (Nov. 7, 1989).

17. White House Memorandum for the United States Trade Representative (Nov. 7, 1989). The President also acknowledged the assurances provided him by the USTR that a USTR-led interagency process will place high priority on working with the Congress, the ITC and the private sector to develop an effective, GATT-consistent Section 337 mechanism.

18. See, e.g., *Welded Stainless Steel Pipe and Tube*, USITC Pub. No. 863, Inv. No. TA-337-29 (1978); *Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper and Components Thereof*, USITC Pub. No. 1138, Inv. No. TA-337-83 (1981); *Molded-In Sandwich Panel Inserts and Methods for their Installation*, USITC Pub. No. 1246, Inv. No. TA-337-99 (1982); and *Alkaline Batteries*, USITC Pub. No. 1616, Inv. No. TA-337-165 (1984).

mitted by the parties before issuing a written initial determination to the Commission on the injury issue. The Commission can decide to review the ALJ's initial determination in whole or in part or accept it. If the Commission decides to review the ALJ's initial determination, it will issue its own opinion for the parts it reviews.

The injury standard for Section 337 requires that the unfair trade practice cause or tend to cause substantial injury to a United States industry. In spite of the statutory language, the injury standard employed by the Commission has been fairly weak, especially in infringement cases. The reason is the important public policy that Section 337 promotes, namely protecting the legitimate investment-based expectations of United States holders of intellectual property rights and encouraging investment in the activities that produce these rights.

The requirements that a petitioner must meet to satisfy the Section 337 injury standard were amended by the Trade Act. Under prior case law, the Commission required that the infringer either hold or threaten to hold a significant share of the domestic market or make significant sales to satisfy the injury standard. The Trade Act provides that injury exists when articles enter the United States that infringe a patent, a registered trademark, a registered copyright, or a registered semiconductor chip mask work. The Trade Act also makes clear that the domesticity requirement can be met if there is substantial investment in the development or licensing of the property right in the United States.

Before the Commission can grant relief in a Section 337 investigation, the Commission must make an additional determination. The Commission must conclude that granting relief would be consistent with the public welfare, competitive conditions, and consumer interests in the United States. Rarely has the Commission declined to provide relief on grounds of the public interest.¹⁹

I am aware of only one Section 337 investigation in which a Chinese company was named as a respondent, *Certain Feathered Fur*

19. See, e.g., Automatic Crankpin Grinders, USITC Pub. No. 1022, Inv. No. TA-337-60 (1979) (complainant could not satisfy auto industry's demand for patented products in order for the industry to make engine parts that would meet the statutory fuel efficiency standards); Inclined-Field Acceleration Tubes and Components, USITC Pub. No. 1119, Inv. No. TA-337-67 (1980) (public needed continued availability of tubes that were important to scientific research programs affecting public health and welfare); Fluidized Supporting Apparatus, USITC Pub. No. 1667, Inv. No. TA-337-182/188 (1984) (complainant could not meet demand for beds used to treat patients with severe burns).

Coats and Pelts, and Process for the Manufacture Thereof,²⁰ which involved a process patent for a method of producing fur coats from fur pelts. The Commission in *Fur Coats* made affirmative determinations with respect to the Chinese respondent and other respondents and issued a general exclusion order, which is currently in effect.

To date, Section 337 has not been very important to importers of merchandise from China. As China increases its technical knowledge and the technical sophistication of the products it produces for export, however, Section 337 could become a more important remedy against imports from China.

V. ANTIDUMPING AND COUNTERVAILING DUTIES

The United States has had antidumping and countervailing duty laws for many years. The current laws are modeled after Article VI of GATT, the Second Antidumping Code, and the Code on Subsidies and Countervailing Duties. The Codes were negotiated as part of the Tokyo Round of GATT negotiations in 1979. The antidumping and countervailing duty laws can be found in Title VII of the Tariff Act of 1930 ("Title VII").²¹

Title VII covers two kinds of practices that Congress considers unfair to domestic producers. These two practices are foreign producers dumping goods in the United States and the sale in the United States of products that benefit from foreign government subsidies. Dumping is the practice of selling merchandise in the United States at less than fair value. Fair value is generally the price of the merchandise in its home market or its full cost of production. Merchandise is sold in the United States at less than fair value when the U.S. price for the merchandise is below its fair value. In order to have a proper basis for comparison, both the U.S. price and the fair value are calculated at the factory door of the foreign manufacturer.

The second practice is the sale in the United States of merchandise produced abroad that benefits from a subsidy. A subsidy is simply a bounty or a grant that is given by a government. A wide variety of subsidies can be countervailed under Title VII, including export subsidies, loans and equity-infusions at noncommercial terms, and research and development subsidies.

20. USITC Pub. No. 2085, Inv. No. TA-337-260 (1988).

21. 19 U.S.C. § 1671 (1988). U.S. law also provides for private antidumping damage actions in state or federal court under the Antidumping Act of 1916. See 15 U.S.C. § 72 (1916). This Act is rarely invoked.

Title VII establishes a bifurcated procedure that divides administration responsibilities between the Commission and the International Trade Administration at the Department of Commerce ("Administration"). Under the bifurcated procedure, the Administration is responsible for determining whether the imports are either being dumped or subsidized and the Commission administers the statutory injury test. If the Administration and the Commission both make affirmative determinations, then a duty equal to either the amount of the dumping or the amount of the subsidy, as appropriate, will be imposed on the offending imports.

Imports from communist countries have long been a problem for the Administration. For many years, the Administration refused to apply the countervailing duty law to imports from communist countries. The reason is that a subsidy has little meaning in an economy where economic decisions are made centrally by government fiat. In such an economy, every action is either a subsidy or a tax so there is no subsidy-free situation against which the subsidy can be measured.

The Administration's refusal to apply the countervailing duty law to imports from communist countries has been challenged in the courts. In 1985, the Court of International Trade ("CIT") held that the countervailing duty law applies to nonmarket economies.²² However, in 1986, the United States Court of Appeals for the Federal Circuit, to which decisions of the CIT are appealed, held that the countervailing duty law does not apply to nonmarket economies.²³ Last year, the House tried to introduce a provision into the Trade Act that would have applied the countervailing duty law to imports from nonmarket economies to the extent that the Administration could reasonably identify and determine the amount of a subsidy. This provision, however, was deleted from the Trade Act in conference committee. Consequently, the current state of the law is that the countervailing duty law does not apply to imports from nonmarket economies.

Although the countervailing duty law does not apply to imports from nonmarket economies, the antidumping law does. In applying the antidumping law to imports from nonmarket economies, the Administration does not consider the price of the merchandise in the nonmarket economy to be its fair value, as it usually does in market economies. This is because prices and costs in nonmarket economies

22. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

23. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

are artificial—a result of government fiat rather than supply and demand. Therefore, the statute generally requires the Administration to employ a constructed value methodology using surrogate producers in market economies when applying the antidumping law to imports from nonmarket economies.²⁴

Prior to 1988, imports from state-controlled economies were singled out for special treatment. The Trade Act, however, expanded the use of the special methodology by requiring its application to imports from nonmarket economies. Under the antidumping law, as amended, the Administration is to make a determination whether a country has a nonmarket economy. In broad terms, a nonmarket economy is an economy that “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 factors for the Administration to consider in making its determination include the extent to which: (a) the country’s currency is convertible; (b) its wage rates are determined by “free bargaining” between labor and management; (c) it permits joint ventures or other investments by foreign firms; (d) its government owns or controls the means of production; and (e) its government controls the allocation of resources and the price and output decisions of enterprises. There is little question that the economies of the communist countries qualify as both state-controlled economies and nonmarket economies.²⁵ An important question is what other economies will be considered to be nonmarket economies by virtue of factors (a), (b), (c), and (e), and therefore subject to the constructed value methodology.

The Trade Act also changed the methods the Administration can use to calculate fair market value (“FMV”) and the priorities among the different methods. Prior to the passage of the Trade Act, the Administration could determine FMV using either: (1) the prices at which merchandise of a state-controlled economy was sold for consumption either at home or abroad; or (2) the constructed value of merchandise for a non-state-controlled economy. As a result of the Trade Act, the primary method for calculating the FMV for imports

24. The Commission has a program of monitoring imports into the United States from nonmarket economies, including China, on a regular basis. The program is known as the East-West Trade Monitoring System and exists under authority granted by Section 401 of the Trade Act of 1974. Under this program, the Commission produces a report each quarter on the effect of imports from communist countries on the production of like or directly competitive articles in the United States and on employment within the industries producing such articles.

25. *Continental Steel Corp.*, 614 F. Supp. at 548.

from a nonmarket economy is the constructed value methodology. However, if the Administration finds that the available information about either the factors of production or their values is inadequate for it to determine FMV, then the Administration is to use a specified alternative method. Under the alternative method, the Administration will calculate the FMV of the imports from the nonmarket economy using merchandise comparable to the imported merchandise that is produced in one or more market economy countries that are at a comparable level of economic development as the nonmarket economy. Under the alternative method, the Administration considers the FMV of the imported merchandise from the nonmarket economy to be the price at which the imported merchandise from the nonmarket economy is sold in other countries.²⁶

The constructed value calculation begins with the factors of production that are used to produce the merchandise that is the subject of the investigation. The statute directs the Administration to value these factors using prices from a market economy that is at a comparable level of economic development and is a significant producer of comparable merchandise. To see how this provision would work, consider the sale of sweaters imported from China into the United States that are the subject of an antidumping investigation. Assume that the sweaters are sold in the United States for \$3 a piece and that this works back to a price of \$2 each at the factory door. The Administration would begin its analysis with the factors of production (including capital) that are used to produce the sweaters in China. The Administration will then find a surrogate producer in a market economy. Next, the Administration will calculate the cost of production for the Chinese producer under investigation using the Chinese producer's own factor proportions and the surrogate producer's factor prices. If the resulting constructed value is \$2 or less a sweater at the factory door, the Chinese producer is not dumping. On the other hand, if the constructed value is more than \$2 a sweater, the Chinese producer is dumping.

The constructed value methodology has been criticized as arbi-

26. The Trade Act also introduced a special rule on the suspension of investigations that applies to nonmarket economies. In addition to the usual bases on which the Administration may suspend an antidumping investigation of imports from a nonmarket economy, the investigation may be suspended upon an agreement with that country to restrict the volume of imports of that merchandise. To suspend an investigation on this basis, however, the agreement must not only satisfy the general requirements for suspension agreements but must also prevent the suppression or undercutting of domestic prices.

trary. This can be illustrated by the antidumping investigation of potassium fertilizers imported into the United States from the Soviet Union. For its preliminary determination, the Administration used a West German producer as the surrogate. The West German producer produced a different grade than the Soviet producer but the Administration used the West German producer's list prices. Also, the West German producer was selling in a protected home market. The result was a dumping margin of 187% for the Soviet producer.²⁷ For its final determination, however, the Administration did not use the West German producer but instead used a Canadian producer of fertilizer. As a result, the Soviet producer's dumping margin fell from 187% to 1.7%.²⁸

The Commission performs its injury test in the same way whether the imports are from a nonmarket economy or a market economy. The statute directs the Commission to make a determination whether a domestic industry is materially injured or threatened with material injury by reason of the dumped imports. There are currently six members of the Commission (its maximum number) and the statute states that if the members of the Commission voting in an investigation are evenly divided between those making affirmative and negative determinations, the Commission's determination is affirmative. Thus, when all six commissioners vote, it takes four negative votes to deny relief but only three affirmative votes to grant relief.

The Commission is currently divided on how to apply the statutory injury test. Two commissioners favor using an approach that relies heavily on the tools of standard economics. As applied to imports from a communist country, such as China, these commissioners try to assess how much higher domestic sales and prices would be if the imports were sold at their constructed value.

The other four commissioners employ the traditional approach, which bifurcates the Commission's statutory determination into a separate injury test and a causation test. These commissioners will make an affirmative determination only if the domestic industry is experiencing injury and the imports are a contributing cause of that injury. To determine if the domestic industry is experiencing injury, these commissioners generally look to see if the domestic industry's for-

27. Potassium Chloride from the Union of Soviet Socialist Republics, 49 Fed. Reg. 35849 (1984).

28. Potassium Chloride from the Union of Soviet Socialist Republics, 50 Fed. Reg. 4562 (1985).

tunes have been declining over approximately the last three years. It is not surprising that using this approach, the Commission will find more domestic industries to be experiencing injury when the U.S. dollar is rising than when it is falling.

To assess causation, the majority of commissioners do not employ the tools of economic analysis. Instead, they assess causation on a case-by-case basis. There are, however, two elements that appear to be important to their decisions. First, these commissioners look for a trend in the quantity and market penetration of the imports. If the imports have been increasing over approximately the last three years, these commissioners will view this as evidence of a causal connection. Second, these commissioners look for "underselling." Underselling, which occurs when the mean price of the imported product is below that of the competing domestic article, appears to be the most important factor for these commissioners. If there is underselling, meaning that on average the imported product is cheaper than the competing domestic product, these commissioners are very likely to conclude that there is a causal connection. The converse is also true: if there is overselling, these same commissioners are very likely to conclude that there is no causal connection.

In conducting their inquiry into underselling, these commissioners will usually make no attempt to adjust the prices for differences in quality, reputation, or the terms of sale. This simple comparison of mean prices, without adjustments, is likely to result in affirmative determinations for many goods imported into the United States from China. Because of differences in quality, much of the merchandise that is imported into the United States from China is cheaper than the competing domestic merchandise. As a result, antidumping petitions filed against merchandise imported into the United States from China have a good chance of succeeding.

An antidumping duty will be imposed on imports allegedly dumped into the United States only if both the Administration and the Commission make affirmative determinations. Once both the Administration and the Commission have made affirmative determinations, the importer must make a deposit on each covered item imported. The deposit is equal to the Administration's calculation of the amount of dumping. At the end of the year, the Administration conducts a review investigation and calculates the actual amount of dumping that occurred during the year, at which point the accounts

are settled for the prior year's duties and the deposit for the following year is set.

VI. CONCLUSION

As trade between the United States and China grows, it is likely that domestic producers will file more petitions against Chinese imports. In addition, because of the statutory language and methods that the Commission uses to make its determinations, import relief is more likely when trade is increasing. Consequently, as trade with China expands, the United States trade laws will play a larger role in the China-United States trade relationship. It is thus important for anyone who imports merchandise into the United States from China or manufactures goods in China for export to the United States to be familiar with the Commission and the laws it enforces.