

# **AMERICA'S TRADE POLICY AGENDA**

**And**

## **THE FUTURE OF U.S. TRADE NEGOTIATIONS**

**Testimony before**

**The House Ways and Means Committee**

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The United States has benefitted from an economy that is second to none -- in its vibrancy, its innovativeness and its productivity. It has created an industrial base that preserves our national security and our national well-being. Trade policy should first and foremost strengthen the capabilities the nation has and improve on them. U.S. trade policy cannot be based on chance, neither operating in the dark nor without a strategy. This Committee's hearing notice recognizes these needs.

I have been asked to concentrate my oral presentation on the enforcement of trade agreements and will do so. My comments on trade law enforcement are drawn from my own experience from service in government as USTR General Counsel and Deputy U.S. Trade Representative, in private international trade and investment law practice, in conversations with those doing business in China and in my continuing research. My comments on U.S. trade negotiation priorities are not only my own views but very largely shared by the members of the National Foreign Trade Council, whose Board I chair.

### **Compliance with the black letter of the WTO rules**

The record is very good. Much of the world went through a period of severe financial crisis and unacceptably high unemployment, rioting in Athens, and tent cities in downtown DC parks and not a single tariff commitment was breached, not a single safeguard action was brought, not a single prohibited export subsidy was granted by a major industrialized WTO member. There was no marked upswing in the number of antidumping cases filed which had

been feared by WTO Director General Pascale Lamy. And on top of that, as opposed to the period of the Great Depression, there were no competitive depreciations although the rates of appreciation of currencies of concern may have slowed.

It is true that some major emerging market countries such as Brazil and India do not have full commitments under the WTO, have not bound their tariff rates at reasonable levels, but that is a failure of negotiations not enforcement.

And in China, it is possible to go into court in Beijing and Shanghai and get enforcement of certain intellectual property rights such as copyright infringement of a major brand, under laws that not very long ago did not exist.

So, in a gross sense, trade agreement enforcement, really in most cases self-enforcement, has been positive. There have also been some clear U.S. enforcement wins under the WTO since its establishment in 1995. The Chinese government withdrew a discriminatory rebate of a value added tax on semiconductors when the U.S., the EU, and Mexico challenged it. China also dropped an antidumping case against the U.S. paper industry when imposing a duty would have been contrary to the WTO rules and did not impose mandatory technology transfer in connection with a wireless LAN standard (WAPI) after strenuous opposition from the senior levels of the U.S. government.

As a side note, but an important one, the United States has through a recent erroneous court decision stripped itself of the ability to offset, that is, to countervail, against Chinese subsidies, despite the WTO rules permitting these offsetting measures. The problem is one of our own making and the cure is simple, restore the U.S. countervailing duty law. We are not even availing ourselves of our full WTO rights in this respect. But it is within our power to fix this and we should do so promptly.

That is the good news. The rest of the story is far more troubling.

For a number of countries, almost every gap in coverage of firm unambiguous WTO commitments is being exploited to distort trade and investment. While market forces play a greater role in world trade than ever before, mercantilism has not been banished. The permitting of investment has become a common means to extract technology transfer. E-commerce and transborder data flows are being impaired. Breaches of cyber-security have become a means for stealing technology and business secrets. Competition laws are threatening intellectual property rights. Whole new areas of commerce -- cross border data flows, e-business, advanced business services are not yet the subject of international trade commitments allowing this trade to expand without unwarranted interference. At the same time, the evolution of technology has rendered increasing obsolete past trade liberalization commitments. Local content requirements in many countries have become the norm rather than the exception. The results of WTO trade litigation are at best uncertain and the progress toward putting new multilateral rules into place has not just stalled, it gives every indication of being sidelined for years to come.

## **Major failings of U.S. enforcement of trade agreements**

1. The first deficiency: Lack of good trade intelligence and analysis. The first and foremost requirement for making U.S. trade policy is to understand trade patterns – where trade flows and where it doesn't and why it does not. U.S. exports are expanding, but what intelligence and analysis do we have on what causes the movement across borders of goods, services, and data? What prevents it? We have been too complacent that market forces will determine all outcomes. But many markets are rigged, they are anything but open. Large wind energy projects in China stopped buying foreign companies' wind turbines. Solar panels sold worldwide are increasingly sourced primarily in China. More obvious, half the world's large commercial aircraft are European – and they are very good. Were these simply examples of the free market operating? Of course they were not.

When we assess the effectiveness of current trade law enforcement, for a variety of reasons we look to the record of dealing with problems with China. This is true for a slew of reasons, but the major one is that China is the most rapidly growing large economy, as Japan's was a third of a century ago, that similarly we have a very large trade deficit with China, and because economic organization is in many respects different from our own. The Chinese government has announced that it wants to be predominantly self-sufficient in a range of leading-edge products. We do not have stated goals for industrial self-sufficiency in commercial products. China employs trade and investment measures that largely we do not. And we don't like some of the numbers that we see.

U.S. exports of manufactures grew by 12 percent in 2011, but Chinese exports were up by 20 percent. As a result, Chinese global exports were 57 percent larger than U.S. exports, and on track to double them by 2015. The U.S. deficit rose by \$48 billion, or 12 percent, and the Chinese surplus soared by \$125 billion, or 23 percent.<sup>1</sup>

By no means is most of this due to inadequate trade agreement enforcement or the absence of effective trade rules, but some of it is. Does any of this matter? Did we see any of this coming or and do we have a clear estimate of the direction that may be taken by China going forward? Where is our trade intelligence capability? How good is it? In fact, it is sadly deficient. We are largely operating in the dark.

We appear to have made a start in the right direction with the creation of a trade agreement enforcement task force announced by the President in his State of the Union Message. It is just a beginning. What is needed is a sustained effort spanning years. So we must not expect too much immediately from this initiative, promising as it may be. Committing resources to understanding where the trade enforcement problems lie and what rules might be applicable is at least one first good step.

2. The second deficiency: the need for a private complainant. In our political system, fixing problems when those directly involved have not complained is a thankless task. It is a

natural outgrowth of our domestic legal system -- that the United States is a democracy and a republic and has a generally free market system. Our courts do not operate without a case or controversy presented to them. There are plenty of inequities in the international trading system, but they are by and large only addressed by the U.S. government when a company or industry comes forward and complains. Our international trade law enforcement is therefore almost wholly "in-box driven", imbuing it with a degree of randomness.

The market access problems of China stand in stark contrast to those we had with Japan. China invited in foreign companies, Japan excluded them. Foreign companies are often making profits or hoping to do so in in China -- the largest most rapidly growing market in the world. Their investments may receive locational incentives, as they do in American states or in Ireland. China has become a major source of supply and a major part of an intricate production supply chains. Companies are generally reluctant to sue their major customers, current and future, or for that matter the suppliers on whom they depend. Private companies would consider any positive inducements granted by China as none of the U.S. government's business, and "forced" technology transfer is either something they manage on their own or resist. Companies, depending on the desirability of their technology, have different levels of bargaining power. Companies within an industry and different industries face different problems. Some may face bids whose selection criteria are skewed to prevent foreign companies winning and others may not. A balance of business interests needs to be calculated by each company and trade association. The rule of law is far from perfect in China neither is its economy completely market driven. China is a one-party state, where compliance with government wishes can be rewarded and noncompliance penalized. It is in a sense a "license raj", with numerous requirements for government approvals for conducting business. While China's governance is not monolithic, there is likely some connection between a company getting a license to expand a plant and the its compliance with what may be taken as the requirements of good citizenship, for example in not challenging treatment that is seen by it to be unfair. Divulging bid criteria may be a revealing a state-secret, punishable by imprisonment.

Independent U.S. government intelligence gathering and analysis can at least illuminate somewhat why trade and investment patterns are the way they are, but they do not remove the principal inhibiting factors to action – the absence of vital sources of information from victims of unfair practices and the absence of domestic support for government action. This leaves the U.S. government in many cases hamstrung, as it was for decades in dealing with European subsidies for the development of large commercial aircraft. The circumstances in Europe were very different in most respects from those that characterize issues in China, but they share the essential element of U.S. companies' self-determination of company self-interest.

It is important not to paint this picture in black and white. It is multicolored. It is not just state interference or threats that change investment patterns or make necessarily tolerable China's, India's or Brazil's excessive state intervention. Investment location may be determined by the presence of a needed talent pool, a lower cost base, more favorable tax treatment, a need

to be near to an important end-market, and in some cases the availability of superior infrastructure. Any or all of these factors may be far more important in a decision on locating production. So, again, there is a calculus applied. It would be a mistake to blame multinationals too quickly for finding that there are reasons not to file a formal complaint of a foreign government's objectionable conduct. Many of us might reach the same conclusions were we sitting on the boards of these companies rather than sitting here considering U.S. trade enforcement policies.

### 3. The third deficiency: dealing with the challenge of state capitalism.

The WTO as an effective regime depends upon the assumption that in the main competitive outcomes will be governed by market forces and the rule of law. There is a consensus among China trade experts that the way that China organizes its economy is at odds with these unwritten central theses. In all too many sectors of the Chinese economy, neither market forces nor the rule of law are determining competitive outcomes. While some problems are generally recognized – such as its undervaluation of China's currency, its stated autarkic industrial policy goals (such as evidenced by its policies of promoting “indigenous innovation”) and its inadequate protection of intellectual property, what is less well understood, are the hidden interactions between private parties and state-owned enterprises, between the latter and government financial institutions, or the pressures on investors for transfer of production and technology.

The WTO's rules have not been able to deal with subtle forms of administrative guidance of Chinese enterprises meeting government and Communist party expectations whether conveyed through direct instruction or not. The WTO regulates government measures, and when those measures are hard to detect, enforcement efforts have to focus on the fact that commercial results that would not occur in an open market are not occurring in China in a variety of sectors. In most instances, the WTO rules are not generally designed to deal with shortfalls in results as opposed to specific violations of clear rules.<sup>1</sup>

A related problem is the tendency of China to bring spite cases in other sectors in retaliation for valid cases brought against its WTO-inconsistent measures. This is immature behavior that must not be allowed to be effective in deterring legitimate cases from being brought. In much more dire circumstances, President Kennedy once told the American people:

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<sup>1</sup> One exception is the provision in WTO dispute settlement dealing with "nullification and impairment". *If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation ... [it may bring a case.]* In fact there are obstacles to prevailing in these cases including an examination of what the parties reasonably expected when the obligations were first negotiated.

"aggressive conduct, if allowed to go unchecked and unchallenged ultimately leads to war."<sup>2</sup> We are not talking about anything remotely as serious as that, but about the possibility of a deteriorating trade relationship that will serve neither country's best interests. Henry Kissinger notes in his recent book on China that it is traditional Chinese diplomatic practice to seek to teach a lesson to those countries that it feels have wronged it by reacting with what it sees as a proportionally aggressive response. When a legitimate action is taken against Chinese exports to the United States, China's imposition of a tit-for-tat trade restriction must be made unacceptable.

4. The fourth deficiency: the existing international rules are less than perfect.

The following are just a few prominent examples:

a. *State capitalism and the rule of law.* While China undertook in its Protocol of Accession to the WTO a number of obligations with respect to state-owned enterprises (SOEs) and commitments in this form have been held to be enforceable, no other country had done undertaken far-reaching obligations of this kind. Thus, when SOEs are used as instruments of discrimination, a case must be made out that this is the act of the government and that it constitutes denial of national treatment. Competition in commercial areas from state enterprises is just beginning to become the subject of international investigation and discussion in the OECD and of negotiation in the TransPacific Partnership (TPP). There are no current rules specifically addressing the support by states of their government enterprises nor governing the conduct of these enterprises in the commercial activities in competition with private companies. The incidence of state enterprises is unfortunately expanding rather than contracting. This is true of Post Offices suffering from declining revenues from first class mail and express package delivery and looking to expand to find other sources of revenue. It has been a bone of contention for years between Japan and the United States as Japan Post continues to sell financial products with less regulation and more market access than accorded to private insurers and banks.

b. *The protection of intellectual property.* The WTO Agreement on Trade Related Intellectual Property (TRIPS) provides that systems of laws be put into place to allow private parties to enforce their IP rights. Progress is being made in China through cases being won in local courts (for example the use by Starbucks of its logo), but on the whole the theft of intellectual property in China and many other countries is rampant. The WTO rules guarantee process not results. No country is held liable for the fact that billions of dollars of software and media are simply ripped off. Efforts to stop counterfeiting are made, but need are unequal to the task. There has been no penalty for any government failing to succeed in stamping out the pandemic of intellectual property theft.

c. *The Agreement on Technical Barriers to Trade (TBT).* The WTO rules on standards have proved to have few if any teeth. National standards are adopted that in fact serve as barriers to trade. This becomes critically important when the subject is encryption which can impair all

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<sup>2</sup> President Kennedy's Radio Address on the Cuban Missile Crisis, October 22nd, 1962

of e-commerce. The Standards Agreement does require that: “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” This is all too subjective a rule. In addition, the agreement states the adoption of international standards is generally to be preferred to the adoption of separate national standards. None of this has prevented the use of separate national standards from attempts at walling off domestic markets.

d. *The Agreement on Subsidies and Countervailing Measures (SCM)*. While export subsidies are prohibited as are explicitly import substitution subsidies, other subsidies must be shown to cause serious prejudice to be actionable. This is far from an easy process and requires WTO panel approval to be actionable – that is to obtain their removal (as opposed so offsetting the subsidies in a domestic market through the imposition of countervailing measures). It is not surprising that this form of discipline has proved to be largely ineffective.

5. The fifth deficiency: conflicting policy goals and jurisdictions. Congress has shown a continuing interest in the undervaluation of the RMB. Estimates in recent years have varied from 20 to 40% undervaluation, with it diminishing over time as the rate of China’s inflation eats away at China’s competitive advantage. Two years ago, Fred Bergsten testified before this Committee as follows:

*The Chinese renminbi is undervalued by about 25 percent on a trade-weighted average basis and by about 40 percent against the dollar.<sup>1</sup> The Chinese authorities buy about \$1 billion daily in the exchange markets to keep their currency from rising and thus to maintain an artificially strong competitive position. Several neighboring Asian countries of considerable economic significance—Hong Kong, Malaysia, Singapore and Taiwan—maintain currency undervaluations of roughly the same magnitude in order to avoid losing competitive position to China.*

*This competitive undervaluation of the renminbi is a blatant form of protectionism. It subsidizes all Chinese exports by the amount of the misalignment, about 25–40 percent. It equates to a tariff of like magnitude on all Chinese imports, sharply discouraging purchases from other countries. It would thus be incorrect to characterize as "protectionist" a policy response to the Chinese actions by the United States or other countries; such actions should more properly be viewed as anti-protectionist*

A year ago Fred Bergsten pointed to progress being made:

*They have been letting [the real exchange rate] go up an average of 10 to 12% on an annual basis so it’s fair to say that if they would let that continue for another couple of years they would achieve a restoration of underlying equilibrium in the exchange rate. That would take away most, if not all, of the distortions that their persistent interventions have created.*

The WTO has a rule contained in GATT Article XV that “Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement”. Whatever the undervaluation of the RMB, it swamps current U.S. and Chinese average tariff levels. Why doesn’t market intervention which lowers the exchange rate of a currency reach a level where it passes the Article XV test of “frustrating the intent of the [WTO/GATT] Agreement? If not now, two years ago? Governments have to be willing to invoke the WTO rules otherwise they are simply a dead letter. Would the US Treasury during any of this period have told USTR to file a WTO/GATT Article XV case against China? Not likely.

6. The sixth deficiency: WTO dispute settlement has difficulty with factually complex cases. The WTO has no real means to investigate the facts in any case. Panels sift through increasingly voluminous submissions of parties. Dispute settlement panels, as opposed to national governments, do not assume that anomalous failures to achieve success in one market while achieving far greater successes in other -markets are due to restrictive government measures, nor are they disposed to finding a violation when state-owned and state-influenced enterprises achieving the same market closure that the government could have achieved by fiat. That is said to be in the realm of competition policy. But what is international trade about other than competition. Trade rules are a form of competition policy. One step in the right direction would be an amendment to the WTO Dispute Settlement Understanding that shifts the burden of proof to the Member alleged to have closed its market through its state-owned and state-supported enterprises if a pattern of behavior exists suggesting intentional market closure.

7. The seventh deficiency: WTO dispute settlement must be judged not by press releases announcing victory (often there are two conflicting press releases, once from each party, both claiming success. Successful litigation can only be judged by commercial success. Is IP protection really delivered in a broad and meaningful way when an IP case is won? Is a market that was closed (such as China’s market for wind energy equipment) now open? Were the programs complained of dismantled and were they the ones that really mattered? Or did the “successful” case prove to be entirely marginal in effect? This is not a comment limited to the effectiveness of the WTO rules. Succeeding in litigation requires having the facts, the facts lending themselves to a finding of one or more violations, bringing the right case to begin with (covering enough of a large number of reinforcing protectionist measures that are preventing market access), the case being well-presented, the WTO dispute settlement panel and its supporting secretariat staff doing an unbiased and solid job, winning on appeal, and obtaining the necessary implementation to obtain the desired result – all in a timely enough manner to matter -- and not least, seeing positive results in the marketplace.

### **Some Potential Cures for Consideration.**

It is easier to cite what is wrong with trade law enforcement than to provide a sure-fire set of remedies. But there are elements that emerge from the above discussion that are useful to consider (some of which are underway):



- Vastly improve the government's intelligence gathering and analytical capabilities. This requires a long term and substantial investment of resources.
- Work more actively with the private sector in this process.
- Unify the Executive Branch's policies and priorities (eliminating the silos that exist among and within agencies), and consult closely with Congress to obtain support for the policy course chosen, including through permanent trade agreement implementing procedures and regular formal policy guidance.
- Build a stronger international community of interest in dealing with trade and investment distortions (a number of countries are doing very well in exporting raw materials to China, for example, but this distorts the long term development of their economies – it has effects not dissimilar to those of 19<sup>th</sup> century colonization).
- Work more closely with countries with allied interests to share information and analysis, engage in diplomatic initiatives and litigation as appropriate.
- Provide greater transparency. Illuminate practices that distort trade and investment or give particular companies, especially state-owned and state-supported companies a competitive advantage. Transparency is an antidote to arbitrary decision-making. There may be no substitute for it. Make regulatory coherence an important objective of U.S. policy.
- Identify additional sources of leverage in the U.S. regulatory structure.
- Where the stakes are high, litigation risks need to be re-calibrated. The transparency and exchange rate provisions of the WTO/GATT (Articles X and XV) cannot be allowed to be considered as dead letters. Amend the WTO Dispute Settlement Understanding to shift the burden of proof to the Member alleged to have closed its market through its state-owned and state-supported enterprises if a pattern of behavior exists suggesting intentional market closure.
- Adopt a policy that measures progress by results in the market place rather than simply additional assurances in settlement of a trade complaint.
- Do not conclude that the United States simply lacks leverage in dealing with unfair trade and investment practices with respect to any country which runs a substantial and persistent trade surplus with the United States.
- An independent U.S. government judgment is needed of the national interest and therefore the priority to be given to matters for negotiation and litigation, fitting in with an overall strategy. Not every private complainant need have the largest trade at stake to gain U.S. government attention, but the country should have a strong interest in the outcome when including such matters in its priorities.
- Make retaliatory foreign restrictions more costly to the foreign government imposing them when the foreign measures are responses to legitimate U.S. trade actions.

- Return the term "reciprocity" to the American trade lexicon – not in any narrow self-defeating sense, but in requiring liberalization in fact in return for our maintaining an open market.
- Negotiate new rules where there are gaps in existing disciplines or new problem areas are identified. Begin the process of closing loopholes. One of the hardest to deal with will be what governments feel justified in doing in the name of their "essential security". This WTO clause must not become a cover for protectionism.

### **Trade agreement negotiating priorities**

I am putting the following thoughts forward for your consideration both on behalf of the National Foreign Trade Council and myself:

Setting priorities. Our trade negotiation priorities have to be set as intelligently as possible, not by simply what lands in the in-box. We have entered into some of our FTAs too often by chance rather than planning. What should we be aiming at now?

- It is critical to pursue a multilateral agenda at the WTO. There is significant benefit to modernizing rules and pursuing new market access at the WTO even if it is impossible to move forward with a comprehensive and unanimous undertaking such as the Doha Round. The National Foreign Trade Council recently released a report on “A 21<sup>st</sup> Century Multilateral Trade Agenda,” which I commend to you. I would like to attach the report for the record.
- What we cannot achieve at the WTO we should accomplish regionally. We are blessed by the appearance of TPP – the Transpacific Partnership. We did not invent it, but it can serve as a model for the architecture of the world’s trade rules going forward.
- We know that American companies are very good at providing business services. We need a services trade agreement. Estimates are that the number of additional US jobs by opening up global services markets could be as high as 3 million jobs<sup>ii</sup>. And the benefits would not only be here but global, as foreign economies grow and became more efficient. USTR Amb. Michael Punke is working hard to see whether the WTO can be a forum in which a services agreement can be achieved, not ten years from now, but within the near future. TPP is most likely to be where the first progress on services will be made – on a negative list basis – meaning simply if a country does not negotiate to exempt a service from liberalization it will be open to international competition.

- We know that American companies are the best in the world at providing data services. The internet and cross-border data flows have grown exponentially since the WTO rules were put into place. Countries are acting to inhibit this essential new element of global commerce. This unwarranted interference must be stopped, for their sake and for ours. Our trade agreements have to be brought into the information age. Information, communications and technology goods and services should be both duty and tax free -- and not subject to domestic taxes on the basis of use. When an African government or our own taxes communications, it and we tax economic growth.
  
- We know that state-owned companies are a growing distortion of world trade in many sectors, rendering in many respects nearly meaningless many of those fine rules negotiated into the WTO. For the first time the United States is pressing within the Transpacific Partnership (TPP) to create rules that will curb the distortions caused by competing with state-backed companies – companies supported with below-market rate finance, that have preferential access to government networks, and that are regulated less stringently than private competitors. This is the story of market limits in existence in many sectors in China, and it is the story of Japan Post banking, express delivery and insurance. We even have proposals floated at home to get our own Post Office more deeply into competing with the private sector with unfair advantages, and Americans are proposing this SOE expansion abroad in the Universal Postal Union while opposing it in international negotiations in TPP. Why do we want to head further in the direction of Japan and China while preaching to them the benefits of private market? Indeed, although Japan’s industrial policy regime no longer functions as it once did thanks to more than 30 years of trade negotiations and reforms emanating out of lessons learned from bursting of its asset bubble, Japan’s legacy remains as a model for state developmental capitalism. In this context, ensuring a level playing field for U.S. companies with respect to competition with the postal bank, insurance, and delivery in Japan, where rule of law and democracy are firmly established, is critical for U.S. trade policy as a precedent for China Post, India Post, and others.

U.S. strategy has to be to ensure that the market model, not the state-dominated model prevails. This has to be a top American trade priority. At least in TPP, we are seeking disciplines over state-owned enterprises. Someday the TPP rules on state-owned enterprises will apply to China. TPP is not designed to exclude China, but ultimately to include it. Our market-based system is superior to theirs – a mixture of market and state-developmental capitalism.

- We know that alternative sources of energy are essential to our future and to the futures of our trading partners. Environmental goods and services must be made duty and barrier free. This is not about whether one believes in climate change or not. It is about whether one can take a deep breathe in Beijing or Caracas and not shorten one's life. America and her trading partners will improve their lot in so many ways if this agreement is attained, one hopes in the WTO, but certainly in TPP.
- We know that as tariffs come down, border procedures in many countries strangle trade. Trade facilitation would enhance our economic growth and that of every signatory. We can try to achieve agreement in Geneva, and we will do it in TPP.
- We know that with tariffs in many countries being lowered, internal regulations often stifle trade. TPP will begin to address this problem under the heading of regulatory coherence. It is a small start, but it is a start.
- We need to enter into serious formal trade liberalizing arrangements with Japan and Europe. We are cut off at present in the WTO from doing so, but TPP is an open and good opportunity to make Japan a full partner in deep and meaningful liberalization, in a way that was not possible in any bilateral agreement. Europe has reached a stage of internal integration where it should be a ready partner for us, to look outward across the Atlantic and open trade possibilities more deeply than is possible with any other trading agreement among equals.
- We should not forget about the FTAs that we do not have or that need improvement. Why should European goods get preferential access to Canadian provincial procurement? We entered the GATT 65 years ago to end Imperial Preferences. Why should we sleep through their being reinstated, with the sole difference that 27 European nations will be the beneficiaries? And is there more to be done with Brazil and India? Worth examining closely.
- We need to care more about all aspects of the fairness of trade. The WTO/GATT limits subsidies, prohibiting some, regulating others. It prohibits trade in goods of prison labor. Our consumers are given a choice to purchase fair traded coffee – made from coffee beans that provide a fair return to growers. Progress has been made on anti-corruption. An intensive effort is needed to consider what improvements are needed in defining what is fair and not fair in trade.
- We need to assure that our trade agreements allow for the movement of highly skilled persons across borders, and in our case, are allowed to stay. We have the best education system in the world but won't allow the PhDs and Masters graduates to

stay here. Why can't we recall that about one-third of Silicon Valley companies were founded by persons born elsewhere? At Intel, one of the three founders was born in Hungary. Our space program was the brain child of a German scientist, and our nuclear energy the product of an immigrant from Italy.

I will conclude this section with a few procedural notes:

- Congress has to be a full and equal partner in setting national trade priorities, and that has not been the case for years now. The absence of trade legislation (most recently called "Trade Promotion Authority) has not been to the advantage of Congress but allowed administrations to wander about the trade landscape without your guidance.
  - You should decide how you want to work with the executive, in what was called variously fast track and Trade Promotion Authority, and make it permanent. The Treaty Power is permanent and has been workable. No overly complex device needs to be created, just a means for the two branches to work together in an area of vital national interest in which neither can act alone.
  - You need to adopt a substantive trade negotiating mandate with objectives and priorities to give guidance to the every President, and update it at least for each new Administration.
  - Doing so could be enhanced by your being advised by either a standing commission, like the Williams Commission that preceded the GATT's Tokyo Round, or *ad hoc* committees to examine new and possibly contentious complex issues, particularly where there are divided domestic interests, to hold in-depth hearings and finance studies, to assist you and to inform the Executive. There is not a trade negotiation policy planning process within the U.S. government at present equal to the task of sifting through these issues and providing adequate advice.
- A word is in order about the role of the private sector. The great strength of the U.S. negotiating position has been the private sector advisory process. As it was devised, there was none that was its equal in the world. Our negotiators, including me as a complete skeptic, knew more than any other country's negotiating team about what we needed that was of value and what we could trade for what we needed. This structure needs to be revitalized, strengthened. Those best able to translate business objectives into practical public policy should be thoroughly engaged, rather than barred from service. Of course they represent private sector interests, that is what they are there to do -- whether they are paid by the year, by stock options, or by the hour. But there needs to be full and complete financial disclosure – the negotiators

need to know exactly what personal or company benefit would accrue to following the advice of those giving it. This may seem like a minor item. It is not. Our government does not run many businesses, thankfully. There is no reason why government should know without having private sector interests very close at hand whether what they get or give in any negotiation will create jobs in this economy. It is a perversion of government to cut itself off from whomever the private sector believes best articulates their interests.

## **Conclusion.**

Tomorrow morning I leave for Melbourne to represent the NFTC, one heck of a long way to go to be part of the cheering section. But I want to find out more about what is taking place and assist if I can in any way. TPP is the world's only live and exciting trade negotiation in which the United States is involved. One thing that I wish to convey is that those TPP participants that employ state-owned enterprises have an interest in disciplines being put into place on how these government enterprises compete in commercial markets. Participating countries in TPP should negotiate with full awareness that it is more than a vague possibility that some other country will have a larger SOE that will distort competition in a manner harmful to their interests. TPP is exciting and important because it has the real potential to set the future rules for trade in a way that I regret the WTO has not been able to continue at this time. I hope that TPP will become a good template for the new rules that ultimately govern global trade through the WTO.

I will close with the "additional remarks" that I appended to a Council on Foreign Relations Task Force Report released last September on *U.S. Trade and Investment Policy*:

*There is no acceptable substitute for the United States exercising leadership in shaping the international economic environment to foster its interests. There is no pause on the part of other countries pursuing what they see as their own trade interests. Bilateral and regional arrangements excluding the United States are proliferating. Inaction by the United States in proposing international trade initiatives has adverse consequences. It can only lead to U.S. goods and services receiving less favorable treatment than that accorded to competitors from other countries.*

*Realistically, the United States is not going to close its market; the primary challenge for U.S. trade policy is maintaining and further opening of foreign markets. Success in gaining benefits from trade agreements, past and present, depends most heavily on domestic policies—creating the conditions for America remaining a primary location for innovation— which includes not only invention but production. [U.S. trade policy must] clearly build on a foundation of domestic policies that foster American economic strength, including the creation of good jobs in sufficient quantity.*

*The thrust of American policies after the Second World War has been to define its own interests broadly as fostering global economic growth. Trade agreements today must address additional common interests—access to food to enhance food security, access to*

*critical raw materials to avoid dislocations of supply, assuring food and product safety in a manner that does not constitute protectionism, adding disciplines for state-owned and state-supported enterprises that compete with private companies, creating free trade in environmental goods and services, and similarly improving access to information and information and communications technology goods and services, among a substantial list of priorities.*<sup>iii</sup>

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<sup>i</sup> Ernest Preeg, *US and Chinese Manufacturing Trade Imbalances Surge in 2011*, The Manufacturers Alliance for Productivity and Innovation (MAPI) February 2012.

<sup>ii</sup> Bradford Jensen, presentation at the Peterson Institute, *Global Trade in Services: Fear, Facts, and Offshoring*, 2012.

<sup>iii</sup> <http://www.cfr.org/trade/us-trade-investment-policy/p25737>