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# Congress of the United States

## U.S. House of Representatives

COMMITTEE ON WAYS AND MEANS

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September 14, 2006

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The Honorable Susan C. Schwab  
United States Trade Representative  
600 17<sup>th</sup> Street N.W.  
Washington, D.C. 20508

Dear Ambassador Schwab:

We are writing to you about a matter of serious concern related to the operation of the "Essential Security" exception in U.S. trade agreements. The concern relates to claims by your office that this important exception is "self-judging" and does not permit an international tribunal convened in the World Trade Organization (WTO) or under a U.S. free trade agreement to "second guess" a country that invokes the exception to avoid an obligation under that agreement.

This issue has arisen in the context of what a growing number of Members of Congress considers to be a dangerous loophole in U.S. free trade agreements, such as the one between the United States and Oman that was considered by Congress this summer and the one between the United States and Peru that the Administration may submit to Congress as early as this month. That loophole would impose a new international legal obligation on the United States to allow a foreign government company, such as Dubai Ports World, to operate U.S. port facilities when it wins a bid to do so.

In a recent markup of legislation to implement the U.S.-Oman Free Trade Agreement, USTR General Counsel, Jim Mendenhall did not contest that the loophole exists. Rather, his remarks reflected the position that if the United States has security concerns related to the takeover of foreign ports by a foreign entity (including a foreign government entity), all the United States has to do to release itself from its international legal obligations is invoke the "essential security" exception.

Specifically, USTR General Counsel Mendenhall, stated that the exception is "self-judging." When asked to clarify whether this meant that an

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international panel of arbitrators could review the decision of the United States to invoke the essential security exception, Mr. Mendenhall stated that the panel could not "second guess" the decision of the United States to invoke the exception, or the reasons for invoking the exception.

The direct implication in legal terms of Mr. Mendenhall's assertion is that a country invoking the exception would automatically deprive an international tribunal of jurisdiction or cause the underlying complaint to be automatically resolved in favor of the country invoking the exception, thereby releasing the United States from its international obligation.

If the position expressed by Mr. Mendenhall that the "Essential Security" exception is "self-judging" and an international tribunal could not "second guess" is indeed the position of USTR and the Administration, please explain this position in light of the text of the agreement and WTO practice, which appear to contradict this interpretation.

For example, Article 21.2 of the U.S.-Peru "Trade Promotion Agreement" specifically exempts certain provisions of that agreement from review by tribunals. The "Essential Security" exceptions at Article 22.2 of the agreement are not included in this (or any other) exemption. There is nothing we can find that exempts the "Essential Security" exception from the dispute settlement provisions of the U.S.-Peru agreement.

Furthermore, our review of the text and history of the WTO agreements lead us to believe that "Essential Security" exceptions are reviewable by international tribunals. Article XXI of the WTO General Agreement on Tariffs and Trade ("GATT") 1994 contains, *inter alia*, an essential security exception that is essentially identical to the "Essential Security" exception in the US-Peru agreement. Neither the WTO GATT agreement nor the Peru agreement exempts these provisions from review by an international tribunal.

To evidence this fact, in 1996-1997, the European Union (EU) brought a case against the U.S. Cuban Liberty and Democratic Solidarity Act (known as Helms-Burton), challenging its application to EU firms involved in trade and investment in Cuba. The WTO ignored U.S. objections that the matter "touches on the foreign policy and national security of the United States as to which no panel in the WTO is competent" and convened a tribunal on November 20, 1996.

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Accordingly, the Helms Burton case stands as clear precedent that the WTO can empower a tribunal to evaluate a U.S. claim related to its "essential security" interests. At the US-Oman markup, the USTR General Counsel attempted to minimize this fact by pointing out that the case was settled before the tribunal issued a ruling. However, the facts demonstrate that, contrary to USTR's assertions, the WTO was prepared to allow the panel to rule on the U.S. essential security argument, were it to have been made.

Again, the Helms-Burton case illustrates this point well. When presented with the view of the EU that the exception is not self-defining, U.S. representatives during the Helms-Burton matter immediately adopted a fall-back position, admitting that a panel could issue a decision adverse to the United States and that "damages could be exercised" against the United States if the United States lost a case. Having effectively conceded that the exception is not self-defining, U.S. officials then changed the subject to assert that an international trade tribunal interpreting the exception adverse to the United States would not have the power to force the United States to take any action. It is well-known that international trade tribunals do not have the power to force a country to do, or refrain from doing, anything

There is a fundamental legal difference between, on the one hand, the United States unilaterally deciding that it will not recognize the competence of an international tribunal to assess U.S. essential security interests and then being found in violation of its international obligations and, potentially, being subjected to trade sanctions, and, on the other hand, the assertion made by USTR that an international trade agreement by its terms denies legal competence to such a tribunal.

The U.S. position raises one further practical question. That is, if the U.S. or any other country at any time or for any reason that it deems "necessary to its essential security interests" can invoke a self-defining "essential security" exception, what is to prevent other countries from using this exception to block U.S. exports or other U.S. rights such as enforcement of intellectual property rights without ample justification? For example, many countries have asserted that "food security" is a matter of national security. It is obvious that this assertion, if broadly invoked as a matter of "essential security" and not subjected to any scrutiny or review, could be extremely detrimental to U.S. farmers.

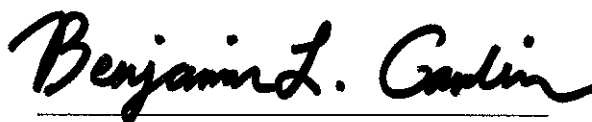
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For all the foregoing reasons, we share the view expressed by USTR that the national security ("essential security") interests of the United States should not be second-guessed by international trade tribunals. Given the vital importance of this issue, we ask you to clarify the USTR General Counsel's representations at the US-Oman markup and the Administration's position on the operation of the "Essential Security" exception in U.S. trade agreements, and explain how that position is consistent with the text of those agreements and WTO precedent. Finally, we thank you for your prompt response inasmuch as Congress could be taking up implementing legislation in the very near future.

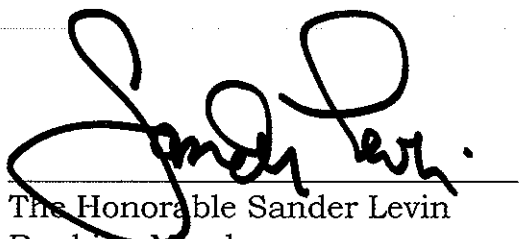
Sincerely,



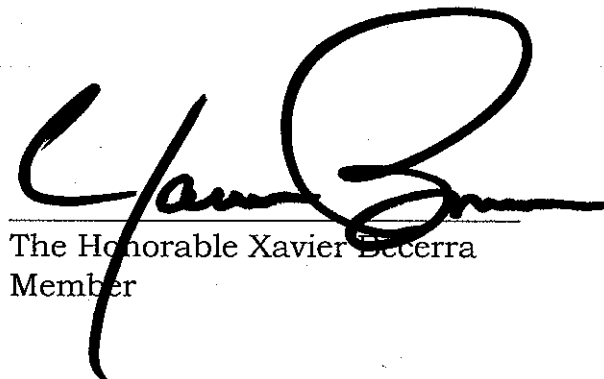
The Honorable Charles B. Rangel  
Ranking Member



The Honorable Benjamin L. Cardin  
Ranking Member  
Subcommittee on Trade



The Honorable Sander Levin  
Ranking Member  
Subcommittee on Social Security



The Honorable Xavier Becerra  
Member