WTO DISPUTE SETTLEMENT AND TRADE REMEDIES:

DID WE GET WHAT NEGOTIATORS WANTED?

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NOTE TO READERS: The following are speaking notes for a panel discussion entitled, *The WTO Dispute Settlement Process: Did We Get What Negotiators Wanted?* in which I, along with Gary Horlick, was invited to comment on a paper presented by the former senior U.S. trade official and WTO Deputy Director-General, Andy Stoler. These remarks should be read alongside Mr. Stoler's much more detailed paper, and will seem cryptic otherwise.

I. Opening Comment on the Stoler paper

Andy's paper does a good job of laying out categories under which to measure whether negotiators got what they wanted. The paper also fairly lays out the history with respect to each point and the often conflicting objectives of the Uruguay Round negotiators.

I disagree with his analysis in two areas. The first is his too-short list of negotiating parties' objectives which, after eight years experience, one can fairly say were not met. My own brief "scorecard" on this point follows. The second is his comment, at page 20, about "non-outcomes." I will return to that point at the end of my remarks.

II. "Binding" dispute settlement; compliance with adopted reports

Negotiators changed the rules governing panel establishment and DSB adoption, but did not meaningfully change the rules on what happens next (compliance / compensation / retaliation). This is still essentially a bilateral affair between complainant and defendant, based on relative economic leverage. One must assume this is what negotiators intended.

Adoption rates have plainly increased. Compliance with adopted decisions, however, is running at about the rate it was previously under GATT 1947 (*i.e.*, occurs usually but not always). Negotiators probably hoped for a bit more, but the blame lies mainly with the decisions themselves (many of which have been outrageous) and with Members' choices to bring problems into the DS system which are not resolvable through litigation.

Inability to block may have tempted trade officials to bring some cases which would have been best kept out of the system -- probably **not** what negotiators wanted.

III. Range of challengeable "measures"

Negotiators wanted only a very narrow range of AD/CVD measures to be challengeable:

- AD Agreement Art. 1 -- rules apply insofar as antidumping measures are imposed
- AD Agreement Art. 17.4 (which negotiators sought to make applicable in CVD context through a Ministerial Decision) -- only 3 types of measures challengeable
- "Acquis" bringing "mandatory-discretionary" rule forward into WTO system

The actual results have included a welter of challenges to things other than the three types of measures mentioned in Art. 17.4. Examples:

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

IV. Standard of review

Negotiators -- at least US negotiators -- wanted deference to national administering authorities on both factual and (especially) legal/interpretative issues. They didn't get it. No one -- friend or foe of contingent trade remedies -- thinks deference exists.

Negotiators wanted a system in which the negotiated balance of rights and obligations would be enforced, not altered. They didn't get it.

Negotiators wanted the AD Article 17.6 standard to apply to CVD disputes. They didn't get that either.

V. Some specific outcomes

Negotiators did not agree to prohibit zeroing in antidumping calculations -- but this requirement has been minted and imposed through the DS process.

Negotiators did not agree to exempt pre-privatization subsidies from offset -- but this requirement has been minted and imposed through the DS process.

Negotiators did not agree to require injury authorities to "separate and distinguish" the impact of various factors contributing to injury -- but this requirement has been minted and imposed through the DS process.

Negotiators did not agree to refrain from awarding collected AD/CV duties to petitioners -- but a prohibition on doing so has been minted and imposed through the DS process.

VI. Political upshot

Negotiators wanted a reputable system that would command respect and confidence. They didn't get it.

Negotiators wanted the trappings of adjudicatory system (AB etc.) to obscure problematic non-judicial elements of the DS system (secrecy, incumbent govt officials' service as panelists, multiple roles played by Secretariat staff). Those faults are showing through.

Negotiators wanted to create an environment conducive to ongoing, additional trade liberalization under WTO auspices. Not at all clear, today, whether they got that.

VII. "Non-Outcomes"

This is an important point. Mr. Stoler writes (at page 20):

> *{S}ince its creation, the Appellate Body has more or less taken the position that it does not have the option to "punt" in the face of what some would regard as an unclear legal situation. It has refused to say "we cannot solve this dispute" and pass the buck back to the Members. Members of the Appellate Body I have talked to over the years have left me with the clear impression that they believe WTO Members' objective in crafting the DSU as they did was to ensure that there would never be a non-outcome to a dispute involving a covered agreement. In the context of the negotiations, I think this is probably right. In 1993, negotiators that had seen disputes go on for years with no light at the end of the tunnel wanted assured outcomes.*

I regard this passage as sophistry, distinguishable in that respect from the entire remainder of Mr. Stoler's excellent paper. For the AB to say, "while we sympathize on policy grounds with the complainant, the agreement before us here includes no clear commitment to refrain from doing what the defendant has done" is not a "punt" or a "non-outcome." Rather, it is an entirely appropriate exercise of the adjudicatory function assigned to the AB. What sovereign states have not expressly promised to refrain from doing, they may do -- that is the essence of international dispute settlement in any forum. The rules in DSU Art. 3.2 and AD Agreement Art. 17.6(ii) are merely restatements of this fundamental principle.

The comment about "non-outcomes" does however capture what in my view is the core problem with WTO dispute settlement. Participants in the DS system, panelists, Secretariat staff and AB Members alike, have -- and most observers are probably willing to forgive them for this -- a "pro-WTO bias." They find intolerable the notion that there might not be a WTO rule or obligation on a particular point complained about. They want the WTO rules to be comprehensive. They abhor the concept of gaps within which Members may do what they please, with no WTO remedy available.

This instinct probably goes a long way toward explaining the shockingly high percentage of pro-complainant rulings. For harboring such an instinct, the WTO's judges may perhaps be forgiven. For acting on it, however, they cannot.