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World Trade Organization (WTO) Decisions and Their Effect in U.S. Law

Abstract
[Excerpt] 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. The act 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, provisions of WTO agreements and WTO panel and Appellate Body reports adopted by the WTO Members that are 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 conflicting statute, regulation, or regulatory action. Violative state laws may be withdrawn by the state or, in rare circumstances, invalidated through legal action by the federal government.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 requirements for agencies to follow where a change in a regulation or the issuance of a new agency determination in a trade remedy proceeding is needed to comply with a WTO decision and existing law may be sufficient to carry out the action.

While the URAA prohibits private rights of action based on Uruguay Round agreements, plaintiffs, in cases brought under other statutes, have argued that the agency actions they are challenging in court are inconsistent with a WTO agreement or a WTO decision and should conform with U.S. WTO obligations. Although courts have deemed WTO decisions to be persuasive, they have also held that they are not binding on the United States, U.S. agencies, or the judiciary, leaving the issue of whether and how the United States complies in a particular WTO proceeding to the executive branch.

Legislation introduced in recent Congresses generally reflected congressional concerns that the WTO Appellate Body had interpreted WTO agreements in an overly broad manner to the detriment of the United States and that the executive branch had in some cases too readily used existing statutory authorities to comply with these decisions, particularly where U.S. trade remedies were involved. Legislation particularly focused on WTO decisions finding the U.S. use of "zeroing" in antidumping proceedings to be in violation of the WTO Antidumping Agreement and an administrative modification instituted by the Department of Commerce in original anti-dumping investigations in response to one of the earliest of these decisions. Under the practice, the department calculates dumping margins by taking into account only sales below fair market value—generally the price in the exporting country—and assigns a zero value to sales at or above this price. While it is argued that zeroing improperly creates or inflates dumping margins, U.S. courts have consistently upheld the department's use of the practice as valid under U.S. antidumping law.

Keywords
World Trade Organization, WTO, Congress, trade, Uruguay Round Agreement Act, URAA, legislation

Comments
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Congressional Research Service

World Trade Organization (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. The act 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, provisions of WTO agreements and WTO panel and Appellate Body reports adopted by the WTO Members that are 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 conflicting statute, regulation, or regulatory action. Violative state laws may be withdrawn by the state or, in rare circumstances, invalidated through legal action by the federal government.

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Uruguay Round Agreements Act (URAA)

The Uruguay Round of Multilateral Trade Negotiations, initiated in 1986 under the auspices of the General Agreement on Tariffs and Trade (GATT), concluded in 1994 with the signing of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The WTO Agreement, which entered into force January 1, 1995, requires any country that wishes to be a WTO Member to accept all of the multilateral trade agreements negotiated during the Round. The Uruguay Round package of agreements not only carries forward long-standing GATT obligations, such as according goods of other parties nondiscriminatory treatment, not placing tariffs on goods that exceed negotiated or "bound" rates, generally refraining from imposing quantitative restrictions such as quotas and embargoes on imports and exports, and avoiding injurious subsidies, but also expands on these obligations in new agreements such as the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Antidumping, the Agreement on Subsidies and Countervailing Measures, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The Uruguay Round package also includes the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), which applies to disputes between WTO Members arising under virtually all WTO agreements. Dispute settlement is administered by the WTO Dispute Settlement Body (DSB), an entity consisting of all WTO Members. The dispute settlement process consists of consultations, panels and possible appeals, adoption by the DSB of the resulting panel and appellate reports, and, if the defending Member is found to have violated a WTO obligation, implementation of the WTO decision by that Member, generally within an established "reasonable period of time." If the Member has not complied by this date, the prevailing Member may seek compensation from the non-complying Member or obtain authorization from the DSB to impose retaliatory measures, such as increased tariffs on selected products exported from the non-complying Member's territory.

Congress approved and implemented the WTO Agreement and the other agreements negotiated in the Uruguay Round in the Uruguay Round Agreement Act (URAA), P.L. 103-465, 19 U.S.C. §§ 3501 *et seq.* In enacting the URAA, Congress comprehensively dealt with the legal effect in the United States of both the Uruguay Round agreements and WTO decisions adverse to the United States resulting from dispute settlement proceedings under the new DSU. The URAA addresses the relationship of WTO agreements to federal and state law and prohibits private remedies based on alleged violations of WTO agreements. It 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. In addition, the URAA places requirements on agencies taking domestic regulatory action to implement WTO decisions, including provisions specific to successfully challenged agency determinations in U.S. trade remedy proceedings.

Domestic Legal Effect of WTO Decisions Under the URAA

As is the case with previous trade agreements, including the North American Free Trade Agreement (NAFTA) and the GATT Tokyo Round agreements, Congress considers the Uruguay Round agreements to be non-self-executing; that is, their legal effect in the United States is based on their implementing legislation (i.e., the Uruguay Round Agreements Act (URAA)).[1] To this end, the URAA approves the agreements and contains provisions "necessary or appropriate" to implement them, including provisions setting out new and revised authorities as well as any needed repeals. In addition, section 102 of the URAA and its legislative history establish that domestic law supersedes any inconsistent provisions of WTO agreements approved and implemented in the URAA and that WTO decisions involving U.S. laws or regulatory actions that are successfully challenged in the WTO do not have direct or automatic legal effect in the United States. Instead, specific congressional or administrative action, as the case may be, is required to implement these WTO decisions.

Federal Law

Section 102(a)(1) of the URAA states 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."[2] Section 102(a)(2) further provides 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."[3]

The Statement of Administrative Action (SAA) that accompanied the WTO agreements when they were submitted to Congress by the President 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."[4] Moreover, § 102 is intended to clarify that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO

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[1] S.Rept. 103-412, at 13. Note ALSO RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 comment h (1987). For background discussions on 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* (Jan. 2001)(S.Prt. 106-71).

[2] Uruguay Round Agreements Act (URAA), P.L. 103-465, § 102(a)(1), 19 U.S.C. § 3512(a)(1).

[3] URAA, § 3512(a)(2), 19 U.S.C. § 3512(a)(2).

[4] URAA Statement of Administrative Action, H.Doc. 103-316 at 659 (1994)[hereinafter Uruguay Round SAA]. The Uruguay Round SAA, which was expressly approved in § 101(a)(2) of the URAA, 19 U.S.C. § 3511(a)(2), is to be 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). The submission of an SAA—that is, "a statement of any administrative action proposed to implement" the trade agreements being sent to Congress—is a requirement of the statutory authority under which the Uruguay Round agreements were approved and implemented. See Omnibus Trade and Competitiveness Act (OTCA), as amended, P.L. 100-418, § 1103 (a)(1)(B), 19 U.S.C. § 2903(a)(1)(B).

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 subsequent legislation."[5] 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."[6]

The implementation of WTO dispute settlement results is to be 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."[7] In the event a statute permits implementation consistent with the WTO decision, Congress has specified procedures for agencies to follow in taking administrative action to comply. These requirements are discussed below.

State Law

Where state law is at issue in a WTO dispute, section 102(b) of 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. 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]

Section 102(b) states 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."[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

[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.

[7] H.Rept. 103-826(I), at 25; see also S.Rept. 103-412, at 13, and the Uruguay Round SAA, *supra* note 4, 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."

[8] For further discussion, see Uruguay Round SAA, *supra* note 4, at 676.

[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 4, at 674.

[10] S.Rept. 103-412, at 15; see also H.Rept. 103-826(I), at 25, and Uruguay Round SAA, *supra* note 4, at 670.

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, 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."[13] Congress has additionally stated in the statute 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.[14]

The House Ways and Means Committee report on the URAA explains that because of this provision a private party, for example, "cannot bring an action to require, preclude, or modify government exercise of discretionary or general 'public interest' authorities under the other provisions of law."[15] The joint Senate committee report on the act adds that this provision would preclude any action by a private party against a state "under or in connection with any Uruguay Round agreement, including … [one] based on Congress' authority under the Commerce Clause of the U.S. Constitution."[16] Overall, the House Ways and Means Committee report states, the prohibitions on private rights of action "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."[17]

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

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

[12] Uruguay Round SAA, *supra* note 4, 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 4, at 674.

[13] URAA, § 102(c)(1), 19 U.S.C. § 3512(c)(1).

[14] URAA, § 102(c)(2), 19 U.S.C. § 3512(c)(2).

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

[16] S.Rept. 103-412, at 16.

[17] H.Rept. 103-825(I), at 26.

the Uruguay Round agreements, although any change in agency action would have to be authorized by domestic law."[18]

Domestic Administrative Implementation of WTO Decisions Under the URAA

The Uruguay Round Agreements Act sets out procedures that agencies must follow in implementing WTO decisions that are adverse to the United States where existing statutory authorities may be sufficient to do so. Section 123 of the URAA addresses regulatory modifications in general, while § 129 addresses the issuing of new determinations in certain domestic trade remedy proceedings. In some cases, implementation of a WTO decision may involve the exercise of authorities under both provisions.

Domestic Regulations and Administrative Practices (URAA, § 123(g))

Section 123(g) of the URAA 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*.[19] Section 123(g) mandates a 60-day consultation period with Congress and provides that the Senate Finance and House Ways and Means Committees may vote to indicate their agreement or disagreement with the proposed action during this period.[20] Section 123(g) does not apply to regulations or practices of the U.S. International Trade Commission.

Determinations in Trade Remedy Proceedings (URAA, § 129)

Section 129 of the URAA sets forth authorities and procedures to be used by the United States Trade Representative, the U.S. International Trade Commission (USITC), 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.[21] The conduct of these proceedings is subject to rights and obligations in,

[18] Uruguay Round SAA, *supra* note 4, at 676.

[19] URAA, § 123(g), 19 U.S.C. § 3533(g).

[20] 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).

[21] URAA, § 129, 19 U.S.C. § 3538.

respectively, the WTO Agreement on Safeguards, the Agreement on Antidumping, and the Agreement on Subsidies and Countervailing Measures.

In safeguards proceedings, as authorized in Title II of the Trade Act of 1974, 19 U.S.C. §§ 2251 *et seq.*, the USITC, either on the basis of a domestic industry petition, executive or legislative branch request, or its own motion, conducts an investigation to determine whether or not increased imports of a particular product are a substantial cause of serious injury (or threat of serious injury) to a domestic industry producing a product that is like, or directly competitive with, the imported good. If injury is found, the President may temporarily restrict imports or take other measures to remedy the harm to U.S. firms.

Antidumping and countervailing duty investigations, which are authorized in Title VII of the Tariff Act of 1930, 19 U.S.C. §§ 1671 *et seq.*, and may be initiated by petition or on the motion of the Department of Commerce, involve determinations by both the Commerce Department and the USITC. The Department of Commerce determines whether the product under investigation is dumped, that is, sold in the United States at less than fair value, or subsidized by a foreign government, while the USITC determines whether the dumped or subsidized imports cause material injury or threat of material injury to a domestic industry. If dumping and injury are found, antidumping duties will be imposed on imports of the product under investigation in the amount of the dumping margin. If subsidization and injury are found, countervailing duties will be imposed on the imported good in the amount of the net subsidy conferred.

In the event of an adverse WTO decision involving one of the above-described DOC or ITC determinations, § 129 requires that, upon USTR request, the affected agency must first determine if it may take action to comply with the WTO decision under existing law. If it finds that it may do so, the USTR may request the agency involved to issue a determination—referred to by the Commerce Department as a "Section 129 Determination" and the USITC as a "Section 129 Consistency Determination"—that would render the agency's action "not inconsistent with the findings" of the WTO panel or Appellate Body.[22] 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 affirmative injury determination—that is, where the USITC no longer finds material injury or threat from the dumped or subsidized imports—the USTR may direct DOC to revoke the order in whole or in part. Where a new DOC determination is issued, the USTR may direct DOC to implement the new determination in whole or in part. Depending on the new DOC finding, DOC may raise or lower the amount of duties to be collected on the subject imports under the order or, where dumping or subsidization is no longer found or is found to occur at a statutory *de minimis* level, DOC may revoke the order.

Section 129 determinations have prospective application, that is, they apply to unliquidated goods (i.e., goods for which final duties have not been assessed) that enter the United States for consumption on or after specified dates. These are as follows: (1) where a USITC material injury determination no longer supports an antidumping or countervailing duty order, the date that the USTR directs the Commerce Department to revoke the order, and (2) where a new DOC dumping

[22] Sections 129 Determinations issued by the Department of Commerce are available electronically at http://ia.ita.doc.gov/download/section129/full-129-index.html. Section 129 Determinations issued by the U.S. International Trade Commission may be searched under the term "Section 129 Consistency Determinations" at the USITC's website, http://www.usitc.gov.

or subsidy determination is made, the date on which the USTR directs the Commerce Department to implement the determination.[23]

Section 129 determinations that are implemented 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).[24] As noted in the Uruguay Round Statement of Administrative Action, "Section 129 determinations that are not implemented will not be subject to judicial or binational panel review, because such determinations will not have any effect under domestic law."[25]

Judicial Responses

Although private rights of action based on Uruguay Round agreements are precluded under § 102(c) the URAA, WTO panel findings have at times been brought to the attention of federal courts, most often in challenges to agency determinations in antidumping and countervailing duty proceedings brought under judicial review provisions contained in § 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a. Section 129 determinations issued by the USITC and the Commerce

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[23] URAA, § 129(c)(1), 19 U.S.C. § 3538(c)(1). See also Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1378-80 (Ct. Int'l Trade 2008); Corus Staal BV v. United States, 515 F.Supp.2d 1337, 1346-47 (Ct. Int'l Trade 2007). Regarding prospective application, the SAA states as follows: "Consistent with the principle that GATT panel recommendations apply only prospectively, section 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only.… Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the Trade Representative's direction would remain subject to potential duty liability." Uruguay Round SAA, *supra* note 4, at 1026. See also Andaman Seafood Co. v. United States, 675 F.Supp.2d 1363, 1369-73 (Ct. Int'l Trade 2010); Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1378-80 (Ct. Int'l Trade 2008); Corus Staal BV v. United States, 515 F.Supp.2d 1337, 1346-47 (Ct. Int'l Trade 2007). Regarding the scope of binational panels convened under North American Free Trade Agreement (NAFTA), see *infra* note 24.

The extent to which the implementation dates in § 129(c)(1) permit the United States to comply with adverse decisions in WTO dispute settlement proceedings was at issue in Canada's unsuccessful WTO challenge of the provision in 2001. Panel Report, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002). Canada did not appeal, and the panel report was adopted by the WTO Dispute Settlement Body in August 2002.

[24] Tariff Act of 1930, as amended, §§ 516A(a)(2)(B)(vii), 516A(g)(1)(B); 19 U.S.C. §§ 1516a(a)(2)(B)(vii), 1516a(g)(1)(B). For further discussion of the relationship of a Section 129 determination to pending litigation in U.S. courts over the final antidumping or countervailing duty determination that is the subject of the Section 129 determination, see Uruguay Round SAA, *supra* note 4, at 1027.

NAFTA 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 determinations are made. A NAFTA panel stands in the place of a U.S. court and is to apply the standard of review and "general legal principles" that a U.S. court would apply in reviewing the antidumping or countervailing duty determination before it. NAFTA arts. 1904.2, 1904.3, 1911 (definition of "standard of review"), annex 1911. In contrast to the URAA authorities and requirements for implementation of WTO decisions, where a NAFTA panel makes a decision remanding a determination to the Department of Commerce or the USITC, federal law directs the agency involved to "take action not inconsistent with the decision…." Tariff Act of 1930, as amended, § 516A(g)(7)(A), 19 U.S.C. § 1516a(g)(7)(A). A NAFTA panel decision may be appealed to a NAFTA Extraordinary Challenge Committee (ECC) on grounds set out in the agreement. NAFTA, art. 1904.13. A U.S. court is not bound by a final binational panel or ECC decision, but "may take into consideration" any such decision in deciding the case before it. Tariff Act of 1930, as amended, § 516A(b)(3), 19 U.S.C. § 1516a(b)(3).

[25] Uruguay Round SAA, *supra* note 4, at 1026.

Department to comply with WTO decisions are also reviewable under this statute. These cases are heard in the U.S. Court of International Trade (USCIT), which has exclusive jurisdiction over civil actions brought under § 516A.[26] The USCIT's decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit, whose decisions are reviewable by the U.S. Supreme Court.

Federal courts must hold a final agency determination in an antidumping or countervailing duty proceeding or a Section 129 Determination unlawful if it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[27] To determine whether an agency determination is in accordance with law, the court employs the two-step analysis for review of agency implementation of a statutory provision set out by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[28] First, the court, using tools of statutory construction, determines whether Congress has clearly spoken to the issue at hand. Second, if the underlying statute is silent or ambiguous, the court decides whether the agency's construction of the statute is permissible and will defer to an agency's interpretation of a statute provided it is reasonable. It has also been argued that, in considering whether an agency construction is reasonable, the court should apply the canon of construction articulated by the Supreme Court in 1804 in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), namely, that where a statute does not require a specific interpretation, that is, it permits more than one interpretation, it should be interpreted consistently with U.S international obligations,[29] in this context, a provision of a WTO agreement either by itself or as interpreted in one or more WTO decisions.[30] When read with C*hevron*, the *Charming Betsy* argument would come into play only where a statute is unclear as to the matter at hand; where the statute is unambiguous, the statutory language prevails and the question of international obligation would no longer be pertinent.

Because the underlying cause of action in domestic legal challenges to the agency actions described above is based in the Tariff Act and not on a provision of a WTO agreement, courts have not viewed § 102(c) of the URAA as preventing them from hearing a WTO-based argument in these challenges.[31] When faced with such arguments, some federal courts have deemed WTO

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[26] 28 U.S.C. § 1581(c)(enacted in Customs Courts Act of 1980, P.L. 96-417, § 201).

[27] Tariff Act of 1930, § 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i).

[28] See United States v. Eurodif S.A., 129 S.Ct. 878, 886-87 (2009); United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); and, e.g., Wheatland Tube Co. v. United States, 495 F.3d 1355 (Fed. Cir. 2007); Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001); Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994); U.S. Steel Corp. v. United States, 637 F.Supp.2d 1199 (Ct. Int'l Trade 2009), *appeal docketed*, No. 2009-1572 (Fed. Cir. Sept. 16, 2009); Corus Staal BV v. United States, 593 F.Supp.2d 1373, 1381-82 (Ct. Int'l Trade 2008);Windmill Int'l PTE v. United States, 193 F.Supp.2d 1303, 1305-306 (Ct. Int'l Trade 2002); Cultivos Miramonte S.A. v. United States, 980 F.Supp. 1268, 1271-72 (Ct. Int'l Trade 1997). For further discussion of the *Chevron* standard, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

[29] The *Charming Betsy* canon stems from the following Supreme Court language: "It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[30] See, e.g, Corus Staal BV v. United States, 395 F.3d 1343, 1347 (Fed. Cir. 2005); Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004); *Corus Staal*, 593 F.Supp.2d at 1383-84.

[31] 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).

decisions to be "persuasive"[32] or a source of useful reasoning, "if sound," to inform a court's decision,[33] but have stated that WTO decisions are not binding on the United States, U.S. agencies, or the judiciary.[34] More commonly, however, federal courts have made clear that, given the statutory scheme established in the URAA for implementing adverse WTO decisions, questions as to whether the United States should comply with an adverse WTO decision and what the extent of U.S. compliance should be are matters falling within the province of the executive branch.[35] As a result, in ruling on whether an agency action is reasonable, courts have declined to base their decision making on a WTO decision adverse to the United States where the executive branch has not taken the necessary domestic action to comply.[36]

The issue of the interaction of *Chevron* and *Charming Betsy* appears to have arisen most frequently in court cases challenging Commerce Department antidumping determinations in which dumping margins were calculated with the use of "zeroing," a practice under which the department considers only sales below fair market value—generally the price in the exporting country—and assigns a zero value to sales at or above this price. The U.S. practice, which is alleged to improperly create or inflate dumping margins, has been successfully challenged in numerous WTO dispute settlement proceedings as violative of the WTO Antidumping Agreement.[37] At the same time, U.S. courts, using the *Chevron* standard of review, have regularly held that, although the U.S. antidumping statute does not unambiguously require zeroing, the Commerce Department's interpretation of the statute as allowing the practice is a permissible one.[38] To respond to these adverse WTO decisions, the Commerce Department used § 123(g)

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[32] Koyo Seiko Co. v. United States, 442 F.Supp.2d 1360, 1363 (Ct. Intl Trade 2006), *citing, inter alia*, NSK Ltd. v. United States, 358 F.Supp.2d 1276, 1288 (Ct. Int'l Trade 2005). Note also that in *Cummings Inc. v. United States*, the Court of Appeals for the Federal Circuit held that a classification opinion of the World Customs Organization "is not binding and is entitled, at most, to 'respectful consideration'" by a U.S. court. 454 F.3d 1361, 1366 (Fed. Cir. 2006).

[33] Hyundai Electronics Co. v. United States, 53 F.Supp.2d 1334, 1343 (Ct. Int'l Trade 1999); see also, e.g., Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

[34] *Corus Staal*, 395 F.3d at 1348-49. See also Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007), and Koyo Seiko Co. v. United States, 442 F.Supp.2d 1360, 1363 (Ct. Int'l Trade 2006). For discussions of federal cases addressing the domestic effect of WTO decisions, see, e.g., Robin Miller, *Effect of World Trade Organization (WTO) Decisions Upon United States*, 17 A.L.R.FED.2D 1 (2007) and Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, 38 GEO. J. INT'L L. 209 (2006). See also 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 & COMP. L. 299 (2009). Jeffry L. Dunoff, *Less Than Zero: The Effects of Giving Domestic Effect to WTO Law*, 6 LOY. U. CHI. INT'L L. REV. 279 (2008); John D. Greenwald, *After Corus Staal – Is There Any Role, and Should There Be – for WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?* 39 GEO. J. INT'L L. 199 (2007).

[35] *Corus Staal*, 395 F.3d at 1347; *Corus Staal*, 593 F.Supp.2d at 1383-85. Note also *Koyo Seiko Co. v. United States*, 442 F.Supp. 1360, 1363 (Ct. Int'l Trade 2006), where the court refused to permit the plaintiff to amend its complaint to challenge the Commerce Department's "zeroing" methodology on the ground that the WTO had since adopted an Appellate Body decision faulting the U.S. practice, stating that such an amendment would be futile "given that it is not controlling precedent and is immaterial to the court's examination of the administrative decisions issued by the Department." See also Interactive Media Entertainment & Gamin Assn v. Gonzales, 2008 WL 5586713 (D.N.J. 2008)(court rejected plaintiff's WTO-related claims, among others, in denying motion to preliminarily enjoin enforcement of the Unlawful Internet Gambling Enforcement Act of 2006).

[36] E.g., *Corus Staal*, 395 F.3d at 1349; *Andaman Seafood*, 675 F.Supp.2d at 1373-74; *SNR Roulements*, 341 F.Supp.2d at 1343-44.

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

[38] E.g., Corus Staal BV v. United States, 502 F.3d 1370, 1372 (Fed. Cir. 2007); Timken Co. v. United States, 354 F.3d 1334, 1343 (Fed. Cir. 2004). Notwithstanding that U.S. courts have routinely upheld the use of zeroing as a matter of (continued...)

authority to prospectively abandon the practice in original antidumping investigations in early 2007[39] and has recently proposed modifications in the use of zeroing in subsequent phases of U.S. antidumping proceedings.[40] In addition, where a specific antidumping order has been challenged in a WTO proceeding, the Commerce Department has utilized § 129(c) authority to issue a new antidumping determination in which the dumping margin was calculated without the use of zeroing and, as a result, has either amended or, in some cases, revoked the antidumping order involved.

(...continued)

U.S. law, a NAFTA binational panel, with two dissenting panelists, issued a decision in April 2010 in which it remanded an antidumping determination to the Department of Commerce (DOC), directing it to recalculate the dumping margin involved without employing the practice. NAFTA Panel Determination, *Stainless Steel Strips and Coil from Mexico*, USA-MEX-2007-1904-1 (April 14, 2010) [hereinafter *Stainless Steel from Mexico*], at http://registry.nafta-sec-alena.org/cmdocuments/edce701c-9720-424b-b232-1fd714d318ba.pdf. The NAFTA panel found that a "plain reading" of the U.S. antidumping statute—that is, the statutory definition of "dumping margin" and a related term in 19 U.S.C. § 1677(35)—did not permit DOC to ignore non-dumped sales. Citing the *Charming Betsy* canon, the panel further found that even if an interpretation is permissible under *Chevron*, it may be contrary to law for *Chevron* purposes if it conflicts with a U.S. international obligation, here the requirements of the WTO Antidumping Agreement. The panel further found that the provisions of the Uruguay Round Agreements Act addressing implementation of WTO obligations—namely, § 102(a), setting out the relationship of U.S. law and WTO obligations, as well as §§ 123(g) and 129—did not preclude the panel from in effect directing implementation of a U.S. WTO obligation itself. Finally, the panel found that prior federal appellate court decisions upholding the use of zeroing, which the DOC argued were binding on the panel, did not preclude a remand. The panel found that there were two competing lines of U.S. cases on the issue of the relevance of WTO jurisprudence to judicial review, one permitting courts to consider WTO jurisprudence in interpreting statutes and the other signaling a "retrenchment" from this approach. Considering the issue to be "not presently reconciled" at the federal level, the panel found that it was permitted it to look to international jurisprudence for guidance. Moreover, it found that it was not bound by the federal appellate courts' reasoning as to zeroing in the cases cited by the DOC on the ground that these cases were distinguishable from the case at hand. The department issued a remand determination without zeroing in August 2010, but filed the remand under protest, vigorously disagreeing with the panel's decision. *Remand Determination Pursuant to NAFTA Panel: Stainless Steel Sheet in Coils from Mexico*, USA-MEX-2001-1907-1[hereinafter *Remand Determination*], at http://insidetrade.com//index.php?option=com_iwpfile&file=sep2010/wto2010_2643.pdf. The NAFTA panel has not yet issued its report on the new determination.

If the United States is ultimately displeased with the results of a NAFTA binational panel proceeding, it may seek review of the panel decision before a NAFTA Extraordinary Challenge Committee. The United States may claim, for example, that the panel has "manifestly exceeded its power, authority or jurisdiction, for example by failing to apply the appropriate standard of review" and must allege as well that the cited action "has materially affected the panel's decision and threatens the integrity of the binational panel review process." NAFTA art. 1904.13(a)(3), (b). The Commerce Department in fact cited these concerns in its remand determination. *Remand Determination, supra*, at 3. In a court case challenging a different DOC antidumping determination, the U.S. Court of International Trade recently declined to consider the NAFTA panel decision in *Stainless Steel from Mexico*, an action permitted under 19 U.S.C. § 1516a(b)(3), stating that "any 'consideration' of the panel decision could not overcome the precedent binding on this court, under which Commerce has statutory authority to apply the zeroing methodology …." NSK Ltd. v. United States, No. 10-00288, slip op. at 7-8 (Ct. Int'l Trade October 15, 2010), at http://www.cit.uscourts.gov/slip_op/Slip_op10/10-117.pdf.

[39] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (December 27, 2006).

[40] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81533 (December 28, 2010).

Recent Legislation

Legislation introduced in recent Congresses generally reflected congressional concerns that the WTO Appellate Body had interpreted WTO agreements in an overly broad manner to the detriment of the United States and that the executive branch had in some cases too readily used existing statutory authorities to comply with these decisions, particularly where U.S. trade remedies were involved. Legislation particularly focused on the various WTO disputes in which the U.S. use of zeroing in antidumping proceedings was successfully challenged and the U.S. response to one of the first WTO decisions on this issue, discussed earlier in this report.

111th Congress Legislation

H.R. 496 (Rangel) provided that the regulatory modification involving zeroing implemented by the Commerce Department in 2007 in response to the adverse WTO decision faulting the U.S. practice would expire March 1, 2009, and the prior departmental practice would thenceforth apply, unless and until the department issues a revised methodology pursuant to procedures laid out in the bill.[41]

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[41] The following bills were introduced in the 110th Congress: **S. 364** (Rockefeller), which would have amended § 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; required 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; rescinded certain administrative compliance actions already in effect; and established a Congressional Advisory Commission on WTO Dispute Settlement to review WTO decisions in light of enumerated statutory criteria; **H.R. 708** (English), which, like S. 364, would also have established a Congressional Advisory Commission on WTO Dispute Settlement; **H.R. 2714** (Barrett), which would have required the President to delay or reverse the implementation of adverse WTO decisions regarding the use of zeroing until the United States had negotiated clarifications in the WTO that the practice is permitted in all phases of antidumping proceedings; and **H.R. 6530** (Rangel), which contained the zeroing-related provision reintroduced in H.R. 496, 111th Congress. No action was taken on any of these bills.