

5-1-2007

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Recommended Citation

Andrew Platt, *The Fate of Domestic Exporters Under the Byrd Amendment as Case Study for Resuscitating Last-in-Time Treaty Interpretation*, 3 BYU Int'l L. & Mgmt. R. 171 (2007).

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THE FATE OF DOMESTIC EXPORTERS UNDER THE BYRD AMENDMENT AS CASE STUDY FOR RESUSCITATING LAST-IN-TIME TREATY INTERPRETATION

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I. INTRODUCTION

United States trade policy is necessarily influenced by powerful political and economic interests but is also bound by national and international law. When foreign importers believe they have been harmed by U.S. policy, international principles support and national law provides the right to claim redress in the U.S. courts. However, due to U.S. trade policies that contravene treaty obligations, it may be argued that aggrieved domestic exporters are not provided with a remedy. This comment illustrates what effect adopting one of the competing schools of treaty interpretation would have on the case study “the 2000 Byrd Amendment in the WTO Appellate body in 2003 and in the U.S. Court of International Trade in 2006.” This Comment argues that harmed domestic exporters will only have a remedy if courts honor the last-in-time rule of treaty reconciliation because, absent this doctrine, Constitutional protections against takings are insufficient in light of the taxing and spending power.

Known as the Byrd Amendment, the Continued Dumping and Subsidy Offset Act of 2000 (CDSO) distributes funds collected from antidumping duties to U.S. companies who make successful dumping complaints.¹ For instance, steel importers who undercut U.S. market prices are charged with dumping penalties, as would occur in any country; and then according to the Byrd Amendment, the amount charged will be distributed back to the U.S. producers who complained. The intent behind the CDSO is to support companies threatened by overseas competition. However, it creates a problem when the anti-dumping duties bring imports up to market value, because the subsequent payments subsidize the American producers that are no longer at an unfair disadvantage.

When the United States signed the treaty establishing the WTO, it agreed to follow certain rules. The WTO claims that the CDSO breaks

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¹ 19 U.S.C. § 1675c (2000).

the rules that the United States committed to follow. Although the WTO has no power to legislate for any country,² it allows other member countries to hit back by charging a tariff equal to the illegal payments. These countries, including several of America's favorite trade partners—the EU, Canada, Mexico, and Japan—may pick their targets so as to motivate the United States to play by the rules.

The EU targets, among other imports, fabrics and shoes.³ It charges a proportional duty to U.S. exports to compensate for the payments made to U.S. companies under the Byrd Amendment. For example, the EU will charge a fifteen percent duty on American shoemakers every time the United States charges duties on other European companies and gives the proceeds of those duties to American steel companies. Simplified to its essence, whenever U.S. steel producers receive the proceeds of a duty, U.S. shoemakers must pay—and they are not happy about it. Now that Congress acknowledged the illegitimacy of the act, exporters will be even angrier, but these companies—who are doing nothing wrong—will continue to pay duties through 2008, and likely into the future.

What remedies do the shoemakers or any of the “innocent” companies have? Since they remain trapped between the international law and domestic law, they must rely on domestic courts to harmonize the two. Regardless of the WTO's interpretation, the enactment of the CDSO was clearly legal in the United States. On this plane, legality simply means it is constitutional within Congress' enumerated Article I power to regulate interstate commerce. At the same time, it is just as clear that it is illegal on the international plane. Internationally, the simplest category of illegal actions is direct treaty violations. But where can a company bring a suit under international law? Or more fundamentally, who could they sue? Individual corporations have no standing in the international realm where abuses are resolved country-to-country or perhaps between a country and an international organization. That is to say, bodies like the U.N. or the WTO possess enough power to act with a set of limited powers to redress abuses. A U.S. shoemaker who feels wrongfully harmed by the CDSO has no recourse in the international plane. Nor does it have a representative except—and here is the irony for the shoemaker—its own government.

² John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT'L L. 109, 112 (2004).

³ Communication of the European Communities, *United States—Continued Dumping and Subsidy Offset Act of 2000*, 2, WT/DS217/47 (May 4, 2005) available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/217-47.doc>.

Therefore, an “innocent” U.S. company charged with retaliatory duties would have to sue under U.S. law. The supremacy clause, Article VI, includes treaties as the “supreme law of the land” along with congressional legislation. On the face of it, a U.S. court must consider the Byrd Amendment’s international illegality on one hand and its domestic legality on the other. Fortunately, a common-law solution exists for this apparent collision: the last-in-time rule. Thus, when a treaty is in place first and Congress subsequently passes “clearly contradictory” legislation, the latter is the “supreme” law.⁴ The collision of doctrines indicates that courts should evaluate the totality of the circumstances surrounding the implementation and the purposes of the treaty. In the case of the CDSO, the legislation can and should be interpreted so as to give effect to the United States international obligation and spare “innocent” domestic exporters.

To approach this novel question, this paper will assert that the U.S. companies harmed by the CDSO’s illegality (subject to retaliatory duties) must resist the recent erosion of the U.S. last-in-time jurisprudence if they are to have any chance of relief in the courts. Part II will describe the reasoning of the WTO decision against the CDSO. Part III will explain the treatment of the CDSO in U.S. Courts and will explore why the only viable remedy in light of the last-in-time canon is the judicial redefinition of the CDSO.

II. INTERNATIONAL OBLIGATIONS AND THE APPELLATE BODY REPORT

A. The WTO Dispute Resolution Process Defines International Law

Dumping is a distortion of free trade whereby a foreign company attempts to undercut prices in a domestic market to drive out local competition. To equalize prices, the importing country charges antidumping duties—fees to bring the imported products up to market value. The WTO oversees these actions so that disputes over procedural fairness or the size of an antidumping duty do not escalate into trade wars. If states are not able to resolve dumping disputes, WTO/GATT treaties authorize a victim of unfair antidumping duties

⁴ In this context, “in place” is used as short hand to assume ratification for Article II treaties or valid exercises of the foreign relations power for executive agreements as well as being either self-executing or appropriately implemented. The discussion of these issues is avoided as the Uruguay Round Agreements Act, P.L. No. 103-465, 108 Stat. 4815 gives a clear date for when the treaty was “in place” as Dec. 8, 1994 (and thus entered into force Jan. 1, 1995).

to charge countervailing duties—fees to compensate for excessive antidumping duties.

The term, “countervailing duty,” suggests the intention to counteract an imbalance; so where possible, the target should be the same industry that is subject to unfair antidumping duties.⁵ Only where this is determined to be ineffective are countries allowed to take action against different industries through the principle of cross-retaliation. Whereas compliance with most international agreements is motivated only by the golden rule’s do-unto-others principles, the WTO dispute resolution mechanism contains powerful consequences. Cross-retaliatory countervailing duties are hit-where-it-hurts penalties designed to fuel internal political pressure to bring a country in line with its international obligations.

While the dispute process is conducted between countries, if countervailing duties are awarded, it is the offending country’s companies, not its government, who pay for it. The award is conceptualized as a suspension of the benefits—the concessions—normally made to the countries by virtue of their membership in the WTO. By the award, the complaining countries may charge duties on classes of goods from the offending country in the amounts approved by a WTO arbitrator. They will continue to collect these duties from the companies of the offending country in these industries until the offender conforms to its commitments.⁶

In the hierarchy of international law, treaties are the strongest—or at least the clearest—type of law,⁷ and the dispute resolution process amounts to a legal interpretation of the states’ treaty obligations. Thus, a WTO Dispute Settlement Body (DSB) decision is a binding determination of a breach of the treaty in dispute.⁸ That is to say, other nations may treat the United States as a party in breach of nothing

⁵ Only Japan imported enough bearings and steel products to make imposing countervailing duties on these imports, while other countries settled for cross-retaliation. *Japan Fines U.S. Exports to Protest Byrd*, METAL CENTER NEWS, Aug. 2005, available at <http://www.metalcenternews.com/2005/August/mcn0508Assoc.htm> #Japan.

⁶ And only that long. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU] available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

⁷ Statute of the International Court of Justice 1946 U.N.Y.B. 843 at 846, 3 T.I.A.S. 1179, ch. II, art 38; Restatement (Third) of the Foreign Relations Law of the United States § 101 (1986).

⁸ DSU arts. 19, 22.

more than a WTO finding. Nevertheless, because the U.S. courts have created their own rules on the effect of international law, they would likely scrutinize a WTO Appellate Body report for themselves.⁹

B. *The Complaint and DSB Report*

The complaining parties convinced the DSB panel¹⁰ that the CDSO was mandatory legislation that violated the basic remedy provisions of the free trade agreement inasmuch as it was a “specific action”¹¹ under Article 18.1 of the Antidumping Agreement¹² (AD) and Article 32.1 of the Subsidies and Countervailing Measures Agreement¹³ (SCM). Although these complaints were the heart of the dispute, the fact that parties further argued—and the DSB found—that the CDSO payments amounted to procedural distortions, encouraging a larger segment of an industry to band-wagon (violating Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement¹⁴). The DSB panel did not agree with the complaining parties that the incentives in turn illegally prevented the accused importer from having a fair opportunity to cure the violation. The panel reported that

⁹ For example, the Appellate Body report articulated an expanded reading of an essential aspect of the Subsidies and Countervailing Measures Agreement in this case, and, given the tendency of U.S. courts to engage in intent-based treaty interpretation it might question whether this expanded interpretation represents the treaty that the United States intended to sign. See John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163, 174 (2001).

¹⁰ Panel Report, United States—Continued Dumping and Subsidy Offset Act of 2000, ¶ 4.86, WT/DS217/R, WT/DS234/R (Sep. 16, 2002) [hereinafter Panel Report], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (follow “Panel Report” hyperlink; then follow language code “E” hyperlink).

¹¹ That is, import regulations are permissible if provided for in the treaty or incidental to imports, but not when they are targeted, or “specific.”

¹² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter AD Agreement] available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf. The only difference between the two provisions is the reference to dumping in the AD agreement and subsidies in the SCM agreement.

¹³ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement] available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf; Panel Report, *supra* note 10, ¶¶ 3.2–3.3.

¹⁴ These provisions use similar language to define the (only) permissible procedures for commencing an investigation.

because the text of the CDSO harmonized with the statistical thresholds of AD 5.4 and SCM 11.4, and because there was no indication that the amendment was implemented in a manner contrary to the two articles, the United States was not accountable for its possible motives in denying a proposal for cure (an “undertaking”).¹⁵

The complaining countries alleged, as they must when asking for countervailing duties, that these violations “nullif[y] or impair[] benefits accruing them” under WTO agreements. This allegation presumes they are harmed by being deprived of what, under the treaty, they are entitled to—namely, the “benefit” of a certain level of access to the U.S. markets. In finding that the CDSO eliminated or interfered with the agreed conditions, the DSB panel held that complaining parties had a right to compensatory (i.e. retaliatory) duties. Likewise, because the CDSO constituted “specific action,” it further violated the United States’ agreement to conform its domestic law with the WTO treaties it signed.¹⁶

C. The Appellate Report

Faced with millions of dollars of retaliatory duties on its companies’ annual exports, the United States appealed the DSB’s determination that the CDSO was a “specific action” against dumping and subsidization and that it illegally encouraged dumping complaints. To avoid retaliatory countervailing duties, it had to persuade the Appellate Body on both issues, for either one would represent non-conformity with international commitments and thereby nullify or impair benefits of the complaining parties. In the end, the United States succeeded only in convincing the Appellate Body to reverse the unfair complaint procedure determination. However, in affirming the DSB panel’s “specific action” finding, the Appellate Body rejected the panel’s determinations of law and substituted its own. Further, the U.S. appeal successfully eliminated overly-broad language used in the DSB report.

¹⁵ Panel Report, *supra* note 10, at ¶ 3.3. The U.S. also prevailed on two other issues. India and Indonesia asserted that the CDSO further violated their special WTO status as developing countries under AD 5, but failed on procedural grounds. Mexico boldly alleged that the CDSO was not only a “specific action,” but rose to the level of a subsidy under SCM 5. Mexico failed to convince the DSB that it was such a direct violation of the central values of the WTO agreement.

¹⁶ Embodied in AD Agreement art. 18.4 and SCM Agreement art. 32.5.

U.S.'s Score Sheet		
Issue	DSB panel	Appellate
“Specific Action” + “against”	Against	Against
Encourages industry to complain	Against	For
Process for Cure	For	
Conformity of domestic law	Against	Against
“Nullifies or impairs benefit”	Against	Against

The U.S. appeal forced a clarification of the meaning in AD 18.1¹⁷ and SCM 32.1¹⁸ of a “specific action against” dumping or subsidy. The Appellate Body described the “specific action against” language as condition precedent for the applicability of these provisions. If a challenged measure were neither a “specific action” nor “against” dumping/subsidization, it would escape the analysis under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. Any measure that is both specific and against dumping/subsidization must fit within the GATT agreements. At first glance, the very title of the Byrd Amendment, the Continuing Dumping and Subsidies Offset Act, suggested an action against dumping and subsidization; however, neither the DSB panel nor the Appellate Body relied on this,¹⁹ and the U.S. appeal pushed the Appellate Body to define the important terms of the treaty.

1. “Specific Action”

While the principle of *stare decisis* is not incorporated into the WTO system, the “governing” Appellate interpretation of the treaty language comes from the 2000 decision in *United States—Anti-*

¹⁷ No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. This in not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

¹⁸ No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

¹⁹ But the DSB panel was tempted to. Panel Report, *supra* note 10, ¶ 7.27. The Congressional findings attached to the Byrd Amendments explicitly provided, “United States unfair trade laws have as their purpose *the restoration of conditions of fair trade* so that jobs and investment that should be in the United States are not lost through the false market signals.” Congressional Findings, P.L. 106-387, § 1(a), 114 Stat. 1549 (emphasis added).

Dumping Act of 1916.²⁰ The pre-WTO language at issue there targeted predatory pricing without calling it “dumping.” Nevertheless, using a “constituent elements” analysis, the Appellate Body found that predatory pricing was using the same criteria as dumping. Because the AD Agreement recited the only permissible anti-dumping remedies, the additional step of giving the proceeds of the duties to competitors was inconsistent with WTO agreements.

In its analysis of the CDSO, the Appellate Body found that the CDSO embodied the constituent elements of dumping. Regardless of what it was called, the CDSO was “inextricably linked to, and strongly correlated with” dumping or subsidization investigations.²¹ The Appellate Body seized on the substance of the CDSO, particularly the mechanism that distributed payments only after duties had been collected pursuant to an order. Because the CDSO clearly stated that the anti-dumping or countervailing duty orders are imposed only following a determination of dumping or countervailing duties, the Appellate Body found that the Amendment was “inextricably linked” to dumping/subsidization.

2. “Against”

The Appellate Body’s analysis of the “against” prong dismissed the United States’ marshalling of various dictionary definitions of “against,” but was more careful with the underlying challenge as to whether a measure could be valid if it was only indirectly against dumping/subsidization. The United States attempted to challenge the DSB panel’s interpretation that “against” simply meant having “an *adverse bearing* on dumping or subsidization”²² (indirect effects) and suggested hostile or active (direct) opposition. The United States tried to emphasize that the CDSO’s impact on dumping was merely indirect, and channeling money to help threatened companies better compete was quite different from a law that attacked the importation

²⁰ Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R (Aug. 28, 2000) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds136_e.htm (follow “Appellate Body Report” hyperlink; then follow language code “E” hyperlink).

²¹ Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.86, WT/DS217/R, WT/DS234/R (Jan. 16, 2003) [hereinafter Appellate Report] available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (follow “Appellate Body Report” hyperlink; then follow language code “E” hyperlink); Appellate Body Report, *supra* note 20, ¶ 242.

²² *Id.* ¶ 247.

directly by fining distributors who resold dumped goods, for example. The Appellate Body declined to limit the meaning of dumping to the definitions advocated by the United States because both the AD and SCM Agreements contemplated indirect actions by referring to “measures” against dumping/subsidization as a practice.²³ In contrast, “[t]here is no express requirement that the measure must act against the imported dumped product, or entities responsible for that product.”²⁴

After affirming the expanded meaning of “against,” the Appellate Body moved quickly through the reasons why the CDSO met this definition: (1) the Amendment offsets were financed by duties, (2) the offsets were paid to the domestic companies who were “necessarily competitors” of the parties subject to duties, (3) domestic companies were eligible for offset payments based on “production of the same product” triggering the duties, and (4) the absence of restrictions on the use of the offset payments indicated that they may be used to gain advantage over the foreign competitors.²⁵

For foreign companies and countries, the obvious link between the duties levied and the subsidies paid is an incentive to avoid dumping or subsidization. Clearly, the U.S. competitors will be enriched by the fines the exporters pay to the degree that these exporters sell goods at prices below normal when the CDSO requires specific action against dumping/subsidization.

The Appellate Body’s focus on the design and structure of the Byrd Amendment stands in contrast with the panel report’s emphasis on proven effects.²⁶ One important thrust of the DSB’s analysis was that the Byrd distributions created inhospitable “conditions of competition.” Although the U.S. arguments forced the Appellate Body to address and reject this analysis, the result does not improve the U.S. situation in this case. In the end, it was much easier to find that the CDSO was by design and structure against dumping/subsidization than to prove that exports were actually harmed.

3. *The footnotes*

After deciding that the CDSO represented a specific action against dumping/subsidization, the Appellate Body analyzed the U.S.’s radical

²³ *Id.* ¶ 253.

²⁴ *Id.* ¶ 251.

²⁵ *Id.* ¶ 255.

²⁶ Panel Report, *supra* note 10, ¶¶ 7.62–7.63.

attempt to turn the test inside out before considering whether the Amendment's provisions were inconsistent with the WTO agreements. The United States argued that the footnotes to the articles prohibiting non-WTO remedies indicated that the agreements were non-exclusive and allowed the type of subsidies the CDSO created.

The United States represented that these footnotes merely clarify the hierarchy of WTO provisions by confining the exclusions in Articles 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement to their respective realms. The AD Agreement, for example, specifies “[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.” Footnote twenty four simply adds, “This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.” Thus, even though other GATT measures naturally result in the inspections of dumped goods, such connection with dumping is not sufficient to bring an independent process in violation of the AD Agreement. The United States was essentially arguing that “an action that [fell] within Footnotes 24 and 56 [could not] be characterized as a specific action . . . and such action would, therefore, not be WTO-inconsistent.”²⁷

As background for the assertion that the footnotes overpower the meaning of the main provisions, the United States argued that the AD and SCM Agreements were non-exclusive. That is to say, even though these agreements restricted measures using certain enumerated strategies, an action such as the CDSO that did not fall into the discrete categories was, by definition, not a “specific action.” Although the Appellate Body was dismissive of this attempt (“this not only turn[ed] the normal approach to interpretation on its head, but it also [ran] counter to our finding in *US-1916 Act*”²⁸), its refutation was methodic—presumably laying down strong enough reasoning to discourage future attempts to blow apart the WTO enforcement system.

In its analysis of the prior arguments, the Appellate Body treated the AD and SCM Agreements as complementary in construction and object. While it eventually reached the same conclusion on the issue of exclusivity, it did not assume their equivalence from the outset. Not only did the nature of the three remedies treated in the AD Agreement differ from the four ones in the SCM Agreement, the *US-1916 Act* report only dealt with the former. Thus, while the dismissal of the

²⁷ Appellate Report, *supra* note 21, ¶ 262.

²⁸ *Id.* ¶ 262.

argument based on Footnote 24 (the AD Agreement) took up only two paragraphs, the question of Footnote 56 and the SCM Agreement consumed four pages. Despite the differences in the scope of the measures in the two agreements, the Appellate Body found that, by the “terminology and structure,” the two agreements embodied the same definitive “obligation or prohibition.”²⁹ While the United States argued that GATT permitted actions against subsidies not mentioned in the SCM Agreement, the Appellate Body rejected this argument independent of an analogy with the AD Agreement. The Appellate Body interpreted the election of remedies requirement in Footnote 35 combined with Article 32.1 (“No specific action against a subsidy of another Member can be taken *except in accordance with the provisions of GATT*”³⁰) as definitive. If, in order to win this dispute, the United States had prevailed with the contention that the GATT remedies were non-exclusive, the precedent would cause a hemorrhage in the WTO enforcement system. If the agreements were suddenly interpreted to be nonexclusive, any country could use creatively structured duties and/or barriers to alter the landscape. This conclusion then brought the analysis to a third step of the prohibition of specific actions. In finding that GATT contained the only appropriate responses to dumping and subsidization, it also determined that the CDSO response was inconsistent.

The Appellate Body’s determination that the AD and SCM Agreements resulted in an identical “obligation or prohibition” was probably the most significant rule of the case³¹ but one that was not necessary to trigger retaliatory duties. Whereas *US-1916 Act* clarified the underlying principles but did not delineate the boundaries of AD 18.1 and SCM 32.1, the declaration that their reach was identical removed this ambiguity.

The statement is useful, but is it non-binding dicta? In the WTO system, the question of the violation is separate from the amount of penalties. In our common law system, it makes sense for a court to limit its determination to the issues that decide the outcome and controversy before it so that the pronouncements that do not influence the outcome are not binding on future cases. In this case, the penalties are the same whether the CDSO violates only the AD Agreement or the SCM Agreement or both. But because the process of determining

²⁹ Appellate Report, *supra* note 21, ¶ 268.

³⁰ Emphasis added.

³¹ Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT’L & COMP. L. 317, 344 (2004).

penalties is separate from the determination of a violation by the “reasonable” time to correct the violation, it is not only permissible for the Appellate Body to make determinations that do not increase penalties, it is essential for it to make a complete determination of the State’s noncompliance. Only a full determination would particularize the requirements of subsequent corrective action. The Appellate Body’s pronouncement on the measures permitted by the SCM Agreement is just as binding as any other decision—meaning that while it is not “dicta,” it is still binding in that future disputes are legally required to follow it. In the absence of *stare decisis*, it will be followed in the future depending on the strength of its reasoning, which is why a full analysis was employed.

4. *Incentives and bad faith breach*

Although the United States did not prevail on the central question of “specific action,” the appeal eliminated the overly-broad holding of the DSB panel regarding the discretion of customs officials and the duty of good faith. The DSB panel was greatly influenced by the evidence that the companies that would not have supported anti-dumping petitions changed their position in order to qualify for potential Byrd Amendment distributions.³² Since GATT required that a majority of an affected domestic industry support an investigation, the DSB panel was concerned that the prospect of the CDSO distribution was distorting this requirement and found that the Amendment’s distributions were such powerful incentives that they defeated the “object and purpose” of GATT. The Appellate Body was critical of a resort to “object and purpose” when the plain language of the CDSO complied exactly with the industry representation requirements of GATT. While the DSB panel had gone so far as to state that the CDSO “in effect mandate[d] domestic producers to support [an] application,”³³ the Appellate Body reversed both this decision and the determination that the mere failure to implement the GATT obligations constituted bad faith. Even though the elimination of the unwarranted conclusions in the Panel Report did not decrease the “reasonable amount of time” allowed for compliance,³⁴ nor

³² Panel Report, *supra* note 10, ¶ 7.6; *cf.* Appellate Body Report, *supra* note 20, ¶¶ 284–85.

³³ Appellate Body Report, *supra* note 20, ¶ 293.

³⁴ “Factors external to the legislative process itself are of no relevance for the determination of the reasonable period of time for implementation.” Award of the

increase the amount of “damages” the complaining parties might receive,³⁵ the elimination of these overly inclusive principles may have been enough justification for an appeal even if the United States knew it would lose on the other issues.³⁶

The finding that the United States acted inconsistently with its GATT obligations triggers two results. First, AD 18.4 and SCM 32.5 provide that each signatory “shall take all necessary steps” to integrate GATT provisions into their own laws. This obligation applies to the laws in place at the time of signing the Uruguay Accord as well as subsequent laws. The United States broke its commitment in enacting the Byrd Amendment, and a U.S. court would not find any grounds to invalidate the finding. Second, the infringement of any obligation “is considered prima facie to constitute a case of nullification or impairment” of benefits that ought to accrue to other members.³⁷ That is to say, the violation itself triggers the relief without any demonstration of harm. Because the GATT framework provides significant tariff reductions on condition of mutual compliance, when a member’s rights to the benefits are “impaired,” it may likewise decline to extend the offending state the benefits of GATT membership—according to WTO DSU principles.

D. The Aftermath

The Appellate Body report clarified the GATT treaty for future cases. The final decision tightened the “specific action against” test, eliminated poorly reasoned sections of the Panel Report, and collapsed the analysis of the exclusivity of remedies under both the AD and SCM Agreements. Of course, the case was also a real case and controversy, although at the WTO a decision is not an executable court order that triggers relief. The WTO has no power to impose legislation on any member country, but it authorizes other countries to withhold

Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 24, WT/DS217/14, WT/DS234/22 (Jun. 13, 2003) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (follow “Article 21.3(c) Arbitration Report” hyperlink; then follow language code “E” hyperlink).

³⁵ AD Agreement, *supra* note 12, art. 22.6; Decision by the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 3.47, WT/DS217/ARB/EEC (Aug. 31, 2004) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm (follow “Recourse to Article 22.6 Arbitration Report” hyperlink; then follow language code “E” hyperlink).

³⁶ Bhala & Gantz, *supra* note 31, at 346–47.

³⁷ DSU art. 3.8.

the benefits of a treaty until the non-complying member assumes all its obligations. Once the CDSO was found to be inconsistent with U.S.'s treaty obligations, the United States then had to return to compliance within a "reasonable time" to avoid the benefit withholding.

If the United States failed to comply by December 27, 2003, the complaining parties could seek authorization to "suspend concessions" by charging the U.S. companies for the illegal CDSO distributions.³⁸ On August 31, 2004, another arbitral panel set seventy-two percent as the rate of the CDSO distributions that had come from their countries and that they could now charge the U.S. companies.³⁹ The countervailing duty is triggered by the presumption that a violation of an agreement is an "impairment or nullification," not by the actual calculation of damages. As trade negotiations failed to produce results in 2005, the EU, Canada, Japan, and Mexico, each obtained approval to collect countervailing duties on various products to motivate U.S. compliance.⁴⁰ These amounts vary by industry and destination but were estimated to amount to at least \$114 million for 2005.⁴¹

Throughout the process, the U.S.'s representatives have accepted the legitimacy of the WTO's authority in this dispute and the validity of its treaty obligation. The dispute involved the meaning of the trade agreement, not its validity or existence. Since the Appellate Body's finding, the United States has submitted regular reports to the DSB appraising the progress of various bills to repeal the CDSO as they advanced or failed through Congress.⁴² Each of these communications reiterated the U.S.'s intent to comply with the WTO and recognized

³⁸ Award of the Arbitrator, *supra* note 34, ¶ 83.

³⁹ Decision by the Arbitrator (Canada), *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 3.149, WT/DS234/ARB/CAN, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds234_e.htm (follow "Recourse to Article 22.6 Arbitration Report" hyperlink; then follow language code "E" hyperlinks); Decision by the Arbitrator (Mexico), *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 3.151, WT/DS234/ARB/MEX (Aug. 31, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds234_e.htm (follow "Recourse to Article 22.6 Arbitration Report" hyperlink; then follow language code "E" hyperlinks).

⁴⁰ Decision by the Arbitrator (Canada) ¶ 6.3.

⁴¹ Press Release, Consuming Industries Trade Action Coalition, CITAC Publishes 2005 'Byrd Amendment Millionaires Club;' Payouts Total \$226 Million in 2005, \$1.26 Billion Since 2001 (Dec. 12, 2005), http://www.citac.info/press/release/2005/12_12.php.

⁴² Addenda one to twenty-two to Status Report by the United States, *United States—Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/16, WT/DS234/24 (Jan. 13, 2004).

that it breached its international obligations. If a corporation took responsibility in this way by recognizing their duty and breach, it would have the effect of blood in the water, exciting a frenzy of claims by anyone harmed by the breach. However, the United States is a state actor in the realm of international trade where corporations have no standing and no exporter subject to the countervailing duties can sue there. May private domestic claims fail as well?

III. THE CDSO AND THE LAST-IN-TIME SUPREMACY CLAUSE

If a U.S. machinery manufacturer doing business in the EU called its attorney after the suspension of concessions was published on August 31, 2005, what would it have learned about the fifteen percent duty it would suddenly have to pay? Should it sue at the WTO to get it all reversed? Could it sue the ball-bearings producer across town because it received the CDSO distributions that triggered the duties? Could it sue the entire bearing industry for supporting the anti-dumping investigation? Should it sue the federal government, instead? Is this a taking, or a tax?

Heedless of the plight of harmed domestic industries, Congress did not repeal the CDSO until trading partners actually started charging countervailing duties. This appears to be a tacit acknowledgment that the CDSO was illegal—or at least ill-conceived—and as such the fact that the U.S. companies will be paying countervailing duties for years to come is an even greater incentive to sue.⁴³ However, if there is nowhere and no one to sue, the solutions must be purely political.

⁴³ The language in the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, § 7601(b) reads:

All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section [the part that repeals the CDSO], be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).

This means that putatively dumped goods imported on September 30, 2007, for example, will be subject to industry complaints as normal. If at the end of the many months of investigation and then negotiation, the treasury receives anti-dumping duties, it will still disperse half of the duties among the complaining U.S. companies according to the Byrd Amendment—even if it takes until early 2009, for example. This means that other countries will still be collecting countervailing duties from U.S. exports through 2008, and possibly beyond, regardless of the repeal on February 8, 2006.

The companies hit by retaliatory duties have a natural ally in the foreign companies subject to antidumping duties in the United States who see their payments handed to their competition. Foreign companies suspect that the prospect of receiving a cut of eventual antidumping duties entices the U.S. companies to initiate complaints against them. In addition to the cost (and harassment) of defending antidumping audits, when their U.S. competitors succeed, all those duties go towards making the U.S. companies more formidable competitors. A handful of foreign dumpers hit by the double force of the CDSO have sued, alleging that the procedure unconstitutionally transforms remedial antidumping duties into a punitive measure.⁴⁴ Unfortunately, the Court of International Trade's rejection of this argument creates a significant hurdle for a challenge by an "innocent" exporter.

A. The Treaty Power

The President and the Senate together have total control over the conduct of foreign affairs through treaties. The United States acceded to the Uruguay and Marrakesh accords by executive signature and the "advice and consent" of the Senate. In addition to the senate approval, GATT was implemented by federal statute.⁴⁵ The added endorsement of the House makes its application to domestic as well as international affairs clearer than most Article II treaties.

While the Constitution has little to say about how the United States behaves internationally, it certainly constrains government behavior at home, regardless of what a treaty may say. Treaties are agreements between states that may bear directly—even entirely—on foreign issues, but it is equally possible, and increasingly common, for international agreements to touch on domestic activities. For example, if the President agrees by treaty to limit factory emissions to certain amounts of sulfur compounds, then a government agency cannot license a factory that does not meet the requirements.⁴⁶ If it were to do so, the agency could be sued for the harm caused. Likewise, an

⁴⁴ *Huayin Foreign Trade Corp. v. United States*, 201 F. Supp. 2d 1351, 1362 (Ct. Int'l Trade 2002), *aff'd*, 322 F.3d 1369 (Fed. Cir. 2003).

⁴⁵ 19 U.S.C. §§ 2501–624 (1994). An exploration of self-executing and non-self-executing treaties is omitted in this note because of the clarity of the implementing language.

⁴⁶ This assumes, for the sake of simplicity, that the hypothetical treaty was an Article II treaty, it received Senate advice and consent, and the treaty was self-executing, or the enabling legislation followed.

individual hunter could be fined by a U.S. court under an international wildlife protection treaty even if U.S. law did not specifically protect the species hunted.⁴⁷ More correctly, the treaty *is* U.S. law. The Supremacy Clause of the Constitution provides that “the laws of the United States . . . and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”⁴⁸ It not only invalidates state laws that conflict with U.S. treaties,⁴⁹ but elevates treaties to the stature of federal law.

When the Supremacy Clause was conceived, treaties were evidently believed to be *superior* to federal statutes. As Thomas Jefferson wrote in 1790, “[a] treaty made by the President, with the concurrence of two-thirds of the Senate, is a law of the land, and a law of superior order, because it not only repeals past laws, but cannot itself be repealed by future ones.”⁵⁰ However, no global police force will ensure compliance with international law, which leaves the force of “interest and honor,”⁵¹ or the prospect of military force, against the state in breach. As the United States became less fearful of a military response to its noncompliance with treaties,⁵² the *Charming Betsy* decision⁵³ and the last-in-time canon allow the United States more

⁴⁷ See *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920) (holding that even though Congress did not have the power to regulate the protection of migratory birds, the same affect was legitimately achieved through treaty).

⁴⁸ U.S. CONST. art. VI, cl. 2.

⁴⁹ The obligatory reference is to *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), which laid to rest the belief that the peace treaty affirming debts with Great Britain was unenforceable because it was made by the Continental Congress, and, more to the point, established that the treaty overrode contrary subsequent state law.

⁵⁰ JOHN N. MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW 57 n.153 (2001) (citing THE JEFFERSONIAN ENCYCLOPEDIA 880 (John P. Foley ed., Fundk & Wagnalls Company, 1900)).

⁵¹ Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 AM. J. INT’L L. 313, 316 (2001) [hereinafter Vagts, *Observance and Breach*].

⁵² *Id.* at 327–28. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 492–93 (1998).

⁵³ The case that gave its name to the doctrine, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), is sufficiently unremarkable in itself that a footnote is enough, as the doctrine was then, and continues still as a common law principle. An American ship was sold in the Caribbean islands and then captured by French privateers. Because of the hostilities between France and the United States, an American privateer subsequently captured the vessel believing it to be in violation of a law that prohibited “commercial intercourse between the United States and France, and the dependencies thereof.” The American claimed the right of salvage under U.S. law but Justice Marshall deferred to the international law customs in awarding the

flexibility in disavowing the “law of nations,” or at least in avoiding their effect in domestic courts. By 1888, the Supremacy Clause meant only that “a treaty [was] placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by [the Constitution] to be the supreme law of the land, and no superior efficacy is given to either over the other.”⁵⁴ In 1889, the low water mark for the judicial enforcement of treaty observance followed with the *Chinese Exclusion Case*, where the Court held that the treaty was “the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress.”⁵⁵ Whereas Jefferson would have believed that complying with an international agreement was a matter of the “honor” of the President and the nation, and renegotiation would be required to change its effect, a hundred years later it was established that the later conflicting act superseded. Thus, in the *Chinese Exclusion Case*, a federal law excluding Chinese workers prevailed over the pre-existing treaty. But a subsequent 1894 treaty allowing workers to return in limited circumstances prevailed over the 1888 statute.⁵⁶

While it is clear that Congress can breach a treaty at its “pleasure,” the authority of treaties has not entirely decreased to that of legislative acts as Justice Field held in the *Chinese Exclusion Case*. When Congress enacts a statute in contradiction of a pre-existing law, the new statute typically acts as an amendment with the prior statute taking on a modified meaning. The inescapable analogy to contract principles illustrates why legislative treaty breach cannot be so fluid. In the treaty context, Congress acts as only one party to the “contract.” One party (Congress or another nation) may propose a modification to

proceeds of the sale to the prior owner. The frequently-cited language that encapsulates the doctrine is as follows:

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.

These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. at 118.

⁵⁴ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁵⁵ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (U.S. 1889).

⁵⁶ *Vagts*, *supra* note 51.

the treaty, and conduct itself in according the change, but the other party is not bound without its consent. Further, just as a breach does not annihilate a contract, a breach will not necessarily end a treaty.⁵⁷ Thus, the fact that “a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation.”⁵⁸ Courts still hold to the goal of giving effect to both an international agreement and a statute.⁵⁹ But in the event of a direct contradiction between the two, even though the *domestic* effect of an international obligation has been defeated by an act of Congress, the *international* obligation does not evaporate as it would if a treaty was only as binding as a legislative act. As Professor Drahozal expressed, “when Congress enacts a law overriding a provision of a treaty, the law may both eliminate the domestic effect of the treaty and violate international obligations under the treaty at the same time.”⁶⁰

This last-in-time construction has allowed Congress to deeply embarrass presidents and ambassadors.⁶¹ One of these cases, *Diggs v. Shultz*,⁶² raised the question of whether some international obligations were too important for Congress to override. Before *Shultz*, the Nixon administration had taken steps to ensure the United States’ compliance with a U.N. Security Council embargo against Southern Rhodesia’s racist government. The Byrd Amendment⁶³ of 1971 prevented the President from enforcing the embargo on chrome ore because of cold war tensions. The Court rejected the argument that, because of the stature of Security Council Resolutions Congress’s circumvention of the embargo was ineffective.⁶⁴ If the contravention of the agreements

⁵⁷ That is to say that treaty obligations are independent covenants—treaties differ from U.C.C. contract law in having no requirement for mutuality (among other significant differences). However, violation of treaty obligations may be considered material breach and entitle the other party(ies) to terminate the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/I_1_1969.pdf [hereinafter VCLT].

⁵⁸ Restatement (Third) of the Foreign Relations Law of the United States, *supra* note 7, at § 115(1)(b).

⁵⁹ See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143 (2005); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

⁶⁰ CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 163 (Jack Stark ed., 2004).

⁶¹ See *Vagts*, *supra* note 51, at 329–32.

⁶² 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

⁶³ Armed Forces, Appropriation Authorization of 1972, Pub. L. No. 92-156 § 503, 85 Stat. 423. This time it was Senator Harry Byrd of Virginia.

⁶⁴ *Diggs*, 470 F.2d at 467 n.4.

touching a Chapter VII Security Council resolution was not outside Congress' power, then breaching the antidumping agreements underpinning the WTO is likewise subject to Congress's "pleasure."

The United States' subordination of international obligations to domestic law (or politics) is not unique. With roots in British common law,⁶⁵ this subordination remains, nevertheless, directly at odds with the core principles of international law. The maxim, *pacta sunt servanda*, requires observance of agreements. In international law, an agreement is not to be made lightly, and other parties should expect that it will be observed unless they should have known that the agreement would be contrary to domestic law.⁶⁶ For example, any treaty partner should know that the President of the United States possesses no power under the Constitution to prevent the U.S. newspapers from criticizing that state because the First Amendment is known to be a fundamental restriction on government power. Well-known, fundamental aspects of a state's legal makeup excepted, the obligation to respect treaties transcends past *and* future domestic laws, in line with Jefferson's conception—and exactly as the United States expects its treaty partners to behave. The Byrd Amendment brings the two universes of law into alignment: domestic U.S. law and international law. But *pacta sunt servanda* means that outside that shadow, international treaty obligations continue undiminished.

In light of the historic status of international agreements, it is not surprising that U.S. courts have interposed a buffer between the rapidly shifting force of domestic legislation and the treaties. If the constitutionality of the CDSO requires courts to ignore the legal force of the GATT Anti-Dumping Agreement, domestic exporters harmed by it cannot rely on those international legal obligations in challenging it. In the WTO Appellate Body's analysis, the CDSO clearly violated the GATT; but under *Charming Betsy*, the analysis followed different standards. As expressed by the Restatement, the last-in-time rule applies "if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled."⁶⁷ This means that a court will try to give effect to

⁶⁵ Bradley, *supra* note 52, at 487–88.

⁶⁶ VCLT, *supra* note 57, arts. 27, 46 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.")

⁶⁷ Restatement (Third) of the Foreign Relations Law of the United States, *supra* note 7, § 115(1)(a). Since the Restatement's publication, courts have treated the "or" as "and;" both intent *and* irreconcilability seem required now.

both treaty and statute if possible, and looks for clear assurances from Congress that a contradiction is not inadvertent.

In the case of the 1971 Byrd Amendment, the D.C. Circuit found it abundantly clear from the legislative record that “no member of Congress voting on the measure was under any doubt about what was involved...it was as presented to the Congress...a measure that would make—and was intended to make—the United States a certain treaty violator.”⁶⁸

Of course, Congress is not always so unmistakably clear, and courts will traditionally strain to avoid finding “clear purpose” where possible.⁶⁹ Perhaps the high water mark of the use of the last-in-time rule occurred in *United States v. Palestine Liberation Organization*,⁷⁰ where Congress attempted to force the closure of the PLO’s observer mission to the United Nations. Under the Headquarter Agreement between the United States and the United Nations,⁷¹ the United States agreed not only to host the United Nations, but also to accommodate delegates. In 1974, over the U.S. objections, the United Nations extended observer status to the PLO.⁷² However, in 1988, Congress declared the PLO a threat to U.S. security and legislated the closure of all its offices.⁷³ While the court acknowledged that the Anti-Terrorism Act of 1988 had the “explicit purpose” of closing the PLO offices in the United States,⁷⁴ it took advantage of the complete lack of substantive debate regarding the act and construed that it could give effect to both the treaty and the act. The court gave great weight to the longstanding of the Headquarters Agreement and its centrality to the U.N. system. While recognizing that Congress had the power to breach such a treaty, it insisted on preserving the obligation unless the “power [to breach was] clearly and unequivocally exercised.”⁷⁵ The court gave

⁶⁸ *Diggs*, 470 F.2d at 466.

⁶⁹ *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

⁷⁰ *United States v. PLO*, 695 F. Supp. 1456 (D.N.Y. 1988).

⁷¹ Agreement Between the United States and the United Nations Regarding the Headquarters of the United Nations, Pub. L. No. 80-357, 61 Stat. 756 (1947), available at http://www.un.int/usa/host_hqs.htm; see also 22 USCS § 287 (2000).

⁷² *PLO*, 695 F. Supp. 1459.

⁷³ Whatever its effect, the law is still in force. 22 USCS § 5202 (2000).

⁷⁴ *PLO*, 695 F. Supp. at 1460.

⁷⁵ *Id.*, at 1465. While the “strong” clear statement rule seems justified by some language in the *Charming Betsy* line, such as in *United States v. Cook*, 288 U.S. 102, 120 (1933), the length the court went to in the *PLO* decision was labeled by one commentator as following the minority doctrine on intent. James Englert, *Congress*,

effect to both the treaty and the statute by holding that the Anti-Terrorism Act applied to any PLO offices in the United States not functioning under the Headquarter Agreement (for which, of course, there were none). Thus, despite the intended effect of the statute, this court held that U.S. law requires overt manifestation that Congress intends to override international obligations. *Charming Betsy* is referred to as the last-in-time rule, but a later act of Congress (such as the Anti-Terrorism Act) only displaces the domestic effect of international agreements when they unavoidably and intentionally conflict.

Just like the 1988 Anti-Terrorism Act, the CDSO avoided committee hearings. When courts look for a clear congressional statement, they will at least find that it is unclear to what degree Congress understood the contradiction between the bills and U.S. treaty obligations.⁷⁶ This lack of clarity allows—or requires—courts to construe the law to preserve the domestic effect of WTO obligations at the expense of the Byrd Amendment. The fact that the administration argued so thoroughly that the CDSO *was* in harmony with the Uruguay Round does not affect the analysis of congressional manifestation. Likewise, while the administration's subsequent statements of the United States' intention to comply with the WTO ruling⁷⁷ indicate that the United States recognizes that it violated its treaty obligations, the acknowledgement does not enter into the *Charming Betsy* analysis.

Inasmuch as *PLO* remains the current last-in-time doctrine,⁷⁸ under this “hallowed principle of American foreign relations law,”⁷⁹ the CDSO would not contradict the GATT. The Appellate Body's decision clearly held that the existence of the CDSO was a violation of

the PLO, the World Order and the Constitution: What's a Court to Do?, 57 U. CIN. L. REV. 1393, 1403–05 (1989).

⁷⁶ *PLO*, 695 F. Supp. at 1470–71. See also Englert, *supra* note 75, at 1404.

⁷⁷ See Addenda to Status Report by the United States, *supra* note 42.

⁷⁸ As distinguished in Section B.2, *infra*, there are contexts in which the Supreme Court has instead followed the line of cases descending from *Whitney v. Robertson*, 124 U.S. 190 (1888). See also Michael Franck, Note, *The Future of Judicial Internationalism: Charming Betsy, Medellín v. Dretke, and the Consular Rights Disputes*, 86 B.U. L. Rev. 515 (2006). However, such decisions as *Allegheny Lublum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004), *Roeder v. Iran*, 333 F.3d 228, 237 (D.C. Cir. 2003), and *Havana Club Holding, S.A. v. Galleon*, 203 F.3d 116, 125–26 (2d Cir. 2000) highlight the ongoing vitality of *PLO*'s reluctance to needlessly construe the abrogation of a treaty.

⁷⁹ Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L. L. 458, 459 (1998).

the U.S. commitments in the international realm. However, in the United States the absence of clear intent to violate the GATT means that the later-in-time action does not mechanically prevail. Just as in *PLO*, the senators could expect that the statute would have effect only to the extent the treaty did not govern.

This means that the exclusionary provision in the Uruguay Round enacting language in 19 U.S.C. § 2504 (2000) would therefore not be implicated. It provides that “[n]o provision of any trade agreement...which is in conflict with any statute of the United States shall be given effect under the laws of the United States.” Without clear statement of intent from Congress, there could be no “conflict” under § 2405.⁸⁰ Although the DSB Appellate Body eschewed legislative intent analysis,⁸¹ preferring the plain language approach, had legislative debate made it clear that the CDSO would conflict with WTO obligations, a clear violation would have arisen under both U.S. law and WTO policy. Because Congress attached the CDSO as a rider to the conference committee version of a must-pass agricultural appropriations bill, there was simply no opportunity to demonstrate the clear intent required under *PLO*.

Can the legislature unilaterally violate a treaty? Yes. Congress has the power. U.S. law recognizes that although the treaty obligation still exists, Congress can nevertheless defeat the domestic effect of the obligation. Did Congress violate the treaty by applying the CDSO to antidumping duties from WTO members? Certainly, but the obligation continues under U.S. law. Absent explicit legislative intent, the CDSO does not extinguish WTO agreements, at home or abroad. So even under the last-in-time rule, the CDSO exists parallel to the unabrogated WTO agreements and both have effect in the U.S. courts.

⁸⁰ The Supreme Court recently declined to conduct a conflict analysis to reach the opposite result in *Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 126 S. Ct 1211, 1224–25 (2006). The government’s assertion that U.S. drug enforcement treaties were important did not prevail over the U.S. statute’s built-in “compelling interest” standard.

⁸¹ The Appellate Body chided the DSB panel with its quotation from the Vienna Convention on the Law of Treaties: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Appellate Body Report, *supra* note 20, ¶ 281.

B. Possible Causes of Action

Non-states have no standing in international courts. The Statute of the International Court of Justice clearly provides that “only states may be parties in cases before the Court.”⁸² Likewise, in the WTO system, “only those Members that are parties...may participate in decisions or actions taken by the DSB,”⁸³ and only states may be “Members.” Although the law of state responsibility has long protected individual aliens, and individuals are capable of breaching their nation’s obligations to another state, traditionally, no mechanism allows an individual to invoke international law—the state must espouse the claim or answer for the violation. Thus, although the United Nations can respond to complaints against states from non-governmental organizations (on human rights issues), no international forum exists for an NGO—let alone an individual corporation—to seek redress under commercial international law.⁸⁴

Additionally, nations consent to claims by individual corporations through bilateral investment treaties. However, these treaties do not provide a forum for U.S. companies to sue the U.S. Government. Rather, corporations from one nation may only sue the other nation causing the harm. The EU, which is not a nation, has acted pursuant to the valid findings of an international legal body, so there is no cause of action against it. The U.S. companies have no international forum for their complaint, and ability to enforce any potential awards. Their only hope is U.S. law, whereby the CDSO is clearly a valid exercise of Congress’s commerce power.⁸⁵

The U.S. manufacturer subject to fifteen percent duties is crushed between the action of a domestically legal, albeit internationally illegal statute, and the undisputedly valid actions of the WTO. As the United States Treasury distributes legitimately collected antidumping duties to the industries affected by the dumping, the machine manufacturer is paying for the illegal “trade effect” through foreign taxes.

⁸² Stat. of the Int’l Ct. of J., June 26, 1945, 59 Stat. 1031, art. 3.

⁸³ DSU art. 2.1.

⁸⁴ Duties do not fall under human rights law, the other branch of international law that concerns individual’s rights. It is in this area that the first steps towards creating a private cause of action against states are being made. Even though the European Court of Human Rights has the ability to hear the claims of individuals against states and has power to enforce its findings, the difficulty of satisfying admissibility (which is standing plus stating a cause of action) means that few claims ever succeed.

⁸⁵ U.S. CONST. art. I, § 8; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

Section A demonstrated that the CDSO would only extinguish the domestic effect of international obligations if it were directly and deliberately in conflict with Congressional action. Since it does not supersede international law under the *PLO* standard, the CDSO must be reconciled with the broader international obligations. Just as the Anti-Terrorism Act of 1988 was confined to apply only to *PLO* missions other than the U.N.'s (where there were none), the CDSO would be logically confined to dispersing antidumping duties where it does not violate the AD and SCM Agreements,⁸⁶ i.e., when they are collected from non-WTO Members. This theory is bolstered by the recent decision in the Court of International Trade reading such a limitation as to NAFTA Members.

1. *Canadian Lumber v. United States*

Even though the WTO tribunals found that the incentives created by the CDSO did not *per se* violate AD and SCM agreements, domestic producers (and the trade law firms that represented them) certainly had a motive to bring dumping complaints against their foreign competitors. By 2002, the Department of Commerce found several Canadian industries were dumping on the U.S. market. Seeing millions of dollars paid to their U.S. competitors, the Canadian businesses brought *Canadian Lumber Trade Association v. United States* to block the application of the Byrd Amendment to Canadian goods based on the NAFTA implementation act and the Administrative Procedures Act.⁸⁷

⁸⁶ The DSB Appellate Body report called the Byrd Amendment an illegal incentive for companies to initiate antidumping complaints (*see supra* II.C.4). The elimination of this finding in the Appellate Body report makes reconciling WTO obligations and the CDSO much simpler. While the DSB Panel stated, "We find it difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the CDSOA measure," (Panel Report, *supra* note 10, at 8.6) the Appellate report merely "request[ed] the United States bring the CDSOA into conformity with its obligations" (Appellate Body Report, *supra* note 20, at 319). The restriction required by the *Charming Betsy* canon achieves this effect, preventing unauthorized specific action against dumping or subsidization.

⁸⁷ 25 F. Supp. 2d 1321 (Ct. Int'l Trade 2006). The time for appeal has not yet passed because a final judgment on remedy has not yet issued. *Id.* at 133–34. Because several billion dollars are still being held in special CDSO accounts, the repeal of the Byrd amendment will not likely discourage an appeal. There is a chance, however, that negotiations between the United States and Canada on the larger issue of the Department of Commerce's dumping finding, will settle the issue without the help of the Court of Appeals for the Federal Circuit. *Ontario Forest Prod. Ass'n v. United States*, 2006 Ct. Intl. Trade LEXIS 123 at *28.

Canada was a complaining party in the dispute before the WTO where they were the voice for Canadian companies who could not sue under the GATT AD Agreement themselves. NAFTA, on the other hand, requires member countries to grant foreign importers access to courts to directly contest adverse determinations. Therefore, although Canada joined the complaint, its status and interest were not identical to the Canadian producers.

On the merits, the Court of International Trade found in favor of the Canadian producers, not by invalidating the CDSO *in toto*, but by finding that it did not apply to the companies from NAFTA countries. This judicially mandated redaction operated the same as *Charming Betsy* acted in the *PLO* case in tailoring the CDSO's effect. Nevertheless, this was not a *Charming Betsy* decision, for that common law principle had been negotiated into NAFTA at § 1902(2)(a), which stated that an "amendment [to a NAFTA party's antidumping law or countervailing duty law] shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement." Accordingly, the doctrine was enacted in the United States as Section 408 of the NAFTA Implementation Act, 19 U.S.C. § 3438. It provides, "Any amendment enacted after [NAFTA] enters into force . . . to . . . the Tariff Act of 1930 (19 U.S.C. 1671 et seq.), or any successor statute . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment."

Due to the incorporation of these principles into the implementing language, the *Canadian Lumber* decision was a simpler express-language analysis than most *Charming Betsy* decisions. Instead of express-language serving simply as a guide⁸⁸ to legislative intent, the court held that § 408 required "magic words"⁸⁹ expressly including NAFTA parties in the CDSO. As such language was patently absent from the CDSO, the court concluded:

In sum, essentially, the Byrd Amendment converts what was just a tariff into a broader compensatory regime. Certainly, this change in the nature of the remedies available under the trade laws is something Section 408 is meant to foreclose as to Canadian and Mexican goods where Congress has not explicitly

⁸⁸ *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

⁸⁹ *Canadian Lumber*, 425 F. Supp. 2d at 1333–34.

stated an intent to change the statutory remedies as to Canada and Mexico.⁹⁰

Section 408 made the merits of *Canadian Lumber* quite clear, but even without it, the last-in-time rule should have led to the same result. That this provision was specially implemented (where, for example, the other elements of § 1902(2) are not) indicated that negotiators were not willing to rely on the common law to protect their rights.⁹¹ At the very least, *Canadian Lumber* provided a model remedy for foreign importers as well as domestic exporters harmed by retaliation, a model that many would like to see extended to WTO Members.

2. *Extending the exclusion to all WTO members*

Section 408 of the NAFTA Implementation Act—and its intent to prevent inadvertent impairment of the NAFTA partnership—applies to amendments, like the Byrd Amendment that changed antidumping and/or countervailing duty law after NAFTA’s enactment. In general, the Trade Agreements Act of 1979, 19 U.S.C. § 1904, represents the contrary presumption that “[n]o provision of any trade agreement approved by Congress under [the act] nor the application of any such provision to any person or circumstance, which is in *conflict* with any statute of the United States shall be given effect under the laws of the United States.”⁹² As this runs counter to the international law doctrine of *pacta sunt servanda* and the standard of observance the United States expects of its trading partners, this language appears out of place (and somewhat arrogant). However, because the *Charming Betsy* standard for conflict requires direct, even express, conflict before § 2504 should apply; most trade agreements are not affected.

In addition to the baseline standard of § 2504, both the NAFTA and Uruguay Round implementation statutes contain their own subordination clauses, § 3312(a) and § 3512(a), respectively. “No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is *inconsistent* with any law of

⁹⁰ *Id.* at 1370.

⁹¹ It is also possible that the doctrine was not common among the NAFTA parties so the United States’ inclusion of a statutory provision was merely a reiteration setting a good example.

⁹² 19 U.S.C. § 2504 (2000) (emphasis added).

the United States shall have effect.”⁹³ Even the substitution of the broader standard of “inconsistency” instead of “conflict” does not break the *Charming Betsy* analysis. Whereas the last-in-time rule (and § 2504) would presume inconsistencies were inadvertent oversights, perhaps the use of “inconsistent” suggests Congress’s expectation of greater flexibility to adjust the United States’ trade practice based on internal concerns and to be free from external restraints.⁹⁴ However, in the Court of International Trade’s opinion in *Canadian Lumber*, any distinction was lost and the court explained how to “reconcile” inconsistency: “[l]imit the reach of the Byrd Amendment to non-NAFTA goods.”⁹⁵

Canadian Lumber was an Administrative Procedure Act (APA) action to enjoin agency action inconsistent with statute. An APA claim brought by domestic importers would not fail on § 2504(a) or § 3512(a) if the court applied the *Charming Betsy* rule of interpretation. Nevertheless, the fact that the clash of a treaty and statute arose pursuant to a decision by an international tribunal added another layer to the analysis. Under international law, decisions from a tribunal designated to interpret treaty obligations are authoritative statements as to the meaning of treaty obligations,⁹⁶ just as national courts authoritatively interpret national statutes and constitutions.⁹⁷ Whereas bodies like the International Court of Justice are in the difficult position of dictating the conduct of sovereign states in highly

⁹³ 19 U.S.C. § 3312(a)(1) (2000) (emphasis added). The GATT version has one grammatical change: “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) (2000).

⁹⁴ *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (noting that trade laws are not exempt from the *Charming Betsy* principle).

⁹⁵ 425 F. Supp. 2d at 1370. The significance here is the willingness to resolve inconsistency instead of treating § 3312(a) as cutting off the court’s efforts to harmonize statute and treaty. In *Canadian Lumber*, the potential inconsistency was between § 408 (a rule of construction) and the Byrd Amendment (a substantive act, silent on construction). In the case of the Uruguay Agreement’s AD and CSM provisions with the Byrd Amendment, both are substantive. Nevertheless, the reasoning still holds because, arguably, the § 408 vs. Byrd clash is in how to give effect to the intentions of Congress. In both cases the court’s task is to determine whether there is sufficient indication that Congress expected their bill to contravene U.S. treaty obligations.

⁹⁶ *See, e.g.*, Statute of the International Court of Justice, *supra* note 7, art. 36(2)(a); U.N. CHARTER art. 94.

⁹⁷ It is also true—and this is the distinction with common law systems—that even ICJ opinions lack precedential force as to situations and states not party to a decision.

political situations,⁹⁸ the WTO dispute resolution panels and appellate bodies simply allow self-help suspension of concessions. Decisions are more practical to implement because the prevailing party always holds the reins.⁹⁹

Whatever status they have in international law, international tribunals weigh less in the U.S. jurisprudence than would logically follow from their authoritative role in defining treaty obligations. The United States is not alone¹⁰⁰ in allowing a disconnection between the effect of decisions on the international plane and the domestic force of those same decisions, but it has a reputation of dealing with this disconnection in a manner that is “confused, unsystematic, and ad hoc.”¹⁰¹ This is not because there is no black-letter standard, *Breard v. Greene* states that the U.S. courts “should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”¹⁰² In *Timken Company v. United States*,¹⁰³ when a foreign importer challenged the Department of Commerce’s dumping calculations after the WTO found a particular methodology contrary to the AD/SCM Agreements, the “respectful consideration” granted was very weak indeed. Yet, whereas *Timken’s* zeroing challenge came up against both statute and reasonable agency interpretation, a challenge to the CDSO after the WTO’s decision would not trigger the resistance that *Timken* met.

In *Timken*, the courts did not defer to WTO Appellate Body interpretation of the treaty, but instead on a distinguishable factor in the situation contemplated for domestic exporters under the CDSO. Prior to the WTO affirmatively finding that the United State’s practice of “zeroing”¹⁰⁴ was inconsistent with the GATT in *Timken*, the Court

⁹⁸ See Christina Tomuschat, *International Courts and Tribunals*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONALS LAW 1108, 1113 (R. Bernhardt ed, 1995).

⁹⁹ See DSU arts. 3(2), 19, 22.

¹⁰⁰ See generally Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405 (2006).

¹⁰¹ *Id.* at 413.

¹⁰² *Breard v. Greene*, 523 U.S. 371, 375 (1998) (overriding the ICJ’s interpretation of the Vienna Convention due to established U.S. due process provisions).

¹⁰³ 345 F.3d 1334 (Fed. Cir. 2004).

¹⁰⁴ “Zeroing” is shorthand for the practice of basing dumping findings on weighted-average dumping margins. The Department of Commerce treats as zero those transactions where a company’s (or industry’s) dumping margin was less than

of Appeals for the Federal Circuit upheld the practice as a reasonable interpretation of statute.¹⁰⁵ The Japanese importer had asserted a *Charming Betsy* claim on the plain language of the GATT combined with the WTO decision finding the EC's zeroing practice inconsistent with its AD/SMC Agreements.¹⁰⁶ As the decision was between the EC and India, the court found it significant that the WTO was not analyzing the U.S.'s practice. Thus, the WTO's analysis was not "sufficiently persuasive to find Commerce's practice unreasonable."¹⁰⁷

Timken seems to have inoculated the Department of Commerce from further challenges even after the WTO decisions in United States.¹⁰⁸ The Federal Circuit in *Corus Staal*¹⁰⁹ chose to read *Timken* as a repudiation of WTO's jurisdiction. Selectively quoting *Timken*, *Corus Staal* asserted definitively, "WTO decisions are not binding on the United States, much less this court."¹¹⁰ While the Court was of course correct in saying that "[n]either the GATT nor any enabling international agreement outlining compliance therewith (e.g., the [ADA Agreement]) trump[ed] domestic legislation," it ignored the last-in-time principles in relying on § 3512(a). So much so that the correct reason for dismissing the importer's arguments (for reasons discussed shortly), namely 19 U.S.C. § 3533(g), was merely an afterthought in a string cite.¹¹¹

In hitchhiking on its *Timken* decision, the Federal Circuit truncated its analysis and failed to ground itself in the "respectful consideration" standard.¹¹² The Supreme Court recently explained the rationale and meaning of that standard in terms of jurisdiction in *Sanchez-Llamas v.*

zero and makes its findings based only on the dumped goods. When applied, this technique inexorably results in a greater aggregate than if dumped transactions are offset by those transactions where there was no dumping.

¹⁰⁵ *Id.* at 1342.

¹⁰⁶ *Id.* at 1333–34. See Appellate Body Report, E.C.—*Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001).. .

¹⁰⁷ 354 F.3d at 1344.

¹⁰⁸ Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003); Final Dumping Determination On Softwood Lumber From Canada, WT/DS264/AB/R (Aug. 11, 2004).

¹⁰⁹ *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (frequently called *Corus Staal II*).

¹¹⁰ *Id.* at 1348 (internal citations omitted).

¹¹¹ See also *Timken*, 354 F.3d at 1345 (stopping its analysis before explaining § 3533 because it had already decided on *Chevron* principles § 3512(a)).

¹¹² See *Breard*, 523 U.S. at 371.

Oregon decision.¹¹³ Chief Justice Roberts’s majority opinion recited, “‘The judicial Power of the United States’ is ‘vested in one supreme Court . . . and . . . inferior courts,’ and that ‘power . . . extends to . . . treaties.’”¹¹⁴ Chief Justice Roberts further stated, “If treaties are to be given effect as federal law, determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department.”¹¹⁵ Given that the “one supreme court” endorsed *Charming Betsy*, Robert’s statement does not intend to displace international tribunals. Instead, Roberts’s statement simply means that until the Court repudiates the last-in-time principles, federal courts should give meaning to the law of nations unless directly contradicted by Congressional action.¹¹⁶ It is not a dereliction of the Constitutional duty to be influenced by courts that—by U.S. agreement—interpret the U.S. treaties. It is giving effect to a long standing federal doctrine that Congress has shown that it knows how to reconcile its legal obligations and override these obligations for domestic purposes.¹¹⁷ Rejecting international tribunals is not asserting the jurisdiction of the U.S. courts, but simply abandoning a domestic canon in the name of jingoism.

While it is understandable that “nationalist legal theorists are wary of ceding decision-making power to officials who are not accountable to the American electorate in the way envisaged by their vision of the Constitution,”¹¹⁸ *Charming Betsy* already deals with conflicting sovereignty by allowing Congress to override (when it is clear) the domestic effect of a treaty that is incompatible with U.S. law. Disdain for the encroachment of international tribunals is misplaced given this established, built-in safeguard, especially when the United States is

¹¹³ 126 S. Ct. 2669 (2006). Even though much of *Sanchez-Llamas* deals with the effect of a treaty on Oregon’s state practice, the analysis of the role of international tribunals is no different from and is more recent than the discussion in *Breard* and others.

¹¹⁴ *Id.* at 2864 (citing U.S. CONST. art. III §§ 1–2).

¹¹⁵ *Id.* (internal citations omitted).

¹¹⁶ There is no danger of, in the words of the Federal Circuit, an international decision being treated as “proxy for independent analysis.” *Cummins Inc. v. United States*, 454 F.3d 1361, 1366 (Fed. Cir. 2006).

¹¹⁷ Also see other cases in the long tradition of clear statement rules. *E.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Lockhart v. United States*, 546 U.S. 142 (2005) (Scalia, J., concurring); *Marcello v. Bonds*, 349 U.S. 302, 210 (1955); *Great N. R. Co. v. United States*, 208 U.S. 452, 465 (1908).

¹¹⁸ Rogoff, *supra* note 100, at 431.

already the dominant player at the negotiating table for any international treaty.¹¹⁹

Despite the Federal Circuit's eagerness to disregard foreign tribunals and Robert's posturing in *Sanchez-Llamas v. Oregon*, other elements of that opinion support honoring *Charming Betsy* and invalidating the Byrd Amendment. In deciding that "respectful consideration" of the tribunal (the ICJ) in *Sanchez-Llamas v. Oregon* allowed rejecting its decision, the Court was influenced by the nature of the remedies contemplated and the position taken by the executive on the agreement.¹²⁰ The Court observed that the ICJ's enforcement power came through the United Nations Security Council and thus "contemplate[d] quintessentially *international* remedies."¹²¹ Security Council enforcement, as it is tied up with geopolitical power brokering and collective state action, represents an extreme of the international relations spectrum. At another extreme are the transaction-by-transaction assessments of countervailing duties by the states that prevail in WTO disputes. Some WTO obligations are enforced abroad, and others play out, as NAFTA actions do, in domestic courts and before domestic administrative agencies. All this suggests that the obligations undertaken under the GATT contemplate the treatment of individual companies in the *national* system even though the obligation at issue in *Sanchez-Llamas*, the Vienna Convention on Consular Relations, contemplated a specific *optional* enforcement mechanism far removed from the police officers or even municipalities who implement Article 36(1)(c).¹²² Congress's simple ratification of

¹¹⁹ See generally John E. Noyes, *American Hegemony, U.S. Political Leaders, and General International Law*, 19 Conn. J. Int'l L. 293, 296 (2004); Jurgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 716 (2002) (putting the U.S. among dominant forces in global investment).

¹²⁰ *Sanchez-Llamas*, 126 S. Ct. at 2685.

¹²¹ *Id.* (emphasis in original).

¹²² That section provides as follows:

- (1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

* * *

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or

the Vienna Convention (even though it is deemed to be self-executing) and statutory implementation of the GATT indicate the vast differences between the two agreements. Whereas the Vienna Convention's posture cuts against honoring the ICJ's interpretation, the nature of GATT obligations weighs in favor of honoring WTO dispute settlement process in the U.S. courts.

In addition, the distinction between the executive's treatment of the two treaties weighs strongly in favor of weakening the CDSO. Whereas the Bush administration affirmatively repudiated the enforcement protocol to the Vienna Convention specifically to avoid ICJ interpretation, both the Clinton and Bush administrations criticized the Byrd Amendment. Administration attorneys repeatedly asserted their intention to comply with the WTO DSB decision and pledged to repeal the CDSO, which they eventually accomplished. "Respectful consideration" means much more in this instance because, "while courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."¹²³

Due to this affirmation that *Charming Betsy* still has vitality, we return to the internal limitations imposed by the implementation language to an APA suit to bring the interpretation of agency conduct in line with the United States' international obligations.¹²⁴ As alluded to above, 19 U.S.C. § 3533(g) represents exactly the type of language that overcomes the *Charming Betsy* presumption that Congress does not violate international agreements. The multi-tiered scheme makes clear Congress's intent to interrupt the interpretation of the treaty by the WTO dispute settlement system. The statute provides that the U.S.

detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

¹²³ The Court of International Trade observed the following in one of its *Corus Staal* decisions:

Had the Government appeared here saying it had lost in the WTO, with respect to this very administrative determination, and it had complied with the entire statutory framework, to the effect that it was reversing its position, even as to a past determination, then the court would have to consider what to do.

Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1300 (2005).

¹²⁴ Continued Dumping and Subsidy Offset, 19 C.F.R. § 159.61–64 (2005).

“practice may not be amended, rescinded, or otherwise modified in the implementation of” a WTO DSB report until the United States completed its own reexamination.¹²⁵ Section 3533(g)(1) sets up a lengthy review process, making it clear that the domestic effect of a WTO DSB decision is not automatic. The review process proceeds as follows: first, consultations between the United States Trade Representative (USTR), the agency, relevant congressional committees, and the private sector; then notice and comment, followed by publication of the modification and its explanation in the Federal Register; and finally another round of consultation between the USTR, agency, and relevant congressional committees regarding

¹²⁵ The statute reads:

§ 3533 Dispute settlement panels and procedures

* * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

19 U.S.C. § 3533 (2000).

implementation of the new determination. By the time *Corus Staal's* challenge of zeroing came before the Court of International Trade (CIT) again in 2005, this process had clearly started,¹²⁶ which indicated that the United States intended on complying with the GATT as interpreted by the DSB. Nevertheless, as the full process was incomplete, the CIT lacked the power to short-circuit it by enforcing the GATT over the statute. The statute was enacted with an understanding of treaty interpretation canons, and when it comes to the WTO, Congress knows how to interrupt those canons when it wishes.

Section 3533(g) likewise applies to the Department of Commerce and the CDSO, but whereas the calculation of dumping margins is the role of the Department of Commerce, which is shielded by § 3533, the International Trade Commission (ITC) plays a fundamental role in Byrd payments but is explicitly excluded from the scheme blocking the effect of DSB reports in § 3533(g)(4).¹²⁷ Instead, § 3538 applies specifically to the ITC's "administrative action following WTO panel reports" and allows for a *discretionary* reporting procedure triggered by the USTR. Although it structured § 3538 as an optional route, Congress did not provide for anything, as the restriction "may not be amended, rescinded, or otherwise modified" that applies to all other agencies. Thus, even though the ITC is just one link in the chain of Byrd distributions, if the ITC does not fulfill its role, the Byrd distributions cannot be made.¹²⁸ Whereas the barrier to implementing

¹²⁶ 387 F. Supp 2d. at 1299.

¹²⁷ The pertinent part of the § 3533's Dispute settlement panels and procedures reads:

(g) Requirements for agency action

* * *

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

19 U.S.C. § 3533(g)(4) (2000).

¹²⁸ The threshold questions for standing under the Administrative Procedure Act, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.) are whether (1) the U.S. exporter is injured in fact by the agency's illegal action, (2) their situation is in the "zone of interest" intended to be protected by the provision the agency has violated, and (3) the court can provide relief. *See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). While it has been long established that customs regulations fall under the APA, it is another matter for exporters to demonstrate that theirs is a class intended to be protected. *Elof Hansson, Inc. v. United States*, 43 Cust. Ct. 627 (1959) (including antidumping decisions within the scope of even the APA's

DSB reports by most agencies is to “ensure that any modifications to regulatory practice as well as statutory changes to comply with dispute settlement findings are made with the full knowledge of the Congress,”¹²⁹ Congress exerts less oversight upon the ITC¹³⁰ because of its special role in trade policy and negotiations.

Given that the Byrd amendment “ought never to be construed to violate the law of nations if any other possible construction remains,”¹³¹ courts could enjoin the ITC from continuing to cause the United States to violate the law of nations when the other possible construction demonstrated by *Canadian Lumber* remains.¹³²

Prior APA challenges based on WTO DSB reports in *Corus Staal* failed on two grounds: (1) the Federal Circuit’s affirmative finding that Department of Commerce’s practice demonstrated a reasonable application of the statute, was based on reasoning prior to the WTO DSB report; and (2) the language of § 3533(g) indicated that a DSB report could not modify agency practice. Neither of those elements applies to the CDSO. On the strength of all the legal and policy reasons stated above, the Byrd Amendment should be construed to not apply to WTO members.

procedural requirements) *rev’d on other grounds* 296 F.2d 779 (C.C.P.A. 1960) (leaving the Customs Court’s reasoning untouched but finding the contention could not be raised for the first time on appeal). The Byrd Amendment is concerned about protecting domestic markets even at the expense of the class of U.S. exporters. Far from being a protected class, U.S. exporters are a class whose interests were strikingly absent from the Byrd Amendment’s zone of protection. While the supremacy clause certainly does nothing to exclude the theoretical possibility of a private cause of action based on international law, courts are reluctant to give weight to the claims. Specifically, just as criminal statutes do not usually create a private cause of action, the existence of a fully binding international law may simply not have been intended to be privately enforceable. Given the existence of the WTO’s own enforcement mechanism, U.S. courts would not permit private companies to enforce WTO obligations themselves.

¹²⁹ H.R. REP. NO 103-826, pt. 1, at 33 (1994). 19 U.S.C. § 3512(d) (2000) states that this report, the statement of administrative action, “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act [the Uruguay Round Agreement Act] in any judicial proceeding in which a question arises concerning such interpretation or application.”

¹³⁰ See 19 U.S.C. § 3004 (2000) (the president makes changes to the HTSUS by proclamation—not through Congressional ratification); 19 U.S.C. § 3005 (2000) (the ITC makes recommendations on changes to HTSUS to the President while ensuring harmony with negotiations and the GATT); S. REP. NO. 103-412, at 26 (1994) (linking ITC policies to USTR positions rather than Congress’).

¹³¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹³² See *supra* pp. 29–30.

3. *The Takings clause*

The vitality of *Charming Betsy* jurisprudence is all the more important given the difficulty the innocent domestic exporters experience in gaining protection under constitutional arguments based on takings or illegitimate taxation. The takings clause might be implicated because the regulatory effect of the CDSO is to take money from certain U.S. companies, like the hypothetical machinery manufacturer/exporter, and give it to other U.S. companies threatened by foreign dumping, like the bearing industry. It is arguably unimportant that the money passes through, the EU, for example. By virtue of the Byrd Amendment, every time bearing manufacturers receive payouts from EU anti-dumping duties, machinery manufacturers must pay a proportional amount. As soon as the distributions stop, the retaliatory duties will stop as well.¹³³ Thus, causation is both direct and proportional: the Byrd tax goes into effect as soon as the U.S. Treasury distributes antidumping duties charged to a company from a WTO member.

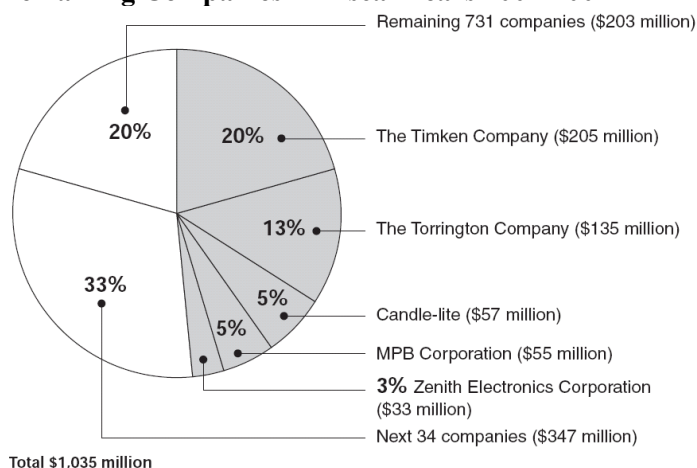
What would be a taking if the federal government performed it directly is no less a taking because it is carried out—pursuant to legislative authority—by another entity. The problem is not *who* is empowered to conduct the taking, but whether it meets the Fifth Amendment’s conditions. The taking must be for “public use” and “just compensation” and it must be paid to the property owner for the loss.¹³⁴ In the case of the CDSO, a successful claim on either condition would suffice, for if the CDSO were to fail on “public use” ground, the taking would be enjoined,¹³⁵ and were it to pass as a “public use,” then the taking would be compensable. Compensation would be equivalent to the readily ascertainable duty, and the effect of the taking would be eliminated.

¹³³ “In this case, the level of suspension of concessions will automatically depend on the amount of disbursements made under the CDSOA in a given year. If this amount decreases, so will the level of suspension of concessions or other obligations that the Requesting Parties will be entitled to impose. If no disbursements are made, the level of suspension will have to be ‘zero.’” Recourse to Arbitration by the United States, *United States–Continued Dumping and Subsidy Offset Act of 2000*, ¶ 4.24, WT/DS217/ARB/EEC (August 31, 2004); DSU art. 22.8.

¹³⁴ *E.g.*, *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003).

¹³⁵ *E.g.*, *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991) (reinforcing that a taking for purely private use is unconstitutional no matter the amount of just compensation given).

CDSO Payments to the Top Five Companies and to the Remaining Companies in Fiscal Years 2001-2004¹³⁶



In September 2005, the Government Accountability Office (GOA) analyzed the effect of the CDSO in light of the retaliatory duties. One of the report's major criticisms¹³⁷ stated that although 770 companies received some portion of the one billion dollars of the Byrd Amendment distributions at the date of the report, the "payments ha[d] been highly concentrated in a few companies."¹³⁸ The fact that the distributions remained so concentrated among so few companies and industries calls into question whether the Byrd Amendment is for "public use." The GOA's graph illustrates the geometric decline in the portion of distributions.¹³⁹ While innocent manufacturers have not

¹³⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, INTERNATIONAL TRADE: ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT 29, GAO-05-979 (2005).

¹³⁷ Another criticism was the administrative monster that the Department created to process accusations of dumping and then evaluate statements of "qualifying expenditure." If the Canadian Softwood Lumber dispute pending at the CIT is sustained, the (illegal) distribution of billions of dollars of treasury money will be an unprecedented burden—first on the treasury, and then on innocent companies exporting to Canada who will have to make up that amount in retaliatory payments.

¹³⁸ ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT, *supra* note 136, at 28.

¹³⁹ Timken (who received 20% of distributions on the graph) acquired the Torrington Company (13%) in 2003, Timken-About Us, <http://www.timken.com/aboutus/history/>, and is the parent company MPB (5%) for a combined total of 38%.

sued to stop enforcement of the Byrd Amendment, many eligible distribution recipients have sued for a greater share of the largesse.¹⁴⁰ Nevertheless, the Fifth Amendment's "public use" requirement is not based on any formula, and, in this case, does not require a whole industry to benefit.¹⁴¹ The focus is the scope of applicability, not the actual short term benefit. A taking does not "fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person."¹⁴² Given that "public use" is broadly construed in deference to legislators, and as nothing indicates that benefit aims a "particular class of identifiable individuals," the Byrd Amendment is unlikely to conflict with the "public use" requirement, however skewed the payouts are.¹⁴³

Without the possibility of enjoining the taking for lack of public purpose, the companies subject to retaliatory duties must seek compensation for the appropriation of their property. The Byrd Amendment is a "shifting of an economic opportunity from the owner to third parties," which is the essence of a taking.¹⁴⁴ In the case of machinery exports to the EU, the shifting is at the rate of fifteen percent, but some dairy products exported to Mexico, for example, are subject to a thirty percent duty;¹⁴⁵ at that rate, exportation costs become such a burden that the interference eclipses the benefits of sale and harms the industry.¹⁴⁶

ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT, *supra* note 136, at 29 n.39.

¹⁴⁰ See, e.g., *Cathedral Candle Co. v. United States*, 400 F.3d 1352 (2005).

¹⁴¹ *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923) ("it is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use").

¹⁴² *United States v. Boyle*, 52 F. Supp. 906 (D. Ohio 1943).

¹⁴³ *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁴⁴ William P. Barr et al., *The Gild that is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 438 (2005).

¹⁴⁵ Decreto por el que se modifica temporalmente el artículo 1 del Decreto por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, par las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de EE.UU. [Decreto Temporarily Modifying Import Duties for Goods Originating in the U.S.A.], Diario Oficial de la Federación [D.O.], art. 1, 17 de agosto de 2005 (Mex.) available at http://www.gobernacion.gob.mx/dof/2005/agosto/dof_17-08-2005.pdf.

¹⁴⁶ Press Release, Consuming Industries Trade Action Coalition, Mexico to Impose \$21 Million in Retaliatory Tariffs Against U.S. Exports; CITAC Says Byrd

The problem with a Fifth Amendment challenge is that because the subject of the taking is merchandise in commerce, the putative taking is manifested in transaction costs on one end and subsidies on the other. Even though the effect is clearly “a law that takes property from A and gives it to B,”¹⁴⁷ the transfer is accomplished by taking a fractional value of property in a way that looks like a tax. While the takings clause would render useless a law requiring a (machinery) company to write a check to another (bearing) company, Congress could accomplish the same thing if it broke the transfer into two steps with the taxing power. The taxing power trumps the takings clause when the two seem to overlap because the taxing power would be meaningless if the collection of taxes was a compensable taking, or essentially, “the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away.”¹⁴⁸

4. *The power to tax is subject to very weak standards*

Congress clearly possesses the power to either incentivize or discourage behavior through taxation. For example, if it desires to discourage tobacco consumption, it can increase the applicable tax rate. Congress could choose to make smoking prohibitively expensive without exceeding its discretion. The maxim from *McCullough* is “the power to tax involves the power to destroy.”¹⁴⁹ Likewise, if it chooses to grant special incentives to any industry, Congress has great latitude within its power to act for the “general welfare.” However, the arbitrary way U.S. exporters are subjected to “Byrd tax” combined with the tiny portion of companies that receive distributions might mean that it does not advance the general welfare. Nevertheless, the legal standard is very low; only the clearest corruption would exceed the taxing and spending power:

[the dominance of the taxing power over the Fifth Amendment] would have no application in a case where[,] although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as

Amendment Must Be Repealed (Aug. 18, 2005), http://www.citac.info/press/release/2005/08_18.php.

¹⁴⁷ *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

¹⁴⁸ *Brushaber v. Union P.R. Co.*, 240 U.S. 1, 24 (1916).

¹⁴⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819).

to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.¹⁵⁰

While the companies paying retaliatory duties may feel subjected to “gross and patent inequality,” the Byrd Amendment only has to meet a rational standard. As explained in part III.B.1., it even meets the higher requirements of “public use.”

Arguably, allowing other governments’ legislators to choose which U.S. industries pay for the Byrd Amendment subsidies is the apogee of caprice. However, what looks like a capricious and arbitrary exertion of the taxing power is clearly acceptable in light of the *Charming Betsy* canon of treaty reconciliation because, under the *PLO* standard, a court would look for unequivocal intent to repudiate a treaty, and it would give effect to both the U.S. treaty obligation and the Byrd Amendment. Regarding the treaty obligation, the only mechanism an exporter subject to retaliatory duties possesses to challenge the Byrd distributions is to follow the *Canadian Lumber* model and seek an injunction against the distributions from WTO members under the APA. To the degree that penalties involve the WTO and foreign governments, a court must give effect to the United States’ acceptance of WTO mechanisms and leave its treaty obligation intact. If courts ignore the policies of *Charming Betsy*, innocent exporters can never prevail against what is facially a clear exercise of commerce power, and what is in substance an unassailable exercise of the taxing power.

IV. CONCLUSION

Innocent exporters are trapped between international law and U.S. law.¹⁵¹ Thus, if courts overextend *Sanchez-Llamas* and other decisions in that vein by turning their backs on *Charming Betsy*, the only forum

¹⁵⁰ *Brushaber*, 240 U.S. at 24–25.

¹⁵¹ “[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; . . . the propriety of the exercise of that power is not open to judicial inquiry.” *United States v. Pink*, 315 U.S. 203, 222–23 (1942). *See also Baker v. Carr*, 369 U.S. 186, 217 (1962).

for innocent exporters penalized by the CDSO subsidies will be Congress. As the CDSO distributions increase, and whatever the Appellate report found about incentives¹⁵² all predictions say they must,¹⁵³ so will the retaliatory payments charged to innocent exporters. Whether or not exporters could get relief from courts, the WTO hopes that they will convince U.S. legislators to stop letting other governments take from *A* so that Congress can give to *B*. As the effect of the determination by the WTO Appellate body that the CDSO violated international agreements is not controlled by the doctrines in *Sanchez-Llamas*, innocent exporters should be able to rely on a resuscitation of the traditional last-in-time rules to invalidate the effect of the CDSO. The insertion of the sunset provision underlines the inequity of the scheme, so exporters should press an APA claim to force the modification of the enforcement regulations as they otherwise would not have a remedy under either international or domestic law.

¹⁵² Appellate Report, *supra* note 21, ¶¶ 286–88.

¹⁵³ *E.g.*, ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT, *supra* note 136, at 45.