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FREE TRADE AGREEMENT IMPLEMENTATION: LESSONS FROM THE PAST

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FREE TRADE AGREEMENT IMPLEMENTATION: LESSONS FROM THE PAST

THURSDAY, MARCH 3, 2016

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Cornyn, Thune, Coats, Wyden, Cantwell, Carper, Cardin, Brown, Bennet, and Casey.

Also present: Republican Staff: Everett Eissenstat, Chief International Trade Counsel; Douglas Petersen, International Trade Counsel; Andrew Rollo, Detailee; Kenneth Schmidt, Law Clerk; and Shane Warren, International Trade Counsel. Democratic Staff: Joshua Sheinkman, Staff Director; Elissa Alben, Senior Trade and Competitiveness Counsel; Michael Evans, General Counsel; Greta Peisch, International Trade Counsel; and Jayme White, Chief Advisor for International Competitiveness and Innovation.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH, CHAIRMAN, COMMITTEE ON FINANCE

The CHAIRMAN. The committee will come to order.

I understand, again, some people have strong feelings about this subject we are talking about today. That is fine, and we respect you. The First Amendment guarantees your right to express your views, but we have to allow a civil discussion to occur in the context of this hearing. So for any friends who are protesting, I ask that you respect the rights of others, respect this committee, and remain quiet so that the hearing can continue.

We are very happy to have all of our witnesses here today. I would like to welcome everyone to this morning's hearing.

Last year, with the passage of our bipartisan legislation to renew Trade Promotion Authority, or TPA, Congress provided the administration with the necessary tools to negotiate and conclude trade agreements to further open foreign markets to American goods and services. In doing so, Congress included high-standard negotiating objectives that must be achieved for any agreement to be eligible for expedited TPA procedures in Congress.

But setting the appropriate negotiating objectives is only the first step in the process for concluding and implementing trade agreements. Once those high standards are set, the administration must consult closely with Congress and stakeholders throughout the negotiations. And once an agreement is concluded, Congress must

closely scrutinize the agreement to determine whether it meets the high standards of the TPA statute and whether it is eligible for expedited TPA procedures in the House and Senate.

That stage—the stage where Congress closely scrutinizes and evaluates a trade agreement—is where we are with regard to the Trans-Pacific Partnership, or TPP, the trade agreement most recently signed by the Obama administration.

Ultimately, a high-standard free trade agreement only takes effect once Congress passes implementing legislation pursuant to the narrow legislative scope of TPA. But even when that process is complete, our work will not be finished. In many ways, the hardest work will just be beginning.

After a trade agreement is approved by Congress, the administration must make sure that our trading partners fully and faithfully implement their obligations under that agreement before allowing the agreement to enter into force. After all, a strong trade agreement that is not fully and faithfully implemented and enforced is not worth much more than the paper it is written on.

It is that part of the puzzle—full and faithful implementation—that we will examine today. As a guidepost for this examination, we will look at some of the lessons we have learned under our existing trade agreements to see what has worked and where we can do better in the future.

Over the past 3 decades, the United States has entered into 14 free trade agreements with 20 countries. Each of these agreements has provided significant economic benefits to the United States, as well as those countries. In fact, although these 20 countries represent less than 10 percent of the global economy outside the U.S., they purchase almost half of all our Nation's exports.

Further, on average, in the first 5 years after a free trade agreement enters into force, U.S. exports to these partners have grown roughly three times more rapidly than the global rate of growth for U.S. exports generally. Just as important, free trade agreements have provided significant cost savings and expanded choices for U.S. consumers.

However, despite these significant gains, there is widespread agreement that many of our partners in existing free trade agreements have not fully and faithfully complied with all of their obligations under our agreements. Just yesterday, I sent letters to the Korean and Colombian ambassadors to the United States outlining my concerns with their countries' implementation of and compliance with the U.S.-Korea and the U.S.-Colombia free trade agreements. In addition, a review of stakeholder submissions to the administration, in connection with mandated reports to Congress, including the Special 301 Report, suggests that many of our trading partners have not implemented, or are out of compliance with, their international trade obligations.

Now, while there are many examples across the board, this problem seems to be most pronounced when it comes to implementation of intellectual property rights protections. This is true with regard to trading partners across the globe, including many TPP countries. And, all too often, those countries are never held accountable for their noncompliance. Thus, they get the benefits of a negotiated

trade agreement with the United States without fulfilling all of their obligations. This is, to put it bluntly, unfair, and it must stop.

Last year, with a number of different pieces of legislation, Congress developed new tools to address these concerns. For example, we included language in the TPA statute requiring enhanced consultations before the administration may allow any trade agreement to enter into force. We also established the Interagency Center on Trade Implementation, Monitoring, and Enforcement within the Office of the United States Trade Representative, or USTR, to monitor our trading partners' implementation of trade agreements and to assist in investigating violations of trade agreement obligations. We also established a Chief Innovation and Intellectual Property Negotiator at USTR, with the rank of Ambassador and required Senate confirmation, whose responsibilities include enforcing the intellectual property rights obligations of our trade agreements. Furthermore, we established a trade enforcement trust fund of up to $15 million a year for use in improving the ability of USTR to monitor and enforce existing trade agreements.

Despite these new tools, I know that there is much more that can be done, so today we are going to examine the implementation of our existing free trade agreements and see what lessons can be drawn. We have some very accomplished witnesses here with us from a variety of sectors, including agriculture, high-tech, the environment, and intellectual property. I am very much looking forward to these testimonies and to what I hope will be a robust discussion of how the U.S. Government can more effectively ensure that our workers, consumers, and job creators receive the full benefits of our international trade agreements going forward.

[The prepared statement of Chairman Hatch appears in the appendix.]

The CHAIRMAN. With that, I will turn to Senator Wyden for his opening remarks.

OPENING STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you very much, Mr. Chairman, and I think this is an important hearing.

I believe deeply in the benefits of trade. In America, trade-related jobs often pay better than do the non-trade jobs. And there are going to be a billion middle-class households in the world by 2023 with money to spend on American-made goods. So it is my view that we need to make things here, we need to add value to them here, and we need to ship them around the world.

Now, I see my good friend Senator Coats here, and Senator Donnelly brought to my attention—and I am sure Senator Coats is focused on it too—what just sounds like heartbreaking news in Indiana, where Carrier Corporation and United Technologies Electronic Controls have announced that they are shuttering their plants and heading to Mexico. Senator Donnelly talked with me about it again just yesterday. These are factories that have been around for decades, supporting the livelihoods of so many working families.

When you are a worker caught up in an awful situation like this, it has to just curdle your blood when you hear some callous line from an executive about how it is "only business," and the company

is going to "synergize its inputs and maximize efficiencies." It must make workers who have been at this plant—and this is the story all over America—just feel like they are a little cog in a machine that they have no power to influence.

My number one goal, when it comes to the cutthroat global economy, is to fight with everything I have for American workers. I believe we have to have trade policies that spur the creation of red-white-and-blue jobs that can support a middle-class family in Oregon and around the country. And I want to make sure American workers and American businesses, and more of them, get into the economic winner's circle when they compete with foreign firms.

You do that by enforcing the rules here at home, stopping unfair trade before it hurts American workers and families. And you do it by writing new rules overseas. That means engaging with other countries, hammering out commitments in trade agreements that countries will drop unfair barriers to products made in our country. You get commitments to raise the bar on issues such as labor rights so that companies are not lured away from the United States by opportunities to kick around cheap foreign workers. You get commitments on environmental protections so that countries do not turn a blind eye to practices like illegal fishing or the sale of stolen timber that often undercuts American producers and does harm to the environment. You prevent a race to the bottom, you close loopholes and end outdated policies, and you bring the world up to our standards.

Then you have to enforce the agreements. The landmark package of enforcement measures put together by this committee—and very recently signed into law—is a major step forward. In the past, trade policies were often too old, too slow, or too weak to fight back when bad actors overseas found ways to rip off American jobs. Our tough, new game plan on enforcement is going to help change that. And I just saw some evidence yesterday that our new approach to trade policy is going to pay off. Last year, Senator Brown and I worked together to close an egregious, old loophole in our trade laws that allowed for certain products made by slave or child labor to be imported to this country if there was no producer here at home. Under this loophole—make no mistake about it—economics trumped human rights, and Senator Brown and I said that was wrong, that it was just 100-percent wrong. So we wrote a provision that closed it. And yesterday, in my hometown, the *Portland Business Journal* ran a story about how our crackdown on imports made with slave labor has the potential to make big improvements in the chocolate industry.

There was a company featured in this story, Tony's Chocolonely, that just set up its U.S. headquarters in Portland, and it is going to make a big push to source cocoa without exploiting slave labor or child workers. One of the company's leaders said in the story just yesterday, "The impact of this law"—our bipartisan law—"will depend greatly on how it is executed and enforced." Not only is that true when it comes to ending slave labor, it is true in all our trade laws and agreements. Enforcement is vital, and the first step in the enforcement of a trade agreement is getting implementation done right. The United States cannot allow countries to backslide on their promises before a trade agreement even goes into effect.

Our trading partners have to take the commitments they have made at the negotiating table and turn them into action before they see benefits. That means writing or updating laws and regulations and dropping unfair barriers so that American workers get the fair shake they have been promised.

Now that the President has signed the Trans-Pacific Partnership agreement, I believe that consultations on its implementation will pick up steam. Confidence that the TPP will be implemented the right way is an absolute prerequisite for the agreement to win the support it would need to pass in the Congress. I see this hearing as an opportunity to identify many of the pitfalls and opportunities in the implementation process. And it is going to be very helpful down the road when it comes time to implement any trade deal.

Mr. Chairman, I just want to make one last comment, because I am so appreciative of the work that you joined me in with respect to the new transparency requirements. In the past, the American people basically were in the dark with respect to trade legislation. And when you believe in trade and you believe in it strongly, you should not have any problems talking about it in public. If you do not, it just looks like some other sleazy thing is going on in Washington. So Chairman Hatch worked very closely with me, and the full text of the TPP has been in the hands of the American public since 60 days before the President signed it. And we insisted on that; the two of us on a bipartisan basis insisted that we have that kind of transparency.

So what this means—and I will close with this, Mr. Chairman—is everybody in America can come to a town hall meeting of their Congressperson or their Senator and sit in the audience with this agreement in full, draw their own conclusions about it, ask questions, voice their opinions to their elected representatives. And adding this sunlight was just absolutely key to establishing what I believe we have to work for in the days ahead, and that is, trade done right. So I hope everybody will use this new transparency requirement.

Mr. Chairman, I want to thank you again, because we put in a lot of time on these transparency provisions, because we both felt it was time for some new sunlight, and everybody in America who is paying attention to this trade debate can now come to one of their legislators' town meetings with the full agreement in their lap to ask questions of their elected officials. And I thank you.

The CHAIRMAN. Well, thank you, Senator. I am happy to work with you.

[The prepared statement of Senator Wyden appears in the appendix.]

The CHAIRMAN. Now I would like to take a few minutes to introduce today's witnesses.

Our first witness is Mr. James Mulhern, the president and CEO of National Milk Producers Federation, or NMPF, a position that Mr. Mulhern has held since January of 2014. Before taking on this role, Mr. Mulhern spent 30 years in agriculture and food policy. In fact, Mr. Mulhern served as NMPF's government affairs director back when the 1995 farm bill was debated. Between his first stint with NMPF and his current role, Mr. Mulhern served as Senator Herb Kohl's chief of staff, worked as managing partner for Watson

Mulhern LLC, and provided expert counsel to a host of Fortune 500 companies. Mr. Mulhern is a graduate of the University of Wisconsin, Madison, with a degree in agricultural journalism.

Our second witness is Sean Murphy. In his role as vice president and counsel for international government affairs, Mr. Murphy manages Qualcomm's international public policy agenda. Before joining Qualcomm in 2001, Mr. Murphy practiced international trade and regulatory law in Washington, DC in the office of a major international law firm, and from 1993 to 2000 held a number of positions at the Office of the United States Trade Representative. Mr. Murphy holds a bachelor's degree in political science from the University of California, Santa Barbara, a master's degree in international relations from the University of Cambridge, and a law degree from Georgetown University Law Center.

Our third witness is Mr. Glenn Prickett, the chief external affairs officer at The Nature Conservancy, or TNC. Before joining TNC in January 2010, Mr. Prickett spent 2 decades working on international environment and development policy. His prior experience includes 13 years at Conservation International, the United Nations Foundation and the U.S. Agency for International Development during the Clinton administration, and the Natural Resources Defense Council. Mr. Prickett graduated from Yale University with a B.A. in economics and political science.

Our final witness today is Mr. Steven Tepp, the president, CEO, and founder of Sentinel Worldwide, an organization that provides intellectual property, legal, and policy counsel to companies and associations with an interest in protecting intellectual property. Mr. Tepp also teaches intellectual property at George Washington University Law School. Before forming Sentinel Worldwide, Mr. Tepp was chief intellectual property counsel for the Global Intellectual Property Center of the U.S. Chamber of Commerce as well as Senior Counsel for Product and International Affairs at the U.S. Copyright Office for many years. But before all that, Mr. Tepp got his start in Washington working for me when I was the chairman of the Senate Judiciary Committee. Mr. Tepp received his undergraduate degree from Colgate University and graduated with his law degree from American University's Washington College of Law.

I want to thank you all for coming. We will hear the witness testimonies in the order that they were introduced. So, Mr. Mulhern, if you will proceed with your testimony, we would appreciate it.

STATEMENT OF JIM MULHERN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MILK PRODUCERS FEDERATION, ARLINGTON, VA

Mr. MULHERN. Thank you very much, Mr. Chairman, Senator Wyden, and members of the committee. It is a pleasure for me to be here this morning to talk on behalf of America's dairy farmers and their cooperatives on issues that our industry has encountered in the implementation of prior free trade agreements.

As I think all of you know, dairy exports have become a very important, critical component for the U.S. dairy industry. Over the last 15 years, exports have increased fivefold, reaching a high of over $7 billion a year in 2014. So this is a very important issue for us, and that growth has coincided with the development of a num-

ber of free trade agreements: the Uruguay Round and numerous other U.S. FTAs. Those agreements have tackled many of the tariff and nontariff barriers that have confronted or been problematic for our industry in the past.

Most of the FTAs that we have worked on are working well. But in certain cases, we have found it necessary to work hard to ensure that the market access terms that the agreements have put in place are not subsequently undermined. And sometimes we have had to work harder on that than we did to negotiate the agreements themselves. In my written submission, I noted a number of measures that Canada, for example, has implemented over the years to block U.S. dairy exports and to isolate their dairy industry from even the very limited degree of imports that resulted from NAFTA and the earlier U.S.-Canada FTA.

One example is the shift in 2007 that Canada made in its cheese standards, a shift that was designed to restrict the import of U.S. dried milk imports. And even just since the conclusion of the TPP negotiations recently, Canada has already been considering expanding this to include a restriction on the use of ultra-filtered milk, a product that we currently export to Canada on a duty-free basis. So if Canada is allowed to continue with this pattern of eroding even existing limited U.S. dairy market access, frankly, we are concerned about whether new trade commitments with them will benefit our dairy industry in practice.

By contrast, I should note that our other NAFTA trading partner, Mexico, has been a much more reliable trading partner, and where problems have arisen, our government has worked with theirs to work those out.

One of the newer FTAs we have been engaged in with South Korea has also experienced some early bumps in the road for dairy, but the administration took quick action, prior to the approval of the agreement and during its early stages of implementation, to ensure that Korean officials worked with our government to resolve most of them.

So the reality of our experience is that our trading partners may often seek creative ways to improperly exploit the terms of a trade agreement despite what the agreement may say. And where our trading partners have persistently demonstrated a willingness to circumvent their trade commitments in a certain sector, as is the case with Canada and dairy, additional measures that are specifically focused on the problem, in our case the dairy issues, are needed to curtail the problem.

We believe the best window of opportunity to do that is during the implementation phase prior to congressional consideration of an agreement. It is important with TPP, as this hearing is going to consider. It is also important with TTIP, given the increasing focus on those negotiations, because when it comes to dairy, the EU is very much like Canada with respect to regulatory and technical barriers to trade. We are, frankly, very concerned about the lack of progress in finding dairy-specific solutions to addressing those issues in the TTIP negotiations to this point. And given our past experience, we do not believe that TTIP is currently on the right track for a successful and truly market-opening conclusion when it comes to dairy.

In addition to the critical SPS and other traditional nontariff constraints we face in accessing the EU market, I have to stress the importance, both in TTIP and globally, of the threat to our industry posed by the EU's geographical indications strategy. It is essential, in our view, that the U.S. Government protect our trade rights from the onslaught of EU efforts to bully our trading partners into blocking imports of products that use names the EU wishes to reserve for itself through its overly broad GI restrictions.

Mr. Chairman, my time is running out here, so let me just say that we appreciate the work of this committee, Chairman Hatch, Senator Wyden, other members of the committee, on the issues that we have dealt with in TPP. We appreciate your supporting our efforts on the GI issue in the TTIP negotiations. And we look forward to working with members of the committee to address the critical implementation issues in TPP and will continue to work both with you and the administration to develop more effective ways to avoid trade barriers as well as to resolve problems as they arise. And I want to note in closing that we do see progress on that front. Just yesterday, USTR announced it has made progress with our CAFTA partner, Honduras, in working on a problem with GI issues there that resulted from the EU-CAFTA Free Trade Agreement.

So progress can be made on these issues. We appreciate your support and your help in those efforts as well as those of the administration.

[The prepared statement of Mr. Mulhern appears in the appendix.]

The CHAIRMAN. Well, thank you.

Mr. Murphy?

STATEMENT OF SEAN P. MURPHY, VICE PRESIDENT AND COUNSEL, INTERNATIONAL GOVERNMENT AFFAIRS, QUALCOMM INCORPORATED, SAN DIEGO, CA

Mr. MURPHY. Chairman Hatch, Ranking Member Wyden, and members of the committee, I am pleased to be here today to discuss the critical topic of lessons learned from existing FTAs. I represent Qualcomm, which was founded in 1985 and is a world leader in next-generation mobile communications technologies. If you have a smartphone, tablet, or other smart device, you are using Qualcomm's technology.

International trade is critical to our business. Last year, Qualcomm generated more than 90 percent of its $25 billion in revenues outside the United States. Because open markets and strong patent rights are essential to our business, Qualcomm has been and remains a strong supporter of trade agreements, in particular of KORUS and the TPP.

We know the value of an FTA depends entirely on the extent to which it is implemented and enforced, and based on that, I offer four recommendations to help improve FTA implementation in the statement that I submitted. First, we should ensure that U.S. trade enforcement officials have sufficient resources to do their jobs. Second, we should make better use of existing trade tools in parallel to dispute settlement. Binding dispute settlement is critically important, but litigation takes time, and it is not the only means

available to ensure compliance. U.S. trade officials have other tools at their disposal, including formal government-to-government consultations, dedicated working groups that oversee specific FTA chapters, and the statutorily mandated reports that publicly identify trading partners for patterns of noncompliance. Third, we should expand the administration's FTA enforcement tool box. This may require new carrots and sticks to help motivate FTA compliance and could be modeled after the so-called snap-back provisions in the KORUS FTA. Finally, the administration should consult with the private sector to complete an FTA compliance checklist before the President certifies that any given agreement is ready to enter into force. As Chairman Hatch stated earlier, before an FTA to which the United States is a party can enter into force, the President must first certify that the trading partner has implemented all obligations that are to take effect on day one. The U.S. private sector is on the front lines in these foreign markets and is likely to have important insights whether an FTA partner has adequately updated its domestic regime consistent with its FTA obligations. The administration should seek the private sector's views to validate a precertification checklist or inventory to determine whether and when Presidential certification is appropriate and the agreement is ready to enter into force. What I am proposing is like a pre-flight checklist a pilot would use to ensure all systems are go before takeoff.

Qualcomm's recent experience in Korea underscores the importance of getting things right before an FTA enters into force. Since KORUS took effect 4 years ago, Korea's antitrust agency, the Korea Fair Trade Commission, or KFTC, has stepped up its enforcement activity, resulting in some 40 antitrust or consumer protection cases against American companies, including Qualcomm. Senator Hatch, you spoke eloquently about this in your letter that you issued yesterday. Thank you for calling attention to this issue.

One of the important benefits of KORUS, which was critical to private-sector and congressional support for the agreement, is the important procedural safeguards in the competition chapter. These obligations are intended to enhance due process and transparency at antitrust proceedings. Specifically, the KFTC must provide respondents in antitrust cases with the opportunity to "review and rebut the evidence and any other collected information upon which the agency's determinations may be based," and "to cross-examine any witnesses or other persons giving evidence in a hearing." Korea, however, has not adopted these important procedures and safeguards, which are fundamental to due process, explicitly required by the KORUS, and consistent with international best practices.

A precertification checklist like I described might have identified these deficiencies before KORUS took effect. The U.S. Government would have had notice and opportunity to ensure that Korea's antitrust procedures were fully compliant with KORUS obligations prior to presidential certification of KORUS and its entry into force.

I hope these recommendations will help advance the discussion about how to improve free trade agreement implementation. Thank

you again for holding this important hearing and for the opportunity to share Qualcomm's views on this important topic.

I welcome your questions. Thank you.

[The prepared statement of Mr. Murphy appears in the appendix.]

The CHAIRMAN. Well, thank you very much.

Mr. Prickett?

STATEMENT OF GLENN PRICKETT, CHIEF EXTERNAL AFFAIRS OFFICER, THE NATURE CONSERVANCY, ARLINGTON, VA

Mr. PRICKETT. Thank you, Mr. Chairman, Ranking Member Wyden, and members of the committee, for the opportunity to share the views of The Nature Conservancy on implementation of international trade agreements. It is very fitting that we meet on World Wildlife Day today. As I will explain, trade agreements, if properly implemented, can make a difference in protecting endangered wildlife and the habitats they depend on.

The Nature Conservancy is the world's largest conservation organization, with over a million members and supporters. We work in the field around the world in 69 countries and all 50 States to conserve the lands and waters on which all life depends. We continually face environmental challenges caused by illegal or unsustainable patterns of trade, particularly illegal trade in wildlife and timber, and illegal and unsustainable fishing practices. Addressing these threats is essential if we are to secure the health of the world's forest, oceans, and wildlife for the benefit of current and future generations.

The Nature Conservancy has strongly supported and welcomed the increasing levels of environmental protection in trade agreements over the years. Linking trade policy to improved environmental management gives the United States valuable leverage to help countries address threats to their natural resources, many of which can be exacerbated by increased trade, especially in countries with important timber, fisheries, or other natural resources to export.

We applaud in particular the landmark agreement reached between Congress and the Bush administration in May 2007 to incorporate a list of multilateral environmental agreements into trade agreements. This paved the way for successful inclusion of environmental chapters in FTAs as well as stronger enforcement mechanisms.

Incorporating environmental measures in trade agreements is just the first step. Implementation makes all the difference. We commend Congress for providing over $177 million to support environmental cooperation and capacity building under FTAs with 20 different trading partners over the past 10 years. This support has been crucial to the environmental progress we have seen under the agreements.

In particular, these commitments have stimulated creation of new environmental laws, policies, and institutions by our trading partners. For example, the Peru Forestry and Wildlife Law was in part a direct response to the U.S.-Peru Trade Promotion Agreement, and laws and policies driven by the Dominican Republic-Central American Free Trade Agreement have been important to

conservation of wildlife and protected areas. TNC was directly involved in CAFTA implementation in the Dominican Republic through a USAID project to improve environmental regulations, build enforcement capacity, and support biodiversity conservation. These advances continue to play a role in enhancing environmental performance in the Dominican Republic. Provisions for transparency and public engagement on environmental issues help ensure enforcement of domestic wildlife conservation laws, especially regarding protection of sea turtles.

The Peru Trade Promotion Agreement included a groundbreaking approach to these core environmental concerns, and it continues to serve as a platform to support Peru's efforts to combat illegal logging and wildlife trade. TNC provided expert advice on the agreement, and we advocated a great deal of specificity in the Forest Sector Governance Annex, because we believe clear environmental obligations spelled out in the agreements, coupled with follow-on funding, technical assistance, and capacity building to implement those obligations, are the main ingredients for success.

The Peru agreement illustrates the complex challenges involved in implementing environmental provisions. Recent disturbances in Peru in response to attempts by Peru's independent forest and wildlife agency—OSINFOR—to enforce the Forestry Annex underscore the scale of the problem. Competent and honest officials are often outmatched by powerful and corrupt elements in the timber sector.

The systems created under the Forestry Annex and built with U.S. assistance are helping to identify illegal actors and to hold them accountable. For example, an electronic timber tracking system developed under the agreement has increased transparency and thwarted the ability of criminals to change source origin documentation. We now have detailed information in a public database available to U.S. importers about the concessions and companies involved in the Peruvian illegal timber trade. There are still gaps, to be sure. We particularly salute Senator Wyden and his staff for their efforts on this issue. Much remains to be done both to strengthen the technical tools and to build political will for enforcement. The United States should continue to support Peru's capacity to implement and remain diligent in challenging Peru to comply with its obligations.

These experiences offer important lessons for future agreements. First, strong, independent institutions are essential, especially to address legality issues. Agreements should specify the creation or reform of these agencies, and the U.S. should provide financial and technical support to strengthen them.

Enforcement requires greater efforts on the part of both governments. The U.S. can support training and capacity building for counterpart governments on enforcement of environmental obligations. At the same time, the U.S. must be diligent in monitoring compliance and take action where necessary.

Transparency helps to strengthen governance, rule of law, and public accountability. Programs to implement environmental measures in trade agreements should be subject to public review and comment and, where possible, undertaken by a broad partnership of stakeholders.

Lastly, civil society can play a key role. Nongovernmental organizations enhance public-sector accountability, provide expert information, generate public support, and help combat corruption. The U.S. should support development of local NGO capacity to work on these issues.

While this hearing is focused on past trade agreements, the recently concluded Trans-Pacific Partnership contains important new obligations to address illegal and unsustainable trade. The Nature Conservancy is optimistic about the potential of TPP to tackle these critical issues. The steps I just outlined will be critical to effective implementation.

Thank you, Mr. Chairman and members of the committee, for this opportunity to share TNC's views.

[The prepared statement of Mr. Prickett appears in the appendix.]

The CHAIRMAN. Well, thank you, sir.

Mr. Tepp, we will take your testimony.

STATEMENT OF STEVEN TEPP, PRESIDENT AND FOUNDER, SENTINEL WORLDWIDE, VIENNA, VA

Mr. TEPP. Thank you, sir. Chairman Hatch, Ranking Member Wyden, and members of the committee, thank you for the opportunity to appear before you today to discuss the implementation and enforcement of free trade agreements.

My name is Steven Tepp, and I am president and founder of Sentinel Worldwide. Previously, I enjoyed a career of 15 years of government service, beginning, as you said, with you, Mr. Chairman, on your Judiciary Committee staff, and then at the U.S. Copyright Office, where I had the opportunity to negotiate the text and/or implementation of seven different free trade agreements with countries around the world. I am here before you today in my personal capacity as an expert in intellectual property and a former trade negotiator. The views expressed are my own and not necessarily the views of any client or employer.

Intellectual property is a tremendous source of value for the United States and a dominant part of our foreign trade. Almost two-thirds of U.S. merchandise exports are from IP-intensive industries. Thus, the United States seeks to ensure fair and modern intellectual property standards in our FTAs.

While some governments find themselves tempted by the illusory short-term gain, the failure to properly protect IP has serious negative consequences at many levels, and these harms do not remain neatly tucked away from the American consumer. In 2014, CBP seized infringing products with an aggregate value of over $1.2 billion trying to come into our country. And an investigation by GAO of military-grade microchips made abroad found that every single microchip they tested was bogus and substandard.

Foreign anti-IP policies can also be a front for industrial policy and protectionism. Around the world and across all IP disciplines, we see trading partners who fail to provide sufficient protection. This is a distortion of national and global marketplaces.

The intellectual property chapter of our free trade agreements is crafted to address these problems. Further, the IP provisions of our FTAs bring some of the basic building blocks of liberty and free-

dom: rule of law, respect for property rights, and transparency and accountability in government.

If successfully negotiated and properly implemented, the intellectual property chapters of our FTAs represent the most advanced IP standards in the world and are a win-win for the United States and its trading partners. And, by and large, the story of the IP chapters of our FTAs is one of tremendous success and progress.

But make no mistake: it is no easy task. Bismarck quipped, "The two things you never want to see being made are sausage and legislation." Bismarck never saw an FTA.

Throughout the process of negotiating text and implementation with our trading partners, leverage is the key. FTAs provide an opportunity to resolve longstanding areas of concern, because the offer of improved access to the U.S. markets melts intransigence that we may have seen in bilateral negotiations for years. By the same token, it is critical to achieve our goals in the negotiation, because once the process is concluded, then intransigence will return.

We retain our leverage through the implementation process up until the U.S. Trade Representative certifies compliance and the FTA enters into force. At that point our trading partners are enjoying the benefits of improved access to the U.S. market, and ultimately our only recourse to address any remaining noncompliance is a formal dispute process.

But transition periods are a distorting force in the implementation process. Transition periods are a useful negotiating tool that allow less-developed countries the time to gain the expertise and capacity to implement modern trade rules. Unfortunately, a trading partner can also misuse them as delay tactics. And because the transition period typically concludes after the FTA has entered into force, we have considerably less leverage to ensure proper implementation of those obligations.

Moreover, we have weakened our own hand. We have had FTAs with modern IP chapters with a variety of trading partners for approximately 15 years. In that time Congress has held no less than 30 hearings on foreign IP theft, and Special 301 submissions of affected industries have set forth significant instances of noncompliance with TRIPS and FTA IP provisions. Yet the United States has not initiated a single dispute under the IP provisions of any of our FTAs and none under TRIPS in nearly a decade.

American innovators and creators face continuing challenges in the markets of our trading partners who have not properly implemented their IP obligations, but those trading partners are enjoying the benefits of improved access to the U.S. market. This is not the equity we achieved in the negotiations, and we should not settle for it now. Simply put, we need to do a better job of holding our trading partners to the obligations they agreed to.

In conclusion, intellectual property is at the heart of our culture and the spirit of American innovation. FTA negotiations are hard fought and, like the rights they purport to secure, they are without meaning if they are never enforced. The IP provisions of U.S. FTAs are the top standard in the world. With an energetic effort to hold our trading partners to their commitments, we can all enjoy the benefits of progressively improved IP protection around the world.

I again thank the committee for this opportunity to present my views, and I would be happy to answer any questions. Thank you.

[The prepared statement of Mr. Tepp appears in the appendix.]

The CHAIRMAN. Well, thank you. I thought all four of you were excellent and very helpful to the committee.

Now, Mr. Tepp, a 2014 report by the U.S. Chamber of Commerce entitled, "Trading Up: The Evolution and Implementation of Intellectual Property Rights in U.S. Free Trade Agreements," noted that U.S. negotiators should avoid whenever possible agreeing to considerable transition periods to implement IP protections because such transition periods often undermine needed momentum to ensure implementation of the agreement.

Now, you echo similar sentiments in your testimony, and you provide some ideas on how to address this particular problem. Could you just elaborate on some of those suggestions?

Mr. TEPP. Certainly, sir. Transition periods are a double-edged sword. We might be able to secure better standards in the negotiation by offering them, but they also make implementation of that agreement harder to secure. To me it is about leverage. We have the most leverage before the FTA enters into force, but transition periods go past that time. So one possible approach that allows us to reclaim that leverage is a mechanism that suspends targeted benefits of the FTA if the trading partner fails to implement its obligations within the allotted time.

The CHAIRMAN. Let me go to you, Mr. Murphy. In his testimony, Mr. Tepp makes a compelling case that trade in counterfeit products not only undermines economic rights, but also puts the health, safety, and security of innocent consumers at risk. Do you agree with that sentiment?

Mr. MURPHY. I do, Senator. If I may just briefly comment on Mr. Tepp's last statement, as I indicated in my testimony, I also agree that the best opportunity for leverage to get things right is prior to implementation. And I suggested a precertification exercise, or a checklist, to try to ensure that while the U.S. has maximum leverage before benefits are extended, that we try to get things right. And I also made an allusion to the KORUS snap-back provisions, which could be a similar sort of mechanism whereby benefits could be withdrawn or suspended pending compliance.

The types of issues you talk about are very important. Some of the proposals that I have made could help to contribute to circumstances where U.S. officials use what leverage they have to improve consumer protection, ensuring that some of the counterfeit and low-quality products that are coming into the U.S. market can be stopped. But there are also additional steps we should consider. The recently enacted Customs enforcement bill creates a new fund for enforcement that has been authorized but not yet appropriated. That would be important unfinished business that the Congress should address to ensure that we have the resources to manage the problem and ensure that we have legitimate, safe, high-quality products coming into the United States. This is both a trade issue as well as a consumer-protection issue.

The CHAIRMAN. Well, thank you. The problems that you are facing with protecting your innovation and intellectual property in Korea are disturbing to me, and I am sure to others. Unfortu-

nately, the use of anticompetition laws to compel disclosure of intellectual property rights seems to be becoming more prevalent, not just in Korea but around the world.

To what do you attribute the increased prevalence of antitrust cases against American companies in Asia? And what do you think is really motivating these investigations? Could this affect Qualcomm's ability to keep jobs here in the United States? And what can we in Congress do to help stop these practices?

Mr. MURPHY. That is an excellent question, Senator. Thank you very much. You have connected several important dots, and, hopefully, my testimony will help raise awareness more broadly.

Qualcomm has been licensing its patent portfolio of over 100,000 issued and pending patents globally for more than 25 years. Over that period of time, we have had relatively smooth business experiences until 12 years ago when we started to first see antitrust issues creep in. In most cases, what has changed are not Qualcomm's business practices, which are very much in line with how technology is licensed in the ICT industry, but rather a dynamic has emerged whereby other governments are very interested in promoting their own indigenous innovation. They have very aggressive industrial policy targets and are trying to help their industries move up the value chain, and they still need inputs of American technology companies' technologies, innovation, and intellectual property rights. But we also are seeing the emergence of so-called national champions. These are favored companies that are very important to the local economy and/or very well politically connected. In some respects, these companies may have buyer's remorse and would prefer to renegotiate the terms of the technology agreements that they have with American and other technology providers in order to obtain those valuable technology inputs at a much lower cost.

But the policy implications for the United States are tremendous, as you rightly point out. IP-intensive industries account for about $8 trillion of the U.S. economy, over a third of U.S. gross domestic product, and directly or indirectly support 40 million jobs. If we start to see an erosion of strong IP rights and the use of antitrust enforcement for improper purposes not related to anticompetitive conduct, we may see a slippery slope situation where the United States begins to lose its competitive edge. This would make it harder for companies like Qualcomm, which invests as much as 20 percent of our global revenues into R&D, the majority here in the United States, which supports high-wage, high-skilled jobs.

The CHAIRMAN. Well, thank you. My time is up.

Senator Wyden?

Senator WYDEN. Thank you. And let me start with you, Mr. Prickett, if I could. First of all, we want to thank you for the relationship we have long had with The Nature Conservancy. You always try to come to the table and look at ways in which we can operate in a bipartisan way and actually get something done.

Illegal logging is just economic poison for Oregon's sawmill workers and resource-dependent communities across the country, because it basically means that those workers—and these are workers who, much like the workers I have been talking about in this committee, have worked for decades in industries where there are

family-wage jobs—they can have those jobs as long as they do not face an influx of cheap, stolen wood. In other words, they can compete with anybody as long as there is not cheating.

Now, you described some of the innovative commitments on forestry that were included in the Peru agreement and how this gives us a chance to up the ante in terms of fighting illegal logging and the criminal enterprises that profit from it. But as you acknowledge, serious challenges remain when it comes to stopping illegal logging in Peru.

Now, I think that the kind of work that we are trying to do, with your organization, with forestry groups, it is good for the environment, it is good for ensuring that those good-paying forestry jobs are available for our workers. But we have a lot of work to do. The Trans-Pacific Partnership agreement contains some new commitments on forestry, including a commitment to combat and cooperate to prevent the trade of wildlife taken or traded illegally.

So my first question is: what would be your advice to the Congress and the administration for the coming months to make sure that these environmental commitments are really followed through on by our partners, so that I can tell sawmill workers in Oregon and all of us who care about protecting our environmental treasures that it is a new day on trade policy and trade is going to be done right because we are going to enforce the agreements?

Mr. PRICKETT. Thank you, Senator. Thank you for the kind words about The Nature Conservancy. We also value the relationship with you and your staff and the good work we are able to do together.

Illegal logging is a disaster for American jobs, as you point out. It is also a disaster for the environment in the places we work. So it is one of The Nature Conservancy's highest priorities in many of the countries where we work to combat illegal logging. And I would note that the governments of most of those countries want to see this problem addressed as well.

The areas where we engage on it, including Peru, are developing countries where rule of law in general is weak, so in our mind, the key issue is to enhance the ability of Peruvian institutions, governmental and nongovernmental, to take action on the problem.

You ask a very good question: what can we do from this point forward to really step up that effort? We think it is a mix of both carrots and sticks. The carrot side is very important—in other words, the support that the U.S. Government and nongovernmental groups like ours can provide to countries like Peru to combat illegal logging.

The United States, I would note, has been engaged in Peru on conservation of its forests for close to 30 years. I have worked on that effort myself at USAID and in a couple of different nongovernmental organizations. So one point I would emphasize is that we need a whole-of-government approach to the problem. So efforts that USTR can take are critical, but a lot of the action will be at USAID, at the State Department, at the U.S. Forest Service, and other specialized agencies and NGOs. So part of the answer is to look at not just the budget and the enforcement effort at USTR but also at what USAID and some of these other agencies have available to help Peru tackle the problem.

The stick, as you have all pointed out, across all of these issues, is more vigilance and more engagement on enforcement on this side of the trade equation. So we were pleased to see last week that USTR asked the Peruvian Government to investigate the origin of certain contested shipments of illegal logging. That was, I think, in large part in reaction to your efforts, Senator, and the efforts of NGOs. So we need to see more of that stepped-up enforcement on the part of USTR, and the enforcement fund that you all created will be a key part of that.

Senator WYDEN. Thank you. Let me get one other question in. Mr. Murphy, for you, in this room I have spent an extraordinary amount of time pushing to ensure that we would have a free and open Internet. Not long ago, we derailed the legislation that would have changed the architecture of the Internet, what was called the PIPA and SOPA legislation. We have to have a free and open Internet in order to prosper, and that means the free flow of data across borders.

You mentioned the U.S.-Korea Trade Agreement, which included the first commitment on restrictions on cross-border data flows. Now, some have raised some concerns about the effectiveness of that commitment with respect to the future. So the committee may in the future be considering the Trans-Pacific Partnership, which, of course, again seeks to lock in some significant new commitments to ensure a free and open Internet.

I would be interested in a sort of technology version of the question I asked Mr. Prickett with respect to illegal logging. How could you envision our working through the implementation process to ensure that we do everything possible to promote a free and open Internet and do not see other countries adopting policies that, in effect, Balkanize the Internet and make it harder for us to tap the potential of high-skill, high-wage jobs in our country, particularly ensuring that we can export around the world?

Mr. MURPHY. Well, I think the way you phrased the question is the right one, and the term that you used, "Balkanization," is very important. Obviously, there has to be an important balance between privacy protection of personal information and the free flow of information, which is innate to the Internet in our borderless global economy.

You also raise another interesting and very important point, which is that each of the FTAs we negotiate stands on the shoulders of the prior one. We learn our lessons and apply them in future negotiations. These agreements evolve over time, and we gradually raise the bar from one agreement to the next. That is crucial. You rightly point out that KORUS was the first to include cross-border data flow rules. TPP takes them to the next step. The e-commerce chapter of TPP, chapter 14, is seen by many as one of the most important contributions of the TPP to the advancement and the evolution of international rules.

It includes, for example, a requirement that the parties allow cross-border data flows, period. That is itself important. In many cases you have different rules, a patchwork effect, across the Asia-Pacific region. The TPP creates a uniform minimum requirement, which is very important, and commercially meaningful.

Chapter 14 of TPP also includes prohibitions on forced localization and forced disclosure of source code, which are also of critical importance. Both of these outcomes will increase confidence for American companies to go abroad and engage in Internet-related businesses and cross-border flow of data. Foreign localization requirements, which require that servers be located in the territory of each country and impose prohibitions on the free flow of information, would add to the issue you identified, Balkanization. And localization mandates also potentially undermine security, because instead of having a company with one data center and one secure perimeter that it needs to protect, it would be responsible for having multiple different secure networks in multiple different economies, which potentially increases the risk of inadvertent disclosure or breaches.

Chapter 14 of TPP also ensures that there are no duties on electronic transmissions, which is very important to helping promote innovation. It also includes a requirement of non-discrimination and national treatment for digital products so that we do not have country-of-origin requirements for different digital products.

Obviously, we understand that the financial services industry is dissatisfied with where the TPP negotiations concluded. But I also understand they are very much engaged with the administration and with the Congress on trying to find some creative solutions to address those concerns before the committees of jurisdiction have to consider TPP.

Senator WYDEN. Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you.

Senator Coats?

Senator COATS. Thank you, Mr. Chairman.

Mr. Tepp, I think this question should go to you, and if others want to address it, they can. I represent several companies in Indiana, including a large pharmaceutical company, that have raised with me very significant concerns about how the Canadians have implemented their commitments relative to intellectual property. Based on what appears to me to be a novel misinterpretation of the internationally accepted patent utility standard called the "Promise Doctrine," Canadian courts have invalidated 24 patents on 20 innovative medicines, many of them pioneered and manufactured in the United States and in my State.

What is your take on that? Is Canada complying with its commitments here? Are they gaming the system, moving it through the courts to achieve what they should not be doing under their agreements? And what is the best way for us to respond to that?

Mr. TEPP. Thank you for the question, Senator. It is extremely disappointing that a developed country, the United States' largest trading partner, is engaged in action that is inconsistent with their trade agreement obligations. And it is not only a problem for U.S. companies doing business in Canada—it surely is—but it undermines our efforts at implementing the TRIPS agreement and our FTA IP provisions around the world, because if a developing country looks at Canada and says, "Well, if a developed country can do this, the United States' largest trading partner can do this, why should I have tougher rules?"—meaning actually comply with the

agreement. So it is deeply disappointing that Canada is engaged in this activity.

Senator COATS. What is the recourse here? What should the administration be doing to address this?

Mr. TEPP. I think the administration should be actively pressing, and I believe they are actively pressing the Canadian Government to address this, to fix it, and ultimately there is the potential for a dispute case to be brought before the WTO and then conceivably future trade agreements.

Senator COATS. Do you have any sense of where this has risen in the priority chain here at the administration relative to the dispute case, moving to a dispute case?

Mr. TEPP. I candidly do not think they are there yet. It has certainly been mentioned in Special 301 reports from the U.S. Trade Representative's office. But there is no indication that the administration is close to initiating a case.

Senator COATS. When we are looking at future trade agreements, should we be keeping this in mind and trying to prevent something like this in the agreement before the agreement is agreed to?

Mr. TEPP. Absolutely. Whenever I have been in a negotiation with a trading partner for a prospective FTA, particular existing irritants have been right up on the table and discussed. At the very, very least, we should ensure that our trading partners are properly complying with their existing obligations before any new obligations are entered into force. And I believe that this committee put language to that effect in the TPA legislation.

Senator COATS. You know, Mr. Chairman and Ranking Member, we fight this political battle back at home in terms of the value of international trade and global trade. And yet when trading partners like Canada, which we have had such good relationships with in the past, are gaming the system against us, it makes it all that much harder to go back home and convince people that we ought to enter into these agreements. Now, it is one thing, you know, to talk about our southern border neighbors; it is another to talk about Canada gaming the system here.

And so, when we are looking at ways of trying to implement TPP or TTIP, we go back home and people say, "Well, why should we agree to stuff like this?" We ought to be putting pressure on the administration here to do something about it. We have the kind of relations with Canada where we ought to be able to go in there and simply say, "You signed this agreement. You are committed to this. Trade is vitally important between our two nations. But you are gaming the system against us. And if you expect cooperation in the future, you have to live up to your commitments."

With that, Mr. Chairman, I will yield back.

The CHAIRMAN. We are keeping the pressure on. I have to say that.

Senator Brown?

Senator BROWN. Thank you, Mr. Chairman, and thank you to you and Senator Wyden for holding this hearing.

This panel, however, has some glaring omissions. No insult to any of you four, but we do not have a single representative of American manufacturers on this panel. We do not have a single representative of American workers on this panel. And listening to

Senator Coats talk about the difficulty of passing trade agreements—with the opposition so often of workers and the groups that represent workers, you simply cannot have a comprehensive discussion about trade agreement implementation and enforcement without these stakeholders.

To ensure that the record for this hearing reflects a consensus and the concerns of American workers, I would like unanimous consent, Mr. Chairman, to insert in the record a recently released report by the AFL–CIO about the state of labor rights in TPP countries that details the compliance status of all TPP countries with the agreement's labor standards, and it should be part of the conversation about FTAs.

The CHAIRMAN. Without objection, it will be entered.

[The report appears in the appendix beginning on p. 33.]

Senator BROWN. I would also like to ask unanimous consent to insert into the record a timeline of the AFL's efforts to use state-to-state dispute settlement to respond to CAFTA labor violations in Guatemala. The timeline illustrates the ineffectiveness of the FTA state-to-state dispute settlement process and lack of enforcement. I would like unanimous consent on this.

The CHAIRMAN. Without objection.

Senator BROWN. Thank you.

[The timeline appears in the appendix on p. 52.]

Senator BROWN. And third, I would like to ask unanimous consent to insert into the record the press release put out by Ford Motor Company earlier this year announcing their withdrawal from the Japanese market. This happened well after TPP's release, so it is evident the company does not believe TPP will grant them access to the Japanese market. Their experience with Korea, that FTA, I think underscored that conviction. I would like to ask unanimous consent on that.

The CHAIRMAN. Without objection.

[The press release appears in the appendix on p. 53.]

Senator BROWN. Thank you. These documents illustrate, I think, widespread issues with FTA implementation and enforcement and the need to get them right under TPP.

Now, I have a couple of questions, starting with you, Mr. Tepp, if I could. You said we need to do a better job—and I agree with this—of holding trading partners to the obligations they agree to or risk emboldening them to test our resolve further. What message does it send to our trading partners that we have pursued only one labor case under all of our FTAs and have not resolved it nearly 8 years after the complaint was originally file?

Mr. TEPP. Well, Senator, it is an even better message than the fact that we have pursued zero cases under our FTAs for IP violations. And I am certainly concerned about that.

Senator BROWN. Okay. Thank you.

Mr. Murphy, a question for you, if I could. I know Qualcomm has been disappointed with Korea's interpretation of some of the KORUS competition law provisions. I understand your concerns have not been resolved. If both options are available, would you advise Qualcomm to pursue a case under state-to-state dispute settlement or under investor-state dispute settlement? And why?

Mr. MURPHY. Thank you for the question, Senator. At this point in time, given where our matter stands in Korea, we would not rule out or rule in any options. We are hopeful that our discussions with the KFTC and our efforts to remind them about Korea's KORUS obligations will eventually cause them to agree with us that some of the very fundamental and basic due process principles that we are asking them to adhere to, which are explicit in the KORUS, are the right way for them to go.

Qualcomm is one of several American companies that have been the subject of investigation by the KFTC. Our hope is that we can persuade the KFTC that our business practices are lawful. Or, perhaps, another option that the KORUS makes available to us, which is a new feature of Korean law as a result of KORUS, is the possibility of a voluntary consent decree. But again, right now, given where we stand, all options are on the table. And I do not know that I am in a position right now, given procedurally where the case is, to have a strong view one way or the other.

Senator BROWN. Let me ask one more question of you, Mr. Murphy. I know that Senator McConnell has pretty much indicated, it seems, that the future of TPP is still sort of unknown and in question. I know that he does not want to put his industrial State Senators on the spot before an election so that they would have to vote on something so controversial in their States, as Senator Coats might have suggested on TPP. But in your testimony you indicate this committee has a critical role in the analysis of trading partners' ability to implement their FTA obligations. How do you suggest this committee get more involved? And I think that Senator Hatch and Senator Wyden in very good faith want to do that. How do we get more involved in the certification process of our trading partners?

Mr. MURPHY. Well, I am glad you asked that question because, as I suggested during my opening remarks, I recommend that we consider a formal checklist approach to determine whether circumstances are right for an FTA to enter into force. In my prepared statement, I mentioned that the greatest leverage and the greatest opportunity to get things right are before the FTA enters into force. I suggested that there be a formal consultative mechanism that could involve the private sector, Congress, and the administration to ensure that we look, for example, in one column at all the different obligations that TPP would create for one of our trading partners, and in another column, we cross-reference TPP obligations with specific measures that the relevant government has taken to transpose a given TPP obligation into their domestic law—whether it is new legislation, whether it is revised regulations, whether it is changed procedures. Again, in the case of Korea, had the KFTC changed its pre-KORUS measures to provide for greater transparency and due process as required under the FTA, then Qualcomm might not be in the circumstances that we are in today.

So I think that dialogue within the jurisdiction of this committee is very important. Hearings like this are an important way to bring issues to the fore and ensure that we are cognizant of what the potential FTA implementation deficiencies are.

In addition, I think there is a role for the committee as well with respect to the enforcement, after certification, once the agreement takes effect, as reflected in key aspects of the Customs bill that was recently enacted. I want to recognize Senator Cantwell for her important work on ensuring that there be an enforcement trust fund that was authorized. This committee can also work with appropriators to make sure that sufficient funds are available to ensure that the trade agencies have sufficient staff, capacity building, training, and travel funds. Other funds can be used to ensure effective monitoring prior to certification so that we are making informed decisions. Additional resources are needed post-certification and post-entry into force to ensure that our trading partners are living up to their obligations.

Senator BROWN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Cardin?

Senator CARDIN. Well, thank you, Mr. Chairman. Thank you for this hearing. I thank all of our witnesses.

I think it is important that we look at the lessons learned from the past as we look forward. We have seen an evolution of our objectives in trade agreements from when we were first interested in dealing with tariffs—which are kind of easy to figure out and implement and take action against for those who violate their obligations—to the nontariff issues, which become more difficult to calculate and to enforce.

So as we talk about labor, as we talk about environment, as we talk about good governance and human rights as objectives, it becomes more challenging. And we need to look at what we have learned from the past.

Some of the proudest moments in America were to show how important access to U.S. markets can be in bringing about fundamental change. It was U.S. leadership that brought down the Soviet Union on emigration policy. It was the United States that brought down the apartheid government of South Africa on trade policy. We used trade pretty effectively to bring about fundamental change.

Mr. Murphy, I agree with you that we need to have progress made before we enter into an agreement. One of the things that I think we have learned is that we have to put these commitments in the core part of the trade agreement, make them enforceable in the core part of the trade agreement, but the blueprint for how to bring about the structural changes needs to be understood before we sign off on the agreement. I think that is a very important point.

Mr. Prickett, I would like to ask you a question, because your organization has been in the forefront of transparency and anticorruption issues. I would like to get your assessment as to how we can do more to advance good governance, anticorruption, and transparency in the implementation of trade agreements. We talk about it in trade agreements, but we have no record of being able to actually bring about fundamental change as a result of recent trade agreements. We are trying to do that with TPP, but I would welcome your observations as to how we could be more effective on this.

Mr. PRICKETT. Well, thank you, Senator, and first I want to thank you for your leadership on environmental issues over the years. It is a very good question. We talked earlier about this general challenge. We think there is a combination of carrots and sticks that the U.S. Government needs to put forward—and not just the government, but the NGO community as well.

I guess one point I want to make is that on environmental issues in these trade agreements, unlike some other more commercial issues, environmental harm by our trading partners hurts those countries as well. Senator Wyden spoke earlier about the impact that illegal logging has on forestry-sector jobs here. Illegal logging also hurts people, wildlife, and economies in the developing countries themselves.

The reason I say that is that we work in many of the countries the United States trades with to support those governments and those societies to take action on environmental harm, particularly illegal logging, illegal fishing, illegal wildlife trade. So a lot of what the United States can do is to provide support for the governmental institutions and the nongovernmental organizations in those countries that are taking action on those illegal natural resource issues. So there is a lot more we can do, not just through our trade policy but through our development assistance, through our foreign policy, and through other U.S. Government functions, to support conservation efforts in those countries. And at the same time, we need to be more diligent in enforcing the environmental measures that we have put into trade agreements.

The good news is, over the last 10 years more and more trade agreements have actionable environmental commitments within them, and those are only good if they are used. So we need to step up our enforcement efforts as well.

Senator CARDIN. And as this committee is aware, in TPP we do have commitments not only on the environment and labor but also on anticorruption and good governance. And it is interesting that we have a firm commitment in regards to anti-human trafficking, as we should, and that has been a subject of some debate in this committee, because we have tiered ratings. We know what good practices are and what they are not.

It is not as clear on good governance and anticorruption. In my role on the Senate Foreign Relations Committee, we are looking at developing similar ratings on countries' performance on fighting corruption, because there are indicators. Do you have an independent judiciary? Do you have the resources for it? Do you have independent prosecutors? Do you have transparency? There are things that we can point to that might help us in enforcing trade agreements, particularly as we are now moving to countries that have challenges in dealing with corruption and good governance, that we want to establish better trade relations with, but that we also want to make significant progress in adopting recognized standards to deal with corruption.

I just point that out because I think we can learn from the past in that, unless we are pretty specific on these areas, it is going to be difficult after the agreements are signed and in effect to bring about these types of behavioral changes.

Mr. PRICKETT. And if I may just add quickly, many of the issues around corruption come out of the natural resource sectors in the countries we are talking about. So this is an issue The Nature Conservancy and other environmental organizations care passionately about. We are eager to work with you on this agenda. And I would note that transparency, support for independent nongovernmental organizations to do fact-finding and to bring issues to light, and then support for truly independent regulatory institutions that can take tough action, are going to be very important.

Senator CARDIN. I just came back from the southern part of Africa where I saw firsthand some of the wildlife issues and corruption and poaching and similar issues.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Carper?

Senator CARPER. Thanks. Thanks, Mr. Chairman. Welcome, one and all. As you know, we serve on a variety of committees, and I have been over in the Committee on Homeland Security this morning, and my focus has been there, and I missed your testimony.

Let me just ask you to start off by asking this question of each of you. Could you share with me, in terms of important issues that you have discussed in your testimony and that are before us today in this hearing, what are one or two of the points where you think you all basically agree, important points where there is a broad consensus? I do not care who goes—would you like to go first?

Mr. PRICKETT. Sure. I think as I listened to the testimonies, this point about the need for stepped-up enforcement of our trading partners' obligations that they have undertaken in trade agreements is critical. Those obligations are only good if they are enforced, and the United States can do more to be vigilant and enforce the agreements we have reached.

Senator CARPER. All right. Thank you.

Mr. TEPP. Proving the truth of that, I will agree. And——

Senator CARPER. You approve that message?

Mr. TEPP. Yes, I approve that message, sir.

Senator CARPER. All right.

Mr. TEPP. And I will add to it that I think I have heard agreement down the line that it is important to get the best possible text during the course of the negotiation and to ensure that it is fully implemented and in force. And combining my comments in response to Senator Coats's question as well as Mr. Mulhern's comments from earlier, I think there is at least some agreement that we have a series of problems on trade issues with Canada.

Senator CARPER. All right. Thank you.

Mr. MURPHY. If I can briefly add, I think there is also a consensus that once a text is in place, ensuring that those obligations have effectively been implemented in domestic law in the trading partner's economy is critical. That is a time of maximum leverage, and withholding presidential certification until those benefits are ready to go on day one is, I think, an area where we are all in agreement.

Senator CARPER. Okay. Thank you.

Mr. MULHERN. I would just add, Senator, in agreement with my fellow panelists, that the important thing is having a commitment

not only to the letter but also the spirit of these agreements. And negotiations are one thing, but to have them go into effect and be undermined by nontariff barriers or ways to try to circumvent what has been agreed to has certainly been a problem in our industry, and I hear that from some of my other panelists as well.

Senator CARPER. In the time that I have been here, we have been involved in negotiating, debating NAFTA, more recently South Korea, Colombia, Panama. When you think back on just those two trade negotions, is there anything that we learned from those trade agreements, mistakes or things we could have done better, should have done better, that we have actually addressed in this trade agreement? Please, Mr. Mulhern, why don't you go ahead and lead us off?

Mr. MULHERN. On this one, Senator Carper, I am going to defer to my colleagues who are more expert in trade negotiations than I. I think they will have a better perspective than I will.

Senator CARPER. All right. Mr. Prickett?

Mr. PRICKETT. That is a great question. I worked on NAFTA 20-odd years ago, and certainly not everything in Washington has gotten better over that time, but I think trade and environmental policy have. I mentioned in my written remarks that there was a landmark agreement in 2007 between the Bush administration and the Congress on the environment to specify multilateral environmental agreements within trade agreements so that commitments countries have made under environmental agreements are actionable under trade agreements. And that has been a breakthrough.

So the agreements we have seen since—particularly we have been talking about Peru—the terms of the Peru Trade Promotion Agreement are a dramatic improvement over what we had in NAFTA and earlier agreements, because the commitments are more specific and they are enforceable. Again, that is only good if they are enforced, but the precision and the weight of trade agreements on environmental matters at least has gone up significantly over time, and Congress and successive administrations get credit for that.

Senator CARPER. All right. Thank you.

Mr. Tepp?

Mr. TEPP. Thank you, Senator. I think in one way, in terms of the intellectual property chapters, there is a great deal of consistency over our trade agreements, and I think that reflects the importance of the sector to our economy. I mentioned in my opening statement that two-thirds of U.S. merchandise exports are from IP-intensive industries, and there are 40 million jobs and $5 trillion to the U.S. economy—GDP—that come from that sector.

In terms of what Mr. Murphy said about making sure that our partners will implement their full set of obligations, even subject to transition periods, one thing that I think has been learned is, I see that in the TPP there is a requirement for our trading partners to report along the way on their progress towards implementing those obligations. I think that is helpful. Ultimately, though, there is still a leverage problem if the agreement enters into force before the transition period ends. We need to be serious about that. And because we have not taken a single case in dispute under any of our FTA IP provisions ever, or under TRIPS for al-

most a decade, I think we need to reestablish our credibility in that area. There are certainly a number of areas that are ripe.

Senator CARPER. All right. Thank you all. Thanks very much.

Yes, sir, please?

Mr. MULHERN. Senator, I would add one thing that does come to mind in TPP, and it is the language in the agreement on geographical indications, GIs, which has been a problem for our industry in particular and several other food-producing industries.

Up to this point, when the EU in particular is negotiating FTAs with third countries, there is not transparency. There is no ability for us to engage in that process. The language in TPP that will commit TPP partners to have an open, transparent process, to at least have an opportunity for us to weigh in during the process of establishing what is a legitimate GI in a third market, is going to be very important for the dairy industry in particular going forward, so that we are not blocked out of exporting our cheese products into those countries.

Senator CARPER. Great. Thanks.

The CHAIRMAN. Senator Cantwell?

Senator CANTWELL. Thank you, Mr. Chairman. I want to pick up on my colleague Senator Brown's comments, because I really do believe that not having this TPP agreement being discussed—you know, next December in the dark of night is not good for us. If we are going to have this discussion, we should have it now, and it should be in the broad daylight, and we should discuss issues about enforcement and Trade Adjustment Authority and also workforce training issues here at home.

So I am very disappointed that the other side, at least over in the House, maybe even here in the Senate, seems to think, well, you know, if you are going to get a trade agreement, then you have to cut Trade Adjustment Assistance, which we did, and you have to limit the focus on actually doing enforcement. So as Mr. Murphy said, we authorized enforcement, but we did not fund enforcement because the House did not want to fund enforcement, even though they said to everybody and Speaker Ryan promised, "Oh, we will do enforcement."

Now here we are having this discussion this morning about the lack of structure for enforcement, and so I am going to keep pushing on this issue, because I come from a State—I tell people we were trading with China before Lewis and Clark showed up, okay? So we know about trade. But this is about creating a system that is a fair system and that has a structure.

So much of the world's economy is going to be happening on a global basis, and if we want to compete, then we have to chase those market opportunities, but we also have to have cooperation and we have to have enforcement.

So there are definitely more people up here on the dais than there are in our enforcement operations, and yet the economy of the United States that we need to chase is outside of our borders. So we need to get enforcement.

I want to point out that a GAO audit on enforcement provisions of the free trade agreements found that since 2008 the Department had resolved only one single complaint out of five that had been filed, and that the relevant agencies responsible for enforcing these

provisions suffered from constant staffing and resource complaints. So to me, this is a key issue, and, Mr. Prickett, you specifically stated in your discussion about the Peru Free Trade Agreement that we need robust training on enforcement with local officials, coupled with continued monitoring.

So I sit here and I think, oh, my gosh, I applaud what was in the Peru agreement as far as sustainable forestry practices. I look at what is being discussed in TPP with addressing illegal and unsustainable fishing practices and combating illegal wildlife trade, and I want to applaud. I think these are great standards to be setting around the globe environmentally. And yet if we do not have the money or the other side will not fund enforcement, how are we going to make this work?

So I wanted to hear from you, Mr. Prickett, what you think we need to do to help get enforcement funded. And, Mr. Murphy, thank you for your commitment to Washington and the same with you, if you have ideas about what we should be doing on this particular case in Korea—that is, what the U.S. Government could do. I am assuming you think it is better to have the agreement than not to have the agreement, but, if you could, comment on that. And, obviously, Mr. Mulhern, please add anything you want to say about what we should be doing on dairy. I mean, I am excited that wheat and potatoes would get better treatment under the Trans-Pacific Partnership, but I know that you have some concerns about dairy. So as quick as people can be——

Mr. PRICKETT. Well, thank you, Senator, for your concerns about illegal logging, illegal fishing, and wildlife trafficking. These are crises for the environment that are going to go on and accelerate with or without trade agreements, to set that context. We think that having them addressed in the TPP is a good step which provides the United States and the NGO community, frankly, more leverage to try to get a handle on the problems. And as I said earlier, the governments themselves that we trade with see these illegal activities as a problem that they want to tackle. So the trade agreement not only gives us more leverage, but it gets us a higher-profile platform in which to cooperate on enforcement.

So, point one, enforcement certainly applies to the United States and how we police the trade agreements and the resources we provide to our own agencies, but it also applies in the first instance to the developing countries where the illegal activity is happening. So I would start with enforcement in those nations and the need for the U.S. Government and organizations like mine to provide more support, financial and technical, to strengthen their capacity.

And then I think you said it: we need to provide the resources here in our government so that the agencies who want to do their job can do their job. And we need to hold their feet to the fire to take action when the other countries are not living up to their obligations.

Senator CANTWELL. Mr. Murphy, do we need enforcement?

Mr. MURPHY. Absolutely. And again, I want to commend your work on the recent enforcement bill. I agree with you about the importance of ensuring that the administration's trade enforcement officials have adequate resources, something I spoke about in my prepared statement. It is of utmost importance. Effective enforce-

ment is not only an important aspect of domestic confidence-building, it is critical to ensure that we achieve the benefits that we negotiated for.

With respect to the matter in Korea you raised, one area where the U.S. Government could be helpful is to recognize that there is a problem. Perhaps too often antitrust cases abroad are seen as sort of a garden variety law enforcement matter. In reality, if you look more closely, you will see that there is something animating many of these cases that is not legitimate antitrust enforcement. I think there are protectionist and industrial policy issues that we need to address. And where the U.S. Government could be helpful would be a "one-government" or a "whole-government" approach to these problems. There is a critical need for U.S. antitrust officials as well as U.S. trade officials to come together, look at some of these issues holistically, look at the trend—again, Qualcomm is one of some 40 American companies that has been the subject of an antitrust investigation in Korea since the KORUS entered into effect 4 years ago. Senator Hatch yesterday sent a letter to the Korean ambassador spelling out some of the very serious concerns that we and other companies have about the KFTC and other aspects of KORUS implementation. And it is very important that the administration is responsive to those concerns.

Senator CANTWELL. Thank you. My time has expired, and I have gone over. Maybe Mr. Mulhern could submit something for the record. Thank you.

Senator WYDEN [presiding]. That would be great.

[The response appears in the appendix on p. 64.]

Senator WYDEN. Senator Thune, before we go to you, I just want to indicate that I am going to put into the Congressional Record the exact details of some of these issues with respect to TAA. For example, TAA was expanded to permanently include service workers, which was a lifeline in my home State where Levi workers, several hundred of them, were laid off. They were able to get help, and also the legislation doubled TAA funding.

Senator Thune?

Senator THUNE. Thank you, Mr. Chairman, and I think many of us share the concerns that were voiced by Senator Cantwell about enforcement and funding for that. There was a trust fund created in the Customs bill that I think Chairman Hatch is interested in trying to make sure has the dollars in there, appropriated funds, to make sure that there are resources there to follow through on some of these enforcement issues that are so important.

I think today's hearing is really important, because we have too many Americans who see trade as one-sided, where our trading partners violate the rules without repercussions. And when that happens, it is all too easy to ignore the many benefits of trade and focus only on the negatives, and that is why Congress did recently enact a strong trade enforcement law, and that is why the Trade Promotion Authority law is rightly focused on holding our trading partners' feet to the fire.

Simply put, if we want to build the public support that is necessary for new trade agreements, we have to convince the American people that we are not only opening new markets to our goods and services, but that we have the ability to ensure that our trad-

ing partners play by the rules as well. So I am going to be very interested in following up too. And there are some issues that specifically impact my State of South Dakota in that regard, and that is why some of us on this committee—Senator Wyden and I, going way back to a few years ago when he was the chair of the Trade Subcommittee, had hearings on——

Senator WYDEN. I coined the legendary term from you, "honey laundering."

Senator THUNE. "Honey laundering." And I think we made some good headway in this last bill on that front.

But let me just ask a question here, and anybody can feel free to answer this. But the new trade law specifies that the government must examine how a nation has adhered to its existing trade obligations when considering if the U.S. will enter into a new trade agreement with that nation. I am just wondering if you agree with that as a right approach, and maybe, put another way, how important is past compliance when considering if a country is likely to comply with the terms of a new trade agreement?

Mr. MULHERN. I will jump in first, Senator, and say I think it is very important. I completely agree with you. And Canada is, in our view, a case study in that. The limited access we have been granted in previous trade agreements in dairy, they have already, as I said in my statement, tried to figure out ways to evade that. And even before the TPP agreement goes into effect, is even approved, there are already efforts underway in Canada to try to, again, circumvent some access that the U.S. dairy industry has into that market.

So those kind of commitments are very important with respect to TPP, and, frankly, given the long history of nontariff trade barriers deployed by the European Union in agriculture and in dairy specifically, we are very concerned about the TTIP agreement as well. The discussions to date have been too much on the European agenda and not enough on the American agenda when it comes to dairy access and dairy trade. There are a number of barriers that the Europeans have routinely put up as nontariff trade barriers to our access to that market. And it is important from our perspective for those issues to be dealt with before there is any possibility that we could support a TTIP agreement.

Senator THUNE. Let me follow up, because in your testimony you described our neighbor to the north, Canada, as actively seeking to thwart dairy trade obligations, and you say that this merits a unique approach by the United States. Could you elaborate on what you mean by that?

Mr. MULHERN. I think what we are looking for, in cases like this is, I think we need a sector-specific approach. We have been working with USTR on these issues. We are in active discussions with them. They are aware of our concerns and have been helpful to date in trying to address them. But it does give us great pause when we see a good trading partner for the United States—Canada—as Senator Coats mentioned in his comments, try to deploy efforts to circumvent agreements that we think we have with them on paper.

So it is making sure through specific language, a written agreement, that the access that is supposed to be granted in one of these agreements is not circumvented through other efforts.

Senator THUNE. And what is so different about how Canada treats dairy? Just for purposes of the record.

Mr. MULHERN. Well, Canada is committed certainly to protecting its domestic dairy industry, because they have a supply management program within Canada which limits domestic production. In order to do that, to keep a price level, they have long had their policy to greatly limit imports of dairy into that country.

Our point through the TPP negotiations was, if you are going to be part of a free trade agreement, free trade is about free trade, and you cannot pick and choose. Frankly, we did not get the access into Canada that we had hoped to get in the TPP agreement, and that is an issue for us. But the limited access we did get we would like to be able to utilize.

Senator THUNE. You, in your testimony, also focused at length on the issue of geographical indications and how their misuse is threatening to create barriers to U.S. exports in a wide range of markets. As the U.S. explores how best to address this nontariff trade barrier, is it the European Union that we need to take to task? Or should we turn our attention to our trading partners who are agreeing to some of these restrictions?

Mr. MULHERN. We need to do both. Number one, we need to address this issue head-on with the European Union. This is something that should be addressed perhaps on the side of the TTIP, because I think in our view it is going to hold it up if they try to keep pushing their approach through the TTIP negotiations. But it is also important that the U.S. Government deal with this directly in third markets where the EU is actively engaged in trade negotiations.

TPP, frankly, has very good language which will help, and we pushed that GI language in TPP. That will be helpful. But it is happening in other markets as well. USTR has been engaged in this. They announced yesterday an agreement with Honduras to address GI issues in that market that we had raised as concerns. So I think we can see that progress can be made, but it is an effort that has to be done both directly with the EU first, and if we cannot stop that effort, we are going to have to continue to do what we are doing right now, which is in third countries' markets.

Senator THUNE. Thank you.

Mr. Chairman, my time has expired. I hope we can figure out a path forward on dairy. That is the one area—not the only area, but certainly one area that causes great concern in this country with regard to implementation of the trade agreements that are in front of us. And by and large, most of the people, organizations that I represent that are in production agriculture, are very supportive of TPP, and I hope we get a good TTIP agreement. But dairy is certainly an outlier in that, and I hope we can make some headway that gets us to where this is a good deal for them as well.

Thank you, Mr. Chairman.

Senator WYDEN. Thank you, Senator Thune. I am glad you brought up the dairy issue, and I intend to submit some questions in writing for that purpose as well.

The chairman and I want to wrap this up by thanking all of you. We very much appreciate your being here and our colleagues participating. We have learned a lot at this hearing, and we are going to continue to work on both sides of the aisle to look at ways to improve U.S. trade policy, and particularly potential issues that may be encountered through implementation of future trade agreements, both in the United States and abroad.

The chairman requests that any written questions for the record be submitted by Thursday, March 17th of this year.

With that, the Finance Committee is adjourned.

[Whereupon, at 11:35 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

SUBMISSIONS FOR THE RECORD FROM HON. SHERROD BROWN

A GOLD STANDARD FOR WORKERS?

The State of Labor Rights in Trans-Pacific Partnership Countries

AFL–CIO

Commonly Used Abbreviations:
Collective Bargaining Agreement (CBA)
Department of Labor (DOL)
Department of State (DOS)
Free Trade Agreement (FTA)
International Labor Organization (ILO)

Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)
North American Agreement on Labor Cooperation (NAALC)
North American Free Trade Agreement (NAFTA)
Office of Trade and Labor Affairs (OTLA)
Organisation for Economic Co-operation and Development (OECD)
Trans-Pacific Partnership (TPP)
United Nations (UN)
United States Trade Representative (USTR)

INTRODUCTION

This report seeks to shed light on the state of labor rights and commitments among the Trans-Pacific Partnership (TPP) partner countries. Respect for labor rights is at the core of increasing jobs, raising wages and creating broadly shared prosperity. The Obama administration had promised that the TPP would be a 21st century agreement, a "gold standard," that would promote and respect labor rights, and raise wages for U.S. workers and workers across the Pacific Rim. Unfortunately, the grim conditions facing workers in TPP partner countries were not effectively addressed in the TPP text or consistency plans. Many commitments to improve labor rights remain vague, and the proposed enforcement scheme relies on the discretion of the next administration. The failure of the TPP to incorporate needed improvements to labor commitments that already have proved themselves inadequate in previous agreements belies the agreement's stated commitment to workers. It is clear that, as currently drafted, the TPP would increase corporate profits and skew benefits to economic elites, while leaving workers to bear the brunt of the TPP's shortcomings, including lost jobs, lower wages and continued repression of worker rights.

The majority of this analysis is based on the submission of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), a body consisting of U.S. trade union leaders with a statutory responsibility to provide advice to U.S. trade negotiators. The LAC had the statutory duty to respond to three questions concerning the TPP:

1. Is the Trans-Pacific Partnership in the economic interests of the United States?

2. Does the TPP achieve the applicable overall and principal negotiating objectives?

3. Does the TPP provide equity and reciprocity for labor interests?

On all three of these crucial questions, the LAC concluded that the TPP fell short. Overall, the LAC found the TPP is likely to harm U.S. manufacturing interests, cost good jobs, suppress wages, and threaten our democracy and economic security interests, while doing little to improve conditions for workers in the United States and overseas.

Before dealing with the question of labor conditions in the TPP countries, it is important to dispel some of the arguments that the supporters of the Trans-Pacific Partnership advance regarding the labor rights provisions in the text of the TPP.

"Enforceable" Labor Rights Provisions

The TPP's supporters note that the TPP's labor provisions are "enforceable." This is the wrong measuring stick. The correct measurement is whether there are sufficient provisions to provide confidence that they will be enforced. The United States has never imposed trade sanctions or even a fine as a response to labor violations by FTA partner countries. It has only attempted dispute settlement once, against Guatemala. The Guatemala case has been ongoing since 2008 and workers have yet to experience any measurable improvements as a result.[1] Despite receiving numerous specific recommendations, informed by experience, on how to turn theoretical enforceability into actual enforcement, the United States Trade Representative (USTR) failed to incorporate these recommendations. For example:

- The TPP fails to require parties to advance to the next stage in the dispute settlement process when an earlier stage proves ineffective (Article 19.15). This failure means that future labor submissions are likely to languish as the Guatemala case has.

[1] As of February 1, 2016, a panel report from the first hearing (held in June 2015) has not even been published. Publication of the report is far from the end of the process. The case seems likely to drag on for years.

- The TPP fails to include deadlines for its public submission process that would require parties to advance TPP submissions they receive in a timely manner (Article 19.9). This failure means that parties will be able to use "administrative delays" to indefinitely defer acting on such submissions, as happened with the Honduras case, in which the petitioners waited for an initial report for two and half years, and formal consultations have still not commenced.
- The TPP fails to clarify the obligations of the parties with respect to International Labor Organization (ILO) standards (Article 19.3). This vagueness as to what the obligation regarding freedom of association and other fundamental labor rights mean makes it less likely the labor obligations will be enforced effectively.
- The TPP fails to include measurable benchmarks or an independent evaluation to determine whether the consistency plans for Vietnam, Brunei and Malaysia are met. This failure means the determination that a consistency plan has been fulfilled and the TPP is ready for entry into force is wholly discretionary. The decision will be subject to immense commercial pressures to prematurely declare fulfillment. Such pressure was brought to bear regarding the Colombia Labor Action Plan (LAP), which also contained positive objectives, but lacked benchmarking criteria or an independent evaluation mechanism. As a result, success was declared prematurely, and Colombia has been out of compliance with its labor obligations since Day One of the agreement. This premature certification of compliance with the LAP apparently has deterred the U.S. government from self-initiating labor consultations with Colombia even though workers continue to be subjected to threats and violence, up to and including murder, in order to discourage them from the free exercise of their fundamental labor rights. There is no reason to expect a different outcome from the TPP plans.
- The TPP contains different dispute settlement mechanisms for foreign investors and working people (Chapters 9 and 19). Foreign investors can bring cases against TPP parties on their own, without having to petition their own government to do so. Working people must petition their governments, and then engage in years-long campaigns to attempt to move the cases through the arduous process. The negotiators demonstrated they know how to create effective dispute settlement mechanisms when they want to (Article 9). Thus, we conclude the failure to equalize the dispute settlement procedures available to workers was purposeful.

The TPP's supporters say the labor chapter responded to all of labor's concerns. This is a spurious claim—one that easily can be disproved.[2] As detailed in the section above, a number of important labor recommendations were wholly ignored. Those proposals that were not wholly ignored were included in a weakened form that would undermine their effectiveness.

After providing high levels of engagement at the initial stages of the TPP negotiations, USTR moved in the opposite direction. Between February 21, 2012, and July 2015, the USTR and the Department of Labor (DOL) provided no updated texts of the labor chapter (and the same was true for many chapters of interest to working people). Furthermore, the LAC was never allowed to review the text or substance

[2] *See* "Report on the Impacts of the Trans-Pacific Partnership" by The Labor Advisory Committee on Trade Negotiations and Trade Policy, December 2, 2015, especially Chapter V and Annex 1.

of the draft labor consistency plans for Vietnam, Malaysia and Brunei, despite numerous requests. Given that these arrangements are focused on these countries' labor and employment laws, the unwillingness of U.S. negotiators to share draft text of these arrangements with its labor advisers (who have security clearances) is indicative of the indifference USTR generally displayed toward its consultation process with the LAC throughout TPP negotiations. The gaps in labor rights coverage and lack of accountability mechanisms in the TPP exemplify the outcome of such an approach. The LAC could have offered advice that would have plugged holes and strengthened weak spots, but we were not provided an opportunity to do so, despite our role pursuant to the Trade Act of 1974.

The TPP's supporters say it is much stronger than the May 10th labor chapter. USTR argues the TPP labor chapter greatly improves on language developed in 2007 known as the "May 10th" agreement on labor, which included "enforceable" language requiring countries to adopt and maintain in their laws, and to practice five basic internationally recognized labor principles as stated in the ILO Declaration on Fundamental Principles and Rights at Work. Yet the changes are minor and provide little value to workers (for example, TPP parties must set a minimum wage, but there is no level below which that wage cannot go). As the AFL–CIO noted at the time, the May 10th agreement, though an important step forward from previous FTAs, was "by no means a complete fix appropriate for any country or any situation."[3]

Because both the May 10th agreement and earlier labor provisions have been weakly enforced,[4] the labor movement worked hard to develop proposals, provide recommendations and engage positively with USTR to reform labor texts that had proved ineffective, even when dealing with countries with less severe labor and human rights issues than Vietnam and Malaysia. Rather than trying a new model, the TPP incorporates without improvement numerous provisions, including the discretion to indefinitely delay acting on labor rights violations, already known to be ineffective. Because employers in our trading partner countries will continue to abuse workplace rights, workers throughout the TPP region will continue to make lower wages and will have fewer benefits and more dangerous workplaces than they otherwise might. An injury to a worker in Vietnam will indeed affect his or her American counterpart by driving down wages and working conditions.

TPP supporters say the TPP would, for the first time, require parties to have laws concerning "acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health." Unfortunately, because the TPP sets no minimum standards for these laws, this provision is not as valuable as it might first appear. The TPP explicitly provides that these obligations will be satisfied "as determined by" each country (Article 19.3.2). As a result, a TPP country can set a minimum wage of a penny an hour, or allow shifts of 20 hours per day with no overtime pay, or require workers to provide their own safety gear—and yet be fully compliant with the TPP. Thus, this provision adds little in terms of meaningful new protections for workers in TPP countries.

TPP supporters say it requires TPP countries to combat trade in goods made with forced labor. Rather than requiring countries to prohibit or even combat trade in goods made with forced labor, the TPP requires parties only to "discourage" trade in such goods "through initiatives it considers appropriate" (Article 19.6). This language ensures a TPP party can judge for itself whether it is "discouraging" such trade. A TPP country not inclined to do much might, for example, put up a poster alerting customs employees that trade in goods made with forced labor should be discouraged. The provision allows parties to judge for themselves whether their initiatives are adequate, and even contains a footnote noting the provision provides no authorization to discourage trade in goods made with forced labor if such activities would violate obligations made in other trade deals. Thus, this provision provides no assurances that workers would be protected from forced or compulsory labor, including forced or compulsory child labor—and explicitly prioritizes trade obligations over obligations to protect human rights.

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[3] Letter from Bill Samuel, director, Department of Legislation, AFL–CIO, to Congress. *Available at: www.massaflcio.org/sites/massaflcio.org/files/PERUlettertoHouse.907.pdf.*

[4] Government Accountability Office (GAO), "Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, But More Monitoring and Enforcement Are Needed," November 2014. *Available at: www.gao.gov/assets/670/666787.pdf;* GAO, "Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain," July 2009. *Available at: www.gao.gov/products/GAO-09-439.*

TPP supporters say the TPP obligates parties not to waive or derogate from statutes or regulations implementing minimum wages, hours of work, and occupational safety and health in a special trade zone or customs area. This is yet another provision that adds little for workers. As explained above, a TPP party's laws need not set meaningful standards regarding minimum wages, hours of work, and occupational safety and health. While preventing TPP parties from reducing these standards through waiver or derogation is a laudable goal, this particular obligation only applies "in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory." Thus, it leaves the vast majority of TPP workers without this protection. The AFL–CIO had requested that parties not be allowed to waive or derogate from laws regarding acceptable conditions of work *for any worker*—as such a commitment would have been useful. Limiting the reach of this provision to special zones only limits its usefulness.

The TPP's supporters say it requires countries to eliminate discrimination in employment. Unfortunately, the text of the TPP itself is vague regarding what types of discrimination are prohibited, even though a number of TPP countries have entrenched in practice (and in some cases in law) discrimination against disfavored groups. For example, Vietnam's consistency plan only requires Vietnam to prohibit discrimination on the basis of color, race and national extraction. It fails to mention religion, political opinion, LGBT status or immigration status.[5] These glaring omissions leave open the strong possibility that these other bases of discrimination will be used as a pretext to discourage unions and deter workers from exercising their rights. Similarly, the Malaysia consistency plan fails to address discrimination on the basis of LGBT or immigration status, even though discrimination on these grounds is pervasive throughout Malaysia. Likewise, the Brunei consistency plan fails to address LGBT or immigration status even though it enacted a Sharia legal code during the TPP negotiations that includes the death penalty for illicit sexual relations.[6] Moreover, neither the TPP text nor the consistency plans address basic human rights, including freedom of expression. Without even basic protections for such freedoms, it seems insincere to argue that governments that have engaged in years of repression against free and independent labor unions will not resort to other legal means at their disposal to continue to undermine workplace rights. These glaring omissions mean that workers who should be protected likely will continue to face major threats and discrimination that the TPP, on its face, will be unable to address.

TPP supporters argue that the TPP is "one of the best tools we have to fight forced labor and human trafficking" in Malaysia.[7] Similar promises were made about the Colombia trade deal. The "strong labor provisions" of that trade deal were supposed to provide leverage to raise standards for a country with notoriously abusive labor practices, which had reduced labor density to 1% through a campaign of terror against labor leaders and activists. Unfortunately, because the Colombia trade deal went into effect before it had complied in both law and practice with its labor obligations, the promised leverage was lost. Now, even though threats and violence against trade unionists have increased since the deal's entry into force, the United States has failed to respond. The commercial pressure to keep trade flowing freely has superseded efforts to protect workers so they can act collectively to raise their wages and conditions of work. Likewise, the TPP includes Malaysia, a country with a notoriously bad record on human trafficking and forced labor. To deal with this, labor unions suggested new protections for migrant workers that would have obligated all TPP countries to prohibit certain practices by employers and labor recruiters that are linked to forced labor and human trafficking. We also recommended a clause making clear that migrant workers are entitled to the same rights and remedies as all other workers. Both of these recommendations were soundly rejected. Since the trafficking provisions in the Malaysia consistency plan apply only to Malaysia and have no independent evaluation mechanism, it is unlikely the TPP will prove effective at addressing trafficking and forced labor.

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[5] While gender also is not mentioned in the Vietnam consistency plan, Vietnam already has strong gender equity laws.

[6] Quratul-Ain Bandial and Bandar Seri Begawan, "A New Era for Brunei," *The Brunei Times,* April 30, 2014. *Available at: www.bt.com.bn/frontpage/2014/04/30/new-era-brunei.*

[7] *https://medium.com/the-trans-pacific-partnership/frequently-asked-questions-on-the-trans-pacific-partnership-eddc8d87ac73#.rn5kzfxr8.*

ANALYSIS OF LABOR CONDITIONS IN TPP PARTNER COUNTRIES

The TPP includes countries with entrenched labor and human rights abuses that are unlikely to be solved during a short implementation period.[8]

The following summary of the labor and human rights practices of other TPP countries is broken down into three categories: countries with critical labor rights violations, countries with serious concerns and selected labor rights violations in partner countries. Holistically, each partner country is assessed on the basis of its adherence to the ILO's five fundamental labor rights: the right to freedom of association, the right to collectively bargain, the abolition of forced or compulsory labor, the abolition of child labor and nondiscrimination. This report also will consider how the TPP and, in some cases, U.S.-negotiated labor consistency plans (side agreements for Vietnam, Malaysia and Brunei) would impact the situation for workers in the future. It will conclude with recommendations for a worker-centered trade policy.

I. Countries with Critical Labor Rights Violations (Out of Compliance)

Mexico

The human and labor rights situation in Mexico is rapidly deteriorating. Mexico currently fails to adopt and implement laws that protect the ILO's core labor standards. Indeed, the Department of State (DOS) Mexico 2014 Human Rights Report concludes that:

> The government did not consistently protect worker rights in practice. Its general failure to enforce labor and other laws left workers without much recourse

[8] It is important to note the United States is also out of compliance in a number of ways with fundamental labor rights. As Human Rights Watch put it, "Freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it." Particularly egregious examples include restrictions and in some cases even prohibitions on the rights of freedom of association and collective bargaining for many public employees (at the federal, state and local levels), child labor in the agricultural sector, many prison labor systems, and the lack of a federal regime sufficient to deter private-sector employers from routinely interfering with the right to freedom of association.

with regard to violations of freedom of association, working conditions, or other problems.[9]

The use of "protection contracts" (agreements masquerading as collective bargaining agreements (CBAs) signed between an employer and an employer-dominated union, often without the knowledge of the workers) is the most serious threat to freedom of association and collective bargaining in Mexico. Today, there are estimated to be tens of thousands of protection contracts and tens of thousands of workplaces in Mexico covering millions of workers. In thousands of workplaces, workers are governed by contracts they have never ratified, were never consulted on, and in many cases have never seen.

When workers attempt to bring complaints about protection contracts, these complaints are heard by Mexico's Conciliation and Arbitration Boards (CABs), which are politically biased and corrupt.[10] Instead of ensuring workers can exercise their rights under Mexican and international law, the CABs, the labor authorities and sometimes privately hired or public police forces have interfered with workers' freedom of association. This situation presents itself at the worksites of many multinational companies, including Atento, Excellon, Honda, PKC and Teksid.[11] In the agricultural sector, child labor, forced labor and inhumane working conditions exist on farms that export fresh produce into the United States, which then is sold at major retailers, including Walmart and Safeway.[12] The recent mobilizations in Baja California for better wages in the agricultural sector and the right to form independent unions were met with police repression.[13]

The union certification process is designed to limit worker representation. For example, a requirement known as *toma de nota* has been used by the labor authorities as a tool to deny union office to leaders who are politically disfavored under the guise of an elections certification process. Labor authorities also have denied legal registration to independent unions on seemingly arbitrary or technical grounds. They continue to assert that unions may represent only workers in specific industries, and that the state may restrict a union to a specific "radius of action" (*radio de accíon*).[14]

The magnitude of these problems has been well documented in public reports, submissions under the North American Agreement on Labor Cooperation (NAALC),[15] reports of the ILO Committee on Freedom of Association,[16] academic investiga-

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[9] DOS, DRL, "Country Reports on Human Rights Practices for 2014: Mexico," 2014. *Available at: www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper.*

[10] Graciela Bensusān and Arturo Alcalde, "El sistema de justicia laboral en México: situación actual y perspectivas," (June 2013). *Available at: www.fesmex.org/common/Documentos/Libros/Paper_AP_Justicia_Laboral_Bensusan-Alcalde_Jun2013.pdf;* U.S. National Administrative Office, public review of submission 9703 (Itapsa) (evidence "raises questions about the impartiality of the CAB and the fairness, equitableness and transparency of its proceedings and decisions"); public review of submission 9702 (Han Young); Julie M. Wilson, "Mexican Arbitral Corruption and the North American Agreement on Labor Cooperation: A Case Study." Swords and Ploughshares: A Journal of International Affairs 12, No. 1 (Spring 2003): 61–77; Adam Bookman and Jeffrey K. Staton, "A Political Narrative of Mexican Labour Arbitration Boards and Legal Strategies." Paper prepared for presentation at the Conference on the Scientific Study of Judicial Politics. Texas A&M. October 21–23. Political Science Working Paper #375. It has been suggested that the boards can be made more efficient by adopting oral procedures. *See* Instituto Mexicano para la Competitividad, Por una mejor justicia laboral (2014). However, it has been reported that in some labor boards the recordings of these proceedings are being used to bring criminal complaints against workers and their attorneys. Manuel Fuentes Muñiz, La justicia laboral de embudo, July 1, 2014. *Available at: http://manuelfuentesmuniz.blogspot.com/2014/07/la-justicia-laboral-de-embudo-la-silla.html.*

[11] Sindicato Mexicano de Electricistas, Public Communication under the North American Agreement on Labor Cooperation (November 4, 2011): 5–6. *Available at: www.dol.gov/ilab/submissions/pdf/MexicoSubmission2011.pdf.*

[12] Marosi, Richard, "Product of Mexico," *Los Angeles Times,* December 7, 2014. *Available at: http://graphics.latimes.com/product-of-mexico-camps/.*

[13] Binkowski, Brooke, "Arrests as Mexico farming wage strike turns violent," *Al Jazeera,* May 12, 2015. *Available at: www.aljazeera.com/news/2015/05/150512051555205.html.*

[14] *See* Secretaria Auxiliar de Conflictos Colectivos, Junta Especial Numero Quince, Expediente Numero: IV.54J2012.

[15] *See* U.S. National Administrative Office, public reports of review for public submissions 940003 (Sony), 2003–01 (Puebla), 2005–03 (Hidalgo), 9702 (Han Young), 9703 (Itapsa).

[16] *See, e.g.,* ILO CFA cases 2115, 2207, 2282, 2308, 2346, 2347, 2393.

tions [17] and recent case studies.[18] Although Mexico and the United States have had more than 20 years to work on bringing Mexican labor law and practice up to minimum international standards through the NAALC process, labor abuses in many cases are worse now than before the North American Free Trade Agreement (NAFTA), and these abuses appear to be concentrated in supply chains that feed U.S. markets.

In short, NAFTA has contributed to labor abuses, not improvements. NAFTA also contributed to massive displacement of Mexican *campesinos.*[19] Some of these workers searched for promised new jobs in the *maquiladoras.* Many others migrated north to the United States, either through irregular channels or by utilizing often-exploitative labor recruitment firms and guestworker visa programs. As documented in a 2011 NAALC petition, migrant workers in the United States are subject to a range of labor rights violations.[20] Meanwhile, companies have shifted manufacturing work to Mexico for decades to take advantage of displaced *campesinos* and other impoverished workers who lack the most basic workplace protections.

There is currently a crisis of violence and impunity taking place in Mexico that raises doubts about whether the Mexican government can and will fulfill its obligations under the TPP. The disappearance last year of 43 students, now declared dead, from the teachers' college in Ayotzinapa, Guerrero, by local police and criminal gangs widely believed to be responsible, is a horrific example of violence, corruption and dissolution of the rule of law. More than 22,000 persons have disappeared since 2007, including more than 5,000 in 2014 alone.[21] These crimes rarely are investigated and almost never prosecuted, allowing public security forces—the same that have sporadically engaged in violent worker repression over the years—to operate with impunity.

There is nothing in the TPP's labor chapter that would ensure Mexico's history of worker abuse and exploitation will be remedied. No provisions were added to the enforcement section to ensure monitoring and enforcement of the labor obligations will be deliberate, consistent, timely, vigilant, effective or automatic. There is not even a "consistency plan" for Mexico despite the U.S. government's extensive knowledge of the problems—problems that not only impoverish Mexico's workers, but also act as an inducement to transfer production out of the United States. The TPP fails to even include any specific protections for equal rights and remedies for migrant workers, or specific prohibitions against exploitive or fraudulent international labor recruitment, which labor union presidents had recommended strongly.

In December 2015 in Cancun, Mexico, President Peña Nieto announced he would send new labor law reform proposals to Congress early this year, but to date there is no clear process to include independent unions and civil society in developing these proposals.

The president of Mexico also sent ILO Convention 98 on the right to organize and collective bargaining to the Senate for ratification, and the labor secretary has announced a new inspection protocol that supposedly would verify whether workers

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[17] José Alfonso Bouzas Ortiz (Coordinador) EVALUACIÓN DE LA CONTRATACIÓN COLECTIVA EN EL DISTRITO FEDERAL, Friedrich Ebert Foundation, 2009. *Available at: www.democraciaylibertadsindical.org.mx/media_files/LIBRO_BOUZAS.pdf;* Carlos de Buen Unna, "Collective bargaining agreements for employer protection ('protection contracts') in Mexico," Friedrich Ebert Foundation, 2011. *Available at: www.democraciaylibertadsindical.org.mx/media_files/Paper_Charles_De_Buen.pdf;* Chris Tilly and José Luis Alvarez Galván, "Lousy Jobs, Invisible Unions: The Mexican Retail Sector in the Age of Globalization." *International Labor and Working-Class History* 70 (2006), pp. 1–25.

[18] *See, e.g.,* Worker Rights Consortium, Violations of International Labor Standards at Arneses Y Accesorios De Mexico, S.A. DE C.V. (PKC GROUP), June 18, 2013. *Available at: http://workersrights.org/Freports/WRC%20Findings%20and%20Recommendations%20re%20Arneses%20y%20Accesorios%20de%20Mexico%2006.18.13.pdf;* Centro de Reflexión y Acción Laboral, "After the Reform: Fifth report about the labor conditions of Mexico's electronics industry," August 2013. *Available at: www.fomento.org.mx/novedades/Informe2013-ingles.pdf.*

[19] M. Angeles Villarreal, "NAFTA and the Mexican Economy," Congressional Research Service, June 3, 2010.

[20] Petition on Labor Law Matters Arising in the United States submitted to the National Administrative Office (NAO) of Mexico under the NAALC, "Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws, Promote Compliance with Minimum Employment Standards, and Protect Migrant Workers," September 19, 2011.

[21] "Law and Order in Mexico," *The New York Times,* November 11, 2014. *Available at: www.nytimes.com/2014/11/12/opinion/murder-in-mexico.html?_r0;* "Mexico's Disappeared," Human Rights Watch, February 20, 2013. *Available at: www.hrw.org/reports/2013/02/20/mexicos-disappeared-0.*

understand their contracts, but workers still would lack the right to get a copy of their contract, which reinforces the current protection contract model.

On January 20, 2016, the Mexican Supreme Court ruled the government can cap back pay at one year in lawsuits over unjust firings, although on average these cases take more than three years to resolve. This ruling creates a perverse incentive to fire workers who attempt to organize democratic unions.

Despite public statements promising to address worker rights issues, the Mexican government has failed to address systemic worker rights violations. The government continues to fail to eliminate the CABs and replace them with independent labor judges, create transparency in the union contracts and certification, or ensure that union democracy is protected through improved election and certification processes. Labor rights must be enforced, not be just potentially enforceable, to have an impact on the ground. As currently written, the TPP fails to meet this benchmark, and would reward Mexico with more trade benefits before the government makes fundamental and structural changes to its labor system to bring it into compliance with international labor law.

Vietnam

Vietnam has an authoritarian government that limits political rights, civil liberties and freedom of association. The government maintains a prohibition on independent human rights organizations and other civil society groups. Without the freedom to exercise fundamental labor rights, labor abuses in Vietnam are pervasive, artificially suppressing wages, stifling the ability of Vietnamese workers to escape poverty, and putting U.S. and other workers at a disadvantage in the global market. Labor provisions in the TPP and the labor consistency plan do not appear to be carefully crafted to effectively mitigate this urgent problem or empower workers to improve conditions.

The Vietnamese government currently restricts union activity outside the official unions affiliated with the Communist Party's Vietnam General Confederation of Labor (VGCL), which actually controls the union registration process.[22] Workplace-level VGCL unions generally have management serving in leadership positions, and when that is not the case, workers cannot meet as the union without management present.[23] This effectively bars the possibility of establishing independent trade unions in Vietnam. Further, there is no right to strike in Vietnam. Wildcat strikes and industrial actions outside VGCL unions have led to government retaliation, including prosecution and imprisonment.

Government repression of civil liberties further undermines industrial relations in Vietnam. Corruption in the judicial system and widespread law enforcement abuse, including arbitrary killings, stifles whistleblowers and labor activists, as well as

[22] U.S. DOS, "Vietnam 2014 Human Rights Report," 2014. *Available at: www.state.gov/documents/organization/236702.pdf.*

[23] ITUC, "Survey of Violations of Trade Union Rights: Vietnam," 2014. *Available at: http://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-3.*

human rights defenders.[24] The government blocks access to politically sensitive websites and monitors the Internet for the organization of unauthorized demonstrations.[25]

Vietnam has significant problems with forced labor and child labor. The U.S. DOL finds that child labor is prevalent in the production of bricks and garments. Forced labor and human trafficking also is prevalent in the garment sector and in the informal economy.[26] Vietnam is the second-largest source of apparel and textile imports to the United States, totaling just under $10 billion in value [27] and employing more than 2 million workers.[28] Many of the clothes contain textiles produced in small workshops subcontracted to larger factories. These workshops frequently use child labor, including forced labor involving the trafficking of children from rural areas into cities.[29]

The government of Vietnam also actively imposes compulsory labor on drug offenders. In these work centers styled as drug treatment centers, detainees are harassed and physically abused when they do not meet their daily factory quotas in so-called "labor therapy." An estimated 309,000 people were detained in Vietnam's drug detention centers from 2000 to 2010. The detainees receive little or no pay for their work.[30]

The labor consistency plan with Vietnam offers many improvements on paper, but few of them are likely to be actualized given that full TPP membership and market access will be granted after ratification and before changes are made. The plan contains a number of other shortcomings. It allows Vietnam to give "independent" unions "mandatory political obligations and responsibilities" so long as they are not "inconsistent with labor rights as stated in the ILO Declaration." It is inconsistent with the concept of free and independent unions to allow the government to saddle them with "political obligations" of any kind. The plan calls for a prohibition on discrimination, but does not include religion, political opinion, immigration status and sexual orientation/gender expression as protected categories. Despite important language clarifying the right to strike, the right of unions to independently manage their own affairs and elect their own leadership, and to create independent federations, it is not clear that penalties for employer violation of these rights will be established.

Further, the plan provides a free pass to Vietnam to deny the right to freedom of association above the enterprise level for *at least the first 5 years* after the TPP's entry into force. The potential penalty is only a delay of future tariff reductions. However, by Year Six of the agreement, Vietnam already will enjoy the bulk of the tariff reductions required by the TPP, including significant market access in the all-important garment sector. By providing a grace period, the agreement gives away important leverage that could improve the situation *now*.

The market opening benefits of the TPP should not apply to Vietnam unless and until Vietnam comes into full compliance with fundamental labor rights. Anything less essentially will create a permanent ceiling on labor and human rights in Vietnam, stunting Vietnamese wage growth, suppressing Vietnamese demand and continuing to allow social dumping on world markets.

Malaysia

Malaysia has grave problems with every one of the five fundamental labor rights. Particularly troubling is its profound failures to protect workers from forced labor and human trafficking. The DOL reports that forced labor is prominent in the elec-

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[24] Human Rights Watch, "World Report 2015: Vietnam," 2015. *Available at: https://www.hrw.org/world-report/2015/country-chapters/vietnam.*

[25] DOS, "Vietnam 2014 Human Rights Report," 2014.

[26] DOL ILAB, "List of Goods Produced by Child Labor or Forced Labor: Vietnam," 2014. *Available at: www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Vietnam;* Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, "Vietnam." *Available at: www.state.gov/documents/organization/243562.pdf;* scroll down to Vietnam report, page 362.

[27] ITA, Office of Textiles and Apparel, "Major Shippers Report: U.S. General Imports By Country," September 2015. *Available at: http://otexa.trade.gov/msrcty/v5520.htm.*

[28] Worker Rights Consortium, "Made in Vietnam," May 2013. *Available at: www.workersrights.org/linkeddocs/WRC_Vietnam_Briefing_Paper.pdf.*

[29] Ibid.

[30] Human Rights Watch, "World Report 2015: Vietnam," Adeline Zensius, "Forced Labor in Vietnam: A Violation of ILO Convention 29, "International Labor Rights Forum, December 2011. *Available at: http://laborrightsblog.typepad.com/international_labor_right/2011/09/forced-labor-in-vietnam-a-violation-of-ilo-convention-29-.html#sthash.FJEFKvw8.dpuf.*

tronics and garment industries, and the palm oil sector, which also uses child labor.[31] The majority of the victims of forced labor in Malaysia are among the country's 4 million migrant workers—40% of the overall workforce.[32] The government of Malaysia's failure to uphold labor rights, or even basic human dignity, puts the products of forced labor into the hands of U.S. consumers, and forces U.S. workers to compete with a workforce with few rights and protections.[33] Under current conditions, it is difficult, if not impossible, to imagine these workers moving into the middle class and becoming a significant market for U.S. exports.

Freedom of association is strictly limited, as there are many legal restrictions on industrial action and police permission is required for public gatherings of more than five people.[34] Collective bargaining also is restricted, especially for migrants and public-sector workers. Employers use provisions that allow for multiple unions at the enterprise level to set up company-dominated unions and erode the bargaining power of representative unions. Trade union leaders and workers report that employers regularly terminate or penalize workers for expressing their political opinions or highlighting alleged wrongdoings by employers. These practices contribute to the overall level of exploitation, suppressing wages and driving demand down.

Migrants to Malaysia face a range of abuses related to their recruitment and placement, and often are threatened with deportation for speaking out. Migrant workers in agriculture, construction, textiles and electronics, and domestic workers throughout Malaysia, are subjected to restrictions on movement, deceit and fraud in wages, document confiscation, and debts by recruitment agents or employers. Migrants also are limited in their ability to improve these conditions. While the Malaysian Employment Act of 1955 guarantees all workers, including migrant workers, the right to join a trade union, employers and government authorities discourage union activity among migrants, and work contracts and subcontracting procedures often undermine worker agency.[35]

Some of the most recognizable electronics brands operate or source components from Malaysia, including Intel, Advanced Micro Devices, Dell and Flextronics.[36] Verité interviewed more than 500 workers and found that approximately 28% of electronics workers toiled in conditions of forced labor. Additionally, 73% of workers reported violations that put them at risk for forced labor, such as outsourcing, debt from recruitment fees, constrained movement, isolation and document retention.[37]

In May 2015, Malaysian police uncovered 139 makeshift graves in the jungle alongside abandoned cages used to detain migrant workers—an operation so massive many believe local officials were complicit.[38] Not long after, the U.S. State Department made the disastrous and apparently political decision to upgrade Malaysia in its annual Trafficking in Persons Report from Tier 3 to the Tier 2 watch list—removing the country from the threat of trade restrictions under the TPP or other

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[31] DOL ILAB, "List of Goods Produced by Child Labor or Forced Labor: Malaysia," 2014. *Available at: www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Malaysia.*

[32] "Immigration in Malaysia: Assessment of its Economic Effects, and a Review of the Policy and System," The World Bank: Human Development Social Protection and Labor Unit East Asia and Pacific Region, 2013. *Available at: http://psu.um.edu.my/images/psu/doc/Recommended%20Reading/Immigration%20in%20Malaysia.pdf.*

[33] Verité, "Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics," 2014. *Available at: https://www.verite.org/research/electronicsmalaysia.*

[34] ITUC, "Survey of Violations of Trade Union Rights: Malaysia," 2015. *Available at: http://survey.ituc-csi.org/Malaysia.html?lang=en#tabs-2.*

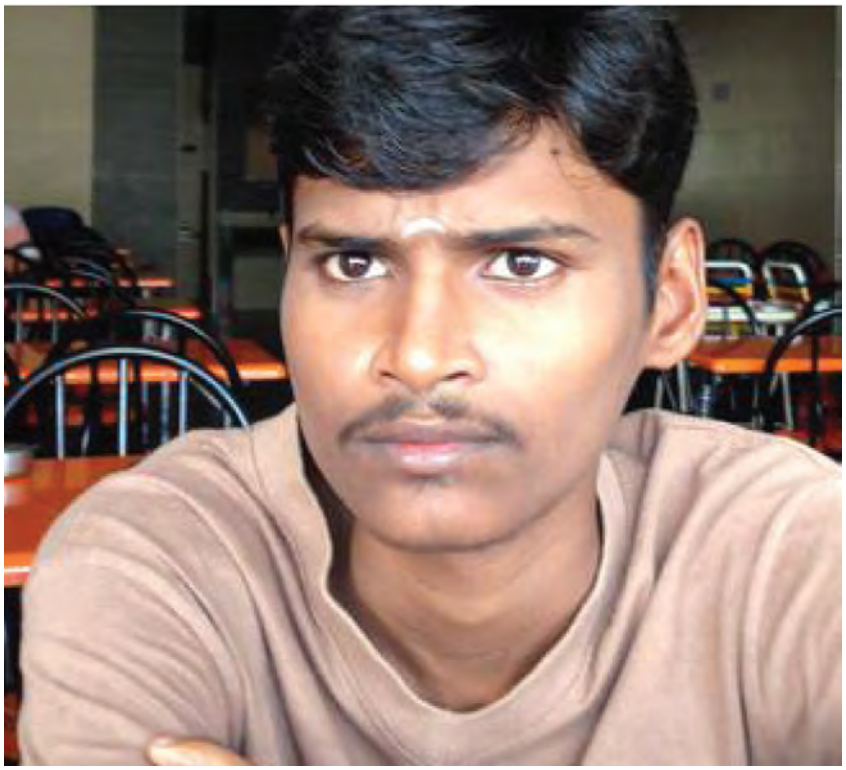
[35] Human Rights Watch, "US/Malaysia: Letter to Secretary Kerry on Trafficking in Persons in Malaysia," July 31, 2015. *Available at: https://www.hrw.org/news/2015/07/31/us/malaysia-letter-secretary-kerry-trafficking-persons-malaysia;* Kosh Raj Koirala, "Malaysia flouts own law on migrants' trade union rights," *Nepal Republic Media,* June 26, 2015. *Available at: www.myrepublica.com/politics/story/23544/plight-of-nepalis-in-malaysia-flouting-own-law-malaysia-prevents-migrants-joining-trade-union.html#sthash.txEWzuIN.dpuf.*

[36] Malaysia Investment Development Authority, "Top 10 U.S. Companies in Malaysia," 2012. *Available at: www.mida.gov.my/env3/uploads/events/TIMUSA29042012/02Top10USCompanies.pdf.*

[37] Verité, "Forced Labor in the Production of Electronic Goods in Malaysia."

[38] Wang Kelian, "Malaysia finds 139 graves in 'cruel' jungle trafficking camps," *Reuters,* May 25, 2014. *Available at: www.reuters.com/article/us-asia-migrants-idUSKBN0OA06W20150525#lbtiVKhvKl33D1cQ.97;* Ambiga Sreenevasan, "Malaysia's deadly connection," *MalayMail,* July 24, 2014. *Available at: www.themalaymailonline.com/what-you-think/article/malaysias-deadly-connection-ambiga-sreenevasan.*

sanctions tied to Tier 3 status.[39] The situation in Malaysia has not improved: forced labor, human trafficking and exploitation remain pervasive.



Fundamental reforms must be taken in terms of Malaysia's labor, immigration and industrial policies before workers will be able to escape the cycle of exploitation and vulnerability that often leads to labor abuses and trafficking. Despite Malaysia's notorious failure to combat human trafficking and protect the rights of migrant workers, the TPP fails to even include any specific protections for equal treatment for migrant workers or against exploitive or fraudulent international labor recruitment.

The TPP labor provisions and the Malaysia consistency plan have some helpful provisions. For example, the consistency plan calls on Malaysia to amend its laws to limit the ability of labor officials to deny trade union registration and affiliation; make it illegal to retain a worker's passport; expand the right to strike; and allow migrant workers improved trade union rights. However, despite these provisions, they do not appear sufficient to ensure working people in Malaysia will be able to exercise their fundamental labor rights.

The plan does not clearly call for an expansion of the right to bargain collectively in all sectors, nor does it appear to hold employers fully accountable for abuses in subcontracting and recruitment processes—major factors in the perpetuation of forced labor. Improved rules regarding access to justice, recruitment fees, targeted labor enforcement in industries known to be problematic and victim services still could be lacking even under the agreement. Nor does the agreement address basic human rights, including the right to free assembly and lack of civil rights for LGBT persons. As such, employers and government officials still may attack workers for their advocacy, while claiming to be using a different section of Malaysia's legal code to do so.

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[39] Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, "Malaysia." *Available at: www.state.gov/j/tip/rls/tiprpt/countries/2015/243485.htm.*

All workers in Malaysia must be broadly empowered to improve wages and working conditions. The consistency plan fails to meet this benchmark and lacks any specific measurements or criteria to evaluate the implementation and enforcement of the required reforms. Given that Malaysia could be rewarded with greater market access under the Trans-Pacific Partnership without having to first enforce the changes it promises to make on paper, there will be little incentive for the government to end exploitative working conditions or the brutality of forced labor after entry into force.

Brunei

The human and labor rights situation in Brunei is dire. Under the Sultan of Brunei, whose family has ruled for more than six centuries, the country adheres to a strict penal code based on Sharia law, which mandates flogging, dismemberment and death by stoning for crimes such as adultery, alcohol consumption and homosexuality. Despite widespread calls from U.S. labor, LGBT and human rights groups to exclude Brunei from the TPP, it appears the agreement and the consistency plan situate the U.S. and Brunei governments to enter into a permanent trading relationship without ensuring that working families can exercise their fundamental human and labor rights in Brunei.

Freedom of speech in Brunei is severely limited, and the legislature has a limited role.[40] It is difficult, if not impossible, to imagine freedom of association will exist where the right to free speech does not accompany it. Under the Internal Security Act, activists deemed to be anti-government can be detained without trial indefinitely, renewable for two-year periods.[41] Harsh punishment stifles worker activism, and there is a nationwide prohibition on collective bargaining.

Workers, and migrant workers in particular, have few protections for their basic rights. The government prohibits strikes. The law does not provide for reinstatement for dismissal related to union activity. The government can refuse to register trade unions.[42] Government permission is required for holding a public meeting involving more than 10 people, and the police can break up any unofficial meeting of more than five people if they regard it as liable to disturb the peace.[43]

Many of the 85,000 migrant workers in Brunei face labor exploitation and trafficking related to debt bondage from labor recruitment fees, wage theft, passport confiscation, abuse and confinement. Immigration law allows for prison sentences and caning for workers who overstay their visas, fall into irregular status, or work or change employers without a permit.[44] This traps migrant workers in abusive employment and impedes access to justice and compensation if a migrant worker chooses to leave an exploitative employment relationship.

The labor consistency plan with Brunei is wholly inadequate to deal with the serious problems indicated above. For example, it calls for an end to document confiscation and "an outreach program to inform and educate stakeholders," but does not address excessive recruitment fees or the criminalization of migrant workers. While it requires that employment discrimination be made unlawful, it fails to include LGBT workers within this new protection. Moreover, it fails to provide for labor courts or other structures free from the political influence of the sultan.

The labor side letter fails to include any specific benchmarks to evaluate the implementation and enforcement of the required legal and regulatory changes. The letter includes no independent evaluation mechanism, which means that partial and ineffective fulfillment of the plan's elements or changes on paper could be substituted for actual changes in workers' lives. In short, the Brunei side letter seems likely to be partially implemented on paper, but likely will continue to leave workers without the ability to freely exercise their fundamental rights.[45]

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[40] U.S. Department of State (hereinafter DOS), "Brunei 2014 Human Rights Report," 2014. *Available at: www.state.gov/documents/organization/236638.pdf.*

[41] Amnesty International, "Amnesty International Report 2014/15: Brunei Darussalam," 2015. *Available at: https://www.amnesty.org/en/countries/asia-and-the-pacific/brunei-darussalam/report-brunei/.*

[42] U.N. Human Rights Council, "Report of the Working Group on the Universal Periodic Review Brunei Darussalam," July 7, 2014. *Available at: www.upr-info.org/sites/default/files/document/brunei_darussalam/session_19_-_april_2014/a_hrc_27_11_e.pdf.*

[43] DOS, "Brunei 2014 Human Rights Report."; ITUC, 2010 Annual Survey of violations of trade union rights—Brunei Darussalam," March 3, 2010. *Available at: http://survey.ituc-csi.org/Brunei-Darussalam.html?lang=en#tabs-2.*

[44] U.S. DOS, "Brunei 2014 Human Rights Report," 2014.

[45] For a thorough explanation of the need for labor provisions in trade agreements that incorporate robust monitoring and enforcement mechanisms, as well as measurable benchmarks for

Continued

II. Countries of Serious Concern

Chile [46]

Today, 25 years after the end of the Pinochet regime, workers confront a profound lack of legal guarantees and effective protection by the state. The current labor legislation remains largely the same and thus perpetuates the destructive legacy of the past. As a result, there has been a steep decline in the rate of unionization—from 30% in 1973 to only 8% today. Today, Chile has among the lowest unionization rates among all OECD members. While the current government has formulated amendments to address some of the issues described below, the legislation has yet to pass.

Freedom of association is restricted, particularly in the public sector. Police, military personnel and civil servants of the judiciary are prohibited from joining a union. Temporary workers also have no right to organize. The constitution also provides that the holding of a trade union office is incompatible with active membership in a political party, and that the law shall lay down related sanctions (Political Constitution, Art. 23). In addition, broad powers are granted to the Directorate of Labor for supervision of union accounts, and financial and property transactions.

Collective bargaining also is restricted in a number of ways. Industrywide agreements that set minimum standards for wages and working conditions for all workers once were common, but since largely have disappeared as the law does not require bargaining above the enterprise level. In addition, workers without permanent contracts and other temporary workers are excluded from collective negotiations, a serious problem as employers are shifting to short-term contracts even for work that in reality is full time. The law also permits groups of workers to submit draft collective agreements, even when there are unions present, undermining the role of unions as a bargaining representative.

Finally, Chile also circumscribes the right to strike. According to the Labor Code, a strike must be agreed to by an absolute majority of the company's employees (Sections 372 and 373) and must be carried out within three days of the decision to call the strike (374). No strike action may be taken by workers if they are deemed to provide services of a public utility, or it would present a serious threat to health, the country's economy or national security. This goes beyond the "essential services" strike restrictions acceptable under ILO guidance. Section 254 of the Penal Code provides for criminal penalties in the event of the interruption of public services or public utilities or dereliction of duty by public employees, and Act No. 12927 authorizes the imprisonment of anyone involved in the interruption or collective suspension, stoppage, or strike in public services or public utilities. Section 381 provides for the possibility of hiring replacement workers during a strike. Agricultural workers are not guaranteed the right to strike.

Peru

Since the U.S.-Peru free trade agreement (FTA) came into force, Peru has reduced protections for workers and weakened mechanisms to enforce labor legislation. Peruvian unions report there are low levels of public investment to eliminate child labor and forced labor, promote equality and nondiscrimination in employment, and to ensure the right to organize and collectively bargain. Labor rights, generally, and rights in export sectors, in particular, have been eroded by a disproportionate increase in temporary employment.

According to the DOS, Peru does not fully comply with the minimum standards for the elimination of trafficking. Peruvian workers are exploited in conditions of forced labor, primarily in informal gold mining, logging, agriculture, brick making and domestic service. Many of these victims are indigenous, rural or migrant workers who face deceptive recruitment, debt bondage, restricted freedom of movement or inability to leave, withholding or nonpayment of wages, and threats and use of physical violence. Forced child labor occurs in begging, street vending and criminal activi-

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change instead of a rigid focus on rules to the exclusion of implementation, *see* Barenberg, Mark, "Sustaining Workers' Bargaining Power in an Age of Globalization: Institutions for the meaningful enforcement of international labor rights," EPI Briefing Paper No. 246, October 9, 2009.

[46] ITUC, "Survey of Violations of Trade Union Rights: Chile," 2015. *Available at: http://survey.ituc-csi.org/Chile.html.*

ties.[47] The DOL also has found significant instances of child labor in the production of bricks, coca, fireworks, fish, gold and timber.[48]

Last year, the Peruvian government passed a series of laws to roll back health, safety and environmental regulations—purportedly "to create a more friendly environment, to reduce the impediments to investment." Despite the fact that regressive laws likely violated trade commitments, the government turned back 2011 improvements to occupational health and safety and inspections processes. It also weakened enforcement mechanisms, fines and mandated action plans.[49]

Further, it has been well documented by national and international organizations, including the ILO and the UN Office of the High Commissioner for Human Rights (OHCHR), that the Peruvian government is not enforcing its own labor laws in the sectors of garments, textiles and agricultural product exports, which together employ hundreds of thousands of workers who produce billions of dollars of goods for the U.S. market.[50] In the textile and garment industry, the Law for the Promotion of Non-Traditional Exports (Law No. 22342)—designed to encourage investment by allowing workers to be hired under an indefinite number of short-term contracts—has been a major obstacle to the promotion of labor rights. The largest textile and garment companies are the major beneficiaries of the law, and the 30 largest companies account for more than 70% of the contracts covered by these regulations. Employers can issue contracts as short as 15 days and renew the contract every two weeks for as long as 15 years. The law allows employers to discriminate against trade unionists by firing them under the pretext of not renewing their contract because of "economic circumstances."

As documented in a recent submission to the Office of Trade and Labor Affairs (OTLA) on the failure of the government of Peru to comply with labor standards under the FTA, employers routinely have abused their power to renew short-term contracts of their workers when they are trying to constitute or become members of a union, making them permanent victims of firings for this purpose.[51] This is the second submission regarding Peru's labor practices in less than a decade, while many also have requested U.S. action on Peru's violation of its environmental obligations as well.[52] The lack of robust action by the USTR to enforce the first "May 10th" agreement sends the wrong message to TPP parties: that despite the "historic" nature of the obligations, these obligations are unlikely to be enforced.

The TPP Labor Chapter does not make significant and meaningful improvements to substantive labor provisions of the U.S.-Peru FTA and offers no improvements to the enforcement mechanisms. This, combined with 20 years of lackluster labor enforcement by the U.S. government, makes it clear that TPP will do little to improve working conditions or raise wages in Peru. Because Peru is currently in violation of the U.S.-Peru FTA, Peru will be in clear violation from the moment the TPP enters into force unless both governments take immediate actions to secure Peru's compliance.

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[47] Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, "Peru." *Available at: www.state.gov/documents/organization/243561.pdf;* scroll down to Peru report, page 277.

[48] DOL ILAB, "List of Goods Produced by Child Labor or Forced Labor: Peru," 2014. *Available at: www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Peru.*

[49] "Paquetazo laboral viola tres TLC," *Diario Uno,* July 13, 2014. *Available at: http://diariouno.pe/columna/paquetazo-laboral-viola-tres-tlc/?fb_action_ids=10203308215938885&fb_action_types=og.likes%20;* "Moody's: Perú crecerá hacia un 6% para el 2016, asegura ministro Castilla," America Noticias, February 7, 2014. *Available at: www.americatv.com.pe/noticias/actualidad/miguel-castilla-sobre-informe-moodys-peru-crecera-hacia-6-2016-n143824.*

[50] *See* Report Number 357 of the Committee on Freedom of Association (CFA), June 2010, case 2675; Office of the United Nations High Commissioner for Human Rights (OHCHR), ITUC submission to the URP. *Available at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PE/CSI_PER_UPR_S2_2008_InternationalTradeUnionConfederation_uprsubmission.pdf.*

[51] "PUBLIC PRESENTATION TO THE OFFICE OF TRADE AND LABOR ISSUES (OTLA) UNDER CHAPTERS 17 (LABOR) AND 21 (DISPUTE SETTLEMENT) OF THE TRADE PROMOTION AGREEMENT BETWEEN THE U.S. AND PERU," July 23, 2015.

[52] *See:* USTR, "Review of 2012 EIA Petition Regarding Bigleaf Mahogany and Spanish Cedar Exports," 2013. *Available at: https://ustr.gov/sites/default/files/EIA%20Review%20Summary.pdf.* Environmental Investigation Agency, "Implementation and Enforcement Failures in the U.S.-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue," June 2015. *Available at: http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf.*

Singapore [53]

Substantial legal limitations on freedom of association, collective bargaining and the right to strike exist in Singapore. The Registrar of Trade Unions has wide-ranging powers to refuse to register a union or cancel registration. The parliament may impose restrictions on the formation of a union on the grounds of security, public order or morality. The registrar has the right to refuse the rule change if she or he deems it either unlawful or "oppressive or unreasonable."

The Trade Unions Act limits what unions can spend their funds on and prohibits payments to political parties or the use of funds for political purposes. Although the Trade Unions Act prohibits government employees from joining trade unions, the law gives the president of Singapore the right to make exceptions to this provision. The Amalgamated Union of Public Employees (AUPE) was granted such an exemption, and its scope of representation now covers all public-sector employees except the most senior civil servants.

Migrant workers particularly are limited in exercising their rights. The Trade Unions Act bars any person "who is not a citizen of Singapore" from serving as a national or branch officer of a trade union unless prior written approval is received from the minister. The act also stipulates that a foreign national cannot be hired as an employee of a trade union without prior written agreement from the minister. Similarly, a foreign national is forbidden to serve as a trustee of a trade union without the minister's written permission.

As in other countries with existing serious rights violations, the United States failed to secure a labor consistency plan with Singapore. The TPP, as in other countries, will come into force, offering Singapore enhanced benefits, before any changes are required.

III. Selected Labor Rights Concerns in Other TPP Countries

Freedom of Association and the Right to Collective Bargaining

In **Japan,** all national and local public employees and some employees of private companies or state-run companies that provide essential services such as electricity are banned from striking. Dismissal and fines or imprisonment for up to three years can be imposed if a trade union leader is convicted of inciting a strike action in the public sector—this limitation for public-sector workers is a serious violation of the ILO forced labor convention (C. 105), which remains unratified by Japan.[54]

New Zealand's employment law allowing employers in the film and video game production industry to classify workers as contractors, denying them rights to collective bargaining and minimum labor standards, was introduced specifically to attract investment to that industry at the demand of Warner Brothers.[55]

In March 2015, changes to New Zealand's Employment Relations 2000 came into force. Key changes to collective bargaining allow employers to end negotiation more easily, weaken good faith negotiations, remove protections for new workers and make collective bargaining more difficult. The changes specifically allow employers to opt out of multiemployer negotiations without providing reasons or being subject to industrial action.[56]

In **Australia,** there are a number of legal obstacles with regard to freedom of association and the right to collectively bargain. The Fair Work Act of 2009 imposes a number of restrictions related to trade union rights to elect representatives and to draw up their constitution and rules. Any person who has been convicted of a prescribed offense at any time is prohibited from holding trade union office, and individuals in vocational placement cannot join a registered union in connection with their work on that vocational placement. A 2015 amendment to the act further restricts freedom of association and the right to collectively bargain, in particular by setting an expiry date for negotiations in greenfield workplaces, after which an employer's "draft agreement" will be treated as a collective bargaining agreement when, in truth, the workers never agreed to it. Due to the act, a representative

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[53] ITUC, "Survey of Violations of Trade Union Rights: Singapore," 2015. *Available at: http://survey.ituc-csi.org/Singapore.html.*

[54] ITUC, "Survey of Violations of Trade Union Rights: Japan," 2015. *Available at: http://survey.ituc-csi.org/Japan.html.*

[55] *www.theguardian.com/business/2010/oct/31/warner-bros-new-zealand-hobbit-film.*

[56] ITUC, "Survey of Violations of Trade Union Rights: New Zealand," 2015. *Available at: http://survey.ituc-csi.org/New-Zealand.html.*

trade union also may be just one of a number of bargaining representatives taking part in the negotiations, which reduces the power of collective bargaining.[57]

In **Canada,** federal labor law applies only to approximately 10% of workers; in workplaces and occupations that are not federally regulated, provincial and territorial governments are responsible for labor laws. This translates into a number of categories of workers being prohibited or limited from forming or joining a union or holding a union office, due to their professional designation or sector (such as in the medical professions or in agriculture). In the public sector, the government of Canada gave itself the exclusive right to define what constitutes an essential service, and to unilaterally designate its employees as essential. If 80% or more of the bargaining unit is designated as essential, strikes are prohibited.[58]

Forced Labor and Child Labor

New Zealand has no minimum age of employment.

In **Australia,** forced and compulsory labor are explicitly prohibited by law; however, there have been a few reports of temporary workers in such sectors as agriculture, cleaning, construction, hospitality, manufacturing and domestic service being subject to forced labor. There also are numerous instances of foreign workers on temporary work visas being underpaid, exploited and denied their rights under Australian law.

Canada prohibits all forms of forced labor, and the government enforces the law. Some reports indicated that child labor occurred, especially in the agricultural sector. In British Columbia, children as young as 12 years old can work legally in any industry; a letter from the parent is all that is required, and the province places no legislative or regulatory restrictions on the occupations, tasks or time of day a child can work. There is some evidence of forced labor trafficking of workers from Eastern Europe, Asia, Latin America and Africa who are subjected to forced labor in agriculture, construction, restaurants, hospitality, food processing plants and as domestic workers.

Discrimination

Japan mandates equal pay for men and women. However, the Japanese Trade Union Confederation (JTUC–RENGO) reports many cases of discrimination against union members or activists as well as gender discrimination in wages and working conditions.

Canada prohibits discrimination with respect to employment or occupation on the basis of race, gender, etc. However, the Public Service Equitable Compensation Act makes it a criminal offense for a union to encourage or assist any employee in filing or proceeding with a pay equity complaint. Unions are subject to summary conviction and fined up to $50,000 if they assist their members in any way in advancing pay equity complaints.

CONCLUSIONS AND RECOMMENDATIONS

The TPP, as currently written, is troubling in numerous ways. Of course, the agreement covers not just traditional trade issues, such as tariffs and quotas, but sets rules that will limit our democracy and how our government can regulate in the public interest. The TPP creates new and expansive legal rights for foreign investors—including their very own private legal system that is outside the reach of U.S. courts. The current labor chapter, even with improved language, does not represent a counterbalance to the protections and privileges gained by corporations. In the TPP, the interests of workers and the promotion of their rights are embedded in a failed model.

The labor movement has now had years of experience with labor rights language in trade agreements. As documented by the Government Accountability Office, the U.S. government does little to actively monitor or enforce commitments made in the labor chapter.[59] Unlike corporations that are able to unilaterally access dispute set-

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[57] ITUC, "Survey of Violations of Trade Union Rights: Australia," 2015. *Available at: http://survey.ituc-csi.org/Australia.html.*

[58] ITUC, "Survey of Violations of Trade Union Rights: Canada," 2015. *Available at: http://survey.ituc-csi.org/Canada.html.*

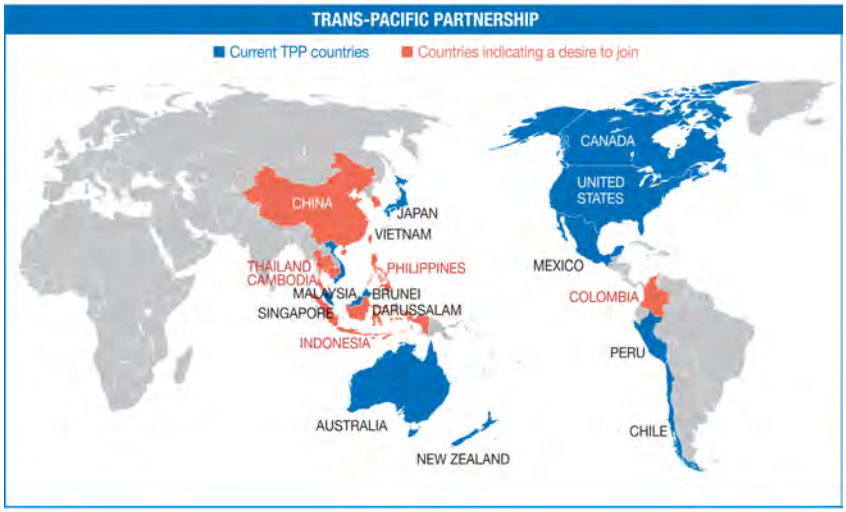
[59] Government Accountability Office (GAO), "Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, But More Monitoring and Enforcement Are Needed," November 2014. *Available at: www.gao.gov/assets/670/666787.pdf;* GAO, "Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain," July 2009. *Available at: www.gao.gov/products/GAO-09-439.*

tlement mechanisms, workers do not have the power to initiate complaints and must petition their governments to advocate on their behalf. For workers denied their rights, trying to convince another government to initiate a complaint focused on the rights of foreign workers has resulted in an unworkable process. The fact is no worker in the global economy has won the right to form an independent union and to bargain collectively as a result of the enforcement of a worker rights provision in a trade agreement. There has never been a single monetary fine or tariff penalty imposed for labor violations in any U.S. trade agreement.

To make matters worse, as outlined above, the United States seeks to enter into the TPP with a number of Pacific Rim nations with troubling anti-worker practices. USTR gave away crucial negotiating leverage by not insisting that trade benefits be contingent on adherence and promotion of the core labor standards. To let the TPP enter into force without full compliance with all labor commitments from all 12 countries undermines the entire agreement. It sends the message that promises to comply—in any area—are sufficient. If the TPP is going to have beneficial effects, promises and changes on paper are not enough.

Nor does the TPP rebalance the playing field in ways beneficial for workers in the United States or globally. The chapters setting out rules for services, financial services, food safety and other regulations put some economic decision making a step further from democratic control, encircling domestic decision making within the neoliberal, deregulatory, Washington consensus indefinitely. This means that when political winds blow in the opposite direction, seeking more activist policies regarding Wall Street or food safety or government purchasing, foreign countries and foreign companies will be empowered to challenge those policies. Even if the labor promises of the TPP's authors were to come to fruition, the labor chapter alone would not create an equity of benefits for workers. The rules included in the other chapters enshrine an inequitable "you're on your own" economic model that places all of the downside risk of trade on working people without setting up adequate countermeasures that ensure future economic growth will be sustainable and inclusive.

As it currently stands, the TPP fails workers. The AFL–CIO and global labor movement stand in opposition to the agreement. To be effective at creating shared prosperity and inclusive growth, the TPP must be renegotiated to include protections for workers, as well as the environment and other public interest issues, that are as strong as all other protections in the agreement—including those for investors. Moreover, the other chapters must be renegotiated to include rules that *promote rather than inhibit* progressive economic policies that correct market failures, ensure adequate government investment in infrastructure and human development, and provide certainty for workers, not just global businesses. The AFL–CIO urges Congress to only support a people-centered trade approach that will guarantee the benefits of trade can improve the working and living lives of millions of workers and their families in the United States and throughout TPP countries. Further, we stand ready to work with Congress and the administration to renegotiate the TPP so that it works for people who work.



AFL–CIO	RICHARD L. TRUMKA President	ELIZABETH H. SHULER Secretary-Treasurer	TEFERE GEBRE Executive Vice President

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TIMELINE FOR AFL COMPLAINT FILED AGAINST GUATEMALA FOR LABOR VIOLATIONS UNDER CAFTA–DR

April 2008—DOL receives submission from AFL

June 2008—DOL accepts submission for review

January 2009—DOL issues report without recommending consultations

June 2009—DOL reassesses and concludes Guatemala has made insufficient progress

July 2010—USTR requests formal consultations with Guatemala

August 2011—Consultations fail; USTR requests arbitration panel

November 2012—Arbitration panel is constituted

April 2013—Arbitration panel suspended in lieu of an Enforcement Plan

April 2014—Enforcement Plan deadline passes without full implementation of plan; USTR grants Guatemala 4-month extension

September 2014—U.S. government reconvenes arbitration panel

June 2015—Dispute settlement panel hearing is held

September 2015—Dispute settlement panel initial report deadline of October is extended to December

November 2015—Dispute settlement panelist resigns, no new date for report deadline established

February 2016—Anticipated publication date of dispute settlement panel report is announced as June 2016

Sources: *GAO Report GAO–15–160, AFL*

Ford Japan Business Operations Announcement

January 25, 2016

The following statement is attributable to Karen Hampton, VP of Communications, Ford Asia-Pacific:

Ford remains committed to serving global markets while aggressively restructuring parts of our business which have no reasonable path to achieve sales growth or sustained profitability, particularly in areas where market dynamics prevent us from competing effectively. After pursuing every possible option, it has become clear that there is no path to sustained profitability for us in Japan. Therefore, we will cease all operations in Japan before the end of 2016 and concentrate our resources elsewhere.

This decision has just been made and has been communicated to our employees and dealers. As we work through the closures, our priorities are to ensure we treat our employees and our dealer partners with respect and support them in this transition. Additionally, we are reaching out to our customers to explain our commitment to facilitate ongoing servicing, spare parts and warranty support for their vehicles following the closures.

PREPARED STATEMENT OF HON. ORRIN G. HATCH,
A U.S. SENATOR FROM UTAH

WASHINGTON—Senate Finance Committee Chairman Orrin Hatch (R–Utah) today delivered the following opening statement at a hearing examining implementation of existing free trade agreements with the United States' trade partners:

I would like to welcome everyone to this morning's hearing.

Last year, with the passage of our bipartisan legislation to renew Trade Promotion Authority, or TPA, Congress provided the administration with the necessary tools to negotiate and conclude trade agreements to further open foreign markets to American goods and services. In doing so, Congress included high-standard negotiating objectives that must be achieved for any agreement to be eligible for expedited TPA procedures in Congress.

But setting the appropriate negotiating objectives is only the first step in the process for concluding and implementing trade agreements. Once those high standards are set, the administration must consult closely with Congress and stakeholders throughout the negotiations. And, once an agreement is concluded, Congress must closely scrutinize the agreement to determine whether it meets the high standards of the TPA statute and whether it is eligible for expedited TPA procedures in the House and Senate.

That stage—the stage where Congress closely scrutinizes and evaluates a trade agreement—is where we are with regard the Trans-Pacific Partnership, or TPP, the trade agreement most recently signed by the Obama administration.

Ultimately, a high-standard, free trade agreement only takes effect once Congress passes implementing legislation pursuant to the narrow legislative scope of TPA. But, even when that process is complete, our work will not be finished. In many ways, the hardest work will just be beginning.

After a trade agreement is approved by Congress, the administration must make sure that our trading partners fully and faithfully implement their obligations under that agreement before allowing the agreement to enter into force. After all, a strong trade agreement that is not fully and faithfully implemented and enforced isn't worth much more than the paper it is written on.

It is that part of the puzzle—full and faithful implementation—that we will examine today. As a guidepost for this examination, we will look at some of the lessons we've learned under our existing trade agreements to see what has worked and where we can do better in the future.

Over the past 3 decades, the United States has entered into 14 free trade agreements with 20 countries. Each of these agreements has provided significant economic benefits to the United States. In fact, although these 20 countries represent less than 10 percent of the global economy outside the U.S., they purchase almost half of all our Nation's exports.

Further, on average, in the first 5 years after a free trade agreement enters into force, U.S. exports to these partners have grown roughly three times more rapidly than the global rate of growth for U.S. exports generally. Just as important, free trade agreements have provided significant cost savings and expanded choices for U.S. consumers.

However, despite these significant gains, there is widespread agreement that many of our partners in existing free trade agreements have not fully and faithfully complied with all of their obligations under our agreements. Just yesterday, I sent letters to the Korean and Colombian Ambassadors to the United States outlining my concerns with their countries' implementation of and compliance with the U.S.-Korea and the U.S.-Colombia free trade agreements.

In addition, a review of stakeholder submissions to the administration, in connection with mandated reports to Congress, including the Special 301 Report, suggests that many of our trading partners have not implemented, or are out of compliance with, their international trade obligations.

While there are many examples across the board, this problem seems to be most pronounced when it comes to implementation of intellectual property rights protections. This is true with regard to trading partners across the globe, including many TPP countries. And, all too often, those countries are never held accountable for their non-compliance. Thus, they get the benefits of a negotiated trade agreement with the United States without fulfilling all of their obligations.

This is, to put it bluntly, unfair, and it must stop.

Last year, with a number of different pieces of legislation, Congress developed new tools to address these concerns. For example, we included language in the TPA statute requiring enhanced consultations before the administration may allow any trade agreement to enter into force.

We also established the Interagency Center on Trade Implementation, Monitoring, and Enforcement within the Office of the United States Trade Representative, or USTR, to monitor our trading partners' implementation of trade agreements and to assist in investigating violations of trade agreement obligations.

We also established a Chief Innovation and Intellectual Property Negotiator at USTR, with the rank of Ambassador and required Senate confirmation, whose responsibilities include enforcing the intellectual property rights obligations of our trade agreements. Furthermore, we established a trade enforcement trust fund of up to 15 million dollars a year for use in improving the ability of USTR to monitor and enforce existing trade agreements.

Despite these new tools, I know that there is much more that can be done. So today we are going to examine the implementation of our existing free trade agreements and see what lessons can be drawn.

We have some very accomplished witnesses here with us from a variety of sectors, including agriculture, high-tech, the environment, and intellectual property. I am very much looking forward to their testimonies and to what I hope will be a robust discussion of how the U.S. Government can more effectively ensure that our workers, consumers, and job creators receive the full benefits of our international trade agreements going forward.

PREPARED STATEMENT OF JIM MULHERN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MILK PRODUCERS FEDERATION

I am Jim Mulhern, and I am here this afternoon representing the National Milk Producers Federation (NMPF). I appreciate the opportunity to express the views of America's dairy farmers on the issues our industry has encountered in the implementation of prior U.S. free trade agreements (FTAs).

NMPF develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's 31 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of more than 40,000 dairy producers on Capitol Hill and with government agencies.

EXECUTIVE SUMMARY

Diligent implementation of U.S. free trade agreements (FTAs) is a vital component to ensuring their effectiveness. Past experience in the dairy industry has dem-

onstrated to us the clear value in strong engagement with our trading partners to foster compliance with their obligations to the U.S.

In some cases this type of engagement has yielded quite positive results such as with Korea prior to Congressional consideration of the U.S.-Korea FTA and subsequently during the early stages of implementation. In other countries such as Canada there is in contrast a pervasive pattern of actively seeking to thwart dairy trade obligations that must merit a unique approach in order to effectively ensure that current market access opportunities are not continually eroded and that future trade opportunities can in practice be realized. Another pervasively problematic challenge our industry has faced are the trade barriers various countries are erecting as a result of geographical indication (GI) provisions in their FTAs with the European Union. The U.S. has rightly recognized that a strong focus on even smaller markets is vital to sending the right message to our trading partners that the U.S. rejects inappropriate GIs that impair the use of common food names.

Based on past experience, we believe that it is clear that the greatest window of opportunity for influencing how countries will implement their obligations to the U.S. is during the period prior to Congressional approval of an agreement. Action during this window not only ensures that Congress has a clear understanding of how the agreement is intended to work in practice, but it utilizes the strongest point of leverage the U.S. possesses: whether or not we will decide to put in place a strengthening of our trade ties with the FTA partner.

Given that the U.S. has recently concluded FTA negotiations with a large group of important trading partners (the Trans-Pacific Partnership) and is working to try to conclude an agreement with the EU, we believe that this hearing is an excellent opportunity to ensure that we carefully examine how past U.S. actions during the implementation and pre-implementation stages have helped to shape the impact of our prior trade agreements.

BACKGROUND

Our nation has gone from exporting less than $1 billion in 2000 to exporting over $5.2 billion in 2015, an increase of 435 percent. (Sales in 2014 even greater at over $7 billion before retrenching during a global dairy recession last year as noted below.) It is not coincidental that the enormous growth over this period occurred when the U.S. began negotiating market-opening free trade agreements and the Uruguay Round took steps to reduce export subsidies and implement the first SPS agreement. These agreements lowered and ultimately removed tariffs and in many cases they gave our products a preferential advantage over other supplying countries. They also helped remove technical and regulatory barriers to our trade. Over that period, our exports of dairy products to FTA partners grew by 489 percent as compared to 384 percent to non-FTA countries.

We must acknowledge that dairy exports last year temporarily dropped from the record $7.1 billion achieved in 2014. This was due in large part to a significant drop in global prices for milk powders and cheeses. In addition, the increased value of the dollar and the strong global milk supply have contributed to the decline in prices. But it is also worth noting that, while our exports to non-FTA countries contracted by 32 percent, they fell by only 20 percent to our FTA partner countries.

Our FTAs have created important new market access opportunities for us and we have worked very hard through our market development efforts to ensure that we are taking full advantage of them. Two to three decades ago our industry feared trade agreements. Now, we fear that if we fail to take advantage of such agreements to tear down foreign barriers to our products and effectively enforce the terms of U.S. agreements, we will lose out to competitors who are themselves cutting FTA deals around the world.

However, negotiating these trade deals is only part of the job. We have found that in a number of cases it has been necessary to work just as hard to ensure that the market access terms of the agreements are not subsequently undermined, or even violated entirely, by governments under pressure from domestic producers to keep imports at bay.

This has been a full-time and, regrettably, not always entirely successful undertaking, as I will outline here. But I must also point out that of the 20 U.S. FTAs now in place, many are working well for dairy with little or no compliance problems.

CANADA

Canada gets top billing as the FTA partner that has not only kept its old barriers, but erected the most new impediments to dairy access negotiated in a free trade agreement, in this case it is the 1989 U.S.-Canada Free Trade Agreement and later the North American Free Trade Agreement (NAFTA). The examples I am providing below are not all-inclusive, but are representative of the types of efforts the Canadian government has engaged in, and is likely to continue to engage in, to shield its industry from the import access it committed to allow in our trade agreements.

Cheese Standards

In 2007 Canada altered its cheese standards in order to more tightly restrict the range of permissible ingredients in standardized cheeses sold in Canada. The regulatory changes placed percentage limits on the amount of non-fluid dairy ingredients used in standardized cheeses that could be incorporated in the product from non-fluid sources.

These changes were prompted by pressure from Canadian dairy farmers to find a way to restrict imports of U.S. milk protein concentrates (and to a lesser extent other dried protein imports such as casein/caseinates). Canada undertook a WTO Article 28 tariff renegotiation to allow it to raise tariffs on imports from other sources, but NAFTA prevented this from applying to products from the U.S. The new cheese standards were explicitly discussed by the Canadian legislature as providing a way to also limit imports of these products from the U.S.

Our industry and the U.S. Government undertook ample efforts to prevent this action, arguing that it was an impairment of concessions granted the U.S. under NAFTA, but we were ultimately unsuccessful in preventing the changes from taking effect. The changes have adversely affected not only opportunities for imported ingredients but also imposed additional requirements on imported cheeses, since all cheeses sold in Canada were required to document compliance with the requirements.

Yogurt Standards

Canadian dairy farmers have more recently been encouraging their government to put in place similar restrictions with respect to yogurt. Again, the primary goal of this action would be to restrict the ability of Canadian yogurt manufacturers to make use of imported dairy products, particularly those that could be exported under low to zero duty tariff-lines secured by the U.S. under NAFTA. These have not yet been adopted, but it is something we continue to monitor.

Ultra-Filtered Milk Requirements

Canada has also begun consideration of how to further restrict other U.S. dairy imports through such standards. In response to complaints by Canadian dairy farmers about growing imports of ultra-filtered milk, which is currently unrestricted in use in standardized Canadian cheeses, the government is reportedly considering a few possible options.

One is to administratively determine that U.S. exports of 85% protein level ultra-filtered milk are "diafiltered milk," rather than unrestricted ultra-filtered milk. Since "diafiltration" is simply one possible step in the ultra-filtration process and it does not result in an entirely different product, the final product is still ultra-filtered milk. If Canada adopts this measure it would clearly be solely for the purpose of evading its NAFTA obligations.

The other option the Canadian government may be considering is to arbitrarily cap the level of protein in ultra-filtered milk that is allowed at unrestricted levels in standardized cheeses. Imposition of such a limit would have no science-based health or safety justification. The only grounds for such a change could be to force a tariff classification change in such a way that the product currently entering Canada under duty-free NAFTA status is no longer permitted and would be allowed entry only at a prohibitively high tariff level.

In addition to cheese standard revisions aimed at impairing these U.S. imports, the province of Ontario has recently approved a special milk class for ingredient usage that is designed directly to force out competition from U.S. imports. This is just the latest in a series of narrowly targeted milk classes that have been created over the past few years specifically in order to displace imports. Although Canada is not alone in having different classes for milk usage and it is not our view that milk classes are in and of themselves problematic, the way Canada has utilized its milk class system is unique.

Canada's milk class system is regularly evolving in order to constrain imports. Canada's "Special Milk Class Permit Program" was created in 1995 and provides lower-priced fluid milk to Canadian processors for use in certain narrowly defined groups of products. The way in which Canada is operating its milk class pricing system suggests an intent to erect trade barriers.

Tariff Reclassification

In 2013 Canada enacted a law that reversed multiple rulings by the Canadian Border Services Agency (which had been upheld by Canada's International Trade Tribunal) that imports of a food preparation product containing mozzarella, pepperoni, oil and spices were being properly imported from the U.S. under the appropriate duty-free tariff line (1601.00.90.90). This law was in direct conflict with multiple Canadian Customs rulings that determined that the product was correctly classified. By reclassifying the cheese portion of the products from that tariff line into one with a duty of over 200%, the intent and effect of the legislation was to block all imports of these food preparation products from the U.S. This action thereby impaired the value of U.S. market access secured for that tariff line under NAFTA.

Limiting "Cross-Border" Shopping

Although the Uruguay Round of multilateral trade agreement under the World Trade Organization (WTO) is not an FTA, it is worth noting that in that agreement, Canada obligated itself to provide a TRQ to allow access for 64,500 MT of fluid milk (0401.10.1000). But Canada then banned commercial shipments from making use of this TRQ. To our knowledge, Canada does not track cross-border shoppers in order to ensure compliance with its WTO obligation but instead simply asserts that cross-border shoppers between the U.S. and Canada fill this TRQ. Our industry continues to believe this is a grievous distortion of the access Canada committed to provide for fluid milk. Similarly, Canada restricts access to its 484 MT TRQ for ice cream to imports in retail size containers, meaning that ice cream mix for further processing in Canada is not permitted to enter under that TRQ.

We note these Uruguay Round compliance issues here since they help to illuminate a consistent and deeply problematic pattern of Canada systemically working to undermine the value of concessions that it has granted in prior agreements. Due to Canada's well-documented strategy of erecting regulatory barriers to impair the full utilization of U.S. dairy market access, we have serious concerns about whether Canada will comply with future trade obligations to which it has committed itself.

Almost immediately upon the close of Trans-Pacific Partnership (TPP) talks, Canada announced that it would be taking steps that appear designed to take with one hand what they committed to provide with the other. Canada announced the introduction of several subsidy programs intended to help ease the burden of transition for its producers. We do not take issue with Canada's right to create these domestic support tools but we do strongly object to the accompanying pledges to take measures to further constrain dairy imports.

For instance, the previous government pledged to exclude supply-managed products from the Government of Canada's Duties Relief Program and the new government has not yet signaled an intention to preserve this access. A large portion of current U.S. dairy exports to Canada enter under the current Duties Relief Program whereby a processor is able to import dairy ingredients duty-free provided that the final product in which they are used is subsequently exported. Elimination of this program would create substantial disruption in U.S.-Canadian trade and underscore industry concerns that the TPP access Canada has committed to provide may not translate to truly new sales opportunities compared to the pre-TPP status quo.

It is critical that the U.S. formulate this year a much stronger strategy than has to date been in place throughout the implementation of NAFTA (and the Uruguay Round) in order to curb Canada's consistent and intentional impairment of the value of dairy concessions to the U.S. Without this, dairy trade with our northern neighbor will continue to be much more volatile than should be reasonably expected and U.S. companies will be hesitant to depend upon reliable access to the market openings Canada has committed in trade negotiations to provide.

COLOMBIA

Colombia has overall proven to be a reliable and responsive FTA partner, although some issues have arisen over the course of the U.S.-Colombia FTA. One of those issues currently still under discussion is detailed here; another relates to restrictions on U.S. exports of asiago and feta, both of which have been blocked as

a result of the EU-Colombia FTA. Although these limitations on commonly produced U.S. cheeses have restricted the range of opportunities for U.S. exporters in Colombia, Colombia has also taken some helpful steps to clarify that U.S. companies can continue to ship products such as parmesan and provolone. These types of clarifications have been critical in clearly establishing for U.S. companies the range of permitted cheeses that can continue to be shipped to Colombia under our FTA with that country, despite GI-driven restrictions in Colombia's agreement with the EU.

Risk Categorization and Associated Import Requirements

Colombia has implemented risk categories through INVIMA Resolution 719 of 2015 as a basis for new import requirements. Ministry of Health Decree 539 of March 12, 2014 establishes numerous new requirements for high risk foods, including plant registration with INVIMA and the inspection of facilities intending to export to Colombia. Colombia did not notify the WTO and accept comments from trading partners before this decree was issued, and the implementing regulations corresponding to this decree risked closure of the Colombian market in September 2015. The strong relationships built through the U.S.-Colombia FTA, however, were successful in helping swiftly respond to this threat and permitting trade to continue. In response to industry concerns, USDA's Foreign Agricultural Service and the Colombia government moved quickly to head off the tremendous trade disruption that abrupt imposition of this implementing regulation would have caused for U.S. exports and as a result additional time for a more careful examination of the plant registration requirements was granted.

At this stage Colombia has indicated its intention to develop new implementing requirements and notify them to the WTO, but dairy remains at risk for burdensome requirements which could again have the potential to close the market as long as it remains in the high risk category. We must note that the criteria that Colombia has used to assign risk were not compliant with Codex risk category principles and Codex guidelines, and also ignored OIE and Codex guidance on the impact of heat treatment on dairy products. Colombia placed all dairy products in the high risk category regardless of processing or packaging. The U.S. has challenged these risk categories. We appreciate the administration's work with Colombia to ensure that shipments under the FTA can continue without undue burden and that regulations reflect a recognition of the high level of food safety assured by U.S. dairy regulations and oversight.

MEXICO

In contrast to Canada, our other NAFTA partner, Mexico, has been much less inclined to use back door means to negate commitments undertaken in our trade agreement. And where problems did arise, particularly during the implementation period while tariffs were being eliminated, our government was generally been able to resolve them. As a result, with limited exceptions, trade in dairy products is now operating fairly smoothly. We consider Mexico not only to be our best foreign market but also a very good trading partner. This situation has not resulted accidentally, however; it is the result of considerable hard work over the years by the U.S. to enforce NAFTA commitments when problems arose and actively work to help establish today's much smoother trading conditions.

One element that does merit review is the sometimes excessive documentation requests from Mexico regarding Rules of Origin. Although we very much support the importance of rules of origin in FTAs, the requirements for meeting these rules must be clearly outlined and not unduly burdensome. Overly invasive requests can work to the detriment of U.S. companies and undermine market access. Lack of sufficient oversight however can be similarly harmful. Towards that end we encourage U.S. Customs to investigate butterfat shipments from Mexico into the United States to verify that the product is actually from Mexico and not a transshipment.

PERU

Peru has also been a relatively reliable trading partner since the implementation of the U.S.-Peru FTA. U.S. exports have grown and trade problems are quite infrequent in this market. With that said, some issues have arisen.

The GI restrictions cited above in Colombia are also present in Peru and impose regrettable limitations on the value of Peru's concessions for cheese in its FTA with the U.S. This over-arching issue is detailed further below.

Another issue of concern has been the reports by U.S. companies that Peru may not be fully complying with U.S. regulations for and the U.S.-Peru FTA's rules of

origin and standards of identity for evaporated and condensed milk. We would appreciate an analysis by U.S. Customs and the Food and Drug Administration to determine whether or not Peru's shipments of this product are in keeping with the terms of the FTA as well as U.S. standards of identity set by FDA. Careful enforcement of the provisions of our agreements—both for imports and for exports—are critical to upholding confidence in the bargains struck with our trading partners.

SOUTH KOREA

Although the Korea-U.S. Free Trade Agreement (KORUS) has been in place only since 2012 and full free trade is still years away, it has played an important role in opening up more export opportunities for many U.S. companies and has already helped expand U.S. dairy product shipments to that market. Dairy exports to Korea in 2015 totaled over $305 million, more than double the average of the three full years prior to KORUS, despite being down from 2014.

We believe that KORUS is a good example of how the U.S. could deal successfully with an FTA partner's market access sensitivities regarding dairy products and had hoped it would serve as a useful model for our efforts in the Trans-Pacific Partnership (TPP) negotiations with Japan and Canada.

Still, a few issues have arisen that required assistance from our government to help ensure that the terms of the agreement were being honored. Korea's response to these concerns to date has been encouraging and we hope that a similarly successful way forward can be found on a current in-process concern.

TRQ Administration

For instance, early on we and other sectors had concerns about how Korea was administering the auction system it used to manage certain dairy tariff rate import quotas (TRQs). The initial auctions were not very successful in fully filling the quotas granted to the U.S. under KORUS. The administration engaged extensively with Korea to understand why this was occurring and explore ways to ensure that the auction was not interfering with market demand for U.S. dairy products. USTR and USDA's prompt and sustained work in this area was critical to ensuring effective implementation of this vital avenue of KORUS agricultural access. As a result, the process has greatly improved and we are currently satisfied with how it is operating. We will continue to monitor it, however, to ensure that problems do not recur.

Organic Certification

Another issue that has been successfully resolved involved imports of organic products generally and, for us, organic dairy products in particular. In late 2013, Korea announced its intention to begin enforcing organic certification regulations adopted in 2008 but which were not previously enforced. These regulations would have halted exports of organic products while exporters attempted to comply. Successful efforts by USDA and USTR, however, resulted in adoption of an organic equivalency agreement that ensured continued access to the Korean market for these high-value products.

Rules-of-Origin

Similarly, the administration worked extensively to address a pattern of overly burdensome rules-of-origin requests for U.S. agricultural exports from the Korean Customs Service. We worked with our exporters to ensure that they provided to Korean Customs information necessary to comply with the KORUS rules of origin requirements and FAS, together with other U.S. agencies, worked to ensure that Korean Customs stopped demanding overly invasive and burdensome information in a manner designed to impede trade. If left unresolved, this issue could have led to serious disruptions in KORUS market access. But prompt and sustained U.S. work with Korea appears to have established a more reasonable approach to documenting rules of origin issues while still ensuring that the product is fully in compliance with the terms of KORUS.

Inequity Vis-à-Vis New Zealand's FTA

There is another KORUS-related issue that we are currently pursuing, as a result of more favorable treatment granted to New Zealand for cheddar cheese under the New Zealand-Korea FTA and an unusual staging of the tariff elimination for U.S. cheddar cheese under KORUS. New Zealand negotiated a tariff and TRQ phase out for cheddar cheese that occurs in year 7 of their agreement, which was implemented at the end of 2015. Under KORUS the tariff for this product is eliminated in year 10 of our own FTA. Year 7 of the Korea-New Zealand FTA and year 10 of KORUS are both 2021. However, due to how the timing of the tariff elimination is structured

in the New Zealand agreement vs. under KORUS, New Zealand cheddar will be subject to a lower tariff in the critical final 2 years prior to the elimination of the tariff for all suppliers.

In 2019 New Zealand will enjoy a tariff almost 40% less than that U.S. exporters will pay under KORUS (10.3% vs. 16.8% for the U.S.); in 2020 this gap will grow such that New Zealand cheddar will face a tariff approximately ⅓ the size of that paid by U.S. exporters (5.1% vs. 14.4% for the U.S.). While not strictly a compliance issue, we do not believe that U.S. and Korean negotiators intended that such a situation should arise and we hope that the phase out for the quota and the tariff on U.S. cheddar cheese can be aligned to avoid this problem in order to avoid undermining the market share the U.S. has established under KORUS.

Geographical Indication Requirements

A final concern in Korea relates to Korea's implementation of restrictions on the use of generic names for certain dairy products as a result of Korea's FTA with the EU. The EU insisted that Korea adopt rules that prevent the use of these "geographical indications" (GIs) by any country other than those in the EU. The Administration made excellent use of the period prior to the implementation of KORUS to secure a very clear understanding from Korea regarding the scope of protection for the numerous multi-term GIs (*e.g.,* Mozzarella di Bufala Campana) that were on the list of GIs included in the EU-Korea FTA. This written clarification was essential in ensuring that KORUS market access opportunities for various cheeses were preserved. We were not able, however, to restore access for several U.S. cheeses directly banned by the terms of the EU-Korea agreement (asiago, feta, fontina and gorgonzola). U.S. exporters have faced increasing enforcement against shipments of these products over the past year.

While stressing that my industry's overall experience with KORUS to date has been positive, the residual GI-driven restrictions in Korea have in practice undermined the value of the cheese concessions granted under KORUS and the same problem is spreading around the world through the EU's many other FTAs, as I describe in detail below.

GEOGRAPHICAL INDICATIONS IN EU FTAS UNDERMINE THE VALUE TO DAIRY OF U.S. FTAS

In a nutshell, the EU has been using its market-size muscle to lean on countries around the world to block imports of products from countries that allow the use of product names the EU inappropriately seeks to reserve for itself. The EU-Korea FTA and its impact on our KORUS agreement was the first indication of what has turned into a massive world-wide problem for us and for other dairy-producing countries.

We very much appreciate the work of Chairman Hatch and Senator Wyden, as well as the many members of this committee and throughout Congress, who have expressed serious concerns about this issue and have helped shine a spotlight on the impacts of the EU's activities. For those who may not be as familiar with some of the details of this issue, let me provide a little background.

Many well-known names for cheeses, meats and other foods trace their origins to Europe, but thanks to generations of emigration and trade, these products are now made and enjoyed throughout much of the world. This has greatly increased the popularity of certain cheeses such as parmesan, romano, feta and others to the commercial benefit of both European and non-European producers.

However, the EU has been working in recent years to monopolize usage of many of these terms, while resisting efforts to clearly identify which names have already entered into wide-spread common usage. This is being done through use of the EU's geographical indication (GI) system, which is aimed initially at keeping such products out of its own market. It is now also being done on the global level, however, through EU efforts to negotiate exclusive use of many EU GIs through its free trade agreements, including with many U.S. FTA partners, and through multi-lateral efforts within the World Intellectual Property Organization. This greatly hinders effective competition with EU products in those markets, as well as in the EU market, since U.S. companies are prohibited from accurately labeling their products.

For instance, as noted above, the EU-Korea FTA forbids the use of the terms gorgonzola, feta, asiago and fontina by non-EU suppliers. It also required Korea to register the EU GIs automatically; that is, stakeholders with an interest in the Korean market had no opportunity to present arguments that the GIs at issue were in fact

widely used generic names or otherwise should not have been protected in Korea. Even the EU provides a case-by-case opposition procedure, something it prevented Korea from adopting as part of their FTA. U.S. companies have had to forego sales opportunities in Korea due to these restrictions.

After its initial success in the EU-Korea FTA, the EU has busied itself expanding that model to many other markets around the world, including countries with which the U.S. has FTAs, such as Peru, Colombia, Canada, Central American countries and Singapore. U.S. engagement with these countries on this issue has been mixed, with some having provided assurances similar to those provided by Korea for multi-term GIs, while others continue to flout U.S. efforts to obtain sufficient clarity regarding the scope of protection they have granted to GIs registered under their FTA with the EU. After extensive U.S. outreach, some countries such as Guatemala and El Salvador have chosen to do the right thing and preserve access for many key U.S. exports but others such as Costa Rica have introduced harmful new restrictions on the use of certain common names.

Other countries such as Nicaragua and Morocco have to date not published any information regarding which components of multi-term GIs are subject to restriction and which can continue to enjoy common usage. Morocco has compounded this problem significantly by proposing to grant protection to all EU GIs en masse despite any apparent individual examination of each GI and no public opportunity for comment on these new trade restrictions. Across all EU FTA markets, restrictions on U.S. exports of asiago, feta, fontina and gorgonzola are proliferating, even where these markets are also U.S. FTA partners.

As noted earlier, the case of Costa Rica has been particularly concerning. In that country the government interpreted its trade commitments as requiring it to restrict the use of parmesan and provolone, despite the fact that the applied-for GIs were "Parmigiano Reggiano" and "Provolone Valpadana." This was done despite the fact that even the EU does not currently restrict use of "provolone" and the Central America-EU FTA clearly permits a country to decline to restrict use of generic terms such as parmesan and provolone which were both used by the local industry for decades and more recently by U.S. exporters under CAFTA.

The EU has also included GI requirements in FTAs it has negotiated with several members of the Trans-Pacific Partnership (TPP), *i.e.,* Canada, Peru, Singapore and Vietnam. Of these, the agreement with Vietnam provides the greatest clarity to date regarding the scope of protection for multi-term GIs yet it too commits to a ban starting in 2017 on new U.S. exports of asiago, feta, fontina and gorgonzola. The EU is also pursuing GI commitments in its ongoing negotiations with Japan, Malaysia and Mexico.

Of course, we are also in the middle of negotiations on an FTA with the EU—the Transatlantic Trade and Investment Partnership (TTIP)—and it is abundantly clear that EU producers and politicians expect their negotiators to deliver an agreement that imposes strict EU GI rules on the United States. Our industry is even more adamant in its expectation that our negotiators should only come to an agreement on GIs with the EU if it simultaneously rejects restrictions in the U.S. market on common names, addresses the trade barriers erected against U.S. exports to third country markets and restores access into the EU for key U.S. exports such as parmesan and feta, labeled as such.

I want to make it entirely clear that we are not opposed to legitimate GIs. Having an avenue to protect GIs is an existing international obligation and the U.S. complies with that obligation by permitting the registration of both U.S. and foreign GIs through our trademark system. In fact, the EU already has a number of GIs registered in the U.S. system. They have available to them all the same enforcement opportunities as do U.S. companies, many of which are small or medium size operations themselves.

In other words, we have no problem with the existing registrations in the U.S.—or elsewhere around the world—of names such as "Provolone Valpadana" or "Parmigiano Reggiano." What we oppose is the EU's effort to effectively license to itself names that are commonly (and globally) used to identify a type of cheese. Production of such cheeses outside the European region to which the EU wants to provide a monopoly often represents a very sizable portion of global production, a clear indication that the name is not a term unique to one corner of the world. In some cases the names were even used generically in the EU until the EU decided to bestow just one country the permanent claim to them. (This was the case for parmesan and feta, which were produced by many European countries until roughly a

decade ago when the EU made its final decision to award sole use within the EU of those generic names decides to Italy and Greece respectively.)

The EU's approach to restricting common food names through the use of GI registrations abuses a good concept in order to impose trade barriers against competitors. This has no place in TTIP or any other trade agreement. In forcing its trading partners to adopt the same trade-restrictive GIs in recent FTAs, the EU has turned FTAs, which are supposed to expand trade, into tools for discriminating against third countries to gain unfair market shares.

This is a major issue for our industry and it will continue to be so as long as new U.S. and EU FTAs are negotiated and implemented and the EU continues using GI's as a means of protectionism.

CONCLUSION

We look forward to working with the members of this committee to address implementation issues in free trade agreements and we will continue to collaborate closely with USTR and USDA to resolve problems as they arise. Active enforcement of not only the clearly enunciated commitments in an FTA but also the overall value of the package provided under that trade agreement is absolutely critical to upholding confidence in those deals. Agreements on paper mean little without the threat of strong enforcement measures behind them.

Based on past experience, we also believe that it is clear that the greatest window of opportunity for influencing how countries will implement their obligations to the U.S. is during the period prior to Congressional approval of an agreement. Action during this window not only ensures that Congress has a clear understanding of how the agreement is intended to work in practice, but it utilizes the strongest point of leverage the U.S. possesses: whether or not we will decide to put in place a strengthening of our trade ties with the FTA partner.

Where trading partners have demonstrated a consistent flouting of their trade commitments to us in certain sector—as is the case with Canada and dairy—additional and specifically-focused measures are needed to curtail this problem. Canada's consistent behavior in creatively finding new ways to constrain trade is reminiscent of another potential U.S. FTA partner—the EU. It is in part because of our past experience with Canada that we believe it is essential for the U.S. to secure clear dairy-specific results from the EU as part of TTIP in order to help try to guard against the type of shifting requirements that have proved to be so problematic with one of our oldest FTA partners. We are deeply concerned that the goal of concluding TTIP this year is not compatible with the type of high-quality dairy-specific result needed on nontariff issues given the lack of concrete progress towards that goal.

If the U.S. lets major trading partners evade their commitments to us through complex regulations that are nonetheless intentionally designed to negatively impact U.S. exports, we run a high risk that this emboldens other countries to similarly impair the letter and/or the spirit of their commitments to us. As an industry that exports $5 to $7 billion a year, this is a dynamic the U.S. dairy industry simply cannot afford to see develop. When a country has demonstrated a sustained commitment to limiting trade, the U.S. must adopt uniquely targeted approaches to hold that trading partner to account.

That is also why U.S. actions with other major countries—even when not FTA partners—is very important. Russia undertook several obligations upon joining the WTO. Its current ban on many U.S. agricultural products, including dairy, has created severe upheaval in global markets and is not in keeping with its WTO commitments. In a similar vein, the EU is not currently an FTA partner, yet it too is bound by existing WTO obligations, including the Agreement on Technical Barriers to Trade. Its continued moves toward the imposition of restrictions on more and more common names runs directly counter to its obligations under that agreement.

NMPF believes U.S. enforcement of both WTO obligations and existing FTA obligations is vitally important to ensuring the future faithful adherence of our FTA partners with their commitments. Without this, U.S. companies cannot be assured of the value of U.S. FTAs which would seriously undermine support for those future agreements.

I appreciate the opportunity to testify here today on this issue and look forward to continuing to work with this committee, as well as with the administration, on the important issue of faithful FTA implementation.

QUESTIONS SUBMITTED FOR THE RECORD TO JIM MULHERN

QUESTION SUBMITTED BY HON. ORRIN G. HATCH

RUSSIA ENFORCEMENT

Question. Mr. Mulhern, USTR stated in its 2015 Report on the Implementation and Enforcement of Russia's WTO Commitments that, "currently, only a limited number of U.S. agricultural products enter the Russian market due to the ban on certain imported food products, and Russia is also restricting the transit of some U.S. agricultural shipments through its territory to other markets." Russia is clearly breaching its WTO obligations by imposing an import ban on U.S. agricultural products. This is just one example of non-compliance. Russia has taken a nearly countless number of economic measures against the United States, many of which USTR itself acknowledges "are not consistent with Russia's WTO obligations."

Are you surprised that, despite the fact that Russia has been a WTO Member for nearly 4 years, USTR has not brought a single dispute against Russia?

Answer. In our view, aggressive enforcement of U.S. trade agreements is critical to ensuring confidence in trade and in the U.S. Government's commitment to holding our trading partners to account. Russia has been a particularly frustrating trading partner given its blatant flouting of WTO agricultural commitments, even prior to the current ban on imports. The current ban has had a tremendous impact on global dairy trade by cutting off access for some of our largest competitors which has in turn driven those exports to other markets we have normally supplied. In addition to being a major agricultural market, Russia is of course a leading global player. Other countries are therefore carefully watching what the U.S. and others such as the EU opt to do in terms of insisting on WTO compliance. We hope that USTR is examining how to best address the numerous problematic trade concerns Russia has prompted in the past few years.

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. Congress just passed a trade enforcement bill, which I hope will significantly up the game for U.S. trade enforcement, including by helping ensure that trade enforcers have the resources they need to get the job done. Each of you has identified some areas where trade agreement implementation has fallen short, yet you all seem to agree on the importance of the implementation process and having the right resources to get it done right. If more resources are dedicated to trade capacity and enforcement in coming months and years, what areas related to implementation are in your view in greatest need of additional resources?

Answer. We suggest three primary points of focus:

1. In addition to simply verifying whether a country has made the appropriate shifts to its laws to come into compliance with the letter of the agreement, it's critical to be also examining—prior to implementation of an FTA—whether they are actively in compliance with existing obligations. If they are not—particularly if the degree of noncompliance demonstrates a pervasive pattern of blocking trade as is the case with dairy and Canada—then we need to first shore up the existing situation before extending new benefits to a country. If a country is consistently working to undermine market access granted in prior agreements, as we have seen time and again with Canada's dairy policies in particular, it is essential that the U.S. take specific steps to address that preexisting problem. Otherwise, our trading partners are likely to assume that "business as usual" will be fine moving forward.
2. We believe additional resources should be devoted to bringing cases against countries demonstrating habitual flouting of trade commitments. In particular, this effort should encompass countries that utilize a range of tools to impair trade, including through nullification of concessions, rather than simply one primary regulation. Countries' use of a complex combination of regulatory and policy approaches designed to intentionally thwart trade need to be taken into account, rather than viewing each policy in isolation. Again, we cite Canada's approach to dairy as a strong example of this type of pattern.
3. Resources are also critical to invest when a challenge is global in nature, as is the problem we face with geographical indications currently. Due to the EU's efforts to block competition from the U.S. and other suppliers, we are seeing

a proliferation of GI restrictions in numerous markets. USTR has worked aggressively to combat this dynamic and been successful in numerous cases. Yet despite this, U.S. exports still face a growing number of restrictions. Enforcement efforts for challenges that are global in scope such as this issue necessitate an approach design to address the core of the problem and then demonstrate to other trading partners what types of policies will not be tolerated.

We appreciate the administration's and Congress's recognition of the importance of trade agreement compliance.

Question. You have highlighted an important trade barrier for cheese producers in Oregon, and throughout the country: the spread of restrictive Geographical Indications regimes. If a market is closed to U.S. goods using generic terms, such as "parmesan," "mozzarella," and "provolone," our farmers and cheese producers simply can't compete there. It is critical that we use every tool in our toolbox to combat this unfair trade practice. Could you elaborate on how implementation could further the goal of keeping markets open for U.S. cheese?

Answer. As noted above, this is a critical issue for our industry. The EU's abuse of geographical indications—both in its own market and around the world—to restrict competition in common food product categories must be rejected as an unacceptable nontariff trade barrier. The driver of a policy is often an important element in determining whether trade impacts are unintentional collateral of a sound underlying policy priority—or whether trade impacts are the direct intention of a policy. In the case of how the EU has developed its approach to GIs too often we are seeing the latter situation whereby the EU is wielding these provisions specifically in a way designed to shut down trade. The CATO institute illuminated this dynamic well in a recent report entitled: Reign of Terroir: *http://www.cato.org/publications/policy-analysis/reign-terroir-how-resist-europes-efforts-control-common-food-names.*

TPP breaks new ground in establishing stronger tools to help us better tackle this growing global threat to U.S. exports. However, it is critical to send the signal to countries that we fully expect compliance with both the letter and spirit of those commitments. Several TPP partners—as well as potential future TPP countries—are in active negotiations with the EU on GIs or are likely to implement EU FTAs in the near-term. As those countries weigh precisely how to handle EU requests to restrict trade and face the same pressure the U.S. is experiencing in TTIP to impose new limits on competition simply to placate EU desires to unfairly gain a leg up on other suppliers, it is essential that the U.S. also be consistently reminding them of the importance of these commitments and the expectation that the U.S. will be able to actually make use of full value of the market access packages negotiated under both TPP and previously under the Uruguay Round.

QUESTION SUBMITTED BY HON. MARIA CANTWELL

Question. Mr. Mulhern, I understand the dairy industry did a study that found that the free trade agreements the U.S. concluded with its partners generated $8.3 billion in profit for the U.S. dairy over 10 years.

For example, in the decade following implementation of the North American Free Trade Agreement (NAFTA), U.S. dairy exports to Mexico increased from $250 million to $1.6 billion. And after the U.S.—Korea Free Trade agreement went into effect, U.S. dairy exports to South Korea have increased from $223.7 million in 2011 before the entry into force of the agreement in 2012) to $416 million in 2014, an increase of 86%.

Now, I have also heard from other growers and agricultural producers in my state that will benefit from lower tariffs in Vietnam and Japan on potatoes and wheat under the Trans-Pacific Partnership (TPP). At the same time, I understand the dairy industry has had mixed views of the Trans-Pacific Partnership. It provides some benefits but also has some challenges on access in some markets.

What should be done regarding dairy as Congress prepares to consider the Trans-Pacific Partnership this year?

Answer. Although at the time of the hearing NMPF did not yet have a position on TPP, we have now announced our support for the agreement. That decision was very carefully taken given both pluses and minuses in the TPP dairy market access results, as well as our disappointment that the dairy export provisions with Canada and Japan did not go as far as prior U.S. FTAs. On the whole, however, and taking non-tariff elements such as TPP's SPS and GI provisions into account, we believe

the terms of the TPP agreement will be positive for our industry and are recommending that Congress approve it. A key factor in that, however, is what Canada plans to do since our analysis assumes that we will not encounter trade barriers that cut off current access avenues and that Canada will faithfully implement its obligations. If Canada backtracks, however, on even its current market access commitments under NAFTA, as it is currently considering doing, dairy trade with Canada could actually move backwards, rather than forward.

We look forward to working with USTR and Congress to ensure that Canada does not impair existing NAFTA access out of an effort to effectively "exchange" the new TPP dairy commitments with a removal of current access opportunities. It's vital that the U.S. be clear that this behavior cannot be tolerated and that we will not move forward with an expanded agreement with Canada if they continue to erect these unjustified barriers to our products.

QUESTION SUBMITTED BY HON. BILL NELSON

Question. In your testimony, you mention that Mexico continues to ask for excessive documentation to verify the origin of U.S. dairy. In Florida, we had similar trouble with South Korea after the U.S.-Korea free trade agreement entered into force. Korean officials didn't agree with the USDA's method of certifying country-of-origin for U.S. juice. It stopped our citrus growers from gaining the benefits of the Korean agreement until 2 years after the agreement went into force—all the while Korean producers were enjoying open access to the U.S. market. How can we avoid having this scenario happen again for the Trans-Pacific Partnership agreement?

Answer. This is an important issue and one we too had experience with in Korea for our dairy shipments. It is our understanding that USTR and USDA took some of the lessons learned from the Korean country of origin documentation experience and sought to improve the TPP text in this area to aim to curtail future similar problems. Each FTA builds on the past one. It's an unfortunate reality that sometimes we need to learn the hard way where the gaps in the text of our agreements are.

What's vital is that we ensure—both in the text of the agreement and through the process prior to implementation—that those types of issues are not replicated moving forward.

This approach of learning from past experiences is a key part of why we have been so insistent that the U.S. needs a heightened approach to dealing with dairy trade with Canada. For too long our industry has had to deal with Canada's active and creative efforts to hinder legitimate U.S. dairy exports to that market when they begin to make inroads after significant investments by U.S. companies under Canada's existing regulations. Canada then regularly shifts the regulations to change the rules of the game half way through, intentionally to disrupt trade.

Just as we know that USTR and USDA's approach to COO issues has been honed by the Korea ordeal, we expect that this long history of a clear pattern of blocking dairy trade must inform a different path forward for dealing with Canada as we prepare to move forward with TPP.

PREPARED STATEMENT OF SEAN P. MURPHY, VICE PRESIDENT AND COUNSEL, INTERNATIONAL GOVERNMENT AFFAIRS, QUALCOMM INCORPORATED

Chairman Hatch, Ranking Member Wyden, and members of the committee, I am pleased to be here today to examine the implementation of U.S. free trade agreements and consider what lessons can be learned and applied in the future.

My name is Sean Murphy, and I am Vice President and Counsel of International Government Affairs at Qualcomm, based at the company's headquarters in San Diego, California. I manage a range of international public policy issues for Qualcomm, including intellectual property, international trade, and innovation policy.

I applaud the Committee for convening this hearing on the important topic of trade agreement implementation. I quite literally have been thinking about ways to enhance trade agreement monitoring, implementation and enforcement, and options for leverage, since the 1990s when I served in the Office of the U.S. Trade Rep-

resentative (USTR). So, it is a privilege for me and Qualcomm to be able to contribute to this important dialogue.

Qualcomm has been and remains a strong supporter of international trade agreements. As I have testified previously before the Trade Subcommittee of this Committee, Qualcomm has been particularly supportive of the U.S.-Korea Free Trade Agreement (KORUS), which created an updated template for future trade agreement negotiations by the United States. We also strongly supported the conclusion of the Trans-Pacific Partnership (TPP) negotiations, which successfully builds upon KORUS to not only open new markets in the Asia-Pacific region for our sector but also to create new standards to advance market opportunities in the 21st century economy. As one of the company co-chairs of the U.S. Coalition for TPP, we look forward to its approval by Congress at the earliest opportunity.

Qualcomm also strongly supported expansion of the World Trade Organization International Technology Agreement (WTO ITA), which will eliminate tariffs on 201 technology products that weren't even conceived of when the ITA was first concluded in the late 1990s. And finally, we also support the ongoing negotiations of the Trans-Atlantic Trade and Investment Partnership (T–TIP). We believe that these agreements, if faithfully implemented and enforced, all have the potential to enable global innovation and connectivity, enhanced productivity, research and development, and economic growth and job creation.

As the United States and its trading partners work diligently to secure ratification and then entry-into-force of the TPP, and to conclude T–TIP, we very much appreciate this opportunity to share lessons learned regarding the implementation and enforcement of prior trade agreements. We recognize that in order to secure continued political support for TPP and future trade agreements, it is important that the U.S. Government demonstrate its commitment to ensuring that America's trading partners are implementing and living up to their existing trade obligations.

OVERVIEW OF QUALCOMM

Founded in 1985, Qualcomm is a world leader in 3G, 4G and next-generation mobile technologies. If you have a smart phone, tablet or other advanced mobile device, you are using some form of Qualcomm-developed technologies. Our research and development efforts, as well as strategic partnerships with other innovative companies, allow us to develop breakthrough technologies mobile companies need to power their businesses. We channel our innovations into the global marketplace in two ways.

First, we broadly license our global portfolio of more than 100,000 issued or pending patents to nearly 300 licensee customers across the mobile industry. Many of our patented technologies have been incorporated into industry-wide technical standards. Qualcomm makes available for licensing both its standardized and non-standardized patented technologies. To help fuel cutting edge innovation, promote interoperability, competition and expanded consumer choice, and enhance widespread dissemination of new technologies, Qualcomm is active in over 150 technology standards bodies around the world. Our innovation- and patent-intensive business model has and continues to provide all companies—big or small—opportunities to enter and compete in the dynamic mobile ecosystem. International standardization is essential for the global mobile industry to achieve scale, which helps drive down prices, expands access, and improves performance. For example, 4G mobile networks offer data speeds that are 12,000 times faster than networks using 2G standards.

Second, we sell advanced semiconductor chipsets and software implementing some of our innovations, which are incorporated into mobile devices manufactured by our customers and then sold globally. The diversity of supply and competition between these device manufacturers translates into greater innovation, enhanced consumer choice and lower prices.

Qualcomm led the development and commercialization of a pioneering digital communications technology called Code Division Multiple Access (CDMA), and we play a similar role for next-generation mobile technologies known as 4G Long-Term Evolution (LTE). We take pride in our contributions in helping to make mobile communications the biggest, most pervasive information platform in history—with nearly 8 billion mobile connections in a world of 7.3 billion people.

Today, we are the fourth largest semiconductor supplier by revenue and the world's largest "fabless" semiconductor company—meaning that we invest heavily in

research and development, and design our chips in-house, but do not own or operate our own semiconductor fabrication facilities.

Since our founding just over 30 years ago, Qualcomm has evolved into a global business that derives more than 90 percent of our revenues outside the United States. Last year, our worldwide revenues exceeded $25 billion, with roughly 60 percent resulting from the sale of chipsets and more than 30 percent from patent licensing.

We license our global portfolio to smartphone and other device manufacturers around the world—including in China, Europe, India, Japan, Korea and Taiwan—and consistently invest more than 20 percent of our total annual revenues in research and development. Since 1985, Qualcomm has invested more than $38 billion in R&D, with the majority spent here in the United States.

Qualcomm has made important contributions to the U.S. mobile communications sector—which accounted for an estimated $548 billion or about 3.2 percent of U.S. GDP and sustains more than 1 million American jobs. While Qualcomm is a global company, approximately 60 percent of our 30,000 employees (65 percent of whom are engineers) are based in the United States. Thus, while Qualcomm drives billions of dollars into a virtuous cycle of innovation and intellectual property creation worldwide, we are also creating and sustaining a significant number of high-skill, high-wage jobs for U.S. workers.

This is why Qualcomm urges government officials around the world to think about international trade in terms of intangible exports in addition to physical products. IP-intensive industries account for over $8 trillion in value added, or over a third of U.S. gross domestic product. America's most IP-intensive industries generated direct employment of 27.1 million jobs in 2010 and an additional 12.9 million jobs through indirect activities associated with these industries, for a total of 40 million IP-supported jobs. These 40 million jobs represent 27.7 percent of all jobs in the U.S. economy.

The growth in sales of mobile products has been enormous—in fact, much greater than previous generations of products. Moreover, the products offered to the consumer have evolved with new technologies at an astounding pace. Consider the cell phone of ten years ago, compared with today's most advanced smartphones. Continued innovation within the United States and throughout the world depends on strong and enforceable intellectual property rights, and viable technical standards enabled by a voluntary private sector-driven technology standard-setting environment, and access to open, competitive markets.

Qualcomm's Strong Support for High-Standard Trade Agreements

Given the importance of international markets to Qualcomm's growth, it is no surprise that the company strongly supports the negotiation and implementation of ambitious, high-standard U.S. free trade agreements. Over the past 15 years that I have been at the company, Qualcomm has actively supported each FTA concluded by the United States, as well as Trade Promotion Authority (TPA) legislation, and multilateral trade negotiations, including expansion of the International Technology Agreement (ITA) and the Trade in Services Agreement (TISA) and Environmental Goods Agreement (EGA). Qualcomm's ability to continue innovating and drive a more competitive wireless industry rests heavily on open markets for information and communications technology goods and services, reliable protection and enforcement of intellectual property rights, regulatory transparency and due process protections.

The foundation of the international trading system is established by the agreements of the World Trade Organization (WTO). Alongside the WTO however, are a web of preferential trade agreements, many of which exclude the United States. According to the WTO, there are more than 400 bilateral and regional trade agreements in force around the globe, and another hundred are being negotiated. Of those, the United States is a party to just 14 agreements in effect with 20 countries.

These U.S. trade agreements, however, are generally among, if not the most comprehensive and high-standard trade agreements negotiated between trading partners. Each FTA concluded by the United States generally builds upon the agreements that precede it, raising the bar and evolving to promote meaningful access to new markets and protect U.S. investments in these markets. For example, the U.S.-Israel FTA did not originally include rules on intellectual property protection. The NAFTA included IPR provisions, but did not cover basic telecommunications services. The Singapore FTA was the first to include disciplines on government-

linked corporations, what we would today refer to as state-owned enterprises, which are the subject of an entire chapter of the TPP.

Early U.S. FTAs, such as NAFTA, the Middle East agreements and the Central American FTA (CAFTA), as well as the conclusion of the WTO's ITA in 1996, played a key role in promoting the global competitiveness and expansion of the U.S. information and communication technologies industry. The fact that it took almost two decades to update the ITA demonstrates the importance of the evolution of U.S. FTAs, which continued to build upon existing WTO and other regional and bilateral agreements, over that same time period.

These agreements also provide important opportunities for the United States to influence and set the rules of the road. This is critical now more than ever to combat a growing array of non-tariff market barriers and "behind the border" impediments to trade, including domestic policies that promote national champions, forced technology transfers and similar protectionist goals.

Of the most recently concluded U.S. FTAs, KORUS and TPP are of the greatest commercial significance to Qualcomm. For example, Korea is the thirteenth largest economy, and the United States' sixth largest trading partner. It is also one of the most advanced mobile communications markets in the world. As a share of the Korean economy, mobile accounts for an estimated 11 percent of GDP, and a significant contributor to Korean jobs and 5 percent of exports. The mobile sector's share of Korean GDP is expected to grow from $143 billion in 2015 to $187 billion by 2020. Qualcomm is proud of its contributions and partnerships in Korea that have helped to propel the impressive growth and success of Korea's mobile industry domestically and in export markets. Given this month marks the fourth anniversary of KORUS's entry into force, it is timely to consider Korea's implementation track record.

The economies that make up TPP account for roughly 40 percent of global GDP and approximately 825,000,000 consumers. The Asia-Pacific region is a critical and growing market for ICT products and services. It is estimated that by 2020, more than 56 percent of all smart phone sales will be in the broader Asia-Pacific region. TPP includes an ambitious range of disciplines that will advance new market access opportunities for the ICT industry, while also promoting this industry's research and development capabilities and competitiveness. These include, among others, a requirement that all TPP parties must join the WTO's ITA, innovative new regulatory cooperation provisions concerning ICT products, strong IP protections, and due process protections in competition proceedings.

Lessons Learned From Existing Free Trade Agreements

The value of an FTA commitment depends entirely on the extent to which it is implemented and enforced. This includes not only the commitments embodied in the agreements, but also any side accords, exchanges of letters or related understandings. I think it is fair to say that most of the time, countries abide by their FTA commitments. But in those instances where a country is not living up to its obligations, it is critical that the United States have an effective enforcement strategy in place.

It is inevitable that implementation issues and differences of opinion about interpretations will arise. Based on Qualcomm's observations about the operation of various FTAs, I offer the following recommendations for the Committee's consideration.

1. *Create a Mechanism To Solicit More Extensive Input From U.S. Stakeholders To Ensure Effective Implementation of All FTA Obligations Before Entry-Into-Force*

Before a trade agreement with the United States can enter into force, the President must determine that the trading partner has taken the necessary steps for implementation of all obligations that are to take effect on day one of the Agreement.

I cannot emphasize enough how critical this certification process is to ensuring that a trading partner has the necessary laws and regulations in place to implement its obligations *before* an Agreement enters into force. It is during this certification process when our ability to secure any necessary protections in our trading partners' laws, consistent with the Agreement, is at its greatest. Certification may be the best opportunity the United States has to ensure that trading partners have taken all necessary domestic steps to implement and abide by their commitments.

In light of the enormous undertaking this exercise presents, the U.S. Government should seek ways to improve effective analysis and verification that FTA partners have transposed FTA obligations into domestic law before presidential certification is made. Because the U.S. private sector may have relevant insights as to whether

domestic measures have been sufficiently updated or changed consistent with FTA obligations, I recommend that the U.S. Government engage in closer consultation with the private sector before and during this analysis.

We should consider a mechanism that enables the private sector to provide input, which may be technically complex and "in the weeds," to be provided and considered as part of a pre-certification "scorecard" or "check list." I recognize such a pre-certification procedure of this nature adds another step to the certification process. However, the importance of getting this "right" makes going this extra mile worthwhile. And since TPA requires consultation between the administration and Congress before instruments of ratification are exchanged and FTAs enter into force, this committee has a critical role in ensuring a careful and considered analysis of whether our partners have taken sufficient steps to implement their FTA obligations.

To illustrate the importance of this sort of analysis, I would like to discuss Qualcomm's recent experiences in Korea. As you may be aware, many U.S. companies, including Qualcomm presently, have had the experience of being involved in competition-related investigations conducted by the Korea Fair Trade Commission ("KFTC"), the agency responsible for applying Korea's competition law.

One of the benefits of KORUS, which I highlighted in my prior testimony in July of 2014, is that it "[e]xpanded existing procedures to ensure fairness, transparency and due process in Korean competition law investigations and enforcement actions." Indeed, the due process provisions for competition law investigations in KORUS Chapter 16 were important factors that contributed to Congressional and U.S. industry support for KORUS. The U.S. Advisory Committee for Trade Policy and Negotiations in 2007 endorsed KORUS in part due to the "state of the art due process provisions" in Chapter 16, noting in particular that KORUS "clarifies that a [respondent in competition proceedings] should be able to cross-examine witnesses and review all documents on which the charges against it" may be based.

In particular, under KORUS, Korea must provide respondents in administrative competition hearings with the opportunity to "review and rebut the evidence and any other collected information on which the determination may be based" and "to cross-examine any witnesses or other persons." Korea, however, has not yet implemented a procedure to provide the subject of an investigation access to all such materials, and to the best of our knowledge, does not have plans to do so. The KFTC appears to take the position that Chapter 16 does not require any revisions to KFTC procedures, and therefore many of the protections promised by KORUS, and the benefits that U.S. companies reasonably expected from the commitment, have not materialized. But that cannot be the right result. The Chapter 16 procedures were put into KORUS to effect change in the KFTC process, not to maintain a status quo that was of significant concern to U.S. companies.

A pre-certification check list exercise that enables the private sector to provide input to the administration and Congress might have identified this inadequacy and ensured that Korean authorities took the requisite steps necessary to ensure that its antitrust regime was fully compliant with KORUS obligations *prior* to presidential certification and entry into force. Since KORUS took effect, the KFTC has stepped up its enforcement activity involving foreign firms, including some 40 antitrust or consumer protection cases against U.S. companies. A pre-certification process would also avoid any after-the-fact debate over whether an important provisions require any change in in-country policies or procedures. The question of whether Chapter 16 requires any change in KFTC process, for example, should not have been left open to debate after the fact.

It is critical that the U.S. administration carefully analyze adherence to the TPP competition chapter's similar due process provisions during the certification process and require any changes needed to faithfully implement those provisions. Moreover, once TPP is approved and has entered into force, we urge the U.S. Government to scrutinize the antitrust procedures and practices of any parties that would like to join the Agreement and ensure compliance with the minimum transparency and procedural fairness standards set forth in the TPP competition chapter before allowing any new Party to join the agreement.

2. *Provide Sufficient Resources To Enforce U.S. FTAs*

As the number of U.S. FTA partners grows, so too will the challenges of vigorously monitoring and enforcing existing FTA commitments. If agreements such as KORUS and TPP, which include state-of-the-art provisions in intellectual property, e-commerce, and other important areas, are truly to establish new global standards,

then the U.S. government must rigorously enforce these commitments. A failure to do so sends a negative message about the seriousness of these commitments not only to current FTA partners but also to those Parties that may seek to join TPP in the future.

Toward that end, Qualcomm applauds the enactment of the long-awaited Trade Facilitation and Trade Enforcement Act (H.R. 644). We are particularly pleased to see inclusion of a $15 million trade enforcement trust fund, championed by Senator Cantwell, which prioritizes the enforcement of intellectual property standards, along with several other disciplines.

The United States' leadership and competitiveness in innovation continues to be challenged in a number of foreign markets. Such challenges include efforts to restrict market access, weaken patent rights, displace imported technologies and foreign intellectual property in favor of indigenous innovation and restrict technology licensors' ability to freely contract with their customers. In many cases, such actions are inconsistent with FTA obligations designed to protect patent rights, combat forced technology transfer or technology localization, and prohibit discriminatory treatment.

The Trade Enforcement Fund is a useful contribution to ensuring the resources needed to identify and address failures to enforce existing FTA commitments. We hope the necessary funds are appropriated immediately and stand ready to work with Congressional appropriators to that end.

3. *Make Better Use of Existing Trade Tools*

Dispute settlement is a critical element of U.S. FTAs by ensuring the binding and enforceable nature of the obligations. But litigation of disputes is not the only mechanism available to ensure compliance—especially when one considers the time horizon and duration of formal dispute settlement procedures.

Short of dispute settlement, U.S. trade officials have a number of other options at their disposal to address FTA-inconsistent practices. These include a range of tools—from consultations to FTA working groups to statutorily mandated "naming and shaming" reports—to mention a few.

Looking again at KORUS, as an example, the agreement contains institutional provisions that create 19 separate permanent committees or working groups to ensure ongoing and continuous dialogue about implementation and compliance, and which provide a forum to have hard conversations when problems arise. However, these committees do not cover all chapters in the Agreement, nor do they appear to meet frequently. For example, last year's Trade Policy Agenda report noted that only three of the 19 committees met in 2014. It is worth exploring whether these groups are fulfilling their existing mission and if not, how best to improve the effectiveness of this forum for addressing implementation concerns without needing to resort to dispute settlement.

USTR also produces annual reports that shed light on trade barriers in key markets, including in those of our U.S. FTA partners, such as the National Trade Estimate Report on Foreign Trade Barriers, and the Special 301 and Section 1377 reports, which cover intellectual property and telecommunication challenges respectively. In many cases, these reports provide useful leverage to encourage trading partners to live up to their obligations. However, in a smaller number of instances, the same markets are highlighted in these reports year-after-year without any meaningful changes to the policies that landed them on those lists. Qualcomm therefore supports the provisions in H.R. 644 that require USTR to develop actions plans with appropriate benchmarks to gauge progress for those countries listed on the Priority Watch List in Special 301. These new provisions also authorize enforcement action if it is determined that the country has not substantially met the benchmarks set forth in the action plan. We are optimistic that requirements like these can provide useful leverage to address new concerns as well as intractable problems.

4. *Expand the FTA Enforcement Tool Box*

The United States must do whatever it takes to ensure effective enforcement of U.S. trade agreements. While the United States should continue to deploy all existing tools available to ensure compliance with its FTAs, in some cases, these tools may just not be enough. We therefore appreciate the interest of this Committee to have a renewed conversation about enforcement. This should be part of an ongoing dialogue about how to create new tools and make new forms of leverage available to U.S. trade officials so that they can more meaningfully engage their counterparts

from FTA countries in results-oriented consultations prior to or in parallel to formal dispute settlement. The U.S. Government and should consider innovative ways to give administration trade policy and trade enforcement officials additional carrots and/or sticks to motivate or ensure implementation and compliance. This is critical to ensuring political legitimacy for trade on an enduring basis.

For example, KORUS introduced a new, expedited dispute settlement process for auto-related measures that violate the FTA, whereby if Korea does not uphold its commitments in this area, U.S. concessions in the FTA can suspend benefits under the agreement, or in other words "snap back" to pre-KORUS terms. It may be worthwhile to consider whether this policy tool could be utilized more broadly, particularly in instances where traditional trade tools might not be sufficient. Such a tool could be necessary to help motivate faster compliance than the conventional approach under most other FTAs which do not envision or authorize the withdrawal or suspension of benefits until after a party has prevailed following lengthy dispute settlement proceedings and possibly also an appeal. The harm to some companies and industries associated with a prolonged period of non-compliance with FTA obligations pending dispute settlement or appellate proceedings could be significant or even irreparable.

Conclusion

For U.S. companies, innovators, employers and workers, the global trading system presents both significant challenges and opportunities. For Qualcomm, we believe there is no choice but to engage and compete in the dynamic global marketplace. Likewise, we believe that the role of the U.S. Government should also be to engage, and lead by example in pushing for further market-opening, high-standard trade disciplines, and creative solutions to the known and emerging trade barriers confronting American interests in the 21st century economy.

Trade agreements are and will remain important vehicles to achieve these objectives. No trade agreement is perfect, but full and faith implementation and enforcement of these agreements are crucial to ensuring that the expected benefits accrue to companies, workers and consumers of the United States and also of our trading partners. And I hope that some of the recommendations I offered here today about how to get the most from our carefully negotiated agreements will help to spark further thinking and discussion.

Thank you again for the opportunity to appear before this committee and share Qualcomm's views on this critical topic. I look forward to answering your questions.

QUESTIONS SUBMITTED FOR THE RECORD TO SEAN P. MURPHY

QUESTION SUBMITTED BY HON. ORRIN G. HATCH

IP ENFORCEMENT AND DISPUTE SETTLEMENT

Question. Mr. Murphy, your testimony emphatically noted the need for the U.S. Government not only to establish high global standards but also to rigorously enforce them. You basically stated that a failure to do so sends a negative message about the seriousness of these commitments, not only to current FTA partners, but also to those parties that might join a trade agreement in the future. In his testimony, Mr. Tepp points out that since 2000, USTR has not initiated a single dispute under the IP chapter of any FTA, and that USTR has not initiated an IP dispute under the TRIPS Agreement in 9 years.

As he said, it is certainly not for lack of candidates. In fact, my office released an illustrative list of problems with our current FTA partners this morning.

Do you agree that it is high time for the U.S. Government to initiate a case to enforce intellectual property rights and that failure to do so sends the wrong message to our trading partners?

Answer. Thank you, Chairman Hatch, for this important question and for being a tireless champion of strong protections for U.S. intellectual property rights.As you appreciate, strong IP protections are crucial to American competitiveness, leadership in creative and innovative industries, and the direct and indirect creation and maintenance of U.S. jobs. Therefore, I agree that U.S. trade enforcement officials should be particularly sensitive to the need to ensure that the carefully negotiated and bargained for intellectual property obligations under our trade agreements are adhered to by our trading partners. As you suggest, failures to enforce these critical

protections could undermine the effectiveness of our trade agreements and send an unhelpful message globally—both to our FTA and non-FTA partners—about the importance and seriousness of these obligations.

I am not familiar enough with the specific examples in your illustrative list to comment on the merits of these matters as potential dispute settlement cases. However, given the significant number of IP concerns highlighted by USTR in its annual Special 301 report, the statistics noted by Mr. Tepp demonstrate that a more vigilant approach may be called for to ensure that our trading partners are living up to their commitments. That is why Qualcomm supported the passage of H.R. 644 (the Trade Facilitation and Trade Enforcement Act of 2015), which requires USTR to develop action plans with specific benchmarks to gauge progress by those countries listed on the Special 301 Priority Watch List. These new provisions also authorize enforcement action if it is determined that the particular country at issue has not substantially met the benchmarks set forth in the action plan.

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. Congress just passed a trade enforcement bill, which I hope will significantly up the game for U.S. trade enforcement, including by helping ensure that trade enforcers have the resources they need to get the job done. Each of you has identified some areas where trade agreement implementation has fallen short, yet you all seem to agree on the importance of the implementation process and having the right resources to get it done right. If more resources are dedicated to trade capacity and enforcement in coming months and years, what areas related to implementation are in your view in greatest need of additional resources?

Answer. As I stated in my prepared statement, Qualcomm applauds Congress for the recent enactment of H.R. 644 (the Trade Facilitation and Trade Enforcement Act of 2015). We are particularly pleased with the authorization of a $15 million trade enforcement trust fund that prioritizes the enforcement of intellectual property rights. This fund is a useful contribution toward ensuring the availability of resources needed to identify and address FTA implementation concerns or new problems. We hope the necessary funds are appropriated as soon as possible, and we stand ready to work with Congressional appropriators to that end.

Qualcomm supports the provisions in H.R. 644 that require USTR to develop action plans with specific benchmarks to gauge progress by those countries listed on the Special 301 Priority Watch List. These new provisions also authorize enforcement action if it is determined that the particular country at issue has not substantially met the benchmarks set forth in the action plan. We are hopeful that requirements like these can provide useful leverage to address the identified problems.

In addition, as you note, Senator Wyden, there are other areas where the commitment of additional resources would be helpful and should be considered. These include funds for trade capacity building, the hiring and training of additional U.S. trade enforcement staff, and enforcement-related travel by government officials.

Question. For years I have fought to protect the free and open Internet and ensure the free flow of data across borders. You mentioned the U.S.-Korea trade agreement, which included the first commitment on restrictions on cross border data flows. Some have raised concerns with the effectiveness of that commitment in addressing restrictions on data flows. This committee may in the future be considering the Trans-Pacific Partnership agreement, which contains a broader set of new commitments to promote an open Internet. How can we use the implementation process to ensure that these new commitments are applied in a way that protects the Internet and ensures that countries do not adopt policies that would Balkanize the Internet and stop the flow of information at the border? In what ways does TPP improve upon the U.S.-Korea trade agreement?

Answer. Senator Wyden, the term "Balkanization," that you use is an apt description of the potential impact of numerous threats facing the Internet. Obviously, there has to be an important balance, between, on the one hand, privacy rights and the protection of personal information, and, on theother hand, the free flow of information that is essential to the Internet and electronic commerce in our borderless global economy.

Implicit in your question is another important point, which is that each U.S. trade agreement that is concluded stands on the shoulders of the prior one. We learn lessons from the negotiation, implementation and enforcement of prior trade agree-

ments, and those experiences help to inform subsequent negotiations and to shape the outcomes of subsequent agreement negotiations. Over time, we have seen an evolution in the substantive rules in U.S. trade agreements and a gradual raising of the bar from one agreement to the next.

For example, you rightly point out that the U.S.-Korea FTA (KORUS) was the first U.S. FTA to include rules on cross-border data flows. TPP not only builds upon and strengthens the KORUS e-commerce disciplines, but it also helps raise global standards in this area. For many industries, including the ICT sector, this is one of the most important achievements of TPP. That is why it is critical to ensure that these provisions are implemented by our trading partners *before* TPP goes into force, which, as I highlighted in my prepared statement, is when the U.S. has the greatest ability to encourage our partners to meet their existing obligations.

TPP requires parties to the agreement to allow cross-border data flows. Without a basic obligation of this nature, we risk seeing a proliferation of different rules and a patchwork effect across the Asia-Pacific region.

TPP's e-commerce chapter also includes prohibitions on forced localization and forced disclosure of source code, which is also of critical importance. These obligations will increase confidence and the ability for American companies to engage in business in the Asia-Pacific region. In addition, the prohibition on data localization—that is to say, requirements that servers be located in the territory of each country and accompanying impediments on the free flow of information—would help American companies stay competitive by reducing costs while also protecting consumers with better information security. Specifically, data localization unnecessarily forces companies to replicate expensive data centers and undermines information security; instead of a company with data centers in one country that need to be protected, national rules requiring a company to locate servers in each country in which it operates makes the company responsible for maintaining multiple different secure data centers in multiple different economies, which potentially increases the risk of cyber-attacks, other malicious conduct, and inadvertent disclosure or other breaches.

To be clear, the threat of data localization requirements is not theoretical. Many countries are increasing restrictions on the transmission of data outside of their borders, while others are considering or passing outright bans. The cost of these actions to American companies, and to the security and privacy of consumers around the world, is real.

Chapter 14 of TPP ensures that there are no duties on electronic transmissions, which is very important to helping promote vibrant competition, innovation and consumer choice. It also includes a requirement of non-discrimination and national treatment for digital products. We understand that the financial services industry is dissatisfied with where the TPP negotiations on this subject concluded. But we also understand and are encouraged that industry representatives are engaged with the administration and with the Congress to identify creative solutions to address those concerns before the committees of jurisdiction consider TPP.

QUESTIONS SUBMITTED BY HON. MARIA CANTWELL

Question. Mr. Murphy, you discussed how Qualcomm has faced antitrust investigation in South Korea in connection with its licensing practices. What role should the U.S. Government play in ensuring U.S. companies are being treated fairly under the laws of the host countries where they do business?

Answer. Thank you, Senator Cantwell, for your sensitivity to the challenges that Qualcomm and other American companies are confronting concerning antitrust enforcement action in Korea on other jurisdictions.

In response to your question how the U.S. Government can assist American companies confronting antitrust investigations abroad, as a threshold matter, it would be very helpful for the U.S. Government to recognize that not all foreign antitrust cases are ordinary or warranted examples of local law enforcement matters. In reality, if we look more closely, some antitrust investigation priorities and decisions reflect industrial policy goals or favoritism for domestic companies. In some cases, the scope of the investigations and remedies have the potential for effects that reach beyond local borders and outside the territories of the countries at issue.

It is critical that the U.S. Government carefully ensures that the due process and transparency obligations in our trade agreements relating to competition and antitrust matters are upheld by our trading partners. It would also be very helpful for

the U.S. Government to engage with foreign counterparts—and do so on a "one-government" or a "whole-government" basis. There is a critical role for U.S. antitrust officials and U.S. trade officials to come together, look at some of these issues holistically, and examine antitrust enforcement motives, trends and practices in key foreign markets.

With respect to Korea, as noted in my prepared statement, the KORUS due process and transparency provisions are one of the reasons for our original strong support for KORUS. We hope the U.S. administration will work together across agencies and use all available means to ensure that Korea adheres to its competition and transparency commitments.

Question. I know concerns have been raised about how the South Korean government has acted in this case. What more should be done in South Korea? I am concerned about what your company has faced there.

Answer. Thank you, again, Senator Cantwell, for your recognition of and concern about Qualcomm's recent experiences before the Korean Fair Trade Commission (KFTC). Qualcomm believes that its patent-licensing business practices are lawful, pro-competitive, and consistent with well-established, customary business norms in the mobile technology industry. We have and will continue to work cooperatively with the KFTC to further explain these points and defend our business.

As detailed in my prepared statement, we currently believe the Korean government is not adhering to important bilateral FTA obligations. KORUS Article 16.1 requires the parties to ensure that companies that are the subject of antitrust investigations have the benefit of certain minimum standards and due process safeguards. Yet the KFTC has not adequately implemented these obligations. A number of U.S. companies are impacted by the absence of these transparency and due process safeguards, as Chairman Hatch noted in his March 2, 2016 letter to the Korean Ambassador concerning KORUS implementation concerns.

More broadly, we believe this situation underscores the importance, going forward, that the U.S. Government send a strong signal that it will look closely at whether a country is satisfactorily in compliance with the procedural, transparency and other obligations under an FTA or similar agreement's competition chapter *before* entry into force of that agreement. And, where a country already has existing trade agreements with the United States that include competition policy obligations, a careful assessment of how these agreements are being implemented also should be one important benchmark to weigh before any U.S. administration decides to enter into new negotiations. Furthermore, we encourage U.S. Government officials to work collaboratively with foreign counterparts to identify aspects of national regimes that need to change to conform to the minimum standards that the United States would expect under any new agreement. For example, since the conclusion of TPP negotiations, a number of countries—including Indonesia, Korea, the Philippines, Taiwan and Thailand—have expressed interest in joining the TPP. In considering the readiness of these or other TPP aspirants, U.S. officials should asses not only the candidate's trade, investment, intellectual property, etc. regimes, but also the trade-related aspects of its antitrust regime and practices.

Question. Your company and other U.S. companies have also faced challenges with competition law in the European Union where we are currently discussing the potential Transatlantic Trade and Investment Partnership (TTIP) agreement. Does it seem to give the U.S. any more leverage when a free trade agreement is in place?

Answer. An important aspect of the Transatlantic Trade and Investment Partnership (TTIP) agreement could be a framework that promotes regulatory conformity with common core principles, ideally one that moves U.S. and European antitrust practices and procedures into closer compatibility, while noting that both the United States and the EU have different but strong rule of law traditions. Such an outcome would not only enhance the already strong U.S.–EU economic relationship, but would also hopefully promote coordinated leadership by Brussels and Washington in encouraging other governments to emulate this framework in their own national regimes and practices.

As I noted in my testimony, and as our experience in Korea has shown, the U.S. Government has both the opportunity and influence to ensure adherence to trade obligations is *before* Presidential certification and entry-into-force. It is, of course, critical that the U.S. and Europe enshrine at a minimum, if not build upon, the important procedural fairness and transparency commitments found in KORUS and TPP. TTIP negotiations also present an important opportunity for U.S.–EU joint leadership in helping drive the development of new international norms by adopting

as trade agreement rules the currently voluntary best practices for antitrust investigative and enforcement proceedings enumerated by the OECD and International Competition Network (ICN). Whatever the outcome of TTIP negotiations on trade-related competition rules, once concluded, it will be important to ensure that the trade agreement obligations are transposed into appropriate law and regulation before TTIP enters into force.

The creation of obligations governing antitrust investigative and enforcement procedures and safeguards was also a goal and anticipated outcome of Chapter 16 of the U.S.-Korea (KORUS) FTA. Unfortunately, as detailed in my prepared statement, this has not been the case in KORUS, where key due process and transparency obligations and safeguards of the KORUS competition chapter have not been adequately transposed into domestic law and practice. For example, KORUS Article 16.1 requires the parties to ensure that companies that are the subject of antitrust investigations have the benefit of certain specific minimum due process safeguards and procedural rights. Yet the KFTC has not sufficiently implemented these obligations. As outlined in my prepared statement, more intensive engagement and consultations between the U.S. Government and industry stakeholders with experience operating in Korea as part of the process of Presidential certification of Korean KORUS compliance might have identified and enabled the U.S. Government to work with Korea to address these deficiencies before that FTA entered into force.

The absence of procedures to enable a respondent company, for example, (1) to receive access to the evidence and other information collected by investigators at the Korean Fair Trade Commission, and (2) to effectively cross-examine any witness testifying in a hearing, are very problematic. We believe that these absences are, on their face, violations of Article 16.1(3), which impose unequivocal obligations on the Korean government. That provision states in full:Each Party shall ensure that a respondent in an administrative hearing convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present evidence in its defense and to be heard in the hearing. *In particular, each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based.* (Emphasis added.)

In contrast, the Korean government has changed other aspects of its antitrust regime and practices to transpose other KORUS Chapter 16 obligations into national law and practice. For example, prior to KORUS, the KFTC did not have authority to enter into a voluntary settlement with a company that is the subject of an investigation under Korean antitrust law. As a result of KORUS Article 16.1(5), Korea's antitrust statute was amended to authorize the KFTC to enter into what in the United States is referred to as a consent decree.

The existence of antitrust obligations in trade agreement should be helpful relative to situations where they are absent. Therefore, it will be telling, depending on how the currently pending KFTC investigation of Qualcomm is resolved, whether KORUS ultimately makes a positive difference. Until then, Qualcomm will continue to cooperate with the KFTC.

QUESTIONS SUBMITTED BY HON. BILL NELSON

Question. In your testimony, you propose having a checklist to ensure a country is in compliance with its obligations before a free trade agreement enters into force. Would you support making the completion of a detailed public checklist a prerequisite for a free trade agreement to enter into force? Do you believe such a mechanism should be added to implementing legislation? If so, why? If not, why not?

Answer. While I believe that use of a pre-entry into force consultations between the private sector and executive branch on the basis of a detailed checklist could go far in terms of identifying and addressing potential problems before they become after-the-fact implementation issues, it may not be necessary to mandate this approach through implementing legislation. Perhaps the proposed private/public cooperation procedure described in my prepared statement could be designed and tested administratively. This experience, and an analysis of the benefits and burdens, could subsequently help to inform a future decision whether this prerequisite should be adopted as a statutory procedural requirement.

Question. Given the past difficulty we've seen in getting countries to comply with our trade agreements, is it still worth pursuing these agreements?

Answer. I believe that the majority of the time, the trade agreements to which the United States is a party work well and substantially deliver the intended benefits that U.S. stakeholders expect. No trade agreement is perfect; but, in my opinion, we are better off pursuing and having trade agreements than not doing so. And where trade agreement implementation and compliance issues arise, they should be addressed by the U.S. Government.

American engagement and leadership through trade agreements is important to opening foreign markets and establishing the rules of the road and high standards that govern international commerce. As I noted in my prepared statement, according to the WTO, there are more than 400 bilateral and regional trade agreements in force around the globe; another hundred are being negotiated. Of those, the United States is a party to just 14 agreements in effect with 20 countries. The future implementation and entry-into-force of the Trans-Pacific Partnership (TPP) would increase that to 15 agreements with 25 trading partners. Unless the United States engages in trade negotiations and concludes high-standard agreements, others will set the norms and disadvantage American interests.

PREPARED STATEMENT OF GLENN PRICKETT, CHIEF EXTERNAL AFFAIRS OFFICER, THE NATURE CONSERVANCY

Thank you, Mr. Chairman, Ranking Member Wyden, and members of the committee, for the opportunity to present the views of The Nature Conservancy on the implementation of international trade agreements entered into by the United States. Our views will focus largely on the environmental provisions of such agreements.

The Nature Conservancy is the world's largest conservation organization with over 1 million members and on the ground programs in over 35 countries that aim to conserve the lands and waters upon which all life depends. In our work, we are continually faced with the environmental challenges caused by illegal or unsustainable patterns of trade and consumption, particularly around the illegal trade in wildlife and timber, and illegal and unsustainable fishing practices. Addressing these threats is essential if we are to secure the health of the world's forest, wildlife and oceans and ocean fisheries so that they can continue to provide their benefits to future generations.

With this objective in mind, **The Nature Conservancy has strongly supported and welcomed the increasing levels of environmental protection** incorporated in sequential trade agreements over time. The Bush administration in 2007 agreed to a landmark agreement involving a bipartisan Congress and the White House to incorporate a specific list of multilateral environmental agreements (MEAs), including CITES, into future FTAs. This has paved the way for successful inclusion of environmental chapters in FTAs as well as stronger enforcement mechanisms. Linking trade to improved environmental management gives us valuable new leverage to encourage countries to deal with natural resource issues, many of which can be exacerbated by increased international trade—particularly in countries with important timber or other natural resources to export.

While including environmental commitments as a core component of FTAs unquestionably provides an important enforcement tool to ensure compliance, it is also critical that we position countries to be able to comply by providing the resources, tools and technical assistance for them to do so. **We commend Congress for its historically strong role in supporting effective implementation of environmental components of Free Trade Agreements**—with over $177 million appropriated to support environmental cooperation and capacity building under FTAs with 20 different trading partners over the past 10 years. This support has been crucial to the environmental progress we have seen under the agreements.

While challenges to implementing these obligations remain, TNC believes these commitments have overall been successful and have resulted in positive developments for the environment. The initial effect of environmental FTA commitments has been to spur legislative action to create at least the legal enabling framework for compliance. Environmental provisions in past agreements have mobilized passage of important new environmental laws in our trading partners. For example, the Peru Forestry and Wildlife Law was in part a direct response to the U.S.-Peru TPA, and laws and policies driven by the Central American Free Trade

Agreement (CAFTA) have been important to wildlife and protected areas conservation in those member states. We believe that FTAs have been an important contributor to the passage of these laws.

TNC was directly involved in CAFTA implementation in the Dominican Republic through a USAID-funded project to improve environmental regulations, streamline its review of Environmental Impact Statements, build enforcement capacity of government regulatory agencies, and support biodiversity conservation. We feel these advances continue to play a role in enhancing environmental performance and outcomes in that country. Other studies have concluded that provisions for transparency and public engagement on environmental issues required by CAFTA were advantageous for civil society seeking to ensure enforcement of domestic wildlife conservation laws, specifically around sea turtle protection, through this FTA.[1]

The Peru Trade Promotion Agreement included a groundbreaking approach to address core environmental concerns, and it continues to serve as a platform to support Peru's efforts to combat illegal logging. The provisions in the Peru agreement also committed Parties to biodiversity conservation, including non-consumptive use, and recognize the link between illegal logging and illegal wildlife trade. TNC was involved in an advisory role with many of the specifics around this agreement, which included arrangements for U.S.-Peru environmental cooperation to:

- Strengthen the legal, policy, and institutional framework governing the forest estate and the international trade in forest products;
- Build institutional capacity for forest law enforcement and the international trade in forest products;
- Improve the performance of the forest concession system in meeting economic, social, and ecological objectives;
- Increase public participation and improve transparency in forest resource planning and management decision-making; and
- Design and implement projects funded by USAID-Peru to promote sustainable production in the indigenous territories as a way to avoid deforestation and illegal logging.

TNC pushed for a great deal of specificity in the Forest Sector Governance Annex with Peru, because we believe **clear environmental obligations spelled out in the agreements, coupled with follow-on funding, technical assistance and capacity building to implement those obligations, are the main ingredients for success.**

However, the Peru case also illustrates the complex challenges involved. The recent disturbances in Peru in response to the independent forestry enforcement agency's (OSINFOR) attempts to enforce the U.S.-Peru FTA Forestry Annex gives us some idea of the scale of the problem. Even competent and honest officials are often no match for powerful and corrupt elements in the timber sector.

What the U.S.-Peru FTA does create, however, is **the transparency and opportunity** to begin to address this problem. The electronic timber tracking system developed under the agreement has proven to be a very positive tool. It has increased transparency and has thwarted the ability of criminals to change source-origin documentation. We also now have detailed information in a public database—also available to U.S. importers trying to comply with the Lacey Act—about the concessions and companies involved in the Peruvian illegal timber trade. **The systems created by the obligations in the Forestry Annex and built with U.S. assistance are proving their mettle by identifying the illegal actors and providing at least the means to hold these actors accountable.** Without the agreement, it is likely we would have little to no information on the scope of the problem in Peru.

But there are still gaps in the supply chain—namely, problems of documentation in the concession system that OSINFOR has brought to light. Due to lack of resources and time constraints, all the pieces have not yet fallen into place in Peru and work remains to be done both on technical tools and certainly on the political will to enforce violations.

The ongoing lessons we draw from the implementation of the U.S.-Peru agreement include the need to reinforce creation of a strong, **independent** agency to address legality issues in the forestry sector, as well as ongoing political and material support for their efforts. We also need to support robust **training on enforcement** for local officials, coupled with continued **monitoring and oversight** by U.S. offi-

[1] A. Lurié and M. Kalinina, "Protecting Animals in International Trade: a Study of the Recent Successes at the WTO and in Free Trade Agreements," *Am U Int'l L Rev,* 2015.

cials. The **transparency** provisions embedded in these commitments are another crucial component, and can help improve governance, rule of law and public participation even beyond environmental matters.

On a related note, we urge that implementation arrangements provide a significant role for civil society. Engaging NGOs can help provide accountability, information and public support to reinforce trade and environment measures, helping to reduce corruption in environmental regulation. We recommend that programs to implement environmental cooperation be public, subject to review and comment, and implemented by a broad stakeholder partnership to promote a culture of positive environmental engagement.

While this discussion is about our past experience on trade implementation, I would just mention that the recently concluded Trans-Pacific Partnership contains important new obligations for Parties to address illegal and unsustainable fisheries practices, and to combat illegal wildlife trade. The Nature Conservancy is very optimistic about the power of these provisions to tackle what are often systemic problems that are depleting ecosystems globally. We are also cognizant that effective compliance will involve significant capacity building and technical support among the partners. We look forward to working with Congress and U.S. Government agencies to ensure the robust implementation of TPP environmental commitments throughout the Pacific region.

Thank you, Mr. Chairman, Members of the Committee.

QUESTIONS SUBMITTED FOR THE RECORD TO GLENN PRICKETT

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. Congress just passed a trade enforcement bill, which I hope will significantly up the game for U.S. trade enforcement, including by helping ensure that trade enforcers have the resources they need to get the job done. Each of you has identified some areas where trade agreement implementation has fallen short, yet you all seem to agree on the importance of the implementation process and having the right resources to get it done right. If more resources are dedicated to trade capacity and enforcement in coming months and years, what areas related to implementation are in your view in greatest need of additional resources?

Answer. Within the environmental sphere, the fisheries provisions in the Trans-Pacific Partnership are a new and significant achievement, but also present unique challenges to implementation and enforcement. Responsible ocean governance and management is really in its infancy, and effective management even within countries' EEZs is beyond the capacity of many governments in the region. On a purely technical level, countries will need support to implement port state measures, to build capacity for applying data poor stock assessment methods, and to develop cost-effective management measures and monitoring that help fisheries move towards sustainability. Good enforcement requires that we have a high degree of confidence in the methods used to assess fishery sustainability, so that TPP parties can agree on which subsidies might still be permissible and which need to be eliminated upon entry into force of the agreement. It would also be helpful to provide technical assistance to partners to implement programs to account for and reduce by-catch, and to develop and deploy innovative technology to increase traceability in the supply chain as a tool for combatting IUU fishing.

More generally, the government institutions responsible for environmental enforcement on forestry, wildlife and parks management tend to suffer from a lack of capacity—resources, trained staff, and equipment—to enforce existing regulations. Targeted U.S. support can vastly improve implementation and verification systems so that these agencies can be more efficient and effective, and can understand and follow international best practice. For timber legality assurance, for example, countries need not only responsible managers and auditors, but also mechanisms for broad stakeholder input, chain of custody systems, and methods for public reporting and independent monitoring of these systems and standards. In some cases, countries in Asia need to establish a clear definition of what is legal timber. We have seen valuable payoff from U.S.-supported capacity building of the Peruvian forest service and the supervisory agency (OSINFOR) created as a result of the Peru TPA; similar capacity building in some of the TPP countries will be required.

Bolstering enforcement capacity of trade agreement environmental provisions is in alignment with U.S. development assistant goals for the environment, particu-

larly seen through the lens of combatting illegally harvested timber, wildlife and fisheries. The U.S. Congress has ensured addressing these challenges to biodiversity will remain a priority for USAID and other development agencies. Enhancing enforcement capacity of our free trade agreements would complement these priorities.

Question. Illegal logging doesn't just hurt the environment, it hurts sawmill workers in Oregon and around the country who have to compete with an influx of cheap stolen wood. Mr. Prickett, you described some of the innovative commitments on forestry that were included in the Peru agreement and how these commitments were used to fight illegal logging and the criminal enterprises that profit from it, but as you acknowledge, serious challenges remain when it comes to stopping illegal logging in Peru. This committee may in the future be considering the Trans-Pacific Partnership agreement, which also contains new commitments on forestry, including a commitment to combat and cooperate to prevent the trade of wildlife that was taken or traded illegally. Can you describe the value you see in the new commitments? What advice would you give Congress and the administration on what to do in coming months to ensure that this and other environmental commitments are fully implemented by TPP partners?

Answer. The new TPP commitments on combating wildlife trafficking and trade in illegally taken wildlife are critical and complement well the commitment toward effective implementation of obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Effective CITES implementation is critical to thwarting illegal wildlife trade. For example, ensuring that CITES authorities issue proper permits and monitor exports to ensure necessary permits accompany the wildlife products is one way to combat illegal trade. In underdeveloped countries this is often underfunded. Trade capacity building activities helps strengthen implementation of the convention and can also address issues related to illegal wildlife trade.

Furthermore, CITES Parties have a variety of requirements to ensure that international trade is not detrimental to species, including making science-based non-detriment findings before issuing export permits and undertaking enforcement action to prevent illegal trade. Congress and the administration must encourage trade partners to improve their compliance with these obligations. Article 20.17.2 of TPP requires the Parties to adopt, maintain and implement laws, regulations and other measures to fulfill its obligations under CITES, but only insofar as it affects trade or investment between the Parties. Given that legal trade in CITES Appendix 1 listed products among TPP Parties is very limited, the requirement that a violation affect "trade or investment between the Parties" may be a difficult threshold to meet. This possible loophole makes countries' having strong prohibitions and measures against illegal trade critically important. No country is currently doing enough.

The TPP also includes a Lacey-type provision in the environment chapter to facilitate a basic legal and enforcement framework to ensure that trade liberalization does not encourage increased demand for, or ease in trading of, illegally taken plants and wildlife. This provision was critical because prior to TPP passage, if a wild animal was captured illegally in one country and imported to another where that species was not protected, the crime would remain unpunished (except in a few TPP countries where a Lacey Act-type law existed). Now all TPP parties are required to "combat, and cooperate to prevent" that type of crime. Furthermore, this is an important provision because it extends protections beyond CITES-listed species to all wildlife captured in violation of a Party's law and regardless of level of endangerment. These provisions establish an important new trade precedent, but will require capacity building and vigilant implementation and enforcement to be effective.

The task is enormous. Only 13% of natural production tropical forests in Asia overall (not restricted to TPP countries) are considered to be under sustainable management. An estimated 30 to 40% of the total quantity and export value of wood-based products exported from Asia-Pacific is derived from illegal sources, generating the second largest volume of financial flows for transnational criminal groups in the region. Forest conversions for oil palm and wood fiber plantations continue at a rapid rate.

The foundation for responsible forestry and trade in the Asia-Pacific region is legality. Beyond the benefits of increased compliance with the wide range of laws that intersect with forestry operations (annual allowable cut, allocation of management rights, taxation, workplace safety, environmental protections, etc.) investing in the standards and systems that allow for legality to be credibly, independently verified along a complete supply chain represents an enormous leap toward the ability to

access high value markets demanding full, independently certified sustainability for many companies. Requirements for legal timber can also trigger dialogues and processes aimed at strengthening governance in places where a lack of transparency and stakeholder involvement in decisions about how land is allocated and managed present an obstacle to credible legality verification.

Part of what makes the continued trade in illegal timber possible is a widespread lack of robust and transparent legality verification schemes in exporting countries that can be used by buyers to verify that the timber being consumed domestically or imported comes from legal sources. There are also key consumer countries that lack regulations to prohibit the trade in illegally sourced products. The development of these schemes and regulations must be done on a case-by-case basis to suit the conditions of each country and can take several years. Once established, there are significant challenges to build the capacity to operate the legality verification schemes, encourage all participants to pay the transaction costs and comply with the requirements, and to enforce the laws.

To date, the establishment of such systems has largely been driven by timber import laws in markets outside of the Asia-Pacific region. International demand for verified legal timber remains an important incentive for continued development and implementation of credible timber legality verification systems. As consumption of forest products within regional and domestic markets continues to grow, there is also a need to better understand the different roles these markets play in driving deforestation and forest degradation and exploring additional measures to target them.

QUESTIONS SUBMITTED BY HON. MARIA CANTWELL

Question. Mr. Prickett, when it comes to trade enforcement, our agencies are woefully underfunded and constrained on resources.

A 2014 GAO audit on the enforcement of labor provisions of our Free Trade Agreements found that since 2008, the Department of Labor had resolved only a single complaint out of five that had been filed, and that the relevant agencies responsible for enforcing these provisions suffered from consistent staffing and resource constraints.

And while the administration has vigorously sought to hold China to its World Trade Organization commitments, China has still yet to meet many of them, like requiring mandatory intellectual property transfers, nearly 15 years after it first joined the organization.

And, Mr. Prickett, as you state in your testimony, the enforcement of the environmental commitments in our Free Trade Agreements leads much to be desired.

Specifically, you cite enforcement of the forestry provisions of the U.S.-Peru Free Trade Agreement remains a challenge, due to, as you put it, "lack of resources," and needed "robust training on enforcement for local officials, coupled with continued monitoring and oversight by U.S. officials."

I firmly believe that our trade agreements aren't worth the paper they are printed on—no pun intended—unless we adequately enforce them.

To help address this problem, I was proud to work with both Chairman Hatch and Ranking Member Wyden to include a provision in the customs bill creating a brand new, dedicated $15 million fund for trade enforcement and capacity building, and I look forward to continuing to work with them to ensure we have adequate appropriations.

Mr. Prickett, can you cite some specific examples from your work where lack of resources has hampered enforcement of the environmental provisions of our Free Trade Agreements?

Answer. I suspect that we often don't even learn the full extent of environmental transgressions when countries lack the resources to implement their environmental obligations. As described in my testimony, it is possible that Peru's recent forestry violations would not have even come to light had we not invested in the systems to uncover them. Perhaps the most significant outcome adequate resources can promote is transparency and public engagement, because without these, neither our trading partners nor the U.S. can hope to enforce wildlife legality provisions. The Peruvian government's efforts to enforce their forestry regulations will require ongo-

ing political and technical support from the U.S. given the challenges they are facing from criminal elements in the forestry sector.

Since we have relatively few trade agreements with strictly enforceable environmental provisions, it is challenging to cite specific instances of lack of enforcement, but there have been several averted problems addressed by timely intervention. Under the Dominican Republic-CAFTA, USAID funds helped streamline the process for permitting for Environmental Impact Statements, which had developed a 1.5 year backlog. Economic development can't proceed if environmental permitting does not function, and long backlogs had created opportunities for corruption. USAID funding to support DR–CAFTA implementation revised the approval process and trained regulators in the details of compliance, greatly reducing the time necessary to obtain permits legally.

Similarly, USAID funding established in INTEC, a Dominican technical university, allowed for independent training courses for government regulators to obtain certification in their responsibilities of ensuring environmental compliance. Enforcement would not be in place had we not assisted in the development of the necessary staff capacity.

One example from the experience of Human Society International (HSI)-Latin America relates to wildlife rescue center work in CAFTA countries. The projects were implemented with funding provided from the State Department, to improve standards for rescue centers working with confiscated wild animals. Rescue centers are pivotal partners to CITES implementation as they are focused on the rehabilitation and release of illegally captured and/or traded animals. Unfortunately there has been no funding to continue this work, although the rescue centers are underfunded and collaborate strongly with national governments. In many countries there is only one national or official rescue center, and increased funding could help grow the number and capacity of rescue center so that confiscated animals don't have to be euthanized or placed with zoos, and may even have the potential to be released back into the wild.

In another example, HSI Latin America was able to develop, with funding from the State Department, training materials for customs officials and police to help them identify and provide immediate care to confiscated animals. The customs officials and police force experiences a high rate of turnover and, although a sustainable method of training was used, this training must be ongoing. Unfortunately, continued trainings for new officials and staff were discontinued due to lack of funding.

Question. In your testimony, you note that enforcing the new environmental obligations in the Trans-Pacific Partnership will require "significant capacity building and technical support among the partners." Can you give some examples what that kind of effort that entails? Would this new trust fund help ensure our trading partners meet these obligations, and what specific steps are necessary to ensure they are properly enforced?

Answer. Capacity building can take many forms, and should be tailored to an assessment of the gaps and needs in each TPP country. In some cases, the solutions are technical or technological—computerized timber tracking systems or fisheries data assessments—but often it is about getting systems and standards in place for everything from public engagement to clarity of legal requirements. Training trainers in the management of these systems is vital to ensure sustainability of our efforts.

The TPP region includes some of the world's largest forest product exporters, some of the largest wildlife trade markets (legal and illegal), and major exporters and consumers of wild-caught fish. These wildlife markets have long been plagued by corruption and other failures of governance, as easily stolen natural resources often are. We believe our capacity-building efforts should address both the supply- and the demand-side of the trade in illegal and unsustainable products to be fully effective, and that a regional approach can attend to both sides of the problem most effectively. If there are many suppliers and buyers who wish to trade in verifiably legal forest products this will send powerful market signals for improvements in forest governance across the region.

This is the logic behind TNC's Responsible Asian Forestry and Trade Program (RAFT), which we are implementing with a wide range of partners and support from the government of Australia. RAFT seeks to address forest legality and sustainability issues across Asia and the Pacific. Although on-the-ground forest management improvements are the focus of much of RAFT's efforts in producer countries,

we emphasize chain of custody and traceability to country of origin systems in the countries that manufacture and import wood products from the region as well. Creating a market-driven approach for sustainable and legal timber creates its own incentives and thereby eases the burden of police-type enforcement. We are encouraged by the potential of TPP to accelerate the move toward fully legal—and ultimately sustainable—timber throughout the region.

QUESTION SUBMITTED BY HON. BILL NELSON

Question. According to your testimony, Peru has had some problems in meeting the environmental obligations under the U.S.-Peru agreement. Could you explain if you think an enforceable action plan to help countries meet their environmental obligations—like TPP's labor action plans for Vietnam, Malaysia, and Brunei—would help ensure a greater level of compliance on the front-end? If so, please provide examples of what could be included in such an action plan?

Answer. The Nature Conservancy would agree that both action plans with clearly defined obligations, as well as strong environmental cooperation work programs, as we have with Peru under the current TPA, would be extremely useful for achieving TPP environmental implementation and assisting with compliance. It is critical to have clear goals, timelines, indicators and benchmarks defined in these action plans to help us measure progress. As I expressed in my testimony, clear obligations and the support to meet them are the key ingredients for success. The action plans should also be completed prior to the TPP's entry into force to maximize leverage, and should be made public to enhance transparency and participation.

In the most recent U.S. free trade agreements, trade partner technical agencies have met to develop an environmental cooperation work program focusing on priority areas to aid in chapter implementation. Once a work program has been developed, the trade partners begin to implement concrete projects to support the objectives in the program. These work programs are updated regularly to incorporate new priorities or progress. In the case of the environment, cooperative approaches are often the most effective way to achieve results, so a cooperative work program coupled with clear goals, timelines and indicators as you would have in an action plan, may be the best overall approach.

Each TPP country will have unique needs, so work programs/action plans should be tailored to national conditions as determined by a gap analysis and an inventory of current capacity building on environment obligations that is already happening in TPP countries related to existing FTAs. This assessment should be public. Once the needs are determined, gaps in the law analyzed, and enforcement weaknesses are assessed, a plan should be developed to address what may be the most critical impediments for that country.

In additional to the national level work programs, there may also be opportunities to establish regional systems for wildlife, fish and timber trade verification and monitoring that can be highly effective in addressing issues in both importing and exporting countries for these products. We would encourage the U.S. Government to explore efforts to find regional approaches to build coherency and capacity across the Pacific.

PREPARED STATEMENT OF STEVEN TEPP, PRESIDENT AND FOUNDER, SENTINEL WORLDWIDE

Mr. Chairman, Ranking Member Wyden, and members of the committee, thank you for the opportunity to appear before you today to discuss the implementation and enforcement of free trade agreements.

My name is Steven Tepp, and I am President and CEO and founder of Sentinel Worldwide. Previously, I enjoyed a career of 15 years of government service, beginning with you, Mr. Chairman, on your Judiciary Committee staff, and then at the U.S. Copyright Office. I now provide intellectual property counsel to companies and associations with interests in protecting and enforcing intellectual property rights, including the Global Intellectual Property Center of the U.S. Chamber of Commerce. I am also a Professorial Lecturer in Law, teaching international copyright law at the George Washington University Law School. I have previously taught at the George Mason School of Law and the Georgetown University Law Center.

During the nearly dozen years I spent with the Copyright Office I had the opportunity to negotiate the text and/or implementation of seven different free trade agreements ("FTA") with countries around the world. I was co-counsel for the U.S. litigation team in the intellectual property ("IP") dispute the United States brought against China before the World Trade Organization ("WTO"). I also participated in numerous bilateral trade talks, including sub-FTA arrangements, such as Trade and Investment Framework Agreements ("TIFA") and Bilateral Investment Treaties ("BIT"). Additionally, I participated in multilateral fora including the World Intellectual Property Organization ("WIPO"), the Asia-Pacific Economic Cooperation ("APEC"), and the Security and Prosperity Partnership of North America ("SPP"). As will be discussed below, these experiences taught me the incredible opportunity and power of FTAs and it is an honor and privilege to have the opportunity to share those experiences with you today.

I am here before you in my personal capacity as an expert in intellectual property and a former trade negotiator. The views expressed are my own and do not necessarily reflect the views of any client or employer.

I. THE IMPORTANCE OF INTELLECTUAL PROPERTY TO THE UNITED STATES AND EVERY COUNTRY

Intellectual property is a tremendous source of value for the United States and a dominant part of our foreign trade. According to a report of the U.S. Commerce Department, IP-intensive industries directly account for over 27 million American jobs. IP-intensive industries also indirectly support approximately 13 million additional jobs, bringing the total to 40 million American jobs—over one quarter of the U.S. workforce.[1] IP-intensive industries account for over $5 trillion of value; over one-third of the U.S. gross domestic product.[2] And, perhaps most directly relevant to this hearing, almost two-thirds of U.S. merchandise exports are from IP-intensive industries.[3]

American intellectual property is the envy of the world. In entertainment, computer hardware, life-saving medicines, literature, software and videogames, again and again American industries lead the world. The Internet grew up speaking English; not because we have the most powerful military or the biggest economy, but because we invented the computers and software on which it operates and we create the content that people want to use and enjoy. All of these are undergirded by intellectual property: patents, copyrights, trade secrets, and trademarks. Thus, it should be no surprise that the United States seeks to ensure fair and modern international standards for the protection of intellectual property. Nor is it a surprise that there are those in the world who seek to free ride on, or outright steal American intellectual property.

Here at home, the members of this committee and your colleagues throughout the Senate and the House of Representatives make your best efforts to keep our intellectual property system up to date and functioning efficiently. In this regard, you join a legacy stretching all the way back to the First Congress, which enacted a Patent Act and a Copyright Act in 1790. And your efforts are rewarded with the continuing bounty of economic growth, innovation and creativity, and job creation.

Policy makers abroad are not always so diligent or dedicated. For over a quarter century the U.S. Trade Representative's Office ("USTR") has annually issued the Special 301 Report, detailing the shortcomings of foreign intellectual property systems. In last year's report, over a dozen countries were assigned to the "Priority Watch List," the worst possible designation short of threatening trade sanctions, and another two dozen were on the "Watch List."

Similarly, the Global IP Center of the U.S. Chamber of Commerce recently published the fourth edition of the world's only cross-sectoral index of countries' IP systems.[4] As the index demonstrates, many countries have a long way to go to reach a modern, effective IP system, including some countries we usually think of as advanced. On the other hand, those who choose to take a positive outlook can find in both the Special 301 Report and the GIPC Index a roadmap to a more prosperous

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[1] "Intellectual Property and the U.S. Economy: Industries in Focus," Prepared by the Economics and Statistics Administration and the U.S. Patent and Trademark Office (2012) *(available at: http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf).*

[2] *Id.*

[3] *Id.*

[4] "Infinite Possibilities, U.S. Chamber International IP Index," 4th Ed. (February 2016) *(available at: http://www.theglobalipcenter.com/gipcindex/).*

future. Indeed, for the last 2 years, the GIPC Index has included an annex identifying correlations between high IP standards and the level of innovation, creative output and growth in high-value jobs.

Those who do not take a positive approach impose grave costs on their citizens. The failure to provide adequate legal protection and effective enforcement for IP has serious, negative consequences at many levels. Domestically, a country that fails to act against IP theft suppresses its own creative and innovative industries and endangers its own populace.

On my very first trade mission, we made a stop in Kuala Lumpur, Malaysia to discuss their implementation of a new law designed to crack down on music and movie piracy. While there, I read an article in the local newspaper about a woman of indigenous Malay ancestry, who had become a highly popular singer. A few years earlier, the article reported, she had cut an album that sold about a quarter million copies. Since then, the organized crime syndicates engaged in music piracy had moved into the Malaysian market and the same singer's current album had sold only 15,000 copies. It wasn't a flop; those were sales lost to piracy. As a result, she had to take a job as a waitress. This made a striking impact on me as a living example of how IP theft can have devastating economic effect, fund criminal networks, and perhaps most sadly, eat away at local culture. I am happy to report that while Malaysia still has challenges ahead, it has worked hard to address IP theft (in part through a motivation to work towards a U.S. FTA) and is no longer on any Special 301 list.

In my travels I have also been to places where counterfeiting rates were so high, that in some cities it was hard to find a legitimate product. There is a degree of cynicism that creeps into one's mind when you visit such a place and then listen to the government officials deny they have an IP enforcement problem. And there is outrage as you walk by shop after shop after shop offering a broad range of knock-offs of American brands. But there is also empathy when one sees the local citizens shopping at some of these places and realizes they aren't all just looking for the cheapest deal, they are buying necessities for their families and have nowhere to go to get legitimate, reputable products. A report from the World Health Organization estimated that in India, one in five drugs is counterfeit.[5] In China, dozens of infants starved to death on counterfeit baby formula that offered little or no real nutritional value.[6] And in Panama, at least 100 people were poisoned and killed by counterfeit cough medicine that had been unwittingly purchased by the government and distributed to indigent people.[7] These are just a few examples of the very real and severe consequences of lax IP enforcement.

Poor protection and enforcement of IP also has consequences beyond the borders of any single country. We have watched over and over as criminal networks engaged in organized IP theft move into a market and rapidly devastate legitimate business. Then, in response to domestic and external pressures, the government eventually takes action that cuts into the illicit profits of the thieves, who then move over to a neighboring market and begin the process all over again. Over time, an entire region can fall ill to this disease. Countries with major ports or other trading hubs must also be vigilant lest they become de facto distribution points for dangerous fakes. FTAs, if properly constructed and fully implemented, can inoculate a country and even a region.

But no market is completely immune from the effects of global IP theft, not even the United States. While there is comparatively very limited production of counterfeit products here, every day untold numbers of foreign-made infringing products reach our shores. It is the responsibility of the good people at Customs and Border Protection ("CBP") to try to protect American consumers by intercepting as many of these as possible. In fiscal year 2014, CBP seized infringing products with an aggregate value of over $1.2 billion.[8] While that is a large number, it is actually 30% less than the $1.7 billion worth of infringing products seized in 2013.[9] This drop coincides with a marked decline in the previously successful Operation In Our Sites campaign. Like many, I hope that the Customs Reauthorization legislation this

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[5] *http://mobile.nytimes.com/2014/02/15/world/asia/medicines-made-in-india-set-off-safety-worries.html?hpw&rref=world&_r=1&referrer=.*

[6] *http://www.cbsnews.com/news/arrests-in-fake-baby-formula-case/.*

[7] *http://www.nytimes.com/2007/05/06/world/americas/06poison.html.*

[8] *http://www.cbp.gov/sites/default/files/documents/IPR%20FY14%20Seizure%20Statistics%20Booklet_100515_spread_web.pdf.*

[9] *http://www.cbp.gov/sites/default/files/documents/ipr_annual_report_2013_072414%20Final.pdf.*

Committee worked so hard on enacting will help re-energize our efforts to stop IP infringing products from entering our country. I thank you for your work on that legislation and congratulate you on it recently becoming law.

The threat from infringing products coming into our country goes even beyond consumer health and safety. The Government Accountability Office ("GAO") made test purchases of microchips advertised as military grade as part of a report prepared for the Senate Armed Services Committee. The GAO report found that every single microchip it purchased was bogus and substandard.[10] These types of chips are used in military equipment including B–2B stealth bombers, Los Angeles Class nuclear-powered attack submarines, and even Peacekeeper inter-continental ballistic nuclear missiles.[11] We all cringe when we hear a story on the news about a military aircraft that crashed in a training exercise, seemingly not in harms way. But I always wonder if the servicemen and women injured or killed in these accidents are actually victims of substandard counterfeits.

As the GAO report shows, foreign-based IP thieves have taken to the Internet to promote and conduct their illicit business. They design websites to look authentic and deceive American consumers into thinking the products are legitimate and safe. Through these portals, criminals generate massive profits at the expense of American consumers and IP owners. And they do this all beyond the reach of U.S. law, in countries with low standards of IP protection and/or ineffective enforcement.

There are many facets needed to address this global problem, including consumer education and voluntary industry arrangements. FTAs are a critical element as well, as they help bring more countries' IP systems up to par, thereby scratching those countries off the criminals' list of fertile fora for infringement.

Many of the countries on the Special 301 lists have been there for years or even decades; some make incremental progress in one direction only to allow new problems to arise, and the most intransigent seem to respond only to the threat of trade sanctions. But there are also success stories, and many of those are tied to the progress made through FTAs.

II. IP THEFT DISTORTS THE MARKETPLACE AND FTAS CAN HELP

As discussed above, IP theft imposes a range of harm from economic to cultural to health and safety. Focusing in on the trade-related aspects of this harm, it is readily apparent that IP theft distorts marketplaces, which in turn distorts cross-border trade in some of our most import export sectors.

When countries provide inadequate legal protection or ineffective enforcement of IP, it allows free riders and thieves to enter the market at artificially low costs, as they bear none of the burden or risk of research, development, or creation. They also bear little or no costs associated with commercially unsuccessful products. Legitimate creators and innovators may and sometimes do find that a product is not well received in the marketplace. This is simply part of the risk of operating in an innovative sector. The infringers bear no such risks. They target only those goods that already have a proven demand in the marketplace—a demand that was created by marketing investments by the legitimate company. Infringers never have a flop.

As a result, IP thieves and free riders have little or no cost beyond their marginal costs of production and distribution. They turn a handsome profit while easily undercutting the price of the legitimate market. The legitimate creators and innovators are thereby forced into competing with versions of their own products sold at a lower price, or even given away for free. It is no wonder then, that international trade in counterfeit and pirated products has been estimated to exceed $250 billion.[12] If anything, this estimate is likely low, as it does not include infringing products produced and consumed entirely within a market, nor does it cover digital piracy.[13]

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[10] "DOD Supply Chain: Suspect Counterfeit Electronic Parts Can Be Found on Internet Purchasing Platforms," GAO–12–375 (February 2012) *(available at: http://www.gao.gov/assets/590/588736.pdf).*

[11] *Id.*

[12] "Magnitude of Counterfeiting and Piracy of Tangible Products: An Update," Organisation for Economic Co-operation and Development (2009) *(available at: http://www.oecd.org/industry/ind/44088872.pdf).*

[13] A study of just the top thirty infringing storage sites found they generate upwards of $100 million a year. "Taking Credit: Cyberlockers Make Millions on Others' Creations," NetNames

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The distortion effect of online piracy goes beyond displaced sales. Online piracy minimizes royalties paid to creators, because licensed services cannot compete on cost with the illegally free platforms. And by the same token, right holders become resigned to accepting such small royalties, because the other option is to receive nothing from the pirates.[14]

Anti-IP policies can also be a front for industrial policy and protectionism. Examples of trading partners' noncompliance with IP provisions of the TRIPS Agreement [15] of the WTO and our FTAs can be found across the major IP disciplines.

A. Patent

The global standard for patentability is well established. Article 27.1 of TRIPS sets forth the rule that patents must be available for any inventions that are "new, involve an inventive step, and are capable of industrial application." This standard is dutifully replicated in our FTAs. However, we have seen in a number of foreign markets, including at least one FTA partner, the imposition of additional criteria or conditions for patentability. These take different forms; some involve requirements for "enhanced efficacy," others interfere with the ability to demonstrate usefulness in industrial application by myopically refusing to consider evidence gleaned after the filing of the patent application, while still others simply ban patents on an entire field of technology, such as software.

The use of these impermissible tools to deny patents is insidious. The denial of such patents (which in many cases are recognized and respected in TRIPS-compliant countries around the world), necessarily denies the inventor the opportunity to utilize the domestic legal system to prevent free riders. And the country can justify that lack of remedies because of course there is no treaty obligation to provide remedies where there is no patent. But the violation of international obligations occurred up front, with the improper denial or revocation of the patent.

Another way in which some countries have inappropriately undermined patent rights is with the issuance of compulsory licenses, particularly in the area of pharmaceutical patents. Compulsory licenses allow domestic competitors of the innovator company to make and sell the patented medicine without the permission of the patent owner and usually for compensation well below market value. Article 31 of the TRIPS Agreement does allow for the possibility of compulsory licenses, but generally applies in dire cases such as national emergency or other extreme urgency. Our FTA's contain similar provisions that reflect an attitude at least as skeptical of this abrogation of property rights. Nonetheless, some compulsory licenses imposed by our trading partners do not appear to be justified by the requisite conditions, including one that appears to have been granted at least in part because the innovator company was not manufacturing the drug in that country. Such a condition is clearly beyond what is permissible under international standards and smacks of bald-faced protectionism.

Market distortion also occurs in the related area of disclosure of proprietary marketing data. As this committee is well aware, in addition to the process of applying for and obtaining a patent, pharmaceutical and biologic companies must apply for marketing approval in each country in which they seek to sell their products. During the time it takes for regulatory approval, the patent term is running, with the result that the innovator loses significant amounts of time of market exclusivity to which they would other be entitled and which is needed to offset the costs of research and development. As a way to rebalance the scales, Article 39.3 of the TRIPS Agreement requires that proprietary data submitted to obtain marketing approval for pharmaceutical products be protected against unfair commercial use, preventing would-be competitors from free-riding on that data and entering the market with artificial speed. Our FTAs contain even more explicit provisions, requiring at least 5 years protection for such data in the case of pharmaceutical products. However, several of our trading partners, including FTA partners, fail to comply with these standards.

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and Digital Citizens Alliance *(available at: https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/8854660c-1bbb-4166-aa20-2dd98289e80c.pdf).*

[14] *See* "Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment," Eric Priest, 27 Harvard Journal of Law and Technology 467 (Spring 2014) *(available at: http://jolt.law.harvard.edu/articles/pdf/v27/27HarvJLTech467.pdf); see also,* "Netflix Says Piracy is Still its Biggest Competitor," Lily Hay Newman, Slate, (Jan. 23, 2015) *(available at: http://www.slate.com/blogs/future_tense/2015/01/23/piracy_is_biggest_netflix_competitor_says_shareholder_letter.html).*

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

Moreover, the burgeoning field of biologics, which involve even greater investments in research and development than chemical compounds, call out for longer terms of regulatory data protection. You and your colleagues in Congress have provided for 12 years of regulatory data protection for biologics under U.S. law. But our trading partners frequently provide significantly less, and in some cases, no such protection.

B. Copyright

As in the field of patents, well-established international standards exist related to copyright. For example, Article 11 the WIPO Copyright Treaty ("WCT") and Article 18 of the WIPO Performances and Phonograms Treaty ("WPPT") obligate member states to prohibit "the circumvention of effective technological measures" that are used to protect copyrighted works [16] and that restrict unauthorized use of those works. These protections have proven to be critical to fostering a bevy of new, licensed, online offerings of copyrighted works. Our FTAs include detailed provisions on the subject, which dutifully replicate the manner in which Congress implemented the obligations of the WCT and WPPT. However, many countries fall short of full implementation, including at least one FTA partner that has provided no such protection.

As discussed above, inadequate enforcement efforts are a longstanding problem for copyright owners doing business overseas. Article 41 of TRIPS requires enforcement procedures to be available against any act of infringement, and Article 61 requires criminal procedures and penalties to be available against willful trademark counterfeiting and copyright piracy on a commercial scale. Our FTAs build on those to elaborate on the standard for criminal infringement and to provide greater specificity on the remedies and penalties that must be available.

But nothing can remedy a lack of political will of a local government to enforce IP rights. In some of the most egregious cases, we have seen a trading partner defund the entire department of the lone effective enforcement official in that country, we have seen the infringing commercial sale of copyrighted works by an arm of a national government, and we have seen the chief law enforcement official of an FTA partner publicly declare that no copyright infringement prosecution would ever be brought. Even when the right holder prevails in court, in some foreign countries damages and fines are commonly minor, in some cases not even covering the costs of the litigation, much less compensating for and deterring future infringement.

Our trade agreements have always given latitude for countries to adopt reasonable copyright exceptions. The TRIPS Agreement, the WCT, the WPPT, and all of our FTAs all provide a wide degree of discretion to countries to adopt exceptions to copyright, subject to the discipline of the globally accepted three-step test.[17] Unfortunately, experience has shown that some of our trading partners, including FTA partners, abuse this discretion by enacting overbroad exceptions that do not comply with the three-step test and leave American right holders without recourse against market-damaging uses. In one country, courts have applied the law to allow commercial copy shops to make unlicensed copies of academic materials, the exact opposite result of how U.S. courts have addressed the issue. Another country enacted an exception that would permit almost any use of a copyrighted work that claimed to be for scientific research, education, or several other purposes but which omits the nuances and safeguards found in U.S. law. And one trading partner went so far as to exempt reproduction and distribution online that purported to be for non-commercial purposes, but which could easily cause commercial scale harm to the market.

A further problem arises from the fact that the United States does not provide a full public performance right for sound recordings. As a direct result, many of our trading partners that provide fuller rights in this area and collect royalties to be distributed to performing artists refuse to pay American performers on the grounds of reciprocity. They are wrong to do so and it is worth noting that the United States Copyright Act provides full national treatment, never imposing reciprocity.

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[16] Here and throughout my testimony, unless otherwise noted, I use the term "works" to include phonorecords and all copyrightable subject matter under the U.S. Copyright Act.

[17] Exceptions are permitted for certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

C. Trademark

While the basic structure and operation of trademark systems is often more harmonized and subject to fewer policy disputes than other areas of IP, it is far from immune to problems. Perhaps more than other forms of IP, trademark is subject to violation in markets in which the legitimate owner does not even do business. Many brand owners are thus unprepared to try to enforce their rights in far-flung reaches of the globe. A related and particularly persistent problem is the bad faith registration of marks, which some trading partner's legal systems make very difficult to reverse. But most of all, trademark owners are subject to the same type of enforcement difficulties described above in the copyright context, both in terms of criminals' abuse of online platforms and with regard to the lack of political will to enforce the law. All of these combine to pose a form of harm unique to brand owners; counterfeits undermine the hard-earned reputation of American companies.

D. Market Access

While conceptually tangential to IP protection, countries have learned that market access affords them substantial opportunity to compel the disclosure or transfer of valuable IP. We have seen trading partners require the disclosure of trade secrets as a condition of entering their market, and similarly we have seen requirements to license IP to domestic entities as a precondition of market access. Some countries place quotas on the import of IP-intensive products, such as limits to the number of American movies that can be shown in their theaters or quotas on U.S. television shows. In other cases, we have seen countries deny rights to IP owners who do not manufacture their products in that market, and there is an ongoing concern with countries that may seek to require online services to locate servers in that market.

By providing baseline IP protection and enforcement, as well as fair rules of market access, our FTAs seek to create and preserve a level playing field for the international trade in IP-intensive products and services. The past 15 years of U.S. FTAs with modern IP chapters have proven very successful at achieving those goals. To be sure, a variety of implementation shortcomings in various countries remain, and I will discuss ways to try to address that further down in my testimony. Notwithstanding those, there ought be no mistaking the fact that the IP provisions of our FTAs deliver extraordinary benefits.

III. THE BENEFITS OF THE IP CHAPTER OF U.S. FTAS

The IP chapter of our FTAs can be a tremendous force for good. Perhaps some people imagine that all our FTA partners are modern, free democracies. The reality is that our FTA partners include countries with a range of approaches to government and society, countries that still bear deep scars of the Cold War, and countries beset by crime and violence. To these lands the IP provisions of our FTAs bring some of the basic building blocks of liberty and freedom: rule of law, respect for property rights, and transparency and accountability in government.[18] And IP enforcement removes a funding source from criminal and terrorist networks. I am fiercely proud of the contributions I have made in this regard.

The IP chapter of our FTAs is also a tool for the advancement of global policy and norm setting. Marketplace and technological advancements generate new policy imperatives and global norms need to keep pace. FTAs have proven the most effective (if not only) way to do that over the past 15 years.

FTAs also provide an opportunity to address bilateral issues that have been met with intransigence for years. The prospect of enhanced access to the U.S. market provides an incentive to our trading partners, which facilitates resolution of longstanding problems in our trading partners' IP systems. The largely successful line of FTA negotiations over the past 15 years is proof of it. This is also a reason to be steadfast in our negotiations; we can only sell this enhanced access once, and we would be wise to make the most of it.

IV. NEGOTIATION AND IMPLEMENTATION OF FTAS

Bismarck famously quipped, "the two things you never want to see being made are sausages and legislation." Bismarck never saw an FTA.

In fact, an FTA is not just one negotiation; it's four. First there is the domestic stakeholder consultation process and interagency clearance as the U.S. proposal is assembled. Second, there is the negotiation with our trading partners of the text of

[18] Although one FTA partner has failed to implement its obligations to provide transparency to its drug reimbursement decision making process.

the agreement. Third is the negotiation of the implementation of the text in the partner countries. Fourth is ongoing consultation over continued compliance.

A. Assembling the U.S. Text

The IP chapter of our modern FTAs took shape with the Singapore and Chile FTA negotiations, respectively. Since then, the DNA of the IP chapter remains the same, and a perusal of the existing agreements on the website of the U.S. Trade Representative gives anyone a clear picture of what the United States seeks from this chapter.

That is not to say that the text is written in stone. On the contrary, with each FTA there is broad opportunity for stakeholder comment as the text is reviewed, policies reconfirmed (or not), and updates made to reflect recent developments. The text is reviewed by the government's subject matter experts and cleared through the inter-agency process before it is presented as the U.S. proposal.

B. Negotiating the Text of the Agreement

Our trading partners know what we want in the IP chapter very early on in the process. The negotiations are frequently intense and grueling. Ultimately, the hard issues are decided by two factors: political salability and leverage.

While the negotiation of the text is neither the beginning nor the end of the process, it is the most important stage. The text defines the obligations for the participating countries. Once this phase is over, any issues not resolved will meet with a predictable return to intransigence. Getting it done right means specific obligations that cannot easily be avoided. Beyond the direct effect of the text on the participating countries, each FTA text has the potential to set a precedent for future FTA negotiations. A strong final text can make everything that comes after it that much easier.

C. Implementation

After the negotiations on the text of the agreement are concluded and the respective national governments have signed the deal, implementation becomes critical. The FTA does not enter into force unless and until USTR certifies that the participating countries have implemented the obligations they undertook in the agreement. The implementation of the agreement is where the rubber meets the road—do our trading partners change their laws and regulations to meet the negotiated standards? Do U.S. companies actually obtain the fair treatment demanded by the text?

I can tell you from personal experience that the negotiation over implementation can be every bit as intense as the negotiation over the text itself. The good news is that the leverage of the FTA continues through this implementation process. Until USTR certifies compliance, our trading partners are not enjoying the improved access to the U.S. market promised by the FTA. So, there are strong incentives to implement the agreement fully.

After certification and entry into force, the final word on compliance evaluation and remedial action for noncompliance is in the hands of third-party dispute panels. But transition periods are a distorting force in the implementation process.

D. Continued Compliance

In their ideal form, transition periods allow less developed countries with less sophisticated governing authorities to gain the capacity and expertise to appreciate and properly implement modern trade rules. This committee and the Congress anticipated that and provided ways to help meet legitimate needs by authorizing capacity building and technical assistance to our trading partners in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.[19]

Transition periods are also a valuable negotiating tool that, if properly employed, can help our trading partners agree to a better level of protection than they otherwise might. I believe that our trading partners enter into negotiations and treaties with us in good faith; the large majority of obligations are implemented reasonably, including those subject to transition periods.

Unfortunately, a trading partner can also misuse transition periods as a delay tactic. And there should be no mistake—in the IP sector, free trade rules mean reducing unfair competition, free riders, and outright theft of our most innovative and creative products.

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[19] Public Law 114–26, 129 Stat. 320 (June 29, 2015), § 102(c)(1).

Our trading partners are shrewd negotiators. They have figured out that when it comes time for USTR to certify compliance, it will do so when obligations subject to transition periods have not been implemented. While this is technically appropriate—the trading partner is in compliance with the terms of the FTA if it has not implemented items still within their agreed transition period—it also means that we have given away our critical negotiating leverage. Once the FTA is certified by USTR and thus enters into force, the trading partner is enjoying the full benefits of the improved access to the U.S. market and has a significantly reduced incentive to implement fully the remaining terms of the agreement. After that, our leverage to compel action is ultimately dependent on initiating and prevailing in a dispute process.

One approach to this problem could be requesting or requiring our FTA partners to provide an action plan for the timely implementation of the obligations subject to transition periods. A similar tool is to write into the agreement a requirement for our partners to provide periodic updates on their progress towards timely implementation. The primary benefit of these would be to highlight instances in which a trading partner is falling behind a reasonable schedule geared towards timely implementation. In that regard, they have a role to play. However, neither of these addresses the loss of negotiating leverage. Rather than forsaking key negotiating leverage, I believe it is worth considering a mechanism to suspend the benefits of the FTA in a field of particular importance to that country if its transition periods expire without compliance.

V. DISPUTE RESOLUTION—A POLITICAL DECISION

The final and ongoing phase of FTA compliance is the availability of a dispute resolution process. Even in cases of clear-cut noncompliance, the decision to initiate a dispute is at least as much political as it is substantive.

To be sure, it is not necessary to initiate a formal dispute process every time there is a disagreement over implementation. The clearer the textual obligation, the more likely it is that direct negotiation will lead to an acceptable outcome. And even the threat of a dispute can have substantial persuasive power. It is to our credit that we do not initiate disputes lightly or frivolously. But there is a line between compassion and complacency.

Since 2000, Congress has held 30 hearings addressing the shortcomings of foreign IP protection.[20] But over that same time span, the United States has not initiated

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[20] **Senate Appropriations Committee**
April 29, 2004: Subcommittee Hearing on "International and Domestic Intellectual Property Enforcement"
Senate Banking, House, and Urban Affairs Committee
April 12, 2007: Subcommittee on Security and International Trade and Finance hearing on "Pirating the American Dream: Intellectual Property Theft's Impact on America's Place in the Global Economy and Strategies for Improving Enforcement"
Senate Commerce, Science, and Transportation Committee
March 8, 2006: Subcommittee on Trade, Tourism, and Economic Development Hearing on "Impacts of Piracy and Counterfeiting of American Goods and Intellectual Property in China"
Senate Foreign Relations Committee
February 2, 2002: Full Committee Hearing on "Examining the Theft of American Intellectual Property at Home and Abroad"
June 9, 2004: Full Committee Hearing on "Evaluating International Intellectual Property Piracy"
Senate Governmental Affairs Committee
April 20, 2004: Full Committee Hearing on "Pirates of the 21st Century: The Curse of the Black Market"
Senate Homeland Security Commitee
July 26, 2006: Stop!: Oversight of Government Management, The Federal Workforce, and the District of Columbia Subcommittee Hearing on "A Progress Report on Protecting and Enforcing Intellectual Property Rights Here and Abroad"
June 14, 2005: Financial Management, Government Information, and the District of Columbia Subcommittee Hearing on "Finding and Fighting Fakes: Reviewing the Strategy of Targetting Organized Piracy"
November 21, 2005: Financial Management, Government Information, and the District of Columbia Subcommittee Hearing on "Ensuring Protection of American Intellectual Property Rights for American Industries in China"
Senate Judiciary Committee
March 23, 2004: Full Committee Hearing on "Counterfeiting and Theft of Tangible Intellectual Property: Challenges and Solutions"
May 25, 2005: Subcommittee on Intellectual Property Hearing on "Piracy of Intellectual Property"

a single dispute under the IP chapter of any FTA. And we have not initiated an IP dispute under the TRIPS Agreement in 9 years. It certainly is not for lack of candidates.

American innovators and creators face continuing challenges in the markets of our trading partners who have not properly implemented their IP obligations, but those trading partners are enjoying the benefits of improved access to the U.S. market. This is not the equity we achieved in the negotiations and we should not settle for it now. Moreover, the apparent hesitancy to initiate IP disputes does not go unnoticed by our trading partners and invites them to test our resolve further. Simply put: we need to do a better job of holding our trading partners to the obligations they agreed to.

VI. CONCLUSION

Intellectual property is a major element of the U.S. economy and balance of trade. Even more, it is at the heart of our culture and the spirit of American innovation. When foreign countries fail to provide adequate legal protection and effective remedies against IP violations, they undermine their own economy, endanger their citizens, harm U.S. businesses and consumers, and distort the flow of legitimate international trade. Modern intellectual property provisions are a critical element of our FTAs. In addition to the benefits associated with improved IP protection, these provisions help spread the fundamental elements of liberty.

FTA negotiations are hard-fought and like the IP rights they purport to secure, they are without meaning if they are never enforced. By the time we get to the final stage of compliance monitoring, we have already negotiated against ourselves once and with our trading partners twice. Along the way, we are making concessions away from our ideal outcome. If we will not hold our trading partners to their obligations, we must eventually ask what is the value of running around the world getting people to sign pieces of paper? But we are not there yet. Even for all the trials

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November 7, 2007: Full Committee Hearing on "Examining U.S. Government Enforcement of Intellectual Property Rights"

June 17, 2008: Full Committee Hearing on "Protecting Consumers by Protecting Intellectual Property"

June 22, 2011: Full Committee Hearing on "Oversight of Intellectual Property Law Enforcement Efforts"

House Energy and Commerce Committee

June 25, 2005: Subcommittee Hearing on "Product Counterfeiting: How fakes are undermining U.S. jobs, innovation, and consumer safety"

July 9, 2013: Subcommittee Hearing on "Cyber Espionage and the Theft of U.S. Intellectual Property and Technology"

House Foreign Affairs Committee

April 6, 2009: Full Committee Hearing on "Sinking the Copyright Pirates: Global Protection of Intellectual Property"

July 21, 2010: Full Committee Hearing on "Protecting U.S. Intellectual Property Overseas: the Joint Strategic Plan and Beyond"

July 19, 2012: Full Committee Hearing on "Unfair Trading Practices Against the U.S.: Intellectual Property Rights Infringement, Property Expropriation, and Other Barriers"

House Government Reform Committee

September 23, 2004: Full Committee Hearing on "Intellectual Property Piracy: Are We Doing Enough to Protect U.S. Innovation Abroad?"

December 9, 2009: Subcommittee Hearing on "Protecting Intellectual Property Rights in a Global Economy: Current Trends and Future Challenges"

House Judiciary Committee

March 17, 2005: Subcommittee Hearing on "Responding to Organized Crimes against Manufacturers and Retailers"

May 17, 2005: Subcommittee Hearing on "Intellectual Property Theft in China and Russia"

December 7, 2005: Subcommittee Hearing on "International IPR Report Card—Assessing U.S. Government and Industry Efforts to Enhance Chinese and Russian Enforcement of IP rights"

April 26, 2012: Subcommittee Hearing on "International Patent Issues: Promoting a Level Playing Field for American Industry Abroad"

June 27, 2012: Subcommittee Hearing on "International IP Enforcement: Protecting Patents, Trade Secrets, and Market Access"

September 20, 2012: Subcommittee Hearing on "International IP Enforcement: Opening Markets Abroad and Protecting Innovation"

June 4, 2014: Subcommittee Hearing on "Trade Secrets: Promoting and Protecting American Innovation, Competitiveness, and Market Access in Foreign Markets"

Congressional-Executive Commission on China

April 2, 2004: "Influencing China's WTO compliance and commercial legal reform: Beyond Monitoring"

September 22, 2010: "Will China Protect Intellectual Property? New Developments in Counterfeiting, Piracy, and Forced Tech. Transfer"

and tribulations of the process, the IP provisions of U.S. FTAs are the top standard in the world. With an energetic effort to hold our trading partners to their commitments, we can all enjoy the benefits of progressively improved IP protection around the world.

I again thank the committee for this opportunity to present my views, and I stand ready to provide any assistance I can.

QUESTIONS SUBMITTED FOR THE RECORD TO STEVEN TEPP

QUESTIONS SUBMITTED BY HON. RON WYDEN

Question. Congress just passed a trade enforcement bill, which I hope will significantly up the game for U.S. trade enforcement, including by helping ensure that trade enforcers have the resources they need to get the job done. Each of you has identified some areas where trade agreement implementation has fallen short, yet you all seem to agree on the importance of the implementation process and having the right resources to get it done right. If more resources are dedicated to trade capacity and enforcement in coming months and years, what areas related to implementation are in your view in greatest need of additional resources?

You highlighted many of the challenges that the United States faces in realizing the benefits of the intellectual property ("IP") provisions in its free trade agreements. As you have pointed out, certain of these provisions are important for consumer health and safety, because they help prevent the importation into the U.S. of fake drugs and other deceptive products.

Answer. In the field of intellectual property, the Office of the U.S. Trade Representative, the U.S. Copyright Office, and the U.S. Patent and Trademark Office, including its IP Attaches, are the central and critical agencies involved in training, capacity building, and implementation and enforcement of free trade agreements. I also highlight the role of the Department of Justice and its regional IP Enforcement Coordinators (IPLECs). Increasing the resources available to these agencies to assist our trading partners and work towards full implementation of free trade agreement commitments will provide the best and most efficient results for the United States and the $5 trillion its IP industries generate.

Full implementation of IP provisions by our trading partners will also improve the safety of products available to American consumers, as you note.

Question. Given the radical changes in technology over the past 20 years, many think that aspects of the U.S. copyright system should be reformed—and I am one of them. However, to the extent that one believes the U.S. copyright system has worked to date, it is due in large part to its flexibility and balance. Specifically, the doctrine of fair use is critical to maintaining a free and open press and to promoting education and research. In your written testimony, you describe problems when countries maintain overly broad exceptions. Do you agree that there is also a danger of overly narrow exceptions? In other words, when the United States works with other countries on the implementation of the copyright provisions in our FTAs, should we ensure that such implementation promotes free and open societies as it does in the United States and does not create tools that could be used to suppress free speech?

Answer. Anything is possible, but history demonstrates that the danger of overly narrow exceptions is extremely low. Trade agreements address practical realities and my experience is consistent with what is demonstrated in USTR's Special 301 Report year after year. That is, a lack of adequate legal protection and effective enforcement of copyright continues to be a major problem that distorts markets, undermines American prosperity, and harms American consumers. As we evaluate the copyright systems in foreign markets going forward, we should continue to consider international obligations and global standards, the adequacy of legal protection (including appropriate exceptions within the framework of the globally accepted three-step test), the effectiveness of enforcement, and all the other factors that make up a complete copyright system.

I agree that copyright promotes free and open societies. As the Supreme Court held in the *Eldred* case, Copyright is an "engine of free speech." Indeed, creators make their living exercising free expression.

As I noted in my written testimony, I had the opportunity to serve as co-counsel on the U.S. litigation team when the United States took China to the WTO over

noncompliance with its TRIPS obligations. The first complaint in that case was that China improperly denied copyright to works it censored. In its decision, the WTO Panel recited, "China argues that such copyright protection is a 'legal and material nullity,' as economic rights pre-empted by public prohibition. It also argues that copyright enforcement is meaningless in this context." WT/DS362/R, p. 32, para. 7.134 (2009). The Panel went on to find China in violation of its TRIPS obligations on this point, and China has since deleted the offending provision from its law. I am proud to have been part of this effort to strike a blow for creators and against censorship.

That case illustrates the diametrically opposed purposes of each law: copyright is designed to promote the creation and distribution of expression; censorship is designed to suppress it.

QUESTIONS SUBMITTED BY HON. BILL NELSON

Question. Given the past difficulty we've seen in getting countries to comply with our trade agreements, is it still worth pursuing these agreements?

Answer. Absolutely. As I wrote in my prepared testimony:

"The IP chapter of our FTAs can be a tremendous force for good. Perhaps some people imagine that all our FTA partners are modern, free democracies. The reality is that our FTA partners include countries with a range of approaches to government and society, countries that still bear deep scars of the Cold War, and countries beset by crime and violence. To these lands the IP provisions of our FTAs bring some of the basic building blocks of liberty and freedom: rule of law, respect for property rights, and transparency and accountability in government. And IP enforcement removes a funding source from criminal and terrorist networks. I am fiercely proud of the contributions I have made in this regard.

The IP chapter of our FTAs is also a tool for the advancement of global policy and norm setting. Marketplace and technological advancements generate new policy imperatives and global norms need to keep pace. FTAs have proven the most effective (if not only) way to do that over the past 15 years.

FTAs also provide an opportunity to address bilateral issues that have been met with intransigence for years. The prospect of enhanced access to the U.S. market provides an incentive to our trading partners, which facilitates resolution of long-standing problems in our trading partners' IP systems. The largely successful line of FTA negotiations over the past 15 years is proof of it."

Question. Once a free trade agreement has entered into force, what is the best strategy for the U.S. to pursue to get our trade partners to comply with their obligations? Is it trade sanctions, consultation, in-kind retaliation, or some other mechanism? Please also provide an example of how the U.S. previously used the strategy to achieve a successful result.

Answer. I believe in using all available tools to achieve full compliance and fair treatment for American's doing business overseas. In the field of IP, these may include the Special 301 Report, bilateral negotiations/consultation, senior political-level pressure, coordinating with other governments aggrieved by the lack of proper protection, TRIPS Council (including the periodic review of countries' laws), marshaling aggrieved industries in the trading partner's domestic market, dispute resolution, and, if needed, trade sanctions and/or revocation of benefits under the Generalized System of Preferences. As I noted in my testimony, I also support suspension of benefits in the case of unimplemented obligations previously subject to a transition period. In my experience, I have seen various combinations of these tools utilized to resolve a variety of IP issues in Oman, Peru, Singapore, and South Korea just to name a few.

The case of Oman may be particularly instructive. In October 2008, I participated in a delegation to Muscat led by then-U.S. Trade Representative Susan Schwab for the purpose of securing full Omani implementation of the U.S.-Oman free trade agreement. We began with a list of 75 shortcomings in Omani legislation and regulations on IP. Ambassador Schwab engaged directly and successfully with Sultan Qaboos, who in turn instructed his bureaucracy to engage constructively with us at the expert level. Over the following 72 hours of intense and nearly round-the-clock negotiations, we were able to use the combination of the political direction Ambassador Schwab secured and the clear obligations of the IP Chapter of the free trade agreement to sustain and reinforce our positions on full implementation and reach

agreement on all of the outstanding issues. After a few more weeks of follow-up exchanges on IP and other areas, Ambassador Schwab was able to certify Omani compliance and the agreement entered into force on January 1, 2009.

PREPARED STATEMENT OF HON. RON WYDEN,
A U.S. SENATOR FROM OREGON

I believe deeply in the benefits of trade. In America, trade-related jobs often pay better than non-trade jobs. And there are going to be a billion middle-class consumers in the developing world in 2025 with money to spend on American-made goods. So it's my view that we have to make things here, add value to them here, and ship them around the world.

Now, my heart breaks when I hear news like what's going on in Indiana, where Carrier Corporation and a United Technologies Electronic Controls have announced they're shuttering plants and heading to Mexico. I talked with my friend Senator Donnelly about this just yesterday. These are factories that have been around for decades, supporting the livelihoods of a lot of working families. When you're a worker caught up in an awful situation like this, it's got to curdle your blood when you hear some callous line from an executive about how it's only business, and the company's going to "synergize its inputs and maximize efficiencies." It must feel like you and your family were just a little cog in a big machine.

My number one goal, when it comes to the cutthroat global economy, is to fight for American workers. I believe our trade policies must spur the creation of red-white-and-blue jobs that can support a middle-class family in Oregon and around the country. I want to make sure American workers and American businesses are in the economic winner's circle when they compete with foreign firms.

You do that by enforcing the rules here at home, stopping unfair trade before it hurts American workers and families. And you do it by writing new rules overseas. That means engaging with other countries, hammering out commitments in trade agreements that countries will drop unfair barriers to products made in the United States. You get commitments to raise the bar on issues such as labor rights, so that companies aren't lured away from the U.S. by opportunities to kick around cheap foreign workers. You get commitments on environmental protections, so that countries don't turn a blind eye to practices like illegal fishing or the sale of stolen timber that often undercut American producers and do harm to the environment. You prevent a race to the bottom, you close loopholes and end outdated policies, and you bring the world up to our standards.

Then you have to enforce those agreements. The landmark package of enforcement measures put together by this committee—and very recently signed into law—is a major step forward. In the past, trade policies were often too old, too slow, or too weak to fight back when bad actors overseas found ways to rip off American jobs. Our tough, new game plan on enforcement will help change that.

You're already seeing this new approach to trade policy pay off. Last year, Senator Brown and I worked together to close an egregious, old loophole in our trade laws that allowed for certain products made by slave or child labor to be imported to this country if there was no producer here at home. Under the loophole, economics trumped human rights, and Senator Brown and I said that was absolutely, 100 percent wrong. So we wrote a provision that closed it. And yesterday, the Portland Business Journal ran a story about how our crackdown on imports made with slave labor has the potential to make big improvements in the chocolate industry.

One company featured in the story, Tony's Chocolonely, just set up its U.S. headquarters in Portland, and it's leading the way when it comes to sourcing cocoa without exploiting slave labor or child workers. One of the company's leaders said in the story, "The impact of this law will depend greatly on how it will be executed and enforced."

Not only is that true when it comes to ending slave labor—it's true in all our trade laws and agreements. Enforcement is absolutely vital. And the first step in the enforcement of a trade agreement is getting implementation done right. The U.S. cannot allow countries to backslide on their promises before a trade agreement even goes into effect. Our trading partners have to take the commitments they've made at the negotiating table and turn them into action before they see benefits. That means writing or updating laws and regulations, and dropping unfair barriers so that American workers get the fair shake they've been promised.

Now that the President has signed the Trans-Pacific Partnership agreement, I expect consultations on its implementation to pick up steam. Confidence that TPP is going to be implemented the right way is a prerequisite for the agreement to win the support it would need to pass the Congress.

I see this hearing as an opportunity to identify many of the pitfalls and opportunities in the implementation process. And it will be extremely helpful down the road when it comes time to implement the TPP or any other trade deal. So I want to thank our witnesses for being here today. And I look forward to working on a bipartisan basis with this committee, the current administration and the next one to see that implementation is done right.

COMMUNICATION

NATIONAL ASSOCIATION OF MANUFACTURERS (NAM)
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Statement for the Record

Senate Committee on Finance

Free Trade Agreement Implementation: Lessons From the Past

March 23, 2016

The National Association of Manufacturers (NAM) is pleased to provide the following statement to the Senate Committee on Finance on "Free Trade Agreement Implementation: Lessons from the Past."

The NAM is the nation's largest industrial association and voice for more than 12 million women and men who make things in America. Manufacturing in the U.S. supports more than 17 million jobs, and in 2015, U.S. manufacturing output reached a record of $2.17 trillion. It is the engine that drives the U.S. economy by creating jobs, opportunity and prosperity. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturing has the biggest multiplier effect of any industry and manufacturers in the United States perform more than three-quarters of all private-sector R&D in the nation—driving more innovation than any other sector.

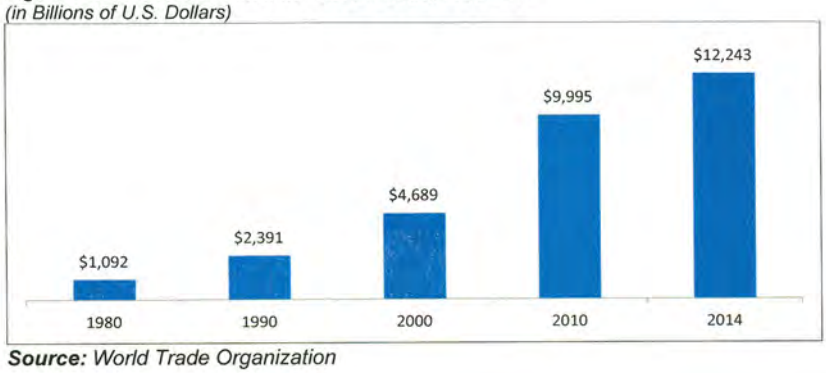
The interconnected global economy presents both substantial opportunities and challenges for manufacturers whether they sell their products across town, throughout the country or around the world. Advances in technology and transportation over the past few decades, as well as economic growth and rising incomes globally, have accelerated the growing interconnection and expanded the U.S. trading relationship with the rest of the world. Goods and services are exchanged around the world with an ever-increasing frequency, and manufacturing supply chains have become more complex. As shown in Figure 1, the most recent data from the World Trade Organization shows the massive growth in world trade in manufactured products, reaching a high of over $12 trillion in 2014.

The manufacturing sector in the United States has benefitted in many ways from the growth of the global economy. Manufacturers in the United States have been able to expand their customer base in growing overseas markets, obtain inputs from around the world to become more competitive, and have been able to develop new and better products through innovation and ingenuity. In doing so, manufacturers are supporting millions of high-paying jobs domestically. At the same time, the growing global economy has posed major challenges to manufacturers. Tariff and non-tariff barriers to accessing overseas markets are on the rise in many countries and unfair foreign government policies and actions have grown as well.

As discussed in depth below, U.S. trade agreements have had a substantially positive impact on manufacturers in the United States, particularly when the agreements are high-quality, enforceable and enforced, result in a level playing field and contain high-standard protections for innovation and property. These agreements have been successful in reducing and in some case eliminating foreign barriers and opening up new markets, which has spurred new manufacturing exports for U.S. industries and workers. At the same time, manufacturers recognize that trade agreements alone cannot address all of the issues that manufacturers face globally, and the NAM continues to work on ensuring that manufacturers in the United States

have the tools they need to be as competitive as possible and that all countries abide by the rules of the global trading system.

Figure 1: World Trade in Manufactured Goods, 1990-2014
(in Billions of U.S. Dollars)



Source: *World Trade Organization*

I. The Impact of Trade Agreements on Manufacturing in the United States

As the United States has opened foreign markets through enactment of new trade agreements, manufacturing output in the United States has grown and manufacturers in the United States have experienced particularly high levels of success in markets that have been opened by these agreements.

As shown in Figure 2, overall U.S. manufacturing output has quadrupled since 1980, reaching a record high of $2.17 trillion in 2015. America's manufacturing growth has been fueled in significant part by the quadrupling of U.S. manufactured goods exports since 1980 to $1.32 trillion in 2015 that has been supported by market-opening trade agreements. Manufacturing output and exports have continued to increase after major trade agreements, such as the North American Free Trade Agreement (NAFTA), China's accession to the World Trade Organization (WTO) and the most-recent U.S. trade agreement with Korea.

a. Impact of WTO Agreements on Manufacturing in the United States

The negotiation of the post-World War II General Agreement on Tariffs and Trade (GATT) in 1947 and the Uruguay Round Agreements creating the WTO in 1995 set the baseline rules for most global trade, now covering 161 members. The Uruguay Round Agreements, implemented by the United States under Trade Promotion Authority in 1994, expanded the basic rules of the global trading system and increased the coverage of those rules.

The core rules of the WTO have been ones that are critical to manufacturers in the United States seeking a more level playing field overseas and include commitments by WTO members:

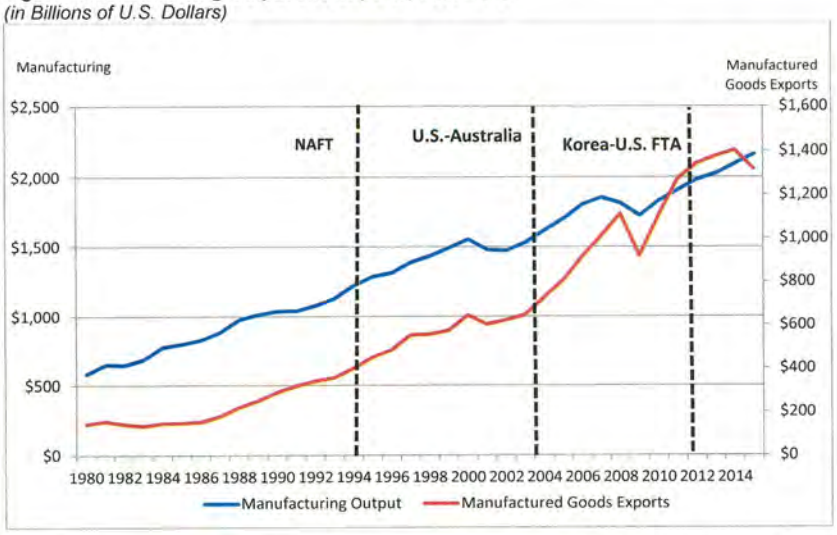
- To limit import tariffs to negotiated levels;
- Not to discriminate against foreign goods or impose technical barriers to trade;
- Not to provide unfair subsidies and advantages to their local producers;
- To respect and enforce basic intellectual property rights; and
- To pay penalties or be subjected to trade sanctions if they refuse to keep their promises.

Efforts to expand these rules for all WTO members and eliminate tariffs and other barriers in the "Doha" negotiations initiated in 2001 have unfortunately stalled.

The binding WTO rules lowered tariffs for manufacturers in the U.S. substantially, helping to fuel huge growth in U.S. manufactured exports from 1995 onward. In addition, these rules have eliminated many unfair foreign barriers to trade. Additionally, when countries have failed to live up to their commitments, the WTO has provided strong dispute settlement procedures. As discussed in more depth below, the United States has brought more than 100 WTO dispute settlement cases and has won or successfully negotiated many of them. Notably, the WTO has continued

to bring new countries into the rules-based trading system, with the accession of China in 2001, Saudi Arabia in 2005 and Vietnam in 2007.

Figure 2: Manufacturing Output and Exports, 1980-2015
(in Billions of U.S. Dollars)



Sources: *Bureau of Economic Analysis, U.S. Commerce Department (2015 data through Q3), United Nations Database (for output data before 1997), World Trade Organization (for export data before 2002)*

b. Impact of FTAs on Manufacturing in the United States

While global agreements with WTO partners set baseline rules that limit some barriers, the United States' 14 Free Trade Agreements (FTAs)[1] with a total of 20 countries require our partner countries to meet higher standards, including to:

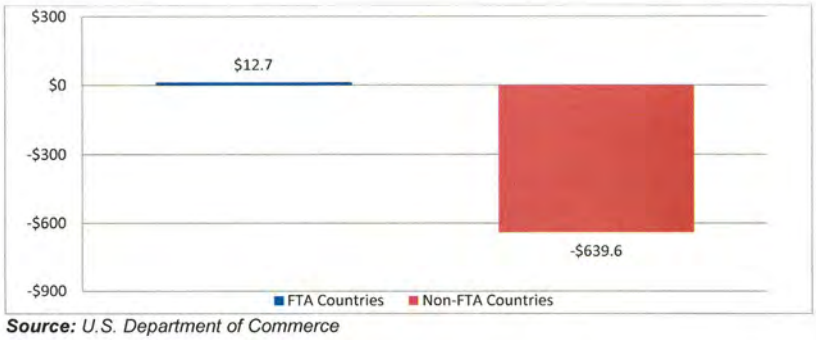
- Eliminate all manufactured good import tariffs within a certain time period (with most such tariffs are eliminated immediately);
- Open up markets to all services such as distribution and express shipments that are critical for manufacturers to get products to foreign consumers;
- Provide stronger protections for intellectual property to ensure that innovative manufacturers in the U.S. are able to combat piracy, intellectual property theft and other unfair actions;
- Maintain more transparent regulatory systems that allow manufacturers in the U.S. to provide input into the development of new standards and regulations; and
- Protect foreign investors' property that is a critical part of many companies' ability to export to foreign markets.

Like the basic WTO rules, FTAs also include binding enforcement rules to guarantee that each country's promises are kept or that penalties or trade sanctions are imposed.

By eliminating barriers overseas and ensuring our manufacturers and their products are treated fairly, FTAs have propelled substantial quantities of manufacturing exports because manufacturers in the United States succeed when markets are open. As shown in Figure 3, the United States has a cumulative manufacturing trade surplus of $12.7 billion with its FTA partners, and a nearly $640 billion deficit with those countries with which the United States doesn't have such agreements.

[1] The United States has two multi-country FTAs: the North American Free Trade Agreement (NAFTA) with Canada and Mexico, and the Central American-Dominican Republic-U.S. Free Trade Agreement with Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua. The United States also has 12 FTAs with: Australia, Bahrain, Chile, Colombia, Israel, Jordan, Morocco, Oman, Panama, Peru, Singapore and South Korea.

Figure 3: US Manufacturing Trade Balance with FTA and non-FTA Partners, 2015
(In Billions of U.S. Dollars)



Source: *U.S. Department of Commerce*

For example:

- U.S. manufactured goods exports to Canada and Mexico have more than doubled since the North American Free Trade Agreement (NAFTA) entered into force in 1994, from $200 billion in 1993 to $460 billion in 2015;
- U.S. manufactured goods exports to Chile have grown nearly six-fold since the U.S.-Chile Free Trade Agreement entered into force in 2004, from $2.5 billion in 2003 to $14.6 billion in 2015;
- U.S. manufactured goods exports to Australia increased nearly 80 percent since the U.S.-Australia Free Trade Agreement entered into force in 2005, from $13 billion in 2004 to $23.3 billion in 2015;
- U.S. manufactured goods exports to Central America and the Dominican Republic grew from $14.6 billion in 2005 to $21 billion in three years, reaching $24 billion in 2015; and
- U.S. manufactured exports to Peru increased 58 percent since the U.S.-Peru Trade Promotion Agreement entered into force in 2009, from $5.6 billion in 2008 to nearly $8 billion in 2015.

Taken together, America's 20 existing trade agreement partners buy nearly half (48 percent) of all manufactured goods from the United States, while they only account for 6 percent of the world's consumers and less than 10 percent of the global economy. Overall, manufacturing in the United States has grown as new trade agreements have been implemented and opened markets and set in place high-standard rules that improve the competitiveness of the U.S. manufacturing sector.

II. New Market-Opening and High-Standard Trade Agreements Are Needed to Combat Unfair Barriers Overseas

Despite the growth in trade and U.S. manufactured goods exports, there remain severe challenges in overseas markets, particularly in those countries where the United States has not negotiated FTAs. Trade barriers are on the rise around the world, costing jobs, growth and economic opportunity for manufacturers and other U.S. industries. Manufacturers in the United States face not only traditional tariff and non-tariff barriers, but also face serious and growing challenges of forced localization, intellectual property theft, and export bans by other countries. They also face higher effective barriers as other countries negotiate trade agreements from which manufacturers in the U.S. are excluded.

On tariffs, the U.S. market is very open to international trade with an average applied tariff on manufactured goods imports into the United States of 3.2 percent in 2014. Moreover, approximately two-thirds of all imports into the United States enter tariff-free already as a result of preference programs and trade agreements already negotiated. Indeed, according to the WTO, the United States has the lowest applied tariff of any other G20 country.

U.S. exporters, however, face much higher tariffs overseas. Tariffs remain a substantial barrier to U.S. manufactured exports. Major emerging economies such as Brazil and India maintain overall tariffs three or four times higher than U.S. tariffs and have the ability to raise tariffs even higher whenever they choose. These and many other economies have prohibitively high tariffs on many top U.S. manufactured goods exports, from up to 100 percent tariffs in India on transport equipment

to 47 percent Chinese tariffs on some chemicals to 35 percent Brazilian tariffs on some manufactured goods.

As other countries negotiate trade agreements that exclude the United States, manufacturers in the United States are also losing ground in foreign markets as competitors overseas benefit from lower tariffs and the elimination of barriers that our manufacturers still must face. There are over 270 free trade and similar agreements negotiated worldwide, of which the United States is only party to 14. On tariffs, U.S. exporters now face higher tariffs than our competitors in most major trading countries as they have been able to negotiate trade agreements that have eliminated tariffs for their producers, creating an even greater disadvantage to our own exporters, as shown in Figure 4.

Figure 4: Tariffs Faced Ranking out of 138 Countries

Country	"Tariffs Faced" Ranking *(From Least to Most Tariffs)*
Chile	1
Mexico	28
Brazil	51
South Korea	55
China	58
India	59
Canada	72
Germany and all EU countries	73
United States	130

Source: *World Economic Forum,* ***Global Enabling Trade Report*** *(2014)*

Similarly, as China, the European Union, Canada and Mexico and others negotiate new agreements without the United States, their producers will face substantially greater access and lower barriers, while U.S. manufacturers will be increasingly shut out.

Beyond tariffs, of course, there are a wide range of discriminatory, unfair and distortive barriers that foreign governments put in place to limit access to their markets. The Office of the United States Trade Representative (USTR) releases annual reports on the wide variety of barriers and foreign distortions, including its National Trade Estimate Report on trade barriers generally, its Special 301 Report on intellectual property rights protection and enforcement overseas, as well reports on technical barriers to trade. The NAM annually provides overviews of the major barriers our companies face overseas and identified most recently a wide range of unfair import policies, investment barriers, forced localization barriers, export restrictions and other challenges in the global economy, as well as the foreign countries that deny adequate and effective protection of intellectual property rights and emerging cross-cutting intellectual property rights concerns that impact manufacturers in a number of markets.[2, 3]

Yet, the baseline rules of the WTO do not address the wide variety and growing trade barriers and unfair trade practices that manufacturers face in overseas markets. For example, while China entered the WTO in 2001 agreeing to much lower tariffs than countries like Brazil and India, the WTO rules have not addressed a wide variety of other barriers that have grown in the Chinese market, from indigenous innovation rules to discriminatory procurement barriers. Manufacturers are pleased to see that China has grown from the sixth largest U.S. manufactured goods

[2] NAM, Comments on 2016 National Trade Estimate Report on Foreign Trade Barriers (Oct. 28, 2015), accessed at *http://documents.nam.org/IEA/Final_NAM_NTE_Comments_2015.pdf.*

[3] NAM, Comments on 2016 Special 301 Review (February 5, 2016), accessed at *http://documents.nam.org/IEA/NAM_2016_Special_301_Comments.pdf.*

export market in 2002 to the third largest in 2015, but further work and more rigorous market-opening and other disciplines are needed. Countries like India, Brazil, South Africa and others continue to impose barriers or are adopting forced localization policies that negatively impact manufacturers in the United States.

As other countries negotiate trade agreements that exclude the United States, manufacturers in the United States are also losing ground in foreign markets as overseas competitors benefit from lower tariffs and the elimination of barriers that our manufacturers still must face. There are over 270[4] free trade and similar agreements negotiated worldwide, of which the United States is only party to 14. On tariffs, U.S. exporters now face higher tariffs than our competitors in most major trading countries as they have been able to negotiate trade agreements that have eliminated tariffs for their producers, creating an even greater disadvantage to our own exporters. Similarly, as China, the European Union, Canada and Mexico and others negotiate new agreements without the United States, their producers will face substantially greater access and lower barriers, while U.S. manufacturers will be increasingly shut out.

Given these continued barriers and despite the trade agreements already negotiated, manufacturers in the United States are looking for new and stronger FTAs that create a more level playing field overseas and for that reason strongly supported the passage of TPA in 2015.

The NAM supports the Trans-Pacific Partnership (TPP) as an agreement which will open markets and put manufacturers in the United States in a much stronger position to compete in an important and growing region of the world. TPP will substantially improve opportunities for the export and sale of U.S. manufactured goods, which means more economic opportunities for manufacturers and their 12 million workers here in the United States. The NAM also urges the Administration and Congress to work together to address key issues, including on stronger intellectual property protection and comprehensive enforcement rules, to ensure that this agreement addresses industry concerns and can set an appropriate template going forward.

The NAM is also strongly supportive of ongoing FTA negotiations with the European Union as part of the Transatlantic Trade and Investment Partnership (TTIP) talks, as well as WTO sectoral negotiations to eliminate tariffs on environmental goods as part of the Environmental Goods Agreement (EGA) talks. The NAM is also reviewing other potential trade agreements that would open markets and create greater opportunities for growing manufacturing in the United States, including other WTO sectoral negotiations.

III. Enforcement of Trade Agreements and Trade Rules Is Also Critical

Enforcement of trade rules, both domestic and those contained in international agreements, is also critical.

a. Trade Agreements Require Stronger U.S. Enforcement

For U.S. trade agreements to be successful, it is vital to ensure effective enforcement of the commitments contained in those agreements by our trading partners and the United States to create a more level playing field.

The United States has worked actively through successive administrations to address market access barriers and other unfair treatment of U.S. exports and products. Before agreements first enter into force, the Office of the United States Trade Representative (USTR) works vigorously to ensure the full implementation of commitments. In most cases, commitments are implemented fully. In cases where they are not, USTR works through the consultation and ultimately the dispute settlement provisions provided in trade agreements to ensure full implementation. Indeed, since the WTO was established nearly two decades ago in 1995, the United States has brought over 100 claims and successfully resolved 70 of the 74 cases that have been concluded.[5] Notably, the United States has brought about 20 percent of the approximately 500 requests for consultation made overall in the WTO.[6] These

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[4] WTO, Regional Trade Agreements, accessed at *http://wto.org/english/tratop_e/region_e/region_e.htm.*

[5] Office of the United States Trade Representative, Snapshot of WTO Cases Involving the United States (May 22, 2014), accessed at *http://www.ustr.gov/sites/default/files/Snapshot%20May.pdf.*

[6] *Id.;* World Trade Organization, Chronological List of Dispute Cases, accessed at *http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.* As USTR's snapshot explains, the United States has filed 103 requests for consultation.

cases have an important impact on growing manufacturing in the United States. For example, the United States has used the WTO dispute settlement mechanism to make sure that:

- China stopped discriminating against U.S. automobile parts, eliminated additional tariffs on U.S. steel exports and eliminated export bans on raw materials and rare earths;
- Argentina's onerous and discriminatory import licensing is addressed;
- South Korea stopped imposing non-scientific barriers to certain food products; and
- A wide number of countries, from Portugal, Pakistan and Sweden to Brazil, Greece and Denmark, provide better protection for U.S. intellectual property.
- India's national solar energy policy violated WTO international trade rules in discriminating against importers' solar cells and modules.

The United States has pursued cases with regard to actions by many of our major trading partners, from the European Union, Canada and Mexico to Brazil and India. Without the underlying agreements, such strong dispute settlement outcomes that open markets and ensure fair treatment would not be possible.

Sustained attention is needed to address other governments' failure to implement their trade and investment commitments fully, including where appropriate through the use of WTO and FTA dispute settlement mechanisms. Whether it is a newer agreement, such as the Korea-U.S. (KORUS) FTA or one that has been in force for decades, the United States should not hesitate to ensure that all trade agreement obligations are enforced. With respect to Korea, implementation of the KORUS FTA has been slow in several areas since it entered into force in 2012:

- While manufacturers are pleased that many of the border problems that impeded many U.S. manufactured goods exports were resolved in 2014, it took far too long to address these excessive tariff certification and verification demands that Korean customs was placing on U.S. exporters and Korea's failure to implement quickly and fully de minimis rules to eliminate red-tape for small-value shipments.
- Manufacturers' access to Korea has continued to be impeded substantially by a range of proposed, new and modified non-tariff barriers to imports of automobiles and motorcycles made in the United States. These include discriminatory emissions regulations that improperly penalize U.S. auto exports to Korea and new noise standards for motorcycles that limit the use of large motorcycles on Korean highways.

These and other barriers must be addressed urgently to ensure the KORUS FTA delivers fully on its promise for manufacturers in the United States and it will be important to monitor Korea's full implementation of the KORUS FTA.

Similarly with Colombia, despite growing manufactured goods exports, manufacturers across several industries in the United States are facing major market access and regulatory barriers in the Colombian market that appear inconsistent with Colombia's existing international commitments, including the U.S.-Colombia Trade Promotion Agreement. Substantial concerns have been raised in three sectors in particular:

- U.S. distilled spirits producers face a discriminatory tax and Colombia imposes spirit monopoly restrictions on the ability of imported spirits companies to do business in the country.
- Colombia's scrappage program has long been a barrier to full access to trucks manufactured in the United States, requiring that an old truck be scrapped before the purchase of a new truck (a unique "one for one" rule) or, formerly, a hefty fee be paid, and in April 2013, the Colombian government eliminated the fee option, creating a situation where new trucks could not typically be purchased.
- Pharmaceutical manufacturers in the United States face a myriad of growing barriers in Colombia's market, including insufficient and unreasonable timeframes for comment, modifications to approval processes for innovative pharmaceutical products to look beyond efficacy and scientific data to require a consideration of price, and an unprecedented "abbreviated" regulatory review to allow the sale of biosimilar products.

The NAM looks forward to working closely with the U.S. government to ensure the full enforcement of U.S. trade agreements in ways that enhance manufacturers' competitiveness.

b. Upholding the United States' International Obligations at Home

Similarly, the United States should uphold its obligations under international agreements and honor remedies imposed when U.S. actions are found to be out of compliance with those obligations. Just as we expect our trading partners to meet the letter of their international obligations, so should the United States.

c. Enforcement Through Investor-State Dispute Settlement (ISDS)

With regard to the enforcement of trade and investment agreements, the NAM also strongly supports the continued inclusion and use as appropriate of ISDS contained in U.S. FTAs and investment treaties. ISDS is a vital enforcement tool that allows individual investors (whether business or non-profit) to seek enforcement of basic principles—such as non-discrimination, compensation for expropriatory action (*i.e.,* takings) and fair treatment—before a neutral arbitration panel. ISDS is in essence an enforcement mechanism and those seeking a more level playing field for manufacturers in the global economy should support the inclusion of this mechanism in existing and future agreements, including the TPP and TTIP agreements, as well as bilateral investment treaties (BITs), such as currently being negotiated with China.

Such provisions should be broadly available for all industries with respect to breaches of the core investment rules of the underlying agreements, but also with respect to contracts and other investment agreements signed by investors with the foreign government. Proposals to eliminate or modify these core enforcement rules should be rejected as such outcomes undermine rather than strengthen a strong enforcement agenda.

d. Full and Timely Enforcement of Domestic Trade Rules Is Essential

Domestically, the NAM continues to be a strong supporter of the full and fair enforcement of our trade remedy laws that help manufacturers address government-subsidized and other unfair competition. These rules too are an essential part of a robust pro-growth and pro-manufacturing trade policy. U.S. trade remedy laws have long been part of the U.S. legal system and are internationally respected mechanisms, authorized by the WTO.

It is vital that both the Department of Commerce and U.S. International Trade Commission exercise their authority to counteract unfair practices overseas. Full, effective, timely and consistent enforcement by the U.S. government of these globally recognized rules is essential to ensure manufacturers get a fair shake in the global economy.

Enforcement of U.S. trade rules must occur during the investigatory and review stages, but these trade rules must also be enforced fully at our border. Too often, we hear stories of manufacturers that have spent significant time and money to utilize the trade remedy rules only to find importers that are evading these orders. Manufacturers strongly supported the Enforcing Orders and Reducing Customs Evasion (ENFORCE) Act that was spearheaded by members of this Committee to address longstanding failures of Customs and Border Protection (CBP) to enforce fully and adequately trade remedy orders at the order in cases of evasion. This legislation was recently enacted as part of the Trade Facilitation and Trade Enforcement Act, which the NAM strongly supported. The NAM will be working with the Committee, Congress and CBP to ensure that these provisions are fully implemented on a timely basis.

Conclusion

For manufacturers in the United States, trade agreements, particularly those that comprehensively open markets and set in place high standards, have boosted manufacturing output and the competitiveness of manufacturing in the United States. Future growth opportunities for the U.S. manufacturing sector will hinge disproportionately on the ability to increase overseas sales and the NAM supports the continued negotiation of comprehensive, high-standard and market-opening new trade agreements, and the vigorous enforcement of these agreements to ensure that countries are upholding their commitments.

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