Order Code RS22154
May 24, 2005

CRS Report for Congress
Received through the CRS Web

# WTO Decisions and Their Effect in U.S. Law

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## Summary

Congress has comprehensively dealt with the legal effect of World Trade Organization (WTO) agreements and dispute settlement results in the United States in the Uruguay Round Agreements Act (URAA), P.L. 103-465, which provides that domestic law prevails over conflicting provisions of WTO agreements and prohibits private remedies based on alleged violations of these agreements. As a result, WTO agreements and adopted WTO rulings in conflict with federal law do not have domestic legal effect unless and until Congress or the Executive Branch, as the case may be, takes action to modify or remove the statute, regulation, or regulatory practice at issue. Violative state laws may be withdrawn by the state or, in rare circumstances, invalidated through legal action by the federal government. In addition, the URAA places requirements on federal regulatory action taken to implement WTO decisions and contains provisions specific to the implementation of dispute settlement panel and appellate reports that fault U.S. actions in trade remedy proceedings. This report will be updated.

## Uruguay Round Agreements Act: Statutory Requirements for Implementing WTO Decisions

Congress approved and implemented the agreements resulting from the GATT Uruguay Round of Multilateral Trade Negotiations — i.e., the World Trade Organization (WTO) agreements — in the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C. §§ 3501 *et seq.* The legal effect of these agreements, as well as WTO dispute settlement results, in the United States is comprehensively dealt with in the statute, which addresses the relationship of WTO agreements to federal and state law and prohibits private remedies based on alleged violations of WTO agreements.[1] The statute also requires the

[1] This report contains a shortened version of a discussion contained in CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett. For background discussions regarding the effect of treaties and international agreements in domestic law, *see* CRS Report RL32528, *International Law and Agreements: Their Effect Upon*
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United States Trade Representative (USTR) to keep Congress informed of disputes challenging U.S. laws once a dispute panel is established, any U.S. appeal is filed, and a panel or Appellate Body report is circulated to WTO Members.[2] In addition, the URAA places requirements on regulatory action taken to implement WTO decisions and contains provisions specific to the implementation of panel and appellate reports that fault U.S. actions in trade remedy proceedings.

## Section 102 of the URAA: Domestic Legal Effect of WTO Decisions

Section 102 of the URAA and its legislative history establish that domestic law supersedes any inconsistent provisions of the agreements approved and implemented in the statute and that congressional or administrative action, as the case may be, is required to implement adverse decisions in WTO dispute settlement proceedings.

**Federal Law.** Section 102(a)(1), 19 U.S.C. § 3512(a)(1), provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." The URAA further provides, at § 102(a)(2), 19 U.S.C. § 3512(a)(2), that nothing in the statute "shall be construed ... to amend or modify any law of the United States ... or ... to limit any authority conferred under any law of the United States ... unless specifically provided for in this act."

As explained in Statement of Administrative Action (SAA) that accompanied the WTO agreements when they were submitted to Congress in 1994, "[i]f there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence"[3]; moreover, section 102 is further intended to clarify that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO agreements are incorporated in the URAA and that any unforeseen conflicts between U.S. law and the WTO agreements "can be enacted in

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[1] (...continued)
*U.S. Law*, by Michael Garcia and Arthur Traldi; Brand, "Direct Effect of International Economic Law in the United States and the European Union," *Nw. J. Int'l L. & Bus.* 556 (1996-97); and Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 86 *Am. J. Int'l L.* 310 (1992).

For general background on treaties and international agreements, *see* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Committee on Foreign Relations* (January 2001)(S.Prt. 106-71), available at [http://www.access.gpo.gov/congress/senate/senate11cp106.html].

[2] Uruguay Round Agreements Act (URAA), § 123(d)-(f), 19 U.S.C. § 3533(d)-(f).

[3] Uruguay Round Agreements, Statement of Administrative Action, H.Doc. 103-316(I) at 659 (1994)[hereinafter cited as Uruguay Round SAA]. The SAA, which was expressly approved in the URAA, is "regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and ... [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." URAA, § 102(d), 19 U.S.C. § 3512(d).

subsequent legislation."[4] This approach, which Congress has taken in addressing potential conflicts between domestic law and prior GATT and free trade agreements, is considered to be "consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements."[5]

The implementation of WTO dispute settlement results is similarly treated, explained as follows in the URAA legislative history:

> Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are non-self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.[6]

**State Law.** Where State law is at issue in a WTO dispute, the URAA provides for federal-state cooperation in the proceeding, requires the United States Trade Representative to work with the state to "develop a mutually agreeable response" to an adverse WTO ruling, and limits any domestic legal challenges to the state law to the United States.[7] The act's general preclusion of private remedies (discussed below) further centralizes the response to adverse WTO decisions involving State law in the federal government.[8]

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[4] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13.

[5] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13.

[6] H.Rept. 103-826(I), at 25; *see also* S.Rept. 103-412, at 13, and the Uruguay Round SAA, *supra* note 3, at 1032-33. The latter states as follows:

> Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

[7] Two recent WTO cases have involved the WTO-consistency of U.S. state laws. In the challenge by Antigua and Barbuda to federal, state, and local laws that affect the cross-border supply of gambling and betting services (WT/DS285), the United States prevailed on the issue of whether state laws violated the General Agreement on Trade in Services (GATS), the WTO Appellate Body having found that the complainants had not presented sufficient evidence and legal arguments to establish a *prima facie* case on this point. United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services; Report of the Appellate Body (WT/DS285/AB/R) (April 7, 2005).

A challenge by Brazil to Florida's equalizing excise tax on processed orange and grapefruit products (WT/DS250) was resolved in 2004 without panelists having been appointed after Florida amended its statute. United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products; Notification of Mutually Agreed Solution (WT/DS250/3)(June 2, 2004); "U.S. Brazil Settle Long-standing Dispute Over Florida Tax to Promote Citrus Products," 21 *Int'l Trade Rep.* 945 (BNA 2004).

[8] For further discussion, *see* Uruguay Round SAA, *supra* note 3, at 676.

Section 102(b) provides as follows:

> No State law, or the application of a such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or its application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purposes of declaring such law or application invalid.[9]

According to legislative history, the provision "makes clear that the Uruguay Round agreements do not automatically preempt State laws that do not conform to their provisions, even if a WTO dispute settlement panel or the Appellate Body were to determine that a particular State measure was inconsistent with one or more of the Uruguay Round agreements."[10] The statute also contains restrictions on any such U.S. legal action, including that the report of the WTO dispute settlement panel or the Appellate Body may not be considered binding on the court or otherwise accorded deference.[11] Any such suit by the United States is expected to be a rarity.[12]

**Preclusion of Private Remedies.** Private remedies are prohibited under § 102(c)(1) of the URAA, 19 U.S.C. § 3512(c)(1), which provides that "[n]o person other than the United States ... shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreements" or "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, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement."

Congress has additionally stated in § 102(c)(2) of the URAA, 19 U.S.C. § 3512(c)(2), that it intends, through the prohibition on private remedies:

> to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements —

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[9] URAA, § 102(b)(2)(A), 19 U.S.C. § 3512(b)(2)(A). The term "State law" is defined to include "any law of a political subdivision of a State, as well as any State law that regulates or taxes the business of insurance." URAA, § 102(b)(3), 19 U.S.C. § 3512(b)(3). The term is intended to encompass "any provision of a state constitution, regulation, practice or other state measure." Uruguay Round SAA, *supra* note 3, at 674.

[10] S.Rept. 103-412, at 15; *see also* H.Rept. 103-826(I), at 25, and Uruguay Round SAA, *supra* note 3, at 670.

[11] URAA, § 102(b)(2)(A), 19 U.S.C. § 3512(b)(2)(A).

[12] Uruguay Round SAA, *supra* note 3, at 674; H.Rept. 103-826(I), at 26; S.Rept. 103-412, at 15. The SAA states, *inter alia*, that the Attorney General "will be particularly careful in considering recourse to this authority where the state measure involved is aimed at the protection of human, animal, or plant health or of the environment or the state measure is a state tax of a type that has been held to be consistent with the requirements of the U.S. Constitution. In such a case, the Attorney General would entertain use of this statutory authority only if consultations between the President and the Governor of the State concerned failed to yield an appropriate alternative." Uruguay Round SAA, *supra* note 3, at 674.

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

The House Ways and Means Committee report on the URAA discusses on the rationale and implications of § 102(c) as follows:

> For example, a private party cannot bring an action to require, preclude, or modify government exercise of discretionary or general "public interest" authorities under the other provisions of law. These prohibitions are based on the premise that it is the responsibility of the Federal Government, and not private citizens, to ensure that Federal or State laws are consistent with U.S. obligations under international agreements such as the Uruguay Round agreements.[13]

The SAA notes, however, that § 102(c) "does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law."[14] In addition, federal courts have not viewed the provision as precluding them from considering U.S. WTO obligations in challenges to agency actions implicating WTO agreements.[15]

## Implementation of WTO Decisions Involving Administrative Action

In addition to the URAA provisions that limit the direct effect of WTO rules and decisions in U.S. law, the URAA also addresses agency implementation of WTO panel and Appellate Body reports. These provisions apply to (1) regulatory action in general and (2) new agency determinations in response to WTO decisions involving trade remedy proceedings and the implementation of such determinations.

**Section 123 of the URAA: WTO Cases Involving Regulatory Action.** Section 123(g) of the URAA, 19 U.S.C. § 3533(g), provides that in any WTO case in which a departmental or agency regulation or practice has been found to be inconsistent with a WTO agreement, the regulation or practice may not be rescinded or modified in implementation of the decision "unless and until" the USTR and relevant agencies meet certain consultation requirements and the final rule or other modification has been published in the *Federal Register*.[16]

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[13] H.Rept. 103-826(I), at 26.

[14] Uruguay Round SAA, *supra* note 3, at 676.

[15] E.g., SNR Roulements v. United States, 341 F.Supp.2d 1334, 1341 (Ct. Int'l Trade 2004); Timken v. United States, 240 F.Supp. 2d 1228, 1238 (Ct. Int'l Trade 2002); Gov't of Uzbekistan v. United States, 2001 WL 1012780, at *3 (Ct. Int'l Trade Aug. 30, 2001).

[16] An example of the use of the § 123 process may be found in the Commerce Department's issuance in 2003 of a modified privatization methodology for use in making subsidy determinations in countervailing duty proceedings, i.e., determining whether a benefit has been conferred on the recipient for purposes of the definition of "subsidy" under the WTO Agreement

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**Section 129 of the URAA: WTO Cases Involving Trade Remedy Proceedings.** Section 129 of the URAA, 19 U.S.C. § 3538, sets forth authorities and procedures to be used by the United States Trade Representative, the U.S. International Trade Commission (ITC) and the Department of Commerce (DOC) in implementing adverse WTO panel and Appellate Body (AB) reports involving agency determinations in U.S. safeguards, antidumping, and countervailing duty proceedings.[17]

The Department of Commerce and the ITC each play a role in antidumping and countervailing duty proceedings, which are provided for in Title VII of the Tariff Act of 1930. DOC makes determinations as to existence and level of dumping or subsidization, while the ITC determines whether the dumped or subsidized imports, as the case may be, cause material injury to domestic industry. The ITC is also charged with conducting investigations under U.S. safeguards law, set forth in Title II of the Trade Act of 1974, to determine whether or not increased imports are a substantial cause of serious injury to a domestic industry. If the ITC makes an affirmative injury determination in a domestic Section 201 proceeding, it recommends remedial measures to the President, who ultimately determines whether or not to take action. U.S. actions in these types of trade remedy proceedings are subject to obligations under the GATT 1994 and, as the case may be, the WTO Agreement on Safeguards, the WTO Antidumping Agreement, and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).

In the event of an adverse WTO decision regarding an above-described determination, the statute ultimately authorizes the USTR to request the agency involved to issue a determination that would render the agency's action "not inconsistent with the findings" of the WTO panel or Appellate Body. The statute also requires consultation with Congress at various stages of the implementation process. Where an antidumping or countervailing duty order is no longer supported by an ITC affirmative injury determination, the USTR may direct that the underlying antidumping or countervailing duty order be revoked in whole or in part. Where a DOC determination is involved, the USTR may direct the Department to implement, in part or in full, the Section 129 determination that it has made. Implemented § 129 determinations in antidumping and countervailing duty cases are reviewable in the U.S. Court of International Trade or before binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA).[18]

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[16] (...continued)
on Subsidies and Countervailing Measures. The modification was issued in response to adverse panel and appellate reports in a challenge by the European Communities to 12 U.S. countervailing duty orders based on what the EC alleged were WTO-inconsistent methodologies. *See* Dep't of Commerce, "Notice of Final Modification of Agency Practices Under Section 123 of the Uruguay Round Agreements Act; Modification of agency practice regarding privatization," 68 Fed. Reg. 37125 (2003).

[17] For further discussion of § 129, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

[18] URAA, § 129(e), *amending* Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a. *See generally* Uruguay Round SAA, *supra* note 3, at 1026-27. Chapter 19 panels are available to review final agency determinations in antidumping and countervailing duty investigations involving NAFTA countries in lieu of judicial review in the country in which the determination is made.