

2005

Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions

James T. Gathii

Loyola University Chicago, School of Law, jgathii@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [International Law Commons](#)

Recommended Citation

James T. Gathii. Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions, 34 Ga. J. Int'l L. 1 (2005).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

I. INTRODUCTION

The citation of foreign precedents in federal courts has received widespread attention in the recent past. Supreme Court Justices have debated the permissibility and effect of citing foreign precedents in interpreting the Constitution. Much less attention, however, has been focused on the equally significant citation of the decisions of the World Trade Organization's, (WTO's) Dispute Settlement Body (DSB).

The significance of DSB decisions is underscored by the Trade Act of 2002.¹ In this law, Congress directed the Department of Commerce (DOC) not to apply any of the United States' implementing legislation with respect to any agreement negotiated under the auspices of the WTO until the Secretary of Commerce had issued a report to Congress addressing congressional concerns as to whether or not the DSB had added or diminished the rights and obligations of the United States under GATT/WTO agreements.² By conditioning the application of U.S. commitments under the treaties negotiated under the auspices of the WTO on the submission of a DOC report,³ Congress was expressing its concern that the DSB was creating additional obligations for the United States and therefore diminishing its rights.

Thus, after the enactment of the 2002 Trade Act, one of its chief architects, then Senate Finance Committee Chairman Max Baucus, criticized the DSB as a "kangaroo court" for issuing a series of rulings against U.S. trade remedy

¹ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (codified in scattered sections of 19, 26, and 42 U.S.C.).

² 19 U.S.C. § 3805 (2002).

³ That report was transmitted to Congress by the Secretary of Commerce on December 30, 2002, as required. In it, the Secretary of Commerce

allayed congressional fears that the DSB was heavily biased against the U.S. by systematically marshalling evidence to demonstrate that DSB rulings had benefited a wide array of U.S. industries and that in those cases in which the U.S. had lost, the "findings involved technical or procedural elements of a law or regulation, or its application, and the United States was easily able to implement the DSB recommendations without affecting the underlying law or regulation."

See James Thuo Gathii, *Insulating Domestic Policy Through International Legal Minimalism: A Re-Characterization of the Foreign Affairs Trade Doctrine*, 25 U. PA. J. INT'L ECON. L. 1, 103 (2004) (citing U.S. Trade Representative, Executive Branch Strategy Regarding WTO Dispute Panels and the Appellate Body: Report to the Congress Transmitted by the Secretary of Commerce, Part III.c (Dec. 30, 2002), available at <http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf>) [hereinafter Gathii, *Insulating Domestic Policy*].

laws.⁴ This was not the first time that a member of Congress had expressed concern that the DSB was overreaching in ruling against U.S. trade laws or their applications. Underlying these worries was Congress' concern over the appropriateness of the DSB overruling congressionally enacted provisions of U.S. trade laws or their applications and interpretations by the DOC. Congress' concerns may be regarded as expressing the need for democratic checks on the DSB's judicial review of U.S. laws, their interpretations and applications.⁵

Federal courts have for several years been grappling with the effect, if any, of DSB or GATT panel decisions in construing U.S. statutes in U.S. courts.⁶ When the United States is a party to a DSB dispute, the resulting DSB decision will be binding on the United States under international law.⁷ For this reason, questions involving DSB decisions in the federal judiciary, like the questions surrounding the citation of international and foreign decisions in construing the Constitution, raise important questions. This is especially so because the United States has voluntarily ratified and has been a primary supporter of the treaties of the international trading regime that the DSB is charged with the responsibility of interpreting. The United States is also a major litigant in DSB cases. Notwithstanding the United States' commitment to a rule-based global trading system and the binding nature of DSB decisions under international law, Congress and the courts have taken steps to limit the potential applicability of DSB decisions considered adverse to the United States.⁸ Congress has been especially critical of DSB decisions that would require congressional reversal of federal mandates such as the protection of U.S. labor and the environment, or those that would prevent the DOC from exercising its trade remedy mandate.⁹

⁴ Senator Max Baucus, U.S. Trade Laws and the WTO, Speech to the Global Business Dialogue (Sept. 26, 2002), <http://tokyo.usembassy.gov/e/p/tp-ec0014.html> ("I am deeply troubled about what has been going on in the WTO dispute-settlement process. These proceedings are looking more and more like a kangaroo court against U.S. trade laws. This trend must stop. And I am here today to suggest some steps to stop it.").

⁵ See, e.g., Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996) (noting that "dispute settlement by an international body such as GATT or WTO treads on the delicate and confusing issue of national 'sovereignty'").

⁶ See *infra* note 16.

⁷ See *infra* Part III.

⁸ See *infra* Part III.

⁹ See *supra* note 3 and accompanying text.

Given this congressional concern, this paper inquires into the status of DSB decisions in the federal judiciary by seeking to answer two related questions. First, given that DSB decisions where the United States is a party to the dispute are binding as a matter of international law, are federal courts bound to follow such decisions when construing a provision of a U.S. trade statute? Second, where a provision of a federal statute has been interpreted by the DSB to be in violation of the United States' GATT/WTO treaty obligations, is a federal court bound to follow this internationally binding decision?

Based on an extensive survey of the case law, I argue that there are two lines of cases on the treatment of conflicts between DSB decisions and domestic statutes. Under the first line of cases, when federal courts are faced with an ambiguous statute, they decline to rely on a DSB decision as the only basis to strike down a U.S. agency's interpretation of the statute. The rationale for this outcome is twofold. First, in the event of a conflict between the holding in a DSB decision and an interpretation or application of a statute by a U.S. agency, the agency interpretation or application of the statute trumps a DSB decision to the contrary. This means that if upholding a domestic statute would create a GATT/WTO violation, the court would have no choice but to create such a violation. Second, in the event of an actual conflict between a statute and a DSB decision, it is a matter for Congress rather than the federal courts to decide and remedy.¹⁰ This line of cases, therefore, treats the domestic legal regime as a separate and distinct sphere from the international legal domain, and in the event of a conflict, the domestic statute trumps the international legal obligation. Under this line of cases, courts do not distinguish between ambiguous or unambiguous statutes in relation to conflicting DSB decisions, since these courts conceive their role as being simply that of affirming congressional intent. Thus, the judicial function is to establish if an agency's interpretation or application of a statute is consistent with a discernable legislative intent and to uphold such interpretation or application even if doing so would be inconsistent with a DSB decision directly on point.

A second and less dominant line of cases holds that the interpretation or application of ambiguous statutes requires domestic courts, as a principle of domestic statutory construction, to interpret ambiguous statutes in conformity with the United States' international obligations. Under this line of cases, the claim for interpreting ambiguous statutes is not based on a presumed superiority of GATT/WTO law to domestic law or the idea that GATT/WTO

¹⁰ See *infra* Part III.

law is part of domestic law. Rather, the claim is that in interpreting ambiguous statutes, courts have discretion to defer to agency interpretations and applications where the agency's application or interpretation was made to conform with a DSB decision or a GATT/WTO obligation. Therefore, the rule that domestic law supersedes where GATT/WTO law or a DSB decision conflicts with domestic law is still true even under this line of cases. The difference from the first line of cases is that rather than using the domestic statute to trump the DSB decision, courts use domestic statutory interpretation techniques to defer to agency interpretations and applications of ambiguous statutes where those interpretations and applications were influenced by considerations of conforming domestic law to a DSB decision or a GATT/WTO obligation. When they invoke this line of cases, courts invariably give consideration to minimizing conflicts with international law. By declining to find DSB decisions as inconsistent with federal law, these courts in effect give deference to agencies applying or interpreting the statute because of their competence and expertise. As a result, courts defer to agency decisions by taking into account the significance of a variety of factors. These factors include decisions on whether or not to minimize conflicts between U.S. law and policy on one hand, and on the other hand, whether to reduce conflicts with the United States' GATT/WTO obligations, which include those contained in DSB decisions. My discussion of *Turtle Island Restoration Network v. Evans*¹¹ (*Turtle Island*) and *Federal Mogul Corp. v. United States*¹² (*Federal Mogul*) in Part III best illustrates the approach in this line of cases.

By upholding domestic law in the event of a conflict between DSB decisions and domestic law, courts in the first line of cases follow a congressional pattern of insulating the United States from its international trade obligations. The effect of this line of cases is that U.S. trade remedy laws protect domestic industries and producers in ways that would be impermissible under a good faith application of the United States' treaty commitments. In addition, by treating U.S. trade laws as superior to GATT/WTO treaties and by declining to interpret and apply U.S. trade laws consistently with the United States' GATT/WTO treaty commitments, federal courts adopting this reasoning acquiesce to the derogation, violation, and disregard of the United States' treaty obligations set in place by Congress and the executive branch.¹³ Ultimately, this Article shows that under the first line

¹¹ *Turtle Island Restoration Network v. Evans*, 538 U.S. 960 (2003).

¹² *Fed. Mogul Corp. v. United States*, 70 F.3d 1289 (Fed. Cir. 1995).

¹³ See *infra* Part III:F and G.

of cases, federal courts have adopted the view that unless the political branches of the government authorize the recognition of GATT/WTO law or indeed of a DSB decision, then courts cannot treat them as sources of federal law.¹⁴ When courts move from the premise that the qualifications placed by Congress in legislation implementing GATT/WTO obligations subordinates the United States' treaty commitments to domestic statutes, the effect of these qualifications renders these obligations largely, if not entirely, irrelevant in federal litigation. As the second and less frequently resorted to line of cases shows, however, these outcomes are not the inevitable result of judicial interpretation. This is particularly so where an agency such as the DOC crafts a policy with the view to conforming it to international legal obligations such as those contained in a DSB decision to which the United States was a party. In cases arising from such agency action, like *Turtle Island*, federal courts can uphold the agency's policy as being consistent with the clear meaning of a statute. *Turtle Island* thus demonstrates that courts can, under domestic law, arrive at a decision consistent with the United States' international legal obligations when confronted with a DSB decision finding a U.S. law inconsistent with a GATT/WTO obligation. Therefore, *Turtle Island* is a good example of a judicial approach that teaches us that domestic law can be mobilized to ensure that the United States acts consistently with the principle that a violation of an international legal obligation is not excusable on the premise that the violation is permissible under domestic law.¹⁵

To make this argument, I proceed as follows: Part II traces two lines of cases outlining the interpretive utility of DSB and GATT decisions in the federal judiciary. Part III examines the policy objections to the DSB's sanctioning mandate and a variety of theoretical approaches to overcoming the direct effect of DSB decisions within the United States. In this part, I also briefly examine the international legal consequences of the first line of cases that subordinates the United States' international legal obligations to domestic law. I will end the Article in Part IV with concluding comments.

¹⁴ By proceeding as such, federal courts have therefore adopted an argument analogous to the revisionist argument that without the authority of the political branches, customary international law is not a source of federal law. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (arguing that absent authorization from the federal political branches, customary international law should not have the status of federal law, and that this is the view largely endorsed by federal courts).

¹⁵ See *infra* Part IV.E.

II. DSB DECISIONS IN U.S. COURTS

A. Under International Law, DSB Decisions Are Binding on Parties to a Dispute

Under international law, WTO dispute settlement decisions that have been adopted by GATT contracting parties and the DSB are binding on the parties with respect to resolving a dispute between them.¹⁶ In addition, DSB decisions are binding irrespective of non-compliance by a party to the dispute in which the decision was rendered and irrespective of the ability of the WTO or of the winning party to enforce them.¹⁷ Since DSB decisions are binding only as to parties to a dispute, they generally do not create a binding precedent in subsequent WTO cases. They are, however, "often considered by subsequent panels"¹⁸ and "create legitimate expectations among WTO members,"¹⁹ and as such, the Appellate Body has argued that they *should* "be taken into account where they are relevant to any dispute."²⁰

Leading WTO jurist, John H. Jackson, has argued that Article 3.2 of the Dispute Settlement Understanding makes certainty and predictability the linchpin of the dispute settlement system. He argues that the nature of the rule-based GATT/WTO system assures security and predictability through the "idea that full compliance is an international law obligation."²¹ To reach this conclusion, Jackson examines Paragraph 4 of Article 16 of the Agreement Establishing the WTO, which obliges WTO members to "ensure . . . [the] conformity of . . . [their] laws, regulations and administrative procedures,"²²

¹⁶ Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, ¶ 9, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan Taxes*]. See also John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out,"* 98 AM. J. INT'L L. 109 (2004) (arguing that adopted WTO dispute settlement decisions are binding as a matter of international law) [hereinafter Jackson, *Obligation to Comply*].

¹⁷ John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 60-61 (1997) [hereinafter Jackson, *Dispute Settlement Understanding*].

¹⁸ *Japan-Taxes*, supra note 16, ¶ 9.

¹⁹ *Id.*

²⁰ *Id.* See also Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999) (making the case that although there is no de jure stare decisis system at the WTO, the DSB follows a stare decisis system in practice and that there are strong reasons for adopting a de jure stare decisis system).

²¹ Jackson, *Obligation to Comply*, supra note 16, at 122.

²² *Id.* at 112 (citing Marrakesh Agreement Establishing the World Trade Organization, para. 4, art. 16, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter *Anti-Dumping*

with the various WTO Agreements, the preparatory work of GATT and other provisions of WTO law, and decades of practice that debunk the view that a country can buy-out of its obligation to comply with a DSB decision.²³ Jackson also advances several policy reasons arguing in favor of the bindingness of DSB decisions and against arguments that suggest flexibility in the status of these decisions. His argument here is that neither the text of the WTO treaty nor the underlying policy of its dispute settlement system suggest that DSB decisions are intended to be flexible or negotiable. Below, I examine two cases in which, consistent with Jackson's view, the DSB found certain applications of U.S. law to be inconsistent with the United States' obligations under one WTO treaty.

B. DSB Decisions Finding U.S. Statutes in Violation of GATT/WTO Treaty Obligations

Is a federal court bound to follow a DSB decision that has declared a federal statute to be in violation of the United States' GATT/WTO treaty obligations?²⁴ To answer this question, I examine two recent reports where the DSB declared a U.S. practice to be inconsistent with the United States' obligations under the Anti-Dumping Agreement.

But first, what is anti-dumping? In short, "the purpose of anti-dumping law is to counteract the effect of price discrimination in sales by a foreign producer which results in injury to the industry of the importing country."²⁵ In this sense,

[A]nti-dumping law is aimed at protecting industries in importing countries from unfair pricing policies or predatory competition engaged in by an industry in a second country. The premise of anti-dumping law under the theory of competitive advantage is that an industry in one country is selling its products in a second country at below cost of production or less than fair value.²⁶

Agreement)).

²³ *Id.* at 112-14.

²⁴ This question is also relevant where a DSB decision, which does not involve the United States, declares that another country's practice, which is similar to the United States, violates one of the GATT/WTO treaties. Zeroing, discussed later, is one of these policies.

²⁵ Gathii, *Insulating Domestic Policy*, *supra* note 3, at 53.

²⁶ *Id.*

The margin of dumping is calculated by deducting sales of the like product in the foreign market from similar sales in the domestic market.

The two cases I discuss challenged a practice referred to as zeroing in dumping calculations. When computing sales in a foreign market, zeroing entails assigning a zero value to non-dumped sales instead of deducting them from dumped or less than fair value sales. By assigning such sales a zero value instead of deducting them from dumped or less than fair value sales, zeroing has the effect of inflating the margin of dumping.

In both *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Bed Linen)*²⁷ and *United States-Final Anti-Dumping Determination on Softwood Lumber from Canada (Softwood Lumber)*,²⁸ the DSB found that zeroing practices violated Article 2.4.2 of the Anti-Dumping Agreement. In the *Bed Linen* case, the Appellate Body held that the European Union's practice of zeroing violated the Anti-Dumping Agreement since this practice did not take into account all comparable export transactions in calculating the dumping margin.²⁹ By giving non-dumped sales a zero value rather than deducting them from the margin of dumping, the Appellate Body held that zeroing distinguished between the presence of successful import competition on the one hand, and injury caused by imports on the other. Similarly, in *Softwood Lumber*, the United States' zeroing practice was struck down by a DSB panel,³⁰ and in February of 2004, the European Community requested the formation of a WTO panel to hear its complaint regarding thirty-one zeroing cases in which it argued that the United States had violated Article 2.4.2 of the Anti-dumping Agreement.³¹

²⁷ Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *Bed Linen*].

²⁸ Panel Report, *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) [hereinafter *Softwood Lumber*].

²⁹ *Bed Linen*, *supra* note 27, ¶ 65 (stating that “the practice of ‘zeroing’ . . . as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement”).

³⁰ *Softwood Lumber*, *supra* note 28, ¶ 108 (holding that “based on the ordinary meaning of Article 2.4.2 read in its context, . . . zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted average methodology”).

³¹ News Release, EU Requests WTO Panel on U.S. Anti-Dumping Methodology (Feb. 18, 2004), <http://www.eurunion.org/news/press/2004/20040020.htm>.

C. The Treatment of Zeroing in U.S. Courts Before the 1994 Anti-Dumping Agreement

Prior to the passage of the 1994 Anti-Dumping Agreement, which has been interpreted by the DSB to make zeroing illegal,³² zeroing was often engaged in and considered legal under the 1979 Anti-Dumping Agreement.³³

For example, *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States (Bowe Passat)*³⁴ was decided in 1996 under the 1979 Anti-dumping Code and was among the first cases in which a foreign importer challenged the DOC's zeroing methodology. This case involved dumping of dry cleaning machinery from Germany. Although the Court of International Trade gave credence to the view that zeroing methodology overestimates dumping margins by assigning all entries that have a higher U.S. price than average foreign price a zero value rather than a negative margin, it nevertheless upheld the zeroing methodology.³⁵ According to the court, "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable, . . . the Court must defer to [the Department of] Commerce's chosen methodology."³⁶

Likewise, the United States Court of Appeals for the Federal Circuit in *Algoma Steel Corp. v. United States (Algoma Steel)*,³⁷ dealing with an anti-dumping dispute with Canada, upheld a calculation of less than fair value that arguably conflicted with the United States' obligations under the 1979 Anti-Dumping Agreement.³⁸ While in *Algoma Steel* the question of the relationship between U.S. law and GATT obligations did not arise, the court nevertheless held that in the case of a conflict between U.S. legislation and the United

³² See, e.g., *supra* note 30 and accompanying text.

³³ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, T.I.A.S. No. 9650, 31 U.S.T. 4919 [hereinafter Tokyo Round Agreement].

³⁴ *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States*, 20 Ct. Int'l Trade 558 (1996).

³⁵ *Id.* at 570-71 (acknowledging the inherent statistical bias of the zeroing methodology).

³⁶ *Id.* at 572.

³⁷ *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989).

³⁸ *Id.* at 242 (noting that "[w]e have also considered the General Agreements on Tariffs and Trade (GATT). Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours."). See also Tokyo Round Agreement, *supra* note 33, art. 3.4 (stating that "It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of the Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to dumped imports.").

States' obligations under the then existing 1979 anti-dumping codes, U.S. legislation would prevail.³⁹

D. Zeroing Decisions in U.S. Courts Following the 1994 Anti-Dumping Agreement

Both *Bowe Passat* and *Algoma Steel* were decided before the *Bed Linen* and *Softwood Lumber* cases which established that zeroing methodologies were inconsistent with Article 2.4.2 of the 1994 Anti-Dumping Agreement.⁴⁰ In this section, I discuss cases that have been decided since these decisions were announced.

In *Corus Staal BV v. U.S. Dep't of Commerce (Corus Staal)*,⁴¹ a case that came before the United States Court of International Trade, the plaintiff challenged an adverse anti-dumping investigation. The challenge primarily relied on the DSB decision in the *Bed Linen* case,⁴² which found the zeroing methodology to be in violation of Article 2.4.2 of the Anti-Dumping Agreement.

While the *Corus Staal* court acknowledged that "WTO decisions may help inform its decisions,"⁴³ it found that it could not "solely rely upon a non-binding interpretation of an international agreement as grounds to strike a United States agency interpretation of a statute."⁴⁴ Instead, it reasoned that "WTO decisions are not binding upon commerce or the court,"⁴⁵ and that "it appears that WTO decisions are not binding on the WTO itself."⁴⁶ The court

³⁹ *Algoma Steel*, 865 F.2d at 242 (noting that "[s]hould there be a conflict [between] U.S. legislation and its obligations under the 1979 Anti-Dumping Code], the United States legislation must prevail").

⁴⁰ Article 2.4.2 of the Anti-Dumping Agreement provides:

Subject to the provisions governing fair comparison in paragraph 4 [of this article], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Anti-Dumping Agreement, *supra* note 22, art. 2.4.2.

⁴¹ *Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003).

⁴² See generally *Bed Linen*, *supra* note 27 and accompanying text.

⁴³ *Corus Staal*, 259 F. Supp. 2d at 1265.

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Hyundai Elecs. Co. v. United States*, 23 Ct. Int'l Trade 302 (1999) and *Footwear Distribs. & Retailers of Am. v. United States*, 18 Ct. Int'l Trade 391 (1994)).

⁴⁶ *Id.* (noting "[t]he common law concept of *stare decisis* does not expressly apply to WTO

thus concluded that “[w]hen faced with an ambiguous statute and ambiguous international agreement, the court should defer to [the Department of] Commerce’s interpretation.”⁴⁷

In reaching this decision, the *Corus Staal* court did actually look at the language of Article 2.4.2, which provides that dumping margins shall be established based upon a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.⁴⁸ Rather than finding an inconsistency, the *Corus Staal* court cited *Bowe Passat* for the proposition that it was “wary of a methodology that intentionally minimizes the impact of nondumped transactions by manipulating the data of potentially equalizing sales.”⁴⁹ As such, the *Corus Staal* court found that the zeroing methodology technically complied with the statute and the anti-dumping agreement since it took into account non-dumped imports by giving them a zero value.⁵⁰

Below, I will illustrate that though DSB decisions are not binding on U.S. courts, they may nevertheless help inform U.S. court decisions.

E. DSB Decisions May Help Inform U.S. Courts of International Trade Decisions

Similarly, in *PAM, S.p.A. v. U.S. Dep’t of Commerce*,⁵¹ the court noted the relevance of the *Bed Linen* case which declared zeroing inconsistent with WTO principles. The Court of International Trade held that *Bed Linen* was nevertheless not binding on the United States. The DOC’s zeroing was very similar to the European Union’s although the United States was not a party to the *Bed Linen* dispute in which zeroing was held to contravene the 1994 Anti-Dumping Agreement.⁵² The court also noted that although DSB decisions are not precedents and do not have a binding effect on the law of the United States,

rulings”).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1262 (discussing the anti-dumping requirements under the 1994 Anti-Dumping Agreement).

⁴⁹ *Id.* at 1263.

⁵⁰ *Id.* at 1264-65.

⁵¹ *PAM, S.p.A. v. U.S. Dep’t of Commerce*, 265 F. Supp. 2d 1362 (Ct. Int’l Trade 2003).

⁵² *Id.* at 1372 (stating that “[d]espite these similarities, *Bed Linen* is not a basis for striking the Department’s zeroing methodology. WTO panel and appellate decisions are non-binding on third parties”) (citing *Corus Staal*, 259 F. Supp. 2d 1253 and *Hyundai*, 23 Ct. Int’l Trade 302).

the "reasoning of such decisions may help inform the court's decision."⁵³ This proposition, that the reasoning in a DSB decision directly relevant to the case before the Court of International Trade may help inform its decision, is particularly important to the extent that the DOC had previously argued that DSB decisions had no bearing on the Court of International Trade's decisions. Nevertheless, the dicta that DSB decisions may help inform a U.S. court in its decision making may yet have no significance since under this view, DSB decisions are non-binding. By contrast, in the next section, I examine cases in which courts have suggested that while DSB decisions are not binding, federal statutes may not be construed to contravene DSB decisions.

F. Federal Statutes Should Not Be Construed to Conflict with GATT Obligations

In *Federal Mogul*,⁵⁴ the Federal Circuit stated that "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."⁵⁵ The court quoted the *Charming Betsy* doctrine⁵⁶ and *Fundicao Tupy S.A. v. United States (Fundicao)*,⁵⁷ which held "[a]n interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress."⁵⁸

Notwithstanding the *Charming Betsy* doctrine that statutes should not be construed to conflict with the United States' international obligations, in *Suramerica de Aleaciones Laminadas, C.A.*,⁵⁹ the Federal Circuit rejected the argument that a statutory provision should be read consistently with the obligations of the United States as a signatory of GATT.⁶⁰ Instead, the court reasoned that:

⁵³ *Id.* (citing *Hyundai*, 23 Ct. Int'l Trade 302).

⁵⁴ *Fed. Mogul*, 63 F.3d at 1581.

⁵⁵ *Id.*

⁵⁶ See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

⁵⁷ *Fundicao Tupy S.A. v. United States*, 11 Ct. Int'l Trade 23 (1987).

⁵⁸ *Id.* at 29.

⁵⁹ *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660 (Fed. Cir. 1992).

⁶⁰ *Id.* at 667-68.

[E]ven if we were convinced that [the DOC's] interpretation conflicts with the GATT, . . . the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy.⁶¹

The Fifth Circuit followed this view in *Mississippi Poultry Ass'n v. Madigan* (*Mississippi Poultry*).⁶² After quoting the foregoing paragraph, it held that it must "give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT."⁶³ It further stated, "[r]egardless of whether Congress' choice should prove to be unwise or disruptive, that choice itself has been made absolutely."⁶⁴

In *Footwear Distributors and Retailers of America v. United States* (*Footwear Distributors*),⁶⁵ after explaining the court's long-standing declination to decide foreign policy matters, the Court of International Trade added that:

However cogent the reasoning of the GATT panels reported above, it cannot and therefore does not lead to the precise domestic, judicial relief for which the plaintiff prays. That is, that relief simply does not attach. Rather, a party . . . , having sought and obtained a favorable panel ruling, has and has had relief available to it via suspension of its obligations to the offending party pursuant to Article XXIII of the General Agreement.⁶⁶

⁶¹ *Id.*

⁶² *Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359 (5th Cir. 1993).

⁶³ *Id.* at 1366.

⁶⁴ *Id.* at 1367-68.

⁶⁵ *Footwear Distribs.*, 18 Ct. Int'l Trade 391.

⁶⁶ *Id.* at 414.

G. Interpreting Intersections Between U.S. Statutes and Relevant GATT/WTO Law

In *Mississippi Poultry*,⁶⁷ the Fifth Circuit laid down three separate, but related, maxims governing the interpretation of statutes in relation to foreign affairs issues including treaty obligations:

First, Congress may abrogate a treaty or international obligation entered into by the United States only by a clear statement of its intent to do so. Second, the extraterritorial application of domestic laws requires a clear statement of congressional intent so as "to protect against unintended clashes between our laws and those of other nations which could result in international discord." And finally, "it has been a maxim of statutory construction since the decision in [*Charming Betsy*], that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.'"⁶⁸

The court then discussed these three maxims in the context of a case involving an alleged violation of the United States' GATT obligations. With regard to the first maxim, which requires a clear statement from Congress to abrogate a treaty, the court noted that this maxim is not relevant where "Congress is not *abrogating* a treaty or an international obligation . . . [and] Congress has at most evinced an intent to place the [statute] *in violation of the GATT*."⁶⁹

Likewise, the court found that the second maxim was distinguishable since it only applies in a case where the issue is whether the "application of American law would directly *affect the sovereignty of a foreign nation*."⁷⁰ For example, *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*⁷¹ was decided pursuant to this maxim because the "defendants were corporations *owned by the Republic of France*, so for all practical purposes a foreign sovereign was a party in the law suit."⁷²

⁶⁷ *Miss. Poultry*, 992 F.2d at 1365.

⁶⁸ *Id.* at 1365 (citing *EEOC v. Arabian Am. Oil*, 499 U.S. 244 (1991) and *Weinberger v. Rossi*, 456 U.S. 25 (1982)).

⁶⁹ *Miss. Poultry*, 992 F.2d at 1366 (emphasis added).

⁷⁰ *Id.* at 1367 (emphasis added).

⁷¹ *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court S. Dist. of Iowa*, 482 U.S. 522 (1987).

⁷² *Miss. Poultry*, 992 F.2d at 1367.

*United States v. Aluminum Co. of America*⁷³ also fell into this category because it involved extraterritorial application of the U.S. law to a Canadian corporation.⁷⁴

The court in *Mississippi Poultry* rejected the application of the third maxim—that “an act of Congress should not be construed to violate the law of nations if there is an alternative construction available”—with regard to its application to the GATT or any multilateral trade agreement.⁷⁵ *Mississippi Poultry*, however, is easily distinguishable today since at the time the case was decided in 1993, the Uruguay Round negotiations did not qualify as “the law of nations,” because the negotiations were non-binding as they did not constitute a final result.⁷⁶

In *Footwear Distributors*,⁷⁷ decided after the Uruguay Round Agreements came into force, the Court of International Trade cited *Paquete Habana*⁷⁸ for the following proposition: “International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”⁷⁹

It also stated, by quoting section 321 of the Restatement (Third) of the Foreign Relations Law of the United States (Restatement), the guiding principle that “every international agreement in force is binding upon the parties to it and must be performed by them in good faith.”⁸⁰ Further, in quoting from a comment to section 115 of the Restatement, it stated:

[I]nternational obligations survive restrictions imposed by domestic law. Hence, the general assumption that ‘Congress does not intend to repudiate an international obligation of the

⁷³ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

⁷⁴ One of the defendants, Aluminum Limited, was a Canadian corporation, and in response to the question of “whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so,” the court stated that “[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.” *Id.* at 443.

⁷⁵ *Miss. Poultry*, 992 F.2d at 1367.

⁷⁶ *Id.* at n.45 (stating that “[t]he Uruguay Round negotiations . . . cannot bind the United States as there is no final result”).

⁷⁷ *Footwear Distribs.*, 18 Ct. Int’l Trade 391.

⁷⁸ *Paquete Habana*, 175 U.S. 677 (1900).

⁷⁹ *Footwear Distribs.*, 18 Ct. Int’l Trade at 409 (quoting *Paquete Habana*, 175 U.S. 677, 700 (1900)).

⁸⁰ *Id.*

United States . . . Therefore, when an act of Congress and an international agreement . . . relate to the same subject, the courts, regulatory agencies, and the Executive Branch will endeavor to construe them so as to give effect to both.⁸¹

The court also acknowledged that the DOC is entitled to deference in its construction of the statute.⁸² It stated that "the best perspective is that both [the GATT panel and the U.S. agency] are entitled to that degree of respect which their reasonings compel,"⁸³ though the court did not specifically address whether either should be given more deference than the other. With respect to GATT obligations, the court stated that: "GATT . . . became part of U.S. law via executive order in accordance with congressional delegation of power to the President . . . And it is well-established that an international agreement or treaty which operates without the aid of legislation . . . 'constitutes a part of the supreme law of the land.'"⁸⁴

Nevertheless, it rejected the argument that panel decisions are binding on U.S. courts.⁸⁵ It reasoned that there were no provisions for the panel decisions in U.S. law, "even though affirmed by the appellate body and adopted by the [Dispute Settlement Body], [they] are binding on the parties."⁸⁶ The court also contrasted the provision of the GATT with chapter 19 of the North American Free Trade Agreement (NAFTA), which "specifically provides that decisions of panels reviewing antidumping and countervailing-duty determinations of the three contracting governments are binding."⁸⁷

*Hyundai Electronics Co. v. United States (Hyundai)*⁸⁸ confirmed *Footwear Distributors*. In *Hyundai*, the Court of International Trade stated "[w]hile *Footwear Distributors* concerned an adopted GATT panel report, the same principles apply to the WTO report . . . [and] the WTO panel report does not constitute binding precedential authority for the court."⁸⁹ The court reasoned that:

⁸¹ *Id.*

⁸² *Id.* at 410.

⁸³ *Id.*

⁸⁴ *Id.* (quoting *Chew Heong v. United States*, 112 U.S. 536, 540 (1884)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 412.

⁸⁷ *Id.*

⁸⁸ *Hyundai*, 23 Ct. Int'l Trade 302.

⁸⁹ *Id.* at 312.

Congress made this clear when it codified the principles espoused in *Footwear Distributors* as part of the [Uruguay Round Amendments Act]. Specifically, Congress provided that the response to an adverse WTO panel report is the province of the executive branch.⁹⁰

It further stated, “When confronted with a conflict between an international obligation and U.S. law, it is of course true that an *unambiguous* statute will prevail over the international concern.”⁹¹

A different rule applies with respect to *ambiguous* statutes. As the court noted, “*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated.”⁹² Since the relationship between these two doctrines seems to be at the core of the *Hyundai* case, below I will engage in a more detailed analysis of these two doctrines.

H. *The Relationship Between the Charming Betsy and Chevron Doctrines*

As noted earlier, it has long been a maxim since the decision of *Murray v. Schooner Charming Betsy* that in construing international law,

[A]n 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.⁹³

On the other hand, there is another doctrine that calls for giving deference to an agency’s interpretation and application of a statute. In *Chevron U.S.A.*,

⁹⁰ *Id.* (citing Uruguay Round Amendments Act, Uruguay Round Implementation and Dispute Settlement, 19 U.S.C. § 3538 (1994)) [hereinafter URAA].

⁹¹ *Id.* (emphasis added).

⁹² *Id.* at 313 (citing *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988)). See also Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (exploring “the tension between the implied delegation theory set forth in *Chevron* and competing expertise-based rationales for judicial deference to agency work product”). But see Patricia M. Wald, *Judicial Review in Mid-Passage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 243 (1996) (identifying the manipulative use of *Chevron* to reach desired results).

⁹³ *Charming Betsy*, 6 U.S. at 118.

Inc. v. Natural Resources Defense Council, Inc. (Chevron),⁹⁴ the Supreme Court established a two-step analysis:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁹⁵

The *Chevron* court argued that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."⁹⁶ Therefore, the court concluded that:

Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies."⁹⁷

Thus, where an agency's construction or application of a statute is "permissible," rather than arbitrary, capricious, or contrary to the statute, a

⁹⁴ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁹⁵ *Id.* at 842-43.

⁹⁶ *Id.* at 843-44.

⁹⁷ *Id.* at 844 (internal citation omitted).

court will sustain it under *Chevron*. Courts will generally apply a reasonableness standard in determining the permissibility of a construction or application of a statute.⁹⁸ Under this standard, a court “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”⁹⁹

In *Hyundai*,¹⁰⁰ the court found that deference to an agency’s construction or application of a statute under *Chevron* superseded deference to international legal obligations under the *Charming Betsy* doctrine.¹⁰¹

I. *The Chevron Doctrine: Deference to the DOC’s Trade Remedy Mandate*

Almost without exception, GATT or DSB decisions are cited by importers in U.S. courts challenging DOC decisions imposing penalties on them under U.S. trade remedy laws. By citing GATT or WTO dispute decisions, these importers seek to use the GATT/WTO framework to reign in what they perceive to be inconsistencies with the United States’ international obligations. In fact, the WTO describes checking protectionist pressures amongst its members as one of the benefits to WTO membership.¹⁰²

By contrast, the subordination of the *Charming Betsy* doctrine to the *Chevron* deference of the DOC’s trade remedy mandate essentially legitimates congressionally mandated protectionism. Thus, in *Serampore Industries Pvt. v. Dep’t of Commerce (Serampore)*,¹⁰³ the Court of International Trade upheld the DOC’s refusal to offset Serampore’s sales at fair value against its (dumped) sales at less than fair value by invoking *Chevron* to justify deference to the DOC’s computations.¹⁰⁴ Yet, such a computation, in so far as non-dumped sales were given a zero rather than a negative value in computing dumping margins, was arguably inconsistent with the United States’ obligations under the then existing 1979 GATT anti-dumping codes. While the *Bed Linen* and *Soft Lumber* DSB cases, which outlawed the related practice of zeroing made

⁹⁸ *Id.* at 845.

⁹⁹ *Id.* at 843 n.11.

¹⁰⁰ *Hyundai*, 23 Ct. Int’l Trade 302.

¹⁰¹ *Id.* at 305.

¹⁰² Indeed, this is one of the advantages of WTO rules as defined by the WTO itself; see World Trade Organization, *10 Benefits of the WTO Trading System*, at 13, http://www.wto.org/english/res_e/download_e/10b_e.pdf.

¹⁰³ *Serampore Indus. Pvt. v. Dep’t of Commerce*, 11 Ct. Int’l Trade 866 (1987).

¹⁰⁴ *Id.* at 874.

under the 1994 Anti-Dumping Agreement, had not been made, the *Serampore* and *Algoma Steel* cases demonstrate that the DOC's protectionist computations and their legitimation by federal courts pre-dates the 1994 Anti-Dumping Agreement. The manner in which this protectionist, and arguably inconsistent with GATT/WTO, result was reached in *Serampore* was by giving substantial deference to the DOC's interpretation of its statutory mandate and its methods of administering anti-dumping law by zeroing. In so doing, the *Serampore* court laid the groundwork for establishing the legal permissibility of zeroing under U.S. law.

In declining to use *Serampore*'s fair value sales to offset its less than fair value sales, the court argued that Congress had directed the DOC, the agency, to find unlawful only those agency determinations and methods "unsupported by substantial evidence on the record, or otherwise not in accordance with the law."¹⁰⁵ Under this "substantial evidence"¹⁰⁶ standard, the *Serampore* court argued that it would affirm the agency's findings so long as they were supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.¹⁰⁷ Thus, if an agency's interpretation or application of a statute does not clearly contravene a discernable legislative intent, the court must uphold it as sufficiently reasonable.¹⁰⁸ Accordingly, the court held that "[a] plain reading of the statute [on anti-dumping law] disclose[d] no provision for [the DOC] to offset sales made at LTFV [less than fair value] with sales made at fair value."¹⁰⁹ Instead, according to the court, the practice of considering negative margins as zero ensures that less than fair value sales are not covered up or masked by more profitable sales.¹¹⁰

J. Unraveling Two Streams of Cases

So far, I have shown that federal courts are almost without exception likely to defer to the government's interpretation or application of an ambiguous

¹⁰⁵ *Id.* at 869 (citing 19 U.S.C. § 1516 a(b)(1)(B) (1982)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 872.

¹⁰⁸ *Id.* (citing *Kelley v. U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) and *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

¹⁰⁹ *Id.* at 873 (citing 19 U.S.C. § 1673 (1982), which provides that if the DOC finds that foreign goods are being sold at less than fair value, then a duty shall be imposed equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise).

¹¹⁰ *Id.* at 874.

statute even if such deference would result in disregarding a DSB decision to the contrary. This pattern of deference, however, is not the inevitable consequence of unbending rules of construction. Although it conceded that DSB decisions are not binding on the federal judiciary, the State Department effectively argued in *Turtle Island*¹¹¹ that the interpretation or application of an ambiguous statute should, as a principle of statutory construction, require that an ambiguous U.S. statute “be interpreted in conformity with the international obligations of the United States.”¹¹² This decision is crucial since the court held that an ambiguous statute should to the extent possible be construed consistently with the United States’ international obligations. In a brief filed on an appeal from the Court of International Trade to the Federal Circuit, the State Department argued that its interpretation of § 609 of the Department of Commerce Appropriations Act¹¹³ should be sustained because it “minimizes potential conflict with international laws, as revealed in [a] continuing international dispute” about its interpretation and application.¹¹⁴

At issue in *Turtle Island* was whether § 609 required the United States to prohibit the import of all shrimp or shrimp products from nations not certified by the State Department or whether § 609 only empowered the State Department to allow importation of particular shipments of shrimp and shrimp products harvested by shipping vessels equipped with technology which would not adversely affect the protected species of sea turtles under U.S. law.¹¹⁵ The plaintiffs, comprised of a group of environmental organizations and individuals, contended that § 609 required the State Department to exclude from the United States any shrimp or shrimp products from all nations that were not certified as having adopted commercial fishing technology, such as turtle excluder devices, that would not adversely affect the protected species of sea turtles under domestic law.¹¹⁶

The controversy in this case stemmed from a change in the State Department’s § 609 Guidelines. While in 1991 and 1993, national certification under the § 609 Guidelines was the only way a nation could export shrimp to the United States,¹¹⁷ in its 1996 and 1999 Guidelines, the State Department

¹¹¹ *Turtle Island*, 284 F.3d 1282 (Fed. Cir. 2002).

¹¹² *Footwear Distribs.*, 18 Ct. Int’l Trade at 413.

¹¹³ Department of Commerce Appropriations Act, 16 U.S.C. § 1537 (1990).

¹¹⁴ Reply Brief of Federal Defendants-Cross Appellants at 2, *Turtle Island*, No. 98-09-02818 (Fed. Cir. May 23, 2001) [hereinafter Reply Brief].

¹¹⁵ *Turtle Island*, 284 F.3d at 1285-86.

¹¹⁶ *Id.* at 1292.

¹¹⁷ *Id.* at 1287.

permitted exports of shrimp from uncertified nations as long as they attested that particular shipments were harvested without adversely affecting the protected categories of turtles.¹¹⁸ It was this shift in the Guidelines that the plaintiffs contended was contrary to Congress' intent to ban all shrimp exports from uncertified countries.¹¹⁹

The State Department argued that the shift from its 1991 and 1993 Guidelines to the 1999 Guidelines was, in part, prompted by a DSB decision where the Appellate Body found that while § 609 was a permissible conservation measure under GATT Article XX, its enforcement was discriminatory insofar as it required countries to adopt a regulatory regime similar to that of the United States as the only path to certification.¹²⁰ While the Court of International Trade had twice upheld the plaintiffs' interpretation of § 609,¹²¹ the Federal Circuit concurred with the State Department's interpretation as contained in its revised Guidelines under which exports of shrimp shipments certified to have been harvested with turtle-safe technology, rather than shipments only from certified countries, were allowed into the United States. The court reasoned that this conclusion was warranted by the express language of the statute and by congressional intent since Congress' aim was to "protect the domestic shrimping industry, not the sea turtle."¹²²

While the Federal Circuit found that § 609 was unambiguous, and it therefore did not reach the question of whether the State Department's interpretation would minimize potential conflicts with international trade agreements,¹²³ it is instructive that its decision affirmed the State Department's interpretation of the statute. More importantly, the State Department's interpretation of the statute had been changed to conform to the DSB's finding that the application of the prior Guidelines were inconsistent with the United States' international obligations under Article XX of the 1994 GATT Agreement.¹²⁴ The State Department added credence to its claims by arguing that a subsequent DSB decision had found the application of its 1998 Guidelines did not conflict with the United States' obligations under Article

¹¹⁸ *Id.* at 1290.

¹¹⁹ *Id.* at 1288.

¹²⁰ Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 47, WT/DS58/AB/RW (Oct. 12, 1998).

¹²¹ *Turtle Island Restoration Network v. Mallet*, 24 Ct. Int'l Trade 627 (2000); *Earth Island Inst. v. Daley*, 23 Ct. Int'l Trade 215 (1999).

¹²² *Turtle Island*, 284 F.3d at 1294.

¹²³ *Id.* at 1297.

¹²⁴ Reply Brief, *supra* note 114, at 18.

XX. In its brief on behalf of the State Department, the Attorney General had argued:

[I]t is clear that the State Department's interpretation of Section 609's embargo provision, while appropriately sensitive to international implications, predated and was not dictated by the WTO Appellate Report [While] WTO reports have no binding effect and provide no legal basis for altering domestic law . . . it is domestic case law that calls upon the State Department to construe Section 609 to minimize conflict with the laws of nations, to the extent possible.¹²⁵

It is crucial to note that the State Department's arguments, that an ambiguous statutory provision should, to the extent possible, be construed consistently with the United States' international obligations,¹²⁶ was predicated on its competence to "understand the international implications of any interpretations."¹²⁷ This is because Congress had delegated to it discretion on a question involving international relations, and in such circumstances, "it is generally assumed that Congress does not set out to tie the President's hands; [since] if it wishes to, it must say so in clear language."¹²⁸ In addition, it was domestic law, rather than international law, that the State Department invoked to justify changing its Guidelines to conform with the United States' obligations that had been established by the DSB.

My point here is that although the Federal Circuit did not reach the question of deference to the State Department's Guidelines as formulated to be consistent with an adverse DSB ruling, the court was effectively deferring to the State Department by finding that the express provisions of the statute supported its Guidelines. This is notwithstanding the dissent's assertion that DSB decisions have no controlling status under U.S. law.¹²⁹ Rather than uphold the 1998 Guidelines, the dissent would have struck them down primarily because "[a]n agency interpretation of a relevant provision which

¹²⁵ *Id.* at 21-22 (citing *Charming Betsy*, 6 U.S. at 118 and *Fed. Mogul*, 63 F.3d at 1581).

¹²⁶ *Id.* at 23.

¹²⁷ *Id.*

¹²⁸ *Id.* at 24 (citing *Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1330 (Fed. Cir. 2001)).

¹²⁹ *Turtle Island*, 284 F.3d at 1303.

conflicts with the agency's earlier interpretation is 'entitled to considerably less deference.'¹³⁰

The *Turtle Island* litigation, therefore, vividly illustrates two different lines of cases on how a federal agency or court can construe an ambiguous statutory provision in light of a DSB decision finding that a particular interpretation or application of that provision was in contravention of the United States' GATT/WTO obligations. In *Turtle Island*, the State Department invoked one line of these cases to the effect that an interpretation and application of a statute which would conflict with the United States' international obligations would violate the intent of Congress.¹³¹ This tradition can be traced to cases such as *Fundicao*¹³² and *Federal Mogul*¹³³ which I discussed in Part II above.

By contrast, in the second line of cases such as *Corus Staal*¹³⁴ and *Bowe Passat*,¹³⁵ courts have held that if an agency's interpretation of a statute conflicts with the United States' GATT/WTO obligations, it must give effect to congressional intent even if doing so would be inconsistent with a DSB decision. This reluctance to use DSB or GATT decisions as a guide to construction of statutes in this line of cases is exemplified by the Court of International Trade, which almost always asserts the primacy of domestic statutes over GATT/DSB-based arguments. Thus, in *Footwear Distributors*,¹³⁶ the Court of International Trade observed that "[h]owever cogent the reasoning of the GATT panels . . . it cannot and therefore does not lead to the precise . . . judicial relief."¹³⁷ Perhaps this should not be surprising for as Paul Stephan has argued, the establishment of a special court with exclusive jurisdiction over foreign trade, like the Court of International Trade, makes it susceptible to overstate its role.¹³⁸ Under this line of cases, where the determination of the Court of International Trade or the Federal Circuit Court of Appeals would be inconsistent with a determination under GATT/WTO obligations, as in the zeroing cases examined above, domestic statutes override GATT/DSB-based

¹³⁰ *Id.* at 1302 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

¹³¹ See *supra* notes 120-28 and accompanying text.

¹³² *Fundicao*, 11 Ct. Int'l Trade 23; see also *supra* notes 57-58 and accompanying text.

¹³³ *Fed. Mogul*, 63 F.3d 1572; see also *supra* notes 54-55 and accompanying text.

¹³⁴ *Corus Staal*, 259 F. Supp. 2d 1253; see also *supra* notes 41-50 and accompanying text.

¹³⁵ *Bowe Passat*, 20 Ct. Int'l Trade 558; see also *supra* notes 34-39 and accompanying text.

¹³⁶ *Footwear Distrib.*, 18 Ct. Int'l Trade 391.

¹³⁷ *Id.* at 414; see also *Avesta AB v. United States*, 12 Ct. Int'l Trade 493 (1988), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990).

¹³⁸ Paul B. Stephan, *Further Reflections on the Implementation of Comparative Advantage Principles in Trade Law*, 2 J. LEGAL ECON. 111, 115-17 (1992).

arguments that would promote statutory constructions consistent with the United States' international trade obligations.

Ultimately, in light of the two foregoing lines of cases, federal courts are not invariably predestined to subordinate the United States' GATT/WTO obligations under a DSB decision to U.S. statutes. The State Department's role in the *Turtle Island* litigation makes it abundantly clear that agencies may craft their policies to conform with these obligations, and courts can uphold such policies as consistent with the clear meaning of a statute without reaching the question of deference to policies crafted to conform with the United States' obligations under a DSB decision. After all, executive agencies have the competence to assess the international implications of the government's policies, and it is within a court's discretion to hold that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹³⁹

In *Turtle Island*,¹⁴⁰ the court upheld the State Department's Guidelines even though they were unfavorable to U.S. shrimpers whom the court held that Congress had intended to benefit with § 609.¹⁴¹ The effect of the decision was therefore to subordinate the domestic interests of protecting these shrimpers so as to ensure the United States kept its obligations as required in a DSB decision.

In the next part, I consider a variety of objections that have been made against the bindingness of DSB decisions within the United States, including opposition from members of Congress and theoretical arguments. An important purpose of this next part is to demonstrate why the *Turtle Island* line of cases is unlikely to find favor as an alternative to the first line of cases, where the U.S. legal system is thought of as being insulated from the GATT/WTO legal system.

III. OBJECTIONS TO THE BINDINGNESS OF DSB DECISIONS, THE WIGGLE ROOM THEORY, AND INTERNATIONAL LEGAL CONSEQUENCES FOR VIOLATING BINDING DSB DECISIONS

In this part I will explore why members of Congress and other critics of the WTO in the United States have opposed giving DSB decisions a direct effect within the U.S. legal system. I will then examine some of the leading

¹³⁹ *Charming Betsy*, 6 U.S. at 118.

¹⁴⁰ *Turtle Island*, 284 F.3d 1282.

¹⁴¹ *Id.* at 1294.

academic approaches on the question of the status of DSB decisions within the U.S. legal system. One such view holds that while DSB decisions to which the United States is a party are binding upon the United States, DSB decisions nevertheless provide wiggle room in their implementation. This wiggle room view therefore sharply contrasts with the first line of cases, which hold that DSB decisions have no effect in U.S. courts. This wiggle room theory has much in common with the jurisprudence of the *Turtle Island* case. I end the next section with an examination of the international legal consequences that would arise from a violation of a binding DSB decision.

A. *Objections to the Binding Nature of DSB Decisions*

When a compulsory and binding dispute settlement system was proposed during the Uruguay Round, critics in the United States immediately pointed to these requirements as an example of how changes to U.S. law "at the behest of an international organization" would thwart America's democratic process.¹⁴² These critics in particular pointed to the legalization or the

¹⁴² Letter from Robert E. Lighthizer, Deputy United States Trade Representative under President Reagan, & Alan W. Wolf, Deputy United States Special Representative for Trade Negotiations under President Carter, to Gloria Blue, Executive Secretary, Trade Policy Staff Committee (July 10, 2000), available at http://www.dbtrade.com/publications/blue_letter.htm. At the 1994 Hearings on the Implementing Legislation on the Uruguay Round, Senator Breaux wondered aloud to the then U.S. Trade Representative, Michael Kantor,

Let me ask another question[] . . . It is the question of the fact that if we have a World Trade Organization somehow running the trade rules and regulations, they are the umpire. They are the referee. If the group that serves as the referee is 120 nations, or what-have-you, and the United States has 1 vote, I mean, are we not giving up our legitimate interest? I mean, it always disturbs me in international meetings when countries that are the size of this building have the same equal vote as the United States, and I am not saying anything derogatory against them because of their size, but to give them in these international organizations the same weight as the United States or any other developed country seems very unfair. Can you comment on that?

GATT Implementing Legislation: Hearing on S.2467 Before the Comm. on Commerce, Science, and Transportation, 103d Cong. 49-50 (1994) (statement of John Breaux, Sen.) [hereinafter *GATT-Senate Hearings*]. In legal parlance, worriers of GATT/WTO law and rulings overriding U.S. law and democracy also argue that all agreements constraining U.S. sovereignty must be subjected to the requirements of Article 2, section 2, clause 2 of the United States Constitution, which provides for Senate approval as a pre-condition of manifesting the United States' consent to such agreements. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1223 (1995) (discussing and challenging the Congressional-Executive Agreement as an alternative to the

juridicization¹⁴³ of GATT under the WTO's Uruguay Round dispute settlement mechanism as further evidence that U.S. laws would be subjected to legal scrutiny by an external adjudicatory body that had sanctioning power.¹⁴⁴ They

treaty form as put forth by Professors Bruce Ackerman and David Golove). At the Senate Hearings on the Uruguay Round's implementing legislation, Tribe argued that it was not enough, as the U.S. Trade Representative had argued, that GATT/WTO panel reports finding U.S. law GATT/WTO inconsistent would not immediately override U.S. law because they nevertheless provided the United States with some wiggle room. According to Tribe:

This is no answer at all . . . [I]t amounts to an assurance that we might just decide to violate our solemn commitments under the WTO agreement. Well, what kind of argument is that? If that kind of reply could justify circumventing the treaty clause, then it seems to me the only thing that would count as a treaty would be a pact in which the United States solemnly turned over all of its military power to a foreign body that could then simply force us to do its bidding. But clearly the treaty clause encompasses vastly more than that.

GATT-Senate Hearings, supra, at 292-93 (statement of Laurence H. Tribe, Professor of Law, Harvard University). According to Tribe:

[T]he treaty clause's provision for supermajority approval is an independent guarantee of especially serious deliberation and especially strong national consensus for those international agreements that significantly constrain American sovereignty by seriously implicating normal State or Federal lawmaking processes. It seems plain to me that the characteristics of the WTO agreement plainly qualify it as the sort of agreement that . . . warrants a high degree of consensus and solemnity.

Id. at 295. By contrast, Bruce Ackerman countered Tribe's argument by stating:

[A]n effort to limit article I might be justified [since Tribe's position was largely premised on the view that the legislative power under Article I and the treaty power under Article II are not coextensive or inter-changeable — in effect that that which the Constitution requires to be accomplished through a treaty cannot be accomplished through mere legislation] if the Constitution had explicitly said that "only" the Senate could give its advice and consent to fundamental international agreements [Tribe would be correct]. But the text of article II does not contain the word only. It simply creates an alternative route which the President and the Senate may use if in their judgment it is appropriate.

Id. at 313 (statement of Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University). See also Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995) (noting the displacement of the Treaty Clause with the advent of the Congressional-Executive Agreement). This section borrows in part from Gathii, *Insulating Domestic Policy, supra* note 3.

¹⁴³ Arie Reich, *From Diplomacy to Law: The Juridicization of the International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 784-809 (1997) (discussing the juridicization of GATT).

¹⁴⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15,

objected to the DSB's authority to determine disputes between members under the WTO Agreements with the power to require members and the United States in particular to abide by its rules and procedures.¹⁴⁵

Those taking issue with the commitments made by the United States in the 1994 Uruguay Round Agreements point to the possibility that the DSB could authorize retaliatory sanctions against the United States for failing to implement its recommendations as evidence of how the new dispute settlement regime would undermine U.S. sovereignty.¹⁴⁶ According to these critics, this

1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Dispute Settlement Understanding or DSU]. The DSU establishes the Dispute Settlement Body (DSB).

¹⁴⁵ *Id.* art. 23.1. In the *Section 301* case, the finding of the consistency between section 301 of the United States' Trade Act of 1974 as amended and GATT/WTO law raised the possibility that Article 23 of the DSU is not the exclusive means of determining the nullification and impairment of benefits under the GATT/WTO Agreements. See Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter *Section 301* case]. The primary issue in the *Section 301* case was whether article 23 of the Dispute Settlement Understanding was the exclusive dispute settlement process of the WTO, and if so, whether section 301 was inconsistent with it. The European Community had attacked section 301 as inconsistent with Article 23 of the DSU because it authorizes the United States to unilaterally make determinations of injury based on GATT/WTO law and to take countermeasures which can only be undertaken pursuant to the GATT/WTO's Dispute Settlement Understanding. In *United States—Import Prohibition of Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU of Malaysia (Shrimp-Turtle II)*, the Appellate Body upheld a U.S. measure that unilateral trade measures directed at other countries' policies are not, in principle, excluded from justiciability under Article XX. Moreover, the Appellate Body pointed that this finding, which also legitimated the fact that unilateral trade measures could be used to protect the environment consistently with the requirements of GATT, was not dicta but was in fact intended to give guidance to future panels. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 107, 137-38, WT/DS58/AB/RW (Oct. 22, 2001). See also B.S. Chimni, *WTO and Environment: Shrimp-Turtle and EC-Hormone Cases*, 35 *ECON. & POL. WKLY.* 1752, 1752-61 (2000) (noting that the WTO has integrated environmental concerns with its objective of free trade).

¹⁴⁶ Steve Charnovitz argues that the mandatory nature of the DSU procedures, particularly Articles 22.8 (which states that suspension actions "shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed") and 23.2(c) (which provides that suspension actions are "in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable time period") amounts to a WTO-authorized sanction and that this departs from the practice under Article XXXII of the 1947 GATT, which was construed as merely allowing compensation equivalent to the value of damages assessed for a party's failure to carry out its obligations under the Agreement. Steve Charnovitz, *Should the Teeth Be Pulled?: An Analysis of WTO Sanctions*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT*

possibility would remove the flexibility that the United States or any other country had under the GATT 1947 dispute settlement process to block the adoption of panel recommendations, thereby making them inutile.¹⁴⁷

HUDEC 602, 609-10 (Daniel L.M. Kennedy & James D. Southwick eds., 2002) (citing *Dispute Settlement Understanding*, *supra* note 144, arts. 22.8, 23.2(c)). Charnovitz further argues that the WTO's dispute settlement system changes the regime of compensation from the 1947 GATT, whose central goal was to re-equilibrate (or restoring balance of benefits and obligations) to a trading system that is based on sanctions and retaliation. He cites the authorization of trade sanctions in the *EC Bananas* case (Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 6.3, WT/DS27/ARB (Apr. 9, 1999)) and in the *EC Beef Hormones* case (Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶¶ 19, 21, WT/DS26/ARB (July 12, 1999)) as examples of where this new direction in dispute settlement has been effectuated. Jackson argues that WTO rules are binding in the “traditional international law sense . . . although not always in a ‘statute like’ sense . . . However, the international law ‘bindingness’ of a [panel] report certainly can and should have an important effect in domestic U.S. jurisprudence, as in the jurisprudence of many other nation-states.” Jackson, *Dispute Settlement Understanding*, *supra* note 17, at 63-64. David Palmetier and Stanimir A. Alexandrov disagree with Charnovitz and advance the view that the DSU, unlike the WTO's Agreement on Subsidies and Countervailing Measures, which provides for special remedy rules, continues GATT 1947 practice of re-equilibrating concessions as opposed to imposing sanctions. David Palmetier & Stanimir A. Alexandrov, “*Inducing Compliance*” in *WTO Dispute Settlement*, in *THE POLITICAL ECONOMY* 650-59 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

¹⁴⁷ Article 16.4 of the DSU requires the DSB to adopt a panel report within sixty days of its publication unless there is no consensus to adopt it. See *Dispute Settlement Understanding*, *supra* note 144, art. 16.4. This differs from the practice of unanimous adoption under GATT 1947, which gave any one member the unilateral power to stand in the way of adoption. To strengthen the case for the bindingness of panel reports under international law, consider Jackson (who is otherwise critical of the view that the WTO would limit U.S. sovereignty) who concludes: “in the light of the practice of GATT, and perhaps supplemented by the preparatory work of the negotiators . . . [DSU-clauses] strongly [suggest] that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report.” Jackson, *Dispute Settlement Understanding*, *supra* note 17, at 62-63. *But see* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 418 (1996) (concluding that “[t]he only truly binding WTO obligation is to maintain the balance of concessions negotiated among members”). In addition, Ambassador Kantor argued that failure to implement a panel report that finds a U.S. law inconsistent with GATT/WTO Agreements would not require a change in U.S. law.

[Instead] . . . the DSU provides for automatic authorization of retaliation on request. That said, dispute settlement panels formed under the new agreement will not have the power to change U.S. law order or us to change our laws. We will remain free, as we are under GATT today, not to implement panel reports.

B. DSB Decisions Are Binding but Give the United States Wiggle Room

By contrast, U.S. Trade Representative Michael Kantor told a congressional hearing on the Uruguay Round Implementing Legislation that fears of American democracy and sovereignty being sacrificed "have no foundation."¹⁴⁸ Kantor also pointed out that U.S. law takes precedence over WTO Agreements,¹⁴⁹ a principle that is further expanded in the Trade Act of 2002.¹⁵⁰

GATT-Senate Hearings, *supra* note 142, at 42 (prepared testimony of Michael Kantor, Ambassador, U.S. Trade Representative).

¹⁴⁸ *GATT-Senate Hearings*, *supra* note 142, at 55. Senator Rockefeller noted that in addition to section 102, the bill also provided other safeguards, such as congressional review of the United States' commitment to GATT/WTO every five years and the fact that state and other local laws from GATT/WTO challenge, which together led him to conclude that he could "not imagine how we could have protected our sovereignty more than we have under this agreement." *Id.* at 55 (statement of Jay Rockefeller, Sen.). By contrast, in a letter to the Senate Committee on Commerce, Science, and Transportation, Professor Anne-Marie Slaughter, then at Harvard Law School, argued that: "Where an international agreement effectively supercedes or directly constrains ordinary state and federal law-making authority, the people have in effect agreed to delegate their sovereignty not to the state or federal governments, but to the federal government acting in concert with a foreign government or governments." Letter from Anne-Marie Slaughter, Professor, Harvard Law School, to Ernest F. Hollings, Senator (Oct. 18, 1994), *reprinted in GATT-Senate Hearings*, *supra* note 142, at 287.

¹⁴⁹ Section 102(a)(1) of the URAA provides: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512 (1994). In addition, the Statement of Administrative Action (SAA) accompanying the URAA provides that the decisions of the WTO panels and the WTO Appellate Body, "have no binding effect under the law of the United States and do not represent an expression of U.S. foreign trade policy." H.R. DOC. NO. 103-316, at 1032 (1994). The SAA further provides that when a DSB report "recommends that the United States change federal law to bring it into conformity with a Uruguay Round Agreement, it is for the Congress to decide whether any such change will be made." *Id.* In addition, the U.S. Code provides, "The statement of administrative action . . . [is] an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act . . ." 19 U.S.C. § 3512(d). Section (a)(i) provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." *Id.* § 3512(a)(1).

¹⁵⁰ Section 2105(a)(4) of the Trade Act of 2002 provides that "[a]ny [trade] agreement or understanding with a foreign government or governments (whether *oral* or in writing) . . . not disclosed to the Congress . . . shall not be considered to be part of the agreement approved by the Congress and shall have no force and effect under United States law or in any dispute settlement body. 19 U.S.C. § 3805(a)(4) (emphasis added). Notice that the provision is very broad, encompassing both written and non-written agreements.

According to Jackson, sovereignty critics failed to appreciate the fact that GATT obligations did not have direct effect in U.S. law, and that the United States could choose to withdraw from the GATT if it was opposed to implementing adverse recommendations. These arguments, in addition to others led to his view that the United States had a buffer zone against GATT and subsequently WTO agreements.¹⁵¹ The late Robert E. Hudec, another leading jurist of the trading system, argued that the process of negotiating trade treaties and follow-up implementing legislation provides a setting within which affected constituencies could participate and therefore confer legitimacy to the outcome.¹⁵² In addition to these reassurances, the Trade Act of 2002 requires the Secretary of Commerce, in consultation with the Secretaries of State and Treasury, the Attorney General, and the U.S. Trade Representative, to report to Congress regarding whether or not the DSB has “added to the obligations, or diminished rights, of the United States.”¹⁵³

The debate between those that thought that American sovereignty and democracy would or would not be limited by the Uruguay Round Agreements replicates an old debate on form and anti-formalism in international law.¹⁵⁴ Critics who oppose the United States for joining these agreements proceed from a sovereignty-centered conception of obligation in international law. In consenting to be bound to an international legal obligation, these critics argue the United States is giving up its sovereignty. By contrast, Ambassador Kantor and others who are agnostic about the United States giving up its sovereignty by joining the WTO Agreements do not proceed from the formalist stance of the significance of consent. Rather, they take the point of view that the WTO’s dispute settlement procedures should be seen as part of a larger informal structure of open-ended and, at times, conflicting policy goals among trading partners whose economies are integrated with the U.S. economy. They argue that this structure has been negotiated through consensus such that it gives the

¹⁵¹ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 95-99 (1989).

¹⁵² ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 219-23 (1999). Hudec further notes that domestic protectionist measures taken by state legislatures in the United States express the electoral or democratic preferences and as such, they are not any more legitimate—or “democratic”—than the expression of “electoral will achieved by the process of authorized international negotiations plus implementing legislation.” *Id.* at 223.

¹⁵³ 19 U.S.C. § 3805(b)(2)(D)(3).

¹⁵⁴ See Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT’L L. 782 (1966) (providing an excellent elaboration on the debate).

United States broad discretion in protecting its rights and interests.¹⁵⁵ Thus, Jackson has argued that WTO panel decisions are not legally binding on the United States in the same way that formal interpretations of WTO Agreement, through the super-majority requirements of a three-fourths majority of the highest body in the WTO, the Ministerial Conference, are.¹⁵⁶

Jackson has consistently maintained a dichotomy between the international legal bindingness of DSB decisions and their effect on U.S. domestic law. Yet this dichotomy inheres in it more than meets the eye. In 1994, when Jackson first advanced the thesis on the bindingness of DSB decisions, he also noted that a panel report “certainly can and should have an important effect in domestic U.S. jurisprudence, as in the jurisprudence of many other nation-states.”¹⁵⁷ Indeed, rather than casting WTO law as something completely estranged from domestic law, as have some critics of DSB decisions, Jackson has, perhaps more than anyone else, developed the relationship between the

¹⁵⁵ The U.S. Trade Representative's office has, therefore, asserted that:

[The U.S.] government was careful to structure the WTO dispute settlement rules to preserve our rights. The findings of a WTO dispute settlement panel *cannot* force us to change our laws. Only the United States determines exactly how it will respond to the recommendations of a WTO panel, if at all. If a U.S. measure is ever found to be in violation of a WTO provision, the United States may on its own decide to change the law; compensate a foreign country by lowering trade barriers of equivalent amount in another sector; or do nothing and possibly undergo retaliation by the affected country in the form of increased barriers to U.S. exports of an equivalent amount. But America retains full sovereignty in its decision of whether or not to implement a panel recommendation.

United States Trade Representative, *AMERICA AND THE WORLD TRADE ORGANIZATION* 13 (1999), http://permanent.access.gpo.gov/lps24531/wto_usa.pdf.

¹⁵⁶ John H. Jackson, *The Perils of Globalization and the World Trading System*, 24 *FORDHAM INT'L L.J.* 371, 380 (2000). Jackson emphasizes that the consensual character of the WTO circumscribes its ability to override U.S. domestic law and policy. *Id.* at 382-83. Similarly, Jackson has described the regime of international economic law of the WTO as presenting themes and problems, such as the “dilemma of rule versus discretion,” the “‘effectiveness’ of the ‘trade rules,’” as well as others, rather than as a seamless legal web. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 151, at 25. Jackson further argues in this pre-WTO book that in the implementation of the Tokyo Round Agreements, the U.S. government (courts, executive branch, and Congress) departed from theories of “strict sovereignty.” *Id.* at 61. *See also* David Kennedy, *The International Style in Postwar Law and Policy*, 1994 *UTAH L. REV.* 7, 59-69 (1994) (discussing Jackson's international trade scholarship).

¹⁵⁷ Jackson, *Dispute Settlement Understanding*, *supra* note 17, at 64.

two as reciprocal rather than opposed, as interpenetrating rather than independent, and as intersecting rather than estranged.¹⁵⁸

C. Jackson's Distinctive View of the Relationship Between WTO and Domestic Law

Jackson's view of the relationship between domestic and international trade law is informed by a view of WTO law that he describes as "rule orientation."¹⁵⁹ He views this rule-oriented system as embedding within it legal and policy goals that do not fit tightly onto the interpenetrating domestic legal regimes of WTO member countries.¹⁶⁰ Thus, while he emphasizes the binding nature of DSB decisions, he acknowledges that the implementation of these decisions gives WTO members a safety valve to address troublesome domestic controversies.¹⁶¹ Jackson's rule orientation thesis, however, arguably extends beyond giving a safety valve to delay WTO member compliance with DSB decisions and also includes the domestic implementation of WTO obligations at the legislative, administrative, and executive levels. Jackson's

¹⁵⁸ A review of Jackson's founding role in the United States in the field of international economic law summarizes Jackson's view of the relationship between domestic and international trade law as follows:

Jackson's academic achievement was to displace international business transactions and the tradition of transnationalism by capturing the intellectual energy and hope for international public law and the felt necessity of dealing with the "foreign" without losing the basic American legal materials and the national private law order. By focusing largely on the reciprocal interaction of national governmental and legislative institutions, he imagined an international "trade constitution" which brought international trade into the domestic public order to revitalize it as an international system. . . [H]e recast clashes between national regimes not as political disputes awaiting international regulatory harmonization nor as deeply estranged cultural differences to be compared, but as an imperfect "interface" mechanism through which different legal cultures related to one another.

Kennedy, *supra* note 156, at 62.

¹⁵⁹ JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 151, at 127.

¹⁶⁰ Kennedy, *supra* note 156, at 62.

¹⁶¹ Jackson, *Obligation to Comply*, *supra* note 16, at 122. For example, in *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Arbitrator gave the United States more time to comply with an adverse DSB decision in the face of congressional reluctance and delay in compliance. Award of the Arbitrator, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS184/13 (Feb. 19, 2002).

rule orientation has another element besides the legislative, executive, and administrative flexibility that members have in domestic implementation of WTO obligations. Rule orientation, according to Jackson, does not set up WTO rules as necessarily creating a specific or categorical compliance method.¹⁶² Instead, under Jackson's view, WTO rules provide that the member may choose the method of compliance. As such, compliance with WTO rules provides what Jackson calls wiggle room for WTO members to protect their rights and interests, while at the same time observing their WTO obligations.

D. U.S. Courts in the Foreign Affairs Context

In the first line of cases noted so far, U.S. courts do not treat DSB decisions as either binding or even persuasive in a comparative law sense.¹⁶³ This seems to square with Jackson's thesis that WTO rules and its dispute settlement system provide member countries with wiggle room to accommodate their implementation difficulties. As demonstrated in Part II, in many cases where DSB decisions were cited, U.S. courts have resorted to a variety of techniques of avoidance or deference to DOC interpretations or applications of U.S. law that were arguably at odds with the United States' obligations under GATT/WTO law and DSB decisions.¹⁶⁴ Under this line of cases, the best a U.S. court is willing to afford a DSB decision is to "inform" itself of such a DSB decision in its own decision making process. This is notwithstanding the fact that unlike most other international or foreign cases, DSB decisions in which the United States is a party are binding on the United States as a matter of international law.¹⁶⁵

The treatment of DSB decisions¹⁶⁶ as neither binding nor persuasive is perhaps accounted for by leading international legal jurist Louis Henkin's observations that "both [the] President and Congress can exercise their respective constitutional powers regardless of treaty obligations, and the courts will give effect to the acts of the political branches within their constitutional

¹⁶² Jackson, *Obligation to Comply*, *supra* note 16, at 122.

¹⁶³ See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000) (proposing that although international law does not bind national judges in an enforcement sense, it ought to be persuasive).

¹⁶⁴ See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993) (arguing that judicial orders requiring national authorities to comply with international law are exceptional).

¹⁶⁵ See *supra* note 16.

¹⁶⁶ See *supra* note 16.

powers even if they violate treaty obligations or other international law."¹⁶⁷ Thus, as Henkin argues, "[i]f there is a breach of a treaty by the other party, it is the President, not the courts, who will decide whether the United States will denounce the treaty, consider itself liberated from its obligations, or seek other relief, or none at all."¹⁶⁸

E. The Responsibility of Domestic Institutions to Give Effect to International Obligations

Although courts have to defer to the political branches regarding treaty compliance or violations, another line of cases holds that "unless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments."¹⁶⁹ One inspiration for this line of cases is the *Charming Betsy* doctrine, which the Restatement notes requires courts, "where fairly possible," to avoid conflict with an international agreement of the United States.¹⁷⁰ Further, while Congress can enact statutes abrogating prior treaties and international obligations,¹⁷¹ Henkin has argued that it seldom uses this power.¹⁷² The

¹⁶⁷ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 214 (Oxford Univ. Press 2d ed. 1996) (1972).

¹⁶⁸ *Id.* Similarly, the District of Columbia Circuit Court of Appeals has held that "[u]nder our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it." *Diggs v. Shultz*, 470 F.2d 461, 466-67 (D.C. Cir. 1971), *cert. denied*, 411 U.S. 931 (1973) (holding that Congress had acted in disregard of the U.S.'s treaty obligations). In the *Head Money Cases*, the Supreme Court held that a treaty "depends for the enforcement of its provisions on the honor and the interest of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations . . . [but] with all this the judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884) (emphasis added).

¹⁶⁹ *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (1988) (citing *Cook v. United States*, 288 U.S. 102 (1933)). Under international law, the "responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not necessarily require that domestic courts apply and give effect to international obligations." LORIF. DAMROSCH ET AL., *INTERNATIONAL LAW, CASES AND MATERIALS* 161 (4th ed. 2001).

¹⁷⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) [hereinafter RESTATEMENT].

¹⁷¹ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that "Congress may modify such provisions [treaties], so far as they bind the United States or supersede them altogether").

¹⁷² Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 529 (1987) (arguing that "Congress has rarely enacted statutes in knowing violation of treaties").

difficulty with this argument and for this second line of cases is that in enacting the Uruguay Round Implementing Acts and the accompanying Statement of Administrative Action, Congress seemed to deliberately subordinate the United States' international obligations negotiated in the Uruguay Round to domestic implementing statutes.¹⁷³ To get around this, courts in the second line of cases have argued that unless Congress clearly and unequivocally exercises its power to abrogate treaties, they have a "duty to interpret statutes in a manner consonant with existing treaty obligations [because] [t]his is a rule of statutory construction sustained by an unbroken line of authority for over a century and a half."¹⁷⁴

F. Consequences of a Federal Court's Rejection of a WTO Decision Under International Law or Misapplication or Rejection of International Legal Obligations

Under the first line of cases discussed, DSB decisions are only relevant in U.S. courts if the particular law governing the case at hand made it relevant. In other words, DSB decisions are only relevant before a U.S. court in so-far-as U.S. law and policy make them applicable.¹⁷⁵ Thus, notwithstanding the fact that DSB decisions in which the U.S. is a party are binding on the United States as a matter of international law,¹⁷⁶ in the view of the first line of cases, U.S. courts must give effect to congressional intent even if doing so would be inconsistent with the United States' GATT/WTO obligations, including DSB decisions.¹⁷⁷ Under this line of reasoning, a federal court is not free to

¹⁷³ See, e.g., *supra* notes 148-51 and accompanying text.

¹⁷⁴ *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (citing *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984), *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953), *Clark v. Allen*, 331 U.S. 503, 510 (1947), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) in holding that "[i]t has been a maxim of statutory construction since the decision in [*Charming Betsy*] that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains'").

¹⁷⁵ See Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-82 (1967) (discussing the application of international law in U.S. courts); see also *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979) (holding that "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing").

¹⁷⁶ See *supra* note 165.

¹⁷⁷ *Suramerica*, 966 F.2d at 668 (holding that "GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for

invalidate a statutory interpretation adopted by an agency to avoid a potential conflict with international law.¹⁷⁸ Ultimately, under this view, the United States is free to accept, reject, acquiesce, implement, or even criticize such decisions.¹⁷⁹

Though it may be permissible to do so under domestic law, the rejection of a binding international legal obligation would be a violation of international law. This is so because a violation of international law is not excusable if it was premised on the justification that the violation was held to be permissible under domestic law¹⁸⁰ or the policy of a country otherwise bound by the obligation.¹⁸¹ In addition, if the violated norm is a rule of customary international law, although WTO DSB decisions are not such norms, this defense would also be unavailable.¹⁸² In the final analysis, the United States would be likely to have an aggrieved WTO member impose DSB-authorized duties to compensate it for trade concessions lost by the violation of a GATT/WTO obligation, both under the GATT/WTO law¹⁸³ as well as under general international law.¹⁸⁴ Congress seems already to have anticipated

Congress and not this court to decide and remedy”).

¹⁷⁸ *DeBartolo Corp.*, 485 U.S. at 574-75 (noting that “statutory interpretation . . . would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress”); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (stating that “[t]he traditional courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of congress”).

¹⁷⁹ See, e.g., *Suramerica*, 966 F.2d at 668 (holding that “GATT does not trump domestic legislation”); *The Over The Top*, 5 F.2d 838, 842 (D. Conn. 1925) (stating that “[i]nternational practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress”).

¹⁸⁰ RESTATEMENT § 311(3) (“A state may not invoke a violation of its internal law to vitiate its consent to be bound unless the violation was manifest and concerned a rule of fundamental importance.”).

¹⁸¹ Louis Henkin, *supra* note 175, at 75, 178-82 (arguing that while international law would be precluded from application where it was contrary to the public policy of the forum, it would not make the United States any less bound to its international obligations).

¹⁸² *Id.*

¹⁸³ This would be determined by the DSB. For example in *The Tax Treatment for “Foreign Sales Corporations”* case, the DSB authorized the European Union to increase duties up to the level of 100% for a total of four billion dollars of U.S. trade for U.S. non-compliance with an earlier DSB ruling. See *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/26 (Apr. 25, 2003).

¹⁸⁴ *Factory at Chorzów* (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (“[I]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”); see also

exactly this kind of an outcome. In 2002, it enacted a WTO Fund under the 2002 Trade Act for the payment of any total or partial settlement of disputes before the WTO.¹⁸⁵

G. Would Rejection of DSB Decisions Establish an Alternative Norm on the Status of DSB Decisions?

It may well be argued that a rejection of a DSB decision by a party to it establishes an alternative norm regarding its status in relation to the United States, which often resists constraints on its power under international law.¹⁸⁶ Under such an argument, the United States is freed from the constraints of having to comply with DSB decisions, even if they are legally binding under international law, because its domestic constitutional and legal frameworks supersede the judgments of international tribunals. In fact, some scholars have argued as much with regard to International Court of Justice decisions.

Under international law, such claims do not establish an alternative norm, and it is hardly foreseeable that members of the WTO would acquiesce, even if only rhetorically, to such unilateral declarations of disregard of international obligations even by the United States. In fact, under international law, departures from an international legal norm do not undermine but rather confirm the efficacy of the norm.¹⁸⁷ Departures from the binding nature of

DAMROSCH ET AL., *supra* note 169, at 161 (noting that where a domestic court disregards or misapplies international law, an international tribunal would not have the power to reverse or even set aside such a decision by a municipal tribunal, but the aggrieved state may be awarded damages under international law).

¹⁸⁵ 19 U.S.C. § 3539 (2002).

¹⁸⁶ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 519 (1998) (noting that from the U.S. perspective, in the twentieth century, the perceived risks associated with lawbreaking have been reduced in light of the United States' global dominance).

¹⁸⁷ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 186 (June 27) (expounding on the inconsistency between actual practice and *opinio juris*:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that *instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule*. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications . . . within the rule itself, . . . the significance of that attitude is to confirm rather than to weaken the rule. (emphasis added)).

DSB decisions therefore confirm the binding nature of these decisions and do not create an alternative rule damning down their status under international law. These conclusions are valid vis-a-vis the United States, which has a dualist system, though one would anticipate that they would be more applicable in monist countries wherein international law is self-executing.¹⁸⁸ By contrast, in the United States, courts are not obliged to consider international law applicable in its own right or as superior to the domestic law and policy, as would be the case in a monist country.¹⁸⁹ Ultimately, when federal courts disregard DSB decisions or GATT/WTO treaty commitments, these decisions and commitments acquire two meanings—one in litigation in U.S. courts and another in the United States' relations with other countries.¹⁹⁰

IV. CONCLUSIONS

In this Article, I have shown that there are two lines of cases on the treatment of conflicts between DSB decisions and domestic statutes. Under the first line of cases, represented by cases such as *Corus Staal*, courts decline to rely on a DSB decision as the only basis for striking down a U.S. agency's interpretation of a statute. By contrast, a second and less dominant line of cases holds that the interpretation or application of ambiguous statutes requires domestic courts, as a principle of domestic statutory construction, to interpret ambiguous statutes in conformity with the United States' international obligations. Under this line of cases, then, the claim for interpreting ambiguous statutes is based on the premise that courts have the discretion to defer to agency interpretations and applications that were made to conform

¹⁸⁸ For an extensive analysis, see Gathii, *Insulating Domestic Policy*, *supra* note 3, at 15-22.

¹⁸⁹ F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 380 (1973) (arguing that "judicial application of international law is, and ought to be, a matter of duty, not . . . of mere right. In other words the requirements of public international law are absolute and leave no room for the relativity of public policy."); *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (stating:

Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders (citations omitted));

F.A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 124-98 (1990) (detailing consequences under international law of violating international legal norms).

¹⁹⁰ *See* RESTATEMENT § 326, at n.4; *see also* *Charlton v. Kelly*, 229 U.S. 447, 472 (1913) (noting that the non-observance of treaty obligations by a state makes that treaty voidable, not void).

with a DSB decision or a GATT/WTO obligation. Courts adopting this line of reasoning, such as *Turtle Island*, therefore, give considerations of minimizing conflicts with international law or avoiding violations of DSB decisions significant interpretive weight. This is because the agencies applying or interpreting the statute have the competence and expertise to take into account the significance of a variety of factors, including whether or not to minimize conflict between U.S. law and policy and whether or not to minimize interference with the United States' GATT/WTO obligations.

By upholding domestic law in the event of a conflict between a DSB decision and domestic law, courts in the first line of cases follow a congressional pattern of insulating the United States from its international trade obligations. This results in U.S. trade remedy laws protecting domestic industries at the expense of the United States' treaty obligations. In addition, by treating U.S. trade laws as superior to GATT/WTO treaties and by declining to interpret and apply U.S. trade laws consistently with the United States' GATT/WTO treaty commitments, federal courts adopting this reasoning are, in effect, acquiescing to the derogation and disregard of the U.S. treaty obligations by Congress and the executive branch.

Such a result, however, is not inevitable. In fact, the *Turtle Island* line of cases demonstrates that where agencies craft their policies to conform with DSB decisions, courts have the flexibility to uphold such policies as consistent with the clear meaning of a statute. In so doing, courts give meaning to the *Charming Betsy* doctrine that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁹¹

¹⁹¹ *Charming Betsy*, 6 U.S. at 118.