

RICHARD
5/16/88

1 EXECUTIVE COMMITTEE MEETING
2 MONDAY, MAY 16, 1988
3 U.S. Senate
4 Committee on Finance
5 Washington, D.C.

6 The meeting was commenced, pursuant to recess, at
7 2:05 p.m. in Room SD-215, Dirksen Senate Office Building,
8 the Honorable Lloyd Bentsen (chairman) presiding.

9 Present: Senators Bentsen, Matsunaga, Baucus, Bradley,
10 Mitchell, Riegle, Daschle, Packwood, Roth, Danforth, Chafee,
11 and Heinz.

12 Also present: Ambassador Alan Holmer, Deputy United
13 States Trade Representative; Ms. Judy Bello, Deputy General
14 Counsel, USTR; and Charles Roh, Associate General Counsel,
15 USTR.

16 Also present: Ms. M. Jean Anderson, Chief Counsel for
17 International Trade, Department of Commerce; and Ms. Lyn
18 Scheitt, General Counsel, ITC.

19 Also present: Messrs. Jim Gould, Staff Director and
20 Chief Counsel; Ed Mihalski, Staff Director, Minority;
21 Jeff Lang, Trade Chief Counsel; and Josh Bolten, Chief Trade
22 Counsel, Minority; and Ms. Marcia Miller, Professional Staff
23 Member.

24 (The press release announcing the hearing follows:)

25

1 The Chairman. Please cease conversation and take a seat,
2 and we will get under way.

3 I am sure we will have other members coming along very
4 soon. I see Senator Baucus and Senator Packwood.

5 I defer to my colleague, Senator Packwood, for any
6 statement he would like to make at this time.

7 Senator Packwood. I just wanted to thank the staff and
8 you, Mr. Chairman, and the others that were involved in
9 resolving the plywood dispute that we had with Canada. For
10 a number of years, they have had a standard--this is a
11 private standard, not a Government standard--that made it
12 very difficult for the United States to sell plywood in
13 Canada because they claimed the plywood would come apart
14 in the cold winters, although this is plywood that we use
15 on the North Slope in Alaska or Bangor, Maine or International
16 Falls, Minnesota, or any place else; and it clearly doesn't.

17 It was a protective device that the Canadians were using
18 to keep out plywood from this country; and we have reached an
19 agreement with the Administration and with the House and with
20 the staff and elsewhere that is directed to both Canada and
21 the United States to negotiate on a common plywood standard
22 so that plywood made in either country can be sold in either
23 country, without these very peculiar limitations on plywood
24 in Canada.

25 And until that agreement is reached, the current tariffs

1 on plywood will not come off; and I think this is a happy
2 settlement all around.

3 I want to congratulate Alan Holmer and the others who
4 helped on this; but from the standpoint of my plywood industry
5 in Oregon, it is a very satisfactory solution and, I think,
6 a fair one to all parties and to both countries.

7 Thank you, Mr. Chairman.

8 The Chairman. Thank you. Mr. Lang, are you prepared
9 to begin?

10 Mr. Lang. Mr. Chairman, members have before them a
11 spreadsheet which now runs through the entire agreement,
12 through Chapter 21.

13 The Chairman. If I might interrupt, Mr. Lang?

14 Mr. Lang. Yes, sir.

15 The Chairman. I see here the draft Statement of
16 Administrative Action, with explanatory comments. I don't
17 know how many pages it is, but it is over 70 pages.

18 As I understand it, you have just received this.

19 Mr. Lang. We received it at 10:00 this morning.

20 The Chairman. And you have been in meetings since; so
21 I obviously presume you are in no position to comment on it
22 at this point?

23 Mr. Lang. Yes, sir. That is true.

24 The Chairman. Mr. Ambassador, did you have any comment
25 on it?

1 Ambassador Holmer. None, Mr. Chairman. We did decide
2 that we would just leave it unclassified. I sensed that
3 was your preference.

4 The Chairman. Good. It certainly was.

5 Ambassador Holmer. If there are any errors or mistakes,
6 I assure you they were inadvertent; and we will be able to
7 fix them up over the course of the next couple of weeks.

8 The Chairman. All right. Fine. Go ahead, Mr. Lang.

9 Mr. Lang. Mr. Chairman, on page 3 of the spreadsheet
10 are two issues that remain outstanding. At the top of the
11 page, Senator Heinz is working with the Administration; I
12 don't know what stage those discussions have reached.

13 That is about the question of conditions of entry into
14 force of the agreement. This concerns the following problem.

15 Even though the agreement has now been signed and
16 specifies by its terms that it binds both countries as of
17 January 1, 1989, Congress can and has in the past specified
18 the conditions under which the agreement actually enters
19 into force; that is, the two sides exchange diplomatic notes
20 indicating that they now consider themselves bound by the
21 agreement.

22 The question is: What should be the conditions for
23 that occasion to occur? Senator Roth's office also indicated
24 that he was concerned about this matter, and I think a number
25 of offices probably are, although they may not have spoken up

1 about it because this bears, among other things, upon the
2 degree to which the Canadian government would be expected to
3 undertake minding the provinces of Canada as a condition for
4 the President allowing the agreement to enter into force.

5 The related issue at the bottom of the page, on which
6 there is some information, is that the Administration is
7 concerned about a private right of action to sue the States
8 for actions that are inconsistent with the underlying FTA.

9 That relates to an issue you discussed on Thursday with
10 Senator Packwood. You can see that issue described at the
11 top of page 5, about whether the free trade area agreement
12 overrides conflicting State law.

13 So, it may be that you see the questions in some way
14 related; in any event, --

15 The Chairman. I would think so. Let's get into that
16 one a little. The discussion last Thursday--is that correct?

17 Mr. Lang. Yes, sir.

18 The Chairman. Last Thursday was the question of override
19 of State laws by this agreement. We are moving beyond what
20 we did in the Israeli Agreement or the Tokyo Agreement.

21 Of course, we are dealing with unitary governments there,
22 where you didn't have the problem of the States or the
23 provinces as we have between the United States and Mexico.

24 And it does appear we are going somewhat beyond our
25 general practice. I suppose you could argue that, if you had

1 the Uruguay Round finally go to an agreement, you might have
2 people coming back and arguing some with the Administration
3 at that point, in trying to get us to adopt that to preempt
4 State laws; and that does give me some concern.

5 I am also concerned about the fact that we are trying
6 to get the Canadian government to preempt the provinces to
7 make this thing work. In trying to search for something that
8 would tie this down, it seems to me--and I understand Senator
9 Heinz has been working on this also--that we ought to have
10 an assurance that, if we do this and we make this agreement
11 in effect the law of the land, we ought to have an assurance
12 that the Canadian government has this same kind of a
13 limitation on the provinces.

14 Otherwise, I don't see any sense in our doing it.
15 And we ought to get some other points involved in that, that
16 the Executive Branch immediately upon the enactment--that
17 means not waiting for entry into force--actively use the
18 Trade Advisory Committee on Intergovernmental Relations to
19 inform the States of their obligations under the FTA; give
20 them advice and assistance on coming into compliance with
21 the FTA; and take other actions to bring about a smooth
22 transition.

23 And I don't see that as a problem for you frankly. And
24 here is where I would differ with you: the Attorney General,
25 and not private parties, is authorized to sue the States to

1 overturn State laws and administrative practices that are
2 inconsistent with the terms of the FTA.

3 We ought to talk about maybe giving the States a year
4 to comply because you have some of these legislatures that
5 won't be in session. That would give you some problem in
6 that regard.

7 The governors have also advised us that they are to the
8 contrary of our view; and I understand they have so advised us,
9 so that the committee members know, that the governors have
10 gone on record that State law should not be preempted by
11 the trade agreement.

12 And I understand their point of view in trying to protect
13 their prerogatives.

14 I have come around to the point that, if we are going to
15 see these provinces comply in Canada, we have to come up with
16 the same kind of an answer.

17 Senator Packwood. Mr. Chairman?

18 The Chairman. Yes?

19 Senator Packwood. I agree with you, and I think we have
20 a lot tougher problem because their provinces have a lot more
21 independence than do our States; and I think it is a relatively
22 small price that we might have to pay in exchange for a much
23 bigger reward on the other end, if they are enforceable in
24 both directions.

25 The Chairman. I have some concern about the argument Mr.

1 Lang made that we are giving to an agreement what we normally
2 hold back for a treaty with its constitutional backing; but
3 I think that we have to move this way.

4 Senator Packwood. I agree.

5 The Chairman. Yes, Senator Bradley?

6 Senator Bradley. Mr. Chairman, when I heard the
7 discussion last week, I was interested and hopeful that it
8 would turn out this way; and I am pleased that you have
9 decided that it is necessary to be able to ensure that the
10 Canadian provinces won't be obstacles to an agreement
11 negotiated by the national government.

12 I am not quite sure of the various parts that you have
13 laid out here, but I think that the thrust of this is the
14 direction that I personally would like to see us go.

15 The Chairman. I have put some things in there requiring
16 them to consult with the States to help them prepare for the
17 process, that the Attorney General can be the one who can
18 sue the States; but I think it is a reasonable compromise.

19 Senator Heinz. Mr. Chairman, a question if I may?

20 The Chairman. Yes, go ahead. We have to have assurance,
21 and Senator Heinz has been pushing on this. We have to have
22 the assurance that the Canadian Government has that kind of
23 force over the provinces.

24 Senator Heinz. That was my question. You are going to
25 make it explicit that the Canadian government will have a ways

1 and means of implementing this, if the provinces for some
2 reason are slow to act?

3 The Chairman. Absolutely.

4 Senator Heinz. But at the same time, you want to give
5 both sides the time to act.

6 The Chairman. That is right. Is there objection to
7 that?

8 Senator Packwood. Could I just ask the Administration:
9 Are you including the suggestion of shifting from private
10 parties to A.G.?

11 The Chairman. Yes, I am. I am putting that package
12 together. Now, that, the Administration had some question
13 about, but that is part of the package.

14 Ambassador Holmer. We did, Mr. Chairman, although I
15 think that is something that will be fine from our
16 perspective. Your suggestion with respect to the Advisory
17 Committee process, we think is a very positive one.

18 It is hard to argue with your statement that we ought to
19 have assurances that the Canadians have the same kind of
20 limitation on their provinces. I don't think there is any
21 strong argument with that.

22 The only issue about which we do have some question
23 relates to-- If I understood you correctly, you would be
24 delaying this for a one-year time period.

25 The Chairman. That, I want to talk to you about. I want

1 your thoughts on that. I am trying to figure out how we give
2 the States a little time to comply. I am searching for an
3 answer there.

4 Senator Packwood. You weren't saying delay the agreement,
5 but you said maybe give the States a year to comply.

6 The Chairman. Yes, give the States a year to comply.

7 Ambassador Holmer. I guess my fear is that we are
8 going to expect that the Canadians will have implemented
9 this and that they will have changed their provincial laws
10 effective January 1, 1989; and I sense that that is the
11 thrust of Senator Heinz' amendment that he is about to offer.

12 As a result, I think we would prefer --

13 The Chairman. I am not locked in on that.

14 Ambassador Holmer. Right.

15 The Chairman. I am trying to search for an answer to
16 give the States some time here.

17 Senator Heinz. Maybe it would be useful for me to bring
18 up page 3, Mr. Chairman, because we probably should consider
19 some suggestions I am going to make, which I have been working
20 out with Jeff and Alan Holmer.

21 The Chairman. I have no idea what page 3 is.

22 Senator Heinz. On the spreadsheet, having to do with
23 the first item at the top, "approval conditional upon
24 Canadian implementation."

25 And I have some language that I think we have worked out,

1 which simply states that the conditions would be as follows:

2 The President is authorized at such time as the
3 President determines that Canada has taken necessary measures
4 to comply with the obligations of the agreement, including
5 compliance by provincial and local governments, as of the
6 date of entry into force, and so forth.

7 That is the critical language; is it not, Mr. Holmer?

8 The Chairman. Has that been worked out to your
9 satisfaction?

10 Ambassador Holmer. That has been worked out.

11 The Chairman. Mr. Lang, do you have any comment on that?

12 Mr. Lang. I think that probably accomplishes your first
13 purpose, Mr. Chairman, which was to assure that the agreement
14 wouldn't go into force until you had some kind of assurance
15 from the Administration that it was going to bind the
16 Canadian provinces the way the Administration is asking you
17 to bind the States.

18 The Chairman. Good.

19 Senator Heinz. Now, there is a Statement of
20 Administrative Action here that is important, which I gather
21 you or Alan have, Jeff?

22 Mr. Lang. Alan has it. I don't think I have a copy of
23 that.

24 Senator Heinz. It is a little lengthy. I am not quite
25 sure how you would like to proceed.

1 Mr. Lang. It is lengthy, and there are some marginal
2 notes on it; but it might be well, Senator Heinz, to bring
3 to the committee's attention the material in the last
4 paragraph, which I could just read.

5 Senator Bradley. Mr. Chairman, could you help us? What
6 last paragraph?

7 Mr. Lang. I am sorry. What Senator Heinz is referring
8 to is a Statement of Administrative Action, which he has
9 prepared in consultation with the Administration, to say
10 how the Administration would implement the provision he
11 has just proposed with respect to entry into force of the
12 agreement; that is, that the President will not allow the
13 agreement to enter into force until he has adequate
14 assurances from the Canadian government that it and its
15 provinces and localities will be bound by the agreement.

16 The Chairman. That is a point I made that I felt was
17 necessary, without which we certainly wouldn't be preempting
18 the State laws.

19 Senator Bradley. Is this the document?

20 Mr. Lang. No. I don't think copies of this have been
21 distributed. The copy I have appears to have been recently
22 addressed.

23 Senator Heinz. Maybe it would be advisable, Mr.
24 Chairman, to have some copies of it made and passed around
25 to the committee.

1 The Chairman. All right.

2 Senator Heinz. Meantime, we could go on to other
3 matters.

4 The Chairman. Let's get to the other points now. Are
5 we in agreement on the points as we have gone through them?
6 One of them is that we get an assurance--the first one--that
7 the Canadian government is preempting the laws of the
8 provinces, just as we would be doing here with this
9 agreement.

10 Number two, that the Administration aggressively carry
11 out the communications with the States insofar as
12 implementation of what has to be done there.

13 And then, we had a third, on the private right of action,
14 that that would be the Attorney General.

15 Mr. Lang. Before you ask the members, there is one thing
16 we were unclear on; and that was the one-year delay.

17 The Chairman. I was asking on that one the Ambassador
18 and Ms. Bello to give me some comments as to how this might
19 be accomplished. I would like to get your thoughts on that.

20 Ms. Bello. Thank you, Mr. Chairman. Our thoughts are
21 that, of course, we would like there not to be a one-year
22 delay on Canadian provincial compliance with the agreement.

23 And our concern, of course, is that if we provide for a
24 one-year interim delay transition, we could expect them to do
25 likewise.

1 The Chairman. I understand.

2 Ms. Bello. What I would like to reassure members of the
3 committee is that, of course, we have a fair amount of
4 prosecutorial discretion about how to use the authority that
5 you are proposing to give to the Attorney General to take
6 actions against the States.

7 So, our first preference, of course, is to work with the
8 States diplomatically to ensure that they appreciate what the
9 agreement provides for and ensure that there is no need to
10 resort to legal measures.

11 But we would be mindful of the need to work with the
12 States and to try to ensure the smoothest possible transition
13 without giving them a black letter law, a one-year delay
14 which we could expect to see mirrored in Canadian
15 implementing legislation with respect to the provinces.

16 The Chairman. I wonder if we could work something out
17 on that in the report language. Would that be appropriate
18 or not?

19 Mr. Lang. Yes, I think we could try to work something
20 out there, and that would give you a little time on this
21 because you don't actually have to write the committee
22 report until the bill comes up on the formal fast track.

23 The Chairman. All right.

24 Senator Bradley. Mr. Chairman?

25 The Chairman. We know our objective in what we are trying

1 to do.

2 Senator Bradley. Mr. Chairman, it sounds to me that
3 what you are saying is you want, as of January 1, 1989, the
4 agreement to be both binding on States and provinces, and
5 that you give the Administration the flexibility to
6 essentially alert States--maybe even --

7 The Chairman. I don't want to give them the
8 flexibility. It is absolutely mandated and required to do
9 that.

10 Senator Bradley. No, no. That you encourage them, but
11 they have the flexibility to first inform the States of
12 what the agreement implies for their particular State law,
13 and then you give them the authority to follow on with the
14 Attorney General forcing compliance.

15 The Chairman. It has to be with the Attorney General
16 and not by private action, but in addition, that we put some
17 language in there counseling the Administration to go slow
18 on their action in that first year, that they have to find
19 cases of outright abuse, I would think.

20 Senator Daschle. Mr. Chairman, what do you do in a
21 case where State law may have to be changed and where
22 State legislatures don't meet until January and February
23 of the following year?

24 The Chairman. I think that is what we are talking about.
25 That is why we are saying we had better have some judgment

1 exercised.

2 Ms. Bello. Mr. Chairman, if I could just stress that
3 there aren't many problems for State laws currently because,
4 in the critical areas of services and investment, of course,
5 all existing State law practices are grandfathered.

6 So, what we are largely talking about here are instead
7 prospective practices. There aren't a lot of State law
8 problems, and that is why we are confident that we can
9 work it out without expressly providing a one-year delay,
10 which is, in a mirror fashion, a big problem for us if the
11 Canadians do that likewise with respect to the provinces.

12 Senator Chafee. Could somebody give me an example of
13 what we are talking about? I know the States might have a
14 Buy-American provision, but what else might come up?

15 Ms. Bello. Senator Chafee, actually Buy America is a
16 bad example because the Government procurement chapter does
17 not apply to the States nor does the financial services
18 chapter nor the chapter on technical standards.

19 But other chapters of the agreement are fully applicable
20 to the States, the provinces, and local governments.

21 An example would be if two years from now some State
22 passed regulations on, say, insurance that denied Canada
23 national treatment, which is the principal obligation that
24 each government has undertaken with respect to services.

25 We would hopefully see that coming and work with the

1 State governments to alert them to their responsibilities to
2 provide national treatment to the Canadians, which doesn't
3 mean precisely identical treatment but meets with the
4 obligations of the agreement.

5 If we were unable to persuade them not to enact a law
6 that would be in conflict with the agreement, we would then
7 --under the bill the chairman has described--have the legal
8 authority for the Attorney General in fact to go to court
9 over the issue to bring that State into conformity with the
10 obligations of the agreement.

11 But we do not anticipate any need for a lot of State
12 activity in the near term because of the broad grandfather
13 provisions already in the agreement for current practice.

14 Senator Chafee. Now, is there a provision in the
15 agreement that grandfathers in all current practices of the
16 States?

17 Ms. Bello. No, Senator Chafee, but in the critical
18 areas of services, there is a very broad grandfather, such
19 that the national treatment obligation under that chapter
20 applies only prospectively.

21 I think I misspoke earlier with respect to investment.

22 Senator Chafee. The same, I assume, is mirrored by
23 the Canadian provinces, and they must be grandfathered in
24 also, aren't they?

25 Ms. Bello. That is correct, Senator Chafee, for services.

1 Current Canadian laws, like current U.S. laws and
2 practices, are grandfathered; but Senator Chafee, there are
3 critical obligations under the wine and distilled spirits
4 chapter that effectively, if the Canadian provinces are
5 given a year's delay, we lose the benefits of that agreement
6 for the length of that one-year delay.

7 That would be very regrettable in many members' as
8 well as our views.

9 Senator Daschle. Mr. Chairman, I have another question
10 if John is finished.

11 The Chairman. Senator Daschle?

12 Senator Daschle. In some of our States, we have just
13 gone through a very rigorous debate on FIFRA in the
14 Agriculture Committee dealing with States' environmental
15 regulations with regard to utilization of pesticides and
16 herbicides and other kinds of chemicals.

17 South Dakota has one very dramatic example, which now
18 may have been resolved; but a similar example could come up
19 where hogs treated with chlorophenicol have not been allowed
20 into South Dakota from Canada.

21 In a case where you have situations where States have
22 much tougher environmental regulations, what happens in
23 cases like that under this agreement?

24 Mr. Roh. Senator, the agreement maintains the GATT
25 exception for measures for public health and safety. So, if

1 the State can justify a health-based regulation as being
2 necessary to protect its population or its livestock or
3 what have you, they can maintain it.

4 Senator Daschle. Even if it is out of sync with the
5 rest of the country?

6 Mr. Roh. Even if it is out of sync with the rest of
7 the country. What they can't do--which they couldn't also,
8 I must add, under the Constitution--is try to apply a
9 standard to the rest of the country and Canada that they
10 don't apply to those within the State.

11 Senator Daschle. To whom must they justify this?

12 Mr. Roh. In the end, you can bring all these matters
13 to dispute settlement; but if it is a reasonable regulation,
14 both Canada and the United States have this. There are
15 provincial regulations as well; you know, Canada has
16 provinces that have more stiff health and safety regulations
17 than others.

18 There is a kind of rule of reason that you can go too
19 far.

20 Senator Danforth. Mr. Chairman?

21 The Chairman. Yes, Senator Danforth?

22 Senator Danforth. Mr. Chairman, I apologize, but I was
23 not in the room when this discussion began. Let me see if
24 I can understand the situation.

25 The question is whether the free trade agreement

1 supercedes Canadian provincial law and American State law.

2 Now, first with respect to Canadian provincial law,
3 is there any doubt that the agreement does supercede
4 Canadian provincial law? Is there any doubt at all that
5 the provinces of Canada are on the hook?

6 Ms. Bello. There is no doubt although I just note that
7 there are three chapters of the agreement that don't apply
8 to the provinces or the States; but with respect to all other
9 chapters, the provinces and the States are on the hook.

10 The Federal Government is responsible for their
11 faithful implementation of the obligations.

12 Senator Danforth. And can the Canadians, as a practical
13 matter, keep their provinces on the hook? They don't have
14 anything like our supremacy clause. As just a practical
15 matter, do they have their provinces on the hook or have
16 they given an empty promise that they are?

17 Ms. Bello. They have agreed to have their provinces
18 on the hook except for the three chapters we have mentioned.
19 They do have a constitutional authority which is relevant
20 here; it is not precisely identical to ours, to be sure, but
21 they do have constitutional authority in this area.

22 And in the end, we look to them to fulfill their
23 responsibilities under the agreement. If they fail to do so,
24 we can take them to dispute settlement.

25 Senator Danforth. Right, but if they don't have the

1 legal ability, if they don't have the power in the central
2 government to speak for the provinces, none of that does
3 very much good, neither the representation nor the
4 possibility of dispute settlement.

5 Ms. Bello. Senator Danforth, we have not seen the
6 Canadian draft implementing legislation yet. We hope to
7 see it soon; but at the end of the day, what is important
8 to us is that they have undertaken this obligation.

9 Senator Danforth. Judy, I appreciate their obligations;
10 but we could make an obligation, for example. It is hard to
11 imagine in this country, with the supremacy clause, but
12 our Government could make an obligation to do something that
13 was clearly unconstitutional, and the fact that we made such
14 an obligation would be a nullity.

15 My concern is: Is it possible that the central
16 government of Canada has made a representation that is
17 binding on the provinces when, in fact, it doesn't have the
18 power to do that?

19 Ms. Bello. Senator Danforth, I think you may have missed
20 this exchange.

21 Senator Danforth. I did. I apologize for that, but it
22 is a very important point; and that is why I wanted to nail
23 it down.

24 Ms. Bello. It is an important point, and Senator Heinz
25 and the Administration have reached an accommodation on some

1 language that stresses that the President is authorized
2 to exchange the diplomatic notes that have the agreement
3 enter into force only when he determines that Canada has
4 taken necessary measures to comply with the obligations of
5 the agreement.

6 And then, there is a very long statement including
7 compliance by provincial and local governments. So, I think
8 that the language that Senator Heinz has asked for and to
9 which we have agreed will satisfy your concerns.

10 Senator Danforth. All right. Now, one other question.
11 What is it that supercedes our State law? Is it the free
12 trade agreement or is it the statute?

13 The Chairman. We went through this, Senator.

14 Senator Danforth. I know, and I really apologize.

15 The Chairman. What I set forth in the beginning was
16 that I wanted assurances that, if we preempted the State
17 laws here and we did it with the agreement itself, making it
18 in effect the law of the land, that we had the same kinds
19 of commitments out of the Canadian government that they
20 were doing to their provinces.

21 And in addition to that, we said that the course of
22 action would lie with the Attorney General here and that,
23 in addition to that, the Federal Government here would be
24 required to take aggressive action in its communication with
25 the States, using the Trade Advisory Committee on

1 Intergovernmental Relations to give them advice and
2 assistance on coming into compliance with the FTA.

3 Now, that is what we had tentatively agreed on.

4 Senator Danforth. Is it our position that the free
5 trade agreement, in and of itself, preempts the State law;
6 or does the free trade agreement preempt State law because
7 it is appropriated by reference into the statute?

8 Mr. Lang. The latter.

9 Senator Danforth. The latter? Right.

10 The Chairman. Yes. All right. Are there further
11 questions?

12 (No response)

13 The Chairman. If not, all in agreement make it known
14 by saying "Aye."

15 (Chorus of ayes)

16 The Chairman. Opposed?

17 (No response)

18 The Chairman. All right. Let's move on.

19 Mr. Lang. I don't know whether the copies of Senator
20 Heinz' proposal are back yet or not. We might want to wrap
21 that up as well.

22 The Chairman. I don't think we have seen that yet.

23 Senator Heinz. Does everybody have a copy of it?

24 The Chairman. I am not sure I am on the distribution
25 list.

1 (Laughter)

2 The Chairman. It would be kind of nice if I could get
3 on it, though. All right.

4 Senator Heinz. I don't know what we can discuss between
5 ourselves, Jeff, unless the chairman has a copy.

6 The Chairman. I have one now. Thank you.

7 Senator Heinz. You do have one, Mr. Chairman?

8 The Chairman. Yes.

9 Senator Heinz. The purpose of the statement is simply
10 to make it clear between ourselves and the Administration
11 the way the Administration would interpret and follow the
12 provision for entry into force; and it really simply makes
13 clear that the goal is to ensure the full implementation
14 that there will be a methodology for scrutinizing Canadian
15 implementation, that there will be a standard for judging
16 that.

17 Jeff, I would change one word, which is in the very
18 last line of next to the last paragraph. Rather than
19 "undermined," I would suggest "impaired." "Impaired" is
20 a more standard word around here.

21 And that the standard is not to impair the balance of
22 benefits in the agreement, and that the President's
23 determination that whatever Canada has done is sufficient
24 to allow him to have this agreement enter into force, does
25 not in any way waive U.S. rights to challenge Canadian

1 measures which may properly be challenged under the agreement.

2 The Chairman. Do we have questions concerning it?

3 (No response)

4 The Chairman. Is there objection to it?

5 (No response)

6 The Chairman. And it is satisfactory to the
7 Administration, as I understand it.

8 Ambassador Holmer. Yes.

9 The Chairman. All right. All in favor make it known
10 by saying "Aye."

11 (Chorus of ayes)

12 The Chairman. Opposed?

13 (No response)

14 The Chairman. The ayes have it.

15 Mr. Lang. Mr. Chairman, a couple of quick things.

16 On page 4 of the spreadsheet, we had not discussed the
17 objectives of the legislation yet because you hadn't gone
18 through the whole agreement.

19 At this point, our suggestion is simply that you carry
20 into the objectives section of the bill the objectives of
21 the agreement itself, which are shown in the left-hand column
22 on the page. They would be prefatory, of course; but
23 nonetheless, it is traditional to have something like this
24 in legislation.

25 The Chairman. Does the Administration have any problems

1 with that?

2 Ambassador Holmer. No problems.

3 The Chairman. If there is no objection, we will move on.

4 Mr. Lang. On page 6 of the spreadsheet begins Chapter
5 3 on Rules of Origin. There, I just want to point out to
6 the committee two matters that were undecided last time
7 that have been worked out.

8 First, as I understand it, some technical problems with
9 respect to implementing the rule of origin are now covered
10 in the Statement of Administrative Action we were given this
11 morning.

12 We haven't had a chance to study them, but presumably
13 that takes care of those problems.

14 And also, Senator Durenberger's concerns with respect
15 to sugar and ethyl alcohol imports have been addressed
16 through the Statement of Administrative Action language that
17 was approved by the Administration, as I understand it.

18 The Chairman. Unless there is objection, we will move
19 on.

20 Mr. Lang. The next item, I believe, that needs to be
21 addressed is in Chapter 7 regarding agriculture. That

22 The Chairman. What page is that?

23 Mr. Lang. It would be on spreadsheet page 24. This
24 concerns negotiating authorities, and it may be a matter you
25 would want to return to. I think Senator Mitchell has

1 something to propose here with respect to the negotiations.

2 Senator Mitchell. Yes, Mr. Chairman, I do have an
3 amendment to provide for negotiating authority for
4 reciprocal limits on potato trade.

5 Now, potato trade flows both ways between our two
6 countries, largely from the U.S. to Canada in the west,
7 and from Canada to the U.S. in the east.

8 Nonetheless, there is nationwide support for reciprocal
9 limit, and this amendment really creates authority for the
10 President to negotiate with the Canadians. All of the major
11 potato producing States--Wisconsin, North Dakota, Michigan,
12 Maine, Oregon, Washington, and Idaho--their potato industries
13 support this amendment.

14 It is intended to establish an upper limit that would
15 take effect only in those cases where there are extraordinary
16 surges either way across the border.

17 Mr. Chairman, it is a very modest amendment. I even
18 modified it further at the request of the Administration
19 to eliminate the provision that would have required the
20 President to present a specific proposal to Canada by a
21 time certain, even though there is obviously no obligation
22 or no commitment that the Canadians will negotiate.

23 I understand that that is still not sufficient for the
24 Administration, but it was an effort on our part to put it
25 in a form acceptable to them.

1 In a broader sense, Mr. Chairman, this is the least we
2 can do for those domestic industries which are not subsidized
3 and which encounter competition from subsidized products in
4 Canada.

5 Now, I have recited the plight of the Maine potato
6 industry so often in this committee that I am embarrassed
7 to do it again; and so, I won't do it again.

8 I think every member of the committee is familiar with
9 it.

10 But when you get into a circumstance where we don't
11 deal effectively with subsidies in the agreement, but promise
12 to talk about them in the future, the one group of Americans
13 that we know will be adversely affected will be the producers
14 of commodities in this country that are not supported.

15 And all this does is say that we authorize the President
16 to engage in negotiations with the Canadians for the purpose
17 of establishing an upper limit if both countries agree to
18 negotiate and if both countries agree to establish an upper
19 limit.

20 The Chairman. Senator, we have a vote up; and I think
21 this is one of those things where the members ought to be
22 here to listen to you and to any who might oppose it before
23 we make a decision.

24 So, I would say we will stand in recess until we are
25 back from that vote. We will go over and vote and come right

1 back.

2 (Whereupon, at 2:44 p.m., the meeting was recessed.)

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(Continued on page 30)

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25

AFTER RECESS

(3:03 p.m.)

1
2
3 The Chairman. Senator Mitchell, would you care to
4 continue your comments for us? Or are you prepared to let
5 others?

6 Senator Mitchell. Mr. Chairman, if I could merely add
7 the following comments to those members that were not
8 present prior to the vote, this amendment merely creates the
9 authority for such negotiations. It does not require such
10 negotiations. It does not compel the Administration to take
11 any action.

12 It will be said that it goes contrary to the thrust of
13 free trade, and there is no denying that; but it should be
14 noted that the agreement already permits the continuance of
15 certain trade restrictions in Canada which limit imports.
16 Poultry and egg restrictions are retained, albeit with a
17 marginal increase; the agreement specifically preserves
18 Canadian Provincial Easement Laws and U.S. Marketing Orders
19 which have the effect of limiting imports.

20 So this is a very modest step, and I frankly had hoped
21 that the Administration would not oppose it, particularly
22 since we went the extra distance to remove the one provision
23 which required action by a date certain.

24 And so I hope my fellow committee members will see fit
25 to support this amendment.

1 Senator Packwood. Tell me again, George, what it does.
2 I initially had a memo on what your amendment was to be, but
3 this doesn't sound like what it was to be.

4 Senator Mitchell. Right.

5 The amendment would authorize the President for a five-
6 year period to negotiate reciprocal quantitative limits on
7 the export of potatoes between the United States and Canada.
8 As originally drafted, it would have required the President
9 to submit a specific proposal to the Canadians by a date
10 certain. At the request of the Administration, I removed
11 that provision.

12 So this would merely create an authority for the
13 President to negotiate, if the Administration sought to
14 implement the authority, and if the Canadians agreed to so
15 negotiate.

16 Senator Packwood. And the Administration's position is
17 what?

18 Ambassador Holmer. We oppose the amendment, Senator
19 Packwood, although we do appreciate the effort that Senator
20 Mitchell has made to accommodate some of our concerns.

21 Basically, there are three principal concerns that we
22 have. The first is, as Senator Mitchell has indicated, it
23 does run counter to the Free Trade Agreement. As far as I
24 can recall, there is nothing in this agreement that moves
25 toward less free trade.

1 Senator Danforth has indicated frequently that it
2 doesn't do everything that he wants or what we would want to
3 move to a total free trade situation, but this provision
4 clearly moves us away from free trade.

5 Second, I was very surprised to hear that Oregon and
6 Washington and Idaho supported this. When I grew up in
7 Oregon we grew an awful lot of potatoes, and we sent an awful
8 lot of them to Canada, and the latest statistics I have seen
9 indicate that with respect to fresh potatoes we have a trade
10 surplus with Canada. Therefore, I would think that a VRA
11 would be against our interests.

12 The third point is, it really does run counter to what
13 we are trying to do in the Uruguay Round and what we have
14 been trying to do in our bilateral trade with Canada, where
15 we are trying to get down these trade barriers, we are trying
16 to have them get away from the supply management and import
17 control regimes that they have had. And that is the principal
18 reason why the Administration and particularly Secretary Lang
19 opposes the provision.

20 We would prefer to have language that would indicate in
21 the agreement there is nothing that would exclude the
22 possibility of doing a VRA, and to include a fast-track
23 study that the Administration could do about the advisability
24 of a VRA; but this language is language that the
25 Administration would have to oppose.

1 The Chairman. Are there further comments?

2 (No response)

3 The Chairman. Will the Senator propose the amendment?

4 Senator Mitchell. Yes, Mr. Chairman. I move the
5 amendment.

6 The Chairman. The amendment is before you. All in
7 favor of the amendment make it known by saying Aye.

8 (Chorus of Ayes)

9 The Chairman. Opposed?

10 (Chorus of Noes)

11 The Chairman. May I see a show of hands for the Ayes?

12 (Showing of hands)

13 Senator Mitchell. Mr. Chairman, I have proxies from
14 two Senators. I don't know if you would include proxies in
15 shows of hands.

16 (Laughter)

17 The Chairman. Well, you can call for a roll call,
18 Senator, if you like. Those who are in opposition, there are
19 four.

20 Senator Mitchell. In which event, Mr. Chairman, I
21 suppose I should call for a roll call.

22 Senator Daschle. Mr. Chairman, I thought that -- could
23 we have another show of hands?

24 The Chairman. Did we miss some of us?

25 Senator Daschle. Yes, I think so.

1 The Chairman. Who were those in opposition? A show of
2 hands.

3 (Showing of hands)

4 The Chairman. Oh, there were three. I beg your pardon.
5 So the Ayes have it.

6 Senator Mitchell. Thank you, Mr. Chairman.

7 Thank you.

8 Senator Chafee. Mr. Chairman, could I just ask, these
9 votes are rather significant, it seems to me. This is no
10 trivial matter we are dealing with.

11 The Chairman. That is why it is important for members
12 to attend, Senator.

13 (Laughter)

14 Senator Chafee. Well, that may well be. And I agree
15 completely. So what happens? So we take a vote like that,
16 and it seems to me we are rather fundamentally altering this
17 free trade --

18 The Chairman. As I understood this particular
19 amendment, it imposes no sanctions for failure to
20 negotiate the quotas.

21 Senator Mitchell. That is correct, Mr. Chairman.

22 The Chairman. So that is why I was not --

23 Senator Chafee. In other words, the President is
24 authorized to but doesn't have to?

25 Senator Mitchell. That is correct.

1 The Chairman. That is correct.

2 Senator Chafee. Now, suppose he does. Suppose he does
3 negotiate, and the Canadians don't want to negotiate?

4 Senator Mitchell. They don't have to.

5 The Chairman. No, they don't have to, Senator.

6 Senator Chafee. Then what happens?

7 ~~The~~ Chairman. Nothing happens. That is the point I
8 have made to you, Senator.

9 Now, let us move on. I am going to have to adjourn
10 this meeting at 4:00, and I would like for us to make as much
11 progress as we can. So let us move on.

12 Are there further points to be made?

13 Mr. Lang?

14 Mr. Lang. Mr. Chairman, the next provision is one that
15 I think the Administration and Senator Mitchell have now
16 worked out, on the Snap Back Provisions on page 25.

17 As I understand it, the monitoring and other provisions
18 that Senator Mitchell wanted are now in a shape that is
19 acceptable to the Administration.

20 Senator Mitchell. That is correct.

21 The Chairman. Now, is that a specific? What are we
22 talking about here? Which one. Does that require action
23 by the committee, is what I am asking.

24 Mr. Lang, Well, we would ask that the committee
25 approve the Mitchell provision with respect to Snap Back

1 monitoring as it has been approved by the Administration.

2 The Chairman. By the Administration.

3 Is there objection?

4 (No response)

5 The Chairman. If not, we will move on. It is approved.

6 Mr. Lang. The next issue we are aware of, Mr. Chairman,
7 is on spreadsheet page 44, and there again we think the
8 Administration and Senator Riegle, in that case, have worked
9 out a provision of a statement of managers' language
10 implementing the provision on a select panel to work on
11 improving the competitiveness of the North American auto
12 industry.

13 My understanding is that the Administration and Senator
14 Riegle both believe the provision is acceptable. And it is
15 only a statement of managers' language -- a statement of
16 administrative action.

17 The Chairman. Is there objection?

18 (No response)

19 The Chairman. No objection. It is agreed to.

20 Mr. Lang. The next provision we are aware of is at
21 spreadsheet page 49 concerning lobster size. I am sorry, it
22 is spreadsheet page 50, the bottom item in the provisions,
23 on the left side.

24 This is Senator Mitchell's provision, and I take it this
25 has not been worked out yet with the Administration.

1 Senator Mitchell. That is correct.

2 The Chairman. Would the Senator elaborate?

3 Senator Mitchell. Mr. Chairman, what is a potato without
4 a lobster?

5 (Laughter)

6 The Chairman. Oh, stop.

7 Senator Heinz. There is something fishy here.

8 Senator Danforth. What is a snap back provision without
9 a lobster?

10 (Laughter)

11 The Chairman. Senators, please. I don't want the
12 audience encouraging anyone.

13 (Laughter)

14 The Chairman. Senator?

15 Senator Mitchell. Mr. Chairman, I offer an amendment to
16 promote the conservation of American lobsters by requiring
17 that those size limitations which now apply to almost all
18 American harvesters of lobsters be applied to lobsters which
19 are imported into this country from Canada.

20 Conservation in management of lobster fisheries occurs
21 under a combination of Federal and State law. Under our
22 Federal law there is a current minimum size. If the lobster
23 is below that size, it cannot be harvested and placed in
24 commerce in this country.

25 Fifty percent of the lobsters sold in the United States

1 originate in Canada, where there is no comparable minimum
2 size. And therefore, many Canadian lobsters are shipped
3 into this country which could not be harvested in the United
4 States. And estimates are that as the Federal minimum size
5 standard increases, as it is scheduled to do under existing
6 Federal law, the amount of lobsters which would be short
7 sized would be nearly a third of the Canadian lobsters shipped
8 in; so that is a third of a half of the market.

9 Now, what has happened is that the domestic industry,
10 which is concentrated in New England, finds itself required
11 to adhere to minimum size requirements which do not apply to
12 imports, thereby placing them at a severe competitive
13 disadvantage.

14 If we don't make the same limit apply to products
15 imported into this country, we will inevitably create an
16 enormous pressure to repeal our conservation laws, because
17 they can no longer be justified. And that would have a
18 serious adverse effect on the long-term future of the
19 resource.

20 So, to make our conservation standard meaningful, we
21 need to prohibit imports of lobsters which are below the
22 minimum size -- that is, do not meet our conservation
23 standards.

24 So my amendment would require compliance with the
25 conservation provisions of the United States, the Federal

0
1 Lobster Management Plan.

2 The Chairman. Ambassador Holmer?

3 Ambassador Holmer. Thank you, Mr. Chairman.

4 I would have felt badly about opposing this provision if
5 I had won on the potato VRA; but having lost on that --

6 There are two arguments that we have against this, and
7 the reason why we hope the committee will not accept it.

8 The first is, the solution that is called for here is
9 one that would provide for an import restriction that we
10 believe would work against us for other fish products that we
11 export to Canada. And we believe that there are number of
12 U.S. fishing interests that would be negatively impacted by
13 that.

14 Second, I remind the committee that the Administration
15 agreed to an amendment offered by Senator Mitchell last week
16 relating to the fish issue both on the East Coast and the
17 West Coast, where the Canadians have replaced their export
18 restrictions with landing requirements.

19 And frankly, this provision, we believe -- and I take
20 it at face value that it is being proposed as a conservation
21 measure -- could be used against us when we may criticize
22 the Canadian landing requirement which the Canadians have
23 justified as well as being a conservation measure.

24 So, it is for those two reasons that we urge you to
25 vote down the Mitchell Amendment.

1 The Chairman. Well, let me ask you: It is a
2 conservation method, isn't it?

3 Ambassador Helmer. I have no information to the
4 contrary.

5 The Chairman. And it is not in violation of the Trade
6 Agreement, is it?

7 Ambassador Holmer. I think Mrs. Bello would like to
8 speak to this question, Mr. Chairman.

9 Mrs. Bello. Mr. Chairman, I just want to stress that
10 we recognize the Senator's good will and good faith, and so
11 forth, and we think this is being offered as a conservation
12 amendment.

13 Our concern is that that is the same justification that
14 the Canadians offer for their landing requirement. So, we
15 are concerned about the abuse which could be made on the
16 other side of the border if we ourselves have an import
17 restriction based on conservation purposes.

18 In our case, it is quite bona fide. We are concerned
19 about the abusive use of that.

20 The Chairman. Ms. Bello, that would mean you would have
21 to strike any kind of a conservation limitation, then --
22 that argument, if we followed it to its ultimate, it seems to
23 me.

24 Ms. Bello. No, Mr. Chairman, we don't think so. For
25 example, I think there are a couple of States that are not

3
1 subject to the same conservation measure that would at least
2 give the Canadians some indication to argue that this was
3 not essential on conservation grounds.

4 In any case, we are not quarreling at all that this
5 would be justified as a conservation measure. Our great
6 concern is about possible mirror action by the Government of
7 Canada.

8 Senator Chafee. But isn't there some way of reviewing
9 whether something is or isn't a conservation measure? I
10 mean, the stock is being depleted. The purpose of the
11 three and a half inch limit is, indeed, to get the larger
12 lobsters and the egg-bearing lobsters are out.

13 So it is a decision arrived at by the New England
14 Fisheries Council, which is made up of governmental entities
15 as well as private groups.

16 This seems to me to be very clear-cut as a conservation
17 measure, and for Canada, too.

18 The Chairman. Well, it seems to me to be.

19 Are there further comments on it?

20 Senator Heinz?

21 Senator Heinz. Mr. Chairman, I have a question. Would
22 this be reviewable by any of the panel set up under this
23 legislation? Would they be authorized to determine whether
24 or not this, or a Canadian measure, was in fact a bona fide
25 conservation measure? And if not, why not?

4
1 The Chairman. Mr. Lang, or Mr. Holmer -- either one of
2 you.

3 Mr. Lang. My understanding would be that, if a provision
4 like this passed into law in the United States, and the
5 Government of Canada objected to it, they would invoke the
6 provisions for settling disputes under the Agreement, I think
7 it is in Chapter 18, and a process would ensue which would
8 decide that question in some way.

9 And assuming the international dispute were resolved
10 against the United States' practice, the Administration
11 would seek to change American law.

12 Senator Heinz. And by the same token, if there was a
13 Canadian measure such as the landing issue that was brought
14 up a minute ago, and we objected to it, we could do
15 likewise?

16 Mr. Lang. I should assume, Senator.

17 Senator Heinz. If I may say to the Justice Department,
18 why isn't that sufficient? Or to whomever over there.

19 Ambassador Holmer. I am not sure I fully follow your
20 question, Senator.

21 Senator Heinz. There is a method of resolving whether
22 or not this is justified. And it seems to me, because it is
23 a dynamic way of resolving it -- that is to say it uses
24 people -- people can distinguish whether something is
25 justified or it is not justified. In this case, it is the

1 conservation measure.

2 Ms. Bello. Senator Heinz and Senator Mitchell, I guess
3 our concern here is that this really is not an issue under
4 the Free Trade Agreement. The conservation of lobsters is
5 not something that is the object and purpose of the Free
6 Trade Agreement.

7 We have, in Article 407, affirmed our GATT rights, which
8 call for, under Article 11, "not imposing quantitative
9 restrictions." Obviously there is the GATT Article 20
10 exception for measures that are necessary for conservation
11 purposes and are not a disguised restriction on trade.

12 But our principal reaction is that we don't object to
13 trying to work this out with the Canadians, but we don't see
14 this as part of the Free Trade Agreement, and we are concerned
15 about the mirror action that may be taken by the Government
16 of Canada.

17 Senator Danforth. Mr. Chairman?

18 The Chairman. Yes. Senator Danforth.

19 Senator Danforth. Well, there are some restrictions --
20 aren't there? -- on importing various items that are products
21 of endangered species, for example, ivory? Am I correct on
22 that? And leopard skins, and so forth?

23 Ms. Bello. Yes, you are correct.

24 Senator Danforth. Is this like that? Or is this
25 something different from that? I mean, in other words, for

1 conservation purposes --namely, in the case of an
2 endangered species -- we prohibit importing certain products.

3 Could we take the position that this is similar to that?
4 Or do we take the position that endangered species are
5 unique?

6 Ms. Bello. Senator Danforth, I think the relevant
7 response is that we don't oppose the conservation measures
8 to protect lobsters. That is what I was trying to clarify
9 initially, that there is no issue of good faith here; this is
10 being offered as a conservation measure.

11 But conservation of lobsters has nothing to do with the
12 Free Trade Agreement with Canada.

13 Senator Danforth. Why not? If the Canadians want to
14 send in a bunch of little lobsters? What I am asking is,
15 is it a general policy of the United States to support
16 conservation by restricting imports? Or is that policy
17 restricted to endangered species?

18 Ms. Bello. The Magnuson Act, which provides in this
19 case for the conservation related to lobsters, applies only
20 domestically, and I think only to the Federal Government.

21 So, to the extent that we have a policy with respect to
22 lobster conservation, I think it is best stated in the Act of
23 the Congress under the Magnuson Act.

24 Senator Danforth. I guess what I am saying is that
25 clearly the United States has an interest in conserving its

1 own lobsters. In some cases we extend our concern for various
2 animals worldwide, and we say we are not going to import ivory
3 or leopard skins.

4 Is this a case where we extend it worldwide? Where we
5 extend our concern for the animal to another country?
6 Are there some conservation cases where our concern for
7 conservation is international, and other cases where it is
8 strictly national?

9 Ms. Bello. Under current law we are already conserving
10 our lobsters. The issue is, in implementing the Free Trade
11 Agreement are we going to mandate conservation of Canada's
12 lobsters.

13 Senator Danforth. That is absolutely what the issue is,
14 and there are some cases where we do enforce import
15 restrictions for the sake of worldwide conservation. Does
16 that apply only to the endangered species situation? Or is
17 as a general principle? Does our concern for conservation
18 extend internationally?

19 Ms. Bello. I am not an expert. I believe there are
20 international agreements on conservation measures to protect
21 endangered species. I am not a fish expert, and I don't know
22 what international agreement there may be for lobsters.

23 But apparently, it is not such as it has required us to
24 seek conservation of Canadian lobsters per these size
25 restrictions.

1 The Chairman. I think we have covered this one.

2 (Laughter)

3 The Chairman. Let's see if we can claw our way through
4 it.

5 (Laughter)

6 The Chairman. Senator Mitchell, do you have any
7 further comment?

8 Senator Mitchell. Mr. Chairman, I have a whole lot of
9 facts to rebut -- several of the things Ms. Bello said. But
10 I don't want to mess up a good vote.

11 (Laughter)

12 The Chairman. Are you proposing your amendment?

13 Senator Mitchell. Yes, I am, Mr. Chairman.

14 The Chairman. All right.

15 All in favor of the amendment as stated, make it known
16 by saying Aye.

17 (Chorus of Ayes)

18 The Chairman. Opposed?

19 (No response)

20 The Chairman. The Ayes have it.

21 Senator Mitchell. Thank you, Mr. Chairman.

22 The Chairman. You may proceed.

23 Mr. Lang. Mr. Chairman, I failed to mention, in going
24 through the energy provisions, that some language was agreed
25 on between the Administration and Senator Moynihan, and other

1 Senators, concerning the energy provisions.. It is reflected
2 on page 37 of the spreadsheet. We have distributed it to
3 all the staffs last Tuesday and have heard of no objections
4 to it. I believe there are no objections.

5 The Chairman. That is the one on refined products?

6 Mr. Lang. Yes, sir.

7 The Chairman. Yes.

8 Are there objections?

9 (No response)

10 The Chairman. If not, it will be agreed to.

11 Mr. Lang. On page 65, Senator Danforth -- let me check
12 that page to make sure that is right.

13 In the institutional provisions -- we are now up to
14 Chapter 18 -- Senator Danforth has proposed legislative
15 language with respect to the National Trade Estimate and
16 action under Section 301.

17 My understanding is that the legislative language,
18 which I will read, is acceptable to the Administration, but
19 that he also has committee report language which has not been
20 completely worked out.

21 The legislative language provides essentially as
22 follows: It would amend the National Trade Estimate, which
23 is the annual report of foreign trade barriers to United
24 States exports, to include the following;

25 "With respect to the acts, policies or practices of

1 Canada, identified under the National Trade Estimate, options
2 for action by the U.S. trade Representative include but are
3 not limited to any action under Section 301, including
4 resolution through appropriate dispute settlement
5 procedures, any action under Section 307, or negotiations
6 or consultations whether on a bilateral or multilateral
7 basis."

8 Now, I don't think that report language explaining the
9 provision has yet been ironed out. But I believe the
10 statutory language is acceptable to the Administration.

11 The Chairman. Senator?

12 Senator Danforth. Mr. Chairman, I was just being filled
13 in on the report language situation.

14 My understanding was that this has been worked out, but
15 clearly the statutory language has been, and I believe the
16 report language will be.

17 What we attempt to address here is the fact that this
18 Free Trade Agreement has left open various trade problems
19 that we have with Canada. We are still going to have
20 difficulties with Canada. This is not really a Free Trade
21 Agreement, as I have said many times. It is more in the
22 nature of a tariff elimination provision.

23 The concern is that, for those problems that have not
24 been worked out, what are we going to do next? The position
25 that is taken by this amendment is that we handle them in

1 the ordinary course; we don't forget that they exist; we
2 don't forget that we have problems with the Canadians, but,
3 rather, we keep track of those problems in the National
4 Trade Estimates, which are provided by law.

5 With respect to Israel when we entered into the Free
6 Trade Agreement, it happened that nothing was ever put in the
7 National Trade Estimates. Maybe that means that there aren't
8 any trade problems.

9 But the view here is to make it clear that we are going
10 to continue to be attentive to any residual trade problems
11 that we have with Canada.

12 The Chairman. Any comments from the members?

13 (No response)

14 The Chairman. If not, that is accepted.

15 While you are looking for the next one, let me state
16 that we will adjourn at 4:00. We have a scheduled vote on
17 the floor on the death penalty amendment. And we will
18 reconvene at 9:30 on Wednesday morning. I really don't see
19 how we can finish it before 4:00, so we will have to come
20 back Wednesday morning.

21 Mr. Lang. Unless there are other amendments in this
22 section, or you wanted to pass over them, that completes the
23 provisions of the Agreement relating to dispute settlement
24 and enforcement of the Agreement.

25 Oh, I am reminded that there is one provision that

2
1 Senator Riegle may want to bring up on duty remissions, on
2 page 65 of the spreadsheets.

3 I understand that the Administration and Senator Riegle
4 have worked out language which is acceptable to both sides
5 on that subject.

6 The Chairman. Senator Riegle?

7 Senator Riegle. I want to thank the Administration for
8 its cooperation in working out some of the concerns that we
9 have raised. In terms of being more specific, it was the
10 composition of the Select Panel and its mandate regarding
11 an increased rule of origin and other issues of particular
12 relevance to the North American automobile industry.

13 There are a couple of items that I would like to just
14 touch on:

15 The State of Michigan had made a request to the
16 Administration some time ago to ask Canada for copies of
17 duty remission contracts between Canada and a variety of
18 foreign manufacturers -- among them, Toyota, Hundai, Honda,
19 and Cami.

20 My understanding is that the Trade Representative has
21 asked Canada for these Agreements and contracts, and we were
22 told that they were coming, and they have been coming. I
23 guess they are en route, but they have never gotten here.

24 So I would like to just pose the question, and that is,
25 where do we stand in that respect? Can we get our hands on

1 this information? Do we have it now? Or, where do we
2 stand?

3 Ambassador Holmer. Senator Riegle, I am advised that
4 Ambassador Gottlieb has recently provided a letter indicating
5 that the response to the questions that have been provided
6 by the State of Michigan will be forthcoming quite soon.

7 Senator Riegle. I guess that is a hopeful answer. I
8 would like you, if you would, to see if you can press that
9 issue, ~~and~~ it shouldn't be that complicated, it has been pending
10 a long time. I think it is important that we understand
11 what contractual understandings are out there, so that we
12 can make some sense of it, some reference to it.

13 With respect to the duty remission study, we have here
14 in the spreadsheet an amendment which we have worked out
15 that has been cited, that I think is very helpful to us.
16 I am pleased that it is there, and I want to thank the
17 Administration again for their work on that.

18 There is one remaining item of concern to me along that
19 line. The Administration has stated that the list of
20 companies included in Annex 1002.1 is the complete universe
21 of companies which are now or may be eligible for Auto Pack
22 membership in Canada.

23 There is, however, some confusion as to what status
24 a joint venture between a company listed and one not listed
25 might have, where the one listed is a majority owner of the

1 new company. And I am wondering if we could get some
2 clarification that no joint venture between a company
3 qualified under the Agreement in that Annex in the future
4 would be considered eligible for benefits under the Auto
5 Pack. Can we maybe get some clarification on that?

6 Ambassador Holmer. You can, Senator Riegle, and we
7 would be happy to respond to you in writing, confirming our
8 mutual understandings in this area.

9 Senator Riegle. I think that probably would do it, so
10 let's try to get that done also, if we can, quite quickly,
11 so we can tie this down.

12 I thank the committee and the staff for all the work
13 that has been done in this area, Mr. Chairman.

14 The Chairman. Sure.

15 Mr. Lang. Mr. Chairman, in Chapter 19, relating to
16 Binational dumping and countervailing duty panels, the first
17 issue occurs on page 74 of the spreadsheet.

18 All we have so far in that regard is that panelists
19 appointed by the United States would not be employees or
20 otherwise affiliated with the U.S. Government.

21 I believe Senator Heinz has an amendment to propose in
22 this area.

23 The Chairman. This is on 74.

24 Senator Heinz?

25 Senator Heinz. Mr. Chairman, as I understand the way

1 the Agreement operates, the President nominates to a roster
2 individuals who then are selected and become members of the
3 Binational Panel.

4 It is, I am told, important that they not be considered
5 affiliates of the Government; although I am not quite sure
6 what the term "affiliates" means.

7 It is clear that these individuals -- both the
8 Canadian appointees as well as the American ones -- will be
9 making the kinds of decisions that would be normally made
10 were this to be, under our law, simply for our purposes,
11 decisions normally reserved to a court, to the Court of Trade.
12 They are arbiters of one or the other country's laws.

13 Therefore, it would seem logical that they be confirmed,
14 at least insofar as the U.S. roster from whom various
15 individuals are selected.

16 So, my amendment is really quite simple, that the choices
17 proposed by a President or The President simply be sent to
18 us for confirmation.

19 We confirm, in the Senate, vast quantities of people,
20 some of whom are Government employees, on down to the rank of
21 Lieutenant in the Army, to members of the National Museum
22 services Board, who serve virtually without pay, as I
23 understand it, or the President's Commission on Libraries.

24 It would seem logical to me that if we confirm people
25 appointed to the Presidential Commission on Libraries, that

1 we would want to confirm members suggested for this panel,
2 particularly in view of the fact that they will be reviewing
3 laws that we have made.

4 -So, I would hope that my amendment would be accepted.

5 Now, I understand that the Administration has some
6 reservations about it. They are afraid to have Senate
7 confirmation, which I assure you confers no benefits on
8 anybody, except it makes us feel a little more comfortable
9 about people that are Presidential appointees.

10 But I cannot see, for the life of me, how Senate
11 confirmation compromises the notion that these people are
12 in any way affiliates of the Government. If the President
13 is appointing them, it is difficult for me to see how the
14 Senate exercising its usual advise-and-consent role in an
15 action like this in any way changes whatever their status
16 was before the President selected them.

17 The Chairman. Senator, what is that? Twenty-five
18 people? Is that what it is?

19 Senator Heinz. I don't know. How many people?

20 Ambassador Holmer. Twenty-five on each side.

21 Senator Heinz. Twenty-five on each side.

22 The Chairman. Do you mean 25 by the Canadians, and 25
23 by us?

24 Senator Heinz. Yes.

25 The Chairman. So we are talking about 25 subject to

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1 confirmation here.

2 Ambassador Holmer. That is a lot of confirmation
3 hearings.

4 The Chairman. Well, I understand that the Administration
5 would prefer not to go through them.

6 Senator Heinz. On May 9th, would anyone care to guess
7 ~~how many confirmations the Senate made? To the nearest~~
8 hundred?

9 ~~Senator Bradleyer. That includes Federal, Judiciary,~~
10 Military?

11 Senator Heinz. They were State Department, they were
12 members of the National Foundation on Arts and Humanities,
13 the Postal Rate Commission, the Public Health Service, the
14 Museum Services Board, to the Navy, to the Coast Guard -- you
15 name it. There were a lot of them.

16 The Chairman. How many, Senator?

17 Senator Heinz. Roughly 200, on one day. And it was a
18 slow day.

19 Senator Bradley. These are what? Promotions for the
20 Military?

21 Senator Heinz. No. To the best of my understanding,
22 there were five promotions.

23 Senator Bradley. And that number appears to be very
24 large, but I don't know how carefully every promotion in
25 the military is scrutinized by the Congress. You tend to

1 say, "Well, if the military makes a promotion, they pretty
2 much have their ideas as to why -- set of criteria,
3 performance record, all the rest." And so, the confirmation
4 of a promotion in the military is really not scrutinized
5 that carefully.

6 Senator Heinz. Of the 200, less than five were
7 promotions.

8 Senator Baucus. Mr. Chairman?

9 The Chairman. Yes, Senator Baucus.

10 Senator Baucus. Mr. Chairman, I would like to hear the
11 Administration's objections, other than the number.

12 Ambassador Holmer. Thank you, Senator Baucus.

13 My task is to explain to nine Senators why it is the
14 Senate confirmation is inappropriate. And let me try to do
15 it this way:

16 The first is, in the Statement of Administrative Action
17 that you all received earlier this afternoon, we indicated that
18 that in development of the list of candidates there would be
19 consultations with the Congress -- Ways and Means, Finance,
20 and the two Judiciary Committees -- private industry and the
21 bar associations. We are perfectly prepared to do that,
22 hopefully in a way that the committee would find acceptable.

23 Second, though, it really comes to a basic principle:
24 Under the terms of the Agreement, as Senator Heinz indicated,
25 the panelists cannot be affiliated with a party. And we want

1 the 25 Canadian panelists to be truly objective and
2 impartial, and not subject to Canadian parliamentary review.

3 And this position, if it were to be adopted by the
4 Committee, would presumably preclude that.

5 Finally, it is really the issue of practicality. You
6 are talking about, initially, 25 panelists, for an
7 Agreement that at the earliest the Congress is going to
8 pass sometime this Summer, perhaps also will pass it
9 sometime in September. We have an Agreement that we are
10 going to want to go in effect on January 1, 1989, and we are
11 going to want to get these panelists appointed and
12 available just as soon as possible.

13 You have FBI costs and time constraints. The cost of
14 about \$3-4000 per appointees. You have a time delay that
15 that would all involve, such a cumbersome process. Of those
16 25 panelists, folks are going to drop off the list and are
17 going to need to be replaced.

18 We just think you need to have a process that can work
19 swiftly, and our fear is that a Senate confirmation process
20 is going to substantially diminish that prospect.

21 Senator Danforth. I think that Senator Heinz's
22 amendment is a minimal requirement. This Agreement is
23 extraordinary in a couple of respects: First of all, it
24 does not go to the underlying question of subsidies at all.
25 In fact, this Agreement ratifies a widespread practice of

1 subsidies.that permeates the Canadian economy.-- far more
2 extensive than anything we have in the United States.

3 Having ratified these pre-existing subsidies, we then
4 go on to say that we are not going to enforce the law, save
5 through this binational system, with panels appointed from
6 lists who knows where they are coming from, and every other
7 panel will have a majority of Canadians on it.

8 So really, this is, in the subsidies area, an
9 extraordinary concession on the part of the United States.

10 I have no doubt that the Canadians, having established
11 their pervasive system of subsidies, are going to take care
12 of their own system with whoever they appoint. I am
13 concerned that whatever minimal protection has been left
14 to the United States under this system is going to be lost
15 by appointing some hail-fellows-well-met to represent us
16 on these panels.

17 It seems to me that one of the few things that we have
18 going for us, or could have going for us, is the possibility
19 that the Senate would at least wave at this panel of people
20 before they pass totally from our control.

21 So I think, really, this is a very good suggestion from
22 Senator Heinz.

23 Ambassador Holmer. If I could, Mr. Chairman, with all
24 respect and deference to Senator Danforth, I think we
25 disagree that this Agreement does nothing with respect to

1 subsidies.

2 Subsidies is the first goal of the working group that
3 is established in Article 1907. Those industries like lead
4 and zinc and others that believe they are being hurt by
5 Canadian subsidies, they have a 10-year phase-out. We
6 retain global Section 201 relief. If relief is not provided
7 to Canada, and there is a surge, we can protect against the
8 surge. There is ~~is~~ bilateral import relief. With respect to
9 fruits and vegetables, there is a special snap-back.
10 We have retained the dumping and countervailing duty law as
11 written by the Congress, and as it will be rewritten by the
12 Congress.

13 The Chairman. Well, thank you, Mr. Ambassador. Let me
14 say I am sure no Administration would not prefer -- any
15 Administration would probably prefer having no confirmations.
16 of anything, and have a free hand in those things. But I
17 am sure glad that from time to time we have a confirmation
18 process on the ITC, for example.

19 This is an extraordinary thing we have set up, one that
20 I, frankly, was not favorable to. And the Administration
21 felt it was necessary that we put this kind of binational
22 panel into effect. So, I think I would support the Senator's
23 amendment.

24 Let us have a vote on it.

25 Yes?

1 Senator Chafee. I would ask a question.

2 You listed all the downsides of the time and the expense.
3 Were those the only downsides? That is not very overpowering.

4 Senator Packwood. I can see another downside.

5 The Chairman. What is that?

6 Senator Heinz. Excuse me, is it the expense? You have
7 to do the expense, anyway. You don't want to appoint people
8 you haven't checked out, do you?

9 Ambassador Holmer. Well, you would want somebody to be
10 checked out. Whether or not you have to go and find out
11 where they lived in 1937 and every place thereafter, I am not
12 so sure.

13 Senator Chafee. But you have listed your arguments
14 against.

15 Senator Heinz. We have just got another reason to do
16 it.

17 Senator Packwood. Let me try it.

18 The Chairman. Let us listen to Senator Packwood.

19 Senator Packwood. There is almost no constituency for
20 further trade, open trade. If you mean specific constituency,
21 there aren't lots of people beating on our doors about, "Wow,
22 knock those barriers, and let the products in." All they want
23 is protection against the products. They don't really knock
24 down our doors very much demanding access overseas. That is
25 recent, but not much.

1 I can see any one of us getting mad, and the system
2 around here is designed for delay, and you are going to have
3 25 of these people coming and going, and you are going to have
4 delay after delay after delay -- three months, six months,
5 a year -- because somebody is irritated about some particular
6 product. And I don't think that is going to be good for
7 this Agreement.

8 The Chairman. Let me say that this is certainly not a
9 partisan decision, because we don't know who that next
10 Administration will be and we are talking about implementing
11 it for the forthcoming Administration.

12 I would think that we would be giving up a point
13 insofar as the Senate that is important to us, in trying to
14 see that we have what we think is a responsible process, the
15 selection of these particular members of the panel.

16 Senator Bradley. Mr. Chairman?

17 The Chairman. Yes, Senator Bradley.

18 Senator Bradley. I really am fearful that, with 25
19 nominations being made in the first three months or the first
20 two months of 1989, that this whole thing is going to get
21 totally bogged down because you are going to have no panel
22 to arbitrate, nor are you going to have any panel on
23 countervailing duties, and that one Senator is going to be
24 able to hold this whole thing up.

25 We have seen that happen before, but never have we seen

1 it happen with so many people at the same time.

2 I really am concerned, as we get into 1989 and 1990, we
3 and we are confirming everyone, everybody in here is going
4 to know how they stand on lobsters, and how they stand on
5 shoes or lead, and how they stand on this and the other
6 thing, and the result is going to be gridlock, and the
7 result will be that the Free Trade area will not go into
8 effect, as it otherwise could.

9 The whole premise of this thing is that there is a
10 binational commitment to this. It is not, "Gee, we are going
11 to take care of our own," in the context of an agreement; but
12 it is there is a commensurate commitment on both sides.

13 The Chairman. Well, we have not seen that, generally,
14 by this committee. And I think you will find that the
15 great majority of those who would be dominated -- you would
16 have very little time lost over them.

17 But anyway, let us get a vote on this.

18 Yes, Senator Daschle.

19 Senator Daschle. I know you want to vote, but I just
20 have to say that I understand the reservations of Bob Packwood
21 and Bill Bradley both.

22 I don't think you are going to have any cause of
23 arbitration the first month of the implementation of this
24 thing. My hunch is that that is going to be down the road.
25 I don't think in the first couple of months we are going to

1 have to worry about that.

2 BUT I think that the most important thing is the
3 implementation of this thing, and whether or not you have
4 qualified people that we have some access to initially
5 with regard to requirements, with regard to credibility,
6 with regard to their ability to make these decisions. And
7 if we don't have that at this point, in this crucial time
8 for the implementation for the first time, I don't think
9 we will ever. It will fall back on our shoulders. Having
10 those quality people it seems to me is worth the investment,
11 and I would certainly hope that a minimal requirement, that
12 we take a look at them and confirm them in block -- even if
13 it is fast track, -- that we incorporate that into this
14 legislation.

15 Senator Chafee. Mr. Chairman, I am unenthusiastic about
16 the proposal. Somehow the idea that the President is going to
17 appoint a bunch of flakes to this thing doesn't ring true
18 with me. I see all the problems that come up.

19 The Chairman. I don't think we ought to open that
20 debate up.

21 (Laughter)

22 The Chairman. Let's have a vote on it.

23 Are you prepared to offer your amendment?

24 Senator Heinz. Yes, Mr. Chairman.

25 The Chairman. All in favor of the amendment as stated,

1 make it known by saying Aye.

2 (Chorus of Ayes)

3 The Chairman. Opposed?

4 (Chorus of Noes)

5 The Chairman. Let's have a show of hands. The Ayes?

6 (Showing of hands)

7 The Chairman. Six.

8 Opposed?

9 (Showing of hands)

10 The Chairman. The amendment carries.

11 What was the count, finally?

12 Mr. Lang. Six to four.

13 The Chairman. All right. Do we have another
14 amendment to be proposed?

15 Mr. Lang. Mr. Chairman, at page 88 of the
16 spreadsheet is a question about the implementation of panel
17 decisions.

18 The problem is this: Panels, under the Agreement, are
19 a substitute form of review for the United States Federal
20 Courts. Therefore, when a panel issues a decision remanding
21 a matter to the agencies concerned -- either the Commerce
22 Department, the ITC, or both of them -- the question is,
23 how is that decision implemented by those agencies?

24 The Administration is concerned that since not all the
25 members of the Binational Panel would be appointed by the

1 President -- obviously some are appointed by the Government
2 of Canada -- the appointments clause comes into question, and
3 therefore the U.S. Government should not follow the panel
4 decision unless the President orders them to do so.

5 There are two concerns with a provision giving the
6 President discretion whether to implement the panel
7 determinations:

8 First, of course, since the antidumping and
9 countervailing duty laws are currently immunized from
10 Presidential intervention, and therefore presumably from
11 politics, this would give the President an opportunity to
12 intervene in those decisions that he doesn't have under
13 current law.

14 Second, the International Trade Commission, which is an
15 independent agency whose determinations under the antidumping
16 and countervailing duty laws are subject to appeal to the
17 Binational Panel, is immunized from political influence by
18 the Administration. And they are concerned that if the
19 President can order them to take actions under this law,
20 their independence as an agency would be compromised.

21 Therefore, we had to raise the issue with you. It is
22 not that any particular member wants the issue raised; but,
23 in order to implement the Agreement, we need guidance on
24 whether the Binational Panel's decisions should just be
25 directly implemented; or whether, as the Administration wants,

1 the Administration should have discretion to implement those
2 determinations.

3 The Chairman. Other comments?

4 Ms. Anderson. Mr. Chairman?

5 The Chairman. Yes?

6 Ms. Anderson. I think it should be said that the
7 Administration's proposed language for implementing the
8 panel decisions into domestic action by the Commerce
9 Department and the International Trade Commission was not
10 intended to detract from the fact that these panel decisions
11 are binding as a matter of international law on the United
12 States, and were not intended in any way to interfere with
13 either the Commerce Department or the ITC in their normal
14 action of redoing their determination on remand, as they
15 do now on remand from the Court of International Trade.

16 In other words, the point was not that the President
17 should interfere with the substance of those agencies'
18 decisions.

19 The point, instead, was to have a mechanism to take
20 what is an international decision of a Binational Panel, and
21 find a mechanism that would clearly be constitutional, that
22 would be the safest possible route in the face of a
23 constitutional challenge to this statute, for implementing
24 into the U.S. system these binational panel decisions.

25 Since the President is the officer responsible for

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1 implementing our international obligations, it would seem
2 logical that that route for bringing the bilateral panel
3 decision into the U.S. system would be through the President.

4 That is the reasoning behind it, and the other motives
5 suggested were not intended -- and I think that can be made
6 clear in the report language or the Statement of
7 Administrative Actions.

8 The Chairman. What if we just required the ITC or the
9 Commerce Department to implement the decision, and avoided
10 the possible intervention and a political determination
11 taking place in between by the President? Would that work,
12 or not?

13 Mr. Lang. Yes, I think it would work. I don't see the
14 reason why it wouldn't. And I take it that is what the ITC
15 at least is seeking.

16 Senator Bradley. I don't understand.

17 The Chairman. Would you go through it?

18 Mr. Lang. Well, as I understand the Chairman's
19 proposal, it is simply that any decision of the Binational
20 Panel would be implemented as a matter of law by the
21 Commerce Department and/or the ITC, as the case may be.

22 The Chairman. Do we have counsel here from the ITC?

23 Mr. Lang. Yes, I think the General Counsel of the ITC,
24 Lyn Scheitt, is here.

25 The Chairman. Would you comment on that and perhaps

1 further clarify it for Senator Bradley and others?

2 Ms. Scheitt. We have taken a look at the constitutional
3 issue. We do not believe there would be a problem in
4 direct implementation, a direct response by the Commission
5 to a decision of the panel, that the Commission could be
6 directed by Congress to respond on a remand as it does to
7 the Court of International Trade on a remand.

8 Senator Bradley. May I follow up on that?

9 The Chairman. Yes, of course.

10 Senator Bradley. So that the ITC believes there is no
11 constitutional question here, that a decision of the
12 Binational Panel could not be challenged in court because the
13 panel was not either appointed by Congress or it was a
14 binational panel and we had no input into the Canadian side?
15 You do not think that would be a constitutional problem?

16 Ms. Scheitt. Of course, it could be challenged. But
17 we do not believe there is a constitutional problem. The
18 House Judiciary Committee held hearings and asked for
19 constitutional scholars also to comment on the issue. They
20 did not believe that there was -- I don't believe that
21 anybody opined of those who presented testimony that there
22 was a constitutional problem with the panel process, if there
23 was direction by Congress to the Commission.

24 Senator Bradley. Even though the panel was not duly
25 appointed by the President, or by the Congress?

1 Ms. Scheitt. Yes. There is a history of international
2 tribunal, the United States entering into agreements under
3 which international tribunals would reach decisions that would
4 be effective in U.S. law. And we prepared a memorandum on
5 that issue, which I believe has been circulated to the
6 committee.

7 Senator Bradley. Mr. Chairman, if that is what the ITC
8 says, then I can't challenge that. I think we all want the
9 same thing -- we don't want to pass the Free Trade Area and
10 then a year later have it declared unconstitutional.

11 ~~The Chairman. That's right. I think what we are trying~~
12 ~~to get, we are trying to continue the insulation that you~~
13 ~~see on dumping and countervailing. You have that now, and~~
14 ~~we are trying to retain that.~~

15 That is why if we then direct the Commerce Department to
16 go ahead and enforce it, or if you are talking about the ITC,
17 that would take care of the question, it seems to me, for
18 the Administration. Wouldn't it?

19 Yes?

20 Ms. Scheitt. Mr. Chairman, if I could just note the
21 obvious: The President gets his advice on constitutional
22 questions from the White House Counsel and from the Office of
23 Legal Counsel in the Department of Justice.

24 We have worked extensively with Justice. And as Jean
25 Anderson has indicated, they have come up with language that

1 we proposed that does what is necessary to ensure that, if
2 there were a constitutional challenge to this panel process,
3 that all the lawyers in the Government think we are in the
4 best possible position to ensure that that challenge is
5 defeated.

6 The problem with the alternative language you are
7 presenting is that it doesn't give us as much certainty that
8 we could beat that constitutional challenge.

9 The Chairman. Mr. Lang, do you want to respond to that?

10 Mr. Lang. Well, there would be, I guess, absolute
11 certainty if you took the Administration's provision, but
12 you would in return lose some of the insulation you are
13 concerned about.

14 The Chairman. Which I feel strongly about. I want to
15 keep that insulation if we can on countervailing.

16 Mr. Lang. This is what the Administration's language
17 says:

18 "The President is authorized to direct the administering
19 authority, the Commission and the U.S. Customs Service, as
20 appropriate, to take necessary and appropriate action to
21 implement the international obligations to the United States
22 under Article 1904 of the Agreement, pursuant to a final
23 decision of a binational panel or extraordinary challenge
24 committee.

25 Any action taken by the President, the administering

1 authority, the Commission, or the U.S. Customs Service under
2 this subparagraph shall not be subject to judicial review,
3 and no court of the United States shall have power or
4 jurisdiction to review the determination, on any question of
5 law or fact, by any action, in the nature of mandamus or
6 otherwise."

7 So, in terms of a constitutional challenge, the
8 provisions is pretty air-tight. But on the other hand, the
9 President's authority is pretty broad. And at least at the
10 staff level, we were concerned about the committee's interest
11 in preserving the independence of the ITC and insulating the
12 Administration on the anti-dumping and countervailing duty
13 laws from political interference.

14 The research the ITC has done, as well as the work on
15 the House side, suggests that the constitutional challenge,
16 while it might be mounted, would not be successful.

17 The Chairman. Further comments?

18 Senator Baucus. Mr. Chairman?

19 The Chairman. Yes. Senator Baucus.

20 Senator Baucus. Mr. Chairman, on the strength of that
21 representation -- that is, that a constitutional challenge
22 probably would be unsuccessful, and a very high probability
23 that it would be unsuccessful, I think that we should not
24 give the Administration what I would interpret as fairly
25 broad discretionary authority as to even whether to direct

1 implementation or to how it should be implemented.

2 It just seems to me we want to move along quickly, as
3 we want this Agreement to work as quickly and expeditiously
4 as it possibly can. And I think the statutory direction
5 would be sufficient, based upon what I hear, that the legal
6 representation as to the constitutionality of that course.

7 Senator Bradley. Mr. Chairman?

8 The Chairman. Yes.

9 Senator Bradley. I am not sure I understand the
10 difference. I hear a difference, but I am not sure
11 specifically what the difference is.

12 The Chairman. You are getting a Presidential
13 intervention.

14 Now, would you go ahead, Mr. Lang?

15 Mr. Lang. The difference is between whether the
16 President is merely authorized to direct the agencies to
17 implement the decision; or whether the agencies are simply
18 told by law of the United States that, when the binational
19 panel makes a decision, they are to carry it out.

20 Senator Bradley. And Ms. Bello says that if the Congress
21 directs that they be carried out -- ?

22 Ms. Bello. The concern arises under the appointments
23 clause in Article 2 of the Constitution. And under the
24 interpretation of that clause in cases -- Buckley V. Vallee
25 and Bowsher v. Synar -- that requiring officers of the

1 United States to act without their having been appointed by
2 the President raises a problem under the appointments clause.

3 Mr. Chairman, I would like to stress that because we are
4 all investing so much into the Agreement, we have taken a
5 cautious legal interpretation here, with a view to being in
6 the best possible position to defend against any possible
7 constitutional challenges.

8 And the issue here, Senator Bradley, is the appointments
9 clause in Article 2.

10 Senator Bradley. Why has the position that you have
11 espoused put you in a better constitutional position than
12 Mr. Lang's suggestion?

13 Ms. Bello. Because, in the language that the
14 Administration has suggested, the President is authorized,
15 but not required, to have Commerce and the ITC take action
16 pursuant to panel reports. Because he is authorized, he is
17 not constrained. And it is the constraint that is the
18 problem under the Buckley-Vallejo/Bowsher-Signar analysis of
19 the courts.

20 As Ms. Anderson indicated, we are providing this
21 broad authorization not because we intend to exercise
22 discretion broadly; we full intend -- and any President will
23 be expected to comply with this international obligations
24 under the agreement. But with the advice of Justice, we
25 have been persuaded that the safest, most conservative

1 legal, constitutional approach is to provide the authority in
2 domestic law, and then have the obligation to act
3 consistently with the panel reports, remain an international
4 law in the Agreement.

5 The Chairman: Senator, I think they have stretched it.
6 And she says they are taking the most conservative approach.
7 I understand that, but I think it is putting the President
8 back into the cycle. And what you have on dumping and
9 countervailing is a nondiscretionary situation. It is
10 insulted. It is nonpolitical.

11 Senator Bradley. Uh-huh.

12 The Chairman. And I would like to preserve that, if we
13 can. And therefore, to direct the Commerce Department and
14 the ITC to carry out the decision of the panel on these is
15 I think the better approach.

16 Senator Bradley. It seems it is a tough call, very
17 tough.

18 The Chairman. Well, now we will move on to the last
19 one, and we will put it to a vote if there is no further
20 discussion.

21 Senator Bradley. Could I ask just one question?

22 The Chairman. Yes.

23 Senator Bradley. How is this different than -- wasn't
24 there something in Gramm-Rudman that was challenged under the
25 same statute?

1 Ms. Bello. Yes, Senator. It is colloquially referred
2 to as "The Foley Fix," and it is the same issues as in
3 Buckley-Valleo and Bowshur v. Signar. It is the appointments
4 clause problem.

5 Senator Packwood. Mr. Chairman?

6 The Chairman. Yes, Senator Packwood.

7 Senator Packwood. I know you want to move on. This
8 seems to me to be an especially sensitive subject. I wouldn't
9 mind waiting until Wednesday morning.

10 We are going to finish this Wednesday, it is clear. But
11 I would like to have a little more time to reflect on it.

12 The Chairman. I have no objection to that, if you would
13 like to do that. Apparently there are a couple of others
14 who have some concerns.

15 All right. With that ~~is~~ do we have any others?

16 Mr. Lang. You have got a couple here that are pretty
17 controversial. I think anything you take up at this point is
18 going to take time.

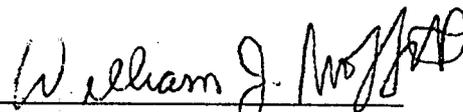
19 The Chairman. It will take some time. All right.

20 We will stand adjourned then until 9:30 Wednesday
21 morning.

22 (Whereupon, at 4:08 p.m., the meeting was recessed, to
23 be resumed at 9:30 a.m. on Wednesday, May 18, 1988.)

C E R T I F I C A T E

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2 This is to certify that the foregoing proceedings of
3 a meeting of the Executive Committee of the Committee on
4 Finance held on Monday, May 16, 1988, were transcribed as
5 herein appears, and that this is the original transcript
6 thereof.

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11 WILLIAM J. MOFFITT
12 Official Court Reporter

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15 My Commission expires April 14, 1989.
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