

CITATION BY U.S. COURTS TO DECISIONS OF  
INTERNATIONAL TRIBUNALS IN INTERNATIONAL  
TRADE CASES

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The topic of the Symposium is the citation to foreign court precedent in domestic jurisprudence. I am going to take a somewhat different approach in my presentation. Instead of citation to foreign court precedent, I will discuss the citation by U.S. courts to decisions by international tribunals in international trade cases.

First of all, I should point out that unlike most of the other speakers, I come before you not as an intellectual or academic but simply as a practitioner. I am Senior Counsel with the law firm Sidley Austin LLP and my practice focuses on international trade. Secondly, I come here as an advocate for implementing the U.S. trade laws in accordance with the international obligations of the United States. Now, Scott McBride and I may disagree on this issue; but I think this disagreement, in part, is really a complaint by Scott, his agency, and some members of Congress, about decisions by WTO Panels and NAFTA Panels that have been lost by the United States. Had the U.S. won more of these cases, I doubt that you would have heard the same complaints about the WTO and NAFTA decisions. But my job here today is not to defend those decisions, but rather to discuss how they are applied or not applied by U.S. courts under U.S. law.

In order to understand what we are talking about here, we need to have some understanding of the antidumping and countervailing duty laws. Fortunately, Mr. McBride has saved me from the task of having to explain the antidumping law, which is obscure, complex, confusing, and to those other than trade lawyers, extremely dull. I

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have learned that whenever anyone asks what I do for a living, their eyes soon glaze over and they nod off when I try to explain the constructed export price offset or the sales below cost provision of the antidumping law.

To give you an over-simplified explanation, the antidumping law imposes additional duties on imported products that are sold in the United States at prices that are below the prices for such or similar products in the home market of the exporting country, or that are sold in the home market below cost, if the imports injure or threaten to injure a domestic industry.<sup>1</sup> The countervailing duty law imposes additional duties to offset subsidies that are granted on the production or exportation of imported products, again if the imports injure or threaten to injure a domestic industry.<sup>2</sup> The issues of dumping or subsidy are decided by the Commerce Department.<sup>3</sup> The issue of injury or threat of injury is decided by the International Trade Commission.<sup>4</sup> These decisions can be appealed to the Court of International Trade (CIT)<sup>5</sup> and then to the Court of Appeals for the Federal Circuit (CAFC).<sup>6</sup>

These laws have been around for many years. What is new is that administrative decisions are now subject to review by two international tribunals as well as U.S. courts—NAFTA binational panels and WTO dispute settlement panels.<sup>7</sup> The question is what weight, if any, will the U.S. courts give to decisions of the international tribunals?

The topic of my presentation is what we fondly refer to as the *Charming Betsy* Doctrine that was established by Chief Justice John Marshall in 1804 in the case of *Murray v. Schooner Charming Betsy*.<sup>8</sup> In Marshall's words, "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible

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<sup>1</sup> 19 U.S.C. § 1673 (2000).

<sup>2</sup> *Id.* § 1671(a).

<sup>3</sup> *Id.* §§ 1677(1) (stating that the "administering authority" means "the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law"), 1671(a)(1), 1673(1).

<sup>4</sup> *Id.* §§ 1676a(2), 1677(2), 1671(a)(2), 1673(2).

<sup>5</sup> *Id.* § 1516a(a)(1).

<sup>6</sup> 28 U.S.C. § 1295(a)(5) (2000).

<sup>7</sup> 19 U.S.C. §§ 1516a(g)(2), 3511, 3553(g); *see also* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 33 I.L.M. 1226, 1244 (1994).

<sup>8</sup> 6 U.S. (2 Cranch) 64 (1804).

construction remains.”<sup>9</sup> This maxim has guided U.S. courts over the past 200 years, although it has been honored more in the breach than in the observance in international trade cases.

The CIT and the CAFC review administrative decisions in antidumping and countervailing duty cases under the standard of *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>10</sup> Under *Chevron* the courts first consider whether the agency’s decision is required or prohibited by an explicit statutory provision.<sup>11</sup> Then, if the statute is silent or ambiguous, the courts defer to the agency as long as the agency’s decision is based upon a permissible interpretation of the statute.<sup>12</sup>

Where does the *Charming Betsy* Doctrine fit in when applying the *Chevron* standard of review? Chief Justice Marshall said that statutes should not be construed to violate international law if there is any other possible construction.<sup>13</sup> There would be no room for the application of *Charming Betsy* under the first prong of *Chevron* review. If the court determines that an act of Congress clearly requires or prohibits the agency action under review that is the end of the story. The statute must be applied regardless of international law.<sup>14</sup> That is consistent with Marshall’s pronouncement. If there is no other possible construction of the statute, then the statute must be applied even if it violates the law of nations.<sup>15</sup>

But what if the statute is silent or ambiguous? Under the second prong of *Chevron*, the court will uphold the agency’s decision if it is based upon a permissible interpretation of the statute.<sup>16</sup> But if the agency has adopted a “permissible” interpretation of the statute in making a decision that is contrary to international law, there may be other “permissible” interpretations that are not contrary to international law. In such cases the *Charming Betsy* Doctrine would require the court to reject the agency’s interpretation and interpret the statute in a manner that is consistent with international law.<sup>17</sup>

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<sup>9</sup> *Id.* at 118.

<sup>10</sup> 467 U.S. 837 (1984).

<sup>11</sup> *Id.* at 842–43.

<sup>12</sup> *Id.*

<sup>13</sup> *Murray*, 6 U.S. (2 Cranch) at 118.

<sup>14</sup> *See Chevron*, 467 U.S. at 842–43. (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

<sup>15</sup> *Id.*; *see also* Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

<sup>16</sup> *Chevron*, 467 U.S. at 843.

<sup>17</sup> *Murray*, 6 U.S. (2 Cranch) at 118.

Unfortunately, that is not the way it has worked out in international trade cases. The CIT and the CAFC have essentially rejected the *Charming Betsy* Doctrine,<sup>18</sup> and it may be up to the Supreme Court to save the schooner from sinking beneath the waves.

Before describing how the *Charming Betsy* Doctrine has come to this sad state I will give a brief description of the dispute resolution process under NAFTA and the WTO.

There are three avenues of appeal from antidumping and countervailing duty decisions. First, the losing party can appeal to the CIT and then to the CAFC.<sup>19</sup> These courts can affirm, reverse, or remand the agency decision in the same manner as other federal courts.<sup>20</sup>

Second, if the case involves imports from Canada or Mexico, the losing party can appeal to a binational panel established under chapter 19 of the NAFTA consisting of members from the United States and Canada or Mexico.<sup>21</sup> NAFTA panels decide the cases under U.S. law, applying the same standard of review as the CIT and the CAFC.<sup>22</sup> NAFTA panel decisions are binding on the Commerce Department and the International Trade Commission in the specific case,<sup>23</sup> but the panels have no power to issue injunctions and their decisions set no authority or precedent with regard to future disputes.<sup>24</sup>

The third alternative is to persuade the government of the exporting country to challenge the administrative decision before a WTO dispute resolution panel on the grounds that the decision is inconsistent with U.S. obligations under the WTO antidumping or subsidy agreements.<sup>25</sup> WTO panel decisions can be appealed to the WTO Appellate Body.<sup>26</sup> Unlike courts, the WTO has no power to

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<sup>18</sup> *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1261–62 (Ct. Int'l Trade 2003); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347–48 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006).

<sup>19</sup> 19 U.S.C. § 1516a(a) (2000); 28 U.S.C. § 1295(a)(5) (2000).

<sup>20</sup> *See* 28 U.S.C. §§ 1295, 1581 (setting out the jurisdiction of the United States Court of Appeals for the Federal Circuit and the Court of International Trade).

<sup>21</sup> 28 U.S.C. § 1581(i)(4); *see also* *Bhullar v. United States*, 259 F. Supp. 2d 1332, 1339 (Ct. Int'l Trade 2003) (discussing the exclusive jurisdiction of the binational panels).

<sup>22</sup> North American Free Trade Agreement, Dec. 17, 1992, art. 1904 § 3, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

<sup>23</sup> *See id.* art. 1904 § 9.

<sup>24</sup> *Id.* art. 1904 § 10.

<sup>25</sup> *See* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 336 (1999).

<sup>26</sup> *Id.*

compel compliance with its decisions.<sup>27</sup> If the losing country fails to comply it may be required to pay compensation in the form of tariff concessions.<sup>28</sup> In the absence of adequate compensation, the winning party may be entitled to retaliate against imports from the losing party.<sup>29</sup> WTO decisions are implemented in the United States under sections 123 and 129 of the Uruguay Round Agreements Act.<sup>30</sup> When directed by the U.S. Trade Representative, the Commerce Department or the International Trade Commission may issue a new determination that is not inconsistent with the WTO decision.<sup>31</sup>

There is an important limitation on this process. Congress has made it clear that in the event of a conflict between a WTO decision and a U.S. statute, the statute will prevail.<sup>32</sup> If a WTO panel or the Appellate Body finds that a provision of a U.S. statute is inconsistent with a WTO agreement, the only remedy is for Congress to amend or repeal the statute.<sup>33</sup> This is consistent with the *Charming Betsy* Doctrine because absent Congressional amendment, the statute could not be interpreted in a manner consistent with U.S. international obligations.

But other WTO cases involve challenges to administrative regulations or practices rather than statutes. Here there can be room to apply the *Charming Betsy* Doctrine to avoid a conflict with international law as long as the regulation or practice is not required by a U.S. statute. Unfortunately, the courts have not taken this approach. Instead, they have whittled down the *Charming Betsy* Doctrine in international trade cases to the point where it has virtually no effect.

At one time it appeared that the U.S. courts would utilize the *Charming Betsy* Doctrine to avoid conflicts with international trade agreements. In a 1995 decision, the CAFC held that the WTO Antidumping Agreement is an international obligation of the United States, and that statutes should not be interpreted to conflict with

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<sup>27</sup> Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union*, 12 INT'L LEGAL PERSP. 1, 4, 6 (2002) (discussing compliance procedures regarding WTO decisions).

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.*

<sup>30</sup> 19 U.S.C. §§ 3532, 3538 (2000).

<sup>31</sup> 19 U.S.C. § 3538(b)(4); see also William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 450–51 (1995).

<sup>32</sup> Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

<sup>33</sup> Hyundai Elecs. Co. v. United States, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).

those obligations.<sup>34</sup> In other cases the CIT held that while WTO decisions are not binding on the court, they may be used to “inform the court’s decision.”<sup>35</sup> While declining to treat the WTO decisions as binding, the court at least considered whether the agency action was consistent with the WTO agreement as well as U.S. law.

Even that minimal nod to the *Charming Betsy* Doctrine has been abandoned in the litigation over a Commerce Department methodology known as “zeroing.”<sup>36</sup> This practice demonstrates the old adage that the devil is in the details.

Dumping consists of selling a product in the United States at a price that is lower than the “normal value” (ordinarily the price at which such or similar merchandise is sold in the home market of the foreign producer).<sup>37</sup> The antidumping duty is based upon the amount by which the normal value exceeds the U.S. price.<sup>38</sup> Companies often make some sales in the U.S. at prices that are below the normal value while making other sales at prices that are higher than the normal value. Commerce calculates a weighted average dumping margin covering all sales made during the period covered by an investigation or administrative review.<sup>39</sup> In calculating the weighted average margin, Commerce includes the “positive dumping margins” (where the U.S. price is below the normal value), but it sets the negative dumping margins (where the U.S. price is above the normal value) at zero.<sup>40</sup> As a result, the importer is hit with an antidumping duty that reflects the full amount of the dumping margin on the dumped sales without any offset for sales that are made at non-dumped prices.<sup>41</sup>

Supporters of the antidumping law argue that the law is not a protectionist statute but that it is only intended to prevent “unfair” pricing.<sup>42</sup> But the converse of an unfair price must be a fair price—

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<sup>34</sup> *Fed. Mogul Corp.*, 63 F.3d at 1581.

<sup>35</sup> See *Hyundai Elecs. Co.*, 53 F. Supp. 2d at 1343; see also *Corus Staal BV v. U.S. Dep’t of Commerce*, 259 F. Supp. 2d 1253, 1264 (Ct. Int’l Trade 2003); *PAM, S.p.A. v. U.S. Dep’t of Commerce*, 265 F. Supp. 2d 1362, 1372 (Ct. Int’l Trade 2003).

<sup>36</sup> *Corus Staal BV*, 259 F. Supp. 2d at 1262.

<sup>37</sup> 19 U.S.C. § 1677 (34) (2000) (defining the term “dumping”); see also *Timken Co. v. United States*, 240 F. Supp. 2d 1228, 1232 (Ct. Int’l Trade 2002).

<sup>38</sup> 19 U.S.C. § 1673 (2000).

<sup>39</sup> 19 C.F.R. § 351.204(b)(1) (2005).

<sup>40</sup> *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1345–46 (Fed. Cir. 2005).

<sup>41</sup> *Id.* at 1346.

<sup>42</sup> John A. Zerby et al., *Dumping of Non-Factor Services: Some Implications of Recent Experiences with Controlled-Economy Shipping*, 4 NW. J. INT’L L. & BUS. 37, 39–40 (1982); see 19 C.F.R. § 351.204(e) (excluding from antidumping enforcement any dumping that is “*de minimis*”).

in other words, one that is above normal value. In cases where Commerce applies zeroing, the foreign producer is given no credit for selling at a fair, non-dumped price.<sup>43</sup> This practice can have a substantial effect on the outcome of many antidumping cases because it can make the difference between an affirmative determination that a party is dumping or a finding that a dumping is *de minimis* and thus not to be enforced. Dumping is *de minimis* when the “weighted average dumping margin is . . . less than 2 percent.”<sup>44</sup>

In 2001 the WTO Appellate Body held that a similar zeroing practice that was applied by the European Community in an antidumping case involving bed linen from India violated Article 2.4.2 of the WTO Antidumping Agreement, which requires a fair comparison of normal value and export price.<sup>45</sup> That set the stage for challenges to zeroing in the United States.

Zeroing is subject to challenge under the *Charming Betsy* Doctrine because it is not required by the antidumping law or even by a Commerce Department regulation.<sup>46</sup> It is merely a method of calculation that is embedded in Commerce’s computer program. In *Timken Co. v. United States*,<sup>47</sup> the CAFC rejected the government’s argument that the antidumping statute specifically requires zeroing.<sup>48</sup> It then considered whether zeroing is based upon a permissible interpretation of the statute under the second step of *Chevron*.<sup>49</sup> That is where the application of the *Charming Betsy* Doctrine came into play. A Japanese producer argued that the *Charming Betsy* Doctrine requires the court to interpret the U.S. law in a manner that is consistent with U.S. international obligations, and it should therefore adopt the Appellate Body’s ruling in the *Bed Linen* case.<sup>50</sup> The court rejected the argument, pointing out that the *Bed Linen* decision is not binding on the United States because it involves a practice of the EC.<sup>51</sup> It also

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<sup>43</sup> *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 412 (2004).

<sup>44</sup> 19 U.S.C. § 1673b(b)(3) (2000).

<sup>45</sup> Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter Appellate Body Report of Mar. 1, 2001].

<sup>46</sup> *Corus Staal BV*, 395 F.3d at 1347–48.

<sup>47</sup> 354 F.3d 1334 (Fed. Cir. 2004).

<sup>48</sup> *Id.* at 1341.

<sup>49</sup> *Id.* at 1341–42, 1345.

<sup>50</sup> *Id.* at 1343–44.

<sup>51</sup> *Id.* at 1344 (stating that such “[d]ecision[s] are] not binding on the United States, much less this court”).

upheld zeroing as a “reasonable interpretation” of the antidumping law, giving considerable weight to Commerce’s longstanding and consistent interpretation.<sup>52</sup>

A few months later, a direct conflict arose between the Commerce Department and the WTO regarding the zeroing practice of the Commerce Department; the WTO Appellate Body ruled that the U.S. violated Article 2.4.2 of the WTO Antidumping Agreement by applying zeroing in calculating antidumping duties on imports of Canadian softwood lumber.<sup>53</sup> Corus, a Dutch steel manufacturer, cited that decision in a lawsuit it filed to contest the application of zeroing in its own case.<sup>54</sup> The CIT ruled for Commerce, and Corus appealed to the Federal Circuit arguing that Commerce violated U.S. law by failing to discontinue its zeroing practice after the WTO decision in *Softwood Lumber*.<sup>55</sup> Corus argued that Commerce was required to interpret the statute in a manner consistent with United States international obligations under the *Charming Betsy* Doctrine.<sup>56</sup> The court rejected the argument out of hand without even a passing reference to *Charming Betsy*.<sup>57</sup> It held that compliance with WTO decisions is a foreign affairs function of the executive that is not binding on the courts.<sup>58</sup> In the court’s view, Congress gave the United States Trade Representative the exclusive authority to determine whether and how to comply with WTO decisions under sections 123 and 129 of the Uruguay Round Agreements Act.<sup>59</sup> The court therefore stated that it would accord no deference to WTO decisions, and it would treat the *Softwood Lumber* decision as nonbinding because the decision was not adopted under the section 123/129 procedure.<sup>60</sup>

The *Corus* decision essentially sunk the *Charming Betsy* Doctrine as far as antidumping cases are concerned. *Corus* indicates that the courts have abandoned any attempt to consider the legality of agency actions in light of WTO decisions even though the current

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<sup>52</sup> *Id.* at 1345.

<sup>53</sup> Appellate Body Report, *United States—Final Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) [hereinafter Appellate Body Report of Aug. 11, 2004].

<sup>54</sup> *Corus Staal BV v. Dep’t of Commerce*, 259 F. Supp. 2d 1253, 1263 (Ct. Int’l Trade 2003).

<sup>55</sup> *Corus Staal BV*, 395 F.3d at 1348.

<sup>56</sup> *Id.* at 1347.

<sup>57</sup> *See id.* at 1347–48.

<sup>58</sup> *Id.* at 1348–49.

<sup>59</sup> *Id.*; *see also* Uruguay Round Agreements Act §§ 123, 129 (1994) (codified at 19 U.S.C. §§ 3533, 3538 (2006)).

<sup>60</sup> *Corus Staal BV*, 395 F.3d at 1349.

antidumping provisions were enacted for the explicit purpose of implementing the WTO Antidumping Agreement.

But that is not the end of the story. In addition to challenging zeroing at the WTO, the Canadian lumber producers also brought their case to a NAFTA binational panel.<sup>61</sup> The panel initially ruled that zeroing is a permissible interpretation of the statute, relying on the Federal Circuit decisions in the *Timken* and *Corus* cases.<sup>62</sup> But it reconsidered its decision after the Appellate Body ruled against zeroing in the *WTO* case.<sup>63</sup> The panel resurrected the *Charming Betsy* Doctrine.<sup>64</sup> It held that even if zeroing passes muster under the second prong of *Chevron*, it is still contrary to law if it conflicts with a U.S. international obligation.<sup>65</sup> The panel stated: “An otherwise permissible agency interpretation (i.e. one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law.”<sup>66</sup>

In contrast to the situation in the *Corus* case, the WTO decision in *Softwood Lumber* involved zeroing by the United States, as did the case that was before the NAFTA panel. More important, the U.S. government accepted the WTO decision through the section 123/129 procedure and it instructed the Commerce Department to recalculate the dumping margin without regard to zeroing.<sup>67</sup> But WTO decisions can only be implemented prospectively, and the revised calculation was limited to imports that entered after the date of the Commerce action.<sup>68</sup> That left open the question of how to treat the prior entries which were subject to dumping margin calculations based on zeroing.

The fact that the executive departments had completed the implementation process gave the NAFTA panel an opening to distinguish its case from the Federal Circuit decision in *Corus*. In *Corus*, the CAFC ruled that the section 123/129 process is the sole

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<sup>61</sup> See Appellate Body Report of Aug. 11, 2004, *supra* note 53; Article 1904 Binational Panel Review, *In re Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, at 2, Secretariat File No. USA-CDA-2002-1904-02 (June 9, 2005) [hereinafter Binational Panel Review].

<sup>62</sup> See Binational Panel Review, *supra* note 61, at 24.

<sup>63</sup> See *id.* at 2, 22; Appellate Body Report of Aug. 11, 2004, *supra* note 53.

<sup>64</sup> See Binational Panel Review, *supra* note 61 at 40–43.

<sup>65</sup> See *id.* at 25.

<sup>66</sup> *Id.*

<sup>67</sup> *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005); see also 19 U.S.C. § 1677(35) (2006).

<sup>68</sup> See *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1287 (Ct. Int'l Trade 2005) (“[R]etroactivity is not favored in the law.” (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

means for implementing an adverse WTO decision.<sup>69</sup> But that process had been completed in the *Softwood Lumber* case, and the issue was whether *Charming Betsy* barred the application of zeroing to prior entries that were not subject to the section 123/129 implementation.<sup>70</sup> Unlike WTO decisions, decisions of NAFTA panels can be applied to imports that entered before the panel decision.<sup>71</sup> The NAFTA panel ruled that as a matter of U.S. law, the *Charming Betsy* Doctrine trumps the second prong of *Chevron*. Even if zeroing is a permissible interpretation of the statute, it is not a statutory requirement or even a regulation or formalized agency practice. It is merely a discretionary action. As such, it is not shielded from the application of the *Charming Betsy* Doctrine. Therefore, the panel ruled that Commerce acted contrary to law when it used zeroing to calculate dumping margins on imports that were not covered by the prospective implementation of the WTO decision.<sup>72</sup>

That was a great result for the Canadian lumber companies and the U.S. importers, but what about *Corus* which still faces antidumping duties based on zeroing? Our firm has filed a petition for a writ of certiorari with the Supreme Court on behalf of *Corus*. We contend that the Supreme Court should take the case because the Federal Circuit decision conflicts with the NAFTA panel decision and places the United States in violation of its international obligations. We also contend that the Federal Circuit decision conflicts with other court decisions that have applied the *Charming Betsy* Doctrine. This is a long shot because the Supreme Court takes very few international trade cases. We hope that it will make an exception in this case in order to resurrect the *Charming Betsy* Doctrine and ensure that the United States complies with its international obligations.

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<sup>69</sup> See *Corus Staal BV*, 395 F.3d at 1349.

<sup>70</sup> See *id.* at 1347–48.

<sup>71</sup> See NAFTA, *supra* note 22, at Art. 1901; Understanding on Rules and Procedures Governing the Settlement of Disputes, December 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, PANEL AND APPELLATE BODY RECOMMENDATIONS, Art. 19.1, 33 I.L.M. 114 at 124 (1994) (applying NAFTA decisions to an actual set of goods in question while WTO decisions are limited to recommending changes in the laws of member nations).

<sup>72</sup> See Binational Panel Review, *supra* note 61, at 43–44.