Testimony of Steven Tepp

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on

"Free Trade Agreement Implementation: Lessons from the Past"

before the

Committee on Finance

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Mr. Chairman, Ranking Member Wyden, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the implementation and enforcement of free trade agreements.

My name is Steven Tepp and I am President & CEO and founder of Sentinel Worldwide. Previously, I enjoyed a career of 15 years of government service, beginning with you, Mr. Chairman, on your Judiciary Committee staff, and then at the U.S. Copyright Office. I now provide intellectual property counsel to companies and associations with interests in protecting and enforcing intellectual property rights, including the Global Intellectual Property Center of the U.S. Chamber of Commerce. I am also a Professorial Lecturer in Law, teaching international copyright law at the George Washington University Law School. I have previously taught at the George Mason School of Law and the Georgetown University Law Center.

During the nearly dozen years I spent with the Copyright Office I had the opportunity to negotiate the text and/or implementation of seven different free trade agreements ("FTA") with countries around the world. I was co-counsel for the U.S. litigation team in the intellectual property ("IP") dispute the United States brought against China before the World Trade Organization ("WTO"). I also participated in numerous bilateral trade talks, including sub-FTA arrangements, such as Trade and Investment Framework Agreements ("TIFA") and Bilateral

Investment Treaties ("BIT"). Additionally, I participated in multilateral fora including the World Intellectual Property Organization ("WIPO"), the Asia-Pacific Economic Cooperation ("APEC"), and the Security and Prosperity Partnership of North America ("SPP"). As will be discussed below, these experiences taught me the incredible opportunity and power of FTAs and it is an honor and privilege to have the opportunity to share those experiences with you today.

I am here before you in my personal capacity as an expert in intellectual property and a former trade negotiator. The views expressed are my own and do not necessarily reflect the views of any client or employer.

I. The Importance of Intellectual Property to the United States and Every Country

Intellectual property is a tremendous source of value for the United States and a dominant part of our foreign trade. According to a report of the U.S. Commerce Department, IP-intensive industries directly account for over 27 million American jobs. IP-intensive industries also indirectly support approximately 13 million additional jobs, bringing the total to 40 million American jobs – over one quarter of the U.S. workforce.[1] IP-intensive industries account for over $5 *trillion* of value; over one-third of the U.S. gross domestic product.[2] And, perhaps most directly relevant to this hearing, almost two-thirds of U.S. merchandise exports are from IP-intensive industries.[3]

American intellectual property is the envy of the world. In entertainment, computer hardware, life-saving medicines, literature, software and videogames, again and again American industries lead the world. The Internet grew up speaking English;

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[1] "Intellectual Property and the U.S. Economy: Industries in Focus," Prepared by the Economics and Statistics Administration and the U.S. Patent and Trademark Office (2012)(available at: http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf).

[2] *Id.*

[3] *Id.*

not because we have the most powerful military or the biggest economy, but because we invented the computers and software on which it operates and we create the content that people want to use and enjoy. All of these are undergirded by intellectual property: patents, copyrights, trade secrets, and trademarks. Thus, it should be no surprise that the United States seeks to ensure fair and modern international standards for the protection of intellectual property. Nor is it a surprise that there are those in the world who seek to free ride on, or outright steal American intellectual property.

Here at home, the Members of this Committee and your colleagues throughout the Senate and the House of Representatives make your best efforts to keep our intellectual property system up to date and functioning efficiently. In this regard, you join a legacy stretching all the way back to the First Congress, which enacted a Patent Act and a Copyright Act in 1790. And your efforts are rewarded with the continuing bounty of economic growth, innovation and creativity, and job creation.

Policy makers abroad are not always so diligent or dedicated. For over a quarter century the U.S. Trade Representative's Office ("USTR") has annually issued the Special 301 Report, detailing the shortcomings of foreign intellectual property systems. In last year's report, over a dozen countries were assigned to the "Priority Watch List," the worst possible designation short of threatening trade sanctions, and another two dozen were on the "Watch List."

Similarly, the Global IP Center of the U.S. Chamber of Commerce recently published the fourth edition of the world's only cross-sectoral index of countries' IP systems.[4] As the index demonstrates, many countries have a long way to go to reach a modern, effective IP system, including some countries we usually think of as advanced. On the other hand, those who choose to take a positive outlook can find in both the Special 301 Report and the GIPC Index a roadmap to a more prosperous future.

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[4] "Infinite Possibilities, U.S. Chamber International IP Index," 4th Ed. (February 2016)(available at: http://www.theglobalipcenter.com/gipcindex/).

Indeed, for the last two years, the GIPC Index has included an annex identifying correlations between high IP standards and the level of innovation, creative output and growth in high-value jobs.

Those who do not take a positive approach impose grave costs on their citizens. The failure to provide adequate legal protection and effective enforcement for IP has serious, negative consequences at many levels. Domestically, a country that fails to act against IP theft suppresses its own creative and innovative industries and endangers its own populace.

On my very first trade mission, we made a stop in Kuala Lumpur, Malaysia to discuss their implementation of a new law designed to crack down on music and movie piracy. While there, I read an article in the local newspaper about a woman of indigenous Malay ancestry, who had become a highly popular singer. A few years earlier, the article reported, she had cut an album that sold about a quarter million copies. Since then, the organized crime syndicates engaged in music piracy had moved into the Malaysian market and the same singer's current album had sold only 15,000 copies. It wasn't a flop; those were sales lost to piracy. As a result, she had to take a job as a waitress. This made a striking impact on me as a living example of how IP theft can have devastating economic effect, fund criminal networks, and perhaps most sadly, eat away at local culture. I am happy to report that while Malaysia still has challenges ahead, it has worked hard to address IP theft (in part through a motivation to work towards a U.S. FTA) and is no longer on any Special 301 list.

In my travels I have also been to places where counterfeiting rates were so high, that in some cities it was hard to find a legitimate product. There is a degree of cynicism that creeps into one's mind when you visit such a place and then listen to the government officials deny they have an IP enforcement problem. And there is outrage as you walk by shop after shop after shop offering a broad range of knock-offs of American brands. But there is also empathy when one sees the local citizens

shopping at some of these places and realizes they aren't all just looking for the cheapest deal, they are buying necessities for their families and have nowhere to go to get legitimate, reputable products. A report from the World Health Organization estimated that in India, one in five drugs is counterfeit.[5] In China, dozens of infants starved to death on counterfeit baby formula that offered little or no real nutritional value.[6] And in Panama, at least one hundred people were poisoned and killed by counterfeit cough medicine that had been unwittingly purchased by the government and distributed to indigent people.[7] These are just a few examples of the very real and severe consequences of lax IP enforcement.

Poor protection and enforcement of IP also has consequences beyond the borders of any single country. We have watched over and over as criminal networks engaged in organized IP theft move into a market and rapidly devastate legitimate business. Then, in response to domestic and external pressures, the government eventually takes action that cuts into the illicit profits of the thieves, who then move over to a neighboring market and begin the process all over again. Over time, an entire region can fall ill to this disease. Countries with major ports or other trading hubs must also be vigilant lest they become de facto distribution points for dangerous fakes. FTAs, if properly constructed and fully implemented, can inoculate a country and even a region.

But no market is completely immune from the effects of global IP theft, not even the United States. While there is comparatively very limited production of counterfeit products here, every day untold numbers of foreign-made infringing products reach our shores. It is the responsibility of the good people at Customs and Border Protection ("CBP") to try to protect American consumers by intercepting as many of these as possible. In fiscal year 2014, CBP seized infringing products with an

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[5] http://mobile.nytimes.com/2014/02/15/world/asia/medicines-made-in-india-set-off-safety-worries.html?hpw&rref=world&_r=1&referrer=

[6] http://www.cbsnews.com/news/arrests-in-fake-baby-formula-case/

[7] http://www.nytimes.com/2007/05/06/world/americas/06poison.html

aggregate value of over $1.2 billion.[8] While that is a large number, it is actually 30% less than the $1.7 billion worth of infringing products seized in 2013.[9] This drop coincides with a marked decline in the previously successful Operation In Our Sites campaign. Like many, I hope that the Customs Reauthorization legislation this Committee worked so hard on enacting will help re-energize our efforts to stop IP infringing products from entering our country. I thank you for your work on that legislation and congratulate you on it recently becoming law.

The threat from infringing products coming into our country goes even beyond consumer health and safety. The Government Accountability Office ("GAO") made test purchases of microchips advertised as military grade as part of a report prepared for the Senate Armed Services Committee. The GAO report found that every single microchip it purchased was bogus and substandard.[10] These types of chips are used in military equipment including B-2B stealth bombers, Los Angeles Class nuclear-powered attack submarines, and even Peacekeeper inter-continental ballistic nuclear missiles.[11] We all cringe when we hear a story on the news about a military aircraft that crashed in a training exercise, seemingly not in harms way. But I always wonder if the servicemen and women injured or killed in these accidents are actually victims of substandard counterfeits.

As the GAO report shows, foreign-based IP thieves have taken to the Internet to promote and conduct their illicit business. They design websites to look authentic and deceive American consumers into thinking the products are legitimate and safe. Through these portals, criminals generate massive profits at the expense of American consumers and IP owners. And they do this all beyond the reach of U.S.

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8 http://www.cbp.gov/sites/default/files/documents/IPR%20FY14%20Seizure%20Statistics%20Booklet_100515_spread_web.pdf

9 http://www.cbp.gov/sites/default/files/documents/ipr_annual_report_2013_072414%20Final.pdf

10 "DOD Supply Chain: Suspect Counterfeit Electronic Parts Can Be Found on Internet Purchasing Platforms," GAO-12-375 (February 2012)(available at: http://www.gao.gov/assets/590/588736.pdf).

11 *Id*.

law, in countries with low standards of IP protection and/or ineffective enforcement.

There are many facets needed to address this global problem, including consumer education and voluntary industry arrangements. FTAs are a critical element as well, as they help bring more countries' IP systems up to par, thereby scratching those countries off the criminals' list of fertile fora for infringement.

Many of the countries on the Special 301 lists have been there for years or even decades; some make incremental progress in one direction only to allow new problems to arise, and the most intransigent seem to respond only to the threat of trade sanctions. But there are also success stories, and many of those are tied to the progress made through FTAs.

II. IP Theft Distorts the Marketplace and FTAs can Help

As discussed above, IP theft imposes a range of harm from economic to cultural to health and safety. Focusing in on the trade-related aspects of this harm, it is readily apparent that IP theft distorts marketplaces, which in turn distorts cross-border trade in some of our most import export sectors.

When countries provide inadequate legal protection or ineffective enforcement of IP, it allows free riders and thieves to enter the market at artificially low costs, as they bear none of the burden or risk of research, development, or creation. They also bear little or no costs associated with commercially unsuccessful products. Legitimate creators and innovators may and sometimes do find that a product is not well received in the marketplace. This is simply part of the risk of operating in an innovative sector. The infringers bear no such risks. They target only those goods that already have a proven demand in the marketplace – a demand that was created by marketing investments by the legitimate company. Infringers never have a flop.

As a result, IP thieves and free riders have little or no cost beyond their marginal costs of production and distribution. They turn a handsome profit while easily undercutting the price of the legitimate market. The legitimate creators and innovators are thereby forced into competing with versions of their own products sold at a lower price, or even given away for free. It is no wonder then, that international trade in counterfeit and pirated products has been estimated to exceed $250 billion.[12] If anything, this estimate is likely low, as it does not include infringing products produced and consumed entirely within a market, nor does it cover digital piracy.[13]

The distortion effect of online piracy goes beyond displaced sales. Online piracy minimizes royalties paid to creators, because licensed services cannot compete on cost with the illegally free platforms. And by the same token, right holders become resigned to accepting such small royalties, because the other option is to receive nothing from the pirates.[14]

Anti-IP policies can also be a front for industrial policy and protectionism. Examples of trading partners' noncompliance with IP provisions of the TRIPS Agreement[15] of the WTO and our FTAs can be found across the major IP disciplines.

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[12] "Magnitude of Counterfeiting and Piracy of Tangible Products: An Update," Organisation for Economic Co-operation and Development (2009)(available at: http://www.oecd.org/industry/ind/44088872.pdf).

[13] A study of just the top thirty infringing storage sites found they generate upwards of $100 million a year. "Taking Credit: Cyberlockers Make Millions on Others' Creations," NetNames and Digital Citizens Alliance (available at: https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/8854660c-1bbb-4166-aa20-2dd98289e80c.pdf).

[14] See "Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment," Eric Priest, 27 Harvard Journal of Law & Technology 467 (Spring 2014)(available at: http://jolt.law.harvard.edu/articles/pdf/v27/27HarvJLTech467.pdf); see also, "Netflix Says Piracy is Still its Biggest Competitor," Lily Hay Newman, Slate, (Jan. 23, 2015)(available at:http://www.slate.com/blogs/future_tense/2015/01/23/piracy_is_biggest_netflix_competitor_says_shareholder_letter.html).

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

A. Patent

The global standard for patentability is well established. Article 27.1 of TRIPS sets forth the rule that patents must be available for any inventions that are "new, involve an inventive step, and are capable of industrial application." This standard is dutifully replicated in our FTAs. However, we have seen in a number of foreign markets, including at least one FTA partner, the imposition of additional criteria or conditions for patentability. These take different forms; some involve requirements for "enhanced efficacy," others interfere with the ability to demonstrate usefulness in industrial application by myopically refusing to consider evidence gleaned after the filing of the patent application, while still others simply ban patents on an entire field of technology, such as software.

The use of these impermissible tools to deny patents is insidious. The denial of such patents (which in many cases are recognized and respected in TRIPS-compliant countries around the world), necessarily denies the inventor the opportunity to utilize the domestic legal system to prevent free riders. And the country can justify that lack of remedies because of course there is no treaty obligation to provide remedies where there is no patent. But the violation of international obligations occurred up front, with the improper denial or revocation of the patent.

Another way in which some countries have inappropriately undermined patent rights is with the issuance of compulsory licenses, particularly in the area of pharmaceutical patents. Compulsory licenses allow domestic competitors of the innovator company to make and sell the patented medicine without the permission of the patent owner and usually for compensation well below market value. Article 31 of the TRIPS Agreement does allow for the possibility of compulsory licenses, but generally applies in dire cases such as national emergency or other extreme urgency. Our FTA's contain similar provisions that reflect an attitude at least as skeptical of this abrogation of property rights. Nonetheless, some compulsory licenses imposed by our trading partners do not appear to be justified by the

requisite conditions, including one that appears to have been granted at least in part because the innovator company was not manufacturing the drug in that country. Such a condition is clearly beyond what is permissible under international standards and smacks of bald-faced protectionism.

Market distortion also occurs in the related area of disclosure of proprietary marketing data. As this Committee is well aware, in addition to the process of applying for and obtaining a patent, pharmaceutical and biologic companies must apply for marketing approval in each country in which they seek to sell their products. During the time it takes for regulatory approval, the patent term is running, with the result that the innovator loses significant amounts of time of market exclusivity to which they would other be entitled and which is needed to offset the costs of research and development. As a way to rebalance the scales, Article 39.3 of the TRIPS Agreement requires that proprietary data submitted to obtain marketing approval for pharmaceutical products be protected against unfair commercial use, preventing would-be competitors from free-riding on that data and entering the market with artificial speed. Our FTAs contain even more explicit provisions, requiring at least five years protection for such data in the case of pharmaceutical products. However, several of our trading partners, including FTA partners, fail to comply with these standards.

Moreover, the burgeoning field of biologics, which involve even greater investments in research and development than chemical compounds, call out for longer terms of regulatory data protection. You and your colleagues in Congress have provided for twelve years of regulatory data protection for biologics under U.S. law. But our trading partners frequently provide significantly less, and in some cases, no such protection.

B. Copyright

As in the field of patents, well-established international standards exist related to copyright. For example, Article 11 the WIPO Copyright Treaty ("WCT") and Article 18 of the WIPO Performances and Phonograms Treaty ("WPPT") obligate member states to prohibit "the circumvention of effective technological measures" that are used to protect copyrighted works[16] and that restrict unauthorized use of those works. These protections have proven to be critical to fostering a bevy of new, licensed, online offerings of copyrighted works. Our FTAs include detailed provisions on the subject, which dutifully replicate the manner in which Congress implemented the obligations of the WCT and WPPT. However, many countries fall short of full implementation, including at least one FTA partner that has provided no such protection.

As discussed above, inadequate enforcement efforts are a longstanding problem for copyright owners doing business overseas. Article 41 of TRIPS requires enforcement procedures to be available against any act of infringement, and Article 61 requires criminal procedures and penalties to be available against willful trademark counterfeiting and copyright piracy on a commercial scale. Our FTAs build on those to elaborate on the standard for criminal infringement and to provide greater specificity on the remedies and penalties that must be available.

But nothing can remedy a lack of political will of a local government to enforce IP rights. In some of the most egregious cases, we have seen a trading partner defund the entire department of the lone effective enforcement official in that country, we have seen the infringing commercial sale of copyrighted works by an arm of a national government, and we have seen the chief law enforcement official of an FTA partner publicly declare that no copyright infringement prosecution would ever be brought. Even when the right holder prevails in court, in some foreign countries

[16] Here and throughout my testimony, unless otherwise noted, I use the term "works" to include phonorecords and all copyrightable subject matter under the U.S. Copyright Act.

damages and fines are commonly minor, in some cases not even covering the costs of the litigation, much less compensating for and deterring future infringement.

Our trade agreements have always given latitude for countries to adopt reasonable copyright exceptions. The TRIPS Agreement, the WCT, the WPPT, and all of our FTAs all provide a wide degree of discretion to countries to adopt exceptions to copyright, subject to the discipline of the globally accepted three-step test.[17] Unfortunately, experience has shown that some of our trading partners, including FTA partners, abuse this discretion by enacting overbroad exceptions that do not comply with the three-step test and leave American right holders without recourse against market-damaging uses. In one country, courts have applied the law to allow commercial copy shops to make unlicensed copies of academic materials, the exact opposite result of how U.S. courts have addressed the issue. Another country enacted an exception that would permit almost any use of a copyrighted work that claimed to be for scientific research, education, or several other purposes but which omits the nuances and safeguards found in U.S. law. And one trading partner went so far as to exempt reproduction and distribution online that purported to be for noncommercial purposes, but which could easily cause commercial scale harm to the market.

A further problem arises from the fact that the United States does not provide a full public performance right for sound recordings. As a direct result, many of our trading partners that provide fuller rights in this area and collect royalties to be distributed to performing artists refuse to pay American performers on the grounds of reciprocity. They are wrong to do so and it is worth noting that the United States Copyright Act provides full national treatment, never imposing reciprocity.

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[17] Exceptions are permitted for certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

C. Trademark

While the basic structure and operation of trademark systems is often more harmonized and subject to fewer policy disputes than other areas of IP, it is far from immune to problems. Perhaps more than other forms of IP, trademark is subject to violation in markets in which the legitimate owner does not even do business. Many brand owners are thus unprepared to try to enforce their rights in far-flung reaches of the globe. A related and particularly persistent problem is the bad faith registration of marks, which some trading partner's legal systems make very difficult to reverse. But most of all, trademark owners are subject to the same type of enforcement difficulties described above in the copyright context, both in terms of criminals' abuse of online platforms and with regard to the lack of political will to enforce the law. All of these combine to pose a form of harm unique to brand owners; counterfeits undermine the hard-earned reputation of American companies.

D. Market Access

While conceptually tangential to IP protection, countries have learned that market access affords them substantial opportunity to compel the disclosure or transfer of valuable IP. We have seen trading partners require the disclosure of trade secrets as a condition of entering their market, and similarly we have seen requirements to license IP to domestic entities as a precondition of market access. Some countries place quotas on the import of IP-intensive products, such as limits to the number of American movies that can be shown in their theaters or quotas on U.S. television shows. In other cases, we have seen countries deny rights to IP owners who do not manufacture their products in that market, and there is an ongoing concern with countries that may seek to require online services to locate servers in that market.

By providing baseline IP protection and enforcement, as well as fair rules of market access, our FTAs seek to create and preserve a level playing field for the

international trade in IP-intensive products and services. The past fifteen years of U.S. FTAs with modern IP chapters have proven very successful at achieving those goals. To be sure, a variety of implementation shortcomings in various countries remain, and I will discuss ways to try to address that further down in my testimony. Notwithstanding those, there ought be no mistaking the fact that the IP provisions of our FTAs deliver extraordinary benefits.

III. The Benefits of the IP Chapter of U.S. FTAs

The IP chapter of our FTAs can be a tremendous force for good. Perhaps some people imagine that all our FTA partners are modern, free democracies. The reality is that our FTA partners include countries with a range of approaches to government and society, countries that still bear deep scars of the Cold War, and countries beset by crime and violence. To these lands the IP provisions of our FTAs bring some of the basic building blocks of liberty and freedom: rule of law, respect for property rights, and transparency and accountability in government.[18] And IP enforcement removes a funding source from criminal and terrorist networks. I am fiercely proud of the contributions I have made in this regard.

The IP chapter of our FTAs is also a tool for the advancement of global policy and norm setting. Marketplace and technological advancements generate new policy imperatives and global norms need to keep pace. FTAs have proven the most effective (if not only) way to do that over the past 15 years.

FTAs also provide an opportunity to address bilateral issues that have been met with intransigence for years. The prospect of enhanced access to the U.S. market provides an incentive to our trading partners, which facilitates resolution of longstanding problems in our trading partners' IP systems. The largely successful line of FTA negotiations over the past 15 years is proof of it. This is also a reason to

[18] Although one FTA partner has failed to implement its obligations to provide transparency to its drug reimbursement decision making process.

be steadfast in our negotiations; we can only sell this enhanced access once, and we would be wise to make the most of it.

IV. Negotiation and Implementation of FTAs

Bismarck famously quipped, "the two things you never want to see being made are sausages and legislation." Bismarck never saw an FTA.

In fact, an FTA is not just one negotiation; it's four. First there is the domestic stakeholder consultation process and interagency clearance as the U.S. proposal is assembled. Second, there is the negotiation with our trading partners of the text of the agreement. Third is the negotiation of the implementation of the text in the partner countries. Fourth is ongoing consultation over continued compliance.

A. Assembling the U.S. text

The IP chapter of our modern FTAs took shape with the Singapore and Chile FTA negotiations, respectively. Since then, the DNA of the IP chapter remains the same, and a perusal of the existing agreements on the website of the U.S. Trade Representative gives anyone a clear picture of what the United States seeks from this chapter.

That is not to say that the text is written in stone. On the contrary, with each FTA there is broad opportunity for stakeholder comment as the text is reviewed, policies reconfirmed (or not), and updates made to reflect recent developments. The text is reviewed by the government's subject matter experts and cleared through the inter-agency process before it is presented as the U.S. proposal.

B. Negotiating the text of the Agreement

Our trading partners know what we want in the IP chapter very early on in the process. The negotiations are frequently intense and grueling. Ultimately, the hard issues are decided by two factors: political salability and leverage.

While the negotiation of the text is neither the beginning nor the end of the process, it is the most important stage. The text defines the obligations for the participating countries. Once this phase is over, any issues not resolved will meet with a predictable return to intransigence. Getting it done right means specific obligations that cannot easily be avoided. Beyond the direct effect of the text on the participating countries, each FTA text has the potential to set a precedent for future FTA negotiations. A strong final text can make everything that comes after it that much easier.

C. Implementation

After the negotiations on the text of the agreement are concluded and the respective national governments have signed the deal, implementation becomes critical. The FTA does not enter into force unless and until USTR certifies that the participating countries have implemented the obligations they undertook in the agreement. The implementation of the agreement is where the rubber meets the road – do our trading partners change their laws and regulations to meet the negotiated standards? Do U.S. companies actually obtain the fair treatment demanded by the text?

I can tell you from personal experience that the negotiation over implementation can be every bit as intense as the negotiation over the text itself. The good news is that the leverage of the FTA continues through this implementation process. Until USTR certifies compliance, our trading partners are not enjoying the improved

access to the U.S. market promised by the FTA. So, there are strong incentives to implement the agreement fully.

After certification and entry into force, the final word on compliance evaluation and remedial action for noncompliance is in the hands of third-party dispute panels. But transition periods are a distorting force in the implementation process.

D. Continued Compliance

In their ideal form, transition periods allow less developed countries with less sophisticated governing authorities to gain the capacity and expertise to appreciate and properly implement modern trade rules. This Committee and the Congress anticipated that and provided ways to help meet legitimate needs by authorizing capacity building and technical assistance to our trading partners in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.[19]

Transition periods are also a valuable negotiating tool that, if properly employed, can help our trading partners agree to a better level of protection than they otherwise might. I believe that our trading partners enter into negotiations and treaties with us in good faith; the large majority of obligations are implemented reasonably, including those subject to transition periods.

Unfortunately, a trading partner can also misuse transition periods as a delay tactic. And there should be no mistake – in the IP sector, free trade rules mean reducing unfair competition, free riders, and outright theft of our most innovative and creative products.

Our trading partners are shrewd negotiators. They have figured out that when it comes time for USTR to certify compliance, it will do so when obligations subject to

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[19] Publ. Law 114-26, 129 Stat. 320 (June 29, 2015), §102(c)(1).

transition periods have not been implemented. While this is technically appropriate – the trading partner is in compliance with the terms of the FTA if it has not implemented items still within their agreed transition period – it also means that we have given away our critical negotiating leverage. Once the FTA is certified by USTR and thus enters into force, the trading partner is enjoying the full benefits of the improved access to the U.S. market and has a significantly reduced incentive to implement fully the remaining terms of the agreement. After that, our leverage to compel action is ultimately dependent on initiating and prevailing in a dispute process.

One approach to this problem could be requesting or requiring our FTA partners to provide an action plan for the timely implementation of the obligations subject to transition periods. A similar tool is to write into the agreement a requirement for our partners to provide periodic updates on their progress towards timely implementation. The primary benefit of these would be to highlight instances in which a trading partner is falling behind a reasonable schedule geared towards timely implementation. In that regard, they have a role to play. However, neither of these addresses the loss of negotiating leverage. Rather than forsaking key negotiating leverage, I believe it is worth considering a mechanism to suspend the benefits of the FTA in a field of particular importance to that country if its transition periods expire without compliance.

V. Dispute Resolution – A Political Decision

The final and ongoing phase of FTA compliance is the availability of a dispute resolution process. Even in cases of clear-cut noncompliance, the decision to initiate a dispute is at least as much political as it is substantive.

To be sure, it is not necessary to initiate a formal dispute process every time there is a disagreement over implementation. The clearer the textual obligation, the more likely it is that direct negotiation will lead to an acceptable outcome. And even the

threat of a dispute can have substantial persuasive power. It is to our credit that we do not initiate disputes lightly or frivolously. But there is a line between compassion and complacency.

Since 2000, Congress has held thirty hearings addressing the shortcomings of foreign IP protection.[20] But over that same time span, the United States has not

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[20] **Senate Appropriations Committee**
April 29, 2004: Subcommittee Hearing on "International and Domestic Intellectual Property Enforcement"
Senate Banking, House, and Urban Affairs Committee
April 12, 2007: Subcommittee on Security and International Trade and Finance hearing on "Pirating the American Dream: Intellectual Property Theft's Impact on America's Place in the Global Economy and Strategies for Improving Enforcement"
Senate Commerce, Science and Transportation Committee
March 8, 2006: Subcommittee on Trade, Tourism, and Economic Development Hearing on "Impacts of Piracy and Counterfeiting of American Goods and Intellectual Property in China"
Senate Foreign Relations Committee
February 2, 2002: Full Committee Hearing on "Examining the Theft of American Intellectual Property at Home and Abroad"
June 9, 2004: Full Committee Hearing on "Evaluating International Intellectual Property Piracy"
Senate Governmental Affairs Committee
April 20, 2004: Full Committee Hearing on "Pirates of the 21st Century: The Curse of the Black Market"
Senate Homeland Security Commitee
July 26, 2006: Stop!: Oversight of Government Management, The Federal Workforce, and the District of Columbia Subcommittee Hearing on "A Progress Report on Protecting and Enforcing Intellectual Property Rights Here and Abroad"
June 14, 2005: Financial Management, Government Information, and the District of Columbia Subcommittee Hearing on "Finding and Fighting Fakes: Reviewing the Strategy of Targetting Organized Piracy"
November 21, 2005: Financial Management, Government Information, and the District of Columbia Subcommittee Hearing on "Ensuring Protection of American Intellectual Property Rights for American Industries in China"
Senate Judiciary Committee
March 23, 2004: Full Committee Hearing on "Counterfeiting and Theft of Tangible Intellectual Property: Challenges and Solutions"
May 25, 2005: Subcommittee on Intellectual Property Hearing on "Piracy of Intellectual Property"
November 7, 2007: Full Committee Hearing on "Examining U.S. Government Enforcement of Intellectual Property Rights"
June 17, 2008: Full Committee Hearing on "Protecting Consumers by Protecting Intellectual Property"
June 22, 2011: Full Committee Hearing on "Oversight of Intellectual Property Law Enforcement Efforts"
House Energy and Commerce Committee
June 25, 2005: Subcommittee Hearing on "Product Counterfeiting: How fakes are undermining US jobs, innovation, and consumer safety"
July 9, 2013: Subcommittee Hearing on "Cyber Espionage and the Theft of U.S. Intellectual Property and Technology"
House Foreign Affairs Committee

initiated a single dispute under the IP chapter of any FTA. And we have not initiated an IP dispute under the TRIPS Agreement in nine years. It certainly is not for lack of candidates.

American innovators and creators face continuing challenges in the markets of our trading partners who have not properly implemented their IP obligations, but those trading partners are enjoying the benefits of improved access to the U.S. market. This is not the equity we achieved in the negotiations and we should not settle for it now. Moreover, the apparent hesitancy to initiate IP disputes does not go unnoticed by our trading partners and invites them to test our resolve further. Simply put: we need to do a better job of holding our trading partners to the obligations they agreed to.

April 6, 2009: Full Committee Hearing on "Sinking the Copyright Pirates: Global Protection of Intellectual Property"
July 21, 2010: Full Committee Hearing on "Protecting U.S. Intellectual Property Overseas: the Joint Strategic Plan and Beyond"
July 19, 2012: Full Committee Hearing on "Unfair Trading Practices Against the U.S.: Intellectual Property Rights Infringement, Property Expropriation, and Other Barriers"
House Government Reform Committee
September 23, 2004: Full Committee Hearing on "Intellectual Property Piracy: Are We Doing Enough to Protect U.S. Innovation Abroad?"
December 9, 2009: Subcommittee Hearing on "Protecting Intellectual Property Rights in a Global Economy: Current Trends and Future Challenges"
House Judiciary Committee
March 17, 2005: Subcommittee Hearing on "Responding to Organized Crimes against Manufacturers and Retailers"
May 17, 2005: Subcommittee Hearing on "Intellectual Property Theft in China and Russia"
December 7, 2005: Subcommittee Hearing on "International IPR Report Card – Assessing U.S. Government and Industry Efforts to Enhance Chinese and Russian Enforcement of IP rights"
April 26, 2012: Subcommittee Hearing on "International Patent Issues: Promoting a Level Playing Field for American Industry Abroad"
June 27, 2012: Subcommittee Hearing on "International IP Enforcement: Protecting Patents, Trade Secrets, and Market Access"
September 20, 2012: Subcommittee Hearing on "International IP Enforcement: Opening Markets Abroad and Protecting Innovation"
June 4, 2014: Subcommittee Hearing on "Trade Secrets: Promoting and Protecting American Innovation, Competitiveness, and Market Access in Foreign Markets"
Congressional-Executive Commission on China
April 2, 2004: "Influencing China's WTO compliance and commercial legal reform: Beyond Monitoring"
September 22, 2010: "Will China Protect Intellectual Property? New Developments in Counterfeiting, Piracy, and Forced Tech. Transfer"

VI. Conclusion

Intellectual property is a major element of the U.S. economy and balance of trade. Even more, it is at the heart of our culture and the spirit of American innovation. When foreign countries fail to provide adequate legal protection and effective remedies against IP violations, they undermine their own economy, endanger their citizens, harm U.S. businesses and consumers, and distort the flow of legitimate international trade. Modern intellectual property provisions are a critical element of our FTAs. In addition to the benefits associated with improved IP protection, these provisions help spread the fundamental elements of liberty.

FTA negotiations are hard-fought and like the IP rights they purport to secure, they are without meaning if they are never enforced. By the time we get to the final stage of compliance monitoring, we have already negotiated against ourselves once and with our trading partners twice. Along the way, we are making concessions away from our ideal outcome. If we will not hold our trading partners to their obligations, we must eventually ask what is the value of running around the world getting people to sign pieces of paper? But we are not there yet. Even for all the trials and tribulations of the process, the IP provisions of U.S. FTAs are the top standard in the world. With an energetic effort to hold our trading partners to their commitments, we can all enjoy the benefits of progressively improved IP protection around the world.

I again thank the Committee for this opportunity to present my views and I stand ready to provide any assistance I can.