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

Statement of

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INTRODUCTION

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

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

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

TITLE I—TRADE ENFORCEMENT PRIORITIES

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

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

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

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

TITLE II—WTO DISPUTE SETTLEMENT REVIEW COMMISSION

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

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

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

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

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

- Whether an Appellate Body member has participated in decisions that involve "over-reaching" (legislating from the bench) should be a factor in whether the United States joins in a consensus to renew him or her for a second 4-year term. U.S. support for second terms should not be automatic, as it has been.

- We should reconsider the formerly-useful fiction that incumbent government officials of WTO members can serve impartially as lower-level panelists.

- Some structural separation is needed with respect to staffing, so that we do not have the same WTO Secretariat officials supporting the Organization's negotiation and dispute settlement functions. (This is analogous to your legislative staff simultaneously serving under you and as clerks to the judges who decide cases arising under the laws you enact.)

- And it may be necessary to have more cases, like the *Internet Gambling* case, where the United States demonstrates a willingness -- at the risk of borrowing a freighted expression – to "just say no."

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

TITLE III—MARKET DISRUPTION BY IMPORTS FROM CHINA

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

TITLE IV—STRENGTHENING ANTIDUMPING AND COUNTERVAILING DUTY LAWS

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

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

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

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

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

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

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

Sec. 402. Clarification of determination of material injury.

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

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

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

TITLE V—TRADE ENFORCEMENT PERSONNEL

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

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

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

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

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

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

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

TITLE VI—INTELLECTUAL PROPERTY ENFORCEMENT PERSONNEL

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

TITLE VII—INTERAGENCY TRADE ORGANIZATION

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

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

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

CONCLUSION

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