Committee On Finance
Max Baucus, Chairman

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For Immediate Release Contacts: Michael Siegel, Lara Birkes
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U.S. TRADE LAWS AND THE WTO

I appreciate the opportunity to speak today about the World Trade Organization and some recent dispute settlement actions. This is one of the issues that I believe will dominate the trade debate in the next few years.

The Trade Act of 2002

Before we talk about the next two years, though, let me begin by looking at the last two – specifically the recently signed Trade Act.

The Trade Act – by codifying the labor and environmental standards of the Jordan Free Trade Agreement – has allowed us to move forward on a stalled trade agenda. At the same time, the Act includes a truly historic expansion of Trade Adjustment Assistance. Hopefully, this will lead to a broader national consensus on trade. Certainly, it will address the real human needs of workers who lose their jobs due to imports.

Going into the Senate debate on the trade bill, conventional wisdom was that the bulk of our time would be devoted to these issues – labor, environment, and TAA. But in the end, it was trade laws that generated the fiercest battles. Senators Dayton and Craig offered an amendment that would have provided for a separate vote on trade laws – and proved to be so controversial that the Administration threatened to veto the bill if the amendment was included.

Now, at the time, I have to admit I was baffled by the Administration's response. If they weren't planning on weakening our trade laws in future agreements, I would think that the Dayton-Craig amendment shouldn't have been a major problem. But I will leave that issue for another day.

I will say that I think the alternative we came up with in Conference is actually a stronger provision. Under the Trade Act, the Administration must now report on proposed trade law changes a full 6 months before an agreement is finalized. If there are problems, the bill allows time to fix them. If the Administration refuses, the Trade Act provides a process for Congress to indicate it opposes the changes and, in an extreme case, a process for taking fast track away.

I am very proud of this legislation. It is the most progressive trade bill ever signed into law. And it is a rare example of bipartisan cooperation in a highly partisan climate.

The Report on Adverse WTO Panel Decisions

One of the most important issues addressed in the Trade Act is the provision directing the Secretary of Commerce to draft a report on recent WTO decisions. A growing number of WTO panels have inappropriately ruled against U.S. trade laws – so the legislation requires the Secretary to prepare a strategy for countering those rulings. Why is this study so important? Because U.S. trade laws are a critical part of the foundation of U.S. trade policy. And these laws have been under aggressive attack in WTO dispute settlement proceedings. Depending on how you count, the U.S. has lost as many as fifteen decisions regarding the operation of U.S. trade laws in the last several years.

I am deeply troubled about what has been going on in the WTO dispute settlement process. These proceedings are looking more and more like a kangaroo court against U.S. trade laws. This trend must stop. And I am here today to suggest some steps to stop it.

The Dispute Settlement Record

While the trade law provisions in the Trade Act are critical, it is not new negotiations or new trade agreements that put U.S. trade laws most at risk. Instead, it is the WTO's binding dispute settlement system that casts the darkest shadow over our trade laws.

During the Uruguay Round negotiations, the U.S. fought for and achieved a system of binding dispute resolution. We also fought for and won a deferential standard of review for trade remedy cases. This standard requires dispute settlement panels to defer to national authorities when they make reasonable interpretations of fact and WTO provisions. It was supposed to apply to all trade remedy cases, but it has been improperly narrowed. And even where notionally applied, it has been disrespected.

As a nation with trade laws that are transparent, fair, and consistent with the express language of WTO agreements, we thought we had little to fear and much to gain from a system that would require our trading partners to bring their practices into compliance with WTO standards. But it hasn't worked out that way. In the area of trade remedies, the U.S. has had one significant victory – against Mexico's politically-motivated antidumping duties on high-fructose corn syrup. Unfortunately, we have lost more than a dozen cases. While time limits prevent an exhaustive review, a few examples are worth mention.

First, the safeguard cases. In a series of cases, WTO panels have overturned U.S. safeguard decisions taken under section 201 involving wheat gluten, lamb, steel wire rod, and line pipe. Instead of deferring to reasonable agency interpretations, these panels have

interpreted any ambiguity against U.S. authorities and done serious damage to core principles of U.S. law.

Second, the Byrd Amendment. This is a law that simply takes money out of the U.S. Treasury and spends it. Even though Byrd Amendment payments impose no burden on imports – and certainly affect few if any exports – a WTO panel recently ruled that they are an impermissible penalty for dumping.

While I expect this to be appealed, in the end, this decision may matter very little – as I suspect there is almost no support in Congress for implementing it. Nonetheless, it is yet another example of overreaching.

Third, softwood lumber. While the WTO appropriately found that Canada subsidizes its lumber industry, it mistakenly ruled that Commerce cannot use U.S. timber prices as a benchmark for determining market prices. Instead, the WTO suggested that Commerce must use Canadian prices, regardless of how distorted those prices are. This is wholly inconsistent with previous WTO cases and makes little sense. If the entire market is distorted by enormous subsidies, why should only prices in that market be examined? This is a troubling decision – more so because of the dire environmental consequences of Canada's practices.

Fourth, FSC. While this is not a case involving trade laws, it is one more example of arbitrary decision-making. Of course, I believe the EC was wrong even to bring this case. But on the merits, the Appellate Body's decisions make an unworkable distinction between countries that rely primarily on direct taxes (like income taxes) and countries that rely primarily on indirect taxes (like the VAT). Even though the Appellate Body acknowledged countries' sovereign right to set their own tax systems, they interpret WTO rules in a way that heavily favors one particular model. I should note here that Senator Grassley and I convened a working group on FSC this week, and I am hopeful that working together with our colleagues in Congress and with the Administration, we can evaluate all options and come up with possible solutions.

So, why have we lost all these cases? What is going on here? The answer is straightforward. WTO dispute settlement panels are legislating. They are ignoring the deferential standard of review. They are exceeding their powers to add to the obligations and diminish the rights of the United States. In sum, they are making up rules out of whole cloth – substituting their judgment for the negotiated agreement. They are making up rules that the United States never negotiated, that Congress never approved, and, I suspect, that Congress would not approve.

The Threat and the Solution

This problem has at least two causes. Most importantly, I frankly think there is a bias against the United States and its trade laws within the WTO dispute settlement system. The Commerce Department and the International Trade Commission – the two U.S. agencies on the front lines of this battle – have done and continue to do their best. They have tried hard both to defend U.S. cases and to reconcile their duties under U.S.

trade laws with the rising tide of new obligations handed down by WTO panels. But no amount of hard work on their part can convince decision-makers who are determined to bring down U.S. trade laws one piece at a time.

Second, WTO dispute settlement rules and procedures have proved inadequate to guard against bias and overreaching by panels. Maybe the standard of review is not clear enough. I think it is, but I am open to considering how to strengthen it. Certainly, the rules under which dispute settlement panels and the Appellate Body operate allow them flout the standard of review with impunity.

What can we do to improve this situation? First, we should look to the ongoing WTO negotiations. WTO members are now undertaking a comprehensive review of the dispute settlement process. Many of our trading partners have tabled ambitious proposals. We must as well. It is critical that the United States move forward with an aggressive proposal designed to ensure that we receive the benefit of the standard of review negotiated in the Uruguay Round. There are several approaches we could take. For example, we can look at changes to the Dispute Settlement Understanding or other Uruguay Round agreements that would reinforce the standard of review.

We can also consider seeking structural changes to the operations of panels, the Appellate Body, and the Dispute Settlement Body that would reinforce adherence to the standard of review and create adverse consequences for any failure to so adhere.
But we need to have a serious discussion on this issue and a forward-looking strategy. I stand ready to work toward that end.

Second, we should consider some kind of oversight. Several years ago, Senator Dole suggested a commission of U.S. judges that would review WTO decisions. I think this kind of commission is an excellent idea. And it shouldn't be controversial. If the WTO is found to be acting appropriately, it will silence critics. If not, lawmakers should have that information – and I suspect they will act on it.

Overall, one thing is clear. WTO proceedings must be governed by the rule of law, not simply an abiding dislike on the part of our trading partners for some aspects of U.S. trade policy. If this trend is not addressed, this will be the next major trade issue. And it absolutely threatens the legitimacy of the WTO.

Conclusion

I hope there will come a day when U.S. trade laws aimed at countering unfair foreign trade practices can fade in importance. When subsidies are sharply reduced, when cartels no longer control key markets, when trade generally flows freely – there will be little call for anti-subsidy or antidumping laws. But that day is not today. And those who advocate eliminating U.S. trade laws now – and later working on reducing other problems – well, they are simply confusing the causes of current problems with the remedies.

Duties on Canadian lumber do not exist because of U.S. countervailing duty laws. Duties exist because the Canadian industry receives enormous subsidies. Duties on imports of Japanese steel do not exist because of U.S. antidumping laws. Duties exist because a cartel of Japanese steel companies colludes to control their domestic market and then dumps excess production in the United States.

If Canada or Japan or any other country wants to eliminate those duties, they need merely put a stop to subsidies and dumping. Period. It is just that simple. In November of 1994 I stood on the Senate floor and explained why I would vote against the WTO. This was a vote that I agonized over for weeks, and a vote that surprised many. I said at the time that I was concerned about preserving U.S. sovereignty. My concerns have proven to be correct.

I understand and support the need for a global trading system and have fought for it at some political risk to myself. But the institution needs to fulfill its mandate and honestly apply its rules. Otherwise, it will be committed to the dust bin of history as another grand failure.

Congressional Consultations

Now, I had originally planned to end my speech there, but I can't help commenting on one additional issue that is causing me very serious concern. Last week, the Administration met for the first time with the newly formed "Congressional Oversight Group." I thought our first meeting with Ambassador Zoellick was useful, and I look forward to continuing this process.

But I worry that the Administration is eager to slip back to the old way of doing things – that is, negotiate first, consult later. They have, as recently as this week, expressed reluctance at allowing Congressional staff to observe negotiations – not participate – but merely observe. I have to say here – I think the Administration risks starting out this post-TPA era on exactly the wrong foot. To me, it is quite simple. If you involve Congress throughout the process, Congress is more likely to support agreements. If not, Congress is going to worry that the Administration has something to hide.
At the end of the day, what we all want is for agreements to pass with wide margins. But I would warn the Administration in the strongest possible terms – if they try to shut Congress out of the process, they risk creating an atmosphere of distrust, and that is not the way to get agreements passed.

Thank you all for the opportunity to speak with you today.