
**PRODUCT-SPECIFIC SAFEGUARD IN CHINA’S
WTO ACCESSION AGREEMENT: AN ANALYSIS
OF ITS TERMS AND ITS INITIAL
APPLICATION IN SECTION
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I. INTRODUCTION

On December 11, 2001, after lengthy and often difficult negotiations that lasted for fifteen years, the People’s Republic of China (“China” or “PRC”) finally joined the World Trade Organization (“WTO”).¹ As China is the second largest economy in the world² and the world’s fourth largest trading nation,³ its accession into the WTO certainly makes this

¹ China’s WTO entry was officially approved one month earlier. See Press Release 252, World Trade Organization, WTO’s Ministerial Conference Approves China’s Accession (Nov. 11, 2001), http://www.wto.org/english/news_e/pres01_e/pr252_e.htm.

² See, e.g., *China*, in CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2003 (2003), at <http://www.cia.gov/cia/publications/factbook/geos/ch.html> (last modified Dec. 18, 1993). CIA’s ranking is based on purchasing power parity.

³ See, e.g., World Trade Organization, *World Trade in 2001—Overview, Table 1.6: Leading Exporters and Importers in World Merchandise Trade (Excluding Intra-EU Trade)*, 2001, http://www.wto.org/english/res_e/statis_e/its2002_e/its02_overview_e.htm (last visited Jan. 31, 2004). The Chinese government seemed to be more modest by only claiming the sixth position in 2001, which was also the rank shown on the WTO’s chart for leading trading entities in world merchandise in 2001 including intra-EU trade. World Trade Organization, *World Trade in 2001—Overview, Table 1.5: Leading Exporters and Importers in World Merchandise Trade, 2001*, http://www.wto.org/english/res_e/statis_e/its2002_e/its02_overview_e.htm (last visited Jan. 31, 2004). Nevertheless, a top Chinese official was quoted in October 2002 to have predicted that “China will become the world’s second largest trading power within the next few years behind the United States if it keeps up its current rapid growth.” *China to Become World’s 2nd Largest Trade Power*, PEOPLE’S DAILY, http://english.people.com.cn/200210/24/eng20021024_105602.shtml (last modified Oct. 25, 2002). The same article notes that in 1989 China ranked fifteenth in world trade. *Id.* By the end of 2003, China was officially ranked by the government as the world’s fourth largest

organization more reflective of today's world economy. China's accession came as a natural, though arguably belated,⁴ development in China's gradual integration into the world economy after it joined the World Bank and the International Monetary Fund in 1980.⁵ As a historical note, it is worth mentioning that when China first initiated its GATT/WTO entry bid, it sought to be reinstated as a contracting party to the GATT, or in the language used in its first application submitted on July 11, 1986, it applied for "the restoration of China's signatory state status."⁶ "Restoration" refers to the fact that China, then the Republic of China ("ROC") under the Kuomintang/Nationalist Government, had been an original signatory and contracting party to the GATT 1947.⁷ In 1949 the Nationalist Government withdrew from the mainland to Taiwan after being defeated by the Communists, and in 1950 it withdrew its membership from the GATT "[i]n the confusion" brought about by the abrupt move from the mainland to Taiwan.⁸

This withdrawal by the ROC (or Taiwan) from the GATT has not been accepted by China as legal,⁹ though China's attempt to "restore" its

trading nation, with the country's foreign trade volume for the year 2003 expected to hit \$840 billion. *China Trade to Top 840 Billion Dollars in 2003*, CHINA DAILY, Dec. 29, 2003, http://www.chinadaily.com.cn/en/doc/2003-12/29/content_294145.htm (last visited Jan. 1, 2004). Since China's trade surplus against the United States has been an important issue in U.S.-China relations, it is worth noticing that according to the same report, China's total trade surplus for 2003 is estimated to be only around \$20 billion. *Id.* In fact, China's foreign trade is officially expected to register a net deficit in 2004. *See, e.g., China's Trade Surplus to Dive in 2004: Report*, CHINA DAILY, Oct. 29, 2003, http://www.chinadaily.com.cn/en/doc/2003-10/29/content_276490.htm (last visited Jan. 1, 2004).

⁴ China acceded to the WTO more than two decades after it joined the World Bank and the International Monetary Fund and fifteen years after its initial application to the GATT, WTO's predecessor. SEAN LEONARD, *THE DRAGON AWAKENS: CHINA'S LONG MARCH TO GENEVA* 16 (1999).

⁵ *See, e.g., id.*

⁶ *Id.* at 15 n.2.

⁷ *Id.* at 17. *See* Board of Foreign Trade, *Timeline of Taiwan's WTO Membership Bid*, at <http://www.trade.gov.tw/english/page31-1.htm> (last visited Apr. 11, 2003), for a brief narration, from the perspective of Taiwan, of China's original GATT membership and Taiwan's (Taiwan's official name still being the Republic of China) WTO accession process.

⁸ *Id.*

⁹ *See, e.g.,* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1478 (2000). The Bhala article is a good place for the reader to get more information on the long and tortuous course of events leading to China's WTO accession. Bhala suggests that China may have lost its first realistic opportunity to join the GATT when its U.N. seat was restored in 1971, "an otherwise auspicious year for the PRC's international status." *Id.* Why China did not choose to apply for a GATT membership at this point was not obvious, but may be due to its internal turmoil at that time that was consuming the energies of its leadership: for one

GATT membership did not succeed for various reasons. One argument advanced by a former U.S. trade official, Robert E. Herzstein, was that China's thirty-five year absence from the GATT constituted an implied consent to the ROC's 1950 withdrawal from the organization.¹⁰ A more politically-charged argument, suggested by Raj Bhala, is that the PRC had never been a member of the GATT in the first place since the PRC "represented a different sovereign entity" from the ROC, which was a GATT contracting party.¹¹ In any event, this restoration or resumption argument by China was considerably weakened when the GATT 1947 itself was replaced by the GATT 1994 (one of the documents establishing the WTO),¹² which was "legally distinct" from the GATT 1947.¹³

This initial argument around whether China could "resume" its membership in the GATT in a sense prefigured the difficult years of negotiations to follow. Now that China has already joined the WTO, our focus, as a practical matter, shifts to the terms under which China joined the WTO and to how these terms play out in real life. This note attempts to analyze an important legal arrangement in relation to China's WTO accession, namely the provisions on safeguard measures, and to examine how this arrangement has been carried out in recent section 421 investigations in the United States.¹⁴

II. SAFEGUARD MECHANISM UNDER CHINA'S WTO AGREEMENT

A. *General Safeguard Provisions Under the GATT and the WTO*

Within the WTO framework, the idea of safeguard measures as a legitimate means an importing country can use to protect its affected indus-

thing, the Cultural Revolution, which started in 1966, would only come to a formal end in 1976. *See id.*

¹⁰ Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 LAW & POL'Y INT'L BUS. 371, 403 (1986).

¹¹ Bhala, *supra* note 9, at 1478.

¹² The GATT 1994 is included in the Uruguay Round Agreements as an item grouped under the title "Annex 1A: Multilateral Agreements on Trade in Goods," attached to the umbrella Agreement Establishing the World Trade Organization. Multilateral Agreements on Trade in Goods, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 28 (1994), available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last visited Jan. 4, 2004).

¹³ *See* World Trade Organization, *GATT 1994: What Is It?*, at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto02/wto2_4.htm#note6 (last visited Jan. 4, 2004).

¹⁴ Section 421 of the Trade Act of 1974, 19 U.S.C. § 2451 (2000), is the U.S. domestic law implementing the product-specific safeguard measures incorporated into China's WTO Accession Agreement.

tries is first codified in GATT 1947 article XIX, "Emergency Action on Imports of Particular Products." Section 1(a) of article XIX provides,

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten *serious injury* to domestic producers in that territory of like or directly competitive products, the contracting party *shall be free*, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.¹⁵

Safeguard measures that were established in GATT article XIX were then incorporated into the present WTO system through the WTO Agreement on Safeguards ("Agreement on Safeguards"), with significant modifications.¹⁶ Two of these modifications stand out. First, the Agreement on Safeguards places greater restrictions on the application of safeguards by changing the "the contracting party shall be free" language of the GATT 1947 into "A Member may apply a safeguard measure to a product only if"¹⁷ Both the replacement of "shall" with "may" and the use of "only if" instead of "be free" indicate the WTO's clear intention to limit the use of safeguard measures to fewer occasions.¹⁸ It is

¹⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX.1(a), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (emphasis added).

¹⁶ Agreement on Safeguards, WTO Agreement art. XIX, *available at* http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf [hereinafter Agreement on Safeguards].

¹⁷ *Id.* at art. 2.1.

¹⁸ It is also worth noticing that the Agreement on Safeguards avoids the "unforeseen developments" requirement of GATT 1947 article XIX. This move does not necessarily mean, however, that the WTO intends to encourage its members to use safeguards more freely than the drafters of the GATT 1947 intended. It may be more appropriate to interpret this change as an attempted solution to the problem of workability of the whole safeguard mechanism created by the GATT language of "unforeseen developments." As Terence P. Stewart, Patrick J. McDonough, and Marta M. Prado point out, requiring a member to establish import surges as "unforeseen developments" as a condition for its application of safeguards makes it very difficult for the member to utilize safeguards within the GATT/WTO framework since such import surges often cannot comfortably be said to be unforeseen. Terence P. Stewart et. al., *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and that Special Needs Are Addressed*, 24 *FORDHAM INT'L L.J.* 652, 662-63 (2000). This is especially true when it comes to a developing country which significantly lowers its tariff level after its GATT/WTO accession. *Id.* Therefore, in this context the avoidance of the "unforeseen developments" requirement in the Agreement on Safeguards is more likely designed to remove an unnecessary or unintended obstacle to warranted implementations of safeguards than to directly encourage freer use of safeguards. A probably unexpected

instructive to notice that the “shall be free” phrase does survive in the WTO Agreement on Safeguards, but only with respect to the kind of action an affected *exporting* country can take in response to a safeguard measure applied by an *importing* country:

If no agreement is reached within 30 days in the consultations under paragraph 3 of article 12, then *the affected exporting Members shall be free*, not later than 90 days after the measure is applied, to suspend . . . the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure. . . .¹⁹

Second, the Agreement on Safeguards adds another requirement on the application of safeguards by providing that “[s]afeguard measures shall be applied to a product being imported irrespective of its source.”²⁰ There is no such regardless of origin requirement in article XIX of the GATT 1947 and its addition evinces the principle of non-discrimination informing the whole WTO system.²¹

The “serious injury” standard set out in GATT 1947 article XIX is continued in the Agreement on Safeguards,²² though not without further

development on this issue is that the Appellate Body of the WTO, despite the absence of the “unforeseen developments” language in the Agreement on Safeguards, “breathed life back into the concept [of “unforeseen developments”] by requiring governments to make a finding on the matter.” *Id.* at 662. In doing so, the Appellate Body may have accomplished more than is necessary the intended goals of the Agreement on Safeguards. The general tendency of the Agreement on Safeguards to put more restraint on the application of safeguards when compared with article XIX of the GATT 1947 is also intimated in article 11.1(a), Prohibition and Elimination of Certain Measures: “A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of the GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.” Agreement on Safeguards art. 11.1(a).

¹⁹ Agreement on Safeguards art. 8.2 (emphasis added). Similar language is contained in GATT art. XIX.3.

²⁰ Agreement on Safeguards art. 2.2.

²¹ This fundamental principle underlying the WTO system is made clear in the Preamble of the Agreement Establishing the WTO, which states “*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. . . .” WTO Agreement pmb., available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last visited May 9, 2004).

²² Article 2.1 of the Agreement on Safeguards provides,

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause *serious injury* to the domestic industry that produces like or directly competitive products.

refinement. The GATT 1947 does not offer any definition of the term “serious injury”; in contrast, the Agreement on Safeguards defines it as “a significant overall impairment in the position of a domestic industry.”²³ The Agreement on Safeguards clarifies that it is the overall impact on “a domestic industry” as a whole and not the impact on certain producers within one domestic industry that should give rise to a safeguard application.²⁴ This refinement in the Agreement on Safeguards can be seen both as an attempt to clarify the safeguard provisions as embodied in the GATT and as part of the overall tendency to attach more restrictions to the use of safeguards.²⁵

Against the background of this shift to a less liberal use of safeguards within the WTO, the safeguards provisions in China’s WTO accession are counter-intuitive. Save minor changes,²⁶ Part I, article 16, “Transitional Product-Specific Safeguard Mechanism,” in the Protocol on the Accession of the People’s Republic of China (“Protocol on China’s Accession”), is the same as the relevant part (“Product-Specific Safeguard”) in the Protocol Language of the U.S.-China WTO Market Access Agreement (“U.S.-China Agreement”), signed on November 15, 1999. The discussion will, therefore, concentrate on the U.S.-China Agreement.

Agreement on Safeguards art 2.1 (emphasis added).

²³ Agreement on Safeguards art. 4.1(a).

²⁴ This point is further clarified in article 4.1(c) of the Agreement on Safeguards: [I]n determining injury or threat thereof, a “domestic industry” shall be understood to mean *the producers as a whole* of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

Agreement on Safeguards art. 4.1(c) (emphasis added).

²⁵ In this respect the Preamble of the Agreement on Safeguards is instructive. Paragraph 2 of the Preamble states, “*Recognizing* the need to clarify and reinforce the disciplines of the GATT 1994, and specifically those of its article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control. . . .” Agreement on Safeguards pmbl.

²⁶ Article 16.9 of the Protocol on China’s Accession states “[a]pplication of this Section shall be terminated 12 years after the date of accession.” WTO Ministerial Conference, *Protocol on the Accession of the People’s Republic of China*, WT/L/432, at art. 16.9 (Nov. 23, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc> (last visited May 9, 2004). Article 9, “Product-Specific Safeguard,” of the Agreement on Market Access Between the People’s Republic of China and the United States of America states “. . . twelve years after entry into force of this Protocol.” Agreement on Market Access Between the People’s Republic of China and the United States of America, Nov. 15, 1999, U.S.-P.R.C., at art. 9, <http://www.uschina.org/public/wto/market> (emphasis added) [hereinafter U.S.-China Agreement].

B. *The Product-Specific Safeguard in the U.S.-China Agreement*

Article 1 of the "Product-Specific Safeguard" section of the U.S.-China Agreement provides:

In cases where *products of Chinese origin* 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, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected Member should pursue application of a measure under the WTO Agreement on Safeguards. . . .²⁷

Article 3 of the same section then provides:

If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected *shall be free*, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. . . .²⁸

The key concept "market disruption" is defined in article 4: "Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a *significant cause of material injury, or threat of material injury* to the *domestic industry*."²⁹

The two most salient differences between the U.S.-China Agreement and the WTO Agreement on Safeguards are: (1) the former's use of the "material injury" standard in place of the "serious injury" standard as consistently used in both the GATT and WTO; and (2) the former's China-specific provision in contrast to the provision in the WTO Agreement on Safeguards against singling out specific countries in applying safeguards on a product. Other noticeable differences between the quoted portions of the U.S.-China Agreement and the WTO Agreement on Safeguards include the return of the U.S.-China Agreement to the "domestic producers" phrase as used in the GATT 1947 and the resurrection of the "shall be free" clause as used in the GATT 1947.³⁰

²⁷ U.S.-China Agreement, *supra* note 26, § III art. 1 (emphasis added).

²⁸ *Id.* at § III art. 3 (emphasis added).

²⁹ *Id.* at § III art. 4 (emphasis added).

³⁰ See *id.* at § III arts. 1, 3. Brett Williams, in his article *The Influence and Lack of Influence of Principles in The Negotiation for China's Accession To The World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 791, 808-10 (2001), goes into some length on the derogations of the U.S.-China Agreement from the most-favored nation treatment in the area of safeguards a WTO member is normally entitled to under the Agreement on Safeguards. Among other things, he notes:

Indeed, the “material injury” test used in the U.S.-China Agreement might be argued to be insufficiently distinct from the “serious injury” test. This fuzziness may be one factor that induces future contention over the safeguard provisions in China’s WTO accession deal. “Serious injury” is defined in the WTO Agreement on Safeguards as “significant overall impairment in the position of a domestic industry.”³¹ “Material injury,” on the other hand, is left undefined in the U.S.-China Agreement. What the U.S.-China Agreement does define in relation to “material injury” is “market disruption,” which is defined as existing “whenever imports of an article” increase so rapidly “as to be a significant cause of material injury, or threat of material injury to the domestic industry.”³²

The addition of “a significant cause” in the U.S.-China Agreement is noteworthy, for this is unmistakably intended by the United States to further lower the threshold test from “serious injury” in applying safeguards to Chinese products. Though what “a significant cause” exactly means in this context is also left unexplained, we have a clue to what the U.S. Trade Representative had in mind in putting this phrase into the agreement. The whole concept of “market disruption” (together with its corollary idea of “material injury”) comes directly from section 406 of the Trade Act of 1974,³³ whose drafters took care to provide definitions of “significant cause,” though they were reticent on the enigmatic phrase “material injury.”³⁴ The “significant cause” provision makes it easier for the importing country to invoke safeguards because it is defined under section 421 of the United State’s Trade Act of 1974 as “refer[ring] to a

In general, the draft clause in the United States-China Agreement does not incorporate all of the normal provisions of the Agreement on Safeguards. As a result, China might be denied a range of provisions, including those relating to the domestic determination of the necessary prerequisites of a safeguard measure, those relating to causation, and those relating to the term of and the review of safeguard measures.

Id. at 809.

³¹ Agreement on Safeguards art. 4.1.

³² A potential confusion is also created here by the use of “domestic industry” in lieu of “domestic producers,” which is the term used in article 1 of the “Product-Specific Safeguard” section. The drafters of the Agreement on Safeguards obviously considered the difference between these two terms significant enough to substitute one for the other and to take the care to provide specific definition for the term “domestic industry” in the Agreement on Safeguards. *See id.* art. 4.

³³ *See, e.g.*, Report to Congress of the U.S.-China Security Review Commission, The National Security Implications of the Economic Relationship Between the United States and China (July 2002), http://www.uscc.gov/ch3_02.htm (last visited April 11, 2003).

³⁴ Section 406 defines “significant cause” as “a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause.” 19 U.S.C. § 2436(e)(2)(B)(ii) (1988).

cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause.”³⁵

In contrast, the Agreement on Safeguards provides that a member country may apply a safeguard measure only if a product is being imported in such a way “as to *cause or threaten to cause* serious injury” to the related domestic industry.³⁶ At first glance, the standard WTO requirement on this point seems to be even easier to satisfy than its counterpart in the U.S.-China Agreement (if the “serious injury” phrase in the general WTO provision is momentarily disregarded). But this is not true. Article 4.2(b) of the WTO Agreement on Safeguards provides more detailed guidance on how to establish the causal link: “When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”³⁷ In other words, in order to prove that the increase of a subject import is causing serious injury to a domestic industry, the petitioner has to establish that it is the increased imports of the product, and not other factors, that have been causing serious injury to the industry. This non-attribution requirement, combined with the “serious injury” standard, makes the general WTO safeguard provision on causation much more restrictive than its counterpart in the U.S.-China Agreement.

To compare it with the relevant provision in sections 201 and 202 of the Trade Act of 1974 it is also helpful to understand the extent to which the “significant cause of material injury” provision derogates from the norm. Unlike section 406 of the Trade Act, which deals with imports from “Communist” countries, sections 201 and 202 deal with general situations which require the President to resort to safeguard measures. The relevant phrase in Section 201 is “substantial cause of serious injury,” which is defined in Section 202 as “a cause which is important and not less than any other cause.”³⁸

The obvious tension between the above-mentioned provisions in the U.S.-China Agreement and in the WTO Agreement on Safeguards leads one to ponder the legal status of such provisions in the U.S.-China Agreement, which are also incorporated into the Protocol on China's Accession. Take the “market disruption”/“material injury” provision in the U.S.-China Agreement. The WTO Agreement on Safeguards says that a member “may apply a safeguard measure to a product only if that Member has determined” that the particular product is being imported “under such conditions as to cause or threaten to cause serious injury” to the affected domestic industry.³⁹ Put another way, this means that in a situa-

³⁵ This language in Section 421 is obviously imported, verbatim, from Section 406. See *supra* notes 14 and 34.

³⁶ Agreement on Safeguards art. 2.1 (emphasis added).

³⁷ *Id.* at art. 4.2(b).

³⁸ 19 U.S.C. § 2251(a) (2000); 19 U.S.C. § 2252 (b)(1)(B) (1975).

³⁹ Agreement on Safeguards art. 2.1.

tion where less than serious injury is caused or threatened to be caused by increases in an imported product, the importing WTO member is not authorized under the WTO Agreement on Safeguards to apply a safeguard measure to this product.

One issue that may arise here is whether article 2.1 of the WTO Agreement on Safeguards thus prohibits an agreement like the one between the United States and China that subjects products from one party, with its own consent, to a set of standard less advantageous to this member than the “serious injury” standard granted in the WTO Agreement on Safeguards. The plain language of article 2.1 of the WTO Agreement on Safeguards seems to compel an affirmative answer, though if we look at the WTO Agreement on Safeguards as a whole, the answer may not be so straightforward.

In this respect it is worth observing that the WTO Agreement on Safeguards devotes one article, article 11, to setting forth prohibited measures under the Agreement and there is no clear language in this article prohibiting the substitution of a test like that of “material injury” for the “serious injury” test. The so-called “gray areas” prohibited in article 11 refer to “any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.”⁴⁰ Relaxing the “serious injury” test into “material injury” does not seem to be as serious a compromise of the underlying WTO principles as a measure like voluntary export restraints and is arguably not within the purview of article 11 prohibition.⁴¹

On the other hand, as Yong-Shik Lee points out, “it is highly doubtful whether it is justifiable to apply a safeguard measure based on anything less than serious injury to domestic industry.”⁴² Even if the “material injury”/“market disruption” standard does not directly violate any positive prohibition of the WTO Agreement on Safeguards, it is quite clear that it goes against the rationale behind the WTO safeguard mechanism. Originally designated as “emergency action” under article XIX of the GATT 1947, safeguard measures are not meant to be an exception to the promotion of free trade,⁴³ which informs the entire WTO system. Rather, such measures are “emergency device[s] of last resort to relieve

⁴⁰ *Id.* at art. 11.1(b).

⁴¹ Williams mentions that voluntary export restraints, when compared with import tariffs, incurs greater cost for the importing country because the wealth goes to the foreign exporter instead of the government of the importing country. Williams, *supra* note 30, at 793.

⁴² Yong-Shik Lee, *The Specific Safeguard Mechanism in the Protocol on China's Accession to the WTO: A Serious Step Backward from the Achievement of the Uruguay Round*, 5 J. WORLD INTEL. PROP. 219, 227 (2002).

⁴³ For comment on the idea of free trade, see *id.*

the domestic economy of an acute economic and political shock from the rapid fall of the domestic industries caused by the increase in imports.”⁴⁴

It is almost inevitable that various domestic industries would suffer from foreign competition once a nation opens its market to the outside world;⁴⁵ this is part of the price the country pays to get the overall benefits flowing from free trade. For developed countries, opening their domestic markets to less developed countries where labor cost, among other things, is significantly lower, means domestic industries producing like or competitive products will almost certainly lose at least some of their sales to competition and will have to transfer their resources to other productive pursuit—for example, developing and manufacturing higher-end products or even entering other industries—if such domestic industries want to survive. According to the theory of free trade, of course, the benefits the importing countries receive from such imports—benefits to their consumers, for example—will be greater than the losses such imports cause to domestic industries.

For less developed countries like China, opening national markets to economically more advanced countries means, among other things, that their technology-intensive and capital-intensive industries, including services, such as automobiles, banking and insurance, which usually lag one or even several generations behind the development level of Western countries, will face potentially debilitating competition from foreign companies. In this context, it is not difficult to understand why, prior to China's WTO accession, there was a strong public concern in China about China's entry into the WTO when many, if not most, of China's domestic manufacturing industries, as well as agriculture, were apparently not well prepared, technologically or financially, to directly compete with multinational corporations. The first two years after China's WTO accession seem to have allayed this fear somewhat,⁴⁶ though it is probably still too early to predict what kind of impact China's WTO accession will have on various sectors of China's economy.

This author, however, has reservations about the free trade theory. World-wide free trade may result in the maximum efficiency in the allocation of productive resources and may benefit consumers all over the world in the sense that they can get the best price for the best products—assuming competition is not inhibited by monopoly. Whether consumers

⁴⁴ Lee, *supra* note 42.

⁴⁵ This can be explained, of course, by the classical theory of comparative advantage. See, e.g., JOHN H. JACKSON ET. AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 8-10 (4th ed. 2002).

⁴⁶ See, e.g., *WTO Entry Spurs China's Economic Expansion*, CHINA DAILY, Nov. 11, 2003, http://www1.chinadaily.com.cn/en/doc/2003-11/11/content_280622.htm (last visited Feb. 1, 2004).

can always afford to buy products even at the best price, however, is another matter. Free trade may enlarge and/or perpetuate existing gaps of development between rich and poor countries. From the perspective of a country like China, one of the greatest strategic concerns over the WTO regime is that the country's own high value-added industries, if crippled by Western imports, will forever lose the chance to catch up with the West and that the country will at most be a "world factory" only receiving benefits at the lower end of the international manufacturing food chain. The purchasing power of the consumers of a specific country obviously cannot be separated from the country's overall development level. It is obvious that Country A that assembles computers but does not have the core technology for making the state-of-art CPUs cannot earn as much as Country B that supplies Country A with the CPUs.

The WTO system, admittedly, has made some accommodations for developing nations (e.g., article 9 of the WTO Agreement on Safeguard, "Developing Country Members"). But under the U.S.-China Agreement, China has not even availed itself of the normal treatment for a WTO member in the safeguard area, let alone the preferential treatment reserved for developing country members.

Against the backdrop of the unmistakable shift within the WTO framework to a more restricted application of safeguard measures, lowering the threshold for such measures under the U.S.-China Agreement, especially through the "market disruption" (or "significant cause of material injury") provision, is both anachronistic in theory and dangerous in practice. It sets up a disturbing precedent of derogation from basic principles underlying the WTO.

III. PRODUCT-SPECIFIC SAFEGUARD IN U.S. APPLICATION: SECTION 421 CASES

Besides the theoretical difficulties and ambiguities involved in the Product-Specific Safeguard of the U.S.-China Agreement, another issue, which is probably of more direct concern to market participants on the ground, is how the China-specific safeguard regime, implemented in the United States through section 421 of the Trade Act of 1974, is going to affect market participants in their business operations. Any assessment of the approach of the International Trade Commission (the "Commission"), the United States Trade Representative and the President in their application of section 421 is currently limited by the simple fact that there has not been much case law on this subject.⁴⁷ Due to the relatively short

⁴⁷ Here is a brief summary of the typical course a Sec. 421 case will take. The Commission has the authority to make a Sec. 421 safeguard investigation concerning Chinese imports. 19 U.S.C. § 2451(b)(1) (2000). It then will make its determination, and if the determination is affirmative, it shall also propose remedies. 19 U.S.C. § 2451(e),(f) (2000). The Commission shall then submit its determination and proposed remedies to the President and the Trade Representative in a Commission

time that has passed since China's WTO entry, which started to subject Chinese imports to the United States to section 421 investigation, there have so far been only four such investigations. The first, *Pedestal Actuators from China* ("Pedestal Actuators"),⁴⁸ ended when the President issued a memorandum for the Trade Representative on January 17, 2003.⁴⁹ The second, *Certain Steel Wire Garment Hangers from China* ("Garment Hangers"),⁵⁰ concluded similarly when the President decided not to take any action against the subject Chinese imports as recommended by the Commission.⁵¹ The third investigation ended when the Commission determined that the subject Chinese imports did not cause material injury or threat of material injury to the domestic producers.⁵² And the fourth is ongoing, with a positive determination by the Commission made in December 2003 and the President to make his final decision sometime this year.⁵³ This note analyzes the first two of these cases, which, despite their apparent atypicality in the area of international trade disputes,⁵⁴ nonetheless fairly represent the two later section 421 investigations.⁵⁵

report. 19 U.S.C. § 2451(e)-(g) (2000). *Id.* The next step is for the Trade Representative to "publish in the Federal Register notice of any measure proposed by the Trade Representative" in response to the Commission report and to allow interested parties "the opportunity, including a public hearing, if requested," to "submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest." 19 U.S.C. § 2451(h)(1) (2000). Within 55 days after receipt of the Commission report, the Trade Representative, after considering the views and evidence mentioned above, shall make a recommendation to the President. 19 U.S.C. § 2451(h)(2) (2000). The final step is for the President to make his decision within 15 days after receipt of the Trade Representative recommendation. 19 U.S.C. § 2451(k) (2000). If a petition alleges "critical circumstances" and calls for provisional relief, the route is basically the same, but the timeline is a bit different. 19 U.S.C. § 2451(i) (2000).

⁴⁸ *Pedestal Actuators from China*, USITC Pub. 3557, Inv. No. TA-421-1 (Nov. 2002) [hereinafter *Pedestal Actuators*].

⁴⁹ *Presidential Determination on Pedestal Actuator Imports from the People's Republic of China*, 68 Fed. Reg. 3157 (Jan. 17, 2003).

⁵⁰ *Steel Wire Garment Hangers from China*, USITC Pub. 3575, Inv. No. TA-421-2.1 (Feb. 2003) [hereinafter *Garment Hangers*].

⁵¹ *Presidential Determination on Wire Hanger Imports from the People's Republic of China*, 68 Fed. Reg. 23019 (Apr. 25, 2003).

⁵² *Certain Brake Drums and Rotors from China*, USITC Pub. 3622, Inv. No. TA-421-3, 2 (Aug. 2003) [hereinafter *Brake Drums*].

⁵³ *Ductile Iron Waterworks Fittings from China*, USITC Pub. 3657, Inv. No. TA-421-4 (Dec. 2003) [hereinafter *Ductile Iron Waterworks*].

⁵⁴ See *infra* notes 57-59.

⁵⁵ See, e.g., *infra* notes 58-59.

An additional caveat is also necessary due to some peculiar features of these two cases.⁵⁶ Both involve only a very small number of market participants⁵⁷ and a relatively small scale of domestic production.⁵⁸

⁵⁶ Indeed, Chris Parlin, lead attorney for the respondents in *Pedestal Actuators*, “cautioned that the underlying case initially brought to the ITC should have been rejected at the outset [because] ‘[t]his case was almost certainly not what Congress had in mind when it drafted the Section 421 provision.’” *Kaye Scholer Helps China Avoid US Trade Sanctions by Winning Landmark Market Disruption Case* (Jan. 2003), [http://www.kayescholer.com/web.nsf/0/3F10592371B691BA85256D720072D54D/\\$file/ChinaMarketAlertJan2003.pdf?openelement](http://www.kayescholer.com/web.nsf/0/3F10592371B691BA85256D720072D54D/$file/ChinaMarketAlertJan2003.pdf?openelement) (last visited Jan. 1, 2004).

⁵⁷ There are only three domestic producers in *Pedestal Actuators* and there are eight domestic producers in *Garment Hangers*. *Pedestal Actuators*, *supra* note 48, at 11; *Garment Hangers*, *supra* note 50, at 9. In *Brake Drums*, there are 5 domestic producers of subject brake drums and 6 domestic producers of subject brake rotors. *Brake Drums*, *supra* note 52, at 20. The relevant number is 6 in *Ductile Iron Waterworks*. *Ductile Iron Waterworks*, *supra* note 53, at 3.

⁵⁸ The published Commission opinion in *Pedestal Actuators* has removed all relevant information on the numbers of units involved, but it does leave intact the numbers of units of subject imports proposed by the Commissioners as quotas on the Chinese imports. It is fairly clear from these numbers, ranging from 4,425 to 7,440, that the entire volume of imports and domestic production at the time of the alleged injury could not have been very large. *Pedestal Actuators*, *supra* note 48 at 1. Confidentiality also prevents us from knowing the price range of the subject products, but we may safely conclude from the fact that the so-called “pedestal actuators” are used as components in building mobility scooters (for raising or lowering the seat) for handicapped people that their prices cannot be very high in absolute terms. *Id.* at 3. So we are basically dealing with a niche market in terms of both the number of units and the amount of money involved.

Garment Hangers entails a similar situation. Though the sheer number of subject imports and domestic production in this second case may be staggering (the Chinese imports in interim 2002 amounted to 405.7 million units, and the recorded peak of domestic production reached 3.98 billion units), the case is, after all, about certain kinds of steel wire garment hangers used in dry cleaning, industrial laundry, and textile industries. *Garment Hangers*, *supra* note 50, at 1, 3, 12, 14. Operating income was \$5.8 million in 1998 when it was apparently the highest in the relevant years. *Id.* at 1, 15.

The amounts of dollars involved in *Brake Drums* and *Ductile Iron Waterworks* *Fittings* are larger than those of the first two investigations, though they are not that large either from the perspective of international trade. U.S. imports of subject brake drums from China were 2.1 million units and those of subject brake rotors were 26.3 million units in 2002. *Brake Drums*, *supra* note 52, at 16 n.66 and 17 n.70. Due to the whitening out of the published opinion, we cannot find out the exact dollar amount of the subject imports in *Brake Drums*, but brake drums and rotors (and Chinese imports of such units are described by the Commission as economy-line as opposed to the premium-line units produced domestically) are not exactly expensive products and the total dollar value should not be very high. *Id.* at 4. In *Ductile Iron Waterworks*, the Commission allows us to be privy to the dollar amounts of the subject imports in some of the relevant years. In 2002, for example, the total value of

Another interesting fact about these two cases, which might not repeat itself often in future cases, is that in both cases there was a U.S. respondent in addition to the Chinese respondents. The U.S. respondent in *Pedestal Actuators* is Electric Mobility, a manufacturer of mobility scooters and power chairs. Electric Mobility purchased the pedestal actuators it needed from the sole petitioner, Motion Systems, and was a major buyer of the subject product made by Motion Systems.⁵⁹ In 2001, Electric Mobility switched to CIM, the sole Chinese exporter in this case, as its only supplier of pedestal actuators,⁶⁰ thus causing Motion System's sale of pedestal actuators to plunge.⁶¹

Garment Hangers also has much to do with the U.S. respondent in the case. In that case an important fact is that Laidlaw, the U.S. respondent, is both a domestic producer of the subject product *and* an importer of the subject product made by the Chinese respondents. Laidlaw apparently mixed the Chinese imports with its own products and sold them together at what it claimed to be the same price as its domestic product.⁶² Though the Commission decided that "at their peak" such producer imports "represented no more than about one third of total imports from China in any given year,"⁶³ producer imports certainly accounted for a substantial portion of the subject imports. Such a fact, unless producer importation has been a fairly common business practice, may be more of a distracting factor than a representative one in this note's assessment of the U.S. application of its China-specific safeguard regime.

It may not be very productive to focus on an extensive comparison of the two cases or to generalize from them about the U.S. approach(es) to section 421 cases, though we are indeed able to see some common factors at play in both cases. At present, it seems more appropriate to discuss some issues, not necessarily existent in both cases to a comparable degree, which present themselves in Commissioners' determinations as well as in the President's final decision in *Pedestal Actuators* and which may prove relevant to future cases.

As discussed in Part I of this note, a central feature of the China-specific safeguard is the substitution of the standard notion "serious injury" with "market disruption"/"material injury," and so we naturally expect

such imports from China was \$40,919,000. Ductile Iron Waterworks, *supra* note 53, at C3.

⁵⁹ *Pedestal Actuators*, *supra* note 48, at 13. As to how important a customer Electric Mobility had been to Motion Systems, we have a clear hint, despite the confidential cut, from the statement that "Motion Systems, the principal domestic producer, has lost its *** customer to CIM . . ." *Id.* This hint is clearly borne out by the discussion of causation between Electric Mobility's switch of supplier and the alleged injury suffered by Motion Systems. *Id.* at 18.

⁶⁰ All of the subject imports from CIM were shipped to Electric Mobility as well.

⁶¹ See, e.g., *Pedestal Actuators*, *supra* note 48, at 18.

⁶² *Garment Hangers*, *supra* note 50, at 21.

⁶³ *Id.* at 21-22.

the first section 421 cases to shed some light on how this notion of “market disruption”/“material injury” will operate. Unfortunately, the kind of injury involved in the two cases probably fits better into the “serious injury” category than the “material injury” category. So, even though the Commission has in theory clarified its approach on this very important issue,⁶⁴ the first two cases have not provided a genuine test of how the Commission will apply the “material injury” threshold in a close case.

The extent of omission due to confidentiality in the Commission’s *Pedestal Actuators* opinion is such that it has virtually removed all concrete

⁶⁴ As the Commission has already set forth its approach to “material injury” in a section 421 context quite clearly in *Pedestal Actuators* (and again in *Garment Hangers*), there is little point in repeating its words. It may be helpful, however, to give a summary of the approach adopted by the Commission on “material injury” for the sake of greater clarity and coherence. By way of parsing the definition of “market disruption” in section 421(c)(1), the Commission identifies “material injury” or threat of “material injury” as one of the three conditions to establish the existence of market disruption. *Pedestal Actuators*, *supra* note 48, at 4. When it comes to how “material injury” itself is to be determined, the Commission acknowledges that “[n]either section 421 nor its legislative history defines the terms ‘material injury’ or ‘threat,’ identifies economic factors to be considered, or cross-references any definitions, factors, or Commission practice under other statutory authorities to which the Commission might look for instruction.” *Id.* at 12.

The Commission chooses to take a cue from the legislative history of section 406 (dealing with market disruption from Communist countries), which, as we mentioned above, does not define “material injury” either, though it does use this phrase. *Id.* The legislative history of section 406 contrasts “material injury” with “serious” injury as used in section 201 (and similarly in section 202, both 201 and 202 prescribing the global safeguard measures), and describes the market disruption/material injury test *negatively* in comparison to “serious injury” as used in section 201. One thing worth mentioning here is that the majority opinion in *Pedestal Actuators* also points to the use of “material injury” in Title VII, which defines the term to mean “harm which is not inconsequential, immaterial, or unimportant.” *Id.* Chairman Okun, in her dissenting opinion, disputes this reference to Title VII as neither useful nor appropriate, because “Title VII applies to unfairly traded imports while sections 201 and 421 apply to imports generally, without regard as to whether they are fairly traded or not.” *Id.* at 32 n.148.

The Commission thus decides that “material injury” as used in sec. 421 “represents a lesser degree of injury than ‘serious’ injury under section 202 of the Trade Act” (section 202 laying down factors to be considered in determining on “serious” injury in subsection c). *Id.* at 13. It then goes on to adopt the various factors used in sec. 202 for establishing serious injury for the present purpose of determining “material injury.” *Id.* In the absence of specific direction as to how to determine on “material injury” in sec. 421, this approach by the Commission is not unreasonable. The problem, though, is how the Commission is going to apply this set of factors in a way that manages to preserve some meaningfulness to the “material injury” standard so as not to let it blur into the apparently more operational category of “serious injury.”

numbers necessary for gauging the injury to the petitioner.⁶⁵ The Commission does give some qualitative description of what transpired in the “domestic industry” during the concerned period:

. . . virtually all of the indicators of the industry’s health (production, sales, capacity utilization) rose through the first part of the period examined and reached their best levels in 2000, began to decline in 2001, and *fell sharply* in the first half of 2002, as compared to the same period of 2001.⁶⁶

Without the benefit of the real numbers, this is one credible way to describe the petitioner’s situation, especially given the apparent importance of Electric Mobility to the petitioner as a-major (if not *the* major) buyer of its pedestal actuators before it switched to CIM.

And if the petitioner’s general situation did deteriorate “sharply,” then it was probably not a real test for the “material injury” notion as it may have already qualified for the “serious injury” category.⁶⁷ The same can

⁶⁵ The reader can get a good sense of how scrupulously (or over-scrupulously) the Commission has whitened out the information by looking at footnote 99 on page 18 of the opinion, for example, which is supposed to tell the reader in detail the impact of the subject imports on the “domestic industry.” Pedestal Actuators, *supra* note 48, at 18 n.99. The confidential omission ensures that we obtain nothing of value from this footnote, the unedited version of which must have a good deal of information that would enable us to have a decent sense of what level of profits decline, for example, can be allowed to indicate “material injury.”

⁶⁶ *Id.* at 18 (emphasis added).

⁶⁷ There seems to be a significant problem in what Chairman Okun calls “allocation methodology” used by the petitioner in *Pedestal Actuators* that is directly related to the profitability of the petitioner in the period when allegedly it was “materially” injured by the increase of Chinese imports. Due to confidential omission again, we do not know exactly what this “allocation methodology” refers to and how it affects the various numbers used to reflect the level of profitability. From the available information, it appears that this methodology has to do with how the petitioner classifies its costs and incomes (with costs apparently exaggerated through some kinds of misallocation). See, e.g., *Pedestal Actuators* at 31. Chairman Okun bases her dissent on her finding that the petitioner failed to establish that its “allocation methodology” is a “reasonable approach.” An alternative method of allocation, Chairman Okun explains, could show that “the industry remains quite healthy.” Though this rather curious factor of “allocation methodology” obviously is very important to this specific case, it probably would not be relevant to many other cases to follow. According to Chairman Okun, the Commission usually will not scrutinize such methodology used by individual domestic producers, apparently because it would not have such a visible impact on the health indicators for the whole industry. *Id.* Here the allocation methodology certainly had an impact on the health indicators for “the whole industry,” because of the peculiar situation of an “industry” “dominated by a small, privately held [organization].” *Id.* This, however, raises the question of defining “domestic industry.”

be said with regard to *Garment Hangers*.⁶⁸

The first two section 421 cases do, however, problematize one issue closely related to “material injury,” i.e., the determination of the relevant “domestic industry.”⁶⁹ Market disruption is defined under section 421 as existing when “imports of an article like or directly competitive with an article produced by a domestic industry are increasing rapidly . . . so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.”⁷⁰ Therefore, in order to determine whether there is the required market disruption to trigger section 421 safeguard measures, the first task for the Commissioner is to decide what constitutes the “domestic industry.”⁷¹ Indeed, in *Pedestal Actuators*, the Commission devotes a substantial part of its opinion to discussing “domestic industry.”⁷² Two approaches have emerged from these section 421 cases, one endorsed by the majority of the Commission and the other taken by Commissioner Bragg.⁷³

The Commission follows the “two-step practice” established under section 202: (1) “determining what constitutes the product like or directly competitive with the imports subject to the investigation; and (2) “identifying who produces it (the domestic industry).”⁷⁴ When it comes to step one, deciding what constitutes “like or directly competitive” domestic product, however, the Commission is divided. The majority approach follows the direction of section 202 safeguard cases and considers factors including “(1) the physical properties of the article, (2) its customs treatment, (3) its manufacturing process (i.e., where and how it is made), (4) its uses, and (5) the marketing channels through which the product is sold.”⁷⁵ The majority approach also focuses on “clear dividing lines among possible products,” which means putting an emphasis on finding a

⁶⁸ The Commission finds that the financial condition of the U.S. domestic producers “deteriorated sharply” in 2001. *Garment Hangers*, *supra* note 50, at 15. Operating income of the domestic industry “rose from \$4.8 million in 1997 to \$5.8 million in 1998, and then fell to \$4.9 million in 1999, \$3.6 million in 2000, and a loss of \$2.3 million in 2001; operating income was a positive \$741,000 in interim 2001, and fell to a loss of \$2.8 million in interim 2002.” *Id.* Such sharp change in profitability can certainly be described as “serious” injury.

⁶⁹ For present purposes we treat “domestic industry” as equivalent to “domestic producers of like or directly competitive products.” Commissioner Bragg makes it clear that she views these two terms “as being synonymous.” *Pedestal Actuators*, *supra* note 48, at 47.

⁷⁰ 19 U.S.C. § 2451(c)(1) (2000).

⁷¹ *Id.*

⁷² *Pedestal Actuators*, *supra* note 48, at 5-11.

⁷³ By the time of the fourth section 421 investigation, Commissioner Bragg had apparently left the Commission.

⁷⁴ *Pedestal Actuators*, *supra* note 48, at 5.

⁷⁵ *Id.* at 6.

“substantial identical” domestic product and “disregard[ing] minor variations.”⁷⁶

Commissioner Bragg, however, argues that the Commission should differentiate section 421 from section 201 and adopt a narrower approach in identifying domestic “like or directly competitive” product.⁷⁷ She prefers to be guided by the criteria applied by the Commission in anti-dumping and countervailing duties investigations: “(1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; and (5) common manufacturing facilities, production processes, and production employees.”⁷⁸ This is certainly a narrower approach and from the perspective of the petitioner, a more demanding approach compared with the majority approach. “Interchangeability” is probably a higher threshold than similar physical qualities and uses. “Customer and producer perception” certainly gives the respondents some leverage because they—including both Chinese producers and probably also U.S. customers, as shown in *Pedestal Actuators*—can claim that the subject import is perceived to be different from the domestic product.⁷⁹ On the other hand, the “customs treatment” criterion under the majority approach can help to establish a fairly wide range of products as like products.⁸⁰

In her argument, Commissioner Bragg offers two reasons for a narrow approach to defining like products in a section 421 case. First section 201, which contains the global safeguard provisions, has a broader focus on “the productive resources of the domestic industry,” while section 201 aims at facilitating the domestic industry to “make a positive adjustment to import competition.”⁸¹ Commissioner Bragg here notes that counsel for the petitioner conceded that, as a legal matter, import relief under section 421 is not directed to the productive resources of the domestic industry.⁸² Section 201(b), “Positive adjustment to import competition,” provides that one situation in which such a positive adjustment can be shown to occur is when “the domestic industry experiences an orderly transfer of resources to other productive pursuits.”⁸³ In contrast, there is

⁷⁶ *Id.*

⁷⁷ *Id.* at 46.

⁷⁸ *Id.* at 47.

⁷⁹ In *Pedestal Actuators*, for example, respondent CIM “asserts that there is no distinct domestic pedestal actuator industry, and that the term “pedestal actuator” is *not accepted industry terminology* but merely petitioner’s ‘contrivance to describe its two models of linear actuators.’” *Id.* at 7 (emphasis added).

⁸⁰ See, e.g., U.S. Int’l Trade Comm’n, *Harmonized Tariff Schedule of the United States (2004)*, Chapter 73: Articles of Iron or Steel, at http://63.173.254.11/tariff_chapters_2004/0400C73.pdf (last visited Jan. 31, 2004). “Garment hangers,” for instance, is listed here as one inclusive category under heading/subheading 7326.20.00.

⁸¹ *Pedestal Actuators*, *supra* note 48, at 46.

⁸² *Id.* at n.226.

⁸³ 19 U.S.C. § 2251(b)(1)(A)(ii) (2000).

no similar language in section 421, which is intended by Congress, at least judging from the statutory text itself, to “prevent or remedy market disruption.”⁸⁴ According to Commissioner Bragg, this broader focus on productive resources of section 201 on productive resources, with the implication that the domestic industry should try to shift resources rendered less productive by import competition to more productive pursuits, argues for a correspondingly broad definition of “like product.”⁸⁵

The Commissioners’ opinions on *Pedestal Actuators* and *Garment Hangers* nevertheless give us cause to doubt if this teleological distinction between sections 201 and 421, supported by textual difference between the sections, can be meaningfully carried out in practice, at least as far as the recommended remedy is concerned. The announced aim of section 421 is to prevent or remedy market disruption.⁸⁶ The Commission further clarifies this aim when it states in *Pedestal Actuators* that the proposed remedy was “intended to restore domestic sales and profitability to reasonable levels”⁸⁷ The question is how the domestic industry could accomplish this. The Commission’s view on this seems to be twofold: (1) the import relief under section 421 will allow the price for the domestic product to rise and so will help restore the profitability of the domestic industry;⁸⁸ and (2) section 421 relief will help the domestic industry to undertake some kind of restructuring or improvements so as to be better able to compete with the imports.⁸⁹

⁸⁴ 19 U.S.C. § 2451(a) (2000).

⁸⁵ *Pedestal Actuators*, *supra* note 48, at 46.

⁸⁶ *See* 19 U.S.C. § 2451(a) (2000).

⁸⁷ *Pedestal Actuators*, *supra* note 48, at 28. The Commission made a similar statement in *Garment Hangers* when it remarked that the remedy it recommended there was “likely to restore domestic sales and profitability to reasonable levels. . . .” *Garment Hangers*, *supra* note 50, at 30.

⁸⁸ In *Garment Hangers*, for example, the Commission states that “[i]n general, [it] would expect that as prices increase, the domestic industry will be able to respond better to new market demands and to increase production as necessary.” *Garment Hangers*, *supra* note 50, at 31. Commissioner Bragg, in her separate opinion in the same case, “anticipate[s] that the short-term effects of [her] recommended remedy will include the stabilization of price levels in the U.S. market for CSWG [certain steel wire garment] hangers. . . .” *Id.* at 39.

⁸⁹ In *Pedestal Actuators*, the Commission predicts that the “relief also would allow Motion Systems to complete planned capital improvements” *Pedestal Actuators*, *supra* note 48, at 28. In *Garment Hangers*, the Commission expects “the domestic industry to be able to increase its ability to compete with imported hangers as it modernizes and consolidates its production facilities.” *Garment Hangers*, *supra* note 50, at 31 (emphasis added). Commissioner Bragg, in her separate opinion in *Garment Hangers*, anticipates that when the domestic certain steel wire garment (“CSWG”) hanger industry as a whole returns to “a reasonable level of profit” the domestic producers will also be able to “either complete their restructuring efforts or, at a minimum, to secure the financing necessary to complete such efforts.” *Id.* at 39.

No Commissioner mentioned “positive adjustment,” which seems to vindicate Commissioner Bragg’s view on the different goals of sections 201 and 421. The absence of the term “positive adjustment,” however, may only be of semantic significance. The actual difference between positive adjustment—or transfer of resources to other productive pursuits,—and modernization and consolidation of production facilities,⁹⁰ or vaguer terms like “restructuring efforts”⁹¹ and “capital improvements”⁹² can be elusive. In *Pedestal Actuators*, the unmistakable implication of the Commission’s opinion is that the proposed relief will enable the petitioner to upgrade its production facilities in order to manufacture other, and presumably higher-end, models of pedestal actuators.⁹³ Such “capital improvements” can certainly also be classified as a positive adjustment, as this term is defined under section 201, which provides:

For purposes of this part, a positive adjustment to import competition occurs when—

- (A) the domestic industry—
 - (i) is able to compete successfully with imports after actions taken under section 2254 of this title terminate, or
 - (ii) the domestic industry experiences an orderly transfer of resources to other productive pursuits; and
- (B) dislocated workers in the industry experience an orderly transition to productive pursuits.⁹⁴

With its facilities improved and new productive capabilities added, the petitioner can focus its resources on manufacturing actuator models other than the subject model and can thus be said to have “experienced an orderly transfer of resources to other productive pursuits.”⁹⁵ “The dislocated workers,” former employees of the petitioner, could also be

⁹⁰ See *Pedestal Actuators*, *supra* note 48, at 46; *Garment Hangers*, *supra* note 50, at 39.

⁹¹ *Garment Hangers*, *supra* note 50, at 39.

⁹² *Pedestal Actuators*, *supra* note 48, at 46.

⁹³ Besides the connotation of the term “capital improvements” itself, the Commission opinion also mentions:

In years two and three of the relief, the share of domestic producer’s sales accounted for by this model [the specific model of actuator that is the subject product in this case] is expected to decline, as the quota level is increased. As the share of sales accounted for by this model declines, [the petitioner’s production of other models will make up the loss due to the decline in its sales of the subject model and ensure that the petitioner remains reasonably profitable].

Pedestal Actuators, *supra* note 48, at 28.

⁹⁴ 19 U.S.C. § 2251(b)(1) (2000).

⁹⁵ *Id.* With this shift in its focus of production, even though the petitioner still manufactures actuators, it can be said to have shifted to “other productive pursuits” because according to its own claim, with which the Commission agrees, the subject model of pedestal actuator is different from other kinds of actuators and manufacturing of these different actuators represent different industries and so

employed in the different “productive pursuits” the petitioner will conduct.⁹⁶ So, in *Pedestal Actuators* a positive adjustment can be expected to be accomplished with the help of section 421 relief, and, therefore, the line between the goals of sections 421 and 201 is probably blurred in that case.

Garment Hangers seems to differ somewhat from *Pedestal Actuators* in this aspect. In discussing the predicted effect of their proposed remedies aside from price increase (or as Commissioner Bragg prefers to call it, “stabilization of price levels”)⁹⁷ Commissioners use terms such as “moderniz[ing] and consolidat[ing] production facilities”⁹⁸ and “restructuring efforts.”⁹⁹ They thereby indicate that the import relief, in its varied forms, is aimed to facilitate the efforts by the domestic hanger industry to reorganize itself through mergers and acquisitions while at the same time upgrading its facilities. Such efforts, if completed, should presumably allow the domestic industry to be “able to compete successfully with imports,” thus essentially satisfying one qualifying factor for “a positive adjustment.”¹⁰⁰ Under section 201(b)(2):

The domestic industry may be considered to have made a positive adjustment to import competition even though the industry is not of the same size and composition as the industry at the time the investigation was initiated under section 2252(b) of this title.¹⁰¹

Therefore, the layoff of workers and the resultant downsizing of the industry does not disqualify the “restructuring” as a “positive adjustment.” As for the requirement in section 201(b)(1)(B) that dislocated workers “experience an orderly transition to productive pursuits,”¹⁰² it is difficult to see how such reorganization of the hanger industry under section 421 relief could fundamentally differ from reorganization under section 201 relief. The Commissioners’ *Garment Hangers* opinions, like the Commission’s *Pedestal Actuators* opinion, fail to evince a meaningful distinction between the goals of sections 201 and 421.

This blurring of distinction between the purpose of section 201 global safeguard measures and the purpose of section 421 China-specific safeguard measures may not be accidental. Admittedly, the kinds of relief the U.S. President can provide under section 201 and section 421 are different. Section 201 authorizes the President to “take all appropriate and feasible action within his power” to facilitate positive adjustments by the

presumably different “productive pursuits.” See, e.g., *Pedestal Actuators*, *supra* note 48, at 7, 49.

⁹⁶ *Pedestal Actuators*, *supra* note 48, at 28.

⁹⁷ *Garment Hangers*, *supra* note 50, at 31, 39.

⁹⁸ *Id.*

⁹⁹ *Id.* at 39.

¹⁰⁰ 19 U.S.C. § 2251(b)(1)(A)(i) (2000).

¹⁰¹ 19 U.S.C. § 2251(b)(2) (2000).

¹⁰² 19 U.S.C. § 2251(b)(1)(B) (2000).

domestic industry.¹⁰³ Under section 421, however, the President is only allowed to “proclaim increased duties or other import restrictions with respect to such product, *to the extent and for such period* as the President considers *necessary* to prevent or remedy the market disruption.”¹⁰⁴ This restriction on section 421 action, consistent with the equally limited goal of preventing or remedying market disruption, is probably an appropriate offset against the unusual harshness with which section 421 (*i.e.*, the China-specific safeguard) treats Chinese exporters.

Whether domestic producers will attune their own actions to this limitation inherent in section 421 action, however, can be a very different story. Confronted with competing Chinese imports which typically have a dramatically lower cost basis,¹⁰⁵ domestic producers in the United

¹⁰³ 19 U.S.C. § 2251(a) (2000).

¹⁰⁴ 19 U.S.C. § 2451(a) (2000) (emphasis added).

¹⁰⁵ The per capita GNP of China is currently around \$1,000, only a small fraction of the U.S. level of around \$35,000. (Here since we are dealing with trade, we use the exchange rate between RMB—*renminbi* or *yuan*, the basic unit of *renminbi*—and U.S. dollars, which has been for quite some years 8.27 RMB = 1 USD.) See, e.g., CENTRAL INTELLIGENCE AGENCY, *supra* note 2. Official statistics have shown the per capita GNP levels of China's economic centers such as Shanghai, Beijing, Shenzhen, Guangzhou, as well as of upstarts like Suzhou have already reached around the \$5,000 line, but this might be misleading as to the cost basis of Chinese imports. See, e.g., *Shanghai Highlights Island Planning as New Development Impetus*, PEOPLE'S DAILY, http://english.peopledaily.com.cn/200303/31/eng20030331_114306.shtml (last updated Mar. 31, 2003) (“With its annual per capita gross domestic product (GDP) reaching 5,000 US dollars, Shanghai is entering a new stage of reaching annual per capita GDP at 8,000 to 10,000 US dollars”). While \$5,000 still lags significantly behind the U.S. average, it also needs to be pointed out that a large proportion, if not the majority, of China's export-oriented industries rely for labor supply on farmer-turned-workers, who migrate to the large cities and their neighboring manufacturing centers (like Dongguan, Guangdong) and on average receive a much lower level of compensation for their work compared with the average city dwellers (who, if possible, would usually prefer to work in more lucrative sections, such as automobile industry in Shanghai). Another important factor affecting the cost basis of China-made products is the fact that China has a seemingly inexhaustible labor supply, at least for quite some years to come: in fact, one of the most serious challenges facing China's new leadership is how to solve the high level of unemployment (both in urban and rural areas, but especially in rural areas). For an official and so rather conservative estimate of rural unemployment, see, for example, *Government's Think-tank Eyes Unemployment*, PEOPLE'S DAILY, at http://english.peopledaily.com.cn/200209/25/eng20020925_103848.shtml (last updated Sept. 25, 2002) (estimating unemployed rural laborers at 100 million and urging the government to undertake structural reforms to help solve this huge unemployment problem). As for the value of RMB relative to USD, which Japan and some other countries have recently attacked as being significantly undervalued (and therefore allegedly hurting Japan's exports, for example), the Chinese government has made it clear that it will not raise the exchange rate for the foreseeable future. See, e.g., *Central Bank Chief Pledges to Maintain RMB Stability*, PEOPLE'S DAILY, at <http://english.peopledaily.com.cn/200301/27/eng20>

States would probably want to make “positive adjustments” as soon as possible.¹⁰⁶ The actual situation may differ widely from industry to industry, but in general, given the comparable quality of Chinese imports and domestic products, the only viable long-term strategies such a domestic industry could adopt to respond to the increasing imports are: (1) to transfer its resources either to more sophisticated products along the same or related product line; (2) to move its operations abroad—including to China—if feasible; (3) to transfer its resources, especially capital, to other industries altogether; or, (4) a combination of some or all of the above strategies. All these moves may be justly called “positive adjustments” in the spirit of section 201. Price increases within a section 421 relief period is clearly not the answer. Mere modernization of the facilities, without any positive adjustment along the way, is probably not a good answer either.¹⁰⁷ With garment hangers, for example, it is at least doubtful that by undergoing modernization and consolidation alone the domestic hanger industry could indeed overcome the steep price gap between its products and like imports to remain “reasonably profitable.”

This of course does not mean that the domestic hanger industry will not benefit from any section 421 measure, if taken. The discussion above, however, helps to show that short of section 201-style positive adjustments, other strategies taken by a domestic industry facing increasing competition from Chinese imports may be less likely to succeed in the long term. Indeed, one would not expect a prudent domestic producer to

030127_110789.shtml (last updated Jan. 27, 2003). With all these factors in mind, it is safe to say that products made in China, especially those labor-heavy products (such products should include items like computer keyboards these days, not just textiles), will continue to be low-priced for the foreseeable future.

¹⁰⁶ Sometimes such “positive adjustments” would mean moving their operations from the United States to China, from where some portions of their products would then be imported “back” to the United States. This certainly complicates the matter when it comes to safeguard measures against Chinese imports and generally should have the effect of weakening the petitioner(s)’ argument for such imports relief because that would directly harm the concerned U.S. companies that have moved their operations to China. To certain extent this United States-against-United States scenario would be rendered less likely by (1) China’s growing domestic market and resultant greater ability to consume such “U.S.” products made in China, and possibly also (2) the increasing transfer by a specific U.S. industry of its operations to China and other countries.

¹⁰⁷ We assume here, of course, that “modernization” does not mean developing other, higher-end products (to conceive which is probably a bit difficult with the garment hanger industry). Suppose the labor cost of a Chinese import product is 1/25 of that of its U.S. counterpart, then the modernization (together with consolidation) of the U.S. domestic industry would need to enable at least a 2,500% fold jump in its productivity to offset the lower-labor advantage of the Chinese product. Aside from the technological difficulty of this in many cases (technology on the Chinese importing side may be upgraded as well), the cost of realizing such a technological advance itself is another important factor limiting the viability of this route.

act otherwise when it faces a *Pedestal Actuators/Garment Hangers* situation, in which the domestic product has little or no quality superiority to the Chinese imports¹⁰⁸ and the domestic product suffers a substantial disadvantage in price. From the perspective of domestic producers, therefore, the section 421 safeguard regime, when compared with section 201's regime, can be viewed as representing a supposedly lighter, and definitely lower-threshold, alternative safeguard relief specifically aiming at Chinese imports.

The disparity between the textual pronouncements of the goals of sections 421 and 201, enouncing supposedly different aims, and the real-world similarity in the intended effects of safeguard measures under these two sections has interesting implications. For one thing, it supports the majority approach in determining the domestic industry and militates against the main argument of Commissioner Bragg's minority approach.¹⁰⁹ As the majority approach is likely to bring a broader range of products into the category of "like product" and so to establish a broader "domestic industry," this could bring certain measure of relief to respondents in future section 421 cases because it is in their interests to argue for a wider conception of "domestic industry." It will make two things more difficult for the petitioners: (1) to prove they are representative enough to bring forth a section 421 application in the first place;¹¹⁰

¹⁰⁸ In *Pedestal Actuators*, the U.S. respondent Electric Mobility claims that it switched from its original U.S. supplier to CIM, the Chinese producer, "primarily because of quality problems . . . and also lengthy lead time . . ." *Pedestal Actuators*, *supra* note 48, at 18. The Commission only concludes that "[i]n any event, the record does not indicate that any alleged problems . . . were so severe as to cause Electric Mobility not to purchase from Motion Systems." *Id.* at 20. In *Garment Hangers*, the Commission finds that a "slight majority of purchasers rated U.S. and Chinese hangers comparable in quality; of those indicating a quality difference, most preferred the quality of Chinese hangers." *Garment Hangers*, *supra* note 50, at 24.

¹⁰⁹ The other argument put forward by Commissioner Bragg for her approach is that section 421 contains a direction that the Commission "consider the effect of subject imports on prices in the U.S. market (similar to antidumping or countervailing duty investigations)" while section 201 lacks a similar express requirement. *Pedestal Actuators*, *supra* note 48, at 46. According to Commissioner Bragg, this specific direction in section 421 calls for a narrow definition of "domestic industry" because "pricing comparisons and the assessment of price effects are likely to be more readily achieved when the like product is defined narrowly, as opposed to a broad range of products." *Id.* This is apparently a very sensible point, though it is open to questions. One obvious explanation for the inclusion of price effects from Chinese imports as one indicator of "material injury" is that Congress, in drafting section 421, which solely deals with imports from China, added the price factor because it perceived the lower prices of Chinese imports as their main threat to the U.S. domestic products. For the section 421 direction concerning price, see 19 U.S.C. § 2451(d)(2) (2000).

¹¹⁰ The Commission is agreed that "domestic industry" in a section 421 investigation should mean, as under section 202, "the producers as a whole of the like or directly competitive article or those producers whose collective production of the

and (2) to prove they have suffered “material injury.” Obviously the smaller the “domestic industry,” the more significant or “material” would the same amount of loss appear to be. For the same reasons, the petitioner would want to have a narrow approach to identifying “domestic industry.” Though the Commissioners settled on the same number of domestic producers in both *Pedestal Actuators* and *Garment Hangers* despite these two different approaches,¹¹¹ in future section 421 cases the difference in these two approaches could play out in a significant fashion.

Another possible ramification of the disparity between the pronounced purpose of section 421 relief and the effect of such relief considered by the Commission when it decides on what remedies to recommend, as shown above, is that it tends to undermine the integrity of the notion of “market disruption/material injury” as implemented under section 421. The low threshold established by “material injury” is to a certain extent justified by the limited statutory purpose of preventing or remedying market disruption. But this consistency may only exist on paper. As the Commissioners’ opinions in the first two section 421 cases have shown, the Commissioners may find it difficult to contain actual safeguard measures it considers within this limited purpose.

In fact, designing safeguard measures that will not exceed the “necessary” extent of remedying market disruption is inherently difficult. Merely providing some “stability of prices” during the relief period is probably not enough; the Commission also needs to have an eye to somehow enabling the domestic industry to be able to maintain a reasonable level of profitability after the relief period ends. The tricky part in all this is to decide how much additional help to the industry beyond providing temporary price stability, or increases, is “necessary.” This exercise is doubtless very fact-specific, and given the myriad factors that may have an impact on market situations,¹¹² it is not at all surprising that the Commission reiterates, “[i]t is not possible to predict market effects [of recommended remedy] with precision following the initial year of relief.”¹¹³ Specific facts of a case may dictate the specific remedies the Commission ends up recommending, but it would be quite natural if the Commission

like or directly competitive article constitutes a major proportion of the total domestic production of such article.” 19 U.S.C. § 2251(c)(6)(A)(i) (2000); *Pedestal Actuators*, *supra* note 48, at 47; *Garment Hangers*, *supra* note 50, at 9 n.42.

¹¹¹ *Pedestal Actuators*, *supra* note 48, at 11, 49 (three firms identified as comprising the domestic industry); *Garment Hangers*, *supra* note 50, at 9 (eight domestic producers identified as comprising the domestic industry).

¹¹² Such factors may include the change in the demand-supply relationship, overall economic situation, or unpredictable eventualities such as terrorist attacks (which, as we have all witnessed in the past two years since September 11, will have a tremendous effect on economy and which are being rendered both more predictable and more unpredictable by the ongoing war with Iraq), to name just a few.

¹¹³ *Pedestal Actuators*, *supra* note 48, at 28; *Garment Hangers*, *supra* note 50, at 31.

should tend to err on the side of prescribing an overdose, as their remedies in the two cases examined above seem to suggest. This difficulty in finding the right measure to meet the purpose of section 421, or as in *Pedestal Actuators*, in finding whether there has been “material injury” to begin with, is manifested in the division of opinions among the five Commissioners. Besides various factors peculiar to these two cases that may help explain such difference within the Commission, the notion of “market disruption”/“material injury” should have been a major factor that has contributed to this confusion and uncertainty.

Fortunately, this troublesome notion of “market disruption”/“material injury,” is not unchecked in its operation in a section 421 case. The final say on a section 421 safeguard remedy resides with the U.S. President and section 421 directs the President to base his decision on a consideration of the overall effect of a recommended remedy on “the national economic interest of the United States.”¹¹⁴ President Bush vetoed the recommended remedy in *Pedestal Actuators* and he listed the interests of downstream manufacturers and ultimate consumers of the subject product among the reasons for his decision not to take any safeguard action in that case. The Commissioners in *Garment Hangers* comment on the likely effects of their proposed remedies on such interests and because of the tiny proportion of cost the subject hangers represent in the final products/services, they conclude that such effects should be minimal. *Pedestal Actuators* obviously represents a much more significant part of the cost of the ultimate products and this difference between the two cases may help explain the different results at the Commission. Yet the final veto by the President in *Garment Hangers* still mentions the negative effect additional tariffs on subject imports would have on “thousands of small, family-owned dry-cleaning businesses across the United States” or on their customers as a reason for not adopting the Commission’s recommendation.¹¹⁵

Other interests the President and the Commission may have to consider in future section 421 cases are those of U.S. importers and distributors of Chinese imports, which have already come into the picture in *Garment Hangers*, though in a rather curious way. As mentioned above, the interests of U.S. companies that have invested in China may also be involved in future section 421 cases if products from such companies contribute to “material injury” suffered by U.S. producers manufacturing like products within the United States.¹¹⁶

¹¹⁴ 19 U.S.C. § 2451(k)(1) (2000).

¹¹⁵ Presidential Determination on Wire Hanger Imports from the People’s Republic of China, 68 Fed. Reg. 23019 (Apr. 25, 2003).

¹¹⁶ The President’s determination in *Garment Hangers* is based heavily on the consideration that taking section 421 action against Chinese imports would injure the interests of the U.S. producer that has imported a significant volume of the subject Chinese products. *Id.*

Other types of interests entailed in section 421 cases are political in nature. Section 421(k)(1) contemplates such interests when it authorizes the President not to take proposed action under section 421 if he decides that taking such actions “would cause serious harm to the national security of the United States.” Pedestal actuators and certain steel wire garment hangers certainly are only remotely, if at all, related to the national security of the United States and it remains to be seen in future cases how this special kind of interest interacts with section 421 investigations. It should be mentioned, though, that when the Commission decided to accept the application in *Pedestal Actuators*, Mr. Dai Yunlou, Minister Counselor of the Chinese Embassy to the United States, sent a letter to the Commission in which he voiced China’s concern with the Commission’s initial decision to take the case.¹¹⁷ This is just one small reminder of the undeniably political undertone in U.S.-China relations under the WTO framework. “It is not possible to predict with precision,” to use the Commission’s words, how U.S.-China relations will develop in the next ten years before the China-specific safeguard ends. Unless some catastrophic developments occur to seriously disrupt this bilateral relationship,¹¹⁸ it should, hopefully, experience a relatively stable period as the

¹¹⁷ Letter from Minister Counselor Dai Yunlou of Chinese Embassy to Marilyn R. Abbott, Secretary of the United States International Trade Commission (Sept. 23, 2003) (on file with author).

¹¹⁸ Nothing seems to pose a more realistic threat to the stability of U.S.-China relations than a war between mainland China and Taiwan, which does not seem to be a totally impossible event, given, for one thing, the on-going political developments on the island. This is worth mentioning in this article because it has been presenting a tremendous challenge and risk for the U.S.-China relations and everything directly related to it (such as section 421 investigations). The United States seemingly has an obligation to help defend Taiwan, presumably by sending U.S. troops to the war zone, if the island were attacked by the mainland. President Bush, early in his presidency, actually clarified (perhaps unnecessarily from today’s perspective) the U.S. position on this sensitive issue by promising that the United States would do “whatever it took to help Taiwan defend itself.” See, e.g., Peter Brookes, U.S.-Taiwan Defense Relations in the Bush Administration, Address at the U.S. Naval War College (Nov. 14, 2003) (transcript available at <http://www.heritage.org/Research/AsiaandthePacific/hl808.cfm>). On the other hand, China has reiterated that it will not give up the use of force as a means for unification with Taiwan. See, e.g., *id.* Therefore, if Taiwan in some manner goes beyond what Beijing considers to be the absolute bottom line and therefore China attacks Taiwan, then the United States either has to go into an armed conflict with China (assuming there is still time for meaningful military response from the United States) or it can refuse to do so and therefore jeopardize, to certain extent at least, its credibility in the international community. Neither of these two courses of action, of course, is desirable from a U.S. perspective. The recent effort by Taiwan’s ruling Democratic Progressive Party to pass a legislative bill on referendum (which could be used to decide sensitive issues including constitutional amendments such as changing the official title of Taiwan or asserting independence—this legislative effort has so far been largely thwarted by the opposing parties as a

interests of both sides become more and more closely related. Political considerations, in the context of section 421 safeguard actions will probably counsel against using safeguard measures against Chinese exporters in many of the section 421 cases to come. This may be a comfort, in a curiously circuitous fashion, to those troubled by the mysterious notion of “market disruption”/“material injury.”

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much toned-down version of the bill was eventually passed) only made this strategic concern more urgent for the United States. This aggravated sense of urgency could partly explain why the Bush administration has shifted sharply from a clearly pro-Taiwan position early on to a pronouncedly more middle-ground position at present. See, e.g., David E. Sanger, *U.S. Asks Taiwan To Avoid A Vote Provoking China*, N.Y. TIMES, Dec. 9, 2003, at A1. Yet how the tension across the Taiwan Strait will affect the U.S.-China relations (and therefore the political factor in a section 421 case) is still an unknown and we can only hope that all the parties involved can follow the counsel of wisdom and let peace reign.

