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SENATE FINANCE COMMITTEE

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

U.S. Trade Enforcement Agenda

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

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

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

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

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

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

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

Overview of Current U.S. Trade Enforcement Process

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

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

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

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

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

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

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

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

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

Impact of Proposed Trade Enforcement Legislation (S. 1919)

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

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

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

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

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

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

Conclusion

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

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

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