NUEVOS ARTICULOS SOBRE ASUNTOS ECONOMICOS
EAS:10/00-105:10

• Centro de Recursos Informativos • Tel: (571) 315-2131 • Fax: (571) 315 2208 • http://usembassy.state.gov/colombia

U.S. INTERESTS AND EXPERIENCE IN THE WTO DISPUTE SETTLEMENT SYSTEM

Charlene Barshefsky,
U.S. Trade Representative;
testimony before the Trade Subcommittee of the Senate Committee on Finance,
Washington, DC, June 20, 2000

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 (WTO) dispute settlement system after five years.

U.S. TRADE INTERESTS AND ENFORCEMENT POLICY

In 1999, the U.S. 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 U.S. 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 WTO in 1995. The WTO's creation deepened the achievements of its predecessor, the General Agreement on Tariffs and Trade (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 fulfil the commitments they have made. And in this work, together with our creation of U.S. Trade Representatives (USTR) 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 assert our rights and protect our interests in the trading system more effectively than ever before. At the same time, the dispute settlement system fully respects U.S. 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 and legal issues;

- Automatic adoption of panel or Appellate Body reports and of requests for retaliation in the absence of a consensus to reject the report or request; and

- Automatic authority for complaining parties to retaliate on request, including in sectors outside the subject of the dispute, if panel recommendations are not implemented or there is 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 predecessor, the GATT, 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 U.S. Trade Representative to apply retaliation equivalent in value to the burden or restriction being imposed on U.S. commerce.

EXPERIENCE WITH D.S.U. 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 U.S. 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 U.S. 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 U.S. 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 U.S. after Canada successfully challenged Australia's ban in the WTO. The U.S. 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 U.S. requested consultations under WTO dispute settlement procedures concerning Brazil's local content requirements for automotive investment. The U.S. and Brazil reached a settlement agreement in March, 1998.

- European Union (EU): market access for grains. In July, 1995 the U.S. 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 U.S., 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 EU 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 Department of State revised its procedures to provide more due process to countries applying for certification under the Shrimp-Turtle law. The U.S. 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 Rica): 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 U.S. make any changes, and no action by the U.S. was necessary.

- DRAMs (Korea): In a dispute involving a Department of Commerce 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 the Department of Commerce's regulations (and, thus, the standard applied to the dynamic random access memory

chips 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. The Department of 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 EU 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 Department of Commerce'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 the Department of 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 U.S. 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 EU 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 (Switzerland).

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 U.S. 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 non-confidential 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 U.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.

* * * * *