



## CRS Report for Congress

# 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 action at issue. Violative state laws may be withdrawn by the state or, in rare circumstances, invalidated through legal action by the federal government. The URAA also contains authorities and requirements for administrative action taken to comply. S. 364 (Rockefeller) would amend the URAA to require that Congress expressly approve any regulatory modification or final rule proposed to implement an adverse WTO ruling and would rescind certain regulatory actions that have already entered into effect. Both S. 364 and H.R. 708 (English) would establish a congressional advisory commission to review WTO decisions in light of enumerated statutory criteria. H.R. 2714 (Barrett) would require the President to delay or reverse implementation of adverse WTO decisions on the use of “zeroing” in antidumping proceedings until the United States has negotiated certain WTO clarifications regarding the practice. This report will be updated.

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

Congress approved and implemented the current World Trade Organization (WTO) agreements in the 1994 Uruguay Round Agreements Act (URAA), P.L. 103-465, 19 U.S.C. §§ 3501 *et seq.* The legal effect of these agreements and WTO dispute settlement results in the United States are 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.<sup>1</sup> The statute also requires the 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.<sup>2</sup> In addition, the URAA places requirements on regulatory action taken to implement WTO decisions, including provisions specific to new agency determinations 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.” The Statement of Administrative Action (SAA) that accompanied the WTO agreements when they were submitted to Congress in 1994 explains that “[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.”<sup>3</sup> Moreover, § 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 statutory changes needed “to remedy an unforeseen conflict” between U.S. law and WTO agreements “can be enacted in

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<sup>1</sup> 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 [hereinafter CRS Report RL32014]. For background discussions of the domestic legal effect of international agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia; Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 Nw. J. Int’l L. & Bus. 556 (1996-97); and John H. 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).

<sup>2</sup> Uruguay Round Agreements Act (URAA), § 123(d)-(f), 19 U.S.C. § 3533(d)-(f).

<sup>3</sup> URAA Statement of Administrative Action, H.Doc. 103-316 at 659 (1994)[hereinafter 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.”<sup>4</sup> 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.”<sup>5</sup>

The implementation of WTO dispute settlement results is similarly treated. URAA legislative history states that “[s]ince 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.”<sup>6</sup>

**State Law.** Where state law is at issue in a WTO dispute, the URAA provides for federal-state cooperation in the WTO proceeding, requires the USTR to work with the state to “develop a mutually agreeable response” to an adverse WTO ruling, and allows the United States alone to bring domestic legal challenges to the state law.<sup>7</sup> 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.<sup>8</sup> Section 102(b) provides that “[n]o 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.”<sup>9</sup>

<sup>4</sup> H.Rept. 103-826(I), at 25; see also S.Rept. 103-412, at 13.

<sup>5</sup> H.Rept. 103-826(I), at 25; see also S.Rept. 103-412, at 13.

<sup>6</sup> 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 SAA states: “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.”

<sup>7</sup> In the WTO challenge by Antigua and Barbuda to federal, state, and local laws that affect the cross-border supply of gambling and betting services, the United States prevailed on the issue of whether state laws violated the General Agreement on Trade in Services, 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. Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005). A challenge by Brazil to Florida’s equalizing excise tax on processed orange and grapefruit products was resolved in 2004 without panelists having been appointed after Florida amended its statute. Notification of Mutually Agreed Solution, *United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, 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. (BNA) 945 (June 3, 2004).

<sup>8</sup> For further discussion, see Uruguay Round SAA, *supra* note 3, at 676.

<sup>9</sup> 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

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.”<sup>10</sup> 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.<sup>11</sup> Any such suit by the United States is expected to be a rarity.<sup>12</sup>

**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 agreement” 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 — (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.<sup>13</sup>

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<sup>9</sup> (...continued)

encompass “any provision of a state constitution, regulation, practice or other state measure.” Uruguay Round SAA, *supra* note 3, at 674.

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

<sup>11</sup> URAA, § 102(b)(2)(A), 19 U.S.C. § 3512(b)(2)(A).

<sup>12</sup> 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.

<sup>13</sup> H.Rept. 103-826(I), at 26.

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.”<sup>14</sup> 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.<sup>15</sup>

## Domestic Administrative Implementation of WTO Decisions

The URAA also sets out requirements for administrative implementation of adverse WTO decisions involving (1) the modification of regulations or administrative practices and (2) the issuance of new agency determinations in trade remedy proceedings.

### **Section 123(g) of the URAA: WTO Cases Involving Regulatory Action.**

Section 123(g) of the URAA, 19 U.S.C. § 3533(g), provides that in any case in which a report of a WTO panel or the Appellate Body finds that an administrative regulation or practice is inconsistent with a WTO agreement, the regulation or practice may not be “amended, rescinded or otherwise modified in implementation of such report unless and until” the USTR and relevant agencies consult with Congress, seek private sector advice, and publish the proposed change in the *Federal Register* with a request for public comment, and the final rule or other modification is published in the *Federal Register*. Section 123(g) mandates a 60-day consultation period with Congress and provides that the Senate Finance Committee and the House Ways and Means may vote to indicate their agreement or disagreement with the proposed action during this period.<sup>16</sup> Section 123(g) does not apply to regulations or practices of the U.S. International Trade Commission.

**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. In antidumping and countervailing duty investigations, DOC determines the existence and level of dumping or subsidization, as the case may be, whereas the ITC determines whether the dumped or subsidized imports cause material injury to domestic industry. The ITC is also charged with conducting investigations under U.S. safeguards law to determine whether or not increased imports are a substantial cause of serious injury to a domestic industry.

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<sup>14</sup> Uruguay Round SAA, *supra* note 3, at 676.

<sup>15</sup> 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 August 30, 2001).

<sup>16</sup> The provision first came into play in 1996 when the United States took regulatory action to comply with the adverse WTO decision in *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2, WT/DS4. See World Trade Organization (WTO) Decision on Gasoline Rule (Reformulated and Conventional Gasoline), 61 Fed. Reg. 33703 (June 28, 1996). The U.S. Court of Appeals for the D.C. Circuit upheld the final issued by EPA to resolve the dispute, finding, *inter alia*, that the agency was not statutorily precluded from considering factors other than air quality in issuing rules under the antidumping provision of the Clean Air Act and could thus consider the effect of the proposed rule on U.S. treaty obligations. *George E. Warren Corp. v. U.S. Environmental Protection Agency*, 159 F.3d 616 (D.C.Cir. 1998).

In the event of an adverse WTO decision regarding an above-described determination, § 129 requires that, upon USTR request, the agency first determine if it may take action to comply with the WTO decision under existing law, and if so, 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.<sup>17</sup> Where a new DOC determination is issued, the USTR may direct DOC to implement it in whole or in part. Implemented § 129 determinations are reviewable in the U.S. Court of International Trade or before binational panels established under Chapter Nineteen of the North American Free Trade Agreement (NAFTA).<sup>18</sup>

**110<sup>th</sup> Congress Legislation.** S. 364 (Rockefeller) would amend § 123(g) of the URAA to require that any regulatory modification or final rule proposed to implement an adverse WTO decision be approved through joint resolution enacted into public law using an expedited legislative procedure; require the USTR, after any adverse dispute finding, to work within the WTO to seek clarification of U.S. WTO obligations under the agreement at issue and under certain circumstances prohibit the executive branch from modifying an administrative measure in order to comply with the adverse WTO decision; and rescind certain administrative compliance actions already in effect. In addition, S 364 and H.R. 708 (English) would establish a Congressional Advisory Commission on WTO Dispute Settlement to review WTO decisions in light of enumerated statutory criteria. H.R. 2714 (Barrett) would require the President to delay or reverse the implementation of adverse WTO decisions regarding the use of "zeroing" — a practice used in antidumping proceedings in which non-dumped sales are disregarded in determining dumping margins — until the United States has negotiated clarifications in the WTO that the practice is permitted in all phases of such proceedings. No action has yet been taken on any of these bills.

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<sup>17</sup> In a suit brought by Canada and Canadian producers as part of the longstanding and now resolved softwood lumber dispute between the United States and Canada, the U.S. Court of International Trade ruled in July 2006 that § 129 only allows the USTR to order the *revocation* of an AD or CVD order in response to a new negative ITC material injury determination and, thus, where a new ITC determination does not legally undermine an existing order, no further administrative action is permitted. *Tembec, Inc. v. United States*, 441 F.Supp.2d 1302 (Ct. Int'l Trade 2006). As a result of the court's decision, the USTR could no longer treat a *negative* ITC determination involving Canadian lumber imports mandated by a binational panel established under Chapter Nineteen of the NAFTA as having been superseded by a subsequent *affirmative* ITC injury determination issued in response to a WTO decision. By declaring the USTR's action *ultra vires*, the court effectively removed the legal basis for continuation of the duty orders. For additional discussion of the legal proceedings in the U.S.-Canada lumber dispute, see CRS Report RL33752, *Softwood Lumber Imports from Canada: Issues and Events*, by Ross W. Gorte and Jeanne J. Grimmer. Regarding Chapter Nineteen panels, see *infra* note 18.

<sup>18</sup> 19 U.S.C. § 1516a(a)(2)(B)(vii),(g)(1)(B); see also Uruguay Round SAA, *supra* note 3, at 1026-27. Chapter Nineteen arbitral panels are available to review final domestic agency determinations in antidumping and countervailing duty proceedings involving imports from NAFTA countries in lieu of judicial review in the country in which the determination is made.