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IS *CHARMING BETSY* LOSING HER CHARM? CONSTRUING U.S. INTERNATIONAL TRADE STATUTES CONSISTENTLY WITH INTERNATIONAL LAW AND *CHEVRON*

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I. INTRODUCTION

More than two hundred years ago, Chief Justice John Marshall announced the principle that "an act of [C]ongress ought never be construed to violate the law of nations, if any other possible construction remains."[1] The canon of statutory construction, named after an 1804 case involving a schooner named The Charming Betsy, requires courts to interpret statutes in a manner consistent with international law unless Congress expressly intends otherwise. In 1984, the U.S. Supreme Court adopted a different doctrine, named after a case involving the Chevron oil corporation, which instructs courts to defer to an administrative agency's construction of an ambiguous statute as long as that construction is reasonable.[2]

The intersection between these two doctrines of statutory interpretation is generating confusion, particularly in litigation arising under U.S. international trade laws. In recent years, the Federal Circuit Court of Appeals ("Federal Circuit"), the Court of International Trade ("CIT"), and World Trade Organization ("WTO") dispute settlement panels, have staked out vastly different positions on what effect, if any, the *Charming Betsy* principle has in cases where a U.S. agency's interpretation of an ambiguous statutes is allegedly inconsistent with an international agreement to which the United States is a party. The *Charming Betsy* canon, akin to

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[1] *Murray v. The Schooner Charming Betsy*, 6. U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804).

[2] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984).

"clear statement" rules related to federalism and state sovereign immunity,[3] is based on the premises that Congress intends to comply with international law and that the decision to deviate from international law should left to Congress.[4] The *Chevron* doctrine, rooted in the separation of powers, assumes that courts should defer to agencies in the face of statutory ambiguity because Congress intended to leave certain "policy" questions to agencies and because agencies are best-equipped to make such decisions.[5]

This Article analyzes the tension between *Chevron* and *Charming Betsy* in cases in which an agency's construction of a statute is allegedly in conflict with an international agreement, in particular agreements under the WTO.[6] Is *Chevron* deference appropriate if an agency's construction of an unclear statute is in irreducible conflict with U.S. obligations under the WTO and General Agreement on Tariffs and Trade ("WTO/GATT")[7]? In the international trade area, the question of how to resolve the tension between *Charming Betsy* and *Chevron* is inextricably linked to the increasingly significant debate among government officials and commentators about the extent to which WTO Dispute Settlement Body ("DSB") decisions are binding under

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[3] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457-58 (1989) (discussing clear-statement principles as forcing Congress to "expressly deliberate on an issue").

[4] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479, 495 (1998) (discussing legislative intent conception).

[5] *See infra* notes 29-36.

[6] The World Trade Organization came into existence as a result of the Uruguay Round of Multilateral Trade Negotiations on January 1, 1995. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (1994), 33 I.L.M. 1125 (1994) [hereinafter GATT/WTO or WTO Agreements]. The Final Act embodying the results of the Uruguay Round and the Agreement Establishing the World Trade Organization was opened for signature on April 15, 1994. *Id.*

[7] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

international law,[8] and whether the United States is obligated to implement DSB rulings into U.S. law.[9] Do DSB reports constitute "the law of nations"? If so, should statutes be construed to comply with them via the *Charming Betsy* canon? These questions assumed greater significance after a 2005 Federal Circuit opinion, *Corus Staal v. Department of Commerce*,[10] which held that DSB reports (including those which found U.S. agencies to have acted inconsistently with the WTO)[11] "have no binding effect" in U.S. courts.[12] Citing *Chevron*, the court refused to overturn a Department of Commerce antidumping practice "based on any ruling of the WTO or other international body unless and until such ruling has been adopted" by the political branches.[13]

This Article begins, in Part II, by spelling out the history and purposes of *Chevron* and *Charming Betsy* and their application in the U.S. Supreme Court and lower courts. Part III focuses on unique problems posed by the Uruguay Round Agreements Act ("URAA"),[14] which

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[8] *See generally* John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 109 (2004) (arguing that WTO reports constitute binding international law that must be obeyed by parties to disputes); Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National Law and Regional Law*, J. INT'L ECON. L. 83, 88 (1998) (comparing European Union and United States approaches towards WTO law in domestic courts); Piet Eeckhout, *Judicial Enforcement of WTO Law in the European Union – Some Further Reflections*, J. INT'L ECON. L. 91-110 (2002) (defending the European Court of Justice's refusal to give direct effect to WTO agreements in municipal courts); Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AJIL 416, 417-18 (1996) (arguing that WTO dispute settlement system accommodates sovereignty of Members by allowing them to "choose" to comply with WTO rules).

[9] *See generally* Steve Charnovitz, *Recent Developments and Scholarship on WTO Enforcement Remedies*, *in* INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES 151, 151-152 (Julio Lacarte and Jaime Granados, eds.) (2004) (examining the WTO practice of allowing complaining WTO Members to suspend concessions or other obligations against a WTO Member that has failed to comply with DSB decision).

[10] *Corus Staal SV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied,* --- S. Ct. ----, 2006 WL 37073 (Jan. 9, 2006) (No. 05-364).

[11] *See, e.g.*, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("Softwood Lumber")).

[12] *Corus Staal*, 395 F.3d at 1349.

[13] *Id.* ("We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse 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*") (emphasis added).

implemented the Uruguay Round Agreements, the non-self-executing treaty which created the WTO in 1994.[15] Attention is paid to recent cases before the Federal Circuit, the CIT, and dispute resolution bodies under the WTO and the North American Free Trade Agreement ("NAFTA"), which together underscore lingering uncertainty about the scope of *Charming Betsy*. Part IV examines how *Chevron* and *Charming Betsy* might be reconciled and offers at least two options: apply *Charming Betsy* under either the first or second step of the two-step *Chevron* inquiry.[16]

This Article argues that *Charming Betsy* is best viewed as a limitation on *Chevron* and criticizes the view that courts are precluded from interpreting U.S. antidumping laws consistently with the WTO/GATT under *Charming Betsy*. It criticizes the Federal Circuit's recent holding that DSB reports are due "no deference"[17] when construing U.S. statutes, and suggests that courts can and should rely on DSB reports for interpretive guidance, giving such reports greater or less weight depending on factors such as whether the United States is a party to a dispute.

Although some commentators, including CIT Judge Jane Restani[18] have addressed the question of how to apply the *Chevron* and *Charming Betsy* doctrines under U.S. trade laws,[19]

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[14] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter "URAA"].

[15] *See* WTO agreement, *supra* note 6.

[16] The interrelationship between *Chevron* and *Charming Betsy* has been addressed by commentators such as CIT Judge Jane Restani. *See*, Jane A. Restani, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L. J. 1533, 1542-43 (2001) (arguing that when a statute is unclear, and an international agreement is clear, the agreement should viewed as "secondary legislative history" under the second step of *Chevron* and "reliance upon the *Charming Betsy* principles is unnecessary").

[17] *Corus Staal*, 395 F. Supp. at 1349.

[18] *See* Restani, *supra* note 16.

[19] *See* James Thuo Gathi, *Foreign Precedents in the Federal Judiciary: the Case of the World Trade Organization's DSB Decisions*, 34 Ga. J. Int'l & Comp. L. 1, 19-22 (2005) (discussing tension between *Chevron* and *Charming Betsy* in international trade litigation); (Elizabeth C. 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. CIR. B.J. 229, 237 (2003) (calling the applicability of *Charming Betsy* to international trade agreements "questionable"); Restani, *supra* note 16 at 1542-43 (2001); Michael F. Williams, *Charming Betsy*,

little scholarly effort has been made to analyze the two principles in light of their purposes and to attempt to reconcile as a doctrinal matter. The relationship between *Charming Betsy* and *Chevron* under the trade laws has implications in other areas, such as pollution control and immigration, where U.S. agencies are tasked with interpreting statutes intended to conform U.S. law to international agreements.[20] Also relevant is the extent to which *Charming Betsy* does or should apply to non-self-executing treaties.[21] The subsidiary question of what interpretive weight to give WTO reports raises evokes broader questions about the proper balance between sovereignty and international dispute settlement organizations.[22] An examination of *Charming Betsy* in cases of administrative agency action is especially timely given that the U.S. Supreme Court in January 2006 turned town an opportunity to decide the matter,[23] and given that lower courts and international panels have diverged on the question.[24]

Chevron and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law, 32 LAW & POL'Y IN'TL BUS. 677, 678 (2001).

[20] *Corus Staal Cert Petition*, at 7.

[21] *See infra* and accompanying text.

[22] *See generally* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, J. INT'L ECON. L. 6(4), 841, 843 (2003) (challenging prevailing wisdom that the WTO erodes sovereignty, arguing that international economic institutions enable states to "fully realize their sovereignty.").

[23] *Corus Staal BV v. Dept' of Commerce*, --- S. Ct. ----, 2006 WL 37073 (Jan. 9, 2006) (No. 05-364). This was the second time in two years that the Supreme Court was asked to reverse the Federal Circuit's decision to defer to Commercedespite alleged their inconsistency with international agreements. *Corus Staal BV v. Dep't of Commerce*, Petition for a Writ of Certiorari, No. 05-364 2005 WL 2290266 (Sept. 15, 2005) [hereinafter Corus Cert Petition]. The Supreme Court had refused to review a 2004 case which also involved *Charming Betsy* and *Chevron*. *Timken v. United States*, 354 F.3d 1334, 1338 (Fed. Cir. 2004), *cert. denied, Koyo Seiko Ltd. v. United States*, 125 S. Ct. 412, 160 L.Ed.2d 352 (2004) [hereinafter *Timken*].

[24] The District of Columbia Circuit Court of Appeals has suggested that *Charming Betsy* limits *Chevron*. *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999) (holding that the Supreme Court's "instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States" limited the Environmental Protection Agency's discretion under *Chevron*).

II. *CHEVRON* AND *CHARMING BETSY*: AN OVERVIEW

A. *Chevron* and the principle of deference to the Executive Branch

In *Chevron v. Natural Resources Defense Council*, the respondents, an environmental group, challenged a U.S. Environmental Protection Agency ("EPA") rule interpreting the Clean Air Act.[25] The EPA construed the term "stationary source" in the Act to mean a collection of smokestacks within a facility rather than a single pollution-emitting source.[26] The agency adopted a "bubble" rule which allowed companies to measure pollution based on the entire facility's emissions rather than from each smokestack.[27] The Court, per Justice Stevens, announced the now-famous two-step test for deciding whether EPA's reading was permissible.

"First, always, is the question whether Congress has directly spoken to the precise question at issue . . . . If a court, employing traditional rules of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[28] Second, "if the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[29]

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[25] *Chevron*, 467 U.S. 837, 104 S. Ct. 2778.

[26] *Id.* at 840, 2780.

[27] *Id.*

[28] *Id.* at 842-43*; Timken*, 354 F.3d at 1341.

[29] *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778; *Timken*, 354 F.3d at 1341.

Chevron has been the subject of much scholarly discussion, most of which is beyond the scope of this Article.[30] The doctrine rests on at least two grounds. First, the Court recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap, implicitly or explicitly, by Congress."[31] "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the state by regulation."[32] *Chevron* is also grounded in the separation of powers. The Court made clear that it is constitutionally preferable for agencies acting under the President, who is accountable to the electorate, to make policy decisions.[33] Courts, by contrast, are to be prevented from arrogating power Congress wanted to vest in administrative agencies.[34]

Step one of *Chevron* requires examining the statute and asking whether Congress has "directly spoken to the precise question at issue."[35] In so doing, the court exercises an independent judgment of what Congress intended and gives no deference to the agency view.[36] The second step of *Chevron*, triggered only if the statute is ambiguous,[37] involves determining whether the agency's interpretation of the statute is "reasonable."[38] By using the term

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[30] *See, e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[31] *Id.* at 842-43 (citations omitted).

[32] *Id.*

[33] *Chevron*, 467 U.S at 865, 2793

[34] *Id.*

[35] *Id.* at 842-43.

[36] Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969 (1992).

[37] *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82.

"reasonable," the Court appears to have meant reasonable in light of the text, its legislative history, and interpretive conventions that govern the interpretation of a statute by a court.[39] Under step two, a court may not substitute its own construction of a statutory provision for an agency's interpretation as long as the latter is permissible.[40] The court "should not disturb [the agency construction] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[41] The practical result of these principles is that courts rarely strike down agency interpretations at the second step of *Chevron*.[42]

B. *Charming Betsy*: Historical Foundation and Application in U.S. Law

The principle that an "an act of Congress ought never to be construed to violate the law of nations"[43] emerged in an early 19th Century prize law case.[44] The question in *Murray v. The Schooner Charming Betsy* was whether a nonresident U.S. citizen was liable for trading with a French colony in violation of the Non-intercourse Act of 1800, which created a comprehensive trade embargo against France.[45] The schooner's owner argued that because he had become a Danish citizen, applying the Act to him would violate principles of neutral commerce under

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[38] *Id.*

[39] Merrill, *supra* note 36, at 977.

[40] *Id.* at 843, 2782 (citations omitted).

[41] *Id.* at 845, 2783.

[42] *See* Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1279 (1997) (noting that courts have wide latitude to define the "precise question at issue" and thus to decide the case).

[43] *Charming Betsy*, 6. U.S. (2 Cranch) at 118.

[44] For a fascinating and extensive treatment of the facts and history of the case, see Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1 (2001).

[45] *Id.*

customary international law.[46] In his opinion for the court, Chief Justice Marshall agreed with the defendant.[47] Citing "principles . . . believed to be correct," Marshall declared, "It has . . . been observed that an act of 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 affect neutral commerce, further than is warranted by the law of nations as understood in this country."[48] Marshall then interpreted the Non-intercourse Act so as to avoid a potential conflict with neutral commerce and exempted the defendant from punishment.[49]

Charming Betsy is a well-established interpretive device in Supreme Court jurisprudence, having been applied in maritime,[50] employment discrimination,[51] refugee[52] and other cases. It requires construing statutes so as to avoid violating not only customary international law,[53] but also executive agreements[54] and treaties to which the United States is a party.[55] The Restatement

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (construing Jones Act in harmony with maritime law).

[51] *See e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (refusing to apply employment discrimination statute to bases in foreign countries that were subject of executive agreements with the host governments); *McCulloch v. Sociedad de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (avoided construing National Labor Relations Act in a manner contrary to State Department regulations because it would have foreign policy consequences); *U.S. v. Palestinian Liberation Org.*, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988) (Anti-Terrorism Act of 1987).

[52] *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178, n.35, 113 S. Ct. 2549, 2562, n.35 (1993) (construing statute in light of United Nations Convention Relating to Status of Refugees); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001) (Immigration and Nationality Act); *Cheung v. United States*, 213 F.3d 82, 92 (2d Cir. 2000) (reading extradition statute in harmony with U.S.-Hong Kong extradition agreement); *U.S. v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988) (interpreting smuggling statutes).

[53] Customary international law refers to the area of law that results from a general and consistent practice of states followed by them from a sense of legal obligation. *See In Re Agent Orange Prod. Liability Lit.*, 373 F. Supp. 2d 7, 130 (E.D.N.Y. 2005) *citing* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. c [RESTATEMENT (THIRD)].

(Third), published in 1987, provides that "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."[56] This language is important because the WTO is an international agreement.

Charming Betsy is applied when a court confronts a claim that an international norm or agreement is relevant to the interpretation of a statute. [57] Professor Steinhardt has suggested that the doctrine can be reduced to three steps.[58] First, the court should assess the meaning and status of the international law norm or treaty provision.[59] Second, if the norm is relevant and "nothing in the statute explicitly repudiates it, or if an inconsistency between the norm and the statute can be resolved, the court should adopt the interpretation that preserves maximum scope for both."[60] Third, if the conflict with the international norm is unavoidable and irreducible, the court should refer to the "supremacy axioms," such as justiciability doctrines, to resolve the conflict.[61]

At the heart of *Charming Betsy* is the "general assumption," to use the phrase in the Restatement (Third) of Foreign Relations Law of the United States § 115, that "Congress does

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[54] *See e.g., Weinberger*, 456 U.S. 25 (executive agreement). *See also* RESTATEMENT (THIRD) § 114 (1987) (stating that statutes should be interpreted consistently with international agreements).

[55] *See, e.g., Chew Heong v. U.S.*, 112 U.S. 536, 539-40, 5 S. Ct. 255, 255-56 (1884) (interpreting statute in harmony with previous treaty affecting resident Chinese aliens right to reenter United States).

[56] *Id.* The Restatement (Second), published in 1965, recast the canon as follows: "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 3(3) (1965) [hereinafter Restatement (Second)].

[57] *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAN. L. REV. 1103, 1134 (1990).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

not intend to repudiate an international obligation of the United States."[62] *Charming Betsy* derives its power from the suggestion that because "international law is part of our law,"[63] Congress will ordinarily not wish to violate it.[64] A second conception of *Charming Betsy* places it among the "clear statement" rules that serve institutional goals by requiring Congress to unambiguously speak to an issue before reaching an undesirable interpretation. Rooted in the separation of powers and notions about the proper division of labor among the three branches, clear-statement principles promote better lawmaking by forcing Congress to carefully consider the implications of its legislation.[65] Such rules include the presumptions against federal government superceding of state police powers,[66] of noninterference with the President's power in foreign affairs,[67] and of avoiding serious constitutional questions.[68]

A third conception of the *Charming Betsy* canon is as a normative principle that serves not institutional goals but substantive judicial value-judgments.[69] The presumption against the extraterritorial application of U.S. statutes, for example, is based on notions of comity towards

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[62] RESTATEMENT (THIRD), *supra* note 54 § 115, comment a.

[63] *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299 (1900).

[64] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479, 495 (1998) (discussing legislative intent conception).

[65] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457-58 (1989).

[66] *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 500, 108 S.Ct. 1350, 1353 (1988) (assumption that state's police powers are "not to be superceded" unless "that was the clear and manifest purpose of Congress").

[67] *See, e.g., Dames & More v. Regan*, 453 U.S. 654, 682 (1981); *Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1981);

[68] *DeBartolo v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75 (1988) (citing *Charming Betsy* as standing for the proposition that "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").

[69] *See* Sunstein, *supra* note 66, at 459.

other nations.[70] Substantive canons are controversial because they represent value choices by the Court, and are perhaps evidence of judicial activism.[71] Steinhardt contends that the canon places courts in a "position of oversight" to ensure U.S. compliance with international law, reinforcing the "general reluctance of the international legal system to impose liability or responsibility for state acts that are unintended."[72] Bradley takes issue with the canon's "internationalist" and legislative intent conceptions, and argues that its only valid justification is as a device to preserve the separation of powers.[73] Bradley's concerns appear to be directed at customary international law norms and the debate over whether such norms are "part of U.S. law,"[74] and seem less forceful when considering statutes that interpret international agreements such as the WTO. The "internationalist" function of *Charming Betsy* seems justified with respect to treaties such as the WTO/GATT precisely because they have Congress's imprimatur.

Under both *Chevron* and *Charming Betsy*, if Congress's intent is clear, it controls, even in the face of a contrary agency interpretation.[75] That is, if Congress intends to deviate from a specific international provision, whether under a treaty or customary international law, its clear intent to violate international law must be enforced in U.S. courts.[76] Under *Chevron*, Congress's

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[70] *See EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 111 S.Ct. 1227 (1991).

[71] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992).

[72] Steinhardt, *supra* note 57, at 1128.

[73] Bradley, *supra* note 64, at 498, 484 (proposing separation of powers justification for the *Charming Betsy* canon).

[74] *The Paquete Habana*, 175 U.S. at 700, 20 S.Ct. at 299.

[75] *DeBartolo*, 485 U.S. at 575.

[76] *See* discussion of clear statement rule, *supra*, and accompanying text.

clear intent ends the matter and no deference is due to an agency.[77] Thus, *Chevron* and *Charming Betsy* lead to inconsistent results only in the face of ambiguity.

Where a statutory provision is ambiguous and international law is *also* ambiguous, there is theoretically no conflict between the two canons. *Chevron* tells us that the court should sustain the agency's reasonable interpretation, and *Charming Betsy* is inapplicable because it is only triggered if there is an unavoidable and irreducible conflict between the "law of nations" and a particular statutory construction.[78] If no international law norm or treaty obligation is implicated, the court has no "law" with which it must reconcile the statute.[79] Where the statute is ambiguous but the agency interpretation is in direct and irreducible conflict with an *unambiguous* international law obligation, however, a clear conflict arises. The court faces a dilemma: sustain the agency's view — and, in the process, sanction an alleged violation of international law — or set aside the agency action in deference to international law, trumping *Chevron*.

III. THE *CHEVRON-CHARMING BETSY* PUZZLE IN THE AREA OF INTERNATIONAL TRADE

A. The WTO, the URAA, Dispute Settlement Bodies and U.S. Law

Understanding the ways in which *Chevron* and *Charming Betsy* can and should interact in the area of international trade requires a brief introduction to the WTO and international trade system. After eight years of multilateral negotiations, the United States and 110 other nations

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[77] *See* discussion of *Chevron, supra*, and accompanying text.

[78] *See* Steinhardt, *supra* note 57.

[79] Of course, whether an unavoidable and irreducible conflict between international law and the agency's construction is subject to interpretation and likely to vary.

signed the Uruguay Round Agreements in Marrakesh, Morocco, on April 15, 1994.[80] The Agreements, which entered into force on January 1, 1995,[81] created the WTO under the auspices of the GATT,[82] which since its establishment in 1946 was the principal treaty in international trade relations. The Uruguay Round Final Act resulted in several WTO-related agreements, including Antidumping Agreement ("Antidumping Agreement or AD Agreement").[83]

On December 8, 1994, Congress enacted the Uruguay Round Agreements Act to implement into U.S. law the obligations undertaken by the United States as a result of the Uruguay Round. The agreements have no direct "statute-like" effect in U.S. law.[84] As the Senate noted, the Uruguay Round Agreements "are not self-executing and thus their legal effect in the United States is governed by implementing legislation."[85] Yet significantly for present purposes, the Uruguay Round Agreements are binding on the United States under international law. [86]

Two important aspects of the URAA are relevant. First, the URAA gives domestic law preclusive effect when a conflict between the URAA and the Uruguay Round Agreement itself arises. Section 102(a) of the implementing bill, 19 U.S.C. § 3512(a)(1), provides that "[no] provision of any of the Uruguay Round Agreements [e.g. the ADA], nor the application of any

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[80] S. Rep. No. 103-412, at 5 (1994). Negotiations formally began in September 1986 in Punta del Este, Uruguay, when parties agreed to launch a new round of multilateral trade negotiations. *Id.*

[81] URAA *supra* note 14, sec. 101(a)(1); *see* WTO Agreement, *supra* note 83, § 3 (stating that the members agreed to the entry into force of the Uruguay Round Agreements "by 1 January 1995, or as early as possible thereafter.").

[82] *See* WTO Agreement, *supra* note 83.

[83] *Id*. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Apr. 15, 2004), in Annex 1A to WTO Agreement, *id.*, *reprinted in* H.R. Doc. No. 103-316, at 1453 (1994) 1994 WL 761483 [hereinafter Antidumping Agreement or AD Agreement].

[84] JOHN H. JACKSON & WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 244 (West, ed. 2002).

[85] S. Rep. No. 103-412, at 13 (1994); *accord* H.R. Rep. No. 103-826, pt. I, at 25 (1994).

[86] Williams, *supra* note 19at 679.

such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[87] Section 3512(a)(2) provides that nothing in the URAA "shall be construed . . . to limit any authority conferred under any law of the United States."[88] According to the Statement of Administrative Action ("SAA"),[89] which is the "authoritative expression of the United States" on the domestic interpretation and application of the Uruguay Round Agreements,[90] Section 1312(a) means that "[t]he WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round Agreements . . . U.S. law will take precedence."[91] In addition, Section 3512(c)(1), 102(c) in the implementing bill, barred private rights of action challenging agency action on the "ground that such action or inaction is inconsistent" with the Uruguay Round Agreements.[92]

A second aspect of the URAA is a separate agreement emerging from the Uruguay Round, the Dispute Settlement Understanding ("DSU").[93] The DSU embodied a far more elaborate and comprehensive system for resolving disputes than existed under the GATT, whose dispute resolution procedure was developed by state practice and was deemed ineffective.[94] The

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[87] 19 U.S.C. § 3512(a) (2000). Section 2504(a) of the Trade Agreements Act of 1979, which pertained to the GATT prior to the WTO, is substantially similar. Trade Agreements Act of 1979, 19 U.S.C. 2504(a) (1994).

[88] 19 U.S.C. § 3512(a)(2)

[89] Statement of Administrative Action ("SAA"), H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

[90] 19 U.S.C. § 1312(d) (2000).

[91] *Id.* at 659.

[92] 19 U.S.C. § 3512(c)(1).

[93] WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 83, 33 I.L.M. at 1226 [Dispute Resolution Understanding or DSU].

[94] *See* John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 165 (1997) (noting that the GATT system was "recognized as an anomaly for an effective dispute resolution procedure").

twenty-seven article DSU, in Annex 2 of the Final Act, created an appellate structure under which panels could issue reports that interpret the WTO Agreements in disputes between member-Parties.[95] Under Article 3.2, the WTO panels "clarify" the obligations of member-Parties under the WTO agreements but "cannot add to or diminish" rights and obligations.[96] Under the DSU, a panel is formed (usually of three impartial individuals) to "make an objective assessment" of disputes initiated by a Member-state (or group thereof), once efforts to resolve the dispute have worn out.[97] WTO reports do not bind non-parties to the dispute and, as a formal matter, lack precedential effect.[98] However, DSB decisions and recommendations are in practice influential on subsequent proceedings.[99]

Under Article 19(1), if a panel concludes that a party's action is inconsistent with an agreement, the panel "shall recommend" courses of action and may "suggest ways" in which the member can bring itself into compliance with its obligations.[100] Article 3.7 states that the losing party shall "use its judgement" as to whether "action" under the report would be "fruitful".[101] Among the most relevant provisions is Article 21(3), which provides that a Member has a "reasonable time" to change its domestic laws and bring its policy into conformity with its

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[95] *Id.*

[96] Article 3.2 of the DSU states that the dispute settlement system is meant to "clarify the existing provisions of . . . the agreements in accordance with customary rules of interpretation in public international law." *Id.* at 1227.

[97] *See* DSU, art. 11. *See also* Jackson, *supra* note 94, at 176.

[98] *See Corus Staal v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1264 (CIT 2003) [hereinafter *Corus Staal I*] (noting that WTO panel decisions are "binding only upon the particular countries involved" and lack *stare decisis* effect). *See also* Dispute Settlement Understanding, Annex 2, vol. 31, 33 I.L.M. 1226, 1227, art. 3(2)).

[99] As a practical matter, dispute resolution bodies have precedential effect to the extent that WTO panels follow their previous decisions. *See Corus Staal I*, 259 F. Supp. 2d at 1264 n. 17.

[100] *Id.* at 1237, art. 19(1).

[101] *Id.* art. 3.7 ("Member shall exercise its judgement as to whether action" under DSB report would be "fruitful").

obligations after it has been found to have violated them.[102] Article 22(1) allows a state whose actions have been found to be WTO-inconsistent to provide "compensation" to the injured party or tolerate the "suspension of concessions . . . in the event that the recommendations and rulings are not implemented within a reasonable period of time."[103]

Much debate has continued to surround the extent to which Members are legally required to change their laws or practices to conform to DSB decisions and recommendations.[104] The debate is central to the present discussion because it sheds light on whether WTO reports constitute the "law of nations" for purposes of *Charming Betsy.*[105] The DSU does not expressly address whether there is an international law obligation to obey DSB reports.[106] John Jackson has argued that under U.S. law and the WTO itself, DSB decisions bind parties under international law.[107] For example, Article 22(1) refers to compensation and the suspension of concessions as "temporary measures" and states that "full implementation" is "preferred."[108] Article 22(8) states that the "suspension of concessions or other obligations shall be temporary."[109] According to

[102] DSU, art. 21(3).

[103] *Id.* art. 21(1).

[104] Jackson, *supra* note 94 at 179 (noting that legal effect of WTO panel reports is "an interpretive issue that has grown in importance since the WTO came into effect").

[105] *See Charming Betsy*, 6. U.S. (2 Cranch) at 118.

[106] John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 112-13 (2004).

[107] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments – Results of the Uruguay Round, Annex 2, vol. 31, 33 I.L.M. 1226, 1237 (1994), art. 19 [hereinafter Dispute Settlement Understanding]. *See generally* John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 109 (2004).

[108] *Id. citing* DSU, art. 22(1).

[109] DSU, art. 21(8) ("The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member

Jackson, these are among at least 12 textual provisions in the DSU and additional clauses in the WTO Charter that support the argument that panel findings are obligatory and that a losing party cannot "buy out" of its obligations to conform.[110] Others contend that DSB decisions are not binding insofar as Members are free to choose not to adopt a particular panel decision.[111] Professors Warren F. Schwartz and Alan O. Sykes refute Jackson's view that failing to comply with the WTO violates international law, instead offering the concept of "efficient breach."[112] Schwartz and Sykes argue that three provisions of the DSU — that permit compensation or the suspension of concessions instead of changing behavior, that limit sanctions for non-compliance, and that permit states a "reasonable time" to correct WTO-inconsistent problems — effectively allow Member nations to "deviate" from commitments under the WTO.[113]

What is clear is that the *domestic-law* effect of WTO panels is determined according to URAA provisions enacted by Congress to curb a perceived threat to U.S. sovereignty.[114] Sections 123 and 129 of the URAA (19 U.S.C. § 3533 and 19 U.S.C. § 3538 respectively) specify a deliberative process involving the Executive and Legislative Branches to be followed before a WTO report has any effect on U.S. law. Section 3533(f)(3) provides that if a WTO report concludes that an agency's "regulation or practice" is "inconsistent" with any of the Agreements, that "regulation or practice may not be amended, rescinded, or otherwise modified

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that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.").

[110] *Id.* at 116.

[111] *See, e.g.* Bello, *supra* note 8, at 416-17. *Cf.* Jackson, *supra* note 107, at 109-110 (responding to Bello).

[112] Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002).

[113] *Id.* at 180.

[114] *See generally* Gathi, *supra* note 19, at29-30 (discussing objections to the binding nature of DSB decisions); Jackson, *supra* note 94, at 174 ("Members of Congress were concerned whether the allocation of power regarding WTO decision-making was an inappropriate infringement on U.S. sovereign decision-making.").

in the implementation of such report unless and until" Congress, the United States Trade Representative ("USTR"), and the agency have consulted about the response.[115] The DSB panels "will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."[116]

The URAA demonstrates Congress's concern that WTO reports not override agency action "unless and until" Congress said otherwise.[117] Yet if John Jackson is correct that WTO reports' constitute binding *international law* on *parties* to DSB disputes, then such reports should at least influence domestic courts' statutory interpretation in some cases.[118]

B. The Federal Circuit's and CIT's Struggle with *Charming Betsy* and *Chevron*

The debate over *Charming Betsy* and *Chevron* has played out in recent cases in which the courts have examined U.S. agency constructions under the antidumping and countervailing ("AD/CVD") laws. These laws are designed to combat the practice of illegal "dumping," which arises when an importer sells its products in the United States at prices lower than those at which it sells the same goods in its home market.[119] The Tariff Act of 1930, as amended by the URAA, permits the United States to impose AD duties where "foreign merchandise is being, or is likely

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[115] 19 U.S.C. § 3533(g)(1). *See also* 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must observe to change its policy in order to conform to a WTO ruling).

[116] SAA, *supra* note 147.

[117] *See* 19 U.S.C § 3533(g) (defining statutory scheme for conforming to WTO rulings).

[118] John H. Jackson, *The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations*, 91 AMJIL 60, 64 (1997).

[119] *See* 19 U.S.C 1673.

to be, sold in the United States at less than its fair value"[120] and causes or threatens material injury to an industry in the United States.[121] The two agencies tasked with administering those laws are the Department of Commerce and the International Trade Commission ("ITC").[122]

The Federal Circuit has treated DSB reports with suspicion and has tended to defer strongly to agency interpretations of AD/CVD provisions. In 1992, in *Suramerica de Aleaciones Laminadas v. United States*, the Federal Circuit rejected the argument that statutes implementing the GATT should be read consistently with the GATT.[123] "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."[124] The court ignored *Charming Betsy*, refusing to inquire whether the agency's reading was consistent with the GATT.[125] In 1995, the Federal Circuit appeared to retreat somewhat from this extreme position, noting that GATT is an international obligation and that "absent Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."[126]

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[120] *Id.* Prior to 1979, this language was adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which was initially codified at 19 U.S.C. 160 *et seq.* (1976) and reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, 46 Stat. 590.

[121] 19 U.S.C. 1673(2)(A)(i)-(ii).

[122] 19 U.S.C. 1671, 1673, 1677 (1994).

[123] *Suramerica de Aleaciones Laminadas v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992).

[124] *Id.* (citations omitted).

[125] *See generally* Michael F. Williams, *Charming Betsy, Chevron and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law*, 32 LAW & POL'Y IN'TL BUS. 677, 678 (2001). The following year, the United States Court of Appeals for Fifth Circuit held similarly, refusing to overturn the Secretary of Agriculture's interpretation of a certain statute under *Chevron* "even if implementation of that intent is virtually certain to create a violation of the GATT." *Mississippi Poultry Ass. v. Madigan*, 992 F.2d 1359, (5th Cir. 1993).

[126] *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

The CIT has proved more comfortable and adept at applying *Charming Betsy* under similar circumstances.[127] In its 1999 opinion in *Hyundai Electronics Co. v. LG Semicon Co.*, the CIT stated that the Uruguay Round Agreements are "properly construed as an international obligation of the United States" despite their non-self-executing nature.[128] Citing *Charming Betsy* as requiring that "absent express language to the contrary, a statute should not be interpreted to conflict with international obligations," the court stated, "*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated."[129]

The intersection of *Charming Betsy* and *Chevron* has come under scrutiny in recent cases before the CIT and Federal Circuit challenging the Commerce Department's "zeroing" methodology, which is used to calculate an alleged violator's liability under the AD/CVD laws.[130] The petitioners in *Timken* argued that zeroing was unreasonable because it violated the Antidumping Duty Agreement as interpreted by WTO panels,[131] citing a WTO Appellate Body report[132] which focused on the European Community's practice of zeroing negative-margin transactions in investigating duties on the importation of bed sheets from India. The Appellate Body concluded in *EC—Bed Linen* that the EC practice of zeroing during an antidumping

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[127] *See Hyundai Elecs. Co. v. United States*, 23 CIT 302, 313, 53 F. Supp.2d 1334, at 1344 (1999) (WTO panel report "does not constitute binding precedential authority for the court").

[128] *Hyundai*, 53 F. Supp. at 1343.

[129] *Id.*

[130] Commerce's zeroing methodology is used to calculate an exporter's "dumping margin," which is defined as "the amount by which the normal value exceeds the export price or constructed export price of the merchandise." 19 U.S.C. 1677(35)(A). Zeroing rests on the premise that a "dumping margin" exists only when the normal value at which the product is sold in the exporting country "*exceeds* the export price" to the United States by a positive value (emphasis added). The Department treats transactions that generate "negative" dumping margins (i.e. a dumping margin with a value less than zero) as if they were zero. *Timken*, 354 F.3d at 1338.

[131] *See Timken*, 354 F.3d at 1339.

[132] *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/R ¶ 1 (Mar. 1, 2001) [hereinafter "*EC—Bed Linen"*].

investigation violated Article 2.4 of the WTO Antidumping Agreement,[133] which states that country-Parties must make a "fair comparison" between the export price or constructed export price and the normal value when calculating dumping margins.[134] The petitioners in *Timken* asked the Federal Circuit to adopt the panel's holding and interpret the "fair comparison" language in the U.S. antidumping statute (which implemented the AD agreement)[135] to preclude Commerce's zeroing practice as unreasonable,[136] on the theory that zeroing creates a statistical bias unfavorable to foreign producers. The petitioners argued that courts "should interpret U.S. law, whenever possible, in a manner consistent with U.S. international obligations."[137]

The court responded by construing the "fair comparison" language in the AD Agreement narrowly as not precluding zeroing.[138] Because the AD Agreement was ambiguous, there was no conflict between Commerce's reading and the international agreement itself.[139] The court reasoned that even assuming that the WTO body's report were correct, it would "nevertheless find Commerce's continued practice of zeroing reasonable" because the WTO decision "is not binding on the United States, much less this court."[140]

In *Corus Staal*, the petitioners, Netherlands-based Corus Staal BV and three U.S. corporations [hereinafter "Corus"] challenged Commerce's imposition of antidumping duties on

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[133] AD Agreement, *supra* note 83, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1455 (1994).

[134] *Timken*, 354 F.3d at 1343 (citing *EC—Bed Linen*, ¶¶ 46-66).

[135] 19 U.S.C. § 1677b(a) ("a fair comparison shall be made between the export price or constructed export price and normal value"). *See* AD Agreement, *supra* note 83.

[136] *Timken*, 354 F.3d at 1344.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

their imports of hot-rolled carbon steel flat products.[141] As in *Timken*, the issue was whether Commerce's zeroing methodology to calculate the "dumping margin" was reasonable.[142] The CIT in *Corus Staal* sustained Commerce's practice,[143] rejecting Corus' argument that a methodology that violates the AD Agreement is *necessarily* unreasonable.[144] The CIT refused to give effect to the WTO Appellate Body's report in *EC—Bed Linen*,[145] declaring that "WTO decisions are not binding upon Commerce or the court."[146] Citing the Statement of Administrative Action,[147] the court found, "WTO decisions are not binding upon the WTO itself" because the concept of *stare decisis* does not apply to their rulings.[148] "As a result, WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved."[149]

On appeal before the Federal Circuit in January 2005,[150] Corus argued that zeroing was inconsistent with Article 2.4.2 of the AD Agreement,[151] this time citing Appellate Body reports

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[141] *Id.* at 1255-56. Commerce argued that zeroing was "required by U.S. law," an argument which the court rejected. *Id.* at 1261-62. Much like the petitioners in *Timken*, Corus argued that zeroing "results in a fundamentally unfair comparison that intentionally ignores certain transactions and distorts the final [dumping] margin." *Id.*

[142]The appellate court turned to step two of *Chevron* after concluding, as it did in *Timken*, that the statute was "silent as to the impact of negative margins." *Id.* at 1261.

[143] *Corus Staal I*, 259 F. Supp. 2d at 1262

[144] *Id.* at 1262.

[145] As in *EC—Bed Linen*, the dispute in *Corus* involved zeroing in an administrative review of dumping. The court conceded that one reason for why *EC—Bed Linen* was distinguishable in *Timken* was not present here. *Id.* at 1264.

[146] *Id.* (citations omitted).

[147] Statement of Administrative Action ("SAA"), H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

[148] *Corus Staal I*, 259 F. Supp. 2d at 1264 (citing *WTO Agreement*, *supra* note 83, art. 3(2)).

[149] *Id.*

[150] *Corus Staal*, 295 F.3d 1343.

[151] *Id.* at 1347-48.

from 2003 and 2004.[152] One report, issued on August 11, 2004, *United States – Final Dumping Determination on Softwood Lumber from Canada,* found that Commerce's use of zeroing in its investigation of Canadian softwood lumber violated Article 2.4.2 of the AD Agreement.[153] In *Softwood Lumber*, the Appellate Body found that zeroing violates Articles 2.4.2's requirement that a dumping margin calculation involve a "fair comparison" between export price and normal value.[154] "There is no textual basis," the Appellate Body found, "under Article 2.4.2. that would justify taking into account the 'results' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results.'[155]

The court refused to rely upon the *Softwood Lumber* report, finding such an argument foreclosed by *Timken*.[156] The Federal Circuit interpreted Section 3512(a)(1) —denying legal effect to WTO provisions "inconsistent" with U.S. law — as meaning that "[n]either the GATT nor any enabling international agreement outlining compliance therewith (e.g. the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[157] The court stated, WTO decisions "are not binding on the United States."[158] Since "Congress has enacted legislation to deal with the

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[152] *Id.* at 1348 (citing *EC—Bed Linen*, WT/DS141/AB/R, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) ("Corrosion Resistant Steel"), and *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("Softwood Lumber")).

[153] *Id.* ¶ 98.

[154] *Id.*

[155] *Id.*

[156] *Corus Staal*, 395 F.3d at 1347.

[157] *Corus Staal*, 395 F.3d at 1348 (citing *Suramerica*, 966 F.2d at 668).

[158] *Id.*

conflict" over zeroing in the URAA, the court found, "[w]e therefore accord *no deference* to the cited WTO cases" (emphasis added).[159] The court "refuse[d] to overturn Commerce's zeroing practice based on any ruling of the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme."[160]

C. After *Corus Staal*: the Looming Conflict Between *Charming Betsy* and *Chevron*

The Federal Circuit's instruction to give no deference to WTO decisions "unless or until" Congress adopts those decisions[161] is a departure from previous cases which read statutes consistently with the WTO/GATT, including some which relied on WTO reports for interpretive guidance. In a June 2004 opinion, the CIT relied on a WTO report to help it consider the reasonableness of the ITC's decision not to revoke AD/CVD orders on carbon steel products from various countries.[162] The court stated that "[i]ts opinions may be informed by WTO documents" even though the WTO Agreements "are not self-executing" and even though WTO panel reports "are not *stare decisis* in United States' courts." WTO reports should be treated like law review articles, treatises or commentaries, the court stated, which a "court can examine for persuasive rationale. Nothing in the law forecloses it."[163] In February 2005, the CIT relied upon

[159] *Corus Staal*, 395 F. Supp. at 1349.

[160] *Id.*

[161] *Corus Staal*, 395 F. Supp. at 1349.

[162] *Usinor v. United States*, 342 F. Sup. 2d 1267, 1279-80 (2004). The case is noteworthy in part because here the United States government, rather than foreign producers, cited to WTO Appellate Body decisions that demonstrated that the ITC's construction of the statute was consistent with the AD Agreement. *Id.* at 1280. The United States argued that it did not cite to the WTO panel reports because it regarded them as binding – and in fact argued that they had "no bearing" on the litigation -- but cited to them because "it was just responding to the 'arguments raised by the German respondents" and that it knew that the CIT and the Federal Circuit had looked to WTO panel reports in the past. *Id.* n.13. The court stated that it disagreed with the United States on this point.

WTO reports despite the Federal Circuit's opinion in *Corus Staal* the month prior.[164] In that case, *Allegheny Ludlum Corp. v. United States,* the CIT gave an Appellate Body report "persuasive weight" in determining whether the privatization of a foreign firm justified the U.S. decision to extinguish subsidies to U.S. firms.[165] The court declared, "[C]ourts should prefer adhering to international law standards unless otherwise indicated by Congress."[166]

Unclear after *Corus Staal* is to what extent the URAA restricts or precludes application of *Charming Betsy*. That is, does the "statutory scheme" in the URAA, which gives U.S. law primacy over international agreements and lets the political branches decide whether to adopt WTO reports, forbid courts from harmonizing statutes with international law? The Federal Circuit interpreted Section 3512(a), which specifies that "[n]o provision" of any of the Uruguay Round Agreements (including the ADA) that is "inconsistent with any law of the United States shall have effect,"[167] as meaning that "[n]either the GATT nor any enabling international agreement outlining compliance therewith (e.g. the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[168] Under this interpretation, U.S. law has preclusive effect over

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[163] *Id.* at 1280. However, the court found no reason to apply *Charming Betsy* because the WTO Agreement and the ITC's construction of the statute were not inconsistent. *Id.* at 1279.

[164] Another example is worth noting. The CIT applied *Charming Betsy* to interpret the Bureau of Customs' classifications of importations of ice cream into the United States as incorporating requirements of an Executive agreement in which the United States committed to allow certain levels of importation of ice cream. *The Pillsbury Co. v. United States*, 368 F. Supp. 1319, 1328 (2005). The Court read the Bureau of Customs' classification "in harmony" with the Executive agreement so as not to "offend the well settled principle that the abrogation of international agreements by implication is strongly disfavored." *Id.* The force of this case for present purposes may be lessened by the fact that the court denied Commerce *Chevron* deference, instead reviewing the matter *de novo. Id.*

[165] *Allegheny Ludlum Corp. v. United States*, 358 F. Supp. 2d 1334, 1348-49 (CIT 2005).

[166] *Id.* at 1348.

[167] 19 U.S.C. § 3512(a) (2000).

[168] *Corus Staal*, 395 F.3d at 1348 (citing *Suramerica*, 966 F.2d at 668).

international law and WTO reports should be given "no deference."[169] The United States, for its part, argued that *Charming Betsy* has limited scope.[170] In its 2005 motion urging the Supreme Court to deny certiorari in *Corus Staal*, the United States rejected the petitioner's argument that "'the *Charming Betsy* principle necessarily excludes from the range of otherwise reasonable interpretations' those that have been held by an international body to violate an international obligation of the United States . . . ."[171] *Charming Betsy*, the United States argued, has applied narrowly to cases in which the court sought to avoid, the Supreme Court's words, "unreasonable interference with the sovereign authority of other nations."[172] According to the United States, *Charming Betsy*, "whatever its proper scope, has *no application* when, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the relevant international agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts."[173]

In 2005, a NAFTA Binational Panel presented a strikingly different conception of *Chevron* and *Charming Betsy*. Under NAFTA, panels are empowered to issue decisions which bind the particular parties before the panel.[174] The five-member panel's report in *In The Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping*

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[169] *Id.*

[170] *Corus Staal BV v. Dep't of Commerce*, 2005 WL 3348829 [hereinafter *Corus Staal* United States' certiorari opposition brief] (Dec. 6, 2005). See *also Koyo Seiko Co., Ltd v. United States*, Petition for a Writ of Certiorari, No. 04-87 (2004). This petition asked the Supreme Court to reverse the Federal Circuit's opinion in *Timken*.

[171] *Corus Staal* United States' certiorari opposition brief.

[172] *Id. citing F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004).

[173] *Corus Staal* United States' certiorari opposition brief, 2005 WL 3348829.

[174] North American Free Trade Agreement, Dec. 17, 1992, United States-Canada-Mexico, 31 I.L.M. 289, Art. 1904(9). These panel decisions lack binding force in U.S. law. 19 U.S.C. § 1516a(b)(3) states, "a court of the United States is not bound by but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA . . . ."

Determination[175] confronted whether the United States' zeroing practice as applied to Canadian softwood lumber violated the Antidumping Agreement. The Panel reasoned that where an agency interpretation is inconsistent with U.S. treaty obligations, the *Charming Betsy* canon renders that interpretation unreasonable.[176] The panel took issue with the suggestion that the URAA provisions, namely Sections 123 and 129, barred courts from reconciling ambiguous statutes with U.S. obligations under international law. The Panel wrote, "The URAA does not render *Charming Betsy* unavailable as a rule of statutory construction."[177] The Panel observed, "*Chevron* is not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute."[178] The Panel also wrote that WTO reports, specifically *Softwood Lumber*, ought to be consulted.[179]

IV. ANALYSIS

Recent cases before the CIT, the Federal Circuit, and the NAFTA and WTO panels expose vastly different views about whether and how ambiguous statutes should be interpreted consistently with international law. The confusion about *Charming Betsy* and *Chevron* cries out for resolution. Three questions follow. First, to what extent should *Charming Betsy* serve as a limitation on the deference normally accorded to agencies in interpreting ambiguous

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[175] Article 1904 Binational Panel Report, *Certain Softwood Lumber Products from Canada*, Secretariat File No. USA-CDA-2002-1904-02, 44 (June 9, 2005) (finding that Commerce's zeroing practice in an investigation "is not permitted by the Antidumping Agreement") [hereinafter NAFTA Report].

[176] *Id.*

[177] *Id.* at 119a.

[178] *Id.* at 102a.

[179] *Id.* at 118a. (citing Article 3(2), WTO Dispute Settlement Understanding).

international trade statutes, in light of purposes and functions of *Charming Betsy* and *Chevron*? Second, assuming that the *Charming Betsy* canon is to limit *Chevron*, how should courts apply the two principles in concert in the context of antidumping statutes? Third is the unique problem posed by WTO reports: Should an agency's otherwise reasonable interpretation under *Chevron* be overturned if it cannot be reconciled with a DSB's interpretation of the WTO/GATT in an opinion?

A. *Charming Betsy*'s Viability When Construing U.S. International Trade Statutes

An initial observation is that *Charming Betsy* is a viable doctrine and has powerful implications. The U.S. Supreme Court has declared the principle to be "beyond debate,"[180] and has applied *Charming Betsy* as a limitation on the Executive Branch's behavior in cases implicating international law. In *Weinberger v. Rossi*,[181] the Court applied *Charming Betsy* to narrowly construe a statute that barred the U.S. military from discriminating against U.S. citizens on U.S. bases abroad to avoid a contrary interpretation that would violate U.S. obligations under an Executive Agreement between the United States and other nations.[182] The extensive case law

[180] *DeBartolo v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75 (1988) (citing *Charming Betsy* as standing for the proposition that "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").

[181] 456 U.S. 25, 102 S.Ct. 1510 (1982).

[182] *Id.* at 32-33, 1516-17. In *McColloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21, 83 S. Ct. 671, 677-78 (1963). the Court applied *Charming Betsy* to construe the National Labor Relations Act in a manner consistent with State Department regulations because a contrary reading "would have been contrary to 'a well-established rule of international law.'" *Id.* at 21, 677-78.

shows that ignoring *Charming Betsy* altogether is not an option and that courts must attempt to reconcile the canon with *Chevron* in cases where both are applicable.[183]

It is axiomatic that Congress is free to legislate in violation of international law.[184] Yet the URAA is not such an intentional violation of international law, nor does it preclude application of *Charming Betsy*. Section 3512(a)(1) does not preclude *Charming Betsy* because it addresses circumstances in which a statute and the WTO agreements are "inconsistent"; to be "inconsistent" with the WTO agreements, the statute must necessarily be clear on a particular matter. But if the statute is *unclear* on that matter, and there is therefore no inconsistency, then Section 3512(a) has no relevance. The *Charming Betsy* principle tells us that in such circumstances the unclear statute should be read so as not to violate international law, which would include relevant provisions of WTO/GATT agreements. As the NAFTA panel noted, Section 3512 (c)(1)(B), depriving a "person" from challenging a U.S. agency action as "inconsistent" with a WTO obligation in a U.S. court, does not "strip away from a court (or a binational panel) the ability — indeed the responsibility — to consider WTO obligations in assessing the legality of agency action under *Charming Betsy*.[185] U.S. courts are free to use canons of construction to review the lawfulness of agency interpretations.[186] As the petitioners in *Corus Staal* argued, zeroing is not challenged because "it is inconsistent with [the AD Agreement]," a line of argument expressly prohibited under § 3512(c)(1)(B), "but [be]cause it is

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[183] *See* Restani, *supra* note 16, at 1542 (noting viability of *Charming Betsy*).

[184] As the Restatement § 115(b) provides, "that a rule of international law or a provision of an international agreement is superceded as domestic law does not relieve the United States of its international obligation or the consequences of a violation of that obligation." Restatement (Third) of Foreign Relations Law of the United States, § 115(b).

[185] NAFTA Panel, at 103a.

[186] *See Corus Staal* Petitioner's Reply Brief, 2005 WL 354113 * 3 ("Section 3512(c) does not bar review" of petitioner's claim challenging zeroing).

inconsistent with *Congress's intent* that the Tariff Act be enforced consistently with that Agreement" (emphasis added).[187] Indeed, the purpose of the URAA, as stated in the Statement of Administrative Action, was to "bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements."[188]

Moreover, just because treaties such as the Uruguay Round Agreements are non-self-executing does not mean that they are irrelevant when interpreting statutes. Non-self-executing treaties are binding internationally, even if they require further legislation to become enforceable in U.S. courts,[189] and serve an interpretive function.[190] In *Cardoza-Fonseca*, the Supreme Court construed a statute in harmony with a non-self-executing executive agreement, the United Nations Protocol Relating to the Status of Refugees.[191] As the Federal Circuit observed in *Hyundai Electronics*, the Uruguay Round Agreements are "properly construed as an international obligation of the United States" despite their non-self-executing nature[192] and therefore "*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated."[193]

Charming Betsy is controversial to the extent that it limits agency decision-making and, as argued below, courts should be wary of applying it too broadly. Yet *Charming Betsy* may

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[187] *Corus Staal* Petitioner's Reply Brief, 2005 WL 354113 * 3.

[188] *Id.* (citing SAA, H.R. Doc. No. 103-316 at 669).

[189] *See* RESTATEMENT (THIRD) § 111, comment h.

[190] Carlos Manuel Vásquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l. L. 695, 722-23 (1995), *reprinted in* JACKSON, *supra* note 84 at 101-102 (arguing that it would be a "serious mistake" to assume that a non-self-executing treaty is irrelevant to construing domestic statutes and noting the legislative history of the URAA).

[191] *See Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (the U.N. Protocol is not self-executing).

[192] *Hyundai*, 53 F. Supp. at 1343.

[193] *Id.*

have favorable consequences, including, one might say, the promotion of U.S. compliance with WTO rulings.[194] For a court to ignore the WTO when interpreting the URAA sends a signal to U.S. trade partners that U.S. courts are willing to sanction a WTO/GATT violation,[195] which, in turn, undermines the effectiveness of the WTO dispute resolution process.

B. Doctrinal Options: Applying *Charming Betsy* and *Chevron* Co-extensively in International Trade Cases Involving WTO Reports

There seem to be at least three possibilities for defusing the conflict between *Chevron* and *Charming Betsy* as a general matter: 1) defer to the agency under *Chevron* as usual and ignore the *Charming Betsy* canon; 2) insert *Charming Betsy* into the first step of *Chevron* (i.e. asking whether Congress has spoken to the precise statutory question at issue) or 2) make the canon part of the second step of *Chevron* (i.e. asking whether the agency construction is reasonable).[196]

The "Step One" approach would add a new step to *Chevron'*s threshold inquiry into whether Congress has "directly spoken to the precise question at issue."[197] Under this approach, the court would consult applicable WTO/GATT provisions and, possibly, WTO reports, as a gloss on Congress's intent. The "Step Two" approach would insert the *Charming Betsy* canon

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[194] *See* Jackson F. Morrill, *A Need for Compliance: The Shrimp Turtle Case and the Conflict Between the WTO and the United States Court of International Trade*, 8 TUL. INT'L & COMP. L. 413, 444 (2000) ("The *Charming Betsy* principle is crucial to the ability of United States courts and the United States government to remain active participants in international fora.").

[195] Gathi, *supra* note 19, at 42.

[196] *See* Restani, *supra* note 19, at 1542-43.

[197] *Chevron*, 467 U.S. at 843.

into the "reasonableness" inquiry under *Chevron*.[198] Under the latter approach, the court would look to the language, text, structure and possibly legislative history at step one of *Chevron*. If the statute is unclear, the court would then turn to the second step of *Chevron* and examine whether the agency's interpretation is permissible — but would exclude from the spectrum of permissible interpretations those that would place the United States in violation of treaty obligations.[199]

The "Step One" approach is, at first blush, an attractive approach, for several reasons. First, as noted *infra*, the Supreme Court has suggested that *Chevron* deference is inappropriate when an agency's construction would violate international law.[200] Second, the "Step One" approach restricts agencies' ability to violate international obligations under the WTO/GATT in the absence of clear congressional approval.[201] This furthers the purpose behind "clear statement" rules: the notion that Congress alone should decide whether to violate treaties or customary international law,[202] and the normative proposition that reading statutes consistently with international law furthers objectives such as international comity.[203]

The "Step One" approach significantly expands *Chevron* by adding international law sources to those typically examined at step one,[204] yet if one takes seriously the premise that

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[198] *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT. L. 675, 736 (2003) (noting that the CIT has effectively collapsed *Charming Betsy* into the *Chevron* analysis).

[199] *See* Restani, *supra* note 19, at 1542-43 (discussing similar approach to the "Step Two" approach).

[200] *See, e.g., Cardoza-Fonseca*, 480 U.S. at 421, 107 S. Ct. 1207 n.22 (applied the *Charming Betsy* canon as a limitation on *Chevron* deference, turning to international sources as a gloss on legislative intent, including a non-binding United Nations Handbook on refugees that provided "significant guidance in construing the Protocol, to which Congress sought to conform.").

[201] *Id.*

[202] For an example of the clear statement rule, see *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1465 (1988) (citing *Charming Betsy*, interpreting treaty narrowly to save a statute).

[203] *See* Sunstein, *supra* note 66, at 459.

[204] *Chevron.* 467 U.S. at 842-43.

Congress intends to comply with international law then perhaps this concern is ill-founded. A more serious flaw of the "Step One" approach is that it implicates the separation of powers by suggesting that a court can overturn an agency action based on inconsistency with the WTO/GATT without consulting the agency's views (which ordinarily aren't consulted unless the statute is ambiguous, i.e. step two).[205] Ignoring the agency's views, while treating the WTO/GATT agreements or WTO reports interpreting them as binding international law would frustrate the rationale for deferring to agencies' expertise,[206] and arguably undermine Congress's intent in the URAA to avoid "interfer[ing] with the President's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under [the Uruguay Round] agreements."[207] Moreover, the "Step One" approach seems counterintuitive given that, as the Federal Circuit has recognized, these laws are highly complex,[208] and the "foreign policy implications of a dumping determination" are arguably better left to agencies than courts.[209]

The "Step Two" approach may be less problematic than the "Step One" approach because the former defers to agencies without abandoning the mandate to reconcile statutes with international law, and provides a more workable approach towards WTO reports. Under the "Step Two" approach, if the statute is clear, the text resolves the matter.[210] If a statute is ambiguous, the court turns to international law (the WTO Agreement), and perhaps WTO

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[205] *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82.

[206] *Id.* at 865.

[207] SAA, at 659 (discussing rationale for barring private rights of action in § 3512(c)(1)).

[208] *See* Seastrum, *supra* note 19,at 237 (calling the applicability of *Charming Betsy* to international trade agreements "questionable").

[209] *Id.* (citation omitted).

[210] *See* Part II *supra.*

reports, to assist its inquiry into whether the agency's construction is reasonable (i.e. "step two"). If the WTO agreement is *also* ambiguous, as the CIT found in *Timken*, the court should defer to the agency under *Chevron*, as long as its construction is otherwise reasonable.[211]

Suppose that the statute is ambiguous but the WTO agreement is clear and in irreducible conflict with the agency's interpretation.[212] As CIT Judge Restani has observed, the court faces a dilemma in this circumstance, which the CIT has yet to confront, because it must choose whether to overturn the agency action, deferring to the WTO, or snub the WTO and sustain the agency's action. The "Step Two" approach presents a flexible response to this dilemma. If the agency's reading is irreconcilable with the plain language of the WTO agreements, it is almost certainly unreasonable under *Chevron.* Yet what if the agency's construction can be reconciled with the language of the WTO agreements, but cannot be reconciled with a WTO report *interpreting* the WTO agreements? According to Restani, in such a case the court ought to defer to the agency and "the schooner should sink," i.e. *Charming Betsy* should not apply,[213] in part because agencies are more capable than courts of weighing WTO reports.[214] This rationale is consistent with *Corus Staal*[215] but is inconsistent with John Jackson's contention that WTO opinions are binding on parties under international law[216] and with the CIT's own statements that its

[211] Restani, *supra* note 19, at 1542-43.

[212] *See* Restani, at 1545.

[213] *Id.*

[214] *Id.* at 1545.

[215] *Corus Staal*, 395 F.3d at 1349.

[216] *See* Jackson, *supra* note 107, at 109.

"opinions may be informed by WTO documents."[217] In my view, the "Step Two" approach requires a more nuanced approach towards WTO reports.

C. WTO Reports: Can they be Persuasive if Not Binding?

In one sense, a decent argument exists to support the Federal Circuit's stance that "no deference" is due WTO panel decisions "unless and until" implemented by Congress.[218] First, DSB reports cannot be said to be "the law of nations" insofar as that term refers to customary international law,[219] as they lack sufficient state practice and *opinio juris*.[220] WTO reports lack formal *stare decisis* effect and are circumscribed by their mandate "to clarify the existing provisions of the [WTO] agreements."[221] One scholar has argued that to defer to WTO decisions would abdicate the court's judicial responsibilities to extra-national, extra-constitutional courts.[222] Perhaps most significant is the URAA itself, which the Federal Circuit has interpreted as meaning that "WTO decisions are not binding upon Commerce or the court."[223] *Corus Staal* attached significance to Section 3533, which provides that if a WTO report concludes that an agency's "regulation or practice" is "inconsistent" with the WTO, that "regulation or practice

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[217] *Usinor*, 342 F. Sup. 2d at 1279.

[218] *Corus*, 395 F.3d at 1349.

[219] *See* Seastrum, *supra* note 19, at 238.

[220] Customary international law requires a general and consistent practice of states followed from *opinio juris*, a sense of legal obligation. *See In Re Agent Orange Prod. Liability Lit.*, 373 F. Supp. 2d 7, 130 (E.D.N.Y. 2005) *citing* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102 cmt. c [RESTATEMENT (THIRD)].

[221] NAFTA Report at 118a. (citing Article 3(2), WTO Dispute Settlement Understanding).

[222] Williams, *supra* note 19, at 699.

[223] *Timken*, 354 F.3d at 1344.

may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" Congress, the USTR, and the agency have consulted about the response.[224] The deliberative process, delegated exclusively to the political branches, supports the argument that the Executive Branch, not the courts, should decide how to respond to an adverse WTO ruling.[225] The inherently political dispute between the United States and Canada over softwood lumber imports arguably illustrates why judicial interference should be avoided.[226]

On the other hand, the controversy over *whether* the United States may ignore an adverse WTO ruling is unresolved. To the extent that the DSU makes WTO reports binding under international law on parties, as John Jackson suggests,[227] it would seem to follow that *Charming Betsy* requires courts to construe statutes consistently with such reports.

In my view, this problem can be addressed by giving DSB reports persuasive weight when construing the reasonableness of agency action under "Step Two" of *Chevron*, as the CIT has done on occasion.[228] WTO reports should be entitled to persuasive weight, because, as the CIT has stated, their "reasoning, if sound, may be used to inform the court's decision" about

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[224] 19 U.S.C. § 3533(g)(1). *See also* 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must observe to change its policy in order to conform to a WTO ruling).

[225] *See* Restani, *supra* note 19, at 1542-43 ("The notion that there exists a body of international law to be adopted by the Federal courts in an area of the law – domestic international trade law – in which Congress has legislated in great detail is likely inconsistent with our current understanding of the role of the courts in our constitutional system.").

[226] The need for caution in relying too much on WTO reports as evidence of international law is demonstrated in the fact that the WTO's rulings on the United States' zeroing methodology continue to change. In October 2005, the WTO Appellate Body found that the United States' zeroing methodology, as applied in antidumping investigations "as such," was inconsistent with Article 2.4.2 of the Antidumping Agreement. *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R at 151, ¶ 8.1(c) (Oct. 31, 2005). However, in a 167-page report, the Appellate Body found that the United States' use of zeroing in the context of administrative reviews of antidumping duties imposed on European exporters was not inconsistent with Article 2.4.2. *Id.* ¶ 8.1(d)-(e). At a minimum, this report suggests that the debate over zeroing is not over in the WTO.

[227] *See* Jackson, *supra* note 107, at 109.

[228] *See, e.g., Usinor*, 342 F. Supp. 2d at 1280 n.13.

whether the United States has violated its obligations under the Uruguay Round Agreements.[229] Giving persuasive weight to WTO reports is consistent with CIT precedent.[230] As the CIT stated in *Usinor*, WTO reports could be treated like law review articles, treatises or commentaries, which a "court can examine for persuasive rationale. Nothing in the law forecloses it."[231] Refusing to recognize WTO reports could create a disparity between the WTO/GATT as interpreted by DSB panels and as interpreted by U.S. courts, leading the WTO/GATT to acquire two meanings, one in U.S. courts and another in U.S. relations with other countries.[232]

If WTO reports are persuasive, it still seems necessary to distinguish among them, giving greater or lesser weight to different reports depending on various circumstances. For starters, keeping John Jackson's observations in mind, a WTO report issued in a dispute in which the United States is a *party* should be given greater weight than a report in a dispute between non-U.S. parties. Moreover, a WTO report that unequivocally finds that a U.S. agency practice violates the WTO/GATT is undoubtedly strong evidence that the agency acted unreasonably. Other factors include whether the WTO report merely indirectly criticizes an agency practice, as in *EC-Bed Linen*,[233] or concludes that it is WTO-inconsistent.

Also significant is whether the Executive Branch has implemented the WTO report. An issue left open after *Corus Staal* is what happens when Congress and the Executive *do*

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[229] *See e.g.*, *Hyundai*, 53 F. Supp. at 312 (WTO panels' "reasoning, if sound, may be used to inform the court's decision."); *see also Pam S.p.A.*, 265 F. Supp. at 1372 (citing *Hyundai* and relying on *Bed-Linen* WTO report in order to assist its analysis of Commerce's zeroing practice).

[230] *See, e.g.*, *The Pillsbury Co. v. United States*, 368 F. Supp.2d 1319, 1328 (2005).

[231] *Usinor*, 342 F. Supp. 2d at 1280 n.13.

[232] Gathi, *supra* note 19, at 41 (arguing that when courts uphold U.S. law in the event of a conflict between U.S. law and a DSB decision, they insulate the United States from its trading obligations).

[233] *EC—Bed Linen*, WT/DS141/AB/R, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*.

implement a WTO ruling? The Federal Circuit has held that WTO reports are not binding "unless and until" their rulings were "adopted pursuant to the specified statutory scheme" under Sections 123 and 129.[234] In May 2005, the Commerce Department, after consulting with Congress pursuant to Section 129, decided to revise its zeroing policy with respect to Canada in the softwood lumber dispute, essentially "implementing" the WTO *Softwood Lumber* decision.[235] Does the *Softwood Lumber* ruling thereby become "binding" via *Charming Betsy*? This debate is unresolved and is subject to further litigation. It seems logical that if the Executive Branch has determined that a WTO report correctly states U.S. obligations, the court should feel less inhibited to apply *Charming Betsy* without upsetting *Chevron's* principle of deference. For its part, the NAFTA Binational Panel interpreted Commerce's implementation of *Softwood Lumber* as meaning that Commerce "recognizes that zeroing is precluded" as a *general* matter and that its actions were no longer protected by the "statutory scheme" described in *Corus Staal*.[236] Whether this is the correct approach is likely a point of contention in pending and future cases.

V. Conclusion

The tension between the *Chevron* doctrine and *Charming Betsy* is real but not insurmountable. On the one hand, *Chevron* tells courts to defer to agency expertise on policy

[234] 395 F.3d at 1349 ("We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse 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*") (emphasis added).

[235] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22636 (May 2, 2005). The United States decided to take actions under Section 129 *only* in the softwood lumber dispute that would render its investigation not inconsistent with the findings of the WTO Dispute Resolution Body.

[236] NAFTA Report, at 116a.

questions, especially those with foreign policy implications such as antidumping duty determinations. On the other hand, *Charming Betsy* suggests that there are limits to such deference and that Congress did not intend to allow an agency to violate international law.

It is important to keep in mind that the two doctrines are only in strong conflict in rather rare circumstances: when international law clearly prohibits the agency's interpretation. On the whole, the "Step Two" approach — inserting *Charming Betsy* into the second step of *Chevron* — seems to be preferable in such a situation because it insists that international law is not subverted by deference to agencies but ensures that an agency's own views are taken into account.

Resolving the legal effect of WTO opinions under international law and domestic law is critical to resolving the controversy. Despite *Corus Staal's* clear disapproval of WTO reports, the CIT has continued to rely on them, which suggests that Federal Circuit may have to clarify its approach.[237] Meanwhile, Commerce's implementation of the Appellate Body's *Softwood Lumber* report seems likely to invite the courts to reexamine *Corus Staal*'s holding that WTO reports are entitled to "no deference" at least "unless and until" implemented by the political branches.[238] In my view, the Federal Circuit would be wise to adopt more flexible approach, one that accommodates the purposes behind the *Charming Betsy* principle without straying from the URAA, that recognizes that WTO reports can useful in interpreting the WTO/GATT.

[237] *See, e.g., Usinor*, 342 F. Sup. 2d at 1280.

[238] *Corus*, 395 F.3d at 1349.