Statement of Robert E. Lighthizer Before the U.S.-China Economic and Security Review Commission[1]

Issues for the Hong Kong Trade Ministerial -- Rules Negotiations

December 8, 2005

Good morning. It is a pleasure to be here today and have a chance to address this distinguished Commission. In my view, there are few if any issues of more importance to our nation and its long-term economic and national security than those being examined by this body. I congratulate you on the work you are doing and appreciate the opportunity to share my perspective on the matter before you today, namely the upcoming Hong Kong ministerial meeting.

My comments this morning will focus on what I believe is the single most important aspect of the ongoing WTO Doha Round trade talks -- and the single greatest threat to our economy and our producers. I am speaking about the negotiations on trade remedy rules -- i.e., anti-dumping and anti-subsidy disciplines -- and the prospect that our basic laws to defend against egregiously damaging forms of unfair trade will be rendered a dead letter.

These laws are absolutely critical in attempting to deter and redress the unfair practices routinely engaged in by countries like China, Japan, Korea, Brazil and other perennial violators of our laws. These and other countries have one goal in the ongoing talks at the WTO, and that is to once and for all eliminate these laws as an effective discipline against unfair trade. And if I had one message for you today, it would be that they are on the verge of succeeding -- and we are on the verge of witnessing an unparalleled disaster from the standpoint of U.S. manufacturers and other producers.

I. Background and Importance of Our Trade Remedy Laws

When you stop to think about it, it is simply amazing that we are even engaged in these negotiations. We are in the midst of an unparalleled crisis impacting our nation's manufacturers and other producers. Unfair trade is one of the principal causes of that crisis and our basic trade remedy laws constitute our one meaningful defense against such market-distorting practices. That we are even considering weakening those laws at this time is a testament to just how far off track our trade policy has gotten, and how far removed from reality is the day-to-day debate on trade issues in this town.

Since June 2000, we have lost 17.5 percent of all U.S. manufacturing jobs -- for a total of over 3 million lost jobs. (Slide 1) At the same time, our current account deficit is approaching $800 billion this year -- a level that is simply

[1] The views expressed in this statement and in Mr. Lighthizer's testimony are solely his own, and do not necessarily reflect the views of his firm or its clients.

unsustainable (Slide 2) and threatens the stability of the American and global economies. Indeed, the United States is the only major economy with a large current account deficit, a sign that the rest of the world is dangerously dependent on exports to this country (Slide 3). *None* of these trends is getting better. Indeed, given recent reports regarding the problems facing the U.S. auto industry, the situation appears to be getting worse.

Last year, our trade deficit with China was almost $162 billion (Slide 4). Looking at data for the first nine months of this year, our trade deficit with China is on pace to reach almost $200 billion. In other words, our trade deficit with China *alone* will account for approximately *one-fourth* of our entire current account deficit. It is not surprising, therefore, that many U.S. industries are extremely concerned about our relationship with China.

I have worked with and am particularly familiar with the steel industry, which serves as a good illustration of the types of problems we face with China and unfair trade. To give you some feel for the situation, in 2000, China was already the largest steel producer in the world, with total production of 127 million MT. By 2004, however, Chinese production had soared to 272 million MT -- 60 million MT more than Japan and the United States *combined.* Now we are seeing reports that China has approximately 100 million MT of excess capacity, and that steel prices in China are collapsing. As a result, there are serious concerns that China could soon flood the world with exports.

China's impact in the steel sector is not the result of free-market forces of supply and demand. Instead, it reflects consistent, long-standing, and continuing intervention by the state in the marketplace. It is estimated that over 80 percent of the Chinese steel industry is state-owned or controlled. Just this year, China made a major announcement with regard to its "steel policy" going forward. That policy reflects significant evidence of state control and influence in virtually every aspect of the industry's operations -- ranging from subsidies, determinations of where and how new mills will be built, access to and pricing of raw materials, ownership of companies, and so forth.

In general, those countries advocating to weaken fair trade disciplines are not seeking market outcomes, but are trying to immunize the range of conduct and market-distorting practices that lead to unfair and injurious trade in this and other import markets -- including subsidies, closed markets, state-sponsored capacity, currency manipulation, cartel behavior, unfair tax rules, and other activities and policies that are negatively impacting American producers in international trade. These practices and policies are precisely what necessitate strong anti-dumping and anti-subsidy laws. American companies and workers can compete effectively with anyone in the world on a level playing field, but no company can or should be asked to compete with foreign governments and treasuries.

II. The Mandate for the Doha Round Trade Talks

As many of you will recall, the original mandate for the current negotiations on Rules was *not* to make major changes to these disciplines or to weaken them. Indeed, these talks come on the heels of a very harmful renegotiation of unfair trade disciplines in the Uruguay Round talks, as well as a decade of activist and unjustified WTO dispute settlement decisions further weakening trade remedies. Accordingly, our negotiators went to great pains to characterize the mandate on Rules as dealing largely with process, transparency and clarification of existing disciplines.

The text from Doha reinforces this view, and clearly does not support the across-the-board, destructive negotiation that is currently underway. Indeed, that text specifically talks about "preserving . . . the effectiveness" of existing disciplines, stating:

> *"{W}e agree to negotiations aimed at **clarifying and improving** disciplines under the {Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures}, **while preserving the basic concepts, principles, and effectiveness of those Agreements** and their instruments and objectives."*
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> -- *Ministerial Declaration Launching the Doha Round, WTO Doc. No. WT/MIN(01)/DEC/1 (Nov. 14, 2001).*

Congress has also been consistent in its view that the United States should not agree to any changes that would weaken our fair trade laws, making this point abundantly clear in the negotiating objectives that it adopted when it provided the President with Trade Promotion Authority. Congress described those objectives as follows:

> *"The principal negotiating objectives of the United States with respect to trade remedy laws are –*
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> *(A) **to preserve the ability of the United States to enforce rigorously its trade laws**, including the antidumping, countervailing duty, and safeguard laws, and **avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies** . . . to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions; and*
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> *(B) **to address and remedy market distortions that lead to dumping and subsidization**, including overcapacity, cartelization, and market-access barriers."*

-- *Section 2102(b)(14), Bipartisan Trade Promotion Authority Act of 2002*

Just last month, the Senate adopted a resolution that offered yet another unambiguous expression of congressional intent that our trade laws not be weakened. That resolution (adopted as an amendment to the tax reconciliation bill) specifically referenced many of the exact proposals that are being most actively considered in the Rules talks, and made clear that they would unacceptably weaken U.S. laws and should not be accepted. The resolution stated that the United States should not be a signatory to any international agreement that "adopts any proposal to lessen the effectiveness of domestic and international disciplines on unfair trade . . . ." Congressional Record at S13135 (Nov. 17, 2005).

One of the most important messages I want to leave with you today is that United States negotiators are *not* abiding by the WTO mandate or the express instructions of Congress. As I will discuss, and as is obvious to any observer of these talks, the current track of these negotiations is geared not only to weaken U.S. laws, but to completely eviscerate them.

III. State of Play in the Negotiations

The state of the talks is quite simple. Foreign countries trying to dismantle the laws have put literally dozens of harmful proposals on the table. Individually, these proposals would hamstring serious trade law enforcement; collectively, they would make our laws a total dead letter.

The United States has put virtually nothing on the table in response. Some negotiators will say that they have raised many issues to potentially strengthen disciplines, but that is nonsense. In terms of actual, detailed proposals that are ripe for serious consideration in the talks, there is nothing there at all that would strengthen our law or counterbalance the weakening proposals.

When you have a stack of very bad proposals and no good proposals, it doesn't take a rocket scientist to see where this will come out. At this point, it is hard to see any agreement that will not decimate our laws and force many U.S. industries to actively oppose this trade round.

It is truly a sad situation. We are in a war in terms of our manufacturing base and our economic security. We are losing that war. And we are unilaterally disarming.

A. Proposals from Trade Law Opponents Would Gut U.S. Fair Trade Laws

As you can imagine, the actual proposals and negotiations on rules are quite technical. But this complexity should not and must not obscure just how destructive these initiatives would be. In the talks, weakening efforts have been led by the so-called "Friends of Antidumping Negotiations" group (actually enemies of the laws like Japan, Brazil, Korea and others that have historically been the most egregious fair trade violators), along with other countries like China -- which have put forward dozens and dozens of detailed and extremely harmful proposals to weaken anti-dumping and anti-subsidy laws (Slide 5). Among the proposals of greatest concern:

- Lesser Duty Rule. This proposal would prevent countries from putting in place antidumping duties reflecting the full margin of dumping – and instead require them to adopt a "lesser" amount of duties (tied in some way to the margin of price undercutting by a foreign producer). This would allow unfair traders to maintain a full presence in the U.S. market *while still dumping*, taking sales and key customers from injured U.S. industries.

- Public Interest Test. This proposal would require administrators to consider, in determining whether to impose relief, the short-term windfalls to consumers from purchasing dumped goods – potentially tipping the balance in key cases. It would allow, indeed require, administrators to second-guess the underlying policy reflected in the anti-dumping law, namely that temporary benefits from buying dumped goods do not outweigh the long-term harm to U.S. producers and the economy from market-distorting practices.

- Mandatory Sunset of Trade Orders. The "Friends" and other countries have submitted numerous proposals to make it more difficult to retain unfair trade orders – including a requirement that all orders end after five years even if unfair trade and injury are likely to continue. This would obviously reduce the value of relief tremendously and invite foreign unfair traders to "game" the system and play out the clock until relief was lifted.

- Undermining Incentives for Cooperation. The "Friends" have made detailed proposals to restrict the use of so-called "facts available" in trade cases – i.e. the alternative information used when foreign producers fail to cooperate in an investigation. Given that the trade law provides no subpoena power, undermining the use of facts available would remove the one tool we have to ensure that foreign producers provide information and cooperate in investigations.

- Making it More Difficult to Prove Injury. Numerous proposals would increase the already high hurdle to show "injury" to a domestic industry –

a prerequisite to relief in unfair trade cases. The result would be to deny trade relief until an industry was irreparably damaged.

This list is just a sampling and could easily be multiplied. Discussions of these and similarly devastating proposals have been and continue to be at the heart and center of the negotiations.

B. The U.S. Has Not Pursued an Aggressive Agenda to Counterbalance Weakening Proposals

Despite a clear mandate from Congress, the Administration has to date failed to aggressively respond to such weakening proposals, or to put forward trade law strengthening proposals to counter them.

Remarkably, U.S. inaction has been most noteworthy in areas where Congress *explicitly* mandated an aggressive negotiating stance. In this regard, for example, Congress expressly directed that U.S. negotiators should seek to redress the existing disparity in the treatment of direct and indirect tax systems -- something that constitutes an enormous disadvantage to the United States and its producers. *See* Section 2102(b)(15) of the Bipartisan Trade Promotion Authority Act of 2002. As discussed below, the Administration has done virtually nothing to advance this issue. Similarly, Congress has instructed the Administration to seek a negotiated solution of the WTO dispute over the Byrd Amendment (see, e.g., Consolidated Appropriations Act, 2004, P.L. 108-199, H.R. 2673 at 62-63), and once again, nothing is happening.

It is not as though we lack leverage in the talks, given the enormous trade deficit we are running or the legions of harmful proposals being sought by trade law opponents. And yet we continue to sit on our hands. The result is an almost entirely one-sided negotiation (Slide 6)

In terms of the specific areas where the United States should be making proposals, several are worth emphasis:

- Tax Subsidies and Advantages to Foreign Producers. For decades, U.S. producers have been grossly disadvantaged by economically irrational international rules that favor foreign value-added tax ("VAT") systems over the income tax system used in the U.S. (Slide 7). Essentially, U.S. producers are double-taxed on export sales (bearing both domestic income taxes and foreign VATs), while foreign producers sell here tax free (after VAT rebates/subsidies). Congress has specifically made elimination of this disparity a principal negotiating objective for Doha (and past trade rounds), but the Administration has done virtually nothing to advance this enormously important issue.

- Recognition of the Byrd Amendment. As discussed above, Congress has similarly mandated that the U.S. seek a negotiated solution to the dispute over the Byrd Amendment (formally known as the "Continued Dumping and Subsidy Offset Act"), which provides for distribution of unfair trade duties to U.S. industries that continue to be injured by market-distorting practices. The Administration has apparently done nothing more than "flag" the issue in an early paper and made no effort to advance it.

- Other Trade Law Strengthening Proposals. There are innumerable other areas (Slide 8) where the U.S. could easily push to strengthen international disciplines (and deter foreign countries from such an aggressive stance in the rules talks). These proposals (some of which would simply involve codifying current U.S. practice) include: specifically recognizing the critical practice of "zeroing" in anti-dumping proceedings; adopting stronger rules to address repeat or persistent dumping; allowing a presumption of injury in cases of particularly high dumping or subsidy margins, etc. To date, the United States has done virtually nothing in these areas, but has stood by while harmful proposals have piled up on the other side -- from countries that make up the vast bulk of the trade deficit we currently suffer (Slide 9).

IV. The Hong Kong Ministerial

The upcoming Hong Kong ministerial meeting offers an opportunity to demand changes in the dynamic we are seeing in Rules, but we have yet to see any sign that the Administration intends to insist on a fundamental reorientation of the negotiations. We continue to hear talk from the Administration that it intends to aggressively push "transparency" issues in the talks -- something that may be of interest to exporters facing less transparent trade remedy regimes abroad but which does absolutely *nothing* to counterbalance the vast array of proposals that would weaken U.S. law. Without a radical change in strategy, we are headed for a train wreck in these talks -- with a Rules agreement that is unacceptable to Congress and many core U.S. industries.

The Hong Kong meeting will stake out the path for the remainder of the Doha Round talks. We have already seen a draft ministerial declaration in the Rules area, and while it may accurately reflect the state of the talks, it is wholly unacceptable as a basis to reach an agreement that will comport with U.S. law and be in the interest of American companies and workers. *See* Draft Ministerial Declaration on Rules, WTO Doc. No. TN/RL/W/195 (Nov. 22, 2005). Among other flaws in the document:

- The draft declaration references and highlights the purported "need to avoid the improper use of antidumping measures." To begin with, there has been no showing that trade measures are used improperly. Furthermore, this statement constitutes a significant change from the letter

and the spirit of the original Doha mandate. The objective of these talks was supposed to be preserving the concepts, principles, and effectiveness of the disciplines -- not undermining them.

- The draft declaration endorses the goal of clarifying and improving provisions covering virtually every element of the existing WTO trade remedy agreements -- something that goes far beyond the limited mandate for the talks.

- The draft declaration congratulates participants on the constructive and fruitful engagement in the talks -- whereas the talks are in fact badly off track and out of balance.

- The draft declaration lists proposals that have been the subject of detailed analysis and discussion in the talks, a list that underscores the one-sided and unacceptable nature of the negotiations. Highlighted are issues like the "lesser duty rule" and the so-called "public interest test" that are wholly incompatible with the mandate of the talks and would single-handedly undermine effective trade law enforcement.

U.S. negotiators should use the Hong Kong ministerial as a venue to articulate how the Rules talks have departed from their original purpose, and how the current path cannot possibly result in an agreement that will be acceptable in the United States. Congressional intent could not be any more clearly stated, and has been recently reinforced. The Administration needs to heed the dictates of U.S. law and take the opportunity to fundamentally alter its negotiating stance -- something that is critical if this Round is to have any chance of success.

V. Conclusion

The stakes of this negotiation could not be any higher. Our manufacturing sector and other core producers simply cannot afford *any* further weakening of trade remedy laws. It is truly outrageous that we are even talking about this.

The truth is, we should be looking for ways to dramatically strengthen our trade remedies -- starting with those applicable to China. This Commission has made a great start in identifying and elaborating on potential reforms -- including the need to apply the anti-subsidy law to China, addressing currency manipulation in a meaningful way, continuing non-market economy treatment for China in dumping cases, and addressing problems with collecting unfair trade duties from China. We should expand on this effort and extend it to deal with the epidemic of unfair trade practices we are seeing globally, and to create a truly level playing field for U.S. producers.

The current direction of the Doha Rules talks runs diametrically against this desperately needed effort and would effectively kill it. Time is running short.

If we do not act soon, we could soon face a WTO agreement that would render almost all of your recommendations with respect to enforcement of our trade laws totally moot. Accordingly, changing the current direction of the Doha Rules talks should be the top priority for anyone concerned about our relationship with China.