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## Trade Secrets: How the Charming Betsy Canon May Do More To Weaken U.S. Environmental Laws than the WTO's Trade Rules

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## NOTES

### **TRADE SECRETS: HOW THE CHARMING BETSY CANON MAY DO MORE TO WEAKEN U.S. ENVIRONMENTAL LAWS THAN THE WTO'S TRADE RULES**

*Kevin P. Cummins\**

*Our sovereignty is not threatened by this agreement or by the WTO. The WTO has no power to force the United States to do anything. They cannot make us do anything. It is not a world power. If the WTO finds that a U.S. law does not square with the obligations we have assumed under the agreement, we remain totally free to disregard that finding. It does not change U.S. law.*

Senator Robert Dole, excerpts from Senate floor debate on S.  
2467,

140 CONG. REC. 30,199 (1994).

.....  
*[I]t is our conclusion that the Uruguay Round Agreement poses the single greatest and broadest threat to consumer and environmental laws and the democratic establishment of such policies. It is on this basis that we urge the Congress to reject this agreement.*

Lori Wallach, Director, Public Citizen's Trade Program, testimony at hearings on S. 2467 before the Senate Committee on Commerce, Science, and Transportation, October 17, 1994.

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\* J.D. Candidate, May 2001. The author would like to thank Professors Annette DePalma and Nicholas Johnson for all of their help in preparing this Note. The author would also like to thank his wife, Diane, for all of her love and support.

## INTRODUCTION

During the last fifty years, the United States has vigorously pursued global trading policies to expand its markets. This has been accomplished primarily through participation in the World Trade Organization (“WTO”).<sup>1</sup> During the last thirty years, the U.S. has also implemented domestic policies to protect the environment.<sup>2</sup> The U.S. now has some of the strongest environmental laws and regulations of any nation.<sup>3</sup> Recently, however, U.S. goals of expanded trade and environmental protection have collided, leaving the future and integrity of certain environmental protections uncertain.

The only way to separate the increasingly explosive rhetoric surrounding this issue<sup>4</sup> from an accurate understanding of the

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1. The World Trade Organization was formed in 1994 when the final General Agreement on Tariffs and Trade (“GATT”) was signed by contracting member nations. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act]. From 1947 until 1994, the GATT governed international trade for contracting member nations and continues to govern trade under the WTO. The WTO primarily operates to ensure the GATT’s implementation and settles disputes between individual nations.

2. See Ilyssa Birnbach, Note, *Newly Imposed Limitations on Citizens’ Right to Sue for Standing in a Procedural Rights Case*, 9 FORDHAM ENVTL. L.J. 311, 313-18 (1998) (describing the early history of the National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.), which was the first legislation to address environmental concerns on the national level). See also Jack Lewis, *The Birth of EPA*, at <http://www.epa.gov/history/topics/epa/15c.htm> (describing the formation of the EPA under the Nixon Administration) (last visited Dec. 1, 2000).

3. See, e.g., Paula C. Murray, *Inching Toward Environmental Regulatory Reform—ISO 14000: Much Ado About Nothing or a Reinvention Tool?*, 37 AM. BUS. L.J. 35, 35 (1999) (arguing that despite the U.S.’s complex and far-reaching environmental laws and regulations, regulatory reform is needed).

4. See Joseph Kahn & David E. Sanger, *Trade Obstacles Unmoved, Seattle Talks End in Failure*, N.Y. TIMES, Dec. 4, 1999, at A6 (describing how the rebellion of developing countries inside the WTO Seattle Ministerial meeting and the violent protests of WTO detractors in Seattle’s streets led to a collapse of the talks between WTO member nations in December 1999).

WTO's power and role in world trade is to examine the relevant agreements and legislation. Under the General Agreement on Tariffs and Trade ("GATT"), domestic environmental laws are often viewed as non-tariff trade barriers and, as such, can be challenged as violations of the GATT by WTO member nations.<sup>5</sup> These challenges are made before WTO dispute resolution panels and Appellate Bodies. Moreover, if a member nation mounts a successful challenge, the WTO ruling often recommends that the challenged nation change its domestic law or regulation to comply with the GATT.<sup>6</sup> Environmentalists and others have expressed concerns that this adjudicatory framework threatens national sovereignty, in that an unelected international body can issue rulings requiring changes

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5. The GATT is a comprehensive agreement that regulates trade mainly by lowering tariffs. *See supra* note 1 and accompanying text. The Preamble to the agreement reads in part:

Recognizing that their [the signatories] relations in the field of trade and economic endeavor should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce . . . .

General Agreement on Tariffs and Trade, Oct. 30, 1947, 4 B.I.S.D. 1, 61 Stat. All, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT] (emphasis added).

6. The Final Act provides:

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

Final Act, Annex II, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. XVIII [hereinafter DSU], *supra* note 1.

in domestic environmental laws and regulations.<sup>7</sup> However, a closer look at the Uruguay Round Agreements Act<sup>8</sup> ("URAA"), the legislation that codified the GATT, reveals that U.S. interests and sovereignty are protected; and under U.S. law, the executive branch may choose whether and how to respond to adverse WTO rulings.<sup>9</sup>

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7. See *GATT Implementing Legislation: Hearings to Review Trade Agreements Concluded Under the Uruguay Round of GATT Multilateral Trade Negotiations, Including Provisions Establishing the World Trade Organization. Hearings on S. 2467 Before the Senate Committee on Commerce, Science, and Transportation*, 103d Cong. 206-07, 221 (Oct. 17, 1994), microformed on CIS No. 94-S261-62 (Cong. Info. Serv.) (statement of Brent Blackwelder, President, Friends of the Earth) (stating "GATT could impact U.S. environmental laws. It could impact the environmental laws of other countries all around the world . . . . We are totally shocked at the prospect of creating a new, international institution which is fundamentally antidemocratic and closed to participation of the peoples of the world."); (prepared statement of Lori Wallach, Director, Public Citizen's Trade Program) ("[I]t is our conclusion that the Uruguay Round Agreement poses the single greatest and broadest threat to consumer and environmental laws and the democratic establishment of such policies. It is on this basis that we urge the Congress to reject this agreement."). *Id.* at 221; Martin Wagner & Patti Goldman, *The Case for Rethinking the WTO: The Full Story Behind the WTO's Environment and Health Cases* 20 (1999) (stating that the WTO "has made trade officials the arbiters of disputes and shunned sharing decision-making power with health and environmental officials, experts and nongovernmental organizations. These issues are far too critical to be left to an institution that represents only one perspective and goal."), at [http://www.earthjustice.org/work/intl\\_index.html](http://www.earthjustice.org/work/intl_index.html) (pdf file) (last visited Dec. 1, 2000).

8. Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. §§ 3501 *et seq.* (1994)). Throughout the paper, the codified U.S.C. provisions will be referenced. When referring to the legislation generally, "URAA" will be used.

9. The URAA provides for the United States Trade Representative ("USTR") to consult with congressional committees when a WTO decision "potentially entails a change in Federal or State law." 19 U.S.C. § 3532(b) (1994). In addition, regarding such potential changes in U.S. law, the USTR is to inform the appropriate congressional committee of "the action the President intends to take in response to the decision or, if the President does not intend to take any action, the reasons therefor." *Id.* at (c)(1)(E) (emphasis added). *Cf.* LOUIS HENKIN, *HOW NATIONS BEHAVE* 13-27 (2d ed. 1979), in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 12 (2d ed. 1995) ("For foreign policy, perhaps the most important legal mechanism is the international agreement, and the most important principle of international law is *pacta*

What is less well known and reported is how U.S. courts view and interpret the URAA.

Ironically, the U.S.'s ability to choose whether and how to comply with adverse WTO rulings may be threatened more by U.S. court decisions than by WTO rulings. While the WTO cannot order or force the U.S. to change its environmental laws or regulations,<sup>10</sup> U.S. courts can review regulations promulgated by executive branch agencies. When environmental regulations come under review, U.S. courts often examine the regulation in question using a *Chevron*<sup>11</sup>

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*sunt servanda*: agreements shall be observed. This principle makes international relations possible.”). As a world leader, the United States cannot afford to categorically refuse to comply with adverse rulings, but the URAA and the DSU provide a flexible framework to foster compliance on a case-by-case basis. See *infra* note 161 and accompanying text for a discussion of options available under the DSU.

10. During Senate debate, Senator Dole stated:

Our sovereignty is not threatened by this agreement or by the WTO. The WTO has no power to force the United States to do anything. They cannot make us do anything. It is not a world power. If the WTO finds that U.S. law does not square with the obligations we have assumed under the agreement, we remain totally free to disregard that finding. It does not change U.S. law.

140 CONG. REC. 30,199 (1994). Senator Dole did, however, urge the Clinton administration to consider creating a special WTO Dispute Settlement Review Commission that would review adverse WTO rulings in an effort to appease senators who had concerns over sovereignty. See Barry E. Carter, *International Trade Law: Where Congress Has, Somewhat Hesitantly, Bought Into International Law*, 92 AM. SOC'Y INT'L L. PROC. 335, 336 (1998). Carter asserts that the Dole proposal “served as a convenient escape valve for some conservatives concerned about U.S. sovereignty in 1994, but the eventual proposed bill died in Congress in 1995. The concerns over sovereignty had dissipated considerably.” *Id.* at 336. See also U.S. TRADE REPRESENTATIVE, THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES, at 59 (Aug. 1994) (stating that adverse WTO “[p]anel reports—whether adopted or not—will not have any binding force as a matter of U.S. law. The appropriate federal and state executive and legislative authorities would decide how to respond under domestic law to any adverse panel recommendation.”).

11. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). In *Chevron*, the Court crafted a two-part test for use in cases when agency regulations come under review. The Court must first determine whether Congress has addressed the issue in question; if so, the

analysis, in which a court defers to either or both of the political branches on questions of a statute's or regulation's interpretation. Recently, however, some courts have been introducing another tool into the rules-of-construction toolbox: the "Charming Betsy" canon that urges a court not to construe an act of Congress in a manner that conflicts with international law.<sup>12</sup>

This Note examines the problems that are created when *Chevron* and Charming Betsy are both raised in environmental regulation cases that implicate the URAA. More specifically, this Note considers the problems faced by the courts and the political branches when a court attempts to reconcile the two. In the process, the Note attempts to challenge the popular arguments—that WTO membership weakens U.S. sovereignty—while raising another argument: that U.S. environmental laws may be threatened more by U.S. courts that apply international law principles in URAA-related cases. The discussion focuses on the language of the URAA, which explicitly states that whenever the GATT's provisions conflict with existing environmental or other laws, the existing domestic laws will

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agency action taken or regulation promulgated must conform to the will of Congress. If Congress is silent on the matter in question, the court must then determine whether the agency's actions or regulations pass a reasonableness test. *Id.* at 842-44.

12. See *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The case involved the Supreme Court's interpretation of an act of Congress that suspended trade with France, and whether or not when construed in light of international law, it should have been upheld and applied to a particular ship owner who was born in America but later became a Danish citizen. *Id.* at 115-21. The passage from the Charming Betsy case often referred to reads:

It has also 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 to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

*Id.* at 118. The "law of nations" is an anachronistic term that "encompassed more than is comprehended by 'international law' today, apparently including admiralty and general principles of the 'law merchant' applicable to transnational transactions." Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 n.1 (1984) (citation omitted). For the most part, the terms 'law of nations' and 'international law' are now used synonymously.

prevail.<sup>13</sup> Also reviewed is part of the legislative history of the URAA, primarily found in the Statement of Administrative Action (“SAA”), which provides a roadmap for courts, future administrations and congresses to follow when interpreting the URAA.<sup>14</sup>

After setting out some background on the GATT and the WTO, Part II examines three GATT/WTO rulings where U.S. environmental regulations were successfully challenged by WTO member nations, resulting in the U.S. modifying its regulations. A companion line of private cases is also examined where environmental, non-governmental organizations (“NGOs”) sued various executive branch agencies to compel stricter enforcement of environmental regulations. In each case, the agencies were ordered to enforce the environmental regulations according to the will of Congress; and in many of these cases, the suits were brought either in response to or in anticipation of a WTO-induced regulation modification. Part III examines another line of cases involving URAA-related litigation where the Charming Betsy canon was raised either by one of the parties or by the court itself. This Part will also summarize the WTO/U.S. jurisprudence to date. Part IV concludes by arguing that if the Charming Betsy canon is permanently appended to the *Chevron* analysis, when both are invoked, the balance that the executive branch seeks in weighing

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13. The URAA supremacy language reads: “No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.” 19 U.S.C. § 3512(a)(1) (1994).

14. See Statement of Administrative Action, *reprinted in* 1994 U.S.C.C.A.N. 3773, 4040 (expressing the Administration’s intent regarding the URAA to which Congress defers on matters of interpretation) [hereinafter SAA]. The URAA itself also references the SAA:

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act *in any judicial proceeding in which a question arises concerning such interpretation or application.*

19 U.S.C. § 3512(d) (1994) (emphasis added). See also *infra* note 172 for a discussion of the SAA text regarding regulation modifications.



trade and environmental policies could be tipped and environmental protections weakened.<sup>15</sup>

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15. Certain U.S. environmental laws might prove vulnerable under the GATT if challenged in the future. These laws could be weakened significantly, not by an adverse WTO ruling, but by a U.S. court ruling that in effect honors a WTO ruling. For example, in 1990, Congress passed legislation banning the export of unprocessed timber originating from Federal lands. The statute reads in part:

No person who acquires unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States may export such timber from the United States, or sell, trade, exchange, or otherwise convey such timber to any other person for the purpose of exporting such timber from the United States, unless such timber has been determined under subsection (b) of this section to be surplus to the needs of timber manufacturing facilities in the United States.

16 U.S.C. § 620(a) (1994). Japan has threatened to challenge this law before the WTO and some environmentalists believe that the U.S. might not be in a position to simply decline with impunity Japan's request for lumber, nor will the ban fall under the GATT's environmental exceptions. See Patti Goldman & Joe Scott, *Our Forests at Risk: The World Trade Organization's Threat to Forest Protection* 15 (1999), at [http://www.earthjustice.org/work/intl\\_index.html](http://www.earthjustice.org/work/intl_index.html) (pdf file) (footnotes omitted) (last visited Dec. 1, 2000). See also Ross W. Gorte & Kenneth R. Thomas, *Restricting Softwood Log Exports: Policy and Legal Implications*, *Congressional Research Service Report for Congress*, 93-738 ENR, at 12 (Aug. 13, 1993), construed in Goldman & Scott, at 15. The report concluded that the environmental exceptions under the GATT would likely not apply to U.S. lumber export bans

unless timber projections were to indicate that the national or local timber supply was in immediate or long-term danger of being depleted. As the [GATT] exceptions appear to be intended for application where resource reserves are in actual decline, it would appear to be necessary to establish this factual basis in order to invoke the exception.

*Id.* at 15. But see *Accelerating Tariff Liberalization in the Forest Products Sector: A Study of the Economic and Environmental Effects* 1 (Sept. 1999) (reporting that a joint study by the Office of the U.S. Trade Representative and the White House Council on Environmental Quality concluded that the ATL initiative [an agreement that will eventually eliminate all tariffs on lumber products] will likely have no environmental impacts), at <http://www.ustr.gov/releases/1999/11/99-91.pdf> (last visited Dec. 1, 2000). The U.S. export ban could be viewed as a trade barrier under the GATT's trading rules. This type of restraint on a nation enforcing its domestic

## I. BACKGROUND

## A. GATT/URAA-Related Litigation in U.S. Courts

Since Congress passed the URAA in late 1994, there have not been many URAA-related cases tried before U.S. courts. The URAA does not authorize private suits.<sup>16</sup> Consequently, when a URAA-related litigation arises, it is often because a party challenges an executive branch agency regulation passed in anticipation of, or in response to, a WTO ruling. A court must then construe the URAA in light of the potentially conflicting environmental regulation or statute. The URAA states that whenever a domestic statute conflicts with an obligation under the URAA, the domestic statute must prevail.<sup>17</sup> However, some courts have been applying the Charming Betsy canon in URAA-related cases. The cases discussed below demonstrate that the Charming Betsy analysis may upset the statutory framework that Congress and the executive branch have constructed, and therefore, may be inappropriate in URAA-related cases.<sup>18</sup>

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environmental protections is what concerns many environmentalists. As this paper suggests, however, U.S. courts, not the WTO, may hold the keys to ensuring that environmental regulations remain intact when the regulations conflict with the GATT's rules. If a U.S. court applies international principles of deference and compels the U.S. to honor its international obligations, such a decision would, in effect, codify an adverse WTO ruling and would be binding.

16. In relevant part, the URAA reads:

No person other than the United States—(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. § 3512(c)(1)(A)-(B) (1994).

17. See *supra* note 13 and accompanying text.

18. See *infra* Part IV.

### B. The GATT and the WTO

In 1947, the United States and other nations began a series of tariff and trade negotiations with the goal of promoting sustainable development throughout the world. The product of these agreements is called the General Agreement on Tariffs and Trade or GATT.<sup>19</sup> Trade talks proceeded in various rounds until 1994 when the final round was completed and the WTO was formed.<sup>20</sup> There are now 140 signatories to the agreement.<sup>21</sup> The GATT governs trade between member nations, and when disputes arise the Final Act provides for member nations to settle disputes.<sup>22</sup> If the member nations do not resolve disputes on their own, the WTO assembles a panel to hear the dispute and each affected nation presents its case before the panel.<sup>23</sup> Although dispute resolution before a WTO panel is adjudicatory in nature, nations are encouraged to negotiate bilateral and multilateral settlements.<sup>24</sup>

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19. See generally Amelia Porges, *The Marrakesh Agreement Establishing the World Trade Organization*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 63 (Terence P. Stewart ed., 1996) (discussing the history of the GATT and early agreements).

20. See *supra* notes 1 and 5 and accompanying text.

21. See The WTO, *Fact File* (stating that as of November 30, 2000, there were 140 member nations in the WTO), at [http://www.wto.org/english/thewto\\_e/thewto\\_e.htm](http://www.wto.org/english/thewto_e/thewto_e.htm) (last visited Jan. 15, 2001).

22. See *supra* note 6 and accompanying text. In 1997, the Deputy Director General of the WTO stated “[t]he WTO performs three basic functions: It is the place where members negotiate trade rules and concessions for liberalization; it monitors those agreements via twenty-five standing committees and councils and more than 200 notification requirements; finally, it provides a means for settling disputes over rules and concessions.” Warren Lavorel, *The World Trade Organization: Looking Ahead*, 91 AM. SOC’Y INT’L L. PROC. 20, 22 (1997).

23. See *supra* note 6 for a discussion of the DSU.

24. See *infra* note 161 and accompanying text for a discussion of why the flexibility available under the DSU should not be undermined by U.S. court application of Charming Betsy. See also Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 581, 588-89 (Terence P. Stewart ed., 1996) (comparing dispute settlement under the GATT and under the Final Act establishing the WTO). In addition, the authors point out that the Dispute

In 1994, the WTO was created and the GATT was finalized, ending a half-century of tariff and trade negotiations between many of the world's nations.<sup>25</sup> It also began a new era of international trade and ushered in a trade regime unlike any seen before. Like the other member nations, the U.S. seeks to protect and foster its domestic interests while honoring its obligations under the GATT, which now has legal effect.<sup>26</sup> These interests have come into conflict during the last ten years, where complaining member nations under the GATT/WTO dispute settlement system have challenged U.S. environmental regulations.<sup>27</sup> In each of the cases discussed below, the U.S. environmental regulations were found to violate the GATT, and the U.S. chose to amend its laws and/or their implementation.<sup>28</sup>

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Settlement Understanding only applies to "disputes between WTO members related to issues covered by WTO agreements. These rules would not apply, for instance, to any U.S.-China dispute until China joins the WTO, nor to a U.S.-EU dispute over investment measures not addressed in the Uruguay Round's Trade Related Investment Measures Agreement." *Id.* at 589. *Cf.* Helene Cooper & David Rogers, *China Trade Bill Passes Final Test: Senate*, WALL ST. J., Sept., 20, 2000, at A2 (reporting that the U.S. Senate voted to normalize trade relations with China, which was the last obstacle to China's entrance into the World Trade Organization. WTO officials state that China's entry is expected to be finalized by the year's end).

25. See What is the WTO? (describing how member nations continue to negotiate various side agreements within the WTO framework), at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Nov. 26, 2000).

26. The Final Act reads in part: "The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions." Final Act, art. VIII, *supra* note 1.

27. See *supra* note 6 and *infra* note 161 discussing the WTO dispute resolution mechanism.

28. See Håkan Nordström & Scott Vaughan, *Trade and Environment Report*, Annex I, IV (Oct. 1999) (summarizing the three U.S. cases discussed *infra* Part II.A-C, and others), at [http://www.wto.org/english/tratop\\_e/envir\\_e/stud99\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/stud99_e.htm) (last visited Dec. 1, 2000). It is important to note that the U.S. has challenged other member nations as well. For example, the United States and Canada challenged a European Economic Community import ban on hormone-treated beef. A WTO panel agreed that the ban violated Articles III and V of the Agreement on the Application of Sanitary and Phytosanitary Measures of the Final Act, respectively, because the EEC ban was "imposed without scientific

*C. Trade Leverage and Environmental Protections Under the WTO*

Historically, nations have negotiated bilateral and multilateral trade agreements, which have often included economic and non-economic restrictions as a way to gain leverage and secure concessions.<sup>29</sup> Using such leverage in order to gain compliance with environmental standards has been common.<sup>30</sup> As the cases discussed below demonstrate, however, using trade leverage against a nation that does not meet U.S. environmental standards is a risky path to take under the WTO.<sup>31</sup> Some view such trade leverage tactics not only as prohibitive under the GATT, but as a flawed and ineffective way to achieve environmental protections.<sup>32</sup> Under the GATT, import restrictions on goods produced or processed by methods that threaten the environment are often found to violate the GATT's provisions,<sup>33</sup> despite the Final Act's stated goal of promoting sustainable development and environmental protections.<sup>34</sup>

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justification" and because it was not based on a "risk assessment." *Id.* Annex I, at 84.

29. See generally Richard W. Parker, *The Use and Abuse Of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL L. REV. 1 (1999) (discussing the history of U.S. trade leverage and policy generally, and its use in the tuna/dolphin dispute in particular).

30. *Id.*

31. See *infra* Part II.A-C.

32. One commentator has stated that the problem with trade leverage measures is their

tendency . . . to displace, rather than energize, good-faith negotiation over ways and means to protect the commons. From this single problem, all other hazards spring. To avoid them trade leverage must be recognized and used as an instrument of diplomacy, not a substitute for it. It must be used to energize negotiations with foreign states, producers, or both, not to try to trump them.

Parker, *supra* note 29, at 119.

33. See Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 296 n.5 (2000) (discussing the differences between goods produced or processed by methods that threaten the environment ("PPMs") and "product-motivated restrictions," which are legal under GATT. "This latter type of restriction 'prevent[s] the product itself from degrading the environment within the importing country.'" (quoting John J. Barcelo III, *Product Standards to Protect the Local*

There are at least two flaws in the WTO's ability to address environmental issues. First, while the Final Act's preamble asserts the goal of sustainable development, no major environmental agreements were adopted as a part of the Final Act. Second, the WTO committee that was established to address trade and environmental issues is new and considered relatively weak.<sup>35</sup> Some have criticized the Committee on Trade and the Environment's ("CTE's") work, and questioned its effectiveness in treating an ongoing problem: the status of domestic, unilateral environmental laws passed before the Final Act.<sup>36</sup>

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*Environment—The GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755, 756 (1994)). The GATT states that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . ." GATT, art. XI.1, *supra* note 5. The Richards & McCrory article provided the citations for the cases discussed *infra* Part II.E.

34. The Preamble to the Final Act establishing the WTO declares its objective of "sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . . ." Final Act, Preamble, *supra* note 1, at 1144.

35. See Final Act, Trade and the Environment, *supra* note 1, at 1267. The Committee on Trade and the Environment ("CTE") has a two-fold mandate: "(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development; (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system . . . ." *Id.* at 1268. In addition, there are environmental exceptions in Article XX of the GATT, but they are often construed so broadly or narrowly so as to be of no effect. See *infra* notes 53, 106 and 169 and accompanying text for a discussion of Article XX's provisions.

36. One critic of the WTO's CTE has stated:

The World Trade Organization's (WTO) Committee on Trade and Environment (CTE) has declined even to discuss a possible role for unilateral trade measures in *obtaining* conservation agreements: the Committee's mandate was deliberately drafted to exclude it. The CTE's deliberations on measures "pursuant to" environmental agreements have been uninformed and yielded no recommendations.

An area of constant discord between member nations and the WTO is environmental protection. Environmental concerns were not part of the original GATT<sup>37</sup> and these issues are only now being addressed. Indeed, the WTO admits that it lacks any mechanism to administer comprehensive environmental policies.<sup>38</sup> Until the CTE establishes itself in advisory, policymaking and dispute resolution roles, however, it is unlikely that environmental concerns of member nations will ever garner more or even as much priority as the WTO's main goal of fostering free trade.<sup>39</sup>

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Parker, *supra* note 29, at 5 (footnote omitted) (emphasis in original).

37. See U.S. TRADE REPRESENTATIVE, *THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES*, at ES-2 (Aug. 1994) ("When the General Agreement was originally drafted more than 40 years ago, environmental policy was in its infancy. Consequently, the GATT does not refer to environmental measures as such.").

38. See *Work of the Trade and Environment Committee* (1999), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/13envi\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/13envi_e.htm) (last visited Dec. 1, 2000). The WTO admits that

it is not intended that the WTO should become an environmental agency. Nor should it get involved in reviewing national environmental priorities, setting environmental standards or developing global policies on the environment. That will continue to be the task of national governments and of other intergovernmental organizations better suited to the task.

*Id.*

39. In addition to the CTE's relative weakness, another hurdle for nations seeking to enforce domestic environmental laws is that before the WTO era, member nations could veto adverse panel decisions; under the WTO, vetoes are not permitted and rulings have legal effect, barring a rejection of the decision by a consensus among all members. See DSU, art. XVI.4, *supra* note 6; Cunningham & Smith, *supra* note 24, at 585. The Dispute Settlement Understanding reads in part: "An Appellate Body report shall be adopted by the [Dispute Settlement Body] DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members." DSU, art. XVII.14, *supra* note 6. And with each member nation having one vote in the WTO, U.S. hegemony has no effect before committee and panel adjudications, and decisions based on unsuccessful appeals are final. See generally G. Pascal Zachary, *Who's Running This Show? A Reckoning for the WTO*, WALL ST. J., Oct. 5, 2000, at A21 (suggesting that because the U.S. is no longer a hegemonic power in trade, the WTO at times suffers from a lack of direction and leadership).

II. THREE GATT/WTO PANEL AND APPELLATE BODY RULINGS<sup>40</sup>

During the past ten years, the U.S. has lost several environmental disputes with other member nations of the GATT and the WTO. In each of these cases, the complaining member nation challenged a U.S. environmental regulation alleging that the laws were discriminatory and violated provisions in the GATT. In each case, the U.S. responded by amending its environmental regulations in dispute.

A. *The Tuna/Dolphin Case*

In the Eastern Tropical Pacific Ocean certain species of tuna travel with pods of dolphins.<sup>41</sup> A commonly used method of catching tuna involves chasing dolphins and tuna and encircling them with nets. This method, called "purse seines," often results in large numbers of dolphins being inadvertently harmed or killed.<sup>42</sup> In an effort to lessen the harm to dolphins, Congress passed the Marine Mammal Protection Act of 1972,<sup>43</sup> which established a general prohibition against the "taking" (harassment, hunting, capture, killing or attempt thereof) of marine life, unless authorized by exception.<sup>44</sup> In 1990, the National Marine Fisheries Service promulgated regulations limiting the numbers of permitted incidental takings of marine mammals by U.S. fisherman.<sup>45</sup> Originally applicable only to U.S. fisherman, the regulations were extended to ban imports of all commercial fish or

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40. The purpose of setting out the Tuna/Dolphin case, the Reformulated Gasoline case, and the Shrimp/Turtle case is to provide background to the disputes that occur with WTO member nations in general. It is also to set up the discussions of the private suits that follow the WTO cases, and to synthesize all of the cases in light of the Charming Betsy canon.

41. Wagner & Goldman, *supra* note 7, at 8; 16 U.S.C. § 1385(b) (1994).

42. See Wagner & Goldman, *supra* note 7, at 8.

43. Pub. L. 92-522, 86 Stat. 1027 (1972), as amended, notably by Pub. L. 100-711, 102 Stat. 4755 (1988) and by Pub. L. 101-627, 104 Stat. 4465 (1990) (codified at 16 U.S.C. §§ 1361-1421 (1994)).

44. See 16 U.S.C. § 1371(a)(1) (1994) (providing certain exceptions for scientific research and educational purposes, among others).

45. 50 C.F.R. §§ 216.3, 216.24 (1999). The National Marine Fisheries Service promulgates and enforces the regulations authorized by the Marine Mammal Protection Act.



fish products caught with technology that yielded levels of incidental killing of dolphins higher than that allowed under U.S. law.<sup>46</sup> In November 1990, Mexico requested consultations with the U.S. concerning the restrictions on imports of tuna and tuna products.<sup>47</sup> When mutually satisfactory results did not emerge after sixty days, Mexico initiated the dispute resolution process under the GATT.<sup>48</sup> Despite this challenge, in April 1991, the U.S. Customs Service implemented an embargo on imports of yellowfin tuna harvested with purse seine nets by vessels from Vanuatu, Venezuela and Mexico.<sup>49</sup>

Among other complaints, Mexico asked the GATT panel to find that the U.S. import restrictions on tuna were inconsistent with the general prohibition of quantitative restrictions under the GATT.<sup>50</sup> The U.S. asked the GATT panel to find that the restrictions were consistent with the GATT provisions requiring each contracting nation to treat imported products no less favorably than products of national origin.<sup>51</sup> The U.S. argued that because the restrictions also

46. See 16 U.S.C. § 1371(a)(2)(D)-(E) (1994) (describing how the Secretary of Commerce may certify nations that use methods that lower the number of incidental killings).

47. See Panel Report on United States—Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1598 (1991) (not adopted) [hereinafter Tuna Panel Report].

48. *Id.* at 1598.

49. *Id.* at 1600.

50. *Id.* at 1601. Article XI.1 reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, art. XI.1, *supra* note 5.

51. *Id.* at 1601. Article III.4 reads in part:

The products of the territory of any contracting party imported into the territory of any another contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . . .

applied to U.S. fisherman, all parties were receiving equal treatment.<sup>52</sup> The U.S. also argued that even if the import ban was not exempted, the provisions should be covered under the GATT's environmental exceptions.<sup>53</sup>

The panel found that the U.S. ban on tuna imports on nations not certified under U.S. guidelines violated the GATT because the regulations (1) were intended to reduce the incidental takings rate of marine mammals; (2) did not regulate the domestic sale of tuna; and (3) "could not possibly affect tuna as a product."<sup>54</sup> The panel also rejected the U.S.'s arguments that the restrictions fell under the GATT's environmental exceptions. The panel stated that the exceptions were to be construed narrowly.<sup>55</sup> Generally, the panel rejected the broad interpretation urged by the U.S., opining that if one nation could unilaterally impose health protection policies on another, parties' rights would be jeopardized under the GATT and the entire multilateral framework would be weakened.<sup>56</sup> The decision stated that the U.S. should have pursued a cooperative agreement through negotiations rather than unilaterally imposing domestic restrictions on one of its trading partners.<sup>57</sup> And the panel reminded

GATT, art. III.4, *supra* note 5.

52. *Id.* at 1603-04.

53. Tuna Panel Report, *supra* note 47, at 1601. The GATT's environmental exceptions permit nations to adopt measures "necessary to protect human, animal or plant life or health," and measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT, art. XX(b), (g), *supra* note 5; *see also infra* note 169 and accompanying text.

54. Tuna Panel Report, *supra* note 47, at 1618. The U.S. position was again challenged in 1992-93 by the European Union (EU) based on the same regulations. The panel's ruling was almost identical to the first Tuna panel's ruling. *See* Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) (not adopted).

55. Tuna Panel Report, *supra* note 47, at 1619.

56. *Id.* at 1620.

57. *See id.* *See also* *Work of the Trade and Environment Committee* (1999) (stating that "[t]hroughout the discussions on this issue in the WTO, it has become clear that the preferred approach for governments to take in tackling transboundary or global environmental problems is through cooperative, multilateral action under an MEA."), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/13envi\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/13envi_e.htm) (last visited Dec. 1, 2000); Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental*

the U.S. that it could not unilaterally impose restrictions on another nation simply because it disagreed with its policies.<sup>58</sup> According to the panel, the U.S. could have also raised the duties on such products or exercised other rights available under the GATT.<sup>59</sup> At least one of the U.S.'s efforts to protect dolphins, however, remained intact.

The only bright spot for the U.S.—and for dolphins—was that the now-familiar labeling provisions established under the Dolphin Protection Consumer Information Act<sup>60</sup> survived the panel's scrutiny and are considered legal under the GATT. Under the Act, it is a violation of Section 45 of the Federal Trade Commission Act<sup>61</sup> to indicate that a tuna product is "dolphin safe" if it was harvested using methods harmful to dolphins.<sup>62</sup> The panel found that the labeling provisions did not violate provisions of the GATT that

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*Agreements*, 4 ANN. SURV. INT'L & COMP. L. 74, 76 (1997) (discussing the difficulties that arise when one party to an MEA is a non-GATT member. There is disagreement as to whether the GATT's provisions or those of the MEA should govern disputes); Rossella Brevetti, *WTO Rules Allow Parties to Join Pacts on Global Environment with Trade Provisions*, 17 Int'l Trade Rep. (BNA), at 446 (Mar. 16, 2000) (discussing how the U.S. believes that member nations should be permitted to enter into MEAs and waive rights under the WTO dispute resolution provisions).

58. The panel stated that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." Tuna Panel Report, *supra* note 47, at 1622.

59. *Id.* at 1622.

60. Pub. L. 101-627 § 901, 104 Stat. 4465-67 (1990) (codified at 16 U.S.C. §§ 1385, 1685 (1994)).

61. 16 U.S.C. § 1385(d)(1) (1994) (citing 15 U.S.C. § 45 (1994)).

62. The provision reads in part:

It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains—

(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or

(B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets . . . .

16 U.S.C. § 1385(d)(1) (1994).

prohibit labels from treating imported products less favorably than domestic products.<sup>63</sup> The panel's ruling indicated that the labeling provisions do not restrict the sale of tuna products, while recognizing that consumers benefit from such labels in that they can choose to purchase tuna products with the "dolphin safe" label.<sup>64</sup>

### *B. The Reformulated Gasoline Case*

In 1990, Congress amended the Clean Air Act in an effort to curb air pollution from automobiles.<sup>65</sup> Under the new regulations promulgated by the Environmental Protection Agency ("EPA"), refineries are required to use certain methods and additives that will reduce harmful emissions.<sup>66</sup> The regulations established baselines using 1990 emissions standards and were to be phased-in over time.<sup>67</sup> The new proposed regulations were meant to apply to both domestic and foreign manufacturers, but concerns about effective monitoring and enforcement over foreign imports led the EPA to impose the regulations on the importers themselves, since the EPA has jurisdiction over the domestic importers but not over the foreign exporters.<sup>68</sup> Foreign refiners and exporters had their own concerns about the new regulations. In April 1995, Venezuela and Brazil requested consultations with the U.S. to discuss the new EPA rules affecting gasoline imports.<sup>69</sup> When a satisfactory solution could not

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63. Tuna Panel Report, *supra* note 47, at 1622. The labeling provision in the GATT art. IX.1 reads: "Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country." GATT, art. IX.1, *supra* note 5.

64. Tuna Panel Report, *supra* note 47, at 1622.

65. See Clean Air Act Amendments of 1990, §§ 211, 212-221, 228(d), Pub. L. No. 101-549, 104 Stat. 2399, 2488-2500, 2510 (1990) (codified at 42 U.S.C. § 7545 (1994)); Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716 (Feb. 16, 1994) (codified at 40 C.F.R. § 80 (1999)).

66. 59 Fed. Reg. 7716, 7716.

67. *Id.*

68. *Id.* at 7786.

69. See Panel Report, United States—Standards for Reformulated and Conventional Gasoline Treatment of Imported Gasoline and Like Products of National Origin, 35 I.L.M. 274, 277 (1996) [hereinafter Gasoline Panel Report]. Brazil and Venezuela challenged the specific provisions that governed how baselines were set for foreign refiners. See

be reached, Venezuela and Brazil challenged the new regulations before a WTO panel arguing that they violated the GATT's Most Favored Nation ("MFN") and National Treatment provisions,<sup>70</sup> in that they treated gasoline exported from certain third countries more favorably and benefited U.S. gasoline producers.<sup>71</sup>

The panel agreed with Venezuela and Brazil that the EPA regulations violated the GATT's provisions that prohibit a country from treating imported products less favorably than domestic products.<sup>72</sup> In comparing the imported and domestic gasoline under the regulations, the panel held that for the most part, foreign gasoline and U.S. domestic gasoline were chemically identical, and stated that the U.S. was not free to discriminate against foreign products.<sup>73</sup> The EPA rule was, therefore, found to discriminate against foreign refiners. The panel also rejected the U.S.'s argument that the

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*id.* at 279. The purpose of setting baselines is to approximate the national average parameter values for gasoline used in the U.S. in 1990 and to maintain those parameters at 1990 levels. 59 Fed. Reg. 7785 n.66 (Feb. 16, 1994). In order to set individual baselines, an individual refiner must produce evidence of the quality of their gasoline produced or shipped in 1990 ("Method 1"). See Gasoline Panel Report, at 293. An individual baseline could then be established for that particular refinery against which future inspections would be made. Unlike domestic refiners, who could establish individual baselines using other methods, however, foreign refiners must either adhere to Method 1 (which was unavailable if evidence of their 1990 quality levels could not be produced), or adhere to a statutory baseline based on average characteristics of all gasoline consumed in the U.S. in 1990. *Id.*

70. Gasoline Panel Report, *supra* note 69, at 280. The MFN language provides, in part: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, art. I.1, *supra* note 5. The National Treatment provisions invoked by the complainants read in part: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin . . ." GATT, art. III.4, *supra* note 5.

71. Gasoline Panel Report, *supra* note 69, at 279-80.

72. *Id.* at 294.

73. *Id.* (stating that "chemically-identical imported and domestic gasoline are like products under Article III(4)"). See *supra* note 70 and accompanying text discussing a portion of the GATT's Article III.4's text.

regulations were necessary to protect human health under the GATT's environmental exceptions.<sup>74</sup> The panel concluded that the EPA regulations were not primarily aimed at conserving natural resources since, as mentioned above, the panel had already established that imported and domestic gasolines were chemically identical.<sup>75</sup> In sum, the panel recommended that the U.S. change the regulations to comply with the GATT.<sup>76</sup> The Appellate Body affirmed the panel's decision.<sup>77</sup>

In response, the EPA amended its regulations to comply with the WTO rulings.<sup>78</sup> The proposed amendments loosened the standards for foreign refiners by giving them the option to either accept the statutory baselines, or to petition the EPA for permission to establish individual baselines.<sup>79</sup> The EPA acknowledged that the new options have contributed to concerns over possible environmental impacts, and addressed these concerns by: (1) establishing benchmarks for imported gasoline that contributes to adverse environmental effects; (2) monitoring imported gasoline to ensure compliance with these benchmarks; and (3) imposing remedies that compensate for violations of the benchmarks.<sup>80</sup> Environmental groups remain concerned because Venezuelan gasoline contains olefins—a pollution-forming compound—in concentrations three times that allowed by the initial EPA approach.<sup>81</sup> While the new regulations do provide for EPA inspections of foreign refineries, given the EPA's limited resources, some argue that it is an inadequate solution.<sup>82</sup>

### C. The Shrimp/Turtle Cases

The clash between trade and endangered species protection was evidenced by recent efforts to protect sea turtles. There are seven

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74. See Gasoline Panel Report, *supra* note 69, at 296-300. See also *infra* note 169 for a description of the GATT's environmental exceptions.

75. See Gasoline Panel Report, *supra* note 69, at 294, 299.

76. *Id.* at 300.

77. See WTO Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996).

78. See Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners, 62 Fed. Reg. 45,533 (Aug. 28, 1997).

79. See *id.* at 45,535-36.

80. See *id.* at 45,537 (footnote omitted).

81. See Wagner & Goldman, *supra* note 7, at 12.

82. See *id.*

species of sea turtles, which are all considered threatened, endangered, or vulnerable under both international and national law.<sup>83</sup> A major cause of incidental capture and death for these turtles occurs when they are inadvertently caught in shrimp-trawling nets that are pulled along the ocean or sea bottom.<sup>84</sup> The Secretary of Commerce is authorized to determine whether any species are endangered and may issue regulations to protect those species.<sup>85</sup> While an estimated 150,000 sea turtles drown in shrimp nets every year, turtle-excluder devices reduce the incidental killings by 97%.<sup>86</sup> In 1989, Congress passed section 609 of Public Law 101-162 ("section 609"), which prohibits the importing of shrimp or shrimp products from countries without comparable sea turtle protections.<sup>87</sup> The law also requires the U.S. Secretary of State, in conjunction with the Secretary of Commerce, to initiate bilateral and multilateral negotiations with other nations to protect sea turtles.<sup>88</sup> Finally, the law bans the importing of shrimp or shrimp products from nations that have not been certified as using harvesting methods that yield incidental taking rates consistent with U.S. levels.<sup>89</sup> The regulations proved to be vulnerable under the GATT.

In an October, 1996 letter, India, Malaysia, Pakistan and Thailand (the "Asian Nations") requested consultations with the U.S. regarding the import restrictions.<sup>90</sup> These consultations did not yield satisfactory results for the parties.<sup>91</sup> In January 1997, the Asian Nations requested that the WTO's Dispute Settlement Body establish

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83. *Id.* at 3. See also Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037-38 (1989) (codified at 16 U.S.C. § 1537 (1994)).

84. See Report of the Panel on the United States—Import Prohibition of Certain Shrimp and Shrimp Products, 37 I.L.M. 832, 837 (1998) [hereinafter Shrimp Panel Report].

85. See 16 U.S.C. § 1533(d) (1994).

86. See Wagner & Goldman, *supra* note 7, at 3. "A TED [turtle excluder device] is a grid trapdoor installed inside a trawling net that is designed to allow shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net." Shrimp Panel Report, *supra* note 84, at 837 n.613.

87. See 16 U.S.C. § 1537 (1994).

88. *Id.*

89. See *id.* (citing Memorandum of the President, Dec. 19, 1990).

90. Shrimp Panel Report, *supra* note 84, at 835.

91. *Id.*

a panel to hear the dispute and rule that the U.S. regulations violate certain GATT provisions.<sup>92</sup> As in the Dolphin and Gasoline cases, the Asian Nations in this case alleged that the U.S. regulations violated the GATT's general prohibition against import restrictions.<sup>93</sup> They argued that the regulations violated provisions prohibiting restrictions on imports or exports on any products, unless the prohibition applies equally to all third countries.<sup>94</sup> The Asian Nations further claimed that the GATT was violated because the U.S. gave certain countries a three-year, phase-in period to comply with the U.S. import restrictions, whereas newly affected countries were not given an extended time period.<sup>95</sup> They also asserted that these different compliance schedules amounted to discriminatory treatment. The panel noted that the U.S. did not dispute that section 609 effectively amounts to a restriction against uncertified nations.<sup>96</sup> Still, the U.S. argued that all third countries were treated equally under the law and that the GATT's environmental exceptions covered the regulations.<sup>97</sup> The panel then turned to the U.S.'s environmental exceptions arguments.<sup>98</sup>

The panel rejected the U.S.'s arguments that it could rely on the GATT's environmental exceptions as an affirmative defense.<sup>99</sup> The panel interpreted the environmental exceptions broadly and stated that before getting to the individual exceptions, the alleged violative conduct must be viewed under the broader language of the provision's chapeau.<sup>100</sup> When the U.S. raised the argument that the

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92. *Id.*

93. *Id.* at 839; see *supra* note 50 for Article XI.1's text.

94. Shrimp Panel Report, *supra* note 84, at 841.

95. *Id.* at 842.

96. *Id.* at 840.

97. *Id.* at 843.

98. *Id.*

99. *Id.* at 843-45.

100. Shrimp Panel Report, *supra* note 84, at 849. The GATT's general exceptions chapeau (or introduction) reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .



panel should consider the intent of the U.S. measures—to protect sea turtles and other marine mammals—and recognize that other international agreements include similar bans, the panel reminded the U.S. that there was no such agreement at issue in this particular dispute.<sup>101</sup> Rather, the panel stated that at issue was the U.S.'s unilateral ban on products that do not meet its environmental protection standards, which is a violation under the GATT.<sup>102</sup> Instead of relying on unilateral bans, the panel stated that the WTO's Committee on Trade and Environment encourages member nations to adopt multilateral solutions based on consensus and international cooperation, especially when addressing environmental problems of a transboundary or global nature.<sup>103</sup>

In the end, the panel held that the U.S. regulations violated the GATT and were not justified under the environmental exceptions.<sup>104</sup> As it did in the other cases, the panel "recommended" that the Dispute Settlement Body "request" the U.S. to bring this measure into conformity with its obligations under the WTO Agreement.<sup>105</sup>

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GATT, art. XX, *supra* note 5; Shrimp Panel Report, *supra* note 84, at 844-51 (discussing how the individual environmental provisions in the GATT need to be read in light of the entire agreement, which is structured to promote and facilitate trade between nations). The panel stated that if every nation unilaterally adopted measures conditioning access to its markets, including environmental protections, it would not be long before the entire multilateral trading system would collapse. *Id.* at 849.

101. See Shrimp Panel Report, *supra* note 84, at 851.

102. See *id.*

103. See *id.* See *supra* note 57 for a discussion on multilateral environmental agreements (MEAs).

104. See Shrimp Panel Report, *supra* note 84, at 857.

105. *Id.* The panel concluded by stating:

In our opinion, Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose . . . . We consider that the best way for the parties to this dispute to contribute effectively to the protection of sea turtles . . . would be to reach cooperative agreements on integrated conservation strategies, covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned.

*Id.*

The United States appealed the ruling but the Appellate Body affirmed.<sup>106</sup> In response to the WTO rulings, the State Department published a notice in the Federal Register proposing several revisions to the regulations and guidelines used in certifying importing nations.<sup>107</sup>

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106. See WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, 38 I.L.M. 118 (1999). Although the Appellate Body reached the same conclusion, that the U.S. laws were not justified under Article XX, it held that the reasoning used by the panel, interpreting the chapeau of Article XX before considering its specific provisions, was doctrinal error. The Appellate Body also determined that the U.S. ban on shrimp and shrimp products was “among the types of measures covered by Article XX(g), but nevertheless was not justified because of the particular method in which it was applied.” *Id.* This has led some to believe that when properly applied, such restrictions may be used to achieve certain environmental protections. See also Parker, *supra* note 29, at 5 commenting on this part of the Appellate Body ruling:

Recognizing the 1994 addition of principles of sustainable development to the WTO’s normative framework, the decision faults the *manner* in which U.S. trade leverage was applied on behalf of a common resource (endangered sea turtles), but not necessarily the fact that trade leverage was used at all. In so doing, the decision implicitly resurrects questions that have been off the table in the CTE for the last four years: whether there is a constructive role for environmental trade leverage (ETL) in obtaining, as well as enforcing, agreements to conserve the global commons; and if leverage is used, how should it be used?

*Id.* (emphasis in original). *Contra* Judith Jacobs, *Better Integration of Environment Issues May Create New Barriers, Industry Says*, Daily Env’t Report News (BNA), at 111 DEN A-5 (June 10, 1999) (discussing how despite the adverse ruling of the Appellate Body regarding the U.S. shrimp import ban, some U.S. business leaders are concerned that this may be a first step to new barriers being erected in the name of environmental protection). A DuPont Co. representative, Robert Heine, said “[w]e don’t want to reinvent previous barriers to trade in the name of protecting the environment.” Heine also said, “[i]n the business community, we see great potential mischief in this aspect of the WTO ruling on the shrimp/turtle case.” *Id.*

107. See Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14,481 (Mar. 25, 1999) (proposing changes in the regulations’ transparency, overall flexibility, and requiring that nations denied

*D. Ramifications of the WTO Rulings*

These cases demonstrate that under a global economic trading system, such as the GATT/WTO, individual nations can no longer unilaterally enforce domestic laws with impunity. Many have raised concerns about eroding national sovereignty, and as these cases indicate, there appears to be at least some reason for concern. In the cases discussed above, various WTO bodies heard the disputes and decided that the United States should change its environmental protection regulations. Although the WTO has no enforcement mechanism, the U.S. executive branch has invoked its broad authority under the URAA and complied with the adverse WTO rulings each time; the U.S. has not decided to comply because the WTO may force a nation to amend its laws or regulations. U.S. courts, of course, do have the authority to strike down regulations as the next set of cases demonstrates.

*E. Private Suits*

Another concern for executive branch agencies is that U.S. courts occasionally compel enforcement of environmental regulations to more closely comply with the will of Congress. This is, of course, by itself unremarkable; but when viewed against the backdrop of the WTO cases, these cases reveal the sensitive nature of the policy choices that the executive branch must make, and how it must craft policies and regulations in light of two conflicting sets of decisions: the first arising from WTO decisions recommending relaxed enforcement of environmental regulations; the second, from U.S. courts ordering stricter compliance under federal law. Some of the holdings of the relevant cases that coincided with the above addressed WTO cases are examined below.

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certification receive notice and explanation for reasons why certification was denied). *See also* Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999) (commenting on the previous comments and suggesting further modifications).

## 1. The Private Tuna/Dolphin Cases

As mentioned in the discussion above, the National Marine Fisheries Service ("NMFS") promulgated regulations that included an embargo option if incidental takings of dolphins exceeded certain levels for a given year.<sup>108</sup> Under the regulations, a country could, however, have the embargo reconsidered if it came into compliance within the embargo's first six months.<sup>109</sup> In 1991, several environmental groups sued the U.S. Secretary of Commerce, among other executive branch agencies, on the grounds that the NMFS violated the Marine Mammal Protection Act and exceeded its authority by granting countries a six-month extension to comply.<sup>110</sup> Plaintiffs also argued that according to the regulations, the NMFS could not authorize imports until a nation provided the U.S. with required data on takings rates, which were required to enforce the embargo.<sup>111</sup> The court agreed and issued a temporary restraining order preventing the NMFS from extending compliance schedules by six months, holding that delays in enforcing the import ban would violate the clear intent of Congress.<sup>112</sup>

The U.S. government appealed the ruling, but the Court of Appeals for the Ninth Circuit affirmed, rejecting the government's argument that the court should defer to the agency's discretion.<sup>113</sup> The court also held that executive branch agencies do not have the authority or discretion to issue regulations that conflict with specific statutory language and a clear congressional purpose.<sup>114</sup> The court ordered the government to enforce the embargo against Mexico and the other countries that were violating the regulations.<sup>115</sup> It was the

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108. *See supra* Part II.A.

109. *See* Taking and Importing of Marine Mammals Incidental to Commercial Fishing Operations, 55 Fed. Reg. 11,921, 11,929 (Mar. 30, 1990); 50 C.F.R. §§ 216.3, 216.24 (1999).

110. *See* Earth Island Inst. v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990).

111. *Id.* at 969-70.

112. *See id.* at 972-73.

113. *See* Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1452 (9th Cir. 1991).

114. *See id.* at 1452-53.

115. *Id.* at 1453.

enforcement of this embargo that led Mexico to challenge the U.S. law before the GATT panel.<sup>116</sup>

## 2. The Private Gasoline Case

In 1998, an American gasoline importer sued the EPA over Clean Air Act regulations that were modified after the WTO held that the regulations discriminated against foreign refiners under the GATT.<sup>117</sup> The importer claimed that the EPA's regulations went beyond the agency's statutory authority and were arbitrary and capricious.<sup>118</sup> The Court of Appeals for the District of Columbia disagreed and held that the EPA's revised regulations were neither inconsistent with the Clean Air Act nor arbitrary and capricious.<sup>119</sup> The court determined that EPA could consider factors other than air quality and that the regulations for determining baselines for foreign importers were a reasonable construction under the Act.<sup>120</sup>

The court used the two-step analysis from *Chevron*<sup>121</sup> in evaluating the challenge to EPA's statutory authority. The court examined the legislative history of the 1990 amendments to the Clean Air Act and concluded that Congress had considered the effects that the rules might have on supplies of foreign gasoline and potential market interruption.<sup>122</sup> The court held that the EPA's rules, crafted in part to prevent anticipated market disruptions, were permissible.<sup>123</sup> The

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116. See Tuna Panel Report, *supra* note 47, at 1599-1600.

117. See *George E. Warren Corp. v. EPA*, 159 F.3d 616, 620 (D.C. Cir. 1998); *cf. George E. Warren Corp. v. EPA*, 164 F.3d 676 (D.C. Cir. 1999), *modifying* certain procedural aspects of the case.

118. Specifically, the plaintiff alleged that the Clean Air Act regulations (1) may lead to a degradation in air quality; (2) consider factors other than air quality, namely the WTO decision, and the effect the regulations would have on price and supply of imported gasoline; (3) impermissibly establish options by which foreign refiners may choose between baseline alternatives; and (4) alter the statutory baselines set by Congress. *Id.* at 620.

119. See *id.* at 620-24.

120. See *id.*

121. See *supra* note 11 for a discussion of the *Chevron* analysis.

122. *George E. Warren Corp.*, 159 F.3d at 623.

123. *Id.* at 624. The court also discussed, in a passage where it is not clear whether or not it is dicta, not only the permissibility of EPA's approach to its rulemaking, but the importance of the U.S. honoring its international obligations under WTO agreements. See *id.* at 624. The court

court agreed with EPA that since Congress did not include explicit language about what factors EPA could or could not consider, the second-step of *Chevron* was properly invoked.<sup>124</sup> Therefore, the court held that it was reasonable for EPA to craft its rules accordingly.<sup>125</sup>

### 3. The Private Shrimp/Turtle Cases

The shrimp/turtle case also had its share of related private litigation. In 1995, environmental groups sued the U.S. Secretary of State to enforce section 609 of the Endangered Species Act in order to better protect sea turtles.<sup>126</sup> Plaintiffs contended, and the Court of International Trade<sup>127</sup> agreed, that the statute did not contain any geographic limitations for enforcement purposes.<sup>128</sup> Yet, the U.S. government admitted that it was only selectively enforcing section

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quoted the Supreme Court from a 1995 case where the Court held “[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.” *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995)). This aspect of the decision will be discussed below. *See infra* Part III.D.4.

124. *See* *George E. Warren Corp.*, 159 F.3d at 623-24.

125. *Id.* at 624.

126. *See* *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (Ct. Int’l Trade 1995).

127. The Court of International Trade’s jurisdiction is authorized by 28 U.S.C. § 1581. *See* Birgit Kurtz, Note, *Dolphins, Sea Turtles, and Finnish Elks: Is the Court of International Trade the Proper Forum for Environmental Disputes?*, 7 *FORDHAM ENVTL. L.J.* 111 (1995) (discussing the history of the Court of International Trade). In 1980, Congress clarified the court’s jurisdiction, among other things, including the court’s name; it had been known as the United States Customs Court.

The scope of the CIT’s jurisdiction includes all cases involving the monitoring and enforcement of international trade agreements . . . [and] the CIT also has exclusive subject matter jurisdiction over an action “that arises out of any law of the United States providing for . . . *embargoes or other quantitative restrictions* on the importation of merchandise for reasons other than the protection of the public health or safety . . . .”

*Id.* at 115-16 (citations omitted) (latter alterations in original).

128. *See* *Earth Island Inst.*, 913 F. Supp. at 574-75.

609 in certain areas affecting approximately fourteen countries.<sup>129</sup> The court also dismissed the arguments of the intervenor, the National Fisheries Institute, Inc., that similar environmental provisions have been found to be illegal under the GATT.<sup>130</sup> Still, the court recognized that by upholding section 609 and compelling enforcement in the wider Caribbean/Western Atlantic region, the U.S.'s actions could be subjected to a GATT challenge.<sup>131</sup> Nevertheless, the court concluded that the government was not properly enforcing section 609 and directed the State Department to prohibit the importation of shrimp if an exporting nation was uncertified.<sup>132</sup> The executive branch took steps to comply with the court's ruling.

In April 1996, the executive branch moved for a one-year extension to comply with the court's order.<sup>133</sup> The U.S. government argued that enforcing section 609 before nations have had adequate time and notice to implement comparable programs would be harmful in at least three ways: (1) the U.S.'s ability to protect sea turtles would be substantially impaired; (2) the embargoes on uncertified countries would disrupt large amounts of international trade in shrimp (estimated at around 185 million pounds with an import value of \$850 million per year); and (3) the disruptions in the exports would cause long-lasting damage in U.S. trade and foreign policy.<sup>134</sup> The court rejected these arguments, holding that nations have been on notice of the certification requirement since the statute's formal enactment in 1989 and any extensions of time to comply would be anomalous.<sup>135</sup> The court also stated that in light of the U.S.'s desire to protect the 124,000 sea turtles that drown every year, 340 per day when turtle-excluder devices are not used, there was no justification for modifying the deadline.<sup>136</sup> The court concluded by stating that Congress was free to extend the deadline if it so desired.<sup>137</sup>

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129. *Id.* at 563.

130. *Id.* at 579.

131. *Id.*

132. *Id.* at 579-80.

133. *See* *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996).

134. *Id.* at 619-20 (footnote omitted).

135. *Id.* at 624.

136. *Id.*

137. *Id.*

Again in 1996, the same plaintiffs brought suit in response to a State Department notice<sup>138</sup> of proposed modifications to section 609.<sup>139</sup> Plaintiffs alleged that the proposed guidelines would result in establishing vessel-by-vessel, instead of country-by-country compliance, as required.<sup>140</sup> The court agreed with plaintiffs and held that the State Department could not modify the certification requirements since such modifications would contravene the unambiguous will of Congress.<sup>141</sup> The government requested a stay pending appeal, fearing that a new regional treaty to protect sea turtles would be threatened and a potential backlash from the Asian Nations would erode progress being made on other programs, where turtle excluder devices were being implemented.<sup>142</sup>

In November 1996, one month before the Court of International Trade denied the stay, the Asian Nations sought consultations with the U.S. on the shrimp import ban.<sup>143</sup> Without the stay, the State Department could not modify the certification procedures to comply with the court order and with the GATT. In January 1997, with the State Department's hands tied, the Asian Nations requested that a WTO panel review the shrimp import ban under the WTO's dispute

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138. See Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (1996).

139. See *Earth Island Inst. v. Christopher*, 942 F. Supp. 597, 603 (Ct. Int'l Trade 1996), *vacated on procedural grounds* by *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998).

140. See *Wagner & Goldman*, *supra* note 7, at 6.

141. *Earth Island Inst.*, 942 F. Supp. at 603.

142. See *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062, 1065-66 (Ct. Int'l Trade 1996), *vacated on procedural grounds* by *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). In denying the stay, the Court of International Trade reasoned, in part, that

this country's government must also abide by its own laws, just as the governments in those lands might be presumed to do. That their perceptions or lawful interests may digress from those of the United States should not be reason to unlawfully abrogate this country's enacted approach. As pointed out repeatedly herein, this Court of International Trade is not the proper forum for foreign accommodation or circumvention.

*Earth Island Inst. v. Christopher*, 948 F. Supp. at 1066.

143. See *supra* Part II.C.



resolution procedures.<sup>144</sup> Of course, as discussed above, the U.S. lost before the WTO panel. In April 1999, on another appeal by the State Department, the Court of International Trade once again held that the State Department's proposed modifications to regulations pursuant to section 609<sup>145</sup> on their face were not in compliance with section 609, and were therefore invalid.<sup>146</sup>

### III. ANALYZING THE ISSUES FROM A DOMESTIC PERSPECTIVE

As the private cases discussed above reveal, the executive branch is in a sensitive position when it comes to crafting and enforcing seemingly incompatible trade and environmental policies. It is clear that the executive branch and its relevant agencies require flexibility in deciding how to respond, if at all, to adverse WTO rulings. Indeed, such flexibility is built into the URAA.<sup>147</sup> Any limitations placed on this flexibility, outside of normal balance of power checks, whether by Congress or U.S. courts (assuming the acts are not unconstitutional), may upset the balancing act that makes up modern U.S. trade policy.<sup>148</sup>

Up to this point, this Note has focused on the WTO rulings and several U.S. court rulings that have not implicated GATT/URAA provisions directly. The discussion immediately below briefly examines possible congressional responses to regulation

144. Shrimp Panel Report, *supra* note 84, at 835.

145. The regulations sought to permit the importation of TED-caught shrimp from *uncertified* nations. See Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14,481 (Mar. 25, 1999).

146. *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1081 (Ct. Int'l Trade 1999). The State Department proposed additional modifications to the rules. See 64 Fed. Reg. 36,946 (July 8, 1999).

147. See *supra* note 9 and accompanying text (discussing the U.S.'s available responses under the URAA).

148. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659-63 (2000) [hereinafter *Chevron Deference*] (describing the long history of judicial deference to the executive branch in foreign affairs). Bradley suggests that there are different types of deference and that most applications correspond to one of five categories: (1) Political Question deference; (2) Executive Branch Lawmaking deference; (3) International Facts deference; (4) Persuasiveness deference; and (5) Chevron-type deference.

modifications and the constitutional restraints Congress must face in the process. After considering the restrictions on Congress, the Note examines a line of cases that suggests that the deference traditionally afforded to the executive branch in foreign and trade policy matters may not be perpetually granted by the federal courts if the Charming Betsy canon is applied in URAA-related cases.

### *A. Congressional Responses*

Congress has yet to respond to any of the regulation modifications proposed or made by the executive branch in response to adverse WTO rulings. It has not had to. Private groups have successfully sued to compel compliance with U.S. laws.<sup>149</sup> But what if certain statutes did not allow for citizen suits? Or if certain private groups lacked standing? Or if the NGOs simply lost in court? What could Congress do if it did not approve of certain regulatory modifications made in response to WTO rulings? Congress passed the URAA knowing that certain regulations would be amended initially and in the future.<sup>150</sup> Indeed, the URAA requires the USTR to consult with Congress and provide an opportunity for public comment in the Federal Register before regulations are amended.<sup>151</sup> Consequently,

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149. *See supra* Part II.E.

150. *See generally* 19 U.S.C. §§ 3511-3513 (1994). *See supra* note 9 and accompanying text. The SAA also addresses the issue of regulation modification; it even lists twenty-one environmental statutes entirely unaffected under the URAA. SAA, *supra* note 14, at 4063. And Congress was apprised of the progress of the trade agreement negotiations as the Uruguay Round progressed:

Indeed, the extensive consultations with Congress by the Executive Branch (especially the U.S. Trade Representative's Office (USTR)) before, during, and after the Uruguay Round talks—mandated in part by the fast-track legislation—are an excellent example of how the Executive Branch can consult with Congress and take its views into account. Objectives were developed in advance, there was extensive and frequent consultations with Senators, Representatives, and their staffs, and there were consultations with important constituencies in the business and agricultural sectors.

Barry E. Carter, *International Trade Law: Where Congress Has, Somewhat Hesitantly, Bought Into International Law*, 92 AM. SOC'Y INT'L L. PROC. 335, 336 (1998).

151. *See* 19 U.S.C. § 3533(g)(1)(A)-(F) (1994).

Congress is not a helpless bystander. Yet, the URAA only requires that the appropriate congressional committees be consulted; it does not provide remedies if the committees disapprove of changes.<sup>152</sup>

Conflicts between the executive and legislative branches in the context of administrative rulemaking are a long-standing problem.<sup>153</sup> Congress may choose among several possible solutions to address agency rulemaking problems, which may include close oversight and review of an agency's activity.<sup>154</sup> However, precedent suggests that this cure may be worse than the disease itself, because in attempting to address separation of powers issues raised by an agency's activity, the legislature may itself violate the separation of powers doctrine.<sup>155</sup> Another dubious remedy available to the legislature is the use of a legislative veto, which enables it to vote to uphold or reject a

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152. *Id.* § 3533(g)(3). The House Ways and Means Committee and the Senate's Committee on Finance may vote to accept or reject the proposed regulation changes, but the votes are not binding on the department or agency. *Id.* In either scenario, however, a vote by the entire House or Senate is not required.

153. See Bradley, *Chevron Deference*, *supra* note 148, at 652 (suggesting that the *Chevron* doctrine was a response to the growing administrative state). The issues get even more complex with the addition of WTO rulings requesting that the U.S. amend its regulations. There is often, in effect, one unelected body, a WTO tribunal, directing another, an executive branch agency, to craft regulations to comply with both U.S. law and with international trade agreements.

154. See Nicholas J. Johnson, *There May be Cracks in the Foundation: An Analysis of Pennsylvania's Current Approach to Legislative Review of Agency Rulemaking*, 94 DICK. L. REV. 637 (1990) (discussing how states in general and Pennsylvania in particular have addressed the increasing influence of administrative agencies in modern governance, and the constitutional problems raised in implementing certain responses posed by legislatures). The article also addresses these issues on the federal level. Professor Johnson argues that so-called independent regulatory review commissions are problematic depending on how they are characterized. See *id.* at 640. For example, if a regulatory review commission is established to review procedures or regulations, and the commission is categorized as an extension of a legislative agency, serious separation of powers issues are raised, because the legislative branch may not unilaterally interfere with the operations of an executive branch agency without overstepping its constitutional limitations. On the other hand, if the review commission is considered an executive branch agency, there are fewer concerns. See *id.* (footnotes omitted).

155. *Id.* at 655 n.72.

particular rule, rule modification or agency decision.<sup>156</sup> Both means, however, should be used with caution in U.S. foreign and trade relations where Congress and the executive branch share power.<sup>157</sup> Despite this equal partnership in foreign relations, the executive branch must remain in a position to take the lead in trade and environmental policy and speak with one voice on behalf of the nation.<sup>158</sup>

### *B. How U.S. Courts Treat the URAA*

The constraints on Congress notwithstanding, U.S. courts do have jurisdiction over executive branch actions through administrative review powers. The cases reviewed below reveal how U.S. courts are interpreting the URAA. Because the URAA governs U.S. commitments to its international trading partners under the WTO, some courts construe the URAA under international law principles, even in regulation review cases, despite the URAA's clarity on how conflicts between domestic laws and commitments under the URAA are to be treated.<sup>159</sup>

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156. *See id.* at 656 n.74 (citing *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983)).

157. The U.S. Constitution provides that Congress shall have power to "regulate Commerce with foreign Nations . . ." U.S. CONST. art. I, § 8, cl. 3; and the President shall have power "by the Advice and Consent of the Senate, to make Treaties . . ." *Id.* at art. II, § 2, cl. 2.

158. As a legislative body, Congress is not well positioned to assume responsibility for many aspects of foreign policies, despite its desire and responsibility to scrutinize policies pursued by the executive branch. It has been suggested that "Congress is simply not capable of presenting a united front to negotiate and implement changes on a regular basis. Its members are beholden to parochial constituents and may have difficulty formulating and maintaining positions that are in the nation's best interest." Yong K. Kim, Essay, *The Beginning of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 994-95 (1996) (footnotes omitted). Thus, while it is true that Congress must eventually approve any agreements signed by the President, in the current global political milieu, the executive branch has taken on increasing responsibility—indeed the lead role—in negotiating foreign policy and trade agreements. Cutting back on the executive branch's authority and its requisite flexibility through congressional oversight and budgetary measures does not seem practical or wise.

159. *See* 19 U.S.C. § 3512 (1994).

### 1. The Problems with Treating the URAA as an International Agreement

The executive branch's need for flexibility in responding to WTO rulings and enforcing environmental policies is clear. It must choose between competing and, at times, conflicting policy goals of environmental protection and increased trade, and respond to adverse WTO rulings as well as U.S. court rulings in private suits ordering compliance with environmental laws. These complexities were contemplated and addressed by the URAA and the Statement of Administrative Action.<sup>160</sup>

The current paradigm, which rests on the executive branch's wide latitude in choosing whether and how to respond to conflicting demands, ensures that compromise may be reached when and where desirable.<sup>161</sup> If courts place the interests of the U.S.'s trading partners

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160. *See supra* notes 9 and 14 and accompanying text. It is also evident from the URAA that changes in regulations required after passage were also contemplated. *See generally* 19 U.S.C. §§ 3533, 3538 (1994).

161. *See supra* note 9 and accompanying text (discussing the President's authority to choose whether or not to comply with WTO rulings). The WTO's Dispute Settlement Understanding ("DSU") itself also provides member nations with flexibility to craft a remedy after a WTO ruling. Under the DSU, when a panel or Appellate Body deems a measure inconsistent with the GATT's rules, "it shall recommend that the Member concerned bring the measure into conformity" with the particular provision or agreement of the GATT. DSU, art. XIX, *supra* note 6 (footnotes omitted). If the offending nation does not comply, the prevailing nation has a progression of available remedies such as receiving monetary compensation or retaliating by suspending concessions granted to the offending nation. *See* Amelia Porges, *The WTO and the New Dispute Settlement*, 88 AM. SOC'Y INT'L L. PROC. 131 (1994) (discussing dispute settlement under the GATT and under the WTO). The executive branch may choose not to comply with a WTO ruling (e.g., not implement domestic regulation changes), but instead negotiate with the prevailing nation and pay that nation compensation in the meantime. Paying compensation is an interim solution that falls between full compliance and the prevailing nation's retaliation. The DSU states that "compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement." DSU, art. 3.7, *supra* note 6. The DSU encourages nations to negotiate solutions to disputes, and although the DSU's article 3 language limits the use of compensation to situations when change is impracticable, the DSU's article 22 language is more flexible. For example, it provides that paying

before those of the U.S., it would be tantamount to making adverse WTO rulings binding in U.S. courts. Currently, they are not. A court, by so doing, might introduce an ironic twist on the sovereignty concern raised by URAA opponents.<sup>162</sup> Strangely, if U.S. courts compel U.S. compliance, genuine sovereignty concerns would be realized for the first time.

## 2. *Chevron-Plus*

U.S. courts are reviving the Charming Betsy canon and applying it in agency review cases. This new approach poses problems. This new "*Chevron-plus*"<sup>163</sup> test could lessen the number of choices now available to the executive branch and Congress when facing adverse WTO rulings. If such a *Chevron-plus* test becomes the majority view in U.S. courts, it would add more uncertainty to the future and integrity of U.S. environmental laws than the adverse WTO rulings,

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compensation should not be "preferred to full implementation of a recommendation to bring a measure into conformity . . . . Compensation is *voluntary* and, if granted, shall be consistent with the covered agreements." *Id.* at art. 22.1 (emphasis added). And nations may enter negotiations "with a view to developing mutually acceptable compensation." *Id.* at art. 22.2. It should be noted that this remedy is available after a panel or Appellate Body has made its decision. Thus, it is clear that the Final Act encourages member nations to cooperate and negotiate before and after formal settlements are undertaken. However, if a U.S. court orders compliance with a WTO ruling by invoking Charming Betsy, it would be effectively eliminating these remedies or, at least the flexibility they foster—now available under the DSU. *See also* Pieter Jan Kuyper, *Remedies and Retaliation in the WTO: Are They Likely to be Effective? The State Perspective and the Company Perspective*, 91 AM. SOC'Y INT'L L. PROC. 282 (1997) (suggesting that paying compensation to the prevailing nation is consistent with and equivalent to "the general international law remedy of damages" and that dispute settlement remedies should include compensation and suspension of concessions "as full alternatives to compliance, just as is the case in general international law."). *Id.* at 284.

162. *See supra* notes 7 and 10 (discussing environmental and sovereignty concerns of environmentalists).

163. A *Chevron-plus* test would essentially combine *Chevron's* two-part analysis of the judicial deference to Congress or to an executive branch agency with the Charming Betsy canon where a court would in effect, by allowing Charming Betsy to trump *Chevron*, defer to another nation by construing an act of Congress in such a way so as to not violate international law.

since U.S. courts are not bound by WTO rulings.<sup>164</sup> Furthermore, if U.S. courts consider U.S. international obligations when hearing URAA-related litigation, the U.S. government would be bound by such rulings. Scholars and U.S. courts continue their attempt to characterize the URAA in order to determine whether the GATT's provisions should ever trump domestic legislation, as the cases discussed below demonstrate.<sup>165</sup> Until this issue, whether or not *Charming Betsy* has a place in URAA-related litigation, is resolved, questions about the executive branch's and Congress's abilities to fully integrate trade and environmental policies will linger.

### 3. Why Understanding the Characterization of the URAA is Important

It is important to unwrap the legislative package comprising the URAA in order to understand the legislation. The URAA is the

164. See *infra* note 218 and accompanying text.

165. Although many factors figure into the debate evaluating the place of international law within U.S. law in general, and the URAA in particular, there are two major schools of thought: (1) the monists, who view obligations under international law and domestic law as comprising a single legal system; and (2) the dualists, who view international law as a discrete legal system that may be augmented by domestic legislation. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864-66 (1987) (discussing that in a monist system, "[d]omestic courts must give effect to international law, anything in the domestic constitution or laws to the contrary notwithstanding."). *Id.* at 864. Most believe that the U.S. position cannot be considered strictly monist. *Id.* at 870. See also Leonard M. Shamson, PROC. OF THE EIGHTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, 149 F.R.D. 245, 257 (1992) (suggesting that "U.S. law is a hybrid of the two approaches."). In a dualist system, international agreements are often considered non-self-executing and require implementing legislation to take effect; See S. REP. NO. 103-412, pt. 2, at 13 (1994) (not adopted), available at 1994 WL 687802 ("The WTO Agreement and other Uruguay Round agreements, like previous trade agreements including the North American Free Trade Agreement . . . are not self-executing and thus their legal effect in the United States is governed by implementing legislation."). The URAA is in this category. As the adjudication of URAA-related cases in U.S. courts demonstrates, a majority of U.S. judges adhere to a dualist approach and have interpreted the URAA as giving way to conflicting domestic law. Some courts, however, are applying *Charming Betsy* in a monist fashion and stressing the importance of the U.S.'s international obligations.

domestic legislation codifying the U.S.'s obligation under the WTO. The international nature of these obligations has led to confusion among some scholars, practitioners, and U.S. courts regarding the threshold issue of whether the URAA is essentially an international agreement, governed under principles of international law, or whether it is simply domestic legislation that includes international obligations.<sup>166</sup> Some federal courts are reviving the ancient canon of construction, the *Charming Betsy*, and applying it in cases where domestic statutes conflict with international obligations.<sup>167</sup> This approach, however, contravenes the plain language of the URAA.

### C. The URAA Text

The URAA explicitly addresses potential conflicts between the URAA and other U.S. law. When a conflict arises, GATT obligations do not prevail over other U.S. laws.<sup>168</sup> The language even

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166. See PROC. OF THE EIGHTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, *supra* note 165, at 257-59, 286-93 (discussing the relationship between U.S. law and international law generally, in light of a sweeping 1992 U.S. court of appeals decision that ruled that the GATT cannot trump domestic law). This case, *Suramerica de Aleaciones Laminadas v. United States*, 966 F.2d 660 (Fed. Cir. 1992), is discussed *infra* Part III.D.1.

167. See *infra* note 12 and accompanying text.

168. The provision reads in part:

(a) Relationship of agreements to United States law

(1) United States law to prevail in a conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States, including any law relating to—

(i) *the protection of human, animal, or plant life or health,*

(ii) *the protection of the environment, or*

(B) . . . unless specifically provided for in this Act.

19 U.S.C. § 3512(a)(1)-(2) (1994) (emphasis added). Perhaps because the final GATT agreement was new when the URAA was passed and the GATT's environmental exceptions untested, Congress decided to make its intent clear, that environmental standards should not be eroded.



appears to track specific environmental exceptions in the GATT itself.<sup>169</sup> The URAA also provides guidance to the courts on how to interpret congressional intent in the case of a legal conflict.<sup>170</sup> In preparing to enact the URAA, Congress and the President, who negotiated the agreements, amended certain U.S. statutes and regulations in order to bring them into compliance with the GATT.<sup>171</sup>

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169. The environmental protections in the GATT read in part: [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) *necessary to protect human, animal or plant life or health;*

...  
(g) *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.*

GATT, art. XX(b), (g), *supra* note 5 (emphasis added).

170. See *supra* note 14 (discussing how the SAA is treated in the URAA and the weight it should be given in a judicial proceeding). The SAA is a document prepared by the executive branch and submitted to Congress along with the draft bill implementing the agreement. It “represents an authoritative expression by the Administration concerning its views regarding the *interpretation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law.*” *Deleverde, SrL v. United States*, 989 F. Supp. 218, 230 n.18 (Ct. Int’l Trade 1997) (emphasis in original).

171. The statute reads, in part:

- (1) the President may proclaim such actions, and
- (2) other appropriate officers of the United States Government may issue such regulations,

as may be necessary to ensure that any provision of this Act, or amendment made by this Act, that takes effect on the date any of the Uruguay Round Agreements enters into force with respect to the United States is appropriately implemented on such date. . . .

(b) Regulations

Any interim regulation necessary or appropriate to carry out any action proposed in the statement of administration action approved under section 3511(a) of this title . . . shall be issued not later than 1 year after the date on which the agreement enters into force with respect to the United States.

19 U.S.C. § 3513(a)-(b) (1994). The URAA defines the procedures that the executive branch agencies (including the U.S. Trade Representative) must follow when responding to an adverse WTO panel or Appellate Body

And, though there may be some obvious inherent tensions between different executive branch agencies in carrying out U.S. trade and environmental policies, it is clear from the SAA that these agencies may consider URAA obligations.<sup>172</sup> A court, however, must first find a conflict between an existing U.S. law and a URAA provision before it can determine which provision prevails.

### 1. When is there a Conflict?

There are at least three approaches courts take when considering whether a conflict exists between U.S. law or regulations and a provision of the URAA. The first emphasizes the supremacy of U.S. law over the GATT; the second looks to the GATT's provisions in an attempt to harmonize them with U.S. law; and the third sidesteps

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ruling and when modifications in U.S. regulations are recommended. *See* 19 U.S.C. § 3533 (1994).

172. The SAA reads in relevant part:

This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

SAA, *supra* note 14, at 4040; *cf.* Berniece A. Browne, PROC. OF THE TENTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, 185 F.R.D. 395, 479-81 (1997). Browne stated:

If the agency argues [before a U.S. court] that what they are doing is consistent with the international agreement, as the government understands that argument . . . then I think the Court is putting the *Chevron* doctrine on top. I think courts have to give a lot of deference to the Executive Branch on the interpretation of the international agreement.

*Id.* at 480. As to what extent agencies may consider international agreements, Browne said, "[c]ertainly, the agency would always have the [international] agreement in mind, although I must say it is very much in the back of our mind because our view is statutory. Our view is that the statute is what we are guided by." *Id.* at 482.

the issue and often declares that there is no conflict at all.<sup>173</sup> Another important, unresolved, and rarely addressed issue, is deciding which U.S. statute provides the rule of decision in URAA-related cases: a particular environmental statute or the general catch-all provision in the URAA, stating that in a conflict U.S. law should prevail.<sup>174</sup> The answer to this question—which rule of decision governs—will naturally help determine the outcome of a court's decision. For example, it is likely that not all Clean Air Act provisions or their related legislative history address precisely what Congress intended regarding potential conflicts between achieving clean air and the U.S.'s obligations to its trading partners. Therefore, if Congress is silent on a particular matter within the Clean Air Act, a court applying a strict constructionist approach *and* Charming Betsy might find that no conflict exists, and therefore could compel the U.S. to honor its international obligations, possibly at the expense of environmental protection.

On the other hand, if the URAA catch-all supremacy language, which provides that existing U.S. law will prevail in a conflict with URAA obligations, is intended to address Congress's silence in any and all existing statutes, then as long as a court finds a conflict, the executive branch would be free to decide whether and when to

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173. See Leonard M. Shambon, PROC. OF THE EIGHTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, *supra* note 165, at 258 (concluding that most cases up until that time fell into the first category).

174. Federal courts that *sua sponte* invoke Charming Betsy may also violate the principles established by the *Erie* doctrine. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 513-24 (1997) [hereinafter *Charming Betsy*] (reiterating the Supreme Court's announcement in *Erie* that "[t]here is no federal general common law." *Id.* at 514 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (alteration in original))). Bradley describes the history of the Charming Betsy canon and the shifts that have occurred in legal thinking since the nineteenth century. *Id.* at 514. Bradley also states that although scholars continue to disagree on the scope and role of federal common law, "many agree that, in light of *Erie*, this lawmaking is proper only if authorized in some fashion by either the Constitution or federal legislation." *Id.* at 516 (citations omitted). Therefore, even though federal courts may hear cases that have international consequences, it does not mean that federal courts may choose which law to apply. *Erie* still governs.

respond to conflicting obligations.<sup>175</sup> The cases examined below demonstrate that this important and unresolved issue of whether there is a conflict—and if so, which statute provides the rule of decision—has not fully evolved.<sup>176</sup> The remainder of this paper examines how, in recent decisions, some U.S. courts are sidestepping the conflict issue altogether, and instead applying the Charming Betsy canon.

*D. Other URAA-Related Cases Revealing the GATT's Status in U.S. Law: Chevron, Charming Betsy, and the URAA*

1. GATT Cannot Trump Domestic Legislation

In addition to the environmental cases discussed above, another line of cases reveal a split among the federal courts as to whether Charming Betsy should be applied in URAA-related cases. In *Suramerica de Aleaciones Laminadas v. United States*,<sup>177</sup> the Court of Appeals for the Federal Circuit was asked to review a decision by

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175. See Donald B. Cameron, PROC. OF THE EIGHTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, *supra* note 165, at 288 (stating that the discussion of U.S. law prevailing in a conflict begs the initial question of whether or not there is a even conflict with which to begin the analysis).

176. For example, in *Fed. Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995), discussed *infra* Part III.D.3, the court casually discusses the “conflict issue.” *Compare id.* at 1580 (“Defendants plausibly argue that the reading of the Act urged by plaintiffs is in direct conflict with obligations arising under . . . (GATT)),” *and id.* at 1581 (“It remains true, however, that in the event of a conflict between a GATT obligation and a statute, the statute must prevail . . .”), *with id.* at 1582 (“We find Commerce’s interpretation of the Act to be within the terms of the statute, and not in conflict with any precedents of this court or the Supreme Court.”). In the first passage, the court refers to “conflict” in reference to the reading of an Act of Congress in relation to U.S. obligations under the GATT; in the second, it refers generally to a conflict between a U.S. statute and a GATT obligation; and in the third it references the Commerce Department’s interpretation as not being in conflict with the court’s own precedents and those of the Supreme Court. When read closely, the opinion reveals that the concept and usage of “conflict” in the 19 U.S.C. § 3512 context shifts even in one court’s interpretation. That there is no uniform understanding of “conflict” among federal courts at this time is no surprise. The need for a precise, consistently applied rule of construction in URAA-related cases is evident.

177. 966 F.2d 660 (Fed. Cir. 1992).

the Court of International Trade that vacated Department of Commerce anti-dumping orders.<sup>178</sup> In 1987, U.S. manufacturers asked the Department of Commerce to investigate and issue orders condemning Venezuelan manufacturers' practices that allegedly violated U.S. anti-dumping laws.<sup>179</sup> The Department of Commerce investigated the practices and concluded that certain Venezuelan manufacturers were selling electrical conductor materials at less than fair value and condemned the practices.<sup>180</sup> The court reversed and held that in the absence of clear congressional intent to the contrary, the Department of Commerce's actions on behalf of U.S. electrical conductor manufacturers were permissible under a *Chevron* analysis.<sup>181</sup> By issuing its determination, the court's application of U.S. law allegedly came into conflict with the GATT's anti-dumping provisions, and the Venezuelan manufacturers urged the court to interpret U.S. law in a way that would be consistent with U.S. obligations under the GATT.<sup>182</sup> The court refused, holding that despite these obligations "[t]he GATT does not trump domestic legislation."<sup>183</sup> Although some considered the opinion to be weak,<sup>184</sup>

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178. Under 28 U.S.C. § 1295(a)(5) (1994), the Court of Appeals for the Federal Circuit has exclusive jurisdiction over decisions appealed from the U.S. Court of International Trade. *See also* Kurtz, *supra* note 127, at 114 n.25; *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1365 n.39 (5th Cir. 1993).

179. *Suramerica*, 966 F.2d at 660-64.

180. *Id.* at 662-63.

181. *Id.* at 665, 667-68.

182. *Id.* at 667.

183. *Id.* at 667-68. The court cited the Trade Agreements Act of 1979, 19 U.S.C. § 2504(a), which governed trade relations at the time, and which tracked the supremacy language now found in the URAA. The court held that

even if we were convinced that Commerce's interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.

*Id.* (citations omitted); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed. Cir. 2000) (upholding the constitutionality of a federal

it remains the flagship case cited by most courts when URAA-related conflicts arise.<sup>185</sup>

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statute while rejecting Carnival Cruise Lines' arguments that doing so violates U.S. GATT obligations). The *Carnival Cruise Lines* court held that while the statute in question may violate the GATT,

[n]either our trading partners nor the World Trade Organization has taken final formal action directed against the Harbor Tax. It is speculative and conjectural whether they will do so. If they take such action and the result is to create serious problems, *either the executive or the legislative branch presumably will take appropriate action.*

*Id.* at 1369 (emphasis added); *Amoco Oil Co. v. United States*, 63 F. Supp. 2d 1332, 1337 (Ct. Int'l Trade 1999) (following *Suramerica* and holding that "[i]f a statute is inconsistent with international obligations, 'it is a matter for Congress and not [the] court to decide and remedy.'" (quoting *Suramerica*, at 668) (alteration in original)).

184. See Don Cameron, Jr., PROC. OF THE EIGHTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, *supra* note 165, at 287-88 (criticizing the opinion for rejecting the role of international law in what appeared to be a casual opinion). "[T]he question is whether or not *Suramerica* is authoritative law to the effect that international law has no role in U.S. adjudication. If it is, then I think we are in trouble." *Id.* at 288. Opposing views were also offered:

Well, I am not going to try to interpret exactly whether *Suramerica* was absolutely determinative once and for all of the issue for the Federal Circuit, but it sounded pretty clear to me, because the Court says that the GATT does not trump U.S. law. Frankly, I am reminded of the bumper sticker that I used to see that has something to do with the issue of textual interpretation. It says, God said it, I believe it, and that settles it. In the trade area, Congress steps into the shoes of God.

Once Congress says something, that is the law.

Michael P. Mabile, *id.* at 288.

185. But see Thomas William France, Note, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH & LEE L. REV. 1481, 1508-09 (1994) (stating that the court in *Suramerica* did not find a conflict and simply deferred to the Commerce Department's interpretation of the statute in question). Therefore the case "does not provide much guidance as to what courts should do when faced with two plausible statutory interpretations, one of which conflicts with the GATT." *Id.* at 1509 (footnote omitted).

## 2. GATT Further Diminished in Hierarchy of U.S. Law

*Suramerica's* precedence took hold right away and was expanded in 1993 by the Fifth Circuit in *Mississippi Poultry Ass'n v. Madigan*.<sup>186</sup> In this case, the court reviewed Department of Agriculture ("DOA") regulations governing imported poultry examining whether the term "same," used to assess quality standards, comported with Congress's intended meaning of that term.<sup>187</sup> Using the *Chevron* analysis, the court determined that the regulations violated the clear intent of Congress, thus, ending the analysis after step one.<sup>188</sup> The court also rejected the DOA's argument that an act of Congress should never be construed to violate international law.<sup>189</sup> The court stated that the Charming Betsy canon advocated by the DOA had never been used in cases involving international commercial law; rather it was traditionally invoked when rules of international public law or sovereignty issues were at stake.<sup>190</sup> Citing *Suramerica*, the court held that the GATT could not

186. 992 F.2d 1359 (5th Cir. 1993).

187. *Miss. Poultry*, 992 F.2d at 1361-62. Some of the relevant language reads: "all imported poultry products shall . . . be subject to *the same* inspection, sanitary, quality, species verification, and the residue standards applied to products produced in the United States; and . . . have been processed in facilities and under conditions that are *the same* as those . . . in the United States." *Id.* at 1361 (citing 21 U.S.C. § 466(d) (alterations and emphasis in original)). The Secretary of Agriculture argued that the term "same" did not have to mean identical but could be interpreted as "at least equal to." *Miss. Poultry*, 992 F.2d at 1361.

188. *See Miss. Poultry*, 992 F.2d at 1363-65.

189. *See id.* at 1365 (quoting *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

190. *Id.* at 1367; *Footwear Distribs. and Retailers of Am. v. United States*, 852 F. Supp. 1078 (Ct. Int'l Trade 1994). The *Footwear* court followed the *Miss. Poultry* decision and stated:

political decisions balancing domestic and foreign interests were the prerogative of the executive branch, not the courts. Such criticism echoes the Supreme Court's admonition that while questions implicating foreign policy determinations are not completely beyond the scope of judicial cognizance, courts should be reluctant to review these matters because "resolution of such issues frequently turn[s] on standards that . . . involve the exercise of discretion demonstrably committed to the executive or the legislature."

trump domestic legislation.<sup>191</sup> The court then dismissed the DOA's final argument, that the court should approve the regulations in question in light of the U.S.'s GATT obligations and the executive branch's exclusive authority over foreign affairs, noting the demarcation where the President controls foreign affairs and Congress controls foreign commerce.<sup>192</sup> Although this young doctrine of diminishing the GATT's importance seemed firmly established, it did not go unchallenged.

### 3. GATT Prominence Raised

In *Federal Mogul Corp. v. United States*,<sup>193</sup> the Court of Appeals for the Federal Circuit seemed intent on pruning back the Fifth Circuit's broad rejection of the Charming Betsy canon in *Mississippi Poultry*. The court examined whether the International Trade Administration and the Department of Commerce ("Commerce") exceeded their congressional authority in establishing tax and anti-dumping regulations on foreign products.<sup>194</sup> The court was asked to review the Court of International Trade's decision that held Commerce's regulations were not permissible.<sup>195</sup> The plaintiffs, two U.S. corporations, urged the court to reject Commerce's interpretation of the statute and to adopt a reading of the statute that would have conflicted with provisions in the GATT.<sup>196</sup> Commerce urged the court to consider the case consistent with the U.S.'s GATT obligations.<sup>197</sup> The court reversed after determining that the statute in question was ambiguous, concluding that Commerce was entitled to

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Footwear Distributions, 852 F. Supp. at 1096 (quoting Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 12-13 (1992) (citations omitted) (alterations in original)). *But see* France, *supra* note 185, at 1517-18 (arguing that the court in *Miss. Poultry* failed to account for the increasing importance of the GATT in U.S. law, even if it may be conceded that it is not a traditional international agreement).

191. *Miss. Poultry*, 992 F.2d at 1365-66.

192. *See id.* at 1367 (footnotes omitted).

193. 63 F.3d 1572 (Fed. Cir. 1995).

194. *See id.* at 1574, 1578-79.

195. *See id.* at 1574.

196. *Id.* at 1576 (citing the Tariff Act of 1930, 19 U.S.C. § 1677(a) (1988)), 1579-81.

197. *Id.* at 1580-81 (citing the GATT's anti-dumping provisions).



*Chevron* deference.<sup>198</sup> In addition, the court agreed with Commerce and pointed out that the GATT was incorporated into U.S. law.<sup>199</sup> Despite the court's acknowledgment of *Suramerica's* holding, and the URAA's supremacy language stating that U.S. law will prevail in a conflict, the court deferred to Commerce's interpretation and invoked *Charming Betsy*, holding that "absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."<sup>200</sup> The court also emphasized that the international deference called for in the doctrine applies if it "affect[s] neutral commerce,"<sup>201</sup> clearly responding to, without directly addressing, the *Mississippi Poultry* court's point that the doctrine has not been traditionally applied to foreign trade matters.<sup>202</sup> The *Federal Mogul* court helped establish *Charming Betsy's* place in URAA-related litigation.

#### 4. WTO Obligations Recognized

Without hesitation, the Court of Appeals for the District of Columbia Circuit agreed that *Charming Betsy* should be applied in trade matters.<sup>203</sup> In *George E. Warren Corp. v. EPA*, discussed above,<sup>204</sup> the court appended a *Charming Betsy* analysis to its *Chevron* analysis. The Petitioner, an American gasoline importer, challenged amended EPA regulations promulgated pursuant to the Clean Air Act, which were subsequently amended in response to a WTO ruling.<sup>205</sup> The Petitioner complained that EPA acted beyond its authority in considering factors other than air quality in crafting the regulations, e.g., the adverse WTO ruling,<sup>206</sup> and that the regulations treated foreign refiners and importers differently than domestic

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198. *Fed. Mogul*, F.3d at 1578-80.

199. *Id.* at 1581. The Uruguay Round Agreements Act was implemented into U.S. law on January 1, 1995.

200. *Id.* at 1581.

201. *Id.* (emphasis in original).

202. *See Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1367 (5th Cir. 1993).

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

204. *See supra* Part II.E.2.

205. *See George E. Warren Corp.*, 159 F.3d at 620.

206. *Id.* at 620, 623.

refiners.<sup>207</sup> The court cited part of the Clean Air Act's legislative history indicating that Congress indeed considered factors other than air quality, such as potential market disruptions of foreign imports.<sup>208</sup> Then it determined that because Congress was silent on the method EPA was to use in gathering data from foreign refiners, step one of *Chevron* was satisfied.<sup>209</sup> The court indicated that petitioner failed to point to anything in the statute's text prohibiting EPA from considering other factors,<sup>210</sup> holding that in light of Congress's silence and the WTO decision, these other factors may be incorporated into the regulations.<sup>211</sup> Therefore, the court held that under step two of *Chevron* and *Charming Betsy*, EPA's regulations were permissible.<sup>212</sup> The court's reasoning, however, may have created more problems than it solved.

*a. Problems Raised by the George E. Warren Court's Approach*

First, in its analysis, the court surreptitiously, or perhaps, carelessly, moved from discussing what EPA may do in light of congressional silence to discussing what the court could do when deciding cases involving international law.<sup>213</sup> This shift in the court's

207. *Id.* at 619.

208. *Id.* at 623. According to the court, the purpose of the amendments to the Clean Air Act under review, 42 U.S.C. § 7545(k)(8), is to:

maintain average emissions per gallon from conventional gasoline at no more than 1990 levels, [and] the specific approach adopted by the Congress makes full achievement of that goal less than certain. This result apparently reflects a legislative compromise between two potentially conflicting goals—avoiding degradation of air quality and not disrupting the market for conventional gasoline.

*Id.* (citing 136 CONG. REC. 35,759 (1990)). *Cf.* *Whitman v. Am. Trucking Ass'ns*, No. 99-1257, 2001 U.S. LEXIS 1952 (distinguishing *George E. Warren Corp.* as construing a section of the CAA that permits EPA to consider costs). *Id.* at \*18 n.1. In addition, the Court unanimously upheld the framework and application of *Chevron*. *See id.* at \*23 n.4, \*39-\*40.

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

210. *Id.*

211. *Id.*

212. *Id.*

213. Consider the court's language: "In the particular circumstances of this case our usual reluctance to infer from congressional

analysis may seem innocuous, since, after all, international law is a part of federal law and federal courts have jurisdiction in such cases.<sup>214</sup> The court applied the new approach, which invokes *Chevron* and *Charming Betsy*, but went further and distorted its *Chevron* analysis. The court revealed its willingness to consider the U.S.'s international obligations in light of Congress's silence in order to get past step one to reach step two. Then, the court appeared to say that step two is partially satisfied by the EPA's desire to be WTO-compliant.<sup>215</sup> While it seems reasonable to acknowledge that EPA would consider U.S. obligations while crafting its regulations, making that consideration part of *Chevron's* second step may have undesired and unintended consequences.<sup>216</sup> If the decision is

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silence an intention to preclude the agency from considering factors other than those listed in a statute is bolstered by the decision of the WTO lurking in the background." *Id.* at 624. The court then quoted a 1987 Supreme Court case that cited the 1804 *Charming Betsy* case: "Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States 'to violate the law of nations.'" *Id.* (quoting *S. African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987) (citations omitted)). The court also cited a 1995 Supreme Court case, as if to further strengthen its rationale, although the case involved the validity of a forum selection clause and did not invoke the GATT: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements." *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995)).

214. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 111 cmt. e. (1987). The Restatement provides:

Cases arising under treaties to which the United States is a party, as well as cases arising under customary international law, or under international agreements of the United States other than treaties, are "Cases . . . arising under . . . the Laws of the United States, and Treaties made . . . under their Authority," and therefore within the Judicial Power of the United States under Article III, Section 2 of the Constitution.

*Id.* at cmt e. (alterations in original).

215. See *George E. Warren Corp.*, 159 F.3d at 624.

216. *Id.* at 622. The court summarized *Chevron's* step two when Congress is silent: "If the Congress has not addressed the issue, however, then . . . we will defer to the agency's interpretation if it is reasonable *in*

extended to other similar cases it may upset the delicate balance established by the URAA and SAA, and inadvertently impede the availability of responses afforded the executive branch and Congress.<sup>217</sup>

Second, WTO rulings are not binding on U.S. courts;<sup>218</sup> they cannot change U.S. laws, and the URAA specifically contemplates that the executive branch may decide whether and how to respond to WTO rulings.<sup>219</sup> If courts incorporate Charming Betsy and compel an otherwise reluctant executive branch to accommodate another nation's interests, it could only serve to weaken executive branch resolve and to limit its choices. The court admitted that the EPA regulations in question survived a *Chevron* analysis.<sup>220</sup> Therefore, the court's "*Chevron-plus*" analysis, not having changed the outcome in this case, is not dispositive. A court's decision to apply Charming Betsy in a future case, however, might yield the opposite result. Whereas in this case, the outcome was unchanged (EPA's regulations were deemed reasonable), applying the Charming Betsy analysis in a future agency review case could just as easily result in a

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*light of the structure and purpose of the statute.*" *Id.* at 622 (citing *Chevron* at 843) (emphasis added)). The court correctly cited other factors that Congress considered in the legislative history, which led to the determination that EPA may also consider such factors. But, as *Chevron* provides—and as the court noted—the regulations must consider the statute for which the regulations are being promulgated—not other factors "lurking in the background." This construction goes beyond what *Chevron* allows.

217. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, Rules and Principles, Chap. 2 (1987) ("When international law is not given effect in the United States because of constitutional limitations or supervening domestic law, the international obligations of the United States remain and the United States may be in default."). "Similarly, the United States remains bound internationally when a principle of international law or a provision in an agreement of the United States is not given effect because it is inconsistent with the Constitution." *Id.* § 115 cmt. b. See also Henkin *infra* note 236 (discussing that even when bound by international agreements the U.S. is free to violate them).

218. *Hyundai Elecs. Co. v. United States*, 53 F. Supp. 2d 1334, 1343 (Ct. Int'l Trade 1999) ("[T]he WTO report itself has no binding effect on the court.").

219. See *supra* notes 1-12 and accompanying text.

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

court deciding that an agency's regulations violate international law. Otherwise, if a court could not use Charming Betsy to compel compliance with international obligations, there would be no point in applying it in the first place.<sup>221</sup>

Third, the court's analysis is confused, in that twice, the court refers to the U.S.'s WTO obligations as "treaty obligations."<sup>222</sup> While this distinction may appear trivial, it underscores the confusion

221. In other words, if Congress is silent on a particular provision of the Clean Air Act, step two of *Chevron* allows the court to decide whether the agency acted reasonably according to the will of Congress. In *George E. Warren Corp.*, EPA modified its regulations in an effort to make them WTO-compliant. But EPA, in accordance with the USTR, could have decided not to comply, and instead "pay the fine" under WTO dispute resolution provisions. See *supra* notes 6 and 161 for a discussion of the DSU. In such a case, the U.S. would admittedly be in violation of its international obligations. If the URAA is viewed as falling under the auspices of international law, it is in precisely such a case that Charming Betsy *could*, in principle, be applied to compel the EPA to craft regulations that do not conflict with international law—but which may effect an inferior result from a domestic environmental law perspective. After all, that is what this interpretation of the canon stands for. Thus, although the cases discussed in this section (*Federal Mogul*, *George E. Warren Corp.*) yielded decisions where Charming Betsy did little more than bolster the agencies' intent to be WTO-compliant, the value and utility of such a canon of construction is highly questionable. Courts should avoid using Charming Betsy like Damocles' sword, unsettling the executive branch's policy choices, which range from full compliance to accepting retaliation. See *infra* note 258 for a hypothetical involving the *George E. Warren Corp.* case.

222. *George E. Warren Corp.*, 159 F.3d at 623-24. The court stated:

The petitioners do not direct our attention to anything in the text or structure of the statute to indicate that the Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the price and supply of gasoline and *the treaty obligations of the United States*.

*Id.* at 623 (emphasis added). The court also stated:

[I]n this case, moreover, that consideration appears to be congruent with both the congressional purpose not to disrupt the market for imported gasoline and 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*.

*Id.* at 624 (emphasis added).

surrounding the URAA, regarding its characterization and components. While there was genuine disagreement during the congressional debates as to what type of agreement GATT was before passage (a treaty, a congressional-executive agreement, or a new type of international instrument),<sup>223</sup> since its passage, these characterization debates have subsided, because it is clear that the URAA language, along with the legislative history, explicitly state how U.S. law relates to obligations under the URAA.<sup>224</sup> Reopening these characterization debates would make predicting the future of environmental regulations much less certain.

Finally, given that the court stated that EPA may consider U.S. international obligations, it might not take much for courts to extend the rationale and hold that an executive branch agency, and/or the court itself, must consider international obligations.<sup>225</sup> The Charming Betsy language states that “an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>226</sup> It is certainly feasible to imagine a court interpreting this language in a way that could compel the executive branch to uphold its international obligations, as implied by the *George E. Warren Corp.* court. The problem with this approach is that currently the executive branch may choose whether and how it

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223. Compare *GATT Implementing Legislation: Hearings to Review Trade Agreements Concluded Under the Uruguay Round of GATT Multilateral Trade Negotiations, Including Provisions Establishing the World Trade Organization. Hearings on S. 2467 Before the Senate Committee on Commerce, Science, and Transportation*, 103d Cong. 290-317 (Oct. 18, 1994), microformed on CIS No. 94-S261-62 (Cong. Info. Serv.) (statement of Lawrence H. Tribe, Law Professor, Harvard University) (urging the Congress to treat the URAA as a treaty obligation), and (statement of Bruce Ackerman, Law Professor, Yale University) (arguing that the URAA covers too much ground to be considered by the President and Senate alone. Professor Ackerman suggests that the URAA be treated under normal Article I procedures—a Bill passed by both houses of Congress and signed by the President—thereby ensuring democratic and constitutional protections). After the House bill (H.R. 5110) passed in both houses (the Senate did not vote on its bill, S. 2467), the President signed the URAA under normal constitutional procedures.

224. See *supra* note 168 discussing how GATT obligations relate to U.S. law. See also *supra* notes 9 and 14 and accompanying text.

225. The *Hyundai* court made such a move. See *infra* Part III.D.5.

226. *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

will respond; compelling it to do so will contravene the directives in the URAA and turn the entire statutory scheme on its head.

### 5. Courts Must Apply Charming Betsy along with *Chevron* when Faced with Congressional Silence

In 1999, the Court of International Trade stated that in the absence of an explicit directive from Congress regarding a specific statutory provision the court *must* consider whether the relevant agency formulated its regulations consistent with the GATT provision in question.<sup>227</sup> The case involved a Commerce Department decision to not revoke an outstanding anti-dumping order it issued that was harmful to Korean semiconductor manufacturers.<sup>228</sup> The order was issued in compliance with the GATT's anti-dumping provisions and survived the *Chevron* analysis.<sup>229</sup> In the statute, Congress did not address precisely how Commerce was to revoke anti-dumping orders once a review revealed that an order was no longer justified.<sup>230</sup> Yet, after applying a "*Chevron-plus*" analysis, the court determined that Commerce fulfilled its mandate from Congress in consonance with U.S. international obligations.<sup>231</sup> The court then declared that "*Chevron must* be applied in concert with the Charming Betsy

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227. See *Hyundai Elecs. Co. v. United States*, 53 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 1999) (following *Federal Mogul* and holding that in congressional silence, the Charming Betsy principle *must* be applied along with a *Chevron* analysis). This is a clear and significant departure from the traditional *Chevron* analysis. It now appears that under step two of *Chevron*, when Congress is silent on the matter, instead of determining whether the agency acted reasonably and giving the agency deference, "under the Charming Betsy doctrine, the Court *must* consider whether Commerce formulated its regulation consistent with [the relevant GATT provision]." *Id.* at 1344 (emphasis added). The *Hyundai* court was careful to point out, however, that "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.

228. *Id.* at 1335.

229. *Id.* at 1337.

230. The Trade Agreements Act of 1979 provided Commerce with the authority to revoke anti-dumping orders after an administrative review. *Id.* at 1339-40. The revocation regulations under review are set out in 19 C.F.R. §353.25(a)(2) (1999). *Id.* at 1336.

231. *Id.* at 1344.

doctrine when the latter doctrine is implicated.”<sup>232</sup> Thus, the *Hyundai* court’s decision helped to move URAA-related analysis far from its starting point in *Suramerica*.

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232. *Id.* (emphasis added) (citing *Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trade Council*, 485 U.S. 568, 574-75 (1987), which held that the combination of the two doctrines should be used “where an otherwise acceptable construction of a statute would raise serious constitutional problems . . . unless such construction is plainly contrary to the intent of Congress”). *DeBartolo*, 485 U.S. at 575. *DeBartolo* did not involve the GATT or international issues. It examined the National Labor Relations Board’s construction of the National Labor Relations Act, where the Board issued an order prohibiting union members from distributing handbills that posed serious First Amendment questions. The Court determined that the NLRB was not entitled to *Chevron* deference. *Id.* at 568. In *DeBartolo*, however, the Court applied *Charming Betsy* in a different manner. It used it as a general rule of construction that is invoked when the constitutionality of a statute is under review. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 114 (1987) (stating “[w]here 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.”). The Reporter’s Notes clarify the Restatement’s, and the *DeBartolo* Court’s, usage of the *Charming Betsy* principle: “The phrase ‘where fairly possible’ derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute, set forth by Justice Brandeis in *Ashwander v. TWA*.” *Id.* at n.2 (citations omitted). While the Court makes it clear that this is a legitimate use of and variation on the *Charming Betsy* canon, the *Hyundai* court used it in its more traditional international context, thus bringing into question its applicability in *Hyundai*. See *supra* Part III.D.5. It would appear then, that there are two different applications of *Charming Betsy* to solve two different problems. See also Bradley, *Chevron Deference*, *supra* note 148, at 685-86 (suggesting that this variation on the *Charming Betsy* doctrine is based in error by the Supreme Court). Bradley states that the *DeBartolo* Court relied on an earlier case, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court mistakenly replaced the ‘international law deference principle’ with the ‘unconstitutional-avoidance’ principle, thus, in effect, expanding the *Charming Betsy* canon. *Id.* at 686. Bradley concludes that “there is no such admonition in the *Charming Betsy* decision, only the admonition about not violating international law.” *Id.* Bradley also suggests that lower courts have followed this precedent and have concluded that *Charming Betsy* trumps *Chevron* when both are invoked. See *id.* at 686-87. Professor Bradley also points out that “[t]here is at least one important functional difference between the *Charming Betsy* canon and the constitutional canon: if Congress clearly violates the Constitution, courts will enforce the Constitution; if Congress clearly violates international law, courts will



## IV. THE PROBLEMS IN APPLYING THE CHARMING BETSY CANON IN URAA CASES

*A. Surveying the Precedents*

The rules of construction adopted by U.S. courts between 1992-2000 show a wide range of opinions and approaches to adjudicating cases that invoke both *Chevron* and the Charming Betsy canon. The approach adopted by the Court of Appeals for the Federal Circuit in *Suramerica* in 1992 stated that the GATT could not trump domestic legislation.<sup>233</sup> In late 1994, the GATT was made a part of U.S. law when the URAA was codified.<sup>234</sup> By 1999, the Court of International Trade stated that in the absence of contrary congressional intent, U.S. courts *must* consider both the *Chevron* and Charming Betsy doctrines in regulation review cases where international obligations arise, and in such cases, Charming Betsy trumps *Chevron*.<sup>235</sup> It is unclear whether a majority view on this issue will emerge among the various federal circuit courts, and if one does, which one will prevail. If one view becomes the majority, it will have profound effects on the future and integrity of U.S. environmental laws and regulations when those laws and regulations conflict with the GATT's provisions. The remaining discussion examines the problems inherent in a "*Chevron-plus*" analysis.

*B. General Problems in Applying International Law Principles in URAA Cases*

When U.S. courts apply international law canons, such as Charming Betsy, in administrative review cases, a number of problems arise. First, like U.S. court judges, scholars have been split on how international law generally intersects with U.S. domestic law,<sup>236</sup> and how URAA provisions are to be specifically construed.<sup>237</sup>

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enforce the statute." Bradley, *Charming Betsy*, *supra* note 174, at 527. Therefore, until the Court clarifies this variation on Charming Betsy, reliance on the *Catholic Bishop-DeBartolo* line of cases in administrative review/international trade cases may be suspect.

233. See *supra* Part III.D.1.

234. See *supra* note 8 and accompanying text.

235. See *supra* notes 227-232 and accompanying text.

236. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) (concluding that while international

Second, the problem with analyzing URAA provisions as international obligations governed under international law is that adopting such an approach would require a court to drag along with it the panoply of cumbersome principles that come with international law.<sup>238</sup> A court's analysis would be incomplete if it selected only

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law is binding on the United States, U.S. courts only adopt these principles, they do not make them). *Id.* at 1555-61. In addition, since Congress has not created international law and cannot modify it, the President should be free to violate it, without intervention by the courts, whenever it is in the national interest to do so. *Id.* at 1561-62, 1567. The Restatement provides:

The GATT is an international agreement, but its status as international law cannot be stated simply. Like other agreements, it is binding upon states that are parties to it . . . . [I]ts status as a commitment of the United States is not in doubt, and courts in the United States assume its binding character.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, § 8, chap. 1, introductory note (1987). The Restatement has not addressed the GATT since it was finalized in 1994, or its new legal personality under the WTO.

237. *See supra* note 223 for a discussion on the characterization of the URAA.

238. *Compare* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 115 cmt. a. (1987) (stating

when an act of Congress and an international agreement or a rule of customary law relate to the same subject, the courts, regulatory agencies, and the executive branch will endeavor to construe them so as to give effect to both. *The courts do not favor a repudiation of an international obligation by implication and require a clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligation.*

(emphasis added)); and *id.* § 112 cmt. c:

[c]ourts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters . . . . Even views expressed by the Executive Branch as a party before the court or as *amicus curiae* will be given substantial respect since the Executive Branch will have to answer to a foreign state for any alleged violation of international law resulting from the action of a court.

isolated rules of construction while ignoring others. In addition, some commentators have criticized the general use of canons of construction in the post-*Erie* era.<sup>239</sup> Indeed, it may be unwise to pluck a single fruit off the tree of international law simply because it appears appetizing.

### *C. Justiciability*

Up to this point, the discussion has focused on why federal courts should refrain from applying Charming Betsy in URAA cases where *Chevron* has been invoked. This is based on language in the URAA and SAA and for reasons concerning the balance of power between the branches. Another important reason only hinted at thus far is the issue of justiciability. Justiciability considers whether an action is appropriate for judicial intervention and whether a judicial remedy is possible.<sup>240</sup> There is no question that federal courts have jurisdiction

*Id.*; with Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1568-69 (1984) (concluding that [s]ince neither Congress nor the President is constitutionally denied the authority to make decisions in disregard of international law, the courts will not require either the President or Congress to observe international law, nor will the courts invalidate such acts on the ground that they violate international law or a treaty of the United States.

*Id.* (footnote omitted)).

Therefore, even within the body of foreign relations/international law, Charming Betsy seems to be only one canon in the well of international law into which all branches of government may dip. The URAA text and the SAA, when bolstered with the many principles of international law found in the Restatement, all lead to the conclusion that a court should not single out Charming Betsy to compel deference to an international trading partner, especially if such a decision is disguised behind the mask of the court's administrative review powers.

239. See Bradley, *Charming Betsy*, *supra* note 174, at 504-09.

240. A justiciable controversy is defined as a:

controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it; rights must be declared upon existing state of facts that may or may not arise in the future . . . . Courts will only consider a "justiciable" controversy, as distinguished from a hypothetical difference or dispute or one that is academic or moot. Term refers to real and substantial controversy which is

over matters involving international law under Article III of the U.S. Constitution<sup>241</sup> and under 28 U.S.C. § 1331.<sup>242</sup> However, although such matters are within the subject matter jurisdiction of the federal courts, nevertheless, they are still constrained by the requirements of justiciability.<sup>243</sup> The question is not whether federal courts may hear

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appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character.

BLACK'S LAW DICTIONARY 599 (6th ed. 1991).

241. Article III of the U.S. Constitution reads in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party . . . and between a State, or the Citizens thereof, and foreign States . . . .

U.S. CONST. art. III, § 2.

242. Congress ensured this jurisdiction under 28 U.S.C. § 1331 by classifying it as a federal question. It states "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994). The Restatement reads in part:

Cases arising under treaties to which the United States is a party, as well as cases arising under customary international law, *or under international agreements of the United States other than treaties*, are "Cases . . . arising under . . . the Laws of the United States, and Treaties made . . . under their Authority," and therefore within the Judicial Power of the United States under Article III, Section 2 of the Constitution.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 111 (2) (1987) (alterations in original) (emphasis added). Thus, regardless of how the URAA is categorized, federal courts have jurisdiction over international cases under Article III.

243. The Third Restatement of Foreign Relations Law states "[c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, *subject to Constitutional and statutory limitations and requirements of justiciability*, are within the jurisdiction of the federal courts."

RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 111 (2) (1987) (emphasis added). The Comments state that an action arises under international law "if the plaintiff's complaint properly asserts a justiciable claim based upon such international law or agreement." *Id.* at cmt. e. Without a foreign plaintiff asserting a justiciable claim and seeking redress, a federal court raising and then applying international law

cases that implicate the URAA, but rather whether they should provide de facto relief to a foreign nation not a party to the suit, by providing a remedy not sought, and injecting ancient international law principles not raised.<sup>244</sup> If a party sues the United States government under the URAA, a federal court would, of course, have the duty to hear the case. But in some cases, e.g., *George E. Warren Corp.*, federal courts have raised Charming Betsy when there has

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principles on its own may constitute a potential misuse of judicial authority. Certain cases may also be deemed non-justiciable if they are seen as "political questions." See CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3529, at 279 (1984). Justice Powell outlined a modern three-part test for political question doctrines: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Made in the *U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226, 1254-55 (N.D. Ala. 1999) (citing *Goldwater v. Carter*, 444 U.S. 996, 998 (1979)).

244. See *supra* notes 213-226 and accompanying text for discussion of why federal courts should refrain from interfering in cases involving foreign affairs and international trade. Chief Justice Warren discussed justiciability and the Court's authority to hear "cases and controversies" and stated:

Embodied in the words "cases" and "controversies" are two complimentary but somewhat different limitations. In part those words [cases and controversies] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

*Flast v. Cohen*, 392 U.S. 83, 94-95 (1968), quoted in CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3529, at 281 (1984).

been no foreign nation party to the suit.<sup>245</sup> In such cases, the requirements of and limitations on justiciability may not be met.<sup>246</sup>

Ironically, the *Chevron* doctrine itself was born out of judicial restraint and self-imposed prudential limitations on the Court's own authority.<sup>247</sup> Yet, *Charming Betsy*, on its face, invokes the court's latent authority to construe statutes in ways *it* deems appropriate in an effort to avoid conflict with another nation's interests. Justice Stevens' decision in *Chevron* demonstrates the Court's own willingness to limit its authority by deferring to the political branches when agency regulations come under review: step one defers to Congress when a statute's language is clear, and step two defers to an executive branch agency when Congress is ambiguous or silent.<sup>248</sup> While the decision did not reveal the precise doctrinal basis for the Court's analysis, it is undeniable that the Court itself

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245. The cases described above were justiciable cases. It is less clear whether a court providing relief for unrepresented foreign nations violates the justiciable issue or controversy principle.

246. The Supreme Court had earlier "defined justiciability as turning on 'whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" *Ad Hoc Comm. on Judicial Admin. v. Massachusetts*, 488 F.2d 1241, 1244 (1st Cir. 1973) (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)). In 1999, the U.S. government was sued by several labor groups alleging that the legislation implementing the North American Free Trade Agreement (NAFTA) was unconstitutional because it violated the Treaty Clause of the Constitution. *See Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). The government claimed that the district court should avoid judicial review of international trade agreements such as NAFTA and the GATT because federal courts have traditionally resisted review of international agreements entered into by the President with the approval of Congress, unless the President and Congress reach an impasse regarding such international agreements. *See id.* at 1268 (citing *Goldwater v. Carter*, 444 U.S. 996, 997, 1005 n.1 (1979)). The court held that it had the authority to review plaintiff's claims because the Act's constitutionality was under review and disagreed with the government's position. In its conclusion, however, the court held that the legislation implementing NAFTA and the process under which it was passed was constitutional. *See Made in the U.S.A. Found.*, 56 F. Supp. 2d at 1322-23.

247. *See Bradley, Chevron Deference, supra* note 148, at 652 (suggesting that *Chevron* deference has direct practical significance in foreign affairs given the overlap between domestic and international law).

248. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

created *Chevron* and it is still good law.<sup>249</sup> Because justiciability limits both a court's ability to hear international law matters on the one hand *and* agency review cases on the other, it seems there is little authority for a court to single out and apply the Charming Betsy canon in agency review cases while trumping *Chevron*.<sup>250</sup>

Finally, the Restatement on Foreign Relations Law provides guidance when a federal statute conflicts with a U.S. international obligation. It is clear that the federal statute will be given effect.<sup>251</sup> If

249. See Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis For Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275, 1277 (1991). Professor Callahan asserts that most traditional assumptions for *Chevron's* doctrinal basis, Congress's delegating authority to an agency, or the externally imposed separation of powers doctrine, are incorrect. *Id.* In her article, Callahan states that *Chevron* deference

is a principle of self-restraint, related to the various well-established prudential limitations on justiciability in the federal courts. Because no convincing indication that the *Chevron* result was compelled by external forces exists, *Chevron* is best understood as having established what is essentially a rule of abstention in favor of another government decision-maker.

*Id.* at 1289.

250. When a court places the Charming Betsy canon onto the second rung of *Chevron's* stepladder it invites problems. Few would disagree that if the intent of Congress is clear within a statute, an agency must conform its regulations accordingly; the analysis ends after step one. And, if a WTO obligation happens to conflict with that provision, a U.S. court would not hesitate to give the statute effect. Why then, when Congress is silent on a particular matter—triggering analysis under step two—would a court assume that Congress and the executive branch do not intend to retain their respective legislative and administrative powers in carrying out trade and environmental policy? It is unreasonable to assume that the political branches intend to relinquish these powers to the judiciary each time Charming Betsy is shoe-horned into *Chevron's* second step, simply because Congress has not addressed each and every interpretive contingency a court may face in reviewing statutes and regulations.

251. The Charming Betsy canon is found in section 114 of the Restatement. It states: "Where fairly possible, a United States statute is to be construed so as to not conflict with international law or with an international agreement of the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 114 (1987). However, the Comment suggests that courts are not obliged to weigh conflicting laws and offer automatic deference, as implied by Chief Justice Marshall's

a U.S. court hears a case in which a plaintiff invokes international law and seeks a judicial remedy, international law and Charming Betsy may be applied. If the U.S. government decides to disregard an international obligation, and in its holding in a URAA-related case, a U.S. court gives effect to a conflicting federal statute, the U.S. might then be in violation of international law.<sup>252</sup> Nevertheless, the U.S., acting through the two political branches, is free to make such a choice.<sup>253</sup> U.S. courts should not interfere to effect a contrary result.<sup>254</sup>

### CONCLUSION

Conflicting trade and environmental policies implemented simultaneously by the U.S. are not necessarily incompatible. The URAA and the Statement of Administrative Action provide a roadmap for U.S. courts in construing the GATT's provisions. The markings are clear. When followed, they reveal the intent of the executive branch and of Congress. The executive branch and Congress anticipated the unique nature of the URAA and provided explicit guidance to future administrations, congresses and courts when URAA provisions are implicated. WTO rulings are not binding

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original opinion; but rather the "principle of interpretation in this section is influenced by the fact that the *courts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law or with a provision of an international agreement of the United States.*" *Id.* at cmt. a (emphasis added). This, of course, should be considered along with the URAA's own supremacy language discussed earlier. *See supra* note 13 and accompanying text.

252. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 115(1)(b) (1987) (stating that a federal law superceding an international obligation "does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").

253. *See* Henkin, *supra* note 236 and accompanying text.

254. Federal courts are limited in their ability to effectively synthesize foreign policy because they "lack the necessary informational resources, the ability to adjust to diplomatic nuance and timing, and the appropriate remedial resources to respond to the international political dynamic." Bradley, *Charming Betsy*, *supra* note 174, at 525 n.267 (quoting Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 462 (1993)).



on U.S. courts, and the executive branch may choose whether and how to respond to such rulings. Despite the concerns of WTO detractors, that U.S. sovereignty is threatened, the Constitution and U.S. law still govern to protect U.S. interests. Ironically, it may be the application of international law principles, such as *Charming Betsy*, by U.S. courts that will ultimately weaken U.S. environmental laws if the executive branch is compelled to comply with the U.S.'s international obligations.

U.S. courts should continue to apply the *Chevron* analysis in agency review cases when the URAA is implicated. It should not raise additional concerns for the courts simply because the regulations in question may have been promulgated in response to, or in anticipation of, WTO obligations.<sup>255</sup> As long as the statute in question is constitutional, and the regulations are considered reasonable, the courts should continue to defer to the executive branch, since it negotiated the final GATT agreement, suggested ways in which the agreement should be interpreted, and Congress has conceded that the Statement of Administrative Action should be given particular weight when interpreting the URAA.<sup>256</sup> A rule of construction as unpredictable as *Charming Betsy* was not likely anticipated—nor is it likely now welcomed—by the executive branch and Congress when the URAA was passed. In certain cases, *Charming Betsy* may upset not only the delicate balance of powers

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255. See Bradley, *Chevron Deference*, *supra* note 148, at 687-88 (suggesting that while administrative agencies do not possess special expertise in making constitutional determinations, the executive branch as a whole does have expertise in international affairs).

256. See THE SIXTEENTH ANN. JUD. CONF. OF THE U.S. CT. OF APP. FOR THE FED. CIR., 193 F.R.D. 263 (1999) (discussing the *Charming Betsy* doctrine and its application to WTO agreements). A participant in the Conference's proceedings asserted that in agency regulation review cases that implicate the URAA, a court may compel an agency to consider the U.S.'s international obligations when crafting its rules. See Joseph Dorn, *id.* at 411. However, if the agency comes back to the court and claims that international obligations were considered but the regulation could not be amended to conform to such agreements, the court should then defer to the agency after it has considered the international obligations under step two of *Chevron*. *Id.* A Commerce Department official added that when agencies consider international obligations while amending regulations, those agencies should enjoy the same deference from a court as afforded them under a standard *Chevron* analysis. See Marguerite Trossevin, *id.* at 412-13.

reflected in the URAA, but it may undo the benefits built into the final legislation.<sup>257</sup>

Applying Charming Betsy in URAA-related cases can only serve as a means to one of two ends: it will either affirm an outcome resulting from a sound *Chevron* analysis, in which case it substantively adds nothing; or, in a case where a court compels an otherwise reluctant executive branch agency to comply with WTO obligations, it would upset the balance and flexibility required to maintain the integrity of U.S. environmental laws as well as affect U.S. sovereignty. In the first instance, the Charming Betsy analysis is unnecessary; in the latter case, it may be unwise.

Some may suggest that these concerns are unfounded, given that in the cases where Charming Betsy has been used to bolster an executive branch agency's decision to modify a regulation, the outcome of the decision was not changed and the will of the executive branch was not thwarted. Such a view, however, would fail to appreciate that a court could have just as easily used Charming Betsy more as a stick requiring WTO compliance than as a carrot affirming the executive branch's voluntary actions.<sup>258</sup>

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257. Consider, however, that at their core, Charming Betsy and *Chevron* are alike in that they both rely first on a statute's language before permitting courts to trigger their interpretive powers. But, if a court is willing to go through a statutory analysis using *Chevron*, it should not then skip this requisite analysis, which is also required in a Charming Betsy analysis. See also Bradley, *Charming Betsy*, *supra* note 174, at 524-26 (suggesting that Charming Betsy itself can operate to enforce the balance of powers between the branches of government).

258. For example, in the *George E. Warren Corp.* emissions case, assume the EPA had decided *not* to modify its regulations in response to the WTO ruling, and instead retained the regulations that treated foreign refiners differently, and which did not allow foreign refiners to set guidelines using all options available to domestic refiners. Assume too, that the challenger in the case was a domestic gasoline refiner that was concerned, as EPA was in the original case, that foreign refiners could not and likely would not meet the stringent U.S. standards. The court would then be faced with the same adverse WTO ruling, indicating that the EPA rule was in violation of the GATT's rules that prohibit member nations from treating countries differently. What would be different in this hypothetical would be (1) the EPA's refusal to comply; and (2) a plaintiff urging that EPA should change its regulations in accordance with the WTO ruling (unlike in *George E. Warren Corp.*, where the plaintiff urged the EPA to not comply with the WTO ruling). In a "*Chevron-plus*" analysis, where a court would apply Charming Betsy after doing a *Chevron*

The URAA should be viewed as legislation in the domain of foreign affairs, where traditional deference is given to the executive branch, or as governing commerce, traditionally under the control of Congress.<sup>259</sup> In the current global political milieu, U.S. courts should offer even more deference in these matters, given the increasing prominence of trade in U.S. policies, as well as the importance of maintaining the integrity of U.S. environmental laws.<sup>260</sup> The most effective way for the U.S. to manage these policies is for the executive branch and Congress to fully exercise all legal, political and policy choices available under the URAA and the WTO's Dispute Settlement Agreement without interference from U.S. courts. In such an arrangement, the decisions would remain in the political arena where they belong and accountability and sovereignty would be truly preserved.<sup>261</sup>

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analysis, it is feasible that the court could just as easily compel WTO compliance, if, for example, the section of the Clean Air Act under review was silent on Congress's will on how to handle conflicts. This is the type of hypothetical that could occur if the *Charming Betsy* analysis is permanently appended to *Chevron* analysis when both are implicated. It is not that paying occasional homage to *Charming Betsy* in itself is threatening to environmental laws. In theory, when it is dusted off and used as a rubber stamp to seal a *Chevron* analysis, there appears to be little reason for concern. But, it is in those circumstances wherein it is expanded to undo policy choices of the executive branch and Congress that its applicability is questioned here.

259. The President "shall have Power, by and with the advice and consent of the Senate, to make treaties . . ." U.S. CONST. art. II, § 2, cl. 2; "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. CONST. art. I, § 8, cl. 3; *See also* *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1367 (5th Cir. 1993) ("Even though the Executive Branch does have exclusive jurisdiction over foreign affairs, the Constitution grants Congress power to regulate commerce with foreign nations. To the extent that a dispute exists over possible foreign policy implications to the GATT, we decline to enter the fray." (footnote omitted)).

260. This is not to suggest that courts have no role in international trade matters. *See supra* note 242 and accompanying text. But when the activities or laws involved are constitutional, in light of traditional deference extended to the executive branch, and in light of the URAA text, U.S. courts should hesitate before interfering.

261. Indeed, in his *Chevron* decision, Justice Stevens stated that when an agency rule comes under review in order to probe the agency's wisdom, the challenge must fail. And in such a case

Under a *Chevron* analysis, courts play a vital role in interpreting URAA provisions in agency review cases. *Chevron* is still a useful fulcrum on which to balance the powers of the branches of government.<sup>262</sup> By applying *Chevron*, the courts fill the gaps in agency accountability left by constitutional constraints such as those galvanized in *Chadha*. By using a *Chevron* analysis, courts can check executive branch agencies' actions in a way that Congress cannot under *Chadha*. Therefore, as long as *Chadha* limits Congress's responses to executive branch agencies, *Chevron* is needed to preserve a constitutional balance of power. Charming Betsy adds nothing to ensure constitutional integrity, agency accountability, or environmental protection.<sup>263</sup> Augmenting the

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federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”

*Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984) (citation omitted).

262. See Bradley, *Chevron Deference*, *supra* note 148, at 673 (revealing that in a series of recent cases, all nine Justices of the Supreme Court reaffirmed their support for *Chevron's* basic framework, thereby suggesting that *Chevron* deference remains on solid ground).

263. Under *Chevron*, the judicial branch ensures that the executive branch does not violate the will of the legislative branch by construing a statute in a way that would contravene the will of Congress. Such a framework is sound and constitutionally necessary. Under a “*Chevron-plus*” analysis, by adding Charming Betsy, the judiciary would be allegedly protecting the executive branch from itself. In effect, all that would be accomplished would be for a court to ensure that the part of the executive branch that is responsible for promulgating environmental regulations, e.g., the EPA, does not step on the turf of another part of the executive branch that is responsible for trade regulation, e.g. the U.S. Trade Representative. If the courts feel the need to intervene in URAA-related cases and assure that the balance of powers between the executive and legislative branches are maintained, the two-step test from *Chevron* provides that protection. Otherwise, if Congress continues to remain silent in these conflicts—indeed it wrote the URAA giving the executive branch specific authority to act—the courts should do so as well. *Cf.* Bradley, *Charming Betsy*, *supra* note 174, at 524 (proposing an alternate conception of the Charming Betsy canon based on the separation of powers doctrine, in contrast to its traditional conceptions: (1) the legislative intent and (2) the internationalist conceptions). *Id.* at 484-85, 524. Therefore, if the

analysis with international law canons, such as Charming Betsy, will introduce too much unpredictability, and would add little to the outcome, save an erosion of the U.S.'s ability to choose how best to respond to difficult policy choices.<sup>264</sup> For these reasons, U.S. courts should refrain from applying Charming Betsy in agency review cases when URAA provisions conflict with existing environmental laws.<sup>265</sup> If courts need more than a statute's text in order to cull out Congress's intent, they need look no further than the URAA, the Statement of Administrative Action, and its legislative history.

#### RECENT DEVELOPMENTS

The U.S. Supreme Court recently affirmed the importance of deferring to the executive branch and Congress in foreign affairs, and the limited role that states and the judiciary play in this area. In *Crosby v. National Foreign Trade Council*,<sup>266</sup> the Court granted certiorari to determine whether a Massachusetts statute that placed sanctions on Burma (Myanmar) due to alleged human rights violations was unconstitutional.<sup>267</sup> The Court held that because Congress passed a similar statute,<sup>268</sup> the Massachusetts statute was

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Charming Betsy canon is used in tandem with *Chevron* in its separation of powers conception, it would not be antithetical to *Chevron*—it would actually compliment it.

264. See *supra* note 258 for an example of how the court's application of Charming Betsy could have compelled an otherwise reluctant EPA to modify Clean Air Act regulations, despite that under the URAA, the executive branch may decide to not comply with a WTO ruling.

265. *Contra* Debra P. Steger, PROC. OF THE TENTH JUD. CONF. OF THE U.S. CT. OF INT'L TRADE, *supra* note 172, at 483-84 (speaking as a former WTO Appellate Body member and stating that governments are obliged to withdraw measures deemed violative of the GATT). In addition, it was offered that under GATT's rules, governments no longer have all of the response choices once available. *Id.*

266. 120 S.Ct. 2288 (2000).

267. See *id.* at 2289. The statute, An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§ 7:22G-7:22M, 40 F, 1/2 (1997)), sought to ban the state from doing business with companies that transacted business with Burma.

268. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, §

preempted and its application was unconstitutional under the Supremacy Clause.<sup>269</sup> The Court also stressed the need for the executive branch to exercise discretion and authority, granted by Congress, in developing consistent foreign policy.<sup>270</sup>

The Massachusetts statute was also challenged by Japan and the European Union before the WTO as violating governmental procurement provisions in the GATT.<sup>271</sup> The President complained that the Massachusetts statute interfered with U.S. foreign relations.<sup>272</sup> The Court reiterated that the executive branch and Congress control foreign affairs and that states and courts do not.<sup>273</sup> The Court recognized that the two political branches need flexibility in order to conduct foreign policy, without interference from other actors, and the decision affirms the principle that judicial intervention into foreign affairs should be avoided.<sup>274</sup>

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101(c), 110 Stat. 3009-121 to 3009-172) (imposing mandatory and constitutional sanctions on Burma).

269. Crosby, 120 S.Ct. at 2299.

270. In referring to the conflicting state and federal statutes, the Court stated that "the state Act is at odds with the President's intended authority to speak for the United States among the world's nations in developing a 'comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.'" *Id.* at 2299 (citing § 570(c) of the federal statute).

271. *Id.*

272. *Id.*

273. *Id.* at 2301. The Court stated that although it does not unquestioningly defer to the executive branch's legal interpretations of all federal statutes,

We have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. *We have, after all, not only recognized the limits of our own capacity to "determin[e] precisely when foreign nations will be offended by particular acts," . . . but consistently acknowledged that the "nuances" of "the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court . . . ."*

*Id.* at 2301 (citing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-29 (1994) (first and third alterations in original) (emphasis added)).

274. Crosby, 120 S.Ct. at 2301. *See also* Bradley, *Charming Betsy*, *supra* note 174, at 523 (stating that

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*Erie* requires that all law applied by the federal courts be either federal or state law, which means that federal courts can no longer apply international law of its own force. *Erie* thus negates the premise of the internationalist conception “that the [international law] norms operate without the mediation of a political branch.”  
(citation omitted) (alteration in original)).