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Bull in a China Shop: Assessing the First Section 421 Trade Case

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Just as the Bush administration is finding its free-trade footing, the president faces a decision later this month that could throw his trade policy agenda off track once again. Under a U.S. trade statute never before tested, the president must decide whether to impose restrictions on imports from China of "pedestal actuators," a product used to adjust the seat height of mobility scooters used primarily by the physically disabled.

Last October, pursuant to authority under Section 421 of the Trade Act of 1974, the U.S. International Trade Commission determined by a vote of three to two that imports of pedestal actuators from China were causing "market disruption" to U.S. producers of the same merchandise. The ITC recommended that the president impose import quotas. Under the law, however, imposition of the recommended trade restrictions is a matter of presidential discretion.

Section 421 is a special statute that applies only to imports from China, and the pedestal actuators case marks the first time that it has ever been invoked. Accordingly, the outcome of this case has important implications for the future of U.S.-China trade relations. If President Bush surrenders to protectionist pressure in this case, he will send a terrible signal to other U.S. industries that face Chinese competition—and also to China as it struggles to open its economy to foreign competition.

Section 421 of the Trade Act of 1974

Section 421 was added to the Trade Act of 1974 by the U.S.-China Relations Act of 2000 (H.R. 4444), which established permanent normal trade relations (PNTR) with China and paved the way for China's accession to the World Trade Organization. The provision aimed to assuage protectionist fears of PNTR by establishing a special "safeguard" to deal with increased imports from China for the first 12 years after China's entry into the WTO.[1]

The normal U.S. "safeguard" law, Section 201 of the Trade Act of 1974, authorizes the imposition of temporary trade barriers against increased imports that are a "substantial cause" of "serious injury" to American producers. The China-specific safeguard of Section 421, by contrast, sets a lower threshold for granting protectionist relief. Specifically, the statute provides:

> If a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product, the President shall, in accordance with the provisions of this section, 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.[2]

Under the statute, "market disruption" exists "whenever imports of an article like or directly competitive with an article produced by a 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."[3] And the term "significant cause" refers to "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."[4]

If the ITC renders an affirmative finding (which is decided by majority vote) or if there is an even split among commissioners, the affirming commissioners must submit recommendations for relief to the president and the U.S. Trade Representative within 20 days of the determination. The USTR then has 55 days to advise the president about the ITC's findings, a period during which it must hold hearings on the matter and solicit views from importers, exporters, and other interested parties. It is also authorized to pursue negotiations to address the market disruption with the Chinese government during this period.

Unless an agreeable settlement is reached, the president must announce import relief by the 150th day after the petition's filing unless he determines that "provision of such relief is not in the national economic interest of the United

States or, in extraordinary cases, that the taking of action . . . would cause serious harm to the national security of the United States."[5] If the president grants import relief, it must become effective within 15 days of his decision.

The Pedestal Actuators Case

In this case, the petitioning industry is a single company, Motion Systems Corporation (MSC),[6] which produces pedestal actuators. One of its largest clients, Electric Mobility Corporation (EMC), a producer of mobility scooters, decided to terminate its business relationship with the petitioner for a variety of reasons. It requested bids from other producers of pedestal actuators around the world (there were no other domestic producers selling on the open market) and decided on a Chinese manufacturer, CCL Industrial Motor (CIM), with which it had cultivated a successful relationship through purchasing other parts since 1998.

Imports of pedestal actuators from China were nonexistent until after EMC decided to terminate its contract with MSC. According to testimony by the president of EMC: "If Motion Systems had been more responsive to our needs, we would not have made the decision to stop purchasing from them—a decision that was made *prior* to our decision to purchase actuators from the Chinese. . . . In late 1999, EMC approached several suppliers, receiving informal bids from three of them, including CIM. EMC solicited CIM to quote on the Seat Lift Actuator, not vice versa."[7]

Despite the fact that this case boils down to a dispute between two U.S. companies with a Chinese company caught in the crossfire, three ITC commissioners found that rapidly increasing imports of pedestal actuators are causing market disruption and recommended quotas on Chinese imports despite acknowledging the possibility that EMC might not resume purchasing from MSC—in which case the relief would provide no benefit at all to the domestic industry.

In her dissenting opinion, Commissioner Lynn Bragg took issue with her colleagues: "This is not a situation in which subject producers in China targeted the U.S. market with rapidly increasing imports in order to capture sales from domestic producers; instead, this investigation presents the limited circumstance of one supplier in China responding to a specific request from a preexisting customer. Thus, any injury experienced by the domestic industry in this case is directly attributable to a single purchaser's perception of the sustained inadequacy of an existing source of supply."[8]

Even more to the point, Commissioner Deanna Okun, the other dissenter, wrote, "I do not think that the trade laws are meant to force a company to purchase from the domestic industry, and in this case from a single domestic supplier."[9]

Conclusion

The inclusion of Section 421 in the PNTR legislation may have been a political necessity, but there is no good reason to stretch it to fit the facts of this case. The law should be used sparingly, as a last resort—and certainly not to punish innocent bystanders to a domestic contract dispute.

The president should exercise his discretion to deny relief. To do so, he needs to find that imposing trade barriers "would have an adverse impact on the United States economy clearly greater than the benefits of such action."[10] That case can be made.

The cost of mobility scooters dropped from $4,100 to $3,800 after EMS switched to the Chinese supplier of pedestal actuators.[11] By disrupting EMS's supply chain, the remedy would have a direct, adverse impact on the physically disabled. Increasing EMS's costs of production would also damage its ability to compete with foreign producers of mobility scooters. There are strong grounds for concluding that those costs would far outweigh the benefits of a remedy that in no way guarantees the resumption of sales and profits for MSC. Government meddling to pick winners and losers is bad enough; it is a travesty when such meddling produces only losers.

If the president grants relief in this first, weak case under Section 421, it will only encourage other U.S. industries to file additional cases of their own. Standing firm now will save him many headaches in the future. When making his decision, President Bush needs to remember the compelling U.S. national interest in encouraging China's opening of its markets pursuant to its new WTO obligations. And he needs to ask himself this question: How can we expect China to resist protectionist pressures if we are willing to close markets to Chinese competition at the slightest provocation?

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1. China acceded to the WTO in December 2001.
2. 19 U.S.C. § 2451(a).
3. 19 U.S.C. § 2451(c)(1).
4. 19 U.S.C. § 2451(c)(2).
5. 19 U.S.C. § 2451(k)(1). Note that in cases in which the ITC is evenly split, the president has complete discretion about whether or not to accept the affirming commissioners' recommendations for relief.
6. Actually, there are technically three companies in the industry. One is a vertically integrated company that produces pedestal actuators for its own use in the production of mobility scooters; the other performs certain fabricating and assembly work on the petitioner's product.
7. Mike Flowers, president, Electric Mobility Corporation, Testimony before the Office of the U.S. Trade Representative, December 18, 2002.
8. U.S. International Trade Commission, *Pedestal Actuators from China* (Investigation No. TA-421-1), Determination and Views of the Commission, USITC publication no. 3557, November 2002, p. 51.
9. Ibid., p. 42.
10. 19 U.S.C. § 2451(k)(2).
11. Flowers.