S. HRG. 110–788

TRADE ENFORCEMENT FOR A 21ST-CENTURY ECONOMY

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

JUNE 12, 2007

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

47–516—PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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TRADE ENFORCEMENT FOR A 21ST-CENTURY ECONOMY

TUESDAY, JUNE 12, 2007

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10:10 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Rockefeller, Lincoln, Stabenow, Grassley, Hatch, and Bunning.

OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

The CHAIRMAN. The hearing will come to order.

Nearly 2,500 years ago, the Greek playwright Sophocles wrote: "What you cannot enforce, do not command." For millennia, people have recognized the importance of enforcement.

When people think about trade, we often think about what nations command. We think about trade agreements. We think about negotiators flying around the world, concluding deals. And those deals are important to expanding America's export opportunities.

But those deals do no good if we cannot enforce them. America needs to get the full benefits of the bargains that it negotiates.

In other words, our export competitiveness depends, in large part, on how good a job we do with enforcement. American exporters cannot compete successfully abroad if our trading partners do not play by the rules of our trade agreements. Likewise, America's workers cannot compete successfully at home if our trade partners export dumped or subsidized goods into our market.

That is why we must do all that we can to enforce our trade agreements abroad and our trade remedy laws here at home. Unfortunately, we are falling behind on both counts.

First, with respect to trade agreements, the administration spends far more time negotiating new deals than enforcing those already in place.

The U.S. Trade Representative recently issued its report on foreign trade barriers in 2006. In it, USTR documented 650 pages worth of trade barriers. But in 2006, USTR filed only three WTO cases against those barriers. This year, it has filed only four. With 650 pages worth of barriers, it is hard to believe that only a handful merit action.

In 6 years, the previous administration filed 56 WTO cases. But in its first 6 years, this administration filed only 17 cases. That is fewer than a third as many.

These WTO cases have been very successful. The United States has, in fact, won all but four of the WTO cases it has filed. But we cannot win if the administration fails to bring the cases in the first place.

And these cases have a real world impact. Studies have estimated, for example, that full enforcement of China's commitments will boost U.S. GDP by 0.7 percent by 2010. That is an $84-billion boost to the U.S. economy.

I recognize that the USTR cannot prosecute every foreign trade barrier. And I recognize that USTR resolves many barriers through negotiations. But we can, and we must, do more to enforce our trade agreements.

Second, we must also do more to enforce our antidumping, safeguard, and other domestic trade remedy laws. When Congress granted Permanent Normal Trade Relations to China, we gave the administration a special safeguard tool to address Chinese import surges, known as "section 421."

But in every case where the International Trade Commission determined that relief was warranted, the President has denied relief. That is not what Congress intended.

What is the problem? How can we improve America's enforcement record?

Are resources the problem? Congress has granted the tiny USTR staff an enormous amount of responsibility. Does USTR have enough people—and does it have the right people—to carry out that responsibility? Does USTR need a dedicated, Senate-confirmed enforcement official to lead its enforcement functions?

Are the tools themselves the problem? Should we revamp our existing enforcement tools, like section 421? Should we create new ones?

Congress has repeatedly underscored the importance of trade enforcement. We need to back up our purpose with action. We must provide the capacity and the tools that will allow the administration to respond to our concerns and rebuild trust in America's trade policy.

I look forward to hearing our witnesses' ideas on how to best accomplished these tasks. Each witness has distinct expertise in trade enforcement.

Today I have one simple request of our witnesses. Please limit your oral testimony to 5 minutes because, as Sophocles wrote: "A short saying oft contains much wisdom." [Laughter.]

Senator Grassley?

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. Yes. Well, thank you, Mr. Chairman. When you have hearings on trade, I really enjoy these, because the issue of trade, although it is very difficult, is one of the most interesting subjects to come before this committee.

Our trade remedy laws reflect a balance. When the United States imposes additional duties on imports, U.S. producers of competing

products may benefit. But at the same time, those benefits do not flow through to consumers, who will see higher prices.

The same goes for downstream users of products whose costs will increase. While that is true of remedial duties such as antidumping and countervailing duties, it is particularly true of safeguard duties. Those duties are available without regard to whether the subject imports are unfair. In other words, safeguard remedies can be applied even if there is no allegation or demonstration of an unfair trade practice.

That is why the standard of showing injury in those cases is particularly higher. That is also why it is important for the administration to weigh carefully the pros and cons of providing safeguard relief.

When it comes to safeguards, we need to be sure that any action taken is in the best interests of the country and not just an economic segment. My own view is that we have strong laws already available. The Commerce Department and the International Trade Commission take very seriously their obligations to enforce those laws. So we should be mindful that, when it comes to remedial duties, trade remedies are only allowed when the U.S. industries either suffer or are threatened with material injury.

When the U.S. economy is strong, as it is now, it is probably going to be more difficult to demonstrate material injury or a threat. That would result in a decline in trade remedy cases, but that is not a reason then to re-write our trade laws. I will be interested in hearing what our witnesses have to say on that.

I believe the administration has been very careful in enforcing our rights at the World Trade Organization, maybe, some people say, too careful. I particularly am glad that Ambassador Schwab has brought new China cases on unfair subsidies and the inadequate protection of intellectual property. The administration has brought some other significant cases, like our challenge to Airbus subsidies.

To me, the claim that our administration is not pursuing cases is unfounded, so I will be interested in hearing what witnesses have to say about whether or not USTR is doing their job. And by "good case," I mean a case that our industry is willing to support and that USTR expects to win.

For example, the administration has been holding tough on negotiation over Russia—proceeding carefully to make sure that it's prepared to live up to obligations of membership.

Just a couple of days ago, President Putin described the World Trade Organization as "archaic," "undemocratic," and "inflexible."

We might all have some concern about the WTO. For example, I would share the concern that the WTO appellate body has gone too far in some cases and created new obligations that the WTO members never agreed to.

If a WTO agreement is silent on an issue, that means members have not consented to follow any particular approach. In that case, it is not the place of the WTO to impose one.

We need to consider any proposal to change our trade laws very carefully.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator, very much.

Today's panel begins with Secretary Dan Glickman, chairman and CEO of the Motor Picture Association of America. Secretary Glickman previously served as Agriculture Secretary in the Clinton administration, and before that, in the Congress.

Following Secretary Glickman is Jennifer Hillman, a distinguished fellow at the Institute of International Economic Law at the Georgetown Law School. Ms. Hillman served as Commissioner on the International Trade Commission and as General Counsel at USTR during the Clinton administration.

Our third witness is Mr. Bob Lighthizer, an international trade partner at Skadden, Arps, Meagher, and Flom. Mr. Lighthizer formerly served as Deputy USTR in the Reagan administration.

Finally, we welcome Mr. Erik Autor, vice president and international trade counsel for the National Retail Federation. Mr. Autor previously served as International Trade Counsel for the Finance Committee under the leadership of former Chairmen Bob Packwood and Bill Roth.

Secretary Glickman, please proceed.

STATEMENT OF DAN GLICKMAN, CHAIRMAN AND CEO, MOTION PICTURE ASSOCIATION OF AMERICA, WASHINGTON, DC

Mr. GLICKMAN. Thank you very much. Thank you, Senators Baucus, Grassley, Rockefeller, and Bunning. It is nice to be back in my old home turf.

When I was at USDA, we brought a high-profile WTO case—some of you may remember—involving beef hormones. This was a big case, a high-intensity case, a lengthy WTO process, and the WTO then approved the U.S. taking retaliatory steps to bring the EU into compliance. We won.

"Good," I thought, "our exports will start flowing again." Well, it was not so simple. For the rest of my time in government, I and many other government trade officials were occupied with attempting to enforce the WTO case.

I recall thinking to myself, if winning a labor trade enforcement case like this causes so many problems, I wonder what it is like to lose a case? I would just start by echoing your words, Senator Baucus, that negotiations, agreement, and even favorable WTO decisions work only to the extent that they are enforced. Enforcement is not simply winning a decision. It is making sure that other parties, other governments, comply.

That is the essence of my message today. Whatever we need to do, realistically, to enforce the cases that we need to enforce, I think that would complement a successful trade policy. This is especially important in the motion picture business.

About half of our revenues are earned outside the United States. If you look at the major motion pictures out right now, from "Spiderman," to "Pirates of the Caribbean," to a myriad of others, if you look at the domestic box office revenues and then you look at international revenues, you will see that in many of those cases, outside the United States is producing, in some cases, twice the revenues, for some of the bigger movies, than they are inside the United States.

If we look at revenues from theaters, home entertainment, DVD, film entertainment, so on and so on, these numbers are actually higher outside the United States than they are here as well.

My predecessor used to say this, and I think it is very important, that by and large, most years the U.S. film and entertainment industry has a positive balance of payment surplus in every single country in the world that we go to. Every single country.

So as you can tell, this is like life or death to us, to be able to move our product outside the United States. We have made great strides. I must say, the USTR has been extremely helpful to us. But we still need to do more to get the right kind of laws and regulations in place, and particularly to protect intellectual creativity, intellectual property in our industry.

If I may offer just five major points. My entire statement will have all of these in greater detail.

Number one: generally speaking, we support a free and open trade agenda. In general, free trade agreements hold countries to a higher IPR standard than the Trade-Related Aspects of Intellectual Property Rights (TRIPS) language in the WTO.

So the free trade agreements are generally good for us because, by and large, they have better IPR language than the underlying statute, but inside the FTA, in the upbringing of other countries' laws and their enforcement of those particular laws, meet a higher priority.

We acknowledge that the FTAs are somewhat controversial in some quarters due to labor and environmental provisions, but they are very important for us, in the general proposition, given the market for U.S. film and television worldwide.

Number two: stressing the importance of ensuring that the government has sufficient resources for an overseas training program. State and the Commerce Department fund a variety of training and education programs, many of which focus exclusively on IPR.

I myself have talked about and given speeches on intellectual property enforcement to judges and administrative law folks around the world. Training foreign judicial officers, administrators, even lawmakers is critical to ensuring effective implementation and enforcement of trade obligations that these countries make.

Many of these countries have no infrastructure or method for enforcing these particular things, and we can help them there. We would also like to see these training programs focus on the countries identified as priorities in the Special 301 process. So that is point number two.

Point number three: the importance of ensuring that USTR and other trade agencies have sufficient resources. While I believe USTR is doing a very good job, they desperately need your resources, particularly in the enforcement area, to advocate, enforce, and advance U.S. trade agreements.

In my view, this is even more important than structural organization or statutory changes. I don't rule those out, but giving these folks the enforcement authority and the clout that they need is particularly important.

Contrary to popular views, USTR, as well as other trade officials, spend as much, if not more, time working to enforce trade agree-

ments as they do negotiating new ones, but they do need more agreements.

Point number four has to do with the Special 301 countries, like Russia, China, and India——

The CHAIRMAN. Do not have too many more points.

Secretary GLICKMAN. All right. Just real quick, two more points.

The CHAIRMAN. All right. Very quick ones.

Secretary GLICKMAN. All right.

Anyway, we believe that the Special 301 process is a key IPR enforcement mechanism and it will lead to positive incentives, such as benefits. Foreign governments would have more reason to abide by their trade agreements.

We recommend that Congress adopt a change to the GSP program to require beneficiaries to adopt IPR action plans where the Special 301 process identifies countries as IPR enforcement priorities.

The final point is just congressional oversight. Nothing gets our trade agenda moving better than a clear and concise look at it.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Glickman, very much.

[The prepared statement of Mr. Glickman appears in the appendix.]

The CHAIRMAN. Ms. Hillman?

STATEMENT OF JENNIFER HILLMAN, DISTINGUISHED FELLOW, INSTITUTE OF INTERNATIONAL ECONOMIC LAW, GEORGETOWN LAW SCHOOL, WASHINGTON, DC

Ms. HILLMAN. Thank you. It is an honor to appear here before you. I do so this morning in my personal capacity, so the views I express are my own and not necessarily those of either the U.S. International Trade Commission, where I served as a commissioner for the past 8 years, or those of the Office of the U.S. Trade Representative, where I served as General Counsel and Chief Textile Negotiator.

In my view, an effective trading enforcement regime is one that ensures both market access for our exports and efficient relief from unfairly traded imports. The fact that we are running larger and larger trade deficits with the vast majority of our trading partners and that USTR's annual "Report on Foreign Trade Barriers" continues to highlight numerous obstacles to U.S. exports of goods and services, suggest that we should be making maximum use of our trade enforcement tools.

These tools include primarily the WTO dispute settlement system, as well as that of our free trade agreements, section 301, and Special 301 for enforcement of intellectual property rights. Yet, if we look at what has happened since 2000, as Senator Baucus noted in his opening statement, we see a significant drop in the number of actions taken by the United States.

During the first 6 years after the establishment of the binding dispute settlement mechanism in the WTO, the period from 1995 to 2000, the U.S. initiated 60 WTO cases covering a wide variety of products and an equally wide variety of legal rights. That meant an average of 10 cases per year. However, during the subsequent

6 years, the most recent period of 2001 to 2006, the U.S. has initiated only 18 cases, for an average of just three cases per year.

If we look at section 301 actions since the statute was enacted in 1974, there have been 121 cases brought to date. However, since March of 2001, no new section 301 investigations have been initiated, and all five of the petitions that have been filed during this period were rejected by the USTR.

Similarly, while USTR continues to maintain a priority watch list, and a watch list under Special 301 for countries that do not adequately enforce their intellectual property commitments, and to negotiate with those countries on those two lists, since March of 2001, when Ukraine was designated a priority foreign country and a related section 301 action was filed, USTR has not designated a single new country as a priority foreign country.

If we turn to the import side of the equation, there are an increasing number of bumps in the road to having a smooth, efficient, and effective trade remedy system in place.

First is section 421, which is the special safeguard provision enacted in 2000 to combat any surges in imports from China. The law was set up to provide fast relief, in that the ITC has only 60 days to make a determination, and was designed with a lower threshold of injury, a material disruption standard. Yet, in the more than 6 years since 421 was enacted, and despite the huge increase in imports from China, only six cases have been filed.

In four of them, the ITC reached an affirmative determination and recommended that the President impose tariffs or quotas on the imports from China, but in all four of those cases the President decided to provide no relief.

In each case, the President gave two primary reasons for his decision. Because those two reasons are likely to apply in every case that might be filed, it is hard to see why an industry will find it worthwhile to file any new section 421 petitions.

The second bump in the road arises from recent court and WTO decisions that have a major impact on antidumping and countervailing duty determinations. In a major decision handed down a year ago, the Federal Circuit held that the ITC cannot reach an affirmative determination unless it can show that imports from other countries that are not the subject of the investigation will not come in and take the place of the imports that were the subject.

The ITC was so troubled by the extra-statutory test called for by this decision that, for the first time in its history, it recommended that the Solicitor General seek Supreme Court review of this decision, but no such review was sought.

Already, at least one ITC decision has been handed down in which the majority opinion stated that the application of the law as written by the Congress would result in an affirmative determination, but because of the new tests laid down by the Federal Circuit, the decision was a negative one.

Similarly, the U.S. has lost a number of WTO cases related to its use of the so-called "zeroing" methodology in calculating antidumping duties.

Finally, some caution should be noted on whether cases involving agricultural goods can be made to fit into a trade remedy system that was fundamentally designed for manufactured goods.

One WTO case called into question whether the U.S. can include farmers and growers in cases involving processed agricultural products. Other cases highlight the difficulty of demonstrating the causal link between particular imports and changes in U.S. prices due to trading on a number of mercantile exchanges and the existence of futures markets for many of these goods. Assuming that farmers can rely on trade remedies to work effectively for them if they are injured by imports may not be a safe bet.

Our trade enforcement regimes have not been substantially changed since the Uruguay Round Agreement Act in 1994. Since then, numerous court cases and WTO rulings, shifts in trade patterns, the growth of trade in services, and the need for better enforcement of intellectual property rights have all placed constraints and pressures on the trade enforcement system.

A sound trade enforcement regime for the 21st century must adjust for these changes, while ensuring that we fully utilize the tools that we already have available to us.

Thank you.

The CHAIRMAN. Thank you, Ms. Hillman. That was very interesting. Thank you very much.

[The prepared statement of Ms. Hillman appears in the appendix.]

The CHAIRMAN. Mr. Lighthizer?

STATEMENT OF ROBERT LIGHTHIZER, INTERNATIONAL TRADE PARTNER, SKADDEN, ARPS, MEAGHER, AND FLOM, WASHINGTON, DC

Mr. LIGHTHIZER. Mr. Chairman and members of the committee, good morning.

We are in the midst of a truly unprecedented crisis in our manufacturing sector. We are witnessing trade deficits that would literally have been unimaginable only a few years ago.

China and several other trading partners act in a blatantly mercantilist manner, pursuing policies designed to capture and dominate manufacturing sectors and the jobs that go with them. Every day, we see new evidence of factories and entire industries picking up and moving overseas.

The loss of American manufacturing is not due to some lack of competitiveness or comparative disadvantage, but all too often results from the rules of the game that are stacked against our producers and our workers that range from manipulation of foreign currency, to subsidies, to protected home markets, to unfair tax rules, and a range of other distortions with no legal or economic justification.

In many ways, the only practical and meaningful lines of defense for American manufacturing are the trade remedy laws, including the antidumping and anti-subsidy laws. Unfortunately, these provisions are under attack as never before.

First, over-reaching WTO dispute settlement decisions have invented wholly new requirements for applying our laws. Second, in international negotiations, foreign countries are pushing scores of detailed proposals with one goal in mind, namely to gut our fair trade laws. Third, to be perfectly frank, we have seen uneven enforcement here at home, something that has given comfort and en-

couragement to foreign countries that engage in market-distorting practices.

Time is growing short to turn the tide and regain a future for American manufacturing. There will need to be a wide-ranging effort, but several steps are of immediate and obvious importance. A first priority must be to deal with judicial activism and over-reaching at the WTO.

Whatever Congress may do to strengthen enforcement of our laws will be of no effect if such measures can be undermined by baseless WTO litigation. At a minimum, Congress should set up an expert body to advise it on WTO dispute settlement decisions adversely affecting the United States.

This idea has been endorsed over the years by a broad range of policy makers, going back to the very creation of the WTO, including my old boss, Senator Dole, President Clinton, Senator Baucus, Senator Grassley, Senator Rockefeller, and several other members of this committee. Its time has come.

Next, we must get serious about China. We, of course, need to apply our anti-subsidy laws to the biggest subsidizer in the world, but we need to do it in the right way. That means continuing to treat China as a non-market economy and ensuring that our anti-dumping methodology is not weakened.

We need to stop talking about currency manipulation and start acting to address it. If anyone is still laboring under the impression that a policy of endless dialogue will lead to anything but unemployment in the United States, they need to reassess the situation.

Finally, we need rigorous enforcement of our antidumping/countervailing duties (AD/CVD) laws. Foreign unfair traders are relentless in attacking these laws because they understand what some policymakers seem to forget, namely that these laws work and have a vitally important effect when we are willing to use them.

A true policy of enforcement means resisting groundless WTO decisions, such as the recent line of so-called "zeroing" cases, which have been ridiculed by observers across the spectrum. It means that Congress must actively oversee our trade negotiations to ensure that our laws are not given away as part of the Doha Round, or any other negotiations.

At the end of the day, businesses will go where the rules favor them. If that means manufacturing overseas and shipping back to the U.S., then that is exactly what they will do. I hope that the committee will make sure that the rules do not reward such behavior.

This is a task that is crucial and urgent if we are to keep our manufacturing base and the millions of good, middle-class jobs that have sustained this country throughout its history.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Lighthizer, very much.

[The prepared statement of Mr. Lighthizer appears in the appendix.]

The CHAIRMAN. Mr. Autor?

STATEMENT OF ERIK AUTOR, VICE PRESIDENT AND INTERNATIONAL TRADE COUNSEL, NATIONAL RETAIL FEDERATION, WASHINGTON, DC

Mr. AUTOR. Thank you, and good morning.

By way of introduction, the National Retail Federation is the world's largest retail trade association, representing an industry with more than 24 million employees, about 1 in 5 American workers, that had 2006 sales of $4.7 trillion.

International trade issues fundamentally impact the ability of U.S. retailers to run their businesses in an industry marked by cutthroat competition and a 2-percent profit margin.

Every American retailer, from the biggest to the smallest, sources consumer products from around the world to provide their customers, the American consumer, what they want: the widest selection of merchandise at the best value.

These commercial activities support millions of good-paying, blue- and white-collar jobs, both in the retail industry and in industries that support retail operations: manufacturing, farming, transportation, and logistics, to name a few.

I, first, want to underscore that American retailers fully support actions by the U.S. Government to ensure that our trading partners abide by their commitments under international trade agreements and rules, for example, through the use of dispute settlement mechanisms at the World Trade Organization.

Retailers have also experienced problems on this front, such as piracy of retail brands and trade barriers that violate international trade rules as more U.S. retailers serve customers in foreign markets.

We do, however, have concerns about over-zealous and inappropriate actions, mainly involving the U.S. trade remedies laws: antidumping, countervailing duty and safeguards measures.

These laws have their place in the rules-based trading system, however, some domestic industries exploit anxiety over trade and globalization to push for protectionist measures and legislation to limit foreign competition and pad their own profit margin at the expense of U.S. consumers.

Calling for stronger laws and more vigorous enforcement against what they erroneously claim is illegal and predatory trade, they manipulate widespread understanding about what the trade remedies laws are and what they are intended to do to make it easier to obtain import protection. As an extremely trade-dependent industry, retailers are very vulnerable in the face of such histrionics.

Based on our experience from an increasing number of trade cases against consumer products, we firmly believe that there is no need to strengthen current trade remedies laws to make it easier for petitioning industries to obtain relief.

The fact is that U.S. trade remedies laws are already vigorously—even zealously—enforced. Most antidumping and CVD cases end up in affirmative determinations, and any disputed or unclear issues are almost always decided in favor of the petitioner.

In the apparel trade, backdoor political deals have created arbitrary safeguard measures that violate basic principles of U.S. administrative law and possible government self-initiation of anti-

dumping actions designed to circumvent the injury and standing requirements of U.S. law.

Meanwhile, the trade remedies rules are already heavily stacked against U.S. retailers and other importing and consuming industries in manufacturing and agriculture who are forced to defend their interests with one hand tied behind their backs.

For example, unless they are an importer of record, they are not considered interested parties for purposes of standing to participate fully in investigations, even though they pay the bill for the import taxes imposed in these cases.

Therefore, many U.S. industries and companies look with alarm at some recent legislation purporting to strengthen U.S. trade remedies laws, some of which would allow petitioners to abuse and game the system to attack legitimate trade, undermine U.S. competitiveness, and violate WTO rules.

We live in a more trade-dependent, interconnected economy than when most of the current trade remedies rules were first written. To be competitive in this world, all U.S. industries now have global supply chains, importing from their foreign suppliers and exporting to their foreign customers.

In this world, trade cases brought against imports into the United States have increased costs and often undermine the ability of U.S. retailers, farmers, and manufacturers to compete globally.

Also, these cases are no longer a struggle solely between foreign and domestic manufacturers. Rather, they increasingly pit U.S. industries against each other, as we have seen in the recent case of the steel and automobile industries. When the importer is a manufacturer, losing this fight can force it to close its U.S. operations and move offshore.

U.S. industries also see increasing risk to their businesses from trade remedies imposed by foreign countries. The problem is so serious, that U.S. exporters are now the number-three target for antidumping cases in the world, after China and Korea.

We need to ask ourselves a basic question: is our trade remedies regime compatible with where our economy will be in 10 years? It is not in our national interest to create a trade remedy system that, posing as a quasi-judicial proceeding, becomes an arbitrary, results-driven, and politically influenced means to provide a few favored industries automatic relief from import competition.

Such a protectionist system undermines U.S. competitiveness, hurts millions of American consumers, and is incompatible with where our country needs to be in the 21st-century global economy.

To support a modern, globally competitive U.S. economy, we need trade remedy rules that are balanced and fair, inclusive of the participation of all affected parties, and compatible with commercial practices. These objectives would not weaken trade remedies rules, they would improve them.

Thank you.

The CHAIRMAN. Thank you, Mr. Autor, very much.

[The prepared statement of Mr. Autor appears in the appendix.]

The CHAIRMAN. I have some concerns about the implementation of section 421, given the ITC's recommendations and the refusal of the administration to pay any attention to the ITC. I may not have

time to get to that. If I do not this round, I will get to it in the next round. I know Senator Rockefeller is quite interested as well.

I would just like to ask each of the four of you, what three new changes should we make in our enforcement regime? Whether it is to increase our exports to other countries, to knock down foreign trade barriers, or better enforce our local trade remedy law.

I am spending a little time asking the question to give you a little time to think about it. But if each of you could give me the three major changes we should make in our enforcement regime to enforce the trade laws and help American companies and employees, what would those three be?

Whoever wants to answer that question first, just speak up, then I will go down to the other ones. Does anyone want to jump into it? Mr. Lighthizer?

Mr. LIGHTHIZER. Mr. Chairman, I am happy to answer that. I would say three things. I would say, first of all, we need to pass a WTO review commission. It is something that I think, if it had been passed when you first introduced it, when Senator Grassley went to the floor of the U.S. Senate in June of 1996 and tried to get it passed, if that had been passed I believe there would be a lot of Americans working right now in manufacturing jobs.

If I could just drop a footnote down on that to show you how important this provision is. When Senator Grassley went there, it was about 2 weeks after Senator Dole resigned from the Senate.

The person who stopped it was Senator Hollings, who, when he introduced his last trade bill, included this provision in it. That is how important this provision is and how universally I think it is accepted. We have to put that in place and we have to stop implementing absolutely patently wrong WTO decisions, like zeroing.

Number two, we need to have CVD for non-market economies. It is crazy to me that the biggest subsidizer in the world is actually treated better than other countries in the world when it comes to this.

We need to do something about currency. This is all under my number two for strengthening trade enforcement. We need to, I think, have subsidies for currency manipulation, and I think we have to do something about this value added tax.

Finally, I think we need more funding, not just for USTR, but for the Department of Commerce. The Import Administration (IA), which actually works on these cases, has seen their budget reduced by almost 20 percent in the last 3 years. It has been a major problem for those of us who litigate before them. So, those are the three things.

The CHAIRMAN. All right. Good. Thank you very much.

Mr. Glickman? And briefly, because my time is expiring.

Mr. GLICKMAN. More resources and dedicated staff at USTR, and a trade enforcement leadership, perhaps, dedicated to advise the President or at a much higher level in the trade agencies. That would be useful.

The other things relate to our particular industry. Again, we are substantially an export industry and we have market access barriers to U.S. motion pictures around the world, so we would like to see that attention heightened because, as I said, this is one business that has a positive balance of payments surplus with the U.S.

Then the final thing is cooperation, working with foreign governments on Internet piracy, which is the real dagger at the heart of protecting our products.

The CHAIRMAN. Ms. Hillman? Thank you. Ms. Hillman?

Ms. HILLMAN. I would start on the export side, because I think we do need to do a lot more work aggressively in terms of getting market access. We have good tools, but they have not been used enough.

We must sort out a way to get both the resources and the political pressure so that the cases are not turned down, and that we actually use 301 to go after the biggest markets that still have the largest number of barriers to our imports. That means starting with China. But we have to use the tools that we have. We cannot simply say "no" to every 301 petition that is filed and not initiate cases on our own and expect those markets to open.

Second, I think we do need to fix the import issues raised by these WTO and court cases so that, on our side of the equation, the dumping and the countervailing duty laws continue to work.

Thirdly, we need to do something about safeguards. We have lost every WTO safeguards case that has been brought, and so has every other country in the world. The WTO has yet to find a safeguard measure that it finds acceptable. We need to do something if that tool is going to be out there, and I think we also need to fix the 421 safeguard problem.

The CHAIRMAN. Thank you.

Mr. Autor?

Mr. AUTOR. Well, I think that we should be using WTO dispute settlement in appropriate cases. I think that Senator Grassley made the point that we need to ensure that these are appropriate cases and ones where we expect that we have a good case and are not going to end up losing.

I would like to make a note of caution, though, that when we look at the trade remedies regime and possible changes to it, that what is sauce for the goose is sauce for the gander. Other countries look at what the United States does and copies it to hit U.S. exports, so we have to make sure that anything we do is consistent with WTO rules.

With respect to applying countervailing duties for non-market economy countries, we need to bear in mind that the way the methodology works in antidumping cases against China and other NME countries, it effectively offsets any benefit from subsidies that the Chinese companies would be getting because they are using costs from a surrogate country.

We need to make sure that if there are concurrent countervailing duty cases and antidumping cases against the same product, that it does not involve double counting.

The CHAIRMAN. My time has expired.

One brief question. How do we properly influence the WTO that makes, clearly, wrong decisions? Zeroing, for example. How do you get the WTO to be fair, not make new law, to be an arbiter, but not be a legislator? How do we do that?

Mr. AUTOR. Well, I am not convinced that the WTO——

The CHAIRMAN. I am going to ask Mr. Lighthizer, because he cares about this.

Mr. LIGHTHIZER. Well, if you asked me, I would say, number one, I would have a commission so that you objectively know, from former judges or something, that this, in fact, is a mistake. Everybody that loses always thinks every decision is a mistake.

The CHAIRMAN. All right.

Mr. LIGHTHIZER. Once you have arrived at that conclusion, number one, I would not implement, and number two, I would begin to negotiate. Number three, if I had to, I would act unilaterally. I think if you are actually convinced, over a period of time, that a lot of WTO cases are wrong, you basically have to change the system. That is my belief.

The CHAIRMAN. Thank you very much.

Senator Grassley?

Senator GRASSLEY. Yes. Erik, I want to ask you to elaborate, because you expressed some concern in your statement about the possibility of countervailing duty law being applied to non-market economy countries in a way that would lead to double relief for the same industry, and ways that you would address that issue.

Mr. AUTOR. Well, this was considered by the House of Representatives last Congress. The House passed a bill that would apply countervailing duty law to China and other non-market economy countries, but in a way that would prevent basically double counting the benefit from the subsidies if there is a concurrent countervailing duty case and an antidumping case.

The antidumping methodology on a non-market economy country, the way it works, it essentially offsets the benefit that a Chinese company, for example, would be receiving from a subsidy it would get.

I can give you a simple example, if you wish. If, for a Chinese company, it costs $15 to make a widget which they are selling in the U.S. for $10, there is a dumping margin. That Chinese company is getting a $5 subsidy from its government, which reduces its cost down to $10, what it is selling in the United States.

In an antidumping case, the Commerce Department would ignore the Chinese company's costs, would look at a surrogate country like India, and determine what the cost of production of that widget is in India.

Let us assume that it is $20 to make that widget, so you are comparing the $20 cost of production with the $10 price in the United States, and you have ignored the entire benefit from the subsidy that the Chinese company is receiving and that essentially offsets that benefit.

Now, if a countervailing duty case were to be filed against Chinese widgets and would apply a countervailing duty on top of that antidumping duty, the concern is, you have essentially offset the benefit from that subsidy twice.

I think WTO rules are fairly clear, that you only get one remedy for an injury. So we want to make sure we do not have a problem with applying the countervailing duty law to China and other non-market economy countries. We want to make sure that it is done in a way that is consistent with WTO rules.

Senator GRASSLEY. Yes.

Mr. LIGHTHIZER. Senator, can I just speak to that for a second? Because as a practitioner on the other side, we totally disagree

with that analysis. I agree that that provision was in the House bill; hopefully it will not be in it again.

The fact is, the non-market economy methodology is a substitute for being able to find reliable costs in a non-market economy. So what we do is, we take a surrogate country and we say we are going to use their costs instead of whatever the costs are—in China, for example—because those are unreliable and manipulable. This surrogate cost could be higher or lower.

They are not always lower, they could be higher or lower. It has nothing to do with whether or not, wholly unrelated to that problem, there are subsidies in that system. There is no double counting. That is just a misunderstanding of what is happening in those economies. So, I totally disagree with that. I hope we get a chance to talk to staff about this. I realize this is very technical, but please believe me, there is no double counting.

Senator GRASSLEY. All right.

Erik, we have heard some concerns about the President's decision to deny relief in section 421 cases. Does the President have too much discretion in deciding whether to provide such relief?

Mr. AUTOR. Well, like in other safeguards measures, the President has the authority to consider the broader economic interests and weigh those in the balance. I do not see that it makes any sense to apply a safeguards remedy if the conclusion is that the potential damage to the U.S. economy is going to outweigh any benefit that might be gained by applying it. So, I think it is appropriate to keep that discretion in the hands of the President.

Now, there may be some disagreement whether the justification that the President gave in not offering relief in those cases was appropriate or not, but I would be very concerned about essentially taking away the President's discretion to weigh the economic interests in whether or not to apply those cases.

We have to remember that these are not products that are alleged to be unfairly traded, so it is appropriate that some higher standard be applied before that trigger is pulled.

Senator GRASSLEY. Dan, in your testimony you talked about the success that we have had when we posted Commerce Department intellectual property experts at our overseas embassies. You also mentioned the possibility of expanding the program to more posts. What countries would you expand that program to?

Mr. GLICKMAN. We are already doing some of that in China, but I would take the priority watchlist examples: Russia, China, India, Thailand, Chile, Argentina, and Ukraine. I would look at each one of those countries. I am not sure exactly how much we have in any of them, but they are extremely helpful.

What we find, our folks on the ground find that there is actually, as opposed to, in many cases, a negative attitude about U.S. product compliance, intellectual property, market access, it is just an undeveloped atmosphere.

In many respects they are very primitive and they need our help and assistance. And it does work. It is not magic, but it is helpful. So, I would look at all the priority watchlist countries, particularly.

Senator GRASSLEY. Thank you.

The CHAIRMAN. Thank you, Senator, very much.

Senator Rockefeller?

Senator ROCKEFELLER. Thank you, Mr. Chairman.

When we and other members of the WTO brought China into the global trading system, it was a deal. It was a deal, it was not just a nice thing to do. It was a contract, exactly in the same manner as contracts apply between private businesses and individuals—you will not accept that [to Mr. Autor]; I think the rest of you might—and having enforcement obligations for all parties involved as a result of that, as contracts must.

Now, the 421. I would just make this point. There is not a chance in the world that Congress would have passed PNTR, Mr. Autor; there is not a chance in the world that we would have passed WTO accession had 421 not been a part of that arrangement. So this is not just something—I mean, in my bill we say the President exclusively, with respect to China, does not have the ability to ignore what the ITC recommends.

All right. So China is huge, it is growing. It has 421 that is supposed to provide a remedy, but no action has been taken on it for the first 5 years of this administration. It appears to me then that 421 is, essentially, meaningless in a country with which we have active and losing trade relations.

So, Ms. Hillman, a quick question for you, then Mr. Lighthizer.

I am interested in your take on this, because you were a member of the ITC that recommended these remedies to the President, which he then neglected to provide. What is the purpose of even having section 421 if it is not going to be used?

Mr. Lighthizer, I would ask you, you represent the steel industry, I am told. So could you share your perspective on what it means to an industry when 421 remedies are ignored?

Ms. HILLMAN. First, on what has happened on 421. There were six cases filed. In the four that went affirmative, the ITC made very clear recommendations to the President. And if you look at what the President then said in denying any relief, he basically said two things in each of the cases.

First, he said that he was not going to grant relief because imports might come in from somewhere outside of China, other than China, and that therefore the domestic industry would not necessarily benefit. Instead, imports from somewhere else would benefit. His second reason was that consumers of the products, the users of these products, will not like the additional tariffs or duties.

My point would be, that is true in all cases. There are virtually no products that are made only in China. So if what your criteria is going to be is that there cannot be any imports from anywhere else that could come in and take the place of China, what you are really saying is you are never going to impose a remedy.

Similarly, users are never going to like it when duties are imposed or quotas are imposed, so that is always going to be the case. So what the President has effectively said in making this determination, in my judgment, is that we are not going to ever impose a 421 remedy.

So, unless and until you take away some of that discretion, I do not see how an industry is going to think that there is a good chance that they can win. The process was set up to be cheap, easy, and fast for the petitioners. They do not have to file a whole lot in terms of data. The timing is very short on the ITC end.

The standard of proof is one of, in essence, material injury, not the serious injury standard that applies in a regular 201 case. So it was intended by the Congress, as I think the ITC read it, to be a very fast and efficient process that resulted in a quick and tailored remedy whenever there was a significant surge in imports from China.

Senator ROCKEFELLER. Thank you.

Mr. Lighthizer?

Mr. LIGHTHIZER. Yes. Senator, I did learn, over the last few years, that the President should not have this discretion. I think administrations—and this is not an attack on this administration, obviously.

But I think every President in every administration has pressures on him for all kinds of foreign policy reasons that are unrelated to the person who is actually suffering. The President should not have that discretion. I do not buy the basic idea that the Congress is somehow less capable of making these decisions or more political.

Finally, I would just say that article 1, section 8 of the U.S. constitution says that you people are responsible for this, not the President. This is a trade-with-foreign-nations question and I think you are in at least as good a position as anyone else to say, if this set of facts happens, people who are victims should get relief.

Senator ROCKEFELLER. Thank you.

The CHAIRMAN. Thank you, Senator, very much.

Senator Bunning?

Senator BUNNING. Mr. Lighthizer, as the former Chief of Staff of this committee and Deputy U.S. Trade Representative in the Reagan administration, you have a strong background and credentials in trade policy.

Why do you believe the legislation I have sponsored with Senator Stabenow to treat currency manipulation by China and other countries as a subsidy is sound and sensible, as you say, and consistent with WTO rules?

Mr. LIGHTHIZER. Well, I think, first of all that, in any WTO analysis, the first question is whether or not there is a benefit. I think everyone who has looked at that will say, yes, currency manipulation does confer a benefit. The question then becomes whether or not there is a financial contribution. I believe that is also clear.

Then the final issue is whether or not this is an export subsidy or is export-contingent, and I think the way this system of currency manipulation in China is set up, that it is export contingent. So, I believe it meets all the requirements.

I also think that if there was only one thing that you could ever do to reduce this trade deficit, this would be the most important thing. It not only helps on the import side, which gives people in our home States a fair shake at sales in their hometown, but it also helps them export.

People tend to forget that currency manipulation helps on both sides: it makes it harder to sell in China and it makes it easier for China to sell here. So, it helps at both ends. I think it is an extremely important piece of legislation. I do believe that it is WTO-consistent.

If you asked me the question, which you did not, whether or not I was confident that a WTO appellate body would rule this way, I would say, for all the reasons I have stated before, I do not have confidence. The United States has had 40 percent of all the cases brought against anybody brought against us, and we have lost 40 out of 47 of them. So, I am never confident about that.

But if you say, if I were the staff director of the Senate Finance Committee, would I advise the members of the committee that this was something that was, in good conscience, consistent with the WTO, I believe I would give that advice.

Senator BUNNING. One more question. As you point out in your written testimony, we are the only major economy with a large current account deficit. Why have our trade agreements not led to improvement in the current account deficit? Does it matter?

Mr. LIGHTHIZER. I think our current account deficit is abysmal. I am not an economist, so I will not get involved in economics. But I think it is important for every member to look at that Figure 2 in my written testimony. Basically what it says is that there is only one country in the world that has a huge current account deficit. Some believe that numerous countries have deficits. But that is not the truth.

Everybody's surplus is driven by the United States' deficit. I am not an economist. I think it does matter. I think economists, more and more, come to the conclusion that it is a huge drag on GDP growth, as well as having a kind of unfair effect on people who engaged in the industries that are, in fact, prey.

Senator BUNNING. Ms. Hillman or Mr. Lighthizer, as you know, a ruling by the Department of Commerce recently found that China has been heavily subsidizing its coated paper industry. Commerce has provisionally allowed an 18-percent tariff on imports of Chinese coated paper.

In reaction, China doubled the subsidy by allowing a targeted value added tax rebate for coated paper. In another case, China has put in place a targeted export tax rebate for steel pipe products.

What would you say to that?

Ms. HILLMAN. First, on the coated, free sheet paper, you are absolutely correct. This is the first time since the 1980s that the Commerce Department has gone against the precedent established way back in the Czechoslovakia and Poland wire rod cases, that yes, in fact, countervailing duty laws can be applied in a country that is deemed a non-market economy.

So, it is very precedent-setting that we have gone down this road and said that our laws permit us to bring a countervailing duty case against a non-market economy country. The problem is going to be, how are we going to measure that subsidy, particularly if China does what it has done. Presumably we will continue as we do——

Senator BUNNING. By double subsidizing.

Ms. HILLMAN. Exactly. We will have to keep assessing, as we do after the fact, the level of the subsidy provided to each company. In an annual review, we are going to have to re-calculate the subsidy amounts because they are going to change if China is going to do this.

Senator BUNNING. The same goes for the steel?

Ms. HILLMAN. I do not know that the Commerce Department has yet decided whether or not to go forward with that case. The Commerce Department has issued its preliminary determination for coated, free sheet paper, saying, yes, it is applying countervailing duties to that industry. They are now in the course of calculating those amounts, which will have to take into account these kinds of programs.

The CHAIRMAN. Thank you very much, Senator.

Senator BUNNING. Thank you.

The CHAIRMAN. Thank you.

Senator Stabenow?

Senator STABENOW. Thank you very much, Mr. Chairman, for this very interesting panel. To each of you, welcome.

Just to follow up with Senator Bunning's comments. I would say, Mr. Lighthizer, when you were speaking about what is happening in manufacturing in this country, I live it every day in Michigan. It is very, very real when you see the faces of workers, families, and businesses that want to be American businesses, people want to work here, what is happening.

I appreciate your comments on the issue of whether or not currency manipulation is a subsidy. We know, in the case of automobiles in Japan—we mostly think of China, but Japan is doing something similar—it is anywhere from a $2,000 to an $8,000 discount on a vehicle, and then if you add the $1,500 our auto makers pay per car for health care that the other folks are not paying, and on, and on, and on, you can see why, even though we are extremely efficient and competitive, it is very tough to compete with that. So, I appreciate your comments.

We had a manufacturing summit, a caucus of about 70 manufacturing leaders, who came in last week and talked to us about level playing fields, what we can do to compete in a global economy, and trade was at the top. Trade and health care, which are both very much a part and connected.

One of the things that struck me is, they talked about the fact that it is companies competing with countries, not competing with companies. They are competing with countries that set up requirements in order to do business there, or they will not partner with you, the country does, or they provide these other kinds of subsidies and so on.

So I hope we are going to come to an understanding of what we are dealing with in this new global economy and what it is going to take for us to compete and keep jobs here.

I have many questions, but I would ask one about nontariff barriers. We have talked a lot about a number of things, currency manipulation and so on. But right now we have an agreement with South Korea that is going to come before us, and we have had, since 1992, two different agreements with them on autos, neither of which they have complied with as it relates to market access.

Now we are in a situation where, when we close one loophole, they add another. Now it is insurance premiums. If you are a foreign vehicle, you pay a higher rate, the owner does, than if you buy a South Korean car, and so on.

I wonder if any of you could speak to the questions around nontariff barriers and what we need to be doing with other countries as they put up new things that continually create barriers. Last year, about 700,000 vehicles were sold from South Korea to the U.S.; we were able to sell about 5,000 to them. Part of that relates to these less-transparent nontariff trade barriers.

Mr. GLICKMAN. If I could just quickly comment. Culture is a big trade barrier. Cultural diversity is being used in many parts of the world to keep U.S. intellectual property out: books, movies, music, intellectual property generally. It is just something we need to watch about. It is not just our traditional adversaries. Even our friends to the north raise culture a tremendous amount when it comes to U.S. products.

On the Korean issue, I would just say to you that, in that area, it is kind of interesting. The Korean FTA, I am sure, is mixed; it does not affect everybody the same way. In our industry, it is actually pretty good because they provide a higher level of protection than previous FTAs and intellectual property. There were side letters.

One of them includes the requirement that the Korean government adopt an anti-camcording law, which is how most piracy starts in this world, and the Koreans did agree, previous to us considering agreement, to reduce the quota on the days that American films could appear in Korea. They have the quota. So, there are some positive things in there.

Senator STABENOW. On the manufacturing end, it is not the case, unfortunately.

Ms. HILLMAN. I would say two things. One part of your question gets to the issue of whether there is a violation, if you will, of an agreement itself—whether the letter of an agreement has been violated. I think what we have seen in Korea and in a number of other countries is that the words of the agreement sound quite good.

I think a lot of manufacturers that testified with respect to the Korean agreement said, on paper, it reads quite well. But when you look at what has actually happened in terms of the volume of trade of foreign autos going into Korea, it is a whole other story. It does go a little bit to this cultural issue. It goes to a lot of other things that the Koreans do, and it has the effect of deterring imports.

So the question is, what do you do about it? You have to come back to, what are your trade enforcement mechanisms? If there is an actual violation of the agreement, you do have rights: if it is a violation of the WTO agreement, within the WTO context; if it is a violation of the Korea Free Trade Agreement, it will have its own dispute settlement mechanism.

But probably the problems that you are addressing are not a violation of the actual letter of the agreement, which brings you back to, what can you do about those in-between kind of violations?

The tool that is available to us is section 301, where you can go after an action that is not deemed, per se, a violation of the agreement itself, but is nonetheless discriminatory and an unfair burden on U.S. commerce, and the other criteria that is laid out in section 301. So, it is a question of working on the political will to bring a

case that is in between a per se violation, and yet still has the effect of burdening U.S. commerce.

The CHAIRMAN. Thank you, Senator, very much. I appreciate it.

Senator Lincoln?

Senator LINCOLN. Thank you, Mr. Chairman, and thanks so much. These hearings on trade have been enormously helpful, and I think they bring to light not only a lot of the struggles and challenges that we see in the ever-increasing global economy, but also the fact that we need to be doing more in terms of implementation.

And thanks to all of our witnesses. I have to say, in hearing your answers and discussions, I am reminded, particularly on the section 421, how we have been encouraging it. I have introduced bills time and time again on expedited remedy, and we have been slow-walked by the Department of Commerce for the last 3 years, basically, on how it is that we can expedite some of the use of our own trade laws in order to be able to make sure that we do see adherence to the trade negotiations that we spend a lot of time and money on.

We spend a lot of time, effort, and money on negotiating these trade agreements, and we should spend at least as much effort—certainly the same amount of time and money—on enforcing those agreements.

We are not, and it is to the detriment of Americans and working families, and really our economy, and a whole host of other things. So our hope is that we can really elevate this issue and work with you and others to see if we cannot do a better job.

A couple of questions. Secretary Glickman, welcome. We are glad to see you again. We appreciate your testimony. Having reviewed your testimony, I kind of started wondering whether or not there were examples of good behavior out there, or success stories in the defense of intellectual property theft.

Towards the end of your written statement, you had mentioned the development of an action plan that was presented to the government of Brazil and the subsequent improvements that happened. I was hoping that maybe you might be able to elaborate a little bit on that action plan in more detail with the committee and really whether you were able to quantify what those improvements meant to the industry, if we know anything about that.

Mr. GLICKMAN. First of all, we are glad to provide you with a more fully documented effort. It was generally improved enforcement. This was part of the issue that we had been working on.

Senator LINCOLN. Improved enforcement on our part or their part?

Mr. GLICKMAN. Their part. Of intellectual property rights, developing a better infrastructure in their court system, in their administrative law system. This was all part of keeping the GSP preferences that we had. This is what I recommend us doing around the world, generally. There has to be a quid pro quo for the GSP preferences we would provide.

Senator LINCOLN. Right.

Mr. GLICKMAN. I am not telling you it is perfect in Brazil, but they have made some strides to improve their internal intellectual property enforcement. I will get you a more specific paper on this.

Senator LINCOLN. Sure.

Are there benefits to them if they adhere to the arrangements that we have?

Mr. GLICKMAN. Yes. Brazil is a very, very big purchaser of American entertainment product. It is a big net importer of our product. We have some cultural problems with Brazil, because they do have some domestic industry there.

But what we found is that there was a lot of Brazilian piracy that was appearing elsewhere, and it is in their interest, not only for us but for them, because they have an indigenous intellectual property industry to protect.

Senator LINCOLN. Well, we have talked about the cultural issues. Of course, when you talk about it in the Korean agreement, for us, when they take a stand that it may be a cultural or a sensitive issue, that rice not even be on the table, which is what the case was for us in the Korean agreement, we have a real problem with that, not only in the precedent it sets for the ability to take other commodities and other things just simply off the table and not have any open market access to them, but the idea that we would allow them to be able to set that precedent and to take an issue off. So, culture is certainly important and we have to be sensitive to it, but I think it is also important for us to stand tough on things that are important to us.

Ms. Hillman, you mentioned today that we should consider whether we are providing adequate levels of funding and staff to kind of carry out the enforcement of trade agreements and domestic trade laws. You mentioned or you touched on a circumvention tactic used by importers into the U.S. market known as "new shippers." We certainly suffered in Arkansas a tremendous amount, whether it is the steel industry or the catfish industry.

You summarized the problem very effectively and mentioned that it is too early to tell whether our new rules and procedures will produce the desired result. I guess my question is whether, in your opinion, you think we are providing adequate resources in that area to be successful.

Ms. HILLMAN. In general, I would say on the side of dumping and countervailing duty cases, I do think we have adequate resources. Where I think we do not have adequate resources is on the side of bringing WTO cases, bringing 301 cases, bringing a lot of the export-oriented cases, where I think the staff, particularly at the General Counsel's Office at USTR, is fairly limited.

Most of the people who work there did not necessarily come in to be litigators; they came in to work on trade agreements. So, it is not necessarily their first priority to think about litigation as their primary work, yet an awful lot of what we are asking them to do is to be aggressive litigators on the affirmative side.

On the new shipper review side, what has happened is, there has been a change in the way they do the bonding procedures at the Department of Commerce, because it had been a huge problem with shippers, particularly in China, basically just changing their name and saying "I'm a new shipper and therefore don't apply dumping duties to me."

The ability for the Commerce Department to go and look and verify whether or not, in fact, they were new shippers was limited

because it was happening in many, many cases and for many producers.

So they have changed the procedures and changed the bonding requirement so that you do not get out from paying a bond, even if you are a new shipper, while the review is being conducted. Certainly, given the number of new shippers, they may need more resources.

But in this whole panoply of trade and enforcement resources, I would put more money into the affirmative side of bringing more actions for market access than I think you absolutely need on the dumping and countervailing duty side of the equation.

The CHAIRMAN. Thank you, Senator, very much. I appreciate that.

Senator LINCOLN. Thank you.

The CHAIRMAN. The next round of questions.

Now, Mr. Lighthizer, does legislation provide for the Commerce Department to, say, commence a CVD case against non-market economies? There was a decision with coated paper, but that was, as you say, Ms. Hillman, sort of precedent-setting. Is legislation still needed to make that clear, that actions can be taken against non-market economies?

Mr. LIGHTHIZER. Yes, Mr. Chairman. I think it is every bit as needed as it was before the action. Number one, a future administration could change this. Number two, China is, right now, challenging it in court. They are asking for an injunction to stop it, even though they agreed to it in the WTO and their accession agreement, they are now challenging it in U.S. court.

And number three, it is extremely important to make sure, in my judgment, that it is done right. Only the Congress can do that, can write the rules to make sure that we do not end up, when we implement this, cutting back on what is already a reasonably effective antidumping regulation.

The CHAIRMAN. All right. Thank you.

Mr. LIGHTHIZER. We have seen evidence of that at the Department of Commerce.

The CHAIRMAN. Thank you very much.

Mr. Glickman, what lessons have we learned with respect to PNTR and 421 with China, with respect to intellectual property, that we can apply to Russia so we do not get caught twice?

Mr. GLICKMAN. The fact is, we need to make maximum use of the leverage of the WTO accession process on Russia. With China, obviously we have been victimized by their failure to properly enforce intellectual property rights.

That is the subject of a WTO case that was done a couple months ago. We were disappointed that Russia did not meet its obligations under the IPR side letter that they reached with us, and that has been criticized as well. My judgment is that it is foundational for WTO accession for Russia that they put their money where their mouth is in terms of intellectual property rights enforcement.

I would like to say there is one difference between Russia and China, however. That is, that the Chinese continue to restrict the importation of American movies; the Russians do not. So while they have IPR problems, we do not have market access problems of the same magnitude that we do with China.

The CHAIRMAN. I would like to ask a general question. Maybe, Mr. Lighthizer, you are best to answer it. How far can Congress go in specifically directing the administration to take an action? On the other hand, how much discretion can we give the President? Clearly, the President, constitutionally, has national security power that may trump anything else.

But constitutionally, how far can the Congress go in precisely establishing specifically the actions that this Congress says that the administration should take under certain circumstances?

Mr. LIGHTHIZER. I believe that article 1, section 8 gives you the power—indeed, the mandate—to tell the administration exactly what to do on this subject. Now, if you had asked me, Mr. Chairman, should he have some kind of a legitimate national security exemption, I guess I would be willing to do that. But I think that is in a very rare case. It tends not to be what happens. It tends to be just sort of foreign policy or politics, somehow or another.

But I think we have learned one thing over the last several years when we have gone from a modest deficit to an $800-billion deficit, and that is we need more involvement, more oversight, and more specific directions from the Congress of the United States.

The CHAIRMAN. Other reactions to that question from any of the panelists? Ms. Hillman, your thoughts? You have given this question some thought, clearly, as the former General Counsel of USTR.

Ms. HILLMAN. I would not disagree with Mr. Lighthizer, that I think you need to be pressing harder on the administration, and in some instances perhaps cutting back on the amount of discretion granted. Again, part of it depends on how it is exercised. Just to give you an example, we have laws respecting imports that violate intellectual property, section 337.

If you look at the history of how those have been implemented, it is the rare case in which the administration does not accept, does not go ahead and implement, an exclusion order if that is what the ITC recommends. So, you certainly have one area of trade law where the exercise of the discretion has been almost universally to accept the recommendation of the ITC.

And then if you flip over to the safeguards area, both 421 and global safeguards, you do not see that same pattern. You see the administration, more often than not—and again, it does not matter the administration—choosing not to implement the recommendation of the ITC.

So part of it may be coming back to what has been mentioned, making sure that the political pressures, the other forces that come in on foreign policy concerns and other things, do not outweigh the trade interests. Right now, in many areas they do.

The CHAIRMAN. Mr. Autor?

Mr. AUTOR. I think we do need to be very cautious about how, and to what extent, we limit the President's discretion here. I think the operative word under 421 is that the ITC makes a "recommendation" to the President. We have had a very bad experience with what was essentially an automatic safeguard measure under the China textile safeguard provision.

This procedure was essentially automatic. The evidence that the domestic industry had to present to trigger the safeguard was minimal at best, and it was essentially an automatic procedure and

it was extremely disruptive. In fact, it was so bad that even importers were willing to have the U.S. go and negotiate new textile quotas with China because the safeguard mechanism was so bad.

The CHAIRMAN. My time has expired. Does anybody else want to comment on the China safeguards? Anybody else?

[No response.]

The CHAIRMAN. As I recall, it also helped the Europeans enact their textile safeguard. There is a little bit of, each country sort of helped each other a little bit, as I recall, back when that happened.

Next, Senator Grassley?

Senator GRASSLEY. Bob, I'm troubled by reports that some antidumping petitioning industries used threats of administrative review to obtain cash payments from foreign producers. The petitioners file requests for review of hundreds of foreign companies, and they agree to withdraw requests if foreigners pay up.

Anyone who refuses is subject to review and risk of increased duties. I think it is a misuse of antidumping laws, possibly anticompetitive. Are you aware of the practice? If so, what, if anything, should Congress do about it?

Mr. LIGHTHIZER. I do not want to create the impression that I am an expert on it; I am really not. I have sort of heard of it. Clearly, it is not acceptable. Every year, either side can ask for administrative review, either the importer or the domestic side.

We make a judgment as to whether or not we think, if there is a re-litigation of what the dumping margin should be, whether it will go up or down, and we make our decision based on the interests of our companies and our workers.

So, I mean, I do not know. I would be happy to think about it and make recommendations. Clearly it is not something that we do. It is not something that I have really heard many people do or talk about. I do not know other contexts in which it comes in.

I am confident that if you told me you wanted me to think about it and give you advice as to how to stop it, that I could come up with a solution. I am happy to do that, Senator, if that is what you want me to do.

Senator GRASSLEY. Submit something in writing, please.

Mr. LIGHTHIZER. Absolutely.

[The information appears in the appendix on p. 76.]

Senator GRASSLEY. All right.

Erik, in your testimony you stated that U.S. exporters are now the number-three target of antidumping cases around the world. Should the United States be concerned about this, and where would we take action?

Mr. AUTOR. Well, a couple of things. We need to ensure that the rules under the WTO with respect to the application of trade remedies are clear, that our trading partners are adhering to those rules, and, when they are not, that we take them to the WTO dispute settlement. And by the same token, we need to ensure that what we do is consistent with WTO rules because what we do is copied by other countries.

That is why, in a number of instances, we have seen proposals that are acknowledged to violate WTO rules, and yet I think that willingness to proceed, notwithstanding the fact that we would clearly be taken to dispute settlement, sends a very bad message

to other countries like China that we are not willing to abide by our obligations.

I think, as I said, it is a two-way street here. We need to ensure that the trade remedies measures that our trading partners take are consistent with WTO rules, and we need to do the same as well.

Senator GRASSLEY. Jennifer, given the sharp decline in antidumping and countervailing duty cases filed over the past few years, and in light of Mr. Lighthizer's conclusion that the Commerce Department's Import Administration is inadequately funded, do you agree or disagree?

Ms. HILLMAN. I do not believe the number of cases being filed relates to the resources at the Commerce Department. I think the reason we have seen a big decline in the number of cases is partly structural within the U.S. economy. Generally, these cases have been filed by U.S.-based companies that are manufacturing primarily in the United States.

You now have seen a huge amount of companies become importers themselves, or a joint venture or partner with facilities overseas, so they are no longer solely a U.S.-based industry that has the same level of interest in filing a case.

Second, I think you have seen many of the prices in the products that are typically subject to cases are right now at very high levels. I mean, we have very high steel prices, we have very high prices in a number of the sectors that typically file these cases. When prices are very high, it is hard for these companies to make a showing that they have suffered price suppression or depression, which you would have to show in order to bring a case.

Then, third, if you look at the major user of the dumping law, more than 50 percent of all cases over time have been filed by the steel industry. If you look at, today, who is the single largest steel producer in the United States, it is a company called Mittal, foreign-owned, foreign-based.

So their interests, I think, in affirmatively bringing a lot of cases is probably different than the steel industry of old in which the vast majority of the production was solely U.S.-based. So I think you have a lot of structural things going on that have, in part, affected the reason why we are not seeing as many cases being filed in recent years as we used to.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Next, is Senator Bunning.

Senator BUNNING. Thank you, Mr. Chairman.

Ms. Hillman, you discussed the Bratsk case in your testimony.

Ms. HILLMAN. Yes.

Senator BUNNING. Can you explain again why this case was wrongly decided by the Federal Circuit? Should Congress overturn the case legislatively? And we can do that.

Ms. HILLMAN. In my judgment, yes, the Congress should overturn it legislatively. The reason I think it was wrongly decided is that it sets up a test or sets of tests that are not in any way contemplated in the statute. What the case involved was imports of silicon metal from Russia.

What the court said was that the ITC cannot render an affirmative determination unless it can affirmatively determine that imports from somewhere other than Russia will not simply come in and fill this void that is created by putting duties on Russia. The ITC has to show us that the dumping order on Russia will have provided a benefit to the U.S. industry.

Nowhere in the statute does it say that the ITC—or anybody—has to understand what imports that are not subject to the investigation are going to do, nor does it say that you have to affirmatively prove that an industry will, in fact, benefit from an order the day you put one on. You do not know when you put an order on what is going to come about.

There is no way for the ITC to prove that an industry affirmatively will benefit, nor is there any way for the ITC to get the data from all of these other countries out there that are not part of the case to say whether they will or will not come in and fill this alleged void.

So, I think there are many reasons why the case was wrongly decided. I think the Federal Circuit did not understand how the trade laws work or what their intent was.

Senator BUNNING. Or they did not understand that the Congress of the United States was in charge of the trade?

Ms. HILLMAN. Clearly, in my view what they have done is to set up things that were not in the statute—what the Congress does not ask the ITC to do in these cases. So they are adding on tests and requirements in order to get a determination that the Congress did not include in the statute.

Senator BUNNING. All right.

Mr. LIGHTHIZER. Senator, could I just add, briefly, I completely agree, of course, with Commissioner Hillman that this is an outrageous case. The law is designed to have the ITC determine whether or not there is present material injury.

What this new standard seems to say is, guess about something that is going to happen in the future. As a matter of policy, it is impossible to do and really not relevant to the question that Congress was trying to address when they created the antidumping laws.

Senator BUNNING. May I suggest to our Chairman that we look for a legislative remedy to this, Mr. Chairman, and move forward with it?

The CHAIRMAN. It is a good suggestion. Thank you.

Senator BUNNING. Dan, it is good to see you. Thank you for being here. In your written testimony, you indicated that the U.S. Government "lacks the political will" to take meaningful action to protect our intellectual property rights abroad, with regard specifically to Russia and China.

Do you think the USTR has been hesitant to enforce our agreements in this area?

Mr. GLICKMAN. I think they have been hesitant, although they did file a case. We worked with them closely on it. It took a very long time because we had two issues with China, which are IPR and market access.

Senator BUNNING. Walking down the streets of Beijing——

Mr. GLICKMAN [continuing]. And that is the case where they interrelate with each other. Since you cannot bring in the product legally, it creates an environment where more illegal product occurs on the streets. As you know, you can find anything ever made in the history of the world on the streets in most cities in China.

Senator BUNNING. Most of it is copied.

Mr. GLICKMAN. Well over 90 percent is pirated material, the stuff that is on the streets. So when you talk about political will, I mean, yes, I realize the issues are complicated, but it has taken our government a very long time to move on the China issue, and hopefully, as Senator Baucus raised, we will learn some of those mistakes as we deal with Russia. They have a different set of problems, but their IPR and piracy issues are every bit as bad.

Senator BUNNING. But we still have the bag that they want. They want WTO accession. If we do not give it to them, if we do not allow it to happen, we have a lot more power in negotiating with Russia than we do with China, because we already caved in to the Chinese.

Mr. GLICKMAN. Certainly we have more power right now. I would just mention one other thing about China. I think I have mentioned this before. In 14 months, China will host perhaps the largest event ever in the history of China where the outside world, by the millions of visitors and billions of people watching on television, will be able to see this great country. And it is a great country. But the fact of the matter is, we need to think through intellectually how we exploit that leverage.

Senator BUNNING. Wear your mask. Because I have been there.

Mr. GLICKMAN. All right. Well, that part of it, I do not know. I would just say that it offers us some opportunities over the next year.

The CHAIRMAN. We have talked about that.

Mr. GLICKMAN. I think that China can, and should, show the world that it intends to play by the rules. The whole world will be watching this process. I suspect that next year it will give them an opportunity to clean up their streets more than they have done in the past because they will want to do that.

They will not want the news stories in the summer of 2008 to be about pirated material on the streets, because I guarantee you, that is what the U.S. television industry will focus on, whether it is DVDs, or whether it is fashion material, or pharmaceuticals.

Senator BUNNING. Mr. Secretary, they are going to have to be able to see the Olympics, too, so they are going to have to shut down all their power plants and take all the automobiles off the streets and only allow buses to transport people to and from the Olympic Games. In my experience of being in Beijing, that had better happen starting right now or it will not be cleaned up in time.

The CHAIRMAN. Thank you, Senator, very much. I appreciate that.

Senator Stabenow?

Senator STABENOW. Thank you, Mr. Chairman. This has been a very, very important hearing. Just one other question related to the WTO process. When we look at China, finally the administration is moving on the issue related to auto parts, and we appreciate

it. It has been too long in coming, but they are moving as it relates to issues of local content and so on.

But we have seen, in the last 5 years, a $12-billion counterfeit auto parts industry, established parts coming in that do not meet our safety standards, they are coming in illegally. We have seen six different major auto suppliers declare bankruptcy: Delphi, Dana Corporation, Collins and Aikman, Federal Mogul, Tower Automotive, and Dura Automotive.

My question is, now we finally have a case, at least on a piece of it. It is not totally about counterfeiting, it is about local content, and so on. But we are at least a year away before we have any kind of a decision from the WTO. We have lost 250,000 jobs. We have seen six major auto suppliers go out of business.

Any other suggestions that relate to the WTO process for moving these cases more quickly? We finally have the administration taking some action, but they are going to have to wait, and we are going to see more job loss in the meantime. Any thoughts?

Mr. GLICKMAN. This does not relate directly to your question, but it relates to the issue of counterfeiting, because a lot of the auto parts that are coming in that are illegal are pirated.

Senator STABENOW. Right.

Mr. GLICKMAN. There are efforts here, and you should be aware that on Thursday, the U.S. Chamber has put together a coalition of music, movies, automobiles, pharmaceuticals, software, manufactured goods to deal with the issue of pirating and counterfeiting goods generally in the world and coming into the United States. So, it may offer some help. It is not going to address your question directly, but it may address it indirectly.

Senator STABENOW. I very much appreciate the fact that there is more focus on this, because it is very real, and it is costing us jobs.

Ms. HILLMAN. On just the speed of the WTO cases, I do not know that anyone can offer much hope. I mean, those that have been involved in this litigation would argue they cannot go any faster than the cases do because there is a huge amount of work on the legal end of it. I mean, the time frames within the WTO were meant to sort of mirror U.S. 301 procedures in terms of timing, so I do not know that an actual case can be sped up.

But clearly, a couple things. One is, we have to get these cases filed faster. We have found, I think, with China that often China does not always want to take the case through the full litigation. They have, in the past, been more willing to actually have the filing of the case be the leverage that gets them to the table to actually try to find a negotiated settlement.

I think, in general, at the WTO, if we can get to a mutually agreed solution, it is far, far better than anything that we can come up with if we let the litigation simply run its course. So if we can use the mere filing of the case to really press the Chinese to come up with a negotiated solution, that is our first, best, and fastest option.

So that, I think, is what we ought to be encouraging, is the USTR to really use the consultation mechanism that is built into the WTO dispute settlement process to try to come up with a better result than we would get simply litigating.

Senator STABENOW. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I just wondered—some suggest, like Senator Stabenow has, this idea of establishing an ambassador-level, Senate-confirmed enforcement officer in USTR. Some suggest maybe it should be someplace else. But the main point being, we need to put more focus on enforcement. I would be interested in any response that any of you might have.

Mr. LIGHTHIZER. Mr. Chairman, I have thought for a long time that we need something like that. The fact is, when I worked for this committee the USTR was 98 percent negotiation and 2 percent sort of non-binding litigation. The fact is, now it is, at best 50/50. I also would add that we lose things in litigation at the WTO that we would never give away, you would never permit any negotiator to give away, in negotiation.

So what is the solution? I think, two deputies in DC. I think one of them ought to be—I totally endorse your bill—a deputy who is responsible for litigation and enforcement, period, and it ought to be a person who is a tough trade litigator and worries about enforcement on both sides. Then let the other be the negotiation deputy. So I guess I would agree with both of you, and up you one. I think one of the two deputies should have that responsibility.

The CHAIRMAN. Other thoughts, any panelist?

Ms. HILLMAN. I would not disagree. I think that the culture at USTR, and the people who tend to come there, and the vast majority of the staff, view themselves as negotiators. They do not necessarily view themselves as litigators. So the question is whether you can develop a different set of players and whether it ought to be USTR that does this litigation.

I know when I was the General Counsel, we had 13 lawyers on the staff. At the time, we had had an average of three or four cases litigated in the old GATT system. Within 2 years, when we had gone to the binding WTO system, we are, all of a sudden, in 33 or 34 cases. I still had 13 lawyers to do that work, and none of them really wanted that as their primary role.

So we actually thought about whether or not the Justice Department should start litigating these cases on behalf of USTR, as most other agencies do, have the Justice Department do their litigation; whether we should create a sort of solicitor/barrister kind of role where you had lawyers with substantive expertise, and yet a cadre of litigators whose job was to actually do the litigation based on the substantive expertise of lawyers; whether there were other mechanisms we should use.

In the end, we brought in more lawyers and tried to do a little bit more training, but I think there was a huge reluctance—you will find a tremendous reluctance at USTR—to farm out the litigation. I think they feel very strongly that they are in charge of any WTO litigation, and that it needs to stay at USTR.

The CHAIRMAN. How do other countries handle this question?

Mr. LIGHTHIZER. Well, I will give you one idea. If you look at the major WTO cases involving the United States, the foreign government is usually represented by an American lawyer.

So when we took our 201 case to the WTO, the other side sat there and they had, representing their governments, the litigator who had litigated against us for 2 years; we had a smart, well-

meaninged government lawyer who did not have near the resources or near the background.

So I believe that, if this is something you care about, you ought to let the private parties be deputized to come in there and help USTR do it. Foreign countries basically do that. It is a travesty that we have not used this free resource.

Senator STABENOW. Mr. Chairman?

The CHAIRMAN. Go ahead. Sorry.

Senator STABENOW. I am sorry. I just wanted to follow up on what you were saying, because, since introducing the legislation that Senator Graham and I have, and the Chairman and Ranking Member also have a larger bill that includes this, there are those who have come to me and said, rather than being in USTR, they think we should put it in Justice, with more of the enforcement piece. I was just curious. Ms. Hillman, you almost sounded like you were suggesting Justice.

The CHAIRMAN. No.

Senator STABENOW. No?

Ms. HILLMAN. Like I said, I think you will find a huge resistance to that at USTR. Part of the argument against it is that the Justice Department lawyers, again, are very, very capable and very knowledgeable about both the procedures and the substantive law in the United States.

When you now go into litigating at the WTO, it is a separate set of rules in terms of how it works, it is a separate set of substantive obligations in terms of the law that nobody at Justice right now is particularly well-steeped in.

And, unlike Federal court litigation, WTO dispute settlements start with a consultation idea, with the concept that you are going to actually sit down and talk through the problem and see if you can come to a negotiated solution.

That is not, again, the typical role of a Justice Department lawyer, to try to come up with a negotiated solution at the get-go. For all of those reasons, the view was leave it at USTR, but substantially beef up their litigation capacity.

The CHAIRMAN. What about Mr. Lighthizer's observation of other countries' practices, that is, hire or pro bono? I do not know how it works out.

Ms. HILLMAN. He is absolutely correct in that. Fairly early on in the WTO dispute settlement process, the WTO did agree that outside hired private counsel could come in in the shoes of the government, and that is very typically now the case.

The CHAIRMAN. Should we do that? Should the United States do that?

Ms. HILLMAN. It has its pros and cons. Again, the concern, I would say, on the USTR end is needing to keep some ability to, in essence, understand an argument that might be compelling to a private litigant in one case, but may have the effect of setting a policy that we cannot live with in another case or in another industry. So the question is, how do you best keep control over the arguments? What is good for GM may not be what is good in another case, or good as a matter of policy or law.

The CHAIRMAN. Presumably the USTR would have control over that.

Ms. HILLMAN. Again, that would be the trick, whether you are unleashing private litigants to be making arguments that you cannot live with in another setting.

The CHAIRMAN. Mr. Glickman?

Mr. GLICKMAN. I am thinking from my old USDA days, running a Federal agency. I would be really careful about allowing private litigants to handle the government's prime legal business, except under rare and exceptional circumstances.

What I find is, many of the private litigants have so many interests that are maybe internally inconsistent, that it may be very difficult to manage. I do think that USTR or some agency of government needs the clout of a somewhat protected or Senate-confirmed enforcement position.

I would say that, when I was at USDA, we used to bring a lot of our own cases, but we would also, in certain circumstances, have to work through the Justice Department because the U.S. Government needs some coordinating authority so every agency does not go out and file any case that it wants to.

So you have to blend it with the realities of the government speaking with one voice, but I do not believe right now there is a place where the government feels comfortable in filing an enforcement action.

The CHAIRMAN. All right.

Mr. Lighthizer?

Mr. LIGHTHIZER. I will let Erik go first.

The CHAIRMAN. All right. Mr. Autor?

Mr. AUTOR. I agree with Mr. Glickman on this, that the government lawyers need also to keep in mind the big picture, and I think that they are best able to do that from the points that Ms. Hillman and Mr. Glickman mentioned.

Also, as I said in my statement, we need a system that is inclusive of all the affected parties, and we do not really currently have that. I think that this would not remedy that situation.

If we had a deputy-level enforcement person in addition to, obviously, giving a higher profile to these issues, I think we need to understand what would be the responsibilities and duties of that person that would be different than what the General Counsel does.

The CHAIRMAN. Thank you.

Mr. Lighthizer, you were going to say something?

Mr. LIGHTHIZER. Yes. I will just be very brief. On this question of private participation, I think the situation here is inapposite from what you would find at the Department of Agriculture.

The fact is, in the rules cases, this is private litigation. This is litigation where there are parties and there is private litigation all the way up. Now, at a new level, it becomes an international appeal. That is really what is happening.

Every one of these rules cases is basically being appealed up to the WTO, so it is not a case where you have a kind of de novo start and you have the interests of the Department of Agriculture, for example, and the interests of somewhere else. You actually have private parties. What is happening is, the other private party is keeping his lawyer and the U.S. private party is not.

The second thing is, you would have to have a situation where the power and the control was at USTR. They, in fact, would be

the client. I do not think that is that much of a problem. If you had difficulty with someone, it would be easy enough, just like anyone else, just to say, I am sorry, we are not going to use you any more, you are not acceptable.

Finally, I guess I would say that when Commissioner Hillman says what is good for GM may not be good for the United States, that may be true. But what is good for neither of them, is losing the cases. We have now lost 40 of 47 cases. We need to make a change.

The CHAIRMAN. All right. We are about out of time.

Mr. Glickman?

Mr. GLICKMAN. I would just say, first of all, I would hire Mr. Lighthizer if I were in this position. He is a very articulate advocate. But I would have to say, industry provides extensive and expensive input on all of these things right now, so I would be somewhat reluctant about having too many private litigants manage the matter.

The CHAIRMAN. This has been a very good hearing. I want to thank everybody very, very much, all of you, all the panelists, for taking the time. It has been very constructive, a lot of good ideas. I cannot thank you enough.

The hearing is adjourned.

[Whereupon, at 11:45 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

TESTIMONY OF

ERIK O. AUTOR
VICE PRESIDENT, INTERNATIONAL TRADE COUNSEL
NATIONAL RETAIL FEDERATION

U.S. SENATE COMMITTEE ON FINANCE

"*TRADE ENFORCEMENT FOR A 21st CENTURY ECONOMY*"

TUESDAY, JUNE 12, 2007

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Good morning, I am Erik Autor, Vice President and International Trade Counsel for the National Retail Federation. I appreciate the opportunity to testify at today's hearing on behalf of the NRF and its member companies in the U.S. retail industry.

By way of background, NRF is the world's largest retail trade association, with membership comprising all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores, and ranging from single store sole proprietorships to the largest publicly-held retailers with hundreds of thousands of employees. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2006 sales of $4.7 trillion.

International trade issues fundamentally impact the ability of U.S. retailers to run their businesses successfully in an industry marked by cut-throat competition and a 2 percent profit margin. Every American retailer, from the biggest to the smallest, sources consumer products from around the world to provide their customers, the American consumer, what they want and need – the widest selection of merchandise at the best value.

These commercial activities support good-paying, blue and white collar jobs, many of them union jobs. Millions of American workers are employed not only in the retail industry, but also in many industries that support retail operations and supply chains – for example, manufacturing, farming, ports, rail, trucking, warehousing, air delivery, and logistics among others.

I first want to underscore that American retailers fully support actions by the U.S. government to ensure that our trading partners abide by their commitments under international trade agreements and rules, for example through use of dispute settlement mechanisms at the World Trade Organization and under our free trade agreements. Our industry has also experienced problems on this front, such as piracy of retail brands or trade barriers that violate international trade rules as more U.S. retailers open stores and serve customers in foreign markets.

Retailers also support strong enforcement of U.S. laws and regulations with respect to any company, foreign or domestic, doing business in the United States. If any of our suppliers are scofflaws, the reputation of our company brands will suffer and the ability to get merchandise to our customers is seriously compromised.

In supporting vigorous trade enforcement, I must acknowledge that we do have concerns about over-zealous and inappropriate actions, mainly involving the U.S. trade

remedies laws – antidumping, countervailing duty, and safeguards measures. Such laws admittedly have their place in the rules-based trading system. However, waving the banner of "fair trade," some domestic industries have taken advantage of popular anxiety over trade and globalization to push for protectionist measures and legislation to limit foreign competition and pad their own profit margin. Among other things, they argue that the U.S. trade remedies laws must be strengthened and enforced more vigorously to make it easier to obtain protection from import competition. They exploit widespread misunderstanding about what the trade remedies laws are, and what they are intended to do, with erroneous claims that major changes are needed to punish "illegal" and "predatory" trade.

As an extremely trade dependent industry, retailers are very vulnerable in the face of such histrionics and disinformation. Recently, our industry has experienced a notable increase in trade remedies investigations against imported consumer products – for example, the dumping case against wooden bedroom furniture and safeguards actions against imported apparel. Based on our experience in these cases, we firmly believe that there is no need to "strengthen" current laws to make it easier for petitioning industries to obtain relief.

The fact is that U.S. trade remedies laws are already vigorously, even zealously enforced. Most antidumping and CVD cases end up in affirmative determinations, and

any disputed or unclear issues or questions are almost uniformly decided in favor of the petitioner. In the apparel trade, backdoor political deals have been cut to impose arbitrary safeguards measures in ways that violate basic principles of U.S. administrative law, and for possible government self-initiation of antidumping actions in ways that are designed to circumvent the injury and standing requirements of U.S. law.

Meanwhile, U.S. retailers and other importing and consuming industries in manufacturing and agriculture feel that the trade remedies rules are already heavily stacked against them. For example, unless they are an importer of record, under the statute they are not considered "interested parties" for purposes of standing to participate fully in antidumping and CVD investigations, even though they pay the bill for the import taxes imposed in these cases. As a result, they are forced to defend their interests with one hand tied behind their backs.

Therefore, an increasing number of U.S. industries and companies now look with alarm at some recent legislation purporting to "strengthen" U.S. trade remedies laws. We are concerned that a number of these proposals would allow petitioners to further abuse and game the system to attack legitimate trade. In a number of cases, these bills, if signed into law would violate WTO rules and expose U.S. exporters to billions of dollars in WTO approved trade sanctions.

Several proposals that raise particular concern are legislation to restrict presidential discretion to consider the national economic interest in so-called 421 safeguards cases; to apply CVD law to non-market economy countries without ensuring that the procedures follow WTO rules by precluding petitioners from getting double relief for the same injury; and to circumvent WTO subsidies rules by deeming currency imbalances to be a countervailable export subsidy.

We live in a much more trade-dependent, interconnected economy, than when most of the current trade remedies rules were first written. To be competitive in this world, all U.S. industries now have global supply chains, importing products from their foreign suppliers and exporting products to their foreign customers. In this world, trade-remedy cases brought against imports into the United States have had a significant and adverse effect on U.S. retailers, farmers, and manufacturers, increasing costs and often undermining their ability to compete globally.

In this new world, trade remedies cases are no longer a struggle solely between a foreign manufacturer and a domestic manufacturer. Rather they increasingly pit American industries against each other as we have seen in the recent case of the steel and automobile industries. When the importer is a manufacturer, losing this fight can force it to shutter its U.S. operations and move offshore.

U.S. industries also see increasing risk to their businesses from trade remedies imposed by foreign countries. The problem has become so serious, that U.S. exporters are now the number three target for antidumping cases in the world after China and Korea.

Thus, an increasing number of U.S. industries in retail, manufacturing and agriculture, are becoming concerned about the use of trade remedies procedures and proposed changes to trade remedies laws that would undermine U.S. competitiveness.

In a recent conversation with Uruguayan Ambassador to the World Trade Organization and Chairman of the WTO Rules Negotiating Group, Guillermo Valles, the Ambassador said something very important that goes to the very heart of the subject of today's hearing – "each WTO member needs to ask itself whether its trade remedies regime is compatible with where its economy will be in ten years." This is a question that many, including the European Union, are now asking.

It is not in our national economic interests to create a trade remedies system that, under the guise of a quasi-judicial proceeding, becomes essentially an arbitrary, results-driven, and politically-influenced means to provide a few favored industries automatic relief from import competition. Such a system merely becomes an instrument of protectionism that undermines U.S. competitiveness, hurts millions of American

consumers, and is incompatible with where our country needs to be in the 21st Century global economy. To support a modern, globally competitive U.S. economy, we need trade remedy rules that are balanced and fair, inclusive of the participation of all affected parties, and compatible with commercial practices. This objective would not weaken U.S. trade remedies laws as some would have you believe – it would improve them.

Thank you.

Respectfully submitted,

Erik O. Autor

Erik O. Autor
Vice President, Int'l Trade Counsel
National Retail Federation

Statement of Senator Jim Bunning
June 12, 2007

Thank you, Mr. Chairman.

I am glad we are taking time today to look closer at trade enforcement.

I am an advocate of free trade. However, I believe that free trade should also be fair to the American worker. When the United States government in good faith enters into a trade agreement with another nation, we pledge to abide by a certain set of standards and expect cooperation from our trading partner. I know that trade does not operate in a vacuum. Some of the challenges we have seen from our trading partners are currency manipulation, tax rebates, tax export subsidies, cartel arrangements, dumping, and other subsidies. Our defense is the faithful enforcement of our trade laws. When we fail to enforce these laws, as has been the case repeatedly in our relations with China, we fail our American manufacturers and workers.

As my colleagues on this committee know, I am concerned that the Administration and the I.M.F. have refused to use the tools available to address China's currency manipulation. In fact, my colleagues on this Committee, including Senator Stabenow, Senator Snowe, and Senator Conrad have joined with me to introduce a bill, the Fair Currency Act of 2007 that would identify exchange rate misalignment as a prohibited export subsidy under U.S. trade law, thereby allowing injured companies the right to seek trade law remedies.

American workers and businesses that compete with China are impatient for change. Congress is impatient. Yet, we have been told for multiple reasons that the United States does not need to act against China now.

Time and time again we have been told that change will take time. It is argued that the Chinese need to make numerous changes—particularly to their banking and financial systems—before they can allow the value of the yuan to float more freely on the international market.

Or, we are told China is already making changes.

Yet, China is doing even more today to manipulate its currency. It has dramatically increased its monthly average exchange rate buying to $45 billion per month. China's extraordinary level of intervention is not only a barrier to trade, it is a growing danger to the global economy and one that Congress is obligated to address.

I look forward to our witnesses' testimony.

Thank you.

Statement of

DAN GLICKMAN
Chairman and Chief Executive Officer
MOTION PICTURE ASSOCIATION OF AMERICA

Before A Hearing of the

COMMITTEE ON FINANCE

"TRADE ENFORCEMENT FOR A 21ST CENTURY ECONOMY"

10:00 AM, Tuesday, June 12, 2007

215 Dirksen Senate Office Building
Washington D.C.

MR. CHAIRMAN: During my career in government, the US took a high profile WTO action against one of our major trading partners. After a lengthy WTO process, the US won, and the WTO then approved the US taking retaliatory steps to bring the other party into compliance.

"Good," I thought, "our exports will begin flowing again." It was not to be so simple, however. Indeed, for the rest of my time in government, I, and many, many other government trade officials, was occupied with attempting to enforce the WTO decision against the other government. I recall thinking to myself: "If winning a major trade enforcement case causes this many problems, I wonder what it is like to lose a case."

The lesson learned: Negotiations, agreements, and even favorable WTO decisions work only to the extent they are enforced. Enforcement is more than simply winning a decision at the WTO, it is making sure the other government complies. Enforcement is making sure the trade agreements we negotiate are fully and faithfully implemented.

Most policy makers who examine trade policy too frequently neglect enforcement: the hard, hard work of making sure other governments abide by their commitments and that our trade policy and agreements bring the benefits they promise. Enforcement is essential to a successful trade policy, and to the ensuring that US companies and workers take full advantage of the export opportunities available to them in the 21st century economy.

Thank you, Mr. Chairman, for taking up this topic. I appreciate the chance to be here with you and the Committee this morning and share with you the views of the Motion Picture Association of America (MPAA)[1].

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[1] The Motion Picture Association of America is the voice and advocate of the American motion picture, home video, and television industries. Its members include: Buena Vista Pictures Distribution; Paramount Pictures; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; and Warner Bros. Entertainment Inc.

Effective trade enforcement is specifically vital to the well being of the US motion picture industry. The industry earns over one-half of its annual revenues outside the US. Our most recent analysis indicates that last year, what we call all media revenues – that is revenue from movies released in theaters, on home entertainment products like DVDs, and filmed entertainment shown on television – was actually higher outside the US than domestically.

The industry is an export success story few other industries can match. It annually generates a positive balance of trade – bringing dollars back home and creating American jobs for American workers from those exports. It generates a positive balance of trade in every country in which it does business.

That accomplishment has not come easily. The industry offers an attractive product that audiences worldwide want, the primary reason for the US industry's overseas success. Another part is the work that we have done, on our own, with the US government, with other governments, and with our allies in the copyright community to make sure that these overseas markets are open to our products and that our products are protected through adequate policies and legal systems.

We have made great strides, with your help and with the help of the trade negotiators in the Administration. In some territories we still need to do more work to get the right kind of laws and regulations in place.

We have increasingly turned our attention to the subject of this hearing. We are increasingly working to urge the US government to focus on enforcement and to work with foreign governments on effective enforcement of their own laws. We are working increasingly to ensure that foreign government are in compliance with the obligations they have made to the US government and to other governments through such bodies as the World Trade Organization (WTO).

As you begin examining options for improvement trade enforcement, I have five themes and recommendations for the Committee's consideration: One, the critical role of the free trade agenda; two, ensuring adequate resources for overseas training and education; three, ensuring that the US agencies charged with negotiating and enforcing trade agreements have sufficient resources; four, improving our laws to require foreign governments to improve their compliance, especially if they are the beneficiaries of US preferential treatment; and five, the value of increased congressional oversight.

THE FREE TRADE AGENDA

The free trade agenda is critically important to the motion picture industry, specifically the Office of the US Trade Representative's (USTR) negotiations on free trade agreements (FTA). I recognize the several controversial issues surrounding these proposals – labor issues, the environment, and others. As you debate those matters, let me remind you that the improvements in intellectual property rights enforcement that these agreements have required of our FTA partners are vital to the industry's interests.

In virtually all of these FTAs, we have reached agreements with our partners calling for intellectual property protections that exceed minimal requirements of the WTO's Trade Related Aspects of Intellectual Property Agreement (TRIPS). Over time,

moreover, USTR has enhanced its negotiating request on intellectual property protections, the negotiating thus further improving the level of protections. For example, the recently concluded Korean FTA will provide the motion picture industry, and other copyright industries, a higher level of protection than previous FTAs. It includes two side letters on intellectual property rights enforcement, one of which involves on-line enforcement. The agreement also includes, for the first time, the requirement that the Korean government adopt an anti-camcording law, which is of particular interest to us.

As a result of these provisions, as well as the improvements the agreement makes in the access we can get to the Korean entertainment market, we support it. We are eager to work with you and your colleagues to see it implemented so that we can take advantage of those improvements.

We view the FTA process as a series of building blocks, at each stage elevating not only the level of intellectual property rights laws but also the commitments of those governments to enforce the requirements of the laws. We believe this is especially important as we work on to see the Doha Round of multilateral trade negotiations come to a successful conclusion.

OVERSEAS TRAINING AND TECHNICAL ASSISTANCE

Unless foreign officials know how to enforce trade agreements, particularly in the complex area of intellectual property rights, the agreements cannot realize their full potential. Consequently, we invest heavily, on our own, in training and education programs around the world with law enforcement officials and with foreign judges. Even in countries where we face some of our most daunting challenges, we are actively engaged in reaching out to host governments to provide technical assistance.

We are very supportive of the training and education resources that the State Department and the Commerce Department invest in these programs, as well. We encourage you to continue to support those programs.

We have been working with a broad coalition of other business groups on a far-reaching package of intellectual property rights enforcement measures that, through the auspices of the Chamber of Commerce, is slated to be unveiled later this week. Much of it has to do with domestic and border enforcement, but a part of it address this specific point: overseas training.

In particular, we have had very good results working with the intellectual property attaches the Commerce Department has posted overseas, most notably in China. The package that will be unveiled later this week will call for expanding that program to more posts and to elevate the coordinating role those officials have within the embassies to enforcement in-country. In addition, this package will propose linking the allocation of training funds for foreign officials with the priorities indicated in the annual special 301 process to ensure that the funds go to the most critical countries.

FULLY FUNDING THE TRADE ENFORCERS

Effective trade enforcement rests upon ensuring that the "enforcers" have sufficient resources and that the Executive Branch has enough "enforcers." Put another way, I urge you to ensure that the officials on the front line, specifically in USTR and at the

Commerce Department have the resources they need to tackle the many, many enforcement challenges they face.

Most of us view USTR as the trade negotiators; they are. However, much of what they do is enforcement – working with foreign governments and US industries to ensure that the trade negotiations they have concluded are in fact enforced. Indeed, my experience is that USTR easily devotes a considerable share of its resources to what we would probably call enforcement matters.

In an increasingly complex global economy, with increasingly complex trade agreements, I cannot stress enough the importance of ensuring that we have sufficient trade enforcement officials. In many cases, the implementation of trade agreements is as complex and time-consuming as actually negotiating them, and that process is clearly as vital to success as the negotiations themselves.

IMPROVING OUR TRADE ENFORCEMENT LAWS

In addition to training, education, and implementation of trade agreements, another important aspect of effective enforcement is leveraging existing programs. I mentioned previously the value of tying training programs to priority countries identified in the special 301 process. Inasmuch as that the 301 process serves as the overall roadmap for the intellectual property rights agenda each year, we believe it can guide our work with governments that benefit from our trade preference programs.

Specifically, we recommend that Congress require that governments' whose economies benefit from the generalized system of preference program (GSP) and which are identified on the USTR 301 priority list develop action plans to address the piracy problems in their countries. In addition, a country's eligibility for future GSP benefits would depend on its willingness to implement such action plans.

A little more than a year ago, the motion picture industry, and other copyright industries, worked with USTR to develop an action plan that USTR subsequently presented to Brazil. We saw notable improvements, and believe it is a pattern that could be expanded to other GSP beneficiaries, provided that the program were so amended.

In addition, we would recommend that GSP beneficiaries on the special 301 list also be priority countries for the allocation of trade capacity building assistance to improve their ability to address piracy.

CONGRESSIONAL OVERSIGHT

From time to time, for our own planning purposes, we evaluate the intellectual property rights landscape in foreign countries. One of the key factors is enforcement, specifically the political will of governments to take enforcement actions. In many cases, all other ingredients may be in place, but the governments lack the political will to take meaningful enforcement actions.

In many cases, that is, frankly, the case with the US government. Bilateral relations involve many components, trade among the more important, but not always the most important. Within that subset, intellectual property rights compete against other factors that US officials must take into account. I understand that reality.

At the same time, as the US economy moves from a manufacturing economy to a service economy to an intellectual property economy, enforcement of our trade agreements to protect intellectual property is, I submit, vital to our national economy prosperity. Intellectual property and innovation is the competitive edge the US has in the global economy. Enforcing our trade agreements to protect that advantage and enhance the ability of US industries that rely on intellectual property must also be a likewise top national priority.

That will require broadening our efforts to improve foreign legal systems and their application, training foreign officials, ensuring that our officials have resources, and enhancing our existing laws. It will also require ensuring that our government has the political will to enforce these rights.

In my view, congressional oversight can be extremely valuable. We need to hold US officials charged with enforcing our trade agreements accountable for their decisions, and few things are as important as congressional oversight to make sure that the Executive Branch is working to enforce the policies and programs that you authorize and direct, in the manner you expect.

The US motion picture industry depends extensively on the overseas market, and thus the effective enforcement of trade agreements designed to protect our product in those markets. Already this summer, we have seen *Spider-Man 3*, *Shrek the 3rd*, and *Pirates of the Caribbean: At World's End* do incredibly well in markets outside the US. The season promises more blockbusters – *Harry Potter, Evan Almighty*, and *The Simpsons* – that I am confident will be just as successful outside the US as they are here. In part, their success and the returns the industry generates from these titles and the other movies we export depend on ensuring that our trade policies – in particular the policies designed to protect intellectual property – are fully enforced.

As I said at the outset, trade negotiation and broad policy usually gets the lion's share of public attention within the trade arena. Effective enforcement of those agreements often involves work outside the public spotlight, but it is essential to the agreements' success.

I urge you to make sure the officials have adequate resources to accomplish this work, that we have resources to work with foreign officials, and that you consider the other recommendations I have made to ensure that our trade agenda realizes the promise of the expanding global market.

Thank you. I welcome your questions.

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Testimony of Jennifer A. Hillman
Distinguished Visiting Fellow
Institute of International Economic Law
Georgetown University Law Center

Before the United States Senate Finance Committee
"Trade Enforcement for a 21st Century Economy"

June 12, 2007

Introduction

It is an honor to appear before you today to provide some comments on the very important topic of trade enforcement. I do so this morning in my personal capacity, so the views I express are my own and not necessarily those of either the U.S. International Trade Commission, where I served as a commissioner for the past eight years, or those of the Office of the United States Trade Representative, where I served as General Counsel and Chief Textile Negotiator.

In my view, the question of whether the U.S. has in place an effective and appropriate trade enforcement regime must be looked at from both sides of coin—whether we are doing a good job of enforcing our trade remedy laws against unfairly traded imports entering the U.S. market and whether we are doing all we can to enforce our rights under agreements opening foreign markets to U.S. goods, agriculture and services.

Effective Enforcement of Our Trade Remedy Laws?

From a policy perspective, the central question with respect to imports is whether we are making it possible for those who are entitled to relief under our trade remedy laws to obtain that relief in a timely and effective manner and at a reasonable cost. I believe the overall answer to that question is yes—for now—but there are a growing number of problems in the administration of our trade remedy laws that need to be taken into account if we are to have a sound trade enforcement regime for the 21st century.

A. Antidumping

The most commonly used trade remedy, by far, is the antidumping law—which provides for relief from imports that are sold in the U.S. market for prices below the price at which the same goods are sold in their own home market. Of the primary trade remedy laws—antidumping, countervailing duty, safeguards and intellectual property cases—antidumping cases accounted for 67 percent of the total. Since the year 2000, there have been 88 antidumping cases initiated. However, of late, the number of cases filed has

dropped off precipitously, from an average of more than 13 new cases a year to only five in 2006 and one new case in the first five months of 2007.[1]

B. Countervailing Duty Cases

Countervailing duty cases involve imports whose production or export was subsidized in part by the foreign government of the country in which the goods are produced. Historically, there are many fewer countervailing duty cases filed than antidumping cases. Since 2000, there have been a total of 23 CVD cases filed, for an average of three new cases per year.[2] The major development in this area is the recent decision by the Department of Commerce to reverse long-standing precedent and permit countervailing duty cases for goods coming from China, a non-market economy country.[3] It is too early to tell whether this initial affirmative determination will open the flood gates to many

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Year	Number of AD petitions filed	$ volume of imports subject to AD investigations
2000	12	$1,436,483
2001	19	9,508,896
2002	15	1,509,691
2003	19	4,393,986
2004	10	1,559,220
2005	7	1,026,737
2006	5	754,587
2007 (1Q)	1	8,181

2

Year	Number of CVD petitions filed	$ volume of imports subject to CVD investigations
2000	5	$415,043
2001	6	7,217,325
2002	3	753,234
2003	5	19,249
2004	2	534,953
2005	1	25,725
2006	1	Confidential
2007 (1Q)	0	0

[3] The U.S. policy of not applying the countervailing duty laws to non-market economies (NMEs) was formally established when the Federal Circuit Court of Appeals upheld a decision by the DOC not to apply the CVD laws to imports of carbon steel wire rod from Czechoslovakia and Poland, Georgetown Steel Corp vs. United States, 801 F. 2^{d} 1308 (Fed. Cir. 1986). The rationale articulated by the court in 1986 was that subsidies are actions that distort or subvert the market process and that in the Soviet-style planned economies of the 1980s, there was no market process to distort and therefore subsidies had no meaning in such an economy. On March 29, 2007, the DOC reached an affirmative determination in a countervailing duty investigation involving coated free sheet paper from China, and in so doing, the DOC noted that because of the substantial differences in the economies at issue in Georgetown Steel and China's economy today, the Department's policy from the 1980s is "inapposite" and "does not bar the application of the CVD laws to imports from China." DOC Memorandum, Coated Free Sheet Paper from China, March 29, 2007.

CVD cases on goods from China or whether this precedent will be extended to other non-market economies such as Vietnam. Like antidumping cases, the number of CVD cases filed has dropped significantly since 2000.

C. Significant Drop Off in the Number of Cases Being Filed

Why the large drop off? In my view, it stems from a number of things, starting with the structural changes in a number of the key industries that have historically been the largest users of the trade remedy laws, most notably the steel industry. Because the filing of an antidumping or countervailing duty case requires that the petitioners have to account for at least 25% of all U.S. production of the product at issue and that at least 50% of those expressing a position on whether a case should proceed must be in favor of it, the cases have tended to be filed by industries that are largely U.S. owned and dominated by firms that produce most or all of their products in the U.S. Much of that has changed in recent years, with almost every industry being made up of at least a few foreign-owned companies along with many other companies who both produce in the U.S. and import similar products from abroad. For these companies and industries, the decision on whether to file a trade remedy case is no longer so clear cut.

Take the steel industry for example. Historically, the steel companies in the U.S. were responsible for filing more than half of all antidumping and countervailing duty cases initiated in the U.S. For many years, the U.S. steel industry consisted of a wide variety of U.S. based firms who produced most or all of their steel in the U.S. Today, the largest steel company in the U.S. is foreign-based and foreign-owned Mittal Steel, who bought up much of Bethlehem, Republic and LTV. Many of the other major U.S. steel producers have also consolidated here in the U.S. and have invested in production facilities or joint ventures overseas. It is not clear whether this new steel industry will have as much interest in filing trade remedy cases as the industry of old.

Second, a number of the largest cases of late have involved imports from China—including cases on wooden bedroom furniture, shrimp, color television receivers, plastic retail bags, and folding gift boxes.[4] In many of these cases, the leading foreign producers or importers ended up with dumping margins of 0% or at least low margins (less than 5%), leaving many U.S. producers to question whether it was worth the time and expense to bring a case if the end result was very small, if any, additional duties being placed on future imports.

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Product from China	Date of Order	Lowest Dumping Margin	Volume of Imports ($1,000
Wooden bedroom furniture	01-04-05	0%	$957,948
Warmwater shrimp	02-01-05	0%	$295,300
Color television receivers	06-03-04	5.22%	$271,110
Plastic retail carrier bags	08-09-04	0%	$125,718
Folding gift boxes	01-08-02	1.67%	$4,451

Thirdly, winning a case involves proving that the U.S. industry has been injured because of a significant volume of imports at prices that are low enough to push down or suppress price increases. However, right now, prices for many U.S. manufactured goods are at high levels, making it difficult for the U.S. industry to demonstrate the requisite injury by reason of the imports.

Finally, there have been a number of significant problems with the enforcement of outstanding antidumping and countervailing duty order, particularly with respect to so-called new shippers. The Department of Commerce is finding increasing numbers of companies who are declaring themselves to be new shippers that should not have any duties assessed on them because they have not been found to have been dumping, but a number of these new shippers turn out to be the same companies that were previously dumping, just operating under a different name. The prospect of winning a trade remedy case only to see imports continue to come in with no additional duties under a new company name has supposedly deterred a number of industries from filing trade remedy cases. New rules and procedures have recently been adopted to address the abuses of new shipper claims. It is too early to tell whether these changes will sufficiently address the problem.

D. Significant Uncertainty Created by WTO and U.S. Court Decisions on Trade Remedies

A number of decisions by the U.S. courts and the WTO dispute settlement system are forcing changes in practice or creating a good deal of uncertainty at the U.S. trade agencies--the Department of Commerce (DOC) and the U.S. International Trade Commission (ITC)-- and among the trade bar.

One of these key court decisions was handed down the U.S. Court of Appeals for the Federal Circuit (*Bratsk Aluminum Smelter v. United States*, 444 F. 3d 1369) in April of 2006. In that case the Federal Circuit vacated a decision by the ITC that had been affirmed by the Court of International Trade. The ITC had determined that imports of silicon metal from Russia, which were the largest single source of silicon metal imports into the United States and were generally the lowest priced imports in the market, were injuring the U.S. silicon industry. The Federal Circuit overturned the ITC's decision because it found that the ITC had not determined whether non-subject imports —meaning imports form countries other than Russia that were not the subject of this investigation-- would simply replace the Russian imports with no beneficial effect on the U.S. industry. The court stated that in any case involving a "commodity product" in which "price-competitive non-subject imports are a significant factor in the market," the ITC must first determine whether non-subject imports would replace the subject imports "without any beneficial effect on domestic producers" and if so, the ITC must render a negative determination.

Because, depending on how the definitions of "commodity product" and "significant factor" are applied, the vast majority of cases could be found to meet the threshold criteria laid out by the Court, the *Bratsk* decision has the potential to affect the majority

of the antidumping and countervailing duty cases. In light of the far reaching implications of the decision and the strong view at the ITC that the case was wrongly decided, the ITC, for the first time in its history, recommended that the Solicitor General of the U.S. seek Supreme Court review of the decision. The Solicitor General elected not to bring the issue to the Supreme Court at this time, so the precedent stands.

The ITC's concerns with this case stem from the fact that it appears to be based on an erroneous understanding of both the purpose of the trade remedy laws and the manner in which those laws are applied. For example, the Federal Circuit asserts that the ITC must determine whether non-subject imports will fill the "void" created by the "elimination" of subject imports from the U.S. market once antidumping or countervailing duties are placed on subject imports. However, the Court fails to understand that the purpose of imposing AD or CVD duties is not to eliminate imports from the market. Nor is the result of putting AD or CVD duties in imports necessarily the exit of those imports from the market. Very commonly, the imports continue to enter the U.S. market; they simply pay the additional duties. The fact that the U.S. has collected hundreds of millions of dollars in such antidumping and countervailing duties pursuant to the Continued Dumping and Subsidy Offset Act, also known as the "Byrd amendment", is a clear indication that imports are not necessarily "eliminated" from the market and there is no clear "void" for non-subject imports to fill.

Similarly, the Court presumes that the ITC is supposed to make a negative decision if it cannot show that an order will be effective in addressing the injury suffered by the domestic industry. However, the law establishes no such test for assessing the "effectiveness" of an order in an original investigation. In fact, as apparent from the sunset review provisions, the statute clearly contemplates that industries may continue to suffer material injury even with orders in place.

The Court also requires the ITC to determine how non-subject imports will perform should an order be put in place, but the ITC does not have the non-subject producers or importers before it as parties, nor would the statute permit non-subject producers to become parties to the investigation, even if they wanted to be. Therefore, the ITC is left by the *Bratsk* decision with the task of determining the potential volume of imports and the prices of those imports from producers all over the world. Asking such producers to fill out a questionnaire providing the ITC with sensitive data about their production, capacity and prices in markets around the world is not likely to produce many responses.

Similarly, recent WTO decisions relating to the methodology by which the Department of Commerce calculates dumping margins, most particularly the Department's use of so-called zeroing, has been ruled a violation of our obligations under the WTO Antidumping Agreement. As a result, the Department has had to amend its methodology, raising concerns among many in the U.S. industry about what margins are likely to be in the future.

Other WTO decisions have found a number of long-standing DOC practices to be violations of our obligations under the WTO Agreements as well, including the method

by which the DOC calculates the "all others" dumping margins[5] and the DOC methodology to determine whether and when the sale of a previously state-owned facility wipes out any subsidies that were granted to that facility when it was owned by the government.[6]

E. Concerns with Agriculture

The problems I have spoken about are true for all goods that are imported, but the increasing volume of imports of agricultural products raises additional questions about whether the antidumping laws can be made to work effectively to address problems with dumped imports of agricultural products.

One of the first problems that arises in the realm of agricultural cases is who is bringing the case. Most often, the producers in the industry that are feeling most aggrieved by low-priced imports are the farmers, yet the goods being imported are often processed or semi-processed products. While U.S. law has been amended to permit the ITC to include growers and farmers to both file a case and be included in the ITC's decision of who to look at in determining whether injury has occurred, the WTO has issued a very strong repudiation of these provisions of U.S. law, making it clear that the ITC can only include as members of the domestic industry those producers making a product at the same stage of processing as the imports themselves. For example, in a case involving lamb meat imports from Australia and New Zealand[7], the WTO Appellate Body ruled that even though the growers and feeders of lambs produced 88% of the value of the lamb meat, they could not be included in the case or looked at in making an injury determination because they produced live lambs, not lamb meat. However, the greatest injury was being suffered by the growers and the feeders, while the packers and the breakers were processing both U.S. and imported lamb and would in all likelihood never have filed a case, leaving the growers and feeders with no effective access to the process.

Similarly, the trade remedy laws call on the ITC to determine whether imports are underselling the U.S. product and have caused price suppression or depression. These determinations are usually made by comparing closely matched products on a quarterly basis. In agriculture, however, if products are traded on the major commodity exchanges, any price differences between imports and U.S. product would be extremely fleeting, as prices would be matched or cleared on a daily or hourly basis. Similarly, if

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[5] *US-Hot-Rolled Steel* –Appellate Body Report, *United States-Antidumping Measures on Certain Hot-Rolled Steel from Japan,* WT/DS184/AB/R, adopted 23 August 2001.

[6] *United States-Countervailing Measures Concerning Certain Products from the European Communities,* WT/DS212/AB/R, adopted 8 January 2003

[7] It should be noted that the *Lamb Meat from Australia and New Zealand* case was a safeguards case, not an antidumping case. The U.S. statutory provisions that give the Commission the authority and the standards to include farmers and producers of raw agriculture products as part of the industry producing the processed product are found in the trade remedy statutes rather than in the safeguards law. However, given the willingness of panels and the Appellate Body to rely on precedents from safeguards cases in antidumping and countervailing duty cases, it is quite likely that any antidumping or countervailing duty cases that include growers or farmers as part of the domestic industry producing processed agriculture products would be similarly found to violate our WTO obligations.

any of the exchanges include significant volumes of trading in futures and those futures are affected by production levels and prices in countries around the world, it is extremely difficult for the ITC to make the requisite finding that it is imports from the subject countries that have caused the price declines rather than the effect of non-subject imports in the futures markets.

Moreover, for any agriculture cases involving products with significant growing or "boom and bust" cycles, such as cattle or pork, correlating the injury with changes in import volumes and prices is much more difficult as it will rarely be clear that it is the imports rather than the growth cycle that led to price changes. Nor is it clear how to separate out changes in any government programs that provide support to the farmers or that support the price of the products from injury that must be linked to imports.

F. Imports that Violate Intellectual Property Rights

Among the other actions that the United States can take against unfairly traded imports are actions to bar the importation of goods that violate U.S. patents, copyrights or trademarks, pursuant to Section 337 of the Tariff Act of 1930. In these cases, the ITC make a determination of whether the complainant has a valid patent or other right and whether the imports infringe on that patent. If so, the ITC makes a remedy recommendation, which can include a general exclusion order on any future imports, regardless of the source. The Commission's remedy is subject to final approval by the President, but in general, ITC relief orders are only seldom disapproved. The cases are then subject to review by the U.S. Court of Appeals for the Federal Circuit.

In recent years, the volume of these Section 337 cases has gone up dramatically, from 16 new cases filed in 2002, to 29 new cases in 2005 and 40 new cases in 2006. Many practitioners have stated that Section 337 is the preferred method for the enforcement of certain intellectual property rights because the cases are handled much more quickly than in district courts, the ITC has more specialized expertise in hearing patent cases, the ITC's affirmance record at the Federal Circuit is better than the district courts' and the remedy of an exclusion order is more readily enforceable.

The problem in this area stems from the strain on the resources at the ITC to hear the burgeoning number of cases, most of which involve ever-increasingly sophisticated technologies with many more patent claims to be construed within each case. It will be increasingly difficult for the ITC to stick to its intended goals for finishing cases within a 12-15 month time frame given the large volume and the difficulties within the U.S. personnel system of attracting and retaining Administrative Law Judges that have the expertise to preside over the initial trial of these complex cases.

G. Safeguards—Global Safeguards (Section 201) and China Safeguards (Section 421)

If we move on to the one area of trade remedy law that does not involve allegations of unfair trade—safeguards—we also see significant clouds on the horizon. Safeguard cases are typically filed by a U.S. industry that believes it has been seriously injured by a

surge in imports. These cases are quite different from antidumping or countervailing duty cases because relief is not automatic if the ITC makes an affirmative determination. The President has the discretion under the statute to impose any relief or no relief as he deems appropriate in those cases.

The United States has imposed safeguard relief 6 times since the WTO came into existence in 1996, including for the huge 2001 investigation of a broad range of steel imports. In 4 of those cases, including the large steel case, the safeguard remedy imposed by the U.S. has been challenged in the WTO and has been found to have violated the WTO Safeguards Agreement. And we are not alone. Every country in the world that has had their safeguard measures challenged has been found to have violated the WTO Safeguards Agreement. To date, in those instances in which the WTO has ruled that U.S. actions have violated our WTO commitments, the safeguard remedies have been removed. As a result, safeguard remedies have remained in place for much less time than planned for.

The WTO Appellate Body has interpreted the WTO agreements to include additional requirements not found in U.S. safeguards law. One such additional requirement is that it must be "unforeseen developments" that caused imports to increase. Another requirement is the so-called "parallelism" obligation; this means that if the United States excludes imports from NAFTA countries or other FTA partners from safeguards relief, it must exclude those imports from its injury determination as well. The Appellate Body has also imposed requirements to "separate and distinguish" the effects of imports versus other factors in a way that has proved impossible to meet. Because these types of requirements will likely apply to every safeguard measure imposed by the United States, it appears that, under current U.S. law, no safeguard measure would pass muster at the WTO.

The second type of safeguards is the China specific safeguard actions that are provided for under Section 421. Like global safeguard investigations, section 421 investigations provide for investigations and determinations of injury by the ITC. If the determination is affirmative, the ITC recommends relief to the President. The President is to impose relief unless he finds that relief is "not in the national economic interest of the United States." The ITC has rendered 4 affirmative determinations under section 421, the most recent in October 2005. In each case the President has declined to grant import relief. In explaining his denial of relief in each case, the President has cited negative effects on downstream U.S. consumers of the imported products, as well as the possibility that the relief would be ineffective because imports from China would be replaced by imports from other countries. Because these reasons would likely apply to many if not most imported products, it is not clear that any more industries will find it worthwhile to file a section 421 petition with the ITC.

Finally, it needs to be understood that all of these trade remedies are available only for imports of goods. Yet today, services represent more than 83% of U.S. private sector GDP and U.S. imports of private services are projected to have exceeded $307 billion (16.5% of total imports) in 2006. None of the trade remedies noted above would be

applicable or available to provide relief should U.S. service industries believe that they are being harmed by the growing amount of services imports.

Enforcement of our Rights to Export and Obtain Market Access

The other side of the trade enforcement coin is doing all we can to enforce our right to export our products and services, given the many rights to access foreign markets that we have under multilateral and bilateral trade agreements, along with the need to enforce protections of our intellectual property rights.

In this area, the principal enforcement tools the U.S. has are: 1) the dispute settlement mechanisms provided for in the WTO and in our various free trade agreements, 2) Section 301 of the Trade Act of 1974, 3) Special 301 for intellectual property matters, and 4) the trade policy review mechanism of the WTO.

A. WTO Dispute Settlement Cases

At the time that the Uruguay Round was completed, one of the key changes from the old GATT system was the move to a binding dispute settlement system that no longer permitted the losing party to block the adoption of the final panel report. As a result, the United States began filing a number of cases as a complainant to try to secure market access rights or enforcement of intellectual property rights that the U.S. believed it was entitled to under various WTO agreements. During the first six years of the WTO (1995-2000), the U.S. initiated 60 such cases, covering a wide variety of products (everything from alcoholic beverages to autos to bananas to apparel and leather products) a number of intellectual property rights, as well as a number of services. Of those cases, 41 of them did not result in the establishment of a formal panel, either because a mutually agreed upon solution was reached or because the consultations provided the needed answers to questions or concerns or because the United States decided not to pursue the matter beyond the initial consultation phase. The remaining 19 cases went through the dispute settlement process with the U.S. prevailing in 16 of the cases and losing in three of them.

Use of the WTO dispute settlement system dropped considerably in the next five years (2001-2005), with only 15 complaints being filed by the U.S. Of those 15, six of them did not go through the dispute settlement process because mutually agreed solutions were reached or the U.S. did not pursue the matter beyond the consultation phase. Nine of the cases went through the dispute settlement process with the U.S. prevailing in all of those cases that have been fully decided.[8]

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[8] In the case involving the U.S. challenge to Canada's practices regarding exports of wheat and imports of grain, the U.S. did not prevail on the issue of whether the Canadian Wheat Board's activities in promoting the export of Canadian wheat violated Article XVII of the GATT, but did prevail in its claims regarding regulatory practices that discriminate against imported grain. Canada ultimately amended its Transportation Act and Grain Act to come into compliance with the Appellate Body report.

Since 2005, the U.S. has initiated seven matters, two of which are pending before panels of the WTO and five of which are in the beginning consultation phase.

In total, the U.S. has initiated 82 such complaints since the WTO dispute settlement system came into being. At the same time, the U.S. has been the subject of 97 complaints against its practices by a wide variety of our trading partners.

Overall, the dispute settlement system appears to have been both used more often and more successful at resolving disputes during the 1995-2000 time frame. Whenever the U.S. has been able to arrive at mutually agreed upon solutions through the dispute settlement process, those solutions have generally been viewed as providing the U.S. with better market access or a stronger resolution of the problem than those cases that have gone through the full dispute settlement process, particularly those in which the U.S. is left with only the right to retaliate against imports (e.g., the EU-beef hormones case).

B. Section 301

Section 301 was enacted in 1974 in order to give the President the power to take action against countries in response to complaints by private companies wanting better access to foreign markets. At the time, the GATT dispute settlement system was not binding and there was considerable frustration with the inability to obtain results when the U.S. believed its rights or benefits under the GATT were not being upheld. The initial 301 system was set up to allow private parties to bring an action to USTR for investigation.

With the enactment of the Uruguay Round Agreements and the change to a binding dispute settlement system in the WTO, the need for Section 301 was altered. Now, Section 301 provides the legal authority for the President to raise tariffs or take other action should the U.S. need to retaliate against a country that has not complied with an adverse WTO dispute settlement ruling. At the same time, Section 301 continues to function as a mechanism by which private parties can request an investigation by USTR of trade practices or policies that are "unreasonable or discriminatory and burden or restrict U.S. commerce."

In general, Section 301 calls for mandatory action by USTR if there has been a determination (preferably by the WTO or an FTA dispute settlement system) that a country's acts or policies violate a trade agreement. Section 301 gives the USTR the discretion to take action if USTR determines that an act, policy or practice is unreasonable or discriminatory and burdens or restricts U.S. commerce. Section 301 actions may be initiated by petition by any interested person or self-initiated by USTR. Typically USTR has self-initiated cases if it believes it will need legal authority to implement retaliation measures as a result of a WTO dispute settlement determination. With respect to acting on petitions, USTR has the discretion to determine whether actions under section 301 would be effective in addressing the act, policy or practice that is being complained about.

All together, there have been 121 section 301 actions initiated since the law was first enacted in 1974, with the majority of those actions (90 of them) occurring before 1993. Between 1993 and 2000, 30 section 301 actions were initiated. No new section 301 investigations have been initiated since March 2001 and all five of the petitions for section 301 investigations that have been filed since January 1, 2001 have been turned down by USTR on the grounds that action under section 301 would not be effective in addressing the act or policy that was the subject of the petition.[9]

C. Special 301

Special 301 was enacted in 1988 and requires USTR to identify those foreign countries that deny adequate and effective protection of intellectual property rights. In so doing, USTR identifies those countries that are "priority foreign countries" under Special 301, with priority foreign countries being those countries who have the most onerous or egregious acts, policies or practices with the greatest adverse impact on the relevant U.S. products and that are not entering into good faith negotiations or making significant progress to provide adequate and effective IPR protection. USTR is required to initiate a section 301 investigation for any country that has been designated a "priority foreign country." As a matter of administrative practice, USTR has also established a "priority watch list" of those countries that meet some, but not all, of the criteria for being a "priority foreign country" and a "watch list" of those countries that warrant special attention because they maintain IP practices that are of concern.

USTR conducts an annual special 301 review and has been active in placing countries on its priority watch list and watch list. In its most recent report (2006), USTR noted that is have placed 13 countries on its Priority Watch List (China, Russia, Argentina, Belize, Brazil, Egypt, India, Indonesia, Israel, Lebanon, Turkey, Ukraine and Venezuela) and 34 countries on its Watch List.

Since March of 2001 when Ukraine was named a Priority Foreign Country, no other country that has been designated as a Priority Foreign Country. As a result, Ukraine was the subject of an on-going Section 301 investigation. In January 2006, following six years of consultations and negotiations to improve Ukraine's protection of intellectual property rights, particularly copyrights on CDs and DVDs, Ukraine was moved from the Priority Foreign Country list to the Priority Watch List.

Despite the requirement for continued Special 301 reports and the movement of countries on and off of the Priority Watch List and Watch list, violations of IPR throughout the world appear to be on the rise with substantial concerns expressed about generally lax enforcement of intellectual property rights.

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[9] One petition was filed in 2004 complaining about labor practices in China, two petitions were filed in 2004 complaining about China's currency controls, one petition was filed in 2005 regarding China's currency, and one petition was filed in 2006 complaining about China's denial of certain workers rights. In all five cases, USTR exercised its discretion not to initiate an investigation.

D. Trade Policy Review Mechanism

A final tool that could be used to at least assess potential violations of rights under trade agreements is the Trade Policy Review Mechanism established by the WTO. Under this mechanism, all WTO members have their trade policies thoroughly reviewed by the WTO's Trade Policy Review Body. At the conclusion of these reviews, a detailed report is issued that describes the country's trade policies and practices, the trade policy making institutions within that country and the macroeconomic policies that affect a given country's trade relationships. The review mechanism at a minimum provides significant information that could form the basis for a dispute if the review reveals policies that may violate the country's WTO obligations. The review mechanism also provides the opportunity to question other countries about their trade practices and to use the review process as a way to encourage countries to make adjustments to their policies.

The four WTO members with the largest share of world trade (EU, U.S., Japan and China) are subject to reviews every two years; the next 16 largest trading countries are subject to reviews every four years and all other countries are reviewed every six years.

Conclusion

On both sides of the issue—enforcement of trade remedies against unfairly traded imports or import surges and enforcement of rights for access to foreign markets and the protection of intellectual rights—our trade enforcement regimes are facing major challenges. Our basic laws and tools for trade enforcement have not been substantially changed since the Uruguay Round Agreements Act in 1994. Since then, numerous court cases and WTO rulings, shifts in trade patterns, particularly the rise of China and India, the growth of trade in services and the need for better enforcement of intellectual property rights have all placed constraints and pressures on the trade enforcement system. At the same time that we have seen an explosive growth in trade, we have seen a significant decline in the number of trade cases initiated by the United States. A sound trade enforcement regime for the 21st century must make adjustments for the changes that have occurred to our trading system in the last decade while at the same time ensuring that we fully utilize the tools that we already have available to us.

TESTIMONY OF ROBERT E. LIGHTHIZER[1]
U.S. SENATE COMMITTEE ON FINANCE
Hearing on Trade Enforcement for a 21st Century Economy
June 12, 2007

I. INTRODUCTION

Good morning. It is a pleasure to be here today and to have the chance to testify on this very important topic – namely enforcement of our trade remedy laws. This is obviously a large and diverse topic, and I would like to confine my remarks principally to the challenges and priorities we face in terms of effective application of our domestic trade laws and efforts to remedy foreign unfair trade practices.

I believe that the topic before you today cannot be separated from the larger crisis we face in terms of American manufacturing and competitiveness. Ensuring that the U.S. market is characterized by fair trade practices – and that our workers and companies have an equitable chance to compete in their own market – may not be a panacea to solve the manufacturing crisis, but it certainly is a necessary condition to do so. No matter what else you do with regard to regulatory costs, health care, education, training, and all the other challenges facing manufacturing, the effort will go for naught if we continue to allow our industries to be devastated by import competition that is not playing by the same set of rules.

This is not a question of protectionism. Indeed, the real protectionists today are those who would defend foreign unfair practices that undermine U.S. and global markets. This is a question of whether we are going to get serious about having one set of rules for producers operating here and abroad – or whether we will continue to let those foreign companies benefiting from government support and other market-distorting practices reap windfall advantages in the market.

Whatever we may like to think about patriotism or the commitment of business leaders to this country, ultimately businesses will go where the rules of the game favor them. They will operate in those jurisdictions where they can maximize sales, returns and market share. If that means relocating to countries that provide government support, rigged home markets, and easy export platforms to ship back into open markets like the United States, they will do so – *if we give them the chance*. In that sense, there is no point in wringing our hands and lamenting the decisions of businesses to place their bets abroad. The responsibility and the challenge here lies with Congress and with policy makers to stop rewarding those who seek such artificial advantages and the benefits of foreign market distortions with unfettered access to this market.

Time is running short, and I sincerely hope a commitment to real change is developing in Congress. Because if we do not act soon, it will most certainly be too late.

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[1] Partner in the International Trade Group of Skadden, Arps, Slate, Meagher and Flom, LLP. The views expressed here are my own and not necessarily those of the firm.

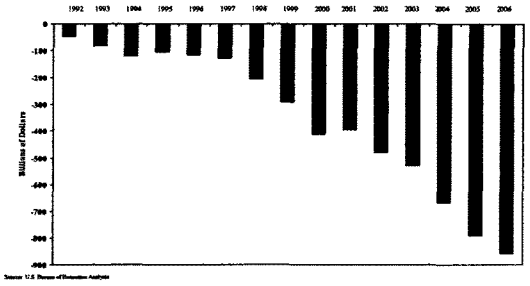
II. THE CURRENT U.S. MANUFACTURING CRISIS UNDERSCORES THE IMPORTANCE OF STRONG U.S. TRADE LAWS

There can be no question that U.S. manufacturers currently face a major crisis. Indeed, the idea that America is steadily losing its industrial base has become almost commonplace. Even with all of the conventional wisdom, however, it is rarely the case that the full magnitude of the problem is recognized.

Consider the current account deficit. (Figure 1). I am old enough to remember the early 1990's when many Members of Congress and other observers expressed alarm at the size of the deficit – which at that time was less than $100 billion. As can be seen, the deficit last year topped $800 billion and there appears to be no end in sight as to how bad it can get.

Figure 1

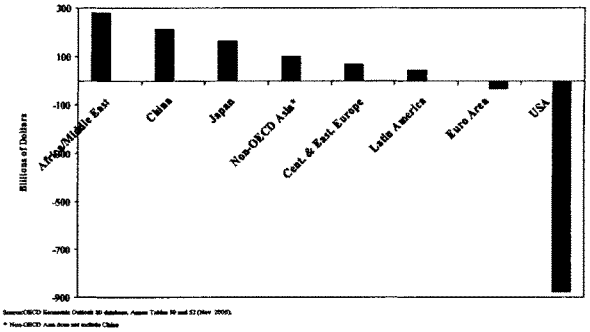
The U.S. Current Account Deficit



This growing deficit is due in large part to our massive trade deficit with respect to goods, resulting from the fact that U.S. manufacturers find it more and more difficult to compete with their international rivals. Significantly, as shown by Figure 2 below, the United States is the *only* major economy that is running such a large current account deficit. These data show that current U.S. policies are effectively propping up manufacturers in the rest of the world, while placing our own manufacturers at a major disadvantage. This is not, I would submit, a healthy or sustainable situation for the global or U.S. economies.

Figure 2

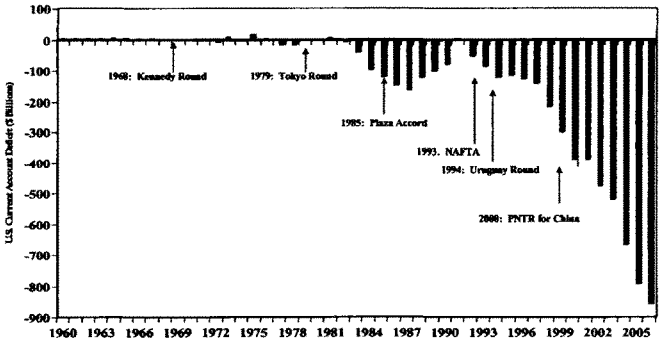
In 2006, the United States Was the Only Major Economy with a Large Current Account Deficit



It should also be noted that however valuable new trade agreements may be, history demonstrates that these agreements are *not* likely to lower our trade deficit. Indeed, Figure 3 shows that our current account deficit has continued to grow, despite the numerous trade agreements that we have approved in recent years.

Figure 3

U.S. Current Account Deficit and Key Trade Agreements from 1960 to 2006

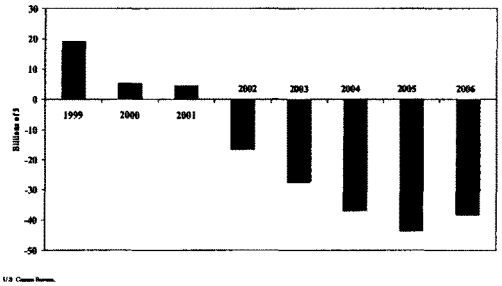


Several years ago, we were told that U.S. manufacturers were simply shifting to more advanced products. But as Figure 4 shows, in the last few years our trade balance

with respect to advanced technology has gone from a surplus to a deficit, and the figures are quite dramatic. The fact is that, given the current rules of the game, we are not competing successfully at *any* end of the spectrum.

Figure 4

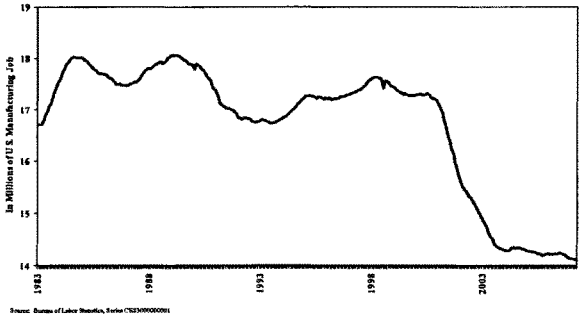
U.S. Trade Balance in Advance Technology



It is not surprising that at the same time U.S. manufacturers are struggling with global competition, they are also reducing their workforce. As Figure 5 shows, the number of Americans employed by manufacturers stabilized after the recession of the early 1980s, and remained fairly steady for almost 20 years. But since 2000, we have lost 3 million manufacturing jobs – and those jobs have not returned despite years of economic growth.

Figure 5

U.S. Manufacturing Jobs
1983-2007

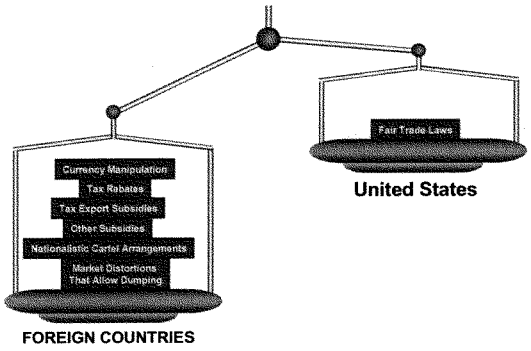


Together, these facts paint a grim picture of the difficulties facing U.S. manufacturers. These difficulties undoubtedly have many causes, ranging from high regulatory costs, to health care burdens and many other factors. But it is pure folly to ignore the role of foreign unfair trade practices and the ways in which the rules are rigged against American workers and companies.

Figure 6 gives a simplified illustration of some of the ways in which foreign countries act to artificially prop up and support their national industries. Many of these topics are of course well known – and include blatant currency manipulation in places like China and Japan, international and foreign tax rules that grossly disadvantage U.S. producers, massive subsidies provided by foreign governments, fixed markets abroad, cartel arrangements, and a host of other practices that lead to dumping on world markets.

Figure 6

Pro-Manufacturing Trade Policies



While our trading partners have many policies to artificially promote manufacturing in their countries, the United States in many ways relies upon only one policy in response: namely, our fair trade laws. Without those laws, American companies would have no practical response to the unfair tactics of our trading partners. It is no exaggeration to say that strong and effective trade laws are essential to preserving our manufacturing base. If those laws are weakened, U.S. manufacturers – and the millions of Americans who depend on manufacturing for a middle-class lifestyle – will be further harmed, perhaps irreparably.

Unfortunately, as discussed in more detail below, we are in the midst of an aggressive effort to undermine these vital laws. Our laws are regularly attacked through the WTO dispute settlement process, they have been weakened by uneven enforcement in the United States, and they are being challenged by our trading partners in ongoing negotiations. If we do not act now to reverse these trends, and to re-affirm our

commitment to strong and effective laws against unfair trade, these critical laws could effectively be lost forever.

III. CHALLENGES TO U.S. TRADE LAWS

U.S. trade remedy laws face significant challenges on a number of fronts.

A. WTO Dispute Settlement Process

Clearly, one of the biggest threats to our trade laws is from the dispute settlement system at the WTO. The system has fundamentally lost its way, and the decisions being issued by the WTO are gutting our trade laws.

The United States has borne the brunt of the problems with the WTO dispute settlement system. The United States has become the principal defendant at the WTO, having been named as a defendant in far more cases than any other WTO member. The United States is also losing almost every case brought against it. In fact, the WTO has ruled against the United States in 40 of the 47 cases in which it has been the defendant. A number of these decisions have required or will require changes to U.S. law.

Rogue WTO panel and Appellate Body decisions have consistently undermined U.S. interests by inventing new legal requirements that were never agreed to by the United States. Not surprisingly, WTO dispute settlement has become the appeal of first resort, not last resort, by our trading partners. Our trading partners have been able to obtain through litigation what they could never achieve through negotiation. The result has been a loss of sovereignty for the United States in its ability to enact and enforce laws for the benefit of the American people and American businesses. The WTO has increasingly seen fit to sit in judgment of almost every kind of sovereign act, including U.S. tax policy, foreign policy, environmental measures, and public morals, to name a few.

But nowhere are the problems with the WTO dispute settlement system more pronounced than in the trade remedies area. Our negotiators in the Uruguay Round painstakingly set forth specific rules in this area and made clear that WTO dispute settlement panels should defer to national authorities like the Department of Commerce and the U.S. International Trade Commission ("ITC") where possible. However, the WTO has ignored this mandate and has instead engaged in an all-out assault on trade remedy measures. The United States' track record in trade remedy cases before the WTO is downright abysmal – the United States has lost an astounding 30 of the 33 cases that have been brought against it in the trade remedy area. A few examples of the overreaching by the WTO in this area are all that are needed to vividly see that the dispute settlement system has veered off course.

- ***Zeroing.*** The WTO has now issued a series of decisions striking down the "zeroing" methodology employed by the Department of Commerce to calculate a company's dumping margin. The use of zeroing merely

ensures that non-dumped sales are not improperly used to offset a foreign producer's dumping margins on merchandise that is not fairly traded. The WTO has ruled against the use of zeroing despite the fact that there is no explicit or, for that matter, implicit prohibition of zeroing in the relevant WTO agreements. In other words, as both Congress and the Administration have repeatedly recognized, the WTO's zeroing decisions have created obligations to which the United States never agreed. In fact, the Administration has been harshly critical of the WTO's decisions on zeroing. The Administration has called the Appellate Body's latest decision on zeroing "devoid of legal merit" and commented that the Appellate Body "appears to be trying to infer the intent of Members with respect to the issue of 'zeroing' without the benefit of a textual basis." The WTO's decisions on zeroing represent a clear example of WTO overreaching in the trade remedy area.

- ***Byrd Amendment.*** The WTO's decision striking down the Continued Dumping and Subsidy Offset Act of 2000 – better known as the Byrd Amendment – is no better. The WTO ruled in this case, without any support in the relevant WTO agreements, that antidumping and countervailing duties that are collected by the United States may not be distributed to injured U.S. producers. The Uruguay Round negotiators never even considered, much less agreed to, any restrictions on how WTO members may use antidumping and countervailing duties that they collect. Indeed, the WTO Appellate Body's decision in the Byrd Amendment case prompted 70 Senators to condemn its actions as "beyond the scope of its mandate by finding violations where none exists and where no obligations were negotiated."

- ***Failure to Abide by the Standard of Review.*** A problem extending throughout the WTO's decisions in trade remedy cases has been the failure to abide by the deferential standard of review for such cases. The United States expended enormous time and resources negotiating the standard of review for antidumping ("AD") and countervailing duty ("CVD") cases. However, WTO panels and the Appellate Body have systematically ignored the standard of review in reaching decisions that show no deference to the findings of government agencies such as the Department of Commerce and the ITC or to the laws enacted by WTO members. Unless and until WTO panels and the Appellate Body adhere to the agreed-upon standard of review, they will continue their baseless assault on the trade remedy laws.

I am not alone in this assessment of the WTO dispute settlement system. Even supporters of the WTO and legal experts hostile to the trade remedy laws have expressed astonishment at the level to which WTO panels and the Appellate Body are simply writing new requirements into the WTO agreements. The threat that this poses to the trade remedy laws and to the entire world trading system cannot be overstated.

B. Uneven Enforcement

Our laws are also weakened by uneven enforcement at home. No matter how strong our laws may appear on paper, they will be ineffective unless we have administrators who are committed to strict enforcement of those laws. Unfortunately, this type of commitment has been found lacking at times, including in some very important areas. To give just a few examples:

- ***Difficulty of proving material injury.*** Domestic industries are eligible for AD or CVD relief only if unfairly-traded imports cause or threaten "material injury." U.S. law defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[2] On its face, this appears to be a reasonable standard that recognizes that unfair trade should generally be discouraged and that *any* not-immaterial harm should be sufficient to justify relief. But in fact, some members of the ITC have in a number of instances appeared to interpret the standard to effectively require a much higher demonstration of injury. Our law was not intended, and does not require, that domestic industries demonstrate heavy losses or devastating injury before they can resort to fair trade remedies. As someone who practices in this area of the law, I can assure you that many unfair trade cases have not been brought – or have been delayed (with consequent extensive injury to the relevant U.S. industry) – *solely* because of a concern with how the ITC interprets the material injury standard.

- ***Failure to apply U.S. CVD laws to non-market economies like China.*** The decades-long policy of not applying U.S. anti-subsidy rules to non-market economy countries like China represents another clear example of uneven enforcement of fair trade rules. China has for years been one of, if not the, most significant subsidizers in the world. There has never been a valid legal reason to refrain from applying anti-subsidy rules to China – a fact made even more clear by China's explicit agreement to be subject to such rules upon its accession to the WTO. While the Commerce Department's recent change in policy in this area is welcome, a great deal of harm has already been done – and it remains to be seen whether the new policy of applying CVD rules to China will be enforced in an effective manner.

- ***Failure to enforce China-specific safeguard law.*** Under Section 421 of the Trade Act of 1974, as amended, the President has authority to impose safeguard relief with respect to Chinese imports that are disrupting the U.S. market. This provision was the result of hard-fought negotiations with China, and was important in persuading Congress to

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[2] 19 U.S.C. § 1677(7)(A) (2000).

support China's accession to the WTO. Used properly, it would be a valuable tool to prevent surges of imports from China. Unfortunately, Section 421 has effectively been rendered a dead letter by the Administration's refusal to impose relief. On four different occasions, the ITC has found that the standard for Section 421 relief has been met.[3] Every single time, the Administration denied relief.

- ***Inadequate funding for enforcement.*** Those of us who practice AD/CVD law regularly appear before the Import Administration of the Department of Commerce ("IA"), which has responsibility for determining whether foreign producers are engaging in unfair trade. In recent years, we and others have witnessed a troubling reduction in the resources allocated to this critical function at Commerce. Indeed, it is our understanding that IA's appropriation was cut from $68.2 million in fiscal year ("FY") 2004 to $59.8 million in FY 2007, a decline of 12.3 percent. Similarly, we understand that the number of employees at IA fell from 388 in FY 2005 to only 319 in FY 2007, a decline of 17.8 percent. In my view, the resources available at IA simply are not sufficient to properly enforce the law – and we are seeing the effect in a variety of ways, including the failure to appropriately staff cases, the failure to conduct verifications of the information provided by foreign producers and the failure to follow up on enforcement issues as vigorously as needed.

C. The Doha Round, Free-Trade Agreements, and Other International Negotiations

Another major challenge to the effectiveness of our trade law resides in ongoing international trade negotiations – especially the Doha Round talks. The most egregious and consistent violators of U.S. trade laws – including countries like Japan, China, Brazil, Korea and others – have made it literally a first priority to use these talks in an effort to undermine U.S. and global fair trade disciplines. If they succeed, our laws will rendered completely ineffective.

The mandate for Doha talks – as well as Congress' clear instructions in granting trade negotiation authority – never envisaged that the so-called "Rules" negotiations would involve substantive weakening changes to these vital fair trade disciplines. To the contrary, the official mandate spoke of the need to preserve the basic "concepts, principles, and effectiveness" of these rules, and Congress made it a principal objective to avoid *any* agreement that lessened the effectiveness of U.S. or international disciplines on unfair trade.

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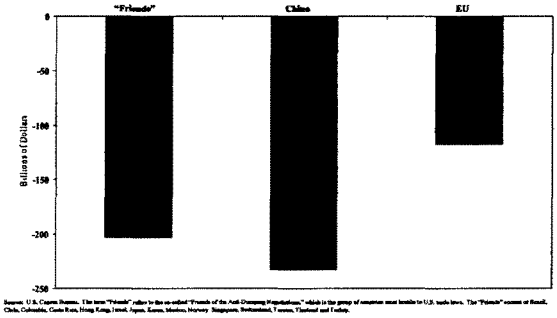
[3] *See Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002); *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003); *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003); *Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (Oct. 2005).

In direct contravention of these instructions, the current negotiating dynamic of the Rules talks would lead to a dramatic weakening of fair trade rules – and an unmitigated catastrophe for American manufacturers. Opponents of AD/CVD laws have put forward literally scores of detailed, substantive proposals that would gut our laws. In response, the United States has advanced precious few proposals to strengthen fair trade laws. As a result, the talks are badly out of balance, and it is not difficult to see that any "compromise" in such a one-sided negotiation would spell disaster from the U.S. perspective.

Set forth in Figure 7 are the 2006 trade balances that the United States maintained with the key proponents of weakening U.S. trade laws. Interestingly, these countries make up the vast majority of the truly unfathomable overall U.S. trade deficit. The basic dynamic in the Rules talks is that these countries would like to gut our trade laws and see these red bars become even bigger.

Figure 7

U.S. Trade Balances in 2006 with
Key Trade Law Opponents



While the Doha negotiations present the greatest challenge, threats to the trade laws exist in a wide range of international trade negotiations – including bilateral and multilateral agreements. The recent U.S.-Korea FTA, for example, included novel provisions never included in any prior agreement that would set forth additional hurdles (e.g., consultations before initiating a trade proceeding, consultations with respect to potential settlement of such cases, etc.) before relief could be implemented. Similarly, talks relating to the proposed Free Trade Area for the Americas included many of the same harmful proposals now being advanced in Doha negotiations.

The importance of our trade laws is not lost on key trading partners, who are exploring literally every avenue possible to weaken those laws and gain unfettered access to our market – even for unfair trade. This fact and recognition should also not be lost on U.S. policy makers, who should similarly see the importance of defending those very provisions.

IV. AREAS FOR NEEDED STRENGTHENING

There are many areas where U.S. trade laws should be strengthened and a number of excellent proposals that have been made. I would like to focus today on several areas of urgent concern and/or where action should first be addressed.

A. WTO Reform

Getting some handle on the problems brought about by judicial activism at the WTO – and reining in those abuses – is an absolute top priority. As noted, WTO overreaching has negatively impacted a vast range of core aspects of the trade remedy laws (not to mention other U.S. laws in the tax, foreign policy, environmental, and other areas), and is increasingly a threat to the legitimacy of the entire world trading system.

Several common sense actions should be pursued immediately:

- First, Congress should establish an expert body to advise it on WTO dispute settlement decisions adversely impacting the United States, and in particular whether WTO decision makers are following the law and the relevant standard of review. This idea was first put forward shortly after the conclusion of the Uruguay Round and has been proposed or endorsed at one time or another by any number of noteworthy figures – including Senator Dole, President Clinton, Senator Rockefeller, as well as the Chairman and Ranking Member of this committee. It was a good idea at the time, and every day we see more and more evidence of why such a body is needed.

- Second, Congress should specifically provide for the participation in WTO dispute settlement proceedings of private parties who would bring special knowledge to a case and be in a position to assist in the U.S. government's litigation efforts. In this regard, foreign governments already frequently make use of private (often U.S.) lawyers in prosecuting WTO actions, and there is no reason the United States should not similarly bring all supportive resources to bear in this increasingly vital litigation.

- Third, any proposed administrative action taken to comply with an adverse WTO decision should require specific approval by Congress. In a number of instances, the Administration has expressed strong disagreement with adverse WTO dispute settlement decisions, and yet felt the necessity to take administrative steps to comply with such judgments. Given the importance of these decisions to the U.S. economy and U.S. citizens – and the obvious sovereignty concerns at stake – Congress should have a direct say in whether there will be a change in U.S. law or practice to comply with the rulings of foreign bureaucrats.

These steps would not only improve the way we litigate cases at the WTO, but would hopefully provide a powerful incentive for reform at the WTO itself -- given the recognition that Congress will be playing a more active role monitoring and responding to WTO decisions.

B. Zeroing

As I mentioned previously, the WTO has struck down the zeroing methodology used by the Department of Commerce to calculate a company's dumping margin. No decision has invited more strident criticism, including from the Administration, than the decisions issued by the WTO on zeroing. This criticism is completely justified. The decisions on zeroing have no basis in the relevant WTO agreements and represent a stark example of WTO overreaching. And although this issue is fairly technical in nature, there is no more important issue in the trade remedies area. The use of zeroing is essential to combat the problem of masked dumping and thereby capture 100 percent of the dumping engaged in by foreign companies. In fact, foreign companies often dump on certain sales to secure accounts in the United States and then sell at higher prices on other sales so as to mask their dumping. If zeroing is not used and non-dumped sales are allowed to offset dumped sales, these companies will be able to dump with impunity and significantly harm U.S. producers. It is not an overstatement to say that the inability to use zeroing will eviscerate the U.S. trade laws.

The Administration has already started implementing the WTO decisions on zeroing by not using zeroing in certain antidumping proceedings, and this is causing enormous problems for U.S. producers. If the Doha Round negotiations do restart in earnest, the Administration's highest priority in the Rules talks should be to seek explicit recognition of the right of WTO members to use zeroing. Until a negotiated solution is reached on this issue, it is imperative that the Administration stop any further implementation of the WTO's fundamentally flawed decisions on zeroing and that it reverse its prior actions to implement such decisions.

C. Applying U.S. Anti-Subsidy Law to Non-Market Economies

Another proposal that has received a great deal of attention is to legislatively mandate that the CVD law be applied to non-market economies like China. Legally, this is clearly a well-justified action, and as noted above the Administration has already announced a policy change to begin applying CVD measures to China.

Even with the Administration's policy change, legislative action is still critical – both to ensure that this policy change will withstand potential legal challenges and that the policy is properly implemented. In this regard, several factors are paramount:

- Application of CVD rules to China should not, and must not, have any impact on its treatment as a non-market economy for purposes of the AD law. These are logically distinct issues, and the evidence is clear that China does not qualify as a market economy. Treating it as such would not only

effectively remove the benefit of applying the CVD law to China; it could actually result in weaker overall fair trade enforcement than existed before the policy change.

- Congress should be required to approve any decision to designate China as a market economy. This decision is simply too important to our economy and our laws for Congress not to have a say.

- Application of the CVD law should not result in weaker enforcement of AD measures against China. In this regard, there is no legal or logical basis for proposals to reduce AD margins by the amount of any countervailing duties imposed to offset domestic subsidies. The antidumping methodology used in nonmarket economy cases is not intended to, and does not, correct for or offset domestic subsidies, and there is as such no basis for the so-called "double counting" adjustments that have been proposed.

D. Currency Manipulation

Another area where action is urgently needed is to address foreign currency manipulation. This problem has received widespread attention for a simple reason – namely that it is completely outrageous. Currency manipulation seriously distorts markets and undermines the very foundation of free trade. It acts as a major subsidy for manufacturers in the manipulating country, because it makes their exports artificially competitive. It also acts as a tariff on U.S. shipments to the manipulating country, by making those shipments artificially expensive.

Our enormous trade deficit with China would normally cause the Chinese yuan to rise significantly vis-a-vis the dollar, but China prevents such a rise by exercising tight control over its exchange rates. Indeed, some experts believe that China's yuan is now undervalued by as much as 40 percent or more. China is not the only country to engage in currency manipulation. Japan and Korea, among others, employ similar tactics.

There has been an enormous amount of talk and posturing on this issue, and it has become increasingly clear to most observers that more serious action is now demanded. There are a variety of sound, sensible proposals out there – including the proposal to treat currency manipulation as a subsidy for purposes of U.S. CVD laws. Those initiatives should be considered and acted upon to spur real change in an area that is simply not sustainable.

E. VAT Tax Inequities

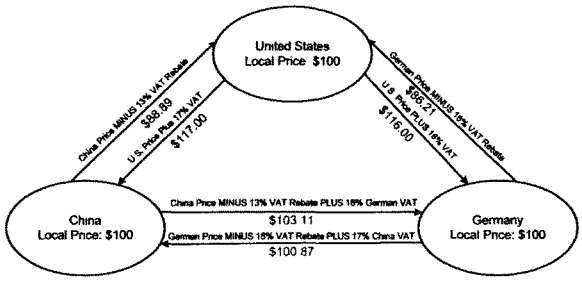
Another significant inequity – less well known but equally damaging – involves the irrational penalty imposed by WTO rules on producers in countries (principally the United States) that rely on income tax systems, as opposed to producers in countries (most of the rest of the world) that rely upon value-added tax ("VAT") systems. For

decades, Congress has repeatedly instructed our trade negotiators to correct this problem, and yet nothing has been done.

The problem is that under current rules, foreign countries may "adjust" their VAT taxes at the border – meaning that those taxes may be rebated on exports and imposed on imports. Meanwhile, income taxes may *not* be adjusted. Accordingly, producers in a country like the United States (which relies disproportionately on a corporate income tax), must bear *both* the U.S. income tax *and* foreign VATs on their export sales, while their foreign competitors may sell here largely tax free. (Figure 8 below shows how this system places U.S. producers at a significant disadvantage). Recent estimates suggest that this disparity likely impacts the U.S. trade balance by more than $130 billion per year. There is no economic justification for this practice; it is simply a gift to foreign producers.

Figure 8

Example of How Current WTO Tax Rules Harm U.S. Manufacturing



Note: Data for Germany and China VAT from the U.S. Council for International Business. See http://www.uscib.org.

The time has come to demand that our trading partners agree to a fairer system. Again, there are a number of good proposals. One approach would be to demand that this problem be rectified in negotiations by a set period (e.g., 1-2 years) – after which period the United States would begin to treat foreign rebates of VAT taxes as a countervailable subsidy (just as rebates of income taxes are now treated). The point again is that action is urgently needed.

F. Funding for Trade Enforcement

Ultimately, our trade laws are only as good as the people and resources enforcing them. Congress should make sure that our core enforcement agency – namely the Import

Administration – is receiving adequate funds and manpower to do the job it is called upon to perform.

G. Congressional Oversight of Trade Negotiations

Finally, Congress needs to become more aggressive in overseeing U.S. trade negotiators. Given the clear constitutional responsibility of Congress with respect to trade regulation, many American manufacturers and workers are depending on you to ensure that U.S. fair trade laws remain effective. Our trading partners have made it a first priority to weaken these core disciplines, and without Congress' direct involvement and resolve, they are likely to succeed. I hope that if an agreement does come back that weakens these vital rules, Congress will oppose it.

V. CONCLUSION

There is no question that our trade laws are under assault as never before, and their efficacy in preserving a fair market for U.S. business and workers is increasingly in doubt. Ultimately, fair trade must be the cornerstone of any manufacturing policy, and is an absolutely fundamental prerequisite for a recovery of manufacturing in this country.

If we continue down our current path for much longer, we will reach a tipping point as U.S. manufacturers will conclude that industry has no future in this country, and they will focus their efforts – and their investments – in foreign markets. If this happens, the effects on our economy, our workers, and our nation will be devastating. I urge you to act now to protect and strengthen trade laws that will allow, and hopefully encourage, manufacturers to remain and flourish in this country.

Response to Question from Senator Grassley
at Hearing on Trade Enforcement for a 21st Century Economy
Robert E. Lighthizer
June 12, 2007

Senator Grassley: **I am troubled by reports that some antidumping petitioning industries use threats of administrative review to obtain cash payments from foreign producers. The petitioners file requests for review of hundreds of foreign companies, and they agree to withdraw requests if foreigners pay up. Anyone who refuses is subject to review and risk of increased duties. I think it raises some issues under the antidumping laws and possibly anticompetitive. Are you aware of the practice and, if so, what if anything should Congress do about it?**

Answer: There have been press reports recently suggesting that the petitioners in certain antidumping cases have used threats of administrative reviews and the possibility of higher antidumping duties being imposed as a result of such reviews to obtain cash payments from foreign producers and exporters. This is not a practice that our firm has engaged in, nor is it one I am familiar with – beyond the referenced press reports.

To put this issue in context, it may be useful to describe how our firm analyzes decisions on whether to request administrative reviews in particular cases. In each case, we analyze the available data regarding the quantities and prices of the imports that are covered by the antidumping duty order. In addition, we analyze the import data and conduct research to ascertain, where possible, the identities of the particular foreign producers and exporters that are shipping the merchandise covered by the order to the United States. Where we have reason to believe that such foreign producers and exporters are or may be dumping at rates higher than the existing rates and it is in the interest of the companies we represent to request an administrative review, we will request such a review. In other words, our determination as to whether to request an administrative review is based purely on the merits of the situation and the need to counteract increased dumping.

To the extent the mere threat of pursuing an administrative review (e.g., for the purposes of harassment and without a good faith basis to believe that increased dumping may be occurring) is being used to encourage responding parties to provide cash settlements, such a practice would certainly raise questions as to both the substance and appearance of impropriety. In considering policy options to address such behavior, it would be important to distinguish such practices from legitimate and good faith attempts to settle trade litigation – something that could inure to the benefit of all parties, that may well be proposed or advocated by respondents themselves, and that could serve to reduce overall costs and litigation expenses. Distinguishing between legitimate and inappropriate settlement activity would not necessarily be easy or straightforward, but establishing some standard could well make sense to the extent there is evidence of a significant problem in this area and to the extent clear dividing lines could be established.

One could foresee, for example, some procedure whereby allegations of improper threats or harassment could be presented. (It would be important, however, to ensure that there is no limitation or discouragement on the ability of petitioners to seek administrative reviews where

they believe such reviews may be necessary to enforce our laws. After all, the very purpose of administrative reviews is to provide exact information as to the level of unfair trade in a given period, thereby ensuring neither the underpayment nor overpayment of duties.) Factors that could potentially be considered in any such procedure would need to be explored, but could include evidence of threats or harassment or affirmative evidence that parties lack a good faith basis to pursue a review.

One possible solution for such conduct, to the extent improprieties were found, could be to require disgorgement of any funds that are paid to avoid administrative reviews and to require that such funds be paid instead to the U.S. government. We would be happy to consult with the Committee or staff regarding other possible solutions to address this practice or to discuss any specific instances in which this practice may have occurred.

Statement of Olympia J. Snowe

Trade Enforcement for a 21st Century Economy
June 12, 2007

Chairman Baucus, thank you for holding this timely hearing on the enforcement of our domestic trade laws and negotiated international trade rules. I would also like to welcome and thank the members of the distinguished panel appearing before the committee today for their time and testimony on this critical issue.

When reflecting on the attributes that have made our great country prosperous– its free market system, its hard-working and enterprising people, its treasured natural resources– we must not overlook the rule of law as an equal, if not paramount element of the blessings we have secured. Since our nation's founding, Americans have recognized that the success of worthy enterprises in a functioning market requires the government– rather than choosing winners and losers– to consistently and dispassionately enforce the rules that bind all actors.

While our legal system evolved over the course of centuries to provide for the rule of law throughout our country, the fates of American people and businesses have become increasingly bound to counterparts in the world beyond our borders. Whether called "Globalization", "Internationalization" or some other moniker, the rapidly growing number of connections between suppliers, consumers and financiers across national boundaries means that agreements breached and laws broken on the far side of the world can harm companies and workers here at home.

Yet our government has failed to adapt to this new reality. While foreign governments engage in market-distorting currency manipulation, refuse to protect intellectual property rights and turn a blind eye to labor exploitation– each a violation of trade obligations to the United States-- ours demurs with communiqués and consultations, only rarely and reluctantly taking formal enforcement action. What makes this abdication of our Government's duty to defend the U.S. economy from unfair foreign practices especially troubling is that the tools to do so already exist in the dispute resolution provisions of various trade agreements.

The distressing reality is that U.S. business and workers are often rebuffed in attempts to petition the United States Trade Representative to initiate a formal investigation or bring a dispute resolution action under the relevant multilateral or bilateral trade agreement. The Administration's handling of domestic industry requests to counter China's currency manipulation practices is representative of the problem, with USTR rejecting multiple petitions requesting enforcement action—in the first instance, on the very day it was filed!

In fact, every single petition filed since 2000 under Section 301 of the Trade Act of 1974– the principal U.S. statute for addressing foreign unfair practices affecting U.S. producers of goods or services– has been summarily rejected by USTR. It is to prevent further disregard for U.S. businesses and workers seeking a fair and consequential hearing of their concerns with foreign trade practices that Senator Rockefeller and I introduced the Trade Complaint and Litigation Accountability Improvement Measures Act, or the "Trade CLAIM Act".

The Trade CLAIM Act would give U.S. businesses and workers a greater say in whether, when and how U.S. trade rights should be enforced, by amending the Section 301 process to require USTR to act upon valid petitions to take formal action in cases where a U.S. trade right has been violated, and by granting the U.S. Court of International Trade jurisdiction to review *de novo* USTR's denials of such public petitions.

In delinking discreet trade disputes from the mercurial machinations of international relations, this act would end the sacrifice of individual industries on the negotiating table, and leave it to the free market– uniformly operating under the trade rules to which our trading partners have already agreed– to decide their fate. I thank Senator Rockefeller and our friend and fellow committee member Senator Conrad for their cosponsorship of this legislation, and would urge our other colleagues on this committee to examine and support this innovative approach to the enforcement of our trade laws.

Chairman Baucus, as this committee, the Congress and the country approach a potentially contentious debate over the expiry of the "Fast-Track" Trade Promotion Authority, it is important that we recognize that a solid consensus has nonetheless grown around the principle that, whatever our trade laws may be, they should be consistently and vigorously enforced. With this hearing, we begin the process of turning that principle into policy. Neither America's businesses and workers, nor I, will be satisfied with anything less.

Thank you.

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