Senate Finance Committee

Hearings on Trade Promotion Authority

Promoting America's Trade Interests

Testimony of

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June 20, 2001

Mr. Chairman, Members of the Committee:

I appreciate this invitation to return to the Senate Finance Committee. The first and most intensive visit that I have had with this Committee occupied much of the year 1974, when I represented the Administration in the drafting of the first fast track provisions.

That first, very successful effort of the Congress to work out terms for a partnership with the Executive Branch in trade now needs to be built upon. The provisions expired in 1993. U.S. negotiators and Congress need a new treaty of the Potomac for the United States to engage fully in broad international trade negotiations. There is no more important trade policy question that this Committee will face during this Congress.

What is called "trade promotion authority" legislation is not literally "authority" at all.[1] Under the Constitution, the President has full authority to negotiate with foreign countries, and the Congress can neither add to it nor subtract from this authority. Major trade legislation is not about "authority" in any formal sense. It is instead your way to create a mandate and set of objectives for America's negotiators and set the rules by which the Congress may approve and implement trade agreements. Passage of this mandate and adoption of a process for review and implementation would make U.S. negotiators far more credible abroad. It will also provide the legitimacy that will make the results of their efforts far more likely to receive approval from Congress.

International trade is vital to America. The Trade Agreements Program, initiated by Franklin Roosevelt in 1934, has been extraordinarily beneficial to our economy and as well as to the world. Much in the way of trade liberalization and promotion of a rules-based system remains to be done. At the same time, there are defects in the current international trading arrangements that need repair and there are risks in new negotiations that should be avoided. This Committee must play a key role in assessing benefits and identifying deficiencies and risks so that trade agreements ultimately serve America's broad and specific interests, and so that the agreements negotiated meet with your approval and are implemented. Before the 1974 enactment of fast track, outside of instances in which specific advance approval was given, most trade agreements were gutted or spurned by the Congress. It is worth an intensive effort by this Committee to avoid returning to that sorry state of affairs.

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[1] **Truth in labeling.** Russell Long, as Chairman of the Senate Finance Committee when the original fast track was conceived introduced a floor amendment to change the name of the bill from the "Trade Reform Act" to simply the "Trade Act of 1974", because, he announced, he was not sure how much "reform" was involved. Following that precedent, "trade promotion authority", which provides no authority to implement a major regional or multilateral trade agreement could better be described as the "Trade Mandate and Approval Process (Trade MAP)". "Fast track" is in fact a more accurate description of what the legislation that is sought would do.

Negotiating priorities

a. The positive list

The continued opening of markets abroad should remain very high on America's list of priorities. This Committee will receive much advice from the private sector on areas in which specific benefits can be achieved. In particular, I would stress the following:

- Approving negotiation of a Free Trade Agreement of the Americas;
- Promoting integration of China into the world trading system -- this is both of enormous geopolitical and economic importance;
- Assuring that the benefits of the technological revolution represented by E-commerce not become encumbered with new restrictions – as will surely occur absent new trade agreements; existing information technology goods and services should trade freely, without tariffs;
- Dealing more effectively with private restraints of trade, as they are more difficult to combat than more transparent forms of market closure, and are not effectively regulated.[2]
- Providing for balanced rules for border adjustment of direct and indirect taxes (for example by adopting the solution the U.S. and the European Community agreed to twenty years ago);
- Obtaining clearer and more effective rules on regional integration; and
- Continuing and accelerating agricultural and services trade liberalization under the WTO's "built-in agenda".

While some of these issues are not yet fully ripe for negotiation in all aspects, progress can be made, and they are all important. In addition, the means must be found to avoid protectionist responses to new scientific breakthroughs in agriculture, while respecting legitimate concerns over human health. Trade can and should promote America's social values as well. Solutions, whether through trade or through other means, must be found to serious issues raised over labor, human rights and the environment. Due consideration must also be given to fostering the continued economic development of the developing countries. However, proposals in these areas should not result in a reduction of the positive benefits that arise from a more open international trading system. It should be recognized that opening markets by itself leads to

[2] It may not yet be possible to address private restraints of trade in the WTO. As the EU last proposed it, this subject holds more risks for world trade than benefits. This is the same reason that the International Trade Organization (the ITO) was spurned by the United States and never came into being.

rising standards of living and reinforces the global trend toward the spread of democracy and the market economy as the most desirable means of organizing commercial activity.

b. What should not be done – the negative list

It would be a major error to proceed to negotiations assuming that all trading nations have relatively similar economies and legal systems. They do not. Differing economic and legal systems require keeping effective interface mechanisms in place. China, Russia, Japan, the United States, and the rest of the WTO Member countries, some to a greater degree, some to a lesser degree, differ substantially each from the others. Some are nonmarket economy countries or have nonmarket economy sectors, some have highly protected markets, some still utilize large government subsidies, and some use competition policy to limit foreign competition.

What "preserving an interface mechanism" means in practice is that first and foremost, the trade remedies must not be diluted. The only way to accomplish this, given the fact that the 140 other WTO members would like to weaken the WTO-approved defenses against dumping and subsidies, is to keep these issues off the table. The trade remedies should not be subject to negotiation. You should take whatever measures are necessary to assure yourselves that this position is adhered to as the U.S. negotiating position. Sixty-three members of the Senate have recently written President Bush to put themselves on the record on this subject. This is not a minor issue. To open up the trade remedies would divide the American private sector in a way that could undermine any hope for sufficient support for approval of any major new agreements.

There are other matters of significance to be avoided: backsliding by developing countries on their obligations, such as on market access, phasing out subsidies and living up to intellectual property obligations.

c. Remedying current defects in the WTO – needed reforms

WTO dispute settlement has been one of the greatest disappointments of the new World Trade Organization. It has drawn criticism from both conservatives and liberals alike. The WTO's dispute settlement panels are creating obligations that were never agreed to by the parties. Moreover, relying on *ad hoc* panels has led to concerns over bias and incompetent analysis, and has caused undue reliance on an international bureaucracy that has its own objectives. And the proceedings are carried out in secret, although there is no legitimate reason to exclude those in the private sector most directly affected by the decisions, nor any reason to exclude the press and the public, for that matter.

A series of reforms are needed at the WTO, including:

- Opening all proceedings to the public;
- Including representatives of the Congress and interested private sector parties on U.S. litigation teams;
- Insisting that the standards of review which were negotiated are adhered to; and

- Creating a standing, highly qualified judiciary, screened for conflicts of interest and supported by an independent group of clerks.

It is also important to create an independent WTO Dispute Settlement Review Commission that was called for by Senators Dole and Moynihan at the time of implementation of the Uruguay Round agreements and was agreed to by the Clinton Administration. This would provide an independent assessment for Congress and the Executive Branch of whether WTO dispute settlement was straying from its authorized function by instead "filling in the blanks" and correcting perceived ambiguities in agreements. WTO dispute settlement has created a non-accountable international legislative process, imposing new obligations where the parties to the original negotiations of the underlying agreements were unable to conclude what the international rules should be.

One of the most serious defects of the WTO dispute settlement system lies in the attempt of WTO members to obtain by binding dispute resolution what could not be obtained at the negotiating table. Consideration should be given to making dispute settlement panel decisions non-binding. Binding dispute settlement has promoted unwarranted litigation and already led to serious friction between the U.S. and the EU. It has created retaliation and threats of retaliation where negotiated settlements are called for. As a start, the U.S. and the EU should sign a WTO litigation non-aggression pact, and get back to the bargaining table. Litigation should not and cannot replace trade diplomacy.

Crafting the new trade partnership between Congress and the Administration

a. Forging a renewed national consensus on trade, setting objectives

Congress has a central role to play in holding extensive hearings in Washington as well as across the country to obtain and provide a greater understanding of what international trade agreements should and can achieve. We are in the post-NAFTA era, in which trade agreements are more widely distrusted than at any other time within the last two generations. There was a message in the streets of Seattle that there are other concerns. These are rising in volume if not always in clarity, and it is best to understand what these concerns are and how they should be best addressed (including where necessary simply disagreeing with the concerns where they are not well founded).

It is important to add resources in the trade field in both the Executive and Legislative Branches. You, Mr. Chairman, have proposed the creation of a Congressional Trade Office. Both elected branches of government should commission studies on matters proposed for negotiation. Nontariff barriers and services were both the subject of extensive studies and reports prior to the previous rounds of negotiations.

b. Procedures for Congressional consideration of trade agreements

The 1974 fast track procedures, as the Administration says about the ABM Treaty, were appropriate for their time. In that earlier, more simple era, where codes on product standards, government procurement, customs valuation, and the like, were being negotiated with very close consultations with the Congress, the fast track system worked. At present, with far more complex matters at stake (including binding dispute settlement now filling in the blanks in agreements, the presence of contentious labor and environment issues, and the continuing attack on the interface mechanisms -- antidumping, countervailing duties, and safeguards – needed to buffer trade exchanges between differing economies), some re-thinking is clearly needed.

Fast track in its original form is unlikely to be granted by Congress. Many of those in America affected by trade agreements view the original fast track as having ceded too much authority to the Executive branch agencies[3]. In addition, it has become apparent that authority may have been unintentionally ceded to an international bureaucracy through WTO dispute settlement, where obscure three member WTO panels representing no one make far-reaching decisions. Democratic accountability has been deeply eroded. If the necessary domestic support for further trade liberalization is to be achieved, Congress will have to take a more assertive role.

There is now an historic opportunity for restoration of the appropriate balance in Constitutional roles between the branches of the U.S. Government and in the division of powers between international mechanisms and the areas to be preserved to domestic sovereignty.

To implement the national trade consensus that you will help to achieve, new procedures are needed for consultation during and before negotiations, as well as for consideration and implementation of agreements that have been concluded. Procedural changes are needed as conditions for special Congressional rules requiring a vote on a no-amendment, time-limited basis. In particular, you could consider requiring:

1. **Senate Finance Committee and House Ways and Means Committee resolutions of endorsement at key checkpoints in the negotiations.** This could occur prior to major ministerials, and prior to initialing or signature of agreements. This process will require notice and time for action.

2. **Inclusion of representatives of Congressional advisors as an integral part of U.S. negotiating teams.** The presence of staff and other Congressional representatives will help assure transparency and information flow. (Congressional representatives cannot appropriately serve as U.S. negotiators, however.)

3. **Formal recognition in the statute of the non-mark-up process, in which the Finance and Ways and Means Committees and other key committees of jurisdiction are responsible for the content of the implementing legislation.**

[3] For example, when I served on the Services Policy Advisory Committee, we were told after the fact what was in the U.S.-Israel Free Trade Agreement. There was no meaningful consultation.

4. **Specific recognition that re-balancing amendments are "necessary and appropriate".** Trade agreement legislation should envisage inclusion in implementing bills of directly relevant matters that are useful in obtaining passage of the implementing bills, even if these provisions are not required to implement trade agreements. The cooperative nature of the drafting process between Congressional committees and the Administration will be a safeguard against abuses. This is how "fast track" functioned in 1979 and 1994 and this should be set out explicitly in new trade legislation.

5. **Exclusions from implementing bills.** Consistent with the points made earlier in this statement, implementing bills should not be permitted to include amendments to Title VII of the Tariff Act of 1930 (antidumping and countervailing duties), title II of the Trade Act of 1974 (safeguard measures), or any antitrust law of the United States. This is the approach, Mr. Chairman, which you have taken in the Free Trade Agreement bills that you have introduced in the last few weeks.

c. No direct implementation without Congressional approval

Congress has a strong vested interest in making sure that international agreements do not override the prerogatives of Congress when administrative agencies implement trade laws. Section 102 (a)(1) of the Uruguay Round Agreements Act seeks to limit the direct effects of trade agreements on domestic law by explicitly providing that domestic statutes are not to be subordinate to trade agreement provisions. However, the question arises whether administrative agencies should be guided in the exercise of their discretion by WTO panel decisions. This is an issue whether or not the United States was a party to the dispute in question.

Section 129 of the URAA covers disputes that involve the United States directly. There is no provision regarding the effect of cases in which the United States was not a party. In neither instance should administrative practice be changed as a result of WTO dispute settlement without formal notification to the Congress, with a period during which Congressional consideration can occur. This provision would allow for consideration of legislation, under specifically provided fast track rules on the subject at hand. It might be provided that deviations from prior administrative practice that are particularly substantial should be subject to direct Congressional approval via a fast track process, prior to any change in practice.

Conclusion

There will be calls to renew fast track quickly, without considering any changes. This would be a serious mistake. It is very important to get right the mandate for major new negotiations and the related process for obtaining Congressional approval. The steps that I have outlined above can, with an intensive effort, be accomplished in time to give U.S. negotiators the Congressional support they need before they enter into detailed substantive negotiations. To do less will to risk a serious setback to the trade agreements

program through inadequate public support for the results of new international trade negotiations.

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[**] The views expressed in this testimony are personal and do not necessarily reflect the views of any member of the firm or of its clients.