

**WORLD TRADE ORGANIZATION (WTO)  
DISPUTE SETTLEMENT REVIEW COMMISSION ACT**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON FINANCE**  
**UNITED STATES SENATE**  
**ONE HUNDRED FOURTH CONGRESS**  
**FIRST SESSION**

ON

**S. 16**

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**MAY 10, 1995**

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# **WORLD TRADE ORGANIZATION (WTO) DISPUTE SETTLEMENT REVIEW COMMISSION ACT**

**WEDNESDAY, MAY 10, 1995**

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

The hearing was convened, pursuant to notice, at 9:30 a.m., in room SD-215, Dirksen Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

Also present: Senators Dole, Chafee, Grassley, Pressler, D'Amato, Murkowski, Nickles, Baucus, Bradley, and Graham.

The CHAIRMAN. The committee will come to order. I have an opening statement, but I will defer for the moment because Senator Dole, the author of this legislation, is here and we want to hear his statement.

## **OPENING STATEMENT OF HON. BOB DOLE, A U.S. SENATOR FROM KANSAS**

Senator DOLE. Mr. Chairman, thanks for holding this hearing and I thank the witnesses for coming.

It is an issue of importance to the success of the World Trade Organization in the long run and our entire trading system. I look forward to the testimony of this extremely capable panel of witnesses.

Mr. Chairman, there is no question that the new rules of the World Trade Organization, especially the new dispute settlement regime which has been established creates a situation of unprecedented opportunity. It also creates a situation of potential harm to American interests if not properly implemented, so it seemed to me terribly important to preserve the opportunity and guard against the harm.

Last year during the GATT debate, supporters of the agreement predicted a host of benefits, including falling tariffs, elimination of non-tariff barriers, increased exports, more jobs, and higher incomes and standards of living here, and around the world.

Some of these benefits were exaggerated, but essentially we knew the good things to expect; even if the exaggerations in the end proved to underestimate the advantages, everyone wins.

Mr. Chairman, it seemed to me that we needed to pay attention to the potential drawbacks of the GATT agreement. These seemed less certain. But, if only a few of the exaggerated criticisms of WTO proved correct, America stood to lose a great deal.

I heard from Americans all across the country, particularly around Wichita, Kansas, during the GATT debate. Most of them frankly were not happy with the new trade agreement. Their biggest concern was that the U.S. might be giving up far more than it was getting under this agreement.

One thing we appeared to be giving up was some of our sovereignty, our ability to decide for ourselves what laws and practices we wanted. The biggest potential threat to our sovereignty was the new dispute settlement process. In most of its functions, the new process is just a benign extension of rules and practices that we have been living with for years.

But, in one important respect, it is entirely new. For the first time, decisions of dispute settlement panels will be binding. That is, they cannot be blocked by the losing side. Stronger dispute settlement with automatic results for the winner was, indeed, a U.S. negotiating objective. The U.S. has won far more than it has lost in GATT cases.

But what happens when the U.S. is on the losing side? Losing parties will now be required either to negotiate a resolution, or else pay some kind of compensation, and sanctions could be authorized. In other words, for the first time, GATT decisions will have real teeth.

As a result, it seems to me that it will be essential for dispute settlement panels to be, above all other things, completely impartial. If they are not impartial, if they overstep their authority, then we must be prepared to respond.

The Dispute Settlement Review Commission will help us respond. The commission will review every adverse decision that comes out of the WTO. Federal appellate court judges are especially qualified to review these decisions because the question will be a legal question, whether another tribunal acted within its authority, abused that authority, or acted arbitrarily or capriciously.

I believe establishing this review commission will enhance the credibility of the WTO. It will be a powerful signal to panelists that their work must be absolutely impartial and a reminder of their obligation to observe the bounds on negotiated trade agreements.

Perhaps most importantly, it will demonstrate that the U.S. Congress takes a strong and long-term interest in the dispute settlement process and its proper functioning. Confidence in the WTO process was not created merely by signing the trade agreement. Confidence must be built up over time.

Finally, Mr. Chairman, there is a provision in the bill dealing with the greater participation in the dispute settlement process by the interested private parties. We have been trying to open up the process in the GATT for a long time and have made some progress.

I know our negotiators fought hard. There is some very limited language in the WTO agreement that opened up the process a little bit. It is a step, but it is not enough. It is very troubling that the deliberations of the panels in Geneva really will occur in secret. This disturbs many people here in America, as access to this process for our own companies and industries is very limited. We discussed this last year during the drafting of the implementing bill, and I had hoped we would be able to address it in this bill.

There is a provision in Section 7 of the bill that requires interested parties be allowed to participate. I know this has raised some concerns, particularly in the administration. Members of this committee may want to have a closer look at this issue as well. I am certainly prepared to modify this provision any way the committee is comfortable with, perhaps by making private participation entirely discretionary with USTR.

I believe our goal should be to assist USTR's efforts to win cases in Geneva, without interfering with those efforts. In the meantime, we must continue toward achieving greater transparency in the WTO. So, I look forward to hearing from our witnesses.

I would also request that the statements by Joe Cobb, and Dan Meyer, be made a part of the record. I thank you, Mr. Chairman. I would ask that my entire statement be made a part of the record.

The CHAIRMAN. Without objection.

[The prepared statements of Joe Cobb, Dan Meyer, and Senator Dole appear in the appendix.]

Senator DOLE. Finally, I want to thank Mr. Kantor and members of the administration who we negotiated with last year and who we've been in contact with this year in an effort to resolve any differences over this particular legislation.

The CHAIRMAN. Thank you, Senator Dole.

#### **OPENING STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM OREGON, CHAIRMAN, COMMITTEE ON FINANCE**

The CHAIRMAN. Will Rogers once said he never met a man he did not like. I have usually never met a trade agreement that I did not like. I am willing to test the United States against any country, any place, in terms of fair competition. We can go head-to-head on pharmaceuticals with the Germans in Brazil, we can go head-to-head on television sets with the Japanese in Mexico, given fair circumstances.

It becomes a bit more difficult when the debate is not, are we going head-to-head with Germany or Japan for trade in a third country, but when we are trying to get into their markets. That argument is going on with Japan right now about auto parts, as we are all well aware. As a result of this difficulty, I think we need significant strengthening of international judgments involving trade.

The United States, won most of its dispute settlements under the GATT. We did not lose most of them, we won most of them. But whenever you lose one, who you hear from is usually the U.S. industry or group that lost and is convinced they were wronged, and you do not hear much from the winning side in a foreign country.

I think what Senator Dole has done in terms of this legislation is important because world trade is only going to work if the public believes in it. That is the strength and the weakness of a democracy.

In my experience, one-third of this country is protectionist most of the time. However, when you have a down-turn, when there is a recession, when two or three industries are suffering and there is significant import competition, the number of American people that are reasonably protectionist increases. At that time, you run

a greater risk, in my judgment, of entertaining and passing dangerous protectionist legislation.

Fortunately, all of the Presidents under whom I have served—and that started with Lyndon Johnson—have not been protectionists. And, when necessary, Republican or Democrat, the President vetoed unwise legislation that Congress passed in moments of passion, or, frankly, legislation that we passed knowing full well that the administration would veto it and the veto would be sustained. In such cases we knew the President was right, but we could then go home and say to our constituents, well, I tried to take care of you against those terrible foreigners, but the President vetoed it and we did not have the votes to override the veto.

What Bob Dole has tried to do with the legislation before us today is not to give us just a cover or window dressing, but to really establish a prestigious body—a Commission—that will review WTO decisions that we have lost to determine if we lost them unfairly.

I believe that in most cases the Commission is going to conclude we did not lose the WTO decisions unfairly. This review by the Commission will strengthen the hands of those of us who are convinced that wider and wider trade is in the interest of this country. It also will help us convince that part of the country that is protectionist that we were not wronged by the WTO when it hands down a decision that is adverse to the United States.

So, I congratulate the Leader for introducing it. I think it is a good piece of legislation. It may need some fine-tuning, as he stated earlier. We may get some constructive suggestions for such fine-tuning from the witnesses testifying here today. But I congratulate him, and I am delighted to have him with us this morning.

Senator Grassley?

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman. I happen to be a co-sponsor of this legislation and I think during our consideration of this legislation, even this very day as we hold this hearing, that we have to recall the Uruguay Round debate that was going on at the Senate floor. At that time there was considerable doubt as to its passage. For awhile, it looked like even seven long years of negotiation on the treaty could go down the drain pretty easily.

Of course, the reason was the attacks at that time on the agreement from certain quarters regarding whether or not we, in the Senate, might be surrendering U.S. sovereignty to the WTO. Personally, I was very satisfied that U.S. sovereignty would not be in jeopardy from the agreement.

In fact a problem, I had throughout the original GATT agreement was that it lacked enforcement power. I think, as the Chairman very well said, the United States would win a majority of these trade disputes.

I remember particularly those involving agriculture, but the losing party could so often simply ignore the decision. Under the provisions of the Uruguay Round, that will no longer be the situation.

Nevertheless, last fall the outcome of the final vote was in doubt until Senator Dole negotiated an agreement with the administra-



tion that set up this WTO review commission now embodied in this legislation, S. 16. It was this agreement that made possible for a number of Senators to vote in favor of GATT. It provides a Congressional escape hatch should the WTO routinely rule against the United States.

And for coming up with this agreement and rescuing the Uruguay Round from possible defeat, I think Senator Dole demonstrated a great deal of leadership, and I think he deserves not only our thanks, but I think the world will thank him, because the Uruguay Round is going to contribute tremendously to expanding our world economic pie, and with a growing world population, it is essential that we do that to have more for more people because less for more people is going to mean a bad political situation.

One thing that all of us are aware of is, WTO decisions then are going to play a more important role in U.S. trade policy and will require a degree of vigilance. The benefits to the U.S. economy from this Round are only going to materialize if the U.S. insists that commitments made are commitments kept.

While some concessions are easy to enforce, many are controversial and require complicated changes in national policy. This, of course, creates opportunities for opponents of these concessions to block implementation. For example, changes in patent and copyright law will require enforcement efforts whose adequacy may be open to question, but difficult to prove.

Some disputes are certain to be brought to the WTO, and the U.S., of course, will need to work under the system to press its trading partners to open markets. In this regard then, the WTO review commission established in this bill, I think, is going to play a pivotal role. I think it is important that the American people and other countries know that Congress will be monitoring the WTO decision making process.

So, I look forward to this hearing. If there are some suggestions for changes to improve the legislation, we will give those fair consideration. Thank you.

The CHAIRMAN. Senator Grassley, thank you.

I might say to our distinguished panel of witnesses this morning that, unfortunately, we have two votes, scheduled at 9:45, if they start on time. We will have to adjourn the committee.

But, if any of you need a desk or a phone while we are gone, talk to Brad Figel—raise your hand, if you would, Brad—and I will make sure that at least while we are gone you can have access to that.

As I said, we do have a distinguished panel of witnesses appearing before us today: a Federal district court judge; two former ambassadors; chief executives of major U.S. corporations; and the president of the National Semiconductor Association. In baseball, I guess we would call it a Murderer's Row. That might be the wrong term to use here today, but it certainly is a distinguished panel.

We will start this morning with Hon. Stanley Harris, the Judge of the United States District Court for the District of Columbia, and he appears before us today in his capacity as the Chairman of the Judicial Conferee's Committee on Intercircuit Assignments.

Judge Harris?

**STATEMENT OF HON. STANLEY S. HARRIS, JUDGE OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, AND CHAIRMAN, COMMITTEE ON INTERCIRCUIT ASSIGNMENTS OF THE JUDICIAL CONFERENCE, WASHINGTON, DC**

Judge HARRIS. Thank you, Mr. Chairman. I am here for a very narrow purpose. Section III of the bill would establish the World Trade Organization Settlement Review Commission to be composed of five members "all of whom shall be judges of the Federal Circuits."

The five commission members would be appointed by the President after consultation with the Majority and Minority Leaders of the House of Representatives, the Majority and Minority Leaders of the Senate, the Chairman and the Ranking Member of the Committee on Ways and Means of the House of Representatives, and the Chairman and Ranking Member of the Committee on Finance of the Senate.

The Judicial Conference of the United States, which is the policy making body of the Federal Judiciary, opposes the provisions of S. 16 which authorize the President to appoint five judges of Federal Judicial Circuits to serve on the commission.

Now, I have submitted a statement in writing which reflects the position of the Judicial Conference. I am here this morning as the Chairman of the Committee on Intercircuit Assignments of the Judicial Conference of the United States and would add a few comments to what is in the written statement.

Congress, recognizing that judicial availabilities and case loads are subject to fluctuations, has authorized the Chief Justice of the United States to assign, in appropriate circumstances, judges from one Judicial Circuit to sit in another Judicial Circuit. For the record, that is Title 28, Section 291 of the United States Code, and the following provisions.

Now, there are 13 Article III United States Courts of Appeals. The circuits, numbered 1-11, the District of Columbia Circuit, and the Federal Circuit. Each circuit has an authorized strength, with the total number of authorized circuit judgeships now being 179. Rarely, of course, are courts at full strength. Illustratively, as of May 1, 1995, there are 16 Circuit Court vacancies.

Not long ago, the Judicial Conference created a long-range planning committee. It issued a report in March of this year. On page nine of that report it noted that, while the population of the United States has slightly more than doubled since 1904, the number of cases filed in the Federal Appeals Courts increased 3,868 percent.

The report states, "While it took 20 years for the level of appeals to double its 1904 level and 38 years to double again, it took seven, 10, and 11 years for each of the next three doublings. While the number of judgeships has increased significantly, it has not kept up with the increase in cases, nor, in the minds of many, should it."

How then can our Federal appellate courts attempt to keep up with their case loads? The answer, in part, is through getting help from other Article III judges, through intercircuit assignments approved by the Chief Justice, and through intracircuit assignments approved by Circuit Chief Judges.

In 1994, there were 98 inter-circuit assignments to the Courts of Appeals, a majority of whom, by the way, were senior judges; that wonderful group of men and women without whom the system would grind to a virtual halt, and who continue to work very productively, often well into their 80's, when they could simply stay home and receive the same compensation by virtue of their lifetime appointments.

In addition to inter-circuit assignments, intracircuit assignments included approximately 350 district judges who helped out on their own courts of appeals. Those assignments, of course, were short-term only. So much for numbers, although many more could be used to illustrate the plight of the 13 Article III Courts of Appeals.

The bill which has us here, S. 16, was introduced on January 4, 1995. Not long thereafter, my Intercircuit Assignment Committee met. Recognizing the impact that the loss of five circuit judges on what we perceive to be virtually a full-time basis would have, my committee recommended to the Executive Committee of the Judicial Conference that it oppose the inclusion of circuit judges in the membership of the WTO Dispute Settlement Review Commission.

By action dated February 16, 1995, the Executive Committee adopted the recommendation that Federal judges be excluded from membership on the commission, and, alternatively, if Congress cannot be persuaded to remove the provision for the appointment of Federal Circuit judges, the bill be amended to provide that only judges who have retired under 28 U.S.C. 371A or resigned their positions be eligible for selection as commissioners. That recommendation has been broadened to include private parties, any number of whom are well-qualified to serve effectively.

I am, as would be expected, far from an expert on international trade matters. I do, however, understand the demands upon, and the needs of, the Federal Judiciary. I decided to set forth some of these facts after reading the testimony of other witnesses who, with striking consistency, purport to see no negative impact upon the Circuit Courts of Appeals by placing five of their judges on this commission.

Also rather striking is the following statement on page 12 of the testimony of Alan William Wolff, although it may have been modified. "Although the Judicial Conference did not raise this as a concern, it should be pointed out that the use of Federal judges on the commission does not present constitutional problems."

The CHAIRMAN. Judge, I am going to have to ask you to wind down because the vote has started and we have 15 minutes to get there, and about five or six minutes have elapsed so far.

Judge HARRIS. All right, sir. Thank you.

The CHAIRMAN. You bet.

Senator DOLE. I just have a couple of questions. You can go vote.

The CHAIRMAN. And then I'll come back. There is only one vote now, instead of the two originally scheduled, so I should not have to leave the hearing for quite as long. I will go ahead and be back in about 10 minutes.

Senator DOLE. Do you want to finish your comments there, Judge?

Judge HARRIS. Yes, sir. I have just a few more lines.

The statement by Mr. Wolff that the Judicial Conference did not raise constitutional issues as a concern, and "does not present constitutional problems" is not accurate. Under Article 3 of the constitution, the Federal courts were created to resolve cases or controversies.

The Judicial Conference feels that it would be inappropriate to venture any sort of what would be, in effect, an advisory opinion on the constitutionality of the proposed utilization of circuit judges, but the issue is raised for the committee's consideration, on behalf of the Judicial Conference, in my testimony. Assuredly, it would be raised in some legal proceeding if the pending bill is enacted as proposed.

With that, sir, I conclude my preliminary remarks. My statement, of course, is a matter of record.

Senator DOLE. Thank you. I just have a couple of questions, and Senator Grassley and Senator Packwood have questions, and I think, probably, you could be excused. We understand the case load from adverse WTO decisions probably to be two or three a year. We are talking about two or three cases a year.

Historically in GATT there have been, on average, around two cases per year involving the U.S. from 1985 to the present. Prior to 1985, there has been, on average, less than one case per year. So, you say it would probably take these judges away full-time. That is not a very heavy case load, I would not think, two cases a year.

Judge HARRIS. Well, it is very difficult to have a crystal ball, Mr. Chairman. I am no expert in the area of international trade. I do, however, respectfully question the validity of that assumption. I have talked to several of my friends who practice law in this area. They believe that a figure of one or two cases a year is unduly conservative.

With a 120-day time period and with the scope of the review which the commission must make, that is an awfully tight time period and an awful lot to do. If you get even two cases a year, I have trouble seeing how they could do it within 120 days.

Then, of course, it also should be noted that putting Federal circuit judges on that commission means you are putting people on who have no inherent or built-in international trade expertise, so they have got to do an awful lot of ground-breaking to get up to speed.

Senator DOLE. But I think it would primarily be legal questions. I think we are concerned about, if you are retired, you may be back in private practice, or you may really be retired or may have other obligations or conflicts. There may be some other alternatives we should look at. Also, with reference to constitutionality, maybe we can provide statements from constitutional experts. Somebody will certainly probably raise it at some future time, but we were led to believe that it would not be in violation. So, I appreciate very much your testimony. We are trying to find some way. It is very important to us.

It seems to me, with all the criticism we receive from all across the country because Congress just sort of took a walk on this issue and we are going to turn it over to faceless, nameless bureaucrats

somewhere, that we have a responsibility to monitor, as Senator Grassley indicated, this process.

Maybe there is a better way to do it. We will look for other alternatives. Certainly we do not want to burden the courts. But it seemed to me they were uniquely qualified to resolve the legal questions about arbitrary or capricious actions. We will take another look at it.

Senator Grassley, do you have a question?

Senator GRASSLEY. Yes. It would be on this case of the constitutional issue you raised about judges exercising other than judicial power. I am sure you are even more familiar than I am with the *Mistretta* case, but the Supreme Court there indicated that Federal judges could participate in commissions that do not decide cases or controversies. Do you not consider that ruling in regard to your concern?

Judge HARRIS. No, I have considered it very carefully. *Mistretta* is an interesting case in which the Supreme Court did sustain the constitutionality of the Sentencing Reform Act and the creation of the United States Sentencing Commission.

The opinion was decided by a vote of 8:1, with Justice Scalia dissenting. The majority opinion, though, made clear that they thought it was an extremely close question as to whether judges properly could participate on the Sentencing Commission.

The linchpin of the majority's decision was the fact that the Sentencing Commission really did operate within the essential framework of the Judicial branch of government. Now, you do not really have that here. I hasten to add, Senator Dole, we certainly have no problem with the overall objectives of S. 16. That is fine.

Our sole concern is with how this commission is made up. But here I have difficulty conceptualizing how you would characterize where this commission would fit if it were constituted as proposed in the bill. It would seem as though it was sort of in between the Executive branch and the Legislative branch.

It would not really be deciding cases, it would simply be doing a rear-view mirror analysis of what was decided within the World Trade Organization decision making bodies. It would then report to the Congress its evaluation of how the case was handled. To me, it is rather clear that that would not, in effect, be within the framework of the Judicial branch which was the basis on which the Sentencing Commission was sustained by the Supreme Court in *Mistretta*.

Senator GRASSLEY. Thank you.

Senator DOLE. If you do not mind waiting for a few minutes, Judge Harris, Senator Packwood is on his way back. We will go over and vote.

Why do we not go ahead, Mr. Barnette, and start your testimony. If you see me leaving, well, you will have to stop, but maybe Senator Packwood will be back. I do not think they will close the vote without the Majority Leader voting, but they might. [Laughter.]

[The prepared statement of Judge Harris appears in the appendix.]

**STATEMENT OF CURTIS H. BARNETTE, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, BETHLEHEM STEEL CORP., BETHLEHEM, PENNSYLVANIA, ON BEHALF OF THE U.S. MEMBER COMPANIES OF THE AMERICAN IRON AND STEEL INSTITUTE**

Mr. BARNETTE. Good morning, Senator Dole. Thank you very much for the opportunity of appearing before you to testify on behalf of the U.S. Member Companies of the American Iron and Steel Institute.

As you know, the American business community worked very hard to help ensure the successful completion of the Uruguay Round. We have a great stake in seeing that this WTO succeeds.

While the agreements hold great promise for American business, the benefits really will not be realized unless the disputes under the agreements are settled in a very expeditious and fair manner, unless there is faith and confidence in the integrity of the WTO decisions. That is why your legislation, S. 16, really provides a means of monitoring this whole WTO settlement process.

The expanded role of WTO under GATT absolutely necessitates the kind of review mechanism that is envisioned under S. 16. The Round extended the international mandates to a vast array of new policy areas. Just think about our commitment to conform domestic laws to new international rules.

Under the WTO, more than 100 nations really have the right to challenge any U.S. Federal or State law if it believes GATT has been violated. So the panels have more powers, and the WTO settlement body may be required to authorize retaliation. These are all well-known facts.

It is certain—absolutely certain—that foreign countries will use the WTO dispute settlement process to try to weaken our trade laws, particularly antidumping, countervailing duty, and Section 301.

The warning signs are there. In the auto dispute that is so much before us today, Japan is threatening to challenge the validity of Section 301 in the WTO. 301 is our strongest weapon in combatting market access problems, and any attempt by panels to weaken this law will certainly be an early sign of major problems with the dispute settlement mechanism.

The primary benefit of S. 16 is to help build, I just call it, a foundation of credibility, for the whole settlement system, with the knowledge that U.S. judges will be reviewing these decisions. It is my belief that panelists are going to have real incentive to carefully scrutinize and follow their mandate because the whole credibility of the dispute resolution section is before them.

I think there is a very interesting question about private panel participation in the WTO settlement process. We think that is essential. There is an inequity in which foreign nations use the full resources of private law firms, private advisors in the GATT process and the U.S. receives limited input from U.S. private parties.

So we really should not go in to these kinds of disputes with one hand tied behind our back. We just should not do that. We think that the WTO Dispute Settlement Commission will really help reassure American business and the American people that disputes under GATT are being settled in an impartial manner and that American interests are being protected.

We think our sovereignty, we think the integrity of our laws, are at stake here. I think the mere existence of the Review Commission will help ensure that U.S. rights are respected, and the promise of expanded trade and economic growth will really be realized. So, we fully support the legislation and wish to work with you, the committee, and the staff and see its prompt passage, Senator Dole.

Senator DOLE. Thank you. I think it is very important, because I think it sends a signal to a lot of people out there who are not fully engaged and are not involved in international trade, but really feel that we are giving up sovereignty, they are going to change our laws.

I mean, there is a lot of misinformation about what was happening in GATT and NAFTA, and that is why it seems to many of us, in a bipartisan way, including the administration, that this might be a useful way to establish credibility, as you said, or reestablish credibility.

There are a lot of people all across America who are good, hard-working citizens who just do not believe that we are going to stick up for American law, in some cases, and American companies and American jobs, even more importantly.

So, I appreciate your testimony. I think I will ask that we just stand in adjournment for a moment. I will head for the floor, and Senator Packwood should be here momentarily. Thank you.

[RECESS TAKEN]

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

The CHAIRMAN. I understand you also testified, Mr. Barnette.

Mr. BARNETTE. Yes, I did. Good morning, Senator Packwood.

The CHAIRMAN. Good to see you again.

Mr. BARNETTE. Good to see you, Mr. Chairman.

The CHAIRMAN. We will next move to Alan Holmer, the former Deputy United States Trade Representative, ambassador, and my former administrative assistant 20 years ago when he was just 19 years of age, as I recall.

Alan?

**STATEMENT OF HON. ALAN F. HOLMER, FORMER DEPUTY U.S. TRADE REPRESENTATIVE, AND PARTNER, SIDLEY & AUSTIN, WASHINGTON, DC**

Mr. HOLMER. Thank you, Mr. Chairman. Good morning.

Senator Dole, I think, deserves to be congratulated for his vision and leadership in drafting this proposal. As Senator Grassley indicated, Senator Dole broke the logjam in late 1994 with respect to the Uruguay Round Agreements Act.

I urge the committee and the Congress to approve S. 16, with some minor modifications, because I believe it will have a positive impact on the WTO dispute settlement process, both in Geneva and in the United States.

In my written testimony I have provided six principles that I hope you will keep in mind as you draft this bill. Principle number one really tracks your opening comments, Mr. Chairman, which is that the United States, the world's largest exporter, has far more

to gain than any other country from a dispute settlement process that works.

Senator Baucus was correct in the mid-1980's when he complained that the GATT was the gentlemen's agreement to talk and talk. I think this committee was equally correct in the 1988 Trade Bill to put an effective dispute settlement system as your number one negotiating objective in the Uruguay Round.

Now that the U.S. has succeeded in achieving an effective WTO dispute settlement system, we should not be afraid of our victory. Rather, we should welcome the system based on enforceable rules of law.

Principle number two: the bill should be consistent with Uruguay Round agreements, with other U.S. international obligations, and the Constitution. What could be more motherhood and apple pie than that? In my written testimony I describe a rather technical provision in S. 16 that establishes a standard of review that, arguably, is inconsistent with the Uruguay Round agreements. I would be happy to discuss it in greater detail in response to questions.

But my overall point here is, if the Dole Commission is going to be able to be credible you have to allow the judges on the commission to be able to act in an impartial, unbiased, and fair manner.

It is imperative that you allow the judges to be able to interpret the WTO rules as they were negotiated in Geneva, not as those rules may be unilaterally, and perhaps incorrectly, interpreted by some in the United States.

The CHAIRMAN. Excuse me. I have to recess the hearing for a few moments to take an emergency phone call.

[Whereupon, at 10:09 a.m., the hearing was recessed.]

[AFTER RECESS]

Mr. HOLMER. My point, Mr. Chairman, before we were interrupted, is that it is, in my view, tremendously important that the judges on the Dole Commission be able to make their own impartial, unbiased review of what was included in the Uruguay Round agreements and not have them be given a standard of review that is going to require them to interpret an agreement that is unilaterally rewritten by the semiconductor industry, the steel industry, the Finance Committee, or even the United States Congress. Let the judges be the judges; let them make their own independent decisions and not prejudice the results in advance.

Principle number three: is that the bill should establish a fair and workable standard of review for the commission. The commission, in my view, should give a fair amount of deference to panel decisions.

They should not be empowered or required to conduct trials de novo, starting from scratch, and forming their own judgment of the merits, and second-guessing every aspect of a panel's decision. The role of the commission should be to determine whether the panel did something truly egregious or not consistent with due process procedures.

I will skip over principles four and five in my written testimony and go principle six, which relates to Section VII of the bill. That really has two different aspects. The first is one that I wholeheartedly support. This is the one that requires USTR to make the



WTO dispute settlement process as transparent as possible and to consult, meaningfully, with U.S. private interests.

USTR should work hand-in-glove with the private sector to review the case, prepare the strategy, briefs, and arguments, and respond to arguments presented by other member countries.

USTR should utilize fully the expertise and additional resources that the U.S. private sector can bring to the proceeding. This is the way the process worked when I was General Counsel at USTR, and I understand that it remains so today.

However, I am opposed to the notion of requiring a seat at the WTO litigation table for U.S. private interests. For me, candidly, this is a declaration against interest because, as a trade lawyer, I would not mind the additional business. But, in my view, the requirement for private sector participation is unwise and is not at all central to the work of the commission or a credible WTO dispute settlement process.

I outline my reasons in my written testimony, but essentially it comes down to the fact that the U.S. Government needs to be able to act efficiently, to speak with one voice, and to speak on behalf of the national interest and not on behalf of just one company or one industry, but the national interest.

I am heartened by the statement of Senator Dole that he is willing to take another look at these provisions. But by following the principles that I have outlined, I am confident the committee can produce a bill that will fortify and promote a fair and equitable WTO dispute settlement process. Senator Dole's introduction of S. 16 has already put you well on the way toward that goal.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Ambassador.

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

The CHAIRMAN. We will now go to Jerry Junkins, who is the chairman, president, and CEO of Texas Instruments.

Mr. Junkins?

**STATEMENT OF JERRY R. JUNKINS, CHAIRMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, TEXAS INSTRUMENTS INC., DALLAS, TX, ON BEHALF OF THE BUSINESS ROUNDTABLE AND THE ALLIANCE FOR GATT NOW**

Mr. JUNKINS. Thank you, Mr. Chairman, and members of the committee. I am here today, on behalf of two organizations; the Alliance for GATT NOW, which is the business alliance that was put together to assist in the passage of implementing legislation for the GATT, and The Business Roundtable.

It seems like every time we open the newspaper, turn on the radio, or switch on the television somebody is talking about the Internet, or the Global Information Infrastructure, or the Networked Society. What all this talk really means is, we are living in an increasingly interdependent world, and technology has certainly linked us to our neighbors in this country and around the world.

With all of the rhetoric we have heard over the last few years, one statistic really says it all, and that is the number of U.S. jobs directly supported by exports has risen five times faster than the

overall jobs in the economy and the passage last year of legislation implementing the Uruguay Round was a clear recognition, I think, of the benefits, to the U.S. economy, of international trade.

Now the WTO and the new rules, especially those pertaining to dispute settlement, have to prove themselves. Dispute settlement needs to be both fair and effective in practice, not just in theory. That is where the WTO Dispute Settlement Review Commission, which S. 16 would establish, comes in.

We clearly support the concept of the commission to assess the results of the WTO dispute settlement cases affecting U.S. interests. The mere existence of the U.S. review commission would put the WTO on notice that its decisions were being closely watched. This should lead to fairer proceedings and more careful decision making by the dispute settlement panels. Good decisions will be good for world trade and, importantly, they will promote public confidence in the WTO.

But I think the commission would have an additional role, in my mind. Its views would get attention, they would affect public discussion. Under these circumstances, it is very important that in appointing members and monitoring the operations of the commission, that the administration and the Congress do everything possible to ensure that it is non-political and is qualified to give the public and the Congress an objective, thorough, and informed assessment of WTO dispute settlement.

Commissioners should have knowledge of international trade law and must be willing to invest the time to do this important job properly. The U.S. Trade Representative should keep the commissioners informed of developments at the WTO. Here, I think, very importantly, USTR should evaluate and report to the commission on all dispute settlement decisions, including those in favor of the U.S. and those involving other countries.

We ought not to make a decision whether the WTO is working based on one negative decision against the United States. I think this will help the commission and the public to put any decision against the U.S. in proper context.

In addition to proposing the review commission, S. 16 contains a proposal for direct participation for private parties in the WTO dispute settlement proceedings, and this proposal in Section VII of the bill does raise, I think, a number of practical concerns, and I have described these concerns in detail in my written statement.

In essence, they relate to the difficulties in choosing participants, ensuring a unified U.S. position, and avoiding undue interference with the proceedings. I urge the committee to consider the proposals of the President's Advisory Committee on Trade Policy and Negotiations—the ACTPN, which again are described in my prepared statement—and consider this as an alternative.

It is clear that economic isolation is not a viable choice for our Nation. If we retreat from the marketplace in the name of independence of action, the likely result will be a shrinking economy and standard of living for Americans and the risk that we will drop from our leadership position in the world.

The reality is, the world is increasingly and unavoidably interdependent. The question we should be asking is not how we can avoid engaging, but how we can structure our economic inter-

dependence to benefit Americans and safeguard the interests of the American people, and enactment, I believe, of S. 16, with some of these proposed changes, is an important part of that answer.

Thank you.

The CHAIRMAN. Thank you very much.

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

The CHAIRMAN. We will now hear testimony from Mr. George Scalise, who is the senior vice president for the National Semiconductor Corporation and chairman of the Semiconductor Industry Association.

Mr. Scalise?

**STATEMENT OF GEORGE M. SCALISE, SENIOR VICE PRESIDENT, NATIONAL SEMICONDUCTOR CORP., AND CHAIRMAN, SEMICONDUCTOR INDUSTRY ASSOCIATION, PUBLIC POLICY COMMITTEE, SANTA CLARA, CALIFORNIA**

Mr. SCALISE. Thank you, Mr. Chairman. Again, I appreciate the opportunity to testify before you today in support of S. 16, the WTO Dispute Settlement Review Commission Act, and am representing both National Semiconductor and the Semiconductor Industry Association.

The semiconductor industry, like most other U.S. industries, supported the successful completion of the Uruguay Round trade agreements. Thanks to the tireless efforts of the U.S. trade negotiators, the final agreement was a vast improvement over the original text that we all saw come forward.

On balance, we believe it is an important step forward for free and open trade. However, we remain concerned with one major aspect of the agreement, the nature of the WTO dispute settlement system.

One of the United States' major objectives during the Uruguay Round was to establish a binding dispute settlement system to guarantee that WTO panel decisions would either be honored, or sanctions would be sought. Other nations supported the U.S. initiative, but perhaps for other reasons.

They viewed a binding dispute resolution process as a mechanism to which they could attack the U.S. trade laws, primarily Section 301 and the antidumping/countervailing duty laws.

So with this in mind, we believe it is critical that the enhanced power of the dispute settlement process not be misused by those who manage or participate in it. U.S. industries must be assured that our commercial interests will not be exploited by a group of unelected international bureaucrats.

We are well aware that the U.S. courts, on occasion, exceed their interpretive roles and will wander into the act of legislating. With American sovereignty and national commercial interests clearly at stake here, we must not permit the WTO dispute settlement body to assume such a role.

The future of the WTO ultimately rests on the ability of these panels to administer their responsibilities in a just and impartial manner. Now, the industry we are a part of, the semiconductor industry, is a very competitive industry, both at home and abroad.

Fortunately, we enjoy a market share that approaches 50 percent of the world market.

We compete in all markets, we are very effective in our technology development, we lead in most areas in that arena today. However, despite our capabilities, we do rely on American trade laws. They saved us from extinction in the face of massive foreign dumping and denial of foreign market access in the mid-1980's.

During that period, the U.S. semiconductor producers were the world leaders in semiconductor technology. But, despite our competitive position domestically and internationally, large segments of our industry were destroyed because of dumped imports from Japan, most notably, dynamic RAMs.

Japanese producers, aided by a protected home market and great financial resources, drove the prices of these D-RAMs down to about one-third of their cost. From 1984 to 1986, U.S. industry suffered losses that exceeded \$2 billion.

At that time we then filed a 301 case and we filed some dumping cases. It was through the effective and judicious implementation of those cases that we not only stemmed the tide of dumping, but we reversed the market access issue and began to open the Japanese market. Today, we have regained our number one position where we had lost it in the mid-1980's, and are gaining momentum every day.

The issue at hand this morning is one of great economic importance. Will the United States, the largest and most open trading Nation in the world, be able to continue to use WTO sanction remedies to defend U.S. producers and workers from unfair traded imports, or will the United States be forced to relinquish its access to these vital remedies in the face of foreign pressure?

To prevent foreign nations from misusing the WTO and, in particular, the dispute settlement system, to attack both 301 and dumping and countervailing duty laws, we believe the Congress must adopt S. 16.

While it is essential that the United States continue to be a leading champion of world trade liberalization, it is equally important that we are not vulnerable to ill-conceived or nationalistic determinations made by WTO panelists that undermine the integrity and efficacy of our trade laws.

The semiconductor industry's experience with foreign trade practices and with U.S. trade remedies, as I have just described as an ideal case study, demonstrate a need to preserve these laws.

It is only proper and reasonable that the United States establish a means for fair and impartial review of WTO rulings that potentially have far-reaching and deep implications for the Nation's business and economic well-being.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

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

The CHAIRMAN. We will conclude this morning with testimony from Ambassador Alan Wolff, like Alan Holmer, another former Deputy United States Trade Representative.

Mr. Ambassador?

**STATEMENT OF HON. ALAN WM. WOLFF, FORMER DEPUTY U.S. TRADE REPRESENTATIVE, AND MANAGING PARTNER, DEWEY BALLANTINE, WASHINGTON, DC**

Mr. WOLFF. Thank you, Mr. Chairman, Senator Bradley. I am very pleased to be here today to testify in favor of S. 16, as introduced by Senator Dole.

I think all of us on this panel who are in the private sector, as well as everyone on the committee, favored the adoption of the GATT agreements, but there were areas of concern. I think the Dole Commission, S. 16, clearly addresses a major area of concern.

I think we went too far. I think we headed away from conciliation and negotiation, and we decided to have a litigative system; it is like Americans to want to do that sort of thing. We were frustrated over the European agricultural restrictions and subsidies. We have this new system, and now we have to make it work. That is the issue before us today.

We have really significant risks, because this WTO system has no checks and balances. Yes, there is an appellate review panel, but if a panel goes off the tracks and it is not corrected by the appellate body, it is going to be nearly impossible to get the members of the WTO to correct it because everyone has to agree. It is just not going to happen very readily, and it is going to be a whole new negotiation.

We have had areas of error in the past. There was a Swedish stainless steel panel in 1990 that legislated new standing requirements. They were not anyplace in the GATT; they just inserted them. In the pork case and in the cement case, they put in a new standard with respect to dumping that restricted the interpretation, actually quite contrary to what the GATT provides, directly opposite to what the GATT provides.

But we were able to block panel reports and negotiate where there was a problem, where the panel had exceeded its mandate. That is not going to happen in this new system and we have got to find some new checks and balances. The WTO panels must be limited to judicial functions and keep away from engaging in legislative activity.

Just as an aside, on the question of sitting judges, who better to determine whether an international panel has applied the correct standard of review? Alan Holmer and I may disagree on what was achieved in the Uruguay Round as to what the appropriate standard is, but judges can apply a standard as to whether a panel acted erroneously or not.

It is really a question of sovereignty for the United States whether a panel will inappropriately strike down something the U.S. Government has decided. Tens of thousands of jobs are on the line in these cases and we ought to have very careful decision making, which is what S. 16 is all about. It is up to the Congress to set priorities for judges. And I do not think, as has been mentioned, one could rely on retired judges; they are either practicing lawyers or may not otherwise be available for the task.

We have a system in which the WTO Secretariat is going to be very important, very influential. The panels are ad hoc. Three or more trade experts or negotiators from other countries come in and

they are ad hoc; they serve only on one panel, perhaps, or every now and then. The Secretariat is there.

The Secretariat and the panelists have to know that, where the United States is involved, we want them to do their job very carefully and apply the correct standards and explain what they are doing, that the Congress of the United States is going to be involved, which has the Commerce power.

The third and last point, the U.S. Government must ensure that it has the best litigative team. If we are going to make this process work and defend our National economic interests in the WTO—and this is Section VII of the bill that I am referring to—we have got to have the best team possible.

USTR has some of the best lawyers in the government; I do not doubt that for a moment. They are always going to be overworked, there are going to be too few of them, we are not going to enlarge the numbers. Senator Domenici is not going to provide in the budget process right now for another 20 or 30 lawyers at USTR.

Let us say we have a subsidy case. The foreign government, on its side, are going to be the folks who granted the subsidies. They are going to know this backwards and forwards, they are going to know it cold, and they may even have American trade lawyers sitting on their team; it has happened before.

What we are saying here is, the opponents of having private participation are saying, for some reason, it would be highly inappropriate to have American lawyers from the private sector supplement the government in this process, whereas the foreign side may have hired the dream team on their side and they will be in the room.

In conclusion, we cannot have a star chamber. When the wheat growers, or the pork producers, or Boeing taking on Air Bus, or the lumber industry goes through the system, they will have gone through a series of stages.

They will go to the ITC and the Commerce Department, always on the record. They will go to the Court of International Trade, to the Court of Appeals. And all of a sudden they get to Geneva and it is a closed session; they do not know what happened, they are barred, and a reading room at USTR is not an adequate substitute.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Ambassador.

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

The CHAIRMAN. Judge, let me ask you to opine on this, if you like. Do you think the legislation establishing the commission poses any constitutional problems?

Judge HARRIS. Yes, sir. We talked about that just very briefly in your absence earlier. Senator Grassley raised the problem presented by the Mistretta decision of the Supreme Court with respect to Sentencing Commissioners who are members of the Article III Judiciary.

I, in response to his question, pointed out that the Supreme Court concluded that the Mistretta case was a very close one, that the linchpin to their decision was the fact that the Sentencing Commission, in effect, functioned within the Judicial branch.

Also, the court concluded that the members of the commission were acting in their individual, as opposed to their judicial, capacities and those factors would not be present here.

I commend the purposes of S. 16. I think it would be extremely unfortunate to have it begin to be implemented, get down the track, and then get thrown off the track by a conclusion that it involves an unconstitutional use of Article III judges.

The CHAIRMAN. All right, then let me ask you this. I assume that the same constitutional problem would exist with a judge on senior status as opposed to one who has simply left the bench, or resigned from the bench.

Judge HARRIS. Yes, sir; that is correct.

The CHAIRMAN. In other words, you could appoint retired judges but not senior status judges, that is, somebody who actually had retired from the bench and left.

Judge HARRIS. That is correct, sir.

The CHAIRMAN. In my experience, the only judges who actually do leave are those who leave at 50, and then go out and make a fair amount of money, or those who go on senior status. We do not have very many that actually retire and do nothing, or little else, do we?

Judge HARRIS. Well, we checked on the pool numbers. It is in excess of 60, if you add together those who retired at a younger age, and most of those did go into other activities, of course. It is true, as you and as Senator Dole have suggested, those who retire at later ages are further along in years than those who are active on the court.

The CHAIRMAN. You phrased that very delicately, I thought.

You know that the fear is we would end up with a panel of 85-year-olds who have no background—and I want to be careful because there are some very able elderly judges—in this. Is that a legitimate fear?

Judge HARRIS. It is something to take into account. I do not think it is a fear to worry about. I think there are a sufficient number out there who still could be extremely productive who could form a pool from which candidates could readily be chosen.

The CHAIRMAN. Mr. Barnette, let me ask you a question. Are we going to get into a tit-for-tat situation where we have our review panel, Germany has theirs, and Argentina has their own panel?

Mr. BARNETTE. I would hope not, Mr. Chairman. But I think the first issue, given the truly one, singular open and fair market, that our concern is preserving, first, the standards of international trade practice in this market, second, the application of our laws and the sovereignty of our country in this market. I think the review provisions of S. 16 can truly accomplish that.

I respectfully disagree with Judge Harris on the prior question and the prior answer. I think we can structure a way within the constitutional framework. Let us take the Japanese auto dispute that is pending before us. Will that not tell us something about the workability of the WTO and the panel process, if, clearly, the standards and the rules are not adhered to?

The CHAIRMAN. It may or it may not. I am reasonably convinced, that, if we put Article III judges on this commission somebody will

challenge the constitutionality of the commission. I do not know how that case will turn out.

Mr. Barnette, you are on the President's Advisory Committee on Trade Policy, right?

Mr. BARNETTE. Yes, sir; I am.

The CHAIRMAN. Now, as I understand it, that advisory committee oppose requiring private sector participation in WTO dispute-settlement cases. Have I got that right?

Mr. BARNETTE. Mr. Junkins is here, actually, testifying on behalf of The Business Roundtable, and I believe made reference to the ACTN remarks and the ACTN position. I would ask him to join me in that.

My understanding is more along these lines, that it should be possible to have our government have the option to have private participation in the process in representing the interests of the U.S. Government.

The dispute comes between whether it is a statutorily mandated right of the private party to participate or whether it is something their government representatives have available to them and may cause to happen if it is believed to be in the overall national interests.

The CHAIRMAN. Well, as I understand it, the Advisory Committee has said, "let us essentially leave the private-party consultation process the way it is." In other words, the process may need some revamping, but it should remain a matter of grace, whereas you want it mandatory as a matter of statute.

Mr. BARNETTE. I would prefer that it be a matter of statute. I think it is essential that it be a matter of discretion.

The CHAIRMAN. Mr. Junkins, do you want to comment on that?

Mr. JUNKINS. Only to add that the ACTPN report really does encourage openness and transparency in the consultation, and bringing in the private sector throughout the process.

Its concern, at least as Section VII is written, is that there are going to be a lot of parties that are "interested" in the WTO case, and how is the USTR going to decide who is excluded from participation.

It requires that participants be supportive of the U.S. position, but how does the USTR draw that line? I think, most importantly, the WTO disputes are between the United States and other countries.

Leaning a bit on Ambassador Holmer's comment, the U.S. delegation needs to speak with one voice to properly defend U.S. interests, and if they are required to include "interested" private parties in the delegation, differences of opinion may make this effective advocacy a difficult one.

So, their finding was not necessarily specifically directed at Section VII, but, more at encouraging the open process and participation by the private sector prior to, and leading up to, the actual discussions in the WTO.

The CHAIRMAN. Senator Bradley.

Senator BRADLEY. Thank you very much, Mr. Chairman. Members of the panel, welcome.

I would like to ask Mr. Holmer and anyone else who wants to volunteer their assessment of how the brewing dispute with Japan



might actually play out in this new world of dispute settlement and talk about withdrawing from WTO if the rules are not applied, et cetera.

It is my understanding that Ambassador Kantor, this morning, will initiate a case against Japan on autos and auto parts and that he will do so under the WTO dispute settlement mechanism and under the Section "Nullification and Impairment" under Article 23, I think it is.

Now, that is a rather unusual choice. It basically says that, well, the rules are being abided by, but we are going to go down this road, which is kind of a catch-all. Now, even though they are abiding by the rules, we still do not like them succeeding and, therefore, we are going to file under Article 23.

My concern here is not that trade barriers in Japan should not come down, I think they should come down. I think that has got to be a priority. But this approach taken by the administration will not be productive and, in fact, could very well be counterproductive. Currency markets could react. I mean, if you like the yen at 80, how would you like the yen at 75.

Mr. HOLMER. Or 50.

Senator BRADLEY. Or 50. My concern also is that it presents a very serious challenge to the fledgling World Trade Organization, because when this is filed, let us say Japan wins. Well, what are we going to do, do we pull out of the World Trade Organization at that point? Or what if Japan actually loses in this; does Japan have less support for the trading system?

So my question to you is, I think the administration has initiated a course here that has got an indeterminate outcome, to say the least, and possibly a rather ominous outcome. Now, it is also true that maybe the Japanese will cave in the last minute and agree to concessions.

My question to you is, how do you see this playing out, and is this a danger to the fledgling WTO?

Mr. HOLMER. Well, it is obviously an excellent question, and very current. In a sense, today's press conference is the easy part. I mean, it is easy to hold a press conference at the White House and say, by gosh, we are going to bash Japan, or even say that we are going to take this case to the WTO.

The hard part, is putting the pieces back together and exercising the necessary political leadership to be able to get some kind of agreement with the Japanese. It seems to me almost incomprehensible that you have two adult countries agreeing that we are going to get in this car and together drive it off the cliff.

Now, specifically with respect to the issues that you have raised, we have obligations under the WTO. One of those obligations is that our tariffs are bound. If we impose 20 percent, or 50 percent, or 100 percent tariffs on luxury cars from Japan to the U.S. and Japan does take us to the WTO—fortunately I am not a U.S. Government official anymore, so I can say whatever I want on this subject—it looks to me as if Japan has a darn good case in the WTO that we have violated that agreement.

What I find somewhat encouraging by your reports—and I am hearing this from you; I have not heard it independently from any-

body else—and it relates to what Senator Grassley said initially that commitments made are commitments that must be kept.

What I see by the step that is being taken by Ambassador Kantor is to say, we are going to try to work through the WTO process, and we have complaints about certain aspects with respect to Japan and we are going to take that to the WTO process and we are going to try to see if we are able to prevail there.

I do think he would be well-advised to make that case as narrow as possible and not address some of the other issues, like local content quotas with respect to auto parts procurement, and the like.

Senator BRADLEY. Right. Now, let us assume that the case is taken and we lose. Now the question is, in the middle of a Presidential election, well, look, should we withdraw from the WTO? I mean, is that not a possibility that that is where this leads?

Mr. HOLMER. Well, in my view, we have more to gain than any other country in the world by continued participation in the WTO. We ought to use the WTO process. Sometimes we will win, sometimes we will lose, but we ought to do it to the maximum extent that we can.

Senator BRADLEY. But, I mean, even the establishment of this commission presumes that the United States is going to pull out. We have a panel of judges. We are going to pull out. That is the message it sends.

Mr. HOLMER. I will let others comment on this as well, but if I could just respond on this. When I first heard about the Dole-Kantor deal I said to myself, what a dumb idea; where did this thing come from?

But the more I thought about it and the more I recognized the positive impact it could have within the U.S., and Chairman Packwood spoke to that in his initial comments this morning, it may very well be that we will have cases with Japan and with other countries that we are going to lose.

What happens in those circumstances is, the U.S. parties that are adversely impacted will come to the Congress and give you all sorts of reasons that was a horrible result.

At least now you are going to have an independent, impartial, unbiased process with judges that will allow you to make an independent judgment as to whether or not, indeed, the U.S. loss in that proceeding was appropriate or not. In that sense, I think it is a positive step.

Mr. WOLFF. Senator Bradley, this bill would not review our case against Japan. It would not cause that review. It only applies to cases brought against the United States. So let us say that the United States loses a case, which I do not think it should, with respect to the closed nature of the Japanese auto market, or auto parts market. That issue would not come before this commission.

Now, if we employed retaliatory tariffs, that case would come before the commission. The commission would take, I would say, about three and a half minutes to say that we were in violation of our bindings, the GATT, or now WTO, panel was correct. I do not think it would cause withdrawal from the WTO; the U.S. would acknowledge when it acted that it acted inconsistently with tariff binding.

Senator BRADLEY. The commission would basically say, yes, retaliatory actions were contrary to GATT, therefore—

Mr. WOLFF. That is right. Which we would know in advance.

Senator BRADLEY. Which everybody knows in advance. So why would the government even announce they are taking retaliatory actions that they know are clearly going to be in violation of GATT and then establish a commission that is going to tell them, no, you cannot do it? It is like, no, stop me, stop me, stop me.

Mr. WOLFF. No. There is a judgment of national interest, I assume, in all of this. The President has the right to act under 301, even if it violates GATT or WTO obligations.

Mr. BARNETTE. Senator Bradley, I believe in putting the current car dispute issue in context, I believe that Ambassador Kantor and Secretary Brown, as they have in trade matters generally, have acted patiently and judiciously and we must await their announcement, of course.

I think the question is, if they do not take this action, what remedy is there that will speak on behalf of the national interests of the United States that will bring about this very serious impairment of trade? The action, it would seem, is appropriate.

The question is, what is in the national interests of the United States. I think the question is not, well, if you take an action like this, what is it going to do to a World Trade Organization? The questions fall, it seems to me, in that order.

Senator BRADLEY. I agree with that.

The CHAIRMAN. Senator D'Amato.

Senator D'AMATO. Thank you, Mr. Chairman.

Mr. Holmer, one of your colleagues on the panel answered this, but I would like to get your impression. Do we have a bona fide case to bring before the World Trade Organization as it relates to the practices which are used, let us talk about, in the auto area in Japan as it relates to market access, et cetera, that is afforded to the United States?

Mr. HOLMER. Is that question to me, Senator D'Amato?

Senator D'AMATO. Yes.

Mr. HOLMER. I have not looked at that question to be able to give you a definitive legal view as to whether or not we do have a strong case to be able to take to the WTO. I hope the lawyers at USTR have done that.

Senator D'AMATO. Let me say this. You are not a stranger to this. This thing has been perking for years. You are the former Deputy Trade Representative and you are telling me that, with all your years of experience, you do not know whether or not we have a strong position relative to the barriers—now, I will give you my opinion—that have been constructed, that have been maintained in this area, and you are telling me you do not know whether or not we could make a case before the WTO? Because if we could not, then what the heck are we doing there?

Mr. HOLMER. Senator D'Amato, that is precisely what I am telling you, that I do not have a view on that subject. I have not—

Senator D'AMATO. How about banking and securities, do you have any idea, as it relates to whether or not we are getting free access and open access as it relates to those areas? I mean, you were there for quite a period of time. How long did you serve?

Mr. HOLMER. I was at USTR for 4 years.

Senator D'AMATO. Well, do you think we have open markets there in this area, that we are permitted to compete competitively without undue restrictions and burdens being placed on us? Are you really saying that, in the auto parts area and in the sale of automobiles, you do not have an opinion on that?

Mr. HOLMER. In many areas the Japanese market is not as open as I would like it to be, as you would like it to be, as open as it should be. Whether or not we have a legally defensible, winnable case in the WTO under the current WTO rules with respect to a specific industry is going to depend on the facts and circumstances that apply to that, and I am not in a position to be able to make a pronouncement on that this morning. I am sorry for that, but I am just not in a position to be able to make it.

Senator D'AMATO. All right. Any other of the other panelists have any ideas on this? I mean, I have to say that I find that incredible. I mean, I just find that if we do not have a case here where our markets are open, their markets are closed, I think we sold less than 12,000 cars, then we are kidding ourselves over here. We are a captive of the special interests from top to bottom. I will not explore any further, but I would like to. I will get in trouble again.

Yes?

Mr. SCALISE. Senator, I cannot speak to the auto industry, but being a part of the semiconductor industry and an industry that did file a 301 case back in the mid-1980's because we did believe that there was systematic denial of market access in Japan, and filed dumping cases where we felt the trade arena was being distorted, the government found that, without question, there was systematic denial of market access.

And, as a consequence, we came forward with a solution that I think is a very creative one that has helped to open that market for us. We have gone from a position of six or eight percent market share in Japan to something in the vicinity of 23 percent that we enjoy today as foreign suppliers.

But rather than using traditional remedies, we put a trade agreement in place with sanctions—and that is my point, with sanctions—because we knew up front, in the absence of sanctions, the trade agreement was going to be a hollow success. We were not going to get anywhere.

And I think that what we are talking about here today allows for that same process, perhaps not exactly the same methodology, but that same process to take place that would deal effectively with these kinds of distortions. So, as I see it, it would take care of the issue you are concerned about, perhaps in a little different way than in the past, though.

Senator D'AMATO. Mr. Wolff?

Mr. WOLFF. I think there is a clear answer to your question. That is, there is a good WTO case against Japan's automotive restrictions, no doubt about it. When I was at USTR I received a letter from a Japanese citizen who had lived in the United States who took his car back to Japan, was told there were no barriers, no problems, no tariffs, not a problem in the world; 6 months later, \$10,000 later spent on inspection fees, the car was still sitting un-

registered in his driveway. He could not understand it. Are there barriers? Sure there are barriers. Is there a WTO case? Sure there is a WTO case.

Senator D'AMATO. All right.

Mr. BARNETTE. I agree with you, Senator. I think the case is clear. Again, the action is one that, if brought by the United States, it should be supported. The United States Member Companies of the American Iron and Steel Institute will be supporting Ambassador Kantor in that direction.

Senator D'AMATO. Mr. Chairman, might I just make one observation? I see that the Majority Leader is here. I think Senator Bradley raised a question as to whether or not we should just then go at our own way and impose tariffs. I take it that most of you are opposed to doing that and we should just bring the case to WTO as opposed to just putting sanctions in or raising tariffs.

Senator DOLE. Or Japan?

Senator D'AMATO. Yes. I mean, I think that is the point that my colleague was making. It would seem to me that we would be better served by taking the case to WTO as it relates to the auto industry as opposed to unilaterally attempting to impose Section 301 sanctions. Am I wrong in the concern that was expressed by my colleague?

Senator BRADLEY. I am not clear what you are saying.

Senator D'AMATO. All right.

Senator BRADLEY. I was concerned that a case that we would take to the WTO on the retaliatory tariffs—

Senator D'AMATO. Right.

Senator BRADLEY [continuing]. Would be reversed.

Senator D'AMATO. All right.

Senator BRADLEY. And when it was reversed at the GATT, that we would misread it here, and the political dynamic would be to make that the first test case as to whether the WTO serves our National interests. That was the concern and the thrust of my question.

Senator D'AMATO. Right. I share my colleague's concern. You have pointed out very aptly why we would, I think, maybe prejudice a good case that we could make. That was my purpose. I think we do have a good case. It would seem to me that we should bring it and not burden it with sanctions.

Sanctions might appeal generally—they appeal to me generally—but I am not very pleased when I come to see that we might, indeed, in the long run prejudice the case against us and not have it heard on the merits, whether or not they are instructing trade barriers and are in violation of the law, we should take it that way and not unilaterally raise tariffs.

I thank the Senator for pointing me in that direction. I thank the panel.

Mr. JUNKINS. Senator, I think, realistically, we are going to be living in two worlds for a period of time while we transition through, and that is trying to enforce the trade laws as they are on our books, and our practices and regulations, at the same time that we are beginning to bring a dispute settlement in the WTO.

So I think it is entirely possible that we may be doing both and find that one may not be in compliance with GATT. But, at the

same time, if it works, the dispute settlement in the WTO will begin to displace some of the need for the trade laws that we have had in place for years in a world that has not been of free trade.

Senator D'AMATO. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dole.

Senator DOLE. I have no questions.

The CHAIRMAN. I might say, before Senator Murkowski comments, when Ambassador Holmer said it depends upon the facts of the case, I remember a very specific situation involving lumber in Oregon, which is one of our big industries.

When I first came to the Senate in 1969, the timber industry was complaining about the closed Japanese market and that they would not buy our 2 x 4s; they would not buy our lumber. Well, it turns out we would not cut to metric sizes, which is how the Japanese measure their lumber. We could not understand why they would not change their measuring system and buy our 2 x 4s.

Second, the Japanese were not using it just for framing, they used the lumber for exposed wood inside post and beam construction. They also wanted the lumber cut in a very particular and fine fashion, so the Japanese would buy logs and cut them there. Around 1978 or so, a company I had never heard of calls me up, the company was named Vanport Lumber. The thing that is intriguing about the company is that it is run by a guy named Adolph Hertrich, whose background is either German or Swiss; he speaks with a Germanic English accent. He had this lumber company and he was selling all of his lumber to Japan. He has got about 150-200 employees.

The reason I got involved with Mr. Hertrich was that he had built a Japanese tea house on his property so he could show it to the Japanese buyers, and the IRS would not let him deduct the house as a necessary and proper business expense. He explained to the IRS that he used the teahouse to sell his products overseas. The IRS had never been up against a tea house before and it just was not going to allow it as a deduction.

So I went out there to meet with him 1 day, and it was a funny meeting that I recall. At the meeting there was Adolph, speaking with kind of a Germanic English accent; my Chief of Staff who is British and speaks with a proper British accent; a Japanese buyer who was speaking a mixture of Japanese and English; and me. We all sat down in the tea house with that little hole underneath the table and had tea. Finally, the IRS gave up and said, okay, he can deduct the teahouse.

Well, today Mr. Hertrich is still selling all of his product, but not only that, he is now contracting with four other companies who are selling lumber to Japan. So the market in Japan is there. These other companies pay Mr. Hertrich on a contract basis to advise them on how to cut timber and sell it to Japan. Initially, the Japanese insisted upon sending Japanese inspectors to his plant for 2 years. He paid for the inspections, put them up in an apartment, and paid for them. They no longer do that.

But that is why I say it does depend upon the facts of the case. It turns out our industry was wrong. There was a market in Japan for U.S. timber. The U.S. industry just did not want to sell the Japanese the kinds of things the Japanese wanted to buy. I'm not say-

ing that there aren't exclusions and discriminations in the Japanese market. There are. But is everything that you see on the surface of the Japanese market always exclusionary? Not necessarily. In the case of lumber, it was not.

Senator Murkowski?

Senator MURKOWSKI. I have a similar story about when we developed our timber markets in Alaska. We had one market, and it was the Pacific Rim, because we could not compete on the west coast with Douglas Fir with our reserves of Western Hemlock and Spruce. We shipped it over to Japan in cants, which is a dimensional cut for the grade primarily, but it amounts to a 6 x 8, or a 10 x 10, or whatever comes out of the log.

At that time, wages were relatively low in Japan and they wanted to keep the finishing process in Japan. But, over a period of about 12 years, their labor costs went up and we converted our mills to the metric system. Now we finish a product and we ship what we produce into that market.

We do not have a tea house, but we do have a guest house. I am not sure whether the company was able to charge it off, but it is primarily for the purpose that you suggested—of bringing the buyers over there so they can look at the product.

But we have gotten off the topic here a little bit, and I would like to get back to the concerns that we have about the World Trade Organization.

My main concern was the effect that a new trade regime would have on our U.S. laws and negotiations. Without the assurances that are provided in S. 16 to protect, U.S. sovereignty, I would not have cast my vote in favor of the World Trade Organization. So I am proud to join with the Majority Leader as a co-sponsor of this legislation.

We have also had a discussion today about U.S. efforts to gain access to Japan's auto market. The automobile industry is certainly part of the whole picture and needs attention, but we should not lose focus on market access for other markets.

I have been laboring in the vineyards of the U.S. construction market in Japan for the last 15 years. The history of confronting and competing in a system based on "dango"—where the Japanese prefer through internal negotiations, to determine who is going to get the next contract, not competition.

If you go back and look at the history of our effort, some of you will recall the Kansai International Airport construction effort. At that time, Kansai was a major construction project. The United States had a great deal of engineering expertise to offer. We were competitive in our presentations. We were advised that we would not be considered for Phase I, but we could be considered in Phase II. Well, by the time they got through with Phase II, we were told to come in on Phase III.

To make a long story short, of about \$15 billion worth of public works contracts, we participated in only about \$600 million. Yet, Japanese contractors were active in our marketplace at the same time competing for our large projects.

There were major government contracts given in Alaska on bases on which Japanese contractors performed and performed well. But my point is, it is not reciprocity. You go into Japan to try and com-

pete as a U.S. contractor and you are told you have to have a license. Well, how do you get a license? Well, you have to have experience. Now how do you get experience without a license? It's a catch-22.

And pretty soon the U.S. says, well, we just do not have enough time or money to stay here. We have got to turn our efforts someplace else where we can generate a profit. So, as a consequence, the Japanese side says, well, they are not interested and that's why they're not competitive.

This has been a consistent problem. We came back with a Major Project Agreement (MPA). The Japanese at that time, because of U.S. pressure, identified 34 major public works projects where U.S. firms would be allowed to compete. Of the 34 major project agreements, we got just 2 percent of the contracts over six years. Finally, last year the U.S. initiated Title 7 sanctions to open up the construction markets.

Under the threat of sanctions, the Japanese promised they would reform their entire system, they would do away with "dango." They gave us an action plan. The blueprint of the plan looked positive, but 1 year later U.S. construction firms have not been awarded any contracts.

Now, this has been going on, Mr. Chairman, for an extended period of time. So as we look at the merits of the automobile case, it should not stand alone. The Japanese market is almost impossible to break into for reasons that are obviously beneficial to Japan. I think the bottom line should be reciprocity.

I would like you to comment on that, as well as one statement that was made to me last week when seven members of the Japanese Diet visited my office. I have been going to Japan for the last 25 years at least once a year. I am sensitive to their system and their traditions.

But the Diet members brought me one message, and that was, they were concerned over the insensitivity of our government to strengthen the dollar. Naturally, our response was, if we strengthen the dollar it is going to increase our interest rates. It is a political year; clearly the administration is not interested in that aspect.

The United States has responded by saying that the Japanese should be more sensitive to their balance of payments surplus. What is it, \$64 billion, something like that? They said we ought to balance our budget and reduce our deficit, which we ought to. But I also told them that you buy more from your best customer, the U.S.

So the bottom line is, they said that they had so many dollars that were worth less, that if we did not stabilize our dollar they would convert their dollars to marks or gold. Now, the implication of that is staggering.

What do you think?

The CHAIRMAN. Who are you asking, all of them?

Senator MURKOWSKI. Well, I am not getting any volunteers. I will take one.

The CHAIRMAN. Ambassador Wolff?

Mr. WOLFF. One part of the question is whether exchange rate changes are really going to solve our problems with Japan. Whether they are is going to depend on whether price makes a difference.



You talked about the dango situation in Japan with respect to construction, or if you look at financial services, it is not the value of the dollar that is going to get us into the Japanese market for a lot of things where price is not allowed to play through because competition is not on the basis of price. So, exchange rate changes are not the sole solution.

Just like in the auto case today, I assume if the administration thought that we would eventually get a share of the Japanese market commensurate with our competitiveness due to exchange rate shifts, then none of this would be necessary. The fact is, you cannot get into the market in a variety of areas due to inspection requirements and other requirements.

So, we are left with, the composition of trade matters. It matters to jobs in the financial services sector in New York; whether it is lumber or construction services, those jobs matter. Exchange rate changes are not going to bring about the adjustment that we are seeking in some sectors where price is not allowed to play through.

Senator MURKOWSKI. Well, what is obvious is that they are generating all of these dollars as they bring their automobiles into our market. Those dollars buy them a level, if they use those dollars in the U.S., but they use those dollars overseas for other purposes.

So, their suggestion is, we will get out of dollars and go into marks or gold. The significance of the necessity of financing our debt with foreign investment is a reality that we face.

Mr. Barnette?

Mr. BARNETTE. Just a general observation, Senator. The question you ask is so comprehensive, but it includes international trade, it includes the value of our dollar, it includes the strength of the yen and the mark. At least I, for one, am of the view that we often, in the debate, overlook the strength of the yen and the strength of the mark. These are very competitive countries with excellent industries and very competitive products in the world economy.

I think the strength of their currency is reflected in the strength of the manufacturing bases in their countries. I think, having said that, our currency problems are related to many things, and they are the focal point of so much that is going on in the Congress today, whether it is our budget deficit, whether it is our savings, inadequacies, and so forth.

But I think the focus here continues to be the international trade focus. As I said earlier, it just strikes me that S. 16 deals with seeing to it that national interest is our first concern and remedies taken, whether it is 301 or otherwise, are taken under our laws.

They may be subjected to the World Trade dispute resolution system because of the linkage, but it just seems to me we need to get our National priorities or national sovereignty issues first and then examine them in their alignment with the WTO.

Senator MURKOWSKI. If I could just respond very briefly, with kind of a, "what if." Japan has huge reserves of dollars. As the dollar declines in value, if you will, they get concerned. Should they get out of those dollars and get into the mark or something else? What is the implication of that action on the U.S. dollar? What is the implication of that action on our deficit?

Mr. BARNETTE. I suppose it could have a significant adverse effect, Senator. I must apologize; I am truly not qualified to answer that question. Perhaps other panelists are, perhaps Mr. Junkins is.

Mr. JUNKINS. I am not sure I am qualified, but there is a corresponding effect. Not only does it cause us problems in terms of financing, but it would begin to put further pressure on the dollar that exacerbates the export position that Japan is worried about right now. That is why they are concerned about that.

So, unloading a whole bunch of dollars on the market and further strengthening the yen versus the dollar goes absolutely in the wrong direction, while the entire Japanese business and governmental community is trying to talk us into pushing the dollar back up.

Mr. HOLMER. Senator Murkowski, you have been absolutely correct over the years to press hard on the construction issue. I think we, as a Nation, should continue to press extremely hard with respect to unfair trade practices, wherever they might be.

Your question, I think, addresses fundamentally how tremendously important it is that the Congress continue aggressively to address the Federal budget deficit, because if you are talking about the single most important thing that you can do to reduce the trade deficit, it is to reduce the Federal budget deficit.

You have U.S. investment needs that are up here, and U.S. savings that are way down here. The gap between our investment need and U.S. savings is fortunately closed with money from overseas, but, when that occurs, we have a commensurate, equivalent trade deficit. So if we can get those savings up by eliminating our budget deficit, we are going to be able to have a very substantial impact on the trade deficit.

Mr. WOLFF. I do not know how much of a debate you want on this subject, but the savings rate in the United States is not all that is involved in the trade deficit, clearly, and the trade deficit has an impact on the savings rate.

Solving the Federal budget deficit problem may not change the balance with Japan very much at all. We are talking about a balance with one country in some sectors that is really a major problem.

You could create very advantageous IRA possibilities or other forms of incentives for investment and we would still not be able to have competitive bidding and win those contracts in Japan for our construction services.

Who has the money to invest depends on who earns money. If our construction companies had all of the Konzai Airport, all their competitiveness would have allowed, we would have had a lot more to invest and, by God, we would have had a different savings rate as well.

Mr. SCALISE. Going back to what Jerry Junkins said, in the final analysis, most of the decisions that they will take relative to whether it is dollar reserves, or how they treat a trade arrangement, or market access, or anything else, is going to be what they perceive to be, first of all, in their self-interest, and, second, as they perceive trade rules that they are working within. They may have a different interpretation; that is all right. There are certain risks

that we are going to have to take to deal with that. Those are risks worth taking.

I think that is really what this is all about, it is establishing a framework that allows us to take the risk, to deal with the issues that are going to emerge, because we do have different self-interest and we do have different interpretations of how these rules must be applied. We must review a framework that allows the trading system to function in a free and open environment.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Pressler?

Senator PRESSLER. Thank you very much. I am very happy to be a co-sponsor of this effort. I did want to ask our friend, Judge Harris, a question. I see in your testimony that you oppose the use of sitting United States judges for the commission due to the current strain on our Judicial system.

I have been working hard over the last couple of months to limit frivolous lawsuits and streamline our court system through the Product Liability Reform Bill. Now, we have passed a portion of that on the floor; I wish we could have passed more. But, in light of this, I recognize your concern.

What alternatives do you propose for selecting the members who will sit on the proposed commission if we want to maintain the integrity of the commission, where do we find qualified candidates, and what should the qualifications for these positions be?

Now, if we depend on retired judges to be members of the commission, do we not limit ourselves to a very small group of people? I know this is the same pool we are drawing on for NAFTA dispute panels as well. How many judges with international law background and ability to continue adjudicating and, moreover, the desire to do so, are available to serve on this commission?

Judge HARRIS. Well, I think there would probably be very few with an international law background, but I think that would be true of Article 3 judges, that is, circuit judges, because that is what we are talking about here, in the first place.

It would be, to me, quite unexpected to find any international trade law expertise or background on any given Circuit Court judge in the country today.

Senator PRESSLER. So you feel that this administrative process would work out well, that there is a good supply?

Judge HARRIS. Well, I think there would not be a good supply within the Judiciary, either of active judges, which we oppose, or of retired judges, which we would endorse, that would have an international trade background.

My own personal lack of experience in the international trade area leaves me thoroughly unqualified to have any feeling for what is out there in the private sector to be available to fulfill this role, but I feel confident there would be many people who could.

Senator PRESSLER. Now, one of the most important provisions of this proposal is Section 7, which allows participation in the WTO panel proceedings by those who support the government's position and who have a direct economic interest in the proceedings.

Other countries allow participation in this manner already and it seems only equitable to allow U.S. interests to participate in a proceeding which will materially affect them. With the tough budg-

et decisions that we have in front of us, the resources at the disposal of USTR, Commerce, and other departments, must be decreased.

I believe that it is in our best interests, and in the interests of those who are involved in a given WTO dispute, to take advantage of the resources and assistance of those parties who are involved in the dispute. As has been discussed here before, they know the issues because they have lived with them and can draw upon these resources during the dispute settlement proceedings.

Now, when there are numerous parties with standing under this section to participate, what should be the procedure for selecting who actually sits at the table?

Mr. JUNKINS. Well, in my testimony, Senator, that is precisely one of the issues, I think, that Section 7 tries with some difficulty to address. Let me give you a very practical example of what I think will be the majority of the cases.

The dumping case that was referred to a minute ago in the semiconductor trials back in the mid-1980's, there are differences of opinion in that. The semiconductor industry was being blasted and nearly shoved out of existence by the world market prices being half, or less, of what it cost to build a product.

But, at the same time that was going on, we had customers that were concerned about prices being higher than they were paying in the world market that day. To put that at the table, I think, represents a significant problem in having a unified U.S. position.

USTR has to take all of that information into consideration and certainly make an open process where all that can be digested, but then someone has to make a decision and take the U.S. position to the WTO as far as dispute settlement is concerned.

I have a very big concern about deciding who is going to be at the table and how they are at the table when you cannot have a unified position that is across the entire United States.

Senator PRESSLER. Yes, Mr. Wolff.

Mr. WOLFF. Senator Pressler, one has to agree with the concern raised by Mr. Junkins. However, I would think it is solvable. Senator Dole said at the outset that perhaps some discretion had to be introduced into this process. That might be one solution. The key is to have the best team on the U.S. side humanly possible; usually that will be petitioner's counsel.

They have to have the same view as the U.S. Government. You cannot have a cacophony, just a Tower of Babel, as to different views speaking out on the U.S. side. The U.S. Government person who has the microphone has to be in charge and they have to allow people to speak up only to support the U.S. position, and within the narrow confines of what is required of them.

Senator PRESSLER. Could I ask one more quick question? I know it is more for Mr. Lang. But we have before us the Telecommunications Bill presently to restructure the telecommunications system in our country.

But I go to these international telecommunications conferences and it is a one-way street. Their products come here, they have a \$2 billion telephone surplus by overcharging us on long-distance calls. The whole thing in telecommunications is very unfair.

Maybe I will have to ask this of Mr. Lang, but can any of you here please tell me what is going on with follow-up negotiations to GATT and the basic telecommunications working group? Does any of you at this table have any strong feelings about that, or should I save that question for Mr. Lang?

Mr. HOLMER. I think that is the unanimous view here. [Laughter.]

Senator PRESSLER. All right. That is a big problem. He probably does not want it either. Thank you very much.

The CHAIRMAN. Gentlemen, thank you very, very much for coming this morning. We will take just a moment here to recess while you leave, and then we will hear Mr. Lang, who is nominated for a position that a number of you have held.

[Whereupon, at 11:19 a.m., the hearing was concluded.]



# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED

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### PREPARED STATEMENT OF CURTIS H. BARNETTE

Thank you, Mr. Chairman. I appreciate the opportunity to appear today on behalf of the United States members of the American Iron and Steel Institute (AISI) and express our support for S. 16, the WTO Dispute Settlement Review Commission Act.

At the outset, Mr. Chairman, let me state that AISI supported both the Uruguay Round and NAFTA. The U.S. business community worked hard to help ensure the successful completion of these ground-breaking initiatives, and has a great deal at stake in seeing that the new trade agreements succeed. The Congress and this Committee in particular deserve many thanks for their efforts to improve upon and enact the Uruguay Round agreements and NAFTA.

While the new Uruguay Round agreements hold great promise for American businesses, we must be ever-vigilant in monitoring how the World Trade Organization (WTO) operates and how it is implemented. We signed a trade agreement, not a blank check. We must constantly ask ourselves: Are American interests being served? Is American sovereignty fully protected? Are American businesses and workers sharing in the gains from expanded world trade?

S. 16 would provide one very useful tool to help Congress, U.S. businesses, and the American people answer these questions. In particular, this legislation would help us determine whether the WTO dispute resolution system is operating in an equitable and impartial manner. Make no mistake—U.S. businesses will not benefit under the new GATT trading system unless disputes are settled in an expeditious and fair manner, and unless there is confidence in the integrity of the WTO's decisions. That is why S. 16 is so important to the business community and why it is so crucial to the ultimate success of the Uruguay Round.

I would also like to note that I, along with Mr. Junkins, have the privilege of serving on the President's Advisory Committee for Trade Policy and Negotiations (ACTPN), which is the President's most senior private sector trade advisory group. The ACTPN has specifically reviewed S. 16 and has adopted a statement endorsing the concept of judicial review of WTO dispute settlement panel decisions. The ACTPN endorsement reflects the broad-based support for close monitoring of the WTO panel process.

Mr. Chairman, in the remainder of my testimony, I would like to briefly discuss the potential abuses that could result if the WTO dispute settlement system does not function properly—particularly as these abuses relate to U.S. sovereignty and to the integrity of our trade laws. I would also like to explain why I believe S. 16 would help ensure that U.S. interests are protected under the WTO. Finally, I would like to address several questions raised by the Committee with respect to private sector participation in the WTO dispute settlement process and the role of Federal Judges in the WTO Dispute Settlement Review Commission.

### THE NEED TO PROTECT U.S. SOVEREIGNTY

In the course of the debate over the Uruguay Round agreements, many Americans have expressed concern about the effect of joining the WTO on our sovereignty. These concerns are well-founded and demonstrate why a review mechanism like S. 16 is so important.

The Uruguay Round greatly expands international trade disciplines to many areas that were not previously covered by the GATT. Areas such as agriculture, telecommunications, and intellectual property are now subject to detailed trade rules. While international mandates have been extended to a vast array of new policy areas, the United States has also increased its commitment to conform domestic

laws to these new international rules. Under the WTO agreement, the United States must ensure that its laws, regulations, and administrative determinations are in conformity with all the agreements of the new GATT.

Furthermore, the requirement that U.S. laws be in conformity with the GATT applies not only to federal provisions but to state laws as well. Under the WTO, more than 100 member nations will have the right to challenge any U.S. federal or state law that they believe violates the GATT.

Proponents of the GATT have rightly pointed out that dispute resolution panels may only "recommend," not require, that a country change its laws. Nonetheless, if a country refuses to bring its laws into conformity with a panel decision, the WTO dispute settlement body may be *required* to authorize retaliation by the complaining party. Such retaliation can occur in economic sectors that were not even the subject of the original dispute.

Equally important, decisions by WTO panels (including, as the case may be, appellate panels) will now be given much greater force than ever before. Under prior practice, each GATT member country effectively maintained a veto over the adoption of a panel report. Under the new GATT, panel decisions are automatically adopted unless all WTO members vote to reject the decision. Since the country that won a case would presumably never vote to block the decision, WTO panel rulings will as a practical matter always be binding.

With the prospect of international panels declaring U.S. laws to be illegal and authorizing retaliation against U.S. businesses, concerns about sovereignty should not be taken lightly. It is absolutely imperative that we monitor the operation of the WTO dispute resolution panels to ensure that U.S. interests are protected.

#### SAFEGUARDING OUR TRADE LAWS

There is special concern about the effect WTO dispute panels could have on the enforcement of our trade laws, particularly the antidumping law, the countervailing duty law, and Section 301. These laws are absolutely essential to the competitiveness of U.S. businesses and to the creation of truly free and fair markets in the United States and overseas.

The steel industry is an excellent example of why we need strong trade laws. Since 1980, our industry has taken all the steps necessary to become the low-cost, high-quality producers in the U.S. market. We have downsized, restructured and modernized, more than doubling our labor productivity. At the same time, we have expanded exports and increased market share against key foreign competitors. This has all been done without significant government subsidies. Let there be no question—our steel producers can compete against fairly-traded imports.

The problem is that foreign steel producers have too often refused or been unable to make the difficult choices necessary to compete fairly in the international market. The U.S. steel industry still confronts more than 100 million tons of unneeded, excess steelmaking capacity from foreign producers. This surplus foreign production is made possible by huge governmental subsidies—more than \$100 billion since 1980.

It is no wonder that subsidized foreign producers look to the U.S. market—the largest and most open in the world—to unload their excess capacity. The U.S. steel industry has seen massive, unprecedented dumping and subsidies from foreign producers, as evidenced by unfair trade margins averaging 37 percent (or \$150 per ton) in the recent flat rolled cases. Without the protection of our trade laws, we are easy targets for foreign competitors who hide behind government subsidies and protected home markets, and then dump in this market.

The situation faced by the steel industry is not unique. Over the past decade, many strategic industries—including advanced materials, semiconductors, and others—have faced intense dumping and other unfair trade practices by foreign competitors. No matter how productive our companies are, they cannot compete over the long term with foreign producers whose prices are not based on market forces.

My biggest worry is that foreign countries will use the WTO dispute settlement process in an attempt to weaken our trade laws. The warning signs are already present. In the auto parts dispute, Japan is threatening to challenge the validity of Section 301 in the WTO. As this Committee well knows, Section 301 is our strongest weapon in combatting market access problems abroad. Any attempt by WTO panels to weaken this law will be an early sign of major problems with the dispute settlement system.

We must also pay careful attention to the results of WTO panel decisions in anti-dumping and subsidy disputes. It is imperative that panels in these cases studiously follow the relevant standard of review. In this regard, WTO panels are prohibited from second guessing the factual findings of our administrative agencies. Further,



where the Uruguay Round antidumping or subsidy agreements may be interpreted in more than one way, a dispute settlement panel may not overturn a U.S. determination so long as it conforms with one of the permissible interpretations.

Mr. Chairman, this Committee spent many long hours over the last year to ensure that the GATT implementing legislation protected our trade laws to the fullest extent possible under the new international agreements. You cannot permit your work to be circumvented by allowing international bureaucrats to simply rewrite our trade laws. S. 16 is designed to prevent this from happening.

#### THE CRUCIAL ROLE OF S. 16

The Dole-Moynihan bill is a bipartisan measure that would establish a WTO Dispute Settlement Commission. This Commission would be composed of five federal judges and would review WTO panel reports in cases brought by other countries where the decision is adverse to the United States. The Commission would determine whether the WTO dispute resolution panel: (i) exceeded its authority, (ii) added to the obligations or diminished the rights of the United States under the Uruguay Round, (iii) acted arbitrarily, capriciously, or engaged in misconduct, or (iv) deviated from the applicable standard of review.

If the WTO Dispute Settlement Commission determines that a panel report is flawed in one of these respects, S. 16 would allow any Member of Congress to introduce a privileged resolution directing the President to negotiate modifications in the WTO dispute settlement rules. If the Commission finds that there were three improper WTO panel decisions in any five-year period, any Member of Congress could introduce a privileged resolution withdrawing Congressional approval of the WTO. Senator Dole has referred to this as a "three strikes and we're out" provision.

Mr. Chairman, S. 16 provides a balanced, flexible approach to the potential problem of improper WTO panel decisions. It is important to note that findings by the S. 16 review commission will not by themselves cause any changes to our status as WTO members. Such changes could only occur after affirmative Congressional action, and only after the U.S. has exhausted attempts to negotiate corrective modifications to the WTO dispute settlement mechanism.

One of the primary benefits of this legislation is that it will help build a foundation of credibility for the WTO dispute settlement system. With the knowledge that U.S. judges will be reviewing their decisions, WTO panelists will have an incentive to carefully scrutinize and follow their mandate. This is crucial because the credibility of the entire dispute resolution system depends upon the willingness of WTO panelists to respect their roles and not encroach upon the sovereignty of WTO members.

From the perspective of the business community, the best of all possible worlds would be for the S. 16 review commission to never find a WTO decision to be improper. We want the dispute resolution system to work fairly so as to lay the groundwork for expanded world trade and a successful WTO.

By the same token, however, even one finding by the S. 16 review commission that a WTO panel acted improperly would be a very serious matter. Given the enormous importance to U.S. businesses of an adverse WTO panel decision, it would be wholly improper for a panel to ignore its mandate. While the United States cannot expect to win every case, it can expect to have a fair hearing and to have its sovereignty respected.

Three improper panel decisions in a five-year period would be totally unacceptable—it would indicate that the dispute resolution system was not working and that U.S. sovereignty had been violated. More ominously, it would raise the prospect that the United States would and should withdraw from the WTO and that the promise of expanded trade and economic growth would go unfulfilled. With this in mind, foreign countries and panelists will certainly be less inclined to abuse the WTO system or to ignore the constraints placed on WTO dispute settlement panels.

The WTO Dispute Settlement Commission will help reassure American businesses and the American people that disputes under the GATT are being settled in an impartial manner and that American interests are being protected. Without a review mechanism such as that found in S. 16, U.S. businesses adversely affected by WTO panel decisions would naturally question the appropriateness of these rulings. With the benefit of the WTO Dispute Settlement Commission, proper WTO panel decisions are less likely to be questioned. At the same time, U.S. objections to improper panel decisions will carry much more weight in the international arena.

## PRIVATE SECTOR PARTICIPATION IS THE WTO DISPUTE SETTLEMENT PROCESS

Mr. Chairman, there are several issues that have been raised by the Committee with respect to private sector participation in WTO proceedings and the role of federal judges in the S. 16 review commission.

Section 7 of S. 16 entitles private U.S. parties who support the U.S. Government's position, and who have a direct economic stake in a case, to participate in WTO panel proceedings. It is my understanding that the Administration has voiced some concerns about the mandatory nature of the provisions in Section 7, and in particular about the administrative and legal difficulties that could arise if private citizens were given a statutory right to take part in WTO consultations and litigation.

My personal belief is that more openness could only improve the WTO panel process. Private parties have a great deal to add in terms of expertise and resources, and these assets should definitely be available in our disputes with other nations. In addition, a more open dispute settlement process would certainly enhance the credibility of the entire WTO system.

In addition, we must address the current inequity whereby foreign nations utilize the full resources of private law firms and private advisors in their GATT disputes, while the United States receives little or no input from U.S. private parties with an interest in the case. We should not go forward in critical international disputes with one hand tied behind our back.

Having said that, we would support changes in the legislation or regulations which would lessen any administrative difficulties with Section 7, so long as effective private sector participation in the WTO process is preserved.

## THE ROLE OF FEDERAL JUDGES IN THE WTO DISPUTE SETTLEMENT REVIEW COMMISSION

Questions have also been raised about the appropriateness of using judges from the federal judicial circuits as members of the S. 16 commission. In particular, some have argued that our federal judges already have extremely heavy case loads and do not have time for the additional duties envisioned by S. 16.

Mr. Chairman, it is important that the WTO Dispute Settlement Review Commission be composed of judges from our federal circuit courts. Ensuring that U.S. sovereignty is respected and that U.S. rights are protected under international agreements is certainly one of the *most* important functions in which our federal judges could engage. Our federal appellate judges are among the most distinguished jurists in the world and are uniquely qualified to engage in the type of review envisioned by S. 16. Review by these judges will enhance the credibility of the WTO dispute settlement system and will provide Congress and the American people with the most considered analysis possible of WTO panel reports.

Filling the S. 16 commission with people other than federal judges would clearly be a mistake. Members of the academic community might be seen to have biases or points of view inconsistent with the neutral perspective required for meaningful review. Similarly, use of private trade lawyers would only give rise to questions about conflicts of interest and the qualification of these individuals to act in the role of judges.

Finally, there are concerns regarding the burdensomeness of serving on the S. 16 review commission. I have great respect for the substantial duties and responsibilities of our federal judges. However, if this role turns out to be truly burdensome, it will almost certainly mean that the WTO dispute settlement system is not working because we are having too many improper decisions. If that is the case, it makes it all the more important that we have a careful and considered review of the WTO panel process by our highly qualified and independent judiciary.

## CONCLUSION

In the end, Mr. Chairman, S. 16 helps to lay the groundwork for a successful system of world trade and for long-term U.S. participation in a truly open world market. I am confident that with close scrutiny and leadership by the United States, the historic agreements reached in the Uruguay Round can establish the basis for expanded world trade well into the next century.

## PREPARED STATEMENT OF SENATOR BOB DOLE

Mr. Chairman, I want to thank you for holding this hearing on an issue of great importance to the success of the World Trade Organization and, in the long run, of our entire trading system. I look forward to the testimony of this extremely capable panel of witnesses.

Mr. Chairman there is no question that the new rules of the World Trade Organization, especially the new dispute settlement regime that has been established, creates a situation of potential harm to American interests if not properly implemented. So it seemed to me terribly important to preserve the opportunity, and guard against the harm.

Last year during the GATT debate, supporters of the agreement predicted a host of benefits, including falling tariffs, elimination of non-tariff barriers, increased exports, more jobs and higher incomes and standards of living, here and around the world. Some of these benefits were exaggerated, but essentially, we knew the good things to expect. Even if the exaggerations in the end prove to *underestimate* the advantages, everyone wins.

But Mr. Chairman, it seemed to me we needed to pay attention to the potential drawbacks of the GATT agreement. These seemed less certain. But if even only a few of the exaggerated criticisms of the WTO proved correct, America stood to lose a great deal.

I heard from Americans all across the country during the GATT debate. Most of them were not happy with the new trade agreements. Their biggest concern was that the U.S. was giving up far more than it was getting under this agreement. One thing we appeared to be giving up was some of our sovereignty, our ability to decide for ourselves what laws and practices we wanted.

The biggest potential threat to our sovereignty was the new dispute settlement process. In most of its functioning, the new process is a benign extension of rules and practices that we have been living with for years. But in one important respect it is entirely new. For the first time, decisions of dispute settlement panels will be binding, that is, they cannot be blocked by the losing side.

Stronger dispute settlement with automatic results for the winner was *indeed* a U.S. negotiating objective. The U.S. has won far more often than it has lost in GATT cases.

But what happens when the U.S. is on the losing side? Losing parties will now be required either to negotiate a resolution or else pay some kind of compensation. Sanctions could be authorized.

In other words, for the first time, GATT decisions will have real teeth.

As a result, it seems to me that it will be essential for dispute settlement panels to be, above all other things, *completely* impartial. And if they are *not* impartial, if they overstep their authority, then we must be prepared to respond.

The Dispute Settlement Review Commission will help us to respond.

The Commission will review every adverse decision that comes out of the WTO. Federal Appellate Court judges are especially qualified to review these decisions, because the question will be a legal question—whether another tribunal acted within its authority, or abused that authority, or acted arbitrarily or capriciously.

I believe establishing this review commission will enhance the credibility of the WTO. It will be a powerful signal to panelists that their work must be absolutely impartial, and a reminder of their obligation to observe the bounds of the negotiated trade agreements.

And perhaps most importantly, it will demonstrate that the U.S. Congress takes a strong and long-term interest in the dispute settlement process, and in its proper functioning. Confidence in the WTO process was not created merely by signing the trade agreement. Confidence in the WTO process must be built up over time.

Finally, Mr. Chairman, there is a provision in the bill dealing with greater participation in the dispute settlement process by interested private parties.

We have been trying to open up the process in the GATT for a long time, and have made some progress. I know our negotiators fought hard for some very limited language in the WTO agreement that opens up the process a little bit. It is a step, but it is not enough.

It is very troubling that the deliberations of the panels in Geneva really will occur in secret—this disturbs many people here in America. Access to this process for own companies and industries is very limited.

We discussed this last year during the drafting of the implementing bill, and I had hoped we would be able to address this issue in this bill. There is a provision, section 7 of the bill, that *requires* interested parties be allowed to participate. I know this has raised some concerns, particularly in the administration. Members of this committee may want to have a closer look at this issue as well.

I am prepared to modify this provision in any way the committee is comfortable with, perhaps by making private participation entirely *discretionary* with USTR. I believe our goal should be to assist USTR's efforts to win cases in Geneva without interfering with those efforts. In the meantime, we must continue to work toward ever greater transparency in the WTO.

Mr. Chairman, I look forward to hearing from our witnesses.

#### PREPARED STATEMENT OF HON. STANLEY S. HARRIS

Mr. Chairman and Members of the Committee: As Chairman of the Judicial Conference Committee on Intercircuit Assignments, I am pleased to present the views of the Judicial Conference of the United States on S. 16, the proposed "WTO Dispute Settlement Review Commission Act."

In December of last year, the Congress enacted the "Uruguay Round Agreements Act," Pub.L. 103-465, 108 Stat. 4809, thereby approving the trade agreements resulting from the Uruguay Round of multilateral trade negotiations conducted under the General Agreement on Tariffs and Trade. A major accomplishment of the Uruguay Round was the formation of the World Trade Organization ("WTO"). The self-declared purpose of S. 16, the bill before this Committee, is to create the "WTO Dispute Settlement Review Commission" ("Commission"), which will review certain WTO trade dispute decisions.

Briefly, the WTO's dispute settlement process utilizes three distinct entities: dispute settlement panels, the Dispute Settlement Body, and the Appellate Body. Decisions of the dispute settlement panels, which can issue findings of fact and conclusions of law, are submitted to the Dispute Settlement Body, unless a party appeals on issues of law to the Appellate Body.

#### THE WTO DISPUTE SETTLEMENT REVIEW COMMISSION

Section 3 of the bill would establish the Commission to be composed of five members "all of whom shall be judges of the Federal judicial circuits." The five Commission members would be appointed by the President "after consultation" with the Majority and Minority Leader of the House of Representatives, the Majority and Minority Leader of the Senate, the chairman and ranking member of the Committee on Ways and Means of the House of Representatives, and the chairman and ranking member of the Committee on Finance of the Senate.

Although initial terms of office of five years are specified and reappointment is apparently mandated ("After the initial 5-year term, 3 members of the Commission shall be appointed for terms of 3 years and the remaining 2 members shall be appointed for terms of 2 years"), no provision appears to have been made for subsequent terms of office.

Section 4(a)(1) of the bill would require the Commission to review "all reports of the dispute settlement panels or the Appellate Body of the World Trade Organization in proceedings initiated by other parties to the WTO which are adverse to the United States and which are adopted by the Dispute Settlement Body." Upon the request of the United States Trade Representative, the Commission would also review "any other report of a dispute settlement panel or the Appellate Body which is adopted by the Dispute Settlement Body."

The Commission is obviously intended to act quickly. Within 120 days of the date of the applicable report, the Commission must receive public comments, secure any necessary information from other federal agencies, hold any hearings it considers "advisable," issue written findings, and report its determination to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate.

Subsection 4(a)(2) requires the Commission to determine specifically whether the panel or the Appellate Body, as the case may be: (1) exceeded its authority or terms of reference; (2) "added to the obligations of or diminished the rights of the United States under the Uruguay Round agreement;" (3) "acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from [applicable] procedures;" or (4) issued a report that deviated from the applicable GATT standard of review. In the event that the Commission makes an affirmative determination of any of the above questions, it must also determine whether the action of the panel or Appellate Body "materially affected the outcome of the report of the panel or Appellate Body."

#### THE JUDICIAL CONFERENCE OPPOSES THE APPOINTMENT OF ACTIVE FEDERAL JUDGES TO THE COMMISSION

The Judicial Conference, the policy-making body of the federal judiciary, opposes the provisions of S. 16 which authorize the President to appoint five judges of Federal judicial circuits to serve on the Commission. The opposition of the Conference is predicated on the drain of scarce judicial resources that this feature of S. 16 would cause during this time of increasing judicial workload. This acute problem,

exacerbated by significant existing judicial vacancies on the circuit courts of appeals, is discussed below in some detail.

As a preliminary matter the Committee should understand that the positions of the Judicial Conference on pending bills, including S. 16, are not grounded on an assessment of whether the bill, if enacted into law, could survive a challenge to its constitutionality. A federal court or courts may be called upon in the future to decide that very question. Therefore, in addition to considering our view of the impact on judicial resources engendered by S. 16, we believe that the Committee may wish to evaluate for itself the following constitutional questions raised by this bill.

First, does the Constitution contemplate Congress granting the President authority over an active member of the judicial branch, the exercise of which could interfere with the effective administration of justice? Second, is it consistent with the Constitution to require that judges appointed under Article III discharge duties other than exercising the judicial power of the United States? These questions go to the fundamentals of the constitutional separation of powers among the three branches of government. We are not aware of any law which served as precedent for the appointment process found in S. 16, and therefore, these appear to be questions of first impression.

#### COMMISSION WORK REQUIRES SUBSTANTIAL TIME AND EXPERTISE.

The responsibilities of conducting the thorough review required in a relatively short period by S. 16 would require a significant dedication of time to Commission matters during the members' five-to eight-year tenures. Even if there were as few as one or two such referrals per year, we believe that each referral would require complete use of the entire 120-day time period.

First, it is unlikely that the Commission will simply review a cold record from the WTO. The nature and importance of international trade disputes will probably elicit much public commentary in each case, and the Commission members are likely to want to gather additional available evidence and clarify questions with hearings.

Second, given the nature of the trade issues underlying the international agreements subject to the WTO, it is likely that the WTO "record" could be quite voluminous itself, containing detailed evidence pertaining to areas such as trade patterns, economic effects, and mercantile statistics.

Third, even though specific standards of review are enumerated in the bill, the scope of review of the Commission is plenary. While several of the issues the Commission is required to decide appear to require only consultation of the instruments defining WTO internal operating procedures, the remaining issues effectively charge the Commission with a plenary review of the dispute.

For example, it would appear that to conduct a meaningful "complete review," whether the WTO acted "arbitrarily and capriciously," whether the WTO deviated from any applicable international standards of review and caselaw, or whether its actions affected the outcome of the dispute in a material way, Commission members would have to develop expertise generally in the norms and construction of international treaty instruments, sources and hierarchy of authority of international law, and global economics principles and effects. The time it takes to develop a thorough understanding of the general international trade law would be in addition to the time it takes for Commission members to master the underlying facts, applicable treaties, and specific standards of review relevant to the matter referred.

Fourth, the requirement in Section 4(b)(2) to "report" to the Congressional committees implies additional responsibilities in being available for Committee hearings.

We believe that it is therefore fair to conclude that Commission membership would become a full-time job for a judge or, at the very least, would require devotion of a substantial amount of time each year.

#### LIMITED JUDICIAL RESOURCES WILL BE REQUIRED TO HANDLE INCREASING WORKLOADS

The number of authorized circuit judges for 1994 (including the Federal Circuit) is 179 active judges. In 1994, 82 senior judges also participated in appellate panels. As of May 1, 1995, of the 179 authorized judgeships, 16 positions are vacant, and four courts of appeals, or one-third of all of the courts of appeals, are considered to be experiencing "judicial emergencies." For the 16 vacant positions, 7 nominations have been made. Over the next five years, 63 circuit judges will become eligible for senior status.

The Judicial Conference Committees on Court Administration & Case Management and Judicial Resources collectively monitor the activity of the federal courts and recommend additional judgeships when necessary. In 1994, the Judiciary requested authorization for 20 temporary court of appeals judgeships.

The appointment of five circuit judges to the Commission would divert a relatively small percentage of current circuit judges. Nevertheless, federal circuit judges have experienced dramatic increases in cases per judge over the course of several decades. For example, in 1970 there were approximately 130 appeals per judgeship. By 1993 and 1994, the number of appeals per judgeship had grown to 298 and 292, respectively.

Furthermore, it is anticipated that the trend of expanding appellate dockets will not dissipate over the next five years. To the contrary, it is projected that by the year 2000, the workload of the appeals filed in the courts of appeals will almost double from 48,815 in 1994 to 84,800 in 2000.

#### CONCLUSION

Without question, international trade issues are of substantial importance to the United States and will become increasingly so in the future. The need to monitor carefully such developments and the ramifications of decisions affecting world trade is patent.

As important, however, is the ability of the federal judiciary to resolve disputes within its jurisdiction justly, efficiently, and speedily. The judiciary's challenge to fulfill these responsibilities over the next decade is particularly acute. Not only should the judiciary address any existing backlogs as expeditiously as possible, it must also prepare to deal with the anticipated explosive increase in filings. This must be accomplished within the fiscal constraints that will continue to confront us.

The federal judiciary believes that both the international trade needs of the Executive Branch and the judicial responsibilities of the Judicial Branch will be best served if the Commission is composed of private parties or of former judges, including those who have fully retired from the judicial office. The Executive Branch and Legislative Branch will be best served if the Commission members are either already well-versed in the subjects of international law and trade regulation instruments and procedures, or can devote undivided attention to becoming so. The Judicial Branch will be best served if it is able to devote 100% of its resources to the resolution of disputes within its jurisdiction.

Mr. Chairman and members of the Committee, I hope that our views have been helpful, and, on behalf of the Judicial Conference of the United States, I wish to thank you for your consideration of our position. I would be pleased to respond to any questions.

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#### PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, I welcome the opportunity to offer my endorsement of Jeffrey Lang to be Deputy United States Trade Representative and to comment on the significance of S. 16, the World Trade Organization Dispute Settlement Review Commission Act.

S. 16 reflects the continuing duty of the state. Trade agreements, like treaties, have domestic consequences. They are rarely self-executing and, in the tradition of Western democracies, have generally required a parliamentary act to enable them.

Trade agreements confer economic rights on the citizens of the signatory states. But they also confer continuing duties on the signatory states themselves to ensure their compliance with respective political cultures, as embodied in written and unwritten constitutions and their derivative domestic laws.

This is the inherent strength of S. 16. The bill has two major features:

First, it establishes an appellate commission which would review the decisions of the WTO Dispute Settlement panels to ensure compliance with the standards agreed to by the WTO signatories.

Second, it encourages private party participation in the dispute settlement process. This is done by allying private parties with the government negotiators. Yet, private parties' rights of participation are limited to the discretion of the government negotiators. This, in my judgment, wisely avoids a private party from actions that might bind or commit the United States to some objective unintended by the President. It is a form of built-in—or axiomatic—limitations on liability, a subject that has its own notoriety in this body these days. *The duty of government to ensure fair treatment of its citizens subject to commercial agreements is well-rooted in case law.* Mr. Chairman, very early in our court history, Mr. Justice Marshall, writing for the majority in the 1829 case of *Foster v. Neilson*, suggested that not all international agreements are in fact self-executing, or become law of the land by any degree of automaticity. He said further that:

“. . . when the terms of stipulation [of an agreement] import a contract . . . the legislature must execute the contract before it can become a rule for the Court.”

The GATT implementing legislation established the terms of execution of the WTO agreement. Despite the opportunity for the U.S., and every other signatory, to withdraw from the agreement, the residual intent is *participation*. This carries implications for courts and governments at all levels. It is a potential incursion on sovereignty. And it is, therefore, the duty of the state to establish safeguards against damage to a nation's sovereign interests.

Mr. Chairman, S. 16 takes us in precisely that direction. In closing, I want to refer to a later Supreme Court decision that reinforces the long-standing commitment of the judiciary to the state's duty to protect its citizens' interests under international commercial agreements.

Mr. Justice Miller, in writing the 1884 decision in the *Head Money Cases*, referred to the state's needs to look after citizen rights in international agreements.

"If these fail," Justice Miller wrote, "its infraction becomes the subject of international negotiations, so far as the injured party chooses to seek redress. . . . It is obvious that with all this, the judicial courts have nothing to do and can give no redress."

Mr. Chairman, I believe that Justice Miller's commentary illustrates the inherent wisdom of S. 16.

—The bill establishes a U.S. review body of distinguished jurists to consider the interests of U.S. entities *as if* they may have been in litigation in our own domestic courts. And, of equal importance . . .

—The bill allows private parties seeking redress for injuries to join the government negotiators in the defense of their interests.

I thank the Chairman for the opportunity to present my views.

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#### PREPARED STATEMENT OF ALAN F. HOLMER<sup>1</sup>

Mr. Chairman, it is a privilege to appear before the Committee today regarding S. 16, the WTO Dispute Settlement Review Commission Act. I urge the Committee and the Congress to approve S. 16, with minor modifications, because it will have a positive impact on the WTO dispute settlement process.

In your consideration of S. 16, I urge you to keep in mind the following six principles:

- *Principle #1: No country has more to gain from a dispute settlement process than the United States, the world's largest exporter. Now that the U.S. has succeeded in achieving an effective WTO dispute settlement system, we should not be afraid of our victory.*
- *Principle #2: The bill should be consistent with the Uruguay Round agreements, other U.S. international obligations, and the Constitution. Judges on the Dole Commission should be allowed to offer their independent, impartial judgment based on the standard of review established in the WTO agreement concerned, rather than a standard established unilaterally by the United States.*
- *Principle #3: The bill should establish a fair and workable standard of review for the Commission. The Commission should give deference to panel decisions, and should not be empowered or required to conduct trials de novo, starting from scratch and forming its own judgment of the merits, and "second guessing" every aspect of the panel's decision.*
- *Principle #4: S. 16 should ensure that the procedures for presentation of briefs and oral argument to the Commission are fair and balanced.*
- *Principle #5: In order for the Commission to function effectively, participation of appellate judges is important.*
- *Principle #6: USTR should make the WTO dispute settlement process as transparent and open as possible, and consult meaningfully with U.S. private interests and utilize the expertise and additional resources that they can bring to the proceeding. However, the U.S. private sector should not have an absolute, guaranteed right to participate in WTO consultations and panel proceedings. The U.S. Government needs to be able to act efficiently and speak with one voice in dispute settlement proceedings. That objective would be undermined if private parties were to have a guaranteed right to a seat at the negotiating table.*

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<sup>1</sup>Mr. Holmer is a partner in the law firm Sidley & Austin. He previously served as Deputy U.S. Trade Representative (1987-89), General Counsel to USTR (1985-87), Deputy Assistant Secretary of Commerce for Import Administration (1983-85), Deputy Assistant to the President for Intergovernmental Affairs, and Administrative Assistant to Senator Bob Packwood (1972-78). The views expressed herein are solely those of Mr. Holmer, and not necessarily those of his firm or any of its clients.

By following these six principles, I am confident the Committee can produce a bill that will fortify and promote a fair and equitable WTO dispute settlement process.

Mr. Chairman, it is a privilege to appear before this committee today in support of S. 16, the WTO Dispute Settlement Review Commission Act. The author of S. 16, Senator Dole, deserves congratulations for his vision and leadership. By addressing widespread congressional concerns about a perceived loss of U.S. sovereignty to WTO governance, Senator Dole broke the logjam in the Senate late last year on the extremely important Uruguay Round Agreements Act.

I urge this committee and the Congress to approve S. 16 with minor modifications. I believe the enactment of S. 16, with the changes described below, will have a positive impact on the WTO dispute settlement process. It will cause WTO panels generally to redouble their efforts to ensure that the process is fair, balanced, and transparent, and that the substantive rulings are supported in the law. It will ensure that panelists do not attempt to expand international rules into areas or in ways that were not previously negotiated in Geneva. While panelists will not be deterred from ruling against the U.S. when the law and facts require such a ruling, I believe panelists will be even more careful so that they cannot be accused, with justification, of exceeding or abusing their authority.

In addition, a series of negative determinations by the Commission—finding that a WTO panel ruling adverse to the United States has not demonstrably exceeded its authority or acted arbitrarily—will bolster U.S. confidence in the WTO dispute settlement process and thus help strengthen the WTO. A negative determination by the U.S. Review Commission will help lay to rest any complaints by a losing U.S. interested party that its loss was unjust.

In your consideration of S. 16, I urge you to keep in mind the following six principles:

- *Principle #1: No country has more to gain from a dispute settlement process that works than the United States, the world's largest exporter. Senator Baucus was right in the mid-1990's to complain that the GATT too often was the "Gentlemen's Agreement to Talk and Talk." This Committee was equally correct in the 1988 trade bill to place an effective dispute settlement system at the top of the list of our Uruguay Round negotiating objectives. Now that we have succeeded in achieving that goal, we should not be afraid of our victory. Rather, we should embrace a system based on enforceable rules of law.*
- *Principle #2: The bill should be consistent with the Uruguay Round agreements, other U.S. international obligations, and the Constitution.*

For example, U.S. negotiators in the Uruguay Round were successful in obtaining a narrow standard of review for panels reviewing antidumping decisions (Article 17.6 of the Antidumping Agreement). However, there is a difference of opinion as to whether this narrow standard of review also applies to countervailing duty decisions. Despite this ambiguity, section 4 of S. 16 would unilaterally apply the antidumping standard of review to countervailing duty and other unfair trade remedy cases.

If the Congress wishes to establish, through S. 16, an impartial and unbiased review process, it should ensure that the Commission is asked to apply WTO rules as they were negotiated in Geneva, not as those rules may be unilaterally (and perhaps incorrectly) interpreted by some in the United States. In other words, let the judges on the Dole Commission offer their fair, impartial judgment based on the standard of review established in the WTO agreement concerned, rather than a standard established by the U.S.

The Committee may also wish to review independently the argument that the decision whether to withdraw from the WTO falls within the President's constitutional authority to conduct the foreign affairs of the U.S. Other alternatives to express congressional displeasure are unquestionably available to the Congress, such as declining to appropriate funds for WTO participation, or repealing U.S. statutory provisions implementing the Uruguay Round agreement, but arguably the Congress may not directly mandate U.S. withdrawal from the WTO.

- *Principle #3: The bill should establish a fair and workable standard of review for the Commission.*

The basic elements of this review standard are already contained in S. 16. The Commission should not be given a broad or ambiguous grant of authority to conduct trials de novo. It should give appropriate deference to panel decisions, and focus on whether a panel acted arbitrarily or capriciously, demonstrably exceeded its authority or terms of reference, deviated fundamentally from the prescribed procedures or misapplied the applicable standard of review. The Commission should not be empowered or required to start from scratch and form its own judgment of the merits, "second guessing" every aspect of the panel's decision.



- *Principle #4: S. 16 should ensure that the procedures for presentation of briefs and oral argument to the Commission are fair and balanced.*

You will want to devise a system so that the Commission is not compelled to make a decision on the basis of a one-sided record.

- *Principle #5: In order for the Commission to function effectively, participation of appellate judges is important.*

I am sensitive to the concerns of the Judicial Conference with respect to the drain on the federal judiciary's already scarce resources. Nonetheless, if the Dole Commission is to function effectively, I see no alternative to having federal judges assume this responsibility.

International trade lawyers or academics would not be perceived as bringing the necessary neutrality or experience (particularly in applying standards of review) to the task. They could be subject to significant political pressures. In my view, the importance of the Dole Commission merits the use of our federal appellate judges.

- *Principle # 6: USTR should make the WTO dispute settlement process as transparent and open as possible, and consult meaningfully with U.S. private interests and use the expertise and additional resources that they can bring to the proceeding. However, the U.S. private sector should not have an absolute, guaranteed right to participate in WTO consultations and panel proceedings.*

Section 7 of S. 16 includes two separate concepts: (1) achieving a transparent and effective consultation process between U.S. Government litigators and the U.S. private sector and (2) requiring that U.S. private interests be guaranteed the opportunity to participate in WTO consultations and panel proceedings.

I wholeheartedly endorse the first goal. USTR lawyers and affected parties from the private sector should work together hand-in-glove to review the case, prepare the strategy, briefs and arguments, and respond to arguments presented by other member countries. The expertise and resources of the U.S. private sector can add greatly to the quality and effectiveness of the U.S. litigation team. This is the way the process worked when I was general counsel at USTR, and I understand it remains so today. Section 127 of the Uruguay Round Agreements Act is intended to further this result, and the Committee may also wish to review the recommendations on this subject from the April, 1995 report of the Advisory Committee on Trade Policy and Negotiations.

Private parties should also have access to dispute settlement documents to the maximum extent permitted by WTO rules. If the rules do not permit adequate disclosure, USTR should seek to negotiate in Geneva improved rules for transparency.

However, while I support the concept of increased transparency and improved coordination, I oppose the notion of requiring a seat at the WTO litigation table for U.S. private parties. In my view, this requirement is unwise, and is not at all central to the work of the Commission or a credible WTO dispute settlement process.

In dispute settlement, the U.S. Government needs to be able to act efficiently and speak with one voice. This is not a mere theoretical issue. Some WTO cases will involve issues having a direct economic impact on dozens of U.S. industries, trade associations, or companies. Will each of them have the right to represent the interests of the United States before the panel? What if, while supporting the overall U.S. Government position, their view of the law or facts is different from that of the U.S.G.? Moreover, inevitably there will be differences in strategic approaches to cases, particularly where the "best" U.S. legal argument in one case may have a detrimental impact on U.S. interests in another case.

The role of the Administration in dispute settlement proceedings is not to represent one company or interest group. Rather, its role is to represent the national interest.

If USTR wishes to permit a private party to participate in a WTO dispute settlement proceeding, fine. But USTR must remain in control of the case made on behalf of the U.S. Therefore, in my view, the Finance Committee should stop short of mandating a seat at the litigation table for U.S. private parties.

Mr. Chairman, I do not want my reservations on portions of section 7 to detract from the overall thrust of my testimony or the fundamental thrust of S. 16—which will be good for WTO dispute settlement and good for U.S. economic interests. By following the principles I have outlined today, I am confident the Committee can produce a bill that will fortify and promote a fair and equitable WTO dispute settlement process. Senator Dole's introduction of S. 16 has already put you well on the way toward that goal.

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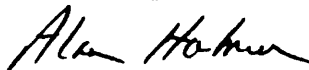
The Honorable Rob Packwood  
 Chairman  
 Committee on Finance  
 United States Senate  
 Washington, D.C. 20510

Dear Mr. Chairman:

I appreciated the opportunity to testify before the Committee on Finance this morning on S. 16, which would establish a commission to review panel decisions of the World Trade Organization adverse to the United States. For the reasons I explained, I believe the enactment of S. 16 would have many benefits.

In the course of the hearing, the panel was asked questions beyond the immediate subject of the hearing, regarding a likely U.S. challenge in the WTO to Japanese automotive-related practices. I answered those questions on the spot, expressing my personal opinions. On reflection, I wish to inform the Committee that my law firm serves as trade counsel to Nissan North America, among many other clients who are American producers and importers and foreign producers and exporters. While I was not speaking on any client's behalf, and was not prepared to address issues beyond S. 16, I am disclosing the fact of this relationship to avoid any misunderstanding and to enable the Committee to weigh my personal opinions in light of this relationship. You may wish to include this letter in the hearing record.

Sincerely,



Alan F. Holmer

## PREPARED STATEMENT OF JERRY R. JUNKINS

Mr. Chairman and members of the Committee, I am Jerry R. Junkins, Chairman, President and Chief Executive Officer of Texas Instruments. I am appearing today on behalf of the Alliance for GATT NOW and The Business Roundtable. Thank you for giving me this opportunity to speak to you today. Before addressing the specific issue of S. 16, the WTO Dispute Settlement Review Commission Act, I would like to comment on the critical importance of international trade and investment to the United States and its companies, workers, farmers, and consumers.

It seems that every time I open the newspaper, turn on the radio or switch on the television, someone is talking about the Internet, the Global Information Infrastructure or the Networked Society. What all this talk of the Networked Society says to me is that we are living in an interdependent world. Technology has linked us to our neighbors in this country and around the world.

A similar pattern of increasing linkage is taking place in the international trade and investment arena. Our own company, Texas Instruments (TI), invests substantially around the world. In Taiwan, for example, investment by TI and other multinational companies made it possible for that country to develop its economy and become a major market for U.S. exports. Last year, U.S. exports to Taiwan were about the size of U.S. exports to Germany, and Taiwan consumed more semiconductors than all of China and the former Soviet Union combined. This is a win-win situation for the United States, since this interdependence results in increased sales for American companies and, therefore, in the creation of jobs at home.

Expanding world markets bring expanded opportunities for U.S. companies, but also increased demands for participation in the global trade community. The United States seems to be at a crossroads. The Cold War is over, and our pursuit of free market reforms around the world has met with stunning success. Our national economy remains fundamentally strong. However, despite these positive realities, there seems to be some question about whether we as a nation should continue to aggressively pursue trade and investment liberalization around the world. The answer should be a resounding yes, and both the public sector and the private sector should work together to expand trade and investment opportunities around the world.

INTERNATIONAL TRADE AND INVESTMENT ARE CRITICAL TO THE HEALTH OF THE U.S.  
ECONOMY

The U.S. economy, and U.S. business, have become internationalized. This is a fact of life that we can not, and should not, run from, but rather must embrace. There are those who enthusiastically recognize the nature of today's global economy and the exciting opportunities it presents. Others may seek to hide from the global economy. But we can't run from the reality of globalization, and we can't afford to turn our backs on major opportunities.

*We are no longer an isolated economy functioning (or capable of functioning) without significant interaction with other economies.*

Since the end of World War II, the importance of international trade to the U.S. economy has grown exponentially. The United States is the world's largest exporter, with \$717 billion in exports of goods and services in 1994, accounting for 10.7 percent of overall GDP. From 1986 through 1993, exports of goods and services accounted for an astounding 37 percent of total U.S. economic growth. In absolute terms, total trade accounted for \$1.9 trillion in business activity in 1994.

Trade is increasingly important for the world at large as well. In the last year alone, global trade in goods rose 9 percent in volume and 12 percent in value, to over \$4 trillion. Compare this to the 3.5 percent rise in world goods production. Moreover, world services trade in 1994 has been estimated at \$1.1 trillion.

While some may yearn for simpler days, there is no real way to now unhook the U.S. economy, or any national economy, from the larger global economy.

*Trade is good for the economy, good for business, good for farmers, good for workers, and good for consumers.*

We have no reason to attempt the impossible and try to hide from the global economy, because it presents enormous, unprecedented opportunities for our nation. I've already mentioned how important exports are to the U.S. economy. This importance continues to increase. In 1994 alone, U.S. goods and services exports grew at an annual nominal rate of 8.1 percent. Merchandise exports grew at a real annual rate of 11 percent, and as for some individual market sectors, consumer goods exports grew at an annual rate of 9.4 percent, and exports of autos and auto parts grew at 8 percent. These growth rates were far higher than the rate of growth for the economy as a whole, which was about 4 percent.

These exports mean huge amounts of money and jobs for the U.S. economy. There are now approximately 11 million U.S. jobs directly created by exports of goods and services; there are about 5 million jobs indirectly supported by exports. Moreover, the number of jobs directly supported by exports has risen 5 times faster than overall jobs in the U.S. economy.

These jobs created by exports pay, on average, higher wages than the average U.S. wage—for example, jobs directly created by goods exports pay 18 percent higher than the average U.S. wage. Moreover, a significant majority of export growth is in high-wage sectors. Of the \$65 billion increase in U.S. exports in the last two years, \$15.5 billion was in electrical machinery, \$8.4 billion in road vehicles, \$4.8 billion in telecommunications equipment, \$4.4 billion in computers, and \$3.6 billion in general industrial machinery. These are the kinds of jobs this country needs to create for its workers.

Here are some examples of how important trade is for leading sectors of the U.S. economy:

Industry	Exports as Percentage of Shipments (1993)
Computer equipment .....	43.3%
Aerospace equipment .....	32.8%
Entertainment .....	26.2%
Telecommunications equipment .....	25.7%
Electronic components & equipment .....	23.6%
Plastics & rubber .....	22.5%
Personal consumer durables .....	18.6%

Exports are also key for our farmers. Thirty percent of harvested acreage in the United States is destined for export markets; a third of all U.S. farmers' cash receipts come from export sales. U.S. agriculture sector exports were \$50.8 billion in 1993.

And exports just keep growing for important U.S. industries. For example, from 1991 to 1994, exports of semiconductors were up 32 percent, machine tools, 22 percent, and telecommunications equipment, 21 percent. Over the past five years, exports of medical equipment grew an average of 14 percent a year, and exports of motor vehicles grew an average 11 percent a year.

Trade obviously benefits the company that sells goods or services abroad. But trade also has a tremendous beneficial ripple effect in communities and throughout the U.S. economy. Trade benefits suppliers, especially the numerous small and medium sized companies, whose goods are either incorporated into exports or whose goods and services directly support the operations of U.S. exporters. Trade benefits numerous service providers, such as insurance companies and banks that finance an exporting company's activities. The benefits ripple throughout the local community, to the restaurants, stores, and other establishments near manufacturing facilities.

In many instances, those who are benefiting from trade have no idea this is happening. For example, many workers, especially in the smaller and medium sized subcontractors, don't realize that the fruits of their labor are destined for overseas markets, and that exports are responsible for a sizable chunk of their paychecks.

Thus, exports are central to the overall health of our economy. The strength of U.S. exports has spearheaded the economy's growth. It has created high-wage jobs. And it will continue to do so.

Imports have their place, too. They give consumers a greater choice of goods and services, and provide them with goods and services not readily available from U.S. sources. Imports are often needed as inputs into further manufacturing, which facilitate U.S. production and make it more competitive, and hence create more U.S. jobs. Moreover, imports encourage competition and innovation. Walling off producers from competition often results in bloated, inefficient enterprises. This does not benefit anyone—not the company, not its workers, not consumers, and not the nation.

The fact is that the United States is highly competitive in many areas including: semiconductors, computers, computer software (in which the United States has 75 percent of the world market), aerospace equipment, construction equipment, telecommunications equipment and services, financial services, information services (in which the United States has 46 percent of the world market), and entertainment.

These are the technologies of today—and of tomorrow. We must not be afraid to leap wholeheartedly into the opportunities presented by the international marketplace.

*A free flow of investment is just as important as a free flow of goods and services.*

Not only is trade good for the United States—international investment is important, too. Far too often, public debate on this issue is shaped by ill-informed and irresponsible rhetoric suggesting that any investment involving a foreign country must be bad. The facts quickly demonstrate how critical foreign investment is for the U.S. economy and for U.S. workers.

First of all, we must recognize that the primary goal of foreign investment is the desire to serve the consumers in the country or region in which the investment occurs, not to find cheap labor or other inputs. Customers, be they users of intermediate goods in their own production operations or end users, demand prompt and reliable service from their suppliers. It is frequently difficult to meet those demands from thousands of miles away in the United States. Customers sometimes need or want to receive their goods from nearby manufacturing facilities. Proximity is even more important for services, of course. Consumers expect their banks, telephone companies, and professionals to be nearby.

In fact, foreign investment by U.S. companies is concentrated in developed countries. If foreign investment were motivated by a search for low cost inputs, developing countries would be the predominant location for foreign investment. But developing countries accounted for less than 22% of worldwide stocks of foreign direct investment in 1992.

Companies are also frequently forced to produce in other countries in order to jump over trade barriers. If we continue aggressively to tear down these barriers, this impetus will be removed. Moreover, overseas investments are often needed to keep U.S. companies competitive. Foreign investment allows companies to enjoy greater economies of scale and scope, and access to important foreign technologies.

It is especially critical to recognize that exports follow investment. From 1982-1990, the growth in exports to affiliates of U.S. multinationals exceeded the growth in exports to unaffiliated foreigners by \$14 billion. There is also a direct positive relationship between U.S. direct manufacturing investment in a country and the likelihood of a U.S. merchandise trade surplus with that country. Moreover, U.S. multinationals' foreign manufacturing investments are not predominantly made to produce goods to send back to the United States—excluding Canada, only 7.2 percent of sales in 1990 by U.S. foreign manufacturing affiliates were exports to the United States.

U.S. multinationals' net return on foreign investments has been consistently positive, amounting to \$48 billion in 1992 alone. In fact, this net return has been the single largest positive contribution to the United States' balance of payments.

Inward investment is good for the United States, too. Foreign-owned companies operating in the United States make important contributions to the nation's economic strength and health and create U.S. jobs. U.S. subsidiaries of foreign-owned companies accounted for 4.7 million U.S. jobs in 1990, and about 10 percent of U.S. manufacturing jobs. Foreign investors in the United States accounted for \$91 billion of U.S. exports in 1990. Foreign investors bring funds that enable U.S. companies to expand. They also bring manufacturing know-how and other technology. We should recognize that we operate in a global economy, and welcome the jobs and other benefits of investment from sources outside our country.

*Liberalized trade and investment simply means getting governments, both at home and abroad, out of people's economic affairs and letting free markets work efficiently.*

The voters have sent a message that they want the government to reduce the level of intervention in their day-to-day lives. They would prefer that markets, not government agencies, make economic decisions. Those of us who believe in markets as the best decision-making mechanism for the economy can immediately see the need for trade and investment liberalization. Barriers to trade and investment impede growth, reduce choice, and result in higher prices, lower quality goods and services for consumers, and fewer jobs. That is why a mainstream consumer group like Consumers Union has generally supported trade liberalization. Artificial isolation from healthy and fair competition results in inefficiency and waste. Governments around the world have recognized these realities, and have been steadily reducing barriers to trade and investment.

*The nay-sayers are wrong—trade is not to blame for the economic problems some perceive in our nation.*

Many arguments have been raised against trade and investment liberalization. These arguments, on close examination, don't hold much water.

One argument is that trade is bad because it costs U.S. jobs. It is true that some jobs are displaced by imports. However, trade involves a trade-off—the gradual shift of jobs from low-productivity, low-competitiveness, low-wage jobs to high-productivity, high-competitiveness, high-wage jobs. Yet far more jobs are shifted because of other factors, most significantly technological change. All these types of job shifts are inevitable. You cannot hide from these realities.

There are always advocates of imposing trade barriers to “protect” jobs. Unless we are willing to reconsider the failed theories of isolated and planned economies, we know that jobs are created by the reality of the marketplace. You cannot permanently freeze jobs into the economy if the realities of technology and competition mandate otherwise. Moreover, I have already described how U.S. jobs are created by exports. We cannot effectively promote export growth and open markets abroad if we close our own markets.

I am not underrating the real effects of job loss for individuals. I simply do not believe that trying to freeze our economy in the face of reality is in the interest of this or future generations of workers. Our work force is one of the most diversified and highly educated in the world, and as a very large and flexible economy, we have the ability to absorb workers into productive and well-paying jobs. Protectionism is not the way to help our workers, our citizens, nor our economy. What we need to do is keep our economy dynamic and open, and promote good, solid, effective training and education to help workers adapt to change.

We are committed to continue working with Congress and the Administration to develop and implement appropriate governmental education and training programs. We are on record in support of a comprehensive national worker assistance and retraining program and in support of programs to improve the U.S. education system, starting with pre-school children. We support these types of initiatives because in a world of increasing technological innovation, companies must be able to rely on a steady flow of educated, trained, and skilled scientists, technicians, and workers.

Some have pointed to the U.S. trade deficit as evidence that trade is bad for the United States. Actually, we have a trade deficit because we consume more than we produce. The rest of the world provides us with what we demand, so we run a deficit. Also, in the last few years, we have been growing rapidly while our trading partners are mired in recession, so we temporarily import more and export less. The federal trade deficit doesn't help, either. We must also realize that a large portion of our trade deficit consists of petroleum imports, which is not a job-displacing commodity. Another huge chunk is our auto and auto parts deficit with Japan, which is due to special, unique bilateral problems.

When discussing the trade deficit, we should be addressing the low savings rate in the United States, and the high federal budget deficit, not imports. If we can lick these problems, we will have gone a long way to improving the U.S. economy, and the trade deficit will fall in line. Resorting to isolationism and protectionism to “solve” the trade deficit problem will not help the economy.

There are also those who argue that international investment is bad. The data I presented above amply refute this argument. The United States is endowed with numerous advantages which make it an attractive place for U.S. companies and foreign companies, including a highly productive and well-educated work force, state of the art communications networks and computer systems, technologically advanced production facilities, a well-developed transportation infrastructure, and stable and sophisticated legal and financial systems. If low wages were the main determinant of investment decisions and manufacturing strength, Haiti and Bangladesh would be economic leaders, not the U.S., Germany, and Japan.

To those who would try to shut the United States off from the world economy, I would point to the experience of the Smoot-Hawley tariff of the 1930s. The United States, in a misguided effort to protect its market, helped spark a worldwide shoving match of protectionism and isolationism, which has been credited with deepening the worldwide depression.

I would also point to the recent trade liberalization undertaken by many developing countries. After years of failed attempts to improve their economies through protectionism, they are converting to the open market, capitalist philosophy and experiencing the highest growth rates in the world. The results have been phenomenally positive. For example, the Argentine GDP has grown at an annual rate between 6.0 and 8.7 percent after the liberalization policies of the current government began to take hold. In all of these countries, people are finding that opening markets, including dropping trade barriers, improves the national economy and the standard of living. It would be ironic for us now to repudiate our own counsel regarding free, open markets after seeing how well it has worked in these newly opened economies.

*Constant trade and investment liberalization are needed to improve prospects for U.S. companies and their workers.*

The goal of the government and the private sector is, and should be, to expand the U.S. economy and to create jobs for our workers. To accomplish this goal, it is critical that we open and expand foreign markets so we can boost U.S. exports. Congress, the Administration, and the business community, working together, have accomplished a lot towards this goal in the recent past. Most significantly, in just the last two years, the United States put into effect the NAFTA and the Uruguay Round, and negotiated numerous bilateral trade and investment agreements. All these accomplishments have gone far in opening foreign markets to U.S. goods and investment.

However, we cannot stop here. In my industry, if you stop investing in the future, you run the serious risk of falling behind. Trade and investment liberalization is the same—an ongoing process in which the United States must invest. If we are not in the vanguard of liberalization, we risk falling behind other countries, which are pursuing their own liberalization agendas. Moreover, continued efforts are needed to open up markets in developing countries, markets that will present huge opportunities for this country in the years to come. And lastly, despite recent improvements in world trade rules, trade and investment barriers remain, and new ones may always be erected. That is why it is critical that we aggressively pursue trade and investment liberalization initiatives, such as those taking shape in the Asia-Pacific Region and in Latin America.

Growth in the developing world presents especially important opportunities for U.S. companies and their workers. Developing countries, particularly in Asia and Latin America, lead the world in GDP growth, have steadily increasing middle classes demanding consumer goods, and have high demand for goods and services, especially those needed for infrastructure improvement. The Commerce Department estimates that of the \$2 trillion increase in global imports expected in all countries except the United States between now and 2010, 75 percent will occur in developing countries and former centrally planned economies.

Developing countries have a particularly strong demand for products and services for which U.S. companies are highly competitive providers. Examples are capital goods and equipment; high technology equipment and services; and goods and services needed for improvement of infrastructure such as transportation, construction, telecommunications, and environmental protection. Moreover, development builds demand for consumer goods and services, again an area of U.S. predominance. By the year 2010, China, India and Indonesia combined will have an estimated 700 million people with annual income equal to that of Spain today. The opportunities for the United States are, frankly, mind-boggling.

We are already seeing significant benefits from these markets. Over 40 percent of U.S. exports now go to the developing world; U.S. exports to Asia (excluding Japan) and Latin America have grown much more rapidly over the last decade than our exports to our major developed country trade partners. In 1994, for example, U.S. exports to developing countries grew at an annual rate of 11.5 percent. Growth of developing country economies and U.S. exports to those countries are predicted to continue rising dramatically.

We need markets, developing and developed alike, to be open to our goods, services, and investment. Although the trend has been positive, we cannot guarantee economic liberalization will continue without our encouragement, and backsliding is always possible.

Moreover, the world will not wait for us, as many countries are pursuing trade and investment liberalization agreements that could leave the United States out in the cold. Already, there are overlapping trade agreements in Latin America that do not include the United States. Some Asian nations have been discussing a trade grouping that would exclude the United States. The European Union has been exploring trade agreements with Latin American nations. In order to ensure that our trading partners don't implement agreements and regimes detrimental to our interests, we must remain engaged, and maintain the leadership role we have exercised so successfully these many years. This is not a burden for the United States. It is an unparalleled opportunity to shape post-Cold War economic relationships in our interests.

The U.S. population is only four percent of the world population. If we ignore foreign markets, and do not actively pursue liberalization abroad, we risk putting our companies and workers at a disadvantage in competing for the huge prizes for success in the world marketplace, selling merchandise to the other 96 percent of the world's population. We cannot afford to do that.

And let's not forget that economic liberalization abroad benefits the liberalizing country itself, as well as global stability in general. Developing countries around the

world have recognized the benefits of liberalization. They have, to varying degrees, abandoned statist, protectionist strategies in favor of openness. The result has been an economic boom. This in turn promotes creation of a middle class, which, along with openness to the rest of the world, promotes democracy and economic and political stability. Thus, economic liberalization advances important U.S. non-economic goals. And, in pure self-interest, we should note that these effects in turn boost the market for U.S. exports.

We recognize that there are many important domestic issues on the national agenda. We are as committed as you are to move aggressively on these issues. Nevertheless, the United States cannot afford to lose sight of the fundamental importance of international trade and investment to the health of the U.S. economy and its continued strength in the future. We are committed to making the extra effort with you to keep international initiatives high on the national agenda.

#### S. 16—THE WTO DISPUTE SETTLEMENT REVIEW COMMISSION ACT

The passage last year of legislation implementing the Uruguay Round was a recognition of the benefits to the U.S. economy of international trade. Now the World Trade Organization (WTO) the Round created and the new rules have to prove themselves. Dispute settlement needs to be both fair and effective in practice, not just in theory.

As I alluded to earlier, the Uruguay Round Agreement ushers in a new and promising era for U.S. and world economic growth. Among the principal objectives of the United States in the Uruguay Round was the negotiation of a more effective dispute settlement process. In the 1988 Omnibus Trade Act, the Congress directed U.S. negotiators to negotiate "more effective and expeditious dispute settlement mechanisms and procedures" that "enable better enforcement of United States rights." After seven years of negotiations under the direction of Presidents Reagan, Bush, and Clinton, the members of the GATT agreed to new dispute settlement procedures in the Uruguay Round.

The World Trade Organization's new dispute settlement process presents opportunities as well as risks. When he introduced S. 16, the "WTO Dispute Settlement Review Commission Act," Senator Dole recognized these opportunities and said:

Make no mistake, the future of the World Trading System depends on this new dispute settlement process being used prudently and administered wisely. . . . Therefore, we must do what we can with the Agreement that was negotiated, and make a good faith effort to make it work well, to further international trade and American commercial interests.

We agree with Senator Dole. We support the concept of a U.S. commission to review WTO dispute settlement decisions. We believe that such a commission, if properly and fairly implemented, will be a constructive means for monitoring the integrity and fairness of WTO dispute settlement procedures. Indeed, the mere existence of a U.S. review commission would put the WTO on notice that its decisions are being closely watched. This should lead to fairer proceedings and more careful decision-making by the dispute settlement panels. Good decisions will be good for world trade, and they will promote public confidence in the WTO.

The Commission would have an additional role. Its views would get attention. They would affect public discussion. Under these circumstances, it is very important that, in appointing members and monitoring the operations of the Commission, the Administration and the Congress do everything possible to ensure that it is non-political and qualified to give the public and Congress an objective, thorough and informed assessment of WTO dispute settlement.

Commissioners should have knowledge of international trade law and must be willing to invest the time to do this important job properly. The U.S. Trade Representative should keep the Commissioners informed of developments at the WTO. Specifically, USTR should evaluate and report to the Commission on all dispute settlement decisions, including those in favor of the U.S. and those involving other countries. This will help the Commission and the public to put any decision against the U.S. in the proper context.

During consideration of the Uruguay Round, the Congress also recognized that international trade issues and disputes will become much more complex. They will, for example, involve complicated business and technical issues that call for special expertise. Such expertise is most readily available from the private sector, and especially from interested parties to the dispute. Limits on government resources will also require the government to rely more on the knowledge and expertise of non-government interested parties when dealing with trade disputes. The drastically shortened time limits incorporated into the WTO dispute settlement process will compound these developments and reinforce the need for outside expert advice.



As a result, in the Uruguay Round implementing legislation, the Congress requires, in all cases where the United States is a party to a WTO dispute, the USTR at each stage of proceedings to, for example: consult with petitioners (if any) under section 302(a) and private sector advisory committees under Section 135 of the 1974 Trade Act; consider the views of appropriate interested private sector and non-governmental organizations; and notify the public through a Federal Register notice of proceedings, and solicit written inputs. In preparing the actual U.S. submissions to a dispute panel or Appellate Body, USTR is also required to take into account the advisory committee recommendations and written public comments provided in response to the Federal Register notice. These requirements supplement other consultation provisions of U.S. trade law.

Senator Dole also correctly recognized the need for additional improvements in consultations between the U.S. Trade Representative and interested parties in the United States during a WTO dispute, so that USTR is provided with the best private sector expertise. He included in S. 16 a provision (Section 7) that would give certain interested U.S. private parties the rights, among others, (1) to participate in WTO consultation and panel proceedings, and (2) to appear before the WTO panel.

In a recent report, the President's Advisory Committee on Trade Policy and Negotiations (ACTPN) noted that the Uruguay Round implementing legislation was a good start in improving consultation with the private sector. The ACTPN, sharing concerns about the demands the new WTO dispute settlement process will place on the quality of the USTR advocacy efforts, the public's view on the value of the WTO, and on the government's ability to pursue and defend critical U.S. trade interests, made very specific recommendations on how to carry out the Congress' mandate for improved transparency and consultation in the United States with respect to WTO disputes.

The ACTPN's comprehensive recommendations are as follows:

1. Establish at USTR a basic document register and a dispute settlement central docket system so that interested persons can determine the status, location and responsible WTO officials, U.S. officials and officials of other WTO members involved in any WTO dispute.

2. Establish at USTR a central information clearinghouse and a system for sending out notices and publishing procedures for receiving input from non-governmental parties.

3. Establish a procedure for identifying U.S. candidates for panelists (both at dispute settlement and the appellate level) for the "indicative list" (Article 8.4 of Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes).

4. Maintain at USTR a public file of potential panel members (e.g., the indicative list). USTR also should encourage the Secretariat to make public the indicative list.

5. When a panel consults an expert, USTR should include information on the expert's credentials in a public file.

6. USTR should publish information on implementation of panel and Appellate Body reports, including withdrawal of a trade measure by an offending country, suspension of benefits, and retaliation. This information also should be included in the USTR docket room.

7. Upon initiation of dispute proceedings, USTR should publish a notice in the Federal Register. Pursuant to the notice interested parties would have a certain number of days to identify themselves and to designate a contact. Each interested party should be given the opportunity to submit comments to USTR prior to USTR's filing of submissions with the WTO. One possible method would be to establish a group of contacts who would have the opportunity to review and comment within a specific time frame on any proposed submissions. These contacts would have to be allowed timely access to the public summaries of other parties and U.S. confidential information.

8. The USTR should review very carefully its processes and procedures to protect the confidentiality of proprietary and confidential business information not only in the domestic consultation process, but in the WTO processes as well.

9. The U.S. should also encourage other WTO members to open their national procedures to facilitate their own private sectors' participation in the WTO dispute settlement process.

We share the concerns of Congress, Senator Dole, and the ACTPN. We believe that the ACTPN proposals incorporate and expand upon the concepts set forth in the Uruguay Round implementing legislation and Section 7 of S. 16, and that the ACTPN proposals would actually be more effective than Section 7 of S. 16.

In the first place, they establish a comprehensive notification system and data base for all interested parties. Secondly, they avoid the problem of forcing the USTR to determine, for example, who should have access to information, who should be consulted, and who shall be included as an advisory member of the delegation for the purpose of attending and participating in sessions of a dispute settlement panel. These are grants of extraordinary status and power. Requiring the USTR to make these special and difficult decisions is more than likely only going to complicate and compound WTO disputes by adding to them a domestic dispute over who should be the chosen ones. Setting up a process by which all interested parties can access information and have their say is more fair and lets the USTR focus on the substance of the WTO dispute.

It also does not serve the best interests of the United States to have a hydra-headed U.S. delegation. WTO disputes will generally involve multiple issues. As a consequence, it is highly likely there will be differences of opinion between the U.S. government and private parties on questions of emphasis, approach, and strategy. These differences, even if they are subtle, would infect the U.S. delegation and thus handicap the forceful advocacy of the U.S. position. Our government needs to speak with one official voice. To the extent there are differences between interested U.S. private parties and the U.S. government, they are best debated and resolved here. The ACTPN recommendations to strengthen consultations in the United States with respect to WTO disputes permit an opportunity for constructive value-added by private parties as well as a process for addressing and resolving differences of opinion in a manner that is more effective, fairer, and less disruptive.

Moreover, the ACTPN recommendations avoid what are, upon reflection, substantial practical problems. These include, for example, how many interested U.S. parties should be included as members of the U.S. delegation, what does "supportive of the United States Government's position mean (e.g., does it require agreement with all the government positions in the dispute?), what happens if the U.S. government changes its position and a designated person does not agree with the change, and what happens if the designated person represents a group of U.S. interested parties and some or all of those parties want the person removed from the U.S. delegation. I could continue identifying significant practical problems, but I think these suffice in demonstrating some of the drawbacks inherent in Section 7. Under these circumstances, Section 7 should be revised to incorporate the ACTPN's recommendations.

#### CONCLUSION

It is clear that economic isolation is not a viable choice for our nation. If we retreat from the world marketplace in the name of independence of action, the likely result will be a shrinking economy, shrinking standards of living for Americans and the risk that the U.S. will drop from its leadership position to last in line. The reality is that the world is increasingly and unavoidably *interdependent*. The question we should be asking, therefore, is not "how can we avoid engaging with the world," but "how can we structure our economic interdependence to benefit Americans and safeguard the interests of the American people." Enactment of S. 16, with our proposed changes, is an important part of the answer.

#### PREPARED STATEMENT OF GEORGE A. SCALISE

Thank you, Mr. Chairman. I appreciate the opportunity to testify before you today in my capacity as Senior Vice President for National Semiconductor Corporation and as Chairman of the Semiconductor Industry Association Public Policy Committee. National Semiconductor has been producing semiconductor products and related technology since 1959. We currently operate nine manufacturing and assembly plants around the globe and employ over 22,800 men and women worldwide. The Semiconductor Industry Association (SIA), which was established in 1977 primarily to address public policy issues that affect the industry's ability to compete internationally, is comprised of 26 U.S.-based chip producers that account for eighty-five percent of all U.S. semiconductor production. Over 214,000 Americans are employed by the semiconductor industry. U.S. semiconductor producers have global annual revenues exceeding \$43 billion—over one quarter of which is reinvested each year in research and development and other capital expenditures. The U.S. electronics industry, which is the major market for our products, is currently the largest employer in the United States. Semiconductors are at the heart of almost all electronic devices, from mainframe computers to household appliances.

I appear before you today, representing a U.S. industry which is highly competitive both at home and in global markets. We are an efficient, outward-looking indus-

try that can compete with any foreign firm in any market. U.S. semiconductor manufacturers hold just over 54 percent of world market share outside of Japan, including a 50 percent share of the European market; half of U.S. producers' sales are overseas. Despite our capabilities, we do rely on America's trade laws. They saved us from extinction in the face of massive foreign dumping and denial of foreign market access in the 80's, and they are helping us achieve success in the 90's.

The issue at hand this morning is one of great economic importance—will the United States, the largest and most open trading nation in the world, be able to effectively use WTO-sanctioned remedies to defend U.S. producers and workers from unfairly-traded imports? Or will the United States be forced to relinquish its access to these vital remedies in the face of foreign pressure? To prevent foreign nations from using the WTO, in particular the WTO dispute settlement system, to attack Section 301 and U.S. antidumping and countervailing duty laws, the Congress must adopt the WTO Dispute Settlement Review Commission Act (S. 16) introduced by Majority Leader Dole in January.

#### DUMPING AND THE U.S. SEMICONDUCTOR INDUSTRY

Before I discuss the merits of S. 16, let me first explain why National Semiconductor and SIA are so concerned about U.S. manufacturers' ability to use the unfair trade laws. In the mid 1980's, U.S. semiconductor producers were the world leaders in semiconductor technology. Yet, despite our competitive position domestically and internationally, large segments of our industry were destroyed because of dumped imports from Japan, most notably DRAMs (Dynamic Random Access Memory). Japanese producers, aided by a protected home market and what I like to refer to as "deep pockets," a vast web of financial and industrial affiliations providing them with great financial resources, drove the price of 64K DRAMs down to an extraordinary \$0.82 per unit—an amount that covered only about one third of their cost of production. From 1984 to 1986, the domestic industry suffered losses close to \$2 billion. Seven out of nine American producers ceased DRAM production, and one producer, Mostek, ceased operations all together. During that same period, Japanese producers lost \$4 billion, but were still able to produce and proceeded to completely dominate the U.S. DRAM market. The U.S. industry filed antidumping petitions to fight back and it was a combination of antidumping relief and market opening achieved through Section 301 that has allowed our industry to rebound. After losing the lead to Japan during the period it was dumping in the United States, we recaptured and have maintained larger market shares than our Japanese counterparts in almost every major market excluding their home market.

For EPROMs (Erasable Programmable, Read-Only Memories), the impact of dumping, while significant, was less severe. While endemic Japanese dumping once again plagued the industry, a suspension agreement reached in 1986 halted excessive dumping of EPROMs before the U.S. industry was completely decimated. Domestic producers were able to regain U.S. market share and eventually secured 60 percent of the world market in EPROMs. As a result of the relief from Japanese dumping, several U.S. firms have become highly competitive in nonvolatile FLASH memories, the next generation of EPROM technology. Without such relief, though, EPROMs would have been dealt the same fate as DRAMs, and many other American firms would have been forced to exit the integrated circuit business entirely.

#### THE SEMICONDUCTOR INDUSTRY SUPPORTED THE GATT URUGUAY ROUND TRADE AGREEMENTS

In November of 1993, when the Dunkel draft was under consideration in Geneva, SIA was deeply concerned that disciplines for unfair trade practices would be severely weakened. Thanks to the tireless efforts of U.S. trade negotiators, the final Uruguay Round Agreement was a significant improvement over the original Dunkel text. However, because of the objections of a number of our trading partners, the ability of U.S. producers to obtain relief from unfairly traded imports has been somewhat limited. The U.S. implementing legislation provided Congress the opportunity to counteract the weakening provisions of the Agreement by strengthening the unfair trade laws to the fullest extent permissible consistent with the new Codes. Although Congress did reject a number of damaging proposals put forth by importers such as the so-called "short-supply" provision, it did not adopt improvements to the Agreement such as narrowing the period allowed for start-up costs.

The semiconductor industry ultimately supported Congressional approval of the Uruguay Round implementing legislation because, on balance, we believed it an important step toward free and open world trade. The legislation provides for improved protection of intellectual property, a marginal reduction of European Union semiconductor and computer parts tariffs, and a general preservation of effective anti-

dumping laws. The key to ensuring that these hard-won gains are sustained lies in an effective WTO dispute settlement system—one that can administer the disciplines and rules agreed to in Geneva in a fair and proper manner.

#### DISPUTE SETTLEMENT AND THE URUGUAY ROUND

One of the United States' major objectives during the Uruguay Round negotiations was to establish a binding dispute settlement system within the new WTO. U.S. industries and agricultural producers, frustrated by foreign policies that restricted their exports, looked to a non-veto system for a guarantee that WTO dispute settlement panel decisions would either be honored or sanctions would be sought. Other nations supported the U.S. initiative, but for different motives. For the most part, they objected to the United States' use of "unilateral measures" to open closed foreign markets and safeguard U.S. industries and workers from dumped and subsidized imports. Many of our trading partners viewed a binding dispute resolution process as a mechanism through which they could attack the U.S. trade laws designed to open foreign markets and provide a remedy against unfairly traded exports to this country.

With this in mind, it is crucial that the enhanced power of the dispute settlement process not be misused by those who manage or participate in it. U.S. industries must be assured that our commercial interests will not be exploited by a group of international bureaucrats. We are all aware that U.S. courts occasionally exceed their interpretive roles and wander into the act of legislating. With America's sovereignty and national commercial interests clearly at stake, we must not permit the WTO dispute settlement body to assume such a role. The future of the WTO ultimately rests on the ability of these panels to administer their responsibilities in a just and impartial manner. In order to ensure that this occurs, Congress should adopt the WTO Dispute Settlement Review Commission Act.

#### SIA SUPPORTS PASSAGE OF THE WTO DISPUTE SETTLEMENT REVIEW COMMISSION ACT

S. 16 establishes a Review Commission, comprised of five Federal appellate judges, to examine WTO panel decisions adverse to the United States. If this judicial review results in a finding that the WTO panel has ruled fairly and within its scope of authority and has applied the proper standard of review, no further action would be taken. If the Review Commission determines that the panel has abused its authority or acted in an arbitrary or capricious manner, it would report that finding to Congress. In such a case, Congress would then have the discretion to either take no further action or it could approve a House and Senate joint resolution requiring the President to enter into negotiations aimed at properly modifying those WTO dispute settlement rules giving rise to the Review Commission's adverse finding. If the Review Commission finds that a WTO panel has ruled improperly or exceeded its authority on three occasions within a five-year period, any Member of Congress may introduce a joint resolution requiring the President to negotiate satisfactory modification of the WTO rules by a specified date or, if such negotiations do not succeed, the Congress could withdraw its support for U.S. participation in the WTO. The United States would withdraw from the WTO only if the joint resolution were enacted and the Administration failed to negotiate a satisfactory modification to the WTO rules.

While it is essential that the United States continue to be a leading champion of world trade liberalization, it is equally important that we are not vulnerable to ill-conceived or nationalistic determinations made by WTO panelists that undermine the integrity and efficacy of our trade laws. The semiconductor industry's experience with foreign unfair trade practices and with U.S. trade remedies, as discussed above, is an ideal case study demonstrating the need to preserve these laws. It is only proper and reasonable that the United States establish a means for fair and impartial review of WTO rulings that potentially have both far-reaching and deep implications for the nation's businesses and economic well-being.

The procedures established under S. 16 are neither unduly harsh nor are they without consequences. They are not too severe since there are a number of safeguards preventing rash, nationalistic judgments that would undermine the ability of the WTO to operate effectively. A panel of independent judges and both houses of Congress must affirmatively determine that a WTO panel has ruled inappropriately. If there is only one instance of abuse, the Administration can resolve the matter simply through negotiation with the WTO. Only if: (1) the Review Commission finds three times that adverse WTO panel decisions are in violation of the principles of the trade agreements; and (2) Congress affirmatively acts; and, (3) negotiations between the United States and other members of the WTO fail, would the United States withdraw from the WTO. During the past five years the number of GATT

cases adverse to the United States has averaged less than two per year. In consideration of that precedential basis, U.S. withdrawal from the WTO under the terms of S. 16 is highly unlikely.

Conversely, however, the Commission and Congressional review process established by S. 16 ensures a vital level of protection for U.S. commercial interests against any potential abuses by WTO panels. It is well understood by all involved parties that the United States' participation in the WTO is essential to that organization's ability to effectively govern in the arena of world trade. It is also well appreciated that Congress' virtually unique role under our system of government to establish the laws and principles guiding U.S. international trade policy makes it an effective overseer of U.S. participation in the WTO. S. 16 provides an effective deterrent to any WTO members who may be tempted to misuse the new dispute settlement system to protect the ability of unfair traders to abuse the international markets. The bill also establishes a fair and orderly means to negotiate appropriate changes to the dispute settlement system—only if such negotiations fail and WTO panel rulings continue to be in violation of the principles of fair and open trade would the United States seek to withdraw from the system.

There are two components of S. 16 that warrant specific consideration. The first is the appointment of sitting Federal judges to serve on the Review Commission. It is vital that the Review Commission be comprised of Federal appellate judges for a number of reasons. First, they are the most qualified candidates for the role. Since their primary judicial function is to review determinations of lower courts and Federal agencies, they are best suited to evaluate a WTO panel's interpretation of the Uruguay Round agreements. In addition, sitting Federal judges will best understand the proper standards of review to be adopted by the WTO panels.

Secondly, sitting Federal judges are best suited to render impartial rulings since, by the very nature of their positions, they must act without conflicts of interests. Former or retired Federal judges often leave the bench for full retirement, in which case they may not be prepared to, or capable of, serving on the Review Commission. Alternatively, they may retire from the Judiciary to return to private practice where they become exposed to a variety of issues on behalf of their clients—it cannot be assured that they would truly remain unbiased or sufficiently independent in such cases.

Finally, the additional casework for the appellate judges as a result of serving on the Review Commission is likely to be modest. As described above, over the past five years the average number of GATT cases decided against the United States amounts to less than two per year. In fact, this number represents a period when litigation against the United States had increased. If one looks back over a longer period, the average drops to less than one case per year. This number of cases could not possibly overburden the judiciary. Moreover, the existence of the Review Commission alone—with its granted authority as described in S. 16—should have the effect of reducing the number of panel decisions requiring the Review Commission's evaluation.

The second component of S. 16 which is of major importance to the semiconductor industry relates to section 7 of the bill. This provision would allow private parties to participate in WTO proceedings to assist the U.S. Government attorneys. Only those parties, however, who support the U.S. Government's position and who have a direct economic interest in the proceeding would be permitted to participate. A private party with developed knowledge of, and expertise in, the unique issues involved in the WTO dispute, would be of great assistance to the Administration when litigating WTO cases. Since USTR is often confronted with limited resources, assistance from private parties would afford U.S. interests the best possible chance of defending their position. Furthermore, for the WTO dispute settlement system to retain legitimacy, its proceedings should not be concealed behind closed doors. If we are truly concerned about the national commercial interest, private American interests should be properly represented throughout the dispute settlement proceedings in an open environment.

#### CONCLUSION

The intent of this legislation is not to allow the United States to arbitrarily decide to withdraw from the WTO anytime a panel decision appears unfavorable to U.S. interests. The true purpose of the WTO Dispute Settlement Review Commission Act is to ensure that the United States, the largest and most open economy in the world, retains its sovereignty as well as its ability to ensure that America's producers are offered the chance to fairly compete in world markets without being subject to unfair foreign competition.

Mr. Chairman, distinguished Members of the Committee, with that I conclude my remarks. I thank you for inviting me to testify this morning and would be happy to answer any questions that you might have.

#### PREPARED STATEMENT OF ALAN WM. WOLFF

Good Morning, Mr. Chairman, Senator Moynihan, and Members of the Committee. I am pleased to be here today to testify in favor of S. 16, the WTO Dispute Settlement Review Commission Act, introduced by Senator Dole.

Mr. Chairman, I have been engaged in the settlement of U.S. trade disputes for the last quarter century. One of my first assignments at the U.S. Treasury Department was to defend the Domestic International Sales Corporation (the DISC) in the GATT. This was promptly followed by the need to defend the U.S. import surcharge in 1971. At the Special Trade Representative's office, as General Counsel and later as Deputy Trade Representative, a significant part of my responsibilities involved defending U.S. interests in the GATT. Since then, I have been in the private sector, during which time I have represented a number of U.S. industries in international trade disputes. My comments today are my personal views, based on my experience both in and out of government.

During last year's debate on the Uruguay Round, I supported the package of agreements reached in December of 1993 and the implementing legislation drafted in this Committee and in the Ways and Means Committee because I believe that, overall, the existence of the World Trade Organization (WTO) serves American interests. This does not mean that there are not justifiable concerns, which I share, about the new WTO dispute settlement system. In particular, I am concerned that by creating a binding dispute settlement system with rigid timetables and automatic adoption of panel reports, we have emphasized litigation over negotiation, conciliation or mediation.

Our negotiators should have begun to recognize that there was something suspect about the U.S. proposal for an automatically binding system when the rest of the parties to the negotiation made an about face and embraced it. They thought that they were curbing America's ability to act under section 301. Our negotiators were thinking primarily of America as complainant, not as a defendant, and we wanted a quick and decisive vindication of our complaints. We failed to appreciate sufficiently the leverage that the United States had been able to bring to bear under the old GATT system, and tilted toward a new one that makes the United States the equal of every other WTO member in a system of binding litigation before WTO panels.

That defect, a swing toward litigation from negotiation, cannot be cured immediately. What we must do at this stage is make sure that the new system that America declared that it wanted and to which our trading partners all too quickly acceded, works well. The credibility of the WTO and of the U.S. trade agreements program depends on it. That is what S. 16, introduced by Senator Dole and co-sponsored by Senator Moynihan and many other Members of this Committee, is all about. I strongly support its early enactment.

#### THE OLD GATT DISPUTE SETTLEMENT SYSTEM

A major negotiating objective of the United States in the Uruguay Round was to "improve" the international dispute settlement system. American trade officials had been frustrated for years by their inability to obtain reforms in the practices of the European Union in agriculture and by EU blockage of adverse GATT panel reports. Coming from a culture and an educational background that epitomizes solving problems through legal recourse, very often through litigation, U.S. negotiators sought to replace the original GATT system of sovereign states using political means to resolve their problems with a mechanical, quasi-judicial system.

In U.S. law schools, American lawyers become indoctrinated with a view that dispute resolution means adjudication and certainty of remedies. International law, however, does not operate by the same rules. As law among distinctly sovereign and theoretically equal entities, international law has developed based upon a slow construction of limited rights and remedies. Unlike domestic law, the Law of Nations is, and it is only, what the community of nations collectively and expressly agree that it is. Treaties and agreements can only bind to the extent that their provisions have been accepted. The nature of international law has led to a distinctly different dispute settlement system. Most international disputes of a political or economic nature, for example, are not tried before the International Court of Justice.

The GATT 1947 system, for example, was intended as a system of conciliation, mediation and arbitration. Dispute settlement through a quasi-adjudicative body

was available, but could be blocked by either party either in its formation or even after a decision had been issued. Thus, even dispute settlement required a "consensus" which included the nation that was on the losing side of a dispute.

It is true that the old GATT dispute settlement system was far from perfect. It could easily be obstructed by a party willing to suffer international criticism. But it did provide a process that encouraged negotiated settlements of many disputes. These settlements often required compromises, but they also permitted U.S. negotiators to use our inherent power as the largest economy in the world to protect our national economic interests. In fact, in spite of its limitations, the old system worked remarkably well. For example, a forthcoming study of GATT dispute settlement from 1948 to 1990 reveals that over 90 percent of panel decisions resolved or partially resolved the dispute to the satisfaction of the winner.<sup>1</sup> What the system could not deliver was a fundamental reform of someone else's economic system—it could not bring about an end to the Common Agricultural Policy nor could it even attempt to make Japan's economy resemble that of Europe or the United States.

#### THE NEW WTO DISPUTE SETTLEMENT SYSTEM

Under the World Trade Organization, as under the old GATT, trade disputes not resolved through consultations between the parties will be submitted to international panels of experts for review. Unlike the old GATT system, however, adoption of panel reports will be automatic (subject on request to a review by an Appellate Body), with the entire process limited within a tight timeframe.

This overemphasis on an expeditious result is understandable, given our frustration with delays under the old system, but it is misguided. In this country, we have never prized the promptness of getting any result—just putting an end to an issue—above getting the correct result. But in Geneva, under the WTO, we decided that what we wanted above all was a quick answer. In order to obtain this, we lost sight of a variety of safeguards. We wanted the panelists to meet promptly and come up with an answer, and while that answer could be subject to review by another panel, it could not be rejected unless all the members of the WTO were unanimous, including the party whose cause had been vindicated, that the panel decision should not stand.

What we have created resembles in some way a judicial process, but may diverge from it in several crucial respects. Let me outline a few problems with this quasi-judicial dispute settlement process.

#### LACK OF SUBSTANTIVE RULES AND DEMOCRATIC INSTITUTIONS

A binding international litigative procedure is unlikely to yield a satisfactory result where there is (1) no clear substantive rule to guide the adjudicators and (2) no effective manner to correct potential adjudicative errors through democratic institutions.

Perhaps the most revolutionary aspect of the entire WTO system is that while it provides procedurally for binding international dispute settlement, in many areas there are no detailed substantive rules. Furthermore, in others areas a consensus on the meaning of particular provisions has not yet been achieved. There are hundreds of unresolved questions in the Uruguay Round agreements, most obviously in the Antidumping and Subsidies Agreements.

For example, the Subsidies Agreement contains for the first time a definition of what constitutes a subsidy, yet leaves many fundamental questions unresolved. As an illustration, the breadth of "indirect" subsidies (government actions that induce private parties to provide subsidies) is left unclear. An example of an indirect subsidy would be a government's causing private banks to lend at below prevailing market rates to a particular industry.

When faced with such a question, will a WTO panel say that there is not sufficient substantive law on which to base a determination and therefore it cannot opine on whether this practice is covered or not? Or will the fact that there was no agreement among the WTO members as to the substantive meaning and scope of an essential term prove to be a relatively minor obstacle to a panel eager to issue a ruling? I believe that it is inevitable that the WTO panel system will be tempted to create substantive norms and to use legal interpretation to extend international obligations to areas that were not agreed upon.

<sup>1</sup> See Robert E. Hudec, "Strengthening of Procedures for Settling Disputes," Chap. 14, Hugh Carbet (ed.), *Remaking the World Trading System* (forthcoming) (1996). Professor Hudec explains that of the 207 complaints filed, 88 resulted in legal rulings, of which 68 resulted in rulings of a violation, of which 60 resulted in either full compliance (45 rulings) or partial compliance (15 rulings). *Id.* at 2.

In domestic legal disputes, it is common to bind parties to a court action to the court's ruling, whether they believe that they had accepted the legal basis of the ruling or not. After all, they elect the representatives who make the law. Ultimately, if a court issues a decision that so offends accepted understanding of obligations, democratic remedies exist. The same is not true in the WTO. Indeed, a change in a WTO rule to "correct" or modify a panel decision would require consensus. Alternatively, even in the unlikely event that the WTO members seek to adopt a differing "interpretation" than a panel, such an interpretation requires a super-majority on a one-nation/one-vote basis, and no nation is bound to the new substantive rule to which it has not agreed.

These concerns will be alleviated only to the extent that panels apply a careful, judicial standard of review; deferring to the decisions of national agencies in most contexts unless the agency has clearly violated WTO obligations.

#### PROCEDURAL PROTECTIONS

Once the decision was made that the WTO dispute settlement system would be adjudicatory, then all of the procedures necessary for a fair and effective dispute settlement process should have been adopted. Unfortunately, the existing WTO procedural rules, absent additional safeguards, are wholly inadequate. While taking on the responsibility of a judiciary, the WTO's procedural rules make a mockery of it:

*Lack of transparency.* As opposed to most other courts, the WTO panels will function in secret, so no one will know, except for a few diplomats in the room, whether they were presented with the right arguments, facts, or statements of the law. Moreover, the panels will produce anonymous legal decisions that will provide no information on whether the panelists were unanimous in their views or sharply divided.

*No clear conflict of interest rules.* The safeguards against panelists having conflicts of interests are close to nonexistent. Nor are there effective controls on ex parte contacts.

*Ad hoc panelists.* The panelists will not be a standing body of judges, but a series of ad hoc groups of academics and former trade negotiators, chosen primarily for their diversity—namely they must be citizens of countries other than the disputants. They may never have sat on a prior case and may never sit on another. There is no reason why they should be imbued with judicial qualities, not having spent any time in this field of endeavor, even if they were the finest individuals and not appointed for political reasons by various WTO members. Generally, they will not be residents in Geneva, so they will be willing to travel there only for limited periods of time. As a result, panelists will not be able to deliberate together very long and must come up with answers to some of the world's most complex trade questions in a short period of time.

*Powerful, ensconced staff.* Another troubling procedural aspect of the system is the effective authority of the WTO secretariat. The secretariat advisors may remain the same from year to year while the panelists serve only infrequently. The secretariat, therefore, is in a position where it may exert a substantial influence on panel decisions. With ad hoc panelists and very limited time, the authority of the secretariat—unelected officials appointed without effective review by WTO member representatives—is likely to grow. The impact of this type of influence on the WTO Appellate Body is also unknown.

*No effective democratic controls.* There will be no democratic controls on the appointment or removal of panelists, nor, as discussed above, any effective democratic mechanism to modify the WTO rules in response to an erroneous decision. This is a due process nightmare.

Yet, those familiar with international trade will surely protest that, by and large, international panelists historically have been of the highest quality and, by and large, this has been true. Creation of a binding adjudicatory system rather than one based on consensus, however, poses a fundamentally different circumstance. These panel decisions will be adopted automatically.

It is true that there is provision for an Appellate Body as a bulwark against arbitrary and inappropriate decisions. Yet, has this body been given the tools to perform its job properly? The time limits for appeal (a decision within 60 days from the filing of an appeal), for example, suggest that in most cases the Appellate Body will simply rubber-stamp panel decisions. A system which is intended, at the panel level, to give deference to national decision-makers, may instead give undue deference to international panel members at the Appellate Body level. Similarly, appeals have been limited to only questions of law, permitting an injustice to stand if, in the eyes of the Appellate Body, it is based on a mere factual error. In any case, the Appellate



Body itself potentially suffers from many of the same procedural infirmities as the panels themselves.

While I hope that this system can be made to work and made to work well, potentially we have gone astray. There is no doctrine of judicial restraint from the GATT or for the WTO. These panelists do not have any legal tradition to apply. What makes this such an important issue is that we have seen excesses in the past by GATT panels. In a case involving U.S. antidumping duties on stainless steel products from Sweden, a panel declared the U.S. antidumping investigation void ab initio because the U.S. Commerce Department did not implement a general procedural requirement regarding the demonstration of domestic industry support to the satisfaction of the panel—despite the absence in the Antidumping Code of any detailed requirement along the lines demanded by the panel and despite the presence of demonstrated industry support for a countervailing duty case filed on the same day by the same domestic petitioner.<sup>2</sup> The panel's action deprived an industry of relief where there was no doubt it was due that relief under both U.S. law and the GATT rules.

A primary purpose of S. 16 is to prevent legislation by panelists who are tempted to make up substantive rules in an international system to which there are no effective checks and balances. The very existence of the WTO Dispute Settlement Review Commission will act to prevent abuses in the first place—by putting the WTO panels and the WTO secretariat on notice that their actions are under scrutiny by eminent, highly qualified jurists.

#### THE BENEFITS OFFERED BY S. 16

S. 16 is designed to help assure that the new WTO system works. It does this in several ways: It seeks to ensure that when the United States must use the new dispute settlement system, it has the legal team in place to most effectively protect our interests. It establishes a clear Congressional oversight role. And it creates a process for systematic review of the actions of the dispute settlement panels. Let me discuss each of these points in order.

#### PRIVATE PARTY PARTICIPATION

Having established a system that will inevitably lead to many disputes being resolved through litigation before WTO panels, our first order of business should be to make sure the U.S. government fields the best litigation team possible to defend our interests. That is what the private party participation provisions of section 7 of S. 16 are all about.

Under our current system, the United States is represented before WTO panels by one or two people from the General Counsel's office at USTR. As a former Deputy Trade Representative, let me say that the USTR has some of the best lawyers in the government. But even the best lawyer cannot do a first rate job if he or she does not have the time or resources to devote to a case. The reality is that these very capable people at USTR are already overworked, and if the new WTO system spawns even more international trade litigation before panels, they will be stretched even thinner.

When foreign countries come up against the United States in an international trade dispute, they often hire outside counsel, often from one of the trade firms here in Washington, to help them prepare their case. Even a relatively small country can afford to hire a "Dream Team" of private lawyers to focus on their one case and produce the best possible briefs and arguments. If the United States, on the other hand, insists on keeping its legal team limited to one or two lawyers at USTR, we will inevitably be put at a disadvantage.

The result, I am afraid, is that the United States will lose cases it should win. This will have a real impact on real people as U.S. industries lose opportunities to compete in closed foreign markets or lose the chance to obtain relief from trade distorting practices like subsidies that put our companies and workers at a disadvantage in international competition.

But it will also hurt the international trading system. If the United States loses WTO cases it should have won, public confidence in the system will be undermined. The credibility of the WTO itself will be called into question. Political pressures will

<sup>2</sup> *United States—Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, GATT Doc. No. ADP/47 (Report of the Panel) (Aug. 20, 1990). The panel expressed the view that GATT Article VI, which is the basis for antidumping and countervailing duty measures and has been a central feature of the GATT from its founding, is a derogation from basic GATT principles and as such, should be construed narrowly against the countries wielding them.

build on Congress and the Administration to negotiate ad hoc solutions to trade problems outside the WTO. The Uruguay Round was intended to strengthen the international system by bringing more aspects of international trade into the system. But if the dispute settlement system is allowed to fail, those efforts will have been for naught.

Section 7 of the bill seeks to remedy this situation by permitting a private U.S. party that is supportive of the U.S. government's position before the WTO and that has a direct economic interest in the dispute to participate with USTR in the consultations and panel proceedings. In any given case, there may be people in the private sector who are steeped in a particular matter in dispute, be it foreign subsidies, cartels or other complex fact patterns. Where they support the U.S. government's position and have a direct economic interest in a case, they should be able to participate. The purpose and effect is to provide USTR with the expertise of the private sector, not to create a private right of action that allows the private party to control the government's litigation strategy.

To participate, they must first have access to the relevant information. In order to make this information available to these private parties, while also meeting WTO requirements of confidentiality, the bill requires USTR to promulgate regulations implementing a protective order system. This is not something new in the international trade arena. The Department of Commerce and the U.S. International Trade Commission have developed procedures for maintaining the integrity of proprietary information submitted to those agencies in U.S. antidumping and countervailing duty investigations through administrative protective orders. These procedures permit parties to a case to have access to proprietary information while ensuring that information is not disseminated for any other purpose. The system works quite well and can easily be modified to apply to confidential information provided in a WTO dispute settlement proceeding.

The bill also lays out the manner in which a private party would be permitted to participate in a WTO dispute. USTR would be required to consult in advance with the private party regarding the content of written submissions to the WTO panel, to include a representative of the private party as an advisory member of the U.S. delegation in sessions of the dispute settlement panel, and to allow the private party representative to appear before the panel under the supervision of U.S. government officials where the representative would bring special knowledge to the proceeding (with special rules where a proceeding involves confidential information). The theme running through all these provisions is that the U.S. government officials, while remaining very much in control of the case, should be able to call upon private sector expertise where it would serve the government's interests.

Let me conclude this section by recognizing that this proposal is somewhat controversial and will meet resistance from some within the Administration. This is nothing new. In 1974, when I was General Counsel of the Special Trade Representative's office, and working with this Committee on the Trade Act of 1974, I resisted the creation of the private sector advisory committees. My attitude was "no thank you, we don't need that much help." My concern was that these private sector advisory committees would use up all the negotiators' time and detract from our negotiating efforts. I was completely and hopelessly wrong. The private sector advisory committees have been of substantial assistance to U.S. trade negotiators and greatly strengthened their hands during both the Tokyo and Uruguay Rounds. They also greatly increased private sector confidence in the negotiating process. I do not think you would find anyone at USTR today who would disagree with this assessment.

I think opposition to section 7 today is the same type of well-meaning but short-sighted reaction that I initially had to the private sector advisory committees. And just as my fears about the private sector advisory committees were unfounded, I think the concerns about private party participation will turn out to be unwarranted.

#### THE ROLE OF CONGRESS

A second important feature of S. 16 is the role given to Congress. While a lot of attention has been given to the role of the WTO Dispute Settlement Commission, which I will discuss later, it is the role of the Congress that I think is central to the bill. What is most important about the review procedures in the bill is that they create a mechanism to assure regular Congressional attention to the workings of the WTO dispute settlement system.

The influence of the U.S. Congress on the international trading system should not be underestimated. When fast track authority lapsed at several points during the Uruguay Round negotiations, all the ambassadors to the GATT in Geneva were focused on the activity on Capitol Hill. The concerns raised by this Committee in June

of 1993 when the last extension of the fast track was approved for the conclusion of the Uruguay Round were quite influential in the final days of those negotiations.

Similarly, what is most crucial to making the new WTO Dispute Settlement system work is a sense in Geneva that the U.S. Congress is watching. While as a practical matter I believe it is important to have the five-judge commission review adverse panel decisions initially, the Congress must play an active role in overseeing the operation of the dispute settlement system and responding to any warnings of abuse from the WTO Review Commission.

This role for Congress is appropriate because the Constitution gives the Congress the authority to regulate commerce with foreign nations. Moreover, as many have noted with regard to the changes to the WTO dispute settlement system, it was Congress that demanded changes to the GATT dispute settlement rules in the negotiating objectives set forth in the Omnibus Trade and Competitiveness Act of 1988. It was Congress that approved the WTO and its new dispute settlement system last year in the GATT implementing legislation. And it is the laws passed by the Congress that will be undermined if an activist and misguided WTO secretariat and panels legislate new WTO obligations where none were negotiated or curb WTO rights in a manner unanticipated by our negotiators.

The purpose of the review process is to cause WTO panels in Geneva and their WTO secretariat advisors to exercise their judicial functions with prudence. My view is that if the Review Commission and the Congress do their jobs properly, we will never get to the situation where the Congress must consider a resolution to renegotiate the WTO dispute settlement rules or withdraw from the WTO.

#### THE WTO DISPUTE SETTLEMENT REVIEW COMMISSION

The review process set up by S. 16 is straightforward. The Review Commission will be composed of five federal judges appointed by the President in consultation with Congress. The Commission will review all WTO panel reports for proceedings initiated by other countries where the decision is adverse to the United States. The USTR will advise the Commission within five days of the adverse decision and will publish notice of such advice in the Federal Register. The Federal Register notice will also invite interested parties to submit comments to the Commission. The USTR will make available to the Commission all information, including proprietary information, relating to the panel report. The Commission may also obtain directly from any federal department or agency such information as the Commission considers necessary to make its determination.

Within 120 days of the adverse decision, the Commission is to determine whether the panel (1) exceeded its authority or terms of reference, (2) added to the obligations of or diminished the rights of the United States under the Uruguay Round, (3) acted arbitrarily, capriciously, or engaged in misconduct, or (4) deviated from the applicable standard of review. This determination is then forwarded to this Committee and the Committee on Ways and Means. In cases where the dispute settlement panels adhered to the proper standard of review, and where they did not exceed or abuse their authority, no further action will be taken. If, however, the Commission determines that a WTO decision is flawed for one of these four reasons, any Member of Congress may introduce a joint resolution directing the President to negotiate modifications to the WTO dispute settlement rules. Upon passage of the resolution, the President must initiate negotiations to reform the system.

If the Commission makes three such affirmative determinations during a five-year period, any Member of Congress may introduce a joint resolution withdrawing Congressional approval of the WTO. If the joint resolution is enacted within 90 session days, and the President fails to obtain modifications to the WTO rules by the date specified in the joint resolution, the United States will cease to be a member of the WTO.

The purpose of this process is to provide some semblance of democratic control over the WTO dispute settlement process. But to work, both the Review Commission and the Congress must play an active role in reviewing the decisions of the WTO panels. It will not work if the Review Commission and/or the Congress give tremendous deference to the decisions of the WTO panels. Because, as noted above, these panels will be increasingly drawn into what are in effect legislative questions, the Review Commission and the Congress must undertake a careful, de novo review of any adverse decisions. To do less would be to cede sovereign legislative authority to the WTO panels and the WTO secretariat. In fact, the legislative history for this legislation should state in explicit terms the views of the Congress that WTO panels are not to engage in common law adjudication that produces new legal rights or obligations on the United States or any other WTO member.

## THE ROLE OF FEDERAL JUDGES

There have been some concerns raised regarding the use of judges of the federal judicial circuits on the WTO Dispute Settlement Review Commission. The Judicial Conference of the United States has argued that the ability of the judiciary to effectively manage its limited resources will be impeded and that obligations imposed on the five federal judges under S. 16 would constitute a significant drain on the federal judiciary's scarce resources. The Judicial Conference suggests excluding federal judges from consideration for Commission membership, or at least limiting membership to former judges or judges who have retired.

The Judicial Conference's concerns are misplaced. First of all, while the views of the Judicial Conference deserve consideration by the Congress, it must be kept in mind that the appropriate allocation of limited federal resources is a decision properly left to the Congress, not to the judiciary. Moreover, requiring federal judges to sit on the WTO Dispute Settlement Review Commission will not be a significant drain on judicial resources. Only five judges out of the entire judiciary would be involved in the Commission at any one time and their workload is likely to be extremely modest: over the last five years, on average, there have been less than two GATT cases per year decided against the United States.

Sitting judges are best qualified to make the type of determinations required of the Commission. The Commission will make determinations relating to the scope and standard of judicial review. Because sitting judges make this kind of determination continually in the course of performing their duties, they will be in the best position to make these determinations as members of the WTO Dispute Settlement Review Commission.

The alternatives to using sitting judges are fraught with problems. Traditionally, few federal judges seek full retirement until a very advanced age and those who leave the bench at a more active age often return to the practice of law. Former judges or other attorneys in active practice will not guarantee the level of independence necessary for the Review Commission. Without sufficient independence, the Commission's value as a check on the operation of the WTO panels will be undermined.

The recent decision of a binational panel under Chapter 19 of the U.S.-Canada Free Trade Agreement on *Softwood Lumber Products from Canada* demonstrates the problems which can arise when the services of trade practitioners are enlisted instead of sitting judges. Under Chapter 19, private trade attorneys are appointed to binational panels to review antidumping and countervailing duty determinations in place of federal judicial review. They are required to apply U.S. law in reviewing U.S. determinations, and to abide by the appropriate standard of review for a U.S. court. In the Canadian Lumber case, however, the private ad hoc panel failed to apply the U.S. standard of review for administrative actions—the type of review which is second nature to a sitting federal judge. Instead the private practitioners substituted their judgment for that of the agency. These trade practitioners thus demonstrated that although one may be an expert in some field of law, that does not mean one is an expert in applying proper standards of judicial review.

More disturbing, this case illustrates the danger involved with private panelists. Two of the Canadian panelists in this case had extensive personal and firm affiliations and representations of the timber industry as well as the Canadian federal and provincial governments—connections which they failed to disclose fully. Despite this, a split Extraordinary Challenge Committee (the appellate body), voting along national lines, upheld the underlying determination in favor of their fellow Canadians, to the dismay of a respected American jurist who sat on this body. Such serious conflicts of interest, and resulting aberrant decisions, can best be avoided in Commission determinations through the use of sitting federal judges.

Although the Judicial Conference did not raise this as a concern, it should be pointed out that the use of federal judges on the Commission does not present Constitutional problems. The Supreme Court has upheld the establishment of commissions on which federal judges have served that do not decide "cases or controversies" in the context of a claim tribunal established in the 1800's,<sup>3</sup> and more recently, the U.S. Sentencing Commission.<sup>4</sup> In analyzing the Sentencing Commission, members of which are also appointed by the President with the advice and consent of the Senate, the Court held that the Constitution does not per se prohibit federal judges from undertaking extrajudicial duties.

Finally, we should not overlook the overriding sovereignty concerns in discussing Commission membership. The purpose of S. 16, as outlined by Senator Dole in his

<sup>3</sup> *United States v. Ferreira*, 13 How. 40 (1852).

<sup>4</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

introductory statement, is to ensure that the new WTO dispute settlement system not be abused in such a way as to infringe U.S. sovereignty. To ensure that our sovereignty is not infringed, we should enlist the assistance of the most capable persons for appointment to the Commission, namely, sitting federal judges.

#### CONCLUSION

Mr. Chairman, it is in our national interest for the WTO to work well and, as the newest institution in the international economic system, to gain credibility. To avoid potential problems, the United States must be proactive: We must present the best possible legal teams to defend our national interests in disputes before the WTO. The Congress must actively oversee the activities of the WTO dispute settlement panels in Geneva to ensure they do not overstep the bounds of their authority.

S. 16 provides the tools to accomplish both these goals. Properly implemented, it will enhance the credibility of the WTO dispute settlement system and of the international trading system in general. It is an important piece of legislation, and it deserves prompt enactment into law.

I would be pleased to answer any questions of the Committee.

#### RESPONSES OF ALAN WM. WOLFF TO QUESTIONS SUBMITTED BY SENATOR HATCH

*Question:* Could the involvement of private parties, which are not deputized, in any way *bind* or *commit* the United States to something?

*Answer:* Under section 7 of the bill, private parties that participate in the dispute settlement process would remain under the control of the officials from the Office of the U.S. Trade Representative. Any statements before a panel by a private party would be at the discretion and under the control of U.S. government officials. It would be the position advanced by the U.S. delegation that would represent the position of the United States.

It is also important to note in this regard that under the new WTO dispute settlement system, what is binding on the United States is the ruling of the panel. This system is more like litigation than a trade negotiation, where the negotiators must have the power to commit their governments to a negotiated agreement.

*Question:* If a U.S. sector, such as textiles, is split on an issue, and one side gets invited to the exclusion of the other, could the excluded party raise a constitutional issue that the President unlawfully delegated his authority to conduct the foreign relations of the United States?

*Answer:* Section 7 of S. 16 leaves the question of which private parties would be permitted to participate to the discretion of the Office of the U.S. Trade Representative. Those officials at USTR also retain control over what positions are taken before the WTO panels and who may speak in a panel proceeding.

It is not unusual to have delegations comprised of some who are not full-time government employees. The WTO is part of the UN family of international organizations. There are often U.S. delegations to these organizations in which there are members who are private citizens or Members of Congress, yet there is never any confusion as to who speaks to the United States. The President gets to choose his spokesperson. In the case of a WTO panel, the USTR attorney would be the head of the delegation and the spokesperson for the United States. Any private sector attorney who is deputized to be a member of the delegation would be under the supervision of the head of the delegation and would only supplement arguments or make arguments on behalf of the head of the delegation. Therefore, no constitutional issue arises.

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## COMMUNICATIONS

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STATEMENT OF JOE COBB

JOHN M. OLIN SENIOR FELLOW IN POLITICAL ECONOMY

THE HERITAGE FOUNDATION

We appreciate very much the opportunity to include a statement in the hearing record on the proposal to establish a commission to review the dispute settlement reports of the World Trade Organization (WTO).

I support the proposal, introduced by Senator Dole, to establish a commission to review the dispute settlement reports of the World Trade Organization. I believe the proposed Review Commission will serve a very useful role in diminishing the credibility of exaggerated, emotional and polemical arguments that may be advanced in the future about some supposed impairment of U.S. sovereignty under the WTO.

### "LOSS OF SOVEREIGNTY" IS A FALSE ISSUE

During the Congressional debate last year, one of the central concerns about United States accession to the Uruguay Round GATT agreements was whether or not there would be some loss of U.S. sovereignty as a member of the WTO. My conclusion last year was that the entire issue of whether U.S. sovereignty could conceivably be jeopardized or compromised, even hypothetically, by the World Trade Organization is a "red herring" designed to distract Congress and the general public from the more important issues of how we should regulate international trade.

Although more open and free trade is manifestly in the interest of the vast majority of Americans—not only those whose jobs depend on exports but also those whose jobs depend on access to the highest quality imports—there are nevertheless very distinct and specific economic interests in the United States who believe they are not going to be *relatively* better off under a system of more open and free international trade. Some of those special interest groups tried as strongly as possible to make their case last year to the American people to reject the Uruguay Round agreements.

The fact that some of those special interest groups deliberately chose to make false and misleading arguments about U.S. sovereignty, rather than making a more accurate case about their potential economic disadvantage, invokes my rebuke. I believe political discourse ought to be held to the highest standards of honesty and accuracy. Fortunately, Congress was not persuaded by the arguments about loss of U.S. sovereignty.

### THE REVIEW COMMISSION'S INFLUENCE

I support the proposal to establish a WTO Dispute Settlement Review Commission because I fully expect the intellectually dishonest arguments about U.S. sovereignty will again be advanced in the future whenever U.S. trade laws and practices are challenged by other governments.

There is a very good probability in future years that a dispute settlement decision from the World Trade Organization *might find* that some law or administrative practice of the U.S. government is not in full accord with commitments the United States has made under multilateral trade agreements. I believe the proposed Review Commission will serve a very useful role in diminishing the credibility of any arguments in the subsequent debate about some supposed impairment of U.S. sovereignty.

I support the plan for structuring the membership of the Review Commission in Section 2. This proposal has an excellent design that would bring to the body the highest degree of credibility. This is very important. Any report by the World Trade

Organization that the United States may not be totally innocent and virtuous in some matter of trade protectionism is going to come before Congress.

Congress will want to rely fully and without hesitation on the credibility and the authority of any opinion by the Review Commission if the Commission finds that the decisions of the WTO are accurate, and have been arrived at under the rules of due process. Such an authoritative pronouncement by a high-status and credible Review Commission will be a very welcome thing to Representatives and Senators who would certainly be faced, under those circumstances, with a sudden hot controversy about U.S. trade practices.

#### CONGRESS WILL BE CAUGHT IN THE MIDDLE

Whenever the World Trade Organization might find that the United States has not lived up to its commitments under multilateral trade agreements, Congress will be caught in the middle of a serious political struggle among different American economic interest groups.

First, any findings by a WTO dispute settlement panel against the United States would have the effect of authorizing some other government to impose its own sanctions against some U.S. exports into its market, as a member of the WTO that had been denied some of its full privileges to trade without discrimination in U.S. markets. Certainly the U.S. exporters to those markets would petition Congress, seeking some relief from the trade sanctions and trade barriers the other government had imposed on those American companies. Congress would be asked by these American interests to change the offending U.S. trade laws and practices so that the WTO-authorized foreign barriers could be withdrawn.

But more important, from the other side, the Congress would be lobbied by whatever special interest groups here in the United States had originally obtained those trade discriminatory laws or practices. All laws and regulations that discriminate against foreign businessmen in the United States are enacted at the urgings of some American economic interests. If the World Trade Organization determined that some of these laws and practices are, in truth, a violation of the multilateral system of open trade and equal rules for all trading partners, certainly the original group of industries and lobbyists are going to descend on Congress to protect their privileges.

Therefore, it is clear that Congress will be lobbied on both sides by American economic interests to consider either repealing or modifying whatever laws or trade practices in this country provoked the WTO decision, or, on the other hand, re-asserting the offending trade laws and practices. With Congress caught between two potentially powerful economic interest groups, I believe Congress would want to have an independent (and thoroughly American) Review Commission speaking first on the issue of whether any impairment of U.S. sovereignty were a legitimate part of the debate.

#### THE CONFUSION OF THOUGHT BEHIND "ECONOMIC NATIONALISM"

The proposed Review Commission could also make a most valuable contribution to the debate in this country about the way we look at our economic national interest. The principles of GATT and the World Trade Organization are based on the "fairness doctrine" that equal rules should govern the economic activities of businessmen, regardless of the jurisdictions in which they seek to carry on their business. By serving as a watchdog on behalf of the U.S. Congress, assuring that the World Trade Organization is living up to that ideal, the fuzzy rhetoric of "economic nationalism" will be dealt a firm setback.

During the debate over implementing the Uruguay Round GATT agreements last year, a very discordant debate occurred over the classical issues of free trade versus "economic nationalism." The central concept of economic nationalism is the belief that *there is only one* "American National Interest" in trade. The central expression of this intellectual error is always associated with the words "WE," or "OUR" national interest. Yet, the plural pronoun is dangerously equivocal.

The world is divided between them and us. This idea of "one national interest" might take the form of "exports are good and imports are bad." Although only some Americans sell their products to foreigners, those are "our exports." Or it might take the form of "Americans ought to buy from other Americans instead of from foreigners." Our trade deficit is cited to justify protecting us from "our imports."

But *there is NOT only one* "American National Interest" in trade. In a country of over 100 million working families, there are at least 100 million different manifestations of America's economic national interest. The belief that our economic national interest is definable in a singular way is very destructive of the principles on which our competitive free market system are built, because that belief would

justify regulating the economy in very specific ways that bestow privileges on some Americans at the expense of the interests of other Americans.

As the United States becomes increasingly integrated with other developed nations in the world economy, and as emerging markets grow and develop around the world, with increasing standards of living, there will be more and more cases where the primary business competitor of some local employer is not another U.S. corporation, but a foreign corporation in the same industry. Just as American companies are opening branch offices and starting subsidiary firms in other countries, so foreign companies are doing that here. More and more of world trade is intra-industry trade. The debate over trade policy must be shielded as much as possible by the false "us" versus "them" debate.

By assuring the American people that the procedures and rulings of the World Trade Organization are always followed consistently, and that even if the United States does not always prevail in cases before the WTO, nevertheless the procedures were fair, the WTO Review Commission will significantly advance the cause of more open trade. And that will truly be in the economic national interest of the United States.

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## STATEMENT OF DANIEL J. MEYER

CHIEF EXECUTIVE OFFICER, CINCINNATI MILACRON, INC.

### I. INTRODUCTION

Good morning, my name is Daniel J. Meyer. I am the Chief Executive Officer of Cincinnati Milacron, Inc., which is headquartered in Cincinnati, Ohio. Cincinnati Milacron was founded over a century ago and is today a world leader in the manufacture of machine tools, plastics machinery, and other related industrial products. Our products supply nearly every industry that is engaged in the manufacture of metal and plastic products. Among these industries are automotive, aerospace, defense, medical equipment, and a tremendous variety of household and consumer products producers.

Cincinnati Milacron employs over 10,000 people world wide, over half of which work at our facilities in Ohio, South Carolina, Michigan, Pennsylvania, and Texas. We are deeply committed to increasing our international competitiveness and expanding our business overseas. Last year, approximately one third of our revenues were drawn from sales made outside of the United States.

### II. THE NEED MAINTAIN AN EVEN PLAYING FIELD

Like many industries in the United States, ours has faced an increasingly dynamic international trade environment in recent years. This environment has created innumerable new opportunities for companies like Cincinnati Milacron. It has also forced us to confront new challenges. The majority of Cincinnati Milacron's products are capital goods. As such, our sales are particularly sensitive to fluctuations in the economic cycle. Gaining a strong initial foothold in an emerging market is also critical to our future success in that market. These factors place us in a particularly vulnerable position should a trade dispute be resolved in a way that adversely affects us.

Our concern for maintaining an open and fair trade environment has led us to strongly support trade agreements such as the North American Free Trade Agreement (NAFTA) and the negotiations which led to the formation of the World Trade Organization (WTO). These agreements have the potential to assist us in opening previously closed markets, to enhance our competitiveness, and to secure America's job base at home. For these reasons, we strongly supported both of these agreements and appreciate the continuing efforts of both Congress and the Clinton Administration to seek further opportunities for trade growth. The benefits of increased trade among nations are well founded in both theory and practice. These arguments, however, require that everyone play by the same rules.

U.S. trade laws were designed precisely for this reason. Without the assurance of effective antidumping and countervailing duty laws and provisions such as section 301, and section 232 of U.S. Trade laws, U.S. companies would be exposed to unfair trade practices at home, unfairly closed markets abroad, and America would be faced with potential risks to our own national security. These laws are enforced and judged by U.S. federal agencies—specifically the Department of Commerce and the International Trade Commission. As such, individual U.S. companies, and U.S. industry as a whole, are assured that their interests will be carefully considered in any trade cases in which they are involved. I believe it is in our interest that this



assurance remains steadfast as the WTO assumes increased responsibility for settling international trade disputes.

### III. THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT REVIEW COMMISSION ACT

The WTO Dispute Settlement Review Commission Act, or S. 16, presents an important opportunity to ensure fair treatment for U.S. companies in cases brought before the WTO. Under the WTO, the U.S. will no longer be able to unilaterally block the adoption of dispute settlement panel reports as was allowed under the rules of the GATT. As it now stands, the U.S. is obligated to honor any and all cases decided by the multi-national dispute resolution panels of the WTO which may adversely affect U.S. industry, regardless of whether a decision conforms with U.S. judicial standards of fairness. Such an obligation not only raises questions of U.S. sovereignty, but also exposes U.S. companies to possible discrimination.

S. 16 seeks to rectify these problems. It creates an independent commission to review any judgments made by the WTO which adversely affect the United States. Importantly, the commission will be composed of sitting federal judges. This structure will avoid the pitfalls of a commission dependent on retired judges who are frequently difficult to locate, or handicapped by the participation of private citizens who may have vested interests in the results of a given dispute. If the past is any indication, the commission could anticipate having to review no more than two to three cases in a typical year. Additionally, S. 16 includes provisions to allow for private party participation in any cases involving the U.S. before the WTO for parties that are directly involved in the case and who are also in agreement with the federal government's position in the case. Such participation will help to ensure that the strongest possible case is made on behalf of American interests in any WTO hearing in which U.S. companies are involved.

Should the commission determine that the WTO has made an unfair ruling against the United States, S. 16 then provides for Congress to seek changes in the WTO dispute resolution process and ultimately, for the U.S. to withdraw from the WTO altogether. Clearly, the hope is that these steps will need to be taken rarely, if ever. However, given the constantly changing dynamics of the contemporary international trade environment, and the uncertainties of how the WTO will function in practice, S. 16 offers a degree of security against possible encroachments of U.S. sovereignty. Moreover, by showing U.S. resolve to ensure a fair hearing in cases filed against U.S. interests in the WTO, S. 16 will likely be a valuable deterrent against judgments unfair to U.S. industry.

### IV. CONCLUSION

When the World Trade Organization came into being following the conclusion of the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT) last year, it replaced the most successful international trade regime ever devised. Since its inception following Second World War, the GATT has helped to facilitate the largest single period of growth in international trade the world has ever seen. The United States' motives for establishing the GATT at that time were clear: to prevent a recurrence of the protectionism that proved so detrimental to economic growth in the years preceding World War II, and also to integrate the national economies of the world to the extent that peaceful coexistence far outweighed the benefits of aggression.

At the time, the United States was far and away the largest, most competitive economy in the world. Today the world economic picture has changed drastically. Most American industries remain incredibly competitive around the world—but they are no longer alone. While opportunities have never been so great for U.S. companies to prosper and grow overseas, foreign competition has never before been so fierce. The WTO stands as the most prominent instrument for ensuring that these international trade opportunities continue, and we at Cincinnati Milacron support the principles it embodies wholeheartedly. At the same time, the provisions of S. 16 are an important step towards ensuring that the WTO will work to the benefit, and not the detriment, of U.S. industry.

In summary, I strongly urge the Congress to pass the World Trade Organization Dispute Settlement Review Commission Act.

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### STATEMENT OF RALPH REGULA

I would like to thank Chairman Packwood and the members of the Senate Finance Committee for allowing me this opportunity to submit testimony on S. 16, the WTO Dispute Settlement Review Commission Act. I would like to commend Major-

ity Leader Dole for proposing the Commission and introducing the legislation for its implementation. As a co-sponsor of H.R. 1434, the companion bill in the House, I have a strong interest in seeing the Commission become a reality, and I commend the Committee for conducting a hearing on this important issue.

Mr. Chairman, last November Congress endorsed a new vision for managing international trade. Years of discussion and negotiation over weaknesses in the existing international trade system had culminated in a proposal for significant change, at the heart of which was the establishment of a new World Trade Organization (WTO). With great hopes and not a little trepidation, the WTO came into being on the first of this year.

For better or worse, world trade plays a central role in determining America's fortunes, and as such, the GATT Uruguay Round is of great importance to America's future. Just reducing tariffs on thousands of manufactured items by an average of 35 percent promises to be a tremendous boon—and one that especially benefits the American economy, because our markets historically have been more open.

But perhaps of even greater significance is the authority provided the WTO itself as an arbiter of world trade disputes. In a nutshell, the WTO has been empowered to make binding judgments on trade disagreements between its member states.

The United States fought hard to ensure that the WTO would have the muscle it needed to serve as an effective guardian of free markets. Too often in the past the U.S. was on the receiving end of the GATT's helplessness in making its judgments stick. Now, under the WTO, members professing to adhere to the ideals of free and open international trade will no longer be able to turn their backs on decisions that don't suit them.

The WTO's strength could prove a double-edged sword, however. For all its positive attributes, binding dispute settlement is a potentially dangerous tool that could be used to promote narrow national aims. Many have voiced concern that the WTO's new powers could be used to interfere with the exercise of America's sovereign rights. For this reason, it is imperative that the new dispute settlement process be carefully monitored, guided, and counterbalanced, especially in its formative years. It is with these considerations in mind that I lend my strong support to S. 16 and the establishment of a WTO Dispute Settlement Review Commission. The bill is designed to ensure a high standard of integrity for WTO activities by providing the fullest possible protection against potential abuses of the system.

The Commission would be charged with reviewing any decision by a WTO panel that challenges a U.S. law as inconsistent with our international trade commitments. The U.S. review would consider whether a WTO panel's decision was consistent with the panel's authority and the proper standards of review, and whether it infringed upon U.S. sovereign rights.

Should the Commission find that a panel abused its mandate in a given case, Congress may require the Commission to renegotiate the terms of the dispute settlement process. After three such determinations, any Member of Congress could introduce a resolution for the U.S. to withdraw from the World Trade Organization altogether.

In my view, the power of this measure comes less from the ultimate application of its sanctions, than from its ability to shape the dispute settlement process and reinforce its potential as a force for good in international trade. I believe the mere knowledge of the existence of a highly competent, impartial Commission will serve as a deterrent to potential abuse. Thus, passage of this legislation would provide the United States with an additional leadership tool to help shape the development of this new international forum.

Mr. Chairman, I look forward to working with you and the members of your Committee over the coming months on this vital next step in America's international trade policy.

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## STATEMENT OF STEWART &amp; STEWART

May 22, 1995.

*Editorial Section,  
U.S. Senate,  
Committee on Finance,  
Washington, DC.*

Dear Sir or Madam:

Re: *Comments on S. 16, a bill to establish a commission to review the dispute settlement reports of the World Trade Organization; Hearing on May 10, 1995*

## I. GENERAL SUPPORT FOR S. 16

These comments are submitted\* in general support of S. 16. The bill should facilitate U.S. acceptance of adverse panel decisions by providing a more open process for the public and interested parties to examine the WTO panel decisions and receive confirmation that the decisions are reasonable. Those who know the GATT/WTO dispute settlement system should agree that in most areas, past panel decisions have been reasonable constructions of GATT obligations. That should continue in the future. That doesn't mean that individual countries may not take strong exception to particular decisions. Panelists, like judges, can and do make bad decisions. The addition of an appeals process will hopefully reduce the likelihood of such decisions requiring review by the U.S. commission.

At the same time, in the hopefully rare instance where an adverse decision is not viewed as reasonable,\*\* Congress and the public will have independent confirmation that the WTO has exceeded its jurisdiction and can evaluate what, if any, steps should be taken to correct the situation. The commission system should over time foster support for the WTO process and provide confidence that the U.S. is being required to honor obligations that it has in fact accepted.

At the same time, there is a range of issues raised by S. 16 that the Committee should address in developing the most effective process for participation and review. Technical questions about access to the WTO documents for commissioners and for those wishing to submit views to the commission is one. Similarly, how to balance the rights of private parties with the government-to-government nature of the WTO dispute settlement process remains an important concern.

I take up these and other issues briefly below.

## II. FORMALIZING AND MAKING PUBLIC THE PROCESS OF REVIEW OF ADVERSE WTO PANEL DECISIONS.

While it has always been a feature of the GATT that a member country could withdraw with appropriate notice [GATT 1947 Article XXXI, WTO Article XV], S. 16 would provide a formal mechanism for an independent commission to evaluate whether decisions adverse to U.S. government policy were reasonably reached and if not, to permit Congress to review the perceived problems to determine if corrective action is needed or, if problems appear frequently, whether U.S. interests are sufficiently harmed to warrant the serious act of withdrawal.

A range of practical issues will need to be resolved for the commission to fulfill its stated purpose.

*(a) scope of review*

The scope of review provisions (Sec. 4(a)(2)) provide Congress and the public confidence that panels are:

- (1) deciding matters properly before them;

\*The views expressed in this submission are those of the author and do not necessarily reflect the views of any of the firm's clients.

\*\*While most areas of panel review should result in acceptable panel decisions, there are areas where at least some panel decisions appear to rely on a construction of GATT rights and obligations that are drastically different than U.S. views. Certain panel decisions in the anti-dumping and countervailing duty areas have been quite troubling to many domestic industries. While the United States obtained the addition of Article 17.6 to the Antidumping Agreement to clarify the standard of review required by panels, such clarification may not be sufficient to resolve the controversy over whether Article VI of GATT is an integral part or an exception to the GATT. The commission may be critical to U.S. interests in these and other areas to highlight the need for panelists to go slowly in creating obligations not specifically agreed to; to negotiate in the WTO constructions that simply do not comport with U.S. understanding of our rights and obligations.

- (2) not creating new obligations or reducing rights that the U.S. has under the agreement;
- (3) conforming to the relevant standard of review in their decisions;
- (4) not acting in a manner inconsistent with procedures specified for panels;
- (5) not engaging in misconduct;
- (6) not acting in an arbitrary manner.

The scope of review provisions are reasonable but will be effective only if the commission and commission staff have sufficient focus on the WTO and have full access to the negotiating history of not only the Uruguay Round, but the prior rounds and ongoing activities of the WTO—i.e., the full resources of the WTO library. Depending on the issue, it may also be desirable for the commission to have access to many of the work documents and telex traffic found in the files of the U.S. government. Because of the importance of the United States in the world trading system, many issues are essentially resolved bilaterally with the U.S. or in small groups of countries to which the U.S. is a participant. The nature of the deal and what the countries were agreeing to will not be part of the WTO library materials. Yet the materials constitute a critical part of the underlying logic to the agreement that becomes notified and ultimately incorporated into the WTO.

*(i) Access to WTO and possibly U.S. documents*

The bill (Sec. 6(b)(3)) requires USTR to make available to the commission "all submissions and relevant documents relating to the panel or Appellate Body report." Thus, the commission will receive information identified by USTR as part of the record before the panel and, presumably, such documents as are referenced by one or more of the submissions. Unlike appellate review of administrative decisions or lower court decisions, there is not a transcript of verbal presentations (although particular points may be included in the detailed write-up of the panel) in the WTO panel process. Nor are panel deliberations part of the record available to countries subject to the dispute. It is not clear whether the U.S. would insist that panel proceedings or at least the "substantive meetings" [Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 3, para. 5 & 7] be transcribed or taped with such materials made available to the commission for review. Nor is it clear that the commission will be able to satisfy itself that all "relevant documents" have been reviewed if it does not have access to the full WTO library materials.

Access to the WTO library may be possible electronically, at least for large portions of the records which have been put on diskettes or made available on line to member governments. Certain portions of the historical documents are also available on microfiche (documents which have been derestricted which is many but not all). Issues might be raised by the WTO or other members as to the public access to the underlying records.

Access to the U.S. government's negotiating records would be more problematic. The government understandably will be reluctant to grant access to documents which may reflect negotiating strategy or otherwise be viewed as work product, internal deliberations or involve sensitive topics. Again, government records tend to be shipped to offsite storage after a Round is complete making the compilation of the government's negotiating record either not easy to reconstruct or potentially even incomplete.

*(ii) Commissioners and staff*

The focus of the commissioners will depend on their other activities, their background, the frequency of their involvement, their tenure on the commission, and the background/training of the commission staff.

The bill calls for sitting appellate judges to be selected by the Congressional leaders of both parties for five year terms (Sec. 3). Nothing in the bill indicates that members of the commission can't be reappointed. However, if more than one term is possible, questions will arise as to the impartiality of members as presumably past performance would be a criteria for reselection. At the same time, there are not likely to be large numbers of cases each year suggesting that there may well be a long learning-curve for commission members before they feel comfortable in handling the full range of scope of review issues mandated by the bill. The utility of the commission will depend on the commission's competence to handle the issues before them. Hence the composition of the panel and the perception of impartiality will be critical elements. The bill should reflect these needs.

I understand that concerns have been raised by the courts based on existing work load, the large number of vacancies on the appellate courts at the present time and the perceived need for specialized knowledge. Judges at the U.S. Court of Appeals for the Federal Circuit and judges at the U.S. Court of International Trade (not an

appellate court) currently have jurisdiction over various international trade disputes and might be used to address the "specialized knowledge" concerns.

The bill should also provide for adequate permanent staffing for the commission to assure that commissioners receive the legal scholarship to support their activities. The bill is presently silent on this subject.

*(b) Commission proceedings*

The bill's proposed structure for commission proceedings raises a number of questions:

Is 120 days (Sec. 4(b)) sufficient time for the commission to review the record before the panel or appellate body, the report, conduct a hearing, research the relevant law and develop a written report?

Will interested parties have sufficient opportunity to participate if they are not provided access to the full record before the panel?

Is the second test identified in Sec. 4(a)(3) ["the Commission shall determine whether the action of the panel or Appellate Body materially affected the outcome of the report of the panel or Appellate Body"] meant to create more than a harmless error exception for reviewed panel decisions?

Does the U.S. really want to evaluate panel decisions on information that was not before the panel?

How broadly should the commission construe the term interested parties?

*(i) time for decision*

There are serious questions about whether the proposed 120 day period is sufficient for a full consideration of the issues that may be present.

First, depending on how the term "interested party" is construed, the commission may well be faced with written submissions from parties who have not formulated views during the underlying panel proceeding in Geneva.

Second, unlike some proceedings, there appear to be serious questions about whether interested parties will have access to the full record considered by the panel. Such lack of access may make briefing more difficult and the need for posthearing briefs more important.

Third, depending on document access to the commission and staff, there may be difficulties in the commission completing its work after full briefing in such a limited time period.

Finally, the schedule of sitting appellate judges may make the 120 day timeline unrealistic in certain circumstances.

While under NAFTA and the US-Canada FTA extraordinary challenges are handled in a very short time period (90 days), such reviews are of a limited nature. Moreover, the parties likely to submit views in those proceedings generally are the same ones who have participated throughout the binational panel review process, have access to the full record and have likely identified problems during the course of the proceeding.

The Committee may wish to consider extending the report period to 180 days or longer.

*(ii) access to the full record*

The bill does not provide for access under protective order or otherwise to documents forwarded to the panel in confidence or treated by one or more of the parties as proprietary for use before the commission. Section 7(b) does require USTR to develop a protective order system but the intent seems to be limited to the panel proceedings. Moreover, it is not clear that there is an overlap between parties eligible to forward information to USTR under Sec. 7(a) and the term "interested party" in Sec. 5(b). Access to information will be critical to full and, in some cases, to meaningful participation in the commission hearing.

*(iii) harmless error*

There is certainly no reason for the commission to make affirmative reports on matters constituting harmless error. It is, however, difficult to understand how the creation of new obligations for the United States or the reduction of U.S. rights could ever be viewed as harmless. Hopefully, the bill and legislative history will clearly define how the standard in Sec. 4(a)(3) is intended to be applied.

*(iv) review on a record or de novo?*

The scope of review provisions in Sec. 4(a)(2) suggest a review of legal issues and whether the panel has evaluated the information in front of it reasonably. Yet, as drafted, the bill permits the commission to consider any evidence and receive any testimony it chooses, including seeking information from one or more agencies whether that information was before the WTO panel. Such an approach cannot pos-

sibly prove supportive of the WTO panel process over time. Panel decisions should be determined on the basis of what information was before the panel not on the basis of facts submitted to the commission. Indeed, one of the criticisms the U.S. has had of certain panel proceedings in Geneva has been that U.S. determinations are being evaluated on the basis of information that was not before the U.S. administrators at the time the challenged decision was made.

At the same time, Section 5(a) should be revised to permit argument based on a briefing schedule similar to the handling of appellate matters at U.S. appellate courts but with greater time periods for oral arguments.

*(v) interested parties*

The bill should include a definition of interested party in Section 8 to clarify the right of participation in hearings under Section 5(b). Are foreign governments, foreign producers, adversely affected individuals or groups, public interest groups, members of the general public entitled to submit views? Will there be opportunities for amicus curiae briefs?

### III. WTO PANEL PROCEEDINGS

Based on the written statements submitted to the Committee to date, there appears to be a division of opinion on whether private parties should be permitted to participate in the panel proceedings themselves and how broadly USTR should seek participation in its preparation of materials for the panel.

*(a) participation in panel proceedings by private parties*

The first issue is susceptible to mischaracterization. One concern expressed by some has been that a government-to-government process should not be complicated by the United States appearing to speak with multiple voices. Another is that there is something wrong with private parties appearing before a panel.

Nothing in Section 7(c) would result in the U.S. being undermined by private party participants. Moreover, GATT dispute panels frequently saw private sector participants (including U.S. lawyers) appear as part of foreign country delegations. Thus, the issue properly understood is not whether private parties will participate in dispute settlement proceedings within the WTO. Instead, the issue is whether the U.S. alone will handicap itself by not taking advantage of the private parties supportive of its position who may have the best command of administrative records or technical matters involved in the dispute.

Sec. 7(c)(1) lets private parties who are supportive of the U.S. government position consult with USTR as to the content of US submissions. This simply permits USTR to have the benefit of the thoughts of those with interests supportive of the U.S. position.

Sec. 7(c)(2) authorizes private parties—where deemed appropriate by USTR—to be included as advisory members of the U.S. delegation. Such participation does not detract from the U.S. speaking with a single voice. Moreover, as noted above, foreign governments currently often include as part of their delegations representatives of private parties with interests adverse to the U.S. Sec. 7(c)(2) would simply place U.S. private parties who are supportive of USTR's position in a situation comparable to that already enjoyed by those opposing the U.S. government.

Sec. 7(c)(3) as drafted allows the U.S. to use a private sector advisory member, where USTR perceives the advisor has special knowledge to appear before the panel *but only* "under the supervision of responsible United States Government officials." By definition, such participation cannot undermine the U.S. government speaking with one voice. The government has to decide that the participant will provide special knowledge to the U.S. team and then will use such participant only under U.S. supervision.

Sec. 7(c)(4) simply requires appearance where confidential information is involved to be through counsel. This prudential subsection does not increase rights of participation; it merely takes the same precautions that the U.S. has imposed in U.S. administrative and judicial matters involving international trade.

*(b) Support for litigation*

Some groups have argued that parties supporting the U.S. position should not be given a special position vis-a-vis USTR compared to other parties who may oppose the U.S. position or who may perceive U.S. interest as other than how the U.S. has chosen to act.

The argument is misplaced. Congress has assured that USTR will have the benefit of views of all members of the public who wish to comment on any dispute in which the U.S. is a party. 19 U.S.C. 3537(b). USTR also receives views from all advisory committees. Thus, all parties have adequate opportunity to present views.

Section 7 as presently structured goes to the ability of USTR to collaborate with interested parties who are supportive of the U.S. government's challenged action or the U.S. government's position. Since the panel process has become equivalent to a legal proceeding, the U.S., as a party, should have the ability to work with those parties most able to help in the preparation of the government's papers. In what other setting has Congress objected to the government being able to present its best case (either on the offense or defense)?

I would urge the Congress not to handicap the government's ability to defend U.S. actions or to attack foreign government practices that are harmful. Section 7 is a potentially very important part of S. 16. The Committee should include it intact.

Sincerely,

TERENCE P. STEWART, *Managing Partner.*

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