



# Committee On Finance

Max Baucus, Chairman

---

**NEWS RELEASE**

<http://finance.senate.gov>

For Immediate Release  
Friday, October 4 2002

Contacts: Michael Siegel, Lara Birkes  
202-224-4515

## **Statement of Senator Max Baucus Negotiations Regarding a U.S.-Chile Free Trade Agreement**

Mr. President, I want to take a few minutes today to discuss the trade negotiations that are currently taking place with Chile.

Let me get straight to the point.

We worked tirelessly this year to reinvigorate our trade agenda by passing the Trade Act of 2002. This legislation includes, as most people know, an extension of fast track trade negotiating authority – something which was stalled for nearly a decade.

We were able to pass that legislation only after agreeing on a delicate balance for new trade negotiations – particularly on the issues of labor and environment, investment, trade laws, and Congressional consultations.

The first test of this new legislation will likely be the U.S.-Chile Free Trade Agreement. Those negotiations are in the final stages – and they are down to some of the most controversial issues.

Let me say at the outset – I have been an advocate for trade negotiations with Chile for several years.

And as recently as several weeks ago, I felt confident about this agreement. Most importantly, the President had just signed the Trade Act, which lays out Congress's goals regarding new agreements. That legislation passed with bipartisan support, particularly here in the Senate.

At the same time, an agreement with Chile makes sense – it is, first and foremost, an important trading partner. Last year we exported over \$3 billion worth of goods to Chile. And with an agreement, our opportunities should increase.

Completing an agreement with Chile will also increase pressure on other countries in the region – particularly Brazil – to let go of their protectionist tendencies, and instead work toward their own agreements with the United States.

Because a free trade agreement with Chile seemed substantively promising, I really viewed it as a major opportunity. Here is a chance, I thought, to take this great trade bill we passed, and use it to regain some momentum on trade – to move beyond the arguments of the past.

I now fear that some in the Administration – and frankly some of my colleagues – may be squandering this opportunity.

On issues that were critical to passing this bill – Congressional consultations, labor, environment, and investment – some seem bent on clawing back the progress that has been made.

### **Congressional Consultations**

Let me begin with consultations, and by that I mean real Congressional participation in trade policy – an equal partnership.

During negotiations of the trade bill, there was a clear understanding that Congressional trade advisors would be able to observe negotiations. Yet just last week I sought to send one of my staff to observe – simply observe – negotiations between the U.S. and Chile. Ambassador Zoellick declined this request.

The argument the Administration makes is separation of powers. But, as Justice Jackson famously remarked, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” We need some reciprocity to make the fast track deal work.

The Administration – when criticized about consultations – seems fond of recounting a list of times they have met with Congress. But these statistics have little meaning. The test of consultations is not the number of meetings; it is the willingness to hear substantive input and have that input reflected in trade negotiations.

Similarly, we in Congress certainly expect that the Administration will allow us to see negotiating documents far enough in advance to have a meaningful opportunity to comment. That means there must be enough time for reasonable Congressional suggestions to be incorporated into U.S. negotiating positions.

In the first test, the results were mixed. On the highly charged issue of investment, a proposal was shared, but only one day before the latest round of negotiations with Chile were to begin. That is clearly not enough time to provide Congress with the opportunity to carefully consider and suggest revisions.

These actions undermine confidence. Why would the Administration be so concerned about Congress merely observing negotiations? Why are they reluctant to share documents with Congress that they plan to share with foreign governments? It suggests – perhaps unnecessarily – that there is something to hide.

The bottom line is this: There is no substitute for first-hand information. There is no substitute for seeing and evaluating events through your own eyes. And having this greater transparency in the process could have many benefits – better relations between the Hill and the White House, better agreements, and, I believe, a better likelihood that agreements will pass. Given the benefits, I cannot for the life of me understand why the Administration wouldn't make more of an effort to engage Members of Congress early in the process.

### **Labor and Environment Standards**

In the Trade Act we also hammered out a clear direction to the Administration to follow the so-called Jordan standard on labor and environment issues – that is, non-derogation from existing laws and equal access to dispute settlement.

Senator Grassley and I agreed on this – it was key to moving forward – and we spelled this out very clearly in the Finance Committee Report.

In fact, just so everyone understands this point, let me read the exact provision in the Report that Senator Grassley and I authored:

“The provisions on labor and environment standards are “based upon the trade and labor and trade and environment provisions found in articles 5 and 6 of the United States-Jordan Free Trade Agreement. Those provisions (*including their coverage by the Agreement's general dispute settlement procedures*) have come to be known as the ‘Jordan standard.’ They seek to ensure that a country does not promote exports or attract investment by lowering or relaxing the enforcement of its environmental and labor laws. The agreement with Jordan accomplishes this through several commitments, *which the present bill directs negotiators to pursue in ongoing and future trade negotiations.*”

To me, this is not ambiguous. Yet there are indications that both the Administration and some of my colleagues would now like to ignore this clear direction in the Trade Act. They do so at the risk of losing support – including my support – for future agreements.

### **Investor-State Dispute Settlement**

Finally, let me address the issue of investment. As many will recall, this was one of the most contentious issues in the Senate debate on the trade bill. The question is, in setting rules for arbitration between investors and governments, how do we balance the interests of U.S. investors abroad with the interests of Federal, State and local regulation here at home? In the Trade Act, we laid out a blueprint for achieving that balance. The objectives we set in this area include:

- mechanisms for prompt dismissal of frivolous claims;

- clearer definitions of key terms – such as “expropriation” – based on U.S. legal principles and practice; and
- the establishment of an appellate body to review arbitration decisions in investment disputes and bring coherence to the interpretation of investment provisions.

I am cautiously optimistic about the Administration’s approach to implementing these objectives. Early consultations suggest that Congress’s instructions were understood.

The one issue on which I have particular concern is the appellate body. It is perhaps the most important aspect of the objective on investment. An appellate body will help ensure that erroneous conclusions of law are corrected and that text is interpreted consistently from one case to the next. Given the potential for investor suits to challenge legitimate policies designed to promote the public welfare, it is crucial that the decisions in these cases “get it right.”

I realize that establishing an appellate body is a big task. It is something new. The closest analogy under current investor-state dispute settlement rules is what is known as “nullification.” In certain circumstances, a party may ask to have an arbitration award “nullified” by a court or other competent body. However, the standard for nullification is extraordinarily high. The question is not whether the arbitrator got it right, but rather, whether the arbitration process itself was fundamentally tainted.

We need something more than nullification review. We need an institution that will take a fresh look at arbitrators’ conclusions of law and decide whether they got it right.

It may be that we will not be able to build a new appellate body for investor-state dispute settlement in the context of the Chile Agreement over the course of the next few months. However, it is my expectation that our negotiators will continue this endeavor beyond the formal initialing of that agreement, and that they will secure Chile’s commitment to that endeavor. I want to make it clear that any first steps short of true appellate review included in the U.S.-Chile Agreement should be understood as just that — first steps. The Trade Act’s objective requires that we go further.

## **Conclusion**

An agreement with Chile can be one of two things – if supported by a large bipartisan majority, it can put us on the right track for other agreements – agreements with Singapore and Morocco, agreements for hemispheric free trade. It can even help us achieve success in the WTO.

Or this agreement can become a political battleground – where those in Congress who were promised a partnership of equals in trade policy feel duped. Where commitments to agreements that reflect strong labor and environmental standards go unrealized.

I hope that I can strongly support an agreement with Chile – I want to. And I know many of my colleagues who voted for the Trade Act also want to. But I would caution the Administration that they have responsibilities to Congress under this Act. And so far, they seem willing to play fast and loose with those responsibilities. I respectfully say to them that they continue that path at their peril.