

Testimony of Lori Wallach Regarding The WTO Dispute Settlement System: Powerful Enforcement of Unbalanced, Extensive Regulations Without Basic Due Process Protections

Senate Finance Committee,
Subcommittee on International Trade
June 20, 2000

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 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 threaten 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 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 disciplines. 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.

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-er-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.

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, as 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 **/?strong> faced with the enormous expertise and resources involved in mounting a WTO defense in Geneva ?/strong> 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 confidential.⁽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 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. obligations 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 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 request 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 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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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 it 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.

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.

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.

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 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.

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 Palmetter 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.
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.
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.
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.

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, ?09.

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 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.