ANSWERS TO QUESTIONS FOR THE RECORD

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Submitted to:
Committee on Finance
United States Senate

Hearing on S. 1919
The Trade Enforcement Act of 2007

Washington, DC
June 13, 2008

QUESTIONS FOR THE RECORD
FOR MR. JOHN MAGNUS

United States Senate
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S.1919: The Trade Enforcement Act of 2007

May 22, 2008

Senator Baucus Questions:

Question 1

INTELLECTUAL PROPERTY EXPERTISE:

The International Trade Commission ("ITC") has seen a significant increase in section 337 intellectual property cases in recent years. But existing law hamstrings the ITC's ability to hire judges with the necessary expertise to adjudicate these cases.

The Trade Enforcement Act of 2007 removes these impediments and gives the ITC the hiring authority it needs.

Will these provisions, in your view, solve the problem?

These provisions make good sense and will indeed remove a significant impediment to the sound processing of the growing (and already large) Section 337 docket.

As I noted in my written statement, the needs of the ITC when it comes to finding adjudicators to manage these cases are atypical -- in regard to both intellectual property expertise and complex case-management skills – and cannot reliably be met under the existing ALJ system. Title VI of S. 1919 strikes a sensible balance by preserving core protections of independence while opening a path for the ITC to lawfully find the kind of super-qualified adjudicators the Section 337 docket demands.

That the ITC has fortunately achieved good results with its most recent ALJ recruiting efforts is no argument against providing, as S. 1919 proposes, additional flexibility for future hiring. The Committee might wish to take into account that the ITC is presently considering an additional hire and that some

existing ITC ALJs, carrying large case-loads, are or soon will be retirement-eligible.

So, yes, Title VI will solve **a** problem. There remains an additional concern of overall resources – a question of how many, rather than what caliber, of adjudicators the ITC can deploy in this important area. No less than other core trade functions of the government, this one needs adequate appropriated funding. But hiring flexibility is an excellent topic to address in an enforcement bill, as the sponsors have proposed.

Question 2

APPLYING COUNTERVAILING DUTIES TO NON-MARKET ECONOMIES:

Several bills have been introduced over the last few years mandating the application of countervailing duties to non-market economies like China. Commerce recently reversed its long-standing opposition to such a policy and made affirmative determinations in several cases involving Chinese imports.

Although these decisions have been applauded, Members have expressed concern about leaving this issue to the Administration's discretion. We therefore included a provision in the Trade Enforcement Act of 2007 clarifying that Commerce does indeed have the statutory authority to apply countervailing duties to nonmarket economies.

In light of Commerce's about face, do you think legislation is still needed?

I favor confirming legislatively the CVD law's applicability to products originating in non-market economies (NMEs).

The legal basis for what Commerce has done is sound. The current CVD law does not exclude NME products from its coverage, and there is no doubt that government entities in a NME can take actions that meet the statutory definition of a "subsidy" – providing a financial contribution that confers a benefit. (That Chinese government entities can do so has been made quite clear both during, and since, the negotiations over China's accession to the World Trade Organization.) The impediment to conducting CVD investigations involving NME products has always been a practical one. Once conditions in a NME evolve to the point where Commerce can confidently identify and measure subsidies bestowed there, Commerce's authority to apply the law to products originating in that NME should be beyond question – and should be upheld when/if challenged on appeal.

But that authority is questioned, and it could perhaps be undermined (however wrongly) via a court appeal, and the use of that authority is, as the question notes, in some sense discretionary. For these reasons – to remove a cloud that

may be large or small, but plainly does exist -- legislation clarifying the law's applicability to NME products is appropriate.

Question 3

ADDITIONAL PROVISIONS FOR THE BILL:

The Trade Enforcement Act of 2007 seeks to address concerns that our current trade enforcement tools are not adequate to protect the rights of U.S. farmers, ranchers, manufacturers, and workers. The bill contains provisions to amend our current trade enforcement tools to make them work better, like the section 421 China safeguard. And it also contains provisions to create entirely new enforcement tools, like the Chief Trade Enforcement Officer at the Office of the U.S. Trade Representative ("USTR").

Do you think the bill strikes the right balance? Are additional provisions needed to further improve our trade enforcement tools?

I believe the bill strikes a good balance. It defines "enforcement" to include both export-promoting and import-regulating elements of the U.S. trade regime, seeking to patch holes in both. And its Title II wisely recognizes the relevance of a topic whose connection to enforcement might not be obvious to casual observers – the topic of WTO dispute settlement decisions that are adverse to the United States.

The bill constructively addresses gaps in coverage, or other impediments to enforcement, in each of the areas that it touches. It does not do, or seek to do, everything that might in some fashion enhance the U.S. trade regime. It is a package of high-priority and well-considered items.

With regard to market-opening initiatives -- prompting effective action on foreign market barriers, and enforcing U.S. rights under international trade agreements -- the bill has a good set of new tools and improvements to existing ones. They are not guaranteed to succeed, either individually or even in combination, but putting them in place makes good sense. I do not have other, specific suggestions in this category. I believe the reforms S. 1919 proposes will bear fruit in the context of, and may even help to spur, a broader (largely political rather than legal) enhancement of collaboration between the government's political branches in trade policy.

If the Committee wants to tighten (and improve enforcement of) import remedies beyond what the current draft of S. 1919 proposes, I would suggest focusing on the remedies involving unfairly traded (dumped or subsidized) goods rather than seeking to adjust safeguard-type remedies like section 201 or section 421. The AD/CVD remedies matter more, and in my view will continue to matter more. Section 402 of S.1919, over-ruling the *Bratsk* line of court decisions, already

addresses the most important priority in this category. To go further, the Committee could consider language that (1) preserves (or restores) legislatively the "zeroing" methodology for all antidumping investigations and reviews, (2) bolsters the CVD law with language, designed to take effect in the future following a vigorous negotiating effort, that removes the disparity in treatment of direct and indirect taxes, and/or (3) makes relief more readily obtainable in the context of "fill-in" countries. (This last refers to the problem of non-subject countries whose U.S.-bound shipments of dumped or subsidized products increase sharply in the wake of an order against a "first wave" of injurious, unfairly traded products of the same type; it is sometimes referred to as "persistent dumping," and existing law provides little extra deterrence against it.)

Question 4

TOP THREE ENFORCEMENT PRIORITIES:

Congress has become increasingly concerned that the administration is not adequately enforcing our trade agreements or our trade remedy laws. The Trade Enforcement Act of 2007 addresses this concern in part by requiring USTR to provide an annual report to Congress that identifies its enforcement priorities for the upcoming year.

In light of the hundreds of trade barriers around the world, I'd like your input on where the administration should focus its enforcement resources. What are your top three enforcement priorities?

My list of priorities, when it comes to foreign trade barriers, is functional rather than sectoral. Sectoral examples abound, however, in each of the categories below.

First is *subsidies*. As border measures diminish in importance, the potential of subsidies to cause adverse cross-border consequences (across a wide range of economic sectors) increases. At the multilateral level, subsidy discipline should accordingly be tightening – but that does not appear to be happening, and there are many proposals in the Doha Round that would reduce current discipline. The U.S. effort to tackle (under existing rules) foreign subsidies and the problems they cause has been enhanced and is impressive, but should not plateau. In the case of China, only export-contingent and import-substitution-contingent subsidies have been directly challenged so far, although an extensive array of domestic subsidies has been documented. And China is by no means the only offender. Self-discipline through tools like the European Union's internal state aid regime does not clamp down sufficiently. Subsidies (as well as oddities in the current framework of subsidy rules, such as the disparate treatment of direct and indirect taxes) remain a problem in international trade and an impediment to U.S. firms succeeding to the degree they should in international competition. There are additional enforcement efforts – some that may be sufficiently treated through

regular diplomatic pressure, others that may require resort to formal dispute settlement – that deserve favorable attention from U.S. officials in this category.

Second is *standards-related barriers*, a category of barrier that has negatively affected market access for U.S. food, high-tech, and other products in the past and has a virtually limitless potential to do so in the future. International rules aimed at disciplining this type of barrier have improved with, for example, the WTO agreements on Sanitary/Phytosanitary Measures and Technical Barriers to Trade, but we don't really know by how much because enforcement actions invoking these rules have been fairly scarce. What we do know is that standards-related barriers remain prevalent and economically important; in fact, it has been suggested that all of the agricultural liberalization (tariffs and subsidies) on offer in the Doha Round will have negligible results for U.S. exports in key categories because of standards-related barriers. Past U.S. decisions about what to litigate and what to pursue by other (mainly diplomatic) means may have been sound ones. And of course, pressing against these barriers can be complicated, as shown by current events in South Korea that are connected to U.S. efforts to gain removal of unreasonable standards-based restrictions on beef trade. But there is no doubt that many barriers remain in this category and deserve priority treatment in current and future enforcement efforts.

Third, I am among those who believe that *private anticompetitive practices* often impair U.S. access to foreign markets and deserve careful consideration when brought to the attention of U.S. trade officials. Well-known past examples of this phenomenon – the *Japan Film* case is one – have given rise to some pessimism that it can be effectively addressed. And this category of barriers has generally receded from public view with the abandonment of efforts to negotiate WTO rules in the area and the decline in usage of Section 301 – especially Section 301(b). But the underlying problem remains. It deserves the continued attention of U.S. trade and antitrust officials -- working in tandem to gain the removal of privately-imposed market barriers through local competition law enforcement if possible, and through other means if necessary.

Senator Lincoln Questions:

Question 1

WTO DISPUTE SETTLEMENT REVIEW COMMISSION:

Mr. Magnus, in your testimony, you support creating a WTO Dispute Settlement Review Commission empowered to review WTO decisions that are adverse to the United States. Can you give examples of some of the WTO Panel and Appellate Body decisions that have been wrongly decided?

You also argue that additional measures are needed in Title II in order to address existing problems with the rules and procedures of the WTO dispute settlement system. What are the challenges to implementing the changes you propose?

Decisions in cases brought against the United States that reflected expansion rather than sound application of existing WTO rules have unfortunately abounded, and have been issued in virtually every year of the WTO's existence. The Committee on Finance has issued findings on this subject, and decisions in this category have involved core elements of the major U.S. import relief laws (antidumping, countervailing duty, safeguard) as well as a wide range of other measures (internet gambling prohibition, subsidies to petitioners under the Byrd Amendment, customs bonding requirements, and others).

Not all adverse decisions in cases brought against the United States are wrong. We are hardly infallible. But those adverse decisions that involve legal judgments made during preparation of our original implementing bill for the WTO agreements – the 1994 Uruguay Round Agreements Act (URAA) – are in my view especially suspect. It is worth recalling that all of the U.S. government's most sophisticated trade law experts, from both political branches and both political parties, collaborated for almost an entire year in crafting the URAA. When the bill was formally transmitted to Congress under fast-track procedures, it carried a certification from the Executive Branch that it contained the statutory provisions needed to bring the United States into compliance with the obligations assumed in the Uruguay Round. This judgment applied to provisions in the bill and also those that did not appear – to cite one mundane example, it was the carefully-considered view of both branches that provisions repealing the "1916 Act" did not need to be enacted. That particular statute had no broad policy significance. But when the legal judgment pertaining to it, and literally dozens of other legal judgments made by our top experts just after the conclusion of the Uruguay Round, are steadily contradicted over the following 13 years by WTO adjudicators, there is reason for skepticism.

The additional measures I identified in my written submission as being needed to deal holistically with the problem of over-reaching in WTO dispute settlement are not items that can easily be legislated. I wish they could. Many involve changes to the WTO *Dispute Settlement Understanding* and its working procedures, which would have to be negotiated in Geneva rather than enacted here in Washington. If the Committee agrees on the desirability of these changes, and wants to add some negotiating directives to S. 1919, that would be highly desirable in my view.

Other suggested changes involve the U.S. government's own behavior as a participant in WTO dispute settlement activities, and the challenges here are largely cultural. Two examples may help to clarify. I would like to see a more neutral approach to the renewal (for second 4-year terms) of Appellate Body members, in which they are held to account for the quality of their decisions as the reappointment system seems designed to facilitate. I would also like to see more widespread and energetic diplomatic efforts by U.S. trade officials to

advocate the U.S. position in dispute settlement cases "outside the room" – in missions, with Secretariat officials, with basically anyone who will listen – in hopes of improving the atmosphere for the decision that will be made "in the room." The United States often underperforms relative to the legal merits of its positions in dispute settlement cases, and I do not believe this is because of less-than-excellent litigating. Some would say the United States, at least as a defendant, can never hope to get a fair shake in an international forum. Whether or not it contains a particle of truth, this view is not a helpful or productive lens for those who want to make things better. I would say, rather, that there remains a very important political/diplomatic element of WTO dispute settlement, to which we should pay greater attention as other Members do. One place to start would be an expectation that all Geneva-based U.S. trade officials will fan out regularly, buy a lot of people a lot of lunches, and generally find opportunities to explain *why we are in the right and must not be found in the wrong* with respect to dispute cases pending against us.

Question 2

RELATIONSHIP TO FREE TRADE AGREEMENTS:

If this legislation is passed, what impact would it have on pending free trade agreements? Do you believe it is important for Congress to act on this legislation, regardless of what it does on the various pending free trade agreements? Why?

There is no necessary connection between the bill and the pending FTAs. S. 1919 addresses how the U.S. government's enforcement machinery should work, regardless of what agreements the United States is party to and what the status is of implementation of particular FTAs.

As noted in my testimony, I am pleased and believe the trade community broadly should be pleased to see the Committee tackling these issues even amid all the unpleasantness over pending FTAs. I see this as responsible stewardship -- a desire not to let the FTA impasse freeze progress on other important elements of the people's business.

It is important for Congress to act on the topics touched by S. 1919.

It is also important for Congress to act on the pending FTAs.

Senator Grassley Questions:

Question 1

WTO DISPUTE SETTLEMENT:

Mr. Magnus, we've heard assertions today that USTR is not filing enough cases at the World Trade Organization.

I'm not convinced of that.

In my experience, there's often a question whether the foreign action being complained about actually conflicts with any of the existing rules of trade.

Other times, there's a question whether the affected U.S. industry actually supports taking the issue to the WTO. That may be due to concerns that, in the long run, litigation would be counterproductive.

In your view, should USTR bring a case even if the affected industry doesn't support it?

Rarely if ever should the U.S. government initiate dispute settlement proceedings without the support of the affected U.S. industry.

A well-considered determination by the responsible government officials that litigating would be counter-productive is also a good reason not to start litigation.

I agree with your statement during the hearing that the number of WTO dispute cases filed is not a very useful metric. Especially dubious is the simplistic notion that "more trade" should necessarily be accompanied by "more formal enforcement actions." When one sees that U.S. exports are expanding, one could just as easily conclude that the mix of diplomacy and litigiousness running in the background has been just right.

It is also (nonetheless) true that some WTO complaints that should have been initiated, or at least credibly threatened, have not been, and that hyper-caution within the Executive Branch when it comes to using dispute settlement is a problem that the Finance Committee should want to address. S. 1919 does seek to address this problem, and one does not need to rely on any dubious metrics in order to endorse its approach.

Question 2

WTO DISPUTE SETTLEMENT:

Mr. Magnus, you expressed some concern in your testimony about "excessive caution" in taking disputes to the World Trade Organization.

Do you think the Administration should be more willing to take marginal cases to the WTO – and by that I mean cases where there isn't a high probability of success?

What do you think the consequences would be if the United States started losing a significant number of cases that we filed?

I do not favor – I know of no one who does favor -- bringing "marginal" cases.

I do periodically disagree with U.S. officials about the likelihood that a given case will succeed, and about the risk/reward profile of advancing (or threatening to advance) particular claims.

A huge preponderance of WTO complaints is upheld. As I noted in my written statement and at the hearing, I believe this situation reflects a certain amount of mission creep and over-reaching by the actors in the dispute settlement system. In light of it, the notion of the United States losing outright in a significant share of its offensive cases is very hard to imagine. And it is certainly not something I would wish to promote.

Of course there can often be a difference between the "on paper" and "real world" results of a case, and the disparity can run in both directions. In *EU – Hormone Fed Beef*, the United States won a legal victory but secured no improved market access. In *Japan – Film*, the United States received a negative result in litigation and yet, because of the case, achieved much-improved access to the Japanese market for photographic film and paper.

Points like these need to be factored into any analysis of the "probability of success." Usually they are, and intelligently so. But occasionally and too often, the level of caution is indeed excessive.

Question 3

NATIONAL TRADE ESTIMATES REPORT:

Mr. Magnus, in your testimony on the so-called Super 301 mechanism, you said the National Trade Estimates report "does not constitute a robust top-down element" for identifying enforcement priorities.

You also mentioned a "presumption against adding new reporting requirements to those under which USTR officials already labor."

As a practitioner, what is your view of the National Trade Estimates report?

Is it serving a valuable function that is commensurate with the staff resources it takes to produce?

Can it be improved?

The NTE is a terrific resource that, admittedly, is terrifically difficult to compile.

It is serving a valuable function, but because of its length is much like a map that does not show topography. (A perhaps more useful analogy is to law firm brochures, which are often designed to make it appear as if the firm being advertised has every imaginable capability rather than laying bare where its truly deep pockets of expertise lie.)

In short, the NTE is a great compendium -- but only a compendium, not a prioritization tool. It sends messages, but somewhat muted ones. And it is not possible for each listing, or even a majority of them, to include real detail on items such as the barrier's trade effects or (in)consistency with international obligations.

The NTE can be improved, in my opinion, not internally but through extra utilization – via legislation like Title I of S. 1919 that runs the NTE listings through a prioritization mechanism.

<u>Question 4</u>

CHIEF TRADE ENFORCEMENT OFFICER:

Mr. Magnus, you seem a bit skeptical of the value of creating a Senate-confirmed position of Chief Enforcement Officer.

I wonder if a better use of our limited resources would be to authorize USTR to hire more staff-level personnel to focus on enforcement.

What is your view?

Hiring more staff-level personnel is a resources issue. Adding a Senate-confirmed Chief Enforcement Officer is mainly an accountability issue. So, I do not see these as logical alternatives, but as distinct ideas deserving to be considered on their merits.

The idea you introduce here, of expanding staff-level personnel, is one I endorse. Unlike the number of WTO disputes filed, I do believe staffing and resources for staffing should (ordinarily) increase in a manner broadly reflective of trade growth.