

TRADE ENFORCEMENT ACT OF 2007

HEARING
BEFORE THE
COMMITTEE ON FINANCE
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

ON

S. 1919

MAY 22, 2008



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TRADE ENFORCEMENT ACT OF 2007

TUESDAY, MAY 22, 2008

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

The hearing was convened, pursuant to notice, at 10:09 a.m., in room SD-215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Lincoln, Stabenow, Salazar, Grassley, and Bunning.

Also present: Democratic Staff: Bill Dauster, Deputy Staff Director and General Counsel; Amber Cottle, International Trade Counsel; and Demetrios Marantis, Chief International Trade Counsel. Republican Staff: David Ross, International Trade Counsel; and John Kalitka, Detailee.

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

The CHAIRMAN. The hearing will come to order.

In "Measure for Measure," Shakespeare wrote, "The law hath not been dead, though it hath slept."

The same could be said of our trade enforcement laws.

The administration has many tools to enforce trade agreements and trade remedy laws. It has the World Trade Organization Dispute Settlement Body to resolve violations of WTO agreements. It has section 301 to fight market access barriers. It has Special 301 to address intellectual property infringements abroad. And it has section 421 to remedy Chinese import surges that cause injury here at home.

But having these rules on the books is not enough. The Government needs to enforce them.

We in Congress often single out the Office of the U.S. Trade Representative for not doing enough to enforce our trade agreements. We sometimes forget that, in recent years, USTR has launched some significant enforcement cases. It has brought cases, for example, against China's weak intellectual property enforcement regime, against Mexico's discriminatory telecommunications barriers, and against European aerospace subsidies.

But USTR can and should do more. And Congress can help USTR to do more by updating its trade enforcement tools. Many of the trade enforcement tools that USTR uses today were created decades ago. Congress created them to address different problems, in a very different world.

For example, in 1974, Congress created section 301 to begin opening foreign countries to American exports. But the rules that govern our trade with those countries have changed dramatically since then.

In 1974, America was party to one trade agreement—the General Agreement on Tariffs and Trade, or GATT. Since then, the GATT has been dismantled, the WTO has been established, and America has entered into 11 bilateral and regional trade agreements. A complex web of interconnecting and often contradictory rules now regulates our trade with other countries.

Our economy has also changed since 1974. Exports are more than 10 times higher. The Internet and other forms of electronic trading have revolutionized international commerce. And America has shifted from a goods-based economy to a services- and knowledge-based economy.

But our enforcement tools have not kept pace.

That is why I introduced the Trade Enforcement Act of 2007 with Senators Hatch and Stabenow. It can help to ensure that the administration has the resources that it needs to enforce our existing trade laws. It can help to provide accountability when the administration does not enforce those laws. And it can help to create new tools to address the enforcement priorities of the 21st century.

The bill would significantly bolster enforcement of our trade agreements abroad. Among other things, it would require USTR to provide an annual report to Congress identifying its trade enforcement priorities for the upcoming year. And it would create a Senate-confirmed Chief Enforcement Officer at USTR to ensure that those priorities are thoroughly investigated and prosecuted.

It would also bolster enforcement of our trade remedy laws here at home. It would limit the President's ability to deny relief in section 421 China safeguard cases. That has happened all too frequently in recent years.

And it would help U.S. companies to obtain relief from subsidized imports. It would clarify that the Commerce Department may apply countervailing duties to nonmarket economies.

So let us wake up our trade laws. Let us ensure that the administration enforces them as much as it can. And for the sake of our farmers, ranchers, manufacturers, and service suppliers, let us ensure that our trade laws do not remain asleep.

Senator Grassley?

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

Senator GRASSLEY. Well, thank you, Mr. Chairman, for holding this hearing. I told you privately, I am going to have to go down to Judiciary when we are done with my statement because I have to help make a quorum. But I wanted to tell the panel members that I might not be here to hear your statements.

Effective enforcement of our trade agreements is, of course, an important and necessary priority. If we want to maintain the benefit of the bargain, we need to make sure that our trading partners respect the rules that they have agreed to. That is also important if we want to sustain broad support for creating more open inter-

national trading relations, and that is all critical to our future economic growth.

This responsibility, of course, is chiefly executive. If the administration fails to take action when our trading partners ignore the rules, no one should be surprised if we start to hear complaints. That said, I am not convinced by those who say this administration is failing to enforce the rules effectively. For the most part, I think the real problem is that people are complaining about practices that are not even subject to rules yet.

If we really want to get serious about enforcement, we should renew the President's trade promotion authority, and then, after that, we will be able to send our negotiators out to solve the problems that are not currently subject to rules, in other words, get more rules-based. That is whether we are talking about energy, autos, or whatever else you might want rules and enforcement on. That is the only way that we will get some resolution of these very tough issues; they will not solve themselves.

I am also concerned that the premise that enforcement is measured simply by the number of cases filed—as if a failure to file a certain number of cases necessarily means that we're not doing a good job of enforcing our rights—that strikes me as being overly simplistic. Litigation is not synonymous with effective enforcement. Often, the best way to enforce the rules is to negotiate, not litigate. Sometimes, even if you have a good legal case, you may not be able to eliminate the problem through litigation.

I will give you an example from a farming area that I am concerned about, because over 10 years ago we filed a case against restrictions on our beef exports to Europe. Now, we won that case, but the restrictions still remain. So that would bring up the question, should we view the beef case as a failure to enforce the rules or does the beef case illustrate that there are limits to what litigation can accomplish? The availability of dispute resolution is a good backstop, but it is most effective when it helps to avoid years of litigation. We know about years of litigation; sometimes we benefit and stretch out that process, sometimes when we are promoting the case we find fault with how long it takes.

The administration has succeeded in resolving a number of disputes, such as with China. Now, we always have problems with China. Everybody feels we are not doing enough. I feel we ought to maybe file more cases than we have. But often we have won without having to litigate to get there. While we certainly need to see much more from China in terms of compliance, that is one example of what I mean by effective enforcement. Our trade agreements offer another means of establishing a strong legal framework for international trade. Without such frameworks, there are not any rules to enforce.

Take, for example, our pending trade agreement with Colombia. Once the agreement enters into force, Colombia will be obligated to effectively enforce labor laws related to core internationally recognized labor rights, as stated in the 1998 International Labor Organization Declaration of Fundamental Principles and Rights to Work, and that obligation will be enforceable under the terms of our trade agreement—but not until that trade agreement is approved. For those who profess to care about enforcing labor laws

in Colombia, our trade agreement is an important tool in achieving that goal.

There is nothing to be gained by forestalling congressional consideration of trade agreements once they are worked out, because there is much to lose. If there is advantage to our negotiations, to our President signing trade agreements, we ought to move along, get them approved, get the enforcement tools that are available, and make use of them, because our trading partners are not idly standing by.

Colombia has almost completed negotiating a trade agreement with Canada, and the European Union is negotiating with Colombia. Delay only harms American workers and exporters who face the prospects of being placed at further competitive disadvantage with the second-largest market in South America.

An implementation agenda is, thus, part and parcel of an effective enforcement agenda. Today we look forward to hearing testimony on these. If there are portions of the bill that may be counterproductive, we should know that, and I hope you will say so. If there are portions that can be improved, we should know that, too.

I am also interested in hearing whether there are other things that we can do to invigorate our enforcement efforts. For example, does USTR have sufficient resources and staff or should additional resources be authorized? I thank each of the witnesses for preparing for this hearing.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator, very much.

Now I would like to introduce our witnesses. Before I do, I would like to say that Senator Rockefeller cares deeply about this subject, but he was unable to be here today. He expresses regrets. He is at his son's graduation, and unfortunately we could not get Johns Hopkins to move its commencement date to accommodate this hearing, so he unfortunately is not here.

Our witnesses today are, first, Warren Maruyama, the General Counsel at USTR. He is responsible for enforcing U.S. trade agreements. Following Mr. Maruyama is Lael Brainard, director of the Global Economy and Development Program at the Brookings Institution. Ms. Brainard previously served as the Deputy National Economic Adviser in the Clinton administration. The third witness is John Magnus, president of TradeWins, a trade law and policy consulting firm. Finally, we welcome Robert Atkinson, the president of the Information Technology and Innovation Foundation.

As I am sure you all know, our usual practice here is that all of your statements will automatically be included in the record, and we would ask each of you to restrain yourselves to about 5 minutes. We will give you a little leeway, but about 5 minutes.

Mr. Maruyama?

**STATEMENT OF WARREN MARUYAMA, GENERAL COUNSEL,
OFFICE OF THE U.S. TRADE REPRESENTATIVE, WASHINGTON, DC**

Mr. MARUYAMA. Chairman Baucus, Senator Grassley, members of the committee, I appreciate this opportunity to testify about the Office of the U.S. Trade Representative's enforcement agenda and our views on S. 1919.

At USTR, we know that our job is both to negotiate and enforce trade agreements. Without enforcement, a trade agreement is just a piece of paper. As Congress and this committee have made clear, the American people expect the USTR to hold foreign governments to their trade commitments. Accordingly, we are committed to using every tool in the U.S. trade arsenal to ensure a level playing field for American workers, farmers, manufacturers, innovators, and entrepreneurs.

As General Counsel, a big part of my job is making sure that trade agreements are enforced. This March, we initiated a major WTO challenge against China's Xinhua for erecting barriers to our financial information providers. We are litigating with the European Union in the WTO on the launch aid subsidies for Airbus, undue delays in approving our biotech products, and its prohibition on hormone-treated U.S. beef. During the last year, we launched two arbitration proceedings against Canada under the softwood lumber agreement.

Effective enforcement requires the flexible and creative application of a wide range of techniques, tools, and strategies. In dealing with foreign barriers, our initial preference is negotiation, since a negotiated solution is typically quicker, more certain, and more clear-cut. But if that does not work, we will analyze the potential for a successful WTO challenge.

In fact, the United States has launched more WTO disputes than any other WTO member. Of the 373 WTO cases that have been initiated through May 1, the United States was the complainant in 89, or almost one-quarter. Our winning percentage in fully litigated offensive cases is almost 95 percent. What is more, we have been able to successfully settle about one-half of our disputes on favorable terms so that our industries do not have to wait 3 years or longer to get relief under the WTO's procedures.

In the last 16 months, we have filed four WTO cases against China, challenging China's prohibited export and import substitution subsidies, failure to adequately protect intellectual property rights, market access barriers to copyright-intensive products—our books, movies, videos, and sound recordings—and Xinhua's barriers to foreign financial information providers.

Last November, we successfully settled the prohibited subsidy case with China's agreement to eliminate all of its WTO-illegal subsidies effective January 1, 2008. We are eagerly awaiting the final panel report on China auto parts which is due in July. Our challenge to the European Union's launch aid subsidies to Airbus has been fully briefed and argued, and we are awaiting a decision by the panel.

We welcome the committee's commitment to ensuring we have the tools necessary to carry out our enforcement duties, and we look forward to continuing our close partnership. However, we cannot support S. 1919 in its present form. First and foremost, we oppose new restrictions on the President's authority to review ITC determinations under section 421. Making 421 relief virtually automatic could threaten the public interest and invite retaliation against some of our leading exports.

Second, there are concerns with the proposed Super 301 procedures. Super 301 may have had utility at one time, but today the

WTO and NAFTA have given us a new set of tools, and the USTR has shown that it is more than willing to use them. The inflexibility of Super 301 could force USTR to bring cases at the wrong time, in the face of industry opposition, or in situations where the risk of failure may be unacceptably high.

We do not see what the new USTR Chief Trade Enforcement Officer or Trade Enforcement Working Group would add to our enforcement process. Since we are already required to consult with the Section 301 Committee or the Trade Policy Staff Committee, the Working Group could be a new bureaucratic hurdle that leads to delays in enforcing U.S. trade agreements.

Finally, we hope the committee will reconsider the need for a commission to review WTO decisions. USTR has already demonstrated that it is fully prepared to criticize flawed WTO decisions, and I urge you to look at our comments yesterday to the WTO dispute settlement body about the Mexico zeroing case. We have publicly stated that the WTO's appellate body overreached in its zeroing decisions, which represent, in our view, an egregious case of misplaced judicial activism with no basis in the WTO agreement.

In conclusion, Mr. Chairman, I want to assure this committee that we are eager to work with Congress to enforce our trade agreements. If you have a constituent with a strong WTO case, we want to hear about it.

I would be happy to answer any questions you may have. Thank you very much.

The CHAIRMAN. Thank you, Mr. Maruyama.

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

The CHAIRMAN. Ms. Brainard, you are next.

STATEMENT OF LAEL BRAINARD, VICE PRESIDENT AND DIRECTOR, GLOBAL ECONOMY AND DEVELOPMENT PROGRAM, BROOKINGS INSTITUTION, WASHINGTON, DC

Ms. BRAINARD. Chairman Baucus and distinguished members of the committee, I am very honored to testify today on the Trade Enforcement Act of 2007, S. 1919.

I wanted to first place that act in a broader context and then talk about some of the specific provisions and how they address the current context. Broadly speaking, I think we are in the middle of a period of breathtaking global integration that really is just of a different magnitude and a different scope than previous episodes.

Right now we are in the process of integrating an expansion of the labor force around the world of about 70 percent, which is quite a startling period if you think about it, with the entry of India and China, and as everybody knows, with wages less than a tenth of the level prevailing in wealthy economies. That is more than 3 times bigger than previous episodes if you think about Asia, Japan, South Korea, and the Asian tigers back in the 1970s and 1980s, and it is much larger than the integration of the North American market, which also, I think, was an important event.

These trends are affecting everyone in the U.S. economy. Everybody is now, in some way or another, exposed to trade. Even those workers who used to be in white collar jobs, which were really very

much segmented from international competition, are now finding themselves competing with services provided in low-wage places such as India.

While some are very well-placed to take advantage of these new opportunities, progressively deepening trade deficits and a sharp 20-percent decline in manufacturing jobs over the past 7 years have contributed to deep and growing concerns among more and more Americans about the benefits and the fairness of trade, and those trends go across income classes, education classes, and even across party lines.

What are we going to see into the future? More and faster of the same. The G-7 economies have really dominated the world economy with about a 65-percent share for over 35 years. In the last 5 years alone, their share of the world economy has slipped by about 10 percent, and over the next 40 years they are going to slip to about a quarter, while the rising economies are going to dominate more than 50 percent of world income.

So what do those trends mean? They mean we have to compete effectively in international markets in order to guarantee future prosperity. They mean that Americans need to see that trade is both beneficial and fair. The administration has been very busy signing a lot of trade agreements. I think many Americans are wondering whether any of those rules are actually bringing benefits to them.

So let me quickly go through how big an increase in activity we have seen. In terms of the actual increase in trade, U.S. exports and imports have grown by over \$1.4 trillion in the last 7 years. The WTO has expanded to include 12 new members, chief among them, of course, China, the world's fastest-growing and most populous nation, which we know does not have internal enforcement mechanisms for its own food safety, let alone some of the trade rules that we are asking them to comply with. The number of countries with which the United States has concluded free trade agreements has expanded by 16, and, for each of those trade agreements, they are vastly more complex, with many more disciplines and rules than we used to have.

With those trade volumes shooting up, the disciplines expanding out, and trade agreements spreading to countries with weaker oversight capacities, you would naturally expect the number of trade disputes and the number of trade enforcement actions to rise. GAO analysis tells us that, in fact, non-compliance has increased, as documented by the interagency process. Enforcement actions have fallen. In fact, if you look at the Clinton period, or just that first 7 years of the WTO, 11 actions per year. If you look at the last 7 years, 3 per year. If you thought about just the volume of trade expanding and trade enforcement expanding at a constant rate, you would expect it to be around 17.

Now, at the end of the day enforcement actions are not the right measure. It is the amount of compliance. That is what we should be looking at, and we do not see that improving the way that one would want.

So let me just quickly point to some of the provisions of the Trade Enforcement Act that I think would be helpful. I think it would be helpful for USTR to have a senior-level person who wakes

up every day with a job of investigating and prosecuting enforcement. I think they should welcome additional resources—\$5 million in additional help from an interagency working group—to proactively prioritize compliance actions. I think that they should welcome the help that would be brought by a very carefully crafted version of Super 301 which is currently in this bill.

Thank you.

The CHAIRMAN. Thank you, Ms. Brainard.

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

The CHAIRMAN. Mr. Magnus?

**STATEMENT OF JOHN MAGNUS, PRESIDENT,
TRADEWINS, WASHINGTON, DC**

Mr. MAGNUS. Thank you, Chairman Baucus and other members of the committee. Good morning. I am, likewise, honored to participate in this hearing before you and in the company of such distinguished experts. I congratulate you for moving ahead with consideration of S. 1919. The bill tackles important topics, and it proposes solid solutions.

I am going to go through the titles in the order that they appear in the bill.

Title 1 establishes an updated version of the Super 301 mechanism for identifying and prompting action on the highest-priority foreign barriers to U.S. trade. I always regarded Super 301 as a useful element in U.S. trade policy, and I would welcome its return in the form that your bill proposes.

Actually forcing action by the executive branch with respect to any trade barriers, of course, is a difficult matter. I think that the “shall” provisions in amended section 310 may give rise to some disagreements, but also will provide some useful jolts of electricity. This can legitimately be part of a new architecture of energized cooperation between the government’s political branch and trade policy.

Title 2 establishes a commission that is empowered to review WTO decisions that are adverse to the United States and to opine as to whether the reasoning and outcomes of those decisions are legally sound. Having such a commission is a good idea. The need for it has not diminished over the years since it was first proposed in 1994. An objective second look at adverse WTO decisions, creating additional inputs for the political actors in the U.S. Government who must decide what to do is something that we should welcome. It can be expected at least to promote fully informed political decisions, and at best to bolster public confidence both in the WTO rulings themselves and in the U.S. Government’s responses.

I have personally devoted a lot of professional time to helping with the defense of U.S. measures that should have survived WTO review, but did not. There is a real problem and a number of reforms are needed, both in the rules and procedures of the WTO dispute system and in the way the United States participates in that system.

Title 3 of the bill assigns Congress a role in the decision made after the ITC finds that the criteria for import relief in a section 421 case are satisfied. This, too, is a sensible reform. Some political

review before imposing relief is appropriate, but that political review can include a role for both of the government's political branches so long as the new arrangements preserve efficiency and respect a rule against legislative vetoes.

Title 4 has two good provisions involving the antidumping and countervailing duty laws. Section 401 confirms that the countervailing duty law applies to products imported from non-market economies. As a policy matter, it makes sense for the law to reach these imports now that the Commerce Department is confident about identifying and measuring the subsidies involved.

The need for legislation is debatable given what Commerce has done on its own, but court approval for Commerce's new approach has not yet been secured, and in any event legislative clarification cannot be harmful. Processing countervailing duty cases involving China may in time lead to Commerce having to grapple more deeply with currency subsidies.

Section 402 of the bill overturns a line of court decisions that impose an additional requirement for obtaining relief under both the antidumping and countervailing duty laws, forcing the International Trade Commission to speculate about whether the benefit of import relief will flow to domestic producers. These court decisions were mistaken ones. They have caused a significant problem in the enforcement of the affected statutes, and they deserve legislative correction.

Title 5 on trade enforcement personnel, which has received a lot of attention this morning, proposes to create a new Senate-confirmed position at USTR with enforcement responsibilities, the goal being to increase the level of enforcement activity and reduce the likelihood of good enforcement initiatives dying on the vine. I share the goal and would only raise a note of caution with respect to expectations because I do not think this reform alone is going to function as a magic bullet. There have been grounds for criticizing enforcement decisions made in each of the last several administrations.

In my judgment, the hyper-caution that functions as a wet blanket over our enforcement program is the true culprit, and it has many sources. Congressional oversight and occasional pressure have been hugely important in maintaining trade enforcement at a reasonably active level. Looking forward, I would advise you to prioritize, addressing the hyper-caution problem at its sources, as you do in other titles of the bill.

If you do legislate on personnel issues, I would urge you to correct a serious mistake from the mid-1990s by repealing the Lobbying Disclosure Act provisions that permanently disqualify individuals from serving in high-level trade positions on the basis of past work on trade disputes for foreign interests. These provisions are unjust at an individual level and unwise at the level of public policy in attracting top-flight talent into government service.

I savor your title 7 of the bill. I think it could help on inter-agency trade organization. I think it could help to reduce the structural problem that makes it harder than it should be for robust trade enforcement actions to achieve lift-off within the U.S. Government. Trade officials are perennially at risk of seeing their market-opening initiatives blunted through input from other agen-

cies more senior in the Cabinet structure whose portfolios lead them to prefer calm and patience. I think clarifying the consultative nature of the relationship there is a good step.

In conclusion, the committee is doing important work by advancing its consideration of S. 1919, acting in its own best traditions and in the public interest. I am very pleased to have a chance to offer a practitioner's viewpoint, along with my ongoing support as the committee takes this work forward.

Thank you.

The CHAIRMAN. Thank you, Mr. Magnus.

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

The CHAIRMAN. Mr. Atkinson?

STATEMENT OF ROBERT ATKINSON, PRESIDENT, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION, WASHINGTON, DC

Mr. ATKINSON. Thank you, Chairman Baucus and members of the committee. It, too, is an honor to be here today, and I commend you for addressing this important issue.

I want to start by talking about how our trade system has changed. It has changed basically in many, many ways, but let me just list two that I think are important to this hearing.

One, over the last decade we have seen the rise of several nations, particularly India and China, that now are so large and have such control that they are able to exert monopsony power over foreign terms and essentially dictate terms of trade. If you do not like their mercantilist policies, you can leave. If you complain about them, you get squeezed out of the marketplace.

Second, and even more important, in the last decade a growing share of nations has set its sights precisely on the sectors that the U.S. economy specializes in and is most competitive in, and that is knowledge-based/technology-based advanced production and business services.

So to get those jobs, they are not just relying on things that we would rely on—government support for research and development, good universities, and the like. They have decided they are going to impose a whole new set of aggressive, what we would call Protectionist 2.0 strategies. ITIF documented these in a recent report called “The Rise of the New Mercantilism: Unfair Trade Practices in the Innovation Economy.” Let me just allude to a few of these.

One of them is antitrust enforcement. We use antitrust enforcement in this country to protect consumers; many other countries do it as a way to protect domestic producers. We have seen this in the EU and Korean cases against leading U.S. technology companies, including Microsoft and Intel.

Rampant IP theft. We hear a lot about that, and it is real. One of the best examples is the fact that the Chinese government itself uses pirated U.S. software on their computers. They do not even buy enough of it and they are using it themselves. So when they say they cannot enforce it, it is really a question of, they will not enforce it.

This really hit home to me over the holidays. Over the holidays I was in Guangzhou, over Christmas, and I went out with my fam-

ily to an electronics mall. I saw there just scores of stalls selling iPods, only they were not iPods, they were fake iPods with the iPod logo on them. This was less than a mile and a half or 2 miles from the U.S. consulate. So it is not as if these things are hidden. They are wide open.

There are a whole slew of other practices. Forced technology transfer. If you do not give them the crown jewels in technology and research, you do not get market access in many of these countries. Use of government standards to keep out foreign products and services. Discriminatory taxes on foreign companies to favor domestic ones. Restrictions on software uses, encryption, and other types of technologies.

But even tariffs have been reengineered for Protectionism 2.0. The best case of this now is what the EU is doing. In 1996, the WTO passed, in large part with American leadership, the Information Technology Agreement, which was probably one of the most important trade agreements in the last 20 years, I would argue. It was supposed to eliminate tariffs on a whole wide variety of IT products, and the result of that has been significant economic growth around the world through the greater use of IT products.

Europe is a signatory to the ITA so, having a limit on many of its IT products, it is difficult for them to come right out and say we are going to eliminate the Act or reimpose the tariffs. Instead, what they have done is a more subtle trick. They have decided to simply reclassify IT products and call them something else.

So, for example, the computer that I have, the monitor I use on my desk at work, is a 21-inch Dell flat-screen LCD monitor. The Europeans just simply decided that is going to be a television. When you call it a television, you can put a 14-percent tariff on it. When you call it a monitor, you cannot put a tariff on it. They are doing this on a whole slew of other products that have changed slightly, that have innovated slightly since the 1990s, and they are going to keep doing it unless we take aggressive action against them.

Overall, I would say these highlight the fact that we need much more aggressive trade enforcement. I think our trade policy suffers from two major limitations. The other speakers have alluded to that. First, it largely is focused, particularly in the last 8 years, on opening new trade agreements but not on keeping markets open with aggressive enforcement.

Second, many of these new Protectionism 2.0 practices fall under the radar screen of the USTO and traditional WTO processes. That is why we believe that the Trade Enforcement Act of 2007 is an important step forward. At the most basic level it will send an important signal to USTR specifically, and the U.S. Government generally, that it must rebalance its approach to trade and make enforcement a much larger component of its trade policies. In that regard, title 1 is an important step to ensure that USTR focuses much more actively on trade enforcement.

For those who say that measuring simply WTO cases is an inferior measure, I would argue it is quite a valid measure, and along that measure, as Dr. Brainard has pointed out, we have fallen behind. But I think the other measure is simply, when you go out and look at the scope of these practices that we have uncovered—

and we have uncovered these only in a slice of our economy, which is the technology slice—the scope of these practices is quite significant. The fact that these practices exist is not being challenged, and that other countries are using them with impunity suggests to me that we simply are not doing enough.

Why is it that USTR has let the balance shift away from enforcement? I think there are a number of reasons. Partly it is financial, that bringing cases costs money. That is why boosting the budget is important. Partly it is cultural, though. It is a lot easier to go out and bring new agreements, but a lot harder to go out and be the bad cop who is always confronting these other countries and some of the colleagues that trade officials always deal with, to have to actually be the bad cop there. I think what you are doing would help move that along.

One last part. I would argue that one of the other advantages other nations have is that they are able to do a lot more of this and take the burden off their companies. In the U.S., we have a public/private partnership in a sense. We rely on companies to do a lot of the legwork for USTR when they bring cases. That is why ITF has proposed letting companies take a 25-percent tax credit for the costs involved in bringing a WTO case. We think that would help bring more action there.

Lastly, I just want to state there are people who would argue that, somehow, enforcement is somehow antithetical to support for free trade. I would argue it is just the opposite. If we are going to continue support here and around the world for a robust trading system, enforcement has to be a key component of it. In my view, unless we really step up to the plate and make enforcement a much bigger role, we will not get the support of Americans for globalization and free trade.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Atkinson.

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

The CHAIRMAN. This world is getting much more complex with the rise of globalization, was Ms. Brainard's point. Mr. Maruyama, why should the United States not have on the books the most aggressive enforcement tools at its disposal? I say that in part because other economies, other countries' attitudes and cultures are a bit different. It may be changing a little bit, but we in the United States pride ourselves in being a process-based country, rooted in the Constitution, fairness, civil rights, et cetera.

Other countries are a bit more results-oriented, a little less process, more results. Forget the process. From their point of view, it is the results, the exports, to get those products into the United States, irrespective of any process. That may have changed a little, I do not know. I think the WTO perhaps is helping a little bit.

But my premise really is, eventually we are going to move—the world is going to move—much more to a process-based approach to trade, and there has to be some common denominator, at least there should be. So why would the United States not, why would you, USTR, not want all the tools at your disposal to make sure that we are being treated “fairly” because we are a process country?

Mr. MARUYAMA. Senator, we completely agree that effective enforcement has to be a very high priority—and it is. We think we also have the tools in our hands right now to enforce U.S. trade laws. During the Uruguay Round, one of the big U.S. objectives was a stronger WTO dispute settlement mechanism that would avoid some of the problems that had come up under the GATT. Effectively, we got it. We have a process where there are arguments by the parties, there are rulings by independent panels, there is an appellate mechanism, and it is all backed up by the threat of sanctions if a party does not comply with the rules. So, we have those tools.

The CHAIRMAN. Let me change the question. Would this bill not give you more tools? Would you not, as an agency—ostensibly to enforce the U.S. trade laws—want all the tools you could possibly get? So what is wrong with more tools?

Mr. MARUYAMA. Well, sometimes if you have too many tools or you have too much process, you can get bogged down, and that is part of our concern about some of the tools in the bill. A new working group. We already go through, as I think Lael can testify, a very extensive interagency process.

The CHAIRMAN. Yes, but it waters it down. It limits you. It does not help you, it limits you.

Mr. MARUYAMA. And then we would have, under the bill, a new process they would have to go through, so there would be a new bureaucratic hurdle that we would have to jump through in order to launch a WTO case.

The CHAIRMAN. But again, why would you not want more tools? You can use the tools at your discretion. For example, in this legislation they are asking you to set priorities and give you a menu of options you can take. Why would you not want that?

Mr. MARUYAMA. Well, the purpose of Super 301 was to force the administration to bring section 301 cases at a time when the WTO did not exist. Now we have the WTO, and I think USTR's track record has shown under both administrations that we are ready, willing, and able to use it. We have brought four cases against China in the last 16 months. The Airbus case is a major systemic challenge to the way that the EU has subsidized its industry. So there is no, as I see it, blockage, hesitation, or cold feet about going after our trading partners who are not playing fair.

The CHAIRMAN. What about the EU changing tariff lines, as mentioned by Mr. Atkinson?

Mr. MARUYAMA. Well, I think I would agree with many of Mr. Atkinson's points. But I think a lot of what he said has bolstered what Senator Grassley said at the outset of this hearing. There are certain practices out there that really are not reachable under the current rules. It is not illegal right now to have a tariff. The standards disciplines in the WTO are pretty weak. Antitrust competition policy really is not covered by the WTO, so to get at that sort of stuff you need new trade promotion authority, and you need to do a new round that brings those under some form of WTO disciplines.

The CHAIRMAN. I do not agree with that, frankly. I do not think that is the remedy.

I might ask Mr. Atkinson, what action could the United States commence today with respect to the changing tariff lines, and does this legislation help? Would that be helpful?

Mr. ATKINSON. Well, I think in some areas it is a little harder to do things, but in many areas we have the ability to do things now. For example, the notion that we need more trade agreements in order to prosecute some of these types of Protectionist 2.0 practices: many of the countries we allude to—in fact most of the countries that we document in that report—are already members of the WTO, or we have our own trade agreements with them.

Vietnam is a good example. We concluded a trade agreement with Vietnam, and yet, after that trade agreement, they had discriminatory taxes on U.S. IT and computer parts that go into Vietnam. So, there is an awful lot we could do on these; we just are choosing not to do them. I think your bill would lend support to that, and more importantly would make it clear that that is the big role for USTR right now.

The CHAIRMAN. Thank you.

Senator Bunning, you are next.

Senator BUNNING. Thank you, Mr. Chairman.

I appreciate your participation, panel.

Mr. Maruyama, yesterday the WTO released a report that criticized China for keeping its currency undervalued. As you know, China is running a huge current account surplus with the rest of the world, and our bilateral trade deficit with China last year reached historical levels. Last year, it was \$256 billion.

Based on China's current account surplus, most trade economists believe China's currency remains substantially undervalued, and the recent appreciation is better explained by movement in the dollar. Article 15 of the GATT requires WTO members to maintain currency policies that do not frustrate the intent of the GATT. Assuming China was violating article 15, would USTR have the resources to challenge currency manipulation, and how would you go about it?

Mr. MARUYAMA. Senator, on matters of exchange rate, this is longstanding. USTR, and I think every agency of the U.S. Government, defers to the Treasury Department.

Senator BUNNING. We have a problem there.

Mr. MARUYAMA. Secretary Paulson has determined that the best approach to the exchange rate issues is high-level bilateral and multilateral engagement with China.

Senator BUNNING. Balking.

Mr. MARUYAMA. We do not think that a WTO dispute is the best way of getting at exchange rate disparity.

Senator BUNNING. Well, sir, we have been talking for 3 years and getting absolutely zero progress, so that is completely unsatisfactory.

Another question. I note, Mr. Maruyama, that USTR has won another battle this week in the long-running banana case at WTO. As Ambassador Schwab stated, this is the eleventh win against the European Union. I am pleased that we won, but I wonder if winning means anything here. What enforcement steps does USTR intend to take to ensure full compliance? You know, we have won before, and we have had no compliance.

Mr. MARUYAMA. Well, my understanding, Senator, is that right now the EU is negotiating with some of the Central American and Latin American banana suppliers to try to reach a settlement. We would hope that that would lead to something that would work for all the parties. It is a difficult negotiation because some of the suppliers have different and varied interests.

Senator BUNNING. Some of us think that the WTO is a toothless tiger.

Mr. Atkinson, I am troubled by what you describe in your testimony as the new mercantilism practiced by developing countries. Among other strategies, you say that some countries have decided that theft of our intellectual property is a legitimate path to growth. U.S. law enforcement and intelligence officials have testified repeatedly about determined efforts of the Chinese government to obtain our industrial secrets by spying and by other means. There are many examples, some of them cited in your testimony. Our comparative advantage in trade rests, to a large degree, on intellectual property. What should we be doing to turn this tide in this area?

Mr. ATKINSON. I think we need to do several things. At the most specific level, we need to bring more cases. Part of what we can do is actually go out and document that these cases are actually going on, that these practices are going on. We are not doing enough of that. We need to do more of that. We need to bring more cases. We also need to renegotiate TRIPS, the agreement on intellectual property, to have it with more teeth, with more enforcement.

Finally, while I think that this bill is a critical, important step, I think it is only the first step. What we need is, we really need to have a fundamentally different approach to trade policy in this country. Other countries simply, as the chairman alluded to, are looking at this—we look at trade basically from the perspective of consumer welfare. These other countries are looking at it largely from producer welfare, not just developing countries, either—Europe, Japan. We need to be much more aggressive at all levels in our government. The President and other officials in the government need to say this is just simply not acceptable when we are almost the only Nation in the world that is running a trade deficit. Almost every other country is—

Senator BUNNING. Let me get to one other thing, and I think it is very important. In WTO dispute settlement, overall statistics—during the Clinton administration the U.S. initiated 60 offensive cases. During the Bush administration we have initiated 25. Of course, we have a little better percentage settlement on the offensive cases. But if you are not going to initiate cases, you are not going to get enforcement. I am telling you that, if the WTO and our Trade Representative will not fight for our corporations, then who is supposed to do it? That is the reason we have S. 1919, to give you more tools. I think you ought to appreciate the fact that the Congress is trying to give you more tools to use.

Thank you.

The CHAIRMAN. Thank you, Senator, very much.
Senator Stabenow?

Senator STABENOW. Thank you, Mr. Chairman.

First, I would ask that a complete, full statement be placed in the record on my behalf.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Stabenow appears in the appendix.]

Senator STABENOW. Thank you. A letter signed by myself and 11 other members was just sent to the President, asking that he not—urging in fact, that he not—bring forward the U.S.-Korea Fair Trade—Free Trade Agreement; I wish it was a fair trade agreement—Free Trade Agreement until we truly enforce, and have enforcement tools in place, and enforce our trade rules.

I believe that this topic is one of the most fundamental topics before the United States going forward in terms of our economy, and I appreciate all of you being here. I think those who say it is protectionist versus free trade are really missing the boat. Mr. Atkinson, I very much appreciate your comments around that. I think this is about how we compete in the global economy and keep our standard of living, and keep the middle class of this country.

We can either compete down to the lowest wage and a lower standard of living or we can compete up, with education, innovation, and a level playing field on trade. That is the choice. I come from the great State of Michigan, that has been, at the moment, sort of the poster child for what happens when this country does not get it, when our government is not fighting for our businesses and our workers.

Mr. Maruyama, I appreciate that the administration, the USTR, has finally brought forward a case with China on U.S. auto parts. But because of the slowness of that and how long it has taken, we have lost six auto parts companies to bankruptcy in this country, and hundreds of thousands of jobs because of the inability to move quickly. I could go from industry to industry to industry on that front.

Mr. Chairman, I very much appreciate the bill you have introduced, and I appreciate your including a provision that Senator Lindsey Graham and I have been advocating regarding a Senate-confirmed chief enforcement officer. I think this brings very important accountability to that position, and also emphasizes the fact that Ambassador Schwab has basically laid out a budget for USTR, where one-quarter of it goes to enforcement and three-quarters to new trade agreements, which does not make any sense to me either.

I also want to thank Senator Bunning. It has been my pleasure to work with Senator Bunning on the issue of China currency manipulation, and I feel strongly about adding to the good work that the Finance Committee did in including other tools, like countervailing duties, in that. So, I appreciate his advocacy on that.

There are many things that I would ask and say. I feel very strongly about this issue. But I would start, Mr. Maruyama, with a new GAO report. GAO has strongly suggested that the USTR is failing in its efforts to monitor and enforce China's compliance with WTO obligations. The report says, your annual China compliance reports lacked critical information on the number, scope, and disposition of reported issues. It took the GAO analysis to reveal that only one-quarter of the problems that had been identified in USTR

reports have been fully resolved, one-quarter, and that since 2003 you reported no progress on about a third of the issues that have been brought to the USTR.

I would, with all due respect, suggest that the GAO's report says that what is being done is not working, as a matter of fact. So I am wondering, the GAO made specific recommendations to make the China compliance reports more transparent and useful. I would like to know what you are going to do in terms of adopting those suggestions.

Mr. MARUYAMA. Thank you, Senator. We welcome the GAO's report, and particularly its conclusion that USTR has made "considerable progress" on implementing the top-to-bottom review. We have made it a top priority to expand our China office, and we have also opened, as part of this initiative, a new USTR office in the U.S. embassy in Beijing. We are studying the GAO's recommendations closely and we are always open to new ideas on how we can improve our report.

I am not sure what to make of the GAO's recommendations that we should try to quantify progress on each issue. Since China joined the WTO in 2001, our goods exports have increased by 240 percent and now total \$65 billion, the best measure of progress on how the WTO has contributed to market opening.

Also, I am not sure how you can effectively quantify progress on those trade issues. It could backfire by overstating or understating progress and it could basically let the Chinese know that they are off the hook. The GAO's proposal to give each issue a numerical rank may tell the Chinese which issues they can ignore. It may be a relatively small issue but one that is important to one of your constituents.

Senator STABENOW. Well, with all due respect, I would suggest what we are doing right now is backfiring. Whether we are looking at currency manipulation—I have had businesses in my office indicating that, when they compete, the differential and currency manipulation, which is anywhere from 8 percent up to 40 percent, has cost them contracts.

The counterfeit industry alone, counterfeit auto parts coming into this country, is a \$12-billion industry and has cost us about 250,000 jobs, and counting. I can take you to any part of Michigan, big city or small, where I have businesses that have had their patents stolen. They have gone out of producing those products because it costs too much to fight it and have laid off people. So I would suggest—and Mr. Chairman, I have a second question, but I would be happy to wait if you would like.

The CHAIRMAN. Go ahead.

Senator STABENOW. I see my time is up.

The CHAIRMAN. Go ahead.

Senator STABENOW. Thank you. Thank you very much.

I would suggest that we do not take this seriously enough. That is an understatement right now. We have to decide who we are going to fight for in this country, whether it is for American businesses and American workers, or if we are going to sit back and just let whatever happens, happen.

I do have a question on South Korea as we go forward. I have spent a great deal of time on this. I have had my chief of staff be

a part of a delegation to visit with those in South Korea and talking before that trade agreement was determined. I am very concerned about the fact that we have had not one, but two Memorandums of Understanding in the past with South Korea as it relates to automobiles, neither one of which has been enforced, neither one has been upheld. We still have a situation where, last year, U.S. auto makers were able to sell 6,300 vehicles to South Korea, and South Korea sold 730,000 to the United States.

Now we have another agreement that basically just sets up an advisory committee with no enforcement powers and threatens a snap-back provision to an already low U.S. tariff on autos, but not on light trucks. There is no real enforcement in this, now, third time around here as it relates to what is a clearly huge imbalance in one of our major industries in this country.

So how can you tout the USTR's dedication to trade enforcement on one hand, and yet offer this free trade agreement as a solution?

The CHAIRMAN. Very briefly. Senator, your time has way expired.

Senator STABENOW. I know it has.

The CHAIRMAN. Very, very, very briefly.

Senator STABENOW. I know it is, Mr. Chairman. I thank you.

The CHAIRMAN. Just take 10, 15 seconds, if you want to respond.

Senator STABENOW. I thank you. I thank you very much. But I do want to know how you can bring this forward without strong enforcement provisions.

The CHAIRMAN. Fifteen seconds.

Mr. MARUYAMA. Senator, I appreciate your concern. The KORUS FTA provides unprecedented new tools for addressing Korean non-tariff barriers and a special snap-back mechanism. That is why we think it is important for Congress to approve the agreement.

The CHAIRMAN. Thank you.

I would just like to focus a little on, I think, the difference between maybe Ms. Brainard and Mr. Maruyama. If I understand you, Mr. Maruyama, everything is fine. You have what you need. That is basically your point. I heard Ms. Brainard say, no, we should give you more tools, or sharper tools.

Ms. Brainard, what is, as you understand it, the difference between you and Mr. Maruyama on that point? I assume you do not agree that everything is fine and we should not change the law.

Ms. BRAINARD. No. My observation is that the administration has been preoccupied with finding trade agreements. We have had a huge increase in negotiations of trade agreements with individual countries that are not huge in terms of the economic commerce involved, but are huge in terms of the details and staff time that are required to deeply understand the full set of disciplines that are at issue. USTR has one-fifth of its staff devoted to enforcement.

Now, the more trade agreements you sign, if you are serious about those trade rules being enforced, the more enforcement mechanisms you need. Yet, we do not see an expansion in staff, we do not see an expansion in funding for this. So the question, I think, is at what time, at what point, do you right that balance?

The Trade Enforcement Act and this committee are offering to provide you those additional tools, the ability to be proactive. Right now I think that interagency is very reactive. It simply does not have what it needs to be proactive in terms of prioritizing which

of these barriers are the most important to the U.S. economy, which ones can be resolved most expeditiously.

So I think it is puzzling. I will say that we in the Clinton administration had Super 301. The minute the WTO came into force we used Super 301 to reinforce those tools multilaterally. I do not see those things as substitutes or in conflict with each other. The way the Super 301 provision is crafted really encourages USTR to use it in that way.

Similarly, on China, that agreement with China was very carefully crafted with a balance of benefits. Congress, in order to approve of that agreement, had certain issues that were extremely important. It took the administration 3 years to take the first case. The GAO report that Senator Stabenow was referring to suggests that the high-water mark in terms of getting enforcement was 3 years ago.

But we know that China is the most important trade partner to monitor and to stay on day-by-day because they, internally, have difficulties with rules enforcement. The whole process of bringing them in to the WTO was intended to in fact introduce a rules-based culture to China's trade. So I would, if I were sitting on these issues, welcome these additional tools because I think they are needed.

The CHAIRMAN. Let me ask you another question. There is a deep suspicion here in the Congress, and certainly among those of us on the Finance Committee, that often legitimate trade enforcement actions are not brought because interests elsewhere in the government—the State Department, DoD, whoever else it might be—they tend to trump any trade action that the United States might otherwise conduct.

Your perspective on that? It is complex. Certainly trade provisions shouldn't prevail over everything else. But we do not want them subsumed to a degree where our trade interests are not enforced. My sense is that the actions that USTR brought with respect to China are a result of a lot of pressure from Congress, that finally the USTR got its act together and brought some actions.

Ms. Brainard, based on your experience in another administration, tell us the degree to which maybe these additional tools will help the United States pursue its economic interests, as well as its non-economic interests.

Ms. BRAINARD. There is always a complex set of interests that is being considered. Members of Congress can also consider a complex set of interests. They weigh security interests, they weigh our broader national interests, they weigh particular economic interests. I think, at any point in time, the question is, how are those interests balanced, and whether this set of interests, in terms of making sure that trade rules are enforced, does that give it enough weight in the interagency process? Is that given enough weight when the ultimate decision is made at the White House?

I think this act suggests that there is a legitimate perception that the enforcement agenda has taken a back seat to a whole host of other agendas in the trade realm, narrowly to the agenda of signing lots and lots of trade agreements, but more generally in the government that the enforcement agenda has not gotten the priority that it deserves.

The CHAIRMAN. Mr. Maruyama, why would you not want more tools? That is the earlier question I asked. I am just kind of perplexed, frankly. Around here, everybody is greedy, everybody wants everything. Most agencies want everything for themselves. Why would you not want a few more tools? Then you have them. Maybe you use them, maybe you do not, but at least you have them there. I just do not understand it.

Mr. MARUYAMA. Well, Senator, we think we have the tools.

The CHAIRMAN. Well, why would you not want more tools, is my question.

Mr. MARUYAMA. Yes. Super 301 would be useful if you had an administration where the State Department or other interests were blocking you from bringing WTO cases. So that is a concern. For some future administration, Super 301 may be appropriate. But in this administration, in the 2 years that I have been there, we have never been blocked from bringing a valid WTO case because of foreign policy or other reasons. So I do not see what Super 301 would add to the process. The idea of just mandating cases willy-nilly at the beginning of the year—

The CHAIRMAN. It is not mandating what you do. This legislation provides a menu and you choose what makes the most sense here.

Mr. MARUYAMA. But the purpose of Super 301 is to force the initiation of—

The CHAIRMAN. As well as enforcing. That is correct.

Mr. MARUYAMA [continuing]. WTO cases on a specific time track.

The CHAIRMAN. Right. But it is written in a way so as not to run up against the problem of the old Super 301. The old Super 301 would not carry very well these days after the WTO. Anyway, I am just perplexed. My time has expired.

Senator Lincoln?

Senator LINCOLN. Thanks to you and to all the witnesses for being here today, as well as my colleagues.

I want to, first, take the opportunity to commend Senators Stabenow, Baucus, and Hatch for their excellent leadership and work on the Trade Enforcement Act of 2007. Trade enforcement is consistently an issue that is on the minds of my constituents in my State. We have seen a surge in trade over the past decade, and with it more frequent cases of industry struggling to compete against the unfair trade practices.

Even with the surge in trade, we have not seen the responding, I do not think, needs that exist in terms of modernizing some of our enforcement laws and trade agreements. There are multiple industries in Arkansas in similar situations, from the catfish industry, to timber, to hardwood flooring, our growing steel industry.

However, the relief from unfair competition for these industries often comes way too late. These other countries know our trade laws better than we do, and they just wait us out until we lose the contest. To give an example, I have made multiple trips and have testified before the ITC on behalf of our Arkansas steel industry.

Despite being the most competitive and efficient steel producers—these are mini-mills—and across the world using recyclable steel and being efficient and effective, our steel companies have suffered from a flood of imported government-subsidized steel from China. It is not a new revelation.

Again, these are things that happen consistently that we do not seem to provide the kind of remedy that we need that is going to act in a timely way. The ITC has found injury to the steel industry in the past; however, the President chose to deny relief to the industry. I found myself back at the ITC just last week testifying on behalf of our steel pipe producers, still facing a surge of cheap, imported steel from China.

I appreciate the USTR's hard work, but it is clear to me and many of my constituents that our trade enforcement monitoring and our enforcement efforts are often cumbersome, they are slow-moving, and they fail to provide adequate relief in a reasonable time frame. The workers who showed up at that ITC hearing that I attended last week were flabbergasted that their government is not doing a better job of making sure that our neighbors in the global economy are meeting the requirements that we have in our trade agreement.

In a time when our trade is rapidly increasing with the rest of the world, and also increasing anxiety from Americans about trade, I agree with my colleagues here that we need more reliable trade enforcement and monitoring mechanisms. I am pleased that S. 1919 works to address those issues—I have raised them, others have—that are critical to our businesses in States like Arkansas, and all across this country that are seeking that kind of relief from unfair trade competition.

So I recognize that legislation is always a work in progress, and we are grateful that you are here, and we hope that you will continue to work with us as we work through the details of bringing about the best legislation we can.

Just a couple of quick questions, if I may. Mr. Magnus, do you support creating a WTO dispute settlement review commission that is empowered to review the WTO decisions that are adverse to the U.S.? Can you give us an example, and maybe you have already done this—I apologize for being late—of some of the WTO panel and appellate body decisions that have been wrongly decided that could have benefitted from something like that?

Mr. MAGNUS. Yes, I would be glad to. By the way, the decisions that are correctly decided would benefit from something like that, too. We have had adverse decisions that were improper in the sense that they expanded our obligations beyond what we had agreed to in a number of areas. One that was very much in the news just recently was Internet gambling. I thought that was a bad decision, and one that I believe would have flunked the standard that is in this bill to be applied by the WTO dispute settlement review commission. In fact, in that particular case the U.S. Government actually said, we are not going to implement.

There have also been quite a few adverse decisions in the trade remedy area that reflected over-reaching. Warren mentioned one a couple of moments ago, actually a series of decisions involving zeroing in the antidumping context. Our other major trade laws have been victimized in that way as well. Our countervailing duty law has been the subject of adverse decisions that were wrongly decided, and one in particular that I spent quite a bit of time working on involving pre-privatization subsidies. Likewise with our safeguard laws and safeguard measures that we put in place on a

whole range of products, ranging from steel, to wheat gluten, to lamb meat, and others.

Senator LINCOLN. Thank you.

The CHAIRMAN. Thank you very much.

Senator Stabenow?

Senator STABENOW. Thank you, Mr. Chairman. I just did not want to leave today without having a moment to ask particularly about small business. I know, Mr. Magnus, that you have devoted your career to trying to fix the problems created by trade policies. I wonder if you have any specific recommendations for us on how you think we could make the trade remedy system more accessible to small business. Then, second, what language do we need to include in trade agreements to prevent the problems that your clients are facing in the first place?

Mr. MAGNUS. One very positive step—and I have to say on behalf of the Trade Bar, the proposal that Mr. Atkinson has made for favored tax treatment of the money the companies spend to work up WTO cases, that sounds dandy. [Laughter.] The government has extended itself to try to make the benefits of the trading system more available to small businesses. The trade remedy laws are costly to use and typically cannot be invoked by individual businesses. They have to be invoked, instead, by industry coalitions. There are offices in both the Commerce Department and in the International Trade Commission whose job it is to try to provide technical assistance to those applicants for relief who cannot afford to hire expensive counsel, or to fully engage expensive counsel, in putting their complaints together.

As far as I know, those officers are doing a good job. The problem with respect to our trade remedy system—I would not describe it as a problem of access. There is certainly a resource problem at least one of the agencies. The Commerce Department, and I think the Import Administration, is running on fumes right now. They have a great many empty positions, and it is hamstringing their work. I do not know if they have been in a position to come and ask you to help with that, but I am aware of the problem there. That might be something in the very near term that you could do.

Then the uncertainty that hangs over the whole trade remedy program because of the longstanding pattern of adverse WTO decisions is a real issue. I think it is something the government should be addressing in a more energetic way in the current round of negotiations, because it casts a pall over the entire program if it raises the costs of getting relief and then maintaining that relief over time at a level that is not worthwhile.

Especially that is true with respect to our trade remedy laws that do not involve a legal right to relief, but they have political discretionary decisions at the end, such as the safeguard law and the China safeguard law, section 421. From my point of view it is a cost/benefit analysis there from an industry that might seek relief and will almost never be satisfied with the way things are working now. I think it is a good idea for the committee to consider that an enforcement issue and to take it up in the bill, as you have done.

Senator STABENOW. Well, thank you very much.

Mr. Chairman, I have heard from so many small businesses that do not have the funds, or are not a part of a coalition, to be able to bring a case. I think of a company in Cadillac, MI, northern Michigan, that makes hand trucks to move boxes, and so on. One of their designs was just totally stolen by a Chinese company, and they said it was going to cost about \$10,000 a month to hire an attorney to try to do something with it, so they just stopped making it and laid off about 50 people. So, I know as we go forward with trade enforcement, hopefully we can keep a special eye on what we can do to help small business.

Thank you.

The CHAIRMAN. Thank you, Senator.

The section 421 matter is very important. As the four of you know, there is considerable frustration among many on this committee that it is not working quite the way it should.

Ms. Brainard, you were there at the creation of China PNTR and section 421. When 421 was enacted, what was contemplated? Or to put it differently, is it working out the way you all thought it would work out?

Ms. BRAINARD. I sort of find myself in a curious position because, at the time that we crafted that provision with Congress, it was designed to give the administration the flexibility that it needed, while addressing very real concerns about the need for safeguards in particular segments. But it was one of the most important provisions ultimately in getting the agreement through, and I think we understood at the time that implementing that provision would be extremely important.

So here we are standing, several years later, and all of the affirmative decisions have been denied by the President. You look at that record and I think there is an understandable desire on the part of Congress to limit the discretion, which the President has used much more loosely than, I think, was intended originally.

So I understand the motivation behind 421. If I were sitting in the administration's position, I think anticipating that, it would have made a lot more sense to be much more proactive on the affirmative cases. This is, I think, an inevitable result of that pattern of inaction.

The CHAIRMAN. Do you think the language that we are proposing is about right? Is it too strong, not strong enough? What is your sense?

Ms. BRAINARD. I think my reading is that many, if not all, of these provisions—and I am not a lawyer; I want to put that on the table—have been very carefully crafted and are striking a very careful balance. I think if I were sitting in Warren's seat, I would be very concerned about any narrowing of that discretion. But again, those provisions were absolutely central to the China agreement, and to see them repeatedly not implemented, I think, does provide grounds for narrowing that discretion.

The CHAIRMAN. Mr. Atkinson, your thoughts on 421, the language here that we are proposing with respect to 421?

Mr. ATKINSON. I am not an expert on the nuts and bolts of how that has been implemented in the past, as Lael has laid out. Again, I am not an attorney either, but it strikes me, again, that it is the right balance. I think if I were USTR I would not necessarily sup-

port a bill that would limit my discretion, to some extent. But I think the case has been shown that some of their discretion needs to be limited here.

The CHAIRMAN. Mr. Magnus, your thoughts?

Mr. MAGNUS. I think the language that you have put forward makes good sense. I do not actually interpret it the way that Warren does. He has described it as something that makes relief automatic, or virtually automatic—

The CHAIRMAN. Right. It is not automatic.

Mr. MAGNUS [continuing]. If the ITC makes an affirmative finding. If that is what it does, it is a bad idea. There should be a layer of political review at the end of these cases. The reason is that they involve goods that may be fairly traded goods. So a layer of political review, I think everybody can agree, for this kind of a remedy makes sense. I see no reason why that political review has to be conducted uniquely by one of the political branches of our government.

I see no reason why that political review cannot be conducted jointly by the executive branch and the Congress, and according to a formula that does not trample on efficiency or involve a legislative veto. I think there is a space in the middle there for that political layer of review to be conducted effectively, and I think you have landed on the right formula.

The CHAIRMAN. Mr. Maruyama, three other witnesses think this is crafted about right. They sound pretty convincing to me. Your thoughts?

Mr. MARUYAMA. Well, I am from the executive branch, and we like presidential discretion.

The CHAIRMAN. We know that.

Mr. MARUYAMA. I was not here when the decisions were made on whether or not to grant import relief under section 421, so I cannot speak from any firsthand knowledge of what happened or why the decisions were made. But as we all know, import relief involves trade-offs. It benefits the domestic industry, but it also raises consumer costs, it can hurt a U.S. manufacturer that is dependent on access to imported parts and components, and in some circumstances it can lead to retaliatory actions against major U.S. exporters like our farm sector. In our view, the President is in the best position to evaluate whether import relief is in the overall national interest. We are concerned that some of the language in the bill would overly constrain his or her ability to make that evaluation.

The CHAIRMAN. But what about the thought—my time has expired. We will get to my point a little later.

Senator Lincoln?

Senator LINCOLN. Thank you, Mr. Chairman.

Mr. Maruyama, I am generally very supportive of trade agreements. I think it is important for us to be engaged with our neighbors in the global community and be a part of that global economy. But we have experienced an incredible surge in trade with other countries in the past decade, and with that I think comes greater anxiety and doubts from Americans, whether they are agricultural producers worried about the restrictions that they have and the markets that they can access, or whether it is hardworking folks

in middle America who are getting undercut tremendously by products, raw materials that are dumped into our country.

You expressed serious doubts about the benefits of S. 1919. I guess I would just like to know if you believe that our current trade enforcement and monitoring policies are sufficient. Is doing nothing about what is occurring, what our workers and what our industries are feeling, is that appropriate? If not, if there is nothing needed—or is there? What further could be done to address some of the problems that are occurring if it is not this?

Mr. MARUYAMA. Well, I think some of the issues that have been raised in this hearing are basically outside USTR's purview. Exchange rates. That is Treasury's job. I know you raised concerns about an ITC determination. I think antidumping and countervailing duty—

Senator LINCOLN. They determined in our favor.

Mr. MARUYAMA. Yes. Antidumping and countervailing duty decisions are not within our bailiwick. On the enforcement side, we have been very active in bringing cases. The United States is still the largest user of the WTO dispute settlement system.

Senator LINCOLN. Do you find any of those decisions that have been wrongly decided from the WTO panel appellate body?

Mr. MARUYAMA. I would invite you to read our comments yesterday to the WTO dispute settlement body, where we blasted the Mexico "zeroing" decision and called it a major over-reach. But on the offensive side, we have been very aggressive.

Senator LINCOLN. But do you expect them to ever reconsider a position on those issues because of that?

Mr. MARUYAMA. We would hope so. There are some new appellate body members, but they are pretty well dug in. As a lawyer, I would say that I would not bet on that one.

Senator LINCOLN. Well, I agree with the other two. I am not a lawyer either, but I figured there were plenty of them in the room. [Laughter.]

Mr. MARUYAMA. And we have been very aggressive with China. We have brought four cases against them in the last 16 months. We have brought big, systemic cases like biotech, Airbus, the China IPR case. Those are big cases that have major implications for how our trading system works.

Senator LINCOLN. Do you think that they will resolve themselves in a timely enough fashion, though, so that it helps the people in this country who really are hurt by the loss of jobs and the loss of resources?

Mr. MARUYAMA. I certainly hope so.

Senator LINCOLN. Do you have the tools to do that, do you think?

Mr. MARUYAMA. We do.

The CHAIRMAN. Thank you, Senator.

I would like to ask a question about Special 301. There has been a lot of concern that the administration has not used Special 301 with respect to China and Russia and has not put those countries on a priority foreign countries list. Why not, Mr. Maruyama?

Mr. MARUYAMA. I think both China and Russia are on priority watch.

The CHAIRMAN. They are?

Mr. MARUYAMA. They are on the priority watch list. I can come back to you on that, but I believe they are both listed on priority watch.

On China, we brought the IPR action against them in the WTO, and also a related action on barriers to copyright-intensive products. On Russia, IP is one of the major issues in Russia's WTO accession and it is a high priority for USTR.

The CHAIRMAN. I think they are on the watch list, but not on the most elevated list that requires sanctions, China and Russia.

Mr. MARUYAMA. Yes. They are not on the—

The CHAIRMAN. They are not on the elevated list, they are on the lower list.

Mr. MARUYAMA. But on both of them, on China we brought WTO cases, and in Russia we are going toe-to-toe with them in Geneva on their WTO accession.

The CHAIRMAN. Let me ask another question. The world is changing so quickly, it is so sophisticated. Are trade laws, or even the proposed provisions here, tailored to the problems, or are they too blunt, kind of flat, out of synch? I am talking about IT, for example. We need more sophistication. Does anybody have any sense of that?

Mr. MAGNUS. Mr. Chairman, one of our IT-related trade laws that none of us actually addressed in our statements, but is covered by your bill and needs your attention, and you have in your bill some very useful language that will enable a problem in the administration to be—

The CHAIRMAN. This is the ALJ?

Mr. MAGNUS. I beg your pardon?

The CHAIRMAN. This is the administrative law judge problem?

Mr. MAGNUS. Yes, sir. That is a good government reform that is in your bill on one of our key statutes that involves the intersection of trade and intellectual property. I am—although I did not mention it in my oral statement—very pleased to see that you are trying to give the ITC the flexibility that it needs to meet—

The CHAIRMAN. Right.

Does anybody disagree with that provision in this bill?

[No response.]

The CHAIRMAN. All right. Well, I am going to conclude this. Has anybody said something that needs to be addressed? Has anybody said something so outrageous that it should be commented on? Anybody?

Ms. BRAINARD. I just wanted to come back to this issue of small business. One of the most important things, I think, about strengthening trade enforcement is that small businesses really rely on rules, and they really rely heavily on proactive efforts to monitor and enforce on the part of the U.S. Government because they simply do not have the resources that large multinationals do to work around the rules in places like China, and they do not have the resources to do the due diligence to help the government bring cases. So this agenda, I think, is extraordinarily important, especially for small businesses that are very active in trade, but could be much more so.

The CHAIRMAN. Well, that is a very good point. It's like the wire hangers case. Is that not an example?

Ms. BRAINARD. Yes, although that is on the remedy side. But I think the set of provisions that you have put down on the market access side are equally important for small business.

The CHAIRMAN. Well thanks, everybody, very, very much. I appreciate you taking the time to come to the hearing.

The hearing is adjourned.

[Whereupon, at 11:35 a.m., the hearing was concluded.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Statement of

Robert D. Atkinson

President

Information Technology and Innovation Foundation

Combating Unfair Trade Practices in the Innovation Economy

before the

Committee on Finance

United States Senate

May 22, 2008

Chairman Baucus, Mr. Grassley and members of the Committee, I appreciate the opportunity to discuss the importance of enforcement to counter nations' unfair trade practices against the United States and to comment on the Trade Enforcement Act of 2007. I commend you for addressing this important issue.

I am President of the Information Technology and Innovation Foundation, a non-partisan research and educational institute whose mission is to formulate and promote public policies to advance technological innovation and productivity. Recognizing the vital role of technology in ensuring American prosperity, ITIF focuses on innovation, productivity, and digital economy issues. Because of the importance of trade policy to technological innovation, ITIF has worked actively in this area, and in particular on analyzing how other nations have established and promoted "mercantilist" trade practices designed to gain unfair advantage, particularly in knowledge- and technology-based industries.

The Trading System Has Changed; Our Approach to Trade Enforcement Also Needs to Change

When many of the trade enforcement tools were established thirty or more years ago, the international trading regime was quite different than it is today. Services accounted for a small fraction of cross-border trade. A larger percentage of goods trade was in commodity-type products. Many other nations, especially developed nations, focused their economic and trade policies on promoting natural resource production and commodity goods assembly. Moreover, no nation, not even Japan, was so large that it could dictate terms of trade to multi-national companies. As a result, competition between nations for investment exerted at least some discipline on nations' worst mercantilist impulses. And when countries erected mercantilist trade policies designed to unfairly gain competitive advantage, these usually consisted of tariffs, quotas, or other relatively blunt means of protectionism that were easy to detect and confront. All of these factors worked to keep the U.S. trade deficit at relatively minimal levels.

Thirty years later, the global trading system is significantly different. With the rise of information technology and global communication networks, services trade has expanded significantly. While commodity-based goods are still traded, a growing share of goods trade is now in technology-based products. And with the entry into the global trading system of nations with very large markets, like China and India, the relative balance of power has shifted away from multi-national companies toward these nations, who increasingly use access to their huge and growing markets as leverage to dictate the terms of trade. Moreover, a large share of nations, including developing nations, see the royal road to growth in shifting their economies more toward high value-added, innovation-based goods and services; the very sectors upon which the United States' competitive advantage is based. And indeed, a growing share of nations have turned to discriminatory mercantilist policies to gain jobs in those sectors, and in the process targeted U.S. technology jobs. Not surprisingly, the U.S. trade deficit has ballooned to record levels as we have become the "importer of last resort" for most of the rest of the world.

Because the nature of trade has changed and because the stakes are so much higher, nations are able to employ a much wider array of complex and relatively non-transparent means of gaining unfair advantage in the global trading system and they have much stronger motivations to do so. In short, mercantilist trade policies have become the policy of choice for many nations. Our trade enforcement system has not kept pace with these changes and has failed to adequately respond to either the magnitude or the nature of the challenge.

The Rise of the New Mercantilism

As technology and knowledge-based industries become a more important part of the global economy, and a key source of high-paying jobs, many nations have established policies to grow their technology industries. Many of these policies are quite legitimate and consistent with market-based competition. These include policies such as research and development (R&D) tax incentives; government investment in research; efforts to increase education and skill levels, particularly in science and technology fields; and spurring telecommunications development.

It would be one thing if that were all these nations were doing to compete for technology-based jobs. After all there is nothing inherent about America's competitive advantage in these sectors. If the United States is to maintain our advantage we will have to work for it, in part by boosting our innovation policies, such as expanding the R&D tax credit and increasing support for federal research. But these nations' efforts go far beyond legitimate and market-based innovation policies. Many have decided that to compete they have to erect a whole host of unfair and protectionist policies focused on systematically disadvantaging foreign, including U.S., companies in global competition.

Perhaps the most troubling part of this is that nearly all of the nations engaging in these unfair and distorting trade practices targeting U.S. technology leadership are members of the World Trade Organization (WTO). These nations made a free decision to join the WTO and when they did they agreed

to reduce if not end mercantilist practices. In fact, many of these nations saw membership in the WTO as an avenue to exporting to the United States without committing to their responsibilities as WTO members. In a recent report entitled “The Rise of the New Mercantilists: Unfair Trade Practices in the Innovation Economy,” ITIF documented a wide array of unfair trade practices by a wide range of nations targeted at the technology sector, including the following:

Tariffs: Despite numerous multilateral and unilateral trade agreements, tariff protection of technology industries is alive and well. For example, The WTO’s 1997 Information Technology Agreement (ITA) was supposed to eliminate tariffs that distort trade flows on wide variety of high-tech goods, including computers and components; telecommunications equipment; printed circuits, resistors, and capacitors; semiconductors and components; and set-top boxes with a communications function. Nevertheless, ten years after its passage, countries such as India and Indonesia still maintain tariffs on imported IT goods despite being signatories to the ITA and maintaining high trade surpluses with the United States.

But it’s not just developing nations that are violating the letter and spirit of the ITA. The European Union has also decided that it must erect barriers to high-tech imports covered by the ITA. In recent years, it has been slapping tariffs on products, as high as 14 percent, simply because companies have improved those products and added innovative features. These products include computer monitors, set-top boxes and multi-function printers.

Discriminatory Taxes: While tariffs are the most straightforward way to shift the cost equation in favor of domestic producers, taxes are less obvious but no less effective. In particular, some nations apply a combination of different types of taxes to support domestic technology producers. However, using taxes to promote exports is complicated by the fact that certain subsidies for goods (but not services) are a violation of the WTO, while other subsidies are not. In particular, the WTO prohibits subsidies that require the companies that get them to meet certain export targets or to use domestic goods instead of

imported goods. A nation that chooses instead to give a domestic (but not foreign) manufacturer a tax break, perhaps through a rebate, for example, may not be violating the WTO. This lack of clarity and the difficulty in proving damage enables mercantilist nations to manipulate taxes to support domestic IT industries while avoiding WTO violations.

Nations also may combine various taxes and duties in a way that may not initially appear to discriminate against imports or favor exports, but could have the same effect. For example, India applies a 12 percent excise duty on computers that local manufacturers (either domestic or foreign) can offset against their value added taxes (VAT). But foreign manufacturers are nonetheless at a disadvantage because they also pay a 4 percent countervailing duty (CVD), which the Indian government has specifically imposed to protect domestic computer manufacturers. China recently created a tax scheme that blatantly violated the WTO when it applied a 17 percent VAT to both foreign and domestically produced integrated circuits (ICs) used in the semiconductor industry, and gave a rebate on most of the VAT only to companies producing ICs in China for export, but not to companies importing ICs. In 2004 the United States filed its first WTO case over the VAT policy and in response China eliminated it the next year.

Not to be deterred, China has since devised another tax policy that favors domestic production of IT goods and services, but is not tied to exports so it may not directly violate the WTO. Similar to India's excise tax scheme, China allows both domestic and foreign companies to deduct the costs of the products they make in China from their corporate income taxes—but only if those products were produced with local parts. While this subsidy may not violate the WTO, it is nonetheless mercantilist since it discriminates against imports. After repeatedly raising concerns about these and other tax policies, the U.S. government filed a WTO case over China's prohibited subsidies in early 2007.

Anti-Trust: Antitrust law has proven to be a powerful weapon in the mercantilist arsenal. Mercantilist nations can use antitrust enforcement to force foreign companies selling in their market to redesign products, share technology with competitors, or in some cases to pay exorbitant fines. These tactics raises

their cost of doing business and make their products less competitive. It should therefore come as no surprise that regions like the EU and nations like Korea have instigated anti-trust cases against some leading U.S. technology companies, including Microsoft and Intel.

Intellectual Property Theft: As a net exporter of manufacturing know-how as intellectual property, the United States is more dependent on protection of intellectual property (IP) than other nations. Over 50 percent of U.S. exports depend on some form of IP protection, compared to less than 10 percent 50 years ago. But this very strength is also a key vulnerability, for unlike physical property, which is relatively difficult to steal, IP theft or forced transfer is much easier. Many nations either turn a blind eye to IP theft or actually encourage it as a way to gain competitive advantage.

China is one of the most egregious violators. Not only does China fail to enforce its own intellectual property laws, but it also has implemented measures to block the trading and distribution rights of producers of U.S. entertainment products. Even the Chinese government continues to support theft of U.S. intellectual property. For example, although China's State Council ordered all government agencies to use only legal software in 1999, widespread lack of enforcement or monitoring ensures that the Chinese government still favors pirated software, as is reflected in its low levels of government purchases. Computer software theft is just the tip of the iceberg. The entertainment software industry (e.g. video games), which the U.S. leads, suffers from rampant piracy in China. Over 90 percent of video games consumed in China are pirated. But China doesn't just copy them; it is a leading producer and exporter of pirated cartridge-based entertainment software. Yet, China is by no means the main offender. Russia also is a distribution center for pirated entertainment software into Central and Eastern Europe. Malaysia is a primary source of pirated CDs, DVDs and console games with a capacity of producing over 300 million disks per year.

Unfortunately, international rules like the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) offer little if any protection from countries that want to steal U.S. technology, because TRIPS only offers standards on how countries should protect intellectual property, and it's up to each nation to decide how, and whether, to enforce them.

Blocking or Limiting Market Access: While mercantilist nations have a variety of policy tools at their disposal to support domestic technology production by blocking or limiting access to their markets to foreign goods and services, they seldom will be so bold as to admit the true reason for these policies. Rather, they will usually claim that the policies are needed to protect consumers. These protectionist policies include mandatory domestic standards, data privacy requirements, government procurement and encryption restrictions, blocking refurbished equipment, and blocking or limiting IT services. For example, China, India, Indonesia, the Philippines, Malaysia, and Thailand all have rules that require government agencies to buy local goods and services. Many WTO member countries willfully ignore their commitments by refusing to force their dominant telecommunications service providers to open up their networks to foreign competitors. Other nations, like China and Russia, essentially block importation of encryption products.

The U.S. Trade Enforcement Regime Needs Strengthening

U.S. trade policy suffers from two major limitations. First, it is largely focused on opening markets through new trade agreements, but has given short shrift to enforcing existing agreements. Second, as documented above, the range of tools other nations can use to erect trade barriers has grown significantly and in many cases they fall under the radar screen of traditional WTO processes. That is why ITIF believes that the Trade Enforcement Act of 2007 is an important step forward. The legislation will send an important signal to USTR specifically and the U.S. government generally that it must rebalance its approach to trade and make enforcement a much larger component of its trade and international policies.

In particular, Title 1 is an important step to ensuring that USTR focuses much more actively on trade enforcement.

There are a number of reasons why USTR has let the balance shift away from enforcement. One reason is that it is simply easier to want to work in cooperation with trade officials from other nations, especially to develop new trade agreements. Taking aggressive action to against mercantilist policies is much harder. It's a natural inclination to want to play the "good cop" instead of the "bad cop" who is complaining, confronting and pressing for change. That is why Title 5 in particular is important. Creating a Chief Trade Enforcement Officer and a Trade Enforcement Working Group institutionalizes within USTR the function of trade enforcement, making it clear that at least one portion of USTR is expected to play the role of the bad cop.

Equally important is Title 5's provision for additional resources for enforcement. In USTR's defense, bringing trade enforcement actions is time consuming and expensive. Boosting their budget by \$5 million and targeting it specifically toward enforcement will help remedy this deficiency.

Toward that end, ITIF would also encourage the Committee to consider an additional tool. Even if Congress gives the USTR more resources, government alone cannot investigate all potential WTO cases. U.S. companies will have to play a larger role. But there are two reasons why U.S. companies don't bring more cases. First, they are expensive. Second, the "free rider" problem means that companies can benefit if they can convince other firms in their industry to bear the burden of helping USTR to bring a trade case. In order to remedy that, ITIF has proposed that Congress should encourage companies to build WTO cases by allowing them to take a 25 percent tax credit for expenditures related to bringing WTO cases. This tax credit could be piggybacked on top of the R&D tax credit.

The Trade Enforcement Act Works to Support Free Trade

In response to calls for tougher trade enforcement some free traders argue that getting tough with other nations over their mercantilist and protectionist trade policies is actually a form of protectionism. Others worry that it's better to be lax on enforcement since being more aggressive risks a trade war. Both views, in our opinion, are wrong.

Aggressively working to reduce other nations' government-imposed trade distortions is in fact the polar opposite of protectionism. Stronger enforcement is important to preserve the integrity of the global trading system and ensure that trade is based on markets and the decisions of consumers and businesses, not on mercantilism and government intervention.

Being more aggressive on trade enforcement will not promote a trade war, for at least two reasons. First, many of the practices being focused on are a blatant violation of existing international trade rules. Second, the fact that the United States is running the largest trade deficit in world history is clear proof that these nations have structured their economies so that they are dependent on the U.S. market, and they risk losing a lot of access if closed to them.

Apologists for the current enforcement system also argue that the United States is hardly in a position to complain. Invoking the Biblical message of "let he who is without sin cast the first stone," they imply that since the United States has mercantilist policies of its own for some sectors, we have no right to complain about other nations' policies. Yet, while we are "not without sin," the U.S. market is perhaps the most open in the world. Moreover, the very fact that we are running huge trade deficits negates any legitimacy of this argument.

Many trade advocates argue that the major response to issues of globalization and trade must be to get Americans to once again support trade and globalization by doing a better job of compensating those who

are hurt from trade. While ITIF believes that better efforts are needed to help individuals hurt by trade, they will not be enough. Regaining American's support for trade and globalization requires that Americans believe that the playing field is level, and that requires significantly stepped up trade enforcement. Americans need to know that their government will stand up for their rights as workers by aggressively fighting unfair, mercantilist trade practices.

In stepping up trade enforcement, the United States will not only help American workers and firms, it will lead the world down the right path by rigorously enforcing international and bilateral trade rules and by showing the world that market-driven commerce is the best way to achieve robust and sustainable domestic and global prosperity. The Trade Enforcement Act of 2007 goes a long way in that direction.

Thank you for letting me share our views, I would be happy to answer any questions you may have.

**QUESTIONS FOR THE RECORD
FOR DR. ROBERT ATKINSON**

**United States Senate
Committee on Finance**

**Hearing on
S. 1919: The Trade Enforcement Act of 2007**

May 22, 2008

Senator Baucus Questions:

Question 1

SPECIAL 301:

Your testimony highlights the problem of intellectual property theft in foreign countries around the world. You also note that the World Trade Organization intellectual property agreement offers little protection against such theft.

Do the Special 301 provisions of U.S. law offer any protection? Do those provisions work as well today as they did 20 years ago? Should we amend Special 301 to make it work better?

Special 301 is useful but works better on some countries than others. Now that the United States is a WTO member our ability to take unilateral action is substantially reduced. USTR can and does put countries on a watch list as a priority foreign country for failing to protect U.S. company IP. But if another nation is a WTO member, their only remedy is to bring a WTO case.

Moreover, while USTR may sometimes want to use Special 301, other U.S. agencies may resist. As discussed below, the Special 301 mechanism might be strengthened by allowing the President to deny certain U.S. government benefits to countries that egregiously fail to protect U.S. IP.

Finally, related tot this, Congress should consider providing additional funding for overseas IPR enforcement, perhaps by providing funding to add officials in U.S. embassies in countries that egregiously fail to protect U.S. IP.

Question 2

ADDITIONAL PROVISIONS FOR THE BILL:

The Trade Enforcement Act of 2007 seeks to address concerns that our current trade enforcement tools are not adequate to protect the rights of U.S. farmers, ranchers, manufacturers, and workers. The bill contains provisions to amend our current trade enforcement tools to make them work better, like the section 421 China safeguard. And it also contains provisions to create entirely new enforcement tools, like the Chief Trade Enforcement Officer at the Office of the U.S. Trade Representative ("USTR").

Do you think the bill strikes the right balance? Are additional provisions needed to further improve our trade enforcement tools?

I believe that the bill does strike the right balance, particularly given that the current "balance" in the trade system is tilted toward new agreements and away from enforcement. The only "provision" I would add would be more funding for enforcement. Perhaps if the legislation becomes law and USTR really begins to take action, it would be appropriate to revisit the issue of funding to determine if additional resources would be needed.

Question 3

TOP THREE ENFORCEMENT PRIORITIES:

Congress has become increasingly concerned that the administration is not adequately enforcing our trade agreements or our trade remedy laws. The Trade Enforcement Act of 2007 addresses this concern in part by requiring USTR to provide an annual report to Congress that identifies its enforcement priorities for the upcoming year.

In light of the hundreds of trade barriers around the world, I'd like your input on where the administration should focus its enforcement resources. What are your top three enforcement priorities?

I will qualify my comment with the caveat that my main focus regarding trade policy has been the technology sector. With that in mind, a top priority has to be China. Not only because their market is so large and fast growing, but equally importantly because other nations, particularly in Asia, base their trade policies (especially currency) in part on what China does. Ultimately, in my view, China does not believe we are serious in our complaints toward them, and as such, have made little effort to be responsive.

In terms of types of trade practices, it is important to give much more attention to non-tariff barriers. One in particular, is the very common practice of tying market access to either technology transfer or local production requirements. These violate WTO rules but are widely practiced, to the point of being seen as normal.

Senator Lincoln Question:

ADDITIONAL PROVISIONS FOR THE BILL:

You argue that our trade enforcement system has not kept pace with changes of other nations' mercantilist trade policies that help them gain an unfair advantage in the global trading system. Some of these policies violate WTO rules while others do not. Do you believe S.1919 goes far enough in addressing the problems you raised? If not, what changes would you suggest?

In my view S.1919 is an important step going forward to improving the global trading system. But, in my view much more needs to be done. We can't expect USTR to shoulder the task alone. It is important that all parts of the federal government involved in international affairs actively support a much more proactive enforcement strategy. We need strong leadership from the White House to reconcile inter-agency disagreements that prevent or slow strong enforcement actions from going forward. Without a strong signal to agencies to support enforcement from the White House, it will be hard to actively pursue this agenda.

But we also can't expect the United States alone to shoulder this burden alone. This goes to a much bigger agenda and much bigger challenge. In my view, the central task of global economic policy should be to encourage all nations to abandon mercantilism in favor of a growth economics doctrine that places

raising domestic productivity as the key priority. Doing this means working to develop a global consensus that raising domestic productivity growth in all sectors, not just traded ones, is actually the best path to prosperity and should be the key focus of economic policy in every nation. It means that development organizations like the World Bank, the IMF, AID, OPIC,¹ and others will have to not only stop promoting export-led growth as a key solution to development. Currently these organizations encourage nations to grow their economies through export led growth, which implicitly supports mercantilist strategies. Rather than doing this, Congress should pressure these organizations to tie their assistance to steps taken by developing nations to move away from such negative-sum mercantilist policies, thereby rewarding countries whose policies focus on spurring domestic productivity, not on protecting the status quo.

Senator Stabenow Questions:

Question 1

NEW TRADE RULES:

In your written testimony, you discuss how the U.S. Trade Representative has focused too much on negotiating new trade agreements and neglected to enforce those already on the books. That's a view I strongly share. In response to questions I asked recently, Trade Representative Schwab admitted that USTR spends just a quarter percent of its resources on monitoring and enforcing trade laws. You've written about the results—USTR has allowed widespread theft of intellectual property rights and turned a blind eye to non-tariff barriers other countries use to protect their markets from U.S. goods. This neglect has contributed to the loss of American businesses and jobs.

At the hearing, both Senator Grassley and you mentioned that many countries are enacting questionable policies and practices that harm U.S. businesses, yet do not violate the letter of international trade law. Senator Grassley suggested that we might need more rules to address these practices. What do you think USTR should be doing in the World Trade Organization to get these countries, which are WTO members, to stop using what you have called "mercantilist" trade practices, such as discriminatory tax systems and market-limiting regulations, which are designed to tilt the playing field in their favor?

The larger problem today is not tariffs but non-tariff barriers (NTBs). They are also the hardest to deal with, because they are embedded deep in the national economies, and bump up against national sovereignty. The WTO does address some of these, but needs to address more. And the U.S. is trying to get more provisions against them in the Doha Round. Congress can play a role by urging the next administration to ensure the strongest possible NTB provisions in the Doha round. In addition, as we work bilaterally with FTAs, it is important to ensure that there are very strong NTB provisions in these.

I would also argue that it is important to not just approach this global challenge from the enforcement side, which, as I stated above, is absolutely critical. But we should also engage much more in capacity building and education. We need to work with other nations to explain why many (but not all) of their mercantilist policies not only distort the global trading system, but also are detrimental to their own economies in the long run. And more importantly why mercantilism itself, as opposed to a domestic productivity growth/Keynesian strategy, is a flawed growth strategy. Unfortunately, while I believe that USTR has a capacity building shop, it is quite small. I would encourage Congress to expand funding for these efforts at USTR.

Finally, as noted above I would reshape not just our own, but also multi-national development assistance to progress on dismantling mercantilist policies. If nations want to get development aid, they should be taking steps to move in the right direction vis-à-vis trade policies

Question 2

TRADE ENFORCEMENT METRICS:

At the hearing, Mr. Maruyama said USTR's success in trade enforcement should not be judged by the number of WTO actions it has brought. In your opinion, as a representative of an industry that has been hurt by a lack of trade enforcement, what are the metrics that should be used to quantify USTR and other agencies' progress at enforcing trade laws, especially with China?

Just to clarify, ITIF is a think tank that focuses on innovation policy, with a specific focus on IT. Metrics are never perfect, but they do tell us something. And in my view the dramatic decline in WTO cases brought by USTR in the last 7 years is a useful metric by which to judge our overall enforcement effort. One related metric that would be worth developing is the "batting average." If for example, one administration is batting 100 percent, and therefore won more cases than another administration, even though the latter might have brought more cases, this would be important. Finally, it would be useful to estimate the importance of cases. Again, if one administration brings many more cases, but they are very small in impact, the overall impact might be less than achieved by an administration that brings fewer but more cases. But I am not aware of anyone compiling these metrics. This might be a useful task for GAO to undertake.

Senator Grassley Questions:

Question 1

NEW TRADE RULES:

Dr. Atkinson, your testimony suggests that a big part of the problem in the information technology sector is that the discriminatory practices of our trading partners are not always against the existing rules of the World Trade Organization.

For example, you stated that a lack of clarity in the WTO Subsidies Agreement, and the difficulty in proving damage, "enables mercantilist nations to manipulate taxes to support domestic IT industries while avoiding WTO violations."

Do you think the President should have the authority to negotiate new rules to address these types of issues?

In our view, FTAs that have strong non-tariff barrier provisions are a good thing and Presidents should actively pursue them.

Question 2

DISPUTE SETTLEMENT CASES:

Dr. Atkinson, you testified that the Administration "has given short shrift to enforcing existing agreements."

Can you provide some concrete examples of the Administration failing to bring cases sought by the affected domestic industries?

I cannot, in part because I am not fully aware of what domestic industries have or have not asked for. However, one difference in today's trade environment relative to 20 years ago, as I noted in my testimony, is that the balance of power has shifted even more toward nations. Individual firms, and sometimes even groups of firms, do not want to alienate the powers that be in nations like China because they know full well there will be retaliation. This makes it all the more incumbent to have the U.S. government take the lead in fighting these practices.

More importantly, it is my understanding that many companies/industries do not bring cases for the simple reason that: 1) it costs them so much to do so; and 2) they know that USTR doesn't have the resources to go forward. WTO cases consume a great deal of time and require a great deal of resources, and in the United States we have decided that we will rely on companies to pay for a lot of the this work. Hiring legal talent to do case preparation work represents a major commitment of resources by companies. This is why increasing funding for USTR for enforcement is so important. Not only should USTR use increased funding to bring more cases, they should use it to do more of the heavy lifting of bringing cases. They would still need a lot of input from the industry, but would at least be able to do more of the basic WTO-related trade research, that industry now has to pay outside law firms to conduct. This would lower the costs to industry of USTR bringing WTO cases and encourage them to press USTR to bring more cases. In addition, ITIF has proposed that Congress should encourage companies to build WTO cases by allowing them to take a 25 percent tax credit for expenditures related to bringing WTO cases. Companies that do bring cases to the USTR are acting on behalf of the U.S. government. So it makes sense to share some of that burden.

Notes:

¹ In a report on offshoring I wrote for the Progressive Policy Institute in 2004, I wrote the following about the role of the Overseas Private Investment Corporation in encouraging these types of practices: *The Overseas Private Investment Corporation (OPIC) is a governmental corporation whose mission is to help American companies invest overseas. When Congress created OPIC in 1971 to get American companies to invest in developing countries, it was a different world. We were not only fighting a global battle with communism, but we were also running a significant trade surplus and were the world's economic leader. In today's competitive global economy, OPIC's mission is an anachronism, yet it continues to encourage U.S. companies to move to other nations, including India. For example, OPIC's website, which is targeted to American business, includes links to organizations such as the Indian Investment Center—a government agency that seeks to induce American companies to move jobs to India—and the Federation of Indian Chambers of Commerce and Industry. This is akin to the state of New York's department of economic development advertising Alabama's industrial recruitment incentives. The OPIC also guarantees investments in overseas venture capital funds, many of which invest in high-tech ventures that potentially compete with U.S. companies. For example, the OPIC India Private Equity Fund, administered by the Oppenheimer investment bank, made investments in Indian companies in the banking, computer, and other industries. It is one thing to help companies make investments overseas that help struggling domestic economies with things like water and electricity supply or energy extraction, but it is quite another thing to subsidize investment in foreign companies that are direct competitors to U.S. corporations.* (http://www.ppionline.org/documents/offshoring2_0704.pdf)

TESTIMONY OF
LAEL BRAINARD¹
COMMITTEE ON FINANCE
U.S. SENATE
MAY 22, 2008
WASHINGTON, DC

Chairman Baucus, Senator Grassley, distinguished members of the Committee, I appreciate the opportunity to testify today on the Trade Enforcement Act of 2007, S. 1919.

AN ERA OF RAPIDLY GROWING GLOBALIZATION

We are experiencing a period of breathtaking global integration that dwarfs previous episodes. Global trade has more than doubled in the last 7 years alone. The entry of India and China amounts to a 70 percent expansion of the global labor force—with wages less than a tenth of the level in wealthy economies. This expansion is more than three times bigger than the globalization challenge of the 1970s and 80s associated with the sequential advances of Japan, South Korea, and the other Asian tigers. It is also far larger than the more recent integration of the North American market.

If, as is now widely expected, these trends in population and productivity growth continue, the time will soon approach where the balance of global economic heft flips. According to my colleague, Homi Kharas, the so-called emerging BRIC (Brazil, Russia, India and China) economies will account for over half of world income by 2050, up from 13 percent today, while the share of the G7 wealthiest economies will slip from 57 percent today to one quarter of world

¹ Vice President and Bernard L. Schwartz Chair in International Economics at Brookings.

income in 2050. And by 2030, 83 percent of the world's middle class consumers will reside in what are today considered emerging markets.

What do these trends mean for American workers, farmers, and businesses? Like it or not, our future prosperity will depend more than ever on competing successfully on a level global playing field where everybody plays by a set of rules that are enforced. Already, our economy is undergoing a profound transformation. Globalization is expanding not just in scale but also in scope. A growing expanse of occupations and sectors are exposed to the bracing winds of global competition, with trade exposure at nearly 30 percent of U.S. income – almost three times higher than in 1970. With developing countries such as India successfully exporting higher skilled “knowledge” services, many Americans in white collar occupations are confronting the reality of low wage foreign competition for the first time. While some are well placed to take advantage of the new opportunities associated with the global economy, progressively deepening trade deficits and a sharp 20 percent decline in manufacturing jobs over the past 7 years have contributed to deep concerns among a growing number of Americans about the benefits and the fairness of trade.

At a time when our nation's continued economic leadership and the economic security of increasing numbers of Americans will depend on competing successfully in a highly competitive global marketplace, it is more important than ever that our nation's leaders work hard to ensure our trade partners play by the rules. At a time when support for trade and perceptions of fairness among Americans are slipping dramatically, the administration has been preoccupied with signing agreements rather than enforcing agreements. The Trade Enforcement Act of 2007 contains important provisions that put the emphasis squarely back on making sure trade rules are enforced and deliver benefits for American workers, farmers, and businesses.

MONITORING AND ENFORCEMENT LAG BEHIND

Over the past 7 years, the volume of economic activity covered by trade rules has grown at a breathtaking pace: U.S. exports and imports have grown by over \$1.4 trillion. The WTO has expanded to include 12 new members—chief among them the world’s fastest growing and most populous nation, which lacks adequate capabilities even to enforce its own product and food safety standards let alone intellectual property rights. The number of countries with which the United States has concluded free trade agreement has expanded by 16,² and the scope of those bilateral agreements has expanded across complex issues from investment to technical barriers to intellectual property.

With trade volumes shooting up, the disciplines covered by trade agreements spreading out, and trade agreements extending to countries with weaker oversight capacities, it would be natural to expect trade disputes and the associated enforcement actions to rise at least proportionally to exports. Yet, contrary to expectations, the administration is taking fewer enforcement actions per year – not more. If we took the simplest approach and assumed that the number of trade violations should be a more or less constant proportion of exports, you would expect the number of enforcement actions taken in the WTO by the United States to increase from roughly 11 per year in the years leading up to 2000 to increase to over 17 per year today. Instead, WTO enforcement actions have fallen to only 3 a year between 2000 and 20007. Despite wide expectations that China’s accession to the WTO would offer critical opportunities to press for adherence to international trade rules in areas of growing problems, such as intellectual property and import administration, the administration waited three

² Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, South Korea

years to take the first enforcement action against China, and GAO recently found that progress in addressing compliance deficits has been *slowing* since that time.

PUTTING ENFORCEMENT BACK AT THE TOP OF THE TRADE AGENDA

Extensive analysis by the GAO suggests that the growing gap between expected trade disputes and enforcement actions stems from a combination of a failure to prioritize, inadequate resources, and a reactive posture.³ Even where trade compliance issues have been clearly documented, as in the National Trade Estimate or in the USTR's top-to-bottom review of China's compliance, GAO analysis show that enforcement has targeted only a fraction of the problems. This analysis highlights several opportunities to substantially strengthen the priority and capability accorded to monitoring and enforcement and underscores the importance of several key provisions of the Trade Enforcement Act of 2007.

1. Raising the Priority of Monitoring and Enforcement

Monitoring and enforcing compliance with trade agreements is but one of many priorities at USTR. As the last several years have demonstrated, it is all too easy for the routine, technically detailed work of enforcement to take a back seat to higher profile negotiations and signing ceremonies. In the past, when Congress felt the Administration was not putting sufficient emphasis on a key priority such as agriculture, it has sought to create a Senate-confirmed post dedicated to the task, often with good results. Section 501 of the Trade Enforcement Act of 2007 follows that precedent by creating a Senate-confirmed

³ See GAO 05-537, *International Trade: Further Improvements Needed to Handle Growing Workload for Monitoring and Enforcing Trade Agreements*, June 2005, and GAO, *US-China Trade: USTR's China Compliance Reports and Plans Could be Improved*, April 2008

Chief Enforcement Officer with the rank of Deputy USTR whose primary responsibility would be to investigate and prosecute trade enforcement cases. Adding a senior position accountable to Congress, who wakes up every morning and leaves the office every night entirely focused on investigating and prosecuting trade cases, would for the first time ensure that sustained attention is devoted to these issues at the highest levels.

2. Expanding and Coordinating Resources for Monitoring and Enforcement

GAO analysis suggests that a key driver of the gap between likely trade compliance problems and enforcement actions is inadequate resources for monitoring and enforcement and lack of coordination among agencies. With bilateral trade negotiations the top priority, USTR now has only one fifth of its staff (48 FTEs) devoted to monitoring and enforcement, with the remaining four fifths devoted to negotiations, trade policy development, and communication and management. Despite the explosion in trade volumes, trade partners, trade agreements, and trade provisions, staffing levels with primary monitoring and enforcement responsibility have not increased since 2002. Static and inadequate levels of staffing are exacerbated by inadequate training and lack of coordination across the key agencies. The \$5 million authorization for the interagency monitoring and enforcement effort in section 501 of the Trade Enforcement Act would help to address the shortfall in resources and the establishment of an interagency working group chaired by the USTR Enforcement Officer in section 502 would address the current coordination deficit.

3. Making Enforcement Proactive

With a premium on efficient use of resources, it is more important than ever to proactively prioritize and target those compliance gaps that have been

identified to have the greatest overall economic cost. One way to insist on greater prioritization and a more proactive approach to enforcement is the provision in Title I of the Trade Enforcement Act to reauthorize a carefully crafted version of Super 301. Title I would require USTR to identify in an annual report for Congress its enforcement priorities and would provide a channel for Congress to convey its enforcement priorities to be reflected in the report. This annual report would then serve as the blueprint for priority enforcement actions over the subsequent months.

4. Restoring Trust with Congress

One of the most critical elements in improving monitoring and enforcement is to restore a level of trust between congress and the administration. Perhaps the most immediate example of a breach of trust that undermines support for trade agreements is the section 421 safeguards provision of the China WTO agreement, which was critical in securing congressional support for the agreement. Surprisingly, the president has decided to deny relief in all the section 421 safeguard cases where relief was recommended by the ITC. Title III of the Trade Enforcement act would narrow the range of discretion for the President to deny relief and give Congress an opportunity to overcome the President's veto under certain circumstances.

* * *

Today's debate over trade is dominated by talk of retreat and retrenchment on the one hand and a singular sprint to sign rather than enforce free trade agreements on the other. Both sides seem out of touch with a reality in which our prosperity and our security as Americans will increasingly depend on our ability to compete fairly in a growing global marketplace with clearly enforced rules.

**Responses to Questions for the Record From Lael Brainard
Hearing of May 22, 2008**

Senator Baucus Questions:

Question 1

TRADE ENFORCEMENT PRIORITIES:

Despite its small staff and limited resources, the Office of the U.S. Trade Representative (“USTR”) has launched some significant enforcement cases in recent years. But many argue that USTR continues to spend too much time negotiating new agreements and not enough time enforcing existing agreements.

The bill would correct this problem by, among other things, requiring USTR to provide annual reports to Congress identifying its enforcement priorities for the upcoming year. And it would give Congress input into that identification process.

Will these provisions, in your view, help refocus USTR’s considerable talents on the importance of enforcement?

Lael Brainard Response:

Extensive analysis by the GAO suggests there is a growing gap between trade violations and enforcement actions stemming from a combination of a failure to prioritize, inadequate resources, and a reactive posture. It should be useful to create a systematic mechanism whereby USTR would consult with Congress on an annual basis regarding U.S. enforcement priorities. This would ensure a consistent strategy for identifying and addressing the highest priority enforcement actions and also provide insights into which enforcement strategies are most likely to yield success.

Question 2

SECTION 421:

As you know, Section 421 gives the administration an important tool to protect U.S. industry against Chinese import surges. But the administration has failed to provide the relief that Congress authorized. Although the International Trade Commission recommended relief in four cases, the President disregarded its advice and refused to provide relief in each case. The Trade Enforcement Act of 2007 would amend the statute to limit the President’s discretion to deny relief.

You have a unique perspective on this issue in light of your tenure at the National Economic Council, where you focused on issues surrounding China accession to the World Trade Organization.

Do you think the provisions in our bill would help to ensure that U.S. industries receive the relief Congress intended?

Lael Brainard Response:

The section 421 safeguards provision of the China WTO agreement was critical in securing congressional support for the agreement. It is thus particularly surprising that the president has decided to deny relief in all the section 421 safeguard cases where relief was recommended by the ITC. Title III of the Trade Enforcement act would narrow the range of discretion for the President to deny relief and give Congress an opportunity to overcome the President's veto under certain circumstances. Although it is advisable to maintain some presidential discretion to allow for broader political and security considerations to be taken into account, it nonetheless makes sense to narrow the scope of that discretion in order to ensure that U.S. industries receive the relief the ITC recommends.

Question 3

ADDITIONAL PROVISIONS FOR THE BILL:

The Trade Enforcement Act of 2007 seeks to address concerns that our current trade enforcement tools are not adequate to protect the rights of U.S. farmers, ranchers, manufacturers, and workers. The bill contains provisions to amend our current trade enforcement tools to make them work better, like the section 421 China safeguard. And it also contains provisions to create entirely new enforcement tools, like the Chief Trade Enforcement Officer at USTR.

Do you think the bill strikes the right balance? Are additional provisions needed to further improve our trade enforcement tools?

Lael Brainard Response:

The overall effect of the Trade Enforcement Act of 2007 would be to increase the resources available to USTR to carry out enforcement actions and ensure accountability for trade enforcement. This is a balanced approach that addresses the deficiencies highlighted in GAO analysis. No additional provisions are currently needed.

Question 4

TOP THREE ENFORCEMENT PRIORITIES:

Congress has become increasingly concerned that the administration is not adequately enforcing our trade agreements or our trade remedy laws. The Trade Enforcement Act of 2007 addresses this concern in part by requiring USTR to provide an annual report to Congress that identifies its enforcement priorities for the upcoming year.

In light of the hundreds of trade barriers around the world, I'd like your input on where the administration should focus its enforcement resources. What are your top three enforcement priorities?

Lael Brainard Response:

I have not undertaken recent analysis that would provide a basis for prioritizing the top 3 enforcement actions. However, I would recommend several principles to be used in such a prioritization: priority should be given to those violations which comprise a systematic pattern, which constitute a breach of international rules, where the violations constitute a threat to America's sustainable competitive advantage, and where the violations unfairly pose a threat to the livelihoods of a substantial number of American workers, farmers, and ranchers.

Senator Stabenow Questions:

Question 1

CHIEF TRADE ENFORCEMENT OFFICER:

You support establishment of a Senate-confirmed trade enforcement officer as a means of ensuring that USTR is focusing attention on critical trade compliance issues. Mr. Maruyama of USTR opposes it on the grounds that it would add to the existing bureaucracy and further delay enforcement of trade agreements. In response to my questions, President Bush's nominee to be Deputy USTR, Deanna Okun, said she opposed creating such a position on the grounds that it would actually hamper trade enforcement because of vacancies at the beginning of a new President's term. Could you address these two concerns: Would establishment of a Senate-confirmed trade enforcement officer delay or expedite trade enforcement actions?

Lael Brainard Response:

Both of these objections would carry more weight if the current Administration had demonstrated a greater commitment to enforcement. However, the evidence suggests a growing gap between the number of potential enforcement actions and the actual enforcement record. In the past, when Congress felt the Administration was not putting sufficient emphasis on a key priority such as agriculture, it has sought to create a Senate-confirmed post dedicated to the task. Section 501 of the Trade Enforcement Act of 2007 follows that precedent by creating a Senate-confirmed Chief Enforcement Officer with the rank of Deputy USTR whose primary responsibility would be to investigate and prosecute trade enforcement cases. Adding a senior position accountable to Congress for investigating and prosecuting trade cases would ensure that sustained attention is devoted to these issues at the highest levels. It would have the advantage of increasing consultations with Congress in defining the President's approach to trade enforcement, and it would enhance the status of enforcement within USTR. While delays in the

confirmation process pose a challenge to all new administrations, in this case, it would be no worse than the status quo.

Question 2

TRADE ENFORCEMENT METRICS:

Mr. Maruyama stated at the hearing that USTR's success in trade enforcement should not be judged by the number of WTO actions it has brought. In your opinion, what are the metrics that should be used to quantify USTR and other agencies' progress at enforcing trade laws, especially with China?

Lael Brainard Response:

A perfect and precise measure of trade enforcement would address the losses avoided by effective trade enforcement actions such as the value of intellectual property protected or the value of additional market access achieved as well as the deterrent effect in other markets. However, it is difficult to attain perfection in estimating the value of trade foregone and especially the deterrent effect of effective enforcement. As an easily quantifiable alternative, the number of enforcement actions serves as an imperfect but nonetheless informative intermediate measure. As I stated in my testimony, it is very surprising to observe a diminution in the number of enforcement actions over the past few years given the explosion of trade volumes, the expansion in the membership of the WTO to include China and others, and the sharp increase in bilateral trade agreements.

Senator Grassley Questions:

Question 1

WTO DISPUTE SETTLEMENT CASES:

Ms. Brainard, you assume in your testimony that the number of trade violations should be, more or less, a constant proportion of exports.

And from that, you infer that USTR should have substantially increased the number of new disputes it brought to the WTO each year since 2000.

But if your assumption is correct, one would have expected to see a significant increase in the filing of cases by all WTO Members, and not just by the United States.

But, the opposite has happened. The number of new cases brought to the WTO is down worldwide.

This suggests one of two things:

Either the entire world is failing to enforce its trade agreements, or your assumption is flawed.

How do you respond?

Lael Brainard Response:

During a period when U.S. exports and imports have grown by over \$1.4 trillion, the WTO has expanded to include 12 new members, including China whose weak enforcement is notorious, and the number of complex U.S. bilateral free trade agreement has expanded by 16, it is puzzling to see the administration taking fewer enforcement actions per year – not more.

Although the number of new cases brought to the WTO is down worldwide, the majority of this drop is attributable to the United States bringing fewer cases. Indeed, the United States is falling behind on trade enforcement relative to other WTO members. During the Clinton Administration, the United States brought 45 cases for every 100 cases brought by other countries. By contrast, during the Bush Administration, the United States has brought 16 cases for every 100 cases brought by other countries. If, like the Clinton Administration, the Bush Administration had brought 45 cases for every 100 cases brought by other countries, it would have brought 60 cases to the WTO, rather than only 21 cases.

Question 2

NEW TRADE DISCIPLINES:

Ms. Brainard, in your testimony, you were critical of the Administration's efforts to negotiate new trade agreements.

Would you agree, however, that negotiating new trade disciplines – for example, through bilateral and plurilateral trade negotiations and negotiations at the WTO – is a valuable way to address and remedy U.S. concerns about foreign trade barriers?

Lael Brainard Response:

In order to ensure support for trade is broadly shared, it is important to strike the right balance between negotiating new trade agreements and ensuring that existing trade agreements are enforced. It is notable that the administration did not take any enforcement action to address China's clear violations of its new obligations under the WTO for several years and instead placed priority on negotiating bilateral trade agreements with Australia, Bahrain, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, and Singapore – none of which helped to resolve pressing trade enforcement issues with China in any way.



Statement of Senator Jim Bunning
May 22, 2008

Thank you, Mr. Chairman.

Nearly all of the trade agreements we have negotiated in the past 25 years have been a bargain. We opened up our markets, lowering tariffs, and foreign nations agreed to abide by the rules of the World Trade Organization (WTO) or open their markets. But the foreign promises we received are worth nothing unless they are enforceable. That is why this hearing today is so important.

For many years, USTR has focused far more resources on negotiating new trade agreements than enforcing the agreements we have in place. Even as the volume of imports and exports has more than doubled in the past 10 years, the resources the President has allocated to trade enforcement at USTR has remained virtually flat.

Although the United States Trade Representative's winning percentage in cases the United States has brought to the WTO is high, their number has dropped to 3 per year since 2000 from 11 per year in the prior period. I find this troubling.

Even as our trade deficit has ballooned to 6 percent of GDP and new investment in United States businesses has remained flat, while employment in manufacturing has plummeted, foreign governments have perfected new strategies to avoid opening their markets to U.S. goods and services.

More troubling, as one of the witnesses today explains, some developing countries have adopted a policy of encouraging the theft of intellectual property to accelerate their own economic growth. Our future prosperity depends on our ability to create and defend the work of our highly educated citizens. Any foreign nation that systematically encourages intellectual property theft, or allow it to occur through state-owned companies, should be denied access to our markets.

The United States cannot thrive as the world's importer of last resort. We need tough and creative trade law enforcement that opens foreign markets to sustain our long tradition as a free trade nation. The American public have lost confidence in our trade policies, and it's time to restore their faith.

I look forward to hearing from the witnesses today.

Thank you.

Statement of Senator Orrin Hatch
Senate Finance Committee Hearing
Trade Enforcement Act
May 22, 2008

Thank you, Mr. Chairman, for holding this important hearing today. As you know, I am a strong believer in the opening of international markets to U.S. businesses. The United States' active involvement in international trade has forced international government to change the way they treat the important exports American workers produce every day. In effect, we have created a very high standard that governs the exchange of goods and services worldwide. These standards include strong intellectual property rights, strong financial services protections, more fair and transparent foreign government procurement procedures and the list goes on and on.

The standards that protect our companies and workers, however, are only good if we enforce the terms of our trade agreements. Enforcement is critical to the overall success of our trade agenda and we should take necessary steps at the appropriate time to ensure our trade agreements are being enforced. That is why I agreed to cosponsor the Chairman's trade enforcement bill being discussed here today.

Ambassador Schwab and her team at USTR have worked tirelessly to advocate on behalf of the American economy. She has a very difficult job which, unfortunately, has become even more difficult because some in Congress have allowed partisan politics to get in the way of passing critically important Free Trade Agreements with Colombia, Panama, and Korea.

Because of the hard work of USTR, I am concerned with the discussions going on in Washington which indicate that the Chairman's Trade Enforcement Bill need to move through Committee and the Senate in concert with the Colombian Free Trade Agreement – an agreement that was completed some time ago and has been languishing in Congress for months.

Mr. Chairman, I hope we can move the Colombian Free Trade Agreement without any more delay or horse-trading. It is a good agreement that will help spur our economy at a time when we could certainly use it.

I believe in trade enforcement. I am pleased we are holding this hearing today to talk about what we can do to enforce the policies outlined in our agreements and I hope we will act on this legislation at the appropriate time. However, I also believe the Colombia Free Trade Agreement needs to move through Congress expeditiously and we need not hold up the Colombia agreement while we discuss and debate trade enforcement options.

Again, thank you for holding this hearing and I look forward to hearing from our witnesses.



**A NEW ARCHITECTURE OF ENERGIZED COOPERATION
BETWEEN THE GOVERNMENT'S POLITICAL BRANCHES
IN TRADE POLICY**

Statement of

John R. Magnus

**President, TradeWins LLC
Of Counsel, Miller & Chevalier Chartered**

Before the
**Committee on Finance
United States Senate**

**Hearing on S. 1919
The Trade Enforcement Act of 2007**

**Washington, DC
May 22, 2008**

INTRODUCTION

It is a great honor for me to participate in this hearing of the Committee on Finance, on a topic of such importance and in the company of the distinguished experts whom you have invited to testify.

I am pleased, and believe the trade community broadly should be pleased, to see the Committee moving ahead with its consideration of S. 1919. This hearing comes at a moment of great unpleasantness, in the trade field generally and specifically in the area of Congressional-Executive cooperation in trade policy. I congratulate you for seeking, as responsible stewards, to move ahead with the people's business despite that unpleasantness. As bad as it is, the stalemate over free trade agreements would be even worse if it also precluded necessary and time-sensitive work on other trade issues.

The bill you are reviewing addresses some important topics whose consideration should not be delayed, and it proposes some solid solutions. My statement addresses the bill's seven titles in the order they appear.

TITLE I—TRADE ENFORCEMENT PRIORITIES

Title I would establish legislatively an updated version of what has previously been known as the "Super 301" mechanism for identifying and prompting action with respect to the highest priority foreign barriers to U.S. trade.

I always regarded Super 301 as a useful element of US trade policy and would welcome its return in the form your bill proposes. There is both a political and a policy logic to Title I of the bill, and that logic outweighs the presumption against adding new reporting requirements to those under which USTR officials already labor.

The process for identifying enforcement priorities should have robust top-down (government-identified) and bottom-up (petition-based) components. Publishing a *National Trade Estimate* (NTE) compendium each year does not, even with the "Special 301" (intellectual property) add-on, constitute a robust top-down element. Title I of your bill would supplement existing prioritization tools in a measured yet meaningful way.

Actually forcing action by the Executive Branch with respect to any trade barrier or group of barriers is a matter of some delicacy, in both legal (constitutional) and policy terms. The "shalls" in amended Section 310(d) can be expected to give rise, as analogous provisions have done in the past, to some disagreements. But with appropriate Congressional follow-up, those "shalls" have the potential to provide useful, periodic, jolts of electricity. This can legitimately be part of a new architecture of energized cooperation between the government's political branches in trade policy. In that context, the specific opening you propose, for the Congressional committees with trade jurisdiction to put items on the priority list, makes good sense.

TITLE II—WTO DISPUTE SETTLEMENT REVIEW COMMISSION

Title II would establish a WTO Dispute Settlement Review Commission empowered to review WTO decisions that are adverse to the United States and opine as to whether the reasoning and outcomes of those decisions are legally sound.

Having such a Commission is a good idea, and the need for it has not diminished over the years since it was first proposed in 1994. An objective second look at decisions adopted by the WTO Dispute Settlement Body (DSB), resulting in additional expert inputs for the political actors in the U.S. government who have to decide what to do in the wake of an adverse WTO decision, is something we should welcome. It can be expected at least to promote fully-informed political decisions, and at best to bolster public confidence both in the WTO rulings themselves and in the U.S. government's responses. I believe we can expect both sorts of benefits. Regular review of this type is not something proponents of the WTO (I count myself as one of those) should fear -- even if it has political and perhaps also some legal consequences.

I have devoted a lot of professional time to helping with the defense of U.S. measures that should have survived WTO review but did not. There is a real problem here -- and for part of it, we have only ourselves to blame. We have too readily agreed to implement some adverse WTO decisions, been too reticent in pushing for changes to no-longer-appropriate aspects of the WTO dispute settlement system, and consistently provided too little "aerial cover" (of a political and diplomatic character) for the work our litigators do in Geneva. Not all of the fault for the problems that have emerged alongside the dispute settlement system's successes lies here at home, but there is much that we can do. I congratulate the Committee both for getting started and for recognizing that this topic is linked inextricably to the topic of "enforcement."

On the provisions you have proposed, I think you could consider a more aggressive approach in Section 206 of your bill -- one that seeks to preclude (or at least requires consultation and layover for) changes in agency practice, on which Congress has relied when legislating, in the wake of a WTO decision that is found to fail the standards applied by the WTO Dispute Settlement Review Commission.

Looking more broadly: as valuable as this Title is, additional measures will be needed to deal holistically with the problem it addresses. There are changes needed both in the rules and procedures of the WTO dispute settlement system, and in the way the United States participates in that system. Among other things:

- Whether an Appellate Body member has participated in decisions that involve "over-reaching" (legislating from the bench) should be a factor in whether the United States joins in a consensus to renew him or her for a second 4-year term. U.S. support for second terms should not be automatic, as it has been.
- We should reconsider the formerly-useful fiction that incumbent government officials of WTO members can serve impartially as lower-level panelists.

- Some structural separation is needed with respect to staffing, so that we do not have the same WTO Secretariat officials supporting the Organization's negotiation and dispute settlement functions. (This is analogous to your legislative staff simultaneously serving under you and as clerks to the judges who decide cases arising under the laws you enact.)
- And it may be necessary to have more cases, like the *Internet Gambling* case, where the United States demonstrates a willingness -- at the risk of borrowing a freighted expression -- to "just say no."

This last point may sound radical, but it is not. WTO rules expressly recognize that the choice regarding whether and how to implement an adverse decision is a political one. For the United States as with any WTO Member, the debate following an adverse decision naturally reflects a variety of factors including (1) the level of attachment to the measure found to be WTO-inconsistent, (2) the anticipated costs and benefits, including reputational and systemic costs and benefits, of implementing versus selecting one of the other recognized options (offering compensation or accepting retaliation), and (3) the soundness of the adverse decision itself.

TITLE III—MARKET DISRUPTION BY IMPORTS FROM CHINA

Title III assigns Congress a role in the political decision that must be made when the ITC finds that the criteria for import relief in a "Section 421" case are satisfied. No matter what view one holds regarding the Presidential decisions denying relief in the Section 421 cases processed to date, this reform is a sensible one. Some political review before imposing relief in these cases -- rather than a legal right to relief as we have under the antidumping and countervailing duty laws -- is appropriate, given that the imports involved may be fairly traded ones. But that political review can include a role for both of the government's political branches, so long as the new arrangements preserve efficiency and respect the (admittedly sometimes hazy) rule against legislative vetoes. As S. 1919 goes forward, it might be worth considering some additional language to minimize any chance of a court seeing a violation of the *INS v. Chadha* line of precedents.

TITLE IV—STRENGTHENING ANTIDUMPING AND COUNTERVAILING DUTY LAWS

Sec. 401. Application of countervailing duties to nonmarket economies.

Section 401 confirms that the countervailing duty (CVD) law applies to products imported from non-market economies (NMEs).

As a policy matter, it makes sense for the law to apply to imports from NMEs. The question presented here, properly understood, has always been a practical one, and if the Department of Commerce (DOC) now believes that it can confidently identify and measure subsidies in economies that have not yet qualified as market economies for antidumping purposes, the practical question is decisively answered. In the current

wave of China CVD investigations that it is already conducting, DOC is having to stretch itself -- both in an investigative sense (uncovering facts) and methodologically -- but it is doing a good job and deserves both congratulations and a vote of confidence.

The need for legislation formally extending the CVD law to China is debatable, given what DOC has done on its own. But court approval for DOC's new approach has not yet been secured, and in any event legislative clarification cannot be harmful.

There is a chicken that has not yet come home to roost, and you should be aware of it. DOC has ducked currency subsidy allegations in the China/CVD cases processed to date, asserting that these particular subsidy claims were inadequately pleaded. DOC has not yet specified in what respect the pleading was too thin, but it appears that DOC's answer (when the time comes) will be that there was no sufficient allegation of a "financial contribution." This would be a flimsy basis for declining to investigate, and unlikely in my opinion to survive judicial review. When Chinese exporters go to a government window and trade one currency for another, the exchange certainly seems to satisfy the statutory definition of a financial contribution -- just as if they exchanged currency for financial instruments or pencils or cement or anything else. The more interesting question is whether these financial contributions confer a "benefit" -- and there too, the petitions filed to date seem to have addressed the statutory criteria, in their pleading, to a degree sufficient to justify an investigation. DOC may eventually find itself in a box.

I am not talking here about new legislation that would specifically define currency mis-valuation as a subsidy under our law. I am saying that the elements of a countervailable subsidy under our existing law may well have been sufficiently pleaded, and I would not be surprised to see reviewing courts send this issue back to DOC with instructions to investigate rather than peremptorily kicking these currency subsidy allegations to the curb. The thought of DOC trying to make determinations about what the proper yuan/dollar exchange rate should be -- whether there is a "benefit" in the exchange transactions between Chinese exporters and the PRC government -- makes some observers nervous, and it would certainly represent a change in terms of the historical (and presumed) allocation of competence among U.S. government agencies where China/currency matters are concerned. But it may be an inevitable consequence of applying the CVD law to Chinese products, and DOC just might surprise its skeptics (I am not one of those) by doing a good job here as it has elsewhere. Some of you, including Chairman Baucus and Ranking Member Grassley, have already endorsed legislation that crosses this bridge and calls for DOC to take currency mis-valuation into account in trade remedy margin calculations. I believe the confidence you have shown in DOC, by taking these positions, will turn out to be justified.

Sec. 402. Clarification of determination of material injury.

Section 402 overturns legislatively a line of court decisions that for the past several years have imposed a new/additional legal requirement for obtaining relief under the antidumping and countervailing duty laws. Under these decisions, the ITC cannot make an affirmative injury determination unless it specifically finds that the benefit of import

relief will flow to domestic producers rather than to foreign producers not under investigation.

These court decisions were mistaken, have caused a significant and unnecessary problem in the enforcement of the affected statutes, and deserve legislative correction. Section 402 adds to the value of S. 1919.

TITLE V—TRADE ENFORCEMENT PERSONNEL

Title V proposes to create a new Senate-confirmed position at USTR with enforcement responsibilities. The objective is a worthy one also pursued by other Titles of the bill: to increase the level of enforcement activity and reduce the problem of good enforcement initiatives dying on the vine. I would like to sound a cautionary note – not about whether this reform is worth trying, but about the appropriate level of optimism that it will produce meaningful results.

There have been grounds for criticizing the enforcement decisions (both actions and inactions) that the Executive Branch has made in each of the last several Administrations. In my judgment, the hyper-caution that functions as a wet blanket over our enforcement program is the true enemy here, and it has many sources. Partly it derives from the too-frequently harrowing experiences of the United States as a defending party in WTO dispute settlement, some of which have featured results so outrageous as to imperil the minimum/baseline level of U.S. public support for ongoing participation in the WTO trade liberalizing enterprise. Partly it derives from unwillingness, in an era of “gotcha” politics, to risk criticism in connection with a complaint that might fail. Partly it reflects a sometimes-excessive reluctance to back theories or interpretations that might later, after considerable stretching, be asserted in support of claims against the United States. There are other sources as well.

Congressional oversight and occasional pressure have been hugely important in maintaining trade enforcement at a reasonably-active level. I sympathize with the desire to bolster accountability by setting up an additional line of confirmation hearings – but believe the questions you would likely pursue in such hearings would not differ meaningfully from those you take up in connection with USTR appointments already requiring your advice and consent.

Beyond those positions, there is already an Assistant USTR for Monitoring and Enforcement – although at present it appears that person exercises general dispute settlement functions, working on both offensive and defensive cases. There is also a new AUSTR-level official whose title suggests an exclusive focus on enforcement with respect to China. Perhaps adding another (notionally) enforcement-only official, enjoying the independence implied by Senate confirmation, will help. But for any position inside the Executive Office of the President, independence may prove to be illusory.

Concerns about enforcement have driven much of the increased spending on the government’s trade functions in the 90s and 00s. For the overall result of greater

investment in these functions, we should all be grateful. But the strategy of earmarked funding connected to new enforcement positions has been heavily tested already, with only modest results. As a strategic matter, I would advise you to prioritize addressing the hyper-caution problem at its sources, as you commendably do in this bill (among other places) in Titles I and VII.

* * *

I would be remiss if I did not urge you, should you indeed legislate in this area, to correct a serious mistake from the mid-1990s by repealing the Lobbying Disclosure Act provisions that permanently disqualify individuals from serving in high-level trade positions on the basis of prior work for foreign interests in trade disputes. These provisions are unjust at an individual level and unwise at the broader level of public policy and attracting top-flight talent into government service. As a volunteer member of a bar association, I undertook (along with a colleague) detailed research that went through every ethics-in-government provision in every title of the U.S. Code, to document the unprecedented and inappropriate character of these trade-related provisions. That work led to a Report & Recommendation that became official policy of the American Bar Association in 1997, and that I hope to have included in the record of this hearing. These objectionable provisions are today impeding the confirmation of a superbly qualified senior trade appointee, providing further evidence of the harm they can do and the importance of repealing them.

TITLE VI—INTELLECTUAL PROPERTY ENFORCEMENT PERSONNEL

Title VI responds in an intelligent and measured fashion to a real problem in the sound functioning of the U.S. trade regime. As the Committee is well aware, "Section 337" cases have grown dramatically in number and importance in recent years. The needs of the ITC when it comes to finding Administrative Law Judges (ALJs) to manage these cases are great, and differ importantly from the ALJ recruiting needs of other agencies. I believe the ITC has gone the extra mile in seeking to have these special needs met under a flawed system, and that legislative relief is now both deserved and urgently needed. Title VI strikes a balance by preserving the core protections of independence while opening a path for the ITC to lawfully find the kind of qualified ALJ candidates it needs and will continue to need in the future. This is a "good government" reform. There may be broader, more systemic reforms to the ALJ system that would also be in theory capable of solving the ITC's problem, but awaiting such a change could result in a breakdown in a part of our trade regime where we can ill-afford one.

TITLE VII—INTERAGENCY TRADE ORGANIZATION

This Title could help to reduce a structural problem, in the U.S. government, that makes it harder than it should be for robust trade enforcement actions to achieve lift-off. Trade officials who become persuaded of the need for aggressive action in a given case -- I say this as one who often seeks to persuade them -- have long been at risk of seeing their initiatives blunted through input from other agencies, more senior in the Cabinet

structure, whose particular portfolios and concerns may lead them to prefer calm and patience over aggressive, and possibly water-roiling, market-opening efforts.

Legislation cannot alter the basic structural relationships among Cabinet officials and the agencies they head, and it cannot dictate at any level of detail which issues are pushed up to high levels of interagency review and how much influence particular actors will have from one Administration to the next. Full realization of the goal that this provision seems to embrace will require not just legislation but also a cultural change -- a recognition that America's global diplomatic and financial strategies are going to have to make more and more space for, and as a factual matter are *not* undermined by, energetic trade enforcement. I fear that this cultural change will come slowly if it comes at all. In the meanwhile, legislation underscoring the consultative rather than permission-seeking character of the relationship between top trade enforcers and the TPRG is a good and sensible step.

CONCLUSION

The Committee is doing important and challenging work by advancing its consideration of S. 1919, acting in its own best traditions and in pursuance of the public interest. I am honored to have the chance to provide a practitioner's viewpoint, and to offer my ongoing support as the Committee takes this work forward.

**QUESTIONS FOR THE RECORD
FOR MR. JOHN MAGNUS**

**United States Senate
Committee on Finance**

**Hearing on
S.1919: The Trade Enforcement Act of 2007**

May 22, 2008

Senator Baucus Questions:

Question 1

INTELLECTUAL PROPERTY EXPERTISE:

The International Trade Commission (“ITC”) has seen a significant increase in section 337 intellectual property cases in recent years. But existing law hamstringing the ITC’s ability to hire judges with the necessary expertise to adjudicate these cases.

The Trade Enforcement Act of 2007 removes these impediments and gives the ITC the hiring authority it needs.

Will these provisions, in your view, solve the problem?

These provisions make good sense and will indeed remove a significant impediment to the sound processing of the growing (and already large) Section 337 docket.

As I noted in my written statement, the needs of the ITC when it comes to finding adjudicators to manage these cases are atypical -- in regard to both intellectual property expertise and complex case-management skills -- and cannot reliably be met under the existing ALJ system. Title VI of S. 1919 strikes a sensible balance by preserving core protections of independence while opening a path for the ITC to lawfully find the kind of super-qualified adjudicators the Section 337 docket demands.

That the ITC has fortunately achieved good results with its most recent ALJ recruiting efforts is no argument against providing, as S. 1919 proposes, additional flexibility for future hiring. The Committee might wish to take into account that the ITC is presently considering an additional hire and that some

existing ITC ALJs, carrying large case-loads, are or soon will be retirement-eligible.

So, yes, Title VI will solve a problem. There remains an additional concern of overall resources – a question of how many, rather than what caliber, of adjudicators the ITC can deploy in this important area. No less than other core trade functions of the government, this one needs adequate appropriated funding. But hiring flexibility is an excellent topic to address in an enforcement bill, as the sponsors have proposed.

Question 2

APPLYING COUNTERVAILING DUTIES TO NON-MARKET ECONOMIES:

Several bills have been introduced over the last few years mandating the application of countervailing duties to non-market economies like China. Commerce recently reversed its long-standing opposition to such a policy and made affirmative determinations in several cases involving Chinese imports.

Although these decisions have been applauded, Members have expressed concern about leaving this issue to the Administration's discretion. We therefore included a provision in the Trade Enforcement Act of 2007 clarifying that Commerce does indeed have the statutory authority to apply countervailing duties to nonmarket economies.

In light of Commerce's about face, do you think legislation is still needed?

I favor confirming legislatively the CVD law's applicability to products originating in non-market economies (NMEs).

The legal basis for what Commerce has done is sound. The current CVD law does not exclude NME products from its coverage, and there is no doubt that government entities in a NME can take actions that meet the statutory definition of a "subsidy" – providing a financial contribution that confers a benefit. (That Chinese government entities can do so has been made quite clear both during, and since, the negotiations over China's accession to the World Trade Organization.) The impediment to conducting CVD investigations involving NME products has always been a practical one. Once conditions in a NME evolve to the point where Commerce can confidently identify and measure subsidies bestowed there, Commerce's authority to apply the law to products originating in that NME should be beyond question – and should be upheld when/if challenged on appeal.

But that authority is questioned, and it could perhaps be undermined (however wrongly) via a court appeal, and the use of that authority is, as the question notes, in some sense discretionary. For these reasons – to remove a cloud that

may be large or small, but plainly does exist -- legislation clarifying the law's applicability to NME products is appropriate.

Question 3

ADDITIONAL PROVISIONS FOR THE BILL:

The Trade Enforcement Act of 2007 seeks to address concerns that our current trade enforcement tools are not adequate to protect the rights of U.S. farmers, ranchers, manufacturers, and workers. The bill contains provisions to amend our current trade enforcement tools to make them work better, like the section 421 China safeguard. And it also contains provisions to create entirely new enforcement tools, like the Chief Trade Enforcement Officer at the Office of the U.S. Trade Representative ("USTR").

Do you think the bill strikes the right balance? Are additional provisions needed to further improve our trade enforcement tools?

I believe the bill strikes a good balance. It defines "enforcement" to include both export-promoting and import-regulating elements of the U.S. trade regime, seeking to patch holes in both. And its Title II wisely recognizes the relevance of a topic whose connection to enforcement might not be obvious to casual observers -- the topic of WTO dispute settlement decisions that are adverse to the United States.

The bill constructively addresses gaps in coverage, or other impediments to enforcement, in each of the areas that it touches. It does not do, or seek to do, everything that might in some fashion enhance the U.S. trade regime. It is a package of high-priority and well-considered items.

With regard to market-opening initiatives -- prompting effective action on foreign market barriers, and enforcing U.S. rights under international trade agreements -- the bill has a good set of new tools and improvements to existing ones. They are not guaranteed to succeed, either individually or even in combination, but putting them in place makes good sense. I do not have other, specific suggestions in this category. I believe the reforms S. 1919 proposes will bear fruit in the context of, and may even help to spur, a broader (largely political rather than legal) enhancement of collaboration between the government's political branches in trade policy.

If the Committee wants to tighten (and improve enforcement of) import remedies beyond what the current draft of S. 1919 proposes, I would suggest focusing on the remedies involving unfairly traded (dumped or subsidized) goods rather than seeking to adjust safeguard-type remedies like section 201 or section 421. The AD/CVD remedies matter more, and in my view will continue to matter more. Section 402 of S.1919, over-ruling the *Bratsk* line of court decisions, already

addresses the most important priority in this category. To go further, the Committee could consider language that (1) preserves (or restores) legislatively the “zeroing” methodology for all antidumping investigations and reviews, (2) bolsters the CVD law with language, designed to take effect in the future following a vigorous negotiating effort, that removes the disparity in treatment of direct and indirect taxes, and/or (3) makes relief more readily obtainable in the context of “fill-in” countries. (This last refers to the problem of non-subject countries whose U.S.-bound shipments of dumped or subsidized products increase sharply in the wake of an order against a “first wave” of injurious, unfairly traded products of the same type; it is sometimes referred to as “persistent dumping,” and existing law provides little extra deterrence against it.)

Question 4

TOP THREE ENFORCEMENT PRIORITIES:

Congress has become increasingly concerned that the administration is not adequately enforcing our trade agreements or our trade remedy laws. The Trade Enforcement Act of 2007 addresses this concern in part by requiring USTR to provide an annual report to Congress that identifies its enforcement priorities for the upcoming year.

In light of the hundreds of trade barriers around the world, I'd like your input on where the administration should focus its enforcement resources. What are your top three enforcement priorities?

My list of priorities, when it comes to foreign trade barriers, is functional rather than sectoral. Sectoral examples abound, however, in each of the categories below.

First is *subsidies*. As border measures diminish in importance, the potential of subsidies to cause adverse cross-border consequences (across a wide range of economic sectors) increases. At the multilateral level, subsidy discipline should accordingly be tightening – but that does not appear to be happening, and there are many proposals in the Doha Round that would reduce current discipline. The U.S. effort to tackle (under existing rules) foreign subsidies and the problems they cause has been enhanced and is impressive, but should not plateau. In the case of China, only export-contingent and import-substitution-contingent subsidies have been directly challenged so far, although an extensive array of domestic subsidies has been documented. And China is by no means the only offender. Self-discipline through tools like the European Union's internal state aid regime does not clamp down sufficiently. Subsidies (as well as oddities in the current framework of subsidy rules, such as the disparate treatment of direct and indirect taxes) remain a problem in international trade and an impediment to U.S. firms succeeding to the degree they should in international competition. There are additional enforcement efforts – some that may be sufficiently treated through

regular diplomatic pressure, others that may require resort to formal dispute settlement – that deserve favorable attention from U.S. officials in this category.

Second is *standards-related barriers*, a category of barrier that has negatively affected market access for U.S. food, high-tech, and other products in the past and has a virtually limitless potential to do so in the future. International rules aimed at disciplining this type of barrier have improved with, for example, the WTO agreements on Sanitary/Phytosanitary Measures and Technical Barriers to Trade, but we don't really know by how much because enforcement actions invoking these rules have been fairly scarce. What we do know is that standards-related barriers remain prevalent and economically important; in fact, it has been suggested that all of the agricultural liberalization (tariffs and subsidies) on offer in the Doha Round will have negligible results for U.S. exports in key categories because of standards-related barriers. Past U.S. decisions about what to litigate and what to pursue by other (mainly diplomatic) means may have been sound ones. And of course, pressing against these barriers can be complicated, as shown by current events in South Korea that are connected to U.S. efforts to gain removal of unreasonable standards-based restrictions on beef trade. But there is no doubt that many barriers remain in this category and deserve priority treatment in current and future enforcement efforts.

Third, I am among those who believe that *private anticompetitive practices* often impair U.S. access to foreign markets and deserve careful consideration when brought to the attention of U.S. trade officials. Well-known past examples of this phenomenon – the *Japan Film* case is one – have given rise to some pessimism that it can be effectively addressed. And this category of barriers has generally receded from public view with the abandonment of efforts to negotiate WTO rules in the area and the decline in usage of Section 301 – especially Section 301(b). But the underlying problem remains. It deserves the continued attention of U.S. trade and antitrust officials -- working in tandem to gain the removal of privately-imposed market barriers through local competition law enforcement if possible, and through other means if necessary.

Senator Lincoln Questions:

Question 1

WTO DISPUTE SETTLEMENT REVIEW COMMISSION:

Mr. Magnus, in your testimony, you support creating a WTO Dispute Settlement Review Commission empowered to review WTO decisions that are adverse to the United States. Can you give examples of some of the WTO Panel and Appellate Body decisions that have been wrongly decided?

You also argue that additional measures are needed in Title II in order to address existing problems with the rules and procedures of the WTO dispute settlement system. What are the challenges to implementing the changes you propose?

Decisions in cases brought against the United States that reflected expansion rather than sound application of existing WTO rules have unfortunately abounded, and have been issued in virtually every year of the WTO's existence. The Committee on Finance has issued findings on this subject, and decisions in this category have involved core elements of the major U.S. import relief laws (antidumping, countervailing duty, safeguard) as well as a wide range of other measures (internet gambling prohibition, subsidies to petitioners under the Byrd Amendment, customs bonding requirements, and others).

Not all adverse decisions in cases brought against the United States are wrong. We are hardly infallible. But those adverse decisions that involve legal judgments made during preparation of our original implementing bill for the WTO agreements – the 1994 Uruguay Round Agreements Act (URAA) – are in my view especially suspect. It is worth recalling that all of the U.S. government's most sophisticated trade law experts, from both political branches and both political parties, collaborated for almost an entire year in crafting the URAA. When the bill was formally transmitted to Congress under fast-track procedures, it carried a certification from the Executive Branch that it contained the statutory provisions needed to bring the United States into compliance with the obligations assumed in the Uruguay Round. This judgment applied to provisions in the bill and also those that did not appear – to cite one mundane example, it was the carefully-considered view of both branches that provisions repealing the "1916 Act" did not need to be enacted. That particular statute had no broad policy significance. But when the legal judgment pertaining to it, and literally dozens of other legal judgments made by our top experts just after the conclusion of the Uruguay Round, are steadily contradicted over the following 13 years by WTO adjudicators, there is reason for skepticism.

The additional measures I identified in my written submission as being needed to deal holistically with the problem of over-reaching in WTO dispute settlement are not items that can easily be legislated. I wish they could. Many involve changes to the WTO *Dispute Settlement Understanding* and its working procedures, which would have to be negotiated in Geneva rather than enacted here in Washington. If the Committee agrees on the desirability of these changes, and wants to add some negotiating directives to S. 1919, that would be highly desirable in my view.

Other suggested changes involve the U.S. government's own behavior as a participant in WTO dispute settlement activities, and the challenges here are largely cultural. Two examples may help to clarify. I would like to see a more neutral approach to the renewal (for second 4-year terms) of Appellate Body members, in which they are held to account for the quality of their decisions as the reappointment system seems designed to facilitate. I would also like to see more widespread and energetic diplomatic efforts by U.S. trade officials to

advocate the U.S. position in dispute settlement cases “outside the room” – in missions, with Secretariat officials, with basically anyone who will listen – in hopes of improving the atmosphere for the decision that will be made “in the room.” The United States often underperforms relative to the legal merits of its positions in dispute settlement cases, and I do not believe this is because of less-than-excellent litigating. Some would say the United States, at least as a defendant, can never hope to get a fair shake in an international forum. Whether or not it contains a particle of truth, this view is not a helpful or productive lens for those who want to make things better. I would say, rather, that there remains a very important political/diplomatic element of WTO dispute settlement, to which we should pay greater attention as other Members do. One place to start would be an expectation that all Geneva-based U.S. trade officials will fan out regularly, buy a lot of people a lot of lunches, and generally find opportunities to explain *why we are in the right and must not be found in the wrong* with respect to dispute cases pending against us.

Question 2

RELATIONSHIP TO FREE TRADE AGREEMENTS:

If this legislation is passed, what impact would it have on pending free trade agreements? Do you believe it is important for Congress to act on this legislation, regardless of what it does on the various pending free trade agreements? Why?

There is no necessary connection between the bill and the pending FTAs. S. 1919 addresses how the U.S. government's enforcement machinery should work, regardless of what agreements the United States is party to and what the status is of implementation of particular FTAs.

As noted in my testimony, I am pleased and believe the trade community broadly should be pleased to see the Committee tackling these issues even amid all the unpleasantness over pending FTAs. I see this as responsible stewardship -- a desire not to let the FTA impasse freeze progress on other important elements of the people's business.

It is important for Congress to act on the topics touched by S. 1919.

It is also important for Congress to act on the pending FTAs.

Senator Grassley Questions:

Question 1

WTO DISPUTE SETTLEMENT:

Mr. Magnus, we've heard assertions today that USTR is not filing enough cases at the World Trade Organization.

I'm not convinced of that.

In my experience, there's often a question whether the foreign action being complained about actually conflicts with any of the existing rules of trade.

Other times, there's a question whether the affected U.S. industry actually supports taking the issue to the WTO. That may be due to concerns that, in the long run, litigation would be counterproductive.

In your view, should USTR bring a case even if the affected industry doesn't support it?

Rarely if ever should the U.S. government initiate dispute settlement proceedings without the support of the affected U.S. industry.

A well-considered determination by the responsible government officials that litigating would be counter-productive is also a good reason not to start litigation.

I agree with your statement during the hearing that the number of WTO dispute cases filed is not a very useful metric. Especially dubious is the simplistic notion that "more trade" should necessarily be accompanied by "more formal enforcement actions." When one sees that U.S. exports are expanding, one could just as easily conclude that the mix of diplomacy and litigiousness running in the background has been just right.

It is also (nonetheless) true that some WTO complaints that should have been initiated, or at least credibly threatened, have not been, and that hyper-caution within the Executive Branch when it comes to using dispute settlement is a problem that the Finance Committee should want to address. S. 1919 does seek to address this problem, and one does not need to rely on any dubious metrics in order to endorse its approach.

Question 2**WTO DISPUTE SETTLEMENT:**

Mr. Magnus, you expressed some concern in your testimony about “excessive caution” in taking disputes to the World Trade Organization.

Do you think the Administration should be more willing to take marginal cases to the WTO – and by that I mean cases where there isn’t a high probability of success?

What do you think the consequences would be if the United States started losing a significant number of cases that we filed?

I do not favor – I know of no one who does favor -- bringing “marginal” cases.

I do periodically disagree with U.S. officials about the likelihood that a given case will succeed, and about the risk/reward profile of advancing (or threatening to advance) particular claims.

A huge preponderance of WTO complaints is upheld. As I noted in my written statement and at the hearing, I believe this situation reflects a certain amount of mission creep and over-reaching by the actors in the dispute settlement system. In light of it, the notion of the United States losing outright in a significant share of its offensive cases is very hard to imagine. And it is certainly not something I would wish to promote.

Of course there can often be a difference between the “on paper” and “real world” results of a case, and the disparity can run in both directions. In *EU – Hormone Fed Beef*, the United States won a legal victory but secured no improved market access. In *Japan – Film*, the United States received a negative result in litigation and yet, because of the case, achieved much-improved access to the Japanese market for photographic film and paper.

Points like these need to be factored into any analysis of the “probability of success.” Usually they are, and intelligently so. But occasionally and too often, the level of caution is indeed excessive.

Question 3**NATIONAL TRADE ESTIMATES REPORT:**

Mr. Magnus, in your testimony on the so-called Super 301 mechanism, you said the National Trade Estimates report “does not constitute a robust top-down element” for identifying enforcement priorities.

You also mentioned a “presumption against adding new reporting requirements to those under which USTR officials already labor.”

As a practitioner, what is your view of the National Trade Estimates report?

Is it serving a valuable function that is commensurate with the staff resources it takes to produce?

Can it be improved?

The NTE is a terrific resource that, admittedly, is terrifically difficult to compile.

It is serving a valuable function, but because of its length is much like a map that does not show topography. (A perhaps more useful analogy is to law firm brochures, which are often designed to make it appear as if the firm being advertised has every imaginable capability rather than laying bare where its truly deep pockets of expertise lie.)

In short, the NTE is a great compendium -- but only a compendium, not a prioritization tool. It sends messages, but somewhat muted ones. And it is not possible for each listing, or even a majority of them, to include real detail on items such as the barrier's trade effects or (in)consistency with international obligations.

The NTE can be improved, in my opinion, not internally but through extra utilization -- via legislation like Title I of S. 1919 that runs the NTE listings through a prioritization mechanism.

Question 4

CHIEF TRADE ENFORCEMENT OFFICER:

Mr. Magnus, you seem a bit skeptical of the value of creating a Senate-confirmed position of Chief Enforcement Officer.

I wonder if a better use of our limited resources would be to authorize USTR to hire more staff-level personnel to focus on enforcement.

What is your view?

Hiring more staff-level personnel is a resources issue. Adding a Senate-confirmed Chief Enforcement Officer is mainly an accountability issue. So, I do not see these as logical alternatives, but as distinct ideas deserving to be considered on their merits.

The idea you introduce here, of expanding staff-level personnel, is one I endorse. Unlike the number of WTO disputes filed, I do believe staffing and resources for staffing should (ordinarily) increase in a manner broadly reflective of trade growth.

**STATEMENT BY WARREN MARUYAMA
GENERAL COUNSEL
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE**

SENATE FINANCE COMMITTEE

MAY 22, 2008

Chairman Baucus, Senator Grassley, members of the Committee, I appreciate this opportunity to testify about the Office of the U.S. Trade Representative's (USTR) enforcement agenda and our views on S. 1919.

U.S. Trade Enforcement Agenda

At USTR, our job is both to negotiate and enforce trade agreements. Without enforcement, a trade agreement is just another piece of paper. As Congress and this Committee have made clear, the American people expect USTR to hold foreign governments to their trade commitments. Every single person working in the Winder Building knows that enforcement is part of the job and that our job is to hold other governments to their word.

Accordingly, we are committed to using every tool in the U.S. trade arsenal to ensure a level playing field for American workers, farmers and entrepreneurs. This includes bringing World Trade Organization (WTO) cases, negotiating bilateral market access agreements, and using U.S. trade laws.

As General Counsel, a big part of my job is making sure that trade agreements are enforced. Below are some examples of our enforcement efforts.

- This March, we initiated a major WTO dispute settlement challenge to China's Xinhua for putting up barriers to U.S. providers of financial information.
- We are litigating with the European Union in the WTO on several cases including challenges to its launch aid subsidies for Airbus, and its undue delays approving biotech agriculture products, and its prohibition of U.S. beef from cattle that have been administered certain hormones.
- During the last year, we have launched two arbitration proceedings against Canada under the Softwood Lumber Agreement.
- We have recently obtained a favorable ruling against Turkey's import licensing regime for rice.

Before going into the specifics of the Committee's proposed changes to enforcement in the legislation before us today, I would like to briefly describe how we currently go about enforcing America's trade agreements on behalf of American workers, farmers and entrepreneurs.

As you are aware, effective enforcement requires the flexible and creative application of a wide range of techniques, tools and strategies. No one, single tool works in all circumstances. And, despite artificial bureaucratic and budget categories, no clear dividing line exists between negotiation and enforcement. Negotiation is a form of enforcement, and dispute settlement is a form of negotiation by another means.

This overlap demonstrates why it is so important that we include strong, enforceable provisions in our free trade agreements. We also carry this philosophy with us during our multilateral negotiations, including in the WTO Doha Round.

Overview of Current U.S. Trade Enforcement Process

Let me quickly walk you through the enforcement process. When we become aware of a trade problem (for example, as we monitor the implementation of an agreement or when an affected stakeholder comes to us with a trade concern) involving action by a foreign government, a team from various USTR offices examines (1) whether it is covered by a trade agreement, (2) whether it could be taken up in a pending bilateral or multilateral negotiation, and (3) what ability we have to work out a resolution with the foreign government. USTR also partners with other Government agencies such as the Commerce Department and the Department of Agriculture to ensure that U.S. firms and workers gain the benefits of trade agreements signed by the United States. These partner agencies help to identify and overcome foreign trade barriers for U.S. companies, especially small and medium-sized enterprises.

In dealing with such barriers, our initial preference is negotiations, since a negotiated solution is typically quicker and more likely to produce a clear-cut solution to the problem than litigation. We will work to engage a foreign government and seek to persuade that government to bring its laws into conformity with its obligations. If that doesn't work, we will analyze the potential for bringing a successful challenge, work with affected U.S. stakeholders, confer with Congress, begin gathering evidence, approach potential country co-complainants, and develop our legal arguments.

The WTO is a unique international organization. Its effective dispute settlement system includes definitive findings by panels of experts and an appellate mechanism; and it can give a complaining party the authority to impose retaliation, in the form of withdrawing benefits, in the event of non-compliance by a respondent party.

As of today, we have launched more WTO dispute settlement challenges than any of our trading partners. According to the WTO, of the 373 WTO cases initiated through May 1, 2008, the United States was the complainant in 89, or almost one-quarter, of the cases. The European Union is the next-most-frequent user of the WTO dispute settlement system, and is a complainant in 81 cases.

Our winning percentage in offensive cases that have proceeded to the issuance of legal conclusions by a WTO panel or the Appellate Body is just under 95 percent. What is more, we

have been able to settle about one-half of our disputes without going all the way to a panel report. In those cases, our industries do not have to wait for relief under the WTO's dispute settlement procedures. Finally, looking at offensive and defensive cases together, we have prevailed or been able to settle on favorable terms in about two-thirds of all cases.

Our most recent cases include four WTO cases against China that we filed in the last 16 months. We have challenged China's prohibited export and import substitution subsidies; its failure to provide adequate laws to protect intellectual property rights; and its barriers to copyright-dependent entertainment industries and products – such as books, movies, home videos and sound recordings. This March, we also requested WTO consultations in a case challenging, among other things, Xinhua's use of its regulatory authority to restrict foreign financial information providers that compete with its new "Xinhua 08" service.

Last November, we successfully settled the prohibited subsidy case, with China agreeing to eliminate all of the challenged illegal subsidies effective January 1, 2008. In addition, we are eagerly awaiting the final panel report on our China auto parts case, which the WTO panel is scheduled to announce in July.

Another important case is our WTO challenge to the European Union's launch aid subsidies to Airbus. The case is fully briefed and argued, and we are awaiting a decision by the Panel.

Impact of Proposed Trade Enforcement Legislation (S. 1919)

With all of our enforcement efforts and challenges in mind, we welcome the Congress' commitment to ensuring we have the tools necessary to do the enforcement job, and we look forward to continuing our close partnership with Congress on these matters. However, we cannot support S. 1919 in its present form.

First and foremost, we oppose new restrictions on the President's authority to review International Trade Commission determinations under Section 421 of the Trade Act of 1974 – the China safeguard provision. Making relief mandatory upon an affirmative ITC determination in Section 421 cases could threaten the public interest and invite retaliation against some of our leading exports, including American farm products.

Second, we are concerned with the proposed Super 301 procedures. Today, the Administration has a wide variety of trade enforcement tools at its disposal – namely, WTO and FTA dispute settlement, as well as Section 1377 and Section 301. Some of these tools did not exist when Super 301 was enacted in 1988. Given that we have these new tools, and that USTR clearly is willing to bring WTO cases when we have a winnable case that can achieve U.S. objectives, we believe that the Administration no longer needs Super 301 to address the sorts of trade issues it was designed to highlight. The inflexibility of Super 301 could force USTR to bring cases at the wrong time, in the face of industry opposition, or in situations where the risk of failure with the case may be high and counterproductive to the objective of removing a barrier.

Further, we have concerns with the provisions creating a new "Chief Trade Enforcement Officer" at USTR and a Trade Enforcement Working Group. We are concerned that the new Trade Enforcement Working Group would add yet another bureaucratic obstacle and could lead

to delays in enforcing U.S. trade agreements due to the requirement that it be consulted before USTR can take any enforcement action. Since we already consult with the Section 301 Committee or the Trade Policy Staff Committee and Trade Policy Review Group as part of our inter-agency process, this would add another requirement to our enforcement decisions, and could get in the way of swift and effective action.

Finally, we would ask that the Committee reconsider the establishment of a Commission to review WTO Appellate Body and panel decisions. USTR has already demonstrated that we are fully prepared to criticize flawed WTO decisions. For example, we have publicly stated that the WTO's Appellate Body overreached in its "zeroing" line of decisions, which in our view represent a misplaced case of judicial activism with no basis in the Uruguay Round Antidumping Agreement. I believe that the Department of Commerce may have additional concerns with the current legislation.

Conclusion

With these thoughts in mind, I want to assure the Committee that we are willing to work with Congress to strengthen our ability to enforce our trade agreements to the benefit of American workers, farmers and entrepreneurs. We appreciate your efforts and look forward to working with you to that end.

I would be happy to answer any questions you may have.

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**QUESTIONS FOR THE RECORD
FOR MR. WARREN MARUYAMA**

**United States Senate
Committee on Finance**

**Hearing on
S.1919: The Trade Enforcement Act of 2007**

May 22, 2008

Senator Baucus Questions:

Question 1

CHIEF TRADE ENFORCEMENT OFFICER:

The Trade Enforcement Act of 2007 calls for the creation of a high-level Chief Trade Enforcement Officer at the Office of the U.S. Trade Representative to ensure that the administration focuses sufficient attention on enforcement. It also authorizes \$5 million in appropriations to build enforcement capacity at the staff level.

The bill would thus raise the stature and appropriate additional funds for your office. But I understand that you nonetheless oppose the provision. Why?

Answer:

At USTR, we have always vigorously enforced U.S. rights under trade agreements, and we will continue to focus our attention on doing so. At the hearing, I mentioned that we had brought 89 cases so far to the WTO; on May 28, 2008 we filed our 90th case, concerning the EU's tariffs on certain information technology products. Since January 1, 2007, we have filed six new WTO disputes; no other WTO Member has filed more than two new cases in that period.

Adding a position of Chief Enforcement Officer would be unnecessary and redundant. Enforcement is a high priority of the United States Trade Representative, assisted by the General Counsel. The Office of the General Counsel includes a litigation unit headed by an Assistant USTR for Monitoring & Enforcement. The Office of the General Counsel also already includes the Chief Counsel for China Trade Enforcement. The great majority of our attorneys prosecute or defend litigation matters. We do not see what a new position would add.

In addition, the General Counsel is a political appointee who reports directly to the USTR, and thus there is already both stature and accountability. What is more, the USTR's ability to name a General Counsel immediately allows USTR's enforcement efforts to move forward rapidly whenever there is a change in personnel. Conversely, we are concerned

that adding the new position of Chief Enforcement Officer could actually lead to delays in taking enforcement actions because of the confirmation process.

Question 2

WTO DISPUTE SETTLEMENT REVIEW COMMISSION:

There is a growing crisis of confidence – both within the Congress and among the American people – about the World Trade Organization (“WTO”) dispute settlement process. In a long string of cases, WTO panels have imposed new obligations that we never agreed to accept.

The Trade Enforcement Act of 2007 sets up a domestic commission of U.S. judges and international trade law experts to review adverse WTO decisions and report their findings to Congress.

Do you think such a commission would be helpful in restoring confidence in the WTO dispute settlement process?

Answer:

We welcome Members’ interest in WTO dispute settlement issues, and we will continue to consult closely with Congress on these issues.

We do not believe that adding a commission to review adverse WTO decisions is necessary. USTR provides an honest appraisal of WTO outcomes, and does not hesitate to criticize those which are problematic. For instance, as I mentioned at the hearing, we have publicly stated that the WTO’s Appellate Body overreached in its “zeroing” line of decisions, which in our view represent a misplaced case of judicial activism with no basis in the Uruguay Round Antidumping Agreement.

Furthermore, the proposed commission would present a one-sided view of the WTO dispute settlement system. By only looking at “adverse” reports, the commission would ignore reports in which the United States won and the benefits that the United States gained from those wins. And the review by the proposed commission would be unlikely to be a balanced review since the proposed commission would be unlikely to hear views in support of the panel or Appellate Body report.

We therefore do not think that establishing a new commission would assist in building confidence in the WTO dispute settlement process.

In addition, we are concerned that assisting in the commission’s review and appearing before such a commission would divert resources from vigorously defending U.S. interests in the dispute at issue or from actually prosecuting other cases.

Senator Rockefeller Questions:**Question 1****WTO DISPUTE SETTLEMENT CASES:**

The Bush Administration has presided over an enormous increase in bilateral and regional trade agreements, in addition to arguably the most important change to the global trading system in recent years: China's accession to the WTO. One would expect that this dramatic expansion in trade activity and trading partners would bring about an increase in enforcement activity. Instead, the United States has brought far fewer WTO enforcement actions during the Bush Administration years than we did during the Clinton years. How do you explain that? Are we to believe that our trading partners are simply following the rules more strictly now than they had been in previous years?

Answer:

After the WTO Agreement first entered into force, there were a significant number of cases brought because of pent-up demand. Many WTO Members had been waiting for the Uruguay Round negotiations to conclude before pursuing a number of complaints in hopes that their concerns would be addressed in the negotiations. In addition, because the WTO system was new, it was difficult to gauge what was a winning case, which contributed to a surge in filings as Members tested out the system. Since 1998, however, we have seen the number of disputes drop, as Members have worked through those issues and have gained more experience with the dispute settlement system generally. That experience with the system has allowed Members to judge more accurately the benefits of settling a dispute in light of the time and other aspects of pursuing formal dispute settlement. These declines in filings started to show up toward the end of the Clinton Administration, when the number of filings began to fall off. The EU has experienced similar declines – in 1998, 1999, and 2000, the EU filed 16, 7, and 9, cases respectively, but in 2001, 2002, and 2003 these figures fell to 1, 3, and 4.

Nevertheless, the United States has always been the most active user of the WTO dispute settlement system. We have filed roughly one-quarter of all WTO disputes. Under the current administration, the United States has filed 26 new disputes and compliance proceedings at the WTO. Since January 1, 2007, we have filed six new disputes; no other WTO Member has filed more than two new disputes in that time period.

The Administration's WTO litigation strategy has focused on filing major cases with broad systemic implications for U.S. trade, such as EC – Airbus, EC – Biotechnology, China – IPR, China – Copyright Market Access, and China – Prohibited Subsidies, and recently EC – ITA. We have not focused on simply filing a large number of cases. This makes a strictly numerical comparison somewhat misleading.

Finally, with respect to China's accession to the WTO in December 2001, we have brought six WTO disputes, and we settled one other matter on the eve of filing a dispute. In fact, the United States brought the first ever WTO dispute against China. No other Member has brought more than two disputes against China.

Question 2

SECTION 421:

The Section 421 safeguard mechanism, which was meant to provide relief from disruptive surges of imports from China, was a critical component of the deal that led to Congressional approval of Permanent Normal Trade Relations with China. To put it bluntly, without this safeguard, PNTR approval would have been in doubt. In other words, Section 421 was part of the deal. Unfortunately, the Bush Administration has effectively ignored that part of the deal, rendering it essentially meaningless. In the context of the President's refusal to follow the ITC recommendation each and every time the ITC has recommended Section 421 relief, do you think that the Section 421 safeguard actually exists? If you ran a business affected by a surge of imports from China, would you see Section 421 as a potential remedy? How do you recommend that we in Congress respond to our constituents when they ask us what the U.S. government is doing to make sure that trade remedies like Section 421 are effective?

Answer

As the President explained in his most recent decision in a Section 421 investigation (involving steel pipe), he remains fully committed to exercising the important authority granted to him under section 421 when the circumstances of a particular case warrant it. In the four cases decided by the President so far (pedestal actuators, wire hangers, pipe fittings and steel pipe), the President accepted as fact the ITC's finding that the domestic industry had suffered market disruption. However, as he is required to do, he also considered how import restrictions would affect a broad set of U.S. interests. For example, in the steel pipe case, the President found that import relief would be ineffective because of the extent to which imports from third countries would likely replace curtailed Chinese imports. Also, the President noted that the quota remedy recommended by the ITC would have generated costs for U.S. consumers five times greater than the additional income that could have been realized by domestic producers. It is also noteworthy that throughout the period investigated by the ITC, the domestic industry was able to raise its prices and remain profitable.

Even when the circumstances of a particular case may not warrant Section 421 relief, the Administration has made clear that it will continue to provide other relief where warranted and consistent with our trade laws. For example, although the President determined that relief under section 421 was not in the national economic interest in the steel pipe case, U.S. standard pipe producers subsequently filed petitions seeking AD and CVD relief for imports of these products from China, and the Commerce Department initiated investigations. On May 30, 2008, the Commerce Department issued final determinations in these investigations, finding both dumping and subsidies. In the AD investigation, the dumping rates range from 69% to 86%. In the CVD investigation, the subsidy rates range from 30% to 616%.

Question 3**DOHA RULES NEGOTIATIONS:**

As you know, there is a great deal of concern in Congress with regard to the Rules negotiations in the Doha Round. There are very few if any provisions in the draft Chairman's text that would strengthen the law as compared to where we were at the end of the Uruguay Round, while there are numerous provisions that would dramatically weaken our AD/CVD laws. Even on the issue of zeroing, which has received so much discussion, the Chairman's draft would actually codify a weakening of the rules as compared to the situation at the end of the last Round. Needless to say, and as many in Congress have clearly indicated, the weakening proposals currently on the table in the Rules talks are unacceptable. I cannot imagine that Congress would approve any Doha pact that included such provisions or that did not take a dramatically different approach on Rules. Is the Administration making abundantly clear that the United States will not accept the weakening proposals on the table in the Rules area? How do you intend to proceed to ensure that we achieve a clear and full reversal of the flawed zeroing decisions that have been issued by the Appellate Body?

Answer

Like you, we believe that strong and effective remedies against unfair trade practices, including those against dumping and subsidies, are essential to the integrity of the multilateral trading system. The United States has put forward a series of proposals to strengthen trade remedies, including developing stronger rules against circumvention and abuse of new shipper reviews; improving transparency and due process; addressing issues arising out of past adverse WTO dispute settlement findings on AD/CVD issues, including proposals to address issues such as zeroing, causation and facts available; and strengthening subsidies disciplines.

As to Chairman Valles' draft text, at the meetings of the WTO Rules Group, we have raised, and continue to raise, our concerns with respect to a number of specific aspects of the text, such as the failure to address zeroing in all contexts in investigations and the provisions relating to sunset reviews. On subsidies, we expressed disappointment that the text does not reflect our full proposal to expand the prohibited category of subsidies.

As you know, we have voiced our strong disagreement with the Appellate Body reports on zeroing. We have emphasized that the role of the Appellate Body is to interpret agreements, not to create rights and obligations. The United States tabled a proposal in the Rules negotiations to provide clear, precise rules in the Antidumping Agreement expressly permitting the use of zeroing, and delivered a strong message to other WTO Members on the critical importance of this issue. Chairman Valles' text addresses an important aspect of our zeroing proposal by permitting zeroing in reviews and in both targeted dumping and transaction-to-transaction comparisons in antidumping investigations. However, as we have stated, the text is deficient because it does not permit zeroing in calculations based on average-to-average comparisons in investigations, as set out in our original proposal. We will work in the ongoing negotiations to address this flaw.

We note that the text does take on board a number of additional U.S. proposals, including improvements to transparency and due process. While we are not fully satisfied with how

the text addresses many of our proposals, improving transparency and due process so that U.S. exporters are treated fairly in foreign antidumping proceedings has been and will remain a key priority for the United States.

In the WTO talks in Geneva, we have raised our serious concerns with respect to a number of specific aspects of the text, such as the provisions relating to the failure to address zeroing in all contexts in AD investigations and AD sunset reviews. We have made it clear that we cannot conceive of an outcome to the Rules negotiations that does not properly address zeroing. While we are disappointed with the proposed text, we fully appreciate that Chairman Valles faced a major challenge because of the multiple, vastly different, and conflicting positions of the various parties. His text represents an effort to bridge these differences, and we believe it offers a sufficient basis for continued negotiations.

- On subsidies, we have expressed disappointment that the text does not reflect our proposal to expand the prohibited category of subsidies.
- On fisheries subsidies, we are pleased with the level of ambition but recognize that certain areas will need further development.

Question 4

VAT TAXES:

How can we reverse the blatantly inequitable rules at the WTO that disadvantage U.S. producers due to our income tax system, while rewarding foreign jurisdictions with VAT taxes? I have included a provision in my trade enforcement bill that seeks to rectify this injustice, and Congress has repeatedly indicated that negotiations in this area are a high priority. What is being done in the Doha talks on this issue? What is your strategy to achieve some resolution of the matter in the current round of talks?

Answer

Pursuant to one of the Trade Promotion Authority negotiating objectives, we submitted a paper to the Rules Negotiating Group in March 2003 identifying the differing treatment of direct and indirect taxes under the WTO rules as an issue that needed to be addressed. Given the use of value-added taxes by nearly all WTO Members and the existing WTO rules that allow the rebate or exemption of value-added taxes on exports, our proposal received no support. Nonetheless, we have expressed our disappointment that our proposal was not reflected in the Chair's draft text issued last year and have continued to raise the issue in the context of related proposals made by other WTO Members. Recently, the Chair made it clear that his draft text is only a first draft and that all issues remain on the table. Therefore, there will be continued opportunities to have other issues included in the future revisions of the Chair's text. As we go forward, however, we will need to be cognizant as to how any change in the rules might affect indirect taxes in the United States, such as state sales and federal excise taxes that, like value-added taxes, are not imposed on export sales.

Senator Bingaman Question:**Question 1**

LABOR:

Mr. Maryuama, the AFL-CIO and several Guatemalan unions recently filed a complaint with the Office of Trade and Labor Affairs. This complaint alleges that in five specific cases, Guatemala has failed to uphold its domestic labor laws, as it must do under CAFTA. Is the administration planning to pursue this complaint? If not, why not?

What is the administration doing to ensure that our FTA partners are enforcing their labor laws?

Answer

We take the allegations contained in the submission very seriously. As required by the CAFTA-DR, the Department of Labor established procedures under which members of the public can make submissions on matters related to the labor chapter and how such submissions are to be considered. DOL received the submission on April 23 and, under its procedures, has 60 days to decide whether to accept the submission for review. If accepted, DOL has 180 days within which to review the allegations and issue a public report. USTR is part of the interagency process that will consult with DOL. We will have to await the outcome of that process, but the fact that a submission has been made acknowledges the labor provisions in the CAFTA-DR and other FTAs provide an important mechanism for bringing to light and addressing labor issues. I assure you that we take the allegations seriously and will make sure that they receive the appropriate level of consideration.

The Administration attaches great importance to effective enforcement of labor laws, and we are committed to ensuring full implementation of labor obligations in our free trade agreements and to pursuing options when necessary to address any shortcomings. We continually raise labor-related concerns with our trading partners as they arise. For example, we have seen significant improvement in Jordan with respect to labor rights because the FTA has provided both a forum to raise labor concerns with the Government of Jordan and leverage to help ensure adequate actions are taken to improve the conditions of workers in Jordan. The Administration also supports funding in many countries, from Central America to the Middle East, to provide longer-term support to assist countries in meeting their labor obligations. We believe in cooperatively working with our trading partners to improve adherence to labor rights, knowing we can invoke dispute settlement procedures if other means fail. We have been successful in ensuring that our trading partners address labor concerns in their countries and will continue to work to do so.

Senator Stabenow Questions:**Question 1****TRADE ENFORCEMENT RESOURCES:**

Former Secretary of Commerce Mickey Kantor testified at a Finance Committee hearing last year that the U.S. has the smallest trade enforcement office of any industrialized country. U.S. Trade Representative Susan Schwab herself even admitted in responses to my questions that USTR only dedicates one-fourth of its resources to trade enforcement. That means the other three-fourths is dedicated to entering trade agreements that we won't enforce. This is outrageous given that we have entered into more than 230 trade agreements.

Shouldn't USTR spend at least as much energy on enforcing our current trade laws as on negotiating new agreements? Why do you spend such a small percentage of your resources on trade enforcement?

Answer:

The claim that USTR only dedicates "one-fourth of its resources to trade enforcement" is based on a highly artificial allocation for USTR's accounting and budgetary purposes, which cited a figure of \$11.6 million. This figure does not include a variety of USTR activities that, even though not categorized strictly under "enforcement" for budgetary purposes, play a vital role in USTR's monitoring and enforcement efforts. As discussed, WTO dispute settlement is only one form of "enforcement." We also seek to enforce trade agreements through a wide range of tools including: bilateral consultations, technical discussions, bilateral and multilateral negotiations and oversight, monitoring mechanisms (both those within agreements and those under domestic law, such as Special 301), as well as formal dispute settlement. Such tools avoid the delay, uncertainty, and inherent litigation risk of bringing a formal WTO or FTA dispute, and are generally preferred by U.S. industry and agriculture. As a result, the claim that USTR only spends one-quarter of its resources on "enforcement" significantly understates the scope and amount of USTR enforcement activities.

As Ambassador Schwab has made clear, the entire USTR staff is engaged in enforcement activities. Success at enforcing U.S. trade rights is thus not limited to formal cases, nor can it be measured solely by looking at resources devoted to such cases. But even looking at formal dispute settlement, USTR has one of the largest, if not the largest, litigation teams of any WTO Member. We have a team of experienced WTO litigators who are experts at both bringing and defending WTO proceedings.

Question 2**HUMAN CAPITAL PLANNING:**

In 2005, the Government Accountability Office released a report that, among other things, suggested that USTR would benefit from a greater use of strategic human capital planning. USTR agreed with the overall nature of GAO's recommendations.

Since then, to what extent has USTR used hiring and pay flexibilities and other human capital measures to attract and retain staff with expertise in trade agreement compliance?

Answer

USTR added a new goal to its Strategic Plan, Achieving Organizational Excellence: "USTR will enhance human capital through recruitment, promotion and retention initiatives and incentives, afford professional development and training opportunities, and provide the administrative processes and infrastructure that will strengthen USTR's ability to recruit and retain the most qualified individuals, and establish a work place that promotes diversity, initiative, creativity and productivity."

One of the specific objectives under this goal is: "Implement a human capital management program designed to help USTR accomplish its mission." Action under this objective includes:

- **Complete a USTR strategic human capital management plan,**
- **Develop and fund a human capital training plan,**
- **Develop and implement an agency succession plan,**
- **Take advantage of supplementary pay and hiring flexibilities to promote hiring and encourage retention,**
- **Develop strategies that ensure human capital is well-managed,**
- **Update all human resource policies and catalog them in an easy to access format,**
- **Implement a fully-certifiable SES performance appraisal system,**
- **Adopt a Career General Schedule performance management system that ties individual performance to achieving USTR strategic goals,**
- **Foster a high-performing administrative staff that provides efficient and effective support to USTR offices**
- **Implement alternative work schedules (5/4-9 compressed plan and others as appropriate), and**
- **Implement an active, best-in-government USTR awards and recognition program.**

As a result, USTR developed a Human Capital Strategic Plan and implemented a number of policies and procedures to better enable the Agency to attract and retain employees. Using a collaborative approach, we established a Human Capital Planning Steering Committee of senior USTR leaders to help guide our human capital planning. Leaders, human resources professionals and key stakeholders teamed up to define the issues, develop the strategies and monitor progress. USTR implemented several workforce flexibilities such as telework, alternative work schedules, and time off for travel. Five percent of employees are enrolled in telework and/or an alternative work schedules. USTR

implemented the Student Loan Repayment Program, Retention Incentive Policy, Recruitment Incentive Policy, Tuition Assistance Program, and Employee Development and Training Policy. Several employees taking college courses related to their area of work are now receiving tuition assistance. Ten percent of employees hired since 2005 were brought on board using the Superior Qualifications Appointment which has been an instrumental tool in the recruitment of attorneys and in competing with private sector salaries. USTR has reduced its vacancy rate from a high of 17% in 2005 to 5%.

In 2007, USTR obtained provisional OPM certification for its SES Performance Management Plan. Senior Executives worked together to align their performance plans to the strategic goals of the Agency. The Non-SES Performance System was revamped to hold managers accountable for communicating performance standards to employees, ensuring strategic goal alignment as well as ongoing communication.

Question 3

U.S.-SOUTH KOREA FREE TRADE AGREEMENT:

I believe USTR needs to rearrange its priorities. Instead of enforcing our trade laws, your agency is lobbying Congress to approve seriously flawed trade agreements. Take the U.S.-South Korea trade agreement, for example.

For years, South Korea has used non-tariff barriers to keep its citizens from buying American vehicles. In 1995, after the Clinton Administration threatened trade sanctions, South Korea signed an agreement saying it would finally play fair. It didn't work. A second agreement in 1998 also failed to produce lasting results. Last year, only 6,300 American-made automobiles were sold in South Korea. It's still the most closed auto market in the industrialized world.

This FTA's solution is to establish an advisory group without enforcement powers, and to threaten to "snap-back" the already low U.S. tariff on autos, but not light trucks. There's no logical reason to believe talking and weak threats will work when even the threat of trade sanctions failed to solve the problem before. In fact, both the U.S. Trade Commission and South Korean officials say the FTA will exacerbate our auto trade deficit with South Korea by \$1 billion per year.

How can you tout USTR's dedication to trade enforcement in this hearing, yet offer this FTA as a solution to a very serious problem for one of our nation's largest industries? How, specifically, does USTR plan to ensure that the promises in this trade agreement are actually achieved five or ten years from now?

Answer

We understand well the challenges that U.S. auto manufacturers have encountered over the years in the Korean market, and share your concern with the autos trade imbalance. That is why leveling the playing field for U.S. auto manufacturers in Korea was always a top priority in the FTA negotiations.

Without the KORUS FTA, U.S. auto manufacturers will continue to face the same tariff and non-tariff barriers that exist today. With the KORUS FTA, American automakers will

obtain important access to the Korean automotive market through the elimination of a wide range of tariff and non-tariff measures, enforceable under a unique and effective dispute settlement mechanism.

And it should be emphasized that this is an enforceable agreement, and upon enactment of the FTA, USTR intends to ensure that Korea fully implements its FTA commitments. Like our other FTAs, the KORUS FTA is a set of binding rules and commitments that are subject to dispute settlement mechanisms if those commitments are violated. Specifically for autos, we secured in the Agreement an innovative and unprecedented process for resolving disputes on automotive-related measures on an expedited basis.

The “snap-back” provision will be a strong deterrent to nullifying or impairing the automotive provisions in the Agreement. The United States will be permitted to suspend its tariff concessions on Korean passenger cars if Korea is found to have taken a measure affecting motor vehicles that violates, nullifies, or impairs an FTA commitment. Based on 2007 import data, the “snap-back” provision could result in the re-imposition of up to \$219 million in U.S. tariffs on Korean passenger car imports. Korea does not export light-duty trucks to the U.S. market.

The package of commitments in the KORUS FTA related to the automotive sector addresses each of the tariff and non-tariff barriers that U.S. industry identified as impeding its access to that market. As GM stated in its comments in the ITAC report on KORUS, “the KORUS Agreement concluded on April 1 has addressed the auto industry’s concerns.”

Specifically, under the Agreement:

- First, upon entry into force of the FTA, Korea will immediately eliminate its 8 percent tariff on nearly all U.S. automobiles.
- Second, Korea will overhaul its automotive taxation system by significantly reducing its existing tax rates and eliminating the discriminatory aspects of its system for taxing cars based on “engine displacement”. Korea has also committed not to impose any new engine displacement taxes and to maintain non-discriminatory application of its existing taxes.
- Third, Korea committed to address specific emissions and automotive safety standards to ensure that they do not prevent U.S. automotive manufacturers from accessing the Korean market.
- Fourth, the FTA prohibits Korea from adopting new automotive regulations that create unnecessary obstacles to trade and facilitates greater cooperation and transparency on regulatory issues. The Agreement also establishes an Automotive Working Group that will serve as an early warning system for monitoring and resolving issues concerning the development, implementation, and enforcement of automotive standards, technical regulations, and conformity assessment procedures.

- **Fifth, to address concerns regarding government-directed campaigns to discourage Korean consumers from buying imported vehicles, Korea expressly affirmed that it is not its policy to discourage the purchase or use of goods or services of the United States through either formal or informal means.**

It is our strong conviction that this innovative package of commitments included in the KORUS FTA related to the automotive sector, which goes well beyond what we have achieved in previous FTAs, will achieve the objective that we both share: to level the playing field for U.S. automotive manufacturers in the Korean market.

Question 4

GAO CHINA REPORT:

A new GAO report strongly suggests that USTR is failing in its efforts to monitor and enforce China's compliance with its WTO obligations. The report says your annual China compliance reports lack critical information on the number, scope, and disposition of reported issues—data that would not only facilitate understanding of China's compliance, but make it easier to hold USTR accountable for its monitoring and enforcement efforts. Judging from the GAO report, you should be taken to task on that issue. It took GAO analysis to reveal that only a quarter of the problems ever identified in your reports have been fully resolved, and that, since 2003, you have reported no progress ever on about a third of the issues. It's clear that whatever you are doing is not working.

How do you explain your lack of progress? Moving forward, how will you change your approach to be more successful?

Answer

We welcome GAO's report, particularly its conclusion that USTR has made "considerable progress" on implementing elements of the top-to-bottom review. USTR has made it a top priority to expand our China office and we have hired a new Chief Counsel for China Enforcement. We've also opened a new USTR office in the U.S. Embassy in Beijing to handle many of our day-to-day interactions with the Chinese authorities.

GAO's principal recommendation was that USTR should try to "quantify" progress on each individual trade issue we have with China. We agree wholeheartedly on the importance of communicating effectively with Congress and the U.S. public on our progress and challenges in opening China's market. From a broad perspective, since China joined WTO in 2001, U.S. goods exports have increased by 240% and now total \$65 billion. During this period, China has become the 3rd largest U.S. export market and the 4th largest export market for U.S. agriculture. These are probably the best overall indicators of progress on market-opening after China's accession to the WTO.

We note that it is difficult, and sometimes not desirable, to seek to attempt to specifically quantify or rank trade issues. Such efforts could backfire by overstating or understating progress, or by letting China know when it is off the hook. For example GAO's proposal to

give each issue a numerical rank could inadvertently indicate to the Chinese which issues they can ignore. In addition, we often devote considerable effort and resources to issues because they involve important points of principle, offer potentially useful precedents, or their importance has been underscored by Congress even though they may not involve large quantities of trade.

We are pleased that GAO's report finds that key U.S. industry associations consider the annual USTR reports on China's WTO compliance to be fair and complete. We also appreciate the advice offered by GAO's report to ensure that we are doing the most effective job in reporting to the Congress and the public. We are always open to improving our communications with the Congress and the public regarding trade policy matters, and we will carefully consider the ideas in GAO's report.

Question 5

TRADE ENFORCEMENT PRIORITIES:

I disagree with your statement at the hearing that USTR already has the tools it needs to successfully enforce trade laws. USTR spends just \$11.6 million annually on trade enforcement, yet has hundreds of agreements to enforce. As Ms. Brainard noted at the hearing, despite the growing number of agreements, WTO enforcement actions have fallen dramatically over the past eight years. GAO reports that, between 2002 and 2007, USTR resolved less than a quarter of the 180 Chinese compliance issues it had reported to Congress. I'm left to conclude that either the tools you have to enforce trade are inadequate, or USTR is not using them effectively.

I'm curious about your criticism of Title I of S. 1919, which would require USTR to identify and prioritize the unfair trade practices used by other countries against U.S. businesses, and report to Congress on its past and planned attempts to address the problems. In my opinion, this title provides measures that would increase accountability and communication between the executive and legislative branches of government and lead to better results. While it directs USTR to address priority foreign country trade practices that are harming U.S. businesses and families, it does not tie USTR's hands by mandating specific actions. Why don't you support this title?

Answer:

Today, the Administration has a wide variety of trade enforcement tools at its disposal – namely, WTO and FTA dispute settlement, as well as Special 301, Section 1377, and Section 301. These trade tools enable the Administration to focus its resources on the key issues facing U.S. exporters as problems arise and to move aggressively to address unfair foreign trade practices.

Some of these tools did not exist when Super 301 – the precursor of Title I of S.1919 – was enacted in 1988. Today, however, the Executive Branch no longer needs such a provision to address the sorts of trade issues that Super 301 was originally designed to highlight. When an industry, commodity, or other interested group comes to us with a WTO case, USTR will work with them to gather factual information, develop legal arguments, and, if necessary, launch a WTO dispute. If you know of someone with a strong WTO case, we want to hear about it. There's no need for Super 301 to get USTR to act. Accordingly, we see no need for Super 301. If you are concerned that some future Administration may

lack the political will to aggressively enforce U.S. trade rights and may need the pressure of Super 301 to force them to act, the issue can be taken up at some future time.

With respect to the portion of Title I of S.1919 that would allow Congressional committee votes to initiate disputes, aside from potential constitutional problems with this proposal, it would appear unnecessary and unwise. USTR will continue to work with Congress with respect to trade enforcement priorities, but in the end the Executive Branch is best equipped to decide which cases have merit and how best to assign priorities and address issues. Indeed, as I mentioned during the hearing, this provision could force the United States to initiate a WTO dispute settlement case at the wrong time, in the face of stakeholder opposition, or in a situation where proceeding to litigation may be counterproductive to the objective of removing a market access barrier.

Senator Grassley Questions:**Question 1****DISPUTE SETTLEMENT:**

Mr. Maruyama, Ms. Brainard's testimony implies that there are several dozen potential cases that the Office of the United States Trade Representative ("USTR") has failed to file at the World Trade Organization ("WTO") since 2000.

In addition, during the hearing, others made unfavorable contrasts between this Administration's enforcement efforts and those of the Clinton Administration. They noted that the Clinton Administration filed 60 offensive cases at the WTO, as compared to 25 by this Administration.

What is your reaction to these comments?

Answer:

The United States is the most active user of the WTO dispute settlement system. I mentioned in my testimony that the United States had brought 89 cases so far to the WTO; on May 28, we filed our 90th case, concerning the EU's tariffs on certain information technology products. We have filed more WTO cases than any other WTO Member.

During the first few years after the WTO Agreement entered into force, there was a temporary surge in WTO filings because of pent-up demand. This occurred because WTO Members had a large backlog of cases that were waiting for the Uruguay Round negotiations to conclude. Since 1998, however, the number of disputes filed per year has dropped, as Members have worked through those initial issues and gained more experience with the dispute settlement system generally, so they are better able to gauge what is a winning or losing case. WTO filings peaked in 1997 when 50 cases were filed. By 2007, WTO Members filed only 13 cases. This decline first started to appear during the Clinton Administration. From 1995-1997, USTR filed 34 WTO cases. During the next 3-year period from 1998-2000, this figure fell to 23 cases.

Nevertheless, the United States has always been the most active user of WTO dispute settlement system and WTO dispute filings by the United States continue to match or exceed those of our trading partners. Since January 1, 2007, the United States has filed six new WTO disputes; no other WTO Member has filed more than two new cases in that period. Under the current administration, the United States has filed 26 new disputes and compliance proceedings at the WTO.

Since China's accession to the WTO in December 2001, we have brought six WTO disputes, and settled one other matter on the eve of filing a dispute. We have filed four WTO disputes against China in the last 16 months – on Auto Parts, IPR, Copyright Market Access, and Xinhua. In fact, the United States brought the first ever WTO dispute against China. No other Member has brought more than two disputes against China.

More broadly, the Administration's WTO litigation strategy has focused on filing major cases with broad systemic implications, such as EC – Airbus, EC – Biotechnology, China – IPR, China – Copyright Market Access, China – Auto Parts, and China – Prohibited Subsidies, and last month EC – ITA. We have not tried to file large numbers of cases just for the sake of pumping up our numbers. This makes a strictly numerical comparison of WTO filings somewhat misleading. In short, it is not possible to assess success at enforcing U.S. trade rights solely by looking at the number of disputes filed.

Question 2

CHINA:

Mr. Maruyama, Ms. Brainard noted in her testimony that, over the past seven years, the WTO has expanded to include 12 new members, and she referenced China in particular.

She also suggested that USTR's enforcement efforts have failed to keep pace with this expansion. For example, she criticized USTR for waiting three years to take its first enforcement action against China.

What is your response to her assertions?

Answer

A great number of the specific market access commitments that China made when it acceded to the WTO on December 11, 2001, were due to be implemented over a transition period of five years, ending 18 months ago. Accordingly, it would have been premature to challenge implementation of those commitments during this transition period. Others, like our WTO challenges to Xinhua and auto parts, involved new regulations that were promulgated in 2005 and 2006, and thus could not have been brought in the first 3 years after China's accession. We did bring a WTO case in March 2004, just over two years after China joined the WTO, while we continued to focus during this transition period on working to ensure that China implemented its many WTO commitments – which involved changes to more than 1000 legal measures – fully and in a timely fashion.

As the end of China's transition period as a new WTO Member approached, the Administration reviewed U.S. trade policy and made clear that it was time to engage China as a "mature" member of the global trading system. We explained this policy change in a "top-to-bottom" review of the U.S.-China trade relationship, issued in February 2006. One of the key initiatives of that review was to hold China more accountable through expanded enforcement, backed up by changes in USTR structure and resources.

The United States has been working to hold China fully accountable for meeting the WTO rules they have agreed to. China clearly benefits from its access to global markets, including the United States. But, China must also contribute as a responsible stakeholder in the multilateral trading system. Specifically, we need to see continued significant progress by China in opening its markets to U.S. exporters consistent with international trade rules.

USTR has used bilateral engagement to achieve these objectives, such as the intensive, high-level work that takes place in the U.S.-China Joint Commission on Commerce and Trade and the U.S.-China Strategic Economic Dialogue. USTR also is fully engaged in pursuing these objectives in multilateral fora, including the WTO.

Where China has not been willing to provide the required access to its markets or has otherwise not played by the rules, and dialogue has failed to secure a resolution, we have not hesitated to bring WTO dispute settlement cases against China. Since the issuance of the “top-to-bottom” review in February 2006, we have brought five WTO cases, each involving substantial U.S. interests. In the last 16 months, USTR has filed four WTO cases against China – on Prohibited Subsidies, IPR Enforcement Rules, Market Access for Copyright-Based Products and Services, and Xinhua’s Barriers to Foreign Financial Information Providers. Last November, we settled the Prohibited Subsidy case on extremely favorable terms with China’s agreement to eliminate its prohibited export and import substitution subsidies effective January 1, 2008. We are looking forward to the upcoming issuance of the final public version of the WTO Panel’s decision in China – Auto Parts. In addition, the Commerce Department, which is responsible for administering our trade remedy laws, has been active in combating unfair trade. It has conducted numerous antidumping investigations involving Chinese products, and, since November 2006, has been conducting countervailing duty investigations of imports from China.

Question 3

CHIEF TRADE ENFORCEMENT OFFICER:

Mr. Maruyama, can you expand on the reasons why the Administration has concerns with the provisions of S. 1919 that would create a new “Chief Trade Enforcement Officer” at USTR?

Answer:

We are concerned that adding a position of Chief Enforcement Officer would be unnecessary and redundant. Enforcement is a high priority of the United States Trade Representative, assisted by the General Counsel. The Office of the General Counsel includes a litigation unit headed by an AUSTR for Monitoring & Enforcement. The Office of the General Counsel also already includes the Chief Counsel for China Trade Enforcement. The great majority of our attorneys prosecute or defend litigation matters. We do not see what a new position would add.

In addition, the General Counsel is a political appointee who reports directly to the USTR, and thus there is already both stature and accountability. What is more, the USTR’s ability to name a General Counsel immediately allows USTR’s enforcement efforts to move forward rapidly whenever there is a change in personnel or administration. Conversely, we are concerned that adding the new position of Chief Enforcement Officer could actually lead to serious delays in taking enforcement actions because of the confirmation process.

Question 4

ADDITIONAL TRADE ENFORCEMENT PERSONNEL:

Mr. Maruyama, I've heard that our ability to bring disputes to the World Trade Organization is complicated sometimes by a lack of transparency by our trading partners.

For example, it can be difficult to understand how various laws and regulations interact, and it is not always easy to obtain reliable translations of complicated legal documents.

Do you think it would be helpful if USTR had a budget that it could use to hire experts to help translate documents and analyze potential WTO compliance issues?

Answer:

We have a variety of means at our disposal to gather information necessary to bring a dispute. These include human resources within USTR (including in the Office of General Counsel, in the policy offices, and in Geneva); resources in other Washington agencies devoted to day-to-day WTO compliance monitoring activities; and officials posted overseas who ensure that we cover the entire range of WTO Members. We also welcome input from industry and other stakeholders. Drawing on these resources we are often able to do the research and obtain the necessary information ourselves. For example, we launched our WTO dispute on a group of China's prohibited subsidies by using China's notification to the WTO, publicly available information, and other sources.

At the same time, to the extent resources permit, we have sometimes found it beneficial to draw upon experts outside the U.S. Government for certain discrete issues, including translation and expertise in the domestic legal structure of the Member involved.

Question 5

ADDITIONAL TRADE ENFORCEMENT PERSONNEL:

Mr. Maruyama, we've heard assertions today that USTR has too few staff dedicated to the monitoring and enforcement of our trade agreements.

In your view, would it make sense for the agency to have a certain number of staffers in the policy offices dedicated primarily to monitoring and enforcement efforts?

Answer:

Professional staff in the various policy offices play an important and ongoing role in monitoring and enforcement efforts, from identifying potential trade problems, working with the relevant foreign government, providing key factual information, and where possible or appropriate negotiating a resolution to a problem. Thus, it would be fair to say that there already are officials in the various offices dedicated to monitoring and enforcement efforts.

**Senator Rockefeller
Statement for Finance Hearing on Trade Enforcement**

May 22, 2008

Mr. Chairman, I thank you for calling this important hearing, and I appreciate your leadership and cooperation on the issue of trade enforcement.

I strongly believe that enforcing our trade agreements and our domestic fair trade laws is crucial to the future of the American and global economy, which are both changing rapidly. Trade enforcement should be the key focus of our trade policy. Agreements and laws are just the first step – we need those agreements and laws to mean something so that our businesses, workers, and citizens have recourse to unfair trade in an increasingly global economy.

This is more important now than ever before. I have been paying close attention to international trade issues for a long time, and I have never seen as much skepticism on trade as I see today. This skepticism exists not just in the steel industry, not just in the state of West Virginia, not just in Congress, and not just among organized labor.

It is an anxiety that has spread throughout our society. It is multifaceted – it is economic and social and political. It has to do with China's unprecedented and literally world-changing economic development. It has to do with rapid changes in our economy, particularly the manufacturing crisis of the past decade or more.

In short, there is a general anxiety in America with how the world and the global economy are changing and how fast this change is happening. It is a sense of lack of control over how this change is affecting the stability of our people and our communities.

This is obviously an issue that is beyond the reach of the focus of today's hearing, but the reason I bring it up is that part of the cure for this anxiety is the enforcement of effective trade laws that the American people and domestic industry can trust.

This is why, three weeks into the 110th Congress, on January 23, 2007, I introduced a comprehensive trade bill that will strengthen our trade laws across the board. My bill, I note gratefully, is echoed in large part by the Chairman's trade enforcement bill.

Mr. Chairman, enforceable contracts are the underpinning of our domestic economy, and similarly, the rule of law in our international trade system is essential to the functioning of the global economy. This is true for agreements between and among nations, just as it is true for contracts between private businesses and individuals.

When the United States joined the WTO, we agreed to liberalize our trade barriers and accept obligations in return for other countries' commitment to lower their trade barriers

and accept obligations of their own. The same is true for all the other trade agreements we have entered into in recent years – including Permanent Normal Trade Relations with China, and China's accession to the WTO.

In all of these cases, it was a deal, a contract, with enforceable obligations for all the parties involved.

Unfortunately, the Bush Administration has shown far more interest in making these deals than in enforcing their terms. This hearing is about enforcing those obligations, both in the global setting and here at home. This is crucial to the future of our industries here at home and economic progress worldwide.

I am pleased to see that the Bush Administration has begun to show an interest in these issues through its recent actions in the WTO, but I think Congress needs to help the Administration act on its enforcement responsibilities. That is why I introduced my trade bill, and I applaud the Chairman for his leadership on this issue. We have much work to do in the coming months.

Finance Committee
May 22, 2008
Senator Stabenow's Statement for the Record

Good morning. I'm really glad that we're going to focus on this issue today. Americans can compete successfully against any company anywhere in the world when those companies and countries play fair.

But for too long, this Administration has let others tilt the playing field in their favor. We've paid the price in lost jobs, closed factories, and greater dependence on foreign manufacturers for staples like clothing and medicine.

That is why I worked with Sens. Baucus and Hatch to introduce Senate Bill 1919. It is long overdue.

The current situation in my state of Michigan illustrates, unfortunately, what happens when the U.S. government does not enforce trade laws. We've lost 280,000 manufacturing jobs in the past eight years. Six major auto suppliers have closed their doors. Our situation shows why we need to reauthorize the Trade Adjustment Assistance Act: Michigan recently had to request emergency trade-adjustment funds because of a 31-percent increase in the number of Michigan workers who lost their jobs because of trade and now need retraining.

Many of the reasons why this is happening would disappear if the U.S. government enforced trade laws. We've seen time and again other countries manipulating their currencies to give their exports a price advantage. We've seen them repeatedly use non-tariff barriers to block U.S. imports, and turn a blind eye when their domestic industries make and sell counterfeit products. We must admit that our government has failed the American people by not stopping these trade violations. We need to tell these countries loudly and clearly that we will no longer let them stomp all over our trade rules. This bill does just that by creating a division within the U.S. Trade Representative that is dedicated to trade enforcement and prosecution.

I know USTR has a big task. Former Secretary of Commerce Mickey Kantor has testified before this committee that the United States has the smallest trade enforcement agency of any country in the industrialized world. Ambassador Susan Schwab admits USTR spends just a quarter of its annual budget, \$11.6 million, on trade enforcement. That simply won't do it; USTR is setting itself up to fail.

But President Bush still doesn't get it. He is asking Congress to rubber-stamp trade agreements with serious flaws. I'm pleased to say that 11 senators have co-signed a letter I wrote telling him that there's no way we can support the U.S.-South Korea free trade agreement. Among its problems, the agreement does nothing to help U.S. automakers who have been shut out of the South Korean market despite two prior Memoranda of Understanding. Indeed, even South Koreans admit: This FTA would make our auto trade deficit with Korea worse—by about \$1 billion a year!

Our letter urges the president to start enforcing the trade laws on the books. Counterfeiting has cost us good-paying American jobs—more than 200,000 in the automotive industry alone. Countries like China and Japan are manipulating exchange rates to help their domestic companies compete. For example, this practice provides

subsidies in the thousands of dollars to Japanese automakers. This is not a partisan issue. Sen. Bunning and I have introduced separate legislation to give USTR new tools to fight currency manipulation. As my friends on the other side of the aisle would say, we need a level playing field so we can have true competition determined by market forces.

I'm glad to see Europe has begun addressing this issue with China. It is a global problem. We need to change course, and make trade enforcement a priority. I hope you agree.

COMMUNICATIONS

**Statement of Steven A. Glazer
First Vice President and President-Elect
The Federal Administrative Law Judges Conference**



Before the

**COMMITTEE ON FINANCE
UNITED STATES SENATE**

Regarding the Hearing on

S. 1919: Trade Enforcement Act of 2007

May 22, 2008

Mr. Chairman, Honorable members of this committee and members of the staff. On behalf of The Federal Administrative Law Judges Conference, I thank you for this opportunity to discuss a very significant issue, the proposal in Title VI, Section 601 of S.1919, the Trade Enforcement Act of 2007, to create a new class of adjudicators for Section 337 cases before the United States International Trade Commission in place of Administrative Law Judges governed by the Administrative Procedure Act.

I am Steven A. Glazer, First Vice-President and President-Elect of The Federal Administrative Law Judges Conference. I serve as an Administrative Law Judge with the Federal Energy Regulatory Commission.¹ I have been a U.S. Administrative Law Judge for three years, and I am a resident of Maryland.

As described below, inclusion of Section 601 is bad for the proper adjudication of administrative cases and is injurious to the time-tested process established by the Administrative Procedure Act, which is designed to provide equal justice under Federal law for all citizens who bring issues before Federal agencies. It will further jeopardize Section 337 determinations initially made by these "section 337" judges in a manner that could potentially violate international trade agreements that are monitored by the WTO. Section 601 will balkanize the administrative law system and threatens the independence of administrative decisions which the APA and the administrative law judiciary assure. FALJC strongly urges that this section be eliminated. This is the only issue in this bill which affects administrative law and the only issue to which my testimony is directed.

¹ The views that I express here do not necessarily represent the views of the Federal Energy Regulatory Commission or the United States.

The Role of Administrative Law Judges in the Federal System

Administrative Law Judges are tasked by the Administrative Procedure Act and their respective federal agencies with holding hearings, gathering and ruling on evidence, hearing and evaluating witnesses, issuing subpoenas, regulating the course of the legal proceedings, and preparing an initial or recommended decision for final agency action in an individual case. In order to assure their impartiality in decision-making, Administrative Law Judges are statutorily assured of decisional independence within their agencies. The process of recruiting and hiring ALJs is designed to favor legal generalists over agency insiders for agency adjudicative positions, and offers military veterans a preference over non-veterans.

Today there are around 1,400 Administrative Law Judges serving in some 30 agencies of the Federal government. Approximately 86 percent serve in Social Security Administration branch offices all over the country, deciding disability benefits cases. A growing number of ALJs also serve in the Department of Health and Human Services, deciding Medicare claims. At the Social Security Administration, 1,100 ALJs heard over 500,000 disability cases in 2006. During that same year, at the Office of Medicare Hearings and Appeals, 52 ALJs each processed an average of 1,800 claims. The 48 ALJs of the National Labor Relations Board issued 239 decisions and conducted 225 hearings.

Administrative Law Judges at the U.S. International Trade Commission

At the United States International Trade Commission, where I worked as a staff attorney and judicial law clerk for 14 years before becoming an ALJ, a much smaller cadre of four Administrative Law Judges decides a much smaller number of cases than Medicare, Social Security or National Labor Relations Board ALJs hear. Their caseload, however, is no less daunting than those of their colleagues in

these other agencies. In 2006, the Administrative Law Judges of the USITC heard 70 “unfair import” cases brought under Section 337 of the Tariff Act of 1930.² These cases involve the importation into and sale in the United States of foreign products that compete with the products of domestic industries and are covered by U.S. patents, trademarks and copyrights. Many of the cases often involve numerous respondents and their counsel from many different foreign countries. Many of the products at issue involve complex patented technology worth billions of dollars in revenue. The Commission is empowered under Section 337, on the basis of the findings and conclusions of these unfair import cases, to exclude infringing imports from the United States and to cause their sales in the United States to cease and desist.

With so much at stake in Section 337 proceedings, the litigation before the ALJs of the USITC is extremely contentious, involving long administrative hearings, enormous amounts of discovery, numerous motions and the submission of lengthy briefs on many, many complicated legal issues of intellectual property law. The Administrative Law Judges and their staff write, in a remarkably short amount of time, Initial Determinations in each case that cover all of the legal issues, render detailed findings of fact, and usually run over several hundreds of pages and thousands of exhibits. Their Initial Determinations and recommended remedies are reviewed by the six Commissioners of the USITC, a final opinion and order of the Commission is issued on the basis of the ALJs’ determinations and the Commission’s review, and the Commission’s final decision is appealable to the United States Court of Appeals for the Federal Circuit. What is more, nearly all final Commission decisions *are* appealed to the Federal Circuit.

It is fair to say, based on my experience as a registered patent attorney who practiced before the Administrative Law Judges of the USITC, that the findings of fact and conclusions of law contained in their Initial Determinations are accorded

² 19 U.S.C. § 1337.

a great deal of respect and weight among legal practitioners of the patent bar, the Commission itself, and the Federal Circuit. The USITC has long been a forum of choice among patent attorneys for deciding intellectual property cases because of the deep and wide experience of the Commission's Administrative Law Judges and the Commission's trial staff. An enormous range of products that are covered by U.S. patents, copyrights or trademarks has been litigated before the ALJs of the USITC, from pianos to automobile parts to laser vision correction machines to roller skates to GPS devices to children's toys to semiconductor chip packages. In the course of that litigation, every conceivable discovery practice allowed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence has been utilized by the parties (including a few that fell outside of those rules) and, when necessary, ruled upon by the Administrative Law Judges for relevance, materiality and other legal considerations. The motions practice that must be decided by the Administrative Law Judges of the USITC often involves the summary determination of fine points of intellectual property law based on extensive legal briefs that are filed in each motion. Hearings involve many days, sometimes months, of expert and fact testimony and the submission of exhibits, many involving substantive objections and rulings thereon. The evidence admitted into the record often consists of highly confidential business information and trade secrets that must be protected from disclosure to competitors. And each of these cases must be heard and decided on an expedited basis, usually within less than two years.

**Section 601 of S.1919 Contributes to a Balkanization of the
Administrative Law Judiciary**

Your Committee has before it a proposal that, in the view of the Federal Administrative Law Judges Conference, will fundamentally change the Section 337 practice before the U.S. International Trade Commission, and not for the better. Section 601 of S.1919 allows the Commission to appoint hearing officers,

other than Administrative Law Judges covered by the Administrative Procedure Act, to preside at Section 337 hearings who are not hired under the certification process for ALJ candidates that is run by the Office of Personnel Management and are not incumbent ALJs from other federal agencies. Section 601 purports to afford such “Section 337 Judges” many of the protections afforded ALJs, but leaves their recruitment and appointment entirely up to the Commission. By doing so, this proposal strikes at the heart of judicial independence by making the appointment a function of the USITC, not the Administrative Procedure Act.

The Federal Administrative Law Judges Conference opposes this provision of S.1919 and urges that it be stricken from the bill before it is reported by this Committee. It is part of a tendency among some federal agencies to “Balkanize” the administrative judiciary, undoing the intent of Congress in enacting the Administrative Procedure Act in 1946 to form a unified corps of Administrative Law Judges with safeguards that assure independence and impartiality in their hiring and retention by federal agencies, in favor of more malleable decisionmakers subject to direct agency control. This tendency contravenes the APA’s purposes of standardizing the conduct of the Government’s administrative proceedings and raising the caliber, independence and impartiality of those who decide them.

Section 601 of S.1919 also purports to give the USITC authority to base “Section 337 judge” appointments upon “technical expertise and experience in patent, trademark, copyright, and unfair competition law.” This provision also compromises a key aspect of the Administrative Law Judiciary. The process for choosing Administrative Law Judge candidates under the Administrative Procedure Act favors the choice of legal generalists over legal specialists. This is so because ALJs who have extensive experience in many fields of law have demonstrated over time that they are adept at acquiring acumen in specialized fields as well, including the fields of intellectual property. Administrative Law Judges have shown over time that they are well-versed in matters of evidence and

procedure that permeate all legal cases, including intellectual property cases, and that they can render sound decisions on such matters that are of vital importance to the ultimate outcome of a case.

Leaving to the Commission the sole discretion to recruit and hire anyone it chooses to adjudicate Section 337 cases, including “insiders” such as Commission staff attorneys and Commissioner’s aides, does not assure litigants the same degree of independence and impartiality that Administrative Law Judges now afford them. The comfort that some may feel from their familiarity with an appointed insider is offset by the suspicion that necessarily arises when appointments are made in this way. The message is sent to the public and practitioners that “the fix is in” and impartiality is no longer the hallmark of the adjudicator. This was a failing of the hearing examiner system that existed before the Administrative Procedure Act was enacted in 1946, and formed one of the primary reason for creating the corps of independent, impartial Administrative Law Judges that we have today.³

Whereas the Administrative Procedure Act and the unified Administrative Law Judge appointment process have withstood the test of time and court challenge, segregating administrative adjudicators by agency creates a troubling potential for legal uncertainty in the enforceability of agency decisions. The USITC is in particular danger of facing this risk if S.1919 is passed with the Section 337 Judge provision included. In November 1989, a GATT Panel Report examined the USITC’s Section 337 process upon a complaint from the European Economic Community. The EEC complained that Section 337 proceedings

³ The 1941 Final Report of the Attorney General’s Committee on Administrative Procedure that preceded the adoption of the Administrative Procedure Act noted that “agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners. But it concludes also that before anyone should undertake these highly responsible duties of a hearing commissioner his judicial qualifications and capacity should be investigated and approved by a body independent of the agency, and whose special concern is the improvement of administrative procedure.” U.S. Dept. of Justice, *Final Report of the Attorney General’s Committee on Administrative Procedure* 47 (1941).

violated the national treatment provisions of the General Agreement on Tariffs and Trade because they treat imported goods less favorably than the procedures that district courts apply to domestic goods in infringement proceedings. The Panel, which was convened by the predecessor to the World Trade Organization, determined that Section 337 (as then written) did, in fact, violate GATT.

In so doing, the Panel examined in detail the Section 337 hearing process before the Commission's Administrative Law Judges. It noted, in particular, as follows:

The administrative law judge conducts the discovery phase of the investigation and the subsequent hearing. In taking evidence and considering written and oral legal arguments, the administrative law judge is required to exercise independent judgment and is not under the direction of the Commission in the conduct of Section 337 proceedings or in the issuance of initial determinations in any particular case. In order to protect their independence, the Administrative Procedure Act provides that administrative law judges may not be removed except for cause or under a reduction in force based on seniority. *The USITC's say in the recruitment of administrative law judges is limited to choosing one out of three names put forward by an independent agency (the Office of Personnel Management).* No ex parte contacts are permitted in connection with a particular case between the administrative law judge and his or her staff, on the one hand, and the Commissioners and their staff advising them on the case, on the other.⁴

The GATT Panel Report required the United States to make many changes to Section 337 in order to comply with the General Agreement on Tariffs and Trade, which Senator Rockefeller of this Committee sponsored and Congress adopted in the Uruguay Round Agreements Act of 1995.⁵ In particular, the Panel rejected Section 337's time limits for reaching final decisions, the simultaneous parallel jurisdiction of the ITC and district courts, the overly broad authority of

⁴ GATT, *Panel Report: United States—Section 337 of the Tariff Act of 1930* ¶ 2.5 (1989) (italics added).

⁵ Pub. L. No. 103-465, § 321(a), 103d Cong., 2d Sess., 108 Stat. 4809 (1994).

the USITC to issue “general exclusion” orders barring the importation of infringing products of both litigants and non-litigants, and the lack of counterclaims in Section 337 proceedings. Tellingly, not one word of the Panel Report criticized the work of the Administrative Law Judges of the USITC in how they performed their duties or how they were chosen for their jobs, nor did Congress see fit in the Uruguay Round Agreements Act to change any aspect of the Administrative Law Judge’s appointment and performance.

Section 601 of S.1919, if adopted, would change all of that. The proposed “Section 337 Judges,” unlike Administrative Law Judges, would not be chosen from the “high three” names on the OPM Register; instead, the Commission alone would decide who would be recruited and hired. This change alone is an open invitation to unsuccessful litigants in Section 337 cases before “Section 337 Judges” to seek redress in the World Trade Organization for yet another breach of international trade agreements, claiming that non-ALJ adjudicator are politically-appointed insiders who favor domestic industries over foreign importers, thereby by failing to provide fair justice at the administrative level and requiring the WTO to convene yet another Panel Report that will most likely force Congress to change the process again.

The Perceived Need for Non-ALJ “Section 337 Judges” Is Unfounded

The proponents of Section 601 of S.1919 contend that the USITC has suffered from a paucity in the number, qualifications and experience of applicants for its Administrative Law Judge positions in recent years. With only five ALJ slots at the Commission to fill, this claim is dubious at best. The Commission recently filled the fourth slot upon the retirement of one ALJ, hiring a qualified candidate among the incumbent ALJs of other agencies. The Commission is now seeking to fill the fifth slot, and it has seven applicants for the position. Hence, there is no shortage of applicants, and the Federal Administrative Law Judges Conference does not believe that the qualifications

and experience of the candidates being considered are so poor that the Commission has to settle for “second best.”

Supporters of S.1919 also claim in defense of Section 601 that it will allow the Commission to choose candidates for its judicial positions who are expert in intellectual property and unfair trade matters. However, allowing the Commission to choose a “specialist” in intellectual property law, such as a Commission staff attorney or practitioner from the international trade bar, is not an assurance to the parties of the same degree of independence and impartiality that Administrative Law Judges now afford all parties. This criterion, if adopted, is not met by most of the Commissioners, most of the Commission’s staff attorneys, and most of the private attorneys who practice before the Commission. At present, only one Administrative Law Judge of the USITC is a registered patent attorney. This qualification is not a requirement for Judges of the U.S. Court of Appeals for the Federal Circuit who review Section 337 cases, nor for Justices of the United States Supreme Court who potentially review such cases. Exclusion orders that are issued by the USITC under Section 337 against products that infringe U.S. patents, trademarks or copyrights are subject to override by the President of the United States for a period of 60 days after they are issued, yet neither the President nor his staff needs to be a registered patent attorney to exercise this power. Likewise, in the federal courts of this country, intellectual property cases are routinely decided by non-professional juries and district court judges, not by an intellectual property elite.

The experience of the Commission itself proves that an ALJ can effectively adjudicate Section 337 cases without prior experience in intellectual property law. There is little or no difference between the function of an ALJ in a Section 337 case and that of, for example, an ALJ at the Federal Energy Regulatory Commission who evaluates highly complex energy-related issues without a degree in petroleum engineering, a Social Security or Medicare ALJ who evaluates medical evidence without having earned a medical degree, or an ALJ at the

Federal Communications Commission who evaluates telecommunications issues without a degree in electrical engineering. In short, ALJs have a long history of effectively evaluating technical evidence, including the testimony of expert witnesses.

If the Commission, pursuant to this proposed section of S.1919, were to enact an implementing regulation, the logical thing to do would be to require a candidate for Section 337 Judge to be a registered patent attorney. That is impossible, however, because such a criterion would instantly wipe out most of the field of potential candidates. Few members of the private patent bar would be willing to give up what is one of the most lucrative practices in law to become a Section 337 Judge for the Commission. Few attorneys within the Commission are patent attorneys themselves, and while becoming an ALJ would certainly be a promotion for them, they would be barred from doing so until they took and passed the difficult test required of patent attorneys to register before the U.S. Patent and Trademark Office.

So the likelihood is that registration would not become a criterion for choosing a Section 337 Judge if this proposal is adopted, and the job would most likely be filled by Commission staff attorneys. I do not mean to imply that they are not very good at what they do, but I point out that the broad-ranging legal experience and impartiality that incumbent Administrative Law Judges have long brought to the Commission would be lost.

Conclusion

In conclusion, the Federal Administrative Law Judges Conference strongly believes that the U.S. International Trade Commission benefits from having its Section 337 cases heard by Administrative Law Judges appointed pursuant to the Administrative Procedure Act. Administrative Law Judges are chosen by an independent agency that vets candidates who are generalists, rather than “insiders”

who may be wedded to to the policies and politics of particular agencies. The Commission's reputation would be tarnished by the aura of favoritism and cronyism that "insider" appointments under Section 601 of S.1919 would invariably possess, and the Commission's stature in the legal community as a principal forum for patent litigation would wane.

I urge this Committee, therefore, to strike Section 601 from S.1919.

THE FORUM



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**STATEMENT
OF
JUDGE CARMEN A. CINTRON, PRESIDENT
FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES**

**Before the
COMMITTEE ON FINANCE
UNITED STATES SENATE**

Hearing on S. 1919, Trade Reorganization Act of 2007

May 22, 2008

Mr. Chairman, members of this subcommittee, and members of the staff. I am Carmen A. Cintron, President of the Forum of United States Administrative Law Judges (Forum). On behalf of Forum, I thank you for this opportunity to express our opposition to Section 601¹ of the Trade Enforcement Act of 2007 (S. 1919). The Forum is a professional organization representing Administrative Law Judges appointed under 5 U.S.C. §3105 of the Administrative Procedure Act of 1946 (APA), 5 U.S.C. §551 *et seq.* Forum opposes enactment of Section 601 because the provision would subvert the APA by allowing the International Trade Commission (ITC) to appoint non-APA hearing officers whose decisions would be subject to inappropriate agency influence and bias. Such decisions would be less than fair and not impartial to the public, contrary to Congress' purpose in enacting the APA.

Section 601 denigrates the system of administrative justice created by the APA. Instead of appointing administrative law judges under 5 U.S.C. §3105, the ITC itself would hire and appoint as Section 337 judges, attorneys with 7 years or more of patent or

¹ SEC. 601. SECTION 337 JUDGES. Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is amended by adding at the end the following new subparagraph:

(o) Section 337 Judges-

(1) IN GENERAL- Notwithstanding the provisions of subsection 556(b) of title 5, United States Code, the Commission is authorized to appoint hearing officers, other than administrative law judges appointed under section 3105 of title 5, United States Code, to preside at the taking of evidence at hearings required by this section and to make initial and recommended decisions in accordance with sections 554, 556, and 557 of title 5, United States Code, in investigations under this section. The hearing officers appointed under this subsection shall be known as section 337 judges.

trademark experience.² Unlike the ITC's four administrative law judges, Section 337 judges would **not** be prohibited from *ex parte* communications with the agency or private parties to agency patent and trademark infringement proceedings and Section 337 judges would not be separated from supervision by or communication with the agency's enforcement staff.

The lack of these important APA safeguards alone and in combination with the non-competitive, non-merit based Section 337 ITC appointments will unduly influence Section 337 judges' patent and trademark infringement decisions. The public's right to fair and impartial APA hearings will disappear. In short, the public will not be the recipient of unbiased justice in the enforcement of international trade agreements as mandated by the APA.

² Section 601 was prompted by OPM's denial of the ITC's request for a waiver of the administrative law judge regulations in 5 C.F.R. Part 930 to allow the ITC to select administrative law judges from a list prepared by OPM consisting solely of candidates possessing patent and trademark experience. OPM rejected this request because it was not permitted under the long-standing OPM regulations in 5 C.F.R. Part 930. As background, it is noted that following a rulemaking during the 1980's, OPM eliminated a regulation and practice known as "selective certification." Previously, OPM appointed administrative law judges from the general register which it administers and from one or more specialized registers, such as the former specialized register for the Interstate Commerce Commission, Federal Maritime Commission, Federal Power Commission (the predecessor of the Federal Energy Regulatory Commission), and the Civil Aeronautics Board, and a discrete register for the Department of Agriculture. Qualification and appointment from a specialized register enabled a candidate to skip over and avoid competition for appointment from the much larger general register. The American Bar Association and others correctly noted that "selective certification" encouraged institutional bias which can result from the appointment almost exclusively of agency attorneys as administrative law judges and it was inconsistent with veteran's preference requirements.

Administrative law judges adjudicate controversies involving significant and diverse matters at more than 29 agencies. These matters include antitrust, banking practices, securities violations, commodity futures, educational grants, environmental degradation, food and drug safety, housing violations, interstate and wholesale pricing of energy, immigration law, international trade, labor, mine safety, occupational safety, postal rates, securities violations, telecommunications licensing, unfair labor practices, Medicare, and Social Security old age and disability benefits.

The ITC employs four administrative law judges, including one who many years ago happens to have brought to his appointment patent and trademark experience. As noted, the ITC recently appointed its fourth administrative law judge from the newly minted OPM register. To our knowledge, the ITC's complement of administrative law judges is competently and efficiently fulfilling their duties. In the circumstances, it is not at all apparent why any additional judicial staffing can not be met adequately and satisfactorily under the APA and long-standing OPM merit-based procedures and regulations.

The government-wide experience with administrative law judges, who are the product of the OPM merit selection process more fully discussed below, is that they quickly acquire the necessary expertise in the matters before their agencies, accurately evaluate technical evidence, including the testimony of expert witnesses, and learn specialized areas of law. Examples include the many administrative law judges who do not have technical degrees or prior agency-related legal or technical experience, but who

hear and decide cases for the Securities and Exchange Commission (complex financial and securities issues), Social Security Administration and Department of Health and Human Services (medical evidence), Federal Energy Regulatory Commission (complex energy-related issues), and Federal Communications Commission (complex telecommunications issues).

There is every reason to believe that the ITC, just like the 29 other agencies that have staffs of administrative law judges, can fulfill its need for a fifth administrative law judge from the OPM merit-based register.

Section 337 judicial appointments could return agency decisionmaking to the era of political appointments and agency biased justice that antedated the APA. Prior to the 1946 enactment of the APA, administrative adjudicators appointed by the agencies were seen as “mere tools of the agency concerned.”³ As noted by a prominent legal scholar:

[T]he big story of the [APA] is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today ... Unable to force an external separation[of the adjudicatory function from the rule-making, investigation and prosecution functions] the proponents of the New Deal (supported by all members of the Attorney Generals committee) ... went as far as they could in the direction of making the person who hears the witnesses into a true judge. Thus, the array of independence protecting provisions in the [APA].⁴

³ *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). See also Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law* §8.52 (1993).

⁴ Michael Asimov, *Administrative Law Judges: The Past and the Future*, NYSBA Government, Law and Policy Journal at 12,15 (2000).

Another respected commentator noted, “ALJs do not in fact feel allegiance to the agency they work for and for all meaningful purposes are independent and neutral.”⁵

The APA was enacted to provide private parties with more confidence that they would be treated fairly during the administrative process.

ALJs are the only Federal adjudicators who are appointed through a statutorily mandated merit-based process administered by OPM. OPM administers a rigorous merit based examination which requires judicial candidates to demonstrate a minimum of seven years of administrative law experience, and undergo a day-long written examination and an oral examination before a panel that includes an OPM representative as chairman, a sitting administrative law judge, and a member of the American Bar Association.⁶ Successful candidates are rated and ranked on a register of eligibles in relationship to their overall examination score, consistent with veteran’s preference.

OPM submits the names of administrative law judges to the agencies under the “rule of three”. For each agency vacancy, the hiring agency is provided by OPM with the names of the three highest rated eligibles, consistent with veteran’s preference, on the register. The agency can appoint the applicant it chooses from that register, or, after exhausting the register, the agency can request that OPM certify another register.

⁵ William F. Funk, *et al*, *Administrative Procedure and Practice* at 201 (1997).

⁶ The experience and qualifications requirements for the ALJ position are contained in a Qualification Standard that is published on OPM’s website and the vacancy notice that was issued in connection with the current judges’ register established by OPM.

Many ALJs, during a career of 25 years or more, may serve at several agencies and, in this respect, ALJs are generalists in the same way that Article III Federal District Court judges are generalists.

- *Unlike Section 337 judges*, administrative law judges are prohibited from receiving bonuses and other awards. An agency can not grant a monetary or honorary award under 5 U.S.C. §4503 for superior accomplishment by administrative law judges in the performance of adjudicatory functions. In marked contrast to this regime, Section 601 does **not** prohibit bonuses and other awards, even though pay would be set without reference to performance reviews.
- *Unlike Section 337 judges*, the civil service requirement of a probationary and career-conditional period before absolute appointment does **not** apply to an appointment to an administrative law judge position.⁷ By comparison, Section 601 does **not** require immediate absolute appointment of the Section 337 judges.
- *Unlike Section 337 judges*, the APA prohibits administrative law judges from engaging in *ex parte* communications.⁸

⁷ 5 U.S.C. §§1305, 3105, 3323(b), 4301(2)(D); 5 C.F.R. §930.203a(b).

⁸ See United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* at 53-56 (1947).

- *Unlike Section 337 judges*, the APA insulates administrative law judges from supervision by any person performing an investigative or prosecuting function for the agency.
- *Unlike 337 judges*, ALJs are subject to adverse action⁹ by their employing agency, including removal, suspension, reduction in grade, reduction in pay, or a furlough under 31 days *only* for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record and after opportunity for hearing before an MSPB administrative law judge. This safeguard prevents the President or his agency appointees from summarily disciplining or intimidating administrative law judges at will and is designed to avert political intrusions in adjudications such as ITC patent infringement cases. By comparison, Section 601 provides for an MSPB process only for removal actions and leaves Section 337 judges as vulnerable as all other federal employees under Part 752 of OPM's regulations to all other adverse actions, including suspension, reduction in grade, reduction in pay, and a furlough under 31 days.
- *Unlike Section 337 judges*, the delicately balanced relationship that administrative law judges must maintain with their employing agencies distinguishes them from the rest of the agency's workforce.

⁹ 5 U.S.C. §7521.

Additional APA safeguards that provide administrative law judges with decisional independence include the requirement that hearings be conducted on the record by merit-appointed administrative law judges. In this respect, the administrative law judge is the “person primarily responsible for developing an accurate and complete record and a fair and equitable decision in a formal adjudicative proceeding.”¹⁰ The APA also requires agencies to assign cases to each administrative law judge on a rotation basis to the maximum extent practical.

The *entire* panoply of APA protections is designed to ensure that administrative law judges decide cases independent of agency influence or pressure. The adjudicative function performed by administrative law judges is subject to *all* of these safeguards—*not just selective protections provided by Section 601*.

The United States Supreme Court recognized the unique status of administrative law judges under the APA. In Butz v. Economou, 438 U.S. 478 (1978), the Court affirmed the unique APA status of administrative law judges within the Executive Branch by stating that administrative law judges are comparable to federal judges for pay and compensation purposes. More recently, in Federal Maritime Comm’n v. South Carolina State Ports Authority, 535 U.S. 743 (2002), the Court recognized that administrative law judges are the functional equivalent of other federal trial judges. Additionally, Congress recognized that the duties performed by administrative law judges are not analogous to

¹⁰ Administrative Conference of the United States, *Manual for Administrative Law Judges* at 4 (3d ed. 1993).

the duties performed by other members of the Executive Branch workforce by creating a separate ALJ pay category in 1990. 5 U.S.C. §5372 (2007).

In conclusion, Section 601 goes outside the APA and creates a class of non-administrative law judges who would be conferred with only some APA-like protections to hear Section 337 cases. In this and the other respects highlighted above, enactment of Section 601 would significantly reduce the independence of ITC decision makers and subvert fair and impartial agency hearings and adjudications.

Consequently, Forum urges the Congress to eliminate Section 601 from S. 1919.

HEARING BEFORE THE SENATE FINANCE COMMITTEE
UNITED STATES SENATE
S. 1919, THE TRADE ENFORCEMENT ACT OF 2007
(Thursday, May 22, 2008)

STATEMENT FOR THE RECORD SUBMITTED BY
DAVID A. HARTQUIST, PAUL C. ROSENTHAL,
MICHAEL J. COURSEY, AND JEFFREY S. BECKINGTON
ON BEHALF OF KELLEY DRYE & WARREN LLP
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These written comments are filed on behalf of our firm, Kelley Drye & Warren LLP, which acts as counsel to United States domestic companies and their workers in a wide range of matters under the trade laws of the United States and the various agreements of the World Trade Organization ("WTO"). We appreciate this opportunity to submit remarks on S. 1919, The Trade Enforcement Act of 2007.

We agree with Chairman Baucus that the United States needs to enforce its trade agreements and bolster enforcement of the trade remedy laws. We also welcome Ranking Member Grassley's invitation to consider what steps the United States can take to invigorate its enforcement efforts.

Certainly one essential component of maintaining the benefits of the bargains that the United States has struck at the WTO and in a growing number of regional and bilateral trade agreements is adequate staffing at the federal agencies charged with oversight of the trade remedy laws, particularly the Office of the U.S. Trade Representative ("USTR"), the International Trade Administration of the U.S. Department of Commerce ("ITA"), and the U.S. International Trade Commission ("ITC"). S. 1919's establishment of a position for a Chief Trade Enforcement Officer within USTR, an Interagency Trade Enforcement Working Group, and a WTO Dispute Settlement Review Commission should help in this respect.

Also in this regard, as noted recently in GAO report 08-391 at page 5 (March 2008), the ITA is at less than half of its authorized manning level and has been for a while. In these circumstances, it is difficult to see how the effectiveness of the ITA in administering the antidumping and countervailing duty laws cannot have suffered significantly, just as any other organization at half strength would struggle to fulfill its responsibilities. Remedial measures to correct this situation should be taken swiftly.

Another essential component of maintaining the benefits of the bargains the United States has entered into consists of having the will to insist firmly and appropriately that our trading partners uphold their international legal obligations to the United States. By whatever combination of negotiation, dispute settlement, and proceedings under U.S. trade laws, the

United States should consistently convey the message that the United States will expect other nations to honor their commitments by holding open their markets and by engaging in fair trade.

Successful enforcement requires ensuring that trade agreements and trade remedy laws are administered to aid a sustainable, constructive flow of trade across national boundaries. Globalization, however defined, is a powerful and far-reaching force that is improving standards of living in many parts of the world, but that also is bringing about dangerous imbalances and causing extensive damage to the extent that mercantilist, beggar-thy-neighbor behavior occurs and is indulged.

In working to understand globalization, it is important that the traditional economic theory of free trade and its underlying principle of comparative advantage be updated to reflect modern conditions. In their book published in 2000 at p. xiii, Global Trade and Conflicting National Interests, Ralph E. Gomory and William J. Baumol observed that “[a]dvantages based on natural resources still exist, as they did when England specialized in wool and Portugal in wine, but more dominant today are advantages that can be *acquired*.” (Emphasis in the original.) The availability of advanced technology and access to enormous amounts of capital in the present age regularly overcome comparative *disadvantages* on a very large scale.

In contrast with the single best outcome realized by everyone from Adam Smith’s invisible hand, it is becoming clearer with time that the various choices made possible by technology and capital can lead to a range of results, some of which are not beneficial for all. In the words of Messrs. Gomory and Baumol, “These outcomes vary in their consequences for the economic well-being of the countries involved. Some of these outcomes are good for one country, some are good for the other, some are good for both. But it often is true that the outcomes that are the very best for one country tend to be poor outcomes for its trading partner.” Id. at 5.

In this more complicated setting today than 200 years and more ago, enforcement of trade agreements and trade laws has a key role to play in tempering adverse consequences for one country when another country through technology and capital converts a comparative disadvantage into a strong or dominant position in the market. In this process of change, it is easy for abuses of international trade rules to occur quickly and with devastating effect.

Against this background and with reference to specific areas in which we believe legislative amendments will enhance enforcement of U.S. trade laws, we submit the comments below.

- Application of Countervailing Duties to Nonmarket Economies – S. 1919 expressly recognizes that countervailing duties should be applied to subsidized, injurious imports into the United States. This modification is appropriate and important to offset subsidies improperly bestowed by governments of non-market economies as a way of stimulating exports.
- Clarification of the Standard of Material Injury – S. 1919 also would overrule the Bratsk line of cases so that the ITC would not be required to address certain factors in its

determinations of injury in antidumping and countervailing duty proceedings. This statutory reversal is very much needed as an explicit statement by Congress that the test for injury by reason of unfairly dumped or subsidized imports from one country does not include consideration of whether other imports are likely to replace the subject merchandise or of the effect of a potential order on the domestic industry.

- Fundamental Exchange-Rate Misalignment – S. 1919 does not at this time have any provision, as S. 1607 does, that addresses enforced undervaluation by other countries of their currencies. Language should be included in S. 1919 that would treat such misalignment as a countervailable prohibited export subsidy, as S. 796 and H.R. 2942 do. The damaging and dangerous influence of currency misalignment is difficult to overstate. As Dr. Gomory observed in recent testimony before the House Science and Technology Committee’s Subcommittee on Investigations and Oversight on May 22, 2008, “To obtain the benefits of trade in the narrow sense we need free trade. This means, in particular, that we need to address major distortions in the market caused by the systematic mispricing of Asian currencies and other mercantilist practices. *If we do not have a free market in currencies we cannot claim that the benefits of free trade are being achieved.*” (Emphasis added.) Exchange-rate misalignment is a hybrid in nature, a monetary measure that has direct and extensive repercussions on trade across national boundaries. Rather than view this matter as one to be addressed either by the monetary authorities or by trade authorities, therefore, both sets of authorities should work in tandem to curb this mercantilism as quickly as possible. There is authority for trade measures to confront exchange-rate misalignment in the General Agreement on Tariffs and Trade (at *Ad Article VI:2, ¶¶ 2 and 3*), whereby it is recognized that multiple currency practices (meaning practices by governments or sanctioned by governments) can constitute in certain circumstances a countervailable subsidy and a form of dumping. Protracted, large-scale undervaluation by a country of its currency should not be tolerated by the international community.
- Reinstatement of “Zeroing” in All Segments of Antidumping Proceedings – In its antidumping calculations, the ITA has had a longstanding, historic procedure of “zeroing” negative dumping margins. In a series of dispute settlements beginning in 1999 at the WTO, however, most of them against the United States, the Appellate Body has insisted that “zeroing” is not permissible under various provisions of the WTO’s agreements. In taking this position, the Appellate Body has refused to acknowledge that the WTO’s Member States have never reached a negotiated consensus to ban “zeroing” in antidumping cases and consequently has wrongly created rights and obligations counter to its jurisdictional bounds in Articles 3.2 and 19.2 of the WTO’s Dispute Settlement Understanding. As important as “zeroing” is to meaningful implementation of the U.S. antidumping statute, the overreaching by the Appellate Body is at least as disturbing and does not bode well for fruitful negotiations by the Member States or the integrity, balance, and effectiveness of the WTO’s system. In the meantime, USTR and the ITA have been adjusting prior instances of “zeroing” that have been challenged successfully by other member states of the WTO. Without “zeroing” in those cases, dumping margins have been reduced, and certain antidumping orders have been revoked. S. 1919 should contain a section that will restore as much as possible the affected antidumping orders to their status quo before the Appellate Body’s rulings against “zeroing” and that also will reinstate

'zeroing' in all segments of the ITA's antidumping proceedings while negotiations are being held in the Doha Round of negotiations.

- 'New-Shipper' Reviews and Bonding Privileges – The so-called 'new-shipper' bonding option, which was legislatively suspended for three years in August 2006, should be permanently repealed.

With one exception, U.S. importers must use cash to cover the duty deposit requirement on all imports covered by an antidumping or countervailing duty order. With the enactment of the Uruguay Round Agreements Act in 1995, importers were allowed to use a customs bond in place of cash to satisfy this requirement on imports from exporters that were undergoing a 'new-shipper' administrative review of an antidumping or a countervailing duty order.

This bonding privilege generally was not abused during the first few years it was available. However, from about 2000 through August 2006, abuse of the 'new-shipper' bonding option enabled certain dishonest Chinese exporters and U.S. importers to enter enormous amounts of four Chinese agricultural products—fresh garlic, crawfish tail meat, honey, and canned mushrooms—at extremely dumped prices, as if these antidumping duty orders did not exist. Over this period, these imports devastated the four domestic industries that competed with them.

The magnitude of injury inflicted by the bonding-option abuse on these domestic producers is reflected in the staggering amount of final antidumping duties that have been assessed in recent years against imports from 'new-shipper' exporters, but which U.S. Customs & Border Protection (CBP) could not collect. According to GAO report 08-391 (March 2008), CBP over the past seven fiscal years was unable to collect over \$613 million in final duties assessed on imports covered by antidumping and countervailing duty orders. Of this amount, 40 percent—or \$245 million—had been assessed on imports shipped by exporters that were undergoing 'new-shipper' reviews. The obligation of the relevant importers to pay whatever duties were ultimately assessed on these imports supposedly was secured by customs bonds.

Final antidumping duties are typically assessed at least two years after the relevant imports were entered into the United States. This means that final antidumping duties were assessed through FY 2007 on only some part of all the 'new-shipper' imports that were entered prior to the suspension of the bonding option in August 2006. As a result, the total amount of assessed but uncollected antidumping duties on these 'new-shipper' imports will no doubt be much higher than the \$245 million reported through FY 2007. Also significantly, the amount of uncollected duties on these imports is likely well below the total economic losses these four domestic industries suffered during the seven-year period through the abuse of the 'new-shipper' bonding option.

In August 2006, Congress and the President legislatively suspended the 'new-shipper' bonding option for about three years. That suspension immediately stopped the flood of dumped 'new-shipper' imports under these four antidumping duty orders, which restored the effectiveness of those orders.

The suspension period will be over in June 2009, exactly one year from now. CBP, the ITA, and the other trade agencies were instructed in the legislation that suspended the bonding option to advise Congress on whether the option should be permanently repealed. These agencies have apparently not yet done this. Nevertheless, it seems clear that the gross abuse of the bonding option that preceded its suspension would immediately return following its reinstatement. Further, there have been no calls for reinstatement of that option from anyone, including the many ‘new-shipper’ exporters that continue to request ‘new-shipper’ reviews under these four antidumping duty orders.

Given these circumstances, S. 1919 should include permanent repeal of the ‘new-shipper’ bonding option.

- Prevention of Circumvention of Antidumping and Countervailing Duty Orders – A real problem in a significant number of instances is the circumvention of antidumping and countervailing duty orders that have already been issued. The statute at 19 U.S.C. § 1677j addresses this concern, but in two respects the ITA has administered this section in a manner that has seriously weakened efforts against circumvention.

First, this provision’s language plainly contemplates a decision by the ITA of whether there is circumvention or not within 300 days in all but the most exceptional circumstances. In practice, however, the ITA not infrequently permits itself multiple unilateral extensions that go far beyond 300 days. For example, in one anticircumvention inquiry that is currently being conducted, a final result is now scheduled to be issued some 685 days after initiation of the review, while in a past anticircumvention inquiry the ITA took 624 days to complete its analysis.

These delays have detrimental consequences for administration of the law and the utility of any relief granted under 19 U.S.C. § 1677j. In the event of an affirmative preliminary and/or final determination of circumvention, the ITA’s regulations require the ITA to instruct CBP to suspend liquidation and collect cash deposits on the circumventing respondent’s entries of merchandise found to be of the same class or kind as the merchandise covered by the order. 19 C.F.R. § 351.225(l). The ITA directs CBP to suspend liquidation and collect duties on entries dating back to the date of initiation of the inquiry. Id. Suspension of liquidation, however, is effective only as to entries that remain unliquidated as of the date the ITA issues its instructions to CBP. Id. Entries that have already been liquidated are beyond reach. As a matter of law, liquidation is presumptively conclusive and final, and the statutory scheme has no provision permitting reliquidation. See, e.g., Sichuan Changhon Electric Co. v. United States, 460 F. Supp. 2d 1338, 1362 (citations omitted). The problem is compounded when entries that otherwise might remain unliquidated have been deemed liquidated by operation of law under 19 U.S.C. § 1504 before the ITA has instructed CBP to suspend liquidation.

In the interest of rectifying this deficiency, S. 1919 should incorporate a section that will remove from 19 U.S.C. § 1677j(f) the phrase, “to the maximum extent practicable.” This revision would establish a firm statutory deadline and remove any doubt that Congress

requires that anticircumvention deliberations by the ITA take no more than 300 days of initiation and that relief be promptly awarded when circumvention is found.

Second, pursuant to 19 U.S.C. § 1677j(b) the ITA is empowered to place under an antidumping duty order that covers merchandise from one country, merchandise from that country that is completed or assembled in a third country and then entered into the United States when certain specified conditions are met. The statute does not provide precise guidance on how the ITA should implement a determination of such circumvention.

In practice, even when the ITA has made an affirmative finding of circumvention under 19 U.S.C. § 1677j(b), the agency nevertheless permits the circumventing exporter to avoid suspension of liquidation and payment of estimated antidumping duties on such entries simply by the filing of a certification, at the time of entry, claiming that the particular merchandise entered does not have ties to the country with merchandise under order. This administrative approach by the ITA severely undercuts the statute.

Allowing these certifications treats the circumventing exporter's entries with a presumption that they are not covered by the order. The presumption based upon the ITA's finding of circumvention instead should be that all of the circumventing exporter's entries from the third country are covered by the order, unless and until the circumventing exporter or an appropriate importer documents otherwise in a subsequent administrative review by the ITA.

The ITA's acceptance of these certifications also improperly delegates to CBP the power to make a country-of-origin determination for purposes of antidumping and countervailing duties and, as a practical matter, prospectively determines the dutiability of entries, even though the entire U.S. statutory and regulatory scheme is premised on retrospective review in accordance with 19 U.S.C. § 1675 and 19 C.F.R. § 351.213. Once again, the ITA's procedure makes it highly likely, if not certain, that most or all of such entries will either be liquidated or deemed liquidated by operation of law by the time the ITA has instructed CBP to suspend liquidation on the entries.

We request that a provision be added to S. 1919 that specifically requires liquidation to be suspended on all entries from the circumventing exporter that are of the same class or kind as the merchandise that is subject to the order, and that the U.S. importer of such merchandise be required to deposit estimated antidumping or countervailing duties at the rate applicable to the supplier in the country under order. The final amount of duties owed on such entries should be determined through a retrospective review conducted pursuant to 19 U.S.C. § 1675.

- Broader Availability and Sharing of Data Under Administrative Protective Order—Since enactment of the Trade Agreements Act of 1979, counsel to parties in antidumping and countervailing duty proceedings have had access to each other's business proprietary information under administrative protective order ("APO"). After nearly three decades of experience by the ITA, the ITC, and respective counsel to petitioners and respondents, it is evident that this system works well in protecting the confidentiality of sensitive data

and that this availability of data advances the very beneficial purpose of developing a fuller and more accurate administrative record than would be possible without disclosure under APO.

Given this successful track record, a provision should be added to S. 1919 that would extend the APO system. The ITA, the ITC, and CBP should all be able to have access to and share one another's business proprietary data more readily and extensively than is currently done, and, as an integral part of this process, petitioners' counsel should have that same access and should be free under APO to submit the business proprietary data of any of the three agencies to the other two agencies in the course of an antidumping or countervailing duty proceeding. This coverage under APO should exist both during the investigations and reviews by the ITA and the ITC and during the period of assessment and collection by CBP.

This coordination and broader availability should help to avoid or deter a number of insidious situations, such as the one in which a respondent reports one set of data to CBP for purposes of normal tariffs and another set of data to the ITA in an antidumping case in an unlawful attempt to minimize the amounts paid in each instance. This approach also is sound from a historical perspective, because U.S. Customs until 1954 had under its control all of the business proprietary data involved. It was only after Congress transferred antidumping injury issues in 1954 to the then U.S. Tariff Commission and the calculation of dumping margins and countervailable subsidy amounts to the ITA in 1979 that the present trifurcated system emerged. By amending the law in this regard, Congress would underscore its intent that antidumping and countervailing duties be computed as accurately as possible and assessed and collected as fully as possible.

June 5, 2008

TESTIMONY OF ROBERT E. LIDTHIZER¹
U.S. SENATE COMMITTEE ON FINANCE
Hearing on S. 1919, the Trade Enforcement Act of 2007
May 22, 2008

I hereby submit this written statement with regard to the Committee's hearing on S. 1919, the Trade Enforcement Act of 2007. I appreciate the opportunity to provide comments on this vital topic, and the importance of strengthening our trade remedy laws in the context of the ongoing manufacturing crisis.

Last June, I appeared before the Committee and provided testimony concerning our trade remedy laws and priority enforcement issues in the Committee's June 12, 2007 hearing regarding Trade Enforcement for a 21st Century Economy. If anything, the importance of meaningful action by Congress in this area has only grown over the last 12 months. In this regard, our trade deficit remains at astronomical levels, we continue to see jobs and companies move offshore, and we continue to face extraordinary levels of unfair competition from China and other import sources.

The testimony I provided last June highlighted a number of specific areas in which Congress should act to address the most pressing trade and manufacturing issues facing our workers and producers. (A copy of that testimony is appended to this statement as Attachment A.) Each of these issues remains very much of concern today, and indeed recent developments have raised related concerns in a number of areas. For example:

- Congress should ensure that the Administration's change in policy to apply the countervailing duty ("CVD") law to China is being implemented in an adequate and effective manner. In this regard, Congress should ensure that prior subsidies granted in China are fully offset, in the same way and based upon the same amortization periods as subsidies granted in other countries – and regardless of arbitrary assessments of the level of economic reforms at the time the subsidy was granted.
- Similarly, Congress should ensure that the decision to apply CVD provisions to China is in no way accompanied by a lessened commitment to enforcing antidumping provisions with respect to Chinese products. In this regard, proposals to consider whether individual Chinese producers could be granted "market" status – even where the country or industry at issue is not market-oriented – make no sense, and this should perhaps be clarified legislatively.

I hope the Committee will act expeditiously to address the critical issues facing our country in terms of dealing with unfair trade and ensuring that our trade laws act in an effective manner. This truly is a precondition and necessary step to restoring the health of our nation's manufacturers. I look forward to working with the Committee and assisting in any way I can as these issues are considered.

¹ Partner in the International Trade Group of Skadden, Arps, Slate, Meagher and Flom, LLP ("Skadden, Arps"). The views expressed here are my own and not necessarily those of the firm. My mailing address at Skadden, Arps is 1440 New York Avenue, N.W., Washington, DC 20005.

ATTACHMENT A

TESTIMONY OF ROBERT E. LIGHTHIZER¹
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.

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.

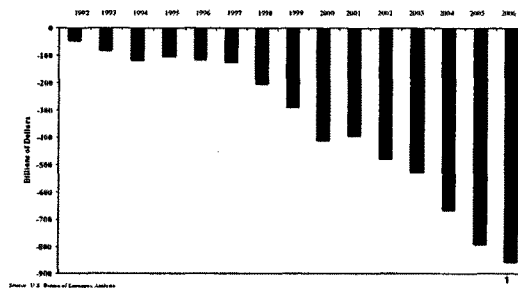
II. THE CURRENT U.S. MANUFACTURING CRISIS UNDERSCORES THE IMPORTANCE OF STRONG U.S. TRADE LAWS

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

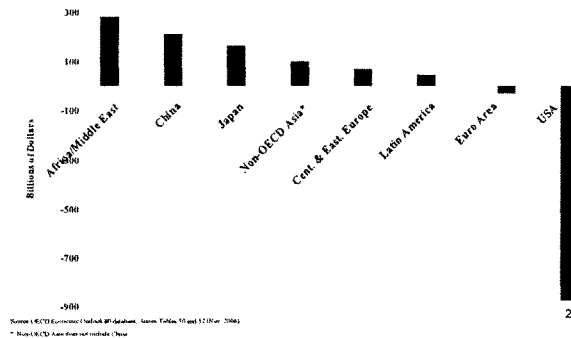
The U.S. Current Account Deficit



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

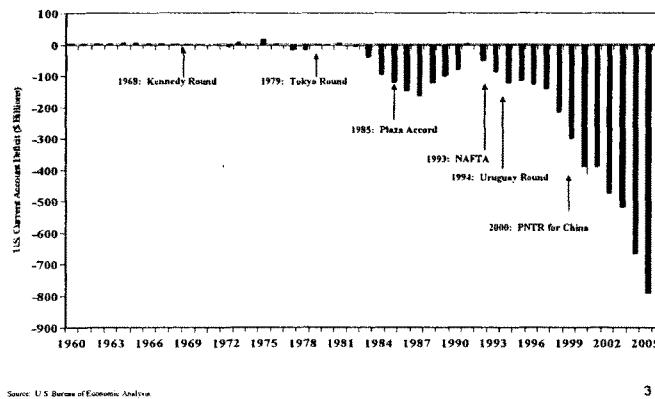
In 2006, the United States Was the Only Major Economy with a Large Current Account Deficit



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

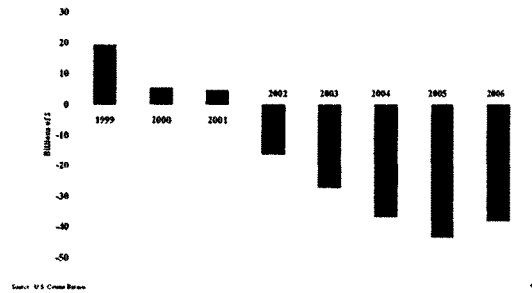


Several years ago, we were told that U.S. manufacturers were simply shifting to more advanced products. But as Figure 4 shows, in the last few years our trade balance

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

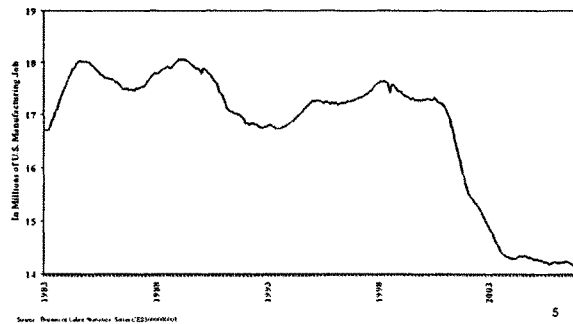
U.S. Trade Balance in Advance Technology



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.

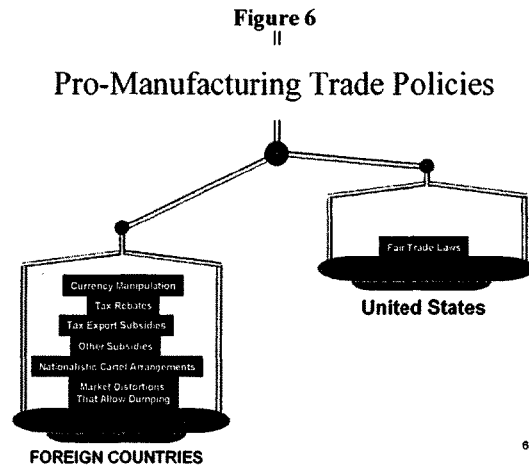
Figure 5

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.



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

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 be 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.

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



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

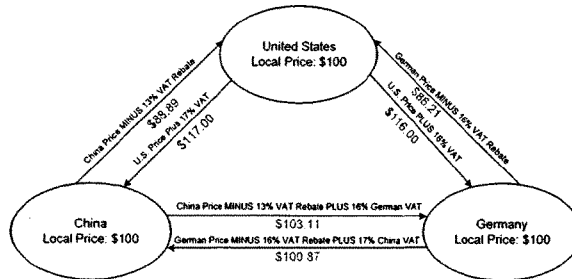
Another significant inequity – less well known but equally damaging – involves the irrational penalty imposed by WTO rules on producers in countries (principally the United States) that rely on income tax systems, as opposed to producers in countries (most of the rest of the world) that rely upon value-added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



May 22, 2008

The Honorable Max Baucus
Chairman
U.S. Senate Committee on Finance
Washington, DC 20510

Dear Chairman Baucus:

The National Retail Federation (NRF) is submitting the following comments on behalf of its member companies in the U.S. retail industry for the hearing on S. 1919, the Trade Enforcement Act of 2007, before the U.S. Senate Committee on Finance scheduled for May 22, 2008.

The **National Retail Federation** is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees - about one in five American workers - and 2007 sales of \$4.5 trillion. As the industry umbrella group, NRF also represents over 100 state, national and international retail associations.

Introduction

As NRF noted in its testimony before the Finance Committee last year, we live in a more trade-dependent, interconnected economy than when most of the current trade remedies rules were first written. To survive and 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, disrupted business operations, threatened domestic jobs, and often undermined the ability of U.S. retailers, farmers, and manufacturers to compete globally.

This situation should be particularly worrisome given the current state of the U.S. economy, the decline in consumer spending, and the spate of retail layoffs and bankruptcies. Yet, we continue to see a largely one-sided debate on how trade remedy measures should be applied, focused mainly on accommodating the interests of the comparative handful of domestic industries that actively use these laws, while largely

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ignoring the impact that they have on many more American companies, including retailers. Instead of being "strengthened" in ways that will exacerbate these problems, we believe these laws should be made more balanced and fair.

Specifically with respect to S. 1919, the subject of today's hearing, we will limit our comments to three provisions in the bill that we find particularly troublesome or about which we have particular questions.

China 421 Safeguard Mechanism

Title III of S. 1919 would limit the President's ability to deny relief recommended by the U.S. International Trade Commission (ITC) in safeguards investigations of imports from China under section 421 of the Trade Act of 1974. The provision would also allow Congress to overturn through a resolution mechanism a Presidential decision in 421 investigations whenever the President declines to follow an ITC recommendation.

Section 421 is a safeguard-like trade remedy in force through 2012 that permits temporary limits through quotas and/or duties on goods from China when an increase in imports injures U.S. producers of those goods. Section 421 investigations are conducted by the ITC, which recommends a remedy if it finds injury. The President then decides whether to impose the recommended relief based on whether the benefit of such relief to some producers is outweighed by the adverse impact on the U.S. economy or national security. Of six 421 cases to date, the ITC has reached an affirmative determination in four, and the President has denied relief in all four.

The result of the changes to section 421 proposed in S. 1919 would be greater automaticity in the application of safeguards remedies against imports from China, thereby making this safeguard mechanism much more like the China textile safeguard. Thus, U.S. textile producers and other petitioner industries would find it much easier to block imports from China.

U.S. retailers have serious concerns about these proposed changes. Section 421 has the potential to create considerable disruption to commerce and should therefore be used cautiously for several reasons. First, it targets goods which even the complaining party admits are fairly-traded. Second, remedies already exist under U.S. antidumping law to redress injury from imports that a U.S. industry claims are unfairly traded. Third, it has very low injury standard (market disruption) compared to both antidumping and other safeguards remedies. Finally, the remedies that may be imposed have a more unpredictable impact on the business operations of adversely-affected U.S. companies (like retail) than even antidumping cases.

In our view, the current system under section 421 establishes an important balance that should be maintained. It makes little sense to impose a remedy that only benefits a narrow economic interest, if the President determines it would result in serious and

disproportionate harm to a wider segment of the U.S. economy. Moreover, section 421 targets only imports from China, and if not carefully considered may only end up benefiting a non-Chinese, non-American supplier. Finally, allowance for the balancing the national economic interest in 421 investigations was part of the agreement between the United States and China in the terms of China's WTO accession.

Application of CVD Law to Non-Market Economy (NME) Countries

Title IV of S. 1919, section 401 would explicitly authorize the Department of Commerce (DOC) to apply the countervailing duty (CVD) law to non-market economy countries NME countries, such as China, Vietnam, and Armenia. In our view, this provision is unnecessary. The DOC already applies CVD law to NME countries, and has proceeded with several CVD investigations against China.

Another issue with this provision is that the CVD remedy may be applied in addition to the special NME methodology currently used in antidumping (AD) proceedings. However, the provision fails to clarify procedures in the case of a CVD investigation against products from NME countries where there is a concurrent AD order or investigation against those products. The specific problem in this situation arises from the fact that the surrogate country methodology used in AD investigations against imports from China and other NME countries already provides a mechanism to offset many government subsidies. In calculating an AD margin in NME cases, DOC uses market-based values from a surrogate country to determine the normal value of the subject imports, which it then compares to the U.S. export price. Unlike a market economy cases involving domestic subsidies, however, the NME surrogate country calculation is not adjusted to offset domestic subsidies. As a result, the AD calculation effectively provides a remedy to offset the domestic subsidies under the NME methodology. Unless Commerce has the authority to avoid double-counting, the combination of these methodologies will result in giving petitioners a double remedy, and thereby violate WTO rules by capturing the effect of the subsidies twice.

Example: It costs a Chinese company \$20 to make a widget, which it sells in the United States at \$10, creating a dumping margin of 100 percent. The Chinese Government gives the manufacturer a subsidy of \$10 per widget, which effectively lowers its cost of production to \$10, the same as its U.S. price. In an antidumping case, the Department of Commerce will ignore the Chinese company's actual costs in calculating what the normal value of the widget is in China, and instead use market-based costs in a surrogate market economy country like India. If the actual cost of production in India is \$30, the result is not only a higher dumping margin of 200 percent, but, the benefit of the \$10 subsidy is completely offset by the NME antidumping methodology which ignores the Chinese company's costs. If no adjustments are made, the application of CVD and AD duties will result in prohibited double remedy.

Accordingly, the bill should be modified to add a provision to address the double-remedies problem, similar to language included in H.R. 3283, approved by the House of Representatives in 2005.

Material Injury Determinations

Title IV, section 402 of S. 1919 would overturn the decision of the U.S. Court of Appeals for the Federal Circuit in *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006), which found that the International Trade Commission (ITC) must consider whether non-subject imports would replace the subject imports, particularly in cases involving competitively-priced, commodity products, such as the investigation in that case involving silicon metal from Russia.

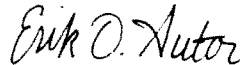
The provision would direct the ITC in its injury determination to ignore any impact on a U.S. industry from imports that are not part of the antidumping or countervailing duty investigation. As such, the ITC would have to evaluate the subject imports in isolation, by requiring that it ignore other factors impacting the market, such as non-subject imports or the effect of the potential order on the domestic industry. The result would be essentially to preclude the ITC from examining the true causes of the domestic industry's injury, and to lower the injury threshold such that the ITC would find material injury whether or not such a finding is warranted.

NRF is of the view that the court's decision in *Bratsk* was reasonable and correct, and should not be legislatively overturned. In the modern, globally-competitive economy in which the United States now participates, there is simply no valid reason to impose antidumping or countervailing duties on imports from a particular country if they would merely be replaced by imports from elsewhere. In this lose-lose scenario, the duties would aid domestic producers, yet American retailers, manufacturers, agricultural producers, and consumers would be saddled with higher costs.

Finally, the petitioners' bar, which is otherwise the first to defend the sanctity of the U.S. trade remedies laws, should not be allowed to engage in competitive misuse and manipulation of the trade remedies rules to ensure results-oriented outcomes in those instances, such as the *Bratsk* decision, when those rules do not work in their favor.

NRF appreciates the opportunity to offer its views on S. 1919 to the committee, and would be happy to answer questions or clarify any viewpoints with respect to this legislation.

Sincerely,



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



Antoinette M. Tease, P.L.L.C.

**WRITTEN COMMENTS OF ANTOINETTE M. TEASE
U.S. SENATE COMMITTEE ON FINANCE
Hearing on S. 1919, the Trade Enforcement Act of 2007**

May 22, 2008

I. INTRODUCTION

Thank you for the opportunity to provide written comments on S. 1919 as it relates to intellectual property law. The purpose of these comments is to provide my perspective as an intellectual property attorney in Billings, Montana.

Based on my review of the proposed legislation, it appears there are three aspects of the bill that impact intellectual property rights directly: (i) the establishment of the WTO Dispute Settlement Review Commission; (ii) the creation of the position of Chief Trade Enforcement Officer; and (iii) the appointment of hearing officers to preside at the taking of evidence at hearings conducted under Section 337 of the Tariff Act of 1930. I address each of these points below.

II. WTO DISPUTE SETTLEMENT REVIEW COMMISSION

S. 1919 calls for the establishment of a WTO Dispute Settlement Review Commission to be comprised of five members, all of whom will either be retired judges of the Federal judicial circuits or have substantial expertise in international trade law. The purpose of the Commission is to review all reports of dispute settlement panels or the Appellate Body that contain adverse findings and that are adopted by the Dispute

Settlement Body and, upon request, any other report of a dispute settlement panel or Appellate Body that is adopted by the Dispute Settlement Body.¹

The WTO plays a critical role in enforcing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards for intellectual property rights protection and enforcement for all WT member states. The current WTO dispute resolution process has been widely criticized within the United States for various reasons, including the perception that dispute settlement reports are adopted quasi-automatically and without proper review, the belief that some WTO awards are arbitrary, and the impression that those authoring the dispute settlement reports fail to exhibit a grasp of sophisticated legal concepts.

Despite these criticisms, the WTO system for resolving trade disputes is generally and universally supported, and it is universally acknowledged that the participation of the United States in this system is necessary if it is to succeed. To the extent that the WTO Dispute Settlement Review Commission will bolster the confidence of U.S. players in the WTO dispute resolution system, I believe it is an important step toward maintaining the integrity of the overall system—a system that is critical to the enforcement of intellectual property rights on a global basis.

Specifically, the requirement that the members of the Commission be retired judges of the Federal judicial circuits or possess expertise in international trade law is intended to address criticisms that WTO rulings lack legal rigor. For that reason, I support this requirement.

III. CHIEF TRADE ENFORCEMENT OFFICER

S. 1919 would create the position of Chief Trade Enforcement Officer. The person serving in this position would assist the United States Trade Representative in investigating and prosecuting disputes pursuant to trade agreements to which the United States is a party, including making recommendations regarding the administration of U.S. trade laws relating to intellectual property. The Chief Trade Enforcement Officer would also serve as chair of an interagency Trade Enforcement Working Group, which would include representatives from the Departments of State, Treasury, Commerce and Agriculture.

¹ The term “Appellate Body” means the Appellate Body established by the Dispute Settlement Body pursuant to Article 17.1 of the Dispute Settlement Understanding. The term “Dispute Settlement Body” means the Dispute Settlement Body established pursuant to the Dispute Settlement Understanding. The term “Dispute Settlement Understanding” means the Understanding on Rules and Procedures Governing the Settlement of Disputes referred to in section 101(d)(16) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(16)).

As I testified before the Senate Finance Committee on March 13, 2008, at the hearing on Customs Reauthorization, intellectual property rights have taken on such a degree of importance in our present economy that enhanced governmental action to preserve and enforce these rights is essential. In this regard, it is important that we place greater emphasis on coordinating the IPR enforcement efforts of various governmental agencies. I also testified that intellectual property rights enforcement must go hand-in-hand with a strategy to work with our international trading partners—both on a public and on a private level—to share knowledge and instill a recognition that the protection of intellectual property rights is mutually beneficial. I advocated that the United States take a vigorous and engaged role in encouraging other nations to develop reciprocal methods of IPR enforcement.

To this end, I support the creation of the position of Chief Trade Enforcement Officer because I believe it would provide added resources and emphasis to the enforcement of intellectual property rights worldwide. It will be important, however, to ensure that the person serving in this position works collaboratively with the National Intellectual Property Law Enforcement Coordinating Council (“NIPLECC”) or a different or successor entity and/or position so as to avoid further turf wars over intellectual property rights enforcement.

IV. INTELLECTUAL PROPERTY ENFORCEMENT PERSONNEL

Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) prohibits the importation of articles that infringe valid U.S. patent, copyrights, trademarks, and mask works. S. 1919 authorizes the appointment of hearing officers to preside at the taking of evidence at hearings required under Section 337 and to make initial and recommended decisions in investigations conducted under Section 337. S. 1919 further provides that the Section 337 hearing officers will have “technical expertise and experience in patent, trademark, copyright, and unfair competition law.”

I am a member of the American Bar Association Section of Intellectual Property Law (ABA-IPL Section), and although these comments are not being submitted on behalf of the ABA-IPL Section, I would like to point out that the ABA-IPL Section has adopted a formal position on this issue. On December 19, 2007, the ABA-IPL Section adopted the following resolution:

RESOLVED, that the Section of Intellectual Property Law favors in principle the ability of the U.S. International Trade Commission (ITC) to properly manage its case load through implementation of procedures for the appointment and retention of hearing officers that are supplemental to the existing procedures for the appointment of Administrative Law Judges; and

NOW THEREFORE, the Section favors the enactment of legislation authorizing the ITC to appoint hearing officers, other than administrative law judges, to preside at the taking of evidence at hearings before it and to make initial and recommended decisions in investigations before it; that such legislation specify qualifications for appointment that may include technical expertise and experience in patent, trademark, copyright and unfair competition law; and that, except as specifically provided in the legislation, all laws, rules and regulations applicable to administrative law judges and to positions in the competitive service apply to ITC appointed hearing officers.

Relevant portions of the report of the ABA-IPL Section on its resolution are reproduced below:

At the request of the U.S. International Trade Commission (ITC), the Chairman and Ranking Minority members of the U.S. Senate Committee on Finance, the relevant committee with authorizing jurisdiction over the bill introduced on July, 2007, S. 1919, which would grant authority to the ITC to hire, in place of or in addition to its currently existing ALJs (“ALJ”), section 337 Judges to be hired by the ITC outside of the selection process for hiring U.S. Administrative Law Judges established by the U.S. Office of Personnel Management (“OPM”) under the provisions of subsection 556(b) of Title 5, United States Code.

The ITC currently has four sitting ALJs appointed through the established OPM hiring process. The four are Judges Luckern (1984), Bullock (2002), Charneski (2007) and Essex (2007). The most recently appointed ALJ, Judge Essex, began his service on October 15, 2007.

Pending legislation (S.1919) proposes amendment to Section 1337 of Title 19, by adding at the end of the current provision a subsection (o). Based upon comments from the ITC Trial Lawyers Association, other Sections of the ABA and additional groups interested in ITC practice, the Commission has proposed adding more specific safeguards and procedures by amendment of the provisions of S.1919 relating to the appointment of such 337 judges....

The Commission also proposes an additional provision that provides for appeal to the Merit Systems Protection Board by an applicant seeking review of the Commission’s selection of a section 337 Judge....

The Section notes the burden currently being faced by the ITC in view of its increasing caseload and limited resources to adjudicate cases involving

patent law and technologically complex matters.... The Section supports the proposed resolution for the following reasons.

The proposed resolution, based on the proposed amendment to Section 1337 of Title 19, represents a pragmatic approach for the ITC to use in hiring qualified personnel to address its caseload. The resolution requires that any person hired under these provisions as a "section 337 judge" have significant legal experience of no less than seven years. The proposed resolution authorizes the ITC to develop regulations for appointing section 337 judges that call for consideration of the candidate's technical expertise and experience in patent, trademark copyright, and unfair competition law. The Section believes that such expertise is important to appropriate handling of matters coming before the ITC. The proposed amendment further contains procedural safeguards referred to in the resolution regarding appointment and evaluation of performance of section 337 judges, including a provision authorizing the Merit System Protection Board to review any contested selection decision of the ITC. These provisions appear to provide adequate safeguards in the appointment of and evaluation of the continued service of section 337 judges under the proposed legislation.

For the reasons set forth above, I agree with the ABA-IPL Section's position in favoring adoption of the provisions similar to those in section 601 of S. 1919 authorizing the appointment of Section 337 hearing officers.

* * *

Please let me know if I can be of further assistance with respect to this or any other matter pending before your Committee. Thank you.



**UNITED STATES
ASSOCIATION OF
IMPORTERS OF
TEXTILES AND
APPAREL**

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June 2, 2008

The Honorable Max Baucus
Chairman, Senate Finance Committee
217 Dirksen Senate Office Building
Washington, DC 20510

Subject: Written Statement for the May 22 Senate Finance Hearing, "S. 1919, the Trade Enforcement Act of 2007"

Dear Chairman Baucus:

The U.S. Association of Importers of Textiles and Apparel, USA-ITA, submits these written comments in connection with the May 22 hearing on S. 1919, the Trade Enforcement Act of 2007.

USA-ITA believes that trade enforcement is essential to ensure an open and fair trading system and to maintain public support for globalization. However, based upon some of the lessons learned by the apparel importing and retailing community, we believe the Congress should exercise caution in considering further changes to current law. It has been our experience that special interest groups often seek to use trade enforcement tools and to change the rules of trade for political purposes, to protect industries afraid to or unwilling to compete in the global marketplace. Based on those concerns, we ask that you and the Committee consider the impact of S. 1919, as currently drafted, on both the importers and consumers who pay the price in terms of higher costs on goods, and the importance of U.S. leadership and credibility in the international trading system. We would urge the Committee to ensure that trade enforcement tools cannot be manipulated unfairly for short term political gains. We are particularly concerned about the possible elimination of presidential flexibility essential to ensuring that all interests affected by a trade remedy action are fully evaluated and weighed to reach a resolution that reflects overall economic and security goals.

Few sectors of the economy are more familiar with repeated changes in U.S. trade laws than importers and retailers of textile and apparel products. USA-ITA is comprised of more than two hundred member companies, including apparel manufacturers, distributors, retailers, importers and related service providers, such as shipping lines and customs brokers. We make our livelihood responding to the demands of the consumer market by sourcing products from around the world, including the United States, the Western Hemisphere, Asia, Europe and Africa, based on a determination to offer the best quality product at the right price, and at the right time.

There are times when achieving that value equation means that labor intensive textile and apparel products will be sourced in locations that rely upon lower wages and production costs, but that is not always the case; nor is it necessarily the case that such production is unfair. In this age of rapid globalization, this is a natural outgrowth of comparative advantage. And in the textile and apparel sector,

which was the subject of special protection for some five decades, including a ten year period for a gradual phase out of a comprehensive system of quotas in order to permit developed economy producers to adjust to increased competition (plus an additional four years just for China), it is particularly important to ensure that trade enforcement tools are not unfairly manipulated to justify further delay of U.S. commitments under international trading rules to open our own market.

Certainly trade in textiles and apparel has benefited from the wide array of global and domestic trade rules that evolved over the years to provide certainty and fairness in the global market. We believe trading partners need to be held to their trade commitments and face the consequences when they do not play by the rules. But the rules work in both directions: we must be watchful of efforts by U.S. special interests to manipulate rules, in the name of trade enforcement, simply to obtain unjustified and futile protection. For example, over the years, we have experienced repeated changes in the rules of origin for textile and apparel products as a means of providing greater protection for domestic producers. Yet those changes never brought one textile or apparel job back to the United States. Instead, such actions threatened the livelihood of the importer and retailer community, and related service providers, which account for a valuable sector of the economy and good jobs. They also increased costs to American consumers for the most basic subsistence items such as clothing and footwear. (It is important to note that additional tariffs or taxes on clothing are socially regressive, adversely hurting poor Americans the most.) Clearly, our energies then and now are better devoted to developing laws and programs that will positively impact American workers and communities, such as assistance for retraining programs that assure a place for workers in our evolving economy.

As was noted repeatedly during the Committee's hearing on S. 1919, safeguard relief decisions, in particular, which involve fairly traded goods, require trade-offs in terms of consumer costs, access to inputs and potential retaliatory actions, that all need to be considered when making determinations. This can only be assured through a deliberative and flexible enforcement process that focuses on the substantive issues rather than a process that responds to political pressure.

We urge the Finance Committee to ensure that its trade remedy bill does not overly constrain any Administration's ability to make balanced evaluations in trade remedy cases. The Congress already has substantial oversight and leverage over an Administration's trade enforcement personnel, through the confirmation process for the members of the cabinet and subcabinet and through the annual authorization and appropriations process, calling into serious question the need for a Senate-approved chief trade enforcement officer. Further, the President must be given the flexibility needed to produce deliberate and fair remedy decisions that take into account the full public interest.

The textile industry offers a key and unfortunate example of how the trade remedy process has already been uselessly manipulated in the false name of trade enforcement. Eighteen months ago, as the Congress considered permanent normal-trading-relations status for Vietnam, based upon its accession to the World Trade Organization and its commitment to eliminate subsidies, the Bush Administration, in response to demands from two Republican senators acting at the behest of U.S. yarn and fabric makers (not apparel makers), created a temporary "import monitoring" program for five groups of apparel made in Vietnam, under which the Administration promised to self-initiate antidumping investigations if the

data indicated unfair trade in those products. Not one apparel company requested the monitoring and not one apparel company stepped forward during either the written comment period or the all day public hearing to present any interest in the monitoring program. The two reviews conducted since then by the U.S. Department of Commerce have demonstrated 1) the absence of any basis for the discrimination and 2) the costs to the apparel importing community and Vietnam's apparel industry, not to mention the absence of any impact on U.S. production. The threat of potential self-initiated antidumping investigations has held down the growth in sourcing in Vietnam, while even the head of the National Council of Textile Organizations, Cass Johnson, has conceded, "It looks like Vietnam is not allowing dumped goods into the U.S. marketplace." More importantly, it has not brought one new order or job to the United States; instead, it simply diverted business to other Asian suppliers.

Nevertheless, it appears that the U.S. textile industry is beginning to press the Congress, and no doubt Presidential candidates, to continue import monitoring against Vietnam and expand to China this unjustified and futile abuse of agency resources and processes. In fact, it should go without saying that if a yarn, or fabric, or a garment industry has an allegation against a product for which it has standing to file a petition for relief, it should act on its own in accordance with the trade remedy laws, just like any other industry. Creating a special mechanism against apparel imports at the behest of another U.S. industry, and inviting political machinations and complete disregard for the very standards and commitments to which we hold our own trading partners, sends exactly the wrong signal to the global community. Such blatant discrimination is WTO-inconsistent and may lead to retaliatory or mirror measures against the U.S. at a time when exports are a major and essential contributor to U.S. economic growth.

The United States should hold foreign governments accountable for their trade commitments. Fair trade and open markets are the right objective, but the credibility of the process, through an objective, apolitical consideration of the facts, is essential. U.S. experience has largely confirmed that the WTO's dispute settlement system is the right forum for addressing failures by trading partners to adhere to their commitments. USA-ITA urges the Committee not to lose sight of this as it considers trade remedy enhancements.

Respectfully submitted,



Laura E. Jones
Executive Director

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