Deference in United States Domestic Courts and Implications for Legality Review

Catherine E. Sweetser*

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

*LL.M., 2009, New York University School of Law; J.D., 2008, New York University School of Law; B.A., 2005, Yale College. Thanks to Benedict Kingsbury, Armin von Bogdandy, and Richard Stewart for useful conversations and thoughts on this topic. Thanks to Bryant Walker-Smith, Christen Broecker, Jane Pek, and Alexandra Khrebtukova for editing and comments.

The problem with according deference at the international level is that the court must somehow balance deference to the domestic agency with deference to the international treaty or adjudicatory body. The Senate, or Congress as a whole, when ratifying or implementing treaties, can specify when courts and agencies *should* defer to treaty bodies, and under what situations. National legislatures should allow courts to examine both domestic and international actors' procedures.

I. Can Deference Help National Actors Influence International Bodies?

U.S. courts are hesitant to disagree with the executive in foreign affairs because they want the country to speak with one voice on foreign policy. They are concerned that delegating regulatory authority to international institutions is an unconstitutional delegation of sovereignty.[1] Nonetheless, in theory, providing a modicum of deference to international decisionmakers may help national actors to influence those bodies by holding out the prospect of national compliance with international decisions. Judicial rulings may also allow for greater credibility with international actors than leaving decisions about the implementation of adjudicatory decisions to political bodies.

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

A. U.S. Distrust of International Decisionmakers

[1] NRDC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).

Distrust of international institutions' decisionmaking with regard to national interests, particularly national regulatory policy, is not unique to the U.S.[2] One key concern is whether international bodies will be able to evaluate local problems with sufficient expertise. In agency theory, allowing affected parties to participate occasionally substitutes for expertise; it is assumed that those parties will bring their local knowledge to bear on the problem. In the WTO, however, only states can bring claims against each other; NGOs and local interests do not have standing to appear.[3]

In *NRDC v. EPA*, Congress appeared to overcome its bias against international decisionmaking bodies, binding the agency to the decisions of the parties to the Montreal Protocol.[4] Nonetheless, the D.C. Circuit held that delegating regulatory authority to an international body would raise "significant constitutional problems."[5] The circuit's opinion went beyond the idea that in order to delegate regulatory authority to an international body, either presidential signature or Senate ratification was necessary. They argued that any delegation of *lawmaking* authority to an international institution would be unconstitutional; treaties could only delegate *adjudicative* authority.

Similarly, the UN Charter contained U.S. acquiescence to dispute settlement within the ICJ framework; in *Medellin*, for example, the President explicitly stated that the US had an international obligation to comply with the *Avena* judgment.[6] Nonetheless, the Supreme Court has held that the Charter is not self-executing, and ICJ decisions will not be judicially enforced

---

[2] Shaffer, *supra* note 17, at 12 ("The primary problem with centralized international rule-making is that nations distrust international political processes for regulatory policy.").

[3] This problem is gradually being eroded through the introduction of amicus briefs in panel and appellate body reports. Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01 (2001), at 5–6, 10–11*available at* http://www.worldtradelaw.net/articles/mavroidisamicus.pdf (discussing discretion of panels to accept amicus briefs where they find that they are 'pertinent').

[4] Bryant Walker Smith, Note, *International Obligations Enforceable as Agency Constraints: Reanalysis of the Methyl Bromide Critical Use Rule at Issue in NRDC v. EPA* (N.Y.U. J. Int'l L. & Pol., forthcoming 2009)

[5] NRDC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).

[6] Medellin v. Texas, 128 S. Ct. 1346, 1355 (2008)

within the United States without further political ratification.[7] Its decision emphasized that the court could take ICJ decisions into account for purposes of comity, but that they would not be binding—an international institution would not be allowed to have binding effect within the United States without an extremely clear statement of delegation by Congress.[8]

The Dispute Settlement Understanding created a dispute settlement system in the framework of the GATT agreements. The Appellate Body has interpreted its role within this dispute settlement system as one of teleological interpretation, using the purpose of fair trade to ground decisions in the philosophical bases of nondiscrimination, certainty and predictability.[9] Yet political actors within the United States have overwhelmingly rejected the decisions that declared use of zeroing, the preferred U.S. methodology of calculating dumping margins, incompatible with the Anti-dumping Agreement based on the above ideological grounds.[10] Section 3533(g), a United States statute discussed below which takes decisions out of the hands of courts and executive agencies and places them in congressional committees, can be seen as the culmination of this backlash to zeroing and anti-dumping decisions by the Appellate Body which arguably depart from the text of the agreement.

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

---

[7] *See generally* Medellin v. Texas, 128 S. Ct. 1346 (2008).

[8] Although the Court does not raise the same constitutional concerns as in *NRDC v. EPA*, the evaluation of the language "undertakes to comply" is filled with ringing statements about "independent nations" and "honor" of those nations. Medellin v. Texas, 128 S. Ct. 1346, 1358-1359 (U.S. 2008).

[9] Sungjoon Cho, *Constitutional Adjudication in the World Trade Organization*, Jean Monnet Working Paper 04/08 (2008) , at 7, *available at* http://www.jeanmonnetprogram.org/papers/08/documents/JMWP04-08Cho.pdf .

[10] Congress, in particular, has protested via language in a recent statute and letters to the US Trade Representative and Department of Commerce. *Id*. at 20–22.

and recognition of decisions of these bodies could provide a tool for constraining these decisionmakers.

B. Constraints on International Decisionmakers

Legitimacy of international institutions is traditionally derived from delegation and control by national governments. National governments hold international institutions accountable and control the "ultimate effect" of international decisions by controlling domestic incorporation of those decisions.[11] As discussed below, separation of powers and textual constraints on decisionmakers are rare in the international context. In the absence of these controls, political constraints—such as pragmatic concerns about implementation—can be used to restrain international institutions.

Yet international decisionmakers are unconstrained by the constitutional and separation of powers concerns that constrain national courts. For example, the statute at issue in *Shrimp-Turtle* and *Turtle Island Restoration Network* mandated negotiations with foreign countries for the "development of bilateral or multilateral agreements with other nations for the protection and conservation of such species of sea turtles."[12] Nonetheless, the Ninth Circuit found that negotiation directives were constitutionally unenforceable; negotiation with foreign nations is committed to the discretion of the executive branch.[13] In contrast, the WTO Appellate Body found in Shrimp-Turtle that negotiations were one of the missing procedural elements making the decision arbitrary, and thus falling outside the protective *chapeau* of GATT XX which

[11] Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, LSE LEGAL STUDIES WORKING PAPER No. 10/2009, at 3–4, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344788. Krisch does not see implementation as sufficiently meaningful control. *Id*. at 5.

[12] The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. 101-162, Title VI, § 609(a) (codified at 16 U.S.C. §1537 note (2000)); *see also* Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1285 (Fed. Cir. 2002).

[13] Earth Island Inst. v. Christopher, 6 F.3d 648, 653 (9th Cir. 1993).

permits environmental exceptions.[14] Although the domestic court may hesitate to stipulate procedural remedies or to deal with questions of inter-state political relations, international institutions are not so reticent.

Limiting judges to strict interpretation of the text alone is one method of controlling judicial discretion, but it is uncommon in the international sphere. Both domestic and international agencies may see dynamic interpretation as increasingly appropriate in interpreting treaties; one justification is the increased difficulty of altering the text of a treaty, particularly a multilateral one, in the face of changed context or facts. Sungjoon Cho discusses this problem in the context of the WTO, where the parties have little power to renegotiate the Anti-dumping Agreement.[15] Similarly, Michael Kirsch has discussed the problems that arise in the context of tax treaties when private actors discover and exploit loopholes faster than national governments can renegotiate or modify the language of the treaty.[16] Policy reasons as well as difficulty in negotiation can lead to vague provisions encouraging dynamic elaboration of norms by agency actors.

Nonetheless, international decisionmakers are somewhat constrained by political considerations. Much as domestic courts have been said to make decisions in order to preserve their institutional influence vis-à-vis political actors, international tribunals make decisions based

---

[14] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 12 October 1998, WT/DS58/AB/R, ¶ 172 [hereinafter *Shrimp-Turtle*]. *See also Turtle Island Restoration Network*, 284 F.3d at 1290 ("[T]he failure of the United States to initiate serious international negotiations to protect sea turtles . . . supported a finding of unjustifiable discrimination."). One factor relevant to the decision was the fact the United States had negotiated with some of the countries but not others. *Shrimp-Turtle*, *supra*, ¶172. (("Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved."). However, under American law these negotiations, however discriminatory, would be considered political questions, while the WTO was free to review them.

[15] Sungjoon Cho, *supra* note 9.

[16] Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 TEXAS L. REV. (*forthcoming, 2009*).

on political constraints. In the WTO context, for example, the Shrimp-Turtle decision has been characterized as one of political necessity. A substantive interpretation barring environmental regulation would have been a political disaster, while a compromise based on procedural limiting and balancing retains the Appellate Body's legitimacy vis-à-vis both developing country constituencies and powerful US interests.[17]

In general, however, the WTO has not been seen as deferential to one group of states over another. Statistical analysis has shown that the WTO tends overwhelmingly to decide cases in favor of Complainants, regardless of the party identity or relative political clout of the litigants.[18] Concern for institutional reputation may also keep institutions from forming a bias in favor of a particular state. International institutions do engage in a dialogue with domestic institutions, as discussed in the next section.

C. A Dialogue With International Decisionmaking Through Domestic Implementation

Although national actors cannot directly rule on how international law should be interpreted, dualism can become a technique for powerful actors to shape the contours of international law.[19] Even if the decision is on a national level, the court's criticism and engagement with the procedures at the international level can have an impact on international procedure. The domestic court is usually acting under an implementing statute, as in the context

[17] Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, University of Minnesota Legal Studies Research Paper Series, Research Paper No. 09-11, 15–18 (2009).
[18] Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 404–09 (2009).
[19] Scholars have discussed *Kadi* as a dualist decision. *See, e.g.*, Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09, *available at* www.jeanmonnetprogram.org/papers/09/090101.pdf. *But see* Piet Eckhout, *Kadi and Al Barakaat: Luxembourg is not Texas – or Washington D.C.*, EJIL TALK!, Feb. 25, 2009, http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/ (arguing that viewing the decision as dualist is unhelpful).

of trade and the context of environmental measures. Nonetheless, as seen in Kadi, such review may receive a response at an international level.

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

In *Kadi*, for example, the European Court of Justice did not explicitly state that the Security Council's counterterrorism sanctions regime violated general principles of due process under international law.[20] Instead, the Court reviewed the implementation of the regime within Europe and concluded that the EC Regulation violated the applicant's EC-recognized "right to be heard, right to an effective legal remedy, and right to property."[21]

In response to the *Kadi* decision, the UN Security Council passed Resolution 1822/2008, which they explicitly said was intended to comply with requirements of transparency and contestation.[22] Resolution 1822/2008 provided that there would be a public release of at least some of the reasons for listing individuals,[23] required notification of the countries of residence

[20] *Yassin Abudllah Kadi v. Council of the EU and Commission of the EC,* and *Al-Barakaat International Foundation v. Council of the EU and Commission of the EC,* judgment of 3 September, 2008. The *Kadi* case was bought by an individual who had substantial assets in the EU; all his funds and financial assets in the EU were frozen under EC Regulation 467/2001, which implemented the listing decisions of the UN Counter-Terrorism Committee under a series of UN Security Council resolutions. For a summary of the facts, see de Burca, *supra* note 19, at 21.

[21] De Burca, *supra* note 19, at 34, 36.

[22] Mathias Vermeulen, *Security Council Hears Briefing of 1267 Committee—No Progress on Implementing* Kadi, THE LIFT, Dec. 16, 2008, http://legalift.wordpress.com/2008/12/16/security-council-hears-briefing-of-1267-committee-no-progress-on-implementing-kadi/ (quoting the chair of the Al-Qaeda and Taliban sanctions committee, Jan Grauls, as saying that "Due respect for fair and clear procedures could only increase the effectiveness of the sanctions regimes.").

[23] S.Res. 1822/2008, ¶ 12–13.

and nationality of those individuals,[24] and instructed those countries to notify the individuals involved.[25] It also provided listed private entities and persons a chance to submit individual requests for de-listing, rather than being required to go through their state; those were repeated from S. Res. 1730, however.[26]

Euan MacDonald has argued that the "watershed" potential of this moment for Global Administrative Law has turned into a weak set of procedural protections that do not satisfy the substantive concerns raised by the ECJ in *Kadi*.[27] Kadi has subsequently filed another case challenging the decision and saying that the reasons given were not sufficient or complete.[28] MacDonald notes that the weak and possibly meaningless procedural protections may raise concerns about legitimation of violations of rights through a procedural gloss, citing Chimni.[29]

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

---

[24] *Id*. ¶ 15.
[25] *Id*. ¶ 17–18.
[26] *Id*. ¶ 19; S. Res. 1730 (2006), Annex, *De-listing Procedure*, ¶ 1;
[27] Euan MacDonald, *Kadi: Recent Developments*, GLOBAL ADMINISTRATIVE LAW BLOG, http://globaladminlaw.blogspot.com/2009/05/kadi-recent-developments.html
[28] *Id*.
[29] *Id*.

II. Deference in the US Context: Engaging With and Rewarding Other Adjudicative Actors.

There are two basic forms of deference in the United States. The first is *Chevron*, which mandates that if the statute is ambiguous and the agency has interpreted the treaty reasonably, the agency's reasonable interpretation should control regardless of whether the court would have construed the statute differently on its own.[30] Under *Skidmore* deference, in contrast, the agency must persuade the court that its interpretation is correct using "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[31] *Skidmore* is a substantially less deferential standard than *Chevron*.[32]

The case used today to determine whether the *Chevron* or *Skidmore* standard of deference applies is *Mead*.[33] *Mead* specified that the level of deference must be based on Congressional intent to delegate the authority to make law to the agency.[34] *Mead* and subsequent cases used level of process to evaluate congressional intent; the more formal the procedures provided for in the statute, the more deference to which the agency was entitled. Arguably, whenever the agency follows a formal rulemaking process delegated to it by Congress, it is entitled to *Chevron* deference.[35]

If the international institution responsible for interpretation is also to be accorded deference, the courts will have to balance the deference due to the domestic agency with the deference due to the international institution. In the United States, the *Charming Betsy* canon of

[30] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[31] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[32] Amy J. Wildermuth, *Administrative Law/Statutory Interpretation: Solving The Puzzle Of Mead And Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1898 (2006).
[33] Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 Geo. Wash. L. Rev. 347, 357 (2003) ("Mead creates a regime that contains Chevron deference, Skidmore deference, and no deference.").
[34] United States v. Mead Corp., 533 U.S. 218, 230 (2001).
[35] *Id*. at 352. I would argue, however, that conflicting international interpretations restrict this analysis, as explained below.

interpretation, which instructs federal courts to construe statutes to avoid conflict with international law, can provide guidance for courts in this balancing act.[36] If the effect of such a delegation is a violation of international law, it is plausible under *Mead* to say that Congress intended the agency to receive only *Skidmore* deference. The court can then give *Skidmore* deference to the international institution, something which the Court of International Trade had done to the WTO before the passage of §3533(g). This balancing of deference is something also done domestically where the jurisdiction of multiple agencies overlaps.

A) The Current Status of WTO Panel Decisions

The GATT is generally not seen as self-executing in the United States; usually the agency is interpreting its implementing statute.[37] The European Union similarly does not generally give the GATT direct effect, although a few cases enforced the GATT as embodied in Community regulations.[38] Nonetheless, courts have recognized that regardless of the self-executing status of the GATT or the Uruguay Round Agreements, they still constitute international obligations on the United States.[39] In Europe, the defining factor is Community intent in passing regulations.[40] The WTO panel process is one of the most formal adjudicative

[36] Murray v. The Schooner *Charming Betsy*, 6 U.S. 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.")
[37] Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Nw. J. Int'l L. & Bus. 556, 559 (1996/97).
[38] *Id*. at 595, 599–602.
[39] *Hyundai*, 53 F. Supp. at 1343 ("Accordingly, the Antidumping Agreement is properly construed as an international obligation of the United States.").
[40] *Id*. at 595 (citing The Banana Cases: Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973, 5073).

mechanisms in international law; therefore, under an analysis that rewards agencies for deference, it would seem to be one of those most entitled to it.[41]

Nonetheless, WTO panel reports are not binding sources of law in the United States, under §3533(g). The statute incorporating the Uruguay Round Agreements states clearly that implementation of a panel report is *not* to be done by the agency but by Congress.[42] First, the Trade Representative shall "notify" and "consult with the appropriate congressional committees" about whether to implement a report adverse to the United States. The Commerce Department may not take any action with regard to a regulation or practice by the agency "unless and until—the appropriate congressional committees have been consulted," the Trade Representative has prepared and submitted "the proposed modification, the reasons for the modification, and a summary of the advice obtained [from the private sector advisory committees]," and there has been "an opportunity for public comment."[43] Although not all agency action need go through notice and comment procedures, any agency action *responding to a WTO panel* must go through not only notice and comment but intense Congressional oversight.

Thus, although some commentators see it as extremely positive that the executive has pushed for binding obligations on the United States in the context of the Dispute Settlement Understanding, Congress has asserted its oversight over any change to an offending practice, and made it more difficult to for the executive to comply with the panel. Under 19 U.S.C. §3533, even where an agency has not formally promulgated a regulation, it may not change its practice

[41] Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, U.PENN. INTL. L.J. (*forthcoming*, 2009) (discussing use of Dispute Settlement Understanding by international legal experts to refute criticism that international law lacks centralized adjudication).
[42] 19 U.S.C. §3533.
[43] 19 U.S.C. 3533(g) (2008).

to comply with a WTO panel unless the congressional committees have been consulted and a final rule or other modification is published in the Federal Register.[44]

The majority of trade cases presenting a conflict between the international interpretation and the United States interpretation of trade statutes arise in the context of the Anti-dumping Agreement and zeroing methodology. Countries may take measures to combat dumping (selling products in a foreign market at a price lower than their normal market value) under the WTO regime. In ascertaining whether a product is being dumped in the United States, the Commerce Department only examines sales below the normal value (usually the value in the domestic market).[45] Sales at an export price above the normal value are assigned a margin of zero.[46] Foreign companies generally argue that such methodology is unfair because "'the presence of a single U.S. sale below normal value can produce a dumping margin, even though there exists hundreds of sales for which the opposite is true.'"[47]

The Commerce Department makes dumping and subsidy determinations based on individual petitions, and the International Trade Commission then determines whether acts of dumping or subsidies actually "harm or threaten potential U.S. industry.[48] In the *Mead* framework, anti-dumping determinations have been found to be "relatively formal administrative procedures" and Commerce uses its legal interpretations in these adjudications as precedential. [49] Moreover, the duty of adjudication has in this case been "explicitly delegated" by Congress.[50]

---

[44] Probably because of *INS v. Chadha* concerns, however, these congressional committees do *not* exercise a veto over agency action. They may vote to indicate agreement or disagreement with the new rule or modification, but that vote is not binding on the agency. §3533(g)(3).
[45] *See, e.g.*, NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1318 (2004).
[46] *Id*.
[47] *Id*.
[48] Suramericana de Aleaciones Laminadas, C.A., v. United States, 746 F. Supp. 139, 141 (CIT 1990).
[49] Pesquera Mares Australes v. United States, 266 F. 3d 1372, 1381 (Fed. Cir. 2001).
[50] *Id*.

Under the *Mead* framework, then, *Chevron* deference is appropriate to the Commerce Department's interpretation of the anti-dumping statute.[51]

In the definitive case on WTO panel rulings, *Corus Staal*, the Federal Circuit held that unless the text of the statute itself clearly conflicted with the domestic agency's interpretation, the court could not overrule the domestic agency.[52] The court rejected engagement with the language in specific WTO panel decisions. It emphasized that "Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law," that GATT was not self-executing, and that there was a congressional scheme for implementation of decisions under 19 U.S.C. §3533.[53]

According to the Federal Circuit, it followed that Charming Betsy was not applicable to harmonization of WTO panel proceedings such as *Bed-Linen* and *Softwood Lumber* which declared U.S. zeroing practices illegal.[54] The court held explicitly that no deference, not even *Skidmore* deference, was applicable to the WTO panel decisions.[55] Examining WTO panel decisions was equated with intruding on the realm of the political branches; foreign policy was an added reason to accord "substantial deference" to Commerce.[56] In *Corus Staal*, the Court held that under the current statute, with its political implementation procedures for decisions, the court was instructed by Congress to give absolutely no *Skidmore* deference to the panel decisions, nor was it to lower its *Chevron* deference to the agency in light of conflicting international obligations.

---

[51] Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 n. 5 (Fed. Cir. 1992) ("This assumes that the agency is by virtue of its responsibilities under the Act and its expertise, entitled to the benefit of *Chevron* deference. We believe both Commerce and the ITC [International Trade Commission] qualify.").
[52] Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (2005).
[53] *Id*. at 1346, 1348.
[54] *Id*. at 1348.
[55] *Id*.
[56] *Id*.

B) Earlier Cases Examined the Language of Panel Decisions for Persuasiveness

In the context of trade, Congress has explicitly delegated the administration of the statute to the executive branch, although retaining some congressional oversight for itself.[57] However, before the specific provisions for the implementation of WTO panels were passed and before the Federal Circuit decided *Corus Staal*, the U.S. Court of International Trade struggled with the tension between agency deference and the traditional canon of compliance with international obligations in illuminating ways. It engaged directly with the language in the WTO panel decisions, balancing deference to the two agencies based on persuasiveness. In 1994, the *Footwear* case dealt with a case that had specifically been decided by a WTO panel with U.S. consent.[58] The *Footwear* court ultimately ruled for Commerce Department, but it did so within the framework of *Skidmore*.

Footwear was brought by U.S. distributors and retailers of Brazilian footwear protesting countervailing duties assessed on Brazilian footwear.[59] In this case, there had been two GATT panels convened; the first found that the revocation of the countervailing duty need not be backdated under Art. VI of the GATT.[60] Brazil blocked the adoption of this panel report and filed a second, as-applied challenge to the imposition of duties.[61] The second panel issued a "general ruling" that the United States had violated Article I:1, the most-favored-nation clause.[62] The United States agreed to the adoption of the second panel report as long as Brazil agreed to the adoption of the first panel report.[63] Plaintiffs contended that refusing to backdate the panel was directly contrary to the statute, the Trade Agreements Act of 1979, under the first step of

[57] *See supra* notes 42–43 and accompanying text.
[58] *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1083 (C.I.T. 1994).
[59] *Id*. at 1079.
[60] *Id*. at 1082.
[61] *Id*. at 1083.
[62] *Id*.
[63] *Id*. at 1085.

Chevron; they then contended that even if the statute was ambiguous, the second panel decision imposed an international obligation on the United States and the court should construe the statute so as to comply with that obligation.[64]

The Court of International Trade in *Footwear* first found that where *Chevron* came into conflict with *Charming Betsy*, *Charming Betsy* would prevail due to the right of the executive to conduct foreign affairs and the necessity of compliance with international law.[65] The court then held that in the face of the need to balance a GATT panel decision with the opinion of the International Trade Administration (a department within the Commerce Department in charge of adjudicating these cases), *Skidmore* deference was appropriate.[66]

The court went on, however, to analyze both the language in the GATT and the language used by the panel in finding that under international law, implementation was left up to the political branches.[67] The court further noted that under the Dispute Settlement Understanding, not yet in effect at the time the *Footwear* panels were convened, there was no provision stating that panel decisions are binding on the parties, contrasting the language in the agreement to language in NAFTA that specifically stated that panel determinations are binding.[68] The court also pointed out that the second panel explicitly rendered only a general ruling and not a specific recommendation.[69] The court, stating that it was applying *Skidmore* or persuasiveness deference to the international panel, held that where no specific remedy was prescribed, the court need not be persuaded by the international panel.[70] Brazil could avail itself of countermeasures, and it

[64] *Id*. at 1089.
[65] *Id*. at 1091–92. The court here incorrectly relied on *DeBartolo*, a Supreme Court case that said that constitutional avoidance trumps Chevron deference but accidentally called the constitutional avoidance canon the Charming Betsy canon. *Id*. at 1091.
[66] *Id*. at 1093.
[67] *Id*. at 1095.
[68] *Id*. at 1094–95.
[69] *Id*. at 1093.
[70] *Id*.

was in the discretion of the political branches (here, the agency) to choose whether or not to grant an administrative remedy.[71]

In other cases prior to *Corus Staal*, the Court of International Trade struggled with what deference to grant in the face of conflict between Commerce and the WTO dispute settlement procedures. In *Hyundai*, *PAM S.p.A.*, *Timkin*, and *NSK*, the Court interpreted the international obligations away from a conflict with Commerce practice, in each case claiming to be not sufficiently persuaded by the corresponding WTO panel rulings and finding that the GATT was unclear with regard to the practice.

In *Hyundai*, the provision at issue was the revocation of anti-dumping duties after an investigation into whether or not the company at issue was likely to continue dumping.[72] A WTO panel ruling had previously held in an unrelated case that the United States method of relying on a "not likely" determination was more stringent than the "likelihood" determination required by Article 11.2; in other words, the burden must be placed on the government to prove likelihood of continued dumping, rather than on the plaintiff to prove that it was not likely.[73] The court cited *Footwear* in holding that the WTO report was not binding on the court, because the choice of whether to comply was a political question for the executive branch.[74] The court also found that Congress, in passing the URAA (19 U.S.C. §3538), had codified the *Footwear* decision and delegated the question of complying with panel reports to the agency.[75] The court

[71] *Id*. at 1096 & n. 42.
[72] Hyundai Electronics Co. v. United States, 53 F. Supp. 2d 1334, 1336 (C.I.T. 1999). The Anti-dumping Agreement provision at issue, Article 11.2, gave any interested party a "right to request the authorities to examine whether . . . the injury would be likely to continue or recur if the duty were removed or varied." *Id*. at 1342. The Commerce Department applied a "not likely" standard, however, only revoking anti-dumping duties upon a finding that the company in question would not be likely to dump again. *Id*. (*citing* WTO Dispute Panle Report: United States-Anti-Dumping Duty on DRAMS of One Megabit or Above from Korea, 1999 WL 38403 (WTO Jan. 29, 1999, *adopted* March 19, 1999).
[73] *Id*. at 1342–43.
[74] *Id*. at 1343.
[75] *Id*.

maintained as in *Footwear*, however, that "a panel's reasoning, if sound, may be used to inform the court's decision"—a form of *Skidmore* deference in interpretation.[76] Unlike the *Footwear* court, the court in *Hyundai* made no explicit reduction in the level of deference accorded to the agency due to the conflict with the WTO panel ruling.

The *Hyundai* court ultimately found the WTO panel's ruling insufficiently persuasive to invalidate the Commerce Department's methodology, because international law explicitly conferred discretion surrounding implementation on the national agency. The court based its finding of discretion in both the text and in earlier panel rulings. First, the court argued that discretion was inherent in provisions of the Anti-dumping Agreement holding that the duty must be terminated only after an agency determination.[77] As an administrative process was necessary, the court implied that the structure and policies of that process must be within national agency discretion. Second, the Court looked at an earlier WTO panel ruling stating that the domestic agency could never be absolutely certain of whether a company was likely to dump again, and concluded that under international law, "an administering authority has considerable discretion to make an inherently predictive analysis."[78] Thus, the court found that Commerce had not explicitly violated an international obligation, noting that "a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine."[79] Disagreeing with the panel and reading more discretion for the agency into the Anti-dumping Agreement left the Court free to conclude that no international obligation was violated by Commerce in the *Hyundai* case.

[76] *Id*.
[77] *Id*. at 1344.
[78] *Id*.
[79] *Id*. at 1345.

Both *Hyundai* and *Footwear* are examples where the United States courts engaged directly with the interpretations offered by the WTO Appellate Body. In the absence of *Corus Staal* and §3533(g), then, there is nothing stopping courts from applying Skidmore deference to both the domestic and international agency. This policy is in line with the way US courts usually treat multiple agencies.

C) Deference to Multiple Agencies

The deference rule becomes more complicated when two or more agencies issue conflicting interpretations.[80] In choosing between rules, a court is actually making its own interpretive decision, and it will need more guidance than *Chevron*'s rule of permissibility.[81] Many United States courts accord simply 'substantial weight' or persuasiveness (*Skidmore*) deference to both agencies, much as the Court of International Trade did in *Footwear* when it balanced the WTO Appellate Body decision and the Commerce Department decision.[82]

The two major Supreme Court decisions in the area are *Bowen* and *Martin*. In *Bowen*, the court found that where Congress delegated the same power to multiple agencies, it was not required to defer to any one agency.[83] In *Martin*, the Court found that where Congress allocated rulemaking power to one agency and adjudicative power to another agency, they intended that

[80] Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 Ala. L. Rev 35, 73 (1991).
[81] *Chicago Mercantile Exch. v. SEC*, Chicago Mercantile Exchange v. SEC, 883 F.2d 537, 547 (7th Cir. 1989) ("When two agencies claim to be the addressees, though, this allocation breaks down. Perhaps a court could say that because the agencies disagree, neither is entitled to deference. Yet disagreement doesn't make the court the recipient of interpretive powers. One or the other agency is still in charge.").
[82] *Id*. at 63. Although Weaver finds the court's approach of according *some* deference significant here, he doubts that there is any material deference between the *Chevron* and *Skidmore* standards. Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead, and Dual Deference Standards*, 54 Admin. L. Rev. 173, 175, 178–79 (2002).
[83] Bowen v. American Hospital Association, 476 U.S. 610, 642 & n. 30 (1986) ("Section 504 authorizes any head of an Executive Branch agency -- regardless of his agency's mission or expertise -- to promulgate regulations prohibiting discrimination against the handicapped. . . There is thus not the same basis for deference predicated on expertise as we found . . . in *Chevron*.").

the rulemaking agency's interpretation control.[84] These cases viewed the appropriate level of deference through the lens of Congressional intent, rather than examining the relative expertise of the two agencies.[85] Thus, the cases are compatible with the *Skidmore* balancing employed by the *Footwear* court.

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

Although 19 U.S.C. §3533(g) insists that the agency violate international law until congressional committees consider the issue, many other regimes do not have such a clear statement favoring violation of international law.[86] In particular, where an agency is administering a treaty directly (as in extradition cases), *Mead* analysis of whether Congress intended to delegate power might indicate that the use of *Skidmore* deference would be appropriate. Congressional action would be necessary in the trade context to allow the courts to examine Commerce's implementation of WTO panel rulings. With 19 U.S.C. §3533, at least as interpreted in *Corus Staal*, Congress has essentially taken the courts out of the equation.

Statutes like §3533(g) leave evaluation of international decisions in the hands of political bodies. Assuming that the US would like to maximize its influence over WTO adjudication, this

[84] Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144, 152 (1991) ("The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations.").

[85] Melanie E. Walker, Comment, *Congressional Intent and Deference to Interpretations of Agency Regulations*, 66 U. Chi. L. Rev. 1341, 1345, 1370 (1999).

[86] Administrative law scholars may be skeptical about the impact that §3533(g) has on agency action, when the committee may only take a nonbinding vote indicating their views. Although the statute indicates congressional intent to refrain from delegating compliance with the WTO to the agency, the executive may choose to disregard that intent and override congressional committee votes. Nonetheless, the intent of the statute, as discussed above, clearly indicates congressional willingness to impede executive compliance with WTO decisions. Congress retains control of this politically sensitive issue.

section will discuss whether deciding on compliance *politically* is the most effective way to influence international bodies. Central to the discussion of types of deference granted to both national and international bodies is the question of whether national actors should allow courts to review the procedural aspects of international decisionmaking, or to influence such decisionmaking through review of implementation.

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

> It is of course important to consider the status in international law of the relevant rule or decision, and the effect given to this category of rule or decision in the national law of the forum. But inquiry may also be needed into other questions: what formal authority and status the rule or decision has in the system within which it was made; *how* it was made (issues of process); how the governance regime actually works and how it is understood by its main participants or constituencies; how this aligns with the public policy of the forum, and perhaps with broader public and governmental interests; and what role could properly and usefully be played by the national court. [87]

Courts may have the implicit power to review international decisions by choosing to agree or disagree with their interpretations of international law in subsequent cases, although they do not have the explicit power to review decisions taken outside of their jurisdiction.[88] Professor Kingsbury suggests 5 criteria for lending more weight to international decisions: legality, proportionality, compliance with the rule of law (defined in his work as compliance with procedural requirements, except perhaps where there is a compelling reason to depart from that procedure), rationality, and respect for basic human rights norms.[89] In a system where no deference is due to other, domestic agencies, the choice of whether to defer to international institutions (much like the *Chevron* v. *Skidmore* choice in the United States) could hinge on these publicness factors. In a legal system where deference to other agencies *is* due, such as the

[87] Benedict Kingsbury, *Weighing Global Regulatory Decisions in National Courts*, ACTA JURIDICA (forthcoming 2009)
[88] *Id*.
[89] *Id*.

United States, these factors sound like *Skidmore* factors, factors that give the international agency the power to persuade. Courts could take them into account in balancing *Skidmore* deference to international institutions against *Skidmore* deference to domestic agencies.

In the trade context, the decision on whether to implement international decisions has been retained by the political branches. Of course, the Commerce Department, Trade Representative, and relevant Congressional Committees could themselves "give more weight to rules or decisions produced by external entities where these more comprehensively meet requirements of publicness."[90] Nonetheless, these political bodies are more likely to be swayed by other considerations, including by industry lobbying.

In the context of national security, commentators have debated whether the judiciary or the legislature is the best avenue of overseeing executive action. De Londras and Davis have published an interesting argument in this regard. De Londras argues that the judiciary is the most steeped in the culture of legality and the most used to protecting individual rights. This is particularly true in countries which, unlike the U.S., have a parliamentary system tying the legislature to the executive. Davis argues for Congressional or parliamentary control, saying that judges too often defer to the executive or fail to protect civil liberties in this context. [91] But Eyal Benvenisti has recently found that courts use international law to gain independence from the executive in many countries.[92]

---

[90] *Id*.

[91] Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, University College Dublin Law Working Papers No. 02/2009 (13 February 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359030.

[92] *See generally* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008).

In American jurisprudence, there has traditionally been a requirement of generality in the law (although individual immigration rights may be granted through "private bills",[93] and individual entities may be singled out for subsidies). There is a constitutional prohibition on bills of attainder.[94] Moreover, courts are viewed as a countermajoritarian force that can protect individual rights.[95] This argument has also been raised in other constitutional systems; Cathleen Powell has discussed how the South African system of requiring individuals whose assets have been frozen to go through Parliament rather than allowing them to file a case in the judicial system is probably unconstitutional under the South African constitution.[96] Courts may seem uniquely suited, then, to both deciding individual cases (i.e., not necessarily *how* but *whether* or not an international decision should be complied with),[97] and to reviewing international decisions for complying with proper procedures and not exceeding their delegated powers (which they do routinely in the domestic agency context).

An additional argument for allowing courts to engage in review for proper procedures and respect for the rule of law is the projected international response. National courts do not have a good reputation for independence. Nonetheless, a national court decision on procedure and delegation may have more international credibility than a similar executive or legislative decision, which will be assumed to be purely political.[98]

---

[93] Private bills can be used to confer immigration or naturalization benefits on individuals. U.S. Senate: Records and Legislation Home, http://senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited May 8, 2009).
[94] Art. 1, § 9, cl. 3.
[95] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 1–11 (1980).
[96] Cathleen H. Powell, *Terrorism and the separation of powers in the national and international spheres*, 18 SOUTH AFRICAN J. CRIM. JUST. 151 (2005).
[97] On the distinction between *how* and *whether* to comply with international law, see Mitra Ebadolahi, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83 N.Y.U. L. REV. 1565, 1584–86, 1602–03 (discussing the institutional competence concerns that underlie a decision to have judges simply identify a rights violation and then having a commission or legislature decide how to remedy that decision).
[98] For example, foreign courts frequently look to U.S. courts for reasons of comity and harmonization. For a discussion of how judges influence one another, *see* Jeremy Waldron, *Partly Law Common to All Mankind: The Use of Foreign Law in United States Courts*, IILJ Colloquium Spring 2008, 42–46, *available at*

The reasoning behind keeping the decision in the political branches is tied to democratic accountability. Legislators want to retain control of such sensitive political decisions. In many cases, however, decisions are so contentious that they have been removed from the control of the whole Congress for fear of stalemates, extensive litigation, and undermining of the international regime. We might believe that agencies are the best mix of both political accountability and impartial review. In the trade context, supposedly impartial adjudicators in the Commerce Department oversee formal adjudication of appeals. Nonetheless, these adjudicators don't have the independence of Article III courts, and they also don't have the same experience in reviewing the procedures and reasoning used by other adjudicators that Article III courts have.

Conclusion

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

---

http://iilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf (discussing how adjudicators around the world refer to one another in their opinions because they share a common legal methodology and mode of analysis—such as evaluating procedures—that can inform their reasoning). *See also* Kingsbury, *supra* note 87, at 18–19 (discussing potential coalescence of transnational norms from national court practice).

Ultimately, there are two important empirical questions that remain unanswered. Will deference incentivize international institutions to follow *publicness* norms? If it does, will the gains outweigh the perceived costs of deferring (are they enough to overcome national decisionmaker's distrust of allocating decisions to international bodies)? This paper has tried to show that if the perceived gains are worth the costs, courts are the best locus for legality review, rather than political branches. Moreover, there is space in at least the United States legal system for legality review in national courts, whether under the *Mead* analysis or framed as a question of the overlapping jurisdiction of multiple agencies.