The CIT in the Middle – International Tribunals: An Outline*

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Introduction

There is no question that the Court of International Trade ("CIT") is "in the middle" of the domestic legal sphere, between the agency and its interpretation and application of the statute in the first instance, and the Court of Appeals for the Federal Circuit, the court to which decisions of the CIT are appealed. But is the CIT "in the middle" with regard to international tribunals?

The CIT's Standard of Review

By statute, the CIT holds unlawful any determination, finding, or conclusion that it finds is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). In its determination of the lawfulness of an agency's construction of a statute, the Court applies the standards articulated by the Supreme Court in the *Chevron* case. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). The court must first determine whether Congress's purpose and intent on the question at issue is judicially ascertainable. If Congress's purpose and intent are not ascertainable or are unclear, the court must defer to the reasonable interpretation of the administering agency. There is no express reference to international law or international tribunals in this standard of review.

Relationship of the WTO Agreements to US Law

In the Uruguay Round Agreements Act ("URAA"), Congress restated the continuing primacy of domestic law in the event of any conflict between domestic law and the WTO Agreements: "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such

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provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1).

Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

Subsequent provisions clarify that neither the Uruguay Round Agreements nor the fact of Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging Executive Branch action:

> No person other than the United States—
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> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
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> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Congress was very specific, when it enacted the URAA, about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA)[1] approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, *supra*, at 659. Nor may a party ask a court to direct implementation of a WTO Report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid*.

In the URAA, Congress made clear that the United States Trade Representative ("USTR") could, after consultation, choose *not* to alter the administrative action that is the subject of an

[1] Congress stated that the statement of administrative action shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and the implementing act in any judicial proceeding in which a question arises concerning such interpretation or application. 19 U.S.C. 3512(d).

adverse WTO report, and may instead offer the complaining party trade compensation in some other form. 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); H.R. Doc. No. 316, *supra*, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation") (emphasis added). Importantly, the political branches could decide not to implement the new determination, but instead to compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, *supra*, at 1016.

Sections 123 and 129

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. Regardless of which option is taken, implementation through one of these administrative proceedings is only possible when the action taken to implement is consistent with the existing statute, otherwise congressional action would be necessary to come into compliance.

The first method, set forth in 19 U.S.C. 3533 (also referred to as Section 123 of the URAA) establishes a procedure for amending, rescinding, or modifying an agency regulation or practice that a WTO report indicates is inconsistent with the Uruguay Round Agreements, including the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures set forward in the subsection have taken place. 19 U.S.C. 3533(g)(1) (emphasis added). The USTR and Commerce are required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E). No implementation may become effective until the relevant congressional committees have been allowed a specified period of time to indicate their agreement or disagreement with the proposed implementation. 19 U.S.C. 3533(g)(2) and (3).

A second procedure for implementing a WTO report in domestic law is set forth in 19 U.S.C. 3538 (sometimes referred to as Section 129 of the URAA). Section 129 is narrower in scope than Section 123(g), and applies, *inter alia*, to the situation in which a WTO report indicates that a particular action by the Department of Commerce in an antidumping or countervailing duty proceeding was not in conformity with the United States' obligations under the Uruguay Round

Antidumping or SCM Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between USTR, Commerce and relevant stakeholders before USTR determines whether to request and Commerce determines how to implement the WTO body report. 19 U.S.C. 3538(b)(3), (d). Upon completion of this process, USTR "*may* * * * direct the Department of Commerce to implement, in whole or in part," the new determination consistent with the WTO Dispute Settlement Body's recommendations and rulings. 19 U.S.C. 3538(b)(4) (emphasis added). If USTR requests that Commerce issue a new determination and directs Commerce to implement it pursuant to Section 129, that new determination applies only to "unliquidated entries of the subject merchandise" that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs Commerce to implement the new decision. 19 U.S.C. 3538(c)(1).

Through the SAA, Congress specifically instructed:

> *Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.*

SAA, at 1027.

To this end, even if the United States accepts the WTO Dispute Settlement Body's recommendation and makes a new determination pursuant to section 129, judicial review of the prior determination may continue and the section 129 determination does not otherwise invalidate the prior determination. See SAA, at 1027.

Charming Betsy

The so-called *Charming Betsy* doctrine is a judicially developed canon of statutory interpretation. As articulated by the Supreme Court, it provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

There are at least two reasons why this canon of statutory interpretation should not be applied to require, through judicial intervention, implementation of an adverse decision by the WTO Dispute Settlement Body.

First, on its face, the canon applies with respect to "the law of nations." Assuming, for the sake of this discussion, that the WTO Agreements, themselves, may constitute the law of nations, WTO dispute settlement reports do not constitute the law of nations. The WTO dispute settlement system is meant "to clarify the existing provisions" of the Uruguay Round Agreements. *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article 3.2. "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." *Id*. WTO decisions are not precedential and are not binding upon other WTO Members or future WTO panels. Only the Ministerial Conference and the General Council of the WTO have the authority to adopt interpretations of the WTO Agreements. *Marrakesh Agreement Establishing the World Trade Organization*, Article IX:2. Additionally, pursuant to Article 22 of the DSU, the Member against which an adverse recommendation has been made has the option of not coming into compliance with the recommendation and, instead, may provide compensation or the suspension of concessions to the aggrieved Member. Consequently, when the WTO Agreements themselves provide alternatives to implementation, it seems inappropriate for domestic courts to require implementation under the *Charming Betsy* doctrine.

Second, as a canon of statutory interpretation, the *Charming Betsy* doctrine is a guide for the courts to interpret a statute. *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1365 (5th Cir. 1993). It should not apply where Congress has expressly spoken to an issue. As discussed above with regard to sections 123 and 129 of the URAA as well as 19 U.S.C. 3512, Congress has addressed the relationship of the WTO Agreements and WTO dispute settlement to domestic law. To that end, Congress has made clear that the issues of whether and how recommendations of a WTO dispute are implemented are left, in the first instance, to the Executive branch, working in consultation with the Legislative branch. To the extent that this implementation is given specific effect, through a section 129 determination that USTR directs Commerce to implement, that determination is subject to judicial review, subject to the same standard of review as any other Commerce determination – based on substantial evidence and otherwise in accordance with (domestic) law.

Domestic Case Law

Judicial review of Commerce determinations has, by and large, confirmed Commerce's view of the roll of decisions of international tribunals in domestic courts. With regard to the single

issue that has received the most attention from both international tribunals and domestic courts, "zeroing," there has been a consistent line of domestic cases confirming that "unless and until" the WTO dispute settlement reports are implemented through the procedures found in sections 123 and 129 of the URAA, the CAFC will not overturn Commerce's reasonable interpretation of the statute. *Corus Staal v. Department of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

> The Federal Circuit first cited *Timken* for the proposition that "WTO decisions are 'not binding on the United States, much less this court.'" *Corus*, 395 F.3d at 1348 (citing *Timken*, 354 F.3d at 1344). The court then noted that pursuant to statute, "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." *Id*. (citing 19 U.S.C. § 3512(a)).
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> The court confirmed that WTO Agreements do not trump domestic legislation. In the event of a conflict, Congress enacted legislation to deal with such conflict. Through section 129 of the URAA (19 U.S.C. § 3538), Congress empowered USTR, in consultation with Commerce and Congress, to decide whether to implement a WTO report adverse to the United States, and if so, to what extent. 395 F.3d at 1348-49.
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> Thus, the Federal Circuit gave no deference to the WTO reports: "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." 395 F.3d at 1349.

Since the *Corus* and *Timken* decisions, there have been additional WTO dispute settlement reports finding the use of zeroing by the United States to be inconsistent with its WTO obligations. However, there has been a steady line of dozens of court decisions declining to overturn Commerce's practice.

Despite this very consistent line of cases denying relief to plaintiffs, the cases keep coming. Just last month, the CIT denied preliminary injunctions in two cases in which the plaintiffs sought to challenge Commerce's use of zeroing. *NSK Ltd. v. United States*, CIT Slip Op. 10-117 (Oct. 15, 2010) and *NSK Bearings Europe Ltd. v. United States*, CIT Slip Op. 10-118 (Oct. 15, 2010). In both cases, the court found that the plaintiffs had no likelihood of success on the merits as a result of the clear, binding precedent of the CAFC.

Without seeking to justify or defend this frivolous conduct, it may be explained.

While WTO dispute settlement panels have regularly disagreed with the WTO Appellate Body's analysis of zeroing, the Appellate Body gets the last word and has consistently found the use of zeroing to be inconsistent with U.S. WTO obligations. The United States has indicated its intent to comply with its WTO obligations with regard to this issue; however, as of this writing, has not yet announced how it will achieve such compliance.

WTO implementation obligations are prospective in nature. The United States has indicated its understanding of how this prospective implementation obligation works in its adoption of sections 123 and 129 of the URAA, however, some have argued that the WTO obligation is broader – applying to any action taken by the implementing WTO Member after a particular date.

By challenging Commerce's determination in domestic court, and enjoining the liquidation of the imports subject to that determination, the foreign respondents seek to place the United States in a position in which it would have to take action with regard to the imports in question (even if they were properly reviewed in accordance with domestic law) at a date after the WTO Dispute Settlement Body might find that the United States should have implemented.

While the potential for such a finding by the WTO is real, it does not alter existing domestic law and practice, which is the standard against which Commerce's determination must be measured by the court, nor does it alter the nature of the prospective implementation provided for in U.S. law. To this end, the court should continue to deny efforts by respondents to use it as a holding tank for cases while they pursue claims in WTO dispute settlement. WTO dispute settlement does not provide injunctive relief and the courts have properly declined to provide such relief for them in the absence of any legitimate claim under domestic law.

NAFTA Panels

NAFTA panel decisions, like WTO reports, are non-precedential, both with respect to future NAFTA panels and with respect to domestic courts. However, domestic judicial precedent is supposed to be binding on NAFTA binational panels. The Steel Wire Rod from Canada panel, however, saw things differently. The majority declared themselves a "generic or virtual court [...] not situated within the regime of, or bound by, decisions of the CIT or the Federal Circuit." *In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada, 2nd Administrative Review*, USA-CDA-2006-1904-04, at 21.

When Congress enacted NAFTA, however, it created NAFTA panel jurisdiction by specific reference to particular determinations reviewable only by the Court of International Trade. In this way, NAFTA panels serve as an alternate venue to the CIT for seeking review in antidumping and countervailing duty cases involving Canada or Mexico, but the panels are bound by the same laws and precedent binding upon the CIT.

NAFTA panels, having derived their jurisdiction from the original exclusive jurisdiction of the CIT, were intended by Congress to sit in place of the CIT and they are to apply, among other things, "judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."

Thus, when the investigating authority is the U.S. Department of Commerce, judicial precedent of the CAFC is binding upon the panel and the legislative history confirms this interpretation.

That the panel in the Canadian Wire Rod case declared itself unconstrained by that precedent is nothing short of shocking.

The more recent NAFTA panel decision in *Stainless from Mexico* did not go so far as to suggest that it is a "virtual court," however, it did find that there are two competing lines of cases regarding the relevance of international decisions in domestic court review. *In the Matter of: Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX-2007-1904-01 at 20 ("*Stainless from Mexico*").

> Separate from the *Timken* and *Corus* line of cases that speak directly to the issue of "zeroing" in domestic law and in relation to the WTO reports on that same issue, the panel cited two cases as standing for the proposition that WTO jurisprudence could be a factor in court review. *Id*., at 21, citing *SNR Roulements v United States*, 341 F.Supp.2d 1334 (Ct. Int'l Trade 2004) and *Allegheny Ludlum Corp. v United States*, 367 F.3d 1339 (Fed. Cir. 2004). However, neither case cited by the panel's majority involved a court overturning Commerce's interpretation of the statute based on the application of the Charming Betsy doctrine.
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> > In *SNR Roulements*, the court said that it was "wary of overstepping the bounds of its judicial authority under the guise of the *Charming Betsy* doctrine" and, instead, affirmed Commerce's interpretation as consistent with judicial precedent. 341 F.Supp.2d at 1343.
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> > In *Allegheny*, the appellate court referenced the WTO dispute settlement findings in *dicta*. The court could not have been more clear that its holding was based on domestic law and merely consistent with the "guideline" of the *Charming Betsy* doctrine:

> *Accordingly, where neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel. In so doing, this court recognizes that the Charming Betsy doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law. Nonetheless, this guideline supports the trial court's judgment.*
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> 367 F.3d at 1348.

On this basis, the NAFTA panel in *Stainless from Mexico* found that zeroing was inconsistent with U.S. law and remanded to Commerce. Panel review of Commerce's remand determination not applying zeroing is on-going as of this writing.

While NAFTA panels do apply domestic law, Congress expressly declared that domestic courts are not bound by a final decision of a NAFTA panel or an ECC, although they may take it into consideration. 19 U.S.C. 1516a(b)(3); NSK Ltd v. United States, CIT Slip Op. 10-117 (Oct. 15, 2010)(declining to take into account the finding of the NAFTA panel in *Stainless from Mexico*).

Conclusion

Statutory and case law do not place the CIT "in the middle" with regard to international tribunals. Instead, respondents seek to place the CIT in the middle in the hope that their injunctive relief will expand the scope of relief those parties may obtain in the event they successfully challenge the U.S. action at the WTO. Prospective relief, provided for in Section 129 was intended to deny any incentive for such abuse of the domestic judicial system; however, even after 15 years, the implementation systems remain relatively untested. That testing will occur through litigation, among other things and, to that end, the CIT may find itself "in the middle" for some time to come.

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