ADMINISTRATIVE DEFERENCE TO LIBERALIZING AND MAINTAINING FREE TRADE: AN ARGUMENT FOR ALLOWING THE DEPARTMENT OF COMMERCE TO BESTOW RETROACTIVELY CALCULATED REMEDIES UPON IMPORTERS UNDER SECTION 129(C)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

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I. INTRODUCTION

Over the last few years, the Appellate Body of the World Trade Organization (WTO) has ruled that one of the United States’ methodologies for calculating antidumping (AD) duties, known as “zeroing,” violates relevant WTO member treaty obligations.1 Zeroing is “a practice in which [the Department of] Commerce ignores negative dumping margins — instances when no dumping is found — when comparing export prices and normal prices of a given product to calculate an overall dumping margin.”2 After a series of adverse rulings by the WTO with regard to U.S. zeroing practices, the United States finally began to take the first steps toward complying with the WTO’s rulings by convincing the European Union to suspend arbitration proceedings commenced to determine the ways in which the EU could retaliate against the United States for not complying with the rulings.3 A few months later, the United States announced a similar deal with Japan.4

After these announcements, the Department of Commerce (DOC) released a proposal, which it believed would bring the United States into

2 Commerce Still Mulling Whether It Will Use Zeroing in Some AD Reviews, INSIDE US TRADE, Jan. 7, 2011, available at 2011 WLNR 396943. A simple qualitative explanation of zeroing is given as follows:
   [I]f a foreign manufacturer has one sale that is ten percent above normal value (the product at issue is not being dumped) and one sale that is ten percent below normal value (the product at issue is being dumped) . . . . under a zeroing methodology, the sale made above normal value is assigned a zero margin rather than a margin of negative ten percent. The averaging process then yields a net dumping margin of five percent. This positive margin triggers the imposition of antidumping duties. . . .
compliance with the WTO’s anti-zeroing decisions. The proposal however, failed to address a crucial question: whether the DOC would recalculate AD duties from past reviews that used now WTO-inconsistent methodologies instead of using legal, or WTO-consistent, methodologies. Subsequently, the EU, Japan, and Mexico indicated that they would push the U.S. to recalculate the AD duties and refund the difference. In other words, these countries wanted the U.S. to go back to instances where it had applied zeroing to assess AD duties on imports from these countries, recalculate the duties using a WTO-consistent legal methodology, and then provide refunds to importers based on the difference between the duties calculated using zeroing and the duties calculated using a new methodology deemed acceptable by the WTO.

There are potential legal problems however, with the DOC retroactively assessing AD duties and providing refunds to importers. Even if the DOC would like to go back and recalculate AD duties, two sections of the Uruguay Round Agreements Act (URAA), the U.S. statute that implements the Uruguay Round agreements to which the U.S. is a signatory, may prevent it from doing so. According to Section 129 of the URAA, two criteria must be met in order to implement adverse WTO decisions. First, implementation of adverse WTO decisions can only apply to unliquidated entries of goods into the U.S. market. Second, implementation of these decisions can only apply to imports that enter the U.S. “on or after the date when the Office of the U.S. Trade Representative directs” the DOC to implement the WTO decisions. The potential problems stem from the fact

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6 U.S. Still Examining Whether It Will Adjust Past Reviews in Zeroing Cases, INSIDE US TRADE, Jan. 7, 2011, available at 2011 WLNR 396955 (stating that to comply with “WTO findings on the use of zeroing in past reviews could require Commerce to go back and recalculate the final dumping margins in those reviews without using zeroing and then provide cash refunds to importers that would have faced lower duties . . . ”).
7 Id.
8 For a discussion of alternative methodologies considered by the U.S., see Commerce Still Mulling Whether It Will Use Zeroing in Some AD Reviews, supra note 2. Because WTO-consistent methodologies that may be used would not “zero out” negative margins, it is presumed that the tariff rate would be lower using the new methodology.
10 Id. § 129.
11 Id. § 129(c)(1).
12 U.S. Still Examining Whether It Will Adjust Past Reviews in Zeroing Cases, supra note 6 (emphasis added).
that: (1) many of the past AD duties calculated using zeroing “have already been ‘liquidated,’ or finally assessed and collected, by U.S. Customs and Border Protection,” and (2) the imports in question have already entered the U.S. market. This Note will focus on the second issue: whether the time at which the goods entered the U.S. precludes the DOC from being able to recalculate the duties and provide refunds.

This timing problem was so challenging for the U.S. to overcome that it continued to resist providing the EU and Japan with retroactively calculated refunds for several years. On February 6, 2012, after continued settlement deadline extensions, the U.S. announced that it had reached settlement deals with both the EU and Japan, and agreed to no longer use zeroing in administrative reviews. However, in what the U.S. considered a major victory, retroactively calculated refunds were not required under these deals. An anonymous observer stated that this was likely, at least in the EU case, because of fatigue related to pressing the U.S. on the issue, leading them to simply give up hope the U.S. would provide refunds. In light of the settlement though, other countries are now coming forward demanding the U.S. provide refunds to their importers and threatening the new litigation at the WTO if the U.S. does not. Thus, the legal issue of whether the DOC can actually provide these refunds remains an ongoing concern.

The DOC believes it will not need new legislation from Congress in order to comply with the rulings. Indeed, as will be shown in Part II, domestic political pressure over concerns of “lost sovereignty” as a result of being a part of the WTO would make it highly unlikely that any new attempts by Congress to allow a federal agency more discretion in complying with WTO law would succeed. Thus, the statute that is analyzed in this Note will be the URAA and its Statement of Administrative Action (SAA).

The answer to whether the United States can retroactively apply new methodologies to calculate past AD duty reviews under domestic law has serious implications. If the U.S. does not retroactively apply a new methodology, it would contradict the WTO rulings. This would allow WTO members such as the EU, Japan, and Mexico the legal authority under WTO law to impose the retaliatory measures that the U.S. has staved off so far.

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13 Id.
15 Id.
16 Id.
18 U.S., EU Reach Deal to Suspend Arbitration Proceedings in Zeroing Case, supra note 3.
These measures would likely include tariffs against U.S. goods exported to these countries.\textsuperscript{19} Overall, the inability or refusal of the United States to implement these could decrease the total volume of international trade, and damage the WTO’s mission to liberalize international trade.

This Note will argue that the DOC can at least make a valid and persuasive argument that it does have the legal authority under the URRA to retroactively calculate AD duties that were originally derived using zeroing and to provide refunds to importers, assuming the entries have not been liquidated. Part II discusses the background of all the relevant issues, including the history behind the Uruguay Round agreements and how the U.S. implemented its provisions through the URRA. The AD issue, specifically the use of zeroing in assessing AD duties, will be placed into context, and the peculiarities of the U.S.’ retrospective method of duty assessment will also be examined. Then this Note will discuss specific issues behind several WTO cases brought against the U.S. for its use of zeroing and attempts at compliance—including a look at the first proposal by the DOC.

Part III will discuss the legality of retroactively calculating AD duties with new methodologies and of providing refunds to importers. This will be done by looking at the actual text of the URRA and the text of its SAA. Issues of statutory interpretation and administrative law, including the possible elimination of the SAA from the context of a traditional statutory construction analysis and use of the \textit{Charming Betsy} canon of statutory interpretation\textsuperscript{20} in a \textit{Chevron}\textsuperscript{21} analysis will then be examined. Decisions of the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit will be analyzed as well.

This Note will then draw the conclusion that the DOC at least has a strong argument that it can legally recalculate AD duties retroactively and provide refunds to importers. Finally, Part IV summarizes the argument and examines the implications of U.S. compliance versus non-compliance. This Note concludes by discussing the overall implication of this issue for the WTO’s future and the liberalization of international trade. Overall, the legal issue of retroactive calculation is a good case study of the interaction between U.S. domestic law and international law and illuminates some of the problems that can arise when implementing legislation is used in lieu of self-executing treaties.

\textsuperscript{19} See id. (noting that prior to its initial deal with the U.S., the EU requested two different types of tariffs as retaliation in cases similar to those of Japan and Mexico).

\textsuperscript{20} Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

II. BACKGROUND

A. The Uruguay Round Agreements and the U.S. ’ Implementing Legislation—The Uruguay Round Agreements Act (URAA)

No effective discussion of the issue at hand can take place without a basic knowledge of the General Agreement on Tariffs and Trade (GATT) and its progeny leading to the formation of WTO. In the immediate aftermath of World War II, international leaders, mostly from the U.S. and Great Britain, crafted the GATT with hopes that establishing such a multilateral trading regime would facilitate world peace. The GATT was not seen as creating an organization, but simply as a contract with specific aims. However, after talks for a so-called International Trade Organization collapsed, the scope of the GATT expanded far beyond the notion of a simple contract between nations.

The GATT, despite its original purpose, proved durable over time through a series of trade rounds that progressively curtailed tariffs and other barriers to trade, and simultaneously created a complex set of rules meant to increase free trade around the world. The trade round known as the Uruguay Round, the negotiations for which began in September 1986 and concluded in April 1994 with the Marrakesh Agreement, and the U.S.’s implementing legislation—is what concerns this Note. An important element of the Uruguay Round’s results was the fact that it was a “single package,” meaning each nation would be required to accept the Uruguay Round results in their entirety, as opposed to the GATT’s “à la carte” approach. Substantively, the Uruguay Round negotiations produced two main changes: (1) the creation of the WTO, and (2) a new system for settling disputes within the WTO, the Dispute Settlement Body (DSB).

After the U.S. signed the Marrakesh Agreement, implementing legislation still had to be crafted and approved by Congress. Although the U.S. had an

24 Id.
25 Id. at 373.
26 Id. at 375.
27 Id.
28 Id. at 375–76 (noting that the DSB includes the formation of panels when disputes arise and a appellate review system).
29 See id. at 377–79, 391–94 (detailing Congressional procedure for voting on trade agreements, why the U.S. needed implementing legislation for the Marrakesh Agreement, and
obligation on an international level to abide by the Marrakesh Agreement, this by itself did not create any obligations at the domestic level; such domestic obligations could only come about through Congress passing legislation implementing the Marrakesh Agreement. In other words, the Uruguay Round Agreements were “not self-executing and thus their legal effect in the United States is governed by implementing legislation.”31

An overarching theme concerning the implementation of the Uruguay Round Agreements, not only in the U.S. but around the world, was the debate over “lost sovereignty.”32 In fact, debate in the U.S. about the possibility of lost U.S. sovereignty was so severe that the Clinton Administration felt that it needed to make clear how the Uruguay Round agreements affected domestic law.33 Thus, the need for implementing legislation left open the possibility for conflict between the responsibilities that the U.S. had at the international level, as a signatory of the Marrakesh Agreement, and what the U.S. had legal authority to do under domestic implementing legislation. Thus, specific provisions of the URRA were included to placate those who feared this occurrence.34

Overall, the Uruguay Round and the creation of the WTO have been a boon to international trade. However, the legal issues surrounding the WTO continue to this day as the WTO’s panel reports and Appellate Body reports aggregated to create a vast body of WTO jurisprudence.35 This jurisprudence and the founding documents of the WTO are what guide member countries when considering trade actions. One of the trade actions that has embroiled countries in much WTO litigation is dumping and the remedies available for countries that are victims of it.

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B. The Antidumping Issue and the U.S. Methodology of Zeroing in Calculating Antidumping Duties

Dumping has been an identifiable problem in international trade for quite some time, predating even the GATT.\(^\text{36}\) Dumping, on a theoretical level, occurs “when similar products are sold by a firm in an export market for less than what is charged in the home market. Alternatively, it may occur if the export price of the product is less than total average costs or marginal costs.”\(^\text{37}\) In other words, dumping occurs when a business entity in one country exports a product at a price below its market price in the exporter’s home country. This is harmful because the exporting firm can continue to sell at below-market-value, price its competition in the importing country out of business, and then raise prices without the fear of having any competitors to force prices down.

Despite the GATT’s purpose of liberalizing international trade, a specific provision\(^\text{38}\) was included to allow antidumping duties “so long as the contracting parties can prove that such dumping of goods is causing or threatens to cause ‘material injury’ to competing industries in the importing country.”\(^\text{39}\) This remains the basic structure under the Marrakesh Agreement for allowing a country to impose antidumping duties.\(^\text{40}\) The Antidumping Agreement (ADA), an agreement to which all WTO-member countries are bound, contains additional requirements. Among these is a “sunset clause” by which all AD actions will come under review and be ended after five years.\(^\text{41}\) The ADA requires the following be satisfied in order for AD duties to be lawfully imposed: the exports must be sold at less than normal value, the exports must cause or threaten to cause material injury to the domestic import-competing industry, and there must be a clear causal link between the injury to the domestic industry and dumping.\(^\text{42}\)

U.S. law also stipulates when AD duties will be rendered on imports; the primary requirements are that products are sold at a less-than-fair value and a U.S. industry is “materially injured or threatened with material injury.”

\(^{36}\) See generally Jacob Viner, Dumping: A Problem in International Trade (1923) (arguing that dumping is a problem and should be addressed).


\(^{40}\) Id.

\(^{41}\) Id. at 35.

\(^{42}\) Id.
because of a dumped product. The DOC determines the amount of AD duties by calculating the margin of dumping, which is “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The AD duties are meant be equivalent to the margin of dumping, no more and no less.

The U.S. has been using a methodology known as “zeroing” to calculate AD duties. While the practice has received a considerable amount of condemnation, particularly from political conservatives who argue that zeroing is simply a façade for protectionist impulses, it has clearly been the preferred methodology for calculating AD duties in the U.S. The U.S. Government has defended its practice in litigation, although the methodology is not mandated by U.S. law. However, the use of zeroing by the U.S. and other countries has come under fire at the WTO, where the Appellate Body has determined it to be illegal. The string of zeroing cases against the U.S. which are at issue here are not exceptions.

C. The U.S. System of Duty Assessment

The system the U.S. employs to assess AD duties on imports is a fairly intricate one. Just one AD proceeding involves multiple stages, starting with an “original investigation,” followed by “annual administrative reviews and five-year sunset reviews.” Additional reviews can also be requested to get
an AD order revoked when circumstances have changed.\textsuperscript{53} The two parts of an AD investigation that most concern this Note are original investigations and annual administrative reviews.

Original investigations are exactly what the name implies—a preliminary investigation conducted by the DOC, usually on the basis of a petition by an industry that claims to be affected by dumped products, to determine whether in fact there are products being dumped.\textsuperscript{54} The DOC typically investigates whether dumping has occurred by examining the product sold for a specified period of time, generally the four most recent fiscal quarters.\textsuperscript{55} After this year-long investigation, the DOC makes a determination as to whether dumping has in fact occurred.\textsuperscript{56} If the DOC determines that dumping has occurred, it will assess an AD duty and require the relevant importer to place a cash deposit with the DOC for each subsequent entry.\textsuperscript{57}

The original investigation of dumping is not the end of the entire process. The U.S. employs a “retrospective” system in its assessment of import duties, where an importer’s ultimate liability for antidumping duties is determined after goods are already imported.\textsuperscript{58} Thus, the DOC employs annual administrative reviews to calculate the final AD duty rate for previously imported goods.\textsuperscript{59} As such, the DOC will conduct an administrative review no earlier than one year from the date the original investigation concluded that AD duties were appropriate, if so requested by the importer.\textsuperscript{60} The DOC will again examine the four previous fiscal quarters to determine if dumping is still occurring. If the affected importer has not requested an administrative review after one year from the conclusion of the original investigation, the DOC will simply use the rate applicable when the imports originally entered the U.S. and will liquidate the entries at that amount.\textsuperscript{61} If, however, the DOC determines in the

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 52.
\textsuperscript{55} 19 C.F.R. § 351.204(b)(1) (2011).
\textsuperscript{57} 19 U.S.C. §§ 1673b(d)(1)(B), 1673d(c)(1)(B)(ii). These cash deposits accrue until a final AD duty rate is determined; however, the DOC may charge interest on the deposits. See 19 C.F.R. § 351.212(e) (2011) (stating “the Secretary [of the DOC] will instruct the Customs Service to calculate interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry”).
\textsuperscript{58} 19 C.F.R. § 351.212(a) (2011).
\textsuperscript{59} GRIMMETT, supra note 43, at 55.
\textsuperscript{60} 19 C.F.R. § 351.213(b)(1) (2011).
\textsuperscript{61} GRIMMETT, supra note 43, at 53.
administrative review that dumping has still been occurring, they will apply the new dumping margin and liquidate at that amount.62

This peculiar retrospective system of AD duty assessment is a main cause of the legal controversy at issue. Among WTO member countries, the U.S. is in the minority since most WTO member countries use a prospective system that forgoes administrative reviews and simply applies a fixed AD duty from the conclusion of the AD investigation onward prospectively.63 The countries who challenged the U.S. at the WTO argue that if the DOC implements an adverse WTO ruling that changes the methodology by which it calculates AD duties, the U.S. should recalculate AD duties for prior unliquidated entries for which administrative reviews are ongoing. Even though the imports entered the country before implementation of the WTO ruling, because those duties are still in the process of being conclusively calculated they should fall under the purview of the WTO’s ruling.64

D. WTO Jurisprudence on Zeroing: Three Examples

In the cases where U.S. zeroing was challenged, the WTO did indeed strike down the U.S.’s practice, but they were not the first to strike down zeroing in general.65 In fact, the U.S. was not even the first party to have its use of zeroing struck down by the DSU; the Appellate Body first ruled that the zeroing methodology violated the ADA in EC–Bed Linen,66 which involved India’s challenge to AD duties imposed on imports of Indian bed linen by the European Communities (EC).67 The legal reasoning behind the decision is beyond the scope of this Note, but the DSU—both in the panel report and Appellate Body report—found that the EC’s use of zeroing was a violation of Article 2.4.2 of the ADA.68 It is worth noting that in that case the U.S. supported the EC’s use of zeroing.69 It is also worth noting that in Corus Staal,70 the U.S. Court of Appeals for the Federal Circuit examined

64 U.S. Still Examining Whether It Will Adjust Past Reviews in Zeroing Cases, supra note 6.
65 U.S.–Continued Zeroing, supra note 1; U.S.–Zeroing (Japan), supra note 1; U.S.–Zeroing (EC), supra note 1; U.S.–Stainless Steel (Mexico), supra note 1.
66 EC–Bed Linen, supra note 51, ¶ 86.
68 EC–Bed Linen, supra note 51, ¶ 66.
69 Id. ¶ 40.
the zeroing methodology and found that the Appellate Body’s *EC–Bed Linen* holding, was simply one interpretation of an international agreement that did not bind U.S. courts. Instead, a “court should defer to the domestic interpretation” even if its domestic statute is ambiguous. 71 It seems the U.S. went to substantial lengths to continue the use of its zeroing methodology.

Subsequent to *EC–Bed Linen*, the WTO’s DSU “explicitly struck down” the U.S.’s use of zeroing in all stages of the DOC’s AD assessment process.72 In *US–Zeroing (EC)*, the Appellate Body found that the practice of zeroing as carried out by the U.S. in original investigations was inconsistent with Article 2.4.2 of the ADA, much in the same way the EC’s practice of zeroing in the *EC–Bed Linen* case did.73 In *US–Zeroing (Japan)*, the Appellate Body found that the U.S.’s use of zeroing in periodic reviews was inconsistent with Articles 2.4 and 9.3 of the ADA and Article VI(2) of the 1994 GATT.74 The Appellate Body reiterated these rulings in *US–Stainless Steel (Mexico)*, finding that, facially, the U.S.’s use of zeroing in periodic reviews violated Article VI(2) of the GATT and Article 9.3 of the ADA.75 All three of these cases suggest that in order to comply with the WTO rulings, the U.S. would have to go back to the challenged instances of zeroing, recalculate the duties using a WTO-consistent methodology, and then issue refunds for the difference accordingly.76 After these rulings, the DOC finally stated publicly that it intended to comply with the WTO Appellate Body’s rulings by eliminating its zeroing practice in original investigations.77

### E. The Department of Commerce’s Initial Proposal and Surrounding Issues

In December 2010, the DOC published a proposal that it hoped would bring the U.S. into compliance with the Appellate Body’s rulings regarding the practice of zeroing.78 However, the proposal met with stiff resistance from the European Union, Mexico, and Japan.79 A primary reason these parties objected to the U.S. proposal was that it did not include a provision

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72 *Id.*
73 *U.S.–Zeroing (EC)*, *supra* note 1, ¶ 263(iii); see also *EC–Bed Linen*, *supra* note 51, ¶ 66.
74 *U.S.–Zeroing (Japan)*, *supra* note 1, ¶ 177.
75 *U.S.–Zeroing (Mexico)*, *supra* note 1, ¶ 133.
76 *U.S. Still Examining Whether It Will Adjust Past Reviews in Zeroing Cases*, *supra* note 6.
77 *U.S., EU Reach Deal to Suspend Arbitration Proceedings in Zeroing Case*, *supra* note 3.
for retroactively recalculating AD duties that were initially formulated using zeroing.\footnote{Id.}

The U.S. responded that it was not sure retroactively applying new AD duty calculation methodologies was legal under U.S. domestic law.\footnote{Id.} As previously stated, the potential problems stem from the fact that (1) many of the past AD duties calculated using zeroing “have already been ‘liquidated,’ or finally assessed and collected, by U.S. Customs and Border Protection,” and (2) the goods in question in these WTO challenges have likely already entered the U.S. market.\footnote{Id.} These potential legal problems stem from provisions of Section 129 of the URAA.\footnote{Uruguay Round Agreements Act, Pub. L. No. 103-316, 108 Stat. 4809 (1994) (codified in scattered sections of 19 U.S.C.). As a side note, but one that should be addressed to avoid possible confusion, countries employing prospective systems of duty assessment that have had their zeroing practices struck down would not find themselves in the legal gray area in which the U.S. currently finds itself. In countries that use a prospective system of duty assessment, duties would have already been finally and conclusively calculated. Thus, if the WTO’s DSU ruled that such a country could no longer use zeroing, this would clearly have no impact on past incidents of duty assessment where zeroing was used. This is because, unlike the cases at issue in the U.S., there would be no ongoing investigation and hence no question about whether or not the government had an obligation to return any refunds to importers. If there were such an obligation, then theoretically importers who were overcharged because of zeroing decades ago could then demand refunds in a prospective system. The legal gray area in which the U.S. finds itself is so murky precisely because this is a rather unique question of U.S. administrative law and statutory interpretation. See Bagwell & Mavroidis, supra note 63.}

As of publication, the U.S. has reached deals with both the EU and Japan.\footnote{U.S. Zeroing Deals with EU, Japan Do Not Address Past Uses of Zeroing, supra note 14.} These deals do not require the U.S. to retroactively calculate past duties and provide refunds to these countries’ importers, and neither the EU nor Japan will seek retaliatory measures as long as the U.S. follows the terms of the deals.\footnote{Id.} However, the U.S. is quickly realizing that the issue will not go away easily. Soon after the deals with the EU and Japan were announced, South Korea said that it would pursue actions at the WTO in order to force the U.S. to retroactively calculate duties with non-zeroing methodologies and provide refunds to South Korean importers.\footnote{Korea Moves Ahead with Zeroing Challenge Despite Final Commerce Rule, supra note 17 (“The fact that the United States refused to give refunds to the EU or Japan does not convince South Korea to reconsider its WTO case at this stage, [a] Korean official said. . . . ”).} South Korea would likely be victorious in such an action.\footnote{Id.} Thus, this is still a significant legal issue and

\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
it is important that the U.S. try to find a way to provide such refunds as more countries seek them.

III. THE LEGAL PROBLEM: DOES SECTION 129(C)(1) ALLOW FOR RETROACTIVE APPLICATION OF ALTERNATIVE METHODOLOGIES?

A. The Legal Framework

The origins of this issue of statutory interpretation and administrative law can be traced to a case Canada brought against the U.S. at the WTO in 2001. In that case, Canada explicitly challenged the language of Section 129(c)(1) of the URRA, arguing that when the DOC makes a finding in an AD proceeding that is subsequently found by the DSB to be WTO inconsistent, this section of the URRA prevents the U.S. from fully complying with the WTO decision. Canada argued that 129(c)(1) prevented the refund of “estimated duties [importers] deposited with [U.S. Customs and Border Protection] before the date that the Section 129 Determination is implemented. In other words, because the duty deposits supported by the challenged determination would no longer have a WTO-consistent basis, Canada argued that they must be returned.” Although the WTO panel that decided the case did not reach the merits because it concluded that Canada had not met its evidentiary burden, the case is nevertheless important. In the case Canada stated:

The United States argues that Section 129(c)(1) would not preclude the [DOC] from making final duty liability determinations in an administrative review on a basis consistent with a DSB ruling in methodology cases, even insofar as the determinations would apply to prior unliquidated entries. However, the US claim that the [DOC] has “administrative discretion” to change its interpretation is inconsistent with US principles of statutory construction, as well as the wording of the SAA.

As Canada understands US principles of statutory construction, the issue of whether the limitation in section 129(c)(1) could be nullified or ignored by the [DOC] in a subsequent administrative review would ultimately be decided.

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88 Panel Report, United States–Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221/R (July 15, 2002) [hereinafter U.S.–Section 129(c)(1) URRA].
89 Id.
90 GRIMMETT, supra note 43, at 11.
by the US courts, and not by the [DOC]. As US courts have explained, a court “cannot presume that Congress intended [one result] with one hand, while reducing it to a veritable nullity with the other”. For this reason, US courts would be unlikely to afford deference to the [DOC’s] interpretation of section 129(c)(1) in a subsequent administrative review. Although “[j]udicial deference to agency...interpretation is normally justified by the agency’s expertise in the regulated subject matter [if the] issue is a pure question of statutory construction [it is an issue] for the courts to decide.”

Thus, although the U.S. believed, or at least argued, that the DOC could potentially refund importers of prior unliquidated entries and still be in compliance with section 129(c)(1), Canada clearly thought differently based upon its own understanding of American statutory interpretation and administrative law. This shows that the DOC’s uncertainty about whether or not it can provide refunds to the EU, Japan, and Mexico right now traced back to a legal argument it made ten years ago at the WTO.

Although the WTO panel did not weigh in, the issue has once again flared up, and the debate between Canada and the U.S. in the case above provides a nice starting point for legal analysis aimed at determining whether the DOC can in fact recalculate these duties and provide refunds to the importers.

The first point of analysis is to examine the legislative history of the URAA. Because traditional tools of legislative history, such as public debates in Congress, are lacking with regards to this specific provision of the URAA, this section will focus almost exclusively on the Statement of Administrative Action (SAA) that accompanies the URAA and was referenced by Canada in its arguments before the WTO panel.

B. The Uruguay Round Agreements Act’s Statement of Administrative Action: Simple Legislative History or Binding Domestic Law?

As described in Part II, the URAA was approved by Congress using a fast track approach. Thus, in order to pass implementing legislation in the U.S., then President Clinton had to submit a statement of administrative action (SAA). According to the Senate Committee on Finance, the SAA’s

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91 U.S.–Section 129(c)(1) URAA, supra note 88, ¶¶ 3.31–.32 (emphasis in original) (citations omitted).
92 Id. ¶ 3.32.
93 JACKSON, supra note 23, at 377–78.
94 See 19 U.S.C. § 2112(d) (1994) (stating “[w]henever the President enters into a trade
purpose was to outline administrative and regulatory changes that would be made in order to implement the Marrakesh Agreement.\textsuperscript{96} Despite this statement of intent, the SAA goes further than simply summarizing changes.\textsuperscript{97} The URAA’s SAA contains a unique provision that makes it superior to any other extrinsic source in interpretive authority.\textsuperscript{98} Buys and Isasi note this is the only instance in which Congress has so explicitly mandated courts abide by an SAA.\textsuperscript{99}

Interestingly, Congress “approved” the SAA, stating that “Congress approves — (1) the trade agreements... and (2) the statement of administrative action proposed to implement the agreements...” Thus, the question naturally arises as to what this congressional “approval” means in terms of its potential binding authority.\textsuperscript{100} Buys and Isasi offer five possible meanings of “approval,” ultimately concluding that “Congress... attempted to give the SAA some sort of elevated status in statutory interpretation by the courts,” but probably did not intend it to have equal status to the statute itself.\textsuperscript{101}

In fact, the U.S. Court of Appeals for the Federal Circuit, which has jurisdiction over the Court of International Trade, has already determined once before that the SAA may be overridden if it conflicts with the language of the URAA.\textsuperscript{102} In \textit{AK Steel Corp. v. United States},\textsuperscript{103} the court grappled
with whether the test used before the URAA but which the language of the
URAA changed, was appropriate after the passage of the URAA. The only
reason the case was not clear-cut was because the SAA stated that
“notwithstanding this change in terminology, no change is intended.”  The
court in AK Steel Corp. determined that the plain language of the statute
overrode the seemingly contradictory language of the SAA. Thus, that
case stands for the proposition that when a provision of the URAA—even if
the provision might be ambiguous—appears to contradict the language of the
SAA interpreting that URAA provision, the explicit language of the URAA
prevails.

In terms of the SAA’s interpretation of Section 129(c)(1) of the URAA,
the SAA explicitly states that decisions by the DSU are to be given
prospective effect only. The SAA also states that AD duties altered or
revoked due to the implementation of an adverse WTO decision shall not
apply to imported goods that entered the country prior to the U.S. Trade
Representative’s (USTR) direction to implement the decision. Thus,
whether the DOC can retroactively calculate AD duties and provide refunds
to importers would seem to hinge on how much interpretive weight is to be
given to the SAA.

It should be noted at this point that the U.S. Court of International Trade
(CIT), a federal court equivalent to a U.S. district court that hears challenges
to U.S. trade issues and whose rulings are appealed to the U.S. Court of
Appeals for the Federal Circuit, has been hesitant to read Section 129(c)(1)
to allow the retroactive recalculation of prior unliquidated entries and
refunds to importers. In a February 2010 case, Andaman Seafood Co., Ltd. v.
United States, a private party importer sued the DOC arguing that refusal to
alter AD duty determinations of prior unliquidated entries imported before
the implementation of an adverse WTO ruling was impermissible under

\[\text{226 F.3d 1361 (Fed. Cir. 2000).}\]
\[\text{SAA, supra note 95, at 822–23.}\]
\[\text{AK Steel Corp., 226 F.3d at 1374.}\]
\[\text{Buys & Isasi, supra note 97, at 109–11.}\]
\[\text{GRIMMETT, supra note 43, at 11 (“Consistent with the principle that GATT panel
recommendations apply only prospectively, subsection 129(c)(1) provides that where
determinations by . . . Commerce are implemented under subsections (a) or (b), such
determinations have prospective effect only. That is, they apply to unliquidated entries of
merchandise entered, or withdrawn from warehouse, for consumption on or after the date on
which the Trade Representative directs implementation . . . .”).}\]
\[\text{Id. (“Under 129(c)(1), if implementation of a WTO report should result in the revocation
of an antidumping or countervailing duty order, entries made prior to the date of Trade
Representative’s direction would remain subject to potential duty liability.”).}\]
Section 129.110 The CIT ruled that the DOC’s interpretation of the statute—that it apply only prospectively from the date the USTR directs implementation and that the DOC is not required to retroactively calculate AD duties for prior unliquidated entries calculated using now WTO-inconsistent methods—was indeed a permissible interpretation of the statute. At the same time, CIT did not rule out the possibility that the DOC could interpret the statute to allow for retroactive recalculation of past AD duties for which refunds could then be given.

However, in a subsequent case, NSK Bearings Europe Ltd. v. United States, the CIT stated in dicta that “[e]ven were a Section 129 procedure to be initiated now or in the near future, it could not apply to entries made prior to a date on which the [USTR] directs the [DOC] to implement the WTO decision.”

In Corus Staal BV v. United States, the CIT issued its most expansive ruling to date by holding that the URAA prohibits retroactive recalculation of prior unliquidated entries. As a later case summarized it:

[the Court held that Corus’s claim was unlikely to succeed on the merits because ‘Section 129 specifically says that any determination made pursuant to that provision applies prospectively, i.e., to merchandise entered or withdrawn from warehouse for consumption on or after the date of implementation.’ While the Section 129 Determination was implemented on April 23, 2007, the entries in question entered between November 1, 2005 and October 31, 2006. Thus, the Court noted that the implementation of the Section 129 Determination on April 23, 2007 had no impact on the subject entries because they entered or were withdrawn from warehouse prior to the revocation date.]

111 Id. at 1369.
112 Id. (“[W]hether the agency may reasonably interpret the statute to apply to all unliquidated entries of subject merchandise [is] a question the court need not and does not decide here. . . .”).
114 See Corus Staal BV v. United States, 31 Ct. Int’l Trade 826, 829, 838 (2007) (noting that URAA Section 129 was designed to recalculate dumping margins in specific cases but that it did not commit the DOC to recalculate prior liquidated entries).
The Federal Circuit has not directly interpreted Section 129(c)(1). In addition, in all the aforementioned cases, it is important to recognize that the DOC was arguing for the legality of its position that it had the legal authority to not recalculate AD duties for prior unliquidated entries and provide refunds. There is no case law that determines the legality of the DOC taking the position that it could retroactively calculate AD duties of prior unliquidated entries and provide refunds.

C. Analysis Under the Chevron Doctrine

Having contextualized the legal framework, this Note now turns to the specific legal question at issue. The best approach for analyzing whether the DOC can retroactively calculate past AD duties for prior unliquidated entries and provide refunds to importers under Section 129(c)(1) is to analyze it under the Chevron doctrine. This analytical framework is derived from an opinion of the U.S. Supreme Court of the same name, *Chevron v. Natural Resources Defense Council, Inc.* In that case, the Court developed a formula for determining whether a federal administrative agency’s interpretation of a statute is permissible. The first step under this framework is to determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” However, if this is not the case, “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.”

1. Step One of the Chevron Analysis

When conducting step one of a *Chevron* analysis, it is important to remember that *Chevron* does not require courts to use a specific method of statutory interpretation, but simply dictates that courts should use the “traditional tools of statutory construction.” Such tools might encompass

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117 *Id.* at 842–43.
118 *Id.* at 843.
the actual text of the statute, dictionary definitions, the structure of the statute, legislative purpose, as well as legislative history.\footnote{120}

It is well established in U.S. statutory interpretation that a court will not examine any extrinsic sources unless there is ambiguity in the actual text of the statute.\footnote{121} Assuming for the moment that Section 129(c)(1) is ambiguous, the next question is whether legislative history should be consulted, and if yes, what legislative history? Although most judges examine legislative history at step one of a \textit{Chevron} analysis, some judges refuse to examine legislative history at all; this is particularly true of those judges who consider themselves to be textualists.\footnote{122}

Of course, these questions of statutory construction and interpretation lead to the inescapable question of how exactly the SAA should be characterized, since the answer will have a large impact on how a court would analyze this issue. At this point in the analysis there are four paths down which a court may go: (1) a court might consider the SAA to be neither a part of the URAA statute itself nor legislative history, but something different altogether, something sui generis, in which case it is indeterminable what role the SAA would play in interpreting the language of Section 129(c)(1); (2) a court could consider the SAA to be a form of legislative history, albeit a unique form, but because of reasons contrary to public policy/comity or unconstitutionality, or some combination thereof, the SAA would be deemed largely irrelevant in a \textit{Chevron} analysis; (3) a court could consider the SAA as a traditional form of legislative history and use it at step one of a \textit{Chevron} analysis to determine the meaning of the plain language of Section 129(c)(1); or (4) a court could again consider the SAA to be a legitimate form of legislative history, but would ignore it for precisely this reason at step one of a \textit{Chevron} analysis.

The first possibility is that the SAA is something completely unique in a statutory scheme, something sui generis, which is not legislative history. “While the SAA is clearly an extrinsic source, whether it may be classified as legislative history depends on how one defines the term.”\footnote{123} As stated above, the SAA is the only interpretative source of Section 129(c)(1) of the URAA.\footnote{124} Thus, if a court were to go down this first possible path, the SAA

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\end{itemize}}
might be excluded on the grounds that it is not legislative history, leaving no other choice but to analyze step one simply by examining the plain language of the statute. However, a textualist court could just as easily use this classification of the SAA as reason to more readily refer to it in a step one analysis. One reason the SAA might not be considered as legislative history per se is that it was written almost entirely by the Executive Branch. Alternatively, one could consider the SAA as part of the broader “institutional progress of a bill to enactment,” by classifying Executive Branch contributions to statutory crafting as legislative history. In addition, although it was primarily the Executive Branch that created the language for the SAA, it was done in conjunction with Congress.

The second possibility is that, like the first, a court would consider the SAA to be something truly unique; but courts may interpret this fact negatively and consider the SAA largely irrelevant as unconstitutional or included in the statutory scheme for illegitimate reasons. Buys and Isasi note that one reason the SAA might not have been incorporated into statutory law is because the actual language of the URAA, which under WTO law was put under notice for examination by other WTO countries, was closely examined by other WTO agreement signatories, while the language of the SAA was not subject to such scrutiny. In addition, it has often been said that many parts of the SAA were included in order to appease domestic interest groups, leading to an increased likelihood that the URAA can be construed to conflict with the WTO agreements in a number of ways. Buys and Isasi take this position, arguing that either of these reasons should give a court pause before giving the SAA too much weight. Although this categorization of the SAA would be beneficial to the DOC because completely ignoring the SAA would render the text of Section 129(c)(1) much more ambiguous, this is also probably the least likely scenario of the four. Ever since the URAA was passed, courts have made reference to the SAA and the interpretive weight it provides. Thus, it seems unlikely a court will strike down wholesale the SAA as unconstitutional or somehow contrary to U.S. public policy at this point in time.

125 Id.
127 Buys & Isasi, supra note 97, at 83.
128 Id. at 112–13 (explaining that the URAA was subject to scrutiny by other signatories of the WTO Agreements under the notice requirements of the WTO Agreements).
129 Id.
130 See id. at 113.
131 Although not impossible. See Linda D. Jellum, “Which is to be Master,” the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 U.C.L.A. L.
The third and fourth possibilities are both based on the assumption that a court would consider the SAA to be a traditional form of legislative history, akin to a debate surrounding the passage of a bill found in the Congressional Record. The third possibility is that a court would use the SAA, the only piece of legislative history available for the URAA, as an aid in interpreting the language of Section 129(c)(1). Given what has already been said about using “traditional tools of statutory construction”\textsuperscript{132} at step one of a \textit{Chevron} analysis, this outcome may seem inevitable at first glance, unless a textualist judge who completely refused to reference legislative history were deciding the case. Upon referencing the SAA, it would appear hard for a court to conclude that the DOC can recalculate and offer refunds. However, it is not a foregone conclusion that a court would reference legislative history at step one of a \textit{Chevron} analysis. This leads to the fourth and final possibility—that despite its categorization as a piece of typical legislative history, the SAA would be ignored at step one of a \textit{Chevron} analysis for precisely that reason. This is because of a strain of judicial thought, most prominent on the Third Circuit Court of Appeals, as expressed in \textit{United States v. Geiser}, which holds that “the current state of Supreme Court and Third Circuit jurisprudence demonstrates that legislative history should not be considered at \textit{Chevron} step one... We determine whether Congress has ‘unambiguously expressed its intent’ by looking at the ‘plain’ and ‘literal’ language of the statute.”\textsuperscript{133} Thus, taking the Third Circuit’s position, as long as the SAA can be categorized as legislative history akin to congressional floor debates, it will be excluded when determining “whether Congress has ‘unambiguously expressed its intent’ ” in a \textit{Chevron} analysis.\textsuperscript{134} Granted, this is an emerging rule, one which the Supreme Court may not agree with under its own interpretation of \textit{Chevron} and its progeny—the Court has yet to decide the issue since the Third Circuit’s holding in 2008—but it likely presents the best argument the DOC has in order to overcome the SAA hurdle. In addition, since the Court denied certiorari in \textit{Geiser}, one can safely assume the Court did not see any basis for reversing the Third Circuit’s decision.

\textsuperscript{132} Garrett, \textit{supra} note 119.
\textsuperscript{134} \textit{Id.}
Aside from legislative history, courts may also look to interpretations of a statute by the executive branch. An agency’s interpretation of a statute is itself evidence of what the statute means; this is distinct from the deference given to reasonable agency interpretations at step two of a *Chevron* analysis. It should also be noted that an initial agency interpretation of a statute is not binding on the agency. Thus, although the DOC argued in previous cases that Section 129(c)(1) permits the DOC to choose not to retroactively calculate and provide refunds, the DOC never foreclosed the possibility that it would one day wish to choose the alternative so that it could provide refunds. In other words, the agency is allowed to change its mind with regard to its interpretation of a statute.

Of course, the entire SAA discussion, and to a large extent the deference given to agency interpretation at step one, is a moot point if a court were to decide that the plain language of Section 129(c)(1), that is the text of the URRAA itself, is unambiguous. Therefore, in order for the DOC to prevail at step one of a *Chevron* analysis it would need to convince a court that the language of the provision is at least ambiguous. At this point, it is worth explicitly stating the language of the provision at issue:

Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after — (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

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136 *Id.* at 61–62.
In order for its interpretation to survive a *Chevron* analysis, the DOC will need a court to consider the above language ambiguous enough with regards to the DOC’s ability to retroactively calculate prior unliquidated entries and provide refunds to importers.

Convincing a court that the statutory language is ambiguous is perhaps the toughest hurdle for the DOC to overcome, even more so than getting the SAA characterized as legislative history in order to exclude it from step one of a *Chevron* analysis. Although a court can use an agency’s interpretation of a statute as a method of statutory interpretation, courts are also aware that agencies might have an incentive to read into legislation a favorable narrative of legislative intent, and a court will not defer to an agency’s interpretation if it is clearly contrary to a statute’s plain and unambiguous meaning. It is likely that the DOC’s best argument to convince a court the statutory language is ambiguous is that goods entering the U.S. prior to the USTR directing the DOC to implement the new methodology’s results are the first products in a so-called “cycle of entry,” and that the language about USTR directing implementation is merely a placeholder saying, in essence, that determinations to implement adverse DSU holdings will apply to subsequent “cycles” of imports. This argument might be enough to persuade a court to find this language at least somewhat ambiguous.

At this point in the step one analysis, three “tools of statutory construction” have been examined: the plain language of the statute, legislative history (or lack thereof), and deference to agency interpretation. However, the canons of statutory construction are one tool that has yet to be sufficiently examined, particularly the substantive canons of statutory construction. Substantive canons are canons of statutory construction that are meant to embody and advance designated policy values. It is with the substantive canon of statutory construction known as *Charming Betsy*, that the final mode of analysis under step one of the *Chevron* doctrine is now examined.

The *Charming Betsy* doctrine is the result of an 1804 U.S. Supreme Court case and states that “an act of Congress ought never to be construed to

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140 *Id.* at 62.
141 While the term “cycle” is not a term of art, it is easy to see how it can be formulated as a possible legal concept for this situation. Because there are multiple stages of review in the U.S. retrospective system, a “cycle” of imports would be the series of imports from the original investigation to the end of the investigatory cycle.
142 See Garrett, *supra* note 119, at 68 (stating “[c]ourts have long used a set of rules of interpretation as a guide to statutory meaning; these rules are referred to as the canons of statutory construction”).
143 *Id.* at 71.
violates the law of nations if any other possible construction remains.**144** Charming Betsy is a substantive canon that “requires courts to interpret statutes consistently with international law absent a clear statement of congressional intent.”**145** The Supreme Court has determined that this canon points “against finding implicit repeal of a treaty in ambiguous congressional action.”**146** This holding is important because the WTO regime itself, including its DSU, can be considered an international agreement to which the U.S. is bound.**147** Thus, Charming Betsy would appear to disallow failure to comply with a DSB decision. There is an ongoing academic debate about how, in light of the emergence of the Chevron framework of agency deference, Charming Betsy should influence agency attempts to interpret statutes in accordance with the WTO decisions and international law.**148** That being said, using Charming Betsy as at least a partial justification for permitting an agency to interpret a statute in accordance with a WTO Appellate Body decision is not necessarily foreclosed.

The treatment that courts, particularly the CIT and the Court of Appeals for the Federal Circuit, have given Charming Betsy with regards to harmonizing agency interpretations of domestic statutes with WTO Appellate Body decisions, is somewhat convoluted. At first glance, the URAA would seem to prohibit an application of Charming Betsy that would harmonize interpretations of U.S. law with WTO DSU decisions, because the URAA explicitly states 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.”**149** Following this mandate, the CIT has held that the U.S. still has obligations at an international level because it is a signatory to the Marrakesh Agreement, regardless of the fact that this agreement was not self-executing and therefore required implementing legislation in the form of the URAA in the United States.**150** In addition, the CIT has on numerous occasions distinguished a seemingly applicable WTO agreement or

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144 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
147 Canizares, supra note 145, at 602.
148 See, e.g., id. at 607–12 (discussing ways of reconciling Charming Betsy and Chevron).
Appellate Body ruling vis-à-vis the domestic interpretation, thereby foreclosing any use of *Charming Betsy* and rendering the URAA Supremacy Clause obsolete, as if it were looking to avoid a potential conflict. 151 The court did not once justify its decision by noting the supremacy of domestic statutes to WTO law as mandated by the URAA Supremacy Clause. 152 Thus, based on CIT jurisprudence, it is unclear whether one could conclude that if the U.S. has an obligation under international law—in this case, a WTO DSB decision—an ambiguous statute should be read as being in conformity with that obligation under the *Charming Betsy* canon. 153 The CIT’s jurisprudence up to this point at least seems to indicate that such an application is not out of the realm of possibility.

On the other hand, the U.S. Court of Appeals for the Federal Circuit has held that “[n]either the GATT nor any enabling international agreement outlining compliance therewith . . . trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.” 154 The court also stated that the WTO’s decisions do not create binding law for the U.S., and that because the URAA laid out a framework for the question at issue in that case, the court would not defer to the decisions of the DSU. 155 However, as Canizares points out “[t]he Federal Circuit’s reading of the URAA is flawed, if it stands for the proposition that courts are statutorily prohibited from construing the statute in harmony with the WTO/GATT agreements under *Charming Betsy*.” 156 While “[i]t is axiomatic that Congress is free to legislate in violation of international law,” 157 *Charming Betsy* can be helpful when “it tells us that an ambiguous statute should be read to avoid violating international law, which includes relevant provisions of WTO/GATT agreements.” 158 However, at least one case 159 suggests that the Federal

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152 Id.

153 It should be noted that there is dispute among those in the academic community over whether decisions of the DSB are in fact international obligations. See Canizares, *supra* note 145, at 617–19 (outlining the two sides of the debate, i.e., on the one hand that the decisions do constitute an international obligation, and on the other hand, that because there are alternatives to a country accepting adverse DSB decisions, such as the right of other countries to retaliate in certain ways, built into the Uruguay Round Agreements, an international obligation is not created).


155 Id. at 1348–49.

156 Canizares, *supra* note 145, at 637.

157 Id.

158 Id. at 637–38 (emphasis added).
Circuit has taken the opposite approach. In *Turtle Island Restoration Network v. Evans*, the court deferred to the State Department’s interpretation of a statute under a *Chevron* analysis. The State Department supported its interpretation with evidence that the WTO Appellate Body issued a ruling that was congruent with the agency’s interpretation of the statute. Although the majority did not reference *Charming Betsy* in its analysis, Judge Newman wrote in her dissent that a *Charming Betsy* analysis with respect to harmonizing an agency’s interpretation of a domestic statute with a WTO Appellate Body decision was expressly forbidden by the URRA Supremacy Clause, arguing that “neither [the court] nor the State Department has authority to rewrite the statute.” Commentators argue that such a strong objection from Judge Newman “suggests that the WTO and *Charming Betsy* had an unacknowledged impact on the majority decision.”

To summarize the entire *Chevron* step one analysis, in order to determine whether the statutory meaning is clear and thus not ambiguous, a court will take into account (1) the text of the statute itself; (2) canons of statutory interpretation; (3) the agency’s interpretation of permissible conduct under the statute; and possibly (4) legislative history. Although most courts would likely use legislative history at step one, this Note urges the DOC to argue for the position taken by the Third Circuit with regard to using legislative history at step one of a *Chevron* analysis, which is not to use it. However, this only matters if the SAA is considered to be a traditional piece of legislative history, which would be the case under either the third or fourth view espoused by this Note concerning how a court would categorize the SAA, i.e., either using the SAA or ignoring it because it is considered traditional legislative history. It seems more than likely that the SAA would be considered a piece of traditional legislative history. However, if the Third Circuit’s view is rejected, the SAA will be referenced when analyzing the meaning of Section 129(c)(1). Should that happen, it is almost certain that the DOC will lose its legal argument. In addition to these tools of statutory construction, the substantitive statutory interpretation canon of *Charming Betsy* can be used to err on the side of not offending international law, i.e., the WTO and its DSU decisions. However, this canon can only legitimately be argued if the text of the statute is sufficiently ambiguous, the reasons for which are outlined above. If all of the above tools are utilized and a court

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160 *Id.* at 1297.
161 *Id.* at 1289–90.
162 *Id.* at 1304 (Newman, J., dissenting).
163 Davenport, *supra* note 151, at 301.
finds that the language of Section 129(c)(1) is ambiguous, the analysis proceeds to step two.

2. Step Two of the Chevron Analysis

At this point in the analysis, the key questions are “what constitutes a reasonable or permissible construction of a statute, or what materials [is] a court required to consider in making that determination . . . ?”164 In reality, an agency’s interpretation is rarely struck down at the second step of a Chevron analysis, which makes it difficult to ascertain the relative weight given to interpretive tools used by a court.165 Once a court reaches step two in a Chevron analysis, the agency’s interpretation is usually upheld, “often in a perfunctory way.”166 Therefore, a step two analysis will largely mirror a step one analysis, with the additional analysis of the agency’s reasoning process.167 Because a step one analysis has already been conducted in this Note, this section will focus on this additional mode of analysis.

A court’s analysis under this rubric largely boils down to the following question: is the agency’s interpretation logically coherent? At this step, courts often look at the reasonableness of the agency’s interpretation, which is for all intents and purposes the same as an “arbitrary and capricious review” that would be conducted under the Administrative Procedure Act (APA).168 It is clear here that the DOC’s interpretation would be logically coherent because it would not pass step one analysis if it were not. Therefore, under step two, a court could find the DOC’s interpretation to be reasonable.

It is, therefore, possible for the DOC to survive a Chevron analysis, albeit not as likely as it is to fail. There are, in short, serious potential pitfalls that prohibit the DOC from being confident it could sustain an interpretation that recalculating the AD duties for prior unliquidated entries and providing refunds to importers is permissible. For one, a court might simply consider the plain language of Section 129(c)(1) to unambiguously forbid such an interpretation. Absent that, a court may simply look to the SAA for an even

165 Id.
166 Id.
167 Id. at 87.
168 Id. at 93. See 5 U.S.C. § 706(2)(A) (2000) for the APA’s statutory basis. “Section 706 of the APA requires that a court ‘hold unlawful and set aside agency action’ that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ ” Magill, supra note 164, at 93–94 (citation omitted).
clearer message from Congress about its intent when passing Section 129(c)(1), as so many other courts have done. If the DOC can avoid both these lethal pitfalls, then it can survive a *Chevron* analysis. However, the DOC would not yet be free to start recalculating and providing refunds because recent decisions by the federal courts.

**IV. CONCLUSION**

The DOC cannot rely on Congress to help it with this issue. Concerns over national sovereignty will not allow members of Congress the freedom to do so. Thus, the DOC must be able to formulate a legal argument under existing law that enables it to provide refunds for prior unliquidated entries after a recalculation of AD duties using WTO-consistent methodologies. While the URAA’s Section 129(c)(1) may at first glance appear to prohibit the DOC from retroactively calculating prior unliquidated entries using a WTO-consistent methodology and providing refunds to the importers, there are certain tools of U.S. administrative law and statutory construction which allow the DOC to make a strong case that it can. To summarize the argument, the DOC should try to remove the SAA from a court’s view, preferably by categorizing it as legislative history and arguing for the Third Circuit’s approach of disregarding legislative history at step one of a *Chevron* analysis. In the alternative, the DOC could argue that the SAA itself is unconstitutional or contrary to public policy or both. Next, after establishing that the Section 129(c)(1) provision is ambiguous, the DOC should use the statutory canon of *Charming Betsy* to argue that deference should be given to its interpretation which aligns DOC’s conduct with international law, i.e., decisions by the WTO’s DSU.

The consequences of the DOC’s failure to comply with the WTO’s rulings are very important. If the United States does not comply, WTO-member countries will be allowed, under WTO law, to impose retaliatory trade measures against the U.S. In addition, such conduct will show a lack of commitment on the part of the U.S., not only to the WTO scheme, but to cooperation in international trade generally. Therefore, the DOC should do its best to comply with these rulings and the wishes of the victorious countries.