Committee On Finance
Max Baucus, Chairman

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Statement for the Record by Senator Max Baucus on Congressional-Executive Consultations on Trade

Mr. President, in the coming weeks, the Finance Committee will be working closely with the Office of the U.S. Trade Representative to develop written Guidelines on consultations between the Administration and Congress in trade negotiations. These Guidelines will be our roadmap for collaboration between the Executive and Legislative Branches on trade negotiations for the next five years. They will be the basis for the partnership of equals called for by the Trade Act of 2002.

The trade negotiation agenda promises to be busy. Even before passage of the Trade Act, work was under way in the Doha Round of WTO negotiations and in the Free Trade Area of the Americas negotiations. USTR also was busy concluding free trade agreements with Chile and Singapore. Since passage of the Trade Act, USTR has expressed the Administration's interest in beginning FTA negotiations with Morocco, Central America, the Southern African Customs Union, and Australia.

This busy agenda requires maximum clarity in the rules governing interaction between the Administration and Congress. Clear rules will form a foundation for a common understanding of how we bring trade agreements from the concept phase to the implementation phase. This common understanding will help ensure a smooth process, with few if any surprises or bumps in the road.

The Trade Act defines the scope of coverage of the contemplated Guidelines on trade negotiations. Specifically, the Guidelines are required to address:

- the frequency and nature of briefings on the status of negotiations;
- Member and staff access to pertinent negotiating documents;
- coordination between the Trade Representative and the Congressional Oversight Group at all critical periods during negotiating sessions, including at negotiation sites; and

- consultations regarding compliance with and enforcement of trade agreement obligations.

The Guidelines also must identify a time frame for the President's transmittal of labor rights reports concerning the countries with which the United States concludes trade agreements.

The Trade Act contemplates collaboration among USTR, the House Ways and Means Committee and the Senate Finance Committee in developing the Guidelines. I would like to use this opportunity to propose specific provisions that should be included in the Guidelines to maximize the potential for a true partnership between the Legislative and Executive branches.

The first issue that needs to be addressed is access to negotiating documents. When U.S. negotiators prepare to make an offer to their foreign counterparts, Congressional trade advisers and staff must be able to review the proposed offer in time to provide meaningful input. In general, trade advisers and staff should be able to see such documents not less than two weeks before U.S. negotiators present their offer to our negotiating partners. This will give trade advisers time to convey comments and make recommendations, with a reasonable expectation that their comments and recommendations will receive serious consideration.

By the same token, when another country makes an offer during the course of a negotiating session, that offer should promptly be made available to Congressional trade advisers and staff. This will enable trade advisers to keep abreast of the give-and-take of negotiations and to provide intelligent input into the development of the U.S. position.

Second, Congressional trade advisers and staff should have access to regularly scheduled negotiating sessions. I know that some in the Administration will bridle at this suggestion, citing separation of powers concerns. However, I do not think those concerns are warranted.

I am not suggesting that trade advisers or staff actually engage in negotiations. I am suggesting only that they attend as observers. This level of Congressional involvement in negotiations has well established precedents. A recent study by the Congressional Research Service on the role of the Senate in treaties and other international agreements catalogued instances of Congressional inclusion in delegations stretching back to negotiations with Spain in 1898 and continuing to the present day.

I would request that the relevant pages of this lengthy CRS study be placed in the Record at the conclusion of this statement.

In the early part of the last Century, Presidents Harding and Hoover actually designated Senators as delegates—not merely observers—to arms limitation negotiations. President Truman included Members of Congress in the delegations that negotiated the establishment of the United Nations and the North Atlantic Treaty.

More recently, a special Senate Arms Control Observers Group was created in 1985 to oversee negotiations that led to the first Strategic Arms Reduction Treaty. It included distinguished members of this body, including Senators Lugar, Stevens, Nunn, Pell, Wallop,

Moynihan, Kennedy, Gore, Warner, and Nickles. President Reagan embraced this endeavor, precisely because he knew that a close working relationship with the Senate at the beginning of negotiations would increase the likelihood of ratification at the conclusion.

Indeed, the history of Congressional involvement in the negotiation of treaties and other international agreements has its roots in the very origins of our nation. Until the closing days of the Constitutional Convention of 1787, the Framers had intended for the Senate to have the sole authority to make treaties. And in the Federalist Papers, Alexander Hamilton acknowledged that treaty making "will be found to partake more of the legislative than of the executive character. ."

The well-recognized utility of Congressional involvement in treaty and international agreement negotiation applies with even greater force when it comes to international trade. For here, the making of international agreements intersects with the Constitution's express grant of authority to Congress to regulate commerce with foreign nations.

The statute that framed trade negotiations for the last quarter century—the Trade Act of 1974—contemplated a close working relationship between Congress and the Administration. Thus, during the Tokyo Round and Uruguay Round of multinational trade negotiations, staff of the Finance Committee and the House Ways and Means Committee traveled regularly to Geneva. They were included in U.S. Trade Representative staff meetings and observed negotiations of plurilateral and multilateral agreements. They had regular access to cable traffic and other negotiating documents. By all accounts, this process worked well. Staff, and, in turn, Members were kept well informed of the progress of negotiations, which helped to secure Congressional support for the resulting agreements.

In fact, there are numerous illustrations of close interaction between Executive and Legislative Branches in the trade negotiation arena. I myself have attended trade negotiating sessions on a number of occasions. Just last year, my staff and I attended a session of Free Trade Area of the Americas negotiations in Quebec City. Before that, I attended some sessions of the mid-term meeting of the Uruguay Round negotiations in Montreal. I know that Members of Congress also have been included in delegations to WTO Ministerial meetings in Singapore and Seattle. And, I understand that during the Uruguay Round, Members traveled to Geneva at key junctures in negotiations on trade remedy laws, and were included in the official delegation to a Ministerial meeting in Brussels.

Even in the period from 1994 to 2002, when fast track trade negotiating authority lapsed along with the express mandate for a Congressional-Executive partnership on trade, Members of Congress sought to remain closely involved. For example, I understand that my friend Senator Grassley sought permission for staff of the General Accounting Office to attend certain negotiations, in order to keep Congress well informed.

Now, fast track has been renewed. Once again, we have an express mandate for a Congressional-Executive partnership on trade. Indeed, the Trade Act of 2002 contemplates an even closer working relationship between Congress and the Administration than the Trade Act of

1974. It is time to revive and strengthen the practices that solidified a close, robust working relationship in the past.

Given the long history of Legislative-Executive partnership in negotiating in a whole host of sensitive areas, given the constitutional role of Congress when it comes to regulation of commerce with foreign nations, and given the policy articulated in the Trade Act of 2002, I see little basis for excluding Congressional observers from trade negotiations.

Third, the Guidelines should set forth a clear schedule and format for consultations in connection with negotiating sessions. At a minimum, negotiators should meet with Congressional advisers' staff shortly before regularly scheduled negotiating sessions and shortly after the conclusion of such sessions. To the extent practicable, the Administration participants in these consultations should be the individuals negotiating on the subjects at issue, as opposed to their supervisors.

Consultations should be an opportunity for negotiators to lay out, in detail, their plan of action for upcoming talks and to receive and respond to input from Congressional advisers. Whenever practicable, consultations should be accompanied by documents pertaining to the negotiation at issue. If advisers or staff make recommendations during consultation sessions, arrangements should be made for negotiators to respond following consideration of those recommendations.

Additionally, to the extent that Congressional advisers or staff are unable to attend negotiating sessions, arrangements should be made to provide briefings by phone during the negotiations.

The key point here is that it is the quality as much as the quantity of negotiations that counts. It matters little that the Administration briefed Congressional advisers a hundred times in connection with a given negotiation, if the briefings amount to impressionistic summaries with no meaningful opportunity for advisers to offer input.

Fourth, the Guidelines must set forth a plan to keep Congressional advisers fully and timely informed of efforts to monitor and enforce trade agreements. In any trade agreement, follow up is critical. If compliance is spotty, the agreement is not worth the paper it is written on. Also, monitoring and enforcement help to identify provisions that might be modified in future trade agreements.

Currently, Congressional advisers get briefed when a formal dispute arises or sanctions are threatened or imposed. Keeping Congressional advisers in the monitoring and enforcement loop tends to be episodic. It should be systematic.

The Guidelines should provide for consultations with Congressional advisers on monitoring and enforcement at least every two months. These consultations should not just highlight problems. They should provide a complete picture of how the Executive Branch is

deploying its monitoring and enforcement resources. They should identify where these efforts are succeeding, as well as where they require reinforcement.

In conclusion, Mr. President, the Trade Act of 2002 represents a watershed in relations between the Executive and Legislative Branches when it comes to trade policy and negotiations. Before the Trade Act, the Executive Branch generally took the lead, and the involvement of Congressional advisers tended to be cursory and episodic. In the Trade Act, Congress sent a clear message that the old way will not do.

From now on, the involvement of Congressional advisers in developing trade policy and negotiations must be in depth and systematic. Congress can no longer be an afterthought. The Trade Act establishes a partnership of equals. It recognizes that Congress's constitutional authority to regulate foreign trade and the President's constitutional authority to negotiate with foreign nations are interdependent. It requires a working relationship that reflects that interdependence.

Our first opportunity to memorialize this new, interdependent relationship is only weeks away. I am very hopeful that the Administration will work closely with us in developing the Guidelines to make the partnership of equals a reality.

INSERTION

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TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE

A S T U D Y

PREPARED FOR THE

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On occasion Senators or Representatives have served as members of or advisers to the U.S. delegation negotiating a treaty. The practice has occurred throughout American history. In September 1898, President William McKinley appointed three Senators to a commission to negotiate a treaty with Spain. President Warren G. Harding appointed Senators Henry Cabot Lodge and Oscar Underwood as delegates to the Conference on the Limitation of Armaments in 1921 and 1922 which resulted in four treaties, and President Hoover appointed two Senators to the London Naval Arms Limitation Conference in 1930.

The practice has increased since the end of the Second World War, in part because President Wilson's lack of inclusion

of any Senators in the American delegation to the Paris Peace Conference was considered one of the reasons for the failure of the Versailles Treaty. Four of the eight members of the official U.S. delegation to the San Francisco Conference establishing the United Nations were Members of Congress: Senators Tom Connally and Arthur Vandenberg and Representatives Sol Bloom and Charles A. Eaton.

There has been some controversy over active Members of Congress serving on such delegations. When President James Madison appointed Senator James A. Bayard and Speaker of the House Henry Clay to the commission that negotiated the Treaty of Ghent in 1814, both resigned from Congress to undertake the task. More recently, as in the annual appointment of Senators or Members of Congress to be among the U.S. representatives to the United Nations General Assembly, Members have participated in delegations without resigning, and many observers consider it ``now common practice and no longer challenged." \60\

\60\ Henkin, Louis. Foreign Affairs and the Constitution. Mineola, N.Y. Foundation Press, 1972, p. 132.

One issue has been whether service by a Member of Congress on a delegation violated Article I, Section 6 of the Constitution. This section prohibits Senators or Representatives during their terms from being appointed to a civil office if it has been created or its emoluments increased during their terms, and prohibits a person holding office to be a Member of the Senate or House. Some contend that membership on a negotiating delegation constitutes holding an office while others contend that because of its temporary nature it is not.

Another issue concerns the separation of powers. One view is that as a member of a negotiating delegation a Senator would be subject to the instructions of the President and would face a conflict of interest when later required to vote on the treaty in the Senate. Others contend that congressional members of delegations may insist on their independence of action and that in any event upon resuming their legislative duties have a right and duty to act independently of the executive branch on matters concerning the treaty.

A compromise solution has been to appoint Members of Congress as advisers or observers, rather than as members of the delegation. The administration has on numerous occasions invited one or more Senators and Members of Congress or congressional staff to serve as advisers to negotiations of multilateral treaties.\61\ In 1991 and 1992, for example,

Members of Congress and congressional staff were included as advisers and observers in the U.S. delegations to the United Nations Conference on Environment and Development and its preparatory meetings. In 1992, congressional staff advisers were included in the delegations to the World Administrative Radio Conference (WARC) of the International Radio Consultative Committee (CCIR) of the International Telecommunications Union.

\61\ The names of congressional advisers to international conferences before December 15, 1995 may be found in an annual list of U.S. accredited delegations that includes private sector representatives, published in the Federal Register in accordance with Article III(c)(5) of the guidelines (March 23, 1987). The last list was published in Federal Register, December 2, 1996, vol. 61, no. 232, pp. 63892-63916. Publication of this list was discontinued after the preparing Office of International Conferences, Department of State, ceased receiving funding that enabled the Office to compile and file the report with the Federal Register.

In the early 1990s, Congress took initiatives to assure congressional observers. The Senate and House each designated an observer group for strategic arms reductions talks with the Soviet Union that began in 1985 and culminated with the Strategic Arms Reduction Treaty (START) approved by the Senate on October 1, 1992. In 1991, the Senate established a Senate World Climate Convention Observer Group. As of late 2000, at least two ongoing groups of Senate observers existed:

1. Senate National Security Working Group.--This is a bipartisan group of Senators who ``act as official observers to negotiations * * * on the reduction or limitation of nuclear weapons, conventional weapons or weapons of mass destruction; the reduction, limitation, or control of missile defenses; or related export controls."
2. Senate Observer Group on U.N. Climate Change Negotiations.--This is a ``bipartisan group of Senators, appointed by the Majority and Minority Leaders" to monitor ``the status of negotiations on global climate change and report[ing] periodically to the Senate * * *." \62\

\62\ Congressional Yellow Book, Winter 2000, pp. 10-11. (Published by Leadership Directories, Inc., New York and Washington, D.C.)
