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Interpreting International Trade Statutes: Is the Charming Betsy Sinking?

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Abstract

This essay is about the North American Free Trade Agreement ("NAFTA"), the General Agreement on Tariffs and Trade ("GATT"), and the World Trade Organization ("WTO"). The United States has chosen to participate in NAFTA, GATT, and WTO by the President's signing international agreements. These agreements, however, have not been presented to the Senate for ratification as treaties, although, as some commentators have noted, they bear the characteristics of treaties. Rather, they are implemented by Congress enacting domestic implementing legislation as statutory law.

INTERPRETING INTERNATIONAL TRADE STATUTES: IS THE *CHARMING BETSY* SINKING?

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INTRODUCTION

The United States has committed to participate in the globalization of world trade by entering into international agreements and participating in international organizations. These commitments raise important issues regarding the interaction of domestic international trade law, *Chevron*[1] deference principles, the *Charming Betsy*[2] doctrine, and decisions of the World Trade Organization ("WTO") in the area of unfair trade practices.

The United States has chosen to participate in the North American Free Trade Agreement ("NAFTA"),[3] the General Agreement on Tariffs and Trade ("GATT"), and the World Trade Organization ("WTO")[4] by the President's signing international agreements. These agreements, however, have not been presented to the Senate for ratification as treaties, although, as some commentators have noted, they bear the characteristics of treaties.[5] Rather, they are implemented by Congress enacting domestic implementing legislation as statutory

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

2. Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) [hereinafter *Charming Betsy*].

3. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., H.R. Doc. 103-159, at 713 (1993) [hereinafter NAFTA].

4. Uruguay Round Trade Agreement, H.R. Doc. 103-316, at Vol. 9, 1696 (1994).

5. *See generally* JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 257 (1977). In the trade agreements area, Congress has generally preauthorized negotiation of the agreements. *Id. Compare* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (defending the constitutionality of the Congressional-Executive agreement), *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (challenging the use of the Congressional-Executive agreement in lieu of a trade treaty). *Cf.* Made In The USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001) (holding that issue of whether non-treaty status of NAFTA renders it unconstitutional is a nonjusticiable political question).

law.[6]

I. *INTERNATIONAL TRADE AGREEMENTS IN U.S. DOMESTIC LAW*

The Constitutional basis for the domestic implementing legislation is found in the Article I power of Congress to regulate international commerce.[7] The domestic implementing legislation delegates to the Secretary of Commerce,[8] the head of an executive branch agency, and the International Trade Commission ("ITC"), an independent regulatory agency, the responsibility for administering the unfair trade practices aspect of the legislation.[9] By entering into the agreements, however, the United States has committed to international dispute resolution mechanisms that operate entirely outside the United States legal system.[10] Resolution of binational or multinational trade disputes may be sought through the WTO dispute-resolution mechanisms, as well as through private action before the ITC and ITA.[11] "Unfair trade" decisions of the ITC and ITA may be appealed to the United States Court of International Trade ("CIT"), an Article III court, subsequently to the United States Court of Appeals for the Federal Circuit, and ultimately, by writ of certiorari, to the United States Supreme Court.[12] A national of any party to the NAFTA accord, however, may opt to resolve the dispute through the binational panel procedure of that agreement.[13] Given that the U.S. Government and organs of the

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6. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

7. U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations . . .").

8. The Commerce Department arm responsible for administering the implementing legislation is the International Trade Administration ("ITA").

9. 19 U.S.C. §§ 1671, 1673, 1677 (1994).

10. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17.6, Apr. 15, 1994, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 27, H.R. Doc. 103-316, at 1654 (1994); 19 U.S.C. § 3533 (1994) (providing for participation in and response to WTO dispute resolution).

11. 19 U.S.C. § 1671 (1994).

12. 19 U.S.C. § 1516a (1994); 28 U.S.C. § 1581(c) (1993); 28 U.S.C. § 1254(g) (1948); 28 U.S.C. § 1295(a)(5) (1999).

13. *See* North American Free Trade Agreement, Dec. 8, 1993, § 1904; 19 U.S.C. § 1516a(g) (1994). Although a few commentators have questioned whether the deprivation of an Article III forum is constitutional, a challenge to the constitutionality of NAFTA's dispute resolution procedure failed on standing grounds. Am. Coalition for

international trade organizations may have different views as to the meaning of applicable laws and the underlying international agreements, conflicts may arise.[14] Inherently, international bodies are not bound by the views of U.S. agencies or courts, and U.S. statutory provisions do not mandate a U.S. agency or court to follow international body decisions.[15]

II. *U.S. CASE LAW: THE LIMITS OF CHEVRON DEFERENCE*

Until recently, it had been settled jurisprudence since the U.S. Supreme Court's unanimous decision[16] in the *Chevron* case that executive agency interpretations of international trade law are entitled to deference.[17] *Chevron*, which involved a challenge to an Environmental Protection Agency regulation, set forth a two-step rule for judicial review of a Federal agency's interpretation of a statute it administers:

> First, always, is the question whether Congress has spoken directly 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. [Second, if]

Competitive Trade v. Clinton, 128 F.3d 761 (D.C. Cir. 1997). *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141 (1994). *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981), which upheld Executive Orders of the President, unsupported by express Congressional action, relegating private parties with claims against Iran, including claims already filed in Article III courts, to a U.S.-Iran claims tribunal. The Court concluded that several existing statutes, although not directly applicable to the case, supported the belief that Congress had accepted "a broad scope for executive action in circumstances such as those presented in this case." *Id.* at 677.

14. *See* Hyundai Elecs. Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999); Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064, 1076 n.19 (Ct. Int'l Trade 1999) (outside the unfair trade practices area, U.S. implementation of environmental statute found GATT violative by WTO appellate body). *See also* Paul Magnusson, *The New Trade Rep Won't Get Much Sleep*, BUS. WK., Jan. 29, 2001, at 38 (describing some of the conflicts that the newly appointed U.S. Trade Representative will have to address).

15. As to NAFTA panel decisions, Congress has spoken directly and indicated that the U.S. courts may consider NAFTA decisions although they are not binding. 19 U.S.C. § 1516a(g)(3) (1994). *See infra* note 51 and accompanying text with regard to limited WTO deference to national interpretations. 19 U.S.C. § 3512(a)(1) (1994) provides that the Uruguay Round Agreements do not prevail over "any law of the United States."

16. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Justices Rehnquist, Marshall, and O'Connor did not take part in the decision.

17. *See, e.g.*, Suramerica de Aleaciones Laminadas, C.A., v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

> the court determines that Congress has not directly addressed the precise question at issue . . . if the statute is silent or ambiguous with respect to the specific question at issue [then the issue before the court is] whether the agency's answer is based on a permissible construction of the statute, [that is whether the agency's interpretation is reasonable or rational and consistent with the statute].[18]

The Court explained the rationale for the decision as follows:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judge's personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for the political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[19]

Chevron deference in the international trade area has not been restricted to agency interpretations reduced to regulatory language but has been expanded generally to all aspects of the agency's decision making in unfair trade proceedings.[20] The continuing viability of the latter instance of deference, however, is no longer entirely clear in the wake of the U.S. Supreme Court's recent decisions in *Christensen v. Harris County*[21] and *United States v. Mead Corporation.*[22]

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18. *Chevron*, 467 U.S. at 842-843.

19. *Id.* at 865-866 (internal citations omitted).

20. *See, e.g.*, Daewoo Elecs. Co. v. Int'l Union of Electronic Elec., Technical, Salaried, and Mach. Workers, 6 F.3d 1511, 1515-16 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994). Further, maximal deference based on foreign policy implications has been cited. Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). The difficulty with the reference to foreign policy in this regard is that it was made in the context of adjustments to the foreign market value component of the antidumping duty calculation, essentially a matter of accounting, which seemed to require no foreign policy choices.

21. 529 U.S. 576 (2000).

22. 121 S.Ct. 2164 (2001).

Christensen appears to limit *Chevron* deference significantly. Justice Thomas, on behalf of a five-justice majority,[23] opined as follows:

> In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute.
>
> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*,[24] but only to the extent that those interpretations have the "power to persuade." As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case.
>
> Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation.[25]

Christensen thus limits *Chevron* deference to statutory interpretations that are tested by the rigors of the regulatory promulgation process or procedures similar to adjudication with attendant safeguards. Otherwise, the *Christensen* opinion indicates[26] that "[i]nstead, interpretations contained in formats such as

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23. In *Christensen*, Justice Scalia concurred in the judgment and most of the majority opinion, but not in the crucial section quoted. Justices Stevens, Ginsburg, and Breyer dissented. Justice Breyer, joined by Justice Ginsburg, however, appears to accept the continuing validity of *Skidmore* deference, but perhaps only in narrower circumstances than the majority: "[T]o the extent that there may be circumstances in which *Chevron*-type deference is inapplicable—*e.g.*, where one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that *Chevron* does not presumptively leave to agency resolution)—I believe that *Skidmore* nonetheless retains legal vitality." 529 U.S. at 596-597 (Breyer, J., concurring). In *Mead*, however, only Justice Scalia dissented.

24. 323 U.S. 134, 140 (1944).

25. *Christensen*, 529 U.S. at 586-87 (internal citations omitted).

26. This view is subscribed to by the majority with the exception of Justice Scalia, who characterizes *Skidmore* deference as follows: "*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect." *Id.* at 589 (Scalia, J., concurring in part and concurring in the judgment). This characterization was repeated in *Mead*, 121 S.Ct. at 2177-2189 (Scalia, J. dissenting).

opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the 'power to persuade.'"[27]

This theme was carried forward and clarified in *United States v. Mead*, in which the Supreme Court, with only Justice Scalia dissenting, found decisions as to classification of imported merchandise for tariff purposes were also entitled to *Skidmore*, not *Chevron*, deference. The Court found a system of informal rulemaking in which forty-six different Customs District offices could generate rulings did not indicate a Congressional delegation of law making.[28] The Court also considered the role of the CIT in reviewing classification decisions as evidence of a Congressional understanding at odds with the *Chevron* regime.[29] Overall, the Court's opinion represents a totality of the circumstances approach in which no one factor is determinative as to whether the *Chevron* mode of analysis applies.[30] *Mead* emphasizes that the basis for *Chevron* deference is Congress' intent to delegate "authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[31] Delegation is demonstrated "by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[32]

While in ITA and ITC proceedings there is a somewhat more centralized decision-making process than that described in *Mead*, there is also CIT review as in *Mead*. Further, it is unclear whether the type of investigatory-adjudicatory proceedings utilized by the ITA and the ITC in unfair trade matters have the appropriate safeguards or are those "formal adjudications" referred to in *Christensen* and *Mead* as warranting *Chevron* deference. Trade proceedings generally are commenced by a domestic petitioner seeking imposition of duties on a class of goods from a particular country or countries to offset the alleged unfair trade practice, whereupon the relevant agencies embark

27. 529 U.S. at 587.

28. *Mead*, 121 S.Ct. at 2175-2176.

29. *Id.* at 2187.

30. *Id.* at 2175-2187.

31. *Id.* at 2171.

32. *Id.*

upon an "investigation."[33] Questionnaires are used and participants in the proceedings may attempt to shape the questionnaires.[34] Information may be received in ex parte meetings.[35] Parties may comment upon the submissions of other parties, but they may be hampered by limited access to proprietary data.[36] In initial investigations and in some periodic reviews, the ITA performs on site verifications of foreign respondent questionnaire responses.[37] It also accepts and considers comments upon draft results of its investigations. No formal record is compiled by either agency until court proceedings commence, and there is no administrative law judge. Hearings before the ITA are in the nature of oral argument on the briefs submitted,[38] whereas more formalized hearings take place before the ITC.[39]

The "formal adjudication" and the "notice-and-comment rulemaking"[40] referred to in *Christensen* and *Mead* as warranting *Chevron* deference share the following characteristics, which appear to have their origin in a concept of due process, as well as a simple desire for informed decision-making: formal notice to the affected party of proposed governmental action, an opportunity for comment that must be considered, the creation of a formal record, and an impartial adjudicator.[41] Without clear Congres-

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33. *See* 19 C.F.R. § 351.201, *et seq.* (2000).

34. DEPARTMENT OF COMMERCE, ANTIDUMPING MANUAL, Chapter 4: Questionnaires (Jan. 22, 1998).

35. 19 U.S.C. § 1677f(a)(3) (1994).

36. *See* 19 U.S.C. § 1677f(c) (1994); 19 C.F.R. 351.308 (2000); DEPARTMENT OF COMMERCE, ANTIDUMPING MANUAL, Chapter 3: Access to Information (Jan. 22, 1998).

37. *See* 19 C.F.R. § 351.307 (2000).

38. DEPARTMENT OF COMMERCE, ANTIDUMPING MANUAL, Chapter 14: Hearings and Briefs (Jan. 22, 1998).

39. For ITC procedures, see generally INTERNATIONAL TRADE COMMISSION, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, Pub. 3257 (Nov. 1999).

40. Notice-and-comment rulemaking has its origin in the Administrative Procedure Act, 5 U.S.C. § 553 (1966). These procedures are designed to assure fairness and mature consideration of rules of general application. NLRB v. Wyman-Gordon, Co., 394 U.S. 759, 764 (1969).

41. In other contexts, the U.S. Supreme Court has described the minimal requirements of due process: Tumey v. Ohio, 273 U.S. 510, 522 (1927) (reviewing historical development, from the common law, of the principle "[t]hat officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided."); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing that is required prior to termination of welfare benefits must provide timely and adequate notice detailing reasons for proposed action and an effective opportunity to defend by confronting adverse witnesses and presenting arguments and evidence orally); Mathews v. Eldridge, 424 U.S. 319 (1976) (finding predetermination evidentiary hearing not required in disability

sional direction, agency interpretations that are the result only of the actions and views of lower level agency officials, without formal adjudication or rulemaking, do not appear to qualify for *Chevron* deference.[42] Under *Christensen* and *Mead*, they may be entitled only to *Skidmore* deference: respect to the extent they have the power to persuade.[43] As the matter of deference in unfair trade proceedings appears unresolved in the wake of *Christensen* and *Mead*, for the purpose of this Essay we assume that not every agency statutory interpretation decision reflected in such matters is entitled to full *Chevron* deference.

III. *THE CHARMING BETSY DOCTRINE*

When faced with decisions of the ITC and the ITA addressing controversies arising from disputes about domestic international trade law implementing legislation, however, Article III courts face an additional complexity. The *Charming Betsy*[44] provides that "an act of [C]ongress ought never to be construed to

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benefits proceedings and opining that due process is flexible and requires analysis of governmental and private interests involved, as well as risk of erroneous deprivation of private interest and probable value of alternate procedural safeguards). *Mead* adopts this view, at least in part, as follows: "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. *Cf.* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 741 (1966) (APA notice and comment 'designed to assure due deliberation'). Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Mead*, 121 S.Ct. at 2172-2173 (citations omitted).

42. These unfair trade proceedings seem to require more procedural safeguards than the opinion letter at issue in *Christensen* or the ruling at issue in *Mead*. The extent to which an international relations gloss bears on the issue of deference is discussed in the following section. *Mead* admits that there are some other exceptional undefined circumstances in which an agency's interpretation of a statute is entitled to *Chevron* deference. *Mead*, 121 S.Ct. at 2173.

A Statement of Administrative Action ("SAA") was approved by Congress in 19 U.S.C. § 3511(a) as the "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (1994). This article concerns statutory interpretation not covered by the SAA.

43. *Christensen*, 520 U.S. at 587. The question of deference to agency interpretation of statutes is quite apart from the deference required by statute in reviewing a decision of the agency. The decision is reviewed for substantial evidence, 19 U.S.C. § 1516a(b)(1)(B)(i) (1994), and the methodologies chosen by the agencies are presumptively correct. Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034 (Fed. Cir. 1996).

44. 6 U.S. (2 Cranch) 64 (1804).

violate the law of nations, if any other possible construction remains."[45] Although almost two hundred years have passed since the decision and the position of the United States within the international community has changed markedly, the *Charming Betsy* doctrine, sometimes described as a canon of statutory construction, continues to sail onward.[46]

The difficult issues arise when the courts are faced with divining the meaning of domestic international trade statutes not just with the guidance of domestic international trade law and the agencies administering these laws, but also with the guidance of the international agreements giving rise to those laws. In 1995, for example, in the *Federal-Mogul* case, the U.S. Court of Appeals for the Federal Circuit cited the *Charming Betsy* as the basis for accepting an agency interpretation in accordance with "international law," in the face of an arguably clear statute to the contrary.[47] *Federal-Mogul* presents an unusual version of the issue under discussion here. The Department of Commerce followed what it viewed as a requirement of GATT that it determined had not been addressed directly by the domestic implementing legislation.[48] At that time, the ITA interpretation of an unclear statute would have been entitled to *Chevron* deference. The United States Court of International Trade, however, found a conflict with the clear language of an extant earlier statute.[49] The CIT's decision was reversed by the Federal Circuit: "For the Court of International Trade to read a GATT violation into the statute, over Commerce's objection, may commingle powers best kept separate."[50] *Federal-Mogul* equates GATT with the customary international law at issue in the *Charming Betsy*. We do not take issue with that approach, as GATT, being less than a treaty from the U.S. perspective, for purposes of this analysis, may be placed in the same category. Further, *Federal-Mogul* did not address an agency interpretation that conflicted with GATT. The additional complication is that all parties do not understand GATT to mean

45. *Id.* at 118.

46. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1997) (arguing that the decision reflected the concerns about the position of the United States as a new and relatively weak nation in the world community).

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

48. *Id.* at 1581.

49. *Id.* at 1577.

50. *Id.* at 1582.

the same thing. In fact, the WTO recognizes that national interpretations of WTO antidumping provisions that are reasonable will not be held to violate the GATT Antidumping Agreement.[51]

In any case, for purposes of domestic law, it is clear that the intent of Congress is the key, and international agreements such as GATT do not "trump" domestic law.[52] In *Erie R.R. Co. v. Tompkins*,[53] the U.S. Supreme Court established the principle that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[54] After *Erie*, in the words of Justice Jackson, "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them."[55] Whatever the view in other contexts about whether Federal courts should continue to apply customary international law as a type of Federal common law, if the WTO agreements are equated to customary international law, as *Federal-Mogul* suggests, the practice should be considered inapposite when addressing domestic international trade law.[56] 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

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51. § 17.6, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 27, H.R. Doc. 103-316, at 1453 (1994). *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L. L. 193, 209 (1996) (noting the parallel with *Chevron* and arguing that the rationale underlying *Chevron* deference does not support WTO deference to national interpretations of GATT).

52. *Suramerica*, 966 F.2d at 668.

53. 304 U.S. 64 (1938).

54. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

55. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring). *See* Bradley, *supra* note 46, at 513-517, 523-525, and commentators cited therein.

56. *See* RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO HART, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 63 (Hart and Wechsler's 2000 Supp.); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (contending that considering customary international law as federal common law is inconsistent with *Erie*). *Cf.* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998) (international law should be treated by Federal Courts as part of Federal common law, unless "ousted as law for the United States by contrary federal directives"). *But see* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (arguing that there are "major errors" in the Bradley and Goldsmith argument).

courts in our constitutional system.[57]

If only the statute, the international agreement, and the agency interpretation are at issue, it should not be terribly hard to resolve the statutory interpretation problem. If the statute is clear, it controls. And it controls even in the face of a contrary agency interpretation. Even under *Chevron* and the *Charming Betsy*, such an interpretation is not considered by the reviewing court.[58]

If the statute is unclear, but the international agreement is clear, it likely should aid the court's interpretation, but perhaps not based upon the *Charming Betsy* principles, as they have been understood. Rather, the statute is intended to implement the agreement, and the relevant WTO agreement may be viewed as secondary legislative history. In such a case, under the second step of *Chevron*, a contrary agency position usually should not be accorded deference. If in the particular case Congress explicitly had left a gap in the statute for the agency to fill, an agency interpretation contrary to clear WTO language probably should be considered "manifestly contrary to the statute."[59] If, on the other hand, the legislative delegation to the agency is implicit, an agency opinion that conflicts with a clear WTO directive likely should be considered unreasonable.[60] Reliance upon the *Charming Betsy* principles is unnecessary.

If the statute is unclear and the international agreement is unclear, the court ought to give an appropriate level of deference to an agency decision. After *Christensen* and *Mead*, the level of deference would depend upon the nature of the agency interpretation and the procedures that spawned it.[61] Congress by positive law has delegated responsibility to the agency, either an executive branch agency–the ITA of the Commerce Department–or an independent agency–the ITC. In either event, the

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57. *Cf.* Barclays Bank PLC v. Franchise Tax Bd. of Ca., 512 U.S. 298, 331 (1994) (in resolving an international trade dispute between other nations and California, the Court opined: "[W]e leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.").

58. Under the first step of *Chevron*, the court determines whether that statutory language is clear. If it is, no resort to agency interpretation is made.

59. *Chevron*, 467 U.S. at 843-844 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute").

60. *Id.* at 844.

61. *See supra* notes 41-51 and accompanying text.

responsibility for adhering to the relevant international law should be with the agencies, which have both the Constitutional authority delegated by Congress and, at least as to the ITA, an aspect of the Constitutional authority of the Executive Branch in foreign relations.[62] 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.

Added to the interpretational stew now are the Appellate Body and various dispute resolution panels of the WTO.[63] They interpret the international agreements, including, of course, their ambiguities. Once again, if the domestic statute is clear, the U.S. court must apply it 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.[64]

If the statute is unclear, however, the court is faced with the problem of what weight should be given to an interpretation of a WTO dispute resolution body. If an agency decision entitled to full *Chevron* deference and the WTO decision are in accord, 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. Even if the agency interpretation is entitled only to *Skidmore* deference, the WTO decision adds to the "respect" that should be given to the agency decision.

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62. *See* Dames & Moore, 453 U.S. 654 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

63. NAFTA panel decisions have not played a large role in decision-making in the U.S. courts. Perhaps the arbitral nature of the proceedings and the lack of precedential effect has led to the minimal role in domestic jurisprudence.

64. *See* 19 U.S.C. § 3533(g) (1994) (Trade Representative to consult with Congress and relevant executive agency before modification of law or practice to comply with WTO decision); 19 U.S.C. § 3538(a) (1994) (Trade Representative consultation with Congress before ITC acts to conform to WTO decision); 19 U.S.C. § 3538(b) (1994) (specifying prerequisites for compulsion by Trade Representative of conformity with WTO decision as to unfair trade practices).

On the other hand, if an agency decision entitled to full *Chevron* deference is in conflict with a WTO decision, the court is faced with a difficult dilemma, a collision among the *Charming Betsy* principles or their like, *Chevron*, and the implications of *Erie*.[65] The agency decision carries with it the statutory authority delegated by Congress, either explicitly or implicitly, and, for the ITA, the Constitutional authority and responsibility of the Executive Branch.[66] If the agency decision is the consequence of rulemaking or adjudication with attendant due process safeguards for the parties involved, thus carrying the force of law, under *Christensen* and *Mead* it is entitled to full *Chevron* deference. If an intervening WTO decision has occurred that conflicts with the agency decision, the reviewing court probably should consider remand of the case to the agency for consideration of the WTO decision, which may moot the potential conflict.[67]

If, however, the agency has already considered the WTO decision and full *Chevron* deference is owed because the agency has acted while according the parties the benefit of the regulatory-promulgation process or adjudication with attendant due process safeguards, then, perhaps, the schooner should sink. The ITA, as part of the executive branch, has responsibilities, along

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65. In *Hyundai Elecs. Co.*, 53 F. Supp.2d at 1334, the CIT upheld a Commerce Department regulation regarding the standard for revoking antidumping duty orders in the face of a WTO Panel Report to the contrary, stating: "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine." *Id.* at 1345. Thus, the court viewed the dispute-resolution body's view of the international agreement and the international agreement as separate.

Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 679 (2000) supports the proposition that "these canons [including the *Charming Betsy* canon] should not trump *Chevron* deference, at least where there is a 'controlling executive act.'" He states thereafter that the Court of International Trade in several decisions has concluded "that the Supreme Court has already held that the *Charming Betsy* canon trumps Chevron deference," citing *Hyundai Elecs. Co.*, 53 F. Supp. 2d at 1344, and Footwear Distribs. and Retailers of Am. v. United States, 852 F. Supp. 1078 (Ct. Int'l Trade 1994). *Id.* at 686-687. These decisions, however, do not support the conclusion reached by Professor Bradley.

66. In *Suramerica*, 966 F.2d at 667, once *Chevron* deference was found owing to a Commerce determination of an ambiguous statute, a conflicting GATT panel interpretation did not prevail over the agency interpretation.

67. *But cf.* Delverde, SrL v. United States, 202 F.3d 1360 (Fed. Cir. 2000) (court noted its interpretation of new statute was in accord with intervening WTO decision rejecting agency interpretation).

with the Trade Representative, for weighing the significance of the WTO decision.[68] The ITC, even though it is an independent agency, must at some point consider the wisdom or lack thereof of the WTO decision, if only to respond to the Trade Representative. The Court, however, has limited means of assessing the fairness of the WTO dispute resolution mechanism.[69] For the court to give overriding weight to the WTO decision, based upon the *Charming Betsy* doctrine, may be likened to the court operating under the pre-*Erie,* now rejected, notions of *Swift v. Tyson.*[70] The court could be said to be seeking some form of "transcendental body of law,"[71] not promulgated by the sovereign speaking through its legislative and executive branches.[72]

If the agency's decision is not reduced to a regulation, however, it may not be law and therefore, unless arrived at through adjudication with appropriate safeguards, may be entitled only to *Skidmore* deference.[73] If only *Skidmore* deference is owed the court should not reject the interpretations of the WTO bodies, but should consider them as it weighs the agency's position. While the agency's interpretation is entitled to "respect," *Christensen, Mead* and the *Charming Betsy,* or its legislative history co-

68. The Executive Branch is faced with addressing the ramifications of its actions upon its stance in future trade negotiations and the potential domestic consequences. *See, e.g.,* Arun Venkataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection,* 37 COLUM. J. TRANSNAT'L L. 533 (1999) (examining impact of binational panel system and WTO dispute resolution upon future trade negotiations with the United States).

69. *See id.* at 565-575 (discussing the NAFTA procedures). *See also* William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System,* 13 AM. U. INT'L L. REV., 1225, 1246-1250 (1998) (discussing the WTO procedures). Generally, WTO proceedings are not as open as the United States wishes. *See id. See also* 19 U.S.C. § 3536 (1994) (requiring Trade Representative to seek transparency in WTO proceedings, including dispute settlement). U.S. participants also have sought greater openness in NAFTA panel proceedings. *See, e.g.,* International Trade, Vol. 17, No. 12, at 489 (BNA Mar. 23, 2000).

70. 41 U.S. (16 Pet.) 1 (1842).

71. *Black & White Taxicab & Transfer Co.,* 276 U.S. at 533 (Holmes, J. dissenting).

72. *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 471 (2000) (opining that *Erie* forbids federal courts from relying on vague notions of a "general" common law unconnected to the commands of any specific sovereign).

73. "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead,* 121 S.Ct. at 2175 (internal citations omitted).

rollary, indicate that the court should consider competing approaches.

CONCLUSION

The subtleties and nuances of domestic international trade law reflect both domestic concerns and the complexities of international trade negotiations and relationships.[74] A careful analysis of the development of a particular statutory interpretation is therefore essential. The sometimes conflicting directions given by the *Charming Betsy*, *Chevron*, *Christensen*, *Mead*, and *Erie* must be considered in each case and applied based upon the nature of the process that resulted in the statutory interpretation at issue. The *Charming Betsy* does not suffice to support an interpretation in accordance with a WTO determination. Further, *Chevron* may not always provide the rationale when such a determination is rejected.

74. The perceived consequences of globalization and free trade have ignited political controversy on a transnational scale. *See, e.g.*, David E. Sanger, *A Grand Trade Bargain*, 80 FOR. AFF. 65 (2001) (describing increasing resistance among developing nations to U.S. trade policy); International Trade, Vol. 16, No. 48, at 1990 (BNA Jan. 29, 1999) (WTO Seattle ministerial meeting fails in midst of violent street demonstrations). This pattern continued in Genoa, Italy in July 2001.