RECENT WTO CASES INVOLVING TRADE REMEDY MEASURES:

FLAWED DECISIONS EMERGING FROM A FLAWED SYSTEM

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I. INTRODUCTION

This paper contains speaking notes for a panel entitled "Recent WTO Cases" in which the panelists, by agreement, focused principally on recent WTO cases involving trade remedy measures. I was deeply honored to be included on this panel with distinguished trade law practitioners and former trade officials Debra Steger, Chris Parlin and Cliff Sosnow. The views expressed in this presentation are personal.

I will briefly review some of the results obtained in several areas – substantive outcomes, decisions about what kinds of claims are entitled to be heard in the WTO, and application of the "standard of review." I will then venture some partial explanations as to what may lie behind this pattern of decisions that many people find so astounding – explanations focusing on the design of the DS system itself, the psychology of its main participants, and the core analytical issue of whether it is in principle proper for WTO tribunals to divine specific obligations from ambiguous text.

II. THE RESULTS – WHAT HAS HAPPENED

A. Some Noteworthy Specific Outcomes

The rules governing trade remedy investigations have been rewritten to a significant degree by WTO tribunals. DS decisions have minted and imposed new obligations including, for example:

- a prohibition on zeroing in antidumping calculations;
- a blanket exemption from offset for pre-privatization subsidies;
- a requirement to "separate and distinguish" the impact of various factors contributing to injury, as the sole means to ensure compliance with the "nonattribution" principle;
- a prohibition on awarding collected AD/CV duties to petitioners;
- a prohibition on including partial FA margins in the weight average calculations used to establish an all others antidumping margin;
- significant new constraints on the use of facts available to fill gaps in the investigatory record and on the enforcement of deadlines established by authorities for the submission of factual information; and
- an obligation to accord identical treatment to high and low priced sales to affiliates in determining what sales are outside the "ordinary course of trade," even though strikingly different investigatory considerations apply to each.

The list could go on (and on) from here, but these are among the more striking examples.

There are many different ways to slice into and examine this rich data base. I will focus on just two, corresponding to the two primary constraints which the UR negotiators put in

place to regulate WTO review of trade remedy measures. The first involves jurisdictional rules designed to limit the range of trade remedy-related complaints that could make their way into the DS system. The second is the standard of review put in place to discipline the analysis of WTO tribunals in those cases that do get past the court house door. As we shall see, both sets of constraints have been largely disregarded.

B. The Range of Challengeable Trade Remedy "Measures"

The UR negotiators did not want an avalanche of WTO disputes over trade remedy rules. Several elements of the UR package make clear that they tried to "fence out" disputes over legislation and to ensure – for trade remedies albeit not more broadly -- that only complaints unambiguously connected to trade effects would get past the courthouse door.

Provisions indicating that negotiators wanted only a very narrow range of AD/CVD measures to be challengeable include:

- AD Agreement Art. 1 -- Agreement's rules apply "in so far as **action is taken** under anti-dumping legislation or regulations"
- AD Agreement Art. 17.4 (which negotiators sought to make applicable in CVD context through a Ministerial Decision), clarifying that only 3 types of measures are challengeable – meant to ensure that actual trade effects would be present in any claims addressed
- "Acquis" bringing "mandatory-discretionary" rule forward into WTO system

But the WTO's tribunals have strained to reach a much broader range of claims. The data base before us today includes a welter of decisions on things other than the three types of measures mentioned in Art. 17.4. Examples:

- 1916 Act
- CDSOA
- Export Restraints
- Section 129
- Korean DRAMs - *de minimis* in reviews
- Numerous other challenges to legislation and agency policies "as such"
- and the mandatory-discretionary rule has been effectively shredded, first in *US -- Section 301* and then in *US -- Countervailing Measures*.

I have never heard a coherent defense of this "mission creep" – neither on the merits of the individual outcomes nor in regard to the concerns frequently raised inside and outside the Centre William Rappard about the "overcrowded" DSB docket. Perhaps one will be offered today. It is also noteworthy that the complaints which arguably should never have received a hearing are among those most responsible – because of their substantive outcomes -- for the current controversy over WTO dispute settlement (most pronounced in Washington DC but also detectable in other capitals).

A digression on trade effects. The UR negotiators had the right idea in seeking, at least in the trade remedies area, to prevent the bringing of disputes unconnected to demonstrable trade effects. The DS process does not exist as a forum for posturing, political point-scoring and obtaining advisory opinions, but to help resolve disputes over measures that actually affect trade flows. But the DS tribunals have blown through the UR package's trade remedy-specific constraints like so many spider webs. In the new round, negotiators should abandon the surgical approach in favor of a horizontal one: they should enact a jurisdictional requirement making a demonstration of trade effects part of a complainant's *prima facie* case in all DS proceedings.

At present only ASCM/serious prejudice complainants are required to plead adverse trade effects in order to secure a decision on the "merits," and to demonstrate such effects in order to get a favorable panel decision. In all other cases, it is sufficient to plead a violation – nullification or impairment is simply assumed – and the harm, if any, arising from an alleged violation becomes relevant only after an adverse decision has been adopted, the "reasonable period of time" has expired without implementation, and the defendant has been hauled into the suspension-of-concessions process. In short, a train wreck scenario, complete with headline-grabbing charges of "outlaw" behavior, is needed simply in order to bring to the fore the question whether the challenged measure is actually affecting trade.

This antiquated aspect of the WTO system makes it controversy-enhancing rather than controversy-reducing, and also utterly unlike any other system of economic rules and remedies enforced through adjudication. For those in today's CBA audience who moonlight as competition lawyers -- imagine filing an antitrust complaint without pleading economic injury. You'd get tossed out on your ear. But this is exactly what WTO complainants can -- and surprisingly often choose to -- do. And as noted above, several of the cases most responsible for the current accusations about over-reaching (on the US side) and about non-implementation (on the complainants' side) are cases in which, regardless of the merits of the substantive claim, the complainants could not possibly hope (or have hoped) to show any actual effect on current trade flows. (For the CBA organizers, it might be an interesting exercise, perhaps for a future panel, to review the Canadian Government's litigation choices -- Export Restraints, Section 129, CDSOA, and individual claims in other cases -- in the light of these considerations.)

C. The Standard of Review

The UR negotiators sought through Article 17.6 to ensure deference to national administering authorities on both factual and (especially) legal/interpretive issues. They didn't get it. Friends and foes of contingent trade remedies seem to agree that deference does not exist.

The AB went to the trouble, in *US -- Hot-Rolled Steel*, to bury Article 17.6 formally – reaching the astonishing conclusion that it is no more deferential than the DSU Art. 11 "objective assessment" standard and thus, even though qualifying as a "special rule" which normally would override DSU standards, is really of no consequence at all.

Imagine a Martian who closely followed that part of the UR negotiations which led to the creation of Art. 17.6. Such an observer would be quite shocked by the suggestion that it, in reality, provides no greater insulation for AD findings than is enjoyed by other sorts of national determinations reviewed in Geneva under the DSU Art. 11 standard.

Another "standard of review" point, which I regret to say was more relevant before other DS decisions gutted the CVD remedy (by imposing a "current benefit" test *etc*.), is that negotiators sought to make the Antidumping Agreement Article 17 rules – including the Art. 17.6 standard of review – applicable to CVD disputes. The AB, whose disdain for Art. 17.6 would later emerge more clearly in *US – Hot-Rolled Steel*, refused to go along – upholding a finding that was based on, among other even flimsier rationales, the observation that the Ministers had expressed their wish through a mere "Declaration" rather than a "Decision." (Ministers subsequently have continued to use Declarations to give effect to a wide variety of agreed actions, so the harm from this bizarre episode has so far been confined to the CVD remedy rather than affecting the status of Declarations as a general matter. Still, one can anticipate that the next time a WTO tribunal finds inconvenient some stricture set forth in a Declaration, the inferior status of this instrument will once again be discovered, and *US - Leaded Bar* cited in support.)

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In sum, the situation we have today is that (1) the spigot is wide open, in defiance of the clearly expressed wishes of the UR negotiators; (2) WTO tribunals have explicitly cast aside the negotiated, deferential standard of review for trade remedy measures and openly claimed the authority to "complete" the contract negotiated by sovereign nations during the UR; and (3) there has resulted a lengthy series of plainly indefensible outcomes adding new obligations in particular areas of trade remedy law and practice. This account fairly cries out for an explanation.

III. WHAT'S REALLY GOING ON HERE?

As with many other messes, this one is much easier to describe than to explain. My speculations -- and that is precisely what they are, offered in the spirit of robust debate which I know my fellow panelists today share -- will touch on the design of the DS system itself, the incentives and world views of its main participants, and the preconceptions and default rules about "gap filling" in international adjudication.

A. The System Itself

The structural flaws of the DS system have been much described elsewhere, and partially during my earlier rant on trade effects. For purposes of today's topic, the DS system's main demerits are:

- **Participation of incumbent government officials as panelists.** This feature ought to have been discarded as a relic once dispute settlement became "binding"

as a result of the UR. Yet we still maintain the fiction that incumbent officials, in the service and on the payroll of governments who have *at least* a strong policy interest in the matters brought before DS panels, can somehow be relied upon to forget their employers' views and judge impartially when recruited as panelists. This has led to such extremes as a senior Canadian trade official -- with a long and distinguished record of advocating Canadian positions on subsidy/CVD issues -- being put in the chair of a panel tasked with judging the most sensitive elements of the American countervailing duty law.

- **Participation of Secretariat staff.** These hard-working (less so during "work to rule" demonstrations) individuals currently service the WTO's adjudicatory, legislative and executive functions in violation of fundamental civics principles recognized, I suspect, in the capitals of most if not all WTO Members. Even within the fraught environment resulting from these multiple roles, they do not always recuse themselves from participating in particular DS proceedings when they should.

- **Secrecy.** More and more often it seems that arguments and admissions deemed by WTO tribunals to be decisive to the outcome of cases are made during oral arguments from which affected stakeholders are excluded. This secrecy is abominable.

- **Absence of rigorously applied abstention doctrines.** The DSU does not impose -- and in cases under the DSU there has been no steady commitment to the principled development of -- doctrines on issues such as mootness, ripeness, judicial economy, political question, standing, *etc*., which are essential to any well-functioning system of adjudication. Indeed, WTO tribunals have strained in an almost frantic fashion to reach claims and issues that should (and under existing WTO law clearly *could*) have been left untouched. There are exceptions -- instances, for example, of the sound application of judicial economy -- but they are regrettably quite noticeable when they should be commonplace. I have listed this here as a structural flaw, but it is plainly in no small part behavioral as well. Among my favorite outrages is the conclusion by the *US -- Countervailing Measures* panel, citing *US -- Section 301*, that legislation giving an executive agency the *authority* to commit a WTO violation can itself be challenged in a DS case, because some WTO obligations are so important that they "admit of no discretion." A more complete shredding of the mandatory-discretionary rule -- one of the few access-limiting doctrines that receives at least lip service in the DS system -- can scarcely be imagined.

B. The Psychology

So, part of the problem is that the system itself is in important respects badly designed. It creates opportunities for mischief. But why do we get *so much* mischief?

Participants in the DS system -- panelists, Secretariat staff and AB Members alike – have what might charitably be termed a "pro-WTO bias." They want the WTO to have the biggest possible footprint, want its rules to be comprehensive, and dislike the concept of gaps within which Members may do what they please. They find distressing the notion that there might not be a WTO rule or obligation on a particular point complained about in dispute settlement, and accordingly are prepared to strain to find one. They know that negotiations -- lurching forward according to political timetables which may dictate buttoning up a text even though many significant issues remain in dispute -- frequently produce muddled language which the negotiating process itself can cure only slowly. They regard it as an article of faith that there must be some enforceable obligation arising from every provision in the WTO rulebook.[1] And they chafe against the default rule – widely accepted, it seems, in most parts of the world except Geneva – that what sovereign states have not expressly promised to refrain from doing, they cannot be faulted for doing.

This instinct probably goes a long way toward explaining the shockingly high percentage of pro-complainant rulings in DS cases. And the DS system's protagonists, in their day to day existence and in the relevant communities to which they belong, receive significant psychic (and perhaps also professional) rewards for acting upon this instinct. By finding obligations which they can enforce, they are expanding the franchise of the WTO itself. And the one thing that unites this group more than anything else is a strong belief in the WTO enterprise and the fervent hope that it will become more and more important over time. Undoubtedly they are deeply conscious of the contribution

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[1] The results at times are almost comical. A provision in the *Antidumping Agreement* that plainly was never intended to confer reviewing authority on WTO panels -- such as a provision stating that the investigating authority must "be satisfied " that circumstance *x* exists before proceeding to consider issue *y* -- will mutate in the course of a DS proceeding along lines such as the following:

- "It says they have to be satisfied, but their decisions are generally required to be 'objective,' based on 'positive evidence,' and arrived at in 'good faith.'"
- "It can't possibly be sufficient for them to simply assert, here in Geneva during dispute settlement proceedings, that they were indeed satisfied that circumstance *x* existed. That would make the obligation to consider *x*'s existence purely hortatory, or reduce it to inutility."
- "For us to play our intended role, we have to evaluate the evidence underlying their conclusion that circumstance *x* existed, and consider whether a reasonable and objective fact-finder looking at the same evidence would have been satisfied as to *x*'s existence. We owe it to the complainant to engage in an 'active' review."
- "So, they really don't have to satisfy themselves that circumstance *x* exists -- they have to satisfy *us*! Eureka!"

multilateralism has made to trade liberalization. Too, virtually all of them make their living either working for, or in jobs that exist because of, the WTO.

And so, sporting a (completely understandable) pro-WTO bias, these protagonists rarely pause to ask themselves whether the defending Member *specifically* promised not to do the thing about which the complaining Member is complaining. They are willing, on occasion, to pay lip service to the concept (familiar to baseball fans) that "a tie goes to the runner" – but only on occasion. Imagine an umpire crew deciding that "ties *sometimes* go to the runner, and *we* get to decide when." *That* is what we have today in Geneva.

C. The Lurking Analytical Issue

This instinct to give the WTO the largest possible footprint has spawned some rather extreme intellectual contortions, especially in the trade remedy area given the constraints notionally imposed by Article 17.6(ii). Here we come to a debate not about individual decisions, but about the basic analytical technique that sits upstream from those decisions.

Of course, where you wind up in this debate depends in large measure on where you start. My point of departure is the "International Law 101" notion that what sovereign states do not specifically promise not to do, they cannot be faulted for doing. This is the essential, common feature of all state-to-state dispute settlement. It predates the WTO agreements and is in effect the ground into which those agreements were planted in 1994. Setting aside for a moment the TRIPs Agreement, which is *sui generis* in many respects, the WTO agreements are largely a catalogue of things the Members have promised to refrain from doing -- applying tariffs in excess of bound rates, using quotas and other border measures, taxing imports more severely than like domestic products, countervailing more than the benefit to the recipient in a CVD case, *etc*. Something not mentioned cannot logically be prohibited. Absent a clear prohibition, the actions of a sovereign must not be faulted. This is simply a general way of stating what DSU Art. 3.2 and Antidumping Agreement Art. 17.6(ii) state with a bit more contextual detail. It is indeed analogous to the rule in baseball that ties *always* go to the runner.

This is not the case, although perhaps it should be, in domestic adjudication. We allow national courts to fill gaps in the legislated rules they enforce -- quite reluctantly, of course, and only in the presence of democratic safeguards against judicial over-reaching that are widely recognized to be lacking in the WTO DS system. But regardless, for the reasons stated above, gap-filling by an international tribunal is profoundly improper, Wrong with a capital "W."

The DS system's apologists insist that the WTO agreements' cross-references to "customary rules of interpretation" – implicitly invoking the Vienna Convention on the Law of Treaties -- change all this, and make it perfectly proper for ambiguities and gaps left by negotiators in the WTO rulebook to be filled, through dispute settlement, with concrete obligations and prohibitions. (Appellate Body member Jim Bacchus has made this argument in several published speeches, and my fellow panelist Debra Steger

advances it in published writings.) This argument crystallizes the issue quite nicely, and it presents us with two questions. Does the VCLT support gap-filling as a general proposition? And if so, do the WTO's cross-references, in DSU Art. 3.2 and AD Agreement Art. 17.6(ii), legitimize gap-filling in the WTO context?

I think the answers are "no" and "no." That is, the apologists are wrong with respect to both the VCLT and the cross-references.

As for the VCLT, neither it, nor its application by international bodies who have utilized it over the years, supports the concept of gap filling or the idea that ambiguous treaty provisions must be distilled to a single "revealed" meaning as opposed to a range of permissible interpretations. The relevant VCLT articles provide in full:

> Article 31
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
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> Article 32
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the

> preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

To suggest that these mild, common-sense articles reverse the longstanding default rules for contracting among sovereign states is truly extraordinary. The VCLT's drafters and signatories would find surprising, to say the least, the notion that these guidelines could justify an interpreter in divining international obligations on topics not even mentioned in the texts being interpreted. Certainly VCLT Article 32's references to "*the* meaning" cannot be understood to imply a requirement, or even a preference, for reducing every vague treaty provision to a *single* permissible interpretation. Yet this is precisely what the apologists contend.

As for the WTO cross-references, they would not provide support for gap-filling even if the VCLT, considered in isolation, did. For one thing, there is the small matter of the express prohibition, set out in DSU Art. 3.2, against expanding the specific obligations set out in the various substantive WTO texts. For another, the Art. 17.6(ii), second sentence, reference to multiple permissible interpretations makes clear that the UR negotiators did *not* regard the "customary rules of interpretation" invoked in the prior sentence as mandating that a single permissible interpretation be discovered for every vague AD Agreement provision.

Turning to more practical concerns, the apologists' argument about the propriety of gap-filling is also at odds with nearly-universal perceptions and understandings, among well-informed people who have never been posted in Geneva, about how trade negotiations and dispute settlement are supposed to work. Those understandings, among other things, have enabled key WTO Members, specifically the EU and the United States, to obtain negotiating mandates both historically and for the current Doha Development Agenda. To my knowledge, not even the most ardent, unreconstructed pro-WTO advocates in the U.S. Government are willing to say, *publicly or even privately*, that they agree with the above-described view of either the VCLT or the Art. 3.2 / Art. 17.6(ii) cross-references. They insist that -- the frustrating experiences of the 1995-2003 period notwithstanding -- there is no reason to fear that the carefully-negotiated boundaries of new agreements now being pursued in the DDA will prove to be porous, because WTO tribunals will *not* have gap-filling authority.

In short, if the apologists' view is correct, then there is a monumental disconnect between the basis on which the U.S. Congress (barely) approved negotiating authority, on the one hand, and the reality of what the DS process can legitimately foist upon the United States, on the other. How can anyone possibly expect smoother sailing ahead, in such an environment?

IV. CONCLUSION

One of the most important metrics by which to judge the DS system is whether it has managed, or at least is increasingly managing, to command respect and confidence sufficient to create an environment conducive to ongoing, additional trade liberalization under WTO auspices. Even the DS system's apologists are hard-pressed to give the system high marks in this respect. I strongly favor additional trade liberalization under WTO auspices and, for that reason among the many others discussed above, hope the DS system will be substantially reformed and reined in.