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WHEN A NEW SHERIFF COMES TO TOWN: THE IMPENDING SHOWDOWN BETWEEN THE U.S. TRADE COURTS AND THE WORLD TRADE ORGANIZATION

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This is the first time I have entered a law school classroom in the last twelve years. I see that some things never change, such as the unwritten rule that law students never sit in the first row. In twelve years as a trade practitioner, another unwritten rule that also is never broken is that as long as there is free trade, there will be free trade disputes.

This is an appropriate time for us to be talking about trade issues. The International Trade Commission is currently considering the largest safeguard action ever, involving steel,[1] and the Department of Commerce is close to announcing the final determination in the countervailing duty investigation regarding Softwood Lumber from Canada, which is probably the largest countervailing duty case ever brought anywhere in the world.[2]

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1 Presidential Proclamation No. 7529: To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products, 67 Fed. Reg. 10,553 (Mar. 5, 2002). *See Foreign Law Year in Review: 2001: Canadian Law*, 36 INT'L LAW. 753 n.36 (2002) (noting the International Trade Commission's conclusion in a global steel safeguard action that steel imports are seriously injuring the U.S. steel industry). *See generally* Section 201-204 of the Trade Act of 1974 as amended; 19 U.S.C. §§ 2251-2254.

2 *See* Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545 (Dep't

And while the passage of these landmarks may go unnoticed by people outside the international trade community, the way that these two cases – and scores of ongoing trade disputes in less high-profile trade disputes – are resolved will impact nearly every U.S. consumer, including everyone who is having a house built or who purchases anything made from steel. When you think of the billions of dollars of trade that happens each year for these two products alone, and the wide variety of downstream products made from them, the impact that 20, 25, or 30 percent additional *ad valorem* antidumping or countervailing duty tariffs can have on U.S. consumers and the U.S. economy is readily apparent. It quickly adds up to a lot of money that is paid by virtually every U.S. business and consumer.

Although the antidumping and countervailing duty laws have their roots in the nineteenth and early twentieth centuries, when an appreciation of the advantages of free trade was becoming mainstream economic thinking, antidumping and countervailing duty actions are really mercantilist throwbacks to the idea that national prosperity flows from protecting domestic industries. Since the beginnings of Adam Smith's work on comparative advantage, most economists have come to accept that free trade affords worldwide economic and social benefits, and that the lowering of tariffs and the elimination of artificial barriers to trade, even if not reciprocated, works primarily to the advantage of the nation opening its economy. The economic benefits from such actions can be direct, such as increased competitiveness of firms that consume imports in making their own products and increased consumer choice, and indirect, such as the gains that occur through competition based upon comparative advantage, which increases aggregate efficiency and worldwide output, and the role that increased competition has in pushing firms to innovate and compete harder. Countries that have embraced free trade, such as the United States, may sometimes see harmful impacts on industries that are not competitive or are unable to make products or sell services that satisfy consumer desires, but the economies of countries that are open to free trade have generally grown at a faster pace than their protected counterparts. As President Bush said in his 2002 State of the

Commerce Apr. 2, 2002) (final determination).

Union Address, good jobs depend on expanded trade.[3] The U.S. Trade Representative estimates that exports support one in five U.S. manufacturing jobs, many of which are the highest paid of all manufacturing jobs, and that increased trade due to the implementation of the WTO Agreements alone boosts U.S. gross domestic product by 125-150 billion dollars per year.[4]

But not everyone agrees that free trade is a good idea. Most recent assaults on the free trade orthodoxy focus on claims that free trade fosters a "race to the bottom" for countries that seek a comparative advantage based upon lax labor and environmental laws, and some critics claim that rather than encouraging economic efficiency through the exploitation of comparative advantage, free trade instead encourages developing countries to adopt a short-term emphasis on the production of a few (primarily agricultural or low-tech) products, which fosters dependence and poverty rather than the development of a diversified and stable economy.[5] Most recently, criticism has focused on the role of "hot money" – liquid investment money that is quickly withdrawn at the first sign of political or economic trouble, which is when stability is most needed, such as during the 1998 Asian currency crisis.[6]

And then there are the issues of separating trade winners from trade losers. Stakeholders in mature industries, such as the U.S. steel industry, worry that free trade is a license for foreign companies to exploit their unfettered access to the world's largest market. Foreign subsidies can prop up inefficient foreign

3 *See The State of the Union: President Bush's State of the Union Address to Congress and the Nation*, N.Y. TIMES, Jan. 30, 2002, at A22. As President Bush stated, "[g]ood jobs depend on expanded trade. Selling into new markets creates new jobs, so I ask Congress to finally approve trade promotion authority."

4 *See, e.g.*, USTR, "The World Trade Organization Works For You," *available at* http://www.ustr.gov/html/wto4you.html (last visited Apr. 12, 2003); *Why Manufacturing Matters to the U.S. Economy*, FDCH Fed. Dep't. and Agency Docs. (Feb. 5, 2000) (stating that manufacturing work represents nearly seventy percent of United States export value).

5 *See* Blair Pethel, *Pushing Bush Trade Power: Firms Want More Negotiating Strength for Him*, CHI. SUN TIMES, May 20, 2001, at 40 (noting that critics of free trade agreements argue that they "erode workers' rights and environmental standards by triggering a 'race to the bottom,' where nations are forced to compete by lowering production costs").

6 *See, e.g., East Asians 'Deserve Bigger Voice' at IMF; It Will Ensure Region's Needs Are Better Served, Says Prof.*, STRAITS TIMES (Singapore), July 11, 2002 (defining hot money as "short-term capital funds which can wreak havoc on vulnerable economies").

competitors, thereby altering supply conditions and creating competition that has no right to exist. You also have a dichotomy between people who stress expanding the size of the pie and those who care about dividing up the pie more equitably, a goal which some say is frustrated by free trade. These are not easy issues, and they are ones that the United States is now dealing with in the context of a recession, which makes the concerns harder to balance.

All these issues are coming to a head at a time when political support for free trade for foreign policy reasons is waning. Formerly, it was the conscious policy of the U.S. government to encourage free trade as a way of rebuilding foreign economies devastated by World War II.[7] The role of the United States as a free trade standard bearer is not surprising. We are one of the most successful examples of free trade, which occurs within the context of the 50 states. Ohio does not collect a special tariff when Ford ships a car from Detroit to Toledo, because the U.S. Constitution has guaranteed that the United States operates as the largest and longest-lasting true free trade zone in the world.[8] Nor do you find restrictions on the movement of capital and labor from one state to another. This has allowed relative uniformity in the economic development of the United States as firms seek to take advantage of incipient wage disparities, and is a level of freedom that the European Union is only now starting to embrace. In fact, one of the principal reasons why the founding fathers crafted the Constitution and discarded the flawed Articles of Confederation was because competition between the states and actions taken to protect local industries were working against the common good of political and economic unity. One can, of course, make a good argument that there is no difference between the advantages of free trade among states and among nation states. Certainly this was the view of the U.S. government through the end of the cold war, and the government was not shy about using free trade and access to the world's largest market as

7 *See, e.g.*, David D. Hale, *Twilight of Anglo-American Power*, CHI. TRIBUNE, June 19, 1987, at 25C (observing that the United States was a "natural supporter" of free trade following World War II when it used its "overwhelming technological superiority" to aid its former enemies in rebuilding their nations).

8 *See* U.S. CONST., art. I, § 8, cl. 3 (giving Congress exclusive power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes").

a means to stitch allies into the U.S. economic fabric.

But while it was easy for the U.S. government to be a force for free trade when the economy was strong, and U.S. firms dominant due to the unparalleled comparative strength of the U.S. economy after World War II, the landscape today has changed. Nearly all U.S. industries face significant foreign competition, and as the U.S. government has more than occasionally acceded to domestic pressure for protectionism, the authority of the U.S. government to act as a free trade advocate is, in the view of many critics and foreign governments, unraveling.[9] Foreign governments and firms see the Bush Administration talking loudly about the benefits of trade but then putting in place safeguard tariffs against steel products.[10] They see a push for cutting back subsidy programs abroad, but then stare in shock when the U.S. government enacts a hugely expensive new subsidy program for U.S. farmers.[11] A government that pushes free trade when it is in the interests of the United States but backs off when it seemingly is not comes across not as a leader, but as a selfish opportunist.

One aspect of U.S. economic policy that has long drawn the ire of many foreign governments is a peculiarly U.S. attachment to industry-specific trade remedies, such as antidumping duty, countervailing duty, and safeguard proceedings. Largely due to concerns about the way these U.S. laws are applied, foreign nations have pushed for increasing restrictions on such actions, culminating in specific rules and obligations in the WTO Agreements. For many nations, the key reason for proceeding with a new round of WTO Agreements will be to strengthen the WTO rules and limitations on the reach of such actions.[12]

9 *See, e.g.*, David Crane, *U.S. Faces Fierce Attack From OECD*, TORONTO STAR, May 17, 2002, at E03 (stating U.S. protection of American companies has caused the nation to come under attack "as the bad boy of the global economy").

10 *See, e.g.*, Elizabeth Olson, *WTO Loophole Allows a Surge in Protectionism*, N.Y. TIMES, June 13, 2002, at W1 (stating that the safeguard exception in the World Trade Organization rules has permitted the Bush administration to justify selective tariffs on steel imports).

11 *See, e.g.*, Ken Bohl, *Bush Is Right on Drought Aid*, DETROIT NEWS, Sept. 9, 2002, at 8A (calling the $190 billion agricultural subsidy bill Congress passed in the spring of 2002 "hugely expensive").

12 *See Brazil's Barbosa Says WTO Talks Stalled on Developing Country Issues*, Daily Report for Executives, Dec. 9, 2002, at A-16; *WTO Appellate Body Overturns Ruling Against U.S. Countervailing Duty Law*, Daily Report for Executives, Dec. 10, 2002, at A-

Even the rules in place right now are having an impact. Since its inception in 1994, almost 300 trade disputes have been brought to the WTO.[13] The increasing development of WTO jurisprudence through the resolution of these disputes is a fascinating process to watch. It's like watching the development of Constitutional jurisprudence in the nineteenth century or antitrust law in the early twentieth century following the passage of the Sherman Act. A body of WTO law is being developed right before our eyes as the WTO Panels grapple with filling in the gaps in the very broad and aspirational WTO rules in the context of specific disputes.[14]

The U.S. Government has been one of the most frequent participants in this whole process, where it has been both a winner, such as with regard to the high-profile bananas dispute,[15] and a loser, such as with regard to U.S. regulations regarding trawl fishing and the inadvertent ways in which nets

19; *WTO Issues Preliminary Ruling Striking Down U.S. Steel Safeguard*, Daily Report for Executives, Mar. 27, 2003, at A-15. *See generally* D. Ravi Kanth, *WTO Sees Urgent Need for Fresh Trade Talks*, BUS. TIMES (Singapore), May 24, 2001, at 18 (stating that the World Trade Organization's 2001 Annual Report noted that, among other things, a new round of trade negotiations would set new rules addressing "issues raised by pressure groups in their campaign against globalization").

For a good overview of the intersection between U.S. and WTO rules, see American Bar Ass'n, Section of International Law and Practice, *The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* (1996), especially chapter 8 (Alan M. Dunn, *Antidumping*), chapter 9 (M. Jean Anderson and Gregory Husisian, *The Subsidies Agreement*), and chapter 10 (James R. Cannon, Jr., *Dispute Settlement in Antidumping and Countervailing Duty Cases*).

13 *See, e.g.*, Publication of the WTO – WTO Dispute Settlement: The Disputes, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes (last visited Apr. 12, 2003). *See generally* Edward Alden & Guy de Jonquieres, *U.S. Looks Poised to Turn Words Into Action on GM Crops: A WTO Case Against the EU Could Imperil Efforts to Inject Momentum Into the Doha Trade Round*, FIN. TIMES (London), Jan. 14, 2003, at 8 (observing that the World Trade Organization has been called on to adjudicate many transatlantic trade disputes since the mid-1990s).

14 Not everyone is equally fascinated by these developments. As this article was going to press, Senator Baucus (D-Mont.) was introducing legislation that would establish an independent Commission to review WTO dispute-settlement decisions. According to Senator Baucus, this Commission is needed because WTO panels "have stopped interpreting trade agreements and instead have begun legislating." Gary Yerkey, "Sen. Baucus Introduces Bill Creating Commission to Review WTO Decisions," 55 Daily Report for Executives A-19 (Mar. 21, 2003).

15 WTO, Report of the Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997); *see, e.g.*, Raj Bhala, *The Bananas War*, 31 McGeorge L. Rev. 839, 848-52 (2000) (describing the background and ramifications of the WTO ruling on the bananas dispute); Bert Wilkinson, *Island Nations Plan to Seek Libya Aid*, SUN-SENTINEL, Aug. 2, 2001, at 16A (noting that the United States was successful in its complaint to the World Trade Organization that the European Union did not levy duties on Caribbean bananas).

can trap turtles in the process.[16] As the most frequent victims of foreign trade barriers, it is safe to say that, on net, U.S. companies (and the U.S. economy) have probably benefited more than they have lost. But regardless of whether one agrees with this assertion, it is clear that the role of the WTO as a global entity with a role in policing trade disputes has been having a very real impact on worldwide economic and even foreign policy, including with regard to the United States.

The growing role of the WTO in the resolution of trade disputes is setting up a collision course between the (largely) free trade principles the WTO implements and the (largely) protectionist U.S. trade laws, such as the antidumping duty and countervailing duty statutes. These laws never were intended to foster free trade. The first countervailing duty law was put in place to protect late nineteenth century sugar producers from foreign subsidies, and never outgrew its protectionist roots.[17] Even after substantial changes in 1979 and 1994 to comply with new GATT and WTO rules,[18] an observer from 1930 might have to adjust to new terminology, but would have little difficulty recognizing the current law.[19] The same is true of the Antidumping Act of 1921,[20] which also has been amended several times but still remains at its heart the same kind of remedy against price discrimination between the U.S. and foreign markets that was put in place at its inception.[21]

16 *See, e.g.*, Julie B. Master, Note: *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles Are "Sacrificed on the Altar of Free Trade,"* 12 TEMP. INT'L & COMM. L. 423, 447-48 (1998).

17 *See* Tariff Act of July 24, 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897) (including provisions to ensure tariff levels on non-enumerated goods are high).

18 *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (providing substantive provisions to implement GATT agreements); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (implementing agreements from the Uruguay Round of WTO negotiations).

19 *See* Tariff Act of 1930, ch. 497, 46 Stat. 590, 672 & 685 (1930) (amended 1979, 1994) (codified as amended at 19 U.S.C. § 1671 *et. seq.*) (implementing a framework for countervailing duties).

20 *See* Pub. L. No. 67-10, § 201, 42 Stat. 9, 11 (1921) (marking beginning of antidumping duty provisions).

21 *See* Tariff Act of 1930, ch. 497, 46 Stat. 590, 672 & 685 (codified as amended at 19 U.S.C. §§ 1673-1677) (providing operative provisions for antidumping actions); *see also* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (amending antidumping provisions of Tariff Act of 1930); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (incorporating U.S. treaty obligations under the Uruguay Round of WTO negotiations to antidumping laws found in the Tariff Act of 1930).

Despite half-hearted claims to the contrary, primarily by firms that rely upon such laws as part of their competitive strategy, there really is no question that the laws continue to be more concerned with protectionism than with righting the supposed trade distorting impact of foreign behavior. For example, there are normally six voting Commissioners on the U.S. International Trade Commission, so it is not uncommon to have tie votes. Under the statute, however, a tie vote does not go in favor of free trade – the tie vote is deemed to be the equivalent of an affirmative determination, which would result in the imposition of antidumping or countervailing duties.[22] Even in five-year "sunset" reviews, where the presumption is supposed to be that an order will be revoked unless there is a clear indication that revocation would lead to the "continuation or recurrence of material injury,"[23] a tie vote at the International Trade Commission is construed as a victory for the U.S. industry and results in the retention of the order.[24] Any law that breaks ties in favor of protectionism cannot be construed as neutral. And there are many other examples of a tilted playing field, which primarily arise in arcane rules regarding how subsidies and the magnitude of dumping are calculated, such as the concept of "zeroing," which is discussed below.

Even the procedures governing trade disputes are designed to foster victories by U.S. firms. For example, a domestic firm is allowed to consult with both the Department of Commerce and the International Trade Commission before bringing a petition to request that a case be initiated.[25] This is quite extraordinary, as the same agencies then will be deciding whether the U.S. or the foreign industries will prevail, as well as the margin that will be

22 *See* 19 U.S.C. § 1677 (11) (1999) (defining what constitutes an affirmative determination when the Commission is divided).

23 *See id.* § 1675(c) (providing a procedure for automatic five-year reviews of antidumping and countervailing duty orders). The relatively low number of revocations of antidumping and countervailing duty orders in sunset reviews has led twelve countries to call for the amendment of the WTO rules to make clear that the retention of orders should only occur rarely, where it is clear that revocation would be likely to lead to the recurrence or continuation of material injury. *See* Daniel Pruzin, *"Friends" Group Targets Sunset Reviews in Latest WTO Proposal on Antidumping*, 54 Daily Report for Executives A-15 (Mar. 20, 2003).

24 *See* 19 U.S.C. § 1677 (11) (clarifying the procedure used when the Commission is divided in a § 1675 sunset determination).

25 *See* U.S. Department of Commerce, Antidumping Manual (1998), ch. 2 at 2, *available at* http://ia.ita.doc.gov/admanual/index.html (last visited Mar. 3, 2003) (delineating procedures under antidumping laws).

applied. In light of this and other home field advantages, it is not surprising that the overwhelming majority of cases brought result in affirmative dumping and countervailing duty findings at the agencies.[26]

It is against this backdrop that the Court of International Trade operates. Both the Court of Appeals for the Federal Circuit and the Court of International Trade have, as Chief Judge Carman just mentioned, extended *Chevron* deference to the findings of the agencies,[27] which the Federal Circuit has described as the "masters" of the trade statutes.[28] So what this means is that you have a statute that is designed to be protectionist, interpreted in a protectionist way by the agencies involved, all of which is reviewed under a deferential standard of review.

None of this is new, but in the wake of new WTO rigor, it takes on especially interesting connotations. With the WTO dispute resolution process often being the end-point of trade disputes, and with simultaneous appeals now often being brought before both to the CIT and the WTO, the potential for differing outcomes in national and WTO appeals increasingly exists. This means that the free-trade WTO principles often are on a collision course with the more protectionist trade remedies that are reluctantly allowed by the WTO Agreements.

Right now, there are three ongoing examples of these types of collisions. The first is the concept of "zeroing" in an antidumping duty calculation. If you have one sale that is ten percent above the normal value (*i.e.*, the foreign comparison price or, if relevant, the foreign cost) and another that is ten percent below, it might seem that these two sales negate each other, yielding a net dumping margin of zero. But that is not the interpretation

26 *See* Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 4 (1995) (stating that the Department of Commerce found dumping in 90% of investigations initiated pursuant to industry petitions).

27 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (explaining Congressional intent of delegating responsibility to agencies to allow them broad discretion in their decisions).

28 *See* Consumer Products Div., SCM Corp. v. Silver Reed America., Inc., 753 F.2d 1033, 1039 (Fed. Cir. 1985) (stating with regard to the Department of Commerce that "we must give reasonable deference to the expertise of the agency, *i.e.*, the 'masters of the subject'") (quoting National Muffler Dealers Ass'n, v. United States, 440 U.S. 472, 477 (1979)).

that the Department of Commerce has taken, which believes that U.S. law requires that it focus solely on instances of "targeted" dumping while not giving any offsetting credit for sales that have a negative dumping margin.[29] Because those sales that exceed the normal value are treated as having a dumping margin of zero, the dumping margin calculated in this example would be five, not ten, percent.

The Court of International Trade has noted that this practice might be interpreted as being inherently unfair, but nonetheless upheld it by stating that it is not the place of a court to overturn the Department's interpretation of its own statute unless it is unreasonable.[30] The WTO, however, has stated that this practice, when indulged in by other countries, violates the WTO Anti-Dumping Agreement.[31] Everyone expects that there will soon be a ruling in one of the cases currently before the WTO challenging the same U.S. practice. Inevitably, such a decision will be cited to the Court of International Trade as requiring that the Court revisit its own affirmance of the same practice.[32]

Another example arises from safeguard measures, such as

29 *See* Timothy C. Brightbill, *et al.*, *International Trade*, 35 INT'L LAW. 407, 425 (2001) (discussing a panel ruling against the European Community and indicating the Department of Commerce still follows "zeroing" policies).

30 *See* Bowe Passat Reinigungs-Und Waschereitechnik Gmbh. v. United States, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade, 1996) (stating that the Court must defer to the Department's interpretation of the statute unless it is clear that zeroing is "impermissible or unreasonable").

31 *See* Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 534 (2002) (discussing the WTO ruling against EC for zeroing negative dumping margins).

32 As this article was being finalized, the Court of International Trade promulgated a decision that appears to be contrary to the recent trend of the trade Courts paying closer attention to WTO arguments. In *Corus Staal BV et al. v. United States Department of Commerce*, Consol. Ct. No. 02-0003, Slip Op. 03-25 (Mar. 7, 2003), the Court squarely confronted the issue of whether the U.S. practice of zeroing was inconsistent with the WTO Agreement. Although the Court acknowledged that the "circumstances and methodology in this case appear to be very similar, if not identical, to the *Bed Linen* investigation" (the WTO case declaring that the practice of zeroing violated the Anti-Dumping Agreement), the court concluded that because "WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved," it would not rely upon the contrary WTO decision to strike down the Department's zeroing practice. *Id.* at 17-18. Instead, the Court declared that "[w]hen faced with an ambiguous statute and ambiguous international agreement, the court should defer to Commerce's interpretation." *Id.* at 19. Since it is widely expected that there will soon be a WTO case involving zeroing by the United States, the decision probably only postpones the issue temporarily. Moreover, the approach to WTO precedent in the *Corus* case appears to be inconsistent with the approach take by the Court in other recent opinions, which may mean that a definitive resolution of the extent to which WTO determinations are relevant in U.S. proceedings may need to be established by the Court of Appeals for the Federal Circuit.

those ongoing with regard to various steel products. Because of the way the statute is structured, these are not cases that go before the Court of International Trade, but they are still of interest because there is a question of causation that is common to both safeguard and antidumping/countervailing duty cases. In both types of cases there is a requirement that imports be the "cause" of injury.[33] Thus, the WTO resolution of causation issues in safeguard cases bears on the likely resolution of analogous issues in antidumping and countervailing duty cases.

This is important because the United States has lost four straight WTO safeguard disputes, involving woven wool shirts,[34] wheat gluten,[35] lamb meat,[36] and line pipe.[37] In each of these cases, the WTO has struck down a U.S. safeguard measure due to a finding that the causation standard applied by the International Trade Commission in the Section 201 proceedings is contrary to the WTO Agreement on Safeguards. These cases likely are precursors to a more rigorous approach by the WTO to causation in antidumping and countervailing duty actions. Such cases would, in turn, reinforce attempts by parties in domestic appeals to reverse affirmative determinations of the International Trade Commission on the grounds that causation was not adequately established.

A final example is one that is very familiar to Chief Judge

33 *See Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997) (defining material injury and factors used to determine the existence thereof, including a causation requirement).

34 WTO, Report of the Panel, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R (Jan. 6, 1997). *See* John Zarocostas, *WTO to Examine Indian Complaints of Woolen Garment Import Curbs by U.S.*, J. OF COMMERCE, Apr. 18, 1996, at 3A (describing dispute over woven wool shirts).

35 WTO, Report of the Panel, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (July 31, 2000). *See* Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent with the GATT and the TRIPs Agreement?*, 17 AM U. INT'L L. REV. 459, 466 n.21 (2002) (noting the U.S. was found to have violated the Agreement on Safeguards with regard to wheat gluten).

36 WTO, Report of the Panel, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R and WT/DS178/R (Dec. 21, 2000). *See Trade Scene: Bush Now a Man of Steel*, J. OF COMMERCE, Mar. 13, 2002 (discussing adverse decisions for U.S. in WTO dispute settlements in general and on the issue of lamb).

37 WTO, Report of the Panel, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001). *See* Elizabeth Olson, *WTO Loophole Allows a Surge in Protectionism*, N.Y. TIMES, June 13, 2002 at 1 (noting that the WTO has not endorsed any safeguard measure brought before it, including a U.S. piping tariff).

Carman of this Panel. Under the countervailing duty law, a subsidy does not exist unless there is a "financial contribution" that provides a "benefit" to a producer. But what happens when the producer that received the subsidy was a government-owned entity that subsequently was privatized in an arms-length transaction for fair market value? The simple answer is that you should do nothing if you truly care about only countervailing distortionary subsidies. Let's say that I have a car to sell that is worth $3,000. But instead of selling it as is, I first put $1,000 in the trunk. Unless people are acting irrationally, the fair market price would now be $4,000, and the fact that there is a $1,000 subsidy in the trunk of the car would have no impact on the price received for the actual car – the subsidy, in other words, is extinguished by the fact that the sale occurred at arms length in the marketplace. The same reasoning would apply equally to a factory or an entire company – any subsidy would be extinguished if you have a true arms length market value transaction. But the Department of Commerce has resisted this view very strenuously, on the asserted grounds that certain kinds of arms-length transactions could somehow result in the subsidy being transferred along with the assets to the new buyer. When this issue came up on appeal before Chief Judge Carman in 1994, the Court of International Trade ruled against the Department's methodology,[38] but the Federal Circuit (in *Saarstahl v. United States*) reversed, finding that the Department's methodology for finding that certain subsidies could survive privatization, even if it occurred in an arms length transaction, was reasonable.[39]

The story does not end there, however. When the Department's privatization rules were challenged at the WTO by the European Union, the subsequent ruling held that the Department's rules improperly presumed that the benefit of a pre-privatization subsidy passed through to the new entity. And in a subsequent case in the Federal Circuit (*Delverde SrL v. United States*), the Court acknowledged the WTO case and noted the consistency of its resolution with the WTO approach when it subsequently

38 Saarstahl v. United States, 858 F. Supp. 187 (Ct. Int'l Trade 1994).

39 Saarstahl v. United States, 78 F.3d 1539, 1544 (1996), *rev'd*, 177 F.3d 1314 (Fed. Cir. 1999) (reversing Court of International Trade decision and finding Commerce's approach to be reasonable).

revised its approach to privatization.[40]

The *Delverde* Court's reference to the consistency of its opinion with the determination of a WTO Panel might have been an aside, but in the Court of International Trade, the number of determinations that have noted or cited WTO obligations or the decisions of WTO Panels has been growing sharply.[41] This is quite a change. Historically, the trade courts paid little attention to GATT opinions. Relevant GATT rulings tended to be fewer and farther between – not as many cases were brought before GATT panels, the issues decided were much more nebulous, and the determinations were not implementing the same kind of rules that you have in the WTO, which are more detailed and place more constraints on the ways that the member states have agreed to implement their antidumping and countervailing duty laws. Thus, we now have a situation where two separate legal entities are reviewing similar or even the same agency decisions. Moreover, since the Supreme Court long ago announced in the *Charming Betsy* case that U.S. statutes should not be interpreted to violate U.S. international commitments unless no other construction of the statute is possible, the potential for WTO decisions influencing the resolution of appeals in the Court of International Trade and the Federal Circuit is apparent.[42]

In short, there are four reasons why the U.S. trade courts are increasingly attuned to, and increasingly considering the consistency of agency actions with, U.S. WTO obligations. The first is the relative specificity of the WTO versus its predecessors, which means that you are going to find targeted rulings by the WTO on technical topics that formerly would not have been a

40 Delverde SrL v. United States, 202 F.3d 1360, 1369 (Fed. Cir. 2000) (stating that the WTO and the Court's decision were not at odds).

41 *See, e.g.*, Timken Co. v. United States, 2002 Ct. Intl. Trade LEXIS 106, at *20-21 (Ct. Int'l Trade 2002) (noting WTO interpretation of the Anti-Dumping Agreement); Usinor v. United States, 2002 Ct. Intl. Trade LEXIS 98, at *15-16 (Ct. Int'l Trade 2002); Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1296 (Ct. Int'l Trade 2002); Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 1999) (noting that although WTO decisions are not binding, they may be useful to a Court's determination); Caterpillar Inc. v. United States, 941 F. Supp. 1241, 1247 (Ct. Int'l Trade 1996) (comparing U.S. law to international trade law). *But see Corus Staal BV et al. v. United States Department of Commerce*, Consol. Ct. No. 02-0003, Slip Op. 03-25 (Mar. 7, 2003) (described in detail, *supra* note 32).

42 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (noting that, unless no other view is possible, a U.S. court should construe U.S. statutes in accordance with U.S. international obligations).

subject of a GATT proceeding. The second is that, with the WTO being used much more frequently, the potential for there being an on-point WTO decision is much higher. This overlap also occurs because more and more parties are pursuing simultaneous appeals *(i.e.*, direct appeals to the Court of International Trade and influencing governments to bring WTO challenges). The third is that the free trade inclinations of the WTO panels and appellate bodies, and their general view that they are trying to sweep away unnecessary trade barriers, often conflict with more protectionist agency determinations. Finally, the number of trade cases being filed is not slowing down, and lawyers for both the U.S. and foreign industries are keeping in mind the potential for a WTO case at the start, and directing the arguments and developing a record that will help set up the most favorable WTO-type arguments in the event that the final results are challenged in that forum. This will result in more cases where both the WTO and the Court of International Trade are hearing appeals of the same determinations. So for all these reasons, it is not surprising that WTO arguments are being heard more and more often before the Court of International Trade and the Federal Circuit, and that U.S. and WTO decisionmakers are increasingly on a collision course with one another.

Whether these additional WTO determinations are a learned body of opinion that can be helpful and provide guidance on interpreting analogous U.S. provisions or just a distraction to the traditional legal argumentation heard by the Courts will undoubtedly vary from case to case. Moreover, since U.S. law specifically provides that there is no private right of action to enforce U.S. WTO obligations, WTO arguments will always be cast in a supporting rather than a starring role in domestic appeals of trade decisions. But the potential for WTO argumentation being relevant now exists in every appeal that is brought. Whether you think this is a good development may well depend on whether your free trade views lean more towards those of the U.S. Business Roundtable or the WTO protesters, but it is inevitable that the role that the WTO plays in the resolution of trade disputes and in the disposition of appeals in trade courts will only grow over the coming years.