PART ONE: INTRODUCTION

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Implacable foes and inveterate supporters of the World Trade Organization (WTO) could agree on at least one point about the past year: 2002 was a tumultuous one in trade. Consider a few of the events, wholly apart from developments in the emerging body of international trade jurisprudence (reviewed below), that occurred in the last quarter of 2002:

> In September:
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> Thailand's Dr. Supachai Panitchpakdi took the helm of the WTO, becoming its third Director-General (with a term expiring in September 2005), following Italy's Renato Ruggiero (who served from January 1995 to September 1999), and New Zealand's Mike Moore (who served from September 1999 to September 2002).[2]
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> In October:
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> A WTO panel met for the first time to consider complaints from eight WTO Members (Brazil, China, the European Union (EU), Japan, New Zealand, Norway, South Korea, and Switzerland) against American steel safeguard tariffs, ranging from eight to thirty percent, imposed by President Bush in March 2002, despite an array of exemptions from the measures granted by the United States.[3]

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2. *See* Daniel Pruzin, *Director-General Selection Process Remains Thorny Issue for WTO Members*, 19 Int'l Trade Rep. (BNA), No. 44, at 1901 (Nov. 7, 2002); Daniel Pruzin, *Trade Officials Give Moore Passing Grade as Head of WTO*, 17 Int'l Trade Rep. (BNA), No. 36, at 1396 (Sept. 14, 2000).

3. *See* Daniel Pruzin, *U.S., Complainants Hold First WTO Dispute Hearing on Steel Safeguard Duties*, 19 Int'l Trade Rep. (BNA), No. 44, at 1882 (Oct. 31, 2002) (reporting that the claims included:

> [T]he United States violated [the WTO] Safeguards Agreement provisions by failing to carry out a proper determination as to whether imported steel was causing serious injury to domestic producers, failing to show that imports were coming in such increased quantities as to cause or threaten serious injury to domestic producers, failing to establish the necessary causal link between increased imports and injury, and failing to show that increased imports were the result of 'unforeseen developments,' all requirements that must be met under WTO rules to justify the imposition of a safeguard measure).

An interim panel found that the steel safeguards violated WTO rules on March 26, 2003. *See WTO Interim Panel Rejects U.S. Steel Safeguard in Limited Ruling*, 21 INSIDE U.S. TRADE 13 (2003).

In December:

> China completed its first year of Membership in the WTO, albeit on the terms of a non-market economy (NME), during which it participated in its first case (against the United States on steel safeguards).[4]
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> The United States announced it completed a free trade agreement (FTA) with Chile,[5] and except for resolving the issue of capital controls, finished negotiations with Singapore on an FTA,[6] following the Congressional grant, in August, to President Bush of fast-track authority to negotiate trade deals (now called Trade Promotion Authority, or TPA).[7]

An environment can be tumultuous not only because of what takes place, but also because of what fails to happen. The lack of closure on a matter can catalyze or exacerbate confusion and disorder and even agitation and conflict. Consider some of the still-unresolved controversies during the last quarter of 2002:

> Following the November 2001 Doha Ministerial Conference and obdurate opposition by some EU members to major reforms in the Common Agricultural Policy (CAP), no agreement was reached among WTO Members on a draft compromise text for liberalization of trade in agriculture under the auspices of the agenda built into the WTO *Agreement on Agriculture* and the

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Interestingly, there are reports the safeguard measures are helping American producers restructure. *See, e.g., A Miracle at Bethlehem*, ECONOMIST, Jan. 11, 2003, at 55; Edward Alden & Caroline Daniel, *Tariffs 'Rejuvinating US Steel Dinosaurs': President Bush's Controversial Protection Measures Are Helping Bring About Restructuring of the Industry*, FIN. TIMES (LONDON), Jan. 15, 2003, at 7. Of course, there also are reports about the damage higher duties, leading to steel price rises of 20-50%, are inflicting on American motor and equipment manufacturers. *See, e.g.*, Jeremy Grant & Edward Alden, *Auto Industry Warned on Steel*, FIN. TIMES (LONDON), Jan. 28, 2003, at 8.

4. *See* Pruzin, *U.S., Complainants Hold First WTO Dispute Hearing on Steel, supra* note 3, at 1882.

5. *See* James Langman, *Chile Digests Conclusion of FTA Talks, Prepares for 'Selling' and Implementation*, 19 Int'l Trade Rep. (BNA), No. 50, at 2186 (Dec. 19, 2002).

6. *See* Rossella Brevetti, *Trade Official Defends U.S. Stance on Capital Controls in FTA Talks*, 19 Int'l Trade Rep. (BNA), No. 49, at 2136 (Dec. 12, 2002); Christopher S. Rugaber & Genevieve Wilkinson, *U.S.–Singapore Free Trade Accord Still Hung Up Over Capital Controls*, 20 Int'l Trade Rep. (BNA), No. 2, at 63 (Jan. 9, 2003).

7. For an interesting empirical analysis concluding political party affiliation has a causal effect on trade policy, see David Brady et al., *Does Party Matter? An Historical Test Using Senate Tariff Votes in Three Institutional Settings*, 18 J. L. ECON. & ORG. 140, 140-54 (2002).

timetable for the Doha Round of trade negotiations.[8] They also fought over the EU ban on food products containing genetically-modified organisms (GMOs), with the United States Trade Representative (USTR), Ambassador Robert Zoellick, using "immoral" and "luddite" as adjectives to describe European behavior.[9]

- Also following the Doha Conference, no agreement was reached on new rules about compulsory licensing of pharmaceutical patents, with the United States insisting that any easing of such rules remain limited to medicines that treat HIV/AIDS, tuberculous, and malaria,[10] and with the EU's trade commissioner,

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8. *See, e.g.*, Tobias Buck, *Climbdown on Farm Trade Boosts Hopes of WTO Talks*, FIN. TIMES (LONDON), Jan. 28, 2003, at 8 (reporting that France and Ireland dropped their opposition to a paper setting out the EU's position on liberalization of global farm trade, but continued to resist a central reform proposal, namely, severing the link between subsidies and production); Tobias Buck & Frances Williams, *Brussels Ready for Battle After Backing Radical Farm Reforms*, FIN. TIMES (LONDON), Jan. 23, 2003, at 3 (discussing the EU's proposed CAP reforms); Tobias Buck, *Fischler Set to Seek Farm Accord Ahead of World Trade Meeting*, FIN. TIMES (LONDON), Jan. 20, 2003, at 6 (discussing the proposal of EU Agriculture Commissioner, Franz Fischler, to reform the CAP by severing the link between spending and production, to end blue-box subsidies, the agreement of Germany, the Netherlands, and the United Kingdom with this proposal, and the staunch opposition to it from France); Tobias Buck & Guy de Jonquières, *Paris Blocks EU Plans for Reform of Farm Trade*, FIN. TIMES (LONDON), Jan. 22, 2003, at 12 (reporting France's blockage of the EU's plan to change the nature of farm support from production-linked subsidies, "blue box subsidies" that link payments to a farmer with the farmer's output, to income support and rural development subsidies); *Europe's Meagre Harvest*, ECONOMIST, Jan. 25, 2003, at 70 (explaining the United States wants countries with high-levels of farm support, such as EU members, to liberalize more quickly than other countries, while the EU favors equal reductions by all, and also stating the EU has retreated from plans to limit support payments to large farms, and to reform subsidies for dairy and sugar); *see also* World Trade Organization, *WTO Agriculture Negotiations–The Issues, and Where We Are Now* (Oct. 21, 2002), *available at*, www.wto.org (outlining the two phases of agricultural negotiations thus far, conducted during March 2000-01 and March 2001-02, the mandate in the *Doha Declaration*, modalities for further negotiations and proposals tabled).

9. *Review and Outlook: "Immoral" Europe*, WALL ST. J., Jan. 13, 2003, at A10.

10. The context in which the issue matters is a country that lacks the capacity to manufacture pharmaceuticals and/or a health care budget to produce the medicines. For that country, invariably a Third World one facing a public health crisis, and thus a need for medicines, the right to affect a compulsory license is of no help. That country needs to import cheap copies of the patented medicines; hence, the issue is whether WTO rules that protect patent holders ought to be waived to allow the country to do so. The American pharmaceutical industry argues that without limits on such a waiver (for example, for drugs to treat AIDS, but not for Viagra to treat sexual dysfunction), the waiver would undermine all drug patent protection. *See* Frances Williams, *WTO Tries to Break Deadlock on Medicines Access*, FIN.

Pascal Lamy, calling the opposition from the American pharmaceutical industry "very stupid."[11]

- Again following the Doha Conference, the United States and EU continued to quarrel over possible reforms of antidumping and countervailing duty laws, with the Europeans advocating–and the Americans opposing–a mandatory "lesser duty" rule and "public interest" test.[12]

- Russia continued to negotiate for accession, without coming to final terms,[13] though the United States and EU previously announced they would not consider Russia–in contrast to China (and Vietnam)–a non-market economy (NME).[14]

TIMES (LONDON), Jan. 28, 2003, at 6; *see also* Amir Attaran, *The Doha Declaration on the TRIPS Agreement and Public Health, Access to Pharmaceuticals, and Options Under WTO Law*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 859, 860, 883-85 (2002) (arguing the problem of access to patented pharmaceuticals can be remedied only imperfectly by the WTO's *TRIPS* Council, and that of the potential remedies the Council's best option would be to decide that an action for improved access should not be justiciable under WTO dispute settlement rules, and to urge a Ministerial Conference or the General Council to resolve the Doha Declaration mandate by consensus, without amending the *TRIPS* Agreement).

11. Guy de Jonquières, *EU Condemns Stance of U.S. Drugs Groups*, FIN. TIMES (LONDON), Jan. 21, 2003, at 6.

12. The "lesser duty" rule calls for antidumping or countervailing duties to be imposed only up to the rate necessary to prevent injury to a domestic industry, not to the full level necessary to cover the dumping margin or subsidization level. Article 19:2 of the *Agreement on Subsidies and Countervailing Measures* contains an optional version of the rule. The "public interest" test would consider whether the interests of other countries would be harmed by the imposition of an antidumping or countervailing duty. *See* Christoper S. Rugaber, *EU to Offer Subsidy Proposals at WTO Will Urge Mandatory "Lesser Duties" Rule*, 19 Int'l Trade Rep. (BNA), No. 46, at 1992 (Nov. 21, 2002).

13. *See* Daniel Pruzin, *Russia and WTO Members Agree on Accelerated Schedule of Negotiations*, 20 Int'l Trade Rep. (BNA), No. 1, at 20 (Jan. 2, 2003).

14. Vietnam's NME status is relevant to an emerging, and potentially major, series of trade problems with the United States. In December 2001, the two countries signed a trade agreement manifesting the political will in Hanoi and Washington, D.C. to improve relations. Catfish farmers in the American south do not share that will. Also in 2001, with the farmers' and packers' encouragement, Congress passed rules requiring the Vietnamese to label their product "basa" or "tri" rather than "basa catfish" (or another name indicating a local product), effectively forbidding the Vietnamese to apply the same rubric ("catfish") to the Vietnamese product. In January 2003, the United States Department of Commerce, in response to a petition from these farmers, announced antidumping duties of 38-62% on Vietnamese "fish fillets." *See* Notice of Preliminary Determination of Sales at Less than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4986 (Jan. 31, 2003) (finding that "[c]atfish" are one of Vietnam's largest exports,

- The War on Terrorism proceeded with varying degrees of success, preparations continued for a possible military conflict with Iraq, but Saudi Arabia remained outside the WTO, and no new Muslim country acceded to the WTO as a full Member.

- The WTO staff engaged in a "work to rule" action (a refusal to work or give administrative support beyond normal business hours) to protest the paucity of recent pay raises, thereby disrupting several meetings at the WTO headquarters.[15]

- Several major trade disputes between the United States and the European Union (EU), in which final adjudications from the Appellate Body had been issued in previous years, remain unresolved, including *Beef Hormones*,[16] *Foreign Sales Corporation*,[17] and *1916 Act*.[18]

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employing 300,000 to 400,000 people in the Mekong delta, and Vietnamese "catfish" have recently accounted for 20% of the U.S. frozen catfish market). Vietnam's status as an NME country almost certainly makes it easier to render affirmative findings of dumping, in this and in future U.S. anti-dumping actions.

15. *See* Daniel Pruzin, *Staff Action to Push Pay Raise Disrupts Several WTO Meetings*, 19 Int'l Trade Rep. (BNA), No. 46, at 1985 (Nov. 21, 2002) (reporting that while the Director-General, Dr. Supachai Panitchpakdi, supports an across-the-board average pay hike of eight percent in line with increases at the United Nations, International Monetary Fund, and Organization for Economic Cooperation and Development, several WTO Members, including the United States and Germany, which are the two major contributors to the WTO budget, respectively, are opposed).

16. *See* Gary G. Yerkey, *EU Plans Initiative at WTO Seeking Removal of U.S. Sanctions in Beef Hormone Dispute*, 19 Int'l Trade Rep. (BNA), No. 50, at 2169 (Dec. 19, 2002) (reporting the EU will ask the WTO to require the United States to lift its annual sanctions worth $116.8 million against EU products, which the United States imposed in 1999 following the Appellate Body ruling on products, such as Danish ham, French mustard, and Roquefort cheese, because the EU now has scientific proof that six beef hormones–melengestrol acetate, oestradiol-17-beta, progesterone, testerone, trenbolone, zeranol–are a significant public health risk). The *Beef Hormones* case is explained and excerpted in RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 1674-1706 (2d ed. 2001).

17. *See* BHALA, *supra* note 16, at 988-1008 (explaining and excerpting *The Foreign Sales Corporation* case).

18. *See United States–Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Sept. 26, 2000), *treated in* Bhala & Gantz, *WTO Case Review 2000*, at 44-52; *see also* Jeffrey S. Beckington, *The World Trade Organization's Dispute Settlement Resolution in United States–Anti-Dumping Act of 1916*, 34 VAND. J. TRANSNAT'L L. 199, 199-223 (2001).

Ironically on Veterans Day, November 11, 2002, the EU and Japan threatened to re-commence hostilities in the WTO against the United States for allegedly failing to comply with the Appellate Body ruling by repealing the 1916 Act. To be sure, the United States never has used the Act as the basis for a judgment resulting in criminal or financial penalties against dumpers, and it has introduced legislation to repeal the Act. One legislative proposal (H.R.

This list of non-achievements was not generated by a lack of interest or effort. Several WTO Members and officials from the WTO Secretariat went to considerable lengths to resolve these matters before the end of 2002.

The critics of the WTO might be inclined to cite this kind of list as yet more evidence of the problems plaguing their target institution. Interestingly, also during the last quarter of 2002, a lively exchange occurred in the pages of London's *Financial Times* about whether the WTO was good for anything.[19] One side argued trade liberalization in goods did not precede or accompany accession to the WTO. The other side pointed to post-accession reductions in tariff and non-tariff barriers on goods, as well as greater market access for cross-border trade in services. In this journalist exchange, defenders also lauded the WTO for its functioning dispute settlement system. Surely, the *raison d'être* of the WTO is not only to adjudicate disputes pursuant to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Dispute Settlement Understanding*, or *DSU*). Yet, the defenders were on to something when they mentioned the *DSU*.

Amidst all the turmoil caused by events and non-events in 2002, one constant remained: the *DSU* did, indeed, continue to function. It might even be said the *DSU* functioned well, with some quiet dignity. To be sure, not everyone would agree. However, persistent objectors would have to admit the Appellate Body handed down decisions covering an impressive range of trade law topics:

3557) would not allow for any judgment under the Act to be entered after September 26, 2000, when the WTO Dispute Settlement Body adopted the Appellate Body Report. However, a different proposal–the Hyde bill–would allow cases initiated before that date to proceed. A WTO arbitration panel gave the United States until July 26, 2001 to comply, and the parties (the EU, Japan, and the United States) agreed to extend the deadline until December 31, 2001. Congress has yet to repeal the Act, hence the ire of the complainants. *See* Daniel Pruzin, *Japan Threatens Retaliation Against U.S. on Hot-Rolled Steel Dumping Duties*, 19 Int'l Trade Rep. (BNA), No. 45, at 1965 (Nov. 14, 2002); *see also* Daniel Pruzin, *EU Eyes Restarting Retaliation Proceedings Against U.S. for Failing to Correct 1916 Act*, 19 Int'l Trade Rep. (BNA), No. 45, at 1966-67 (Nov. 14, 2002).

19. Similar debates, albeit in more limited contexts than the WTO, arose or continued during 2002. For example, to what extent is duty-free treatment pursuant to the African Growth and Opportunity Act (AGOA) of 2000 assisting in the economic development of sub-Saharan African countries? Proponents pointed to the (1) increase in imports from Africa into the United States, and (2) change in the pattern of African exports from only oil and minerals to non-fuel products (for example, wedding dresses from Senegal, traditional clothes from Ghana, and cars from South Africa). Doubters explained: (1) African goods still account for less than 2% of American imports; (2) AGOA rules of origin restrict the number of goods eligible for tariff-free treatment (for example, for textiles, all cotton must be sourced from either Africa or the United States); (3) tariff-free treatment is used by the United States as a political weapon, creating uncertainty that discourages long-term foreign direct investment, and as economic leverage to gain increased access to African markets; and (4) a combination of import quotas and farm subsidies, exacerbated by low commodity prices and onerous sanitation inspections, limit opportunities for African farmers to export their produce to the United States. *See No Silver Bullet*, ECONOMIST, Jan. 16, 2003, at 69.

countervailing duties; safeguards; intellectual property; agriculture; and technical barriers to trade. In other words, the caseload put upon the Appellate Body demanded intellectual adroitness from these judges working in Geneva. They had no choice but to come to terms with rules from very different WTO texts.

Persistent objectors also would have to admit the Appellate Body took a significant, if not symbolic, step to highlighting the extent to which it relies on its emerging body of jurisprudence. For the first time, beginning in its *Carbon Steel* Report (reviewed below), the Appellate Body constructed a "Table of Cases Cited in This Report." Not every observer would infer from the Table that all Appellate Body members now agree their jurisprudence is, or at least ought to be, accepted as a source of international trade law. At the same time, the Table itself serves as a user-friendly device necessitated by the increasing use of cases in *DSU* proceedings. Surely, this kind of Table (which panels and the Appellate Body have built in subsequent opinions) is a small monument to the system of *de facto stare decisis* operating at the WTO.[20]

These are not the only points persistent objectors must admit. They would have to agree the Appellate Body adjudicated the cases before it in an atmosphere made tumultuous not only by the events and non-achievements mentioned above, but also by the attacks against it, as an entity. Even with the best of good will from Members, non-governmental organizations (NGOs), and commentators, it is not easy to sit in modestly-furnished rooms in the Appellate Division in the WTO in Geneva, read stacks of briefs, hear oral arguments, retire to serious deliberations, and come up with a report that will gain the respect of international trade lawyers and scholars around the world. Put aside the facts that the weather in Geneva probably is grey and cold, that the Appellate Body members probably have been called from far away at short notice, and that their ninety-day period in which to write a report is cut to about seventy-five days because of the increasingly dubious requirement that the report must be translated not only into Spanish, but also into French.[21] Set aside, too, the

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20. The authors note the existence of a trilogy of law review articles relating to this point. *See generally* Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT'L L. REV. 873 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999).

21. For a critique on WTO's language rules, see Raj Bhala, *Poverty, Islam, and Doha*, 36 INT'L. LAW. 159, 170 (2002). While translation obviously makes WTO Appellate Body reports accessible to a larger number of potential readers around the world, it should be admitted candidly that some readers remain "potential" regardless of the language in which the reports are available. Moreover, among the reasons for calling the translation requirement "dubious" are: (1) an increasing number of trade officials can, and arguably should, read English, because it is the global business language; (2) reducing the already short 90-day time frame in which to contemplate and draft a report risks compromising the quality of the report, and does so at a period in the history of international trade law when the integrity of the Appellate Body's work is in question; and (3) one of the largest divisions of the WTO is dedicated to translation, yet the WTO is increasingly strapped for funds and resources, and

fact that neither the Appellate Body nor any official in the Appellate Division, by convention if not law, is at liberty to defend reports in public.

Aside from the fact that Appellate Body members are compensated for their official duties, what stands out–if one is working as or with an Appellate Body member–is that the *DSU* process remains a highly controversial area of international trade law, and no less so in 2002 than in any previous year. Consider a few of the tumultuous events in the *DSU* area in 2002. First, in the context of the Doha Round, many WTO Members tabled proposals for *DSU* reform.[22] Second, a United States Senator called the Appellate Body a "kangaroo court."[23] Third, several Congressmen resurrected the idea of a commission to review WTO adjudicatory outcomes that went against the United States, a proposal discussed and discarded in the context of the 1994 *Uruguay Round Agreements Act* by former Senator Robert Dole (R-Kansas) and former United States Trade Representative (USTR) Mickey Kantor at the conclusion of the Uruguay Round.[24] Fourth, worried about judicial activism in Geneva, a prominent commentator called for changes to the reverse consensus rule to allow the WTO Members to block the adoption of a Panel or Appellate Body decision, and suggested that the WTO should "adopt a less rigid, more flexible dispute settlement system."

Yet, through all this controversy, the Appellate Body soldiered on. Its members rendered decisions as best they could. They understood that the political context, in which they had to march, prevented them from writing with the candor and style they otherwise might have preferred to use so as to bolster the persuasive force of their reports and of their institution. Each knew that over one shoulder the United States peered and might threaten, and over the other shoulder the EU examined and might sneer. Thus, whenever possible, the Appellate Body made its changes to the style of its output, and to the substance of the emerging body of its jurisprudence, gradually and incrementally. This behavior, and the very effort to soldier on, provided stability in a tumultuous year in trade. Defenders of the WTO, at least, could be happy about that.

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arguably resources put to translation that is not strictly necessary could be put to better use, like training officials from less developed countries.

22. For a discussion of these proposals, see Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, INT'L LAW. pt. V(a) (forthcoming 2003) (manuscript on file with author).

23. Gary G. Yerkey, *Sen. Baucus Calls WTO 'Kangaroo Court' With Strong 'Bias' Against the United States*, 19 Int'l Trade Rep. (BNA), No. 39, at 1679 (Oct. 3, 2002).

24. RAJ BHALA, INTERNATIONAL TRADE LAW 174-78 (1996).