

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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I. INTRODUCTION

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.¹ 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

1. 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.

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 aids, and the courts are now deferring to the political branches to resolve any alleged inconsistencies between domestic laws and U.S. international trade obligations.

II. 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 Constitution of the United States of America, the laws “made in pursuance thereof,” and treaties constitute “the supreme Law of the Land.”² 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.”³ Article II, Section 3, further states that the President “shall take Care that the Laws be faithfully executed.”⁴ 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 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.⁵

2. U.S. CONST. art. VI.

3. *Id.* art. II, § 2, cl. 2.

4. *Id.* § 3.

5. *See, e.g.,* Weinberger v. Rossi, 456 U.S. 25 (1982) (unilateral executive agreement); JEANNE J. GRIMMETT, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-

U.S. law distinguishes between international agreements that are self-executing and those that are not self-executing.⁶ The status of a particular agreement is determined according to the intent of the United States in entering into the agreement.⁷ 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.⁸ 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.⁹ Non-self-executing international agreements require separate enactment into domestic law.¹⁰ An agreement is treated as non-self-executing when Congress specifically requires implementing legislation.¹¹ If the agreement is non-self-executing, intervening domestic legislation defines or limits the agreement’s effect.¹²

With respect to foreign tribunals, in an early nineteenth-century case, the Supreme Court of the United States held that decisions of foreign tribunals, while respected, are not binding on U.S. courts.¹³ Finally, if there is no U.S. law on a particular issue, then U.S. courts sometimes have given effect to customary international law.¹⁴

EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES, CONG. REP. NO. 97-896, at 2-4 (2002); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215-18 (2d ed. 1996).

6. *See, e.g.*, LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 202-09 (2d ed. 1980).

7. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

8. *See, e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *The Head Money Cases*, 112 U.S. 580, 598-99 (1884).

9. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115.

10. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

11. *See, e.g., id.* § 111(4)(b).

12. *See, e.g., id.* § 111 cmt. h.

13. *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.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112.

14. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677 (1900); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. d (1987).

III. 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 toward common goals.

A. *The Reciprocal Trade Agreements Act of 1934 and the General Agreement on Tariffs and Trade (GATT)*¹⁵

After World War I, Congress passed the Antidumping Act of 1921 to impose antidumping duties when the United States 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 foreign merchandise [that] is being sold or is likely to be sold in the United States or elsewhere at less than fair value¹⁶

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.¹⁷ 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.¹⁸

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 postwar economic relations. The participants agreed to adopt a Protocol of Provisional Application putting the GATT into effect until an International Trade

15. See generally CONG. BUDGET OFFICE, *THE GATT NEGOTIATIONS AND U.S. TRADE POLICY* ch. II (1987).

16. Antidumping Act of May 27, 1921, ch. 14, § 201(a), 42 Stat. 11 (1921) (previously codified at 19 U.S.C. § 160 (1978)).

17. 46 Stat. 763 (1930); 19 U.S.C. § 1674 (1930); see also, e.g., Bruce Bartlett, *The Truth About Trade in History*, <http://www.freetrade.org/pubs/freetotrade/chap2.html> (last visited Mar. 24, 2009) (chronicling previous attempts by Congress to raise tariffs in the United States prior to the Smoot-Hawley Tariff Act).

18. 48 Stat. 943; 19 U.S.C. § 1351 (1934). In reviewing the Tariff Act of 1890, the Supreme Court had previously upheld the constitutionality of Congress's delegation of tariff-bargaining authority to the President and Congress's authorization of the President to suspend duty-free treatment on particular items. See *Field v. Clark*, 143 U.S. 649, 700 (1892).

Organization became operative. The International Trade Organization Agreement never became effective, mainly because the United States Congress failed to approve it, so to implement the GATT in the United States, President Truman used his proclamation authority under the Reciprocal Trade Agreements Act of 1934.¹⁹ 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.²⁰

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.²¹ 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 United States Tariff Commission.²² 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:

The 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

19. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; 61 Stat. 1103-11 (1947) (President Truman's Proclamation of Modification of Existing Duties).

20. *Compare, e.g.*, Footwear Distrib. & Retailers of Am. v. United States, 852 F. Supp. 1078 (Ct. Int'l Trade 1994), *with* Am. Express Co. v. United States, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973).

21. *See* S. Con. Res. 100, 89th Cong., 112 CONG. REC. 14,425 (1966).

22. *See* S. Con. Res. 38, 90th Cong., 113 CONG. REC. 20,825-26, 20,894 (1968).

law by executive agreement in violation of the constitutional provisions vesting in the Congress the sole power to assess taxes and duties.²³

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 would interpret a new international obligation in such a way as to avoid conflict with an existing statute" and that

[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.²⁴

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 sufficient power 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.²⁵

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.²⁶ Moreover, the President's authority

23. S. REP. NO. 90-1385, pt. 2, at 1385 (1968).

24. *Id.*

25. *Id.* (emphasis added).

26. Renegotiation Amendments Act, Pub. L. No. 90-634, 82 Stat. 1347 (codified at 19 U.S.C. § 160 (1968)) (providing that the International Antidumping Code would not restrict the

to enter into trade agreements was not reauthorized until the Trade Act of 1974.²⁷

*B. The Trade Act of 1974 and the Trade Agreements Act of 1979
(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 passed implementing agreements would the agreements become law.²⁸ 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 conflict 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."²⁹

After the two codes were negotiated, Congress adopted specific implementing legislation, the 1979 Trade Act.³⁰ 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.³¹

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.³² Discussing the relationship between the 1979 Trade Act and the

United States 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).

27. See REPORT OF THE COMM. ON WAYS & MEANS, TRADE AGREEMENTS ACT OF 1979, H.R. REP. NO. 96-317, at 6 (1979).

28. See 19 U.S.C. § 2111(a)-(c) (2006).

29. S. REP. NO. 96-249, at 5 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 391.

30. Pub. L. No. 96-39, 93 Stat. 144 (1979).

31. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 162 (codified at 19 U.S.C.A. § 1673 (2006)).

32. 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,

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.³³ 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 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 those obligations*. The bill implements the United States understanding of those 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 law in a way which ensures maximum predictability and fairness*.³⁴

Under 19 U.S.C. § 2504(c), a procedure was established in order to implement a requirement of, amendment to, or recommendation under

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:

Regulations 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.

33. S. REP. NO. 96-249, at 36-37 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 422-23.

34. *Id.* (emphasis added); *see also, e.g.*, COMM. ON WAYS & MEANS, TRADE AGREEMENTS ACT OF 1979, H.R. REP. NO. 96-317, at 41 (1979).

an international trade agreement.³⁵ Finally, Congress clarified that it did not intend to create any unspecified private remedies.³⁶

C. *Chevron, Charming Betsy, and Pre-Uruguay Round Agreements Act Case Law*³⁷

Under *Chevron U.S.A., Inc. 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.³⁸ "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."³⁹ 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."⁴⁰ 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

35. 19 U.S.C. § 2504(c)(2) (1982) ("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 (A) the President, after consultation with the Congress under paragraph (1), notifies [Congress] of his determination and publishes notice of that determination in the Federal Register, (B) the President transmits a document to [Congress] 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 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.").

36. 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.

37. 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.

38. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

39. *Id.* at 842-43.

40. *Id.* at 843.

“respect legitimate policy choices” made by the agency in interpreting and applying the statute.⁴¹

1. When Congressional Intent Is Clear

In pre-Uruguay Round Agreements Act 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.⁴² 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.⁴³

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.⁴⁴ In other appeals, the reviewing courts upheld the agency’s

41. *Id.* at 866.

42. For example, in *Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989), the Federal Circuit noted that the disputed practice of the ITC was longstanding and rejected arguments that the legislative history supported a contrary reading of the statute. *Id.* It noted that neither of these arguments merited more detailed consideration given the plain language of the statute. *Id.* 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).” *Id.*; see also, e.g., *Timken Co. v. United States*, 11 Ct. Int’l Trade 786, 813 (1987), *aff’d in part, rev’d in part*, *Koyo Seiko Co. v. United States*, 20 F.3d 1160 (Fed. Cir. 1993), *aff’d*, 95 F.3d 1094 (1996) (“The court cannot 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.”).

43. 19 U.S.C. § 2504(a) (1982).

44. For example, in *Torrington Co. v. United States*, 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. 44 F.3d 1572, 1581 (Fed. Cir. 1995). 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.” *Id.* Likewise, in *Hercules, Inc. v. United States*, the Court of International Trade found that the U.S. statute, case law, and Commerce’s prior countervailing duty determinations clearly supported the reasonableness and lawfulness of

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.⁴⁵

There were also pre-Uruguay Round Agreements Act 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.⁴⁶ For example, in *Federal Mogul*

Commerce's determination that certain regional incentive programs were countervailable subsidies. 11 Ct. Int'l Trade 710, 763 (1987). The Court of International Trade 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)." *Id.* In *Fundicao Tupy, S.A. v. United States*, plaintiffs argued that the ITC's practice of cumulation violated the GATT. The Court of International Trade disagreed noting that the ITC'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).

12 Ct. Int'l Trade 6, 10 (Ct. Int'l Trade), *aff'd*, 859 F.2d 915, 917 (Fed. Cir. 1988).

45. *See, e.g.*, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 n.5 (Fed. Cir. 1990) (upholding the ITC's construction of an ambiguous statute that, among other things, was not inconsistent with the GATT); *Serampore Indus. Pvt. Ltd. v. United States*, 12 Ct. Int'l Trade 825, 830 (1988) (finding Commerce's calculation of the "all others" rate does not violate the GATT). In *Alberta Pork Producers' Marketing Board v. United States*, plaintiffs argued that the ITC 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. 11 Ct. Int'l Trade 563, 588 (1987). The Court of International Trade disagreed, finding the language of the statute and the legislative history did not require the ITC to find such a causal connection, and such a requirement was not imposed by the ITC upon itself in past countervailing duty investigations. *Id.* at 889. 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." *Id.* at 589. Furthermore, in *United States Steel Corp. v. United States*, the Court of International Trade 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 Court of International Trade deferred to the agency's construction of the statute, which conformed to the GATT requirement. With respect to the legislative history, the court noted:

Moreover, despite the scarcity of legislative history specifically concerning § 606, the overall intent of Congress to adhere to GATT in enacting the 1984 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.

618 F. Supp. 496, 500-01 (Ct. Int'l Trade 1985).

46. In *PPG Industries, Inc. v. United States*, 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." 928 F.2d 1568, 1575 (Fed. Cir. 1991). The court explained that interpreting the statute consistent with the GATT Subsidies Code was one of the objectives that the agency properly took into

Corp. v. United States, before the United States Court of Appeals of the Federal Circuit, the issue was whether Congress precluded the Department of Commerce (Commerce) from calculating dumping margins in a tax-neutral fashion.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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*.⁵⁰ The court found:

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.⁵¹

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?

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." *Id.*

47. *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1579 (Fed. Cir. 1995).

48. *Id.*

49. *Id.* at 1580.

50. *Id.* at 1581.

51. *Id.* at 1582; *see also, e.g.*, *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002) (upholding a United States Customs and Border Protection 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.⁵² 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.⁵³

52. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b) (1987); see also, e.g., *id.* § 115(1)(b) cmt. 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.”).

53. *Murray v. 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 Guadaloupe, 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 Guadaloupe as a prize. *Id.* Before reaching Guadaloupe, 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 Guadaloupe, 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 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. *Id.* 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’s intent. *Id.* at 71. 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

Under the original articulation of that canon, U.S. statutes ought never be construed to violate international law if any other possible construction remains. This canon actually owes its origins to an earlier Supreme Court decision, *Talbot v. Seeman*.⁵⁴ The *Charming Betsy* canon and a weaker version of the canon that is reflected in the Restatement (Third) of Foreign Relations Law,⁵⁵ have been followed on numerous occasions

Congress ought never to be construed to violate the law of nations if any other possible construction remains, and 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.

54. 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, 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, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured 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 re-captured neutral, and a re-captured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

Id. at 42-43. 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.

55. The RESTATEMENT (THIRD) OF 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.” *Id.* (emphasis added).

over the years, including in circumstances where courts have interpreted ambiguous U.S. statutes so as to avoid a conflict with earlier treaty provisions.⁵⁶ Some courts have applied a diluted version of the canon wherein “any other possible construction” has been read as any other reasonable construction.⁵⁷ 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.⁵⁸ Whereas the *Charming Betsy* canon may have seemed appropriate to the Marshall Court in light of the events of that era, commentator Curtis Bradley has questioned the continued viability of the canon today.⁵⁹ 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.”⁶⁰ 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.⁶¹ Subsequent to the *Charming Betsy* era, Professor Bradley notes, the natural law conception of international law faded and was

56. See, e.g., *Chew Heong v. United States*, 112 U.S. 536, 560 (1884) (interpreting a later immigration law to not affect the treaty right of a Chinese resident alien to reenter); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”).

57. 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 (1998) (providing examples).

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

59. See generally *id.* Bradley 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.

60. *Id.*

61. *Id.*

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 maritime law—gradually were absorbed into domestic law; and there was a proliferation of treaties, both bilateral and multilateral.⁶²

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-Uruguay Round Agreements Act 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*,⁶³ 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's intended meaning.⁶⁴ Appellees had argued that the legislative history demonstrated Congress's intent to comply with the GATT, and a GATT panel had recently rejected Commerce's views on the meaning of “on behalf of.”⁶⁵ 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

62. *Id.*

63. 966 F.2d 660 (Fed. Cir. 1992).

64. *Id.* at 665.

65. *Id.* at 667.

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.⁶⁶

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 pay much heed to the GATT panel report.

A very different approach was taken in *Footwear Distributors & Retailers of America v. United States*,⁶⁷ and some background is needed to understand this case. A countervailing duty order on Brazilian nonrubber footwear had been issued by the United States on September 12, 1974, without an injury determination.⁶⁸ 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.⁶⁹ Commerce issued instructions to revoke the countervailing duty order on Brazilian footwear effective October 29, 1981, but Footwear Distributors and Retailers of America appealed to the United States Court of International Trade because it believed that the order should have been revoked as of January 4, 1980, the effective date of the new statutory provision.⁷⁰ At the request of Footwear Distributors, the Court of International Trade 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.⁷¹ A GATT panel concluded that Commerce's actions were consistent with article VI, but Brazil blocked adoption of the report.⁷²

66. *Id.* at 667-68.

67. 18 Ct. Int'l Trade 391, 391 (1994).

68. *Id.* at 394.

69. *Id.* at 393-94.

70. *Id.* at 392.

71. *Id.* at 393.

72. *Id.* at 396.

Commerce moved to dissolve the Court of International Trade'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 nonrubber footwear from Brazil imported between January 4, 1980, and October 29, 1981, was subject to countervailing duties.⁷³ 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; however, out of respect for the panel process, the United States agreed to adopt the report because the report expressly provided only a general ruling and had not made any specific recommendation.⁷⁴

After completion of the GATT panel proceedings, the Court of International Trade resumed its own proceedings and determined that the U.S. statute was not clear and that Commerce's interpretation of the statute was reasonable.⁷⁵ Based on a perceived holding from the Supreme Court's opinion in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the court determined that *Chevron* deference must yield to *Charming Betsy*, so the remaining question was whether Commerce's determination complied with U.S. obligations under international law.⁷⁶ The court stated:

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."⁷⁷

The court noted that GATT contracting parties did "not automatically accept panel decisions as binding."⁷⁸ The Court of International Trade 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

73. *Id.* at 393.

74. *Id.* at 396, 398-99.

75. *Id.* at 405.

76. *Id.* at 407-09 (citing *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75 (1988)).

77. *Id.* at 410.

78. *Id.*

United States as to how to proceed on the international stage.”⁷⁹ 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.⁸⁰ The Court of International Trade 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.⁸¹

Thus, although the Court of International Trade 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 Footwear Distributors 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 Court of International Trade cited to the Supreme Court’s opinion in *DeBartolo*⁸² for the proposition that *Chevron* should yield to *Charming Betsy*.⁸³ The *DeBartolo* opinion apparently repeated the mistake contained in an earlier Supreme Court opinion, *NLRB v. Catholic Bishop of Chicago*.⁸⁴ Others have also relied on *DeBartolo* and other cases that perpetuate the same citation error.⁸⁵ While the Supreme

79. *Id.* at 413.

80. *Id.*

81. *Id.* at 414 (footnotes omitted).

82. 485 U.S. 568 (1988).

83. *Footwear Distribs. & Retailers of Am.*, 18 Ct. Int’l Trade at 407-09.

84. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501, 504 (1979).

85. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (noting that the mistaken citation in *Catholic Bishop* has led at least one commentator as well as the Court of International Trade in *Footwear* and in *Hyundai Electronics 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); Jackson F. Morrill, Comment, *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 (2000) (“[T]he [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

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."⁸⁶ *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*.⁸⁷ Thus, the Supreme Court cannot be inferred to have actually considered in *DeBartolo* that *Charming Betsy* trumps *Chevron*, the court only stated that *Parsons* trumps *Chevron*.⁸⁸

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, 452-54 (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). *Id.*

86. *DeBartolo*, 485 U.S. at 575.

87. 28 U.S. (3 Pet.) 433, 448-49 (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. Bradley, *supra* note 85, at 687.

First, while Congress may not violate the Constitution, it is well established that Congress can violate international law. . . . 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. . . . 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 law making authority to agencies has less force in the area of foreign affairs. 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.

Id. at 687-88. 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 Bradley, *supra* note 85, at 687-88.

88. See *id.* at 649; 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, 230 (2006) ("[I]t might well be argued that *DeBartolo* is distinguishable and that the

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 Court of International Trade noted, the 1947 GATT became part of U.S. law via executive order.⁸⁹ 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.⁹⁰ 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.

IV. 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 American 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.⁹¹ 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.⁹² Commenting on the process, the House Report accompanying the NAFTA Implementation Act noted:

integration of WTO consistency into step two of *Chevron* analysis does not necessarily require a WTO-inconsistent decision to be overruled.”).

89. *Footwear Distribs. & Retailers of Am. v. United States*, 18 Ct. Int'l Trade 391, 408-09 (1994).

90. *Id.* at 410.

91. Pub. L. No. 100-418, § 1102, 19 U.S.C. § 2902 (1988), *amended by* Pub. L. No. 103-49 (1993).

92. The fast-track procedures are described in 19 U.S.C. § 2191 (2006).

The purpose of the 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 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.⁹³

Because the Executive Branch did not submit the Uruguay Round Agreements as a treaty to the United States 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.⁹⁴ 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 nonjusticiable political question.⁹⁵

93. COMM. ON WAYS & MEANS, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, H.R. REP. NO. 103-361, at 10-11 (1994) (emphasis added).

94. Indeed, as reflected in advice provided in a Memorandum from Walter Dellinger, Assistant Att’y Gen., U.S. Dep’t of Justice, Office of the Legal Counsel to Ambassador Michael Kantor, U.S. Trade Rep. (Nov. 22, 1994), *available at* <http://www.usdoj.gov/olc/gatt.htm>, 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.

[P]ractice 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 & 2903. 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.

Id. (footnotes omitted).

95. *See, e.g.,* *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir.) (dismissing an appeal challenging the constitutionality of a different congressional-executive agreement, NAFTA, because the case involved a nonjusticiable political question); *see also, e.g.,* GRIMMETT, *supra* note 5.

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 (DSU)

The Uruguay Round Agreements were signed on April 15, 1994, and entered into force on January 1, 1995.⁹⁶ Like determinations issued by other member countries' investigating authorities, determinations by the ITC and Commerce in antidumping and countervailing duty cases may be appealed to a WTO dispute resolution panel.⁹⁷ Under the GATT, individual countries could and often did block adoption of panel reports, and unadopted reports did not have a legally binding effect.⁹⁸ But, under the current DSU, panel reports

shall be adopted at a DSB [dispute settlement body] 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 a panel report.⁹⁹

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.¹⁰⁰

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

96. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1143 (1994), 1867 U.N.T.S. 14 [hereinafter Final Act].

97. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, arts. 6, 17, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at http://www.wto.org/English/docs_e/legal_e/28-dsu.pdf [hereinafter DSU]. Only WTO members and not private entities may initiate a dispute settlement proceeding under the WTO Agreements. *Id.* art. 2.1.

98. See GATT art. XXIII and decisions and interpretations thereof.

99. DSU art. 16.4 (footnote omitted).

100. *Id.* art. 17.14 (footnote omitted).

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.¹⁰¹

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 international law.”¹⁰² As 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.”¹⁰³ 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.¹⁰⁴

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 noncompliance.¹⁰⁵ 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 Act¹⁰⁶ 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

101. *Id.* art. 19.1 (footnote omitted).

102. *Id.* art. 3.2 (emphasis added).

103. *Id.* (emphasis added).

104. *See* Final Act, arts. IV.1-2.

105. DSU arts. 21-22; *see also, 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, 165-67 (2006).

106. 19 U.S.C. § 3501 (2006).

Uruguay Round Agreements Act and corresponding legislative history. *First*, U.S. law is to prevail in the event of a conflict.¹⁰⁷ The Statement of Administrative Action accompanying the Uruguay Round Agreements Act echoes 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. . . . 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.¹⁰⁸

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 Statement of Administrative Action of changes to regulations that would be implemented within one year.¹⁰⁹ As indicated in the Statement of Administrative Action:

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.

107. The statute warns

(1) United States law 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) (discussing the relationship of trade agreements to U.S. law) (emphasis added).

108. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. REP. NO. 103-316, at 23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042.

109. *See, e.g.*, JOINT REPORT, COMM. ON FIN., COMM. ON AGRIC., NUTRITION, & FORESTRY, COMM. ON GOV'T AFFAIRS, URUGUAY ROUND AGREEMENTS ACT, S. REP. NO. 103-412, at 4 (1994) ("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."); *id.* at 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 the Congress."); *id.* at 16.

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.*¹¹⁰

In several circumstances, the Statement of Administrative Action noted that no, or only limited, action was required in order to implement the Uruguay Round Agreements.¹¹¹

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.¹¹² The standard of review

110. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. REP. NO. 103-316, at 25 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4050 (emphasis added) (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”).

111. *See, e.g., id.* 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.”); *id.* 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.”).

112. 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

applicable to these panels reviewing antidumping cases appeared to be an important consideration in placating these fears.¹¹³

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 Uruguay Round Agreements Act 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. JOINT REPORT, COMM. ON FIN., COMM. ON AGRIC., NUTRITION, & FORESTRY, COMM. ON GOV'T AFFAIRS, URUGUAY ROUND AGREEMENTS ACT, S. REP. NO. 103-412, at 13 (1994) ("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 Import Admin., Understanding on Rules and Procedures Governing the Settlement of Disputes: A Summary of Provisions, para. 6(e), <http://www.ia.ita.doc.gov/regs/uraa/saa-dr.html> (last visited Mar. 31, 2009) ("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."); *id.* 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.").

113. As the Statement of Administrative Action 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.

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*

Fourth, Congress specified how it was to be kept informed of dispute resolution panel and Appellate Body proceedings.¹¹⁴ 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.¹¹⁵ Finally, the statute established a different mechanism to handle specific actions by the ITC or by Commerce that were the subject of adverse reports.¹¹⁶

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's 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—

- (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

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.

Id. at 818 (emphasis added).

114. Under 19 U.S.C. § 3533(d) (2006), 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.

115. *See id.* § 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 ITC. *See id.* § 3533(g)(4).

116. *See id.* § 3538(a) (regarding actions by the ITC); *id.* § 3538(b) (regarding actions by Commerce).

on the ground that such action or inaction is inconsistent with such agreement.¹¹⁷

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.¹¹⁸ Indeed, in a section entitled, appropriately enough, "Intent of Congress," the statute continues:

It is the intention of the Congress through paragraph (1) *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.*¹¹⁹

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 Statement of Administrative Action that the U.S. statute "is intended to bring U.S. law fully into compliance with U.S. obligations," which 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.¹²⁰ It reflects the Administration's view, adopted by Congress, that U.S. law fully complies

117. *Id.* § 3512(c)(1) (emphasis added); *see also, e.g.*, JOINT REPORT, COMM. ON FIN., COMM. ON AGRIC., NUTRITION, & FORESTRY, COMM. ON GOV'T AFFAIRS, URUGUAY ROUND AGREEMENTS ACT, S. REP. NO. 103-412, at 13, 16; URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. REP. NO. 103-316, at 25-26 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4054-55.

118. As succinctly stated in Wright, Miller, and 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." 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1 (2008).

119. 19 U.S.C. § 3512(c)(2) (1994) (emphasis added).

120. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 669-70 (1994).

with its international obligations, as the United States *understands* them.¹²¹

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. international trade obligations to U.S. courts.¹²² 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, or 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.'"¹²³ A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed,"¹²⁴

121. See URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 669, 670.

122. This statutory provision is equally applicable in appeals of determinations by the ITC 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." North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, annex 1911, at 693 (1993) [hereinafter NAFTA]. A panel reviews "whether such determination was in accordance with the antidumping or countervailing duty law" of the United States. *Id.* art. 1904.2, at 683. 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 importing party would rely on such materials in reviewing a final determination." *Id.*

123. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (alterations in original) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); see also, e.g., *Fed. Deposit Ins. 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.").

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

and “[a]ny statute which creates a waiver of sovereign immunity must be strictly construed in favor of the Government.”¹²⁵

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 Court of International Trade and Federal Circuit, other courts agree that 19 U.S.C. § 3512(c)(1) is jurisdictional,¹²⁶ but decisions from the Court of International Trade and Federal Circuit have been more mixed. When actually discussing this provision, these courts sometimes find that the provision deprives them of jurisdiction,¹²⁷ and sometimes reach the opposite conclusion.¹²⁸

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

126. In *Intercitrus Ibertrade Commercial Corp. v. United States Department of Agriculture*, No. CIV. A. 02-1061, 2002 WL 1870467, at *4 (E.D. Pa. 2002), plaintiffs had argued that a suspension order issued by the 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.” *Id.* at *3-4. The court found that it did not have jurisdiction because the Uruguay Round Agreements Act precludes a “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.” *Id.* at *4. 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.” *Id.* In *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, No. 98-15444, 1999 WL 68632, at *1 (9th Cir. 1999) (citation omitted), 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. . . . [N]o one other than the United States ‘shall have a cause of action under the [Uruguay Round] Agreement.’

See also, e.g., Barceló, *supra* note 105, at 161-64.

127. In *Cook v. United States*, 20 Ct. Int’l Trade 217, 220-21 (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 Uruguay Round Agreements Act and the Uruguay Round Agreements was unconstitutional. *Id.* The court found that plaintiff lacked standing to challenge the Uruguay Round Agreements Act’s conflict with the Hopewell treaty because “[t]he terms of the [Uruguay Round Agreements] Act unmistakably limit private remedies solely to those brought by the United States.” *Id.* Accordingly, pursuant to 19 U.S.C. § 3512(c), plaintiff lacked standing to bring any nonconstitutional claims against the Uruguay Round Agreements Act. *Id.* The court did not decide whether these statutory provisions precluded constitutional attack on the Uruguay Round Agreements Act because it found plaintiff’s constitutional claims were deficient for failure to demonstrate injury in fact. *Id.* at 220-21. In *Fieldston Clothes, Inc. v. United States*, the Court of International Trade agreed with the Government’s argument that it lacked jurisdiction to hear that

In denying arguments that 19 U.S.C. § 3512(c)(1) deprives the court of jurisdiction, court opinions do not give much guidance as to why this statutory provision does not apply.¹²⁹ Indeed, the rationale in these cases

portion of Fieldston's case challenging the Committee for the Implementation of Textile Agreements' action as inconsistent with the Uruguay Round Agreements Act or the Uruguay Round Agreement on Textiles and Clothing and cited 19 U.S.C. § 3512(c)(1) as the relevant legal authority. 19 Ct. Int'l Trade 1181, 1184 (1995).

128. In *Uzbekistan v. United States*, the Court of International Trade rejected Commerce's reliance on 19 U.S.C. § 3512(c) as an "erroneous technical bar argument" and stated that "[o]f 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 Ct. Int'l Trade 1084, 1088 (2001); *see also, e.g.*, *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1341 (Ct. Int'l Trade 2004), *aff'd*, No. 05-1297, 2006 U.S. App. LEXIS 31200 (Fed. Cir. 2006). In *Timken Co. v. United States*, the court 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."

26 Ct. Int'l Trade 1072, 1081 (2002), *aff'd*, 354 F.3d 1334, 1341 (Fed. Cir. 2004). With respect to a different claim, that Commerce's methodology involved zeroing and violated the WTO Antidumping Agreement, the Court of International Trade 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." *Id.* at 1085; *see also, e.g.*, *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 n.13 (Ct. Int'l Trade 2003); *NSK Ltd v. United States*, 346 F. Supp. 2d 1312, 1322 n.6 (Ct. Int'l Trade 2004). In *Timken*, the Federal Circuit found that

[s]ection 3512(c) bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreements Act. 19 U.S.C. § 3512(c). As the Court of International Trade 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 at 1341. A NAFTA panel reached the same result, through a different route. *See* Panel Decision, *In re Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, 26-27, USA-CDA-2002-1904-02 (June 9, 2005) [hereinafter Panel Decision, *Softwood Lumber*] (concluding that § 3512(c) barred a "person" from making such arguments but did not preclude a panel from considering such issues).

129. *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, 1327, 1339-42 (Fed. Cir. 2008) (involving the Byrd Act, passed after a different congressional-executive agreement (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 Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, 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), *vacated*, 475 F. Supp. 2d 1393 (Ct. Int'l

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.”¹³⁰ Conspicuously missing from these opinions is a discussion of the meaning of § 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.”¹³¹ These opinions also do not purport to explain the purpose of 19 U.S.C. § 3512(c)(2) (Congress’s 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”).¹³² 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 Statement of Administrative Action 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 in the way that they did. These opinions simply do not acknowledge these points.¹³³

Trade 2007), agreed with the analysis in *Canadian Lumber Trade Alliance* with respect to § 3312(c) and also found that § 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 § 3312(c) is similar to § 3512(c), there is additional language in § 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 § 3512(c) discussed herein.

130. 19 U.S.C. § 3512(c)(1) (2006).

131. *Id.* § 3512(c)(1)(B) (emphasis added).

132. *Id.* § 3512(c)(2) (emphasis added).

133. 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 & Conduit Corp. v. United States*, the Court of International Trade (erroneously) stated that the Uruguay Round Agreements Act Statement of Administrative Action is “a document prepared by the WTO for the purpose of interpreting and explaining the provisions of the Uruguay Round Agreement.” 24 Ct. Int’l Trade 1357, 1368 n.7 (2000), *aff’d in relevant part and rev’d in part* by 25 Ct. Int’l Trade 23 (2001). In fact, the Statement of Administrative Action was prepared by the Executive Branch, and Congress has determined that it “shall be regarded as an authoritative expression by the United States

Some more recent decisions of the Court of International Trade and Federal Circuit suggest that these courts may be rethinking the meaning of 19 U.S.C. § 3512(c).¹³⁴ Only time will tell whether the course has changed or if these cases are more evidence of mixed treatment of this statutory provision.

V. 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 ITC 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 County*¹³⁵ and *United States v. Mead Corp.*,¹³⁶ there was some uncertainty about whether *Chevron* deference applied to determinations issued in trade cases involving Commerce and the ITC. Contemporaneous law review articles and decisions issued by

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).

134. See, e.g., *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1274, 1284 (Fed. Cir. 2006). When the European Community did not implement the recommendations of a WTO Appellate Body report in *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, the United States was authorized to retaliate. Gilda, an importer of toasted breads from Spain, argued that the USTR's implementation of a retaliation list resulted in the collection of retaliation duties that exceeded what the United States was entitled. *Id.* at 1274. 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." *Id.* at 1284; see also *SKF USA Inc. v. United States*, 491 F. Supp. 2d 1354, 1365 (Ct. Int'l Trade 2007), *aff'd*, 537 F.3d 1373 (Fed. Cir. 2008). Likewise, the Federal Circuit held in *Norsk Hydro Canada, Inc. v. United States* that Norske Hydro Canada's argument that *Charming Betsy* necessitated that the court construe a statutory term consistent with the WTO Subsidies and Countervailing Measures (SCM) 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 legislation,'" 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) (quoting *Defenders of Wildlife v. Hogart*, 330 F.3d 1358, 1362 (Fed. Cir. 2003)).

135. 529 U.S. 576, 587-88 (2000) (explaining that 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"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' . . . , but only to the extent that those interpretations have the 'power to persuade.'").

136. 533 U.S. 218, 231-34 (2001) (concluding that Customs' import ruling letters are entitled to *Skidmore* not *Chevron* deference).

the courts reflected this uncertainty.¹³⁷ The Federal Circuit's September 25, 2001, decision in *Pesquera Mares Australes v. United States* settled any such questions and reaffirmed that *Chevron* deference applies to unfair trade determinations by Commerce (and the ITC).¹³⁸ 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 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.¹³⁹

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,¹⁴⁰ the courts should also examine the

137. See, e.g., Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1536 (2001).

138. 266 F.3d 1372, 1379-80 (Fed. Cir. 2001).

139. *Id.* The delegation of authority to the ITC 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).

140. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 845, 859-64 (1984) (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 Environmental Protection Agency's use of the bubble concept was a reasonable policy choice for the agency to make).

congressionally approved Statement of Administrative Action in this context. The Statement of Administrative Action “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.”¹⁴¹

1. The Role, if Any, for International Trade Agreements

In international trade cases, when congressional intent is clear,¹⁴² *Chevron* deference is not triggered and neither is *Charming Betsy*.¹⁴³ 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. 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.¹⁴⁴ Likewise, the Federal Circuit majority

141. 19 U.S.C. § 3512(d) (2006); *see also, e.g.*, Restani & Bloom, *supra* note 137, at 1540 n.42.

142. 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.

143. *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, 591, 640-41 (2006); Reed, *supra* note 88, at 220; Restani & Bloom, *supra* note 137, at 1543-45.

144. 107 F.3d 1556, 1561 (Fed. Cir. 1997) (quoting *Suramerica de Aleaciones Laminadas C.A. v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992), 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 America, Inc. v. United States*, 24 Ct. Int’l Trade 733, 756-57 (2000), *aff’d*, 283 F.3d 1364 (Fed. Cir. 2002). The court cited 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.” *Id.* at 756-57. Later, the court stated, “As 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.” *Id.*; *see also* *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1369 (Fed. Cir. 2000), *aff’d*, 404 F.3d 1312 (Fed. Cir. 2005) (“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 Hüttenwerke v. United States*, 26 Ct. Int’l Trade 298, 308 & n.17, 316-17 (2002) (remanding the case due to Commerce’s failure to fulfill its statutory obligations, and only

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.”¹⁴⁵

Unfortunately, on several occasions, U.S. courts found congressional intent to be clear, sometimes after reviewing the Statement of Administrative Action, and yet they then proceeded to discuss or examine the language of the international trade agreements. For example, in *Flli 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 should request an extension of provisional measures.¹⁴⁶ In contrast, plaintiffs had contested the legality of Commerce’s failure to terminate the provisional measures within four months of publishing its preliminary determination.¹⁴⁷ The court agreed with the 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.¹⁴⁸ Notwithstanding its finding that the statute was clear, the Court of International Trade also discussed the corresponding provisions of the WTO Antidumping Agreement, observing:

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

referencing consistency with U.S. international trade obligations in the opinion’s summaries of plaintiff’s arguments to that effect).

145. *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1297 (Fed. Cir. 2002). 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. *Id.*

146. 21 Ct. Int’l Trade 1130, 1138 (1997).

147. *Id.* at 1130.

148. *Id.* at 1138.

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.¹⁴⁹

Similarly, despite the clear statutory language and support from the Statement of Administrative Action in *World Finer Foods, Inc. v. United States* the Court of International Trade proceeded to discuss the corresponding provision of the WTO Antidumping Agreement.¹⁵⁰ The court's insertion of a footnote in *Steel Authority of India, Ltd. v. United States*, noting that "nothing in the WTO Antidumping Agreement requires otherwise," after having found that the U.S. statute was clear as further evidenced by the legislative history, is also puzzling.¹⁵¹

In a different case, the Court of International Trade determined that Congress's intent was clear after looking to the plain meaning of the statute and its structure and history.¹⁵² The court'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 Agreement 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.¹⁵³

Others took a similar approach in cases that involved Commerce rather than Customs issues.¹⁵⁴

149. *Id.*

150. *World Finer Foods, Inc. v. United States*, 24 Ct. Int'l Trade 541, 546-47 (2000).

151. *Steel Auth. of India, Ltd. v. United States*, 25 Ct. Int'l Trade 472, 480 nn.17-18 (2001).

152. *Salant Corp. v. United States*, 24 Ct. Int'l Trade 24, 27-29 (2000).

153. *Id.* at 29 (citations omitted) (alterations in original).

154. *See, e.g., Koyo Seiko Co. v. United States*, 24 Ct. Int'l Trade 364, 370, 372 (2000), *aff'd*, 258 F.3d 1340 (Fed. Cir. 2001) (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 Court of International Trade 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:

There 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.

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

In circumstances where congressional intent is clear, it would seem 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.¹⁵⁵ 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. Christopher (Earth Island I)*,¹⁵⁶ the Court of International Trade 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.¹⁵⁷ 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 produce the same conclusions.¹⁵⁸

The intervenor argued that the court should apply a *Charming Betsy* corollary—even if all conflict with international obligations could not be

Id. at 372 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Absent any clear guidance on the issue from Congress, the court next examined whether the agency’s interpretation was reasonable, and concluded that it was. *Allied Tube & Conduit v. United States*, 24 Ct. Int’l Trade 1357, 1367-71 (2000) (finding that the statute was not clear but the Statement of Administrative Action was clear, then finding that the corresponding provision of the WTO Antidumping Agreement provided a result similar to the Statement of Administrative Action, and ultimately upholding Commerce’s practice that was consistent with the Statement of Administrative Action and the WTO Antidumping Agreement).

155. *See, e.g.*, *Nippon Steel Corp. v. United States*, 25 Ct. Int’l Trade 377, 382 & n.9 (2001), *rev’d and vacated by* 337 F.3d 1373 (Fed. Cir. 2003) (“Whatever the merits of the [WTO panel’s] holding in light of WTO rules, it plainly contradicts the applicable statute. . . . [T]he panel decision therefore has no bearing.”); *see also, e.g.*, *Restani & Bloom*, *supra* note 137, at 1544 (“[T]he 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.”).

156. 19 Ct. Int’l Trade 1461 (1995), *aff’d in part and rev’d in part by* 284 F.3d 1282 (Fed. Cir. 2002).

157. *Id.* at 1479.

158. *Id.* at 1485.

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.¹⁵⁹ In response, the court stated, “Suffice 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.”¹⁶⁰ While the above quotation might be considered dictum in light of the court’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.¹⁶¹

Likewise, in *Delverde, SRL v. United States*, 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 a clear statute. The Federal Circuit also noted:

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

159. *Id.*

160. *Id.*

161. 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 Court of International Trade did not follow its earlier erroneous inclination. In *Earth Island Institute v. Daley (Earth Island II)*, 23 Ct. Int’l Trade 215, 216, 231-35 (1999), *aff’d in part and rev’d in part* by 284 F.3d 1282 (Fed. Cir. 2002), the court reviewed guidelines that were issued by the United States Department of State in 1998 after an adverse WTO panel report. *Id.* at 201. After an Appellate Body report was eventually issued, the United States indicated that it would comply with the report. Before the Court of International Trade, 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. *Id.* at 231. 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. *Id.* at 234-35. Having found the U.S. statute to be clear, the court did not apply *Charming Betsy*. *Id.* at 234. The court decided to reserve its judgment on *Earth Island Institute*’s motions until the defendants’ annual report to Congress. *Id.* at 235.

irrespective of the WTO's decision, we do not consider the relevance of that decision except to note that it is not inconsistent with our holding.¹⁶²

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.¹⁶³ Instead, the Federal Circuit went on to say that it found "additional support" in an Appellate Body report, which 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."¹⁶⁴

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 Statement of Administrative Action, 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.¹⁶⁵

162. *Delverde, SRL v. United States*, 202 F.3d 1360, 1369 (Fed. Cir.), *as amended on reh'g*, No. 99-1186, 2000 U.S. App. LEXIS 15215 (Fed. Cir. June 20, 2000). Similarly, in *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 926-28 (6th Cir. 2000), the United States Court of Appeals for 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

take[s] 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."

Id. at 928 (quoting *Suramerica de Aleaciones Laminadas v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992)).

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

164. *Id.*

165. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also id.* at 843 n.9, 845, 859-64.

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.”¹⁶⁶ In one early case where congressional intent was not clear, the Court of International Trade upheld the agency on the basis that the agency’s interpretation of the statute was not inconsistent with the international agreement.¹⁶⁷ In a more recent case, however, the Federal Circuit reiterated its holding from a pre-Uruguay Round Agreements Act 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.¹⁶⁸ Citing 19 U.S.C. § 3512(a), the Federal Circuit emphasized that “[n]either the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation.”¹⁶⁹ 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).¹⁷⁰

166. Restani & Bloom, *supra* note 137, at 1543; *see also, e.g.*, JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 96 (2d ed. 1997); Reed, *supra* note 88, at 222-25.

167. *See, e.g.*, Hoogovens Staal BV v. United States, 22 Ct. Int’l Trade 139, 143, 146 (1998), *aff’d*, No. 04-1081, 2004 U.S. App. LEXIS 23940 (Fed. Cir. 2004) (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 Court of International Trade 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.” 26 Ct. Int’l Trade 1402, 1413 (2002), *aff’d*, No. 04-1081, 2004 U.S. App. LEXIS 23940 (Fed. Cir. 2004). 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 Antidumping Agreement, but in the end, the court affirmed the agency on this point. *Id.* at 1412-13 & n.20.

168. *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005), *aff’d*, 186 F. App’x 997 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007).

169. *Id.*

170. *Id.*

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 United States Court of Appeals for the District of Columbia Circuit in *George E. Warren Corp. v. EPA* found that the statute was not clear and deferred to an Environmental Protection Agency (EPA) rule that, among other things, took into consideration an adverse WTO panel report.¹⁷¹ A WTO panel had found that a 1994 EPA rule violated the antidiscrimination norm of the GATT because domestic refiners could set individual baselines while foreign refiners could not.¹⁷² The United States announced it would comply with the report, and the EPA then promulgated a 1997 final rule.¹⁷³ 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 United States Department of Energy and the WTO panel's report.¹⁷⁴ 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.”¹⁷⁵ The D.C. Circuit noted:

In the 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.’”¹⁷⁶

Thus, the court concluded that it was permissible for the agency to take into consideration international obligations in determining how to

171. *George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998).

172. *Id.* at 623-24.

173. *Id.*

174. *Id.* at 624.

175. *Id.*

176. *Id.* (citations omitted).

interpret an ambiguous statutory provision, and it upheld the agency's interpretation that did so.¹⁷⁷

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. v. United States*,¹⁷⁸ the Court of International Trade 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 the 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.¹⁷⁹ 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.¹⁸⁰ A WTO dispute panel reviewing the same underlying administrative decision had found that Commerce's "not likely" requirement violated WTO rules.¹⁸¹ 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.¹⁸² 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."¹⁸³ In the end, the court determined that Commerce's regulation was consistent with the statute and in consonance with U.S. international trade obligations, and stated "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear,

177. *Id.* 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." Restani & Bloom, *supra* note 137, at 1544.

178. 23 Ct. Int'l Trade 302, 313-14 (1999).

179. *Id.*

180. *Id.* at 312.

181. *Id.* at 313.

182. *Id.* at 310.

183. *Id.* at 311-12.

a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine."¹⁸⁴

The court in *Usinor v. United States* went a step further in an appeal involving the "no discernible adverse impact" standard in five-year reviews.¹⁸⁵ In reviewing a five-year review determination issued by the ITC that was also the subject of an adverse report by a WTO dispute resolution panel, the court first compared the U.S. statute with the WTO Antidumping Agreement and ascertained that there might be a conflict between the two.¹⁸⁶ The Court of International Trade then remanded the determination to the ITC 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."¹⁸⁷ The court asked if the language of the U.S. statute and the WTO Agreement might "be read in harmony."¹⁸⁸ After the ITC 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.¹⁸⁹ 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.¹⁹⁰ In reviewing the ITC's remand determination, the court ultimately found that the ITC's "interpretation of U.S. law as not requiring a strict quantitative negligibility analysis is not inconsistent with the WTO [Antidumping] Agreement."¹⁹¹ 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.¹⁹²

Like the *Hyundai* and *Usinor* courts, the Court of International Trade in *Timken Co. v. United States* agreed that WTO reports are not

184. *Id.* at 313-14.

185. *Usinor v. United States*, 26 Ct. Int'l Trade 767, 773 (2002).

186. *Id.* at 777.

187. *Id.* at 795.

188. *Id.* at 777.

189. *Usinor v. United States*, 342 F. Supp. 2d 1267, 1280 (Ct. Int'l Trade 2004).

190. *Id.* at 1280-81.

191. *Id.*

192. *Id.* at 1279 & n.13.

binding but asserted that they might inform its decision.¹⁹³ 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 Antidumping Agreement, as a WTO dispute settlement panel and the Appellate Body had also found.¹⁹⁴ The court 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.¹⁹⁵ Commerce had published in the *Federal Register* a notice requesting comments on the proposed changes.¹⁹⁶ 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."¹⁹⁷ In circumstances such as the Court of International Trade faced in *Timken* and in *Usinor*, 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.¹⁹⁸ 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.¹⁹⁹

193. 26 Ct. Int'l Trade 1072, 1082 (2002), *aff'd*, 354 F.3d 1334 (Fed. Cir.).

194. *Id.* at 1082-83.

195. *Id.* at 1085.

196. *Id.* at 1084-85; *see also* SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1342 (Ct. Int'l Trade 2004).

197. *Timken*, 26 Ct. Int'l Trade at 1083 n.17.

198. *See, e.g.*, Tembec, Inc. v. United States, No. 05-00028, 2005 WL 1592958, at *1, *vacated*, 475 F. Supp. 2d 1393 (2007) (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); Barceló, *supra* note 105, at 161; Restani & Bloom, *supra* note 137, at 1544 ("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 probably should avoid importing its interpretation of international law into its decision in derogation of deference to the agency.");

199. As the URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. REP. NO. 103-316 (1994), *reprinted in* U.S.C.C.A.N. 4040, 4054, 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.

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 ITC, 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 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.”²⁰⁰ Congress was concerned that in these reports, WTO dispute resolution panels and the Appellate Body did not apply an appropriately deferential standard of review.²⁰¹ Other commentators have expressed similar concerns about reports by WTO dispute resolution panels and the Appellate Body.²⁰² 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,²⁰³ 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.”²⁰⁴ As the Federal

200. BILL THOMAS, TRADE ACT OF 2002, H.R. REP. NO. 107-624, at 61 (2002) (Conf. Rep.).

201. *Id.*

202. 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, 235-37 (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, 208-09 (2007-2008) (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).

203. For an explanation of zeroing, see Brief for the Federal Respondents in Opposition at *2-4, *Corus Staal BV v. Department of Commerce*, No. 05-364 (Dec. 2005) (on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit).

204. *Timken Co. v. United States*, 26 Ct. Int’l Trade 1072, 1085-86 (2002), *aff’d*, 354 F.3d 1334 (Fed. Cir. 2004).

Circuit explained, it would not overturn Commerce's practice based on the Appellate Body report in *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC—Bed Linen from India)* 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 Court of International Trade in the underlying case, upheld Commerce's practice as reasonable.²⁰⁵

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 from India*, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (United States—Anti-Dumping Duties on Corrosion-Resistant Steel)*, and *Softwood Lumber*, the Federal Circuit explained that there is a statutory procedure for dealing with adverse reports by which USTR consults "with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation."²⁰⁶ As in the *Timken* case, the Federal Circuit emphasized that *EC—Bed Linens from India* did not involve the United States. It further found that in *United States—Anti-Dumping Duties on Corrosion-Resistant Steel*, the Appellate Body did not make a finding regarding Commerce's methodology; 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."²⁰⁷ Noting the Supreme Court's holding in *United States v. Pink* that the "conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government,"²⁰⁸ the Federal Circuit explained that it gave "substantial deference" to Commerce's administration of the statute "because of the

205. *Timken Co. v. United States*, 354 F.3d 1334, 1340-45 (Fed. Cir.).

206. *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

207. *Id.*

208. 315 U.S. 203, 222-23 (1942).

foreign policy implications of a dumping determination.”²⁰⁹ 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.”²¹⁰

As other commentators have pointed out, the Federal Circuit’s approach in *Corus Staal* is also consistent with a subsequent decision in *Sanchez-Llamas v. Oregon*²¹¹ wherein the Supreme Court held that opinions of the International Court of Justice (ICJ) deserved “respectful consideration” but are not binding on U.S. courts.²¹² The Federal Circuit subsequently relied on *Sanchez-Llamas* in *Cummins, Inc. v. United States* in affirming the Court of International Trade’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 Court of International Trade 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, “Like the ICJ’s interpretation of the treaty terms in *Sanchez-Llamas*, the WCO opinion is not binding and is entitled, at most, to ‘respectful consideration.’ It is not a proxy for independent analysis.”²¹³ 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.²¹⁴

209. *Corus Staal*, 395 F.3d at 1349 (citing *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995)).

210. *Id.*; see also, e.g., *Koyo Seiko Co. v. United States*, 442 F. Supp. 2d 1360, 1363 (Ct. Int’l Trade 2007), *aff’d*, 2008 U.S. App. LEXIS 25663 (Fed. Cir. 2008).

211. 548 U.S. 331, 353 (2006); see also, e.g., *Medellin v. Texas*, 128 S. Ct. 1346 (2008). The Supreme Court found a non-self-executing treaty for which Congress had not issued implementing legislation. *Id.* at 1356. While agreeing that opinions of the International Court of Justice constitute international law obligations for the United States, the Court disagreed that these opinions are automatically enforceable in U.S. courts because such a construction would eliminate the option of noncompliance by the political branches and cited *Sanchez-Llamas v. Oregon* 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.” *Sanchez-Llamas*, 548 U.S. at 347.

212. Canizares, *supra* note 143, at 645-46.

213. 454 F.3d 1361, 1366 (Fed. Cir. 2006) (citations omitted).

214. *Id.* In a subsequent case, *Airflow Technology, Inc. v. United States*, the Federal Circuit again reached a decision that conflicted with the interpretation of the WCO, but in this

Consistent with the Federal Circuit's 2004 *Timken* and 2005 *Corus Staal* 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.²¹⁵ 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 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

instance, the agency had agreed with the WCO's opinion. 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.

215. In *Corus Staal BV v. Department of Commerce*, the Court of International Trade relied on the Federal Circuit's 2005 *Corus Staal* decision to dispose of many of the issues. 387 F. Supp. 2d 1291, 1298-1300 (Ct. Int'l Trade 2005), *aff'd*, 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006), *cert. denied*, 127 S. Ct. 3001 (2007). With respect to plaintiff's argument that the status of the Appellate Body's report in *United States—Final Antidumping Determination on Softwood Lumber from Canada* had changed since then, the Court of International Trade 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. *Id.* 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 Court of International Trade 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. *Id.* at 1299-1300. Moreover, Commerce's own section 129 determination in *United States—Final Antidumping Determination on Softwood Lumber from Canada* made clear that Commerce switched its methodology for that case and "was not intending to implement an approach that applies to all antidumping investigations." *Id.* 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, 2008).

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 2007).

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.²¹⁶ 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."²¹⁷

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*²¹⁸ 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

216. *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 (Fed. Cir. 2007).

217. *Id.* at 1375 (quoting *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)); see also, e.g., *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381-82 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007). 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., Panel Decision, *Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review*, 33, USA-CDA-1904-04 (Nov. 28, 2007) [hereinafter Panel Decision, *Steel Wire Rod from Canada*]; Panel Decision, *Softwood Lumber*, *supra* note 128, at 33; Lawrence R. Walders, *Citation by U.S. Courts to Decisions of International Tribunals in International Trade Cases*, 69 ALB. L. REV. 817, 821 (2006). It is clear from the statute, legislative history, and Statement of Administrative Action 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 Staal* 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.

218. Panel Decision, *Softwood Lumber*, *supra* note 128.

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) was eventually settled as part of the September 2006 Softwood Lumber Agreement.²¹⁹ Nevertheless, a different panel issued a decision aimed at a similar result shortly thereafter.²²⁰

A finding in a separate decision issued by the Court of International Trade in one of the other lumber appeals, *Tembec I*,²²¹ however, calls into question whether any such findings by a NAFTA panel could ever be enforced. In *Tembec I*, the Court of International Trade explained that, although the ITC 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.²²²

219. Softwood Lumber Agreement, U.S.-Can., annex 2A, (Sept. 12, 2006), available at <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/SLA-main-en.asp>.

220. See Panel Decision, *Steel Wire Rod from Canada*, supra note 217, at 21, 29, 37, 40 (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 Court of International Trade or Federal Circuit including the Federal Circuit's zeroing decisions (such as *Corus Staal*), 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). The 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. 23,183, 23,183-84 (Apr. 29, 2008).

221. 441 F. Supp. 2d 1302, 1318 (Ct. Int'l Trade 2006) (per curiam opinion by three-judge panel).

222. *Id.* (citing 19 U.S.C. § 1516(a)(g)(7)(A) (1988)). In *Tembec I*, a three-judge panel at the Court of International Trade 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 (2006)), and in this instance also found that plaintiffs were entitled to review of the legality of USTR's administration and enforcement of the ITC's section 129 determination. Plaintiffs had argued that USTR unlawfully administered and enforced an affirmative section 129 injury determination issued by the ITC in response to an adverse WTO panel report because the ITC 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 court 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 ITC's affirmative section 129 determination was *ultra vires*. In *Tembec v. United States (Tembec II)*, 461 F. Supp. 2d 1355, 1357, 1367 (Ct. Int'l Trade 2006), vacated, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007), the Court of International Trade addressed the remedy issue for *Tembec I*. The court 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, 1399-1403 (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 ITC'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 ITC's negative remand

VI. CONCLUDING THOUGHTS

If the Federal Circuit's more recent decisions in *Timken* and the *Corus Staal* appeals stand, 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 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 Canada* 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 Uruguay Round Agreements Act 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."²²³

determination on injury). Such language may be welcome to the United States in the light of NAFTA panel reports in cases such as *Steel Wire Rod from Canada* and *Softwood Lumber*.

223. Memorandum from Walter Dellinger, Assistant Att'y Gen., U.S. Dep't of Justice, Office of the Legal Counsel, to Ambassador Michael Kantor, U.S. Trade Rep., *supra* note 94.