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The United States Court of International Trade in the Middle—International Tribunals: An Overview

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I. INTRODUCTION

There is no question that the United States 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. One may reasonably ask, however, whether the CIT is "in the middle" with regard to international tribunals.

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II. THE UNITED STATES COURT OF INTERNATIONAL TRADE'S STANDARD OF REVIEW

By statute, the CIT holds unlawful any agency determination, finding, or conclusion that it finds is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[1] In its determination of the lawfulness of an agency's construction of a statute, the CIT applies the standards articulated by the United States Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[2] The CIT must first determine whether Congress's purpose and intent on the question at issue is judicially ascertainable.[3] If Congress's purpose and intent are not ascertainable or are unclear, the court must defer to the reasonable interpretation of the administering agency.[4] There is no express reference to international law or international tribunals in this standard of review.[5]

III. RELATIONSHIP OF THE WORLD TRADE ORGANIZATION AGREEMENTS TO U.S. 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 World Trade Organization (WTO) Agreements: "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."[6] 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."[7]

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—

1. 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).
2. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
3. *Id.*
4. *Id.* at 843.
5. *See id* at 842-43.
6. 19 U.S.C. § 3512(a)(1).
7. *Id.* § 3512(a)(2).

> (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
>
> (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.[8]

When it enacted the URAA, Congress was very specific 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) approved by Congress in connection with the passage of the URAA makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change."[9] 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."[10]

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 adverse WTO report, and may instead offer the complaining party trade compensation in some other form.[11] Importantly, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) recognizes that WTO members could decide not to comply with an adverse dispute settlement report, but instead to compensate the complaining party in some other way.[12]

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8. *Id.* § 3512(c)(1).

9. H.R. DOC. NO. 103-316, at 659 (1994). Congress stated that the SAA "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).

10. *See* H.R. DOC. NO. 103-316, at 659.

11. 19 U.S.C. § 3538(b)(4) (stating that the USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); *id.* § 3533(f)(3) (requiring the 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)); H.R. DOC. NO. 103-316, at 1015.

12. Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3.7, 22, Apr. 15, 1994 [hereinafter DSU]; Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 112 (1994); H.R. Doc. No. 103-316, at 1016.

IV. SECTIONS 123 AND 129 OF THE URUGUAY ROUND AGREEMENTS ACT

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 it is consistent with the existing statute; otherwise, congressional action would be necessary to come into compliance.[13]

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).[14] 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 forth in the subsection have taken place.[15] The USTR and the United States Department of Commerce (DOC) are required to consult with the appropriate congressional committees and private sector advisory committees and to provide an opportunity for public comment before determining whether and how to implement a WTO report.[16] 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.[17]

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).[18] 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 DOC in an antidumping or countervailing duty proceeding was not in conformity with the United States' obligations under the Antidumping or SCM Agreements.[19] Like the statutory procedure in section 123, section 129 provides for consultation between the USTR, the DOC, and the relevant congressional committees

13. 19 U.S.C. § 3533(g)(1); *id.* § 3538(b).
14. *Id.* § 3533(g)(1).
15. *Id.* (emphasis added).
16. *Id.* § 3533(g)(1)(A)-(E).
17. *Id.* § 3533(g)(2)-(3).
18. *Id.* § 3538(b)(1).
19. *Id.*

before USTR determines whether to request that the DOC make a new, WTO-consistent determination and the DOC determines the specific content of such a determination.[20] Prior to making any such determination, the DOC must provide interested parties an opportunity to comment with respect to the determination.[21] Upon completion of this process, the USTR "*may* . . . direct the administering authority to implement, in whole or in part," the new determination.[22] If the USTR directs the DOC to implement its new determination 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 the DOC to implement the new decision.[23]

Through the SAA, Congress specifically instructed:

> Since implemented determinations under section 129 may be appealed, it is possible that [the DOC] or the [United States International Trade Commission] 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 the 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.[24]

To this end, even if the United States accepts the WTO Dispute Settlement Body (DSB) 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.[25]

V. *CHARMING BETSY*

The so-called *Charming Betsy* doctrine is a judicially developed canon of statutory interpretation.[26] 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."[27]

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20. *Id.* § 3538(b)(3), (d).
21. *Id.* § 3538(d).
22. *Id.* § 3538(b)(4) (emphasis added).
23. *Id.* § 3538(c)(1).
24. H.R. DOC. NO. 103-316, at 1027 (1994).
25. *See id.*
26. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
27. *Id.*

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 DSB.

First, on its face, the canon applies with respect to "the law of nations."[28] 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.[29] "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[30] 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.[31] Additionally, pursuant to article 22 of the DSU, the Member against which an adverse recommendation has been made may determine not to come into compliance with the recommendation and instead may provide compensation or the suspension of concessions to the aggrieved Member.[32] 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.[33] It should not apply where Congress has expressly spoken to an issue.[34] 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 in a WTO dispute settlement report 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 the DOC to implement, that determination is subject to judicial review, pursuant to the same standard

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28. *Id.*
29. DSU, *supra* note 12, art. 3.2.
30. *Id.*
31. Marrakesh Agreement Establishing the World Trade Organization art. IX.2, Apr. 15, 1994, 33 I.L.M. 1144 (1994).
32. DSU, *supra* note 12, art. 22.2.
33. *See, e.g.*, Miss. Poultry Ass'n v. Madigan, 992 F.2d 1359, 1365 (5th Cir. 1993).
34. *Id.* at 1365-66.

of review as any other DOC determination—based on substantial evidence and otherwise in accordance with domestic law.

VI. DOMESTIC CASE LAW

Judicial review of DOC determinations has, by and large, confirmed this view of the role 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 United States Court of Appeals for the Federal Circuit will not overturn DOC's reasonable interpretation of the statute.[35]

In *Corus Staal BV v. Department of Commerce*, the Federal Circuit first cited *Timken Co. v. United States* for the proposition that "WTO decisions are 'not binding on the United States, much less this court.'"[36] The court then noted that pursuant to statute, "[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."[37]

The *Corus Staal* court confirmed that that the WTO Agreements do not trump domestic legislation.[38] In the event of a conflict, Congress enacted legislation to deal with such conflict.[39] Through section 129 of the URAA (19 U.S.C. § 3538), Congress empowered the USTR, in consultation with the DOC and Congress, to decide whether to implement a WTO report adverse to the United States, and if so, to what extent.[40]

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 [DOC]'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.[41]

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35. *See, e.g.*, Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005).
36. *Id.* at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1348 (Fed. Cir. 2004)).
37. *Id.* (citing 19 U.S.C. § 3512(a) (2006)).
38. *Id.*
39. 19 U.S.C. § 3538.
40. *Id.*; *Corus Staal*, 395 F.3d at 1349.
41. *Corus Staal*, 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.[42] However, there also has been a steady line of dozens of court decisions declining to overturn DOC's practice.[43]

Despite this very consistent line of cases denying relief to plaintiffs, the cases keep coming. In October 2010, the CIT denied preliminary injunctions in two cases in which the plaintiffs sought to challenge DOC's use of zeroing.[44] 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 Federal Circuit.[45] Without seeking to justify or defend this 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.[46] The United States has indicated its intent to comply with its WTO obligations with regard to this issue,[47] and, on December 28, 2010, the DOC published a proposal pursuant to section 123 to achieve such compliance.[48]

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42. Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007); Panel Report, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (Jan. 30, 2007); Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008); Panel Report, *United States—Measures Relating to Shrimp from Thailand*, WT/DS343/R (Feb. 29, 2008) (adopted, as modified by the Appellate Body, 2008); Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS3350/AB/R (Feb. 4, 2009); Panel Report, *United States—Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R (Jan. 22, 2010); Panel Report, *United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R (Jan. 18, 2011).

43. *See, e.g.*, Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008); SKF USA v. United States, 537 F.3d 1373, 1381 (Fed. Cir. 2008) ("We have addressed the practice of 'zeroing' numerous times, however, and have unequivocally upheld this practice."); NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007); Dongbu Steel Co. v. United States, 677 F. Supp. 2d 1353, 1366 (Ct. Int'l Trade 2010); Andaman Seafood Co. v. United States, 675 F. Supp. 2d 1363, 1370-71 (Ct. Int'l Trade 2010); SKF USA Inc. v. United States, 675 F. Supp. 2d 1264, 1286 (Ct. Int'l Trade 2009); JTEKT Corp. v. United States, 675 F. Supp. 2d 1206, 1216 (Ct. Int'l Trade 2009).

44. NSK Ltd. v. United States, No. 10-00288, 2010 WL 4055932 at *1 (Ct. Int'l Trade Oct. 15, 2010); NSK Bearings Eur. Ltd. v. United States, No. 10-00289, 2010 WL 4055929, at *1 (Ct. Int'l Trade Oct. 15, 2010).

45. *NSK Ltd.*, 2010 WL 4055932, at *6; *NSK Bearings*, 2010 WL 4055929, at *6.

46. *NSK Ltd.*, 2010 WL 4055932, at *3.

47. *Id.* at *3-4.

48 *See* Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81,533 (Dec. 28, 2010).

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.[49]

By challenging DOC'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 delay action with regard to the imports in question (even if they were properly reviewed in accordance with domestic law) until a date after which the WTO DSB might find that the United States should have carried out implementation.[50]

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 DOC's determination must be measured by the courts. Nor does the potential of the finding alter the nature of the prospective implementation provided for in U.S. law. To this end, the CIT should continue to deny efforts by respondents to use the court 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 respondents in the absence of any legitimate claim under domestic law.[51]

VII. NORTH AMERICAN FREE TRADE AGREEMENT PANELS

North American Free Trade Agreement (NAFTA) panel decisions, like WTO reports, are nonprecedential, both with respect to future NAFTA panels and with respect to domestic courts.[52] However, domestic judicial precedent is supposed to be binding on NAFTA binational panels.[53] In the Steel Wire Rod from Canada decision, the panel, however, saw things differently. The majority declared themselves a

49. *NSK Ltd.*, 2010 WL 4055932, at *2-4; *see* 19 U.S.C. § 3533(g)(1) (2006); *id.* § 3538(b).

50. *See NSK Ltd.*, 2010 WL 4055932, at *2-4.

51. *Id.* at *5.

52. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904(9), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; 19 U.S.C. § 1516a(b)(3).

53. NAFTA article 1904(2) provides that, for purposes of binational panel review, the antidumping law consists of, 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." NAFTA, *supra* note 52, art. 1904(2). When this phrase is considered in its entirety, it demonstrates that when the important party is the United States, judicial precedent of the Federal Circuit is binding upon the panel.

"generic or virtual court . . . not situated within the regime of, or bound by, decisions of the CIT or the Federal Circuit."[54]

When Congress enacted NAFTA, it created NAFTA panel jurisdiction by specific reference to particular determinations reviewable only by the CIT.[55] 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.[56]

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."[57]

Thus, when the investigating authority is the DOC, judicial precedent of the Federal Circuit is binding upon the panel and the legislative history confirms this interpretation.[58] That the panel in the Canadian Wire Rod case declared itself unconstrained by that precedent is nothing short of shocking.[59] The more recent NAFTA panel decision in Stainless Steel 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.[60]

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

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54. Panel Decision, *In re* Carbon and Certain Alloy Steel Wire Rod from Canada (Wire Rod), Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, 21, USA-CDA-2006-1904-04 (Nov. 28, 2007).

55. *See* NAFTA, *supra* note 52, art. 1904.

56. *See id.*

57. *Id.*

58. Senate Report No. 103-189 confirms that "the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces" because "misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process." S. REP. NO. 103-189, at 44 (1993).

59. Wire Rod, USA-CDA-2006-1904-04, at 21.

60. Panel Decision, *In re* Stainless Steel Sheet and Strip in Coils from Mexico (Stainless Steel), Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, 20-21 (2007).

review.[61] However, neither case cited by the panel's majority involved a court overturning DOC's interpretation of the statute based on the application of the *Charming Betsy* doctrine. In *SNR Roulements v. United States*, the CIT said that it was "wary of overstepping the bounds of its judicial authority under the guise of the *Charming Betsy* doctrine," and, instead, affirmed DOC's interpretation as consistent with judicial precedent.[62]

In *Allegheny Ludlum Corp. v. United States*, the Federal Circuit referenced the WTO dispute settlement findings in dicta.[63] 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.[64]

> 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.[65]

On this basis, the NAFTA panel in Stainless Steel from Mexico found that zeroing was inconsistent with U.S. law and remanded to the DOC.[66] Panel review of DOC's remand determination not to apply zeroing is on-going as of this writing. Regardless of the outcome, 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 extraordinary challenge committee, although they may take it into consideration.[67]

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61. *Id.* at 21 (citing SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1342 (Ct. Int'l Trade 2004); Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004)).

62. *SNR Roulements*, 341 F. Supp. 2d at 1343-44.

63. *Allegheny*, 367 F.3d at 1342, 1348.

64. *Id.* at 1348.

65. *Id.*

66. Stainless Steel from Mexico, USA-MEX-2007-1904-01, at 21, 24.

67. 19 U.S.C. § 1516a(b)(3) (2006); NSK Ltd. v. United States, No. 10-00288, 2010 WL 4055932, at *2-3 (Ct. Int'l Trade Oct. 15, 2010) (declining to take into account the finding of the NAFTA panel in Stainless Steel from Mexico).

VIII. 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 its injunctive relief will expand the scope of relief those parties may obtain in the event they successfully challenge a U.S. action at the WTO. Prospective relief, provided for in section 129 of the URAA was intended to deny any incentive for such abuse of the domestic judicial system; however, even after fifteen 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.