STRICT LIABILITY FOR GROWING TRADE?

-- SPEAKING NOTES --

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> ***Strict Liability***
>
> *n. automatic responsibility (without having to prove negligence) for damages due to possession and/or use of equipment, materials or possessions which are inherently dangerous, such as explosives, wild animals, poisonous snakes or assault weapons. This is analogous to the doctrine of res ipsa loquitur in which control, ownership and damages are sufficient to hold the owner liable.*
>
> *LAW.COM Dictionary, http://dictionary.law.com*

Good morning ladies and gentlemen, and thanks to Judge for the generous introduction. I'm honored to be among those chosen to start the discussion this morning.

I'll briefly contribute some thoughts about the Doha negotiation overall, then about the negotiation's agriculture chapter, and lastly about the Special Safeguard Measure ("SSM").

I. The Doha Negotiation Generally

The effort to push the Doha negotiation to a new plateau this year is an important one. It deserves everyone's fervent support and has mine. It should be pursued, if necessary, straight through to midnight on December 31.

If that effort comes up short (as now seems likely), and a fresh impetus for the negotiation has to be discovered sometime in 2009, it may be necessary -- though difficult -- to broaden the negotiating agenda. I won't go deeply into the details, since some could take us off-topic, but the basic idea is as follows:

- The negotiation needs some elements more affirmatively appealing and exciting to the business sector – sufficient to quicken the pulse of company CEOs and not just their Washington representatives. At present business' interest in the negotiation, especially its textual (as opposed to scheduled market access) components, is lukewarm.

- The players on the Doha stage need to be seen proactively addressing *current* challenges. As an exercise in which officials have been working inconclusively for nearly a decade to reach answers to old questions, while not even broaching new ones such as the trade effects of carbon control measures, the negotiation has a musty aura of irrelevance.

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- Given the extreme unlikelihood (apologies to my co-panelist Dan Rotenberg!) of significant commitments on expanded protection for geographically distinctive food products, the political balance may favor making space for some other "new" issue of interest to the EC – perhaps one of the "Singapore" issues backed for inclusion by the EC but rejected by other Members at the current round's inception.

- Reading the tea leaves a bit, it may be that more attention is needed to what used to be called Functioning Of the GATT System ("FOGS") issues. The way in which these issues were put to rest at the close of the Uruguay Round may not be as durable as previously hoped. I would include in this basket of issues DSU reform (already being discussed but in a shallow fashion and with no official connectivity to other negotiating topics) as well as some more cosmic items such as revisiting the "round" concept and the consensus rule, and making greater use of plurilateral agreements where fully multilateral liberalization cannot be achieved.

I cannot say exactly what the new parameters should be, and I don't want to imply that an Extreme Makeover is needed. But some of the adjustments suggested above will likely receive, and deserve, consideration in the context of a strategic re-set of the Doha Round parameters established in 2001.

Implicit in these suggestions -- but I'll make it explicit -- is finding a revised structure in which Agriculture policy reforms are less emphasized than in the current structure, and less capable of keeping everything else bottled up behind.

II. The Doha Round's Agriculture Chapter

The visions dancing like sugar plums in the heads of Agriculture negotiators include two hoped-for "grand bargains." One involves rebalancing the Uruguay Round's iniquitously pro-developed-country agriculture provisions -- in exchange, I suppose, for keeping the WTO itself in business with a large membership. The other, more popular in this country, involves meaningfully enhanced export market access -- in exchange for reducing the magnitude of domestic subsidies. Neither shows much current likelihood of materializing.

There are a lot of difficult issues in the Agriculture negotiation. Some are very specific (for example, Geographic Indications) and others are more architectural. In general, I think the best way to move the Agriculture negotiation ahead is through a political-level pledge, coupled with an instruction to lead negotiators, to *advance as much as possible the integration of Agricultural trade into the normal framework of WTO rules*.

This implies stepping back from the continued, tunnel-visioned, effort to refine special rules for Agriculture trade -- special subsidy disciplines based on numerical commitments rather than the general standards in the WTO *Agreement*

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on Subsidies and Countervailing Measures, and special import relief mechanisms differing from the ones applicable to every other category of traded goods.

Perpetuating the old mode of Agriculture negotiations -- continuing to talk about Peace Clauses and colored boxes, as if that clunky apparatus just needs a tune-up in order to run smoothly for another hundred thousand miles -- looks today, with apologies for mixing metaphors, like throwing good money after bad.[1] And worse, it exacerbates the Doha Round's biggest problem: a wretched trap in which governments cannot seem to agree about the future without first agreeing about the past. I don't think they're ever going to agree about the past. So we should, instead, look for ways to make agreeing about the past less crucial.

A new template and vocabulary for pursuing today's commercial interests in Agriculture trade will not by itself break the cycle of recrimination; it will not bridge the entire gap between those who consider "rebalancing" to be the current Round's only imperative and those who have nothing but disdain for the idea of a "donor's conference." But it sure won't hurt to start phrasing the questions differently if we're tired of the same old answers. And there is more than one way to drive reform of applied Agriculture sector policies through the exchange of government-to-government commitments.

What if we miniaturized two "pillars" of the Agriculture negotiation by willingly and permanently agreeing not to use export-contingent subsidies, and not to cause each other adverse effects through the use of domestic subsidies? Would cotton even need separate treatment in that scenario? What if we defined *ad valorem* tariffs as the only acceptable constraint on Agriculture market access and promptly began subjecting those tariffs to aggressive formulas like those that have produced so much liberalization in the world of industrial goods?

How much negotiating energy might then be freed up to tackle the new generation of Agriculture trade problems -- like sanitary/phytosanitary and food safety measures, labeling measures, and others that are fairly crying out for more bandwidth and cooperative effort within government-to-government dialogues?

That's the pie in the sky. The SSM is a different kind of pie -- a cow-pie on the sidewalk. I'll conclude with a few quick points on that.

III. The Special Safeguard Measure

There has been much speculation about a politically-minded decision, made in one or more national capitals prior to the July 2008 ministerial-level meetings,

[1] GBD has given me the opportunity to elaborate this view, specifically on competing tactics for driving subsidy reform in the Agriculture sector, before. See *The Evils of a Long Peace: Legal Consequences of WTO "Peace Clause" Expiry and Practical Issue for New Litigation Over Farm Subsidies*, at www.tradewinsllc.net/publi/Peace_Clause_GBD_12_03.pdf, and *Thinking Outside the "Boxes": A (Possibly) Simpler Strategy for Advancing Multilateral Regulation of Farm Subsidies*, at www.tradewinsllc.net/publi/Ag-Subsidies-GBD-7-04.pdf.

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that the negotiations had to stall somewhere, and about the SSM having been merely a convenient topic for an impasse. I have no scoop for you on that, no wrinkle on the conspiracy theories. As my brother-in-law Bob likes to say, "we'll die not knowing." But what I would like to do is suggest some context for the SSM debate, assuming that it is real and not a case of shadow-boxing.

The SSM is a trade defense/import relief mechanism, and so should be examined against the backdrop of the existing WTO rules governing such mechanisms. Judging from the discussions held in the Doha Round's Rules Negotiating Group, many Members believe that those existing rules are scandalously lax -- meaning that they are far too tolerant of contingent trade protection. Say what you will about these rules; they do limit the use of import relief in many ways, most notably through an injury test that allows unfairly traded imports to be restrained only if they cause or threaten "material" injury, and fairly traded imports to be restrained only if they cause or threaten "serious" injury.

And the SSM? As proposed, it would allow import relief with respect to any agricultural goods whose cross-border flows have increased by a specified percentage, and irrespective of:

- whether any "unfair" practice, such as subsidization or dumping, is involved;

- whether the increased trade flow meets any sort of injury or market disruption standard; and

- whether the proposed import relief has cleared some sort of public interest test (commonly used for import safeguards whose coverage extends, or can extend, to fairly traded goods).

Moreover, the relief contemplated is not just a "snap-back" to pre-DDA treatment, but the abrogation of older (hence well-settled and relied upon) market access commitments.

From this perspective, it is perhaps surprising that the hang-up in July was (reportedly) over whether an 11% increase, or some greater quantum of import growth, should be sufficient to justify the imposition of SSM import restraints.

A couple of ironies, among many one could cite:

- Some of the proponents of this virtually automatic remedy, based solely on import growth, are the very same Members seeking to make import relief in cases of injuriously dumped and subsidized goods much harder to obtain.

- An antidumping or countervailing duty case in which imports have grown by 11% is a case one could probably expect to fail on the injury side -- meaning that no relief would be available even if the products in question are shown to be unfairly traded.

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So if the WTO's existing rules are too tolerant of contingent trade protection, the SSM would seem to stretch the continuum considerably, establishing a new pole far away in a region of utter laxity.

In fact, the SSM is so lax, it's actually … strict. It amounts to strict liability for growing trade.

I side with those who see this as a matter of principle, going to the fundamental question of whether the integration of agriculture trade into the normal WTO framework is going to be advanced, or deemed inconvenient and shelved.

Despite its imperfections, I favor using the injury test as a sorting mechanism, to determine which import surges (and also which domestic subsidies) are sufficiently troubling to justify offsets, and which are benign. I've heard the arguments why we should shrink from applying these tried-and-true concepts to Agriculture trade, and they are not persuasive. The proposed SSM is symptomatic of -- really, the logical extension of -- the broader effort to keep agriculture rules distinct, an effort that as far as I can tell is not really benefiting any group of stakeholders whether producers or consumers.

Can't we at least start making *different* mistakes?

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I'll conclude there. I appreciate your attention this morning and look forward to your questions.

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