

**Reflections on the Current State of Play: Have U.S. Courts Finally
Decided to Stop Using International Agreements and Reports of
International Trade Panels in Adjudicating International Trade Cases? ***

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This article provides an overview of the extent to which U.S. courts have used international trade agreements and reports by international trade panels to interpret U.S. antidumping and countervailing duty laws.² In the last thirty-five years, the executive and legislative branches have jointly exercised their authority to control international trade by permitting the executive branch to negotiate international trade agreements using a “fast-track mechanism.” They have agreed that any international obligations undertaken by the United States in these non-self-executing agreements would be incorporated into U.S. law through separate implementing legislation by Congress. The implementing legislation for these congressional-executive international trade agreements has included increasingly stronger language to highlight the primacy of domestic laws over international trade obligations, to emphasize that international trade agreements and reports by international trade panels do not override domestic law, and to establish an elaborate statutory mechanism for the political branches to respond to any apparent violations of U.S. trade obligations. Despite the extensive coordination between the political branches, U.S. courts over the years frequently disregarded the resulting statutory language and instead analyzed international trade agreements and reports by international trade panels in their decisions. Very recently, however, U.S. courts have become more reluctant to use such materials as interpretive aides, and the courts are now deferring to the political branches to resolve any alleged inconsistencies between domestic laws and U.S. international trade obligations.

I. International Agreements Under U.S. Law Generally, and the Distinction in U.S. Law Between Self-Executing and Non-Self-Executing International Agreements

The interplay between the executive and legislative branches of the U.S. government over their respective authorities to control international trade is critical to how international trade agreements and reports of international trade panels are interpreted under U.S. law. In the United States, the Constitution, the laws “made in pursuance thereof,” and treaties constitute “the supreme law of the land.”³ Under Article II, section 2, clause 2 of the Constitution, the President “shall have [the] Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Article II, section 3 further states that the President “shall take Care that the Laws be faithfully executed.” On the other hand, the Constitution separately gives Congress the power to regulate commerce with foreign nations under Article 1, section 8, clause 3. In addition to making treaties with the “advice and consent” of two-thirds of the Senate, the President often undertakes international obligations via unilateral executive agreements without the involvement of the legislative branch, and

¹ Submitted by Mary Jane Alves in her personal capacity. The views expressed herein are not intended to and therefore may not reflect the views of the U.S. International Trade Commission, any individual Commissioner, or the Commission’s General Counsel’s Office.

² Although this article also discusses some cases outside of the antidumping and countervailing duty realm, the primary focus of the article is on antidumping and countervailing duty law.

³ U.S. Const., Art. VI.

sometimes the United States enters into international agreements through congressional-executive agreements that are ratified with a majority of members from both houses of Congress.⁴

U.S. law distinguishes between international agreements that are self-executing and those that are not self-executing.⁵ The status of a particular agreement is determined according to the intent of the United States in entering into the agreement.⁶ Self-executing agreements are incorporated into domestic law by the mere signature of the agreement, without the need for further implementing legislation, and have at least equal status with other federal statutes.⁷ In case of conflicts between self-executing agreements and federal statutes, a “last in time” rule applies: a federal statute supersedes a provision in a prior international agreement, and, conversely, a provision in an agreement supersedes prior federal statutes.⁸ Non-self-executing international agreements require separate enactment into domestic law.⁹ An agreement is treated as non-self-executing when Congress specifically requires implementing legislation.¹⁰ If the agreement is non-self-executing, intervening domestic legislation defines or limits the agreement’s effect.¹¹

With respect to foreign tribunals, in an early 19th century case the U.S. Supreme Court held that decisions of foreign tribunals, while respected, are not binding on U.S. courts.¹² Finally, if there is no

⁴ See, e.g., Louis Henkin, Foreign Affairs and the U.S. Constitution 215-18 (2d ed. 1996); Weinberger v. Rossi, 456 U.S. 25 (1982) (unilateral executive agreement); Jeanne J. Grimmer, Why Certain Trade Agreements are Approved as Congressional-Executive Agreements Rather Than as Treaties (Congr. Res. Rep. 97-896 Apr. 5, 2002).

⁵ See, e.g., Louis Henkin et al., International Law (2nd Edition) 198-209 (1987).

⁶ See, e.g., American Law Institute, Restatement (Third) Foreign Relations Law of the United States § 111.

⁷ See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829); The Head Money Cases, 112 U.S. 580, 598-99 (1884); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).

⁸ See, e.g., Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); American Law Institute, Restatement (Third) Foreign Relations Law of the United States § 115 (Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States) (1987).

⁹ See, e.g., American Law Institute, Restatement (Third) Foreign Relations Law of the United States § 111(3).

¹⁰ See, e.g., id. § 111(4)(b).

¹¹ See, e.g., id. § 111 (comment h).

¹² Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (“The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.”); see also, e.g., American Law Institute, Restatement (Third) Foreign Relations Law of the United States § 112.

U.S. law on a particular issue, then U.S. courts sometimes have given effect to customary international law.¹³

II. Discord Between the Political Branches Eventually Leads to Joint Trade Regulation

Historically, there was tension between the legislative and executive branches over their respective international trade powers, but that tension gave way to considerable cooperation towards common goals.

A. The Reciprocal Trade Agreements Act of 1934 and the General Agreement on Tariffs and Trade (“the GATT”)¹⁴

After World War I, Congress passed the Antidumping Act of 1921 to impose antidumping duties when the U.S. Department of the Treasury (and beginning in 1954, the Treasury in conjunction with the Tariff Commission) determined “an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of merchandise {that} is being sold or is likely to be sold in the United States or elsewhere at less than fair value.”¹⁵ Characteristic of that era, in the 1930 Smoot-Hawley Tariff Act, Congress unilaterally raised tariffs to record levels on U.S. imports of thousands of goods. A number of U.S. trading partners retaliated by increasing their own tariffs on U.S. goods.¹⁶ In the aftermath, Congress passed the Reciprocal Trade Agreements Act of 1934 under which it delegated for specific periods of time authority to the President to negotiate with other nations and to implement tariff reductions in exchange for compensating reductions by the trading partners.¹⁷

Subsequent to World War II, the United States participated in multilateral negotiations that produced the GATT, the International Monetary Fund, and the World Bank to oversee post-war economic relations. The participants agreed to adopt a Protocol of Provisional Application putting GATT into effect until an International Trade Organization became operative. The International Trade Organization Agreement never became effective, mainly because the U.S. Congress failed to approve it, so to

¹³ See, e.g., The Paquete Habana, 715 U.S. 677 (1900); see also American Law Institute, Restatement (Third) Foreign Relations Law of the United States § 115, comment D (1987).

¹⁴ See generally Congressional Budget Office, The GATT Negotiations and U.S. Trade Policy ch. II (Jun. 1987); Leonard M. Shambon, Kim Rubenstein, Scott A. Stofel, The Interplay of the U.S. International Trade Laws and the GATT (1992 Judicial Conference of the U.S. Court of International Trade).

¹⁵ Antidumping Act of May 27, 1921, ch. 14, § 201(a), 42 Stat. 11, previously codified at 19 U.S.C. § 160.

¹⁶ 46 Stat. 490; 19 U.S.C. § 1674 (Jun. 17, 1930); see also, e.g., Bruce Bartlett, The Truth About Trade in History, <http://www.freetrade.org/pubs/freetotrade/chap2.html> (chronicling previous attempts by Congress to raise tariffs in the United States prior to the Smoot-Hawley Tariff Act).

¹⁷ 48 Stat. 943; 19 U.S.C. § 1351 (Jun. 12, 1934). In reviewing the Tariff Act of 1890, 26 Stat. 612, the Supreme Court had previously upheld the constitutionality of Congress’ delegation of tariff-bargaining authority to the President and Congress’ authorization of the President to suspend duty-free treatment on particular items. See Field v. Clark, 143 U.S. 649 (1892).

implement the GATT in the United States, President Truman used his proclamation authority under the Reciprocal Trade Agreements Act of 1934.¹⁸ As a result, some have argued that the 1947 GATT became part of U.S. law via executive order, such that it is a self-executing treaty equivalent to an act of Congress and, while in force, is supreme law of the land.¹⁹

Under the auspices of the GATT, multiple countries engaged in various subsequent rounds of negotiations aimed at reducing tariffs. Between 1964 and 1967, over sixty countries participated in the sixth round referred to as the “Kennedy Round.” Partway through these negotiations, in 1965, Congress learned that the parties were discussing an international antidumping code. The 89th Congress passed Concurrent Resolution 100 stressing that the United States should not enter into any such international antidumping code without advance delegation of authority by Congress.²⁰ In June 1967, after U.S. negotiators and seventeen foreign countries agreed to an international antidumping code, Congress passed Concurrent Resolution 38, expressing the sense that the code was inconsistent with existing U.S. statutes, requesting that the code be submitted to the Senate for its advice and consent, stating that the International Antidumping Code should not become effective in the United States until Congress enacted legislation to implement it, and requesting comments on the concurrent resolution from the U.S. Tariff Commission.²¹ After reviewing the March 8, 1968 responsive report, the Senate Finance Committee agreed with the views expressed in the report by the majority of the Tariff Commission,

[t]he domestic law is paramount and a mere executive obligation cannot stand equal to it, and should not be interpreted as if it were coequal. Rather, if the obligation conflicts with the domestic law, it cannot be applied until the domestic law is amended to eliminate the conflict.

In the opinion of the committee there are many areas of significant conflict between the International Antidumping Code and our domestic unfair trade laws. ... Such a result is equivalent to changing the domestic law by executive agreement in violation of the constitutional provisions vesting in the Congress the sole power to assess taxes and duties.²²

The Senate Finance Committee’s report then went on to recount a number of inconsistencies identified by the Tariff Commission between the International Antidumping Code and existing U.S. law. Some had argued that where there were inconsistencies, the U.S. law should be interpreted in a manner consistent with the international obligation, to which the report responded, a “more appropriate rule of construction

¹⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (herein “GATT Agreement,” “GATT,” or “GATT 1947”); 61 Stat. 1103-11 (1947) (President Truman’s Proclamation of Modification of Existing Duties).

¹⁹ Compare, e.g., Footwear Distrib. and Retailers of Amer. v. United States, 852 F. Supp. 1078 (Ct. Int’l Trade 1994), with American Express Co. v. United States, 332 F. Supp. 191 (Cust. Ct. 1971), aff’d, 472 F.2d 1050 (C.C.P.A. 1973).

²⁰ See S. Con. Res. 100, 89th Cong., 2d Sess. (1966).

²¹ See S. Con. Res. 38, 90th Cong., 1st Sess. (1968).

²² S. Rep. No. 1385, Part II, 90th Cong., 2^d Sess. (July 11, 1968).

would interpret a new international obligation in such a way as to avoid conflict with an existing statute” and “[b]lindly applying the rule that a statute be interpreted so as to avoid conflict with an international agreement (as some suggest) would enable the contracting parties to an agreement, in effect, to apply their interpretation to an act of Congress contrary to the express or implied intent of the Congress.”²³ The report continued,

Even if the International Antidumping Code had been negotiated as a treaty, it could not be implemented in the absence of enabling legislation. This is so because of our constitutional system of checks and balances which vests in Congress the sole authority to impose tariffs and to regulate foreign commerce and confers on the President the sole authority over foreign affairs. The Antidumping Act of 1921, as well as being an act to regulate foreign commerce, is also a tariff act. Its basic purpose is to remedy unfair pricing of imports into the United States by imposing a special dumping tariff. Dealing as it does with the constitutional authority of Congress and with the President’s authority over foreign affairs, the International Antidumping Code involves an area where neither Congress nor the President has the authority to act independently of the other. Thus, while the President may enter into an agreement relating to the Antidumping Act, he may not place it into effect without the participation of Congress. The statute must first be amended to reflect a change in the tariff-imposing features of the Antidumping Act.²⁴

Although the Kennedy Round Antidumping Code entered into force with respect to the United States on July 1, 1968, Congress subsequently passed the Renegotiation Amendments Act of 1968 to ensure that the Code would not be implemented in the United States except to the extent that it was consistent with U.S. law.²⁵ Moreover, the President’s authority to enter into trade agreements was not reauthorized until the Trade Act of 1974.²⁶

B. The Trade Act of 1974 and the Trade Agreements Act of 1979 (“the 1979 Trade Act”)

In contrast to President Truman’s unilateral implementation of the GATT and the failed attempt by the Executive Branch to implement the Kennedy Round International Antidumping Code, in the Trade Act of 1974, Congress delegated authority to the President to negotiate, *inter alia*, GATT Antidumping and Subsidies Codes. The President was authorized to enter into trade agreements provided that he consulted with Congress and submitted the agreements to Congress for review; but, only if Congress

²³ S. Rep. No. 1385, Part II, 90th Cong., 2^d Sess. (July 11, 1968).

²⁴ S. Rep. No. 1385, Part II, 90th Cong., 2^d Sess. (July 11, 1968) (emphasis added).

²⁵ P.L. 90-634, 90th Cong., 2^d Sess., Title II, § 201, Oct. 24, 1968, 82 Stat. 1347 (formerly codified at 19 U.S.C. § 160) (providing that the International Antidumping Code would not restrict the U.S. Tariff Commission in performing its duties and functions under the U.S. Antidumping Act of 1921 and requiring the Secretary of the Treasury and the Tariff Commission to take that Code into account only when consistent with the provisions of the U.S. statute).

²⁶ See H.R. 96-317, 96th Cong., 1st Sess. at 6 (July 3, 1979).

passed implementing agreements would the agreements become law.²⁷ Characterizing the procedures of the Trade Act of 1974 that led to the 1979 Act as a “unique Constitutional experiment,” the accompanying Senate report stated that Congress adopted these procedures “as a means to avoid conflicts between the Congress and the President such as the dispute which occurred after the Kennedy Round. The committee believes the Trade Act experiment in coordination is a success. It expects this coordination to continue.”²⁸

After the two codes were negotiated, Congress adopted specific implementing legislation, the 1979 Trade Act.²⁹ In the 1979 Trade Act, Congress reenacted the 1921 Antidumping Act as Title VII of the Tariff Act of 1930 in the process of otherwise revising U.S. laws in response to the Tokyo Round GATT agreements.³⁰

Significantly, the 1979 Trade Act expressly provided for the primacy of domestic legislation over the international trade agreements. The 1979 Act stated that if there were any conflict between any trade agreement and any statute of the United States, then U.S. law would prevail.³¹ Discussing the relationship between the 1979 Trade Act and the GATT as “among the most sensitive issues,” the Senate Report, like the House report, stated flatly that the international trade agreements were not self-executing. As the report explained, the Senate Committee

specifically intends section 3 to preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress. ... If, in the future, amendments to, or interpretation of, any MTN agreement should be adopted internationally which are inconsistent with U.S. legislation, the President may, upon approval by Congress under section 3(c) of the bill, accept such amendments or interpretations. No such amendment or interpretation shall be given effect under U.S. law until it is approved and the necessary or appropriate changes to U.S. legislation have been enacted.

The committee is aware that some major trading partners are concerned that

²⁷ See 19 U.S.C. § 2111(a) to (d).

²⁸ S. Rep. No. 249 at 5, 96th Cong., 1st Sess. (Jul. 21, 1979).

²⁹ Pub. L. No. 96-39, 93 Stat. 44 (1979).

³⁰ Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. § 1673 et seq.).

³¹ 19 U.S.C. § 2504(a) provides, “No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.” Moreover, Congress specifically contemplated what amendments to existing regulations would be necessary to implement U.S. international trade obligations, and instructed that such regulations should be issued within one year. Thus, 19 U.S.C. § 2504(b) provides, “[r]egulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action submitted to the Congress under section 2112 of this title to implement each agreement approved under section 2503(a) of this title shall be issued within 1 year after the date of the entry into force of such agreement with respect to the United States.”

particular elements of this bill do not repeat the precise language of the agreements. This bill is drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreements, as the United States understands these obligations. The bill implements the United States understanding of these obligations.

Our trade laws are, and long have been, subject to administrative and judicial review processes. These processes both lead to and require greater precision in our law than the often vague terms of the agreements or implementing regulations of other countries. Furthermore, unfamiliar terms in the agreements, or terms which may have a different meaning in United States law than in international practice or another country's laws, need to be rendered into United States laws in a way which ensures maximum predictability and fairness.³²

Under 19 U.S.C. § 2504(c), a procedure was established in order to implement a requirement of, amendment to, or recommendation under an international trade agreement.³³ Finally, Congress clarified that it did not intend to create any unspecified private remedies.³⁴

C. Chevron, Charming Betsy, and Pre-URAA Caselaw³⁵

Under Chevron U.S.A. v. Natural Resources Defense Council, Inc., in reviewing an agency's construction of a statute, a court must first look to whether Congress has directly spoken on the issue.³⁶ "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must

³² S. Rep. No. 249, 96th Cong. 1st Sess. at 36-37 (emphasis added); see also, e.g., 125 Cong. Rec. 17857 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 41 (1979); Statement of Administrative Action 4-14, reprinted in H.R. Doc. No. 153, 96th Cong., 1st Sess., pt. II (1979).

³³ 19 U.S.C. § 2504(c)(2) (providing that no "such amendment shall enter into force with respect to the United States, and no such requirement, amendment, or recommendation shall be implemented under United States law, unless" certain consultations take place between the President and Congress, the President transmits to Congress a document "containing a copy of the text of such requirement, amendment, or recommendation, together with – (i) a draft of a bill to amend or repeal provisions of existing statutes or to create statutory authority and an explanation as to how the bill and any proposed administrative action affect existing law, and (ii) a statement of how the requirement, amendment, or recommendation serves the interests of the United States commerce and why the legislative and administrative action is necessary or appropriate to carry out the requirement, amendment, or recommendation, and (C) the bill submitted by the President is enacted into law.")

³⁴ Under 19 U.S.C. § 2504(d), "[n]either the entry into force with respect to the United States of any agreement approved under section 2503(a) of this title, nor the enactment of this Act, shall be construed as creating any private right of action or remedy for which provision is not explicitly made under this Act or under the laws of the United States."

³⁵ This article does not purport to discuss every possible court decision issued after the 1979 Trade Act that touches on the relevance of international trade agreements and reports issued by international trade panels, of which there are many, but instead seeks to highlight some of the more representative cases.

³⁶ Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

give effect to the unambiguously expressed intent of Congress.”³⁷ If Congress is silent or its intent regarding the specific issue is unclear, the court moves to “step two” in the analysis and “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”³⁸ An agency’s interpretation of its governing statute is entitled to deference unless the agency’s construction is clearly contrary to the intent of Congress. In determining whether the agency made a “permissible construction” of the statute, the reviewing court’s duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to “respect legitimate policy choices” made by the agency in interpreting and applying the statute.³⁹

1. When Congressional Intent is Clear

In pre-URAA court decisions involving what the courts found to be clear statutes (i.e., Chevron “step one” cases), the courts rejected arguments that language from international agreements should be read into the U.S. statute.⁴⁰ These decisions are consistent with the directive of the 1979 Trade Act that should there be a conflict, U.S. laws must prevail over international trade agreements.⁴¹

³⁷ Chevron, 467 U.S. at 842-43.

³⁸ Chevron, 467 U.S. at 843.

³⁹ Chevron, 467 U.S. at 866.

⁴⁰ For example, in Algoma Steel Corp. Ltd. v. United States, 865 F.2d 240, 242 (Fed. Cir. 1989), the Federal Circuit noted that the disputed practice of the Commission was longstanding and rejected arguments that the legislative history supported a contrary reading of the statute. It noted that neither of these arguments merited more detailed consideration given the plain language of the statute. With respect to the U.S. statute’s consistency with the GATT, it stated, “Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours. Should there be a conflict, the United States legislation must prevail. 19 U.S.C. § 2504(a).” See also, e.g., Timken Co. v. United States, 673 F. Supp. 495, 521 (Ct. Int’l Trade 1987) (refusing to read the statute as covering “commissions and profits” and not just “commissions,” stating that it could not agree “that the ITA should follow a Code provision not incorporated into United States law. The Code has no independent force as law. ... Additionally, although the 1979 Act was intended to be consistent with the Code and with other trade agreements, Congress recognized the possibility that it might nonetheless fail to adequately implement the agreements, as is manifest from a provision of the 1979 Act setting forth the procedures for amending United States law if necessary to implement any requirement of one of the agreements implemented by the Act.”)

⁴¹ 19 U.S.C. § 2504(a).

2. When Congressional Intent is Not Clear

a. The Role, if any, for International Trade Agreements

In circumstances where Congressional intent was not clear, the courts had to determine whether the agency's construction of the statute was permissible under Chevron "step two." In several cases involving ambiguous Congressional intent, the courts held the agency's interpretation was supreme, regardless of any conflicting GATT provisions.⁴² In other appeals, the reviewing courts upheld the agency's interpretation of the statute but may have conditioned their approval on the fact that the agency's interpretation was consistent with or at least was not inconsistent with the corresponding international trade agreement.⁴³

⁴² For example, in Torrington Co. v. United States, 44 F.3d 1572 (Fed. Cir. 1995), the Federal Circuit found that the U.S. statute did not specifically address the issue, but that Commerce's decision to deduct inventory carrying costs from foreign market value as an indirect selling expense was a permissible interpretation. The Federal Circuit explained that the 1979 GATT Antidumping Code "serves as a guide to interpretation of the antidumping laws to the extent it does not conflict with Title 19." Likewise, in Hercules, Inc. v. United States, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987), the CIT found that the U.S. statute, case law, and Commerce's prior countervailing duty determinations clearly supported the reasonableness and lawfulness of Commerce's determination that certain regional incentive programs were countervailable subsidies. The CIT further found that it did not need to "utilize GATT for interpretive purposes. The countervailing duty law authorizes Commerce to countervail subsidies as set forth in § 1677(5)(B)." In Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade 1988), aff'd, 859 F.2d 915, 917 (Fed. Cir. 1988), plaintiffs argued that the Commission's practice of cumulation violated the GATT. The CIT disagreed noting that the Commission's practice "may test the limits of conformity to the Code but it does not constitute a clear violation of the Code. It must also be stated that even if we were to reach the conclusion that the operation of the cumulation provision violated the GATT Code, we would be bound to give primacy to the law of the United States in accordance with the direction in 19 U.S.C. § 2504(a) (1982)."

⁴³ See, e.g., Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103 n.5 (Fed. Cir. 1990) (upholding the Commission's construction of an ambiguous statute that, among other things, was not inconsistent with the GATT); Serampore Indus. Pvt. Ltd. v. United States, 696 F. Supp. 665, 670 (Ct. Int'l Trade 1988) (finding Commerce's calculation of the "all others" rate does not violate the GATT). In Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445 (Ct. Int'l Trade 1987), plaintiffs argued that the Commission was required to find a causal relationship between the subsidies found by Commerce and the material injury suffered by the domestic industry to make an affirmative injury determination in a countervailing duty investigation. The CIT disagreed, finding the language of the statute and the legislative history did not require the Commission to find such a causal connection, and such a requirement was not imposed by the Commission upon itself in past countervailing duty investigations. The court also found that the GATT provisions "do not unambiguously require that there be a causal connection between the foreign subsidy and the injury to the domestic industry seeking protection from subsidized imports." Furthermore, in United States Steel Corp. v. United States, 618 F. Supp. 496 (Ct. Int'l Trade 1985), the CIT disagreed with the domestic producer's claim that the U.S. statute was clear. The statute was silent regarding the length of provisional suspension, so the CIT deferred to the agency's construction of the statute, which conformed to the GATT requirement. With respect to the legislative history, the CIT noted, "Moreover, despite the scarcity of legislative history specifically concerning § 606, the overall intent of Congress to adhere to GATT in enacting the 1984

There were also pre-URAA cases where the agency exercised its discretion to construe an ambiguous U.S. statute to harmonize it with the international trade agreements and the agency's interpretation was upheld on appeal.⁴⁴ For example, in the Federal Circuit's decision in Federal Mogul Corp. v. United States, 63 F.3d 1572 (Fed. Cir. 1995), the issue was whether Congress precluded Commerce from calculating dumping margins in a tax-neutral fashion. The Federal Circuit found that the statute could be read to support competing views, and the legislative history did not indicate that Congress intended to preclude Commerce from making the adjustment tax-neutral.⁴⁵ While there might be some question as to whether Commerce's newest methodology was entitled to Chevron deference, the court noted that it was at least clear from the record that "in administering the Act, the Agency over the years has pursued a policy of attempting to make the tax adjustment called for by the Act tax-neutral," and the GATT required calculation of antidumping duties on a tax-neutral basis.⁴⁶ While it noted that in the event of a conflict between a GATT obligation and a statute, the statute must prevail, the Federal Circuit also noted that absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations, and cited Charming Betsy.⁴⁷ The court found that "Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of 'the foreign policy repercussions of a dumping determination,'" and "[f]or the Court of International Trade to read a GATT violation into the statute over Commerce's objection, may commingle powers best kept separate."⁴⁸ Thus, the thrust of the Federal Circuit's decision in Federal Mogul was that in situations involving Chevron "step two," the court would defer to an agency's interpretation of the statute if the agency's interpretation was consistent with the GATT because, absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations. This decision merits discussion of two points: (1) what are the origins of the Charming Betsy rule cited by the court, and (2) should it apply in these circumstances?

legislation is quite clear. Although the Trade Agreements Act of 1979 did not constitute either Congressional approval or disapproval of the GATT Subsidies Code, ... the objective of GATT consistency was embodied in the Act. ... Similarly, conformity with the GATT was an underlying principle in the Trade and Tariff Act of 1984."

⁴⁴ In PPG Industries, Inc. v. United States, 928 F.2d 1568 (Fed. Cir. 1991), the court found that the domestic producer's view that the U.S. trade statutes had only one purpose, namely, to protect the U.S. industry from every competitive advantage afforded by foreign governments, was "simplistic and myopic." The court explained that interpreting the statute consistent with the GATT Subsidies Code was one of the objectives that the agency properly took into consideration, "The congressional debates and the objectives listed in the GATT Subsidies Code indicate that numerous public policies, some of which conflict with overcoming a competitive advantage, entered into enactment of these statutes, and must be considered by ITA."

⁴⁵ 63 F.3d at 1579.

⁴⁶ 63 F.3d at 1580.

⁴⁷ 63 F.3d at 1581.

⁴⁸ 63 F.3d at 1582; see also, e.g., Luigi Bormioli Corp. v. United States, 304 F.3d 1362, 1368 (Fed. Cir. 2002) (upholding a Customs decision that was consistent with the GATT, a GATT Committee on Customs Valuation decision and the U.S. statute, without deciding what standard of deference applied).

International laws are built on the consensus of nations and as a sign of their sovereignty, nations need not enter into, or follow, international agreements. When a domestic law violates an international agreement to which the United States is a signatory, however, the United States is not relieved of its international obligation or of the consequences of the violation of that obligation.⁴⁹ Thus, when U.S. law is not clear, rather than find that the United States is in violation of its international obligations, U.S. courts sometimes apply, explicitly or not, a canon of statutory construction known as the Charming Betsy canon.⁵⁰ Under the original articulation of that canon, U.S. statutes ought never to be construed to violate

⁴⁹ See, e.g., Restatement (Third) Foreign Relations Law of the United States § 115(1)(b) (1987); see also, e.g., comment b (“International legal obligation continues. Subsection (1)(b) makes clear that although a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally under the principle stated in § 321. Similarly, the United States remains bound internationally when a principle of international law or a provision in an agreement of the United States is not given effect because it is inconsistent with the Constitution.”).

⁵⁰ Alexander Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). A brief discussion of the Charming Betsy case is warranted. On April 10, 1800, an American-built vessel named Jane belonging to U.S. citizens left Baltimore for St. Bartholomew where her cargo of flour was to be delivered, and where she was to be sold. Id. at 115. Although the cargo was delivered, the vessel could not be sold in St. Bartholomew, so the captain proceeded to St. Thomas and sold the vessel to an American-born Danish subject, Jared Shattuck, who renamed her the Charming Betsy. Id. The Charming Betsy was loaded with American produce and left St. Thomas as a Danish vessel bound for the island of Guadeloupe, a French dependency. Id. at 116. While at sea, the Charming Betsy was captured by a French privateer and crew that planned to take her to Guadeloupe as a prize. Id. Before reaching Guadeloupe, the Charming Betsy was captured anew by Captain Alexander Murray, commander of the U.S. Constellation frigate, allegedly under the authority of the Nonintercourse Act of 1800. Id. During the undeclared war between the United States and France, Congress had passed the Nonintercourse Act prohibiting trade “between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof.” Id. at 116, 118. Captain Murray suspected that the Charming Betsy was engaged in prohibited trade with Guadeloupe, and that formed the basis for his seizure and condemnation of the Charming Betsy and the sale of her cargo. Id. at 116. A U.S. district court found that the seizure was illegal, and ordered that the vessel be restored and the proceeds of the cargo plus net costs and damages be paid to Mr. Shattuck. Id. at 116-17. The circuit court affirmed the district court’s finding that the seizure was illegal and its order directing restitution of the vessel and payment to the claimant of the net proceeds of the sale of the cargo, but reversed with respect to the calculation of damages. Id. at 117.

The Supreme Court affirmed the circuit court and district court in part, but disapproved of both the district court and the circuit court’s calculation of damages, so the Court remanded that issue with instructions regarding the standard for calculating damages. 6 U.S. at 125-26. In so doing, the Supreme Court determined that the U.S. statute was not clear. In construing the Nonintercourse Act to determine if it applied to the circumstances at bar, the Supreme Court examined the language of the U.S. statute and the context in which the statute was enacted to ascertain Congress’ intent. In determining that the capture of an unarmed, neutral vessel, under the command of the French, but not otherwise menacing and owned by an American-born man living in St. Thomas for most of his life, was unlawful, and that Captain Murray was not entitled to any salvage, the Court also kept in mind the principle that “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and

international law, if any other possible construction remains. This canon actually owes its origins to an earlier Supreme Court decision, Talbot v. Seeman.⁵¹ The Charming Betsy canon and a weaker version of the canon that is reflected in the Restatement,⁵² have been followed on numerous occasions over the years, including in circumstances where courts have interpreted ambiguous U.S. statutes so as to avoid a

consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” Id. at 118. The Supreme Court deferred to international common law practices that it “discovered,” under which neutral, unarmed ships should not be taken and salvage costs are not to be awarded for the capture of neutral vessels. Id. at 121-22.

⁵¹ 5 U.S. (1 Cranch) 1 (1801). There is scant mention of Talbot in the Charming Betsy decision. See 6 U.S. at 121 (referring to “the case of the Amelia,” with the Amelia being the name of the vessel at issue in Talbot). But, it is clear that Chief Justice Marshall, the author of both opinions, relied on Talbot for the decision in Charming Betsy. In Talbot, an armed neutral vessel, the Amelia, was captured by a French national, who replaced the crew with other French sailors; the Amelia was then captured by a U.S. vessel. Chief Justice Marshall opined that the Amelia did not come within the description of the Nonintercourse Act, being a neutral armed vessel which had been captured and at the time of capture was commanded and manned by Frenchmen, unless she be considered “quoad hoc as a French vessel.” 5 U.S. at 31. He determined that the Amelia was not a French vessel, but continued, “It is, I believe, a universal principle, which applies to those engaged in a partial as well as those engaged in a general war, that where there is probable cause to believe the vessel met with at sea is in the condition of one liable to capture, it is lawful to take her and subject her to the examination and adjudication of the courts.” Id. at 31-32. Having determined that the capture was lawful, he next examined whether Captain Talbot was entitled under U.S. law to payment of salvage for restoring the Amelia to her owners. He continued:

It has been contended that the case before the court is in the very words of the act. That the owner of the Amelia is a citizen of a state in amity with the United States, retaken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a recaptured vessel belonging to a nation engaged with the United States against the same enemy.

The words of the act would certainly admit of this construction.

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a recaptured neutral and a recaptured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

5 U.S. at 43. Hence, the Supreme Court construed the ambiguous provision of the U.S. statute in such a way as to make it consistent with international common law, and determined that the U.S. captors had no right to salvage for restoring a neutral vessel, concluding “By this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.” Id. at 44.

⁵² The Restatement (Third) Foreign Relations Law of the United States § 114 (1987) provides, “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” (emphasis added).

conflict with earlier treaty provisions.⁵³ Some courts have applied a diluted version of the canon wherein “any other possible construction” has been read as “any other reasonable construction.”⁵⁴ The Charming Betsy canon is not rooted in any particular U.S. law, but rather is a tool of judicial construction. One author writes that the canon does not mandate application of international law, but that some judges and commentators have nevertheless viewed the canon as a means of supplementing U.S. law and conforming it to the contours of international law. Under the latter view, courts use the canon not primarily to implement legislative intent, but rather to make it harder for Congress to violate international law, and to facilitate U.S. implementation of international law.⁵⁵ Whereas the Charming Betsy canon may have seemed appropriate to the Marshall Court in light of the events of that era, this commentator, Professor Curtis Bradley, has questioned the continued viability of the canon today.⁵⁶ When Charming Betsy was decided, he noted, the United States was a weak power with an unproven government, and the possibility that breaches of international law could result in war with other nations or with Indian tribes had been a significant concern during drafting of the Constitution. Also, at that time, U.S. courts viewed customary international law as an independent source of domestic law, treating it as part of the “general common law.” U.S. courts in that era deemed international law to be objective and discoverable, partly due to their association of international law with natural law.⁵⁷ Subsequent to the Charming Betsy era, Professor Bradley notes, the natural law conception of international law faded and was replaced by an emphasis on state practice and consent; there came to be a separation between public and private international law; private law components of the law of nations – merchant law, conflict of laws, and

⁵³ See, e.g., Chew Heong v. United States, 112 U.S. 536 (1884) (interpreting a later immigration law to not affect the treaty right of a resident Chinese alien to reenter); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (There is “a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”).

⁵⁴ See Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479, 490 & n.60 (Jan. 1998) (providing examples).

⁵⁵ Id. at 491-504 (citing examples of cases applying both formulations of the canon).

⁵⁶ See Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479 (Jan. 1998). He notes that in recent times, three criticisms have been made of canons: (1) canons do not provide any meaningful restraint on judicial decision-making; (2) canons do not accurately reflect likely congressional intent, relying on factors unlikely to be considered by legislators or assuming an attention to detail by the drafters that is inconsistent with the realities of the legislative process; and (3) canons promote judicial activism by allowing judges to ignore the plain meaning of statutes, and although Congress has the ability to overturn judicial decisions with which it disagrees, this can be politically difficult and costly.

⁵⁷ Id.

maritime law – gradually were absorbed into domestic law; and there was a proliferation of treaties, both bilateral and multilateral.⁵⁸

Whatever the utility of the Charming Betsy canon in other contexts, the canon would appear to have limited utility in the antidumping and countervailing duty context. On the one hand if an agency’s permissible construction of an ambiguous or silent statute is also consistent with an international trade agreement, then it is reasonable for courts to uphold the agency. On the other hand, as discussed below, some would advocate a corollary – when an agency’s interpretation of a silent or ambiguous statute conflicts with an international agreement or a report by an international trade panel, the agency’s interpretation should be rejected automatically by application of the Charming Betsy canon (*i.e.*, Charming Betsy trumps Chevron). The corollary is simply inconsistent with the non-self-executing nature of international trade agreements under U.S. law and other provisions of the Trade Act of 1979 (and subsequent U.S. trade laws) stating that U.S. law prevails over the international trade agreements.

b. The Role, if any, for Reports of International Trade Panels

There were a handful of pre-URAA court decisions involving whether and to what extent reports by international trade panels may be used as aids in interpreting and applying the domestic international trade laws in situations where Congressional intent is not clear. In Suramerica de Aleaciones Laminadas, C.A. v. United States,⁵⁹ the Federal Circuit determined that the phrase “on behalf of” was not among the terms defined in the statute, nor did the statutory context indicate Congress’ intended meaning.⁶⁰ Appellees had argued that the legislative history demonstrated Congress’ intent to comply with the GATT, and a GATT panel had recently rejected Commerce’s views on the meaning of “on behalf of.”⁶¹ In determining that Commerce’s interpretation of the statute was permissible, the court explained,

First, the GATT panel itself acknowledged and declared that its examination and decision were limited in scope to the case before it. The panel also acknowledged that it was not faced with the issue of whether, even in the case before it, Commerce had acted in conformity with U.S. domestic legislation. ¶ Second, even if we were convinced that Commerce’s interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress’s interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.⁶²

Thus, the Federal Circuit deferred to the agency’s construction of the statute, and opined that even if Commerce’s construction of the statute were to conflict with the GATT, U.S. law was supreme. It did not

⁵⁸ Id.

⁵⁹ 966 F.2d 660 (Fed. Cir. 1992).

⁶⁰ 966 F.2d at 665.

⁶¹ 966 F.2d at 667.

⁶² 966 F.2d at 668.

pay much heed to the GATT panel report.

A very different approach was taken in Footwear Distributors and Retailers of America v. United States,⁶³ and some background is needed to understand this case. A countervailing duty order on Brazilian non-rubber footwear had been issued by the United States on September 12, 1974, without an injury determination.⁶⁴ Several years later, U.S. statutes were amended after the negotiation of the April 12, 1979 GATT Subsidies Code; as a result of this amendment, countries subject to orders that had been issued without an injury determination were entitled to request that the United States conduct an injury investigation to determine whether the order should be revoked.⁶⁵ Commerce issued instructions to revoke the countervailing duty order on Brazilian footwear effective October 29, 1981, but the Footwear Distributors and Retailers of America (“FDRA”) appealed to the CIT because it believed that the order should have been revoked as of January 4, 1980, the effective date of the new statutory provision.⁶⁶ At the request of FDRA, the CIT stayed its proceedings while a GATT panel initiated by Brazil considered whether Commerce’s actions violated U.S. obligations under Article VI of the GATT.⁶⁷ A GATT panel concluded that Commerce’s actions were consistent with Article VI, but Brazil blocked adoption of the report.⁶⁸ Commerce moved to dissolve the CIT’s stay, but the stay remained in place while a second GATT panel heard a challenge by Brazil that Commerce’s actions violated the GATT Article I most-favored-nation requirement because Commerce had revoked other “black hole” orders as of January 1, 1980, whereas non-rubber footwear from Brazil imported between January 4, 1980 and October 29, 1981 was subject to countervailing duties. The panel found that the United States acted inconsistently with its Article I GATT obligations, but, because Brazil had requested a general ruling, the panel did not make any specific recommendation. The United States noted its serious disagreement with the panel’s report and that Brazil had repeatedly blocked adoption of a companion panel report, but out of respect for the panel process, the United States agreed to adoption of the report because the report expressly provided only a general ruling and had not made any specific recommendation.⁶⁹

After completion of the GATT panel proceedings, the CIT resumed its own proceedings and determined that the U.S. statute was not clear and that Commerce’s interpretation of the statute was reasonable.⁷⁰ Based on a perceived holding from the Supreme Court’s opinion in DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988), the court determined that Chevron deference must yield to Charming Betsy, so the remaining question was whether Commerce’s

⁶³ 852 F. Supp. 1078 (Ct. Int’l Trade 1994).

⁶⁴ 852 F. Supp. at 1081.

⁶⁵ 852 F. Supp. at 1081.

⁶⁶ 852 F. Supp. at 1080.

⁶⁷ 852 F. Supp. at 1081.

⁶⁸ 852 F. Supp. at 1082-83.

⁶⁹ 852 F. Supp. at 1083-85.

⁷⁰ 852 F. Supp. at 1089-90.

determination complied with U.S. obligations under international law.⁷¹ The CIT stated that

GATT, including its clause regarding most-favored nations, became part of U.S. law via executive order in accordance with congressional delegation of power to the President. See Reciprocal Trade Agreements Act, as amended and extended, 59 Stat. 410 (1945). And it is well established that an international agreement or treaty which operates without the aid of legislation is “equivalent to an act of Congress and, while in force, constitutes a part of the supreme law of the land.”⁷²

The court noted that GATT contracting parties “did not automatically accept panel reports as binding.”⁷³ The CIT observed that it is the court’s “province and duty to say what the law is, although this responsibility does not traditionally extend to directing the United States as to how to proceed on the international stage.”⁷⁴ Without making an independent finding regarding the consistency of the U.S. statute with the GATT, the court noted that a GATT panel found that the United States violated its international obligations but did not decide whether Commerce’s decision was consistent with the U.S. statute and did not make any specific recommendations to the United States.⁷⁵ The CIT determined that “[h]owever cogent the reasoning of the GATT panels reported above, it cannot and therefore does not lead to the precise domestic, judicial relief for which the plaintiff prays. ... [A] party in Brazil’s position, having sought and obtained a favorable panel ruling, has and has had relief available to it via suspension of its obligations to the offending party pursuant to Article XXIII of the General Agreement.”⁷⁶ Thus, although the CIT found that Charming Betsy trumped Chevron and sought to harmonize the U.S. statute with international law, the result of the court’s efforts was that no judicial relief was available to FDRA from the U.S. court – the only available relief was Brazil’s ability under the GATT to suspend application of such concessions or other obligations as it determined appropriate in the circumstances.

Several comments with respect to the Footwear decision are appropriate. First, the CIT cited to the Supreme Court’s opinion in Debartolo⁷⁷ for the proposition that Chevron should yield to Charming Betsy.⁷⁸ The DeBartolo opinion apparently repeated the mistake contained in an earlier Supreme Court opinion, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504 (1979). Others have also

⁷¹ 852 F. Supp. at 1091-92.

⁷² 852 F. Supp. at 1093 (footnotes omitted).

⁷³ 852 F. Supp. at 1093-95.

⁷⁴ 852 F. Supp. at 1095.

⁷⁵ 852 F. Supp. at 1095.

⁷⁶ 852 F. Supp. at 1096 (footnotes omitted).

⁷⁷ 485 U.S. 568 (1988).

⁷⁸ 852 F. Supp. at 1091-92.

relied on DeBartolo and other cases that perpetuate the same citation error.⁷⁹ While the Supreme Court's opinion in DeBartolo does appear to indicate that Charming Betsy trumps Chevron, the rule of statutory construction that the Supreme Court attributed to Charming Betsy and that the Supreme Court indicated trumps Chevron, is "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."⁸⁰ Charming Betsy said nothing about avoiding constitutional problems, and the canon of statutory construction discussed in DeBartolo, in fact, owed its origins to a different opinion of the same century, Parsons v. Bedford.⁸¹ Thus, the U.S. Supreme Court

⁷⁹ See Curtis A. Bradley, Chevron Deference and Foreign Affairs, 86 Va. L. Rev. 649 (May 2000) (noting that the mistaken citation in Catholic Bishop has led at least one commentator as well as the CIT in Footwear and in Hyundai Elecs. Co. v. United States, 53 F. Supp. 2d 1334, 1344 (Ct. Int'l Trade 1999), to conclude that the Supreme Court held that Charming Betsy trumps Chevron); see also, e.g., Ronald A. Brand, Direct Effect of International Economic Law in the United States and European Union, 17 Nw. J. Int'l L. & Bus. 556, 571 n.76 (1996/97); Comment, Jackson F. Morrill, A Need for Compliance: the Shrimp Turtle Case and the Conflict Between the WTO and the United States Court of International Trade, 8 Tul. J. Int'l & Comp. L. 413, 441-42 (Spring 2000) (suggesting that the Supreme Court's reasoning in Debartolo "leads to the conclusion that the Chevron rule may yield to the Charming Betsy principle in statutory review, thereby affording courts greater discretion in interpreting United States obligations under international law. If there is any ambiguity in the statute, the reviewing court should construe the statute so as to avoid violating international law."). Another case that is also sometimes wrongfully cited for the proposition that Charming Betsy trumps Chevron is Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987). Because the Supreme Court found the statutory provision at issue in Cardoza-Fonseca to be clear on its face, Charming Betsy could not have been triggered, and, in fact, was never mentioned (although the Supreme Court nevertheless included a lengthy discussion of the legislative history and a discussion of whether the agency was entitled to deference – neither of which was necessary under Chevron in light of the finding that the statutory provision was clear, as pointed out in the concurring opinion of Justice Scalia).

⁸⁰ DeBartolo, 485 U.S. at 575.

⁸¹ 3 Pet. 433, 448-49, 7 L.Ed 732 (1830). One commentator suggests that important differences between the constitutional avoidance canon and the Charming Betsy canon suggest that they should not have the same relationship to Chevron deference. First, while Congress may not violate the Constitution, it is well established that Congress can violate international law, and since statutory violations of international law will not be overturned by the judiciary, the Charming Betsy canon does not seem to implicate the same separation-of-powers concerns implicated by the constitutional avoidance canon. Second, while administrative agencies have no special expertise in constitutional determination, the executive branch does have substantial expertise with respect to international law and courts generally give substantial weight to executive branch interpretations of international law. Third, the idea that some canons should trump Chevron deference in order to limit delegations of lawmaking authority to agencies has less force in the area of foreign affairs, and the Supreme Court has long recognized that, because of practical necessity and executive branch expertise, Congress may need to delegate especially broad foreign affairs powers to the Executive. The commentator suggests that if the Charming Betsy canon trumps Chevron because Congress rather than administrative agencies should deliberate on whether to violate international law, such a reason is more plausible in the context of self-executing treaties than in non-self-executing treaties. See Curtis A. Bradley, Chevron Deference and Foreign Affairs, 86 Va. L. Rev. 649, 687-88 (May 2000).

cannot be inferred to have actually considered in DeBartolo that Charming Betsy trumps Chevron, just that Parsons trumps Chevron.⁸²

Furthermore, the Footwear decision is also noteworthy to the extent that it suggested a distinction between the 1947 GATT and subsequent international trade agreements. As the CIT noted, the 1947 GATT became part of U.S. law via executive order.⁸³ Subsequent international trade agreements clearly were not self-executing, however, and they became part of U.S. law only after Congress enacted implementing legislation, such as the 1979 Trade Act. The court determined that the 1947 GATT is an international agreement which operates without the aid of legislation, is equivalent to an act of Congress, and while in force constitutes a part of the supreme law of the land.⁸⁴ The correctness of this finding is debatable to the extent that it would appear to imply that intervening U.S. statutes (*i.e.*, the 1979 Trade Act in that case) did not somehow erode the status accorded to the 1947 GATT Agreement, even assuming it was entitled to equal status with U.S. statutes at some point.

III. The Uruguay Round Negotiations, the Uruguay Round Agreements, and the Uruguay Round Agreements Act Implementing Legislation

A. The Uruguay Round Trade Negotiations

Using the same process that resulted in the Trade Agreements Act of 1979, the United States-Israel Free Trade Area Implementation Act of 1985, the United States-Canada Free Trade Agreements Implementation Act of 1988, and the North America Free Trade Agreement (“NAFTA”) Implementation Act, Congress authorized the President to enter into the Uruguay Round trade negotiations for a specific time period under the Omnibus Trade and Competitiveness Act of 1988, and subsequently extended the President’s authority to complete the negotiations.⁸⁵ As required by the delegation of authority, the Executive branch consulted with Congress during the negotiations and submitted the agreements negotiated by the President to Congress along with an implementing bill for enactment into law.⁸⁶ Commenting on the process, the House Report accompanying the Uruguay Round Agreements Act noted,

The purpose of this approval process is to preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which generally involve substantial changes in domestic laws. The consultation and notification requirements provide the opportunity for congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or

⁸² See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649 (May 2000); cf. Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, 38 Geo. J. of Int’l L. 209, 228-30 (Fall 2006) (“it might well be argued that DeBartolo is distinguishable and that the integration of WTO consistency into step two of Chevron analysis does not necessarily require a WTO-inconsistent decision to be overruled”).

⁸³ 852 F. Supp. at 1092.

⁸⁴ 852 F. Supp. at 1093.

⁸⁵ P.L. 100-418, § 1102, 19 U.S.C. § 2902, as amended by P.L. 103-49.

⁸⁶ The fast-track procedures are described in 19 U.S.C. § 2191.

administrative practice to be fully taken into account and any implementing problems resolved prior to entry into the agreement and introduction of the implementing bill. At the same time, the process ensures the Executive branch and foreign countries of expeditious action on the final agreement and implementing bill without amendments.⁸⁷

Because the Executive branch did not submit the Uruguay Round Agreements as a treaty to the U.S. Senate, under the Constitution, the Uruguay Round Agreements are not treaties that make up part of the “supreme law of the land,” but are instead non-self-executing congressional-executive international agreements that required implementing legislation, *i.e.*, the Uruguay Round Agreements Act (“URAA”).⁸⁸ The courts have characterized the question of whether such agreements should have been approved by two-thirds of the Senate as a treaty as a non-justiciable political question.⁸⁹

B. The Uruguay Round Agreements and the Status of Reports by Dispute Resolution Panels and the Appellate Body Under the World Trade Organization (“WTO”) Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”)

The Uruguay Round Agreements were signed on April 15, 1994 and entered into force on January 1, 1995.⁹⁰ Like determinations issued by other Member countries’ investigating authorities,

⁸⁷ H.R. Rep. No. 826, 103rd Cong., 2nd Sess. at 19 (Oct. 3, 1994) (emphasis added).

⁸⁸ Indeed, as reflected in advice provided in a memorandum to Ambassador Michael Kantor, United States Trade Representative, from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel (Nov. 22, 1994), notwithstanding arguments to Congress to the contrary by Professor Lawrence H. Tribe, the Uruguay Round Agreements could be constitutionally adopted by the passage of implementing legislation by both Houses of Congress, together with signature by the President. See <http://www.usdoj.gov/olc/gatt.htm> (retrieved on Sept. 8, 2008) (“practice under the Constitution has established that the United States can assume major international trade obligations such as those found in the Uruguay Round Agreements when they are negotiated by the President and approved and implemented by Act of Congress pursuant to procedures such as those set forth in 19 U.S.C. §§ 2902-03. In following these procedures, Congress acts under its broad Foreign Commerce Clause powers, and the President acts pursuant to his constitutional responsibility for conducting the Nation’s foreign affairs. The use of these procedures, in which both political branches deploy sweeping constitutional powers, fully satisfies the Constitution’s requirements; the Treaty Clause’s provision for concurrence by two-thirds of the Senators present is not constitutionally mandatory for international agreements of this kind.”) (footnotes omitted).

⁸⁹ See, e.g., Made in the USA Foundation v. United States, 242 F.3d 1300, 1311-20 (11th Cir.) (dismissing an appeal challenging the constitutionality of a different congressional-executive agreement, the NAFTA, because the case involved a non-justiciable political question), cert. denied sub. nom., United Steelworkers of America v. United States, 122 S. Ct. 613 (2001); see also, e.g., Jeanne J. Grimmatt, Why Certain Trade Agreements are Approved as Congressional-Executive Agreements Rather Than as Treaties (Congress. Research Report Order Code 97-896 Apr. 5, 2002).

⁹⁰ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994), 08 Stat. 4809, 1867 U.N.T.S. 14 (herein “Uruguay

determinations by the Commission and Commerce in antidumping and countervailing duty cases may be appealed to a WTO dispute resolution panel.⁹¹ Under the GATT individual countries could and often did block adoption of panel reports, and unadopted reports did not have a legally binding effect.⁹² But, under the current DSU, panel reports

shall be adopted at a [Dispute Settlement Body (“DSB”)] meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.⁹³

Under the Uruguay Round Agreements, a standing Appellate Body now exists to hear appeals from WTO dispute resolution panels, and Appellate Body reports

shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.⁹⁴

Under the DSU, where a panel or the Appellate Body concludes that a

measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.⁹⁵

Adverse reports bind the Member country, but only with respect to the particular case; they do not create binding precedent or a body of WTO jurisprudence because WTO dispute resolution panels and the Appellate Body do not have the legal authority to issue an interpretation of the WTO Agreements. Rather, Article 3.2 of the DSU states that the dispute settlement system is meant “to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public

Round Agreements” or “WTO Agreements”).

⁹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (herein “DSU”), at Arts. 6, 17. Only WTO Members and not private entities may initiate a dispute settlement proceeding under the WTO Agreements. *Id.* Art. 2.1.

⁹² See GATT Art. XXIII and decisions and interpretations thereof.

⁹³ DSU Art. 16.4 (footnote omitted).

⁹⁴ DSU Arts. 17.1 and 17.14 (footnote omitted).

⁹⁵ DSU Arts. 19.1 and 19.2 (footnote omitted).

international law.”⁹⁶ Article 3.2 further states, “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁹⁷ Article IX.2 of the Agreement Establishing the WTO vests exclusive authority to adopt a binding interpretation of the WTO Agreements in the Ministerial Conference and General Council, two bodies within the ambit of the WTO where all members are represented.⁹⁸

The DSU anticipates that Members shall have a reasonable period of time in which to comply with adverse reports by dispute resolution panels and the Appellate Body and further provides for the possibility of compensation and the suspension of concessions in the event of non-compliance.⁹⁹ Notwithstanding any international legal obligation associated with an adverse report, such reports do not have any force for purposes of U.S. domestic law, as discussed below.

C. The Implementing Legislation – The Uruguay Round Agreements Act

In implementing the Uruguay Round Agreements, the Uruguay Round Agreements Act¹⁰⁰ and its legislative history contain even stronger language than their predecessors regarding whether and to what extent international trade agreements and reports by international trade panels may be used as aids in interpreting and applying the domestic international trade laws. Several themes reverberate throughout the Uruguay Round Agreements Act and corresponding legislative history. First, U.S. law is to prevail in the event of a conflict.¹⁰¹ The Statement of Administrative Action accompanying the URAA (“SAA”) echos this theme, “If there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence. [Moreover], WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration decide whether to implement a WTO panel recommendation and, if so, how to implement it.”¹⁰²

⁹⁶ (emphasis added).

⁹⁷ (emphasis added).

⁹⁸ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), at Arts. IV.1, IV.2.

⁹⁹ DSU Arts. 21 and 22; see also, e.g., John J. Barceló, The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, 21 Tul. Eur. & Civ. L.F. 147, 165-67 (2006).

¹⁰⁰ 19 U.S.C. § 3501 et seq.

¹⁰¹ The statute warns “(1) United States statutes to prevail in conflict. No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. (2) Construction. Nothing in this Act shall be construed – (A) to amend or modify any law of the United States ... unless specifically provided for in this Act.” 19 U.S.C. § 3512(a) (Relationship of trade agreements to United States law) (emphasis added).

¹⁰² SAA, H.R. 316, 103rd Cong., 2nd Sess. at 659 (Sept. 27, 1994); see also H.R. Rep. No. 826 at 23.

Second, Congress thoroughly reviewed the Uruguay Round Agreements and believed that it addressed, as needed, all inconsistencies between the existing U.S. law and regulations and the international agreements through amendment to the U.S. statutes or through identification in the SAA of changes to regulations that would be implemented within one year.¹⁰³ As indicated in the SAA,

The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

As section 102(a)(2) of the bill makes clear, those provisions of U.S. law that are not addressed by the bill are left unchanged.

Section 102(a)(1) clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill. Section 102(a)(1) will not prevent implementation of federal statutes consistently with the Uruguay Round agreements, where permissible under the terms of such statutes. Rather, the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by those agreements.

The Administration has made every effort to include all laws in the implementing bill and identify all administrative actions in this Statement that must be changed in order to conform with the new U.S. rights and obligations arising from the Uruguay Round agreements. Those include both regulations resulting from statutory changes in the bill itself and changes in laws, regulations and rules or orders that can be implemented without change in the underlying U.S. statute.

Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements. Should it prove otherwise, the Administration would need to seek new legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations.¹⁰⁴

In several circumstances, the SAA noted that no, or only limited action, was required in order to

¹⁰³ See, e.g., S. Rep. No. 412, 103rd Cong., 2nd Sess. at 4 (“As U.S. law is already largely in compliance with the provisions of most of the Uruguay Round agreements, the implementing bill does not reflect all of the provisions of those agreements. Additionally, while a number of provisions require legislative action, others will be given effect through administrative action, as described in the Statement of Administrative Action submitted by the President to the Congress with the bill to implement the Uruguay Round agreements on September 27, 1994.”), 5-6 (“The drafting by the Committees of jurisdiction was done in close consultation with the Administration to ensure that the legislation would faithfully implement the agreements and that the Administration’s subsequent formal submission was, to the greatest degree possible, supported by Congress.”), 16 (Nov. 22, 1994).

¹⁰⁴ SAA at 669-70 (emphasis added); see also, e.g., H.R. Rep. No. 826 at 25 (1994) (emphasizing that the Uruguay Round Agreements are not self-executing in the United States and that “necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements.”).

implement the Uruguay Round Agreements.¹⁰⁵

Third, there was serious concern that WTO dispute resolution panels and the Appellate Body might attempt to construe U.S. laws in a way that was not intended by Congress.¹⁰⁶ The standard of review applicable to these panels reviewing antidumping cases appeared to be an important consideration in placating these fears.¹⁰⁷

¹⁰⁵ See, e.g., SAA at 708 “No changes in regulation or administrative practice will be required to implement GATT 1994 other than those necessary to carry out the provisions of the implementing bill described above.”); SAA at 847 (“The Agreements make relatively few changes to the substantive standards for determining injury and causation set forth in the 1979 Codes. The most significant change reflected in the Agreements is the express recognition of cumulative analysis.”)

¹⁰⁶ Indeed, in the closing days of the Uruguay Round, the U.S. delegation apparently insisted – with the threat of walking out or blocking the whole deal – on a special standard of review for antidumping cases. See Tenth Judicial Conference of the U.S. Court of International Trade (presentations of Debra Steger and Professor Lowenfeld). The Senate Report accompanying the URAA reflected some of the same anxiety as the corresponding Senate Report to the 1979 Trade Act about the potential effect of reports by dispute resolution panels. S. Rep. No. 412 at 13 (“The WTO Agreement and other Uruguay Round agreements, like previous trade agreements including the [NAFTA], U.S.-Canada Free Trade Agreement (CFTA), and the Tokyo Round agreements, are not self-executing and thus their legal effect in the United States is governed by implementing legislation. If, at any time in the future, a dispute settlement panel or the Appellate Body established pursuant to the [DSU] were to determine that a particular Federal statute was inconsistent with any of the Uruguay Round agreements, the Congress would retain full authority to determine whether to amend, modify, or repeal that law. The panel or Appellate Body does not have any authority to order the United States, or any other country, to change its laws, regulations, or practices when those are found inconsistent with a Uruguay Round agreement”); see also SAA at 1012 (“The United States has expressed the view in the GATT, and will maintain the view in the WTO, that in making its assessment of the case a panel should refrain from opining on complex, unsettled issues of domestic law. Panels that base their reports on opinions purporting to resolve such issues risk raising questions about the immediate and continued validity of their reports and may undermine confidence in the dispute settlement process.”) and at 1015 (“When it finds that a government’s measure is inconsistent with a Uruguay Round Agreement, a panel or the Appellate Body must issue a recommendation to that government to bring the offending measure into conformity with the agreement. While the panel or Appellate Body may also suggest ways to implement such a recommendation, Article 19 makes it clear that any such suggestion is non-binding. Any decision on whether or how to implement such a recommendation is entirely a matter for the country concerned.”)

¹⁰⁷ As the SAA stated

Article 17.5(ii) provides that in reviewing antidumping actions taken by national authorities, the “scope” of WTO panel review will be based upon “the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.” Thus, as is the case in domestic judicial review, WTO panel review should be limited to the facts made available to the agency in conformity with the agency’s procedures. Further, panel review should not constitute a reconsideration of the administrative proceedings, but should determine whether the agency’s investigation of facts was properly conducted and its evaluation was unbiased and objective.

Fourth, Congress specified how it was to be kept informed regarding dispute resolution panel and Appellate Body proceedings.¹⁰⁸ Moreover, the statute set up specific procedures to be followed in the event of adverse reports necessitating a change in an agency's regulations or practice.¹⁰⁹ Finally, the statute established a different mechanism to handle specific actions by the Commission or by Commerce that were the subject of adverse reports.¹¹⁰

Fifth, the statute emphasizes that the political branches are the appropriate vehicle to address questions of inconsistency between U.S. statutes and international obligations. The statute provides that "no person" other than the United States can bring any claim in a U.S. court that arises out of the WTO Agreements or Congress' approval of the WTO Agreements, or that challenges any action or inaction by any U.S. department, agency, or instrumentality in any action brought under any provision of law on the grounds that it is inconsistent with the WTO Agreements, stating that "no person" other than the United States –

Article 17.6 contains a special standard of review, which is analogous to the deferential standard applied by U.S. courts in reviewing actions by Commerce and the Commission. It provides that:

- a WTO panel may not reevaluate the factual findings of the national authorities if the national authorities' determination was objective and unbiased, even though the panel might have reached a different conclusion; and
- where the language of the Agreement may be interpreted in more than one way, a panel must confirm a determination by national authorities that conforms to one of the permissible interpretations of the Agreement.

Article 17.6 ensures that WTO panels will not second-guess the factual conclusions of the agencies, even in situations where the panel might have reached a conclusion different from that of the agency. In addition, Article 17.6 ensures that panels will not be able to rewrite, under the guise of legal interpretation, the provisions of the Agreement, many of which were deliberately drafted to accommodate a variety of methodologies.

SAA at 818.

¹⁰⁸ Under 19 U.S.C. § 3533(d), Congress is to be notified promptly after a dispute settlement panel is established to consider the consistency of Federal or State law with any of the Uruguay Round Agreements. Under 19 U.S.C. § 3533(f), Congress is to be notified promptly after panel reports or Appellate Body reports are circulated and consulted concerning the nature of any appeal that may be taken of the report, and if the report is adverse to the United States, Congress is to be consulted regarding whether to implement the report's recommendation, and if so, the manner of such implementation and the period of time needed for such implementation. Under 19 U.S.C. § 3533(e), Congress must be promptly notified when appeals are taken of panel reports about the issues under appeal, and the identity of the persons serving on the Appellate Body that are reviewing the panel report.

¹⁰⁹ See 19 U.S.C. § 3533(g) (discussing the roles of the congressional committees, private sector advisory committees, the head of the relevant department or agency, and the Office of the United States Trade Representative ("USTR")). These procedures do not apply to any regulation or practice of the Commission. See 19 U.S.C. § 3533(g)(4).

¹¹⁰ See 19 U.S.C. § 3538(a) (regarding actions by the Commission) and 19 U.S.C. § 3538(b) (regarding actions by Commerce).

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.¹¹¹

The language of 19 U.S.C. § 3512(c)(1) is even stronger than the language from the 1979 Trade Act in 19 U.S.C. § 2504(d). Absent a finding that the provision is unconstitutional, it appears to deprive the judiciary of jurisdiction to review the consistency of the WTO agreements with U.S. antidumping or countervailing duty statutes or to review the consistency of agency action or inaction with the WTO agreements.¹¹² Indeed, in a section entitled, appropriately enough, “Intent of Congress,” the statute continues –

It is the intention of the Congress [through paragraph 1 cited above] to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements – (A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or (B) on any other basis.¹¹³

Because Congress intends to occupy the field in this area of law, private parties may not bring any cause of action to U.S. courts alleging inconsistencies between the implementing legislation or agency action or inaction thereunder and U.S. international trade obligations. Indeed, the sentence in the SAA that the U.S. statute “is intended to bring U.S. law fully into compliance with U.S. obligations” that often serves as a launching point for parties to argue and courts to examine on appeal arguments concerning the consistency of U.S. laws and U.S. international legal obligations, stands for the exact opposite proposition, when viewed in context. It reflects the Administration’s view, adopted by Congress, that U.S. law fully complies with its international obligations, as the United States understands them.¹¹⁴

Although 19 U.S.C. § 3512(c)(1) was not numbered to appear in the jurisdictional portion of the statute, based on the statutory context and corresponding history, its purpose is jurisdictional. Private parties are prohibited from bringing issues about the consistency of agency actions or inactions with U.S.

¹¹¹ 19 U.S.C. § 3512(c)(1) (emphasis added); see also, e.g., S. Rep. No. 412 at 13, 16; H. Rep. No. 826 at 25-26.

¹¹² As succinctly stated in Wright, Miller & Cooper’s treatise on Federal Practice and Procedure, “The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.” § 3529.1

¹¹³ 19 U.S.C. § 3512(c)(2) (emphasis added).

¹¹⁴ See SAA at 669, 670.

international trade obligations to U.S. courts.¹¹⁵ Instead, such claims must be brought by a Member country to a WTO dispute settlement panel (and eventually to the Appellate Body, if necessary). A statutory mechanism is in place to discuss, debate, and otherwise respond to adverse reports from WTO dispute settlement panels and the Appellate Body. No corresponding mechanism exists to provide the agencies with advice from the public, USTR, and Congress in order for the agencies to respond to adverse decisions from U.S. courts or NAFTA Article 1904 panels concerning the consistency of the agencies' actions or inactions with U.S. international trade obligations.

The consequences of this being a jurisdictional provision are not insignificant. As the Supreme Court has observed, "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued[,] and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"¹¹⁶ A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed,"¹¹⁷ and "[a]ny statute which creates a waiver of sovereign immunity must be strictly construed in favor of the Government."¹¹⁸

Not all courts reviewing this issue agree that the provision is jurisdictional. In fact, in many opinions, the courts do not even discuss this statutory provision. Outside the CIT and Federal Circuit, other courts agree that 19 U.S.C. § 3512(c)(1) is jurisdictional,¹¹⁹ but decisions from the CIT and Federal

¹¹⁵ This statutory provision is equally applicable in appeals of determinations by the Commission and Commerce to a NAFTA panel. Article 1904.3 of the NAFTA requires the Panel to apply the standard of review and general legal principles that a U.S. court would apply. NAFTA Annex 1911 specifically sets out that the "standard of review" for the United States is "the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended" 19 U.S.C. § 1516a(b)(1)(B). A Panel reviews "whether such determination was in accordance with the antidumping or countervailing duty law" of the United States. NAFTA Article 1904.2. For purposes of such review, U.S. law consists of "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the . . . [United States] would rely on such materials in reviewing a final determination" NAFTA Article 1904.2.

¹¹⁶ United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)); see also, e.g., Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature"); NEC Corp. v. United States, 806 F.2d 247, 249 (Fed. Cir. 1986) ("The terms of the government's consent to be sued in any particular court define that court's jurisdiction to entertain the suit.")

¹¹⁷ See, e.g., Mitchell, 445 U.S. at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)).

¹¹⁸ See, e.g., RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1461 (Fed. Cir. 1988) (citing Sherwood, 312 U.S. at 590).

¹¹⁹ In Intercitrus Ibertrade Commercial Corp. v. United States Department of Agriculture, 2002 WL 1870467, 24 ITRD 2088 (E.D. Pa. Aug. 13), plaintiffs had argued that a suspension order issued by the U.S. Department of Agriculture on certain clementines from Spain to prevent Mediterranean Fruit Flies was not consistent with U.S. obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures of the Uruguay Round Agreements requiring "transparency and accessibility" and the application of "sound science." The court found that it did not have jurisdiction because the URAA precludes a "challenge, in any action brought under any provision of law, any action or inaction

Circuit have been more mixed. When actually discussing this provision, these courts sometimes find that the provision deprives them of jurisdiction,¹²⁰ and sometimes reach the opposite conclusion.¹²¹

by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.” It also noted statutory language that “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States, shall have effect,” and that nothing “in this act shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health.” In Bronco Wine Company v. Bureau of Alcohol, Tobacco and Firearms, 168 F.3d 498 (table), 1999 WL 68632 (9th Cir.), in an unpublished opinion, the Ninth Circuit found that the “district court correctly concluded that there is no private right of action afforded Bronco for the Lanham Act claims it asserts in this litigation. Although 15 U.S.C. § 1052 references registration of wine trademarks in the context of the Uruguay Round Agreement, the Lanham Act does not provide a cause of action under which Bronco could bring a claim. See 19 U.S.C.A. § 3512(c) (stating that no one other than the United States ‘shall have a cause of action under the [Uruguay Round] Agreement’).” See also, e.g., John J. Barceló, The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, 21 Tul. Eur. & Civ. L.F. 147, 161-64 (2006).

¹²⁰ In Cook v. United States, 20 CIT 217, 220 (1996), Dale Cook, Sr., Chief of the Original Cherokee Nation, petitioned for the return of ownership of all land acquired by the United States in certain agreements with Native Americans or for a finding that the passage of the URAA and the Uruguay Round Agreements was unconstitutional. The court found that plaintiff lacked standing to challenge the URAA’s conflict with the Hopewell treaty because “[T]he terms of the [Uruguay Round Agreement] Act unmistakably limit private remedies solely to those brought by the United States.” Accordingly, pursuant to 19 U.S.C. § 3512(c), plaintiff lacked standing to bring any non-constitutional claims against the URAA. The court did not decide whether these statutory provisions precluded constitutional attack on the URAA because it found plaintiff’s constitutional claims were deficient for failure to demonstrate injury in fact. In Fieldston Clothes, Inc. v. United States, the CIT agreed with the Government’s argument that it lacked jurisdiction to hear that portion of Fieldston’s case challenging CITA’s action as inconsistent with the URAA or the Uruguay Round Agreement on Textiles and Clothing and cited 19 U.S.C. § 3512(c)(1) as the relevant legal authority. 903 F. Supp. 72, 76 (Ct. Int’l Trade 1995).

¹²¹ In Government of Uzbekistan v. United States, the CIT rejected Commerce’s reliance on 19 U.S.C. § 3512(c) as an “erroneous technical bar argument” and stated that “of course, the Uzbeks are not bringing an action under any WTO agreement, and they are free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.” 25 CIT 1084, 1088 (2001); see also, e.g., SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1341 (Ct. Int’l Trade 2004). In Timken Co. v. United States, the CIT found that Koyo “is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department’s application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement. Koyo is certainly ‘free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.’” 240 F. Supp. 2d 1228, 1838 (Ct. Int’l Trade 2002), aff’d, 354 F.3d 1334, 1341 (Fed. Cir.), cert. denied sub nom. Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). With respect to a different claim, that Commerce’s methodology involved zeroing and violated the WTO AD Agreement, the CIT also found that “[t]his action is commenced under U.S. law, and a party may reasonably assume that the agency will interpret U.S. law so as to avoid a conflict with international obligations.” 240 F. Supp. 2d at 1242; see also, e.g., PAM, S.p.A. v. United States, 265 F. Supp. 2d

In denying arguments that 19 U.S.C. § 3512(c)(1) deprives the court of jurisdiction, court opinions do not give much guidance why this statutory provision does not apply.¹²² Indeed, the rationale in these cases arguably only reaches a portion of the statutory provision, providing that no person other than the United States “shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement.” Conspicuously missing from these opinions is a discussion of the meaning of section 3512(c)(1)(B), which provides that no person other than the United States “may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States ... on the ground that such action or inaction is inconsistent with such agreement.” These opinions also do not purport to explain the purpose of 19 U.S.C. § 3512(c)(2) (Congress’ expression of its intention to “occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements”). The absence of any such analysis is striking in light of the progressively stronger statutory language dealing with this issue, the clarity of the statutory language, the reinforcement of the statutory language by the SAA and the legislative history, and the fact that the Executive and Legislative branches acted in concert to implement U.S. obligations under the non-self-executing Uruguay Round Agreements

1362, 1371 n.13 (Ct. Int’l Trade 2003); NSK Ltd v. United States, 346 F. Supp. 2d 1312, n.6 (Ct. Int’l Trade 2004). In Timken, the Federal Circuit found that “section 3512(c) bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the [URAA]. 19 U.S.C. § 3512(c). As the [CIT] noted, however, Koyo brought this action under U.S. law under the assumption that it would be interpreted so as to avoid a conflict with international obligations. We agree and find that § 3512(c) does not prevent us from addressing Koyo’s appeal.” 354 F.3d 1334, 1341 (Fed. Cir. 2004). A NAFTA panel reached the same result, through a different route. See In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 at 26-27 (Jun. 9, 2005) (concluding that section 3512(c) barred a “person” from making such arguments but did not preclude a panel from considering such issues).

¹²² But cf Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321, 1357-66 (Ct. Int’l Trade 2006), aff’d in relevant part and vacated and remanded on other grounds, 517 F.3d 1319, 1339-42 (Fed. Cir. Feb. 25, 2008) (involving the Byrd Act, passed after a different congressional-executive agreement (the NAFTA) was implemented in the United States, and allegations that the United States did not provide notice to Mexico and Canada of its intent to apply the Byrd Act to imports from these countries and that the Appellate Body had issued adverse reports regarding the Byrd Act) (rejecting arguments that 19 U.S.C. § 3312(c) precluded parties from challenging implementation of the NAFTA and distinguishing between Congressional approval of the NAFTA, Congressional approval of the SAA, and Congressional implementation of the NAFTA). The per curiam opinion by a three-judge panel in Tembec, Inc. v. United States, 441 F. Supp. 2d 1302, 1319-20 (Ct. Int’l Trade 2006), agreed with the analysis in Canadian Lumber Trade Alliance with respect to section 3312(c) and also found that section 3512(c) bars actions “arising from the [Uruguay Round Agreements] and Congressional approval thereof” as opposed to actions involving the “implementation of” the Uruguay Round Agreements. Regardless of the merits of the court’s attempted distinction in Canadian Lumber Trade Alliance, although section 3312(c) is similar to section 3512(c), there is additional language in section 3512(c) that arguably warrants a different analysis. The opinion in Tembec and the Federal Circuit’s opinion affirming Canadian Lumber Trade Alliance in relevant part do not address the additional, stronger language in section 3512(c) discussed herein.

in the way that they did. These opinions simply do not acknowledge these points.¹²³

¹²³ As a practical matter, the willingness of the courts to entertain such issues is problematic because the courts do not have access to current information concerning the WTO Agreements, including the status of reports by WTO dispute resolution panels and the Appellate Body discussing these agreements. Due to the confidential nature of interim reports, for example, the system is not set up to provide the courts with such access. Even on a more basic level, there are misunderstandings about the nature of U.S. laws and the WTO Agreements that could lead to unintended consequences. For example, in Allied Tube and Conduit Inc. v. United States, the CIT (erroneously) stated that the SAA is “a document prepared by the WTO for the purpose of interpreting and explaining the provisions of the Uruguay Round Agreement.” 127 F. Supp. 2d 207, 217 at n.7 (Ct. Int’l Trade 2000). In fact, the SAA was prepared by the Executive branch, and Congress has determined that it “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d).

Some more recent decisions of the CIT and Federal Circuit suggest that these courts may be rethinking the meaning of 19 U.S.C. § 3512(c).¹²⁴ Only time will tell whether the course has changed or if these cases are more evidence of mixed treatment of this statutory provision.

IV. Post-Uruguay Round Agreements Act Case Law

In the first decade after the Uruguay Round Agreements implementing legislation took effect, there was an explosion of cases in which the courts not only took jurisdiction over but also reviewed the consistency of decisions by Commerce and the Commission with the WTO Agreements and/or reports by international trade panels. One reason may help to explain some of the increase. After the Supreme Court's decisions in Christensen v. Harris County¹²⁵ and United States v. Mead Corp.¹²⁶ there was some uncertainty about whether Chevron deference applied to determinations issued in trade cases involving Commerce and the Commission. Contemporaneous law review articles and decisions issued by the courts reflected this uncertainty.¹²⁷ The Federal Circuit's September 25, 2001, decision in Pesquera Mares Australes v. United States, 266 F.3d 1372 (Fed. Cir.), settled any such questions and reaffirmed that Chevron deference applies to unfair trade determinations by Commerce (and the Commission). As the Federal Circuit explained, in many past cases –

we have afforded Chevron deference to Commerce's antidumping determinations even when (as here) there is no applicable regulation. ... ¶The Supreme Court's recent decision in Mead does not change our obligation to afford Chevron deference to

¹²⁴ See, e.g., Gilda Industries, Inc. v. United States, 446 F.3d 1271 (Fed. Cir. 2006). When the European Community did not implement the recommendations of a WTO report in EC – Measures Concerning Meat and Meat Products (Hormones), the United States was authorized to retaliate. Gilda, an importer of toasted breads from Spain, argued that USTR's implementation of a retaliation list resulted in the collection of retaliation duties that exceeded what the United States was entitled. The Federal Circuit held that under 19 U.S.C. § 3412(c), Gilda “may not challenge the retaliation list's implementation on the ground that it violates the WTO's recommendation.” 446 F.3d at 1284; see also SKF USA Inc. v. United States, 491 F. Supp. 2d 1354, 1365 (Ct. Int'l Trade 2007). Likewise, the Federal Circuit held in Norsk Hydro Canada, Inc. v. United States that NHC's argument that Charming Betsy necessitated that the court construe a statutory term consistent with the WTO Subsidies Agreement failed for several reasons, including that Article 19.4 of that agreement “is not self-executing and therefore ‘cannot become binding domestically unless Congress implemented it through domestic litigation,’” and because “Congress has precluded challenges to agency action on the grounds that they are inconsistent with Uruguay Round Agreements, of which Article 19:4 is a part.” 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006).

¹²⁵ 529 U.S. 576 (2000) (interpretations of ambiguous statutes in opinion letters, “like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant Chevron-style deference.” Instead, such interpretations are “entitled to respect” under the decision in Skidmore v. Swift & Co. (323 U.S. 134, 140 (1944)), “but only to the extent that those interpretations have the ‘power to persuade’”).

¹²⁶ 533 U.S. 218 (2001) (concluding that Customs' import ruling letters are entitled to Skidmore not Chevron deference).

¹²⁷ See, e.g., Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int'l L.J. 1533, 1538-39 (2001).

Commerce’s interpretations of ambiguous statutory terms articulated in the course of Commerce’s antidumping determinations. ¶We understand Mead to clearly recognize that Chevron deference is not limited to regulations adopted after notice-and-comment rulemaking. The line that Mead draws is not defined with great clarity. However, we conclude that Chevron deference is due at least to those statutory interpretations that are articulated in any ‘relatively formal administrative procedure,’ Mead, 121 S Ct. at 2172, where Congress has provided for agency resolution of rights, subject to deferential judicial review (whether such judicial review involves direct review of the agency, and whether it is confined to review on the administrative record) and those interpretations are embodied in rulings that are given precedential effect by the agency.¹²⁸

As shown below, although Pesquera Mares was issued relatively soon after the Christensen and Mead decisions, the implication of Pesquera Mares in appeals involving arguments about the WTO agreements and reports by international trade panels did not register immediately.

A. When Congressional Intent is Clear

After the Uruguay Round Agreements implementing legislation became effective, to determine whether Congressional intent is clear, in addition to the language of the statute, surrounding provisions, and the corresponding legislative history,¹²⁹ the courts should also examine the congressionally approved SAA in this context. The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.”¹³⁰

1. The Role, if any, For International Trade Agreements

In international trade cases, when Congressional intent is clear,¹³¹ Chevron deference is not

¹²⁸ 266 F.3d at 1379-80. The delegation of authority to the Commission to conduct antidumping and countervailing duty investigations is governed by the same statute as the delegation to Commerce, so Pesquera Mares resolved the issue of Chevron deference to both agencies in their respective roles in administering these laws. Cf, e.g., Nucor Corp. v. United States, 414 F.3d 1331, 1336 (Fed. Cir. 2005).

¹²⁹ Chevron, 467 U.S. at 843 n.9, 845, 859-64 (employing “traditional tools of statutory construction,” examining the legislation and its history and concluding that Congress did not have a specific intention and that the EPA’s use of the bubble concept was a reasonable policy choice for the agency to make).

¹³⁰ 19 U.S.C. § 3512(d); see also, e.g., Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int’l L.J. 1533, 1543 n.2 (2001).

¹³¹ It bears repeating: “First, always, is the question whether Congress has directly spoken If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron, 467 U.S. at 842-43. Of course, there may be disagreement between the litigants and the reviewing courts as to whether or not a particular statute is clear.

triggered and neither is Charming Betsy.¹³² As the courts have sometimes explained, if Congressional intent is clear, even if there is a conflict with international trade agreements, U.S. law is supreme, and it is up to the other branches to address the conflict. For example, in Campbell Soup Co., Inc. v. United States, the Federal Circuit rejected as “not determinative” an argument that the agency’s construction of a clear statute was improper because it violated U.S. international trade obligations.¹³³ Likewise, the Federal Circuit majority concluded in Turtle Island Restoration Network that, because Congressional intent was clear from a review of the plain language, legislative history, and comparison with other statutory provisions, that was the end of the matter, and it did not need to reach the issue of “whether the State Department’s interpretation would minimize potential conflicts with international trade agreements.”¹³⁴

Unfortunately, on several occasions, U.S. courts found Congressional intent to be clear, sometimes after reviewing the SAA, and yet they then proceeded to discuss or examine the language of the international trade agreements. For example, in F. Lli de Cecco di Filippo Fara San Martino, S.P.A. v. United States, Commerce had argued that the U.S. statute was ambiguous and that the court should defer to Commerce regarding the statute’s silence about the form, manner, and timing of how an exporter

¹³² See, e.g., Alex O. Canizares, Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine, 20 Emory Int’l L. Rev. 591, 640-41 (Fall 2006); Patrick C. Reed, Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality, 38 Geo. J. of Int’l L. 209, 220 (Fall 2006); Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int’l L.J. 1533, 1543-45 (2001).

¹³³ 107 F.3d 1556, 1561 (Fed. Cir. 1997) (quoting Suramerica for the proposition that the GATT does not trump domestic law, and that it is a matter for Congress to remedy any inconsistencies with GATT). Similar reasoning was repeated in Fujitsu General Am., Inc. v. United States, 110 F. Supp. 2d 1061, 1083 (Ct. Int’l Trade 2000) (citing 19 U.S.C. § 3512(a)(1) in rejecting Fujitsu’s argument that “the application of compound interest violates the government’s obligation” under the GATT, “[e]ven assuming the instruction of 19 U.S.C. § 1677g(b) were somehow inconsistent with the WTO Antidumping Agreement, however, an unambiguous statute will prevail over an obligation under the international agreement” and later stating, “[a]s 19 U.S.C. § 1677g(b) unambiguously provides that interest on antidumping duty payments must be compounded in accordance with 26 U.S.C. § 6621, even if we were so inclined, this Court cannot alter or repeal the clear instruction of the statute.”). See also Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361, 1369 (Fed. Cir. 2000) (“Neither our trading partners nor the World Trade Organization has taken final formal action directed against the Harbor Tax. It is speculative and conjectural whether they will do so. If they take such action and the result is to create serious problems, either the executive or legislative branch presumably will take appropriate action”); AG der Dillinger Huttenwerke v. United States, 193 F. Supp. 2d 1339, 1350 at n.17, 1359 (Ct. Int’l Trade 2002) (remanding the case due to Commerce’s failure to fulfill its statutory obligations, and only referencing consistency with U.S. international trade obligations in the opinion’s summaries of plaintiff’s arguments to that effect).

¹³⁴ Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1291-96, reh’g en banc denied, 299 F.3d 1373 (Fed. Cir. 2002), cert. denied, 538 U.S. 960 (2003). In that case, the majority came to a different conclusion than the dissenting opinion regarding what the “clear” legislative intent was, but the dissenting opinion, like the majority opinion, refused to reach arguments about the consistency of U.S. laws with international trade obligations once it found Congressional intent to be clear.

should request an extension of provisional measures. In contrast, plaintiffs had contested the legality of Commerce's failure to terminate the provisional measures within four months of publishing its preliminary determination. The CIT agreed with plaintiffs, finding that the statute was clear and stating that only the most extraordinary showing of contrary intentions would lead it to disregard the plain meaning of the statute. Notwithstanding its finding that the statute was clear, the CIT also discussed the corresponding provisions of the WTO Antidumping Agreement, observing that the

strong wording in both 19 U.S.C. § 1671b(d) (CVD provisional measures) and 19 U.S.C. § 1673b(d) and the corresponding sections of the Antidumping Agreement suggests that the GATT signatories meant to put a strict limit on the imposition of provisional measures, particularly because of the harshness of the penalties involved, and that Congress has now dealt specifically with the GATT requirement. ... Petitioners correctly point out that the time limit on provisional measures initially arose partly because there was international concern with the length of time U.S. antidumping investigations were taking, stemming from the two-agency format which the U.S. employs. ... As Congress' intent, evidenced by the URAA, was to insure U.S. law was consistent with the GATT, ... it can be inferred that Congress' intent was to keep provisional measures to as short a period as possible, only to be extended by a request from those whom the provisional measures adversely affect.¹³⁵

Similarly, despite the clear statutory language and support from the SAA in World Finer Foods the CIT proceeded to discuss the corresponding provision of the WTO Antidumping Agreement.¹³⁶ The CIT's insertion of a footnote in Steel Authority of India noting that "nothing in the WTO Agreement requires otherwise," after having found that the U.S. statute was clear as further evidenced by the legislative history is also puzzling.¹³⁷

In a different case, the CIT determined that Congress' intent was clear after looking to the plain meaning of the statute and its structure and history.¹³⁸ The CIT's "step one" analysis under Chevron also included reviewing the international agreement, which the court considered part of the "legislative history":

In this case legislative history includes an examination of the GATT Valuation Code, because "Title II [Customs Valuation] ... implement[ed] in U.S. law the [Customs Valuation Agreement]." ... As such, the definition of assist, gleaned from the Customs Valuation Code was codified into law for the first time by the statute. Upon examination of these factors, the Court determines that waste fabric may be properly included as part of an assist.¹³⁹

¹³⁵ 21 C.I.T. 1130, 1997 WL 615693 (Ct. Int'l Trade 1997).

¹³⁶ World Finer Foods, Inc. v. United States, 24 CIT 541, 546-47 (2000).

¹³⁷ Steel Authority of India, Ltd. v. United States, 146 F. Supp. 2d 900, 909-10 & n.18 (Ct. Int'l Trade 2001).

¹³⁸ Salant Corp. v. United States, 86 F. Supp. 2d 1301, 1304-07 (Ct. Int'l Trade 2000).

¹³⁹ Salant, 86 F. Supp. at 1306.

Others took a similar approach in cases that involved Commerce rather than Customs issues.¹⁴⁰

2. The Role, if any, for Reports by International Trade Panels

In circumstances where Congressional intent is clear, it would seem that much more obvious that courts should not take into consideration the existence of adverse reports issued by WTO dispute resolution panels or the Appellate Body. In several instances, the courts did take such an approach and correctly left to the political branches the decision on how to respond to the adverse report.¹⁴¹ In other circumstances, however, the courts felt the need to “take note of” or otherwise acknowledge the existence of adverse reports, sometimes even if these reports did not involve the same underlying investigation.

In Earth Island Institute v. Warren Christopher,¹⁴² the CIT determined that the language of the statute was clear and a ban on shrimp imported from commercial trawling boats that were not equipped with special devices to protect endangered sea turtles applied globally, not just to shrimp harvested in certain geographic regions.¹⁴³ An intervenor had asserted that there were “very serious questions relating to the consistency of the {U.S. statute} with U.S. GATT obligations. Indeed, in two instances GATT dispute panels have found analogous embargo provisions of the Marine Mammal Protection Act of 1972, ... to be violative of GATT principles. A GATT challenge to operation of {the U.S. statute} would likely

¹⁴⁰ See, e.g., Koyo Seiko Co., Ltd. v. United States, 110 F. Supp. 2d 934, 940 (Ct. Int’l Trade 2000) (regarding whether 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) required Commerce to calculate assessment rates using sales value, rather than entered value, the CIT concluded that the statute is not clear. Turning to the legislative history to determine whether Congress had directly addressed the precise question at issue, it noted that “[t]here is nothing in the history of GATT 1947, the URAA, or 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) that indicates any intent to designate a specific denominator for the assessment rate formula. Therefore, the court concludes that neither the statute nor its legislative history provides an ‘unambiguously expressed intent’ with regard to the precise question at issue.” Absent any clear guidance on the issue from Congress, the CIT next examined whether the agency’s interpretation was reasonable, and concluded that it was.); Allied Tube and Conduit v. United States, 127 F. Supp. 2d 207, 216-19 (Ct. Int’l Trade 2000) (wherein the CIT found the statute was not clear but the SAA was clear, then found that the corresponding provision of the WTO Antidumping Agreement provided a result similar to the SAA, and ultimately upheld Commerce’s practice that was consistent with the SAA and the WTO Antidumping Agreement).

¹⁴¹ See, e.g., Nippon Steel Corp. v. United States, 146 F. Supp. 2d 835, 840-41 at n.9 (Ct. Int’l Trade 2001) (“whatever the merits of the [WTO panel’s] holding in light of WTO rules, it plainly contradicts the applicable statute” ... “the panel decision therefore has no bearing ...”); see also, e.g., Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int’l L.J. 1533, 1544 (2001) (“the U.S. court must apply [the U.S. statute] as written, whatever the consequences to international considerations and the views of international organizations. It is the Executive Branch that must respond to a WTO decision that concludes a U.S. statute unreasonably interprets and thus violates one of the WTO agreements.”).

¹⁴² 913 F. Supp. 559 (Ct. Int’l Trade 1995).

¹⁴³ 913 F. Supp. at 575.

produce the same conclusions.”¹⁴⁴ The intervenor argued that the CIT should apply a Charming Betsy corollary – even if all conflict with international obligations could not be eliminated, the court should seek to minimize or reduce conflict to the maximum extent possible, which in that case, the intervenor argued, meant to construe the U.S. statute so that it affected the fewest nations and products possible. In response the CIT stated:

[s]uffice it to state that this court concurs [citing Footwear], but also notes in passing that the record of enforcement of section 609 to date does not reveal troubling tensions with the foreign sovereigns already deemed covered, including those not certified positively and thus subject to embargoes.¹⁴⁵

While the above quotation might be considered dicta in light of the CIT’s finding that the U.S. statute was clear, it suggests that had there been a GATT challenge or even an adverse GATT panel report involving the specific U.S. laws at issue, the court might have construed the clear statute more narrowly. The implications of such a statement are troubling because the Charming Betsy doctrine should not come into play when the court finds that the statute is clear.¹⁴⁶

Likewise, in Delverde, in reviewing Commerce’s calculation of countervailing duties in the case of a sale of a private company to another private company, the Federal Circuit found that Commerce’s methodology conflicted with the clear statute. The Federal Circuit also noted that while

this appeal was pending before this court, a dispute panel of the [WTO] issued a decision holding that Commerce’s countervailing determination in the British Steel case, which involved the same methodology as in this case was not in accordance with the definition of a “subsidy” as stated in the [WTO Subsidy Agreement]. ... Because we hold Commerce’s methodology to be invalid under the amended Tariff Act irrespective of the WTO’s decision, we do not consider the relevance of that decision except to note that it is

¹⁴⁴ 913 F. Supp. at 579.

¹⁴⁵ 913 F. Supp. at 579.

¹⁴⁶ When the circumstances foreseen by the intervenor in Earth Island I did arise, and first a WTO panel, and later the Appellate Body (on different grounds) found that the U.S. laws violated U.S. international trade obligations, the CIT did not follow its earlier erroneous inclination. In Earth Island Institute v. William M. Daley (Earth Island II), 48 F. Supp. 2d 1064 (Ct. Int’l Trade 1999), the CIT reviewed guidelines that were issued by the State Department in 1998 after an adverse WTO panel report. After an Appellate Body report was eventually issued, the United States indicated that it would comply with the report. Before the CIT, the United States argued that the 1998 Guidelines conformed to the plain meaning of the U.S. statute, and that any ambiguity should be resolved in a manner deferential to administrative prerogatives and/or that affected the fewest nations and shipments possible, consistent with the Charming Betsy doctrine. 48 F. Supp. 2d at 1078. The court found, as it did in Earth Island I, that the language of the statute was clear, and it found that the new Guidelines issued by the State Department did not comport with the statute. 48 F. Supp. 2d at 1079-80. Having found the U.S. statute to be clear, the court did not apply Charming Betsy. The CIT decided to reserve its judgment on Earth Island Institute’s motions until the defendants’ annual report to Congress. 48 F. Supp. 2d at 1081.

not inconsistent with our holding.¹⁴⁷

Later, in Allegheny Ludlum, the Federal Circuit determined that Commerce’s same-person methodology in privatization cases was inconsistent with clear Congressional intent in the statute and legislative history, but did not end its discussion there. Instead, the Federal Circuit went on to say that, it found “additional support” in an Appellate Body report that found the U.S. practice violated its international obligations, even though it acknowledged that the Charming Betsy canon “is only a guide” and that the Appellate Body report “does not bind this court in construing domestic countervailing duty law.”¹⁴⁸

B. When Congressional Intent is Not Clear

After the Uruguay Round Agreements Act became effective, the courts also confronted the question of what to do in international trade cases in circumstances where Congressional intent is not clear after reviewing the statute, the SAA, and any legislative history. Under Chevron, if the court “determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁴⁹

1. The Role, if any, for International Agreements

Some have suggested viewing international agreements as “secondary legislative history,” meaning that courts would reject under Chevron “step two” agency interpretations that are contrary to clear language in the international agreements, with reliance upon the Charming Betsy canon being “unnecessary.”¹⁵⁰ In one early case where Congressional intent was not clear, the CIT upheld the agency

¹⁴⁷ Delverde, SRL v. United States, 202 F.3d 1360, 1369 (Fed. Cir.), as amended on denial of reh’g and reh’g en banc, (Jun. 20, 2000). Similarly, in Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co, 221 F.3d 924 (6th Cir. 2000), the Sixth Circuit determined that the U.S. statute was clear, providing only for treble damages, attorney’s fees, and costs, and it did not find any evidence to suggest that injunctive relief was “traditionally accorded by courts of equity,” so it determined that it was under no obligation to exercise its inherent equitable powers to grant injunctive relief under the 1916 Act. Notwithstanding its finding that the statute was clear, the court also “took note” that the WTO “has just recently ruled in two separate decisions that the 1916 Act violates various sections of several international agreements, including the [GATT], which generally prohibits bans on imports. . . . While GATT ‘does not trump domestic legislation,’ Congress has an ‘interest in complying with U.S. responsibilities under the GATT.’” (citing Suramerica).

¹⁴⁸ Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

¹⁴⁹ Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); see also id. at 843 n.9, 845, 859-64.

¹⁵⁰ Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int’l L.J. 1533, 1543 (2001); see also e.g., Patrick C. Reed, Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality, 38 Geo. J. of Int’l L. 209, 222-25 (Fall 2006); John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 96 (2nd Ed. 1997).

on the basis that the agency's interpretation of the statute was "not inconsistent with" the international agreement.¹⁵¹ In a more recent case, however, the Federal Circuit reiterated its holding from a pre-URAA case and found that even in circumstances where Congressional intent was not clear, domestic laws need not be consistent with international agreements. In Corus Staal BV v. Department of Commerce, the Federal Circuit rejected Corus' argument that, where the statute did not directly speak with respect to zeroing, Commerce's refusal to apply Charming Betsy to interpret the statute consistent with U.S. international obligations under international trade agreements was unreasonable. Citing 19 U.S.C. § 3512(a), the Federal Circuit emphasized that "neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation."¹⁵² It explained that if the U.S. law is "inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress" and cited Suramerica and 19 U.S.C. § 2504(a).¹⁵³

2. The Role, if any, for Reports by International Trade Panels

If international agreements are not to be used to invalidate an otherwise permissible agency construction of silent or ambiguous Congressional intent, then, it might be argued, there would be even less of a basis to rely on reports by international trade panels in such circumstances. In the first several years after the passage of the Uruguay Round Agreements Act, however, U.S. courts frequently examined and were willing to give weight to reports by international trade panels.

On the one hand, the D.C. Circuit in George E. Warren Corp. found that the statute was not clear and deferred to an EPA rule that, among other things, took into consideration an adverse WTO panel report.¹⁵⁴ A WTO panel had found that a 1994 EPA rule violated the anti-discrimination norm of the GATT because domestic refiners could set individual baselines while foreign refiners could not. The United States announced it would comply with the report, and the EPA then promulgated a 1997 final rule. Those challenging the EPA argued that in the new rule, the agency could not consider factors other than air quality such as comments on the proposed rule by the Department of Energy and the WTO panel's report. Finding nothing to indicate Congressional intent precluding the EPA from considering possible effects on the price and supply of gasoline and U.S. international trade obligations, the court moved to Chevron "step two." The D.C. Circuit noted, that in the

¹⁵¹ See, e.g., Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213, 1218 (Ct. Int'l Trade 1998) (finding Commerce's regulation regarding reimbursement of dumping duties was a permissible construction of the statute, and that the regulation was not inconsistent with the GATT Code). In Usinor Industeel, S.A. v. United States, however, the CIT found the agency's argument, which it characterized as "until respondents establish that the conditions surrounding the original determination no longer exist, excess capacity translates to a finding of future volume," to be "somewhat troubling," but to have some statutory support. The court questioned whether this practice of U.S. investigating authorities relying heavily on the determination in the original investigation "while narrowly consistent with U.S. law and congressional instructions" might not live up to U.S. commitments under the WTO AD Agreement, but in the end, the court affirmed the agency on this point. 26 CIT 1402, 1413 & n.20 (2002).

¹⁵² Corus Staal BV v. United States, 395 F.3d 1343, 1348 (Fed. Cir. 2005).

¹⁵³ 395 F.3d at 1348.

¹⁵⁴ George E. Warren Corporation v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998).

particular circumstances of this case our usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute is bolstered by the decision of the WTO lurking in the background. “Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States ‘to violate the law of nations.’”¹⁵⁵

Thus, the court concluded that it was permissible for the agency to take into consideration international obligations in determining how to interpret an ambiguous statutory provision, and it upheld the agency’s interpretation that did so.¹⁵⁶

On the other hand, rather than leaving the weight of the adverse panel report to the agency like the George E. Warren Corp. court, in Hyundai Electronics Co. Ltd. v. United States,¹⁵⁷ the CIT appeared willing to give some weight to an adverse panel report, although it ultimately found that Commerce’s regulation regarding revocation of antidumping orders was a permissible construction of statute. With respect to plaintiff’s argument that Commerce’s regulation was inconsistent with U.S. obligations under GATT, the court distinguished between a WTO panel report and the Agreements themselves. Relying on the mistaken citation in the Supreme Court’s opinion in DeBartolo, discussed above, the court noted that when confronted with a conflict between an international agreement and U.S. law, an unambiguous statute will prevail, but it also noted that absent express language to the contrary, a statute should not be interpreted to conflict with international agreements.¹⁵⁸ A WTO dispute panel reviewing the same underlying administrative decision had found that Commerce’s “not likely” requirement violated WTO rules. The panel did not suggest that the United States revoke the order on DRAMs from Korea but instead concluded that the United States had a “range of possible” options to implement its recommendation. Although the court held that the WTO panel report had no binding effect because any response to the report was the prerogative of the executive branch under 19 U.S.C. § 3538, the court nevertheless rejected the implication that “a panel report serves no purpose in litigation before the court. To the contrary, a panel’s reasoning, if sound, may be used to inform the court’s decision.”¹⁵⁹ In the end, the court determined that Commerce’s regulation was consistent with the statute and in consonance with

¹⁵⁵ George E. Warren Corp., 159 F.3d at 624.

¹⁵⁶ When Congressional intent is not clear (the statute is ambiguous or silent), but the agency decision is in accord with a report of the WTO dispute resolution panel or the Appellate Body,

then the “reasonableness” of the agency decision is given strong support by the WTO interpretation, and a court should hesitate to find such an agency decision “unreasonable.” The Charming Betsy doctrine, if applicable, also points in the same direction.

Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int’l L.J. 1533, 1544 (2001).

¹⁵⁷ 53 F. Supp. 2d 1334 (Ct. Int’l Trade 1999).

¹⁵⁸ 53 F. Supp. 2d at 1344.

¹⁵⁹ 53 F. Supp. 2d at 1343.

U.S. international trade obligations, and stated “unless the conflict between an international obligation and Commerce’s interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce’s regulatory authority under the Charming Betsy doctrine.”¹⁶⁰

The court in Usinor, Beautor v. United States went a step further in an appeal involving the “no discernible adverse impact” standard in five-year reviews.¹⁶¹ In reviewing a five-year review determination issued by the Commission that was also the subject of an adverse report by a WTO dispute resolution panel, the CIT first compared the U.S. statute with the WTO Antidumping Agreement and ascertained that there might be a conflict between the two.¹⁶² The CIT then remanded the determination to the Commission for the agency to “discuss its obligations under the Antidumping Agreement vis-a-vis 19 U.S.C. § 1675a(a)(7) and [to] fully explain whether its position can be reconciled with, or unavoidably contradicts, the Antidumping Agreement.”¹⁶³ The court asked if the language of the U.S. statute and the WTO Agreement “might be read in harmony.”¹⁶⁴ After the Commission issued its remand determination in which it explained why the negligibility standard in original investigations did not strictly apply to the “no discernible adverse impact” standard in five-year reviews, the Appellate Body issued a report that overturned the earlier adverse WTO panel report reviewing the same underlying determination; the Appellate Body agreed with the United States that original investigations and five-year reviews are different processes with distinct purposes. In addition, prior to oral argument, a different WTO panel and the Appellate Body issued additional reports reaching a similarly favorable conclusion in a different matter.¹⁶⁵ In reviewing the Commission’s remand determination, the court ultimately found that the Commission’s “interpretation of U.S. law as not requiring a strict quantitative negligibility analysis is not inconsistent with the WTO AD Agreement.”¹⁶⁶ It also “found persuasive” the “reasoning” of the later WTO panel and Appellate Body reports and emphasized that “[n]othing in the law foreclose[d] it” from looking to such reports.¹⁶⁷

Like the Hyundai and Usinor Beautor courts, the CIT in Timken Co. v. United States agreed that WTO reports are not binding but asserted that they might inform its decision.¹⁶⁸ The court determined that the U.S. statute and Commerce’s regulations were ambiguous regarding the definition of “ordinary course of trade,” but it agreed that both were consistent with the WTO AD Agreement, as a WTO dispute

¹⁶⁰ 53 F. Supp. 2d at 1343-45.

¹⁶¹ Usinor, Beautor v. United States, 26 CIT 267 (2002).

¹⁶² 26 CIT at 773-78.

¹⁶³ 26 CIT at 795.

¹⁶⁴ 26 CIT at 778.

¹⁶⁵ Usinor, Beautor v. United States, 342 F. Supp. 2d 1267, 1276-77 (Ct. Int’l Trade 2004).

¹⁶⁶ 342 F. Supp. 2d at 1280-81.

¹⁶⁷ 342 F. Supp. 2d at 1279 at n.13.

¹⁶⁸ 240 F. Supp. 2d 1228, 1239 (Ct. Int’l Trade 2002), aff’d, 354 F.3d 1334 (Fed. Cir.), cert. denied sub nom. Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

settlement panel and the Appellate Body had also found.¹⁶⁹ The CIT upheld Commerce's application of the arm's-length test in that particular case, but noted that Commerce was reconsidering its policy under 19 U.S.C. § 3538(b) as a result of the Hot-Rolled Steel from Japan report that found the policy (as distinguished from the statute or regulations) was inconsistent with U.S. international trade obligations. Commerce had published in the Federal Register a notice requesting comments on the proposed changes.¹⁷⁰ As the court explained, it found itself in "the unfortunate position of reviewing a policy that Commerce has already decided to modify. Nothing in this opinion should be construed as limiting the Department's obligations in this regard."¹⁷¹ In circumstances such as the CIT faced in Timken and in Usinor Beautor, the court might have considered staying its own proceedings pending the outcome of the related proceedings, remanding the determination, or otherwise allowing the agency the first opportunity to give adequate consideration to the international obligations.¹⁷² Unlike the courts, Congress did not preclude agencies from hearing and considering arguments regarding the consistency of their actions with U.S. international trade obligations.¹⁷³

As discussed next, beginning around 2004, a series of considerably more deferential opinions began to issue from U.S. courts. These decisions gave progressively less weight to reports by international trade panels and deferred to the political branches to work out possible responses to adverse reports by international trade panels pursuant to the mechanisms established in the statute. In addition to the Pesquera Mares decision that resolved the issuance of deference to Commerce and the Commission, another event that may have influenced the change was the passage of the Trade Act of 2002 in which Congress expressed its frustration with "the recent pattern of decisions by dispute settlement panels of the

¹⁶⁹ 240 F. Supp. 2d at 1240.

¹⁷⁰ 240 F. Supp. 2d at 1240-42; see also SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1342-43 (Ct. Int'l Trade 2004).

¹⁷¹ 240 F. Supp. 2d at 1240 n.17.

¹⁷² See, e.g., John J. Barceló III, The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, 21 Tul. Eur. & Civ. L.F. 147, 161 (2006); Jane A. Restani & Ira Bloom, Interpreting International Trade Statutes: Is the Charming Betsy Sinking?, 24 Fordham Int'l L.J. 1533, 1543-44 (2001) ("If the Court is uncertain whether the agency has given adequate consideration to matters of international law, it should consider remand to the agency with appropriate direction. The court should avoid importing its interpretation of international law into its decision in derogation of deference to the agency."); Tembec, Inc. v. United States, 29 CIT 656 (2005) (staying three-judge panel proceedings to await the outcome of an Extraordinary Challenge Committee review of a NAFTA panel's opinion in litigation regarding softwood lumber from Canada).

¹⁷³ As the URAA SAA states –

The prohibition of a private right of action based on the Uruguay Round agreements, or on Congressional approval of those agreements in section 101(a), does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law.

SAA at 676.

WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures by WTO members under the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.”¹⁷⁴ Congress was concerned that in these reports, WTO dispute resolution panels and the Appellate Body did not apply an appropriately deferential standard of review.¹⁷⁵ Other commentators have expressed similar concerns about reports by WTO dispute resolution panels and the Appellate Body.¹⁷⁶ Opinions issued by U.S. courts began to echo some of these concerns about reports by international trade panels.

In one of several opinions involving zeroing,¹⁷⁷ the Federal Circuit found in Timken that the U.S. statute did not unambiguously preclude Commerce’s practice and noted that Commerce’s long-standing practice had been upheld previously under Chevron “step two.”¹⁷⁸ As the Federal Circuit explained, it would not overturn Commerce’s practice based on the Appellate Body report in EC – Bed Linen because that report did not pertain to a U.S. practice and dealt with an antidumping investigation whereas the challenged determination before the Federal Circuit involved an administrative review. For these reasons, the Federal Circuit, like the CIT in the underlying case, upheld Commerce’s practice as reasonable.¹⁷⁹

Soon thereafter, the Federal Circuit in Corus Staal BV v. Department of Commerce rejected Corus’ argument that, where the statute did not directly speak with respect to zeroing, Commerce should have applied Charming Betsy to interpret the statute consistent with U.S. international obligations. The Federal Circuit explained that the Timken rationale (upholding zeroing in an administrative review) also applied in the context of an investigation. As to Corus’ argument that Commerce’s interpretation was unreasonable in light of adverse Appellate Body reports in EC – Bed Linens, Corrosion-Resistant Steel,

¹⁷⁴ Pub. L. 107-210 at § 2101(b)(3), 116 Stat. 933 (Aug. 6, 2002), 19 U.S.C. §§ 3801.

¹⁷⁵ Pub. L. 107-210 at § 2101(b)(3), 116 Stat. 933 (Aug. 6, 2002), 19 U.S.C. §§ 3801.

¹⁷⁶ See, e.g., Elizabeth Seastrum, Chevron Deference and the Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?, 13 Fed. Circuit B.J. 229 (2003-2004) (questioning application of Charming Betsy in light of differences between U.S. judicial review and review by WTO dispute settlement panels and the WTO); John D. Greenwald, After Corus Staal – Is There Any Role, and Should There Be – For WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?, 39 Geo. J. Int’l L. 199 (Fall 2007) (pointing out that WTO panels and the Appellate Body, unlike U.S. courts applying Chevron deference, do not follow a U.S. tradition of deferring to agency expertise, but “systematically dismiss the idea that the language of an agreement is susceptible to different *permissible* interpretations” and instead “always come up with an *ordinary meaning* of an agreement that dictates a particular outcome;” do not have a “tradition of dissent”; and are influenced by WTO bureaucracy on panels and the Appellate Body).

¹⁷⁷ For an explanation of zeroing, see Brief for the Federal Respondents in Opposition, Corus Staal BV v. Dep’t of Commerce, Supreme Ct. No. 05-364 (on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit) (Dec. 2005).

¹⁷⁸ 240 F. Supp. 2d 1228, 1238-42 (Ct. Int’l Trade 2002), aff’d, 354 F.3d 1334 (Fed. Cir.), cert. denied sub nom. Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

¹⁷⁹ 354 F.3d 1334, 1340-45 (Fed. Cir.), cert. denied sub nom. Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

and Softwood Lumber, the Federal Circuit explained, there is a statutory procedure for dealing with adverse reports by which USTR consults “with various congressional and executive bodies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.” As in the Timken case, the Federal Circuit emphasized that EC – Bed Linens did not involve the United States. It further found that in Corrosion-Resistant Steel, the Appellate Body did not make a finding regarding Commerce’s methodology; and, at the time of the Federal Circuit’s decision, the Appellate Body’s finding in Softwood Lumber “was not adopted as per Congress’s statutory scheme.”¹⁸⁰ Noting the Supreme Court’s holding in United States v. Pink, 315 U.S. 203, 222-23 (1942), that the “conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government,” the Federal Circuit explained that it gave “substantial deference” to Commerce’s administration of the statute “because of the foreign policy implications of a dumping determination.”¹⁸¹ It concluded that it would “not attempt to perform duties that fall within the exclusive province of the political branches, and [it] therefore refus[ed] to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.”¹⁸²

As other commentators have pointed out, the Federal Circuit’s approach in Corus is also consistent with a subsequent decision in Sanchez-Llamas v. Oregon¹⁸³ wherein the Supreme Court held that opinions of the International Court of Justice deserved “respectful consideration” but are not binding on U.S. courts.¹⁸⁴ The Federal Circuit subsequently relied on Sanchez-Llamas in Cummins, Inc. v. United States in affirming the CIT’s decision that Cummins was not entitled to preferential treatment under the NAFTA because the articles it imported from Brazil did not undergo a substantial transformation in Mexico prior to entry into the United States and were classifiable under the same tariff subheading when imported into the United States as when imported into Mexico. The Federal Circuit found that the CIT properly construed the statutory terms as they were written and gave no deference to a contrary opinion issued by the World Customs Organization (“WCO”). As the court explained, “[l]ike the ICJ’s interpretation of the treaty terms in Sanchez-Llamas, the WCO opinion is not binding and is entitled, at

¹⁸⁰ 395 F.3d at 1349.

¹⁸¹ 395 F.3d at 1349 (citing Federal Mogul Corp. v. United States, 63 F.3d 1572, 1582 (Fed. Cir. 1995)).

¹⁸² 395 F.3d at 1349; see also, e.g., Koyo Seiko, Ltd. v. United States, 442 F. Supp. 2d 1360 (Ct. Int’l Trade Aug. 23, 2007).

¹⁸³ 548 U.S. 331 (2006); see also, e.g., Medellin v. Texas, 552 U.S. ___, ___, 128 S. Ct. 1346 (2008) (involving what the Supreme Court found was a non-self-executing treaty for which Congress had not issued implementing legislation) (while agreeing that opinions of the International Court of Justice constitute international law obligations for the United States, disagreeing that these opinions are automatically enforceable in U.S. courts because such a construction would eliminate the option of non-compliance by the political branches and citing Sanchez-Llamas for the proposition that “where a treaty does not provide a particular remedy either expressly or implicitly, it is not for the courts to impose one on the states through lawmaking of their own.”)

¹⁸⁴ Alex O. Canizares, Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine, 20 Emory Int’l L. Rev. 591, 645-46 (Fall 2006).

most, to ‘respectful consideration.’ It is not a proxy for independent analysis.”¹⁸⁵ In reaching its decision in Cummins, the Federal Circuit came to the same conclusion as the agency, although the agency’s decision conflicted with a WCO opinion.¹⁸⁶

Consistent with the Federal Circuit’s 2004 Timken and 2005 Corus opinions, U.S. courts began to exercise much more restraint, allowing the political branches to decide whether and how to respond to adverse reports by international trade panels.¹⁸⁷ For example, in Corus Staal BV v. United States, the Federal Circuit upheld Commerce’s issuance of liquidation instructions related to the second administrative review of an antidumping duty order. Corus had argued that Commerce’s zeroing practice in the administrative review was inconsistent with its recent decision to revoke the order as part of a section 129 proceeding responding to an adverse Appellate Body report. Although Commerce revoked the antidumping order after the Appellate Body found the use of zeroing in the underlying investigation was improper, Corus pointed out that a more recent Appellate Body report found that Commerce’s use of zeroing in administrative reviews was also inappropriate. The Federal Circuit noted that the United States

¹⁸⁵ 454 F.3d 1361, 1366 (Fed. Cir. 2006) (citations omitted).

¹⁸⁶ In a subsequent case, Airflow Technology, the Federal Circuit again reached a decision that conflicted with the interpretation of the WCO, but in this instance, the agency had agreed with the WCO’s opinion. Airflow Technology v. United States, 524 F.3d 1287, 1293 (Fed. Cir. 2008). It is unclear whether the Federal Circuit’s application of a different standard of deference (Mead rather than Pesquera Mares/Chevron) may have affected the outcome.

¹⁸⁷ In Corus Staal BV v. United States, the CIT relied on the Federal Circuit’s 2005 Corus decision to dispose of many of the issues. 387 F. Supp. 2d 1291, 1297-98 (Ct. Int’l Trade 2005), aff’d, 2006 U.S. App. Lexis 15022 (Fed. Cir. Jun. 13). With respect to plaintiff’s argument that the status of the Appellate Body’s report in US – Softwood Lumber had changed since then, the CIT concluded that the statutorily-mandated procedure for responding to the adverse report was still incomplete because, although Commerce had issued a responsive determination, USTR had discretion under the statute to direct Commerce to implement, in whole or in part, the determination. 387 F. Supp. 2d at 1299. In any event, however, because Commerce’s determination was issued as part of a section 129 proceeding (and not a section 123 proceeding that the CIT noted concerns an agency’s “general practices”), Commerce’s section 129 determination, if implemented in full, would still not apply to the case at bar because section 129 determinations “will only affect the unliquidated entries of subject merchandise prospectively, from the date that USTR directs Commerce to implement the determination.” 387 F. Supp. 2d at 1299-1300. Moreover, Commerce’s own section 129 determination in Softwood Lumber made clear that Commerce switched its methodology for that case and “was not intending to implement an approach that applies to all antidumping investigations.” 387 F. Supp. 2d at 1300; see also, e.g., SKF USA Inc. v. United States, 491 F. Supp. 2d 1354, 1365-66 (Ct. Int’l Trade 2007), aff’d 2008 U.S. App. Lexis 18159 (Fed. Cir. Aug. 25).

In Corus Staal BV v. United States, Commerce had issued liquidation instructions even though it had already revoked the underlying antidumping duty order as instructed by USTR to implement its section 129 determination responding to an Appellate Body report. Because the liquidation instructions pertained to an already completed administrative review and because the statute specified that section 129 determinations only applied prospectively, the Court found that Corus was not entitled to any relief even if in the underlying administrative review Commerce had used a methodology that the Appellate Body had concluded was unlawful zeroing. 515 F. Supp. 2d 1337, 1343-45 (Ct. Int’l Trade Sept. 19, 2007).

had not yet formally responded to the adverse Appellate Body report concerning Commerce's practice in administrative reviews, that any response to the adverse Appellate Body report concerning investigations was prospective, that Commerce had specifically said that it was not going to apply its section 129 determination retrospectively, and that the United States had expressed strong reservations concerning the Appellate Body's report regarding the U.S. practice in administrative reviews. For all of these reasons, the Federal Circuit upheld the validity of Commerce's liquidation instructions related to an administrative review conducted prior to revocation of the underlying antidumping duty order and refused to "overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such a ruling has been adopted pursuant to the specified statutory scheme."¹⁸⁸

The restraint exercised by U.S. courts in recent times stands in stark contrast to the approach taken by certain NAFTA panels reviewing recent trade cases. In response to an adverse Appellate Body report regarding zeroing in the Softwood Lumber from Canada investigation, USTR, after following the required consultation process and consistent with the statute, had instructed Commerce to apply its Section 129 determination prospectively. Although it had declined to do so in its earlier opinions remanding the case to Commerce, based on the adverse report that the United States had agreed to implement, the panel in Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination,¹⁸⁹ decided to remand the decision with instructions for Commerce to revoke the order with respect to one Canadian producer and to recalculate the margins for the other Canadian producers without "zeroing." Because the U.S. statute only permitted prospective relief after section 129 determinations, the panel relied on Charming Betsy as the basis for its instruction that Commerce apply its Section 129 determination retroactively. This and other Softwood Lumber NAFTA litigation were eventually settled as part of the September 2006 Softwood Lumber Agreement.¹⁹⁰ Nevertheless, a

¹⁸⁸ Corus Staal BV v. United States, 502 F.3d 1370, 1374 (Fed. Cir. 2007) (citing Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005)); see also, e.g., NSK Ltd. v. United States, 510 F.3d 1375, 1379 (Fed. Cir. 2007); SKF USA, Inc. v. United States, Ct. No. 2007-1502 (Fed. Cir. Aug. 25, 2008). Some have suggested that Congress was only concerned about possible changes to U.S. statutes made to conform them with U.S. international trade obligations in international agreements and reports by international trade panels. See, e.g., In the Matter of Carbon and Certain Steel Alloy Wire Rod from Canada: 2nd Administrative Review, USA-CDA-1904-04 (Nov. 28, 2007); In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (Jun. 9, 2005); Lawrence R. Walders, Citation by U.S. Courts to Decisions of International Tribunals in International Trade Cases, 69 Alb. L. Rev. 817, 821-22 (2006). It is clear from the statute, legislative history, and SAA that Congress also wanted to be aware of and consulted before any contemplated changes to an agency's regulations, practices, policies, etc. The decisions in Timken and the Corus appeals reflect the Federal Circuit's agreement to the extent that they upheld Commerce's long-standing and judicially approved zeroing policy even though the Federal Circuit found that the statute was silent on the question of zeroing and even though Commerce eventually decided to change its policy in response to adverse reports by international trade panels, because the political branches had not revoked the policy with respect to the determinations at issue in those cases.

¹⁸⁹ USA-CDA-2002-1904-02 (Jun. 9, 2005).

¹⁹⁰ See Annex 2A.

different panel issued a decision aimed at a similar result shortly thereafter.¹⁹¹

A finding in a separate decision issued by the CIT in one of the other lumber appeals, Tembec I,¹⁹² however, calls into question whether any such findings by a NAFTA panel could ever be enforced. In Tembec I, the CIT explained that, although the Commission and Commerce are required to issue remand determinations not inconsistent with a NAFTA panel's report, no private party may sue to enforce implementation of a NAFTA panel report.¹⁹³

V. Concluding Thoughts

If the Federal Circuit's more recent decisions in Timken and the Corus appeals hold, then, when faced with clear Congressional intent, U.S. courts will no longer look to international agreements or reports by international panels to interpret U.S. trade laws. Furthermore, even when faced with

¹⁹¹ See In the Matter of Carbon and Certain Steel Alloy Wire Rod from Canada: 2nd Administrative Review, USA-CDA-1904-04 (Nov. 28, 2007) (remanding the determination to Commerce after, *inter alia*, concluding that NAFTA panels are like a "virtual or generic court" that are not bound by decisions of the CIT or Federal Circuit including the Federal Circuit's zeroing decisions (such as Corus), finding that Commerce's zeroing methodology was not written and was thus not a "practice" or "regulation," construing WTO law with respect to zeroing "settled" as "impermissible," and applying Charming Betsy to preclude approval of Commerce's use of zeroing in that instance). Participants subsequently terminated binational panel review of this appeal by joint consent motion. See Notice of Consent Motion to Terminate Panel Review, 73 Fed. Reg. 23183, 23183-84 (Apr. 29, 2008).

¹⁹² 441 F. Supp. 2d 1302 (Ct. Int'l Trade Jul. 21, 2006) (per curiam opinion by three-judge panel).

¹⁹³ 441 F. Supp. 2d at 1318 (citing 19 U.S.C. § 1516(a)(g)(7)(A)). In Tembec I, a three-judge panel at the CIT acknowledged that U.S. courts could review the merits of certain determinations made under section 129 of the Tariff Act (19 U.S.C. § 3538), and in this instance also found that plaintiffs were entitled to review of the legality of USTR's administration and enforcement of the Commission's section 129 determination. Plaintiffs had argued that USTR unlawfully administered and enforced an affirmative section 129 injury determination issued by the Commission in response to an adverse WTO panel report because the Commission had also made a negative remand determination in conjunction with a NAFTA panel's review of the same underlying affirmative injury determination on softwood lumber. Because the three-judge panel of the CIT found that the statute clearly only permitted USTR to order implementation of negative section 129 injury determinations, it held that USTR's implementation of the Commission's affirmative section 129 determination was *ultra vires*. In Tembec v. United States (Tembec II), 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006), the CIT addressed the remedy issue for Tembec I. The CIT subsequently vacated its judgment in Tembec II because Commerce's issuance of revised liquidation instructions on October 31, 2006 consistent with the September 2006 Softwood Lumber Settlement Agreement provided the plaintiffs with the relief they sought in Tembec I. Tembec v. United States, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007). Had the United States and Canada not agreed to settle the softwood lumber litigation, the Tembec I opinion suggests that USTR's enforcement of the Commission's affirmative section 129 determination would have been *ultra vires* but that there would have been no means for private parties to challenge in U.S. courts the failure of the United States to enforce implementation of a NAFTA panel report (*i.e.*, the Commission's negative remand determination on injury). Such language may be welcome to the United States in the light of NAFTA panel reports in cases such as Carbon and Certain Steel Alloy Wire Rod from Canada and Softwood Lumber.

ambiguous Congressional intent, U.S. courts will not condition approval of the agency's interpretation of the ambiguous or silent statute on consistency with U.S. international obligations under international agreements or findings in reports issued by WTO dispute resolution panels or the Appellate Body. Moreover, U.S. courts may even be inclined under Gilda and Norsk Hydro to breathe new life back into statutory sections such as 19 U.S.C. § 3512(c) and construe them as jurisdictional bars against hearing arguments about the consistency of U.S. laws with U.S. international trade obligations.

It should not be surprising that U.S. courts are now more consistently deferring to the political branches to resolve any conflicts between U.S. laws and U.S. international trade obligations. Indeed, as Assistant Attorney General Dellinger explained at the time that the URAA was under consideration, "Here, if anywhere, is an area where the sound judgment of the political branches, acting in concert and accommodating the interests and prerogatives of one another, should be respected."¹⁹⁴

¹⁹⁴ Memorandum to Ambassador Michael Kantor, United States Trade Representative, from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel (Nov. 22, 1994) found at <http://www.usdo.gov/olc/gatt.htm> (retrieved on Sept. 8, 2008).

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