THE GREAT VANISHING: INTERNATIONAL TRADE AGREEMENTS IN U.S. COURTS*

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Slowly but surely, international trade agreements have disappeared from U.S. courts. This Essay provides a concise historical account of this disappearance—which it calls the "Great Vanishing"—and explains how and why it came to pass. It first describes how the Trade Preferences Act of 1979 banned private lawsuits to enforce international trade agreements. It then shows how the Uruguay Round Agreements Act of 1994 further restricted the ability of private parties to enforce these agreements indirectly. Finally, it shows how U.S. courts today refuse to look to international trade agreements—and to decisions rendered by international tribunals construing those agreements—to interpret domestic statutes that implement them. The Great Vanishing is noteworthy, this Essay contends, for two reasons. First, it represents by far the most comprehensive and successful attempt by Congress to banish a particular type of international law from the courts of the United States. Second, the Great Vanishing coincides with an era of greater skepticism when it comes to the private enforcement of public law. Indeed, in many respects it represents the apotheosis of that trend.

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INTRODUCTION

Under the law of the State of Idaho, it is illegal for any restaurant to serve eggs laid by foreign chickens unless it posts a sign bearing the words "We Use Foreign Produced Eggs" in a conspicuous location.[1] At first glance, this statute would appear to rest on shaky legal ground. It is arguably inconsistent with article III of the General Agreement on Tariffs and Trade ("GATT").[2] It arguably contravenes provisions contained in sixteen bilateral treaties of friendship, commerce, and navigation ("FCN treaties").[3] And it is arguably preempted under the dormant foreign commerce clause of the U.S. Constitution.[4] In theory, a private litigant should have little trouble persuading a judge that this particular statute has been displaced by not one, not two, but *three* different sources of federal law.

In fact, the Idaho statute is immune to all of these attacks. Its immunity stems from the remarkable breadth of the statutory language that Congress used to give effect to the GATT and the various other Uruguay Round Agreements in 1994.[5] While it is widely recognized that neither the GATT nor the legislation that implements it may give rise to any private remedies in U.S. courts,[6] it is less well known that this ban on private remedies extends to attempts to

1. IDAHO CODE § 37-1505 (LEXIS through ch. 40, 2017 Reg. Sess.) (making it "unlawful for any person owning or operating any restaurant, hotel, cafe, coffee shop, or other place where food is served, or any bakery or confectionery shop where food products are sold, to serve or sell any foreign eggs or egg products manufactured from foreign eggs without posting and maintaining in a conspicuous place where the customers entering any such place of business can see it, a placard or sign bearing the words 'We Use Foreign Produced Eggs' printed or painted in legible letters not less than two inches (2″) high").

2. *See* Territory of Hawaii v. Ho, 41 Haw. 565, 570–71 (1957) (concluding that a similar statute violated article III of the GATT); General Agreement on Tariffs and Trade art. III, ¶ 4, Oct. 30, 1947, 61 Stat. A-11, A-18, 55 U.N.T.S. 194, 206.

3. *See*, *e.g.*, Treaty of Friendship, Commerce and Navigation, Den.-U.S., art. XVI, ¶ 1, Oct. 1, 1951, 12 U.S.T. 908, 926 ("Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."); *see also infra* note 27 and accompanying text.

4. U.S. CONST. art. I, § 8, cl. 3; Japan Line, LTD. v. Cty. of Los Angeles, 441 U.S. 434, 448 (1979) (stating that "[a]lthough the Constitution . . . grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater").

5. *See infra* text accompanying note 39.

6. *See, e.g.*, Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 NW. J. INT'L L. & BUS. 609, 634 (1996–1997) ("An examination of the implementation of major U.S. trade agreements shows a clear trend to eliminate the availability of private remedies in U.S. courts against the states.").

indirectly enforce any provision contained in the GATT. Even if there exists an alternative legal basis for invalidating a state statute that discriminates against foreign goods—a different treaty, for example, or the dormant foreign commerce clause—a private litigant may not invoke it.[7] If a sub-federal government entity in the United States acts in contravention of a GATT rule, the injured party has only two possible means of redress: (1) it can attempt to persuade its home country to bring a claim against the United States before the World Trade Organization's ("WTO") Dispute Settlement Body, or (2) it can seek to persuade the U.S. federal government to bring a suit in U.S. courts challenging the law.[8] The injured party may not challenge the action in a private lawsuit.

This ban on private remedies has given rise to what this Essay calls the "Great Vanishing." Slowly but surely, international trade agreements have disappeared from U.S. courts. This Essay provides a concise account of the Great Vanishing. In Part I, it describes how the Trade Preferences Act of 1979 banned private lawsuits to enforce international trade agreements. In Part II, it shows how the Uruguay Round Agreements Act further restricted the ability of private parties to enforce these agreements indirectly. In Part III, it explains how U.S. courts now refuse to look to international trade agreements—and decisions rendered by international tribunals construing those agreements—to interpret domestic statutes that implement these agreements. The Great Vanishing represents by far the most comprehensive—and successful—attempt by Congress to banish a particular type of international law from the courts of the United States.[9] It also coincides with an era of greater skepticism when it comes to the private enforcement of public law. Indeed, in many respects it represents the apotheosis of that trend.

7. *See* STATEMENT OF ADMINISTRATIVE ACTION, 1 H.R. DOC. NO. 103-465, at 676 (1994), *as reprinted in* 1994 U.S.C.A.A.N. 4040, 4055; Schaefer, *supra* note 6, at 634; *see also id.* at 611 ("Private remedies in domestic courts are perhaps the most persuasive means of ensuring compliance by sub-federal governments with international trade norms.").

8. *See* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 7, at 676; Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 647 (2007) ("The WTO has its own dispute resolution system, and the implementing legislation declares the WTO agreement itself to be non-self-executing. In practice, no judge has directly enforced the agreement or decisions made under it." (citing Uruguay Round Trade Agreements, 19 U.S.C. § 3512 (a)(1), (b)(2)(A) (2000); Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1303 (Fed. Cir. 2002) (Newman, J., dissenting)).

9. *See infra* notes 41–47 and accompanying text.

I. THE GATT AND THE TRADE PREFERENCES ACT OF 1979

In 1947, the United States officially committed to the trade regime known as the GATT.[10] The principal goal of this regime was to liberalize the rules of international trade so as to prevent a return to the economic isolationism of the 1930s.[11] Among other things, the GATT prohibits contracting states from discriminating against foreign goods after those goods have cleared the customs frontier.[12] The text of GATT article III(2), for example, states, "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."[13] The text of GATT article III(4) states,

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[14]

The Appellate Body of the WTO has invoked article III(2) to conclude that the Japanese liquor tax system—which levied a lower tax on domestic liquor than on imported spirits—was inconsistent with that nation's obligations under the GATT.[15] That same body has looked to article III(4) to conclude that Korea could not require that domestic and foreign beef be sold through different sets of retail establishments.[16] The basic rule set forth in article III is that foreign goods must be treated no differently than like domestic goods once they are in circulation within a nation's internal market.

In the 1950s, 1960s, and 1970s, a number of foreign litigants invoked article III in domestic litigation to challenge state laws that

10. *See* Proclamation No. 2761A, 12 Fed. Reg. 8863, 8863–66 (Dec. 25, 1947).

11. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 26 (2d ed. 2012).

12. General Agreement on Tariffs and Trade, *supra* note 2, art. III, ¶ 2, 61 Stat. at A-18, 55 U.N.T.S. at 206.

13. *Id.*

14. *Id.* art. III, ¶ 4.

15. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 12, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996).

16. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* ¶ 186(e), WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000).

drew a distinction between foreign and domestic goods.[17] In 1957, for example, the Hawai'i Supreme Court cited article III(4) in invalidating a law requiring any person selling imported chicken eggs to post a sign in their shop notifying customers that the eggs were of foreign origin.[18] In 1962, a California appellate court held that article III(2) preempted a California "Buy American" statute mandating that the materials to be used to construct a government-operated power plant be manufactured in the United States.[19] In 1977, the Supreme Court of New Jersey considered—though ultimately rejected—the argument that article III(4) preempted a New Jersey law requiring that state and local governments purchase only U.S. materials.[20] In 1979, the U.S. Supreme Court rejected a claim that an ad valorem tax assessed on all property physically present within the state of California violated article III(2).[21]

The litigation based on GATT article III came to an abrupt halt in 1979 with the passage of the Trade Preferences Act.[22] This Act—which implemented a number of international trade agreements concluded as part of the Tokyo Round, including a revised version of the GATT—expressly stated that these agreements did not create any "private right of action or remedy for which provision is not explicitly made under this Act or under the laws of the United States."[23] Henceforth, private plaintiffs who believed that a particular state law violated article III would have to find an alternative means of enforcing the treaty obligations of the United States in domestic courts.

17. In deciding these cases, none of the courts were apparently called upon to consider what impact GATT Article XXIV(4)—now codified at article XXIV(12)—should have on their analysis. *See* Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 373 (1960).

18. Territory of Hawaii v. Ho, 41 Haw. 565, 569–71 (1957) (General Agreement on Tariffs and Trade, *supra* note 2, art. III, ¶ 4, 61 Stat. at A-18, 55 U.N.T.S. at 206).

19. Baldwin-Lima-Hamilton Corp. v. Superior Court, 25 Cal. Rptr. 798, 808–10 (Dist. Ct. App. 1962) (General Agreement on Tariffs and Trade, *supra* note 2, art. III, ¶ 2, 61 Stat. at A-18, 55 U.N.T.S. at 206); *see also* CAL. GOV'T CODE § 4303 (West 2017) *invalidated by* Bethlehem Steel Corp. v. Bd. of Comm'rs of Dep't of Water and Power of L.A., 80 Cal. Rpts 800, 806 (Dist. Ct. App. 1969).

20. K. S. B. Tech. Sales Corp. v. N. Jersey Dist. Water Supply Comm'n, 381 A.2d 774, 776–78 (N.J. 1977) (General Agreement on Tariffs and Trade, *supra* note 2, art. III, ¶ 4, 61 Stat. at A-18, 55 U.N.T.S. at 206); *see* N.J. STAT. ANN. § 52:32-1 (West, Westlaw through 2017, ch. 34).

21. Japan Line, Ltd. v. Cty. of Los Angeles, 441 U.S. 434, 439 n.4 (1979).

22. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 3(a), (f), 93 Stat. 144, 148, 150 (codified as amended at 19 U.S.C. § 2504(a), (d) (1982)).

23. 19 U.S.C. § 2504(c)–(d) (2012).

II. TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION AND THE URUGUAY ROUND AGREEMENTS ACT

In the two decades after the Second World War, the United States entered into a number of bilateral FCN treaties.[24] The general purpose of these agreements was to serve as a "basic accord fixing the ground-rules governing day-to-day intercourse between two countries[.]"[25] Each of these agreements addressed a remarkably wide range of topics—including trade, human rights, investment protection, intellectual property, immigration, shipping, and workers' compensation—in a single document.[26] Most significantly for the purposes of this Essay, sixteen of the FCN treaties negotiated during this era contain language that closely tracks the language in the GATT articles III(2) and III(4).[27] The typical FCN treaty provides that "[p]roducts of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."[28] This language, to be sure, is not

24. *See generally* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 307–11 (2013) (discussing the history and purpose of FCN treaties).

25. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 805 (1958).

26. *See e.g.*, Treaty of Friendship, Commerce and Navigation, *supra* note 3, art. II, ¶ 1–3, art. III, ¶ 1–2, art. IV, ¶ 1–2, art. X, art. XI, ¶ 2–4, art. XII, ¶ 2, art. XIV, ¶ 1–3, 12 U.S.T. at 910–12, 918–21, 923, 926; *see also* Walker, *supra* note 25, at 806.

27. The treaties containing the parallel language were negotiated with Denmark, Ethiopia, Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, Muscat & Oman, the Netherlands, Pakistan, Thailand, Togo, and Vietnam. *See* Treaty of Friendship, Commerce and Navigation, Den.-U.S., Oct. 1, 1951, 12 U.S.T. 908; Treaty, with Exchanges of Notes, Eth.-U.S., Sept. 7, 1951, 4 U.S.T. 2134; Treaty of Friendship, Commerce and Navigation, Federal Republic of Ger.-U.S., art. XVI(1), Oct. 29, 1954, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, Greece-U.S., Aug. 3, 1951, 5 U.S.T. 1829; Treaty of Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899; Treaty of Friendship, Commerce and Navigation, Ir.-U.S., Jan. 21, 1950, 1 U.S.T. 785; Treaty of Friendship, Commerce and Navigation, Isr.-U.S., Aug. 23, 1951, 5 U.S.T. 550; Treaty of Friendship, Commerce and Navigation, It.-U.S., Feb. 2, 1948, 63 Stat. 2255; Treaty of Friendship, Commerce and Navigation, Japan-U.S., Apr. 2, 1953, 4 U.S.T. 2063; Treaty of Friendship, Commerce and Navigation, Kor.-U.S., Nov. 28, 1956, 8 U.S.T. 2217; Treaty of Friendship, Commerce and Navigation, Neth.-U.S., Mar. 27, 1956, 8 U.S.T. 2043; Treaty of Amity, Economic Relations and Consular Rights, Muscat & Oman, Dec. 20, 1958, 11 U.S.T. 1835; Treaty of Friendship and Commerce, Pak.-U.S., Nov. 12, 1959, 12 U.S.T. 110; Treaty of Amity and Economic Relations, Thai.-U.S., May 29, 1966, 19 U.S.T. 5843; Treaty of Amity and Economic Relations, Togo-U.S., Feb. 8, 1966, 18 U.S.T. 1; *see also* General Agreement on Tariffs and Trade, *supra* note 2, art. III, ¶¶ 2, 4, 61 Stat. at A-18, 55 U.N.T.S. at 206.

28. Treaty of Friendship, Commerce and Navigation, Federal Republic of Ger.-U.S., art. XVI, ¶ 1, Oct. 29, 1954, 7 U.S.T. 1839, 1857.

identical to the language that appears in GATT Articles III(2) and III(4).[29] It is, however, substantially similar. These similarities are intentional. A guide to FCN treaties prepared by the U.S. State Department states that this particular treaty provision "represents the compression into relatively few words of the detailed provisions . . . appearing in the GATT."[30]

In the years after the enactment of the Trade Preferences Act of 1979, the FCN treaties offered a mechanism by which private plaintiffs could enforce international trade agreements in litigation before U.S. courts without relying directly on the GATT. The Supreme Court long ago recognized that FCN treaties are self-executing.[31] Unlike most international agreements, the FCN treaties give rise to a private right of action.[32] And, most importantly, the FCN treaties do not appear on the list of treaties that do not create any "private right of action or remedy" under the Trade Preferences Act of 1979.[33] To be sure, the FCN treaties were not a perfect substitute for the GATT. The FCN treaties contain only a few provisions that parallel the text of a limited number of GATT Articles,[34] and a foreign litigant must hail from one of the sixteen nations that are parties to FCN treaties with the United States that contain the relevant provisions to take advantage of these parallel provisions.[35] In principle, however, the provisions in the FCN treaties made it possible for private litigants to continue to litigate certain issues relating to international trade in U.S. courts in the years following 1979.

29. *Compare id.*, *with* General Agreements on Tariffs and Trade, *supra* note 2, art. III, ¶ 2, 61 Stat. at A-18, 55 U.N.T.S. at 206, *and* General Agreements on Tariffs and Trade, *supra* note 2, art. III, ¶ 4, 61 Stat. at A-18, 55 U.N.T.S. at 206.

30. CHARLES H. SULLIVAN, U.S. DEP'T OF STATE, STANDARD DRAFT TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION 255 (1970).

31. *See* Foster v. Nielson, 27 U.S. 253, 254 (1829) (noting that, in the United States, treaties are "regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision"); *see also* SULLIVAN, *supra* note 30, at 256.

32. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 191 (1961); Asakura v. City of Seattle, 265 U.S. 332, 339 (1924).

33. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 3(a), (f), 93 Stat. 144, 148, 150 (codified as amended at 19 U.S.C. § 2504(a), (d) (2012)).

34. Only portions of three GATT provisions are arguably treated in this manner—article I, article III, and article X. *See* General Agreements on Tariffs and Trade, *supra* note 12, at arts. I, III, X. Since the parallel provisions set forth in article I and article X apply primarily to the federal government, the parallel provisions in article III—which can be used to preempt state laws—are the ones most likely to prove useful in domestic litigation. *See id.*

35. *See supra* note 27 and accompanying text (listing the sixteen nations).

In 1994, however, Congress took action to address this loophole when it enacted the Uruguay Round Agreements Act ("URAA").[36] The purpose of this Act was to "implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations."[37] The list of agreements implemented by the URAA includes the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the General Agreement on Trade in Services ("GATS"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").[38] The Act expressly states,

> No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, *except in an action brought by the United States for the purpose of declaring such law or application invalid*.[39]

In an accompanying statement of administrative action, which was to serve as an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements," Congress offered the following explanation as to why it had taken this step:

> With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under those agreements.[40]

Had Congress stopped here, then the ability of private parties to rely on the trade provisions in the FCN treaties would have been unaffected. The statutory text and the statement of administrative action clearly state that the prohibition on private lawsuits only applies to attempts to enforce the Uruguay Round Agreements. The FCN treaties do not appear on the list of such agreements.

Congress, however, did not stop there. In a different section in the URAA, Congress provided that "[i]t is the intention of the

36. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 532, 108 Stat. 4809, 4983–88 (1994) (codified at 19 U.S.C. § 3501 (2012)).

37. S. REP. NO. 103-412, at 1–2 (1994).

38. Uruguay Round Agreements Act § 101(d), 108 Stat. at 4814–15.

39. 19 U.S.C. § 3512(b)(2)(a) (2012) (emphasis added).

40. STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 7, at 676.

Congress . . . to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements."[41] The statement of administrative action that accompanied the URAA clarified that this decision to "occupy the field" meant that private parties were also forbidden from seeking to enforce the agreements *indirectly*.[42] The relevant language reads:

> Congress will have "occupied the field" with respect to any cause of action or defense that seeks, directly or indirectly, the private enforcement of [the Uruguay Round] agreements. That means that private parties may not bring suit or raise defenses:
> - directly under those agreements;
> - on the basis of a successful judgment against a state in a suit brought by the Attorney General under the agreements; or
> - on any other basis, including Congress' Commerce Clause authority.
>
> In sum, the language of section 102(c)(2) is intended to make clear that Congress seeks the complete preclusion of Uruguay Round agreement-related actions and defenses in respect of state law in any action or proceeding brought by or against private parties.[43]

This interpretive gloss effectuates perhaps the most comprehensive banishment of a specific type of international law from the courts of the United States in history. It applies to both "actions" and "defenses."[44] It applies to lawsuits that seek to enforce the agreements "directly" and "indirectly."[45] It even prohibits the parties from invoking the dormant foreign commerce clause.[46] In the wake of the URAA's enactment, therefore, it is clear that private parties cannot rely on the trade provisions in the FCN treaties to challenge state laws that discriminate against foreign goods.[47]

41. § 3512(c)(2).

42. STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 7, at 676.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The Supreme Court's dormant foreign commerce clause jurisprudence also dates to 1979. *See* Japan Line, Ltd. v. Cty. of Los Angeles, 441 U.S. 434 (1979). As applied to foreign trade, it would appear that the dormant foreign commerce clause no longer provides a private right of action in the wake of the URAA. *See* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 7, at 676.

47. Article III(8) of the GATT states that certain laws relating to government procurement are not subject to the national treatment guarantees set forth in article III(4). General Agreement on Tariffs and Trade, *supra* note 12, art. III, ¶ 8. In light of the GATT savings clause contained in all of the relevant FCN treaties, it would appear to follow that

III. THE WORLD TRADE ORGANIZATION AND THE *CHARMING BETSY* CANON

In 1804, the Supreme Court held that that "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[48] This canon of statutory construction, which is today known as the *Charming Betsy* canon, posits that U.S. courts should generally strive to avoid interpreting domestic statutes in a manner that brings them into conflict with international law.[49] When a statute is enacted for the express purpose of implementing a treaty, moreover, it is the general practice of U.S. courts to seek to conform their interpretation of the statute to their interpretation of the treaty that birthed it.[50] On the one hand, these canons seek to ensure that the courts of the United States do not inadvertently put the nation in breach of its international obligations. On the other hand, they seek to ensure the consistent interpretation of international treaties across national borders when the substance of those treaties is written into a domestic statute.

The primary purpose of the URAA, it will be recalled, was to write the substance of the Uruguay Round Agreements into the U.S. Code.[51] In many instances, the statutes implementing these agreements contain language that closely track the treaty language.[52] Inevitably, a number of these statutes have been interpreted by federal agencies. In some cases, agency interpretations aligned with the international interpretations of the text of the Uruguay Round Agreements rendered by the WTO Dispute Settlement Body.[53] In other cases, however, agency interpretations were attacked on the

government procurement laws that fall within the scope of article III(8)—which is a limited subset of all such laws—are also beyond the reach of the FCN treaties.

48. Murray v. Schooner Charming Betsy, 6 U.S. (Cranch) 64, 118 (1804).

49. *See id.*

50. *See, e.g.*, Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1014 (9th Cir. 2000) (stating that "the most straightforward construction [of a statute incorporating an international treaty] is perfectly consistent with international law"); United States v. Layton, 509 F. Supp. 212, 222–24 (N.D. Cal. 1981), *aff'd*, 855 F.2d 1388, 1396–97 (9th Cir. 1988) (looking to the intent of Congress "to enforce fully the government's obligations under the treaties in question" and conforming the interpretations of the implementing statutes to these meet the obligations under the treaties in question); *see also* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 680–91 (2010).

51. *See supra* note 37–43 and accompanying text.

52. John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 477–81 (2015).

53. *See, e.g.*, George E. Warren Corp. v. EPA, 159 F.3d 616, 624 (D.C. Cir. 1998) (upholding an EPA rule adopted after the WTO's interpretations that "the [prior] rule violated the anti-discrimination norm of the [GATT] because domestic refiners were allowed to set individual baselines while foreign refiners were not").

ground that they were (1) contrary to the plain meaning of the treaty text, or (2) inconsistent with the interpretations previously rendered by the WTO Dispute Settlement Body.[54] In these cases, the courts were confronted with the question of what relevance—if any—these international sources had with respect to the *interpretation* of statutes whose purpose was to give effect to the Uruguay Round Agreements.[55]

Initially, some courts seemed somewhat receptive to the notion that statutes that implemented international trade agreements should be interpreted whenever possible to conform to the relevant WTO decisions.[56] Over time, however, they have gradually moved away from this position. In 2005, for example, the Federal Circuit made the following remarks in explaining its decision to accord no deference to the views of the WTO in the *Corus Staal BV v. Department of Commerce*[57]:

> WTO decisions are not binding on the United States, much less this court. Further, no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. Neither 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. Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. *We therefore accord no deference to the cited WTO cases*.[58]

In this and other decisions, the Federal Circuit held that *Chevron* deference must trump the *Charming Betsy* canon.[59] The Commerce

54. *See, e.g.*, Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348–49 (Fed. Cir. 2005).

55. *See id.* at 1348–49; *George E. Warren Corp.*, 159 F.3d at 624.

56. *See, e.g.*, Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995); Caterpillar Inc. v. United States, 941 F. Supp. 1241, 1244, 1247 (Ct. Int'l Trade 1996).

57. 395 F.3d 1343, 1348–49 (Fed. Cir. 2005).

58. *Corus Staal BV*, 395 F.3d at 1348–49 (emphasis added).

59. *See id.* at 1347–49; Timken Co. v. U.S., 354 F.3d 1334 (Fed. Cir. 2004); *Fed Mogul Corp.*, 63 F.3d at 1579–82; Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L. &

Department is free to construe the URAA in a manner consistent with the international obligations.[60] It is likewise free to construe that statute in a manner that is inconsistent with those obligations. Whatever choice is made, the Federal Circuit—and the Court of International Trade—will defer to the agency's interpretation notwithstanding the *Charming Betsy*. The effect of these decisions is to render the *Charming Betsy* canon irrelevant. In the words of one judge who served on the Court of International Trade, "Congress and the administration have pretty much put the Schooner Charming Betsy to rest at the bottom of the sea."[61]

CONCLUSION

Taken together, the Trade Preferences Act of 1979, the Uruguay Round Agreements Act in 1994, and the Federal Circuit's decision in *Corus Staal* in 2005 have led to the disappearance of international trade agreements from U.S. courts. The Great Vanishing is, for all intents and purposes, now complete.

The Great Vanishing is noteworthy for two reasons. First, it represents by far the most comprehensive—and successful—attempt by Congress to banish a particular type of international law from the courts of the United States. In this, it represents a sort of counterpoint to the dramatic expansion of litigation that has occurred in recent years under the Alien Tort Statute ("ATS").[62] Even as the ATS effectuated an expansion in the role that international human rights law played in domestic litigation,[63] the Trade Preferences Act of 1979 and the URAA brought about a dramatic contraction in the role played by international trade law. In this, the Great Vanishing highlights the fact that international law is not a monolith. In order to fully capture the role that this law plays in U.S. courts, it is important to consider its many different varieties rather than focusing exclusively upon a single area.

COMP. L. 299, 352 (2009); Alex O. Canizares, *Is* Charming Betsy *Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the* Chevron *Doctrine*, 20 EMORY INT'L L. REV. 591, 591, 640–41 (2006).

60. *See Corus Staal BV*, 395 F.3d at 1347–49.

61. Mark A. Barnett, *What Is the Role of International Dispute Resolution in Interpreting Domestic Law?*, 47 CASE W. RES. J. INT'L L. 283, 296 (2015) (transcribing a speech by the Honorable Mark A. Barnett, judge on the United States Court of International Trade).

62. *See* 28 U.S.C. § 1350 (2012); Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 712–13 (2012).

63. Childress, *supra* note 62, at 716–18.

Second, and perhaps more importantly, the Great Vanishing tracks broader trends in U.S. policy when it comes to private enforcement of public statutes. In the 1960s and 1970s, the preferred enforcement model was to rely on private attorneys general to enforce a broad range of federal statutes.[64] Today, there is far more suspicion of this mode of enforcement.[65] The URAA completed the transfer of control over all domestic litigation relating to international trade agreements to the federal government. On the one hand, this transfer of control to the federal government ensures consistent litigation positions and consistent interpretations of the relevant agreements. On the other hand, it is remarkable that an injured party is forbidden from bringing a lawsuit to enjoin the enforcement of a statute—such as the Idaho statute relating to the sale of foreign eggs—that is clearly preempted by the GATT, numerous FCN treaties, and the U.S. Constitution. In this respect, the Great Vanishing represents the apotheosis of the more general trend in favor of reducing the ability of private parties to enforce public statutes.

64. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148–51 (2012).

65. *Id.* at 1160–72.