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DISPUTE SETTLEMENTS IN THE WTO

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OF THE

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DISPUTE SETTLEMENTS IN THE WTO

TUESDAY, JUNE 20, 2000

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10:09 a.m., Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Baucus and Bryan.

Senator GRASSLEY. I would call the hearing to order.

I have waited a few minutes for two reasons. Number one, the Senate Agriculture Committee is meeting and Senator Baucus, who is one of the leading members of our committee, attends regularly and wanted to come. I thought maybe that meeting would be over, and I would wait a few minutes for that.

Our first witness, our Special Trade Representative Charlene Barshefsky, is delayed just a little while as well.

I think I will start out the hearing by welcoming all of you on the trade dispute process of the World Trade Organization. It is my privilege to ask members of the parliament of the European Union who are present in the audience to stand and be recognized.

We thank you very much for your interest in this process and for your coming here to view our work, and to hopefully enjoy what you learn about the operation of the U.S. Senate. My suggestion would be, there are some good aspects you want to follow, but there are a lot of bad things that you do not want to follow.

I think our first witness has arrived. I am going to give a brief statement, and if we get into Ambassador Barshefsky's statement, I will not interrupt that. But somewhere along the line, if Senator Baucus or Senator Moynihan come, it is always our tradition to have members of the minority speak in an opening statement as well as the majority.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM IOWA, CHAIRMAN, SUBCOMMITTEE ON INTERNATIONAL TRADE

Senator GRASSLEY. Once again, good morning to all of you. This is the International Trade Subcommittee of the Senate Committee in Finance, and the hearing is on dispute settlements in the World Trade Organization. I would like to make two brief announcements.

First, it has been reported that the United States will offer a new agricultural trade negotiating proposal at the second special session of the WTO Committee on Agriculture in Geneva later this

month. We have had a chance to look at this proposal. We consider it a very substantial proposal.

I will not go into any detail because obviously we do not want to do any disservice to our negotiators, but I think I should commend you, Ambassador Barshefsky, as well as Ambassador Rita Hayes and her staff at the WTO mission there in Geneva, for very good work.

This is something that I and the Trade Subcommittee will watch very closely as events unfold in Geneva because breaking down trade barriers and gaining market access means so much to our farmers and our agricultural producers.

The second announcement, is that this is one of two hearings of the Trade Subcommittee that we will hold this year on the issue specifically about the World Trade Organization.

The first hearing with WTO Director General Mike Moore has to be rescheduled. Unfortunately, Mr. Moore had to cancel his trip to the United States in order to prepare for this special session later this month.

Mr. Moore has written me expressing his regrets and assures me that he will try to reschedule his trip for sometime in July. I will keep the subcommittee members informed about developments.

Now we get to today's hearing and the subject of dispute settlement. Dispute settlement is the backbone of the multilateral trade system. It is about how the 137 WTO members, and those are all nations, resolve their trade conflicts quickly and peacefully.

It is about upholding carefully negotiated trading rules so that workers and consumers get a better deal. It is about giving the smallest and least developed countries the same rights under the rules as the wealthiest developed nations.

Today we will take a broad look at the dispute settlement so that we can see the complete picture. This is not a hearing just about specific cases. That is one of the problems that we have had in looking at the WTO and the United States' role in the WTO, we have tended to focus on very specific cases.

Our friends here from the European Union parliament that are present probably know that we talk an awful lot about beef hormone cases or banana cases, and we have looked at those. But this meeting today is intended to look at the larger context of the trade dispute settlement process.

Without the larger context, I do not think we can appreciate how dispute settlement works and what it means for our country and the rule of law in trade. During its first 5 years of operation, about 200 complaints have been filed with the World Trade Organization.

The United States has been a party to 42 cases that have either reached a final conclusion or resolved without a ruling. As one of our witnesses today from the General Accounting Office will tell us, the United States has gained more than it has lost in the dispute settlement process.

The United States has been able to effectively enforce our international trading rights because of the way that we have improved the dispute settlement system. The improvements in the dispute settlement system are perhaps the most significant feature of the World Trade Organization.

We can better appreciate the new dispute settlement system if we recall how dysfunctional the old General Agreement on Tariffs and Trade system of resolving international trade disputes often was for the decades that it operates.

I would list just a few of the worst problems. In the early GATT, dispute settlement was basically a diplomatic exercise. Most of the panels' judges were also diplomats. Their rulings were often vague and hard to pin down.

Panel reports had to be approved by consensus. This meant the losing party could block adoption of reports. In fact, parties who anticipated losing sometimes even blocked the establishment of a panel to hear the case. Effective enforcement was almost non-existent. The only real sanction was unilateral retaliation.

Small countries were at a particular disadvantage. They had a very hard time in achieving effective results against large countries. With the signing of the WTO agreement and the creation of the dispute settlement understanding in 1995, we have fixed most of these problems.

The changes in the rules have, in my view, proven to be very positive. Without these changes, we would not have predictable, enforceable rules. Without predictable, enforceable rules, these feuds would drag on for years with no clear or final resolution. Small, low- income nations would be especially harmed because they would not have a fair chance to defend their rights.

Without predictable, enforceable rules, the rule of the jungle, not the rule of law, would control. If we could not protect the rights of these small exporting firms in the international markets, consumers would have fewer choices and would end up paying more for what they buy.

Could we improve the dispute settlement system? I think the answer is, clearly, yes. We could open up the process more and make it more transparent. We could sharpen and streamline the rules, and draft new rules on the length of submissions by parties, for example, so litigation does not get needlessly bogged down.

I certainly welcome suggestions that any of our witnesses might have on these matters. I would like to say one thing in closing. The trading rules we will talk about today are the one thing standing between us and the sort of economic isolationism that marked the years just before World War II, especially in the 1930's in which many, including myself, believe contributed to the Great Depression and the onset of devastating world war.

When nations can discriminate against one another in trade and disregard the rights and livelihoods of others in the economic sphere, they pave the way for the rise of anti-democratic forces that are the real enemies of peace.

By breaking down trade barriers that lead to isolationism, misery, and misunderstanding, our international trading rules play a vital role in keeping the peace.

Before we hear from our first witness, I am going to now turn the microphone over to Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman. I congratulate you for holding today's hearing.

The WTO dispute settlement mechanism is clearly of crucial importance to all of us in the United States. To make it work better, we have a responsibility here in the Finance Committee to hold fairly frequent and aggressive oversight hearings.

I regret that this committee has not done so. I think that is one of the reasons why we are not doing better in the dispute settlement mechanism.

Mr. Chairman, I want to congratulate you personally for holding this hearing of the subcommittee. I think this is extremely important and I want to work with you as we try, as difficult as it is, to get some better results.

Thank you.

Senator GRASSLEY. Well, everybody on this committee surely knows Charlene Barshefsky, our Ambassador and Special Trade Representative, very well. I thank her for coming. I know you are on a tight schedule, and we will go immediately to you. If just a few of us show up, surely we can get you out by the time you have prescribed. We look forward to your testimony.

STATEMENT OF AMBASSADOR CHARLENE BARSHEFSKY, U.S. TRADE REPRESENTATIVE, WASHINGTON, DC

Ambassador BARSHEFSKY. Thank you very much, Mr. Chairman, Senator Baucus. It is a great pleasure to appear before you. We are very grateful to you for having this hearing.

Let me begin, if I can, with a little bit of context. America's two-way trade in goods and services with the world last year represented a near doubling of our trade since 1992, contributing substantially to the remarkable record of growth, rising living standards, and job creation that we have built.

This expansion of trade owes a great deal to the nearly 300 trade agreements we have negotiated since 1992, and in particular to the formulation of the World Trade Organization with its agreements on goods, services, intellectual property, agriculture, sanitary and phytosanitary measures, and others.

As the world's largest importer and exporter, full implementation of these agreements is more important to the U.S. than to any other nation. To ensure implementation, we have created the first special unit within USTR dedicated solely to monitoring and enforcing trade agreements. We use our domestic trade laws, and we have found the WTO dispute settlement mechanism to be of absolute essential importance.

The WTO's dispute settlement understanding fundamentally improves the previous GATT system, as the Chairman has noted, in a number of ways. It imposes time limits. It eliminates the ability of the losing party to block panel results. It creates an appellate body. It offers a WTO-consistent means of retaliation.

While we believe it can still be improved, we have found it to be a reliable, comprehensive, and effective system. Since 1995, we have been its most active user.

Our goals include the protection of specific U.S. rights in cases of high economic interest or precedential importance to American industries, farmers, and workers, and the broader demonstration of our concern for the importance of compliance with WTO rules.

We believe the record shows that the dispute settlement mechanism has enabled us to reach these goals. Since the WTO's creation in 1995, we have brought 53 cases. Our goal, as I said, is to assert American rights in the specific issues at stake and to ensure broader respect for WTO obligations.

Our hope in filing cases is to secure U.S. rights rather than to engage in prolonged litigation. Therefore, whenever possible we have sought to reach favorable settlements that eliminate the violation without having to resort to panel proceedings.

Twenty-eight of the cases we have filed have been concluded. Of these, we have prevailed in 25, through either panel victories or our preferred option of favorable settlement. The results have assisted American businesses, farmers, and workers in every sector of our economy.

Cases include those against Japan, with elimination of discriminatory taxes on distilled spirits, strengthened copyright protection and elimination of unjustified restrictions on agriculture.

The European Union, with enforcement of market access commitments on grain, protection of intellectual property, victories on services trade with respect to bananas, and victory with respect to the safety of hormone-treated beef.

In Korea, the elimination of unfair shelf-life requirements for beef and pork and the elimination of discriminatory taxes.

In Southeast Asia, the elimination of Indonesia's local content requirements for autos. Reform of agricultural import policies in the Philippines. In Canada, elimination of barriers to magazines, reduction of dairy export subsidies.

In Mexico, elimination of antidumping duties on high fructose corn syrup from the United States. In South America, compliance with rulings against statistical taxes and various specific rates of duty, reform of auto policies.

In India, compliance with obligations on patent protection and elimination of non-tariff barriers on 2,700 agricultural and manufactured products.

In Pakistan, compliance with intellectual property rights obligations. In Australia, elimination of a ban on imports of U.S. salmon, and a panel victory on export subsidies for automotive leather which will shortly be settled.

In the vast majority of cases, our trading partners have provided a satisfactory resolution either through settlement or through full compliance. In the two cases in which they have failed to do so, the EU's failure to implement the panel findings on beef and on bananas, we have exercised our right to retaliate through imposition of sanctions on over $300 million of EU exports to the U.S. We continue to work, however, to resolving these cases.

The United States has also been the subject of 39 complaints in the WTO. Only eight have been completed through litigation; 10 were resolved in a mutually satisfactory manner.

Of the completed eight, and most important, the WTO has fully upheld the U.S. position on the legality of Section 301 of the Trade

Act of 1974, which is our principal domestic trade law relating to foreign market access barriers.

In the other seven cases, panels found some aspect of U.S. practice inconsistent with our WTO obligations, and in most the remedy has been minor, indeed. In two cases relating to textile imports, no action from the U.S. was required at all.

Two other cases deserve mention, and those involve environmental policy. One was a challenge by Venezuela and Brazil to a regulation on reformulated gasoline issued under the Clean Air Act, and one was a challenge by several Asian countries to restrictions on imports of shrimp caught in a manner that endangered sea turtles.

In these two cases, while the panel found some problems with our implementation of the base of laws, the result in each panel ruling supported the U.S. in the most important matters.

In each, the appellate body affirmed our fundamental right to take actions to protect the environment and to conserve endangered species. Neither of these statutes have been changed.

In both, we have complied with the ruling without changing our statues, making largely procedural changes in implementation only while fully meeting our environmental policy goals.

The only other case I would mention is the FSC case, the Foreign Sales Corporation case, challenging certain provisions in U.S. tax law. Here, after consulting with the Finance Committee, as you know, Mr. Chairman, we have presented to the European Commission a detailed proposal which we believe addresses the problem. We remain hopeful we will be able to resolve our differences over the regime in a cooperative and constructive manner.

Looking back on the experience as a whole, we find the dispute settlement mechanism to be a tool of fundamental value in defending U.S. rights and advancing the rule of law.

While there are certainly some panel findings with which we have disagreed, the proceedings have been fair, respective of U.S. sovereignty, and of great value in facilitating the resolution of trade disputes.

At the same time, however, there are areas in which dispute settlement can be improved. First of all, it can be more effective in promoting compliance with WTO findings and facilitating swift action in the event of non-compliance.

This was especially clear in the case dealing with the European Union's banana trade regime. We have thus been working over the past year to clarify the dispute settlement procedures when we encounter a disagreement about the WTO consistency of measures taken.

Second, we believe the dispute settlement system can and should be more transparent and accessible to the public. In this regard, since 1995 we have raised a number of concerns related to these issues, ensuring prompt release, for example, of panel findings and other documents, enhancing the input of citizens and citizen groups, providing the opportunity to file amicus briefs in dispute settlement proceedings, and opening those proceedings to public observation.

Some of our concerns have been partly satisfied. The appellate body, for example, has accepted amicus briefs and have ruled that dispute settlement panels can also do so.

Likewise, the WTO now makes panel and appellate body reports, together with other documents, available on the Internet when they are circulated in Geneva. Nonetheless, the system can still be improved along the lines I have suggested. In addition, as you know, we have a standing offer to all countries with which we have disputes, either as plaintiff or defendant, to open panel meetings to the public.

At the same time, we have also ensured maximum transparency in our own dispute settlement work. We seek public comment on every dispute settlement proceeding to which the U.S. is a party, whether plaintiff or defendant.

We make our own written submissions available to the public as soon as they are submitted to the panels. Furthermore, we routinely request all parties to cases to provide us with a copy of their submissions, or a non-confidential summary, for release to the public. Due to our efforts, Canada and New Zealand are now making their submissions available to the public, and the EU is also considering this.

In summary, Mr. Chairman, the WTO dispute settlement mechanism can be strengthened and improved, but after 5 years it has changed our ability to assert our rights for the better. It has been highly effective in protecting our rights and interests.

It has at the same time confirmed basic principles of the rule of law. The trade policies must be non-discriminatory, that we and other nations have a fundamental right to set the highest standards of environmental protection and consumer safety, and that all WTO members must keep their commitments. We can do better, but we are highly satisfied with out experience to date and we will build on it with the help of the committee.

Finally, if I may, Mr. Chairman, close on a related issue. China will soon enter the WTO. Without permanent normal trade relations, we will be unable to benefit fully from that accession.

Without permanent normal trade relations, we will have no right at all to WTO dispute settlement in the event of violation of its commitments. Every day that goes by without Senate action raises a risk to fundamental American economic and strategic interests.

We appreciate greatly, Mr. Chairman and Senator Baucus, the strong support of the Finance Committee for our China agreement and for achieving permanent normal trade relation status with China. But with the House having now passed PNTR, we hope that the Senate will act quickly to bring the debate to a close.

Thank you again, Mr. Chairman, for the opportunity to appear here today.

[The prepared statement of Ambassador Barshefsky appears in the appendix.]

Senator GRASSLEY. Thank you for your last comment. Obviously, Senator Baucus and I agree fully with you on the importance of getting the China situation before the Senate, hopefully before the July 4 break.

We have met as a bipartisan group informally to come to that conclusion, and also to urge our colleagues, through letter, not to

amend it in any way so that it has to go back to the House, where the vote was so much more close, and until late hour, very unpredictable.

So we agree with you fully on that and want to move forward on that, and that is my recommendation to our leadership.

Some of the issues that I am going to bring up in questions you have already touched on. I will start with one, the Foreign Sales Corporation case. I know that these discussions are very ongoing and very sensitive, and I would not want you to comment on anything that is sensitive.

First of all, to compliment the administration on their response. I think it sets a good example when the United States is so positive about the WTO process and we sometimes are critical of other nations for not responding to our win there in a cooperative way, and we have tabled within 2 months after we lost that case an alternative, which was rejected.

Negotiations are still going on, but I think it puts the United States in a good position of setting a good example, within 2 months getting back with some alternatives, and hopefully they will be successfully negotiated.

Having said that, I think it is very important that the administration come up with a proposal that fully complies with the report of the appellate body, and having said that, what do you think that we can do to ease this situation, without commenting on the specifics of ongoing negotiations?

Ambassador BARSHEFSKY. Certainly we felt it very important to respond in an immediate fashion to the panel and appellate body ruling. As you know, Deputy Treasury Secretary Stu Eizenstat is heading this effort for the administration.

We have worked closely with the committee and we thank the committee for your ample assistance on the FSC issue. We have also worked closely, as you know, with the Ways and Means Committee.

We believe that we have made a proposal to the European Union which does satisfy the panel ruling and it is of concern that the European Union may be missing an opportunity to resolve this matter in a mutually agreeable manner.

We do believe the approach that we have come up with which addresses the export contingency problem which is at the gravamen of the panel decision is the appropriate approach. We would of course continue to talk with our European friends, and we will of course continue to consult with the committee as the process moves forward.

Senator GRASSLEY. Yes. Obviously we hope that there is a response and an agreement very shortly because of the short period of time for us to legislate any changes that might be needed.

I hope, on the part of the European Union, if there is not agreement reached in time for us to legislate, the fact that members of this body, of this committee, have spoken of the necessity of doing this quickly and our desire to do it quickly, that if it is not done by adjournment in October, that that would be expression of good faith that other nations would take into consideration as we wait then until next year for this body to make a final enactment.

Many WTO members seem to be resistant to increasing the transparency of the WTO dispute settlement process. You have touched on, in your statement, some of the things that we are trying to do on our own initiative in that direction.

Beyond what you have said, do you have a strategy for achieving such WTO dispute settlement reforms in the sense that every country would abide by the example that you have tried to set?

Ambassador BARSHEFSKY. We do have a series of proposals that we have put forward in Geneva which I have encapsulated in my testimony. We do believe increased transparency is vital. We believe rapid responsiveness to adverse panel and appellate body rulings is equally critical, as is rapid adjudication whether a measure taken is WTO-consistent.

A number of our trading partners are finally beginning to respond in a more positive fashion to a number of our transparency requests. As I noted in the case of Canada and New Zealand, filings that those countries make before dispute settlement bodies will now be available when filed.

The European Union has agreed that filings made will be available at the close of the litigation, but we are hopeful Europe will revisit this. While this is in and of itself a positive move, we are hopeful Europe will revisit this and also agree with us, Canada, and New Zealand to make public briefs and so on at the time at which they are filed, not merely at the close of litigation.

Two areas seem to be more complicated in terms of achieving consensus, including with Europe. One has to do with the filing of amicus briefs, friends of the court briefs. We have pushed very hard on this issue.

The appellate body has recognized the importance of amicus briefs and has accepted them, and has indicated panels may do the same. We would like to see a rule on this and we would like to persuade Europe that it is also in Europe's interests to see rules in this area.

The second issue that has been more contentious has to do with our desire to open up panel proceedings to the public. In the U.S. and in Europe, one can go to any courtroom in our Nation, sit in the back of the room, and watch quietly the proceeding as it unfolds.

That is not the case in WTO dispute settlement, even though these are quasi-juridical in nature. We believe these proceedings should be open, and we would hope that our European colleagues would agree, if not as a WTO rule, then at least in all cases involving the U.S. and Europe.

Senator GRASSLEY. The extent to which there is cynicism about the WTO process, even in the United States but for sure in other countries, and that was somewhat expressed, obviously, in the demonstrations in Seattle, and not giving any praise to those demonstrations because I do not think they were beneficial in the long run, but on the issue of transparency that was discussed and that somehow everything is done in secrecy, that feeds that sort of activity on the part of demonstrators and gives some credibility to their position.

The more we practice transparency, the more we open up the process, the more that people see that it's the rule of law and noth-

ing to fear, it seems to me that we are going to advance this. We will not only advance the process, but advance the process of freeing up trade to a greater extent.

I will ask one more question, then I will turn to Senator Baucus.

This is more domestic with your operation, Ambassador Barshefsky. Does the USTR have the capacity to handle the growing workload associated with preparing and litigating dispute settlement cases, particularly giving the fact that the House of Representatives has turned down your requests for increased staff resources?

Ambassador BARSHEFSKY. We believe additional resources are necessary, not only with respect to enforcement of existing WTO agreements and WTO rights, but also as we consider China's entry into the WTO and the House-passed legislation which mandates enhanced compliance initiatives.

In addition, of course, it is imperative that the work of the agency—the core work, that is, the negotiation of trade agreements—be supplemented by the addition of career personnel. We will continue to work with the House in order to help ensure that we will be adequately funded, and we look forward to working with the committee on this as well.

Senator GRASSLEY. Thank you, Ambassador.

Now, Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

I compliment both of you on the issues you have brought up and the agreement on the need for transparency. I think it is, frankly, curious why Europeans are not a little more forthcoming on transparency.

Second, I very much congratulate you, Madam Ambassador. You have done a heck of a job with the agreements you have negotiated. I do not know a more qualified and competent USTR, and just want you to know that I think my views are shared by almost everyone. You have done a great job.

I would like to focus a little more on one aspect. I understand, Mr. Chairman, that you have invited a dozen European legislators who are sitting in the audience. I say this in a very constructive tone, and I hope they take that appropriately.

In his prepared testimony for this hearing, Professor John Jackson states:

> A central feature of the WTO is its dispute settlement mechanism. Indeed, the statesmen involved in the Uruguay Round and the WTO, and the current WTO officials and ambassadors, take consierable pride in this feature.

The credibility of the World Trade Organization depends on a prompt, responsive, effective, and accountable dispute settlement system. Those adjectives—prompt, responsive, effective, accountable—do not describe the system that exists today. We, along with the other WTO members, have a lot of work to do to make that a reality.

I think it is important to look at the way that the European Union deals with difficult issues at the dispute settlement system and compares it to the American approach. There is a huge difference, and therein lies much of the problem.

The EU has used every rule in the WTO procedure book to avoid coming to terms with a negative finding by WTO dispute panels on beef and bananas. They played every conceivable trick to delay the panel process and a final decision in these cases. Once the EU ran out the time on these procedural delays, they refused to take action to come into compliance with the panel decisions. It is clear that they have no intention of even attempting to satisfy those decisions.

The EU tells us that these are very tough domestic political issues. They tell us that when America finds itself on the losing side at the WTO on an issue that is politically sensitive domestically, then we will understand and do the same delay dance as the EU is doing in the beef and bananas cases.

Yet, let's look at the reality of American action. The decision that went against us in the Foreign Sales Corporation case, FSC, creates a major $4 billion problem for us. Yet we are conscientiously trying to develop a solution that meets WTO criteria. Deputy Secretary of the Treasury Stu Eisenstadt traveled to Europe last month to present the Administration's proposal to the EU in a serious effort to resolve the dispute. Going back a few years, when Congress passed the Helms/Burton bill on Cuba, a potential major WTO violation, President Clinton took a big political risk by courageously waiving the retaliation required by that law so the US would not violate the WTO.

In contrast to the United States, the EU sits back, trumpets that its actions are in accord with WTO rules (which is technically correct), and then acts like a tiny country with very narrow interests, rather than acting like one of the world's three economic superpowers with a deep responsibility to maintain the credibility and integrity of the WTO.

We Americans are certainly far from perfect in the trade area. But our behavior and sense of responsibility regarding the WTO is light years ahead of the behavior that Europe has displayed in dealing with the critically important dispute resolution process.

We plead with the EU. We try to cajole them. We threaten retaliation. We have now resorted to carousel retaliation. I don't particularly like the idea of carousel and the uncertainty surrounding a rotating retaliation list. But I support it as a way to send a message to the EU that we are totally fed up with their performance and irresponsibility.

The solution to the broader problem of the European Union's contempt for the integrity of the World Trade Organization's dispute settlement process cannot be found at the WTO. I certainly would not propose that we give the WTO enforcement or police power. The solution can only come from Europe itself, with leaders recognizing their responsibilities as one of the principal custodians of the world trade system.

Over a hundred years ago, Winston Churchill wrote, "There are men in the world who derive as stern an exaltation from the proximity of disaster and ruin as others from success." Europe better start thinking long and hard about the damage it is doing to the integrity of the WTO and the world trading system.

Let me turn to some specific suggestions for repairing the dispute settlement process.

First, increase transparency in deliberations and submissions. This includes releasing briefs, requiring panels to accept amicus curae briefs, publication of transcripts of panel meetings, and opening panel and appellate hearings to the public.

Second, shorten the process. Close loopholes that allow delay in complying with a panel decision. Provide for an expedited process when serious harm is being done. Allow for immediate action once a panel makes its decision that a violation exists.

Third, ensure there is sufficient professional staff to support the panelists. Make sure panelists have no conflict of interest in terms of their current and past business relationships.

Fourth, find a way to deal with a government that implements protection in a non-transparent way, such as Japan's system of administrative guidance. The burden should not be on the aggrieved party to ferret out invisible and deliberately hidden measures that keep a market closed. We are going to face this problem with China, in spades. Enable panels to address privatization of protection. With so many border measures successfully removed, nations are finding other means of protection. Japan is the champion violator here. We can't get at Japan's barriers through traditional means. Their steel cartel is a good example. The film case was another sector where the barriers should have been addressable by the WTO.

The United States was the prime mover in establishing the WTO's dispute settlement process. We should be the prime mover in making sure that it works right.

Ambassador, I would like your thoughts.

Ambassador BARSHEFSKY. I hesitate to say anything.

Senator BAUCUS. I have. You can.

Ambassador BARSHEFSKY. We have obviously been mightily concerned with the EU's failure to implement in bananas and beef. These are the only two instances we know of in scores of cases that have gone through the panel process where a country has declined to implement and the EU has declined not once, but twice.

We have bent over backward to try and work with the EU to find an acceptable and agreeable solution, both in beef as well as in bananas. In the latter case, for example, the Caribbean countries who are most deeply affected have made a proposal for settlement of the dispute.

It is somewhat problematic for us in some critical respects, but we have told the Caribbean countries we will accept it. We then have turned to Europe, and Europe, in the name of protecting the Caribbean against their own proposal, has said no.

So this has become a rather frustrating exercise. We will continue to work on it. We would like to see, as I said in my testimony, a settlement of the dispute. Litigation and retaliation is not the preferred option, but at this point the retaliation is not only in force, but I will in the process of rotating the retaliation under the legislation which has been passed.

I, too, was not in favor of the legislation, but I understand the frustration the Congress has, and I share that frustration.

In the case of beef, certainly the WTO makes clear that all countries can set the highest levels of environmental, health, and safety

possible. We, as well as Europe, have insisted on such a rule and we believe that such a rule must be maintained.

But in the case of beef, even Europe's scientific experts have found no problem with the specific hormones at issue. Despite agreement among the scientific community, the EU refuses to implement. We, here again, put forward settlement proposals, all of which have essentially been rejected. We have gone back round after round.

We will continue to do it, but again recognize that retaliation is in place and beef retaliation is also subject to the carousel, so that list will also be rotated shortly.

We would like to see these cases resolved. We would like to see them off the docket between the U.S. and Europe. When you look at the trade relationship between the U.S. and Europe, you see a remarkably strong, expansive, and huge trade relationship, and most of that trade is problem free.

But as we look at these specific disputes and their ramifications on the global trading system, we believe these disputes must be resolved. I agree with you, Senator, Europe simply has to step up to the plate.

Senator BAUCUS. What are some of the consequences of Europe's failure to live up to at least the spirit of WTO, live up to the decision panels? What are the consequences, short-term, long-term?

Ambassador BARSHEFSKY. Well, it hurts the credibility of the WTO and of the WTO dispute settlement process as the impartial adjudicator of claims. It emboldens other countries to consider similar feats of non-compliance, which is extremely damaging to the system.

It impacts negatively public confidence on the global trading system, a dispute settlement process viewed as somehow secretive, and countries themselves ignoring the outcome. It is bad in every way. In every way.

Senator BAUCUS. Is this at all similar—I know it may be a major stretch—to our hope in China in downsizing these SOEs? I mean, it just seems to me like Europe has got a sweetheart deal.

It thinks it is fearful of facing competition in the world in some of these areas. Why is that? Why is Europe seen to be fearful of competition, openness, and transparency? Why are they afraid?

Ambassador BARSHEFSKY. I do not know if Europe is afraid. It is surprising, and has been surprising to us, given that our legal tradition comes from Europe, that Europe has been very adverse to broad-gauge transparency.

Part of this might arise because of the historic underpinnings of the global system which, as the Chairman noted, were essentially diplomatic in nature, a bit of a gentleman's club, and a place in which disputes were discussed quietly, secretively, largely.

But that is not the system today. Even though improvements are needed, the WTO system is far more transparent than the 50 years of GATT system before it. It may be that Europe carries with it this historic notion that somehow this dispute settlement system should be treated as the old GATT system was. Of course, that is not appropriate to the system and it certainly is not appropriate to the times.

Senator BAUCUS. Thank you very much, Madam Ambassador. I hope that some Europeans are listening. I think a dozen are, and I hope more are as well. I hope that those who are listening take these comments to heart, because they are not intended to be critical at all. They are just intended to further open up the system and make the system work better.

Thank you very much.

Senator GRASSLEY. We have been joined by the Senator from Nevada, Mr. Bryan.

Senator BRYAN. Thank you very much, Mr. Chairman. Welcome, Ambassador Barshefsky. As you know, I am supportive of your efforts. I was thinking as I was walking up to the committee room this morning that in August I will be out in rural Nevada. That is a long way from China, a long way from Europe, and not too many folks there claim to have great expertise in international relations, or international lawyers, or trade experts.

What would your explanation be to them, if you were at a town hall meeting, just regular, good, hard-working folks, the backbone of America, and they say, Senator, you are voting for this China deal, this PNTR. They would not use the word PNTR. They would say, the Chinese always cheat, do they not? Do we not always kind of get the short end of the stick in all of these international agreements?

There is, to the extent that there is really any understanding or focus, and I would acknowledge that most Americans do not have that as the topic of their evening conversations around the dinner table. Not too many families in America are talking about PNTR, WTO, and what that means for the kids after they get out of school. But what would your explanation be?

What kind of assurance could we give them that, look, they are going to play by the rules, this WTO mechanism works, and it works for America? What would be the short answer that you would give to that question?

Ambassador BARSHEFSKY. The short answer that I would give would be that the agreement we have negotiated with China has more enforcement mechanisms in it than any trade agreement or agreement for accession to the WTO that we have ever negotiated.

Not only our own trade laws, not only WTO dispute settlement, which is a formidable power, but also, of course, antidumping remedies that are specially crafted for China, anti-import surge remedies specially crafted for China, global pressure of 135 other countries that have now the same interest in market access in China as we, and substantially stepped up monitoring and enforcement efforts by the U.S. Government.

I think that package, coupled with the specificity of the commitments China has made, what action they will have to take by what precise date, product by product, area by area, will all help ensure that we will get the benefit of the agreement that we negotiated.

Senator BRYAN. It sounds like a pretty good answer. I will let you know after the August recess how I make out.

Ambassador BARSHEFSKY. You can call me during the recess.

Senator BRYAN. Do you have a hotline number in case I get into real trouble? These town hall meetings can get kind of raucous from time to time. Thank you very much, Madam Ambassador.

Ambassador BARSHEFSKY. Thank you.

Senator BRYAN. Thank you very much, Mr. Chairman.

Senator GRASSLEY. One more question, if I could, and that is in regard to China, but not just our vote on China. We have to assume that China will be in the WTO with or without our passing our bill. It is only that we get the short end if we do not have our normal trading relations with them at the same time they are in the WTO.

Given the size of China's trade and its past trade barriers, it seems to me that there will be a substantial number of possible dispute settlement cases that will be filed that will involve China.

So getting to your understanding of the resources of the dispute settlement body, they seem to be somewhat already stretched. Is there a danger that China's accession could result in a breakdown of the system?

Ambassador BARSHEFSKY. Let me make two comments. One, and this can add to Senator Bryan's town hall meeting, we will establish in Geneva for the first time a multilateral review mechanism of China's compliance with its commitments.

Part of the idea behind that is to have an early warning system, if you will, in areas where China's compliance may be lagging, as well as in areas where China simply needs technical assistance or other expertise so that it can fully comply.

Apart from that, we are working as well to make proposals which would help streamline further the dispute settlement process to avoid overload in Geneva, to ensure that cases move along more rapidly, and to ensure, therefore, that we do not get bogged down in a morass in Geneva because of simply the case load.

We will keep a sharp eye once China enters on whether the case load increases substantially. I do not think it is a foregone conclusion that it will. But we will keep a sharp eye whether it does, and if so, how we might make further improvements to the system to ensure that we do not end up with a backlog of cases.

Senator GRASSLEY. Thank you very much. Thank you for your appearance before our committee. You have been very cooperative with us, and we once again have received good testimony on a very important issue that will really be ongoing for a long period of time as we monitor the progress of the WTO.

Our second panel now consists of Susan Westin. Susan Westin is Associate Director of the U.S. General Accounting Office. Ms. Westin is at the International Trade Issues Branch of the General Accounting Office.

I welcome her to the subcommittee, look forward to her testimony, and say that, as is usual, a longer variety of your testimony, if it is available, will be put in the record and we would ask you to summarize.

As our members of the European Union parliament leave, we thank you for your kind attention.

STATEMENT OF SUSAN WESTIN, ASSOCIATE DIRECTOR, INTERNATIONAL RELATIONS AND TRADE, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

Ms. WESTIN. Mr. Chairman and Senator Bryan, I am pleased to be here today to provide some observations about the World Trade

Organization's dispute settlement system since its founding in 1995.

In my remarks, I will summarize how WTO members have used the new dispute settlement system, with a focus on cases involving the United States.

I will then discuss our analysis of these cases, including their impact on foreign trade practices, the impact on U.S. laws and regulations, and their overall commercial effects. Finally, I will present some conclusions from our work.

The main message of my testimony this morning is that, on balance, the United States has gained more than it has lost in the WTO dispute settlement system to date. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal.

In addition, there have been many cases that provided commercial benefits through greater market access and stronger protection of intellectual property rights.

Let me turn, first, to how WTO members have used the dispute settlement system. In the past 5 years, WTO members have brought 187 complaints. As you can see, the United States and the European Union were the most active participants.

The U.S. filed 56 complaints, or almost one-third of the total brought, as of April 2000. The EU was the next most frequent filer. Over a third of the U.S. and EU cases were against each other.

The U.S. was also the most frequent defendant in WTO dispute settlement cases. The 187 complaints pertained to 150 distinct matters. Of these, one-fourth of the cases were filed against the U.S. The EU was the second most frequent defendant.

Of the 150 matters WTO members brought to the WTO, 42 cases involving the U.S. were completed as of March 2000. The U.S. was a plaintiff in 25 of these cases and a defendant in 17. As a plaintiff, the U.S. prevailed in 13 cases, resolved the dispute without a ruling in 10 cases, and did not prevail in 2 cases. As a defendant in 17 cases, the U.S. prevailed in one case, resolved the dispute without a ruling in 10, and lost in 6 cases.

We analyzed these 42 cases in depth to determine their impact. About three-fourths of the 25 cases that the U.S. filed resulted in some agreed change in a foreign trade practice.

As one example, the Philippines agreed to modify its tariff rate quota system for imports of pork and poultry, resulting in an increase of U.S. pork and poultry exports to the Philippines.

Of the 25 cases the U.S. filed, 14 resulted in commercial benefits to the U.S. either through greater market access or stronger intellectual property protection. For example, in a case challenging Japan's inadequate time period for protecting copyrights on sound recordings, Japan changed its copyright law in 1996 after a WTO ruling.

As a result of this change, U.S. sound recordings will be protected for a 50-year period, including retroactively. The U.S. recording industry estimated that these protections are worth about $500 million annually.

In the 11 other cases that the U.S. filed, 9 had limited commercial benefits either because the implementation of the WTO ruling

was disputed, other barriers existed, or the case was brought mainly to uphold trade principles.

For example, in two high-profile cases, the EU decided not to fully comply with WTO rulings involving imports of bananas and hormone-treated beef, and instead face U.S. retaliation of almost $310 million for non-compliance. Losing parties are allowed to accept retaliation or provide compensation as alternatives to complying with WTO rulings.

As I noted earlier, WTO members challenged U.S. practices in 17 cases. In these cases, one U.S. law, two U.S. regulations, and one set of U.S. guidelines were changed, but the changes were relatively minor. Most of the six cases that the U.S. lost had limited commercial consequences.

One case, however, challenging provisions of U.S. tax law regarding foreign sales corporations has potentially very high commercial stakes. The U.S. provides tax exemptions to a wide variety of companies on exported products used abroad.

In this case, the WTO ruling found that U.S. tax provisions constituted prohibited export subsidies. The U.S. has not fully determined how it will implement the WTO ruling.

Finally, there are several conclusions we draw from our analysis of these cases. Overall, the U.S. has gained more than it has lost in the WTO dispute settlement to date for several reasons.

The U.S. has been able to effect changes in a substantial number of foreign practices that it considered to be restricting trade. Further, most of the cases that the U.S. filed provided commercial benefits to U.S. exporters or investors. In addition, WTO rulings have upheld trade principles that are important to the U.S..

Our second conclusion, the dispute settlement system's impact on the United States should not be evaluated solely on the basis of U.S. wins and losses. Some winning cases do not result in the desired outcomes, such as the bananas and hormone-treated beef cases as I mentioned previously.

Conversely, some losses are only partial or may uphold WTO principles important to the United States. Moreover, the U.S. derives systemic benefits from a well-functioning, multilateral dispute settlement system, even if it does lose some cases.

Finally, it is important to note that there have not yet been a sufficient number of WTO dispute settlement system cases to fully evaluate the system. In addition, the outcomes of some important pending WTO cases could be problematic for the United States.

Mr. Chairman, this concludes my prepared remarks. I would be happy to respond to any questions you have.

[The prepared statement of Ms. Westin appears in the appendix.]

Senator GRASSLEY. Thank you very much for your testimony and your study of this from the well-respected research and tracking agency for the Congress. You do a lot of good work for not only this committee, but a lot of other committees I serve on. I appreciate that, not just for you, but for your agency.

You have stated that the United States has gained more than it has lost from this dispute settlement system to date. You said, obviously, that we need to think beyond just the wins versus the losses, but could you please elaborate and tell us more about what these gains are?

Ms. WESTIN. Well, there have been several cases where the gains provided real commercial benefits, first of all, to the United States. We will have a more detailed report coming out on this issue detailing all of the cases and, where we can, applying commercial benefits to it.

I think Ambassador Barshefsky mentioned the one on liquor and spirits in Japan, I mentioned one on the pork and poultry exports to the Philippines, and of course one of the largest was the protection for intellectual property rights in Japan and the sound recording industry's estimated $500 million gain to the U.S. annually.

In addition to just the commercial benefits, though, there is a benefit to the U.S. in having the WTO dispute settlement system. As I mentioned, systemic benefits. We feel that it provides a crucial framework for resolving trade disputes among WTO members.

Ambassador Barshefsky started her statement with a little history of the GATT system compared to WTO, and we will have further analysis on that in our reportcoming out in August as well.

The WTO dispute settlement system ensures that trading partners keep the bargains made in past negotiations, and it provides a climate of greater legal certainty in which trade can occur. These are not inconsequential items to consider.

While it facilitates the resolution of specific trade disputes, it has also served as a vehicle for upholding the trade principles that are important to the U.S.: intellectual property rights and decreasing export subsidies.

Senator GRASSLEY. I would like to have you comment, and this might not be easy for you to comment on because it is asking you to look into U.S. interest groups, but given your statement that changes to United States laws and regulations have been minor, why are so many U.S. interest groups concerned about the WTO dispute settlement process?

Ms. WESTIN. Well, the critics are concerned about WTO dispute settlement rulings' effect on the U.S.'s ability to protect health, safety, and the environment. Regarding the environment, so far, there have been only two challenges to U.S. environmental laws in the WTO's first 5 years.

Although these resulted in negative rulings, we found that in our analysis to date the United States has been able to respond to the rulings in a way that avoids weakening U.S. protections.

In a nutshell, in the Venezuela Gas case, it did not end up that we have dirtier gasoline or dirtier air because of the slight modification we had to make in the regulation. That really points out one key feature of the dispute settlement system: it does give WTO members flexibility in choosing how to respond to its rulings.

Senator GRASSLEY. Let us look at agriculture a minute. What have been the overall results of U.S. cases brought to challenge other WTO members' practices? Obviously, we know about the Beef Hormone case and the Banana case. Beyond those, or even comments you might have on those.

Ms. WESTIN. Well, about a third of the cases that the U.S. has brought to the WTO have involved agricultural trade. The U.S. has won every one of these eight cases. We have achieved compliance in six of them, leaving aside the beef and bananas, and the frustration has already been expressed here this morning.

These cases have included the removal of sanitary, phytosanitary, or SPS barriers in Korea and Japan, reform of the Philippines' agricultural quota system, and reduction in Canada and Hungary's agricultural subsidies. So, the record overall on the agricultural cases that the U.S. has brought is very good.

I really do not have much more to add on the beef and bananas cases, except to reiterate what I said in my statement. The WTO dispute settlement system is not set up for the WTO to have the right to force any member to change its laws.

Protection of sovereignty was a big issue for the United States when the WTO was established, and that is why it does provide that a member can choose to accept retaliation or provide compensation as opposed to implementing a WTO ruling.

Senator GRASSLEY. You stated that there are some high-profile cases that are not included in your study, but are in the pipeline. What are examples of these cases, some sort of update on their status, and is there any thinking on your part that their outcome could change your conclusions or affect your conclusions?

Ms. WESTIN. Well, the high-profile cases that are in the pipeline right now really regard U.S. antidumping and countervailing duty laws, or CDV laws. There have been a number of challenges to U.S. antidumping and CDV actions, mostly in the steel sector, challenges to U.S. antidumping measures on Korean stainless steel and Japanese hot-rolled steel.

It is really too early to speculate on the final outcomes of these cases. In terms of what it would do to affect our conclusions, I guess I would say that it would not affect our conclusions on what has happened in the first 5 years because these cases are not included in that group.

But it is not clear, and I tried to emphasize that in my statement. I do not think that we have had enough cases go through the WTO dispute settlement yet in the first 5 years to draw broad conclusions about how the U.S. is going to fare.

To date, we see that the U.S. has gained more than it has lost, but there are these cases in the pipeline where the rulings could be somewhat problematic to the United States, but it is really too early to speculate how they will be ruled on, and secondly, how the U.S. will choose to implement the ruling if it goes against us.

Senator GRASSLEY. How would you respond to some of the criticism of this dispute settlement process, the commonly heard complaints that we have had about threats to national sovereignty or the lack of transparency?

Ms. WESTIN. Well, I think that certainly the lack of transparency is quite an issue. As you know, the U.S. Trade Representative has been at the forefront of trying to introduce more transparency into the system. I think when you hear from the Director General Mike Moore at an upcoming hearing, he will probably also address these efforts.

For a long time, the U.S. was standing pretty much by itself in trying to get more transparency in; it seems other countries now are starting to make some movement in that direction.

The U.S. would like to see the right for interest groups to file amicus briefs and would like the proceedings to be open rather than just have what happened in the proceedings become known

after the ruling has been made. Transparency is certainly one of the issues that I think the WTO does need to address.

With regards to national sovereignty, concerns on sovereignty have centered over whether WTO rulings are going to weaken U.S. protections of health, safety and the environment, and so far this really has not been proven to be the case. But, as I say, we are only looking at the first 5 years of cases that have gone through the system.

Senator GRASSLEY. I thank you very much.

Now, some members have come and gone. Some maybe would have questions to ask in writing, and we will keep the record open for a few days.

If you get questions in writing from me or other members of the committee, we would appreciate your response. That would also be true of our last panel as well that I am going to call now.

I thank you, Ms. Westin.

Ms. WESTIN. Thank you.

Senator GRASSLEY. Now, would the third panel please come forward as I am giving introduction.

Professor John Jackson is university professor at the Georgetown University Law Center, a very distinguished teacher and legal scholar and the author of many books and articles on the WTO and the dispute settlement process.

Gary Horlick is a partner in the law firm of O'Melveny & Meyers. He previously served as Deputy Assistant Secretary of Commerce for Import Administration in the Reagan Administration, and as International Trade Council for the Senate Finance Committee.

Lastly, Lori Wallach is director of Global Trade Watch, which is a division of Public Citizen, the national consumer group that was founded by Ralph Nader.

I think what we are going to do, even though you are not sitting this way, normally I go left to right, but I am going to start with Professor Jackson, Mr. Horlick, then Ms. Wallach.

So would you start out, Professor Jackson, please?

STATEMENT OF PROFESSOR JOHN H. JACKSON, UNIVERSITY PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Professor JACKSON. Thank you, Mr. Chairman. I am, indeed, very pleased to accept your invitation to testify here. I must say, I was extremely interested in your statements at the outset, and the statements of the previous witnesses. As you already know, much of what they have said I sympathize with greatly.

I am going to be very brief. Of course, we are required to be brief. I have a written statement that is somewhat longer and I am not going to read that or get into it, I am just going to outline some of the thoughts I have.

Senator GRASSLEY. For all three of you, your statements will be put in the record, and we do appreciate your summarization.

Professor JACKSON. Good.

Basically, as we have seen from the previous testimony, we now have somewhat over 5 years of experience under the WTO. In many ways, and I think many others who appraise this with great

experience agree, this has been a remarkable, successful launch of a new institution.

It faces enormous problems, very difficult problems of what is happening in the world, particularly trends towards globalizations that in some way seem to be beyond the control of governments and very much under the control of markets, as well as technology.

One of the central features of the WTO, as previously stated, is the dispute settlement system. I think it was you, yourself, that mentioned that this is one of the keystones of the new system.

Our previous witnesses have talked quite extensively about the statistics. I do not need to go into that. I will note that, generally, overall, not just focusing on the cases of the U.S. but in the broader, systemic sense, that it does appear that about half of the cases brought never go to panel. In other words, they are settled, or withdrawn, or some other aspect like that.

I think that is an encouraging sign. I think what it means, is that the participants, the disputants, can appraise with greater accuracy the predictability of the system as they get into a case and hopefully that this will be part of the purpose of the whole system over time so that there will be more and more settlements.

We are also beginning to see that there are fewer appeals. It used to be, even a year or two ago, that almost every case was appealed. Now there are seven or so that have not been appealed, and I think there is something of the same flavor. There is a growing jurisprudence which gives guidance to disputants, and we should welcome, the system should welcome the notion that you do not have to appeal every time.

When I look at what has happened in the process, particularly looking at the jurisprudence as represented in the appellate body opinions, this has been quite a remarkable development of jurisprudence.

As one who has spent a lifetime of scholarship on jurisprudence in law matters, particularly related to international affairs, I think the appellate body is maybe one of the best international tribunals, even though we do not call it that, in existence.

It has really had very penetrating analyses of the cases and is developing a very interesting, and I would say further understanding of some of the difficult dilemmas facing nation states in the world today.

In particular, one thing that is interesting is the appellate body has indicated in its opinions a considerable amount of deference to national sovereignty. In some cases, it has indicated that deference, at the same time holding against the national sovereign, but in other cases it has actually altered the result of a first-level panel to really give a wider degree of latitude to the national sovereigns.

Perhaps this is a function of the constitution, the make-up of the appellate body. In the first group, the first seven that were appointed, there really were only two that one would say were trade experts, as such. There were five that, although they had considerable knowledge about some of these affairs, those five I would call generalists.

I think the generalists have brought something of a different attitude to the jurisprudence, more of a weighing against other policies, and more of a sense of understanding of what national govern-

ments face in the decision making that they have to go through, particularly in economic affairs.

Now, we do see emerging some potential constitutional problems. For one thing, because the decision making opportunities are so constrained in the organization, there is less ability to avoid impasses and, therefore, a temptation to throw things at the dispute settlement system. I think this is going to be a matter that we will need to look at in the future. My time is short and I cannot get into that.

In conclusion, just let me say that if we were to evaluate the process so far, you could do so under four criteria. First, does it promote settlement? I would say, yes, the marks are pretty good. Second, is it developing a welcome jurisprudence that is very, very well-reasoned and analytical? I would say, yes.

Third, are the results being implemented by states? Well, there the question is not so optimistic, particularly in light of the several cases that have been discussed already.

Finally, is there a political and public acceptance of the process? And there, I think, the marks are really somewhat less, and that goes into the questions already raised about transparency in the procedures.

Thank you, Mr. Chairman.

[The prepared statement of Professor Jackson appears in the appendix.]

Senator GRASSLEY. Thank you, Professor Jackson.

Mr. Horlick?

STATEMENT OF GARY HORLICK, ESQ., O'MELVENY & MEYERS, LLP, WASHINGTON, DC

Mr. HORLICK. Thank you very much, Mr. Chairman. It is an honor to appear today.

I want to cover three points. First, what the numbers tell you from my perspective as a private practitioner is that countries, companies, and people are voting with their feet to use the system.

I can give you an example. I am currently working with USTR on a major telecommunications services case in the WTO for a large U.S. carrier. I would not have recommended they bring that case without the existing DSU rules. It is not worth the time and trouble that would have occurred under a system like the old GATT system where the loser could simply block the result.

They might have won their case, and in fact the GATT was fairly effective for people who brought cases, but it is not the kind of case you would have brought. The company would just have gone about its business and given up on its rights.

So this is an example where people, because the system is as it is described, are willing to use it. The system works, so it attracts people to enforce their rights, and that is good.

A number of the settlements John Jackson mentioned also show that people bring cases, like Korean Shelf-Life or Chilean Scallops that would have just hung around the international agenda for 10 years as an irritant; now they get resolved in 6 months.

Second, the results of the DSU, the actual decisions, have been right. A lot of the controversy is about what is, to be blunt, dicta.

But if you look at the results of the cases, they basically come out right.

I have described this in my statement, but actually an unbiased journalist put it best. Let me just quote it a little bit. This is a reporter named Bruce Ramsey writing last November 3.

"Like other newsmen, I have done my best to understand the decisions of the World Trade Organization without actually reading them. I finally decided to sweat through several of these cases myself. I started with Venezuela and gasoline.

"Opponents loved this case. The WTO allowed Venezuela to beat back the EPA, which opponents say the shows the WTO lets corporations pollute the air. Actually, what this case says is that the U.S. is free to regulate in order to obtain whatever air quality it wished.

"What it disallowed was the U.S. imposing a stricter set of requirements on Venezuelan refiners than American refiners." He goes on and concludes, "In my view, the cases agree far more with what the trade lawyers say than with what the crusaders say." I will give a copy of this article to the panel.

The third point is that there are some problems which have arisen at a working level. They have to be fixed and it will take a new round to fix them, a new negotiation.

First, and you have seen the results of this in Bananas, Beef Hormones, and a couple of others, there are built-in incentives to delay compliance. The way the system works, if you lose there is no particular rush in complying. You have every reason simply to delay, to appeal, et cetera. So something should be done to put in some incentives to comply and disincentives to delay.

This is stuff that lawyers and court systems face all the time. It is not surprising that this comes up in a new system, but it is something to which the members of the WTO are going to have to pay attention.

Second, is the concept that at the end of the line you wind up with trade retaliation. Obviously, compliance is a better result. The purpose of the WTO is not to raise tariffs. The Golden Rule for trade disputes, as well as trade negotiations, is you should always lower barriers, not raise them.

So again, this is something that court systems and lawyers deal with all the time. Let us find some other ways to put a burr under the saddle so people comply with the results so we do not have to raise tariffs. Let us find some way to liberalize trade, not restrict it.

Then, finally, we do have to bear in mind the domestic repercussions of compliance. Ambassador Charlene Barshefsky mentioned the Australian Leather case.

Australia has been claiming, well, if we comply and take away the subsidy and make the company repay it, the company goes bankrupt and all the workers get fired. Well, some could say, too bad, they should not have taken the subsidy. Politically, I am not sure where the U.S. would come out in the same situation. So, it is the kind of thing that countries should be looking at before it becomes a big problem.

Finally, while I disagree with a lot of Ms. Wallach's claims in her testimony about what the cases say, and I cover that in my written

statement, I agree with a lot of her suggestions about what has to be done. Some of them, I think, can be solved again in a new round.

For example, she says we "should institute meaningful conflict of interest rules." I think you probably need permanent panelists, and with that you will get that kind of vetting.

Similarly, she wants to open up the process in terms of transparency. I agree. Almost any American agrees that the hearings should be open, the documents should be open.

I think, again, once you have a system of permanent panelists, that will be easier, by the way. But right now, you have people serving who are in governments and they get nervous about being seen to do anything.

Professionalizing the WTO legal department, I would have to disagree with her. I think that is an unwarranted personal attack. They are quite professional.

Ensuring equal functional access by all the WTO members. Absolutely true. It is a big problem. Developing countries simply cannot keep up with this system.

It is easy to say, and USTR internally says that is great, we can beat them. But once you beat someone 100 times they are not going to stay in the game, they are just going to walk away. So we have to find some way to make the system work for all countries.

Empowering other institutions to provide substantive expertise. They already do, and you will see, once the Asbestos report comes out, heavy reliance on the WHO, as has been done before.

Some of her other suggestions, obviously, I disagree with. Outside of WTO appeals, what you need is a legislative process.

Just to finish, and I always finish with this or start with it, what we cannot forget are the benefits of this system. The world trading system has helped add 50 percent to life expectancy in the last 50 years, cut infant mortality and maternal mortality enormously. This system works for basic human needs.

So despite all the claims, before we start throwing it out, we should be very careful to make sure we do not throw out the benefits. Thank you.

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

Senator GRASSLEY. Thank you, Mr. Horlick.

Ms. Wallach?

STATEMENT OF LORI WALLACH, DIRECTOR, GLOBAL TRADE WATCH, WASHINGTON, DC

Ms. WALLACH. Thank you, Mr. Chairman. I appreciate the opportunity to testify.

The 5-year record of WTO dispute resolution can be evaluated in different ways. In my testimony, I take two approaches. One, is a systems analysis which looks at due process, effectiveness, implementation, and comes to the conclusion that there are serious procedural problems. Some of my recommendations have been happily outlined of how to fix those by my colleague.

But what largely has happened is a shift from a diplomatic system to a court system without implemention of the basic due process guarantees that would be in a court system.

So, as a result, there are some major problems, for instance, in conflict of interest, where on the Helms-Burton on the Cuba embargo panel, a panelist appointed was Arthur Dunkel, who at that time was on the board of Nestle's Cuba, so would have been an interested party in the case, and was chairing the International Chamber of Commerce Committee, leading the campaign against the very law he was supposed to judge. The conflict of interest rules are voluntary and it is self disclosure. That is a problem.

Secrecy is an issue, but as well there is no way for some interested parties to be represented at all in addition to the secrecy. So while there is a growing body of jurisprudence, I would argue that it is lopsided. The reason why, is that there are other values and perspectives that simply are not in the discussion.

As far as effectiveness, I have described some of the problems with implementation, which others have as well, bananas, beef. I would only note that these rule of law issues about implementation of a system become much greater with China in the system.

So if one believes as I do that you need an international trade system, questions about the scope of the current rules, which I will bring up, if you need such a system, then it becomes a question of what happens when you have a country that does not follow the rule of law in a system that requires, for implementation, the following of the rule of law.

Finally, on the issue of consistency. An issue that I raise is the asbestos case as an example of the political aspects of the current WTO dispute resolution system.

Now, the fact that the panel on the Asbestos case has effectively thrown the case and found for France and allows the asbestos ban, from a public health perspective, I find to be a good outcome.

But the jurisprudential limbo that was required to avoid the entire Technical Barriers to Trade Agreement to come to that conclusion shows the politicalization of that ruling.

While the outcome, from my perspective, is the right one, I suspect many who have supported WTO's past dispute resolution practices could be upset.

On the other consistency points, the plaintiffs always win. This gets to the issue of who has the funding to be a plaintiff. Of the 33 cases that have gone through the whole system, in all but four the plaintiff has prevailed.

That is not only an issue of who participates, but also the U.S. ends up as a defendant, not just a plaintiff, and the U.S. has lost the cases, all but one, where it is a defendant.

Beyond the functional, though, is a performance analysis. I have criticized in my testimony GAO's perspective because they only look at an economic analysis.

For instance, the environmental cases are dismissed as having little economic value. Yet, as is not in the report but as is known, the reason why the Clean Air Data and the reformulated gasoline data does not look very changed is even though Venezuela won the case, they have not implemented their new right to send in their dirtier gasoline.

In fact, Brazil, the smaller party in the ruling, is the country that has. So the reason the data has not changed is because Venezuela has not actually implemented its new right.

Second, in the U.S. brief itself to the WTO, the data of the potential of Venezuela, our number-one gasoline importer, does implement a 5 to 7 percent increase in air dirtiness, as stated by the U.S. Government in its own brief to the WTO.

As well in the turtle case, dismissed as not a problem. It is not fully implemented. We do not know what will happen. Environmentalists won in a District Court case against the a U.S. regulatory attempt to implement. Malaysia has reserved the right to continue to challenge.

This set of issues, though, brings up the bigger question of scope of the WTO rules, and this is the broader context of my testimony.

The Uruguay Round expanded the WTO rules beyond objective rules like non-discrimination and got into many new areas where there are value-laden subjective decisions on the level of protection or what areas are appropriate to be regulated.

That shift, to my thinking, is the cause for the big fight-back internationally. As long as countries are told, you cannot treat products differently according to where they are made, it ought to be their right to set the level of protection. Yet, in the GAO analysis, only the economics is looked at, and from a mercantilist perspective.

So I would conclude by asking this question. From the GAO analysis, some of the cases the U.S. won are seen as U.S. gains. But how is it a gain for the U.S. public interest? For instance, in the Banana case when a special interest in a commodity we do not trade in is allowed to use the system and the retaliation that results raises prices for U.S. consumers?

How does the U.S. gain, even if we won, in the Beef Hormone case when the retaliation in the case raises prices and U.S. consumers stand to be hurt by the application of the principle of the interpretation of law in that case because the U.S. law has many instances of regulations taken on the precautionary principle, which is why U.S. and European consumer groups actually support the European Union's holding out, paying the retaliation, and not changing the law, a point which the parliamentarians are no longer, unfortunately, here to answer.

Then finally, if you look by topic but not by country, the consistent pattern until the Asbestos case is that every invasive species, environmental food safety case gets ruled against as a trade barrier. If you look, not on a country basis but a topic basis, it stands to explain part of why the opposition of environmental and consumer groups are so strong.

Thank you.

[The prepared statement of Ms. Wallach appears in the appendix.]

Senator GRASSLEY. Thank you very much. I obviously did not have a question in regard to your asking questions, but if the other two panelists would like to respond to them, maybe not all the questions, but some of the more important questions you raise, I would be glad to give a few minutes before I ask questions.

Would either one of you like to take that on?

Professor JACKSON. Well, I do not really have too much, Mr. Chairman.

Like my friend, Mr. Horlick, we both seem to agree with the more substantial part of Lori Wallach's statements than we usually do. There are problems, clearly, and there are some things that we have got to look at in the future. She has pointed to some of them.

I think she has a harsher and perhaps not as detailed evaluation of some of the cases and the jurisprudence in them. Let us take the gasoline case, for instance. There is a problem that could have been solved. In fact, I think the whole thing got into some kind of a mess because there was apparently some conscious desire to discriminate against the imports, and the rules of the GATT say you are not supposed to do that.

It was not necessary to do it. If you want to have a certain level of clean air you could do that by applying an equal measure against both the domestic product and the imported product.

So it is really kind of curious that that case, which turned out to be the first case that went through the whole process, which for whatever reason, we do not know, was against the largest trading entity in the world, and that entity has been willing to comply with it.

It strikes me, it does not provide the basis of the lesson that she suggests. It provides, I think, some optimism about the system.

Mr. HORLICK. Just briefly. Reformulated Gas, and probably the Australian Salmon case, and the Japanese Apple case illustrate the kinds of cases we do want the WTO to deal with. I disagree with Ms. Wallach and I agree with Professor Jackson.

The U.S. could have set just one standard. What it got caught doing was setting, frankly, an easier standard with, in her terms, dirtier gasoline for some U.S. refineries than for foreigners and you cannot do that. We could have set a higher standard for everyone but chose not to.

We do not want that done to us. With respect, if you are going to have a rules system and a court system, the Golden Rule applies: do unto others as you would have them do unto you. That is what is happening.

The EPA administrator in charge talking to the Senate Committee on Environment and Public Works said, "I thought I would lean on the side of favoring the U.S. company's position over that of Venezuela." Well, it is a smoking gun. Of course you were going to lose that case.

So I cannot get that bothered by it because we want to be able to hit cases like that overseas, the same with the Japan Apples case where Japan had done no work, they just said no. The same rules are going to apply to everyone. We want to make sure that they are rules we like. Fortunately, the U.S. has more clout than anyone else in the WTO negotiations, so pretty much we do.

Even in the Gas case, I think USTR saw the Reformulated Gas case as a chance to show that U.S. compliance would set up the ability to demand compliance by others, including China.

Senator GRASSLEY. You may comment, and then I will ask three or four questions of you as we wind down. Go ahead.

Ms. WALLACH. Those responses did not really answer the question of how the consumer is broadly benefitted by this current state of affairs, but it does tease out some interesting questions about dispute resolution.

In the Venezuela Gas case, including that unfortunate statement—I do not like the statement either—gets down to what the actual regulation said. The actual regulation had two categories of treatment, but there were domestic and foreign companies in both of them.

If you were a foreign company that sent more than 80 percent of your gasoline to the U.S., you had to file with the EPA and you were allowed, like the domestic companies, to have your own baseline.

If you were a new U.S. company, i.e., within 18 months of starting your enterprise, or you had violated the EPA filing rules and were on sanction, you were treated like the foreign companies, which is to say, your data was not considered reliable and you had to take the statutory baseline.

So in fact, as compared to all of the U.S. companies in one category and all the foreign companies in another, as a practical matter, the agency, looking at how it could enforce and afford to enforce a goal set by Congress, came up with a system that they thought worked, and it was their discretion that those categories should work.

It is undoubtedly true that that meant that there might be a foreign refiner who was treated worse than a similarly situated domestic refiner, but the converse is also true.

Our argument is that the discretion that is necessary to implement policies on the environment when they are judged under a least trade restrictive type rule, the trade implication is looked at ahead of the effectiveness, the affordability.

It means that, as compared to only taking out truly protectionist measures, you end up wiping out legitimate environmental laws that can only be implemented in the expert's opinions of a country's regulators in a manner that may have a discriminatory effect.

Finally, on the Japanese Apples case, this case is looked at by the U.S. environmental movement with whom I work. They call it the WTO boomerang, because they see it as an example of how an invasive species protection is ruled on under the sanitary and phytosanitary agreement, where the precautionary principle/notion is ruled against.

They are all panicked because, of course, China has threatened action as soon as it gets into the WTO on the Asian Longhorn Beetles case, which Hong Kong had threatened to take action on and China was fuming it did not have a standing at the WTO to go after.

The U.S. has taken basically a similar stance, which is just a total close-down, we are stopping the importation of any materials that could have this infested critter.

There may be other ways to deal with it. We have not figured out what they are, but under the precautionary principle the question is, can someone who wants to do it differently prove scientifically there is a way? The burden should not be on the U.S. to prove there is no way.

Mr. HORLICK. What you are saying is someone could challenge us. We could well win that case. The Japanese had no evidence whatsoever. APHIS has evidence on the longhorn beetle. You are raising phantoms.

If you look at the actual results of the cases, they do not stand for that. The question in Reformulated Gas was, to be blunt, good lobbying by two U.S. refineries. Well, other countries have lobbying also. It was not the reasoned discretion of an administrator. It is the kind of disguised protectionism you want a world trading system to stop.

Ms. WALLACH. Japan has data from a USDA study showing varietal differences in the transmission of the larvae of this particular critter. There is one study. There are not a lot of studies. They should have done more science, there is no doubt.

On the other hand, the U.S. basically knows the Asian longhorn beetle eats trees, and we cannot figure out any way to stop that except to chop the trees and burn everything to smithereens.

So, we have taken a precautionary approach, which is to say there might be other ways to deal with this problem. But until we figure out what they are, in the name of maple syrup for all, we have taken a rather strong approach on the basis of knowing the harm. The jurisprudence could boomerang back. It remains to be seen.

Senator GRASSLEY. I will move on then. I do appreciate the discussion. Very seldom does a panel interest me that much as we have people that have honest differences of opinion and can discuss them in a fairly non-emotional way.

Professor Jackson, I wonder, to what extent the WTO dispute settlement panels create new law that is not agreed to among the parties. I worry about this because we do not have a new round of negotiations now for some time. Panels then might begin to fill in some of the details that the member states ought to deal with.

Could you comment on this, and what the interplay is between dispute settlement and negotiations?

Professor JACKSON. Yes, Mr. Chairman. You put your finger on a problem that has perplexed me and that I alluded to in my talk, and on which I have written.

I think so far it would be difficult to say that the panels have over-reached in any way. The Shrimp/Turtle case was an interesting case where one might argue that the panel, and particularly the appellate body, moved up to the borderline here, but did so to try to allow an understanding that policies other than trade must be balanced in the process of their decision making.

But overall, the system has been very textual-oriented, very, very meticulously looking at the language of the treaties and using that language as constraints and as borders.

That approach could be criticized itself. Particularly in a more national jurisprudence, we probably would not see it so carefully textual. I think the appellate body, in particular, is responding to a clause in the dispute settlement understanding in Article 3, Paragraph 2, which warns the panel system not t go beyond the existing obligations in any direction.

But if the organization is paralyzed in other respects in the sense of inability to move with negotiation towards new rules that are needed, or inability to resolve some of the ambiguities and lacunae that already exist in the text, there will be more and more temptation to throw some of these issues at the dispute settlement bodies

because it's the dispute settlement bodies that seem to be effective in coming to a decision.

I think that is a risk for the future, so I applaud, for instance, what Ambassador Barshefsky alluded to, seeking alternative ways to handle some of these kinds of disputes that are more, if you will, negotiated or legislative in nature.

Senator GRASSLEY. All right.

I have one more question for you, and then Ms. Wallach and Mr. Horlick.

What impact will China's entry into the WTO have on the dispute settlement system? We have had a couple of different points of view on that today and I would like to have yours.

Professor JACKSON. I, of course, do not know for certain. We do not know for certain. There have been a number of expressions of unease that this could overload the system with many disputes. I tend to doubt that. I noticed that the Ambassador also tended to raise some questions about that.

But I do think, and I think it is being done but I am not entirely sure because I am not privy to a lot of this, it is important to have systems other than the dispute settlement system to work on these problems of Chinese compliance with what is going to be a really major, major question for them in altering their economic system.

Senator GRASSLEY. Ms. Wallach, your organization opposes some of the cases that the U.S. Government has pursued at the WTO dispute settlement against foreign practices such as EU hormones, the Korean shelf-life, the Japan varietal cases. These are non-tariff barriers keeping out U.S. products.

So my question is, why should the U.S. Trade Representative not pursue those?

Ms. WALLACH. This gets to my overall point about in what way one judges a gain in a case. Our concerns with those cases are that the U.S. economic interest in market access not ride rough over legitimate food safety, environmental, and other public interest goals.

So in the case of the European hormone case where the U.S. and EU consumer movements unanimously support the European Union's regulation, in that instance it is an issue of the European Union taking a non-discriminatory regulation, which is to say its domestic farmers are not allowed to use the artificial beef hormones and it will not accept imports grown with those hormones either.

From our perspective then, it is the right of the consumers who will eat the product to choose the level of food safety protection they seek.

In that instance, when there is not discrimination, there is truly not a trade basis for going after the second-guessing and undoing of a strong consumer preference, particularly in the instance, as that is, of the precautionary principle being applied.

That is to say, as in many U.S. regulatory systems such as our pharmaceutical approval, the European Union's system requires the producer to scientifically prove something is safe over the long term.

That is also like the U.S. pharmaceutical system and it is why we did not approve thalidomide and Europe did, which does not have a precautionary principle in its pharmaceutical system.

The European system does have a precautionary principle in their food system, so the burden is on the producer to scientifically prove something is safe, not for the government to prove it is dangerous.

Why, in the U.S., our people and our legislature has decided to apply the precautionary principle of pharmaceuticals and not food and Europe has done food and not pharmaceuticals, is the diversity that is a blessing of democracy.

But that right, when there is not discrimination, is a right that consumer, environmental, and other public interest advocates protect fiercely. It is the right to decide how much level of risk one will be exposed to.

In the Korean Shelf-Life case, the issue that has the consumer groups around the world upset about that case is it is an example of a rich country threatening WTO action on a poor country, and the poor country, without even getting into the jurisprudence of the WTO or looking at their own law, saying, we give up.

In fact, the statement that the Korean representative to the WTO made was basically, this is the least of our problems given everything else that is going on in our country. If you have a big issue about this, fine, we will drop it. Do not drag us to the WTO; that should be saved for big issues.

The problem is that the reason that law was done that way, as we learn from the consumer groups in Korea, is because fewer people in Korea have refrigerators, so the shelf-life difference—and it was much, much longer than is the U.S. shelf-life rule—had to do with the context of the consumer safety in Korea.

As far as the Varietal case, the issue there is the jurisprudence that is set up under the sanitary and phytosanitary agreement, and particularly the environmental implications for invasive species, defending invasive species cases in the U.S. when the U.S. decides to take a precautionary principle approach to avoid an infestation versus trying to deal with getting rid of an infestation once it has occurred.

The Asian Longhorn Beetle case is obviously the one of the biggest economic factor because it potentially has huge industry implications for both lumber and a variety of other industries, but there are other instances.

Finally, these cases serve the overall conclusion of my testimony, which is, there is a way to gain public support for the global trade system and there are sort of two paths it can take.

One path is to have a more diplomatic manner of settling these values-laden subjective cases where it is not a clear issue of discrimination, and obviously is a trade issue, but rather gets to democratic choices.

Either there needs to be a more diplomatic system for dealing with those issues, or alternatively those issues should be taken out of the global trade rules. If the system is to remain solely a court system without an avenue distinguishing these non-objective issues, and in my testimony I lay out the improvements that would be required even if you pruned down what the WTO's substantive

rules covered to avoid some of these subjective decisions, you still would have to do the repairs to the procedure about conflict of interest, openness, et cetera for it to function well on the more objective commercial issues.

Senator GRASSLEY. Mr. Horlick, could you comment on the substantial number of WTO dispute settlement cases being filed regarding U.S. antidumping laws? Why do you think so many of these cases are being filed, and do you think that they are likely to weaken these laws?

Mr. HORLICK. The Antidumping Agreement was one of the most intensely negotiated during the Round. According to a neutral observer, IIE it was one of the worst in terms of its drafting.

It is, technically, very badly drafted. It is basically, take one from column A, one from column B, put them together. So you do not find consistent drafting and it invites challenges, so it is no real surprise.

The U.S. actually is not the only country whose antidumping laws are being challenged. In fact, the first case on antidumping was brought by Mexico against Guatemala. The next case was brought by the U.S. against Mexico. The main case right now is by India against the EU.

So, basically everyone's antidumping laws are being challenged because each country in its own way attempts to use their antidumping laws to protect their local producers. And each country attempts to protect their local producers, but when they export, they bring cases to improve their exporters.

So you have the U.S. both attacking another country's antidumping cases while defending its own, and you will see a lot more of that. It is the nature of the Agreement. Because antidumping cases can exclude people from markets completely, people get mad and bring cases. But as I said, the U.S. is hardly the only target. You will see lots more of these.

Probably the Agreement should be renegotiated, because it is a mess right now. But politically, that seems difficult for the current Administration, for political reasons.

Senator GRASSLEY. And the last question is for Professor Jackson.

What have been the costs to the United States of the WTO dispute settlement system?

Professor JACKSON. Overall, economically, the impact, is that what you are referring to?

Senator GRASSLEY. Yes.

Professor JACKSON. I rely very heavily on the GAO study for that. I do not have the means to independently evaluate as deeply as they have. I somewhat agree with Lori Wallach that that may not be the most important part of the issues before us in dispute settlement.

I think in the longer run, although I take this from the GAO study, the systemic impact of this system is really what we need to be most concerned about now after only 5 years of experience.

I would certainly agree that it appears that the gains have exceeded the losses, even in the broader systemic jurisprudential concepts which are hard to quantify, but I have to go on the more quantifiable questions on what the GAO study says.

Senator GRASSLEY. I thank each of you on the panel. That is the end of our questioning.

I have just made a decision that we will keep the record open for one week for the submission of statements or questions. Thank you all very much.

[Whereupon, at 11:59 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF AMBASSADOR CHARLENE BARSHEFSKY

Mr. Chairman, Senator Moynihan and Members of the Subcommittee, thank you very much for this opportunity to testify on our experience with the World Trade Organization's dispute settlement system after five years.

U.S. TRADE INTERESTS AND ENFORCEMENT POLICY

In 1999, the United States was the world's largest exporting and importing nation, carrying on $2.2 trillion in two-way goods and services trade with the world. This represents a $1 trillion expansion of trade since 1992, contributing substantially to the remarkable record of growth, rising living standards and job creation the United States built in the 1990s. Thus far in the year 2000 as well, both exports and imports are growing rapidly.

This remarkable expansion of trade owes a great deal to the network of nearly 300 trade agreements the Clinton Administration has negotiated over the past seven years. Of special importance was the creation of the World Trade Organization in 1995. The WTO's creation deepened the achievements of its predecessor, the GATT, through a one-third cut in world tariff rates and the elimination of quotas, and broadened the GATT with new agreements covering agriculture, sanitary and phytosanitary measures, services, intellectual property, trade-related investment measures, and other issues—the vast majority of which apply to all of the WTO's 137 members.

Of course, to win the full economic benefit of the WTO and each other agreement we negotiate, both for America's concrete trade interests and the broader strengthening of the rule of law, we must ensure that our trading partners will fulfill the commitments they have made. And in this work—together with our creation of USTR's first special unit dedicated solely to monitoring and enforcement of agreements; and the use of our domestic trade laws and other measures—the WTO's dispute settlement mechanism is of central importance.

WTO DISPUTE SETTLEMENT UNDERSTANDING

In the Uruguay Round negotiations, Congress made a more effective GATT dispute settlement system a principal U.S. negotiating objective. The result is the WTO's Dispute Settlement Understanding, created at the foundation of the WTO itself, which enables us to assertour rights and protect our interests in the trading system more effectively than ever before. At the same time, the dispute settlement system fully respects American sovereignty, as panels have no power to order any WTO member to change its laws, nor to impose retaliation. The most important changes it makes vis-a-vis the previous GATT system include:

- Imposition of stringent time limits for each stage of the dispute settlement process,including the time for implementation of panel recommendations;
- Creation of an Appellate Body to review panel interpretations of WTO agreements andlegal issues;
- Automatic adoption of panel or Appellate Body reports and of requests for retaliation inthe absence of a consensus to reject the report or request; and
- Automatic authority for complaining parties to retaliate on request, including in sectorsoutside the subject of the dispute, if panel recommendations are not implemented or thereis no mutually satisfactory solution to the matter.

In those cases where our trading partners are not fulfilling their commitments, in comparison to the dispute settlement options available under the WTO's prede-

cessor, the General Agreement on Tariffs and Trade, we have found the WTO dispute settlement mechanism to be more reliable, as it eliminates opportunities to block panel results; more comprehensive, in that it covers all the WTO agreements while the GATT system covered only goods; and more timely in securing results.

DISPUTE SETTLEMENT PROCEDURES

Before I review our experience in detail, let me set out the procedures the Dispute Settlement Understanding establishes. In essence, although there are opportunities to settle disputes at each stage of the process—and we take these opportunities whenever possible, consistent with our basic interests in the case—a completed WTO case can involve up to five stages and take as much as one year. The process is as follows:

First, having identified a probable violation of WTO obligations, we begin by requesting consultation with the government whose measure is in dispute. This is the initial step, and after the consultation request the parties are given sixty days before a complaining party may request establishment of a panel.

Second, if no settlement is reached in this period, we request formation of a panel. These panels generally have three members, who may not be citizens of either party to the dispute unless both parties agree. The panel hears arguments and reviews evidence over a period of six to nine months.

Third, on completing its review, the panel gives the parties to the dispute a complete draft of its report, including findings and conclusions. The parties may provide written comments on the draft and the panel must hold a meeting at any party's request to consider those comments.

Fourth, the panel completes and releases its report, which must be adopted by the Dispute Settlement Body within 60 days after it is issued unless one of the parties to the dispute files an appeal with the WTO Appellate Body.

Fifth, in the event of an appeal, a three-person appellate panel, drawn from an Appellate Body of seven independent experts reviews the case and issues a finding within 60 to 90 days. Governments found in violation of their obligations have a "reasonable period of time" to comply, normally not to exceed 15 months. Most cases are concluded at this point, and in many cases the party has complied in less than a year.

If governments do not comply with the panel or Appellate Body findings, complaining parties have the right to retaliate, in an amount equivalent to the damage done by the violation. This standard is equivalent to that in section 301 of the Trade Act of 1974, which permits the Trade Representative to apply retaliation equivalent in value to the burden or restriction being imposed on U.S. commerce.

EXPERIENCE WITH DSU TO DATE

Let me now turn to our experience with the dispute settlement mechanism in practice since 1995.

Since 1995, WTO members have filed a total of 202 complaints on 159 distinct matters. Of these, the United States has filed 53 complaints. Our experience in these cases has helped dispel some early fears and misconceptions; develop ideas on further improvements and reforms to the system, both in terms of effectiveness and procedural transparency; and on the whole, confirmed that the Dispute Settlement Understanding is a fundamental improvement in the world trading system and in the enforcement of U.S. trade rights.

To illustrate this, let me now turn to a detailed review of the cases in which the United States has been involved since 1995.

CASES BROUGHT BY THE UNITED STATES

Since the WTO's creation, we have been the world's most active user of the WTO dispute settlement mechanism. Our goal in filing cases is two-fold: first, to protect U.S. rights in cases of high economic interest or precedential importance to American industries, farmers and workers; and second, to ensure that our trading partners understand the importance of compliance with WTO rules. And while we have not agreed with panel findings in every single case, we believe the record shows that the dispute settlement mechanism has enabled us to reach these goals.

Of the 53 cases we have filed to date, 28 have been brought to conclusion. Of these we have prevailed in 25, winning 13 cases in panel proceedings and successfully settling 12 others. In the vast majority of cases, our trading partners have acted to eliminate the violations; in the only two cases where they have failed to do so, we have exercised our right to retaliate.

1. FAVORABLE SETTLEMENT

Our hope in filing cases, of course, is to secure U.S. rights rather than to engage in prolonged litigation. Therefore, whenever possible we have sought to reach favorable settlements that eliminate the violation without having to resort to panel proceedings. We have been able to achieve this preferred result in 12 of the 28 cases resolved so far:

- *Australia: salmon import ban.* Australia recently eliminated its ban on imports of salmon from Canada and the United States after Canada successfully challenged Australia's ban in the WTO. The United States had sought its own consultations with Australia in November 1995 and participated in the Canadian litigation as an interested third party; and U.S. salmon exporters will benefit from the result.
- *Brazil: auto investment measures.* In August 1996 the United States requested consultations under WTO dispute settlement procedures concerning Brazil's local content requirements for automotive investment. The United States and Brazil reached a settlement agreement in March 1998.
- *European Union: market access for grains.* In July 1995 the United States invoked WTO dispute settlement procedures to enforce the EU's WTO obligations on imports of grains. Before a panel was established, we reached a settlement. The settlement ensured implementation of the EU's market access commitments on grains, including rice, and provided for consultations on the EU's "reference price system."
- *Greece: copyright protection.* In 1998 we held consultations with the Greek government because a significant number of television stations in Greece regularly broadcasted copyrighted motion pictures and television programs without the authorization of the copyright owners. Effective remedies against such copyright infringements were not provided. In September 1998, the Greek government enacted new legislation to crack down on pirate stations, and the rate of television piracy fell significantly in 1999. We continue to monitor the situation, to ensure continued enforcement.
- *Hungary: agricultural export subsidies.* In March 1996 the United States, joined by five other countries, began a process of consultations with Hungary under WTO dispute settlement procedures concerning Hungary's lack of compliance with its scheduled commitments on agricultural export subsidies. We reached an agreement with Hungary and the WTO approved a temporary waiver that specifies a program to bring Hungary into compliance with its commitments.
- *Japan: protection of sound recordings.* As a result of WTO consultations, Japan changed its law—to grant full copyright protection for sound recordings. The Recording Industry Association of America estimated the value of this case at $500 million in annual sales.
- *Korea: shelf-life standards for beef and pork.* The United States and Korea consulted under WTO dispute settlement procedures and reached a settlement in July 1995 addressing Korea's arbitrary, government-mandated shelf-life restrictions that were a barrier to U.S. exports of many food products, including beef and pork.
- *Pakistan: patent protection.* The United States used WTO dispute settlement procedures to enforce Pakistan's obligation under the TRIPS agreement to establish a "mailbox" mechanism for patent applications. In July 1996 the United States requested that the matter be referred to a panel. We subsequently settled this case in February 1997 after Pakistan issued an ordinance bringing its law into conformity with its TRIPS obligations.
- *Philippines: pork and poultry imports.* The United States used WTO dispute settlement to challenge tariff-rate quotas and other measures maintained by the Philippines on pork and poultry imports. Following WTO consultations, the Philippines agreed in February 1998 to reform its restrictive tariff-rate quotas and licensing practices.
- *Portugal: patent protection.* The United States invoked WTO dispute settlement procedures to challenge Portugal's patent law, which failed to provide the minimum twenty years of patent protection required by the TRIPS agreement. As a result of the U.S. challenge, Portugal announced a series of changes to its system, to implement its WTO obligations. A settlement was notified to the WTO in October 1996.
- *Sweden: enforcement of intellectual property rights.* In May 1997 the United States requested consultations with Sweden concerning Sweden's failure to implement its obligations under the TRIPS agreement. The following year, Sweden passed legislation addressing U.S. concerns.

- *Turkey: theater box-office taxes.* The United States requested consultations in June 1996 under WTO procedures concerning Turkey's tax on box office receipts from foreign films. Turkey maintained a discriminatory "municipality" tax on box office revenues from showing foreign films, but not domestic films. The United States and Turkey reached a settlement in July 1997, and Turkey eliminated its discriminatory tax.

2. PANEL SUCCESSES

When our trading partners have not been willing to negotiate settlements, we have pursued our cases to conclusion. This has occurred 13 times:

- *Argentina: Textiles*--Argentina has complied with a WTO ruling against its statistical tax on imports and specific duties on various textile, apparel and footwear items in excess of its tariff commitments.
- *Australian Leather*—We are very close to an agreement with Australia on actions it will take in response to WTO rulings against its export subsidies on automotive leather; and if we fail to reach agreement, the WTO will authorize us to retaliate.
- *Canada: Magazines*—Canada has eliminated barriers to U.S. magazines, and created new tax and investment benefits and opportunities for U.S. publishers to sell and distribute magazines in Canada.
- *Canada: Export Subsidies for Dairy*—Canada has reduced its subsidized exports of dairy products, coming into compliance with its WTO obligations on butter, skimmed milk powder, and an array of other dairy products; beginning in the 2000–2001 marketing year, Canada will not be able to export more than 9,076 tons of subsidized cheese, which is less than half of the volume exported in recent years.
- *India: Non-Tariff Barriers*—India has eliminated import bans and other quantitative restrictions on 2,700 specific types of goods. This is among India's most significant modern trade policy reforms, opening new markets for U.S. producers of consumer goods, textiles, agricultural products, petrochemicals, high technology products and other industrial products.
- *India: Intellectual Property Rights*—India has complied with its WTO intellectual property rights obligations prior to providing patent protection for pharmaceutical and agricultural chemical inventions;
- *Indonesia: Autos*—Indonesia has eliminated its 1996 National Car Program, including local content requirements which discriminated against imports of U.S. automobiles;
- *Japan: Varietal Fruits*—Japan has eliminated restrictions on imports of apples, cherries and other fruit, which U.S. growers estimate will help them export more than $50 million a year of apples and other products to Japan;
- *Japan: Distilled Spirits*—Japan has eliminated discriminatory taxes on U.S. exports of distilled spirits. As a result, U.S. exports of these products in the year after implementation of the panel finding grew by 23%, or $14 million—faster growth than our exports to other markets, in spite of the Japanese recession;
- *Korea: Distilled Spirits*—Korea has eliminated-discriminatory taxes on U.S. exports of distilled spirits. .
- *Mexico: High-Fructose Corn Syrup*: The United States successfully challenged Mexico's HFCS antidumping determination in WTO dispute settlement panel proceedings. Mexico did not appeal the panel's findings, and has indicated it will comply with the rulings by September 22, 2000.

Finally, of course, two cases of particular concern involve European Union violations of WTO obligations on beef and bananas. These are unique in our 25 successfully concluded cases, in that the EU has failed to implement findings of both the dispute panel and the Appellate Body, failing to lift its unscientific ban on imports of U.S. meat, and adopting a new banana import regime that perpetuates WTO violations previously found by a WTO panel and the Appellate Body. In response, the Administration has imposed retaliation consistent with our WTO rights, on products totaling $308 million worth of EU exports to the United States. We continue to work toward a positive resolution of these cases.

3. UNFAVORABLE PANEL FINDINGS

Of the 28 cases completed where we were the plaintiff, WTO panels have not ruled in favor of the United States in three cases.

One case involved Europe's reclassification of local-area network computer equipment from one tariff category to another. The WTO findings in that case, however, were of no effect; we succeeded in negotiating the elimination of tariffs on both categories of goods through the multilateral Information Technology Agreement (ITA).

The EU has met its obligation to remove the tariffs, and the equipment now enters the EU duty-free regardless of its classification.

In another case, we challenged various Japanese laws, regulations, and requirements affecting imports of photographic film and paper. The WTO panel in this case did not find sufficient evidence that Japanese Government measures were responsible for changes in the conditions of competition between imported and domestic photographic materials. Japan in this case made a number of assertions as to the openness of its photographic film and paper market, and we are actively monitoring the market to ensure that opportunities for U.S. photographic film and paper are in line with Japan's representations.

In a third case, just concluded yesterday, the United States decided not to appeal a panel finding that Korea's government procurement obligations did not cover an airport project which had not been explicitly included in Korea's coverage list. Nevertheless, the Korean Government has informed us that the entities procuring for that project intend to open remaining procurements to foreign bidders.

CASES BROUGHT AGAINST THE UNITED STATES

The United States has also been the subject of 39 complaints in the WTO, of which eight have completed all phases of litigation and ten were resolved in a mutually satisfactory manner. Eleven others are presently inactive, while the rest remain in various stages of litigation. Of the eight completed complaints, in one case, a WTO panel upheld the WTO-consistency of Section 301 of the Trade Act of 1974; in the other seven, panels found some aspect of U.S. practice inconsistent with our WTO obligations. In such cases, we have respected our obligations, as we expect others to do. A review of the cases is as follows:

- *Section 301 (EU)*: The WTO panel found that Section 301 (the principal U.S. domestic trade law addressing foreign trade barriers) is fully consistent with our WTO obligations, both as a legal matter and in terms of our administration of the statute.
- *Reformulated Gasoline (Venezuela Brazil)*: In a dispute regarding an Environmental Protection Agency (EPA) regulation on conventional and reformulated gasoline, a WTO panel found against one aspect of the regulation that treated domestic companies differently than their foreign competitors. In that case, the WTO Appellate Body took a broad view of the WTO's exception for conservation measures, thus affirming that clean air is an exhaustible natural resource covered by that exception. The WTO ruling recognized the U.S. right to impose special enforcement requirements on foreign refiners that sought treatment equivalent to U.S. refiners. The ability of the United States to achieve the environmental objective of that regulation was never in question, and EPA was able to issue a revised regulation that fully met its commitment to protect health and the environment while meeting U.S. obligations under the WTO. No changes have been made to the Clean Air Act.
- *Shrimp/Turtle (India, Thailand, Malaysia, Philippines)*: In a dispute involving U.S. restrictions on imports of shrimp harvested in a manner harmful to endangered species of sea turtles (the "Shrimp-Turtle" law), the Appellate Body found our law to be fully within the scope of the WTO's exception for conservation measures, and U.S. import restrictions on shrimp harvested in a manner harmful to sea turtles have remained fully in effect. The Appellate Body did, however, find problems with implementation of the law. For example, it noted that procedures for determining whether countries meet the law's requirements did not provide adequate due process, because exporting nations were not given formal opportunities to be heard, and were not given formal written explanations of adverse decisions; and that the application of the law to Asian countries had been discriminatory, as Western Hemisphere nations had been given substantially more time than Asian countries to comply with its requirements, and were afforded greater opportunities for technical assistance.

Since the decision, we have addressed these procedural issues in a manner which has enhanced rather than weakened sea turtle conservation policies. In July 1999 the State Department revised its procedures to provide more due process to countries applying for certification under the Shrimp-Turtle law. The United States is also now negotiating a comprehensive sea turtle conservation agreement. with the countries of the Indian Ocean region, including the complaining countries, and has offered additional technical assistance.

- *Textiles and Apparel (Costa Rich)*: A WTO panel concurred with Costa Rica's complaint about U.S. import restrictions on underwear. The panel finding, however, led to no policy changes, as the U.S. measure at issue was imposed in

March 1995 for a two-year period, expiring one month after dispute settlement proceedings concluded.

- *Textiles and Apparel (India)*: A measure on wool shirts from India was unilaterally terminated by the U.S. interagency Committee on Implementation of Textile Agreements (which oversees the U.S. textile import program) due to changed commercial conditions. U.S. production in this category had increased and imports from India in this category had plummeted. The WTO panel did not recommend that the United States make any changes, and no action by the United States was necessary.
- *DRAMS (Korea)*: In a dispute involving a Commerce Department antidumping order on dynamic random access memory chips (DRAMS) from Korea, we prevailed on all but one of the claims raised by Korea. Specifically, Korea won on its claim that the standard in Commerce's regulations (and, thus, the standard applied to the DRAMs order) for revoking an antidumping order should have been whether the retention of the order was "necessary" instead of whether it was "not likely" that dumping would continue or recur if the order were revoked. Commerce amended the regulation in question by incorporating the "necessary" standard from the Antidumping Agreement, made a redetermination of its revocation decision by applying this new regulation to the facts, and concluded that retention of the order was "necessary" in light of evidence showing that a resumption of dumping by the Korean exporters was likely.
- *Foreign Sales Corporation (EU)*: In a case challenging the Foreign Sales Corporation (FSC) provisions in U.S. tax law, the WTO Appellate Body ruled that the FSC tax exemption constitutes a prohibited export subsidy under the WTO Subsidies Agreement, and also violates the WTO Agreement on Agriculture. The panel and Appellate Body reports were adopted on March 20, 2000. In response, we have presented to the European Union a detailed proposal which we believe addresses the problem. We remain hopeful that we will be able to resolve our differences over the regime in a cooperative and constructive manner.
- *Leaded Bar (EU)*: Finally, the EU prevailed in its case involving the Commerce Department's "change-in-ownership" methodology, as applied in three administrative reviews of its countervailing duty order on leaded bars from the United Kingdom. The panel found Commerce's methodology to be inconsistent with the WTO Subsidies Agreement, and the WTO Appellate Body upheld that finding. Meanwhile, the countervailing duty order in question was revoked by operation of law, on January 1, 2000, under the Department of Commerce's "sunset review" procedures.

POSITIVE EXPERIENCE

Looking back on this experience as a whole, there are certainly some panel findings with which we have disagreed, and areas in which we believe the dispute settlement mechanism can be improved. Before turning to these areas, however, let me note two areas in which our experience to date should dispel unnecessary fears or misconceptions.

1. RESPECT FOR SOVEREIGNTY

First, the dispute settlement system fully respects American sovereignty. No panel has the power to order the United States or other countries to change their laws; neither does any panel have the power to impose retaliation on WTO members. If a panel finds that a country has not lived up to its commitments, all it may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how to settle their differences. The defending country may choose to change in its policy; to offer trade "compensation" such as lower tariffs; or not to change its measure, in which case the complainant can retaliate by suspending trade concessions equivalent to the trade benefits it has lost.

2. LEAST DEVELOPED COUNTRIES

Second, some had been concerned that the system might place the least developed countries at a disadvantage, due to their relative lack of expertise in trade law and the WTO in particular. However, no cases have been filed against any of the WTO's least developed members, nor do any appear likely.

IMPROVEMENT OF THE DISPUTE SETTLEMENT UNDERSTANDING

While the system has worked very well for us, we do believe there are areas that can be improved, and we are working to do so.

1. IMPROVEMENTS IN ENSURING COMPLIANCE

First, the dispute settlement mechanism can be more effective in promoting compliance with WTO findings and facilitating swift action in the event of non-compliance. This was especially clear in the case dealing with the European Union's banana trade regime. We have been working over the past year to clarify the dispute settlement procedures to prevent protracted litigation where there is a disagreement about the WTO-consistency of measures taken to comply with a panel finding, and to preclude a party that has lost a case from gaming the system and delaying the exercise of WTO rights by the complaining parties. That work continues.

2. TRANSPARENCY AND PUBLIC ACCESS

Second, with respect to procedural reform, we believe the dispute settlement system can and should be more transparent and accessible to the public. In this regard, since 1995 we have raised a number of concerns related to these issues: ensuring prompt release of panel findings and other documents; enhancing the input of citizens and citizen groups; providing the opportunity to file amicus briefs in dispute settlement proceedings, and opening those proceedings to public observers.

Some of these concerns have been at least partially satisfied. For example, the Appellate Body has accepted amicus briefs, and ruled that dispute panels can do so as well. Likewise, the WTO now makes panel and Appellate Body reports, together with other documents related to disputes, available on the Internet the day after they are circulated in Geneva.

We have also ensured maximum transparency in our own dispute settlement work. USTR seeks public comment, through a Federal Register notice, on every dispute settlement proceeding to which the United States is a party. We make our own written submissions to panels and the Appellate Body available to the public as soon as they are submitted, and routinely request parties to all WTO cases to provide us with a copy of their submissions or nonconfidential summaries for release to the public. And as we pursue broader reforms, we have made a standing offer to all countries with which we have disputes (either as plaintiff or defendant) to open the panel meetings to the public.

CONCLUSION

In summary, Mr. Chairman, the WTO's dispute settlement mechanism has proven itself, after five years of experience, to have changed the world trade environment for the better.

In terms of our concrete interests, it has proven a highly effective means of protecting the rights of America's farm families, working people and businesses in the trade agreements we have negotiated. And it has, at the same time, confirmed basic principles of the rule of law: that trade policies must be nondiscriminatory; that we and other trading nations have a fundamental right to set the highest standards of environmental protection and consumer safety; and that all WTO members must keep their commitments. We are thus highly satisfied with our experience to date, and will build on it in the months and years to come.

Thank you again, Mr. Chairman, for the opportunity to testify today.

RESPONSES TO A QUESTION FROM SENATOR HATCH

Question: Madame Ambassador, as mentioned in my statement, I would like to see more private party participation in the WTO dispute settlement process. I'm not objecting to the government role in WTO panel matters; this is consistent with international public law practices, and it is an appropriate governmental function in my judgment.

While the submission of amicus briefs is a step forward, their consideration by the panel or its appellate body is not required. The very parties most affected are not getting a voice.

I'd like to have your views on whether we can revise the WTO rules to increase private party participation?

Answer: We have worked very closely with private party stakeholders at every stage of dispute settlement proceedings, and we certainly will continue that practice. In fact, we rely on them to provide the factual evidence to make our case, and we include them in the process of preparing the briefs and answers to questions that we submit to WTO panels and the WTO Appellate Body.

In every dispute, we also seek agreement from the other disputing parties to open panel and appellate hearings to observers from the public, which would enable our stakeholders to be present during oral argument. We regret that to date we have not been able to persuade any other WTO members to agree to open hearings—or

to even agree to permit attendance by private sector attorneys representing stakeholders—but we will persist in our efforts to change WTO practice in this way. In the meantime, without waiting for revised WTO rules, we will continue to press the European Union to open the process to stakeholders by mutual agreement in disputes between the United States and the EU. The majority of our WTO disputes, both as complainant and defendant, are with the EU.

Separately, increased transparency has been a central focus in our negotiations to revise the Dispute Settlement Understanding (DSU). Unfortunately, such negotiations have not led to DSU revision at this time; but, increased transparency will remain among our objectives in any such negotiations.

Response to a Question From Senator Graham

Question: The testimony provided by the panelists leave me with the impression that generally the WTO's dispute resolution process has, to date, worked properly but is capable of and needs to be protected from abuse or improper use. In a question to Professor Jackson, Chairman Grassley focused on an issue that concerns me: the potential for dispute panels to create "new law" in areas where the topic may not be dealt with specifically in the text of treaty obligations, yet may have been sufficiently addressed in national laws or jurisprudence. Consequently, are there or should there be safeguards in the dispute resolution process to prevent exploitation or overburdening the WTO process from claims that fall in such areas?

In a somewhat related manner, Ms. Wallach highlighted public policy and national interest concerns. I am also concerned with cases that pit mutually accepted public policy concerns versus technical conflicts, particularly in areas not specifically covered in treaties or where law and policy is evolving. What safeguards are, or should be, in place?

Answer: The negotiators of the WTO Dispute Settlement Understanding (DSU) shared these concerns and consequently wrote explicit safeguards into the DSU itself. In particular, Article 3.2 of the DSU provides that recommendations and rulings of the WTO Dispute Settlement Body cannot add to or diminish rights and obligations provided in the WTO agreements. This express prohibition is repeated for emphasis in Article 19.2 of the DSU, which provides that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." Panels and the Appellate Body are thus specifically prohibited from "making law."

In addition, the Appellate Body itself provides a further safeguard. While we do not always agree substantively with the outcome of Appellate Body decisions, these are generally recognized to be the product of an objective and unbiased process that requires panels to adhere to the text of the WTO agreements as written. In one case the Appellate Body stated ". . . we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." In another case, the Appellate Body reiterated that "the rulings and recommendations of the DSB serve only "to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements.'"

The United States will continue to invoke this provisions to ensure that neither panels nor the Appellate Body attempt to create "new law" through the dispute settlement process.

Prepared Statement of Hon. Max Baucus

In his prepared testimony for this hearing, Professor John Jackson states:

> A central feature of the WTO is its dispute settlement mechanism. Indeed, the statesmen involved in the Uruguay Round and the WTO, and the current WTO officials and ambassadors, take considerable pride in this feature.

The credibility of the World Trade Organization depends on a prompt, responsive, effective, and accountable dispute settlement system. Those adjectives—prompt, responsive, effective, accountable—do not describe the system that exists today. We, along with the other WTO members, have a lot of work to do to make that a reality.

I think it is important to look at the way that the European Union deals with difficult issues at the dispute settlement system and compare it to the American approach. There is a huge difference, and therein lies much of the problem.

The EU has used every rule in the WTO procedure book to avoid coming to terms with a negative finding by WTO dispute panels on beef and bananas. They played

every conceivable trick to delay the panel process and a final decision in these cases. Once the EU ran out the time on these procedural delays, they refused to take action to come into compliance with the panel decisions. It is clear that they have no intention of even attempting to satisfy those decisions.

The EU tells us that these are very tough domestic political issues. They tell us that when America finds itself on the losing side at the WTO on an issue that is politically sensitive domestically, then we will understand and do the same delay dance as the EU is doing in the beef and bananas cases.

Yet, let's look at the reality of American action. The decision that went against us in the Foreign State Corporation case, FSC, creates a major $4 billion problem for us. Yet we are conscientiously trying to develop a solution that meets WTO criteria. Deputy Secretary of the Treasury Stu Eisenstadt traveled to Europe last month to present the Administration's proposal to the EU in a serious effort to resolve the dispute. Going back a few years, when Congress passed the Helms/Burton bill on Cuba, a potential major WTO violation, President Clinton took a big political risk by courageously waiving the retaliation required by that law so the US would not violate the WTO.

In contrast to the United States, the EU sits back, trumpets that its actions are in accord with WTO rules (which is technically correct), and then acts like a tiny country with very narrow interests, rather than acting like one of the world's three economic superpowers with a deep responsibility to maintain the credibility and integrity of the WTO.

We Americans are certainly far from perfect in the trade area. But our behavior and sense of responsibility regarding the WTO is light years ahead of the behavior that Europe has displayed in dealing with the critically important dispute resolution process.

We plead with the EU. We try to cajole them. We threaten retaliation. We have now resorted to carousel retaliation. I don't particularly like the idea of carousel and the uncertainty surrounding a rotating retaliation list. But I support it as a way to send a message to the EU that we are totally fed up with their performance and irresponsibility.

The solution to the broader problem of the European Union's contempt for the integrity of the World Trade Organization's dispute settlement process cannot be found at the WTO. I certainly would not propose that we give the WTO enforcement or police power. The solution can only come from Europe itself, with leaders recognizing their responsibilities as one of the principal custodians of the world trade system.

Over a hundred years ago, Winston Churchill wrote "There are men in the world who derive as stern an exaltation from the proximity of disaster and ruin as others from success." Europe better start thinking long and hard about the damage it is doing to the integrity of the WTO and the world trading system.

Let me turn to some specific suggestions for repairing the dispute settlement process.

First, increase transparency in deliberations and submissions. This includes releasing briefs, requiring panels to accept amicus curae briefs, publication of transcripts of panel meetings, and opening panel and appellate hearings to the public.

Second, shorten the process. Close loopholes that allow delay in complying with a panel decision. Provide for an expedited process when serious harm is being done. Allow for immediate action once a panel makes its decision that a violation exists.

Third, ensure there is sufficient professional staff to support the panelists. Make sure panelists have no conflict of interest in terms of their current and past business relationships.

Fourth, find a way to deal with a government that implements protection in a non-transparent way, such as Japan's system of administrative guidance. The burden should not be on the aggrieved party to ferret out invisible and deliberately hidden measures that keep a market closed. We are going to face this problem with China, in spades. Enable panels to address privatization of protection. With so many border measures successfully removed, nations are finding other means of protection. Japan is the champion violater here. We can't get at Japan's barriers through traditional means. Their steel cartel is a good example. The film case was another sector where the barriers should have been addressable by the WTO.

The United States was the prime mover in establishing the WTO's dispute settlement process. We should be the prime mover in making sure that it works right.

PREPARED STATEMENT OF HON. ORRIN G. HATCH

Mr. Chairman, this is a timely and important meeting. The House is considering a WTO withdrawal measure dealing with the very topic of this hearing.

WTO WITHDRAWAL ACCOMPLISHES NOTHING

Withdrawal is not the way to go. There are flaws in the Dispute Settlement process; but they have not hindered the impressive record compiled by the US which has prevailed in 23 of 25 cases that we have brought before the body. Have there been setbacks and challenges for us? Of course, we're the largest import market in the world, by far. Challenges to our trade laws will always be unavoidable.

What have we gained under the WTO Dispute Settlement process? For one thing, a rule of law in international commerce that greatly improves on the old GATT process. Proceedings are forced into a strictly enforced timetable, rather than dragging out for years. Members who violate the WTO standards they agreed to, are getting challenged. Those who don't comply with panel decisions are suffering sanctions—or at least the threat of sanctions which are often sufficient enough to get compliance. Most members comply with their obligations. For some, especially those in developing countries, the cost of compliance is steep. We've shown that we're willing to consider these costs and provide technical assistance to help bring even these states into compliance.

DEALING WITH EXISTING BARRIERS

There are still barriers, Mr. Chairman. I, for one, would like to see mechanisms that ensure quicker compliance. Dragging out an anti-dumping sanction can bankrupt a company. And I would certainly like to see some form of participation, direct or indirect, by private parties so that their concerns are being aired in court. While amicus briefs can be submitted, they are not necessarily considered by the panels. Which means that the most-affected groups are denied the opportunity to submit a plea in way that few representatives of our government, as able as they may be, could manage.

I would also like to institutionalize our ability to measure WTO decisions against US interests. I am suggesting the creation in USTR of a monitoring capability that alerts us to the misuse of the WTO process to conduct broad-based assaults on our trade laws. I am uneasy, for example, over the pledge of Japan and Korea to initiate a WTO appeal against any US determination contrary to their interests.

US HAS MADE SOLID GAINS UNDER THE WTO DISPUTE SETTLEMENT PROCESS

Overall, we have done well in the five years of WTO's existence. In my state, Utah, we have benefitted from many WTO decisions favoring cases brought by the US. Here are just five examples:

- We have reduced Japanese restrictions on imported cherries and apples, adding $50 million of export sales to growers in the Intermountain region and Northwest.
- We have reduced Canadian export subsidies on dairy products which have helped my state expand cheese and powdered milk sales. Canadian cheese exports have been reduced in half.
- I personally intervened with the Korean Government to alter its unfair shelf-life standards for agricultural imports. When they dragged their feet, we took them to court—or so to speak. The result was a WTO decision facilitating the flow of meat and other products, including pork exports from my state.
- In the Philippines, we gained significant market access for pork as well as poultry.
- We prevailed in improving market access for pharmaceuticals in Pakistan, and for better patent protection of pharmaceuticals by India consistent with its WTO obligations.

Mr. Chairman, once more, I appreciate your initiative. I have several questions which I will either present to our witnesses or submit for the record.

PREPARED STATEMENT OF GARY N. HORLICK

It is a pleasure to appear before this committee, for which I worked as staff many years ago. I am appearing in my personal capacity to discuss WTO dispute resolution. I should note that I have been counsel to the National Cattlemen's Beef Association during the Beef Hormones WTO case, and have served as counsel in a number of other GATT and WTO cases.

My testimony today covers three points:

- the successful first five years of the WTO dispute settlement system,
- the decisions in some of the more talked about cases, and
- some problem areas which have become apparent during the last five years and which merit consideration in future negotiations.

Before reviewing those three points, it is worth remembering why we care about the world trading system.

Since 1947, life expectancy around the world has increased more than 50 percent [1]—one of the best crude indicators of human health and nutrition. The world's population has doubled and we are now capable of feeding it better than ever in history. Science has eliminated former plagues, such as smallpox, and parents in much of the world no longer watch childhood colds kill their young children.

What does this have to do with trade, or the WTO?

The answer is that science and trade, together, in the last 50 years have made the greatest progress ever in human history in serving two basic human needs, nutrition and health. Science has provided the means to increase food production far faster than Dr. Malthus ever suspected, and has provided medical remedies and procedures that would have been considered miracles 50 years ago. Trade spread these benefits around the world, whether by movement of goods, movement of ideas, or movement of people. Scientifically engineered rice varieties from a lab in the Philippines have eliminated the scourge of famine from Asia, not just the Philippines. New vaccines, whether from Switzerland or Cuba, save lives around the world. Chlorinated water saves millions each year from cholera, dysentery, and other waterborne diseases. Without trade, these improvements in human life would not be spread as rapidly or as well. In our fortunate country even many of the poor now live at levels that would have been considered middle class in the 1950's. While liberalizing trade obviously did not cause all of the positive effects, the dynamic efforts from freeing up markets—as well as the more direct effects of lowering trade barriers—were an important engine for the ongoing economic expansion.

1. The Success of the WTO Dispute Settlement System

The number of cases filed of which you have been told this morning is a good measure of the success of the system. It shows that countries, especially the United States, and companies, especially U.S. companies, are "voting their feet" to use the system. Cases like the one against Korea's shelf life rules on U.S. food exports [2] or the EU rules on the labeling of scallops [3] would not have been brought under the GATT because the defending country would have blocked progress. I am currently working with USTR on a major telecommunications services case in the WTO for a major U.S. carrier, which requires a major investment of the company's internal time and resources to build the case. I could never have recommended that investment under the prior GATT system where the losing country could block the result even though it had violated a binding legal commitment.

One further measure of the success of the WTO dispute settlement system is the number of interest groups that want to climb aboard. Proposals have been made to include substantive provisions on investment, competition law, labor rights, and the environment within the WTO system, primarily to take advantage of the WTO dispute settlement system.

In order to obtain the benefit of trade, countries must agree to cooperate to open markets and avoid beggar-thy-neighbor protectionism. This is done through the WTO. Some will tell you that the WTO agreements represent a loss of "sovereignty" for the U.S. Nothing could be further from the truth—in classic international law, sovereignty is defined in part precisely by the ability of a country to enter into such agreements.[4] We have been limiting our options in trade agreements for more than 200 years. No member of Congress would have any problem recognizing the bargaining that goes on in WTO negotiations—you get what you pay for, and the U.S. has more clout than any other Member except perhaps the EU. The complaints instead seem to stem from the unavoidable fact that if there are real rules, and a dispute settlement system to enforce them, no country, including us—will be exempt. If we are going to attack other countries' trade barriers, no one here is really surprised when other countries attack us—even if we complain publicly about it. By the same token, we also pull our punches for fear of the precedents we might set—

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[1] *Bretton Woods Revisited*, J. COM., Sept. 12, 1994, at 8A.

[2] *See* World Trade Organization, Overview of the State-of-play of WTO Disputes (Sept. 1, 1999) <http://www.wto.org/english/tratop—e/dispue—e/bulletin—e.htm>.

[3] *See id.*

[4] *See* 1 OPPENHEIM'S INTERNATIONAL LAW §§ 35,595 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

USTR has no qualms about sacrificing hundreds of millions of dollars of U.S. corn product exports in order to protect the U.S. steel industry through antidumping law in the run up to an election year.[5]

2. *The Decisions of the WTO Appellate Body*

If one examines the actual decisions in the most discussed WTO disputes, rather than leaping to conclusions and personal attacks, it is difficult to see what all the fuss is about. Yet some foes of the WTO claim that the rulings of WTO Panels and the Appellate Body have undermined health, safety, and environmental laws.[6] A review of some of these decisions reveals that the WTO, contrary to those claims, leaves member states ample room to develop their own health, safety, and environmental standards. What the WTO does undermine is protectionism that masquerades as something else.

a. *Environmental Regulations*

Critics assert that the WTO has "weakened environmental safeguards."[7] To back up their claim, they cite three cases: Reformulated Gas, Dolphin/Tuna, and Shrimp/Turtle. These cases, they allege, "have confirmed environmentalists' fears [of] dire consequences for global environmental protection."[8]

In *Reformulated Gas*,[9] Venezuela and Brazil challenged U.S. gasoline cleanliness regulations. The WTO Appellate Body found that the regulations were "unjustified discrimination" and a "disguised restriction on international trade" and that they therefore violated GATT.[10] According to the critics, this case "was the first concrete evidence of the WTO's threat to environmental policy"[11] and "[t]he WTO's rulings forced the U.S. to choose between— permitting imports of dirtier Venezuelan gasoline— or— facing— $150 million in trade sanctions each year—."[12]

But gasoline is not "dirtier" because it is foreign. The WTO panel and Appellate Body found the regulations objectionable only because they imposed different requirements on foreign than on domestic gasoline. Whereas domestic refiners were held to an individualized standard based on their own 1990 contaminant level, foreign refiners were held to a statutory standard equal to the average 1990 contaminant level of all oil refiners. In other words, half of the domestic oil refiners—by definition—were held to a lower standard than the foreign refiners. It was this discriminatory treatment—and not the U.S.'s environmental goals—that the WTO Appellate Body found objectionable.[13]

In *Shrimp/Turtle*,[14] India, Malaysia, Pakistan, and Thailand challenged U.S. import prohibitions on shrimp from countries that did not adopt a regulatory program requiring the use of turtle excluding devices ("TEDs") by commercial shrimp trawling vessels. According to the critics, "the turtle policy was exactly the same for foreign and domestic fishers."[15] Further, when the Appellate Body ruled against the U.S., it was a "WTO ruling against the Endangered Species Act. . . ."[16]

Neither of these statements is true. First, the panel and Appellate Body ruled not on the Endangered Species Act, but on prohibitions on the import of shrimp from India, Malaysia, Pakistan, and Thailand.[17] Second, the U.S.'s turtle policy was not "the same for foreign and domestic fishers" because it was not even the same for all foreign fishers. Indeed, the WTO Appellate Body found that the U.S. measures violated GATT precisely because they constituted arbitrary and unjustifiable discrimination among different countries.[18] Specifically, the United States allowed some countries longer phase-in periods than others;[19] negotiated seriously with some, but not other, countries towards reaching international agreements relating

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[5] Cite Footnote early on in *HFCS* about US failure to challenge the lack of a like product.

[6] *See* LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (1999).

[7] *Id.* at 19.

[8] *Id.* at 14.

[9] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) ("*Reformulated Gas*").

[10] *Id.* at 29.

[11] WALLACH & SFORZA, *supra* note 6, at 19.

[12] *Id.* at 21.

[13] *Reformulated Gas*, Report of the Appellate Body, at 29.

[14] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Docs. WT/DS58/R (May 15, 1998) and WT/DS58/AB/R (October 12, 1998) ("*Shrimp/Turtle*").

[15] WALLACH & SFORZA, *supra* note 6, at 27.

[16] *Id.* at 28.

[17] *See Shrimp/Turtle*, Report of the Appellate Body, at ¶ 1.

[18] *See id.* at ¶ 184.

[19] *See id.* at ¶ 173.

to shrimp harvesting;[20] and made "[f]ar greater efforts to transfer" TED technology to some countries than to others.[21]

The critics also cite *Shrimp/Turtle* as an example of the WTO ignoring multilateral environmental agreements (MEAs). They assert that the "WTO panels ignored the fact that the U.S. law conforms with the objectives of CITES, which lists sea turtles as a protected species and which allows the imposition of trade sanctions to protect them."[22] But the Convention on International Trade in Endangered Species (CITES) was not relevant to the dispute in *Shrimp/Turtle*. CITES governs only international trade in endangered species or in products derived from them. Therefore, while it prohibits trade in sea turtles, CITES does not prohibit trade in shrimp.

More generally, there should not be too many serious problems if WTO panels defer to the major environmental MEAs in disputes between parties to those MEAs. The main players in WTO disputes (at least other than the U.S.) will usually be members of these MEAs. For example, the four plaintiffs in *Shrimp/Turtle* were all members of CITES.[23]

b. *Health and Safety Regulations*

Some allege that the WTO Sanitary and Phytosanitary (SPS) Agreement "sets strict limits on WTO Members' abilities to enact laws pertaining to food safety and—animal and plant health"[24]—"trade trumps health."[25] They cite three cases in this regard: *Beef Hormones*, *Australian Salmon*, and *Japanese Varietals*.

In *Beef Hormones*,[26] the U.S. and Canada argued that the European Union's ban on the import of beef from cattle using six types of growth hormones was an unjustifiable restriction on trade—which protected European beef farmers—rather than a legitimate SPS measure. The EU argued that it was entitled to select a risk level of no risk and that having chosen that level of risk, the precautionary principle entitled the EU to ban the import of beef raised with growth promoting hormones because there was a perception (among European consumers) that such beef created a health risk.

In this case, the EU measures were facially nondiscriminatory. Such measures, however, as with any facially neutral law, can hide discriminatory motives. The requirement that health- and safety-motivated trade-restrictive measures be supported by sound science is a means of preventing disguised protectionism. Some critics assert that this requirement prevents nations from adopting a precautionary approach under the SPS Agreement.[27] This statement is untrue; the Appellate Body in the *Beef Hormones* case explicitly accepted the use of a precautionary approach.[28] In this case, however, there was no scientific disagreement; rather, all scientific evidence, including that from European studies, indicated that the beef in question cattle was safe.[29]

In *Australian Salmon*,[30] Canada challenged an Australian ban on the import of uncooked salmon. A WTO panel and the Appellate Body found that Australia's measures were not scientifically justified. The critics assert that

> [t]he WTO's SPS rules do not allow countries to err on the side of caution. The ruling against the Australian law set a precedent requiring WTO Members to adopt SPS standards relating to plant and animal health only when precise risk to animals or plants can be quantified and the likelihood of infection or infestation can be established with scientific certainty.[31]

The Appellate Body did neither of these things. Australia was not "erring on the side of caution." Its own draft risk assessment had concluded that the ban was not scientifically justified; all it offered were "vague statements of mere possibility."[32] Furthermore, the Appellate Body specifically indicated that "the SPS Agreement

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[20] *See id.* at ¶ 172.
[21] *Id.* at ¶ 175.
[22] WALLACH & SFORZA, *supra* note 6, at 41.
[23] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *List of Parties* (visited June 12, 2000) <http://www.cites.org/CITES/common/parties/alphabet.shtml>.
[24] WALLACH & SFORZA, *supra* note 6, at 54.
[25] *Id.* at 57.
[26] *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WTO Doc. WT/DS26/AB/R and WT/2DS/48/AB/R (January 16, 1998) ("*Beef Hormones*").
[27] *See* WALLACH & SFORZA, *supra* note 6, at 60–61.
[28] *See Beef Hormones*, Report of the Appellate Body, at ¶ 124.
[29] *See id.* at ¶¶ 196–200.
[30] *Australia—Measures Affecting Importation of Salmon*,5, WTO Doc. WT/DS18/AB/R (October 20, 1998) ("*Australian Salmon*").
[31] WALLACH & SFORZA, *supra* note 6, at 63.
[32] *Australian Salmon*, Report of the Appellate Body, at 50.

does not require that the evaluation of the likelihood [of harm] needs to be done quantitatively."[33]

In *Japanese Varietals*,[34] the U.S. challenged a Japanese requirement that it retest its fumigation treatments whenever it wished to use them on a new variety of fruit. Japan feared that imported fruit might contain eggs from the codling moth, which can cause extensive agricultural damage. Some assert that the WTO panel and appellate body "rejected Japan's risk assessment" and prevented Japan from adopting a precautionary approach.[35] But Japan had no risk assessment and no scientific evidence whatsoever for the specific question that the Appellate Body addressed: whether a proven treatment need be retested again and again for new varieties of fruit.

c. *Conclusions*

Nobody can quarrel with the results of *Reformulated Gas*, *Australian Salmon*, or *Japanese Varietals*. All were cases of simple protectionism. The existence of such protectionist measures is exactly why we want the WTO. Similarly, *Shrimp/Turtle* struck down the discriminatory application of U.S. environmental laws, but said nothing about the laws themselves. *Beef Hormones* is more interesting, but even there the Appellate Body did not preclude nations from applying a precautionary approach (as the U.S. does in its own food and drug regulations). In short, the WTO does not prevent nations from adopting their own environmental, health, or safety standards. It does, however, prevent protectionism.

3. *The DSU's Problems*

Several of the WTO dispute settlement cases completed in 1998 and 1999 have demonstrated how problems built into the structure of the WTO Dispute Settlement Understanding (DSU) have the potential to gradually undermine some of the obligations contained in the WTO Agreements.[36] These problems can be classed at least three ways: incentives to delay compliance, lack of alternatives to trade sanctions, and impact of the remedies on private actors.

The first problem can be described by assuming—charitably—that the losing Member finds out on the day the Appellate Body decision is released that it has been acting in a way inconsistent with a WTO Agreement. The losing member, having already spent at least 15 months in the state of inconsistency (again assuming that the request for consultations was made on the first day of existence of the inconsistent measures) now has no incentive to comply (except that compliance may be in its own economic self-interest—but that is rarely why WTO inconsistent measures are adopted in the first place), because the DSU offers it a cost-free opportunity to delay compliance for several months. The first step is to seek arbitration as to the length of the "reasonable period of time" for compliance. In practice, that can delay matters for 2 months after the Appellate Body Decision.[37] In that arbitration, the losing Member has every incentive to ask for the longest possible "reasonable" period of time, and certainly the 15 months is "normally" considered reasonable.

Having completed the reasonable period, the losing Member can stall many more months before actual retaliation is imposed (often on sectors of its economy unrelated to the WTO inconsistency).[38] An optimistic reading of the outcome in Bananas is that the retaliation can remain in effect while the losing member comes up with a WTO-consistent measure.

However, the losing Member can claim that a new measure is WTO-consistent, forcing the winning Member to proceed to a further arbitration.[39] Indeed, the

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[33] *Id.* at 74.

[34] *Japan—Measures Affecting Agricultural Products*, WTO Doc. WT/DS76/AB/R (February 22, 1999) ("*Japanese Varietals*").

[35] WALLACH & SFORZA, *supra* note 6, at 65–66.

[36] For the sake of simplicity, non-violation nullification impairment cases will be left to one side, but many of the same problems arise in that context.

[37] *See European Communities—Measures Concerning Meat and Meat Products (Hormones)—Complaint by the United States*, WT/DS26/AB/R (adopted Feb. 13, 1998); *European Communities—Measures Concerning Meat and Meat Products (Hormones), Surveillance of Implementation of Recommendations and Rulings, Request for Arbitration by the European Communities*, WT/DS26/14, WT/DS48/12, G/L/235 (Apr. 16, 1998)).

[38] *See European Communities—Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS26/ARB (circulated July 12, 1999) (period of implementation set by arbitration at 15 months from the date of the adoption of the reports (Feb. 13, 1998)); Implementation of WTO Recommendations Concerning EC—Measures Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 40,638–41 (pub. Jul. 27, 1999) (eff. Jul. 29, 1999).

[39] E.g. in *Australian Leather*, the DSB adopted the report on June 16, 1999. Australia announced its compliance on September 17, 1999, 93 days later. The U.S. challenged it on October

irresistibility of the temptation to delay can be seen from the U.S. reversal of position: in Bananas, the U.S. argued that Article 21.5 arbitration as to the reality of compliance could not delay Art. 22.6 WTO-authorized trade retaliation for failure to comply. Yet as soon as the good faith of U.S. compliance had been challenged, the U.S. reversed course and insisted that it could postpone retaliation for its non-compliance as long as the Art. 21.5 arbitration—and possibly appeal of that arbitration—is ongoing.[40]

Finally, the absence to date of retroactive remedies in WTO—but not GATT[41]—practice provides a further incentive to delaying compliance. This is illustrated by the *Australian Leather* case. In that case the panel found that Australia had granted a prohibited export subsidy. The U.S. sought an arbitration of Australia's alleged non-compliance. Neither Member sought a fully retroactive remedy—i.e., a full repayment of the subsidy. Both parties agreed in advance to waive an appeal, which freed the arbitration panel to order full repayment of the subsidy—but without interest (meaning that the arbitration effectively allowed an interest-free loan of the amount of the subsidy—itself a prohibited export subsidy). Yet, as Australia pointed out, ordering repayment (with or without interest) could well bankrupt a small or medium size enterprise—*quaere* if the WTO negotiators intended such a result. That said, it should be noted that more typically a retroactive remedy applies to governments, not businesses, and it is not surprising that neither government party in the *Australian Leather* case sought fully retroactive remedies. Governments all live in glass houses, and left to their own devices are likely to avoid any remedy which can be turned against that same government. This leaves the private commercial interests involved with no remedy for what could be 4–5 years of blatantly illegal trade barriers, and leaves cynical or desperate governments with the temptation to take such measures knowing that effective WTO discipline can be avoided for 4–5 years.

The second problem is the perversity of imposing trade sanctions at the end of the process. If a member wins a case and the losing member chooses not to comply (after all the potential (and likely) stalling outlined above), the winner has two options: tariff compensation or retaliation (limited to suspension of WTO concessions). Theoretically, both are temporary while the losing Member complies, since compliance is expressly stated to be the desired outcome of the DSU.

Compensation does not seem to be a very likely outcome. In theory, there is a place for temporary compensation, while the losing Member puts itself into compliance, but in practice, the WTO is generous enough about allowing a "reasonable" period for compliance without compensation or retaliation that such temporary compensation will be rare indeed. As a permanent solution, compensation at least has the value of lowering some trade barriers (presumably the winning party will not agree to "compensation" that consist of lowering duties from bound rates down to effective rates) but the result is still a suspension of WTO obligations as between at least two Members, which if repeated a sufficient number of times could undermine the universality of the obligations. Finally, and most importantly, compensation is extremely unlikely to be a "burr under the saddle" painful enough to lead the losing Member to compliance (by definition, the compensation which the losing Member has chosen is presumably something not so irritating as to lead it to comply with its WTO obligation).[42] Retaliation (higher trade barriers) is usually even worse as a solution, of course. Stated simply, the purpose of the WTO is not to impose 100 percent duties on importers of Roquefort cheese, or other bystanders. While tariff retaliation has the possible virtue of being a "burr under the saddle" irritating enough to lead the compliance, the history of retaliation within the GATT/WTO context is not encouraging. The only GATT-authorized retaliation, by the Netherlands against the United States, was never in fact applied, and certainly had no influence on compliance. The other retaliation with at least implicit GATT acquiescence was the Chicken War tariffs placed by the U.S. on a variety of European products. At least one of those tariffs, the 25% duty on trucks, is still in effect, which aptly illus-

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4, 1999, and the arbitration panel ruled on January 21, 2000—4 months later (and after both parties foreswore on appeal of the arbitral ruling, which would have been several more months). *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, Report of the Arbitration Panel, WTO Doc. WT/DS126/RW (Feb. 11, 2000).

[40] *WTO Panel to Review U.S. Compliance With Ruling on AD Rules*, Inside U.S. Trade, (April 28, 2000).

[41] GATT panels ordered retroactive remedies in AD/CVD cases: *Dispute Settlement New Zealand—Imports of Electrical Transformers From Finland*, BISD 32S/55–70 (Jul. 18, 1995); *United States Countervailing Duties—Fresh, Chilled and Frozen Pork from Canada*, BISD 38S/30–47 (July 11, 1991); *Canadian Countervailing Duties on Grain Corn From the United States*, BISD 39S/411–436 (Mar. 26, 1992).

[42] One could envision a small number of scenarios down the road where compensation—even chosen by the loser—may be a desirable outcome for inconsistency with obsolete obligations.

trates the danger that retaliation (absent carousel-like changes) can create a vested interest in the maintenance of those duties. This may become a real danger as retaliation becomes more attractive. Historically, retaliation was attractive to smaller or poorer countries because it was perceived as raising the cost of their purchases (even where they could be supplied internally under tariff protection). The recent authorization of Ecuador to retaliate by not paying for certain EU intellectual property rights means that Ecuador could lower its costs by this type of retaliation—a dangerously attractive calculation.

Retaliatory tariffs may have been logical (if not perfectly so) in a GATT system based on the assumption that the predominant barriers would be tariffs, and in any event they may have been the only acceptable instruments in a world where views of national sovereignty were considerably more formal. Recent experiments (e.g., Canada's commitment in the NAFTA side agreement on the environment, and the Canada-Chile agreement on the environment) that the sanction will be judicially enforceable monetary payments to be used to improve the environment (rather than protectionist trade barriers) suggests that new, more specifically targeted sanctions could be imagined. One intriguing proposal, by Joost Paulwyn of the WTO Secretariat's Legal Affairs Division, is that the winning Member be allowed to choose the loser's trade compensation (subject to arbitration as to the amount), or that the loser pay monetary damages to the damaged foreign industry.[43]

A new Round presents the opportunity to consider new ideas. Other possibilities include limiting access by non-complying Members to the dispute resolution mechanism, or such "nuclear deterrents" as depriving the non-complying Member if its parking spaces at the WTO building! The key is to find remedies which (1) lead to compliance, assuming that is truly the preference under the DSU[44], and which (2) also limit the incentives to delay. For example, one cannot eliminate the parking space retroactive to the DSB adoption of the initial panel/AB report—but one could extend the effectiveness of the "No parking" sign for the corresponding number of days (more seriously, if monetary fines or damages are used, interest could run from some prior date).[45] While these will be considered radical thoughts by traditionalists, they barely begin to skim the surface of useful possibilities—such as interim relief.

A third set of problems, closely linked to the problem of retaliation, requires giving thought to the domestic consequences for private entities of the implementation of DSU decisions. In the easy case—say, an illegal 5% tariff—removal of the tariff removes the small amount of admittedly illegitimate protection, and so few tears are shed. But often, as in *Japan Liquor Taxes*,[46] the protection from the discriminatory tax had to be removed over a longer period of time than that contemplated by the DSU (made possible by the negotiation of compensatory lowering of other barriers) to ease the transition. This is not surprising. If "normal" WTO-legal tariffs are phased out over as much as 18 years (in some FTAs) to ease the pain, the same would apply to equally long-standing (even if WTO-inconsistent) protection. But it is easy enough to imagine the situation in which straightforward compliance with a ruling requiring removal of protection could destroy the affected domestic producer, with all the domestic consequences involved. In *Australian Leather*, it was argued that repayment of the subsidy (and not even all of the economic benefit of the subsidy, at that) by the subsidized producer would put it (and its employees) out of business at once.

Compliance is not the only source of such problems. Retaliation can have the same impact on bystanders, whether they are Roquefort cheese or cashmere sweaters exporters (in Europe) or small businesses (in the U.S.) specializing in import of products from a specific country (often catering to descendents of immigrants here from that country). Even some of the proposals mentioned above to replace retaliation (such as the winning Member choosing the tariffs to be lowered as compensation) could have the same effect. Obviously, it is not desirable for the WTO to devastate innocent bystanders, both from a moral point of view and in terms of maintaining its political legitimacy. Even beneficiaries of protective tariffs, subsidies or non-tariff measures will merit some consideration. In legal terms, the obligations

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[43] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 346 (2000). Even Pauwelyn does not go so far as to advocate compensation (monetary or otherwise) for damage prior to or during the dispute settlement process. *Id.*

[44] Some argue that non-compliance is to be expected in at least some politically painful cases.

[45] *See* Georges A. Cavalier, *A Call for Interim Relief at the WTO Level: Dispute Settlement and International Trade Diplomacy*, WORLD COMPETITION, 22(3), 103–139 (1999).

[46] Office of the United State Trade Representative, Press Release, USTR Settles Successful WTO Case Opening Japanese Market for Distilled Spirits and Eliminating Discriminatory Taxes and Tariffs (Dec. 17, 1997).

under the WTO run between governments, not private enterprises, and some thought should be given in a new Round to making sure that those obligations are fulfilled without wreaking habit on the private sector.

Response to a Question From Senator Graham

Question: The testimony provided by the panelists leave me with the impression that generally the WTO's dispute resolution process has, to date, worked properly but is capable of and needs to be protected from abuse or improper use. In a question to Professor Jackson, Chairman Grassley focused on an issue that concerns me: the potential for dispute panels to create "new law" in areas where the topic may not be dealt with specifically in the text of treaty obligations, yet may have been sufficiently addressed in national laws or jurisprudence. Consequently, are there or should there be safeguards in the dispute resolution process to prevent exploitation or overburdening the WTO process from claims that fall into such areas?

In a somewhat related manner, Ms. Wallach highlighted public policy and national interest concerns. I am also concerned with cases that pit mutually accepted public policy concerns versus technical conflicts, particularly in areas not specifically covered in treaties or where law and policy is evolving. What safeguards are, or should be, in place?

Answer: Senator Graham raises important concerns. It is not in the interest of the U.S. to allow other WTO Members to unilaterally exclude from the WTO dispute resolution system specific disputes (for example, allowing the EU or Japan to exclude disputes which might affect their agricultural programs). This suggests that the mechanism for preventing exploitation or overburdening must be multilateral—either the Appellate Body (which has been very careful not to come close to boundary) or through the more legislative functions as described by Professor Jackson (bearing in mind that we start with fewer votes than the EU, and pay less of the budget). The same analysis applied to truly mutually accepted public policies, which are much less likely to lead to disputes.

In any event, whatever the WTO does, it cannot change U.S. law, so the WTO cannot really overstep its bounds with respect to U.S.

Prepared Statement of Professor John H. Jackson

I. INTRODUCTION

The World Trade Organization (WTO) has been in existence slightly over five years. Its predecessor, the General Agreement on Tariffs and Trade (GATT), operated for almost fifty years as a "provisional" treaty and institution, but the WTO has a definitive, legal international organization structure. By most accounts, the WTO has been an enormous success, and has been diligently implementing and providing the appropriate infrastructure for the massive treaty results of the Uruguay Round of multilateral negotiations. The WTO has the unparalleled responsibility of overseeing a treaty of 26,000 pages, including approximately 1,000 pages of dense, and often relatively ambiguous, treaty text. (The other 25,000 pages are generally schedules of concessions, both regarding goods and services.) However, there are increasing worries about the direction and the long-term viability and strength of the WTO, particularly during the last year or two, and accentuated by a disturbing failure of the Third Ministerial Conference, which was held in Seattle in late 1999.

A central feature of the WTO is its dispute settlement mechanism. Indeed, the statesmen involved in the Uruguay Round and the WTO, and the current WTO officials and ambassadors, take considerable pride in this feature. The WTO dispute settlement system has had an enormous impact on the world trade system and its diplomacy. This dispute settlement system is unique in international law and international relations practice, in having a remarkable juridical and "legalistic" system for disputes, with a virtually automatic application of its decisions and reports in a manner that is binding on the members of the WTO. These attributes are in the context of an extraordinarily broad and comprehensive competence (unlike some of the more specialized systems of this type, which also have a great deal of rigor). In addition, the questions posed to the dispute settlement system often strike at the heart of the tension between views desiring a protection of nation-state sovereignty on the one hand, and the needs in the context of "globalization" or intertwining of economies requiring greater international cooperative mechanisms to allow the international economy to continue to work successfully.

II. THE WTO DISPUTE SETTLEMENT SYSTEM—THE FIRST FIVE YEARS

Since the WTO entered into force, there have been 193 complaints, involving 151 "distinct matters."[1] If more than one country brings a complaint against the same measure, the complaints will be consolidated and reviewed by a single panel. To date, the Dispute Settlement Body (DSB) has adopted 34 panel or Appellate Body reports (26 Appellate Body reports and eight panel reports). Since the appellate reports usually accept or affirm part of the first-level panel report, there are about 60 reports overall that have all or part application.

At the beginning of the WTO, it was generally expected that almost every case would be appealed. To date, 39 panel reports have been issued. In three cases, the time for appeal has not run out.[2] Of the remaining 36 cases, 28 were appealed, and eight were not appealed. Thus, Appellate Body review was invoked in 78 percent of the cases. Possibly and hopefully, the modest trend of non-appeal can be attributed to a greater sense of predictability and direction that is developing through the Appellate Body decisions and very elaborate reports, so that disputing parties can more likely see when appeals would not be useful. Of course, there may be other reasons not to appeal, such as when both sides feel that they do not want certain issues tested at the appellate level, or when both sides feel that they have achieved what they wished to achieve from the first-level panel report. In addition, there is additional expense for bringing an appeal.

There are some interesting features of the statistics regarding the dispute settlement. In 1995 the industrialized and the less-developed countries brought an equal number of cases.[3] During the next five years, the number of cases brought by less-developed countries remained relatively constant, while the number brought by industrialized countries peaked at 40 cases in 1997 and fell to 22 in 1999.[4] The United States and the European Union have been the most frequent complainants. Each of these two entities has participated as complainants or respondents in about half of the WTO cases.[5]

One encouraging characteristic of the cases brought so far is that a very large number are settled, in the sense of never leading to a panel report. The DSB has established 64 panels out of 151 distinct matters. Our statistical analysis concluded that adopted panel or Appellate Body reports resolved 46 disputes, while 43 disputes were resolved in other ways (such as settlement or withdrawal of contested measures).[6] Interestingly, no cases were resolved by good offices, conciliation, or mediation, as provided for in the DSU rules.[7] This may suggest a need to enhance the use of this potential procedural phase of the process.

One of the significant overall statistics is the staggering number of cases, and thus the exceptional work load of the WTO dispute settlement system, both at the first-level panel stage, and at the appellate stage. There are some estimates that suggest that well over half, maybe two-thirds or three-fourths of the effective work of the diplomats, missions, and secretariats in the WTO system is now related in one way or another to the dispute settlement process, including consideration of potential suits to bring. A key question, perhaps not yet fully answered, although an optimistic view suggests that the practice so far is encouraging, is whether the dispute settlement system is in fact lending a greater degree of predictability and reliability to the world trading system, including to the millions of entrepreneurs who depend on the trade treaties for a certain amount of security and decreased risk of their many transactions and other economic activities that cross borders.

The tough issues of implementation of the dispute settlement decisions were encountered in a significant way in the second half of 1998. In particular, the Banana case brought some of these issues to the forefront.[8] Until that time, it looked as if compliance and implementation were on an appropriate track, with most of the

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[1] "Overview of the State-of-play of WTO Disputes" available on the WTO Web site (http://www.wto.org) (dated May 19, 2000) [hereinafter State-of-Play of WTO Disputes].

[2] Panel Report, *Canada—Patent Protection Term*, WT/DS170/R, circulated May 5, 2000; Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, circulated May 1, 2000; Panel Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/R, circulated Mar. 31, 2000.

[3] *See* Young Duk Park & Barbara Eggers, *WTO Dispute Settlement 1995–99: A Statistical Analysis*, 3 JIEL 193, 194–95 (2000).

[4] *See* Park & Eggers, *supra* note 3, at 194.

[5] *See id.*

[6] *See id.* at 196–97 (analyzing disputes through January 1, 2000).

[7] *See id.*

[8] Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted Sept. 25, 1997. *See generally* Mauricio Salas & John H. Jackson, *Procedural Overview of the WTO EC—Banana Dispute*, 3 JIEL 145 (2000) (discussing procedural aspects of the banana dispute).

countries complying with the DSU rules on compliance, even the trading "superpowers," namely, the United States, Japan, and the European Communities. Each of these countries had indicated that its policy would be to comply with the results of the dispute settlement system, and, in many cases, they have either fully complied, or are in the process of complying in a satisfactory manner.

The *Banana* case has a contrary history, unfortunately. In addition, the *Beef Hormones* case has proven difficult in this regard.[9] Several recent cases look as if they will also be difficult to manage in the compliance or implementation phase. One of these is the so-called FSC (Foreign Sales Corporation) case against the United States.[10] Other cases that may pose important problems in this regard are the aircraft cases between Canada and Brazil, and the *Australia—Leather* case, where a panel ruled that a refund of duties is required. In the *Australia—Leather* case, a "compliance review" panel determined that Australia had failed to withdraw the prohibited subsidies within 90 days and thus had not taken measures to comply with the recommendation of the DSB.[11] In the *Canada—Aircraft* and *Brazil—Aircraft* cases, two compliance review panels concluded that Brazil had failed to withdraw prohibited export subsidies within 90 days[12] and Canada had failed to withdraw prohibited export subsidies within 90 days.[13]

One issue, which has been raised in several cases, is whether the action by the losing party has been a "true implementation" of the recommendations of the report. In the *Banana* case, the United States challenged the Europeans in this regard, in a series of ancillary procedures, to try to resolve the differing viewpoints on this.[14] During this procedure, it was discovered that there was a very significant problem of inconsistency between two different provisions of the DSU (Articles 21.5 and 22). Different views of the meaning of those Articles resulted in something of an impasse, and there have been a number of suggestions as to how those clauses should be rephrased to solve the apparent inconsistency. In the meantime, the parties to several subsequent disputes have concluded bilateral agreements governing the application of Articles 21.5 and 22 to that dispute, in an attempt to resolve that particular dispute despite the lack of clarity between these two provisions.[15]

Compensatory measures may be taken if the losing party does not bring into effect a true implementation of the report, and the United States has several times applied compensatory measures against the European Union.[16] Almost from the beginning of the WTO dispute settlement system, there has been a controversy about whether the treaty obligations of the DSU require the losing WTO member to perform obligations as set forth in the final dispute report, or whether the country concerned has the complete juridical freedom to choose between performance on the one hand, and providing "compensation" or accepting retaliatory measures on the other hand. I have taken the view that the treaty text imposes an international law obligation to perform, and does not give a free choice to prefer compensatory measures.[17] In addition, there is some policy that would lead one to conclude that it was better to require performance. In particular, to have a system where the rich countries can always "buy out" of the obligations, particularly those with respect to small or less powerful countries in the world, raises an important asymmetry that could undermine the credibility of the whole procedure. Likewise, it creates an additional uncertainty for millions of independent entrepreneurs and traders, who otherwise

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[9] Appellate Body Report, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 & 48/AB/R, adopted Feb. 13, 1998.

[10] Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R, adopted Mar. 20, 2000.

[11] Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW & WT/DS126/RW/Corr.1, adopted Feb. 11, 2000, para. 7.1.

[12] Panel Report, *Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, circulated May 9, 2000, para. 7.1.

[13] Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, circulated May 9, 2000, para. 6.2.

[14] *See* Salas & Jackson, *supra* note 8.

[15] *See Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/13, Nov. 26, 1999; *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/9, Nov. 23, 1999; *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU*, WT/DS126/8, Oct. 4, 1999.

[16] In both the *Banana* and the *Beef Hormones* cases, the United States sought and received authorization from the DSB to suspend concessions to the European Communities. *See* State-of-Play of WTO Disputes, *supra* note 1. In the *Beef Hormones* case, Canada also sought and received authorization to suspend concessions to the EC. *See id.*

[17] John H. Jackson, *Editorial Comment: The WTO Dispute Settlement Understanding: Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997).

would like to depend upon the rule structure as formulated by the treaty text. Nevertheless it would be useful to do some serious thinking about other alternatives such as "payment compensation" schemes to avoid retaliation, since the latter tends to undermine general trade policies of liberalization.

III. EVALUATING THE PROCESS AND ASSESSING THE JURISPRUDENCE

A survey of the jurisprudence of the Appellate Body appears to demonstrate that this body has a more deferential attitude towards national government decisions (in other words, more deference to national "sovereignty"), than sometimes has been the case for the first-level panels or the GATT panels.[18] In some sense, therefore, the Appellate Body has been exercising more "judicial restraint" and has been more hesitant to develop new ideas of interpreting the treaty language than sometimes has been the case in the first-level panels themselves. It is not clear why this is so, but one can note that the Appellate Body roster contains relatively few GATT specialists. Rather, the Appellate Body, which is considered to have outstanding members, has members that are more "generalists" than one would typically find on the first-level panels or in the GATT panels in previous years. This could be a very good omen, because the care and appropriate deference to national decisions may be a significant factor in the long-run general acceptance of the work of the WTO Dispute Settlement Body among a great variety and large number of nations of the world.

There is, of course, quite a bit of criticism of some of the dispute settlement report results. Quite often persons who have not read, or perhaps not understood, the reports, indulge in this criticism. However, the reports are quite finely crafted. Even at the first-level panel, the panels now look to what the Appellate Body may do, and the quality of the reports under the WTO seems quite a bit higher on the average than at least most reports under the GATT. There is, of course, a certain lack of political accountability by the dispute settlement process, particularly the results of the Appellate Body. This is largely due to the failure of the members of the WTO to appropriately exercise their responsibilities regarding negotiations and the making of certain decisions under the WTO Charter,[19] which they could use to critique dispute settlement reports that seem to be wrong. The charter has constrained both negotiations and decisions, making it quite a bit harder for anything but a complete, or almost complete, consensus to operate in the WTO. However, there does seem to be general satisfaction by the WTO members of the dispute settlement reports, and arguably that satisfaction represents accountability for the system towards governments and their constituencies. Clearly, however, members of the so-called civil society argue that the system is not accountable enough to them, or particular groups among them. This is a very important jurisprudential and political theory question, in which the WTO system will have to engage itself during the short- and long-term future.

IV. EMERGING "CONSTITUTIONAL" PROBLEMS OF THE WTO DISPUTE SETTLEMENT SYSTEM

It seems clear that the new dispute settlement system is having a profound impact on the methods of diplomacy, based on many discussions with diplomats and other officials in the WTO, as well as observation and reading of reports and developments. The fact that the final report of the dispute settlement system is now essentially automatically adopted has shifted the dynamics of the role of dispute settlement in the system. Under the GATT, there was the blocking opportunity, but there was also a "political filter" process by which a political body (the GATT Council) would evaluate a report, and on some occasions, refuse to adopt the report (even when blocking did not cause such refusal). Thus, there was arguably something of a political legitimization for the end result, which could operate as a check against the dispute settlement process. The elimination of a blocking opportunity was one of the important features of the Uruguay Round reforms, but the quid pro quo for this was the development of an appellate procedure. The appellate procedure has many admirable traits. But in the context of the WTO, where the decision-making process is often paralyzed and cannot really review or change the results of an Appellate Body report and its determinations, the Appellate Body has wound up with a great amount of power. This amount of power has been noticed and commented on. By contrast, many national systems with powerful supreme courts and judicial

[18] *See* John H. Jackson, *Dispute Settlement and the WTO*, 1 JIEL 329 (1998).

[19] The phrase "WTO Charter" refers to the Agreement Establishing the World Trade Organization. *See* Agreement Establishing the World Trade Organization, 33 I.L.M. 13, 15 (1994) [hereinafter WTO Charter].

review have also the possibility of legislative (and even constitutional amendment) changes that can effectively overrule the highest court. Thus there is concern that the WTO appeal procedure has put too much power in the hands of a group of very fine persons who are, however, not always able to appraise all of the different political and economic factors that would go into a more "legislative" judgment. The Appellate Body members themselves would be quick to recognize this and indeed, have been, it is argued, extremely cautious in how they have applied the treaty texts, partly because of their sense of responsibility and judicial restraint.

What might the future bring? What potential circumstances or events could have a strong impact on the dispute settlement system? Several emerging factors and developments may have significant impacts. If a new negotiating round is finally launched, it would not be foolhardy to predict that at least some results of such a negotiation will have some specific and perhaps more generic impacts on the dispute settlement system. The DSB itself might recognize and give more weight to its responsibility to supervise the dispute settlement process, and could develop means to critique the Appellate Body's and first-level panels' adopted reports.

Furthermore, the impacts on developing countries could lead developing country initiatives and supporters from industrial countries, to try to redress some of the particularly harsh impacts on developing country participation in the processes. One particular reform would be to provide a certain amount of "legal aid" assistance to the advocacy of developing countries, partly to improve their capacities to participate in the dispute settlement procedures, but also to lower the cost to them of those procedures.[20]

The potential impact of a Chinese membership in the WTO has been commented on extensively. There is considerable concern that the transition phase of the Chinese economy, from state-operated or non-market-operated techniques to a more market-oriented technique, could give rise to a number of dispute settlement procedures brought against China by existing members of the WTO. Some even worry about a massive caseload completely overloading the dispute settlement system.[21] Certainly, some care needs to be taken by the negotiators in this context, perhaps to develop alternative means to resolve disputes in cases like China and for China itself.

Finally, there are increasing demands for "transparency" and "democratic participation" in the dispute settlement process. Partly, this is a function of the increasing understanding among knowledgeable critics of the WTO about the power of the dispute settlement process and how it can impact constituents' lives.

Almost every institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up. This is most certainly true of the original GATT, and now of the WTO. With the fast-paced change of a globalizing economy, the WTO will necessarily have to cope with new factors, new policies, and new subject matters. If it fails to do that, it will, sooner or later, be marginalized. This could be quite detrimental to its broader multilateral approach to international economic relations, pushing nations to solve their problems through regional arrangements, bilateral arrangements, and even unilateral actions. Although these alternatives can have an appropriate role and can be constructive innovators for the world trading system, they run considerable additional risks of ignoring key components and the diversity of societies and societal policies that exist in the world. In other words, they run a high risk of generating significant disputes and rancor among nations, which can inhibit or debilitate the advantages of cooperation otherwise hoped for under the multilateral system.

How will the WTO solve or attempt to solve some of these issues? The First Ministerial, held at Singapore in 1996, faced some of these questions. Many conclude that the results of that meeting did not suggest very innovative ways to cope with new issues. Obviously, the ministers felt both the legal constraints of the WTO Charter, and political as well as economic constraints of attitudes of constituents in a number of different societies. The Third Ministerial Conference in Seattle failed so far to develop a framework for a new negotiation that might address some of these issues.

The issues needing resolution could be broadly grouped into two categories: (1) substantively new issues and (2) a number of procedural or arguably interstitial ("fine-tuning") issues for the Organization. It is clear, for example, that a variety

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[20] The Institute of International Economic Law was founded at Georgetown University Law Center in 1999. Its Director is John H. Jackson.

[21] *See, e.g.*, Congressman Richard A. Gephardt, Press Release: Gephardt Speech on China PNTR (Apr. 19, 2000), *available at* <http://democraticleader.house.gov/media/b—speech.asp> (visited May 4, 2000).

of the procedures of the dispute settlement process (particularly relating to the text of the DSU), as well as other procedures regarding decision making, waivers, new accessions, are being scrutinized and various suggestions for improvement are being put on the table. With respect to dispute settlement, most readers are aware that the treaty text itself called for a review during the calendar year 1998, which was not accomplished.[22]

How can these many issues be considered and dealt with in the current WTO institutional framework? There is a delicate interplay between the dispute settlement process on the one hand, and the possibilities or difficulties of negotiating new treaty texts or making decisions by the organization that are authorized by the Uruguay Round treaty text, on the other hand.

What are the possibilities of negotiating new text or making decisions pursuant to the WTO charter? Clearly these possibilities are quite constrained. In the final months of the Uruguay Round negotiations, the negotiators built a number of checks and balances into the WTO charter, to constrain decision making by the international institution that would be too intrusive on sovereignty. The decision-making provisions (Article IX) and the amending provisions (Article X) of the WTO charter limited what the WTO membership can do.[23] These amending provisions are probably as difficult as those that existed under the GATT (largely copied from the GATT, with the possible exception of certain non-substantive procedural amendments). Under the GATT, it was perceived by the time of the Tokyo Round in the 1970s that amendment was virtually impossible, so the Contracting Parties developed the technique of *side agreements*. The theory of the Uruguay Round was to avoid this GATT a la carte approach and pursue a *single agreement* approach. Various attitudes toward that approach persist in the WTO.

Apart from formal amendments, one can look at the powers concerning decisions, waivers, and formal interpretations. But in each of these cases, there are substantial constraints. Decision making (at least as a fallback from attempts to achieve consensus) is generally ruled by a majority-vote system, but there is language in the WTO (Article IX:3) as well as the long practice under the GATT, that suggests that decisions cannot be used to impose new obligations on members.[24] In the GATT, waivers were sometimes used to innovate and adjust to new circumstances, but this process fell into disrepute and caused the negotiators to develop Uruguay Round texts that quite constrained the use of waivers, particularly as to the duration of waivers and also subjecting waivers to explicit revocation authorities. The GATT had no formal provision regarding interpretations, and thus the GATT panels probably had a bit more scope for setting forth interpretations that would ultimately become embedded in the GATT practice and even subsequent negotiated treaty language. However, the WTO addresses this issue of formal interpretations directly, imposing a very stringent voting requirement of three-fourths of the total membership. Since many people observe that often a quarter of the WTO membership is not present at key meetings, one can see that the formal interpretation process is not an easy one to achieve. Some observers feel, however, that in some contexts the technical requirements of consensus (not unanimity)[25] may not always be so difficult to fulfill.

Given these various constraints, it would be understandable if there were a temptation to try to use the dispute settlement process and the general conclusions of the panel reports to redress treaty ambiguity or gaps. However, Article 3.2 of the DSU itself warns against proceeding too far in this direction, saying: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." The emerging attitudes of the Appellate Body reports seem to reinforce a policy of considerable deference to national government decision making, possibly as a matter of "judicial restraint," ideas such as that

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[22] The Uruguay Round treaty text calls for a "full review of the dispute settlement rules" of the WTO during 1998. *See* Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[23] WTO Charter, *supra* note 19, arts. IX and X.

[24] WTO Charter, *supra* note 19, arts. IX:2, X:3, and X:4; DSU *supra* note art. 3.2. *See, e.g.*, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, adopted Nov. 1, 1996; Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted Sept. 25, 1997; Appellate Body Report, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 & 48/AB/R, adopted Feb. 13, 1998.

[25] WTO Charter, Article IX, footnote 1, defines consensus as follows: "The body concerned shall be deemed to have decided by consensus on a matter submitted for consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." *See* WTO Charter, *supra* note 19, art. IX n.1.

quoted from Article 3 of the DSU, and otherwise expressed by various countries who fear too much intrusion on "sovereignty."

In short, there are indications that the dispute settlement system cannot and should not carry much of the weight of formulating new rules either by way of filling gaps in the existing agreements, or by setting forth norms that carry the organization into totally new territory such as competition policy or labor standards.

In addition, there are many procedural questions. Some of the procedures under the Dispute Settlement Understanding are now being questioned. Various suggestions are coming forward, and some lists of proposals for change exceed 60 or 80 items or suggestions. Many of these suggestions are reasonable fine-tuning, without dramatic consequence to the system, but even the fine-tuning can be difficult to achieve given some of the constraints on decision making. One of the geniuses of the GATT and its history was its ability to evolve partly through trial and error and practice. Indeed, the dispute settlement under GATT evolved over four decades quite dramatically—with such concepts as prima facie nullification or the use of panels instead of working parties, becoming gradually embedded in the process—and under the Tokyo Round Understanding on Dispute Settlement becoming definitive by consensus action of the Contracting Parties.

But the language of the DSU (as well as the WTO charter) seems to constrain greatly some of this approach compared to the GATT. Article 2.4 of the DSU states that "[w]here the rules and procedures of this understanding provide for the DSB to take a decision, it shall do so by consensus." The definition of consensus is then supplied in a footnote, and although not identical with "unanimity," provides that an objecting member can block consensus. Likewise, the WTO charter itself provides a consensus requirement for amendments to Annexes 2 and 3 of the WTO. It will be recalled that Annex 2 is the DSU. Thus, the opportunity to evolve by experiment and trial and error, plus practice over time, seems considerably more constrained under the WTO than was the case under the very loose and ambiguous language of the GATT, with its minimalist institutional language.

Thus, we have a potential for impasse or inability to cope with some of the problems that face the WTO.

V. CONCLUSION

We can see that if we are trying to appraise the value and effectiveness of the WTO dispute settlement process during its first five years, we have to be cautious. Two years ago, we could have been very optimistic since, at that time, some of the very tough issues, including issues of implementation, had not yet been reached, and major governments were indicating that they intended to perform all obligations raised by the dispute settlement reports. But during the last two years, a number of further issues, and some very "tough cases" have come to the floor.

Nevertheless, it is possible to make some preliminary judgments. First of all, such judgments depend very much on the question one is asking. For example, we could appraise the dispute settlement system by how effective it is in promoting the settlement of cases, or how it develops the jurisprudence in the sense of providing greater certainty and stability while resolving ambiguities in the rule structure. Another possibility is to ask how effectively the results of dispute settlement cases have been implemented. Finally, one can ask about the degree to which there has been political and public acceptance of the results of the dispute settlement process.

With respect to each of these four ways to appraise the system, it seems to this author that the first two questions could be answered optimistically, indicating quite a good record so far of settling cases (including approximately half the cases being settled before they get to a panel process). Similarly, good marks could be given to the development of the jurisprudence, which is highly sophisticated and of very high quality. On the other hand, there are some important questions about implementation of the results of the procedures and, in addition, some developing troubles concerning political acceptance.

As indicated earlier in this manuscript, important problems are emerging regarding the WTO dispute settlement procedures. Most salient are the problems pointed out, regarding the danger of overloading the system in terms of caseload, but also in terms of the types of issues that are passed on to the dispute settlement process, in the absence of effective ways to negotiate.

Nevertheless, I think a broad-brush approach would allow the careful observer of the process to say that the record has been extraordinarily good during the first five years, perhaps better than any other comparable international law tribunal.

RESPONSE TO A QUESTION FROM SENATOR GRAHAM

Question: The testimony provided by the panelists leave me with the impression that generally the WTO's dispute resolution process has, to date, worked properly but is capable of and needs to be protected from abuse or improper use. In a question to Professor Jackson, Chairman Grassley focused on an issue that concerns me: the potential for dispute panels to create "new law" in areas where the topic may not be dealt with specifically in the text of treaty obligations, yet may have been sufficiently addressed in national laws or jurisprudence. Consequently, are there or should there be safeguards in the dispute resolution process to prevent exploitation or overburdening the WTO process from claims that fall into such areas?

In a somewhat related manner, Ms. Wallach highlighted public policy and national interest concerns. I am also concerned with cases that pit mutually accepted public policy concerns versus technical conflicts, particularly in areas not specifically covered in treaties or where law and policy is evolving. What safeguards are, or should be, in place?

Answer: Senator Graham appropriately indicates a concern about the potential for WTO Dispute Panels to create "new law" in areas where a particular topic may not be dealt with specifically in the text of treaty obligations, although it may have been more fully addressed in national laws or national jurisprudence. Consequently he asks, should there be safeguards in the dispute resolution process to prevent exploitation or overburdening the WTO process from claims that fall into such areas?

I do believe there should be safeguards, and indeed, I do believe there are already some safeguards regarding that. In the Dispute Settlement Understanding of the WTO, at Article 3, paragraph 2, the treaty text says "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." The Appellate Body and many of the first level panel in the cases so far, have taken this admonition to heart. The Appellate Body has been extremely textual (some would say too textual) in its approach to interpreting the Treaties. In this sense, the Appellate Body may have been a little too reluctant to interpolate into the meaning of the text approaches that would fill gaps or resolve ambiguities.

One of the problems that I have mentioned, both in my writing and testimony, is that the WTO decision making and negotiating processes are extremely constrained by the language of the WTO "Charter." Thus, there is the potential for paralysis on a number of issues, and when that potential develops into reality, the diplomats have a temptation to push the issues into the dispute settlement process as the only place where they can get a meaningful decision. I believe rather than trying to limit the dispute settlement process in any way about what it can decide, the diplomats and negotiators need to give more attention to the dispute settlement and negotiating procedures in the WTO, and to try to improve those so that there will be better opportunities to resolve gaps and ambiguities in the treaty text through a negotiating and deliberative process which is more "legislative" than it is "judicial." Some of this is being done in limited ways, such as in the context of the anti-dumping committee. However, more attention needs to be given to these approaches which are an important and priority alternative to the dispute settlement process itself.

PREPARED STATEMENT OF LORI WALLACH

Mr. Chairman and members of the committee, on behalf of Public Citizen and its members nationwide, thank you for the opportunity to testify on the issue of the World Trade Organization's (WTO) Dispute Settlement system.

My name is Lori Wallach. I am the director of Public Citizen's Global Trade Watch. Public Citizen is a consumer advocacy group founded in 1971 by Ralph Nader. Global Trade Watch, created in 1993, is a division of Public Citizen dedicated to promoting government and corporate accountability in the context of the international commercial agreements shaping the current version of globalization. Global Trade Watch promotes a public interest perspective on an array of globalization issues, including implications for health and safety, environmental protection, economic justice, and democratic, accountable governance.

The Committee is interested in the five year record of the WTO's dispute resolution system. There are many ways to answer that inquiry. Theoretically, one could simply review the system's functions as far as fairness in adjudication, application of basic due process protections, quality of outcomes and the like. On this basis, the WTO system is significantly lacking as described below. Strangely, not even the most dire conflict of interest problems and other core operational flaws are noted in the recent General Accounting Office briefing report "World Trade Organization:

U.S. Experience to Date in Dispute Settlement System."[1] Public Citizen urges GAO to include these problems and proposals to remedy them in the upcoming, more complete report on the WTO dispute resolution system noted in this briefing report.

However, given that this particular system has a single goal, the enforcement of the Uruguay Round Agreements of the General Agreement on Tariffs and Trade (GATT), it is impossible to make a very deep analysis of the dispute resolution system without considering what rules it is supposed to enforce. Most simply, if one supports the current rules being enforced by WTO, then one would support a strong enforcement system shielded from any countervailing values or pressures. But, from those critical of the current rules enforced by WTO, strong enforcement of bad rules is a bad scenario. For instance, many who are pleased with the WTO's past dispute resolution decisions will undoubtedly decry the imminent WTO ruling in favor of France on Canada's challenge of France's asbestos ban[2] as a miscarriage of the WTO's dispute system, wherein political considerations about shielding the WTO from further criticism have tainted the panel and have been allowed to trump the clear requirements of the trade rules. Yet, if one is critical of the Uruguay Round rules as systematically prioritizing commerce over other values and as inappropriately covering policies which must be decided through democratic processes by those who will live with the outcomes, then the fact that the asbestos panel threw the case for political purposes is good news.

A. THE GAO BRIEFING REPORT ON WTO DISPUTE RESOLUTION: NARROW, BIASED VIEW

In its briefing report, the GAO takes a rather perverse approach to judging the WTO dispute resolution system's performance. Yet, the perspective that the GAO brings to this analysis is sadly consistent with the narrow approach too many trade experts continue to apply to evaluations of the WTO and the Uruguay Round Agreements.

First, the GAO actually states a conclusion that the U.S. has gained more than it has lost from the system. Given that several major WTO cases, such as the potentially high-economic-cost ruling against the U.S. foreign sales corporation tax system and the high-political-cost conclusion of the shrimp-turtle Endangered Species Act case, remain in play, coming to such a conclusion is premature at best. Indeed, even if it had more complete data, the GAO's analytical methodology is so narrow and biased in favor of commercial goals trumping all else, that its outcomes would be questionable. The GAO comes to its positive conclusion by:

- *Considering only the economic costs associated with WTO rulings.* The GAO report concludes that the U.S. is a net winner because "WTO rulings have upheld several trade principles."[3] Meanwhile, the successful WTO challenge of two U.S. environmental law is dismissed in the report as inconsequential because of having "limited or no commercial consequences for the United States.[4]" Yet, obviously the laws involved in those cases have significant value for public health (Clean Air Act[5]) and the environment (Shrimp-Turtle[6]) and the WTO attack against them has greatly fueled public criticism of WTO as consistently prioritizing commercial goals over equally legitimate environmental and other goals.
- *Calculating economic costs in a haphazard, seemingly biased manner.* Meanwhile, the report subjectively treats the data to ensure that it supports a conclusion of net gain for U.S. economic interests. For instance, in the GAO report, a significant U.S. loss at WTO with the Appellate Body ruling in the U.S.-EU computer part classification case is dismissed by adopting the U.S. Trade Representative's press spin. (USTR replaced a news release lauding the tribunal win as the biggest U.S. monetary WTO victory with a statement on the appeal dismissing the equally large loss as irrelevant.) Yet, in stark contrast, computer

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[1] GAO, "World Trade Organization: U.S. Experience to Date in Dispute Settlement System, GAO/NSIAD/OGC–00–196BR.

[2] WTO, European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products, (WT/DS135), panel established Nov. 25, 1998.

[3] GAO/NSIAD/OGC–00–196BR at 29.

[4] GAO/NSIAD/OGC–00–196BR at p. 5.

[5] *See e.g.* WTO, United States-Standards for Reformulated and Conventional Gasoline, Second Submission of the United States, Aug. 17, 1995, at 3–5, 22–24 and at Appendix 387–89 wherein the U.S. government states that the regulation is ultimately adopted to replace the regulation ruled against by the WTO was unacceptable because it was unenforceable, too expensive and could cause increases in air polluting emission from imported gasoline by 5–7%.

[6] Given the U.S. law ruled against by the WTO was the domestic implementation of U.S. multilateral environmental agreement obligations, this case has broad implications for even those environmental policies taken in the basis of international consensus—the one area of environmental policy many have argued should be safe from WTO attack.

industry officials viewed the WTO Appellate Body ruling as a serious setback that would allow European competitors to establish market share in an industry where U.S. manufacturers have captured 50% of the market. "We thought the original decision was a significant victory for U.S. exporters and established an important precedent that switching classifications was a violation of world trade rules," one computer industry official said. "We are very upset that the decision has been overruled."[7]

In addition, the U.S. win at WTO on the Japan alcohol case is touted as an important gain ($10 million in additional whiskey exports) yet the U.S. drubbing at WTO on the Kodak Japan case is not quantified as far as the sizeable opportunity costs of the lost market access denied. This is an especially obvious bias, given not only did the U.S. lose its WTO Kodak case, but in addition as a result of WTO rules, the U.S. could no longer use its unilateral trade enforcement tools to obtain the potential market access gains—a lose-lose. Indeed, when Kodak initially brought its concern that the Japanese government had conspired to keep Kodak film out of Japanese stores to boost sales of Japanese-made Fuji film, the U.S. Trade Representative's first step was to threatened action under Section 301. The Japanese government responded that it would no longer be bullied by the threat of unilateral U.S. sanctions and refused to even talk to U.S. negotiators.[8] However, the U.S. backed off and tried to pursue the case at the WTO after Japan threatened to challenge U.S. Section 301 use at the WTO, a case the U.S. knew Japan would win.[9] *The Washington Times* reported, "The administration is considering its options [including a Section 301 investigation.] But unilateral sanctions in almost all cases would violate WTO rules."[10] Japanese officials were overjoyed. One Japanese official called the USTR's decision "a good thing" and was described as "visibly struggling to contain his delight."[11] Forcing the U.S. to drop a Section 301 threat was generally considered a significant procedural victory for Japan.[12] The U.S. then brought the matter before the WTO, which ruled that the activities that were resulting in Kodak film receiving less favorable placement in Japanese stores were not covered by WTO disciplines.[13] The WTO also ruled that the nonviolation impairment claim the U.S. made was unfounded.[14] Thus, there simply is no remedy available thanks to WTO rules and this loss of market access should be calculated in the WTO economic losses column. included.

- *Taking a mercantilist approach to "wins" and "losses" by assuming any WTO ruling in favor of the U.S. position at WTO is a "winner" for the broad U.S. public interest.* Yet, U.S. consumers face higher prices for imported goods from Europe thanks to trade retaliation after U.S. "victory" on the banana case wherein the U.S. launched a WTO case on behalf of a company whose chief was a high campaign contributor even though the product in question, bananas, is not grown for trade in the U.S. Similarly, U.S. consumers face an increased likelihood that U.S. food safety rules could be successfully challenged thanks to the extreme WTO jurisprudence established in the U.S. "victory" on the beef hormone case, which also has resulted in higher consumer prices thanks to retaliatory tariffs on European imports.
- *Assuming any instance in which another country changed its law after a U.S. WTO victory is a "gain."* The GAO briefing report bases its conclusion of net U.S. gains on the U.S. being able to "effect (sic) changes in several foreign laws, regulations, and/or practices that it considered to be restricting trade."[15] While U.S. pharmaceutical companies may have cheered, many in the U.S. would not consider it a victory that poor consumers in India will be forced to pay higher prices for medicine. The GAO report notes as a U.S. gain that India has changed its intellectual property rules after a U.S. win at the WTO. Indeed, U.S. consumers are more likely to be upset with pharmaceutical companies' monopolistic pricing policies than to seek to impose the same system and problems

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[7] Martin Crutsinger, "U.S. Loses WTO Computer Trade Case," *Associated Press*, Jun. 5, 1998.
[8] Martin Crutsinger, "U.S. Sends Film Dispute to Global Trade Panel," *The Washington Times*, Jun. 14, 1996.
[9] *See* Wendy Bounds & Helene Cooper, "U.S. to File WTO Complaint for Kodak, Handing Fuji a Procedural Victory," *Wall Street Journal*, Jun. 12, 1996.
[10] Lorraine Woellert, "Kodak, U.S. Lose Trade Dispute," *The Washington Times*, Dec. 6, 1997.
[11] Paul Blustein, "U.S. Shelving Threat of Sanctions on Japan," *Washington Post*, Jun. 12, 1996.
[12] Wendy Bounds & Helene Cooper, "U.S. to File WTO Complaint for Kodak, Handing Fuji a Procedural Victory," *The Wall Street Journal*, Jun. 12, 1996.
[13] WTO, Japan—Measures Affecting Consumer Photographic Film and Paper (WT/DS44/R), Report of the Panel, Mar. 31, 1998, at Para. 10.155.
[14] *Id.* at Para. 10.106.
[15] GAO/NSIAD/OGC–00–196BR at p. 29.

on others. Similarly, the GAO notes a gain with Japan's lifting of a varietal testing policy because the WTO ruled Japan did not have the scientific proof to maintain the policy. Yet, environmentalists around the world see the jurisprudence in that case as setting a dangerous precedent against the use of precautionary principle-based approaches to invasive species threats.

B. WHY A BROADER PERSPECTIVE IS REQUIRED TO ANALYZE THE WTO'S RECORD

With the exception of the North American Free Trade Agreement (NAFTA), the WTO contains the most powerful enforcement procedures of any international agreement now in force. Indeed, the WTO and NAFTA enforcement systems are of a different species than those of the multilateral environmental agreements and the International Labor Organization conventions. The latter are "conventions" through which signatories agree to substantive rules which are only enforceable by each signatory.[16] In contrast, one of the most dramatic changes made to the global trade system by the Uruguay Round negotiations of the GATT was the establishment of a new free-standing global commerce agency, the WTO, with a powerful, binding dispute resolution system replete with tribunals whose ruling are automatically binding unless there is unanimous consensus by all WTO Members to reject the new interpretation. The new WTO enforcement system replaced the consensus-based GATT contract and its dispute resolution system which was based on diplomatic negotiation and which required consensus of the GATT countries to adopt a ruling by a GATT dispute resolution.

The Uruguay Round negotiations of the (GATT) which established this new enforcement system also dramatically expanded the issues covered by international commercial rules. Previously, the GATT covered trade in goods and focused mainly on traditional trade matters, such as tariffs and quotas. In addition, the GATT contained a set of basic trade principles, such as National Treatment and Most Favored Nation.

In contrast, the Uruguay Round contained hundreds of pages of new regulations going beyond tariffs and quotas and instead affecting domestic standards on matters as diverse as food and product safety to environmental rules on invasive species and toxics. The Uruguay Round also brought new economic sectors, such as services, investment and government procurement, under international commercial disciples. The expanded coverage of the international commercial rules newly implicated issue areas loaded with subjective, value-based decisions about the level of health, safety or environmental protection a society desires or relative social priorities, for instance in designing the balance between access to medicine for poor consumers and the degree of protection of intellectual property rights. It sought to apply one-size-fits-all rules on these issues to the whole world. Uruguay Round rules extended the realm of commercial rules beyond requiring that domestic and foreign goods be treated under the same standard (non-discrimination) to actually seeking to set a global standard to which all countries must adapt, a much more complicated, subjective decision.

The combination of the WTO's powerful new enforcement capacities and the Uruguay Round's expansive new rules encroaching into areas traditionally considered the realm of domestic policy effectively shift many decisions regarding public health and safety and environmental and social concerns from democratically-elected domestic bodies to WTO tribunals.

While this shift of effective decision-making is inherently troubling to those committed to the future of accountable, democratic governance in the era of globalization, its implications are made worse by the abysmal lack of basic due process protection built into the powerful WTO dispute resolution system.

WTO rules promote selection of panelists for these dispute tribunals who have a predetermined trade perspective and a stake in the existing trade model and rules. The enforcement system is an integral part of the WTO, the inherent purpose of which is "expanding . . . . trade in goods and services."[17] It is therefore not surprising that WTO panelists consistently have issued interpretations that lean toward furthering trade liberalization whenever that goal conflicts with other policy goals.

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[16] For instance, the U.S. implements the Convention on International Trade in Endangered Species (CITES), a multilateral environmental agreement, through provisions of the U.S. Endangered Species Act which commit the U.S. not to allow into the U.S. markets products made from the species agreed in CITES to be endangered. However, unlike WTO, there is no CITES tribunal that has been empowered by CITES signatories to judge signatories' conduct and approve trade sanctions or other penalties against those in violation of CITES' terms.

[17] Agreement Establishing the WTO, Preamble, at Para. 1.

Indeed, the WTO system gives trade-motivated tribunal members the power to undercut the preferences of national governments. Such an infringement on democratic, accountable governance itself raises many inherent problems. However, the WTO's system additionally fails to provide safeguards for ensuring an open decision-making process or a full airing of all the issues involved, especially by those who would be most affected by the decisions, namely the citizenry of the countries involved in the dispute. Many national policies are aimed at non-economic goals such as environmental or public health protection or labor rights guarantees. While such policymaking inherently takes into account economic considerations, once such laws are subject to a WTO panel's review they will be judged exclusively by narrow, specific WTO-set economic standards.

Five years of the WTO's actual operation—combining lopsided rules that systematically prioritize commerce over other policy goals and strong enforcement of those rules—is the single greatest factor in the building critique of WTO's legitimacy. Either the WTO's enforcement system must be returned to a consensus based, diplomatic model[18] so as to safeguard the ability of countries to exercise their right to set domestic priorities and seek the goals demanded by their citizens or the scope of rules enforced by the WTO must be scaled back so as to eliminate the subjective, value-laden decision areas the Uruguay Round invaded. If the latter approach is taken, the procedural problems noted in this testimony regarding the WTO binding disputes system would still demand repair.

C. PUBLIC INTEREST IS BIG LOSER UNDER WTO DISPUTE RESOLUTION

The WTO's powerful and enforceable dispute resolution system was to be all things for all WTO Members. U.S. WTO proponents promised that it would enable the U.S., which has the most open markets in the world, to enforce the obligations assumed by the rest of the world during the Uruguay Round negotiations. By the same token, proponents in other countries promised that it would protect the rest of the world from U.S. unilateralism and give nations at various stages of development more equal access to remedies for trade law violations.

After five years of WTO panel rulings, however, the reality is quite different. First, when viewed outside the context of competition between countries, the real loser at the WTO is the public interest. An analysis for our 1999 book, *Whose Trade Organization: Corporate Globalization and the Erosion of Democracy*, revealed that when the record of WTO cases are scrutinized by topic rather than by country, not one environmental, health, food safety or environmental law challenged at the WTO has ever been upheld. All have been declared barriers to trade. In an interesting twist, the WTO ruling on the asbestos case upholding France's ban to be formally issued soon applies limbo-like legal contortions in order to avoid the Uruguay Round Technical Barriers to Trade Agreement rules which would have required a politically damaging ruling against the popular public health policy.

The other trend that is apparent is that the WTO dispute system's application of the WTO's *trade-uber-alles* substantive rules have resulted in most cases being ruled in favor of the plaintiffs. Thus, countries that can afford to launch WTO challenges generally are winning and the trend towards plaintiffs winning has resulted in mere threats of WTO action causing targeted countries to change their laws. To date, WTO tribunals have almost always sided with a challenging country and ruled against the targeted law. In a preliminary analysis of the WTO's Dispute Panel results as of May 19, 2000 by Public Citizen found that in only four out of 33 completed WTO cases did the respondents win, only 12 percent. (By completed, we mean cases that have gone through the entire WTO system culminating in a panel ruling.)

The U.S. had lost every completed case brought against it except one, with the WTO labeling as illegal U.S. policies ranging from sea turtle protection and clean air regulations to anti-dumping duties. The one case in which the U.S. was the defendant that is counted in the WTO's tally and the GAO's briefing report as a U.S. "win" was the European challenge against Section 301[19] of the U.S. trade law.

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[18] For instance, the GATT contained the typical sovereignty safeguards found in almost every international agreement; consensus was required to bind any country to an obligation. Thus, while countries could challenge other GATT contracting party countries laws before dispute panels, adoption of the ruling and approval of sanctions for noncompliance required a consensus decision of all GATT countries, including the losing country. In order to maintain the legitimacy of the GATT system, countries rarely objected to rulings against them, although the option existed as a sort of emergency brake. This was the mechanism the U.S. and Mexico used to stop final adoption of the 1991 ruling against the U.S. dolphin law.

[19] Section 301 of the U.S. Trade Act of 1974, as amended in 1979, permits the U.S. trade representative to investigate and sanction countries whose trade practices are deemed "unfair" to

Yet, a review of the facts of this case shows that this case is not a victory for the maintenance of U.S. law even if the panel ruled for the U.S. The WTO panel announced that the U.S. could keep on its books a version of the law which already was re-written once to meet WTO requirements, as long as it does not attempt to use the law in any way that might violate WTO rules. During the Uruguay Round debate in Congress, members of Congress and U.S. industry expressed concern that WTO rules would forbid the application of Section 301. Even as Japan and other countries promoted the WTO to their public and parliaments on the basis that the WTO would end the use of Section 301, then-USTR Mickey Kantor and a score of other administration representatives promised repeatedly that nothing in the WTO would limit U.S. use of the law. "The Uruguay Round will not impair the effective enforcement of U.S. trade laws, especially Section 301,"[20] pledged Kantor.

Yet, despite assurances of no conflicts between the U.S. law and WTO rules, the Clinton Administration included amendments to Section 301 in the Uruguay Round Implementing Act which moved the U.S. law into compliance with WTO rules. WTO dispute resolution provisions require that the WTO time line controls when the U.S. may impose trade sanctions, even when the WTO finds a violation[21] and that the WTO rules—not U.S. law—determines the amount of sanctions permitted.[22] The 1994 amendments to Section 301 (and its trade law relations called Super and Special 301) to conform them with these requirements eliminated Section 301's main benefits—speediness and large sanction amounts. "Super 301 has been weakened, downgraded and largely declawed," noted a trade expert involved with writing the law.[23] It was this eviscerated version of the U.S. law that the WTO panel decided could stay on the books as long as it was not implemented in a way that violated the underlying WTO rules.

The U.S.—which has brought more complaints than any other country—was a claimant or co-claimant in 15 of the 33 cases. Yet, a noted above, cases the U.S. brought and "won" have not necessarily benefitted the public interest. Interestingly, the U.S. was also the loser in two of three unusual cases where the plaintiff lost on the merits, the Kodak case and the EU computer case.

Overall, the spoils of the WTO dispute system seem to go to the wealthiest participants. Of the 21 cases brought against the developed countries (17 by other developed countries, 4 by developing countries) the defending country successfully defended their laws in 3 of them, or 14% of the time. In comparison, of 12 cases that have gone to completion against developing nations, all brought by developed nations, the developing nations have only won 1 case, or 8%.

Moreover developed countries have the resources to take advantage of the WTO's pattern of ruling in favor of the challenger. Many developing countries not only cannot afford to bring cases but also cannot afford the costs of a WTO defense. Indeed, an alarming trend under the WTO is that developing countries—faced with the enormous expertise and resources involved in mounting a WTO defense in Geneva—are changing laws merely after the threat of a WTO challenge from wealthy countries. Several of these cases are noted in the GAO report as U.S. gains from the WTO system. However, is pressuring Korea to weaken two food safety laws, including one on the shelf life of meat, by use of a trade threat the intended purpose of WTO dispute resolution?

D. WTO TRIBUNALS: SECRET PROCEEDINGS, LACK OF DUE PROCESS

The design and operation of the WTO's dispute resolution system is established in the Uruguay Round Dispute Resolution Understanding (DSU). The DSU provides only one specific operating rule—that all panel activities and documents are con-

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U.S. interests. (*See* 16 U.S.C. Section 301.) The language of Section 301 calls for the U.S. government to take unilateral action in trade disputes by allowing the president to "suspend, withdraw, or prevent" the application of benefits of trade agreement concessions and to "impose duties or other import restrictions" if the president determines it to be appropriate to do so. Section 301 also requires the trade representative to identify, investigate and prioritize foreign countries deemed to be engaged in unfair trading practices. Those countries are then subject to Section 301 sanctions. "Under Section 301, foreign negotiators were confronted with the stark prospect of either opening their markets to U.S. exports or facing U.S. trade sanctions. Time and again, the U.S. threat succeeded," noted one trade commentator. (*See* Greg Mastel, "Section 301: Alive and Well," *Journal of Commerce*, Aug. 16, 1996.)

[20] U.S. Trade Representative Michael Kantor, Testimony to Senate Commerce Committee, Jun. 16, 1994.

[21] *Id.* at Article 23.2(b).

[22] *Id.* at Article 23.2(c).

[23] *See* Greg Mastel, "Section 301: Alive and Well," *Journal of Commerce*, Aug. 16, 1996.

fidential.[24] Under this WTO rule, dispute panels operate in secret, documents are restricted to the countries in the dispute, due process and citizen participation are absent and no outside appeal is available. The WTO's lower panel and Appellate Body meet in closed sessions[25] and the proceedings are confidential.[26] All documents are also kept confidential unless a government voluntarily releases its own submissions to the public.[27]

The closed nature of the dispute process prevents domestic proponents of health, environmental or other policies that are being challenged from obtaining sufficient information about the proceedings to provide input. This is in sharp contrast to domestic courts and even to other international arbitration systems (for instance the International Court of Justice) that also pit nation against nation. The International Court of Justice deliberates in public and employs strict due process criteria[28] The WTO's closed operations also stand in sharp contrast to the promises of then-U.S. Trade Representative Mickey Kantor, who said in 1994 that "the Uruguay Round Agreements provide for increased transparency in the dispute settlement process."[29]

WTO disputes are heard by tribunals composed of three panelists (unless the disputing countries opt for five-member panels).[30] The WTO secretariat nominates panel members for each dispute, and the disputing parties may oppose nominations only for "compelling reasons."[31] The only recourse after a panel ruling is to appeal to the WTO Appellate Body. To date, the Appellate Body, composed of seven panelists, has reversed only one case, reversing against the U.S. in its case against the European Union on computer tariff classifications.

1. BUREAUCRATS WITH TRADE EXPERTISE JUDGE ENVIRONMENTAL, PUBLIC HEALTH, WORKER RIGHTS AND ECONOMIC DEVELOPMENT POLICIES

Qualifications for serving on WTO dispute panels include past service on GATT panels, past representation of a country before a trade institution or tribunal, past service as a senior trade policy official of a WTO Member country, and teaching experience in or publishing on international trade law or policy.[32] These qualifications promote the selection of panelists with a stake in the existing trade system and rules. They also winnow out potential panelists who do not share an institutionally derived philosophy about international commerce and the role of the GATT system that supports the status quo.

These qualifications also serve to narrowly limit the panelists' areas of expertise to international commercial policy. Given the Uruguay Round's 700-plus pages of nontariff rules, many trade disputes now arise between national legislation enacted to protect broader public interests such as the environment, animal and human health, and workplace health and safety, and WTO constraints on such policies. The record shows that WTO panelists have needed more than just trade law expertise, as the outcome of several cases has turned on the interpretation of environmental treaties or general rules of international law.[33] The outcomes have not always been consistent with conventional interpretations, and WTO panels have been criticized in international law journals for their excessively narrow interpretations of general rules of international law.[34]

In fact, there are no mechanisms for ensuring that individuals serving as panelists have any expertise in the subject of the dispute before them. This is particularly worrisome in disputes concerning health and environmental measures, as the DSU does not even require panelists to consult with experts. A panel may, but is not required to, call on outside experts.[35] One very basic safeguard for minimally ensuring

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[24] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) at Article 14 and Appendix 3, Paras. 2 and 3.
[25] *Id.* at Appendix 3, Para. 2.
[26] *Id.* at Article 14.
[27] *Id.* at Appendix 3, Para. 3.
[28] For example, the International Court of Justice, or the European Court of Justice. *See* Dinah Shelton, "Non-Governmental Organizations and Judicial Proceedings," 88 *American Journal of International Law* 611 (1993).
[29] U.S. Trade Representative Michael Kantor, Testimony to the Senate Commerce Committee, Jun. 16, 1994.
[30] WTO, DSU at Article 8.5.
[31] *Id.* at Article 3.6.
[32] *Id.* at Article 8.1.
[33] *See* Palmeter and Mavroidis, "The WTO Legal System: Sources of Law," 92 *American Journal of International Law* 398 (1998).
[34] *Id.* at 411.
[35] WTO, DSU at Article 13.

accurate legal analysis would be the selection of panelists with broader competencies.

2. CONFLICT OF INTEREST STANDARDS AT THE WTO: DON'T ASK, DON'T TELL

As established in the Uruguay Round Agreements, the WTO dispute resolution system lacked any mechanism guaranteeing that panelists do not have potential conflicts of interest in serving on a panel. In 1996, the WTO adopted the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.[36] The document recognizes that confidence in the DSU panels is linked closely to the integrity and impartiality of its panelists.[37] The provisions designed to achieve this, however, are so weak that they are pointless, as made clear in the case described below about the appointment of an International Chamber of Commerce representative who serves on the board of Nestle to judge the WTO challenge of the Helms-Burton sanctions against certain foreign investors in Cuba, where Nestle has a plant.

Under the Rules of Conduct, discovery of the panelists' backgrounds is based on self-disclosure, leaving it up to the individual panelist to decide which aspects of his or her past should be known.[38] The rules stipulate that the disclosure "shall not extend to the identification of matters [of insignificant] relevance;" that it must "take into account the need to respect the personal privacy" of the panelists; and that it must not be "so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on the panels."[39] In other words, if the person fulfills the criteria set out in the original DSU, it is up to him or her to disclose whether a conflict exists. Further, if full disclosure is deemed burdensome by the panelist, it is waived, and the panelist still can qualify without disclosing potential conflicts of interest. This process is a far cry from the procedures used in U.S. domestic jurisdictions to ensure the integrity and independence of judges. The WTO has been called a global Supreme Court of Commerce, but U.S. Supreme Court judges must pass Senate scrutiny after their presidential appointment to make it to the bench, and U.S. federal judges are bound by a strict set of conflict-of-interest rules.

The lack of meaningful WTO conflict-of-interest rules has, on at least one occasion, led to the selection of a panelist with a potential conflict of interest. This example highlights why such serious questions about the efficacy and fairness of the WTO's dispute resolution system are continually raised. Former GATT-head Arthur Dunkel was selected by WTO Director-General Renato Ruggiero to serve on the dispute panel ruling on the merits of an EU challenge of the U.S. Cuban Liberty and Democratic Solidarity Act (also known as Helms-Burton).[40] At the time, Dunkel served on the board of Nestle S.A., which operates a production company in Cuba. He also chaired a key International Chamber of Commerce committee that produced a paper harshly critical of the U.S. law.

Arthur Dunkel, a well-known figure in trade circles, had both a potential conflict of interest relating to his role on the board of directors of Nestle, S.A., and an obvious prejudicial bias relating to his role chairing a policy committee of the International Chamber of Commerce (ICC). Dunkel serves as the chair of the ICC's Commission on International Trade and Investment Policy, a body that has strongly opposed the U.S. Cuban Liberty and Democratic Solidarity Act.[41] The law sanctions foreign companies benefitting from investment in assets illegally seized from U.S. nationals during the Cuban revolution. It includes U.S. visa restrictions for the executives of such companies.

The ICC, an organization founded to promote the industry perspective on international trade and investment, is a harsh public critic of the U.S. law. According to its June 19, 1996, position paper: "The ICC believes that the Helms-Burton Act, which threatens to distort international trade and investment and to cause considerable commercial disruption to companies from countries which are trading partners of the U.S., is in clear contradiction of the fundamental principles of the World Trade Organization and may contain elements which are incompatible with U.S. ob-

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[36] WTO Document WT/DSB/RC/1 (96–5267), Dec. 11, 1996.
[37] *Id.*, Preamble at Para. 3.
[38] *Id.* at Article VI.2.
[39] *Id.* at Article VI.3.
[40] WTO, United States—The Cuban Liberty and Democratic Solidarity Act (WT/DS38), Complaint by the European Communities, May 3, 1996.
[41] P.L. 104–114, also known as the "Helms-Burton Act." Title III of Helms-Burton denies entry into the U.S. of corporate executives who have acquired property from the Cuban government that had been "expropriated" from U.S. citizens during the Cuban revolution. Title IV enables U.S. citizens whose property was expropriated to sue foreign investors who later acquire it from the Cuban government.

ligations under the WTO."[42] Dunkel chairs the committee that defines and determines the ICC's positions on trade issues.[43]

Dunkel also served as a member of the board of directors of Nestle, S.A., from 1994 to 1999.[44] Nestle has operated a production company in Cuba since 1930,[45] and thus has an interest in the outcome of this case and in the status of U.S. commercial policy regarding Cuba.

The WTO's director general appointed Dunkel as a panelist to judge the legality of the Helms-Burton Law when it was challenged by the EU. The USTR says it was unaware of Dunkel's role chairing the ICC committee until Public Citizen notified it in 1998—two years after the WTO panel was constituted.[46] Dunkel's role on the board of a company with a possible economic stake in the case's outcome was never raised either. This oversight—or lack thereof—does not inspire confidence in either the WTO's "conflict-of-interest safeguards" or in the zeal of the Clinton administration's defense of U.S. laws before the WTO.

The Clinton administration has been hostile toward the Helms-Burton Law,[47] raising the troubling issue of whether governments can be trusted to defend laws, especially those to which they are hostile, in closed fora such as the WTO. Given that the trade agenda of governments is shaped primarily by multinational corporations (for instance, the U.S. trade advisory committees that shape U.S. negotiating positions on trade issues have hundreds of representatives from business and only a handful from the public interest community), the willingness of governments to strongly defend environmental, public health, development and other policies opposed by their constituents in industry is suspect.

Finally, contrary to the majority of court hearings, whether international or domestic, where the judges sign their opinions by name, opinions expressed in the final WTO panel reports by individual panelists remain anonymous.[48] This practice removes yet another important way for the public to monitor the relationship between the panelists' background and their work on the panels. The example of the selection of Dunkel, a well-known figure whose career has been dedicated to advocating on behalf of industry, who was chosen after the establishment of "conflict-of-interest rules," at a minimum shows strong contempt by the WTO for judicial independence.

3. ADDING INSULT TO INJURY WTO LIMITS: CITIZENS ABILITY TO RECTIFY PANELS SHORTCOMINGS

The lack of competence on health, environment and other matters among tribunal members could have been rectified to some extent by permitting the intervention of all interested parties, by requiring the participation by ad hoc independent experts on panels or by requiring panels to consider third-party submissions from parties with a demonstrated interest in the case (*amici curiae* or *amicus briefs*). The WTO's dispute resolution system does not allow any of these due process guarantees.

WTO panels are allowed, but not required, to seek information and technical advice from outside individuals and expert bodies.[49] However, the names of such experts are kept secret until the panel issues its report on the case,[50] making it impossible to prevent conflicts of interest among the technical experts.

Technical experts and panelists can second-guess policies crafted by elected government representatives while having no understanding or appreciation of that government's domestic law and policy objectives. Panelists are bound only by the Uruguay Round rules and may have connections to parties with an economic interest

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[42] International Chamber of Commerce, ICC *Statement on the Helms-Burton Act*, Jun. 19, 1996, on file with Public Citizen.

[43] *Agence France Presse*, "GATT's Dunkel Urges No Hurry in China's Accession to WTO," Apr. 8, 1997.

[44] *See*, Annual report of Nestle, S.A., Nestle Management Report 1998, Directors and Officers (1999) found at www.nestle.com/mr1998/ar1998/01/index.htm on Sep. 7, 1999, on file with Public Citizen. Members of the board serve five-year terms. Dunkel was up for re-election on Jun. 3, 1999. *See Id.*

[45] *See*, Annual report of Nestle, S.A., Nestle Management Report 1998, consolidated accounts of the Nestle Group (1999) found at www.nestle.com/mr1998/consoloaccts/13/index.htm on Sep. 7, 1999, on file with Public Citizen; see also Nestle Worldwide North and South America, found at www.nestle.com/html/w3.html, on file with Public Citizen.

[46] Personal communication between Chris McGinn, Public Citizen and USTR staff, May 18, 1998.

[47] For instance, the Clinton Administration has never allowed its enforcement provisions to enter into force. To convince the EU to drop its WTO challenge, which it did in 1997, it regularly grants waivers from Title III to EU-based companies, and has never let Title IV enter into force.

[48] WTO, DSU at Article 14.3.

[49] WTO, DSU at Article 13.

[50] *Id.* at Appendix 3, Para. 3.

in the dispute. In contrast, citizens of WTO Member countries whose laws are challenged cannot serve on expert review groups.[51] This can prevent participation by those most knowledgeable about the reasons for and the operation of the domestic measures in question.

Even though the WTO recently lifted its absolute ban on *amicus* briefs, interested parties who wish to provide input in the form of amicus briefs face an array of obstacles. During the beef hormone case, U.S. public interest groups strenuously opposed the U.S. government attack on a nondiscriminatory European health law. The groups' perspective was totally excluded from the U.S. brief. The groups attempted to submit an amicus brief in favor of the European ban. At the time, the WTO explicitly forbade such briefs from members of the public, arguing that the WTO is a governments-only body.

In 1998, the WTO changed its policy, allowing *amicus* briefs if they constitute part of a government's formal submission in a case.[52] The change occurred as dicta in an Appellate Body ruling in the shrimp-turtle case, in which the lower panel in the case had ruled that accepting information from nongovernmental sources that had not been requested would be "incompatible with the provisions of the DSU as currently applied."[53] The rationale of the lower panel ruling was that access to the WTO dispute settlement system is reserved for WTO Members—i.e., countries represented by their governments.[54] The Appellate Body noted that the government system was preserved by giving the countries the ultimate discretion concerning submissions from outside parties.

The Clinton administration praised the change as major progress. However, the new policy's effect is very limited. Governments always were able to include the contents of outside briefs or other materials in official submissions if they chose to do so. What remains unchanged is that if a public interest or advocacy organization disagrees with the position of its government in a WTO case, it is unlikely that the information would be considered by a WTO panelist, because the government would not submit it.

Most international organizations and their arbitration systems are less exclusive than the WTO concerning what information they receive from outside organizations and those who are not parties to cases. The International Court of Justice (ICJ), for example, may request information from public international organizations and is required to review any information presented to it by such organizations.[55] The European Court of Justice allows the European Commission, member states, the European Council, and in limited cases citizens and organizations to intervene as *amici curiae*.[56]

However, a major difference between the WTO dispute panels and other international arbitration systems is that in these other systems, the need for expert advice and public interest safeguards is lessened by a more careful selection of the judges themselves. The ICJ, for example, requires its judges to possess competence in international law and be of high moral standard.[57] Thus, the ICJ is unlikely to deal with matters its judges are not equipped to rule on, whereas the very narrow qualifications of WTO panelists heightens the possibility that a dispute involves subjects about which the panelists have little knowledge. In addition, the European Court of Justice employs a unique system of advocates general to represent the public interest.[58] In contrast, the powerful WTO Dispute Settlement Understanding makes an unprecedented move away from public interest safeguards in international arbitration.

4. NO OUTSIDE APPEAL ALLOWED

WTO panels establish specific deadlines by which a losing country must implement the panel's decision.[59] If this deadline is not met, the winning party may re-

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[51] *Id.* at Article 8.3.

[52] WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R), Report of the Appellate Body, Oct. 12, 1998, at Para. 100.

[53] WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/R), Report of the Panel, May 15, 1998, at Para. 7.8.

[54] WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products, (WT/DS58/AB/R), Report of the Appellate Body, Oct. 12, 1998, at Para. 101.

[55] International Court of Justice Statute at Article 34(2).

[56] Dinah Shelton, "Non-Governmental Organizations and Judicial Proceedings," 88 *American Journal of International Law* 611 (1993) at 629.

[57] International Court of Justice Statute at Article 2.

[58] *See* Dinah Shelton, "Non-Governmental Organizations and Judicial Proceedings," 88 *American Journal of International Law* 611 (1993).

[59] WTO, DSU at Article 21.

quest negotiations to determine mutually acceptable compensation.[60] If compensation is not sought or not agreed to, the winning party may request WTO authorization to impose trade sanctions.[61] Once requested, sanctions are disallowed only if there is unanimous consensus against sanctions, requiring the winning country to also agree to drop its sanctions request.[62]

For a government that loses a case, there is no appeals process outside of the WTO's Appellate Body. The DSU merely provides that those persons serving on the Appellate Body are to be "persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered Agreements generally."[63] Again, there are no provisions for environmental, consumer law or labor experts to serve on the panel. Unlike members of lower panels who are called to serve in particular cases, the appeal panelists are part of a seven-person standing WTO body, meaning that they are on the permanent WTO payroll.[64] This is a startling conflict in its own right, given that every case requires a determination of whether domestic law or the Appellate Body tribunalists' employer's rules take precedence.

Two of the Appellate Body's most dramatic actions have involved the U.S. The first one came after a lower panel ruling in the shrimp-turtle case that was so fanatical in its anti- environmental tone that it created a backlash among even WTO boosters—including *The New York Times* editorial entitled, "The Sea Turtles Warning."[65] Among other goofy, sloppy, and bizarre moves, the panel interpreted the Chapeau of GATT Article XX in a way that totally eviscerated the two provisions of GATT Article XX that might ever be used to defend an environmental or health law.[66] The interpretation was based on nothing but the tautological whim of the WTO legal staff or perhaps the panelists on the case. Amidst all of this slop, the panel also specifically ruled that the U.S. law in question did not conform with WTO requirements or exceptions and had to be eliminated or changed.[67]

In a dramatic display of politics—the politics of trying to save the WTO from itself—the Appellate Body wrote a remarkably soothing-toned opinion, which while spouting lots of nice, non-binding, and green platitudes, also ruled that the U.S. law requiring all shrimp sold in the U.S. to be caught in nets equipped with turtle escape devices violated WTO rules and had to be changed. The Appellate Body ruling was such a sophisticated piece of political writing, as far as trying to soothe enraged legislators and environmentalists, that the Clinton Administration got away with using selected portions of the opinion to spin the press that the case was a win for them and a reversal of the lower panel.[68] Once the actual ruling was made public (after the Clinton Administration press spin was completed), it became clear that the bottom line was the same: the U.S. law had to be changed or eliminated.

The second unusual Appellate Body ruling involved the only time in the history of WTO dispute resolution that the Appellate Body has reversed a full panel ruling. This case involved tariffs imposed by the EU on U.S.-manufactured computers. In February 1998, a WTO dispute panel ruled in favor of the U.S. in its complaint that the EU was violating the GATT by reclassifying computer equipment to impose higher tariffs.[69] U.S. Trade Representative Charlene Barshefsky gloated that the

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[60] *Id.* at Article 22.2.
[61] *Id.*
[62] *Id.*
[63] *Id.* at Article 17.3.
[64] *Id.* at Article 17.1.
[65] "The Sea Turtle's Warning," *The New York Times* (editorial), Apr. 10, 1998.
[66] *See* WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/R), Report of the Panel, May 15, 1998, at Para. 9.1 (Concluding Remarks). GATT Article XX reads in relevant part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . . ." Significantly, the Endangered Species Act requirements being challenged applied equally to both foreign and U.S. shrimp trawlers. *See* Pub. L. 101–162, §609.
[67] *See* WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/R), Report of the Panel, May 15, 1998.
[68] *See, e.g.*, Marc Selinger, "WTO fishing decision both good, bad for U.S.," *The Washington Times*, Oct. 13, 1998, at B1, quoting U.S. Trade Representative Charlene Barshefsky, "The ruling by the WTO's appellate body 'does not suggest that we weaken our environmental laws in any respect, and we do not intend to do so. The appellate body has rightly recognized that our shrimp-turtle law is an important and legitimate conservation measure, and not protectionist.'"
[69] WTO, European Communities—Customs Classification of Certain Computer Equipment (WT/DS62,67,68), Report of the Panel, Feb. 5, 1998. European countries had reclassified the

victory involved the largest case, in dollar terms, that the U.S. had brought before the WTO.[70] Said Barshefsky, "These products are made in the U.S.A with leading-edge American technology. The EU tariffs affect billions of dollars in U.S. exports."[71] But in June 1998, the WTO Appellate Body reversed the earlier decision.[72] Incredibly, the USTR then reversed its earlier proclamations that the ruling would effect "billions of dollars in U.S. exports," now claiming that "under the Information Technology Agreement (ITA), tariffs—will go to zero on January 1, 2000, no matter where LAN [computer] equipment is classified. Consequently, this decision will have a limited economic impact."[73] Yet, in stark contrast, computer industry officials viewed the WTO Appellate Body ruling as a serious setback that would allow European competitors to establish market share in an industry where U.S. manufacturers have captured 50% of the market. "We thought the original decision was a significant victory for U.S. exporters and established an important precedent that switching classifications was a violation of world trade rules," one computer industry official said. "We are very upset that the decision has been overruled."[74]

CONCLUSION

Obviously, a highly politicized and arbitrary dispute resolution system relying on the personal whims of an ever-changing cast of characters is no way to operate the enforcement of the most powerful international agreement now in force, or for that matter to operate the enforcement system of any institution of lesser importance.

This brief voyage through some of the more picturesque WTO dispute resolution foibles leads naturally to the question of what changes are needed. There are two approaches. Either the WTO system must restore the safeguard of requiring consensus approval of panel decisions, or it must transform its current system by pruning back the subjective decision-making the Uruguay Round seeks to impose in new issue areas regarding the level of health and environmental protection and with reforms of the disputes system for the remaining rules' enforcement. In the latter scenario, changes in the dispute resolution system that will be required would include:

- instituting meaningful conflict of interest rules;
- professionalizing the WTO legal department;
- ensuring that all WTO Members have equal functional access to the system—meaning not only the rich countries have the ability to use the system;
- opening up the process so that documents and proceedings are accessible to all interested parties; and
- providing means for all interested parties to get their information before decision-makers.
- empowering other institutions to provide substantive expertise to which dispute panels are bound (for instance, the World Health Organization through a public process, not three trade lawyers meeting in secret, should determine whether a country's pharmaceutical compulsory-licensing system or parallel-importing system actually serves a public health goal);
- instituting venues for outside-of-WTO appeals of WTO panel reports; and
- explicitly forbidding decisions on the merits of non-commercial claims (for instance, the notion of three trade lawyers making subjective judgements about the quality of the science on beef hormone residues).

However, procedural reforms of the WTO dispute resolution system alone cannot deliver improvements in public perceptions of the WTO or start to repair that institution's legitimacy problems. Such change can only be achieved if there are also significant changes in the WTO's substantive rules. Most simply, backwards, anti-public-interest substantive WTO rules, even if implemented through an open and well-designed dispute resolution system, will still result in bad outcomes for the lives of many.

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computers as telecommunications equipment, which carried tariffs that were nearly double what they would have been under the old classifications. *See* Martin Crutsinger, "U.S. Loses WTO Computer Trade Case," *Associated Press*, Jun. 5, 1998.

[70] USTR, "USTR Barshefsky Announces U.S. Victory In WTO Dispute On U.S. High-Technology Exports," press release, Feb. 5, 1998.

[71] *Id.*

[72] WTO, European Communities—Customs Classification of Certain Computer Equipment (WT/DS62,67,68), Report of the Appellate body, Jun. 5, 1998.

[73] USTR, "USTR Responds To WTO Report On U.S. High-Technology Exports," Press Release, Jun. 5, 1998.

[74] Martin Crutsinger, "U.S. Loses WTO Computer Trade Case," *Associated Press*, Jun. 5, 1998.

RESPONSE TO A QUESTION FROM SENATOR GRASSLEY

Question: In Ms. Wallach's prepared testimony, she criticizes the GAO report, *World Trade Organization: U.S. Experience to Date in Dispute Settlement System.* Specifically, she takes issue with the conclusions drawn in the report and faults the methodology used to develop them. What is GAO's response to Ms. Wallach's critique of your report and its findings?

Answer: We disagree with Ms. Wallach's overall characterization of our report and its findings. As a general criticism, she contends that the report takes a narrow, biased view of the U.S. experience in the WTO dispute settlement system and makes "economic costs" the only measuring stick for evaluating U.S. gains and losses. As we state in our report, however, our conclusions were based not only on an analysis of the commercial consequences of the WTO cases to date, but also on their impact on U.S. laws and regulations. Specifically, we evaluated the system based on how well it supported the policies and goals of the U.S. government. Moreover, in our conclusions, we specifically state that the impact of the system on the United States, "should not be judged by wins and losses or commercial value alone." In this regard, we cite the benefits of a well-functioning multilateral dispute settlement system and the fact that it has upheld WTO principles important to the United States.

A major factor we cite to support our conclusion about U.S. gains is that the cases to date have resulted in only minimal changes in U.S. laws and regulations. We point out that only one WTO case thus far has resulted in a change in U.S. law (a relatively minor change in a law for determining the country of origin of textile and apparel imports). Regarding the two WTO cases challenging U.S. environmental measures, we point out in our report that the change in U.S. guidelines protecting endangered sea turtles has been very minor to date and that restrictions on shrimp imports have remained in effect. We also note that in the turtle case the WTO expressly upheld the right of the members to protect the conservation of natural resources. In the reformulated gas case, we report that the 1997 change in an EPA gasoline regulation in response to a WTO ruling has thus far affected less than one percent of U.S. gas supplies; we also note that EPA has established a mechanism to ensure there is no deterioration in the overall cleanliness of gas imports.

Finally, we are planning to issue a more comprehensive report on the U.S. experience with the dispute settlement system in August. In this report, we will discuss several of the concerns that Ms. Wallach has raised, including the transparency of the system and its impact on U.S. sovereignty. For example, we will examine how the cases to date have affected the U.S.' ability to protect health, safety, and the environment.

PREPARED STATEMENT OF SUSAN S. WESTIN

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to provide some observations about the World Trade Organization's dispute settlement system since its founding in 1995. In my remarks I will summarize how WTO members have used the new dispute settlement system, with a focus on cases involving the United States. I will then discuss our analysis of these cases, including their impact on foreign trade practices, the impact on U.S. laws and regulations, and their overall commercial effects. Finally, I will present some conclusions from our work.

The main message of my testimony this morning is that on balance, the United States has gained more than it has lost in the WTO dispute settlement system to date. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal. In addition, there have been many cases that provided commercial benefits through greater market access and stronger protection of intellectual property rights.

Let me turn first to how WTO members have used the dispute settlement system. In the past five years, WTO members have brought 187 complaints. As you can see, the United States and the European Union were the most active participants. The U.S. filed 56 complaints, or almost a third of the total brought as of April 2000. The EU was the next most frequent filer. Over a third of the U.S. and EU cases were against each other.

The United States was also the most frequent defendant in WTO dispute settlement cases. The 187 complaints pertained to 150 distinct matters. Of these, one-fourth of the cases were filed against the United States. The EU was the second most frequent defendant.

Of the 150 matters WTO members brought to the WTO, 42 cases involving the United States were completed as of March 2000. The United States was a plaintiff in 25 of these cases and a defendant in 17. As a plaintiff, the United States prevailed in 13 cases, resolved the dispute without a ruling in 10 cases, and did not prevail in 2 cases. As a defendant in 17 cases, the United States prevailed in one case, resolved the dispute without a ruling in 10 and lost in 6 cases.

We analyzed these 42 cases in depth to determine their impact. About three-fourths of the 25 cases that the United States filed resulted in some agreed change in a foreign trade practice. As one example, the Philippines agreed to modify its tariff rate quota system for imports of pork and poultry, resulting in an increase of U.S. pork and poultry exports to the Philippines.

Of the 25 cases the United States filed, 14 resulted in commercial benefits to the United States, either through greater market access or stronger intellectual property protection. For example, in a case challenging Japan's inadequate time period for protecting copyrights on sound recordings, Japan changed its copyright law in 1996 after a WTO ruling. As a result of this change, U.S. sound recordings will be protected for a 50-year period, including retroactively. The U.S. recording industry estimated that these protections are worth about $500 million annually.

In the 11 other cases that the United States filed, 9 had limited commercial benefits, either because the implementation of the WTO ruling was disputed, other barriers existed, or the case was brought mainly to uphold trade principles. For example, in 2 high-profile cases, the EU decided not to fully comply with WTO rulings involving imports of bananas and hormone-treated beef and instead face U.S. retaliation of almost $310 million for non-compliance. Losing parties are allowed to accept retaliation or provide compensation as alternatives to complying with WTO rulings.

As I noted earlier, WTO members challenged U.S. practices in 17 cases. In these cases, one U.S. law, two U.S. regulations, and one set of U.S. guidelines were changed, but the changes were relatively minor. Most of the six cases that the United States lost had limited commercial consequences. One case, however, challenging provisions of U.S. tax law regarding foreign sales corporations, has potentially very high commercial stakes. The United States provides tax exemptions to a wide variety of companies on exported products used abroad. In this case, the WTO ruling found that U.S. tax provisions constituted prohibited export subsidies. The United States has not fully determined how it will implement the WTO ruling.

Finally, there are several conclusions we drew from our analysis of these cases.

1. Overall, the United States has gained more than it has lost in the WTO dispute settlement system to date, for several reasons. The U.S. has been able to effect changes in a substantial number of foreign practices that it considered to be restricting trade. Further, most of the cases that the U.S. filed provided commercial benefits to U.S. exporters or investors. In addition, WTO rulings have upheld trade principles that are important to the U.S.

2. The dispute settlement system's impact on the United States should not be evaluated solely on the basis of U.S. wins and losses. Some winning cases do not result in the desired outcomes, such as the bananas and hormone-treated beef cases I mentioned previously. Conversely, some losses are only partial or may uphold WTO principles important to the United States. Moreover, the United States derives systemic benefits from a well-functioning multilateral dispute settlement system, even if it does lose some cases.

3. It is important to note that there have not yet been a sufficient number of WTO dispute settlement cases to fully evaluate the system. In addition, the outcomes of some important pending WTO cases could be problematic for the United States.

Mr. Chairman, this concludes my prepared remarks. I will be happy to respond to any questions you may have.*

SUPPLEMENTAL STATEMENT OF SUSAN S. WESTIN

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to provide some observations about the World Trade Organization's (WTO) dispute settlement system since its founding in 1995. Specifically, my testimony will address (1) how WTO members have used the new dispute settlement system, focusing primarily on cases involving the United States; and (2) the impact of these cases on foreign trade practices and U.S. laws and regulations,

* For further information on this subject *see also*, GAO Report GAO/NSIAD/OGC–00–196BR.

and their overall commercial effects. We issued an overview report on this subject on June 14[1] and plan to provide a more comprehensive report in August.

My observations are based on our past and ongoing work; our review of WTO and U.S. executive branch documents and related literature; discussions with U.S. government officials, members of nongovernmental organizations, trade attorneys, and industry experts; and analyses of WTO data.

SUMMARY

WTO member countries have actively used the dispute settlement system during its first 5 years, filing about 200 complaints. The United States and the European Union (EU) have been the most active participants, both as plaintiffs and defendants. In the 42 cases involving the United States that had either reached a final WTO decision or were resolved without a ruling, the United States served as a plaintiff in 25 cases and a defendant in 17 cases. As a plaintiff, the United States prevailed in a final WTO dispute settlement ruling in 13 cases, resolved the dispute without a ruling in 10 cases, and did not prevail in 2 cases. As a defendant in 17 cases, the United States prevailed in one case, resolved the dispute without a ruling in 10, and lost in 6 cases.

Overall, our analysis shows that the United States has gained more than it has lost in the WTO dispute settlement system to date. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal. In about three-quarters of the 25 cases filed by the United States, other WTO members agreed to change their practices, in most instances providing commercial benefits to the United States. For example, in a dispute involving barriers to U.S. exports of pork and poultry in the Philippines market, the United States challenged how the Philippines administered its tariff rate quota system[2] for these products. Following consultations, the Philippines agreed to modify its system in 1998. U.S. poultry exports to the Philippines subsequently increased by about $16 million in 1999 and pork exports increased by about $1 million that year. As for the United States, in 5 of the 17 cases in which it was a defendant, two U.S. laws, two U.S. regulations, and one set of U.S. guidelines were changed or subject to change. These changes have been relatively minor to date, and the majority of them have had limited or no commercial consequences for the United States. For example, in one case challenging increased U.S. duties on Korean semiconductor imports, the United States took action to comply with the WTO ruling, while still maintaining the duties. However, the commercial effects of one recently completed case involving tax exemptions for U.S. foreign sales corporations are potentially high, but the United States has not fully determined how it will implement the WTO ruling. Moreover, there are several ongoing WTO cases whose outcomes could be problematic for the United States.

BACKGROUND

The World Trade Organization provides the institutional framework for the multilateral trading system. Established in January 1995 as a result of the Uruguay Round of international trade negotiations, the WTO administers rules for international trade and provides a forum for conducting trade negotiations. For the first time, the 1994 Uruguay Round agreements brought agriculture, services, intellectual property rights, textiles and apparel, and trade-related investment measures under the discipline of multilateral trade rules. In addition, the Uruguay Round agreements established a new dispute settlement system, replacing that under the General Agreement on Tariffs and Trade, the predecessor to the WTO.

The WTO dispute settlement system provides a multilateral forum for resolving trade disputes among WTO members in four major phases: consultation, panel review, appellate body review (when parties appeal the panel ruling), and implementation of the ruling. The new system has several important features. It discourages stalemate by not allowing losing parties to block decisions; sets firm timetables for completing litigation of cases; and establishes a standing appellate body, which helps make the dispute settlement process more stable and predictable. Finally, it allows losing parties to accept retaliation or provide compensation as alternatives to complying with WTO rulings. While the new dispute settlement system facilitates the resolution of specific trade disputes, it also serves as a vehicle for upholding trade rules, preserving the rights and obligations of members under the WTO agree-

[1] See *World Trade Organization: U.S. Experience to Date in Dispute Settlement System* (GAO/NSIAD/OGC–00–196BR, June 14, 2000).

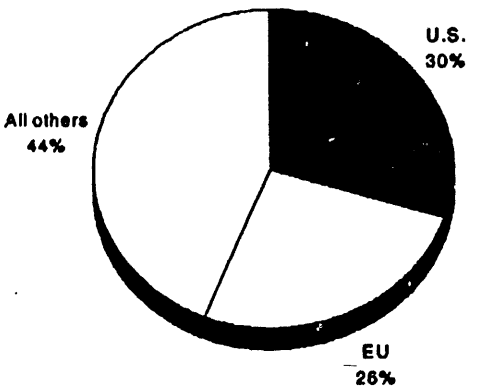
[2] A tariff-rate quota is the application of a lower tariff rate for a specified quantity of imported goods. Imports above this specified quantity face a higher tariff rate.

ments. Finally, the system clarifies the provisions of specific WTO agreements and provides a climate of greater legal certainty in which trade can occur.

WTO MEMBERS HAVE ACTIVELY USED DISPUTE SETTLEMENT SYSTEM

WTO members have used the WTO dispute settlement system frequently over the past 5 years, bringing before it 187 complaints.[3] The United States and the European Union (EU) were the most active participants, both as plaintiffs and defendants. The United States filed 56 complaints, or almost a third of the total number of complaints brought as of April 2000. The EU was the next most frequent filer, with 49 complaints (see fig. 1). Over a third of the U.S. and EU cases were against each other.

Figure 1: WTO Members' Share of 187 Complaints Filed, 1995–2000



Legend: EU = European Union

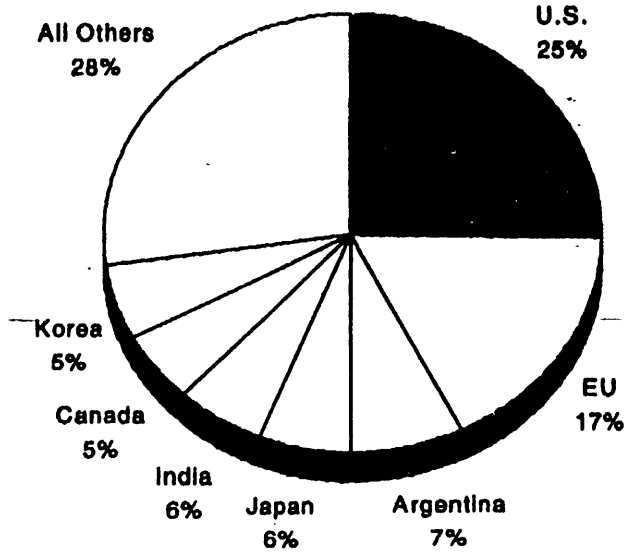
Note: This chart covers 187 complaints. It excludes five cases in which there were co-complainants (more than one country filing a complaint on the same case).

Source: WTO data.

The United States was the most frequent defendant in WTO dispute settlement cases. The 187 complaints filed pertained to 150 distinct matters; in some cases, multiple complaints were filed against the same defendant. Of these 150 matters, 38 cases were filed against the United States, a number of which are still pending. The EU was the second most frequent defendant, with 26 cases filed against it (see fig. 2).

Figure 2: WTO Members as Defendants in 150 Distinct Matters, 1995–2000

[3] The 187 complaints filed as of April 18, 2000 excludes five cases in which there were co-complainants (more than one country filing a complaint on the same case). A number of the cases are still pending.

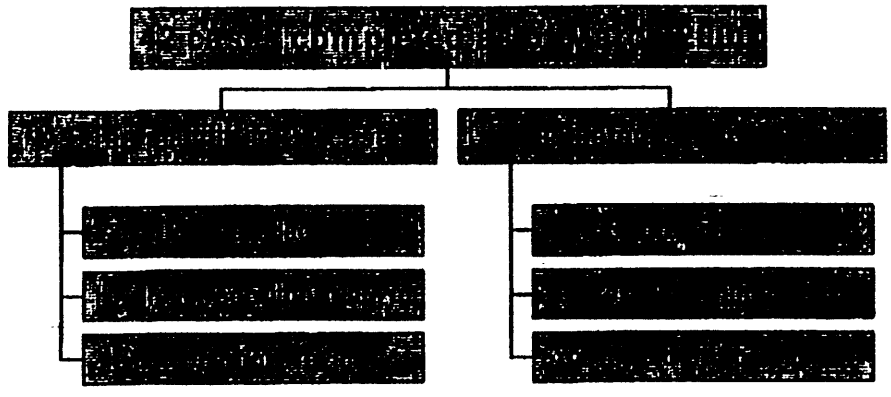


Note: Percents do not add up to 100 percent because of rounding.

Source: WTO data.

Of the 150 matters WTO members brought to the WTO, 42 cases involving the United States were completed as of March 2000. Completed cases include those that have gone through WTO litigation with a panel or appellate body ruling and cases that were resolved without a WTO ruling. The United States was a plaintiff in 25 of these cases and a defendant in 17 cases (see fig. 3).

Figure 3: Outcome of Completed U.S. Disputes in the WTO



Source: Office of the U.S. Trade Representative.

IMPACT OF COMPLETED DISPUTE SETTLEMENT CASES INVOLVING THE UNITED STATES

About three-fourths of the 25 cases that the United States filed resulted in some agreed change in foreign laws, regulations, or practices such as the removal of discriminatory taxes or other import barriers. Fourteen of these cases also resulted in commercial benefits for U.S. industry, either greater market access or increased intellectual property protection. As for the United States, in 5 of the 17 cases in which it was a defendant, two U.S. laws, two U.S. regulations, and one set of U.S. guide-

lines[4] were changes or subject to change. These changes have been relatively minor to date, and the majority of them have had limited or no commercial consequences for the United States, although one recently completed cases, where the WTO ruling has not yet been implemented, may have potentially large commercial effects.

Changes in Foreign Practices Resulting from WTO Cases

The 25 cases that the United States filed with the WTO resulted in several types of changes in foreign laws, regulations, or practices. For example, in one case involving a tax on imported liquor, Japan began lowering taxes and tariffs on distilled spirits in 1998 after a WTO ruling found that Japan had discriminated against imports. In another case, Japan lifted a varietal testing requirement for imports of apples, cherries, and other fruits at the end of 1999 after a WTO ruling found that the requirement was maintained without sufficient scientific evidence. As a result, U.S. exports of these fruits recently entered the Japanese market, with shipments in December 1999 and March 2000.

In a case the United States filed with the WTO challenging inadequate intellectual property protection for pharmaceuticals and agricultural chemicals, India passed legislation in March 1999 to establish a filing system for patent applications on these products and to grant exclusive marketing rights to the patent applicant. The WTO ruled that these changes were called for under the Uruguay Round agreement on intellectual property rights. Pakistan agreed to make similar changes to settle another WTO case filed by the United States. In a case involving investment measures that may limit or distort trade in the auto sector, Indonesia eliminated local content requirements and other trade-restricting measures in 1999 after a WTO ruling found Indonesia had discriminated against foreign investors.

Commercial Effects of Foreign Changes

Of the 25 cases that the United States filed, 14 resulted in commercial benefits to the United States, either through greater market access or stronger intellectual property protection. For example, in a case involving Korean standards for food imports, Korea made changes in its food code in 1995 and 1996 after a WTO case was filed. Korea's standard had previously kept out approximately $87 million of U.S. chilled beef exports and $79 million of U.S. pork exports, according to Department of Agriculture estimates. Also, in a case challenging Japan's inadequate time period for protecting copyrights on sound recordings, Japan changed its copyright law in 1996 after a WTO ruling. As a result of this change, U.S. sound recordings will be protected for a 50-year period, including retroactively. The U.S. recording industry estimated that these protections are worth about $500 million annually, based on lost sales in 1995.

In the 11 other cases that the United States filed with the WTO dispute settlement body, 9 had limited commercial benefits, either because (1) other barriers existed; (2) implementation of the WTO ruling was incomplete or disputed; or (3) the case was brought mainly to uphold trade principles. For example, in a case involving Canadian fluid milk imports, Canada changed its tariff-rate quota system, which the U.S. dairy industry estimated could increase U.S. exports by $45 million a year. However, the U.S. dairy industry cannot take advantage of these changes until the United States and Canada concludeseparate, ongoing negotiations on fluid milk standards..

Regarding WTO rulings whose implementation is incomplete or disputed, in two high-profile cases the EU decided not to fully comply with WTO rulings involving imports of bananas and hormone-treated beef and instead face U.S. retaliation of almost $310 million for non-compliance. In addition, as of mid June, Australia had not complied with a 1999 WTO ruling that maintained that Australia had provided an improper export subsidy grant to a leather manufacturer; the WTO had recommended that the grant be repaid. The United States and Australia have been negotiating a compliance plan.

In a case primarily involving trade principles rather than commercial interests, the United States filed a case against Hungary involving agricultural export subsidies, although U.S. products do not directly compete with the affected Hungarian exports. According to the Office of the U.S. Trade Representative, the case was brought to protect the integrity of the Uruguay Round Agreement on Agriculture. The Office maintained that Hungary was in violation of the agreement's provisions limiting these subsidies.

The United States initiated two WTO cases with high commercial stakes that it lost. In the first case, involving alleged trade restrictions in Japan's film and photo-

[4] Although guidelines are often general statements that do not impose particular directions, sometimes they are specific and binding and essentially equivalent to regulations.

graphic supplies market, the United States failed to gain greater access to this market as a result of the loss. In the other case, the United States challenged an EU change in customs classification of local area network equipment that resulted in higher tariffs for U.S. exports. Although the United States lost the case, the effects of the loss were mitigated by the WTO's 1997 Information Technology Agreement, which made U.S. exports of this equipment duty free.

Changes in U.S. Laws Resulting from WTO Cases

Out of the 17 WTO cases in which U.S. practices were challenged, only one resulted in a change in U.S. law and that change was relatively minor. In another case, the United States pledged to seek from Congress legislation providing the President authority to waive certain provisions of a law. However, Congress has yet to grant the President this authority.

Regarding the one change in U.S. law, the United States amended a 1996 law for determining the country of origin of U.S. textile and apparel imports. The United States made this change in May 2000 in response to a WTO case filed by the EU. The amendment changed the country of origin of certain fabrics including silk, and of certain goods such as scarves, from where the raw fabric was made, to where the product was both dyed and printed with two additional finishing operations.[5] The EU maintained that the 1996 law's criteria for determining country of origin affected its quota-free access to the United States. This is because raw fabric is often produced in countries subject to U.S. quotas, such as China. According to Department of Commerce data, the affected EU exports to the United States are relatively small.

In the other case, the EU challenged certain aspects of a U.S. law involving trade sanctions against Cuba. The United States and the EU reached an agreement in 1997 before a WTO dispute settlement panel ever met. Among other things, the EU agreed to drop the dispute settlement case in return for a U.S. pledge to seek from Congress legislation providing the President authority to waive title IV of Helms-Burton Act,[6] which authorizes denial of U.S. visas to persons involved in trafficking in confiscated Cuban property when certain conditions are met. Congress has yet to grant the President authority to waive title IV.

Changes in U.S. Regulations and Guidelines Resulting from WTO Cases

Two U.S. regulations and one set of guidelines have been changed as a result of WTO rulings. First, in a case brought by Venezuela and Brazil, the Environmental Protection Agency (EPA) changed a regulation implementing the 1990 Clean Air Act pertaining to the cleanliness of gasoline.[7] EPA modified the regulation in 1997 to give foreign suppliers the option of using a baseline for gas cleanliness, based on their own performance rather than on an EPA-established baseline (this treatment was already afforded to domestic suppliers). EPA also put in place a mechanism to adjust the requirements if the overall cleanliness of gas imports declines. Brazil and Norway, which account for 0.18 percent of U.S. gas supplies, are currently the only countries exporting to the United States under this option.

Also, as a result of a case brought by Korea involving dynamic random access memory (DRAM) semiconductors, the Department of Commerce in 1999 changed its standard for lifting an antidumping order[8] to conform to WTO antidumping provisions.[9] The WTO found that the previous U.S. standard placed too high a burden of proof on the party contesting an antidumping order. After the U.S. regulation was changed, Commerce conducted another review of Korean DRAM imports and still found the likelihood of continued dumping and kept the antidumping order in place. At Korea's request, a panel is now examining U.S. compliance with the WTO ruling.

Finally, as a result of a WTO case challenging a U.S. ban on imports of shrimp harvested in a manner harmful to endangered sea turtles, in July 1999 the State Department revised a set of certification guidelines.[10] The revision provided more transparency (openness) and due process in making decisions to grant countries' cer-

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[5] 22 U.S.C. section 3592(b)(2) was amended by a provision in the Trade and Development Act of 2000, Public Law 106–200, section 405.

[6] 22 U.S.C., section 6091.

[7] 40 C.F.R. part. 80.

[8] "Dumping" is generally defined as the sale of an exported product at a price lower than that charged for a like product in the "home" market of the exporters or at a price below cost. An antidumping order imposes additional duties on imports when dumping is found.

[9] 19 C.F.R. sections 351.222.

[10] 64 *Federal Register* 36936 (July 8, 1999). According to the Department of State, these guidelines implemented section 609 of Public Law 101–162 relating to the protection of sea turtles in shrimp trawl fishing operations and are binding for countries that wish to export shrimp to the United States.

tification to export shrimp to the United States. This change was very minor and, throughout the case, U.S. restrictions on shrimp imports remained in effect. However, one of the plaintiffs—Malaysia—has reserved its right to challenge U.S. compliance with the WTO ruling.

Commercial Effects of U.S. Chance

In the 17 cases in which the United States was a defendant, the United States lost 6 cases, 5 of which had limited commercial consequences. The sixth case, challenging provisions of U.S. tax law regarding foreign sales corporations, has potentially very high commercial stakes. The United States provides tax exemptions to a wide variety of companies on exported products used abroad. In this case, a February 2000 WTO ruling found that the U.S. tax provisions constituted prohibited export subsidies. The United States has not fully determined how it will implement the WTO ruling.

In the 11 other WTO cases filed against the United States that were resolved without a panel ruling or that the United States won, 5 had potentially high commercial stakes. However, the outcomes of all 11 cases had a limited or no commercial effect. For example, one of these high-stakes cases involved a challenge by Mexico to the initiation of a U.S. antidumping investigation on imports of certain fresh tomatoes. The U.S. International Trade Commission reported that imports of Mexican fresh tomatoes were $452 million, or almost 36 percent, of the $1.3 billion U.S. market in 1995. The Commerce Department and the U.S. International Trade Commission made preliminary determinations that the Mexican imports were being sold at less than their fair value and were causing material injury to the U.S. industry. If the final investigations upheld these findings, the Commerce Department could have placed duties on these imports to raise their price up to the fair market value. Mexico requested WTO consultations about this issue. However, Commerce resolved the matter with a formal commitment by Mexican growers not to sell their exports below a certain price. This agreement was reached to eliminate the injurious effects of the dumped imports on the U.S. industry.

The remaining six cases resulted in some U.S. government action with minimal commercial effect. For example, in a case challenging U.S. duties on imports of urea (primarily used as a fertilizer) from the EU, the United States removed the duties after it found that U.S. industry was not interested in maintaining them.

CONCLUSIONS

Overall, the United States has gained more than it has lost in the WTO dispute settlement system to date, for several reasons. First, the United States has been able to effect changes in a substantial number of foreign laws, regulations, and/or practices that it considered to be restricting trade. Further, most of the cases that the United States filed provided commercial benefits to U.S. exporters or investors. In addition, WTO rulings have upheld trade principles that are important to the United States, such as the patent protection provisions of the Uruguay Round agreement on intellectual property rights and provisions in the Agreement on Agriculture to eliminate export subsidies.

The dispute settlement system's impact on the United States should not be evaluated solely on the basis of U.S. wins and losses. First, some winning cases do not result in the desired outcomes. For example, the EU decided not to fully comply with two WTO decisions involving bananas and hormone-treated beef and instead face U.S. retaliation. Conversely, some losses are only partial, as in the case regarding Korean DRAM semiconductors where the U.S. antidumping order being challenged was maintained despite an adverse WTO ruling. In addition, some losing cases actually may uphold WTO principles important to the United States, as in the case involving endangered sea turtles, which expressly upheld provisions that protect the conservation of natural resources, including sea turtles. Moreover, the United States derives systemic benefits from a well-functioning multilateral dispute settlement system, even if it does lose some cases.

It is important to note, however, that there have not yet been a sufficient number of WTO dispute settlement cases to fully evaluate the system. In addition, the outcomes of some important pending WTO cases could be problematic for the United States, including several cases that challenge various aspects of U.S. trade laws, such as U.S. antidumping laws.

Mr. Chairman and Members of the Subcommittee, this concludes my prepared remarks. I will be happy to respond to any questions you may have.

CONTACTS AND ACKNOWLEDGMENTS

For future contacts regarding this testimony, please call Susan Westin or Beth Sirois at (202) 512–4128. Individuals making key contributions to this testimony included Nina Pfeiffer, Tim Wedding, and Richard Seldin.

RESPONSES TO QUESTIONS FROM SENATOR GRAHAM

Question: The testimony provided by the panelists leaves me with the impression that generally the WTO's dispute resolution process has, to date, worked properly but is capable of and needs to be protected from abuse or improper use. In a question to Professor Jackson, Chairman Grassley focused on an issue that concerns me: the potential for dispute panels to create "new law" in areas where the topic may not be dealt with specifically in the text of treaty obligations, yet may have been sufficiently addressed in national laws or jurisprudence. Consequently, are there or should there be safeguards in the dispute resolution process to prevent exploitation or overburdening the WTO process from claims that fall into such areas?

In a somewhat related manner, Ms. Wallach highlighted public policy and national interest concerns. I am also concerned with cases that pit mutually accepted public policy concerns versus technical conflicts, particularly in areas no specifically covered in treaties or where law policy is evolving. What safeguards are, or should be, in place?

Answer: GAO can respond to the first part of your question regarding what safeguards are in place to prevent dispute settlement panels from addressing areas either not covered by WTO agreements or involving sensitive evolving public policy matters as Ms. Wallach has discussed. However, it was beyond the scope of our review of the dispute settlement system to assess what types of safeguards, if any, should be in place regarding these two areas.

The WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" contains no specific safeguard provision covering the types of cases that dispute settlement panels may accept. As was the case under the 1947 GATT agreement, WTO panels have authority to conduct board investigations of members' practices and procedures. With the exception of cases involving antidumping procedures, panels are authorized to review the specific uses or applications of members' domestic laws as well as the conformity of the laws to WTO obligations. However, the Understanding does stipulate that dispute settlement rulings should be related to existing WTO agreement. Specifically, article 3.2 states:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB [Dispute Settlement Body—administers the rules and procedures of the Understanding] cannot add to or diminish the rights and obligations provided in the covered agreements.

Regarding the types of cases that WTO members can bring to the Dispute Settlement Body, the Understanding puts the onus on the members to use their best judgement in bringing matters to dispute settlement, and it specifies that the resolution of disputes should be consistent with WTO agreements. Specifically, article 3.7 states:

> Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if they are found to be inconsistent with the provisions of the covered agreements.

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COMMUNICATIONS

STATEMENT OF HON. ROBERT DOLE

Mr. Chairman, and other members of this Subcommittee, I thank you for the opportunity to present this statement concerning the World Trade Organization ("WTO") Dispute Settlement System and its impact on United States law. I offer this statement on my own behalf, not on behalf of any person or corporation. I remain generally hopeful about the WTO, and continue to believe that it represents an opportunity to advance free trade around the world. However, the WTO cannot perform these essential functions unless it retains the confidence of voters throughout the developed world, particularly within the United States.

I am proud to have been a member of this Senate. Because of my respect for this institution, I was concerned when I learned that WTO panels would have the authority to review American laws, and even to rule that American law is inconsistent with our treaty obligations. Such a procedure—in which unelected foreign arbitrators, who need not even be lawyers in their home countries, can review our laws—raises serious questions about who can legislate for Americans.

Accordingly, I welcome the timing of this hearing, for no one can deny that several recent WTO decisions represent a serious challenge to this country's laws. For example, the WTO recently attacked an American tax provision that the United States government deemed essential to allowing American companies to compete on an equal footing overseas. This country taxes certain income that American companies earn outside the United States, but other countries do not apply similar taxes on their own companies. To allow American companies to compete on a level playing field with untaxed foreign competitors, U.S. law allows for the creation of Foreign Sales Corporations ("FSC's") which are not taxed if their products are largely made in the United States.[1] Unfortunately, the WTO's Appellate Body has now declared that these provisions of American law constitute an improper export subsidy.[2] Such a ruling could strip American companies of an important tax break that has been considered necessary to maintain fair competition.

But at the same time the WTO has attacked U.S. law concerning FSC's, it has upheld a challenge brought by the European Union against the U.S. imposition of countervailing duties on subsidized imports. The WTO Appellate Body ruled that the countervailing duties imposed by the United States in that case were improper, as the foreign producer had been sold for fair market value.[3] Such a decision provides an obvious blueprint for foreign countries to avoid our countervailing duties laws, and thus attacks a basic premise of the open trading system. The economic competition and innovation that we expect to gain from free trade is undermined when American companies are forced to compete against government subsidies, which are designed to promote a country's political goals, not economic growth and efficiency.

Other serious challenges to American law remain on the horizon. In 1998, Japan dumped large amounts of hot-rolled steel in this country, and the International Trade Commission found that this dumping materially injured the American steel industry.[4] But Japan has challenged this decision before the WTO, and apparently intends to urge that body to annul yet another aspect of American law, this one relating to the ITC's consideration of captive production, which includes products

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[1] See 26 U.S.C. 921–927.

[2] See United States—Tax Treatment for "Foreign Sales Corporations", WT/DS108/R (2000)

[3] The Panel Ruling was United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in The United Kingdom, WT/DS38/AB/R (1999)

[4] See Certain Hot-Rolled Steel Products from Japan, Inv. No. 731-TA-807, USITC Pub. No. 3202 (Final) (June 1999)

made not to compete with foreign imports, but that are used instead for further processing.[5] Japan will urge the WTO to rule that captive production must be included in calculations that determine whether material injury has occurred, even though this production does not actually compete for sales in the open market. If Japan prevails on this question, yet another important aspect of our trade laws could be eliminated.

Now by mentioning these causes for concern, I do not mean to imply that the United States derives no benefits from the WTO's dispute settlement system. The General Accounting Office ("GAO") recently issued a report that summarized some of these benefits, and generally took a positive view of the American experience with this system.[6] Obviously, the United States gains when other countries lower their trade barriers, and the WTO dispute settlement system can assist in that process even though we do not always obtain the full benefit of our victories. For example, the European Union still has not complied with WTO decisions rendered in our favor with regard to bananas and hormone-treated beef. There should be a way to enforce WTO decisions, and I would hope the committee would explore this.

But notwithstanding the WTO's benefits, as a former member of this body, I am naturally concerned whenever any entity attempts to annul provisions of American law. Moreover, I worry that Americans may lose faith in the WTO dispute settlement system if significant panel decisions seem to harm our interests. Historically, American industry has supported an open trading system because our trade laws protected Americans from unfair trading practices in foreign countries that pervert the principles of free trade.

Because of my concerns about the WTO, since 1995, I have urged the creation of a WTO Dispute Settlement Review Commission. The Commission would be an American agency, composed of five federal judges who would review all WTO cases lost by the United States. The Commission would report to Congress whenever it determined that the WTO had exceeded its authority or abused its discretion. Under such a circumstance, any Member of Congress could introduce a binding joint resolution directing the President to negotiate modifications to the WTO dispute settlement rules. If the Commission found three improper WTO decisions within a five-year period, then any Member of Congress could introduce a joint resolution withdrawing Congressional approval of the WTO. If such a resolution were enacted within 90 sessions days and the President could not obtain modifications to the WTO rules by the date specified in the joint resolution, the United States would cease to be a member of the WTO.

Legislation creating such a Commission should have passed years ago. In November 1994, Mickey Kantor—who then served as United States Trade Representative—wrote a letter assuring me that the Administration would support the Commission proposal. In 1995, Senator Moynihan and I introduced a bill to create such a Commission, while Congressmen Amo Houghton and Sander Levin introduced the measure in the House. This measure had broad bipartisan support, including support from the Chairman of this Subcommittee, Senator Grassley, who continued efforts to bring this idea to fruition even after I resigned from the Senate in June 1996. While I believe that this legislation could have passed overwhelmingly, it never became law, largely due to the procedural maneuvering of those whose true goal involved destroying the WTO altogether.

Fortunately, however, this review represents an opportunity for Congress to correct the mistakes of the past and finally create a WTO Dispute Settlement Review Commission. While some people fear that such a Commission could undermine the WTO, the opposite is true. The WTO remains new and largely untested; it has yet to gain the credibility necessary to give its statements their proper weight. Congressional resolutions and Administration reports alone cannot create this credibility; it must be earned, as the American people become convinced that the WTO really treats Americans fairly, and that we truly can obtain a fair hearing under its auspices.

Creating a Dispute Settlement Review Commission would encourage that essential trust. With such a Commission, American companies and workers could know that their interests were being protected—not merely by a group of unknown panel members meeting in Geneva—but by American judges trained in the application; and interpretation of treaties and statutes, as well as by their representatives here in Congress. If, as I expect, the Commission finds that the United States has generally been treated fairly, confidence in the WTO and its dispute settlement system would grow. Americans certainly understand that we cannot prevail all the time,

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[5] See 19 U.S.C. 1677(7)(C)(iv)

[6] General Accounting Office, World Trade Organization: U.S. Experience to date in Dispute Settlement System, GAO/NS(AD/OGC–00–196BR (June 2000)

and that even the most objective panelist may sometimes rule against us. Once the American people become confident that the process is fair and objective, even rulings against our interests may not create too much controversy.

On the other hand, as I noted above, that confidence has not yet been earned, and the WTO has ruled against us in a number of very serious matters. While I want the WTO to succeed, we cannot be näive, nor can we ignore the fact that we live in a highly competitive world. Many nations are hostile to the United States, and almost every country probably contains some people who are jealous of our enormous economic success. With the accession to the WTO of China—a country that regularly criticizes the United States and acts in ways contrary to our national interest—the possibilities for hostility to this country within the WTO increase. I certainly make no accusations concerning the WTO at this time, and I trust that I will never have cause to do so. But just as President Reagan invoked the principle of "trust—but verify", so we should have a Commission to verify the fairness of rulings made against the United States.

The Commission idea will also reduce the influence of extremists on both sides of the trade debate. Both those who wish to open the American economy to any producer in the world (no matter their business methods), and those who oppose any expansion of trade (no matter its benefit to Americans) will find their agendas thwarted, as the world continues to move toward a fair-rules-based trading system. Moreover, the commission idea will significantly improve the process by which nations negotiate trade agreements. Knowing that such agreements will ultimately come under the scrutiny of at least one nation's judiciary, trade negotiators will use more precise language, thus reducing the number and complexity of disputes. WTO panels will also be more cautious in their interpretations of trade agreements. Developments such as these can only make the WTO stronger, which will, in turn, lead to greater economic growth around the world.

I would also like to respond to two largely procedural arguments that have been made against the Commission idea. First, some have suggested that serving on the Commission would be too burdensome for federal judges. But the GAO's report notes that during the first five years of the WTO, the United States has been involved in only 42 cases that have either reached a final WTO decision or were resolved without a ruling. In only eight of those cases did the CAO consider the United States to be a losing party. Eight cases in five years should hardly cause us to worry about judicial gridlock. Second, some fear that if we create such a Commission, other nations will do so as well. But I see no reason to worry about such a possibility. Americans have always believed that, in general, closer scrutiny makes for better government. If more countries carefully review WTO decisions, the likelihood is that the WTO will become increasingly responsive and professional in its response to member concerns. Such a result can only redound to the WTO's benefit.

While these procedural arguments provide no genuine reason to oppose the Commission idea, I would like to emphasize one final argument that strongly supports it. Whenever Congress debates the touchy issue of how the United States should relate to international bodies, technical terms like "sovereignty" and "national autonomy" often get tossed around. But these legalistic words and phrases represent a very simple and powerful idea: this nation belongs to the American people, and those people should only be ruled by a government that they choose. We have fought for this principle for over 200 years; the Founders enshrined in their protests against "taxation without representation". Accordingly, Congress must never delegate significant amounts of authority to any international body, unless it actively represents the American people by carefully scrutinizing the actions taken by that body. By creating the Commission I have proposed, and paying careful heed to its decisions, Congress can remain true to this principle.

Statement of Robert E. Lighthizer and Alan Wm. Wolff [1]

On June 20, 2000, the International Trade Subcommittee of the Senate Finance Committee held a hearing on dispute settlement and the World Trade Organization ("WTO"). Drawing upon our years of experience, both in the government and in private practice, we hereby submit the following statement with regard to this important issue:

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[1] Mr. Lighthizer served as the Deputy United States Trade Representative under President Reagan, and is now a member of Skadden, Arps, Slate, Meagher, and Flom LLP. Mr. Wolff served as the Deputy United States Special Representative for Trade Negotiations under President Carter, and is now a member of Dewey Ballantine LLP.

Approximately five years ago, the United States added an important new chapter to its history of seeking to create a rules-based international trading system by agreeing to the establishment of the WTO. A primary U.S. objective, after years of frustration brought about by the inability to obtain enforceable judgments under the General Agreement on Tariffs and Trade, was to achieve in the WTO a dispute settlement system that promised to resolve disputes quickly and efficiently. The United States, which saw itself disadvantaged by foreign governments' failure to live up to their international obligations, particularly in agriculture, saw these provisions as holding the promise of more open markets abroad, as well as the curtailing of trade-distorting practices such as subsidies. While favoring the WTO agreements, we were concerned at the time of the Uruguay Round that the replacement of diplomacy (and the use of U.S. domestic laws such as section 301) posed risks for the United States. Foreign government measures were often opaque, not having the transparency of the U.S. legal system. Congress was correctly concerned that international trade agreements not have direct effect in the United States, superceding U.S. law without Congressional action.

There were some early successes. When foreign measures were clearly in violation of the rules—e.g. length of protection of copyright, or violation of tariff classifications, the WTO's dispute settlement caused foreign compliance. Now the record is a cause for serious concern. Foreign barriers have proved resistant to the dispute settlement process, even where it declares the United States to be correct about the violation of the foreign government's international obligations. In addition, the dispute process has been used to attack American laws, and extend the rules of the WTO beyond what the United States agreed to at the negotiating table.

Simply responding, as some do, that only Congress can change American law, and that WTO panel decisions cannot directly alter the laws Congress has enacted, completely ignores the practical realities of the situation: if the WTO declares that an American law should be changed, then that law will almost certainly be changed. In fact, refusing to change our laws could lead to sanctions by other countries against the United States. Regardless of the legal technicalities that surround the process, we have entrusted to panelists in Geneva—some of whom represent countries that are generally hostile to U.S. interests—the authority to determine whether our laws have to be amended. In short, inadequately prepared panelists, who are not reviewed effectively for bias, staffed by international bureaucrats who seek to advance substantive agendas of their own, meet in secret, and can cause a chain of events leading to a re-ordering of U.S. laws, that ordinarily would take the Committees of jurisdiction of the Congress, the two Houses of Congress, and the President acting after serious deliberation.

Any provision of the United States Code represents the careful consideration of Congress and the President; it reflects the best judgment of the representatives of the American people as to how this nation's interests should be advanced. Any time a provision of U.S. law has to be changed at the behest of an international organization, and this occurs without a serious deliberative process having taken place, America's democratic processes have been thwarted. Accordingly, the grant of such unprecedented authority to an international organization requires constant and careful vigilance on the part of the United States government.

It has now been demonstrated that the WTO's decisions can have deleterious results for American companies. The WTO recently ruled in favor of the European Union's claim that our treatment of Foreign Sales Corporations ("FSC's") constituted an unjust export subsidy.[2] As a result, American corporations who had created FSC's could now face millions of dollars in new taxes. The WTO also placed new limits on the ability of the United States to levy countervailing duties against products made with the assistance of subsidies by foreign governments.[3] This decision should greatly concern us, for this government has long recognized that government subsidies undermine the innovation and competition that an open trading system is designed to provide. Moreover, the same American companies that have to pay new taxes as a result of the FSC decision may find it more difficult to obtain relief from government subsidies that have been provided to their foreign competitors.

Press reports also indicate that the WTO will rule in favor of the European Union's claim that an emergency restriction on imports of wheat gluten—signed by President Clinton on May 30, 1998—violates WTO rules.[4] If true, such reports indi-

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[2] United States—Tax Treatment for "Foreign Sales Corporations", WT/DX108/AB/R (2000).

[3] United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead & Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DX138/AB/R (2000).

[4] See WTO Set to Favor EU in Dispute With U.S. on Wheat Gluten Safeguards, BNA WTO Reporter (June 20, 2000). The case title is United States—Definitive Safeguard Measures on Im-

cate that the WTO could heavily restrict the ability of American policymakers to use the so-called "escape clause" provisions of our trade laws to protect domestic industries, thus undermining a significant tool that this government has long considered necessary to protect American interests.[5] The practical effects of such a change could be enormous. Japan has also brought a major challenge against our anti-dumping laws.[6] If Japan prevails, significant aspects of our anti-dumping law—such as the captive production provisions—might be changed, again representing a major blow to American industries.

In short, in these WTO cases, three panelists from very diverse backgrounds, in violation of their mandate (for example to give due deference to the administrative decisions of WTO members, when those decisions are equally reasonable) can substitute their judgment for what Congress mandated and the Executive Branch warranted had been preserved at the negotiating table.

Furthermore, while the United States has won some decisions at the WTO, we must not overstate our success on this front. For years, American trade negotiators have complained about Japan's efforts to limit competition in photographic film, but Japan prevailed when we challenged their practices before the WTO.[7] And while the United States won highly-publicized cases against the European Union with regard to bananas and meat products,[8] the Europeans have thus far refused to change their laws in accord with the WTO's rulings. In short, we cannot rely on WTO dispute settlement as a magic wand to eliminate other countries' unfair trading practices.

Thus, we urge this subcommittee to consider seriously several measures that can improve the WTO dispute process. We support the Dole-Moynihan proposal to appoint federal judges to a WTO Dispute Resolution Panel to review any decisions lost by the United States, particularly if those decisions require changes in United States law. Such decisions can be, and often are, of great importance to Americans—and to the basic principle that the American people have a right to be governed by their own representatives. This Subcommittee is to be commended on its holding these hearings in order to provide greater oversight on this subject. However, no mechanism exists currently within the United States to devote the time or the resources to review such cases in necessary detail. The Dole-Moynihan proposal would address this problem by ensuring that the Congress and the American people would pay careful attention to—and receive an adequate explanation for—any defeats suffered by the United States. Our national interest demands nothing less.

We also believe that the United States must do more to win the cases that are litigated before the WTO. The United States still refuses to draw on the resources available to it to litigate cases effectively. It would be a small step to deputize those private lawyers to participate in the WTO process where those individuals were deeply involved in the same matters that were originally brought and litigated in American courts and administrative agencies by private companies, and where private companies often have an enormous stake in the outcome of the case. Surely it should be obvious that private lawyers—who have often developed and lived with a case for several years before it was ever brought to the WTO's attention—could provide significant assistance in such matters. In fact, increased cooperation between the government and private parties can only improve our chances of winning these important cases. As it stands today, the only way a private American lawyer can get into the room in Geneva in which his clients' interests are being disposed of, is to represent a foreign government.

The United States must also not overlook the political aspects of the WTO dispute process. It would be naive to assume that advancing our trade goals within the WTO simply involves filing the best brief and trusting the panelists to make the right decision. Like any international organization, the WTO reflects the political agendas and strategies of its members, and lobbying and negotiating will always play an important role in determining the direction of such an institution. Now that we have invested the WTO with such significant powers, Congress must carefully oversee any political efforts undertaken by the Executive Branch in this regard.

The WTO process can and should be improved. The WTO will never reach its full potential unless it obtains the confidence of the American people. Accordingly, the

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ports of Wheat Gluten from the European Community, WT/DS166. At this time, the WTO's interim report in this case is not publicly available.

[5] See generally 19 U.S.C. §§ 2251–2254 (discussing situations in which the President can intervene to protect domestic industries that are under pressure from imports).

[6] This case is entitled United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan. Argument on this case is scheduled for August 2000.

[7] See Japan—Measures Affecting Consumer Photographic Film & Paper, WT/DS44/R (1998).

[8] See EC—Regime for the Importation, Sale, and Distribution of Bananas, WT/DS27/AB/R (1998); EC—Measures Affecting Meat and Meat Products (Hormones), WT/DS26/AB/R (1998).

WTO's other supporters will not advance their cause by simply ignoring the difficulties we have mentioned. We want the WTO to succeed, and we also want to ensure that Americans derive the greatest benefit possible from this new process. The Dole-Moynihan proposal, and some of the other suggestions we have made, should help us achieve these goals.

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