Deference to Administrative Agencies in Interpreting Treaties: Chevron, Charming Betsy, and Global Decisionmaking

Catherine E Sweetser
Deference to Administrative Agencies in Interpreting Treaties: Chevron, Charming Betsy, and Global Decisionmaking

Catherine E. Sweetser*

Introduction................................................................................................................................... 2

I. How Should Courts Reconcile the Congressional Intent to Respect International Law with the Congressional Intent to Delegate Lawmaking Authority to Agencies ................. 3
   A. The Charming Betsy Canon................................................................................................. 3
   B. Deference to Administrative Agencies in Domestic Law ............................................... 5

II. Does International Law Encourage Deference to Administrative Agencies? ............. 8
   A. Do International Rules of Treaty Interpretation Implicitly or Explicitly Instruct Courts to Defer to the Executive? .................................................................................. 10
   B. Do Principles of General International Law Instruct Courts to Defer to the Executive? ................................................................................................................................ 14

III. Charming Betsy Can Be Used at Step One of Chevron; It is a Non-Delegation Canon Appropriately Used to Determine the Meaning of the Statute........................................... 19
   A. Charming Betsy After Mead: Charming Betsy May Be Applied At Either Step of Chevron, But Has Not Been Applied in the Mead Analysis......................................................... 19
   B. Nondelegation Canons Can Influence the Application of Chevron Deference even in Formal Adjudication or Notice and Comment Rulemaking........................................... 20
   C. Charming Betsy as a Nondelegation Canon .................................................................... 21
   D. Charming Betsy Should Be Applied at Step One of Chevron ........................................ 23

IV. Deference When an International Agency Is Involved: As in the Domestic Context of Multiple Agencies, Courts Should Examine Whether Congress Intends Deference to the International Agency as Well................................................................. 25
   A. The Trade Example: Engaging With and Rewarding Other Adjudicative Actors. ..... 26
   B. International Law and Agency Deference in the Context of Immigration .................... 33
   C. Two Options for Incorporating International Institutions: Deference to Multiple Agencies, or Charming Betsy as a Non-delegation Canon......................................................... 38

V. Global Administrative Law and the Role of International Institutions: Influencing International Decisions Through the Use of Charming Betsy .................................................. 42
   A. International Institutions Can Be Given Great Power Under A Particular Treaty Regime................................................................................................................................. 42
   B. Can Deference Help National Actors Influence International Bodies? ......................... 43
   C. Monitoring the Publicness Of International Decisions: Courts, Legislatures, or Executive Agencies? ............................................................................................................... 47

* LL.M., New York University, 2010; J.D., New York University, 2008. Thank you to Richard Stewart for supervising this project, and to Alexandra Khrebtukova, Christen Broecker, and Bryant Walker Smith for their invaluable feedback.
Introduction

A major concern underlying whether national courts should use international law is whether doing so is anti-democratic; in other words, whether a measure of democratic accountability is lost when judges examine the behavior and opinions of international institutions. In the domestic administrative context, however, review by domestic courts is considered a way of holding domestic agencies accountable to the law as created by Congress, even when courts find that Congress intended them to defer to national agencies. Thus, theoretically, review by domestic courts could increase the accountability of administrative agencies.

This Article examines how national courts in the United States should deal with agency interpretations of international treaties. The increasing use of treaties means that courts are increasingly forced to look for the proper balance between deference to administrative agencies and the canon that statutes should be interpreted so as to comply with international obligations, also known as the Charming Betsy canon. Under Chevron deference, a court defers to an agency interpretation where it believes that Congress when passing a statute intended to delegate lawmaking power to the agency. When an agency produces its own interpretation of a treaty, it is not clear that courts should defer to domestic agencies. The Charming Betsy canon assumes that Congress also has an interest in complying with international norms and in binding the United States to follow international rules. The problem of reconciling the Congressional intent to avoid violations of international law with the Congressional intent to delegate lawmaking authority has arisen in the context of refugees, liability of air carriers, extradition, environmental regulation, and most often in the context of international trade.

Courts facing agency interpretation of treaties or implementing statutes have four potential options: not to consider the international regime or decision at all, to apply Chevron deference and use Charming Betsy to either interpret the statute or to determine whether the agency interpretation is reasonable, to apply Skidmore deference only (again, possibly influenced by Charming Betsy), or to interpret the statute or treaty itself without deferring to the agency, using the Charming Betsy canon as a guiding principle. This Article concludes that it is appropriate to apply Chevron deference while using Charming Betsy in interpreting the statute. Conflicting interpretations by international institutions may be taken into account in the process.

1 See, e.g., INS v. Aguirre-Aguirre, 119 S.Ct. 1439 (1999) (holding that the UNHCR handbook is not a binding source of international law); Barrera-Echavarria v. Rison, 44 F. 3d 1441, 1445 (9th Cir. 1995) (holding that customary international law obligations were not relevant in Marielito cases: “Because the Attorney General’s construction of the relevant statutory provisions is reasonable and Congress has not acted to restrict detention authority despite being well aware of executive practice, we have little difficulty concluding that Barrera’s continuing detention is authorized by statute.”).

2 See, e.g., El Al Israel Airlines v. Tseng, 119 S. Ct. 662, 671 (1999) (“Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.”).

3 See, e.g., Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000)(deferring to State Department and the Department of Justice’s Office of International Affairs).


5 See infra Part III.
Part I discusses the use of *Charming Betsy* in general and the constitutional framework of foreign affairs. It examines the goals of a clear statement framework and points out that Congressional intent is relevant where treaties have been ratified, particularly in the trade and immigration contexts. As both *Charming Betsy* and *Chevron* speak to Congressional intent, they are appropriate tools for interpretation of treaties and implementing statutes. Part II discusses international law perspectives on deference and executive control, concluding that nothing in international law requires a court to defer to a domestic agency in interpreting international law or precludes the use of *Charming Betsy*. Part III sets out the appropriate use of *Charming Betsy* in the agency framework, arguing that it should be used at “Step One”, where the court determines the meaning of the treaty or its implementing statute, although it may not make a great deal of difference in the ultimate outcome of the case whether it is used at Step One or Step Two. Part IV looks more deeply at cases where international agencies conflict with domestic agencies in trade and immigration. It notes that where a conflict arises, courts could either apply the multiple agency framework found in the domestic context or they could use the international interpretations under the rubric of *Charming Betsy*. Finally, Part V discusses the way that domestic courts can influence international adjudication by evaluating the *publicness* of agency decisions. Because courts are more likely to persuade other adjudicative actors, this Article concludes that allowing courts to engage with and reward persuasive international interpretations could actually increase U.S. influence abroad. Because the rubric of *Charming Betsy* is more permissive than the multiple agency framework—it engages with adjudicative agencies, while the multiple agency framework gives priority only to international rulemaking, *Charming Betsy* is the appropriate interpretive rule.

The courts have the power and ability to examine international decisions in detail and to come to their own conclusion about the content of international law. Moreover, Congress should be sensitive to this policy concern when drafting new legislation. Rather than foreclose court examination of international law and international adjudicative decisions, Congress should recognize that courts are uniquely suited to evaluating the publicness of international and domestic agencies and to balancing interpretations of international law.

I. How Should Courts Reconcile the Congressional Intent to Respect International Law with the Congressional Intent to Delegate Lawmaking Authority to Agencies

A. The *Charming Betsy* Canon

The *Charming Betsy* canon of interpretation instructs federal courts to construe statutes to avoid conflict with international law. The canon is applied regularly by the federal courts. Perhaps the most famous case of *Charming Betsy* interpretation is *United States v. Palestine Liberation Organization*, where the court explicitly required Congress to state in so many words that they wished to violate a prior international treaty when passing legislation. In that case, the statute (and the Attorney General’s reading of the statute) was intended to preclude the

---

6 Murray v. The Schooner *Charming Betsy*, 6 U.S. 64, 118 (1804) (“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.”)


maintenance of a PLO Observer mission at the United Nations. 9 Although the court in that case acknowledged that it did not have the power to set international policy, it maintained that the need for a clear statement justified some violence to the text, and cited a long line of other cases which had similarly construed text broadly so as to reconcile it with international law. 11 The imposition of a clear statement rule in _Palestinian Liberation Organization_ was in line with other canons of clear statement, where Congress is required to address an issue head on rather than dodging a question. 12 Scholars often talk about clear statement rules as “forcing Congress to make what the court feels are important policy choices”; clear statement rules are a trigger for increased deliberation. 13 The Supreme Court has also recognized clear statement rules as “facilitat[ing] a dialogue” between the court and Congress and prompting an “informed legislative choice.” 14

This substantive canon may operate in practice as blocking the ability of Congress to act, however. Requiring specificity of Congress increases the cost of passing legislation that has an impact on international interests. By emphasizing prior commitments Congress has made over the text of the current enactment, the judiciary asks Congress whether they really want to breach an international law norm. _Charming Betsy_ makes it more difficult for Congress to violate international law. The _Charming Betsy_ canon may be seen as protecting against democratic deficits that keep the majority’s interest in complying with international law from being realized in legislation. 15 The short-sighted nature of electoral democracy may skew policy choices away from the long-term interests of the constituency in international cooperation. 16 Or it may be seen as providing a space for international interests that are not represented in the political process; cosmopolitan theorists argue for the “undesirability of disregard for certain actors in decision-making.” 17 In line with this concern for everyone’s interests, courts can address the legitimacy deficits posed by regulatory responses to problems outside national boundaries. 18

The _Charming Betsy_ canon could also, however, be seen as the court deferring to Congressional intent. There is a presumption that Congress did not intend to violate international law unless they explicitly examine the international law at hand and state clearly that they so intend. This collective intent not to violate international law is a fiction, but so is any collective intent, whether or not embodied in text; the court looks at a multi-member body and imposes on them one unified intent based on the court’s reading of the text. The _Charming

---

9 _Id._ at 1460.
10 _Id._ at 1462.
11 _Id._ at 1468–71.
16 The generally short-term perspective of politicians, if not empirically verified, is at least a widely-held belief. See, _e.g._, JARED DIAMOND, _COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED_ 522 (2006) (discussing short-term thinking of elected politicians).
18 _Id._ at 6.
Betsy canon may be seen not just as an obstacle to Congressional enactment or a guide to better (more informed) decisionmaking, but as a way of protecting the Congressional interest in preserving the international law it has ratified.

The view of the Charming Betsy canon as protecting Congressional intent is heightened in the agency context. When an administrative agency is interpreting international law, Congress does not solely have an interest in delegating power to the agency to interpret that law. There is also a Congressional interest in ensuring that the United States respect its international commitments.

B. Deference to Administrative Agencies in Domestic Law

There are two basic forms of deference to administrative agencies in the United States. The first is Chevron, which mandates that if the statute is ambiguous and the agency has interpreted the treaty reasonably, the agency’s reasonable interpretation should control regardless of whether the court would have construed the statute differently on its own. Under Skidmore deference, in contrast, the agency must persuade the court that its interpretation is correct using “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Skidmore is a substantially less deferential standard than Chevron.

The case used today to determine whether the Chevron or Skidmore standard of deference applies is Mead. Mead specified that the level of deference must be based on Congressional intent to delegate the authority to make law to the agency. and subsequent cases used level of process to evaluate congressional intent. The more formal the procedures provided for in the statute, the more deference to which the agency was entitled.

Some commentators have argued that the Mead case elaborated a more detailed inquiry into congressional intent to delegate interpretive authority, using the level of process required of the agency as persuasive only. Mead restored judicial power to decide whether Chevron or Skidmore deference was appropriate. Other commenters, such as Adrian Vermuele, argue that Mead gives judges too much flexibility; they argue that rather than allowing judges to look to

---

24 Vermeule, supra note 22, at 352.
25 United States v. Mead Corp., 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”)(emphasis added).
26 Lucius B. Lau, Agency Interpretations of the Statute After Mead With a Special Emphasis on the Antidumping and Countervailing Duty Laws, 12 FED. CIR. B.J. 223, 237 (2002) (“This increased effort, however, results in a level of judicial review that corresponds to Congress’ expectations--those agency pronouncements supported by the greatest amount of delegated authority receive the greatest deference and those agency pronouncements supported by the least amount of delegated authority (and the least amount of persuasive power) are viewed by the court with ‘near indifference.’ In this manner, Mead achieves an admirable balance between the agencies and the courts.”).
intent, the *Mead* inquiry should focus only on process. On its face, however, *Mead* asks judges to evaluate from the statutory scheme whether Congress expects the agency to act with the force of law.

Congressional intent is at the heart of deference to administrative agencies. John Hart Ely objected to the idea that Congress could choose to avoid difficult decisions; but courts have found that their role is to decide when Congress has in fact made that choice and to uphold that choice in giving the agency the power to interpret statutes. Seen through the lens of the judiciary as opposed to the political branches, the delegation of lawmaking authority operates to displace the judiciary’s power to interpret statutory text. The question is to what extent that delegation should also operate to displace the judiciary’s power to interpret treaties.

Administrative law questions raise delicate questions of the constitutional separation of powers. In any case where the judiciary is evaluating the respective powers of Congress (the original statute or treaty) and the Executive (the agency interpretation), the balance of power between all three branches will be called into question. This Part will examine whether courts have sufficient constitutional justification to regulate the interpretation of treaties, to the extent of imposing their own interpretation on a reluctant agency.

In treaty interpretation, courts historically do not explicitly give *Chevron* deference but instead use the framework of “great weight.” The first scholar to introduce the concept of *Chevron* deference into treaty interpretation was Curtis A. Bradley, who proposed that *Chevron* deference cover all executive submissions to courts in the area of foreign affairs. Bradley envisioned *Chevron* deference as occupying a “middle of the road” position between a perspective that argued for enforcing the “rule of law”—giving courts complete control over interpretation—or abdicating the judicial function in favor of executive interpretation of norms. The *Chevron* doctrine assumes that lawmaking authority rests with Congress and is delegated to the agency. By focusing on Congressional “specific[ity] in its enactments” and intent in passing statutes or ratifying treaties, Bradley suggests that using *Chevron* to limit deference to agencies in international law “may actually reduce Executive power over time.”

*Chevron* deference is often applied in the context of statutes implementing international law by giving agencies the power to enforce it. Many foreign affairs decisions take place in the context of statutes which Congress intended to implement international regimes. For example, the Customs Act, 19 U.S.C. §1977, is used to regulate trade in accordance with prior treaties such as the GATT and the Uruguay Round. In the immigration context, the Immigration and Nationality Act implements the Convention on the Status of Refugees.

---

28 *Mead*, 533 U.S. at 229 (“Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law . . . .”).
29 **JOHN HART ELY, DEMOCRACY AND DISTRUST** 133 (1980).
31 *See generally* Bradley, *supra* note 7.
32 *Id.* at 650–51.
33 *Id.*
34 *Id.* at 674.
35 Timken Co. v. United States, 354 F.3d 1334, 1339-1340 (Fed. Cir. 2004); *see also* infra part II.
36 *See infra* notes 242–248 and accompanying text.
The *Charming Betsy* canon, used in the framework of *Chevron* deference, encourages courts to interpret statutes so as to limit violations of international law. At times, this requirement can mean a countermajoritarian result, as the court applies a clear statement rule to legislation that Congress has passed. It rests on a foundation of Congressional intent, however, assuming an intent to comply with international law when passing statutes. The countermajoritarian result of this philosophy can be justified in accordance with John Hart Ely’s philosophy, discussed below in Part I.C.2. The judiciary should apply *Chevron* deference in order to preserve the allocation of foreign affairs powers between Congress and the executive.

*Chevron* deference is appropriate in the context of treaty interpretation under the United States Constitution, because Congress and the Executive have been accorded different roles in foreign affairs. Congress is in charge of ratifying and implementing treaties. Even in the foreign affairs realm, the judiciary must preserve the balance of powers between the political branches. Second, this Part points out that treaty and statutory interpretation have been recognized as purely legal questions in the province of the judiciary. Despite certain decisions to the contrary, the judiciary has the competence to discern Congressional intent and ensure that agencies are abiding by a reasonable interpretation of the relevant treaty or statute in the area of foreign affairs.

The first question in evaluating deference to administrative agencies in cases of international law is to determine whether Congress or the Executive should be considered dominant in that area. As Judge Edwards pointed out in a recent concurrence outlining the political question doctrine, a major function of the courts is to govern the allocation of powers between different constitutional branches. In cases of *Chevron* or *Mead* deference, the general principle is that Congress should be the dominant actor and is the one delegating powers to the Executive branch. If the executive here has inherent authority in foreign affairs, however, *Chevron* deference may not be the proper framework. The framework of “great weight,” often used in foreign relation cases to avoid examining even the reasonableness of a statute, may be the appropriate tool.

Cases which concern “exclusive” executive authority will be dismissed before trial on political question grounds. But as *Baker v. Carr* pointed out, not all cases involving foreign policy are political questions. The question is then whether the political nature of foreign relations should prompt the court to apply greater deference. In fact, the D.C. Circuit has previously conflated the political question doctrine and the appropriate level of deference to administrative agencies.

The text of the Constitution is the starting point for courts when determining whether a case is a political question and whether the case deserves “great weight” deference; the Constitution also allocates powers between the political branches. Congress has power over “Commerce with foreign nations”, defining and punishing “piracies and felonies on the high seas, and offenses against the law of nations,” regulation of the armed forces, naturalization, and

---

37 Zivotofsky v. Secretary of State, 571 F.3d 1227, 1235 (D.C. Cir. 2009).
39 *Id.* at 1228 (majority op.).
41 Hwang v. Japan, 413 F.3d 45 (D.C. Cir. 2005).
42 *Baker v. Carr*, 369 U.S. at 217 (holding that the first factor in the political question doctrine is whether the question is textually committed to the political branches in the Constitution).
declarations of war and letters of marque and reprisal. The President has a number of foreign affairs powers: the commander-in-chief power over the armed forces, the power to conclude treaties with the advice and consent of the Senate, the power to appoint ambassadors and other diplomats with the advice and consent of the Senate, and the power to receive foreign ambassadors. The powers are thus divided among the branches in line with their basic competences. The powers of regulation, of defining law, and of regulating entry to the country are given to Congress; the powers of appointment, enforcement and negotiation are given to the Executive. One area often seen as exclusively in the power of the Executive, for example, is the recognition of foreign governments.

The question this Article is concerned with, however, are questions constitutionally allocated to Congress, and governed by treaties. In the context of trade, it is the most obvious that Congress has constitutionally allocated decisionmaking power. Congress has a specific constitutional mandate to regulate “Foreign Commerce.” There is no question that trade regulation and negotiations are squarely within Congressional power under the U.S. Constitution. Thus, a focus on Congressional intent under Mead is particularly appropriate in trade cases.

Congress does not have a specific textual power regarding immigration, besides the provision which gives Congress power over naturalization. Congressional powers in this area are instead amalgamated from various other provisions, including the foreign commerce clause which gives Congress the power to regulate trade. Such provisions include the migration and importation clause, the foreign affairs power, and an inherent power incident to sovereignty read into the Constitution in the Chinese Exclusion Case.

In treaty interpretation, the treaty power is explicitly allocated to Congress. As in other areas of law, the lawmaking power remains with the legislative branch. Even where the President was the primary negotiator or is more informed about foreign affairs than Congress, the constitution ultimately allocates the power of ratifying treaties to the Senate. It is Congress’ decision whether to delegate lawmaking power—the power of treaty interpretation—to the executive. As discussed below, the laws of treaty interpretation internationally do not belie the idea that treaty ratification and rules promulgated under treaties are lawmaking functions, not exclusively executive functions.

II. Does International Law Encourage Deference to Administrative Agencies?

International law is an important source of law for United States courts, and its implications for interpretive methodology should not be ignored. If international law instructs courts to defer to the executive, Charming Betsy may in fact be an inappropriate tool to use in the face of contrary executive interpretation. If deference to domestic bodies is part of international interpretation, courts should not overrule the executive based on the persuasiveness of international bodies’ interpretations. But as this section will discuss, there is no international

---

45 Zivotofsky, 571 F.3d at 1231; Baker v. Carr, 346 U.S. at 211–12.
46 US Constitution, Article II sec. 8.
48 The executive may have more inherent authority over interpretations of customary international law, which is created by actions of national executives. Nonetheless, this Article is concerned only with treaties and treaty interpretation.
49 See Bradley, supra note 7, at 688 (“[B]ecause of practical necessity and executive branch expertise, Congress may need to delegate especially broad foreign affairs power to the executive.”).
law analog to *Chevron*. With the minor exception of one provision in the GATT Anti-Dumping Agreement, deference to administrative agencies remains an American, not international, idea.

As discussed in the preceding section, treaties are part of the supreme law of the land in the United States. Under the Supremacy Clause, they have equal status to federal laws, subject only to the latest-in-time rule. They can be incorporated into US law as self-executing, or as non-self-executing obligations which fall within the *Charming Betsy* canon of interpretation. The incorporation of treaties into domestic law raises important questions as to the relationship between the executive and the legislature.

Many scholars hypothesize that international law tightens executive control and constrains legislative options. It is axiomatic in international law that domestic law may not excuse a breach of an existing treaty obligation. Commentators have long noted that “[a] treaty . . . once made has created new rules of international law which are *ipso facto* binding on the parties.” Moreover, the federal State will be held responsible for any action by local actors. These factors encourage national courts to interpret international law deferentially.

An argument can be made that the discretion and control conferred on the executive by international law argues for court deference to the executive in interpreting that law. There is a (contested) distinction between “obligation of conduct” and “obligation of result”, and people have traditionally interpreted sovereignty as requiring only an obligation of result and not of conduct. In the modern era, “good faith” requirements, frequently used in investment and trade law, and structural injunctions, used in litigating economic and social rights, belie this idea past focus on only results and not conduct. Nonetheless, there is an idea in international law that the state is responsible on the international level for meeting its obligations, but that international law can have nothing to say about the methods the state uses to meet those obligations.

---

50 U.S. Constitution, Art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).


U.S. courts have often taken this maxim as support for the proposition that international law does not give the judiciary a mandate to police violations of international law. 55 In the European Union, the European Court of Justice held that courts should not look to reciprocity in deciding if direct effect should be used within a particular jurisdiction, because there is a margin of appreciation for legal systems in choosing whether to require implementing legislation. 56 This margin of appreciation has been seen as a right of courts to require their own procedures in the U.S., even in the face of conflicting international decisions. In Breard, the Supreme Court wrote:

> it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention ‘shall be exercised in conformity with the laws and regulations of the receiving State,’ provided that ‘said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.’ Article 36(2).

Although the VCLT specifies that the state will be held to account once ratification takes place, domestic courts have seen the international margin of appreciation for implementation as granting liberty to courts to defer to other domestic authorities and their requirements as to specific channels and procedures for individual invocation of international rights. Thus, the court in both Breard and Medellín held that federal courts are powerless to affect the states’ implementation of international law; state courts had the final say, in the absence of Congressional action, on whether to relax their own procedural default rules. 58

Does international law itself have anything to say about whether national courts should defer to national or international agencies in their interpretation of treaties? This section examines whether the rules of treaty interpretation themselves confer discretion and power on the executive. It also examines whether the rules of general international law instruct courts to defer to the executive. It then discusses the way in which national actors can constrain decisionmaking by international bodies, in particular the WTO. It concludes that international law does not mandate deference to the executive and should not be used as support for deference.

A. Do International Rules of Treaty Interpretation Implicitly or Explicitly Instruct Courts to Defer to the Executive?

58 Id. at 378 (“It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard’s execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.”); Medellín v. Texas, 128 S. Ct. 1346, 1362–63 (2008)(expressing concern about expansion of judicial power); Sanchez-Llamas v. Oregon, 548 U.S. 331, 347 (2006) (“But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”).
Treaty interpretation is the process of determining the meaning that treaty text should have in the context of a particular case. A treaty is defined in the Vienna Convention on the Law of Treaties as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Treaties thus have a broader meaning in international law than they do in U.S. domestic law. Although U.S. courts distinguish between treaties, which need Senate ratification, and congressional-executive or pure executive agreements, in international law all of the above agreements would constitute treaties.

In the United States, treaty interpretation follows customary international law rules, as the United States has not ratified the Vienna Convention on the Law of Treaties. U.S. courts continue to look to the travaux as a primary means of interpreting the text. U.S. courts do, however, traditionally use teleological interpretation in the context of treaties, even when they do not specifically cite the VCLT. They invoke Art. 31 and Art. 32 of the Vienna Convention, although often without any discussion of whether these provisions do in fact constitute customary international law.

This section explores whether national courts are correct in assuming that the rules of treaty interpretation confer a certain amount of administrative discretion on the executive branch vis-à-vis other branches. It concludes that, in fact, the current rules of treaty interpretation do give the executive flexibility and discretion, but that it does not do so explicitly and that courts are not thereby bound to defer for lack of remedies.

1. An Emphasis on Context and Purpose Counteracts Domestic Pulls Toward Deference.

Teleological interpretation of international agreements can limit deference where the agency interpretation is contrary to the purpose of the treaty. Restricting agency interpretation by the purpose of protecting individual rights may fit in well with U.S. constitutional law, which encourages greater restrictions on agencies where their interpretation narrows individual rights. International law does not preclude limiting deference where individual rights are at stake. An emphasis on context can also allow courts to look at foreign sources and to reach a conclusion about the international meaning of the text of the treaty. Nonetheless, ultimately, the flexibility given to courts by rules of treaty interpretation that depend on context and purpose does give courts the flexibility to defer to the executive if they so choose.

The Vienna Convention on the Law of Treaties sets out the rules of treaty interpretation in Articles 31 and 32. The basic rule is that “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

62 Frankowska, supra note 61, at 334–35.
63 Id. at 339–341.
64 Id. at 307–08; 387.
65 VCLT, supra note 60, Art. 31–32. Although the quality of these principles of “rules” is contested; some argue that they are purely methodological and should not be viewed as hierarchical or part of customary international law. Jan Klabbers, The Invisible College, http://opiniojuris.org/2009/03/03/theinvisible-college/. Nonetheless, U.S. courts have applied them as customary international law. Frankowska, supra note 61.
in the light of its object and purpose.”66 The purpose can be ascertained from the text, the preamble, the annexes, and any other agreement concluded between the parties related to the treaty.67 Unlike in interpretation of domestic U.S. law, object and purpose ascertained from the text is of primary importance for interpretation; it is not limited to clarification of ambiguities, but is used to ascertain what the text means in the first instance. As well, intent is not necessarily found in the negotiating history. The travaux préparatoires (preparatory work) of the treaty can be used only as a supplementary means when the text is ambiguous or leads to an absurd result.68 Nonetheless, most international lawyers research and use the travaux in litigating their cases.69

The Vienna Convention on the Law of Treaties encourages the use of context and purpose over pure textual or historical interpretation. Jan Klabbers has suggested that this emphasis is more useful in international law because the national court must interpret the law in terms of a different political community than it usually refers to; the international community of drafters, rather than the national political community.70 Michael Kirsch has argued that, at least in the tax context, following the purpose of the treaty argues for increased deference to interpretive declarations made by the Treasury Department.71 As the treaties are published, updated clarifications and interpretations by the executive are necessary as tax evaders discover loopholes faster than parties can renegotiate treaties to plug those loopholes. Because treaties are negotiated by a broader and more linguistically diverse community, and are difficult to renegotiate, dynamic interpretation in light of context and purpose is more appropriate in international law than in domestic law.

The flexibility bestowed on courts to interpret international law by the customary rules codified in the VCLT may create space for national courts and national actors to defy the executive.72 International law becomes an additional source which national courts can use to constrain executive action that has not been ratified by the legislature.73 Teleological interpretation, in the cases noted by Benvenisti, becomes a tool to protect individual rights.

In the United States, however, such use of international law to constrain executive action is rare. Although courts often construe statutes so as to conform to international obligations under the Charming Betsy rule, they rarely strike down executive action altogether, more often ratifying it even where they limit it.74 In fact, U.S. courts often construe international obligations so as to comport with the executive’s position.75 In so doing, they cite the provisions of

---

66 VCLT, supra note 60, Art 31(1).
67 VCLT, supra note 60, Art. 31(2).
68 Travaux may also be used to confirm the meaning even when the text is not ambiguous. However, on the face of the convention, it seems as though one cannot use the travaux to conflict with the clear meaning of the text. VCLT, supra note 60, Art. 32.
69 Jan Klabbers, Interpretation as a Continuation of Politics by Other Means, http://opiniojuris.org/2009/03/02/continuation/
70 Jan Klabbers, The Invisible College, http://opiniojuris.org/2009/03/03/the-invisible-college/
71 See infra note 287 and accompanying text.
72 Some commentators have insisted that the VCLT is much more flexible than its earlier counterparts when it comes to giving courts discretion to interpret treaties using a variety of sources. See, e.g., Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 VA. J. INT’L L. 281, 341–52 (1982).
75 The trade cases provide a potent example of this. See, e.g., Federal Mogul Corporation v. United States, 63 F.3d 1572, 1582 (Fed. Cir. 1995) (citing Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983)) (holding that foreign policy considerations warrant judicial deference to the
international law which provide a margin of appreciation for domestic implementation. As discussed above, this hesitancy by courts is misguided in the context of treaty interpretation. The rules of treaty interpretation clearly instruct courts to look to the purpose of the treaty and to examine textual meaning in the context of the international community.

2. The Role of National Courts in Providing Post-Ratification Practice May Encourage Courts to Defer.

Do the international rules of treaty interpretation give a different role to national courts in interpreting international regimes as opposed to domestic legislation? At the international level, national courts do not have the power to nullify a country’s acceptance of a treaty. Conforti, in a proposal reminiscent of civil law, has theorized that national courts cannot make international law that is generally applicable but can declare a treaty inapplicable in a particular case, if the decision is tied closely to the factual context. Part of the reluctance of international bodies and international scholars to look at national court decisions in deciding whether a treaty is binding is the low reputation that national courts have for independence internationally. Even in the United States, which prides itself on the independence of its judiciary, commentators have suggested that executive deference is the biggest factor in treaty interpretation and most accurately predicts the outcome of cases.

National courts may, however, be able to influence the interpretation of a treaty through their decisions. Under the Vienna Convention on the Law of Treaties, both national and international courts should take into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Although a single country’s courts may not be enough to change the international meaning of the treaty, national courts provide important post-ratification practice in implementation of the treaty. For this reason some commentators have insisted that the VCLT is much more flexible than its

---

76 See, e.g., Footwear Distributors and Retailers of America v. United States, 852 F. Supp. 1078, 1095 (C.I.T. 1994) (finding that under international law, implementation was left up to the political branches). Where any mode of implementation is permissible, United States courts will find that they have no specific law to implement and that the implementation must be done politically.


78 Id. at 90, 99.

79 Frankowska, supra note 61, at 282.


81 Art. 31(3)(b).

82 Conforti, supra note 77, at 107–08. Although a single national court’s interpretation may not be sufficient, if the majority of signatories to a treaty interpret it in a particular way, that subsequent practice may be used to establish the parties’ intent. Post-ratification practice, such as national court decisions, is considered similar to the “context” of the treaty. VCLT, supra note 60, Art. 31.
earlier counterparts when it comes to giving courts discretion to interpret treaties using a variety of sources.  

This ability to create post-ratification practice may lead to an increased legislative role for national courts in the international arena. On the one hand, one might see this as increased power given to national courts, which would lead to reduced deference to the executive; national courts could see themselves as powerful actors which are meant to play a role in establishing treaty interpretation. In the United States, however, the ability of national courts to affect interpretation of agreements leads to increased deference so that the country can speak with “one voice”. As courts do not wish to undermine the executive’s control over foreign policy, the ability of national courts to provide post-ratification practice encourages national courts to defer.  

It is clear, however, that such reluctance stems from the constitutional and domestic law considerations examined in the first section. Given that under international law, national courts can provide post-ratification practice, American judges feel that the constitution and domestic law and policy considerations encourage them to defer. Nonetheless, the rules of treaty interpretation themselves do not instuct national judges to defer; if anything, it allocates power to them, and gives them an increased role in determining the meaning of the treaty.

B. Do Principles of General International Law Instruct Courts to Defer to the Executive?

In the excerpt from Breard discussed above, the court did not simply conclude that the rules of treaty interpretation precluded the court from interpreting international law independently of the executive. It also referred to the principles of general international law. This Part will examine whether general principles of international law, such as sovereignty and state responsibility, indicate a preference under international law for deference to the executive.

1. Sovereignty Does Not Provide a Rationale for Deference From National Courts to National Executives

Some scholars argue that deference by courts or adjudicators to the government is inherent in the international law principle of state sovereignty. Governments contest the application of international law at the domestic level by arguing that their right to make decisions within their own territory precludes such application. European institutions grant a margin of appreciation to states in their formulation of law and policy. Even in the trade context, where states litigate against states, deference to the state taking traditional regulatory action may be seen as deference to state sovereignty. Some have argued for such deference to local values and community norms in international institutions, following principles of subsidiarity in interpretation.

83 Frankowska, supra note 61, at 341–52.
84 See supra note 121.
86 Roger P. Alford, Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body, 45 COLUM. J. TRANSNAT’L L. 196, 202 (2006-07) (“[T]he margin of appreciation is an interpretive device accepted as an international norm appropriate for use by particular international tribunals.”).
Nonetheless, sovereignty is an essentially contested concept in modern international law. Some have argued that sovereignty today applies only insofar as states are fulfilling their obligations under international law. If that is a credible claim, deference in interpreting those obligations can scarcely be justified on the basis of sovereignty.

Although sovereignty may implicate the principle that international law should not overly limit regulatory flexibility, international law does not intentionally shift the power between branches. Although international courts are instructed to defer to local governments, they can defer to both executives and courts. The principles of margin of appreciation and subsidiarity do not provide any normative stance on whether local courts or local political actors should have the final say on the interpretation of law.

2. The Law of State Responsibility Has Also Been Used as a Rationale to Centralize Decisionmaking Power in Foreign Policy.

Courts have used the fact that the executive is solely responsible for negotiating agreements and committing the country to a course of action as a rationale for deferring to the executive. The reputation for deference by American courts to executive actors stems from American judicial reluctance to conceive of judges as international actors. They are hesitant to order the executive either to submit to or terminate an international treaty, or to submit a dispute for arbitration. Part of this hesitation may be the strict rules of state responsibility, which hold the state liable for violations of international law regardless of whether internal law prevents compliance.

The VCLT empowers the executive by allowing use of the travaux and by limiting the effect on international law of failure to comply with internal law. Nonetheless, although these structural considerations favor the executive, there is no explicit mandate for deference. If anything, the ability of the executive to commit the country instructs courts to hold the executive to their commitments.

The executive controls negotiation and commitment of the country to international law obligations, although the latest-in-time rule in the United States does give Congress some power.

92 United States v. Palestine Liberation Organization, 695 F. Supp. 1456, 1463 (S.D.N.Y. 1988) (“[T]he ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide.”); Goldwater v. Carter, 444 U.S. 996, 996-97 (1979) (holding that the President does not require the advice and consent of the Senate to terminate a treaty); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 602 (“the question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts”) (1889); Made in the USA Found. v. United States, 242 F.3d 1300, 1305 (11th Cir. 2001).
In the United States, Congress is taken into account in the creation of international law, as legislative ratification is necessary (unless a pure executive agreement is used). Yet executive actors alone conduct negotiations, and even after the negotiations often exert control over the travaux that may be used to interpret treaties. The executive has power over negotiation, although it usually takes the subsequent preferences of the legislature that must ratify and implement the treaty into account. Congress does not have the same control in the ratification of a treaty as it does in the creation of a new law, as the executive negotiates the details with other actors and Congress is then expected to vote on the provisions of the already-negotiated treaty (although Congress does have the power to append reservations).

Many international law scholars feel that it is important for national courts to “model their approach on that of international judges” and thus to “seek the international meaning of the legal terms” present in treaties. In the international context, treaty interpretation is generally dictated by the Vienna Convention on the Law of Treaties, which focuses on the objective intent of the parties. U.S. courts do focus on the intent of the parties to the treaty, but they often concentrate on the intent of U.S. officials and lawmakers to the exclusion of other parties, and “rely more heavily on drafting history than would an international court.” This focus on the travaux may strengthen executive interpretations of the meaning of the law, although it is balanced out by the judicial use of legislative history from Senate ratification.

The VCLT favors honoring executive commitments. Under the VCLT, Senate ratification of treaties does not appear to be a law of fundamental importance for the purpose of Art. 46; the executive can thus bind the country to treaties internationally without obtaining legislative approval. The Senate refused to ratify the VCLT because it insisted that its advice and consent was a law of “fundamental importance” under Art. 46, a position the executive could not endorse. Congressional-executive agreements and sole executive agreements continue to allow the executive to get around the strict provisions of the Constitution and create treaties for VCLT purposes. Anti-internationalists and members of minority parties, among others, have insisted that the Senate two-thirds rule is key to “American principles of law and democratic governance.” Nonetheless, the Senate ratification rule no longer seems to have the status of a

---

93 Criddle, supra note 90, at 454.
94 CONFORTI, supra note 77, at 107.
95 Id. at 103.
97 Frankowska, supra note 61, at 297–99.
98 Id. The number of executive agreements has increased in recent years; during the 1990s, 300 to 400 executive agreements were signed per year. Id. at 56–57. Executive agreements are still less than 15% of the international agreements entered into by the United States. Id. at 60.
99 John R. Bolton & John Yoo, Restore the Senate’s Treaty Power, N.Y. TIMES, Jan. 5, 2009, at A21. Yoo has elsewhere argued that the congressional-executive agreement is more important in areas entailing domestic legislation, as it incorporates House and not just Senate input. John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 844-845 (“Establishing a process in which the House's prerogatives over domestic legislation are preserved by the congressional-executive agreement provides yet another security for popular sovereignty.”).
“rule of fundamental importance” in U.S. law. 100 Even a unilateral declaration can be binding under international law and thus taken into account in U.S. courts. 101

Another provision of the Vienna Convention on the Law of Treaties that may seem to tilt toward executive control is Article 18, which says that once the executive signs a treaty the country is under an obligation not to defeat the object and purpose of the treaty. 102 It remains unclear whether Article 18 applies in the United States as a matter of customary international law. 103

The fact that the executive is in charge of negotiation and commitment at the international level does not in and of itself mean that the structure of international law favors executive control. Although provisions like VCLT Art. 18 and the principle of formation of unilateral declarations indicate that executive action alone can commit a country to a course of action, courts are responsible for ensuring that the executive complies with its own commitments. The law of state responsibility has no explicit instructions directing national courts to defer to the executive as the primary actor in the international realm.

100 This point is demonstrated by the widespread use of executive agreements discussed above in notes 98–39.
101 The court when finding a unilateral declaration by the President in the context of NAFTA found that that declaration was the only relevant one for causation; subsequent agency action was controlled by the declaration. See, e.g., Dept. of Transportation v. Public Citizen, 541 U. S. 752, 766, 770 (2004).
102 VCLT, supra note 60, Art. 18. The text reads:

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

103 The State Department at the time of submitting the Vienna Convention on the Law of Treaties said that Art. 18 was in fact customary international law, while several professors have argued that Article 18 goes beyond the traditional good faith requirement. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 319–23 (1985). In three of the cases where it has been brought up by litigants, it was not found necessary to decide the issue to decide the case. United States v. Jho, 465 F. Supp. 2d 618, 631 (E.D. Tex. 2006) (holding that UNCLOS is binding as customary international law and thus Art. 18 is irrelevant); Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 373 (2d Cir. N.Y. 2004) (“We decline to address the merits of that argument. The argument is “deemed waived. . . .”); United States v. Royal Caribbean Cruises, 11 F. Supp. 2d 1358, 1374 (S.D. Fla. 1998) (ruling that UNCLOS does not contain a private right of action and was not violated to avoid deciding the Art. 18 claim).

Only one court, the District of Puerto Rico, has found that Article 18 is applicable. The court in that case erroneously cited Article 19 (reservations) instead of Article 18 (obligation not to defeat the object and purpose).

Matters of pollution by foreign vessels within the territorial sea of the United States are governed by UNCLOS. Although the treaty arising from the convention is currently pending ratification before the Senate, it nevertheless carries the weight of law from the date of its submission by the President to the Senate. See Article 19 of the Vienna Convention on the Law of Treaties. The submission of the treaty to the Senate expresses to the international community the United States' ultimate intention to be bound by the pact. Pending a treaty's rejection or ratification by the Senate under Article 18 of the Vienna Convention, the United States is bound to uphold the purpose and principles of the agreement to which the executive branch has tentatively made the United States a party.

United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155, 159 (D.P.R. 1997). Even there, however, the court did not find Article 18 applicable on signature, only once the treaty has been submitted to the Senate for ratification and until the Senate officially rejects the treaty, implying that the signature provision does not constitute customary international law. Id.
3. The Anti-Dumping Regime Explicitly Provides for Deference, Which Supports the Proposition that General International Law Does Not.

Although, as seen above, international law principles do not explicitly provide for deference to national agencies, Art. 17.6 of the Anti-Dumping Agreement arguably was an attempt by states to introduce *Chevron*-like deference into the international realm. First, on the facts, the contracting parties recognized that national governments have an informational advantage on factual determinations; thus, Art. 17.6 of the Anti-Dumping Agreement provides that the WTO shall defer to national governments on the facts as long as those government determinations are “proper”, “unbiased”, and “objective”. The WTO does have procedures for hearing expert evidence. In the *Shrimp-Turtle* case, the Appellate Body convened a panel of marine biologists as an “expert review group” to evaluate the environmental interests at stake. Nonetheless, the facts are largely meant to be left to domestic administrative determination.

As regards legal interpretation, Art. 17.6 provides that the Appellate Body should defer to any “permissible” interpretation. The Appellate Body has interpreted “permissible” narrowly, however, taking a teleological approach to interpretation and striking down administrative methods, like zeroing, which do not further the perceived *telos* of free trade. This interpretation of 17.6 has opened it to criticism by American courts and commentators. Controlling for other factors, and across various subjects within the trade regime, the WTO Appellate Body has evinced a systematic tendency to strike down trade restraints rather than deferring to regulations by states or accepting Respondents’ interpretations of the text.

In a specialized treaty regime, it is perfectly possible for states to contract with each other to give a marked deference to national regulatory agencies. The explicit contract in the trade context demonstrates that where states have not so contracted, such deference cannot simply be assumed. Yet even in the trade context, the Appellate Body has chosen not to defer where Art. 17.6 questions are implicated.

The experience of the trade regime shows us that international bodies are capable of ignoring the plain text and moving away from the context towards a teleological interpretation; the Vienna Convention does not remove the possibility of commitment of an institution to a particular “constitutional” norm in interpreting the treaty, and may even support it by making object and purpose part of the first step in interpreting the text of the treaty. Short of renegotiating the treaty, a lengthy, arduous, and perhaps impossible process, national actors have

---

105 Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6 (i), in Annex 1A to the Agreement Establishing the World Trade Organization, 33 ILM 1144.
110 See supra Part II.A.1.
a limited range of means of controlling the behavior of international bodies once the treaty is established.

III. Charming Betsy Can Be Used at Step One of Chevron; It is a Non-Delegation Canon Appropriately Used to Determine the Meaning of the Statute.

The preceding two sections have established that the use of Charming Betsy within Chevron deference is consistent with both domestic and international law principles. Although the political branches are responsible for foreign policy, the judiciary need not always give “great weight” to the executive’s interpretations but can ensure that the executive abides by the international law that Congress has ratified using both the Charming Betsy presumption that Congress did not intend to violate international law in delegating power to the agency and the Chevron deference framework in the context of treaty interpretation. The next question is how the Charming Betsy canon should fit into the Chevron deference model.

There are three steps of Chevron deference. First, the Charming Betsy canon could be used at the so-called “Step Zero” of Chevron, the Mead analysis to determine whether Chevron or Skidmore deference applies. It could apply at Step One of Chevron, to determine the precise meaning of the statute, as in the PLO case. Or Charming Betsy could have force at Step Two of Chevron, to determine whether the agency is reasonable.

A. Charming Betsy After Mead: Charming Betsy May Be Applied At Either Step of Chevron, But Has Not Been Applied in the Mead Analysis.

Is there an argument to be made that rather than at one of the two steps, Charming Betsy should apply at the “Step Zero” stage, Mead’s choice between Chevron and Skidmore? Many commentators have argued for a more nuanced approach to deference in the context of international obligations.111 Scholars have argued that the treaty process calls for Skidmore, not Chevron deference.

Evan Criddle proposes using the line between self-executing and non-self-executing treaties as the line between Chevron and Skidmore deference; where Congress has delegated to the agency through a statute, Chevron deference should be applicable, but where a treaty directly confers rights on individuals, the agency must persuade the court using its particular foreign policy expertise.112 The basis of Criddle’s distinction seems to be a skepticism that Congress truly intended to delegate interpretive authority to the executive when it chooses to confer judicially enforceable rights on individuals. Yet Criddle’s theory flies in the face of established


112 Criddle, supra note 111, at 1933–34 (“To the extent that executive treaty interpretations warrant deference at all, courts should employ only persuasiveness deference based upon the executive's special expertise in foreign affairs.”). Criddle bases his advocacy of the self-executing/non-self-executing distinction on the fact that non-self-executing treaties are meant to constrain executive discretion in becoming the law of the land. Id. at 1932. However, it is unclear to me how this differentiates self-executing treaties from any other statute; statutes generally operate as legal constraints on agency discretion, but agencies still receive Chevron deference in interpreting those statutes.
administrative law theory. Deference does not apply only to unenforceable statutes; it applies precisely to those statutes that have the force of law and that alter legal rights and obligations.

Robert Chesney argues that the notice and comment process called for under Mead eliminates the separation of powers concerns that might be present in executive interpretation of a treaty.\textsuperscript{113} Chesney claims that Chevron deference should be employed where the agency has properly promulgated a rule and, where no rule exists, deference should “vary from minimal to substantial depending on the origins and circumstances of the interpretation.”\textsuperscript{114} Yet this position assumes that the notice and comment process itself acts as a sufficient democratic check on the executive. Chesney’s stance elides the focus on Congressional intent that Mead outlines. If Congress did not intend the agency to violate international law, a notice and comment process may not be sufficient to confer lawmaking authority on an agency.

In no case has the court directly found that the Mead analysis should be affected by an international obligation. Mead specified that the level of deference must be based on Congressional intent to delegate the authority to make law to the agency.\textsuperscript{115} Charming Betsy could influence the Mead analysis insofar as it is a clear statement rule; one could assume that Congress never intended to delegate the authority to violate international law to the agency unless it made a clear statement to that effect. Nonetheless, nondelegation canons are usually not part of the Mead analysis. Instead, they can be used at Step One or Step Two of Chevron.

B. Nondelegation Canons Can Influence the Application of Chevron Deference even in Formal Adjudication or Notice and Comment Rulemaking

Canons of textual interpretation have been used to limit the reach of Chevron deference.\textsuperscript{116} Cass Sunstein calls these “nondelegation canons,” as they avoid allowing agencies to make important determinations about sensitive topics it is constitutionally questionable for Congress to delegate.\textsuperscript{117} Sunstein describes three broad categories of nondelegation canons that cause courts to be less deferential: constitutionally-inspired nondelegation canons, sovereignty-inspired nondelegation canons, and nondelegation canons based on perceived public policy (such as canons that limit agency ability to make exceptions to general policy on behalf of interest groups).\textsuperscript{118}

The level of process of the agency does not dictate whether or not Charming Betsy or other nondelegation canons should be used by courts. The cases Sunstein relies upon demonstrate that in all four types of cases (formal/informal, rulemaking/adjudication), nondelegation canons can play a salient role. However, these canons are usually not used to reduce Chevron deference to Skidmore; in other words, the canons are not used at Step Zero to determine how much deference to allocate to the agency. Instead, they will be used at Step One or Step Two to determine whether Congress spoke clearly to the issue or whether the agency’s interpretation was reasonable. Deference is thus allocated to the agency, even if it does not result in an outcome favoring the agency.

\textsuperscript{113} Chesney, supra note 30, at 1773 (“The rigors of such a process - particularly its public aspects - would go far toward alleviating the checking considerations that underlie the separation-of-powers argument against deference.”).
\textsuperscript{114} Id.
\textsuperscript{116} Bradley, supra note 7, at 676.
\textsuperscript{118} Id. at 331–34.
C. Charming Betsy as a Nondelegation Canon

Sunstein does not mention the *Charming Betsy* canon. He does, as mentioned above, use three broad categories of nondelegation canons that trump *Chevron*: constitutionally-inspired nondelegation canons, sovereignty-inspired nondelegation canons, and nondelegation canons based on perceived public policy. These canons arise where the court presumes that Congress did not intend to delegate sensitive or weighty matters. They also operate as constitutional avoidance canons; the use of nondelegation canons in the context of deference keeps the delegation of power to the agency from raising constitutional questions.

1. Charming Betsy as Sovereignty-Inspired Nondelegation Canon

Sunstein did discuss the canon on “extraterritorial application” as a sovereignty-inspired nondelegation canon because “extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.” In other words, where sensitive matters of foreign policy are at stake, canons of textual interpretation may trump agency interpretations. The role of the judiciary is to ensure that the executive branch does not encroach on the lawmaking function, and that Congress does not avoid making decisions that have been congressionally allocated to it.

The same rationale of preserving traditional legislative review for sensitive matters also applies to the canon that statutes should be interpreted so as to comply with international obligations. As discussed by advocates in the *Charming Betsy* case itself, “the whole world is bound to notice a law which affects the interests of all nations in the world.” Compliance with international obligations frequently involves sensitive matters of policy. It is questionable whether Congress should be allowed to delegate to an agency the passage of later-in-time rules, regulations, or practices that violate international law.

2. Charming Betsy as Constitutional Nondelegation Canon

*Charming Betsy* could be seen as a nondelegation canon in a constitutional sense; it limits the ability of the executive to violate international laws to which Congress has subscribed. The courts themselves have often confused *Charming Betsy* with the constitutional avoidance canon. The constitutional avoidance canon unquestionably trumps *Chevron* deference. *Charming Betsy* implicates separation of powers concerns in the agency context; as discussed in Part I, the Constitution mandates that Congress have a say in what international obligations the United States will observe. In interpreting statutes, the fact that an agency is interpreting

---

119 Id. at 331–34.
120 Id. at 333. Bradley, on the other hand, argues that sensitivity of the issues argues for taking them away from courts and unelected judges, but not necessarily from the executive, which will have much more factual expertise at the ready. Bradley, *supra* note 7, at 694.
121 Murray v. The Schooner Charming Betsy, 6 U.S. 64 (U.S. 1804).
122 In the case most often cited for the proposition that *Charming Betsy* trumps *Chevron*, *De Bartolo v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, the Supreme Court called the constitutional avoidance canon the *Charming Betsy* canon. 485 U.S. 568, 568 (1998).
123 Id.
124 With the rise of executive agreements, however, this principle is often honored in the breach. LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 5–6 (2000). The number of
them rather than Congress should not erase the rule that Congress is generally construed so as not to overrule a prior international obligation unless doing so explicitly.

The Charming Betsy canon is in part a canon of separation of powers; it ensures that the executive does not overstep the boundaries of laws and treaties passed by Congress. The Court of International Trade recognized this important constitutional aspect of international obligations in Pillsbury. The court in that case noted that the President was only allowed to modify the Harmonized Tariff Schedule of the United States in order to bring United States practice into accord with international legal obligations. In a case where Congress explicitly referred to compliance with an international regime, the court found that interpreting presidential modifications as conflicting with the international regime would make the President’s actions ultra vires.

The D.C. Circuit held exactly the opposite in NRDC v. EPA, however. Where an international body was concerned, the court held that allowing the decisions of that body to become law “raise[d] significant constitutional problems,” as “Congress either has delegated lawmaker authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution.” Because of the involvement of an international decisionmaking body, the D.C. Circuit found that constitutional problems would be created if Charming Betsy were applied. Nonetheless, using an international agency’s decision as an interpretive tool or for persuasiveness value does not raise constitutional problems.

Bradley argues that Charming Betsy is significantly different than the constitutional avoidance canon and thus should not be used to limit Chevron deference in the same way. The distinguishing factor is that constitutional avoidance is used to keep agencies from doing things that Congress itself would not be allowed to do—namely, violating the Constitution. Congress, on the other hand, clearly can violate international law under the “latest in time” rule. Bradley argues that as Charming Betsy does not raise the same concerns about the outer limits of congressional power, it should not be used to limit Chevron deference.

It is unclear why the principles underlying the constitutional avoidance canon does not also come into play in the Charming Betsy context. As discussed above, the foreign affairs power raises significant separation of powers concerns. In fact, Bradley himself recognizes as

executive agreements has increased in recent years; during the 1990s, 300 to 400 executive agreements were signed per year. Id. at 56–57. Executive agreements are still less than 15% of the international agreements entered into by the United States. Id. at 60.

The Supreme Court has never ruled on what agreements constitute a treaty and are thus subject to the constitutional requirements for treaties. Made in the USA Found. v. United States, 242 F.3d 1300, 1305 (11th Cir. 2001). The 11th Circuit has held that the question of whether international commercial agreements require Senate ratification is a political question. Id. The executive does have to submit all treaty agreements to Congress under the Case Act. Case-Zablocki Act, 1972, 1 U.S.C.S. § 112b(a) (2005). Congress thus tacitly ratifies these agreements by not passing legislation to override their provisions. Nonetheless, that is a large deviation from the text of the constitution, and shifts the burden to Congress to act.

126 Id. at 1326.
127 Id.
128 464 F.3d 1 (D.C. Cir. 2006).
129 Id. at 8.
130 Bradley, supra note 7, at 687.
131 Id.
132 Id.
much in another piece. He writes that the canon is best understood as “a device to preserve the proper separation of powers between the three branches of the federal government.”

One could find a meaningful difference between the constitutional avoidance canon and the *Charming Betsy* canon in that the agency could invalidate its own statute by creating conflict with the constitution, while it could not do so by violating international law. But the agency does not necessarily invalidate the statute by raising a constitutional question, as the justices are not required to find a specific constitutional conflict before they construe away from the constitutional question. The focus of the avoidance doctrine is more on allowing Congress to decide whether or not it wants to raise constitutional questions and venture into such sensitive and important areas. This rationale is equally applicable in the area of international law; as discussed above, under the clear statement rationale for the *Charming Betsy* canon, Congress must explicitly raise the issue where it wants courts to approve or disapprove of an overruling of international law.

3. *Charming Betsy* as Protecting Agency Policy and Procedures from Special Interests

The third category of Sunstein’s non-delegation canons, canons inspired by perceived public policy, contains canons that are substantively linked to characteristics of the underlying statutory scheme. Some of these canons are meant to thwart special interest groups, such as the canon that exemptions from taxation are to be read narrowly. Others are meant to strengthen groups that are politically or financially weak, such as the canon that statutes giving benefits to veterans should be construed in favor of the veterans or the many canons of lenity.

Can *Charming Betsy* be read as a canon of lenity, in line with Ely’s theory of representation? As discussed above, one justification for the use of *Charming Betsy* is the need for virtual representation of both foreign states and foreign individuals. Yet the focus of *Charming Betsy* is not on the identity of the parties but on the international obligations. In this way, *Charming Betsy* is similar to the canon of implied repeal in regulating the balance between courts and Congress by forcing Congress to make a clear statement. It is not a canon of lenity.

Nonetheless, the problems of special interests and agency capture can be particularly salient in the international context. Although foreign states and individuals may not be particularly favored, there are substantial policy concerns that arise with the formulation of international commitments. Because it may be harder for elected officials and domestic political actors to keep track of international developments, the risk of capture by special interests is greater. The *Charming Betsy* canon may thus be read as a canon based on perceived public policy. It is appropriate to see *Charming Betsy* as a nondelegation canon that can be used to trump ordinary *Chevron* deference. Like the other nondelegation canons, *Charming Betsy* may be applied in determining whether the meaning of the statute is ambiguous.

D. *Charming Betsy* Should Be Applied at Step One of *Chevron*

At Step One of *Chevron*, the court decides whether the statute is ambiguous; at Step Two of *Chevron*, if the statute is ambiguous, the court examines whether the agency’s interpretation of the statute is reasonable. Where the statute implements a treaty, as in the trade context,

---

134 *Id.* at 334–335.
135 *Id.*
136 *See supra* Part I.B.2.b.
scholars have argued about which step of *Chevron* should take international obligations into account. Alex Canizares concluded that the “Step Two approach”—using *Charming Betsy* as one factor to determine whether an agency interpretation is reasonable—was less troubling than the “Step One” approach which used *Charming Betsy* to ascribe meaning to the statute itself. He argues that a Step Two approach allows more room for agency expertise. A Step Two, as opposed to Step One, use of *Charming Betsy* gives the agency more flexibility and input into interpretation.

The idea that the Step Two approach differs from the Step One approach implies that a statutory construction, once made, is set in stone. As discussed below in Part IV, the Court of International Trade in *Footwear* had given a certain flexibility to courts in light of potential future panel rulings. Although the Court found the WTO panel to be unpersuasive in that case, the court could potentially be persuaded by a different panel, one binding on the parties, in the future. In later cases such as *Timken*, however, the Court implies that the statutory construction, once made, is set in stone. Congress only intended one construction, and if not violating international law at the time when the first case was decided, the agency action would never be found to be violating international law.

But it is contested whether a statutory construction based on avoidance, such as the constitutional avoidance canon or the *Charming Betsy* canon, should also be used in cases which do not implicate the same questions, concerns, or violations. Moreover, it is unclear why, if statutory constructions in a particular case would be binding in the future, a holding that an agency interpretation of a statute is unreasonable would not also be binding in the future.

Some scholars also argue that the court is more likely to decide in favor of the agency if it proceeds to Step Two of the analysis. It is unclear, however, whether this correlation implies causation. In other words, it seems obvious that where the court has decided that the statute is unambiguous, it will not proceed to Step Two of *Chevron*, leading to much higher rates of agency loss in such situations. It does not necessarily mean, however, that a different process of analysis is being applied in each *Chevron* case, or that it makes a difference at what step *Charming Betsy* is applied.

Courts should apply *Charming Betsy* at Step One of *Chevron*, to determine whether or not the statute is ambiguous. Treaty interpretation is within the province of the judiciary; as discussed in Part I, there is no constitutional problem with the court interpreting the treaty or implementing statute and determining whether there is ambiguity. It is appropriate for the court to use *Charming Betsy* to determine whether a treaty or implementing statute is unambiguous, and how much flexibility is given to the agency to interpret the statute. Moreover,

---

138 Id. Of course, as discussed below (*see infra* Part IV), the Court of International Trade is a specialized court and thus also has expertise in the area.
139 See generally Timken Co. v. United States, 354 F. 3d 1334 (Fed. Cir. 2004) (holding that zeroing is a “fair comparison”).
140 Courts still struggle with whether a statutory construction based on avoidance, such as the constitutional avoidance canon or the *Charming Betsy* canon, should also be used in cases which do not implicate the same questions, concerns, or violations. *See, e.g.*, Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326, 335 (D.N.J. 2002) (“I therefore cannot agree that a Supreme Court interpretation based on the avoidance canon necessarily binds all subsequent interpretations of the statute.”).
this use of canons of interpretation will not necessarily set a statutory construction in stone. First, Congress has the power to amend its statute, under the latest-in-time rule. As the Supreme Court noted in Boumediene, clear statement rules do not work forever; eventually, Congress can produce such a clear statement that the Court must take their intent at face value, no matter whether it creates constitutional problems.143

If there is no clear violation of international law at issue, as there often will not be where international bodies have not produced an alternative interpretation, courts may proceed to Step Two and examine whether the agency’s interpretation of the treaty or implementing statute is correct. If there is no clear violation of international law, no delegation problems are raised. This use of Charming Betsy is in line with nondelegation theory, and is not precluded by constitutional theory or international law.

IV. Deference When an International Agency Is Involved: As in the Domestic Context of Multiple Agencies, Courts Should Examine Whether Congress Intends Deference to the International Agency as Well.

The question in the context of Mead is whether Congress could also have intended deference to international institutions. If the international institution responsible for interpretation is also to be accorded deference, the courts will have to balance deference due to the domestic agency with deference due to the international institution. In the United States, the Charming Betsy canon of interpretation, which instructs federal courts to construe statutes to avoid conflict with international law, can provide guidance for courts in this balancing act.144 If the effect of such a delegation is a violation of international law, it is plausible under Mead to say that Congress intended the agency to receive only Skidmore deference. The court can then give Skidmore deference to the international institution, as it did in the Footwear case. Domestically, this approach has also been possible where the jurisdiction of multiple agencies overlaps, as long as the court identifies the rulemaking agency and give priority to its views. The other alternative is for the court to incorporate the persuasive international interpretation into a Charming Betsy framework.

This Article will use two illuminating examples: trade litigation in the U.S. Court of International Trade and the Federal Circuit, and immigration litigation in various U.S. Courts of Appeals. It will contrast Cardoza-Fonseca with Aguirre-Aguirre to explain how international law and international sources are viewed. In the trade context, certain scholars have argued that treaty interpretation takes on a sui generis characterization; trade is its own specialized regime.145 Nonetheless, the WTO system does incorporate “the customary rules of interpretation of public international law”.146

144 Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ( “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.”)
146 Thirlway, supra note 145, at 11.
In both the early trade cases such as *Footwear* and in the immigration context of *Cardoza-Fonseca*, the court balanced the interpretation of international institutions with the domestic agency interpretation in interpreting an implementing statute. In both cases, the court found that Congress had passed the statute to comply with international obligations. In the trade cases, Congress explicitly said that the agency is free to violate international law; in the refugee context, Congress intentionally tried to tie the definition to an international definition. This Part discusses the trade and immigration examples and the possibility of balancing the international with the domestic, using either the multiple agency framework or the *Charming Betsy* canon.

A. The Trade Example: Engaging With and Rewarding Other Adjudicative Actors.

In the context of trade, the Court of International Trade used the *Skidmore* framework to balance the demands of the WTO with the interpretations by the Commerce Department. In so doing, it engaged closely with the text of the decisions and evaluated them for their bindingness and specificity. The trade examples demonstrate that courts can evaluate both international and domestic agencies in a way that increases legitimacy of their subsequent decision and engages with international agencies, even within a deferential administrative law framework.

The majority of trade cases presenting a conflict between the international interpretation and the United States interpretation of trade statutes arise in the context of the Anti-Dumping Agreement and zeroing methodology. Countries may take measures to combat dumping (selling products in a foreign market at a price lower than their normal market value) under the WTO regime. In ascertaining whether a product is being dumped in the United States, the Commerce Department only examines sales below the normal value (usually the value in the domestic market).\textsuperscript{147} Sales at an export price above the normal value are assigned a margin of zero.\textsuperscript{148} Foreign companies generally argue that such methodology is unfair because “the presence of a single U.S. sale below normal value can produce a dumping margin, even though there exists hundreds of sales for which the opposite is true.”\textsuperscript{149} In evaluating these claims, courts must take into account the binding nature of GATT obligations and their role in U.S. law. Although the WTO Appellate Body has ruled a number of times against zeroing, U.S. courts have not seen those rulings as binding on the United States’ administrative methodology.

1. The Current Status of WTO Panel Decisions

The GATT is generally not seen as self-executing in the United States; usually the agency is interpreting its implementing statute.\textsuperscript{150} The European Union similarly does not generally give the GATT direct effect, although a few cases enforced the GATT as embodied in Community regulations.\textsuperscript{151} Nonetheless, courts have recognized that regardless of the self-executing status of the GATT or the Uruguay Round Agreements, they still constitute international obligations on the United States.\textsuperscript{152} In Europe, the defining factor is Community

\textsuperscript{147} See, e.g., NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1318 (2004).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{151} Id. at 595, 599–602.
\textsuperscript{152} Hyundai, 53 F. Supp. at 1343 (“Accordingly, the Antidumping Agreement is properly construed as an international obligation of the United States.”).
The WTO panel process is one of the most formal adjudicative mechanisms in international law; therefore, under an analysis that rewards agencies for deference, it would seem to be one of those most entitled to it. Nonetheless, WTO panel reports are not binding sources of law in the United States, under § 3533(g). The statute incorporating the Uruguay Round Agreements states clearly that implementation of a panel report is not to be done by the agency but by Congress. First, the Trade Representative shall “notify” and “consult with the appropriate congressional committees” about whether to implement a report adverse to the United States. The Commerce Department may not take any action with regard to a regulation or practice by the agency “unless and until—the appropriate congressional committees have been consulted,” the Trade Representative has prepared and submitted “the proposed modification, the reasons for the modification, and a summary of the advice obtained [from the private sector advisory committees],” and there has been “an opportunity for public comment.” Although not all agency action need go through notice and comment procedures, any agency action responding to a WTO panel must go through not only notice and comment but intense Congressional oversight.

Thus, although some commentators see it as extremely positive that the executive has pushed for binding obligations on the United States in the context of the Dispute Settlement Understanding, Congress has asserted its oversight over any change to an offending practice, and made it more difficult to for the executive to comply with the panel. Under 19 U.S.C. § 3533, even where an agency has not formally promulgated a regulation, it may not change its practice to comply with a WTO panel unless the congressional committees have been consulted and a final rule or other modification is published in the Federal Register.

In the definitive case interpreting § 3533, Corus Staal, the Federal Circuit held that unless the text of the statute itself clearly conflicted with the domestic agency’s interpretation, the court could not overrule the domestic agency. The court rejected engagement with the language in specific WTO panel decisions. As discussed below, however, before § 3533 and Corus Staal, the trade court was allowed to engage with the language and to evaluate international decisions under a Skidmore deference framework.

2. Baseline Deference to the Commerce Department

The Commerce Department makes dumping and subsidy determinations based on individual petitions, and the International Trade Commission then determines whether acts of dumping or subsidies actually “harm or threaten potential U.S. industry.” In the Mead framework, antidumping determinations have been found to be “relatively formal administrative procedures” and Commerce uses its legal interpretations in these adjudications as precedential.

---

153 Id. at 595 (citing The Banana Cases: Case C-280/93, Germany v. Council, 1994 E.C.R. I-4973, 5073).
157 Probably because of INS v. Chadha concerns, however, these congressional committees do not exercise a veto over agency action. They may vote to indicate agreement or disagreement with the new rule or modification, but that vote is not binding on the agency. §3533(g)(3).
158 Corus Staal BV v. Dep’t of Commerce, 395 F.3d 1343 (Fed. Cir. 2005).
Moreover, the duty of adjudication has in this case been “explicitly delegated” by Congress, leaving room only for “substantial evidence” review by the Court. Under the *Mead* framework, then, *Chevron* deference is appropriate to the Commerce Department’s interpretation of the antidumping statute. Another relevant agency is Customs, now under the auspices of the DHS, which sets tariff rates for imported goods.

As Brand points out, in “reject[ing] arguments that legislation or administrative acts violate GATT obligations . . . courts have assumed GATT authority.” Courts are reluctant to see themselves as international tribunals, even when deciding on international law. The trade cases are no exception; deference to agencies is common, despite the substantial expertise that the court itself has in the area of trade. The Court of International Trade is a specialized court that deals with all trade cases; appeal from that court is to the Federal Circuit, which handles cases of exclusive federal jurisdiction such as trade and patents. The judges on the specialized court, however, emphatically see themselves as part of the judicial branch (a position reinforced when they sit by designation on appellate courts).

In Article I tribunals, handling specialized caseloads is seen as a reason for deference to interpretation of both facts and policy, with review only of legal questions. In fact, the Court of International Trade was actually an Article I court called the United States Customs Court until 1956, when Congress granted it Article III status. The Court of International Trade specializes in trade cases, and has “exclusive jurisdictional authority to decide any civil action against the United States, its officers, or its agencies arising out of any law pertaining to international trade.” Nonetheless, the Court of International Trade is not considered a specialized or expert body for the purpose of deference.

The Federal Circuit has held that “Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of ‘the foreign policy repercussions of a dumping determination.’” It so held in a case where the Court of International Trade would have overturned an interpretation of the statute conforming with GATT to impose a GATT violation on the Commerce Department, however; an important factor in the case was that “[f]or the Court of International Trade to read a GATT violation into the

---

160 Pesquera Mares Australes v. United States, 266 F. 3d 1372, 1381 (Fed. Cir. 2001).
161 *Id.*
163 Brand, *supra* note 150, at 564.
166 In *Footwear*, for example, the Judge began his opinion by stating that the Court of International Trade “is an extension of the great American experiment in judicial review of prerogatives of the sovereign that began with Chief Justice Marshall’s nascent pronouncements that it is emphatically the province and duty of the judicial department to say what the law is.” *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1079 (C.I.T. 1994).
168 *Id.* See also Customs Courts Act of 1980.
169 Federal Mogul Corporation v. United States, 63 F.3d 1572, 1582 (Fed. Cir. 1995) (*citing* Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983)).
statute, over Commerce’s objection, may commingle powers best kept separate.”¹⁷⁰ The Federal Circuit was thus concerned that given the possible repercussions in the international sphere, only the political branches should choose to violate international law.

The converse does not necessarily follow, however, where the political branches have committed the country to an international regime. Although the court may have no power to itself choose to violate international law, that does not mean that it must abdicate judicial responsibility altogether where the agency’s interpretation is in violation of international law. The tension between the *Chevron* ideal of leaving policy decisions to agencies and the *Charming Betsy* notion that Congress must be especially clear where international obligations are at stake is particularly acute where conflicting international panel decisions exist, as in the trade cases discussed below.

3. A History of Deference in the Court of International Trade and Federal Circuit: Should *Charming Betsy* Lower *Chevron* Deference to *Skidmore* Deference?

The first definitive statement that *Chevron* deference must be given to the Commerce Department and International Trade Commission in antidumping cases came from the Federal Circuit in 1992 in *Suramerica*, well before the Uruguay round was completed.¹⁷¹ The Court of International Trade had previously specified that there was “substantial deference” to Commerce in interpretation of the antidumping law.¹⁷² But *Suramerica* solidified and limited this deference to *Chevron*, even in the jurisdictional context of determining the scope of each agency’s responsibilities and creating standing requirements for petitioners.¹⁷³ The Court in *Suramerica* also reversed the *Charming Betsy* presumption, arguing that as the GATT “does not trump domestic legislation”, if the agency’s interpretation of standing requirements conflicts with the GATT, “it is a matter for Congress and not this court to remedy.”¹⁷⁴

The next major trade case at the Court of International Trade added nuance to this presumption by calling for *Skidmore* deference in the face of conflicting panel decisions, however. In 1994, the *Footwear* case dealt with a case that had specifically been decided by a WTO panel with U.S. consent.¹⁷⁵ The *Footwear* court ultimately ruled for the agency, but it did so within the framework of *Skidmore*.

*Footwear* was brought by U.S. distributors and retailers of Brazilian footwear in protest of countervailing duties assessed on Brazilian footwear.¹⁷⁶ In this case, there had been two

¹⁷⁰ In the *Federal Mogul* case, the Federal Circuit found that the interpretation of the agency (interpreting the language of the statute to ensure that anti-dumping margins were calibrated precisely to ignore the effect of taxes imposed in home countries) was in compliance with GATT, while the Court of International Trade’s interpretation was a GATT violation. *Id.* Interestingly, in this case the economic methodology of the statute was unambiguously miswritten and had since been amended; the court was thus interpreting an unambiguous statute in accordance with intent and not text in order to uphold Commerce’s interpretation. *Id.* at 1583 (Mayer, J., dissenting).

¹⁷¹ *Suramerica de Aleaciones Laminadas, C.A.* v. United States, 966 F.2d 660, 665 n. 5 (Fed. Cir. 1992) (“This assumes that the agency is by virtue of its responsibilities under the Act and its expertise, entitled to the benefit of *Chevron* deference. We believe both Commerce and the ITC [International Trade Commission] qualify.”).


¹⁷³ *Suramerica*, 966 F. 2d at 665 n. 6 (discussing agency responsibilities), 667 (discussing standing requirements).

¹⁷⁴ *Id.* at 667–68.


¹⁷⁶ *Id.* at 1079.
GATT panels convened; the first found that the revocation of the countervailing duty need not be backdated under Art. VI of the GATT. Brazil blocked the adoption of this panel report and filed a second, as applied as opposed to facial challenge to the imposition of duties, arguing that it violated the most-favored-nation clause in the GATT. The second panel issued a “general ruling” that the United States had violated Article I:1, the most-favored-nation clause. The United States agreed to the adoption of the second panel report as long as Brazil agreed to the adoption of the first panel report. Plaintiffs contended that refusing to backdate the panel was directly contrary to the statute, the Trade Agreements Act of 1979, under the first step of Chevron; they then contended that even if the statute was ambiguous, the second panel decision imposed an international obligation on the United States and the court should construe the statute so as to comply with that obligation.

The Court of International Trade in Footwear first found that where Chevron came into conflict with Charming Betsy, Charming Betsy would prevail due to the right of the executive to conduct foreign affairs and the necessity of compliance with international law. The court then held that in face of the need to balance a GATT panel decision with the opinion of the International Trade Administration (a department within the Commerce Department in charge of adjudicating these cases), Skidmore deference was appropriate.

Skidmore deference was, however, applied in a way similar to the later Mead decision. In applying Skidmore deference, the court first pointed out that international law did not impose a specific remedy. The court further noted that under the Dispute Settlement Understanding, not yet in effect at the time the Footwear panels were convened, there was no provision stating that panel decisions are binding on the parties, contrasting the language in the agreement to language in NAFTA that specifically stated that panel determinations are binding. The court also pointed out that the second panel explicitly rendered only a general ruling and not a specific recommendation. The court, stating that it was applying Skidmore or persuasiveness deference to the international panel, noted that where no specific remedy was prescribed, the court need not be persuaded in the outcome of the case one way or another. In the finding of violation, Brazil could avail itself of countermeasures, and it was in the discretion of the political branches (here, the agency) to choose whether or not to grant an administrative remedy.

In evaluating the work of the international agency the Footwear court appears to have looked at whether the agency had ‘lawmaking’ power. Because the panel was not meant to be binding, and didn’t issue a specific ruling, the court decided that it need not be persuaded. Although the court said that it was using Skidmore, the analysis closely approximates Mead because it looks to whether the international agency was intended to have the force of law, based

---

177 Id. at 1082.
178 Id. at 1083.
179 Id.
180 Id. at 1085.
181 Id. at 1089.
182 Id. at 1091–92. The court here incorrectly relied on DeBartolo, a Supreme court case that said that constitutional avoidance trumps Chevron deference but accidentally called the constitutional avoidance canon the Charming Betsy canon. Id. at 1091.
183 Id. at 1093 (“Of course, the best perspective is that both are entitled to that degree of respect which their reasonings compel.”).
184 Id. at 1094–95.
185 Id. at 1093.
186 Id.
187 Id. at 1096 & n. 42.
on the binding nature of the decision. It could also be seen as employing a multiple agency framework, where the lawmakers or legislative agency is given increased deference. In *Hyundai*, *PAM S.p.A.*, *Timkin*, and *NSK*, the Court interpreted the international obligations away from a conflict with Commerce practice, in each case claiming to be not sufficiently persuaded by the corresponding WTO panel rulings and finding that the GATT was unclear with regard to the practice. Thus, before § 3533(g) was passed, the Federal Circuit did employ a framework that accommodated both *Chevron* and *Charming Betsy*.

As mentioned above, however, after § 3533 was passed, the court held that WTO decisions could not be taken into account. In *Corus Staal*, the Federal Circuit spoke to whether courts could use the panel rulings as persuasive, upholding the clear statement rule from *NSK* and rejecting earlier cases’ earlier reliance on the nonbinding nature of and discretionary language in specific decisions. It emphasized that “Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law,” that GATT was not self-executing, and that there was a congressional scheme for implementation of decisions under 19 U.S.C. § 3533. According to the Federal Circuit, it followed that *Charming Betsy* was not applicable to harmonization of WTO panel proceedings such as *Bed-Linen* and *Softwood Lumber* which declared U.S. zeroing practices illegal. The court held explicitly that no deference, not even the *Skidmore* deference of *Footwear*, was applicable to the WTO panel decisions. To examine WTO panel decisions was equated with intruding on the realm of the political branches; foreign policy was an added reason to accord “substantial deference” to Commerce.

After *Corus Staal*, courts were largely limited in according deference to WTO panel reports. Nonetheless, it seems like an inherent judicial power to interpret legal obligations, international though they may be. The Court of International Trade still has the right to interpret the meaning of international obligations, particularly in the context of trade statutes which do not involve dumping.

In one such case, *Pillsbury*, the Court of International Trade examined what *Mead* would mean in the context of an international obligation. As discussed above, the Court in *Pesquera*

---

188 *See infra* Part III.C.
190 *Timken Co. v. United States*, 354 F. 3d 1334, 1340 (Fed. Cir. 2004) (holding that zeroing is a “fair comparison”).
193 *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).
194 *Id.* at 1346, 1348.
195 *Id.* at 1348.
196 *Id.*
197 *Id.*
198 *Id.*
had held that the *Mead* factors weighed in favor of Commerce in the context of an adjudication of dumping margins.\(^{200}\) In *Pillsbury*, however, the court examined an informal policy of Customs (part of DHS) under which it had adjudicated the number of liters of ice cream permitted to enter at a lower tariff rate under Schedule XX, a tariff concession agreement annexed to the Marrakesh Protocol to the GATT.\(^{201}\) The court noted that “when Customs had not issued a regulation adopted by notice and comment rule making”, but instead relied on its own informal policy, *Skidmore* deference was appropriate under *Mead*.\(^{202}\) The court ultimately struck down the policy of the Customs Department with regard to importation of ice cream; the lower tariff rate had to be applied to at least the amount of ice cream specified in Schedule XX.\(^{203}\) The court’s decision about deference was not based on any international agency, however, but simply on the process the domestic agency had or had not followed.

Congressional action would be necessary in the trade context to allow the courts to examine Commerce’s implementation of WTO panel rulings. With § 3533, at least as interpreted in *Corus Staal*, Congress has essentially taken the courts out of the equation. Benedict Kingsbury has called for national courts to play a more active role in global governance by monitoring *jus cogens* violations and “publicness” of international decisions, among other factors.\(^{204}\) Of course, the Commerce Department, Trade Representative, and relevant Congressional Committees could themselves “give more weight to rules or decisions produced by external entities where these more comprehensively meet requirements of publicness.”\(^{205}\) Nonetheless, these political bodies are more likely to be swayed by other considerations, including by industry lobbying.

As we can see from the history of the trade cases, courts rarely struck down the interpretation of the domestic agency and never struck down an interpretation on the basis of a conflicting panel report. It is hard to see, therefore, what the danger of allowing courts to deploy their traditional expertise in evaluating legal arguments and due process concerns would be. Allowing the courts to deal directly with the language and reasoning of decisions might lend legitimacy under a *Skidmore* deference framework might lend increased legitimacy to conflicting U.S. interpretations of international law. Although 19 U.S.C. § 3533(g), which insists that the agency violate international law until congressional committees consider the issue, is a clear statement, many other regimes do not have such a clear statement favoring violation of international law.

4. These Cases Examined the Language of Panel Decisions for Persuasiveness

In the context of trade, Congress has explicitly delegated the administration of the statute to the executive branch, although retaining some congressional oversight for itself.\(^{206}\)

\(^{200}\) Pesquera Mares Australes v. United States, 266 F. 3d 1372, 1381 (Fed. Cir. 2001).

\(^{201}\) *Pillsbury*, 368 F. Supp. at 1321, 1323.

\(^{202}\) *Id*.

\(^{203}\) *Id*. at 1334 (“Therefore, upon application of the canon of constitutional avoidance and the *Charming Betsy* canon, the Court incorporates the unambiguous interpretation of Schedule XX into the meaning of Note 5. Consequently, the Court deems that Note 5 requires Customs to reallocate the unused quotas of the enumerated nations.”). This decision was on a motion for summary judgment, however, and it was later vacated when the parties settled.


\(^{205}\) *Id*.

\(^{206}\) See supra notes 155–156 and accompanying text.
However, before the specific provisions for the implementation of WTO panels were passed and before the Federal Circuit decided Corus Staal, the U.S. Court of International Trade struggled with the tension between agency deference and the traditional canon of compliance with international obligations in illuminating ways. In particular, the Court suggested before Mead was decided that potential conflict with international obligations, as interpreted by international bodies, might be relevant to the choice between Chevron and Skidmore deference. It engaged directly with the language in the WTO panel decisions, balancing the two agencies based on persuasiveness.

As discussed above, the court in Footwear analyzed both the language in the GATT and the language used by the panel. The court paid attention to small details in the ruling, such as the decision to issue only a general ruling and not a specific recommendation. Skidmore or persuasiveness deference thus focused on the nuances of how the WTO panel decided the case to determine persuasiveness.

Similarly in Hyundai, PAM S.p.A., Timkin, and NSK, the Court interpreted the international obligations away from a conflict with Commerce practice, in each case claiming to be not sufficiently persuaded by the corresponding WTO panel rulings and finding that the GATT was unclear with regard to the practice. The court closely analyzed both the text of the Anti-Dumping Agreement and in earlier panel rulings to hold that the domestic agency had discretion to follow its own policy. Although the Court came to the conclusion that no international obligation was violated by Commerce, they did so based on extensive textual analysis and engagement with the panel, not based simply on a blanket deference rule or a rule that ignored international institutions completely.

Both Hyundai and Footwear are examples where the United States courts engaged directly with the interpretations offered by the WTO Appellate Body. In the absence of Corus Staal and § 3533(g), then, courts would be free to examine the international interpretation for its persuasiveness. As discussed below, courts could use Charming Betsy or a multiple agency framework to interpret the implementing statute in light of the treaty.

B. International Law and Agency Deference in the Context of Immigration

As discussed in Part I, another area where the constitution concentrates power in the hands of Congress and where international law often arises is immigration. A focus on congressional intent can lead to increasing deference to the board of immigration appeals, given congressional action in recent years to reduce the power of the courts in this area. Nonetheless, under the Refugee Convention the UNHCR also has an interpretive and lawmaking role to fulfill. In two cases, INS v. Cardoza-Fonseca and INS v. Aguirre-Aguirre, the Supreme Court evaluated whether regulations promulgated internationally by the UNHCR should be taken into account in interpreting statutory provisions meant to closely parallel the Refugee Convention.

1. Overview of Congressional Action Increasing Deference to the BIA

---

208 Id. at 1095.
209 Id. at 1093.
210 Id.
211 Hyundai, 53 F. Supp. 2d at 1344.
Over the past twenty years, Congress has increased deference to the Board of Immigration Appeals (BIA) by the circuit courts, through stripping jurisdiction over many proceedings and streamlining regulations, and has even limited review by the BIA of immigration judges’ findings of fact.\(^{212}\) The Supreme Court has noted that the immigration statutes place decisions about asylum and withholding “primarily in agency hands.”\(^{213}\)

The factual findings in immigration proceedings are reviewed under a “substantial evidence” standard.\(^{214}\) Legal determinations, on the other hand, such as treaty interpretations, are reviewed \textit{de novo}.\(^{215}\) Immigration judges have an incentive to decide cases on a factual basis, so as to receive more substantial deference.\(^{216}\) If the immigration judge decides the case based on alternative grounds of a factual finding that the applicant is not credible and a legal interpretation of a term such as “political opinion”, the reviewing circuit court will only review the substantial evidence underlying the credibility determination and may decline to reach the legal interpretation.\(^{217}\) Even where an Immigration Judge has gotten important facts about the situation in the country wrong (or states facts contrary to State Department reports), a credibility determination remains a “sufficient basis to deny withholding of removal and protection under the CAT.”\(^{218}\)

The Convention Against Torture is a self-executing treaty in the U.S. legal system.\(^{219}\) The U.S. ratified it in 1988; as of March 2009, there are 146 States Parties to the treaty.\(^{220}\) In an immigration proceeding, an otherwise removable person may invoke the Convention Against Torture and receive an order of withholding of removal.\(^{221}\) That applicant must demonstrate that he is “more likely than not” to be tortured.\(^{222}\) Cases under the Convention Against Torture, therefore, meet the standard (proposed by Evan Criddle) of self-execution for \textit{Charming Betsy} to overrule \textit{Chevron} deference.\(^{223}\)

The major cases dealing with international institutions, however, deal with interpretations by the UN High Commissioner for Refugees interpreting the Refugee Convention of 1951. They


\(^{214}\) McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981).

\(^{215}\) Zoarab v. Mukasey, 524 F. 3d 777, 780 (6th Cir. 2008).


\(^{219}\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]. . The Fourth Circuit has held that the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a) 112 Stat. 2681–822 [hereinafter FARRA], strips jurisdiction from the federal courts to review CAT claims in some instances. \textit{Mironescu v. Rice}, 480 F.3d 664 (4th Cir. 2007) (holding that judicial review is precluded by §2242(d) of FARRA in any proceeding that is not a “final order of removal”, such as extradition proceedings).


\(^{221}\) Immigration and Nationality Act §241(b)(3); \textit{Implementation of the Convention Against Torture}, 8 C.F.R. 208.18.


\(^{223}\) \textit{See supra} notes 111–112 and accompanying text.
do not deal with the Committee Against Torture under the Convention Against Torture, as the United States has not yet ratified the Optional Protocol creating the Committee and giving it jurisdiction.\textsuperscript{224} The Refugee Convention has been implemented in the United States through the Refugee Act of 1980, which created Immigration and Nationality Act § 208.\textsuperscript{225} Much as in the trade context, the courts are interpreting an implementing statute.

2. International Institutions: The UN High Commissioner for Refugees [UNHCR]

Commentators have recognized that the UNHCR is a “global administrative body” whose actions have a direct impact on the lives of refugees.\textsuperscript{226} The UNHCR plays a role in adjudication, performing refugee status determinations to determine who it has jurisdiction to help.\textsuperscript{227} It also plays a role in interpreting the Refugee Convention of 1951 by publishing handbooks and guides for its implementation.\textsuperscript{228}

The original statute establishes the UNHCR as humanitarian and advocacy-based, but does not explicitly draw a picture of it as interpretive and adjudicatory. It was established in 1951 by the UN General Assembly with

\[\text{“the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities...”}\textsuperscript{229}

The original mandate was “non-political” and purely “humanitarian and social.”\textsuperscript{230} Nonetheless, the UNHCR was given authority to “[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”\textsuperscript{231}

The delegation of interpretive authority to the UNHCR occurs in the Refugee Convention itself.\textsuperscript{232} The preamble, for example, establishes that governments should cooperate with the UNHCR in implementing the Convention because the UNHCR is the “supervising” body.\textsuperscript{233}

\textsuperscript{227} Id.
\textsuperscript{228} All handbooks published since 1992 are available at the UNHCR website. UNHCR—UNHCR Handbooks and Guides, http://www.unhcr.org/doclist/publ/3d4a53ad4.html (last visited June 8, 2008).
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{233} Id. (“Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.”).
Under Art. 35 of the Convention, the Contracting States are to report periodically to the UNHCR and undertake to cooperate with its supervision.\textsuperscript{234}

Thus, although the creation of handbooks and interpretive guides is not explicitly in the Convention, it follows logically from the UNHCR’s supervisory authority. Like the Dispute Settlement Understanding of the GATT or the Montreal Protocol, albeit in less binding form, the UNHCR is a treaty-monitoring and law-determining body. It has become an international institution whose interpretations can be taken into account by national courts.


There are two major cases in the United States which deal with the use of UNHCR handbook to interpret legislation. The first, \textit{Cardoza-Fonseca}, used the UNHCR handbook to interpret substantive provisions relating to refugees. The second, \textit{Aguirre-Aguirre}, insisted that the \textit{Cardoza-Fonseca} court did not intend U.S. courts to be bound by the handbook, and ruled in the opposite way that the UNHCR handbook dictated. This section discusses why the two cases came out so differently, and what status the UN Handbook has in refugee litigation today.

At issue in \textit{Cardoza-Fonseca} was the definition of “refugee”. The question was whether a refugee petitioning for asylum need only have a “well-founded fear” of persecution, or whether he or she must prove that future persecution was “more likely than not” (the stringent standard under withholding of removal).\textsuperscript{235} In that case, the petitioner, a Nicaraguan citizen, had not herself been persecuted in the past, but her brother had. She testified that because she had fled with her brother, her political opposition would come to light and she herself would be tortured on her return to Nicaragua.\textsuperscript{236}

The court first found that in passing the statute, Congress had the intent to implement the Protocol Relating to the Status of Refugees (the later form of the Refugee Convention) to which the U.S. had acceded twelve years prior.\textsuperscript{237} Moreover, Congress intended to tie the U.S. definition explicitly to the definition in the Protocol.\textsuperscript{238} The court thus noted both the international drafting history and previous versions of refugee protection, and the UNHCR Handbook’s definition of refugee together with the burden of proof:

“[i]n general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”\textsuperscript{239}

In examining the burden of proof placed on Cardoza-Fonseca, the court used the High Commissioner’s guidance to determine that “There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event

\begin{footnotes}
\item[236] Id. at 424-25.
\item[237] Id. at 436-37. Helpful in this regard was an explicit provision in the Committee Report which noted that the definition should be “construed consistent with the Protocol.” Id
\item[239] Id. at 439 (citing \textit{UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS Ch. II B(2)(a) § 42 (Geneva, 1979))}.
\end{footnotes}
The court was careful to note, however, that the interpretation used by the High Commissioner was persuasive, and not binding. In determining that it was only persuasive, the court noted that the Handbook itself said that refugee status determination was a process that should be done by the state in which the refugee is located. Just as in the trade cases, the grant of authority to make determinations was construed as granting a certain amount of discretion. In *Cardoza-Fonseca*, however, unlike the trade cases, the court saw that discretion as falling not upon the agency, but on the courts adjudicating the rights of the refugee.

In *Aguirre-Aguirre*, the court seized upon the language from *Cardoza-Fonseca* noting that the decision was non-binding, and used that language to uphold the agency’s determination, although it was contrary to the Handbook’s guidance. In *Aguirre-Aguirre*, the language at issue was that of a “serious non-political crime”, which if committed, under Art. 1(F)(b), waives the refugee’s rights to non-refoulement under the 1951 Refugee Convention (although there is no such provision in the Convention against Torture and the refugee may still be able to gain withholding).

The petitioner in the case had engaged in some crimes which were borderline political and borderline serious: bus burning, for instance, a common form of protest in Latin America but also an arguably violent act (as it requires forcing the passengers to leave the bus).

The relevant portion of the Handbook in defining a “serious non-political crime” pointed out that in those instances, it is “necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared.” This language is extremely vague and leaves the balancing itself up to the national authorities. The Court of Appeals in *Aguirre-Aguirre* had overturned the Board of Immigration Appeals based on this handbook provision, finding the Board had failed to balance the two considerations. Nonetheless, the Supreme Court staunchly upheld the view that the Handbook is “not binding on the Attorney General, the BIA, or United States courts.”

The contrast between *Cardoza-Fonseca* and *Aguirre-Aguirre*, then, is not so stark. In *Cardoza-Fonseca*, the court interpreted international law for itself, and forced the Board of Immigration Affairs to change its standard of review for asylum claims. In *Aguirre-Aguirre*, the court found that the Handbook was not binding, and that the Court of Appeals had erroneously used the Handbook to overturn the Board of Immigration Appeals. Yet looking at the language quoted by each court, *Cardoza-Fonseca* demonstrated a much stronger standard clearly in conflict with the standard used by the Department of Justice. In *Cardoza-Fonseca*, a “reasonable degree” of proof seems obviously less stringent than the “more likely than not” standard the INS had adopted. In *Aguirre-Aguirre*, on the other hand, the “balance between the nature of the offence and the degree of persecution faced” does not facially conflict with the INS’ determination and provides more deference to the domestic agency’s findings of fact.

The examination of the Handbook occurred in both cases for its persuasiveness value, in line with Congressional intent that there be some degree of international uniformity in deciding who would be considered a refugee. The Skidmore-like analysis deployed by the court allows the

---

240 Id. at 453.
241 Id. at 439.
244 Id. at 427.
245 Id.
court to look at persuasive international agency documents, even under *Aguirre-Aguirre*. Although the international agency interpretation is not binding, it can still be taken into account.

4. Agency Expertise

Part of the rationale for deference in legal interpretation is agency expertise. The difference between *Cardoza-Fonseca* and *Aguirre-Aguirre* could be characterized as one of “pure law” as opposed to factual balancing. 246 In *Aguirre-Aguirre*, the Board of Immigration Appeals examined the nature of Aguirre-Aguirre’s political conduct, including burning buses, assaulting passengers, and vandalizing property, and found that the conduct was more criminal than political. 247 The Supreme Court did not emphasize those aspects, however; instead, the Court emphasized the idea that officials “exercise especially sensitive political functions that implicate questions of foreign relations.” 248

The Supreme Court found that the issue was one of institutional competence; they found that the “judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.” 249 *Aguirre-Aguirre* may be a particularly politically sensitive case; after all, it raises difficult questions of honoring another country’s criminal law as opposed to identifying that country as a political persecutor. Nonetheless, most asylum and withholding of removal cases will raise similar questions regarding treatment of citizens by their government and the validity of foreign domestic law.

The traditional rationale for the plenary power of Congress in the immigration setting has been the foreign affairs implications of immigration. 250 As discussed above, in the early immigration cases, the courts found that the ability to control ingress to the country and to secure borders were a fundamental aspect of sovereignty. 251 Nonetheless, the rule of immigration lenity has also provided an important counterbalance to potential executive overreaching. The question is how the *Charming Betsy* canon differs from the rule of immigration lenity in the treaty context. One response is that it reminds courts to look to the persuasiveness of UNHCR rules and regulations. *Charming Betsy* fits neatly here with the overall rubric of Congressional intent.

In looking to the UNHCR rules and regulations, the courts are not simply overruling the political branches; they are ensuring that the agency abides by congressional intent. In ratifying the Refugee Convention, the Senate agreed that the UNHCR should have ‘supervisory authority’. 252 In revising immigration rules and stripping rights, Congress has not decided to step back from our international commitments to protecting refugees. Using UNHCR rules as a benchmark thus honors congressional intent.

C. Two Options for Incorporating International Institutions: Deference to Multiple Agencies, or *Charming Betsy* as a Non-delegation Canon.

In the context of immigration and trade, one can see that the courts have wrestled with the question of how to balance international interpretations with domestic interpretations. A *Skidmore* deference framework, which retains the court as the primary interpreter and admits

---

246 Guendelsberger, *supra* note 212, at 624.
247 *Id.* at 625.
251 See, e.g., Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 602 (1889).
252 See *supra* note 233 and accompanying text.
agency definitions only insofar as they have the power to persuade, makes room for both interpretations. This can be justified in two ways under Mead.

First, one could assume that in the context of international institutions with delegated authority under a treaty, the multiple agency framework usual to administrative law can be used. Both the WTO Appellate Body and the UNCHR fit into that theory, as they are supervisory bodies for their respective treaties. Second, one could assume that as Charming Betsy is a nondelegation canon, the decision to conflict with an international institution must be made by Congress. Congress has clearly decided, in unambiguous language, to violate international law in the context of international trade. Congressional intent appears to have been to comply with and harmonize international law in the immigration context, however. Although Skidmore deference has not been used purely on the grounds of Charming Betsy, it is occasionally used in the multiple agency context.

1. Deference to Multiple Agencies

On its face, the deference rule stops clearly directing courts when two or more agencies issue conflicting interpretations. In choosing between rules, a court is actually making its own interpretive decision, and it will need more guidance than Chevron’s rule of permissibility. Many United States courts accord simply ‘substantial weight’ or persuasiveness (Skidmore) deference to both agencies, much as the Court of International Trade did in Footwear when it balanced the WTO Appellate Body decision and the Commerce Department decision.

The two major Supreme Court decisions in the area are Bowen and Martin. In Bowen, the court found that where Congress delegated the same power to multiple agencies, it was not required to defer to any one agency. In Martin, the Court found that where Congress allocated rulemaking power to one agency and adjudicative power to another agency, it intended that the rulemaking agency’s interpretation control. These cases viewed Congressional intent as demonstrated by the particular process delegated to each agency, rather than examining the relative expertise of the two agencies.

---

254 Chicago Mercantile Exch. v. SEC, Chicago Mercantile Exchange v. SEC, 883 F.2d 537, 547 (7th Cir. 1989) (“When two agencies claim to be the addressees, though, this allocation breaks down. Perhaps a court could say that because the agencies disagree, neither is entitled to deference. Yet disagreement doesn’t make the court the recipient of interpretive powers. One or the other agency is still in charge.”).
255 Id. at 63. Although Weaver finds the court’s approach of according some deference significant here, he doubts that there is any material deference between the Chevron and Skidmore standards. Russell L. Weaver, The Emperor Has No Clothes: Christensen, Mead, and Dual Deference Standards, 54 Admin. L. Rev. 173, 175, 178–79 (2002).
256 Bowen v. American Hospital Association, 476 U.S. 610, 642 & n. 30 (1986) (“Section 504 authorizes any head of an Executive Branch agency -- regardless of his agency’s mission or expertise -- to promulgate regulations prohibiting discrimination against the handicapped. . . There is thus not the same basis for deference predicated on expertise as we found . . . in Chevron.”).
257 Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 152 (1991) (“The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary’s statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations.”).
Does a multiple agency framework make sense in the context of international agencies? As discussed above, there is no constitutional or international law problem with having courts interpret international law. However, constitutional questions are raised if Congress tries to delegate lawmaking power to foreign agencies. The Supreme Court has been reluctant to delegate interpretive power to international bodies, as seen in *Medellin*. However, if international agencies are used in the domestic context only insofar as they are persuasive, the court is still making the final decision. The court can look at the way that Congress allocated power between the international and domestic agency to see which agency Congress intended the court to defer to. As long as the court is applying only *Skidmore* deference to the international agency, there is no constitutional problem.

In the immigration context, the UNHCR could be said to be the rulemaking agency. As discussed above, it has supervisory authority under the 1951 Refugee Convention. Its statute also confers on it the power to draft amendments to the treaty and promote ratification of the laws. Moreover, as discussed in *Cardoza-Fonseca*, the Committee Report among other legislative history sources specifically tied the definition of refugee to the international definition. It seems, then, a failure to use the UNHCR’s definition for its persuasiveness value would be in defiance of Congressional intent.

Unlike in the domestic agency context, however, *Chevron* deference should not be the lens through which to look at an international rulemaking decision. As discussed in Part II, *Chevron* deference is not part of international law; courts are allowed to be the primary interpreters of international law. And deferring so greatly to international agencies may in fact raise constitutional questions. *Skidmore* deference is appropriate in the context of international rulemaking agencies.

In contrast, the WTO Appellate Body is an adjudicatory, not a rulemaking agency (if there can be said to be a bright line between adjudication and rulemaking at the international level). As the court decisions discussed above noted, the Appellate Body and prior panels often did not give specific instructions for remedying a violation; they found only that there was a general violation. The remedy could include countermeasures by the winning party and did not necessarily have to be reform by the losing party. Rulemaking power, then, particularly under the Anti-Dumping Agreement’s provisions on deference, appears to be delegated to the domestic agency. Thus, even *Skidmore* deference is not necessary in the context of the WTO.

Another benefit of the multiple agencies framework is that it explains the current divide in the treatment of the UNHCR and the treatment of the WTO. While Congress has directed courts to look to the UNHCR in refugee cases, they have precluded use of the WTO decisions for persuasiveness value in anti-dumping cases. This difference in treatment of international agencies need not have a solely political explanation. The UNHCR is a rulemaking body, while the WTO is an adjudicatory body. Thus, the Congressional intent to allow use of the opinions of one while absolutely precluding the views of the other is consistent with the multiple agency framework decreed by the Supreme Court in *Martin*.

2. International Institutions and *Charming Betsy*

The second option for incorporating international institutions is using *Charming Betsy* within a *Chevron* framework. As discussed above, *Charming Betsy* usually does not demote an agency using an otherwise formal process with the “force of law” under *Mead* to *Skidmore*.

---

260 See supra notes 237–238 and accompanying text.
deference. Nonetheless, the canon can be used to show that the statute is clearly against the agency, or that the agency is acting unreasonably. The use of the *Charming Betsy* canon raises the issue of whether U.S. courts should look to international institutions in preparing an interpretation of international law and what constitutes a violation thereof. As the purpose of the *Charming Betsy* canon appears at least in part to avoid violation of international legal obligations, it seems as though the international institution should be influential insofar as it imposes a binding obligation.

In the absence of congressional action, then, *Charming Betsy* would cut exactly the opposite way as the multiple agency framework. The UNHCR imposes no sanctions on the United States; although a diplomatic protection claim might be brought by a country of origin on behalf of a refugee, practically speaking refugees are politically powerless or at the least disfavored in their country of origin. There is no international sanction forthcoming, besides the loss of honor or standing or reputation, when a refugee is wrongly denied asylum. Moreover, the court in *Cardoza-Fonseca* pointed out that the refugee status determinations are left up to the individual country; they are not appealable to any international body. The UNHCR generally issues non-binding guidelines, although it occasionally condemns countries for their treatment of refugees.

In contrast, trade cases are adjudicated at the international level. The WTO Appellate Body is one of the most binding international legal structures, with a clear enforcement mechanism; it authorizes countries to pursue economic measures against each other. Although its biases have come under fire recently, it has the ability to impose international obligations on a country in a way that the UNHCR does not.

Under a *Charming Betsy* framework concerned only with U.S. compliance with binding obligations, the WTO might get persuasiveness deference while the immigration body might not. Nonetheless, in § 3533(g) Congress has spoken clearly, as the Federal Circuit held in *Corus Staal*. Congress did not give the agency permission to remedy violations of international law without congressional committee approval. It seems then that *Charming Betsy* can play no role in winning respect for the Appellate Body in that context. In the immigration context, however, Congress has not clearly denied the influence of the international institution. Indeed, Congressional intent to use the international definition of “refugee” seems clear.

Benvenisti and Downs have recently written two articles about the ability of national courts to cooperate with each other and with international institutions to increase their power vis-à-vis other domestic actors. By looking to international institutions and engaging in cooperation, national courts can decrease fragmentation. Such use of international institutions is also acceptable where deference to administrative agencies is appropriate, as this Part has shown. In the next Part, I will discuss whether persuasiveness deference to international institutions also makes sense under a global administrative law section. This Part has shown that it would be legal to do so; in the next Part, I will discuss whether it would be beneficial to the United States and to international law as a whole for our national courts to engage with international institutions and to examine whether their decisions are persuasive. I will then

---

261 For a discussion of how this factor is undervalued, see *supra* Part I.B.2.b.
264 Id.
discuss what the goal of persuading and influencing international decisions means for whether we choose option 1 (a multiple agency framework) or option 2 (a more simple *Charming Betsy* framework).

V. Global Administrative Law and the Role of International Institutions: Influencing International Decisions Through the Use of *Charming Betsy*

As discussed in Part IV, the court must somehow balance deference to the domestic agency with deference to the international treaty or adjudicatory body. The Senate, or Congress as a whole, when ratifying or implementing treaties, can specify when courts and agencies *should* defer to treaty bodies, and under what situations. National legislatures must balance domestic and international actors’ power and procedures in this process, as multilateral treaty framers will leave legality review vague to accommodate a variety of legal systems.

In the United States, courts can encourage agencies to follow formal procedures by allocating increased deference where more process has been given. The question is whether national courts should use a similar rubric at the international level in the interpretation of treaties to try and influence the behavior of international institutions. By interpreting the terms of a treaty in a way that aligns with an international body’s interpretation, the court would be according a measure of deference to that agency. In the context of trade, Congress passed a statute making a clear statement that both requires United States courts to defer to domestic agencies and encourages the agency, the Commerce Department, to violate international law. This Article will argue that that clear statement reduced the capacity of the United States to control the procedures used by international decisionmakers by eliminating the court’s ability to provide incentives to those international institutions.


International institutions are important aspects of a treaty regime. In some cases, particularly in the human rights and environmental contexts, treaty bodies are used to monitor or “police” the national implementation of a treaty. Conferences of parties are given the power to amend a treaty. In the case of the Montreal Protocol, they may even make binding “adjustments” to the treaty by a supermajority vote.

The Montreal Protocol has two different procedures for modification: an amendment procedure and an adjustment procedure. The amendment procedure allows for the Conference of Parties to amend the treaty, but it only enters into the force for the parties that ratify, accept, or

---

267 Lohl, *supra* note 266, at 106
approve the Protocol. The adjustment procedure, on the other hand, allows Parties to tighten control measures based on periodic scientific and technological assessments; this adjustment procedure is binding even if only a two-thirds majority of the Parties present and voting approve it, as long as they represent a majority of the relevant categories of parties affected by the treaty. This style of treaty adjustment procedure was adopted because no consensus could be reached during the negotiations. The example of the Montreal Protocol demonstrates that parties may often want to precommit themselves in cases where later scientific or technological developments may drastically change the status quo. International environmental law offers the most striking examples of negotiators delaying decisions for future knowledge and attempting to bypass traditional problems of treaty rigidity.

B. Can Deference Help National Actors Influence International Bodies?

U.S. courts are hesitant to disagree with the executive in foreign affairs because they want the country to speak with one voice on foreign policy. They are concerned that delegating regulatory authority to international institutions is an unconstitutional delegation of sovereignty. Nonetheless, in theory, providing a modicum of deference to international decisionmakers may help national actors to influence those bodies by holding out the prospect of national compliance with international decisions. Judicial rulings may also allow for greater credibility with international actors than leaving decisions about the implementation of adjudicatory decisions to political bodies.

This section will examine how international decisionmakers consider and respond to actions by nation states. It will then turn to an evaluation of domestic implementation and the way that domestic constraints have operated to change Security Council policy in Kadi.

1. U.S. Distrust of International Decisionmakers

Distrust of international institutions’ decisionmaking with regard to national interests, particularly national regulatory policy, is not unique to the U.S. One key concern is whether international bodies will be able to evaluate local problems with sufficient expertise. In agency theory, allowing affected parties to participate substitutes for expertise; it is assumed that those parties will bring their local knowledge to bear on the problem. In the WTO, however, only states can bring claims against each other; NGOs and local interests do not have standing to appear.

In NRDC v. EPA, Congress appeared to overcome its bias against international decisionmaking bodies, binding the agency to the decisions of the parties to the Montreal

\[\text{Id.}\]
\[\text{Id. at 106–07.}\]
\[\text{Id. at 117.}\]
\[\text{Id. at 103–04.}\]
\[\text{NRDC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).}\]
\[\text{Shaffer, supra note 106, at 12 (“The primary problem with centralized international rule-making is that nations distrust international political processes for regulatory policy.”).}\]

This problem is gradually being eroded through the introduction of amicus briefs in panel and appellate body reports. Petros C. Mavroidis, Amicus Curiae Briefs Before the WTO: Much Ado About Nothing, Jean Monnet Working Paper 2/01 (2001), at 5–6, 10–11 available at http://www.worldtradelaw.net/articles/mavroidisamicus.pdf (discussing discretion of panels to accept amicus briefs where they find that they are ‘pertinent’).
Protocol. Nonetheless, the D.C. Circuit held that delegating regulatory authority to an international body would raise “significant constitutional problems.” The circuit’s opinion went beyond the idea that in order to delegate regulatory authority to an international body, either presidential signature or Senate ratification was necessary. They argued that any delegation of lawmaking authority to an international institution would be unconstitutional; treaties could only delegate adjudicative authority.

Similarly, the UN Charter contained U.S. acquiescence to dispute settlement within the ICJ framework; in Medellin, for example, the President explicitly stated that the US had an international obligation to comply with the Avena judgment. Nonetheless, the Supreme Court has held that the Charter is not self-executing, and ICJ decisions will not be judicially enforced within the United States without further political ratification. Its decision emphasized that the court could take ICJ decisions into account for purposes of comity, but that they would not be binding—an international institution would not be allowed to have binding effect within the United States without an extremely clear statement of delegation by Congress.

The Dispute Settlement Understanding created a dispute settlement system in the framework of the GATT agreements. The Appellate Body has interpreted its role within this dispute settlement system as one of teleological interpretation, using the purpose of fair trade to ground decisions in the philosophical bases of nondiscrimination, certainty and predictability. Yet political actors within the United States have overwhelmingly rejected the decisions that declared use of zeroing, the preferred U.S. methodology of calculating dumping margins, incompatible with the Anti-Dumping Agreement based on the above ideological grounds. § 3533(g) can be seen as the culmination of this backlash to zeroing and anti-dumping decisions by the Appellate Body which arguably depart from the text of the agreement.

The cases show that U.S. courts are extremely wary both of making decisions about international law themselves and of delegating decisions to international institutions. They may be concerned because international decisionmakers do not operate under the same political and institutional constraints as domestic courts and agencies. Nonetheless, judicial interaction with and recognition of decisions of these bodies could provide a tool for constraining these decisionmakers.

2. Constraints on International Decisionmakers

Legitimacy of international institutions is traditionally derived from delegation and control by national governments. National governments hold international institutions accountable and control the “ultimate effect” of international decisions by controlling domestic

---

276 NRDC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).
279 Although the Court does not raise the same constitutional concerns as in NRDC v. EPA, the evaluation of the language “undertakes to comply” is filled with ringing statements about “independent nations” and “honor” of those nations. Medellin v. Texas, 128 S. Ct. 1346, 1358-1359 (U.S. 2008).
281 Congress, in particular, has protested via language in a recent statute and letters to the US Trade Representative and Department of Commerce. Id. at 20–22.
incorporation of those decisions. As discussed below, separation of powers and textual constraints on decisionmakers are rare in the international context. In the absence of these controls, political constraints—such as pragmatic concerns about implementation—can be used to restrain international institutions.

Yet international decisionmakers are unconstrained by the constitutional and separation of powers concerns that constrain national courts. For example, the statute at issue in Shrimp-Turtle and Turtle Island Restoration Network mandated negotiations with foreign countries for the “development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles.” Nonetheless, the Ninth Circuit found that negotiation directives were constitutionally unenforceable; negotiation with foreign nations is committed to the discretion of the executive branch. In contrast, the WTO Appellate Body found in Shrimp-Turtle that negotiations were one of the missing procedural elements making the decision arbitrary, and thus falling outside the protective chapeau of GATT XX which permits environmental exceptions. Although the domestic court may hesitate to stipulate procedural remedies or to deal with questions of inter-state political relations, international institutions are not so reticent.

Limiting judges to strict interpretation of the text alone is one method of controlling judicial discretion, but it is uncommon in the international sphere. Both domestic and international agencies may see dynamic interpretation as increasingly appropriate in interpreting treaties; one justification is the increased difficulty of altering the text of a treaty, particularly a multilateral one, in the face of changed context or facts. Sungjoon Cho discusses this problem in the context of the WTO, where the parties have little power to renegotiate the Anti-Dumping Agreement. Similarly, Michael Kirsch has discussed the problems that arise in the context of tax treaties when private actors discover and exploit loopholes faster than national governments can renegotiate or modify the language of the treaty. Policy reasons as well as difficulty in negotiation can lead to vague provisions encouraging dynamic elaboration of norms by agency actors.

284 Earth Island Inst. v. Christopher, 6 F.3d 648, 653 (9th Cir. 1993).
285 United States—Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 12 October 1998, WT/DS58/AB/R, ¶ 172 [hereinafter Shrimp-Turtle]. See also Turtle Island Restoration Network, 284 F.3d at 1290 (“[T]he failure of the United States to initiate serious international negotiations to protect sea turtles . . . supported a finding of unjustifiable discrimination.”). One factor relevant to the decision was the fact the United States had negotiated with some of the countries but not others. Shrimp-Turtle, supra, ¶172. (“Clearly, the United States negotiated seriously with some, but not with other Members (including the appellants), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved.”). However, under American law these negotiations, however discriminatory, would be considered political questions, while the WTO was free to review them.
286 Sungjoon Cho, supra note 280.
Nonetheless, international decisionmakers are somewhat constrained by political considerations. Much as domestic courts have been said to make decisions in order to preserve their institutional influence vis-à-vis political actors, international tribunals make decisions based on political constraints. In the WTO context, for example, the Shrimp-Turtle decision has been characterized as one of political necessity. A substantive interpretation barring environmental regulation would have been a political disaster, while a compromise based on procedural limiting and balancing retains the Appellate Body’s legitimacy vis-à-vis both developing country constituencies and powerful US interests.\textsuperscript{288}

In general, however, the WTO has not been seen as deferential to one group of states over another. Statistical analysis has shown that the WTO tends overwhelmingly to decide cases in favor of Complainants, regardless of the party identity or relative political clout of the litigants.\textsuperscript{289} Concern for institutional reputation may also keep institutions from forming a bias in favor of a particular state. International institutions do engage in a dialogue with domestic institutions, as discussed in the next section.

3. A Dialogue With International Decisionmaking Through Domestic Implementation

Although national actors cannot directly rule on how international law should be interpreted, dualism can become a technique for powerful actors to shape the contours of international law.\textsuperscript{290} Even if the decision is on a national level, the court’s criticism and engagement with the procedures at the international level can have an impact on international procedure. The domestic court is usually acting under an implementing statute, as in the context of trade and the context of environmental measures. Nonetheless, as seen in Kadi, such review may receive a response at an international level.

If a major player on the international scene imposes procedural requirements that must be met before they will incorporate international law as enforceable in their domestic legal system, the international institution may comply. It will do so for pragmatic reasons, but perhaps also because it agrees with and takes seriously the legal reasoning of the national actor. It is important not just that the major player refuse to comply, but that it do so for cognizable and legal reasons that do not undermine greatly the overall scheme of the institution.

In \textit{Kadi}, for example, the European Court of Justice did not explicitly state that the Security Council’s counterterrorism sanctions regime violated general principles of due process under international law.\textsuperscript{291} Instead, the Court reviewed the implementation of the regime within

\textsuperscript{288} Shaffer, \textit{supra} note 106, at 15–18 (2009).
\textsuperscript{291} Yassin Abdullah Kadi v. Council of the EU and Commission of the EC, and Al-Barakaat International Foundation v. Council of the EU and Commission of the EC, judgment of 3 September, 2008. The \textit{Kadi} case was bought by an individual who had substantial assets in the EU; all his funds and financial assets in the EU were frozen under EC Regulation 467/2001, which implemented the listing decisions of the UN Counter-Terrorism Committee under a series of UN Security Council resolutions. For a summary of the facts, see de Burca, \textit{supra} note 290, at 21.
Europe and concluded that the EC Regulation violated the applicant’s EC-recognized “right to be heard, right to an effective legal remedy, and right to property.”

In response to the Kadi decision, the UN Security Council passed Resolution 1822/2008, which they explicitly said was intended to comply with requirements of transparency and contestation. Resolution 1822/2008 provided that there would be a public release of at least some of the reasons for listing individuals, required notification of the countries of residence and nationality of those individuals, and instructed those countries to notify the individuals involved. It also provided listed private entities and persons a chance to submit individual requests for de-listing, rather than being required to go through their state; those were repeated from S. Res. 1730, however.

Euan MacDonald has argued that the “watershed” potential of this moment for Global Administrative Law has turned into a weak set of procedural protections that do not satisfy the substantive concerns raised by the ECJ in Kadi. Kadi has subsequently filed another case challenging the decision and saying that the reasons given were not sufficient or complete. MacDonald notes that the weak and possibly meaningless procedural protections may raise concerns about legitimation of violations of rights through a procedural gloss, citing Chimni.

One may wonder whether allowing for deference in national courts is thus giving something without getting anything in return. Even with an incentive, will international institutions comply with procedural suggestions? Kadi was perhaps a unique case, as the UNSC resolution is recognized as law in the European Union regardless of the actual procedural constraints placed on the implementing statute. The ECJ can delay implementation and require more procedures in national law, but it did not choose to enjoin compliance with the international system altogether or to rule directly on the validity of the international system. Other institutions may have less power in domestic systems and may need deferential incorporation under national law to win state support.

C. Monitoring the Publicness Of International Decisions: Courts, Legislatures, or Executive Agencies?

Although 19 U.S.C. § 3533(g) insists that the agency violate international law until congressional committees consider the issue, many other regimes do not have such a clear statement favoring violation of international law. In particular, where an agency is

---

292 De Burca, supra note 290, at 34, 36.
295 Id. ¶ 15.
296 Id. ¶ 17–18.
297 Id. ¶ 19; S. Res. 1730 (2006), Annex, De-listing Procedure, ¶ 1;
299 Id.
300 Id.
301 Administrative law scholars may be skeptical about the impact that § 3533(g) has on agency action, when the committee may only take a nonbinding vote indicating their views. Although the statute indicates congressional
administering a treaty directly (as in extradition cases), *Mead* analysis of whether Congress intended to delegate power might indicate that the use of *Skidmore* deference would be appropriate. Congressional action would be necessary in the trade context to allow the courts to examine Commerce’s implementation of WTO panel rulings. With 19 U.S.C. § 3533, at least as interpreted in *Corus Staal*, Congress has essentially taken the courts out of the equation.

Statutes like § 3533(g) leave evaluation of international decisions in the hands of political bodies. Assuming that the US would like to maximize its influence over WTO adjudication, this section will discuss whether deciding on compliance *politically* is the most effective way to influence international bodies. Central to the discussion of types of deference granted to both national and international bodies is the question of whether national actors should allow courts to review the procedural aspects of international decisionmaking, or to influence such decisionmaking through review of implementation.

In his recent article, Benedict Kingsbury argues that courts, in addition to ascertaining the status of rules adopted by international bodies, can participate in global governance by considering certain aspects of policy:

> It is of course important to consider the status in international law of the relevant rule or decision, and the effect given to this category of rule or decision in the national law of the forum. But inquiry may also be needed into other questions: what formal authority and status the rule or decision has in the system within which it was made; how it was made (issues of process); how the governance regime actually works and how it is understood by its main participants or constituencies; how this aligns with the public policy of the forum, and perhaps with broader public and governmental interests; and what role could properly and usefully be played by the national court.  

Courts may have the implicit power to review international decisions by choosing to agree or disagree with their interpretations of international law in subsequent cases, although they do not have the explicit power to review decisions taken outside of their jurisdiction.  

Professor Kingsbury suggests 5 criteria for lending more weight to international decisions: legality, proportionality, compliance with the rule of law (defined in his work as compliance with procedural requirements, except perhaps where there is a compelling reason to depart from that procedure), rationality, and respect for basic human rights norms. In a system where no deference is due to other, domestic agencies, the choice of whether to defer to international institutions (much like the *Chevron v. Skidmore* choice in the United States) could hinge on these publicness factors. In a legal system where deference to other agencies *is* due, such as the United States, these factors sound like *Skidmore* factors, factors that give the international agency the power to persuade.

In the trade context, the decision to implement international decisions has been retained by the political branches. Of course, the Commerce Department, Trade Representative, and relevant Congressional Committees could themselves “give more weight to rules or decisions produced by external entities where these more comprehensively meet requirements of intent to refrain from delegating compliance with the WTO to the agency, the executive may choose to disregard that intent and override congressional committee votes. Nonetheless, the intent of the statute, as discussed above, clearly indicates congressional willingness to impede executive compliance with WTO decisions. Congress retains control of this politically sensitive issue.

---

303 Id.
304 Id.
publicness.” Nonetheless, these political bodies are more likely to be swayed by other considerations, including by industry lobbying.

In the context of national security, commentators have debated whether the judiciary or the legislature is the best avenue of overseeing executive action. De Londras and Davis have published an interesting argument in this regard. De Londras argues that the judiciary is the most steeped in the culture of legality and the most used to protecting individual rights. This is particularly true in countries which, unlike the U.S., have a parliamentary system tying the legislature to the executive. Davis argues for Congressional or parliamentary control, saying that judges too often defer to the executive or fail to protect civil liberties in this context. But Eyal Benvenisti has recently found that courts use international law to gain independence from the executive in many countries.

U.S. constitutional theory sees courts as an important guardian of individual rights. In American jurisprudence, there has traditionally been a requirement of generality in the law (although individual immigration rights may be granted through “private bills,” and individual entities may be singled out for subsidies). There is a constitutional prohibition on bills of attainder. Moreover, courts are viewed as a countermajoritarian force that can protect individual rights. This argument has also been raised in other constitutional systems; Cathleen Powell has discussed how the South African system of requiring individuals whose assets have been frozen to go through Parliament rather than allowing them to file a case in the judicial system is probably unconstitutional under the South African constitution. As discussed above, U.S. constitutional theory sees courts as uniquely suited to both deciding individual cases (i.e., not necessarily how but whether or not an international decision should be complied with), and to reviewing international decisions for complying with proper procedures and not exceeding their delegated powers (which they do routinely in the domestic agency context).

An additional argument for allowing courts to engage in review for proper procedures and respect for the rule of law is the projected international response. National courts do not have a good reputation for independence. Nonetheless, a national court decision on procedure and delegation may have more international credibility than a similar executive or legislative decision, which will be assumed to be purely political.

305 Id.
309 Art. 1, § 9, cl. 3.
310 See generally JOHN HART ELY, DEMOCRACY AND DISTRUST 1–11 (1980).
311 Cathleen H. Powell, Terrorism and the separation of powers in the national and international spheres, 18 SOUTH AFRICAN J. CRIM. JUST. 151 (2005).
312 On the distinction between how and whether to comply with international law, see Mitra Ebadolahi, Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa, 83 N.Y.U. L. REV. 1565, 1584–86, 1602–03 (discussing the institutional competence concerns that underlie a decision to have judges simply identify a rights violation and then having a commission or legislature decide how to remedy that decision).
313 See also supra Part I.B.2.
314 For example, foreign courts frequently look to U.S. courts for reasons of comity and harmonization. For a discussion of how judges influence one another, see Jeremy Waldron, Partly Law Common to All Mankind: The
The reasoning behind keeping the decision in the political branches is tied to democratic accountability. Legislators want to retain control of such sensitive political decisions. In many cases, however, decisions are so contentious that they have been removed from the control of the whole Congress for fear of stalemates, extensive litigation, and undermining of the international regime. We might believe that agencies are the best mix of both political accountability and impartial review. In the trade context, supposedly impartial adjudicators in the Commerce Department oversee formal adjudication of appeals. Nonetheless, these adjudicators don’t have the independence of Article III courts, and they also don’t have the same experience in reviewing the procedures and reasoning used by other adjudicators that Article III courts have. Because of their legal modes of reasoning and their independence from political interests, Article III courts can be more persuasive than the political branches when addressing foreign and international judicial and adjudicative bodies.

Conclusion

This Article has argued that both U.S. courts and the Congress should look to incorporating international institutions’ decisions as a way to influence those institutions and to establish a reputation for compliance with international law. As discussed in the first section, American interests in complying with international law and maintaining a long-term reputation are often undervalued in our political system. Canons of interpretation such as *Charming Betsy* which favor these interests play an important role in furthering democratic goals. Incorporation of international institutions’ decisions for persuasiveness could take place under the rubric of *Charming Betsy*: to do so would be to condition congressional intent on compliance with international law or a clear statement to violate it. In ascertaining international law independently under Step One of *Chevron*, American courts can look to the current jurisprudence and guidance of international institutions. One could also incorporate international institutions’ decisions under a multiple agency framework. In that case, the decisions could be considered using Skidmore deference, particularly where the international agency is considered a rulemaking, and not a simply adjudicatory, body.

Is one way of incorporating international institutions’ decisions more persuasive than another? A straightforward *Charming Betsy* approach may allow courts to play a larger role in influencing international institutions. If we assume that courts can be influential by evaluating whether international decisions are persuasive, and identifying particular facets of a decision as more persuasive as others, there is no reason to limit this influence to rulemaking as opposed to adjudication. In fact, courts will be more persuasive when interacting with other adjudicative actors. Because they are themselves employing modes of legal reasoning and adjudication, they can more authoritatively set forward the types of reasoning and process that they expect when reviewing decisions by international institutions. The rulemaking versus adjudication divide among international agencies may divide neatly along the lines that Congress has already established for deference in the immigration and trade context. Nonetheless, a *Charming Betsy* application that takes agency decisions into account when determining whether a statute would violate international law, but which does not explicitly defer to rulemakers as in a multiple

---

*Use of Foreign Law in United States Courts, IILJ Colloquium Spring 2008, 42–46, available at http://iilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf* (discussing how adjudicators around the world refer to one another in their opinions because they share a common legal methodology and mode of analysis—such as evaluating procedures—that can inform their reasoning). See also Kingsbury, *supra* note 302, at 18–19 (discussing potential coalescence of transnational norms from national court practice).
agency context, may be more appropriate. Although Charming Betsy focuses on compliance with binding obligations, it is precisely where international agencies are creating binding obligations that publicness matters most.

A regime under which courts could evaluate international decisions for publicness, including transparent procedures and increased reason-giving, would give international agencies incentives to use formal procedures and to write decisions in a persuasive and well-reasoned way. National courts may be better positioned than legislatures to look at legality review in particular cases, and may have increased legitimacy in other jurisdictions to the extent that they are seen as a neutral forum that uses legal reasoning, rather than a political body. The Kadi case can be seen either as a sign that international institutions will listen to national institutions’ refusal to comply, or as a sign that any changes will be superficial procedural changes rather than substantive protection of rights.

Ultimately, there are two important empirical questions that remain unanswered. Will deference incentivize international institutions to be more ‘public’ in their procedures? If it does, will the gains outweigh the perceived costs of deferring (are they enough to overcome national decisionmakers’ distrust of allocating decisions to international bodies)? If the perceived gains are worth the costs, courts are the best locus for legality review. Courts should not let a spurious idea of “great weight” deference overcome the need for both enforcement of international law in the domestic sphere and influence over the formation of international law in the global sphere.