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# Section 102 of the Uruguay Round Agreements Act: "Preserving" State Sovereignty

Joseph A. Wilson

The Uruguay round of negotiations was a comprehensive effort to reform the international trade system.<sup>1</sup> To a large extent, these efforts were successful. Among the innovative provisions of the Uruguay Round were agreements on both Trade in Services and Intellectual Property.<sup>2</sup> More importantly, these agreements were accompanied by the creation of a new governing body.

The World Trade Organization (WTO) was created to oversee the implementation of the trade agreements and settle disputes among member nations.<sup>3</sup> To that end, the decisions of the WTO dispute settlement body are binding on all members; an adverse decision becomes an international obligation of the defendant nation.<sup>4</sup> The WTO has consequently been welcomed as a much needed reform to the international trade system.<sup>5</sup>

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1. Concluded on December 15, 1993, after seven years of negotiation, the Uruguay Round Agreements fundamentally restructured and improved the trading system which had developed under GATT. William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 *FORDHAM INT'L L.J.* 427, 427 (1995). See also Judith E. Bello & Alan F. Holmer, *The Uruguay Round: Where We Are, reprinted in URUGUAY ROUND NEGOTIATIONS: WHERE DO WE GO FROM HERE?* (1991).

2. Aceves, *supra* note 1, at 428.

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the World Trade Organization, Annex 2, 33 *I.L.M.* 112 (1994) [hereinafter Understanding]. The Understanding applies to all disputes which are formally referred to resolution under GATT. *Id.* art. 1. The Understanding contemplates that resort to formal procedures will not be commonplace. The preferred dispute settlement process first consists of attempts at a negotiated settlement—a mutually agreed solution. If that fails, the injured member may utilize the mediation services offered by GATT, and finally, may resort to the formal panel process. *Id.* art. 3, ¶ 7. See also JOHN H. JACKSON, *INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995).

4. Aceves, *supra* note 1, at 462. See also Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 *DUKE L.J.* 216, 219-20 (1995).

5. Straight, *supra* note 4, at 223.

Under the former system, the decisions of dispute settlement panels were not binding until adopted by the consensus of all Contracting Parties.<sup>6</sup> Consequently, any Contracting Party that was unhappy with an adverse decision could block adoption of the decision by casting a lone dissenting vote.<sup>7</sup> Any subsequent retaliation by the complaining party would be GATT illegal.

Under the reformed system, however, a member nation may no longer avoid an adverse decision by dissenting.<sup>8</sup> As a result, the new system not only makes the enforcement of decisions easier, it encourages member nations to solve trade disputes quickly and amicably.

However welcome these reforms were among the trade negotiators, the creation of the WTO caused serious concerns among United States lawmakers. Concerned that the new dispute settlement process would leave state and local regulations susceptible to attack by both foreign and domestic parties, state officials sought protection for their regulations.<sup>9</sup>

After an extensive lobbying effort involving the Attorneys General of forty-two states, the Uruguay Round Agreements Act (URAA) was enacted with protection for state regulations.<sup>10</sup> Section 102 of the Act was ostensibly intended to protect state regulations against attack from foreign and domestic private parties, while simultaneously limiting government challenges.<sup>11</sup>

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6. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 97 (1989).

7. *Id.*

8. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 839-42 (1995).

9. These state officials confirmed the suspicions raised in the article *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*. Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 147 (1993) (noting that federal intervention may be seen as an infringement on local official's authority to set and maintain policies).

10. An implementing act is the federal legislation by which an international agreement becomes part of federal law. For a discussion of the relationship between international agreements, federal law and state and local laws, see *infra* notes 49-50 and accompanying text. See also Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in 4 STUDIES IN TRANSNATIONAL ECONOMIC LAW 187, 192 (noting that GATT is superior to state laws, but not superior to inconsistent federal law).

For a discussion of the lobbying effort, see *infra* notes 79 & 85.

11. The URAA was the implementing legislation for the Uruguay Round Agreements in which the WTO Agreement and its provisions (GATT, GATS, TRIPS, etc.) are codified as federal law. Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994). Within this Note, primary reference will be made to Section 102, rather than its codification in the U.S.C. However, where appropriate,

This Note examines the lasting effect of the protection provided in Section 102, particularly the likelihood of federal challenges to GATT-illegal state regulations. Part I of this Note will detail the dispute settlement process both before and after creation of the WTO, as well as the difficulties the reformed process creates for state regulations. Part II will outline and analyze those provisions of the URAA that are intended to protect state regulations. It is the goal of this Note to determine whether state regulations can survive under the WTO's dispute settlement process. This Note argues that state regulations are extremely vulnerable to international, as well as domestic, political pressures—pressures that they may not withstand. Finally, this Note concludes that Section 102 provides little actual protection to state policy makers and their laws.

### I. Innovations in the Dispute Settlement Process

GATT has formed the backbone of international trade agreements for nearly fifty years, a period during which the dispute resolution process evolved slowly.<sup>12</sup> Originally, Article XXIII governed conflicts between Contracting Parties.<sup>13</sup> However, no structured institutional arrangement existed for deciding conflicts, nor for enforcing such decisions. During the early years of GATT, the contracting parties settled disputes jointly or through the use of "working groups" of representatives.<sup>14</sup> Beginning in the 1950's, the GATT Secretariat adopted a panel-

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references to Section 102 will also include references to the codified version under 19 U.S.C. § 3501 *et seq.*

12. For a brief history of the GATT dispute settlement process, see Shell, *supra* note 8 (detailing the introduction of formal panel, outlining the dispute settlement process through the Uruguay Rounds, and detailing the rise of legalism in GATT proceedings).

13. GATT Article XXIII authorizes suspension of trade concessions or obligations whenever a panel determines that a state has nullified or impaired benefits under GATT. The substantive law—what constitutes a nullification or impairment—is quite comprehensive. See generally JACKSON, *supra* note 3, at 327-71. GATT article XXIII(2) provides in part:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, . . . the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

14. These groups were the earliest version of a panel oriented process. Shell, *supra* note 8, at 841.

based process.<sup>15</sup> If informal negotiations failed to resolve a conflict, the dispute would be sent to a panel, which would consider the evidence and issue a written decision or recommendation.<sup>16</sup> The Contracting Parties would then decide whether to adopt the recommendation and impose sanctions.<sup>17</sup> If adopted, the decision would become an international obligation of the defendant.<sup>18</sup> In order to satisfy that obligation, the defendant nation must either alter its domestic laws or accept trade sanctions.<sup>19</sup>

However, adoption of the panel recommendation required a consensus of contracting parties.<sup>20</sup> In the absence of a consensus, the panel report would not become part of GATT law.<sup>21</sup> Consequently, a single adverse vote, including that of either party to the dispute, would prevent adoption of the panel recommendation.<sup>22</sup>

GATT dispute settlement procedures changed dramatically in 1994 after the organization of the WTO.<sup>23</sup> As part of its authority to enforce trade policy, the WTO has the ability to bind all parties to dispute settlement decisions and allow sanctions against offending nations.<sup>24</sup> These decisions—as adjudged by an independent WTO panel—are adopted automatically, unless there is a consensus of members to the contrary.<sup>25</sup> Dissent will

15. Panels are composed of individuals acting in their own capacity, and are not to be considered as representatives of their respective nations (a concept which dramatically differs from the national representatives identified with the working parties). Early panels consisted of willing representatives. In recent years, though, the trend has been to use individuals that are not associated with GATT—professors and government officials. It should be noted that there was no explicit right to have a panel hear a controversy until 1989. JACKSON, *supra* note 3, at 339-41.

16. Shell, *supra* note 8, at 842.

17. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 175-76 (1969).

18. *Id.*

19. If the defendant nation does not reach a satisfactory result (i.e. change the offending laws), the complainant may withdraw previous concessions under GATT article XXIII:2. In other words, the complainant is allowed to retaliate.

20. JACKSON, *supra* note 6, at 50. See also ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: GATT DISPUTE SETTLEMENT IN THE 1980's* 8 (1993).

21. See Straight, *supra* note 4, at 223.

22. JACKSON, *supra* note 6, at 50.

23. See *supra* note 1.

24. Aceves, *supra* note 1, at 437-39.

25. The WTO's conflict resolution and enforcement authority is outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Understanding provides that, with regard to settling disputes among members,

[w]ithin 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a [Dispute Settlement Body (DSB)] meeting unless a party to the dispute formally notifies the DSB

no longer allow a defendant nation to avoid the international obligation requiring them to correct the offending behavior or law.<sup>26</sup>

One of the nations most affected by the new dispute settlement process is the United States. Because of the federal structure of the United States, regulation occurs on several levels—federal, state, and local.<sup>27</sup> WTO members can challenge the regulations on any of these levels, and a WTO panel can find any of these regulations GATT illegal.<sup>28</sup> Upon adoption, the panel decision becomes a binding international obligation of the United States.<sup>29</sup> In order to satisfy that obligation, the United States

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of its decision to appeal or the DSB *decides by consensus not to adopt the report.*

Understanding, *supra* note 3, art. 16, ¶ 4 (emphasis added). Automatic adoption, unless there exists a consensus to the contrary, also applies to Appellate Panel decisions. *Id.* art. 17, ¶ 14.

Furthermore, the WTO introduces several significant dispute settlement procedures. First, the Understanding sets up a bi-level decision making process. On the lowest level, independent Dispute Settlement Body (hereinafter DSB) Panels are set up to hear individual conflicts. These panels are basically the same panels utilized before the WTO, although there are organizational changes. Panel decisions are issued to the Dispute Settlement Body—composed of all Members—which automatically adopts the reports, subject to two exceptions. First, the DSB will not adopt the report if there is a consensus against adoption. Second, automatic adoption will be postponed if either party elects to appeal the panel decision. See JACKSON, *supra* note 3, at 342-43.

The creation of a permanent appellate body is also a new innovation in GATT dispute settlements. Shell, *supra* note 8, at 849. It is composed of seven individuals of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." Furthermore, there is no set membership—neither the European Community (EC) nor the United States is guaranteed representation on the appellate panel. The decision of the appellate panel will be automatically adopted, unless there is a consensus to the contrary. Understanding, *supra* note 3, art. 17, ¶ 14. See also *supra* notes 3, 13 & 15.

26. Aceves, *supra* note 1, at 429.

27. See *infra* notes 35-41 and accompanying text.

28. Article XXIII allows a nation which is injured (i.e. a loss of competitiveness under the Agreement) by the actions of another state to seek redress. Furthermore, the offending nation is responsible for the restrictive measures imposed by its governmental or territorial subunits. In the case of the United States, GATT applies not only to the federal government, but to the states and local governments as well. GATT, *supra* note 13, ad art. III, ¶ 1. International Agreements, enacted as part of federal law, effectively bind state laws. Courts will allow government challenges to invalidate state laws that are inconsistent with international obligations. Hudec, *supra* note 10, at 192. See also John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967).

29. Straight, *supra* note 4, at 219.

government must either change the offending statute or accept retaliation.<sup>30</sup>

The threat of punishment following the automatic adoption of an adverse decision may have serious consequences for state regulations. According to the U.S. Constitution, state regulators cannot negotiate with foreign governments or organizations, including the WTO.<sup>31</sup> In essence, state lawmakers depend upon the federal government to protect their regulations in the face of conflicting international obligations.<sup>32</sup> Under the pre-WTO dispute settlement process, the federal government could protect state regulations by providing the single dissenting vote, preventing the consensus required to adopt an adverse decision and avoiding an international obligation.<sup>33</sup> Under the current WTO process, however, the United States can no longer prevent the adoption of decisions that deem state regulations GATT-illegal.

The threat of automatic adoption, and subsequent retaliation, may provide an incentive for the national government to invalidate state laws (either before or after a challenge).<sup>34</sup> Indeed, state laws appear particularly susceptible due to the variety of ways in which the national government may invalidate them.

## II. State Laws and Dispute Settlement

### A. THE EFFECT OF STATE REGULATIONS ON INTERNATIONAL TRADE

The U.S. Constitution prohibits individual states from interfering with foreign commerce and exacting customs duties.<sup>35</sup>

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30. Understanding, *supra* note 3, art. 22. A WTO DSB panel does not automatically affect U.S. domestic law. Rather, the United States can pursue one of three options. First, the United States could negotiate a satisfactory solution with the complainant. Second, the United States could compensate the complainant with additional concessions. Finally, it could refuse to act, and simply accept sanctions (the withdrawal of concessions by the complainant). Rufus Yerxa, Deputy United States Trade Representative, prepared testimony to the U.S. Senate Foreign Relations Committee, June 14, 1994, FEDERAL NEWS SERVICE WASHINGTON PACKAGE, available in 1994 WL 8371590.

31. JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 142-43 (1984).

32. Straight, *supra* note 4, at 219.

33. See *supra* note 20.

34. See *infra* notes 152-54.

35. Congress possesses power to regulate foreign commerce, as well as authority to lay and collect duties and imposts. U.S. CONST. art. 1, § 8, cl. 1 & 3. For a general discussion of these powers, and infringement upon them by state

However, it does not necessarily follow that state regulations do not affect international trade. Indeed, the exact opposite is true. In an expanding global market, state regulations and revenue measures increasingly affect international trade.<sup>36</sup> Some of these affects are deliberate, aimed at attracting favored industries or discouraging unwelcome investment.<sup>37</sup> A number of states maintain industrial policies intended to stimulate manufacturing or reduce unemployment.<sup>38</sup> As part of their policies, many of these states offer tax incentives to foreign industries relocating within their state.<sup>39</sup>

Other regulations, though less deliberate, still impact trade. State governments continue to exercise extensive powers in the areas of land use, insurance and banking regulation, environmental controls, hazardous waste disposal, labor relations, and corporate regulation.<sup>40</sup> Numerous regulations cover a broad range of topics—including health and safety guidelines,<sup>41</sup> commercial law, government procurement, and revenue measures.<sup>42</sup>

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governments, see Brenda S. Beerman, *State Involvement in the Promotion of Export Trade: Is It Time to Rethink the Concept of Federalism as it Pertains to Foreign Relations?*, 21 N.C. J. INT'L & COM. REG. 187, 197 (1995) (arguing that states are increasingly looking to global markets in order to raise revenues).

36. Beerman, *supra* note 35, at 198.

37. "Some state-enacted laws, such as the unitary taxation formula or a prohibition on foreign investment in certain business or agricultural sectors, have a clear and precise impact on the overseas business community." Earl H. Fry, *The United States of America*, in FEDERALISM AND INTERNATIONAL RELATIONS, THE ROLE OF SUBNATIONAL UNITS 292 (1990).

38. THOMAS R. DYE, AMERICAN FEDERALISM, COMPETITION AMONG GOVERNMENTS 149-53 (1990).

39. *Id.*

40. *Id.*

41. States have traditionally maintained the authority to regulate health and safety measures, recognized as the exercise of their individual police powers. However, the authority to exercise the police power is not explicitly recognized in the U.S. Constitution. Rather, it has grown out of a large body of case law. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 277 (4th ed. 1991).

42. See *Savage v. Jones*, 225 U.S. 501 (1912) (state inspection laws are within the state police power when reasonable). See also *Trojan Technologies Inc. v. Pennsylvania*, 916 F.2d 903 (3d. Cir. 1990), *cert. denied* 59 U.S.L.W. 3527 (U.S. June 10, 1991) (No. 90-1189) (holding that federal law did not preempt Pennsylvania's "Buy American" statute). State regulations on a variety of subjects will be upheld against challenge. Under the Dormant Commerce Clause, the standard for challenging state regulations, as a violation of the Commerce Clause, is outlined in *Pike v. Bruce Church, Inc.*: "Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Furthermore, many states impose sales and use taxes (as well as income taxes) on goods and services sold within their borders.<sup>43</sup> Although these taxes must be applied in an equitable manner—neither discriminating against interstate commerce,<sup>44</sup> nor against foreign commerce<sup>45</sup>—they do affect the sale of imported goods.

Finally, the States themselves have dabbled in international relations on a number of occasions. Many states have understandings, compacts, or contracts with foreign governments.<sup>46</sup> Together these state regulations, incentives, agreements, and taxes create a considerable burden on both domestic and foreign commerce.<sup>47</sup> Yet they also protect a state's citizens and raise considerable revenues.<sup>48</sup> Consequently, state officials are rather protective of their ability to continue these activities.<sup>49</sup> When the WTO appeared as a threat to the continued use of these tools, state officials responded, opposing any measures which could detract from their authority.<sup>50</sup> These officials considered the WTO dispute settlement a particularly strong threat given the status of state laws in international trade and their susceptibility to attack.<sup>51</sup>

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43. Most of the individual states, the District of Columbia, and certain municipalities (for example New York City) impose income tax on residents and on non residents engaged in business within their jurisdictions. And, several states determine the taxable income of a multinational corporation within a state by the unitary method, whereby worldwide sales are allocated to the state based on the percentage of sales, payroll and property located within the state. Finally, a sales or use tax, as well as business licensing fees may be imposed by local authorities. 1990 INTERNATIONAL TAX HANDBOOK 93014, 93034 (1990).

44. See *supra* note 35.

45. See *infra* note 53.

46. Fry, *supra* note 37, at 290. It has been estimated that over 1,000 state and local governments engage in activities which could be considered foreign relations. Beerman, *supra* note 35, at 189.

47. Some economists argue that the complexities and trade barriers created by fifty different regulatory schemes impedes trade and retards economic growth. John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995).

48. DYE, *supra* note 38, at 149-53.

49. See *infra* notes 78-80.

50. See *infra* notes 82 & 86.

51. See *infra* note 80.

## B. THE STATUS OF STATE REGULATIONS IN INTERNATIONAL TRADE: THE STATES' PREDICAMENT

International agreements can become part of federal law through either legislation or executive agreement.<sup>52</sup> Once integrated into federal law, they become superior to state law (as are all federal laws).<sup>53</sup> Consequently, the terms of GATT, once codified in the Uruguay Round Agreements Act are enforceable under federal law. State laws must thereafter be consistent with the URAA (and thus must comply with GATT). After codification, GATT illegal state laws can be challenged under the Supremacy Clause as conflicting with federal law.<sup>54</sup>

Furthermore, since state regulations are included in the body of United States law, they are subject to challenge by foreign nations under the GATT and the WTO.<sup>55</sup> Indeed, previous panel reports have found state regulations inconsistent with GATT.<sup>56</sup>

However, a difficult problem arises when a WTO panel deems a state regulation GATT-illegal. Although the panel decision is not codified in the URAA, it is an international obligation

52. Professor Hudec outlines the various types of international agreements. Self executing international obligations become operative upon ratification of the agreement. Upon ratification, the obligations are part of domestic law. A non-self executing obligation requires additional legislation before it becomes part of US domestic law. It can become effective domestic law only to the extent that a domestic law parallels its obligations. Consequently, a self executing international agreement, once ratified, is part of federal law, and thus superior to state law. See Hudec, *supra* note 10, at 188.

53. Under the Supremacy Clause, all federal laws are superior to state laws. U.S. CONST. art 6, § 2. Consequently, outside agreements enacted as federal law are also superior to state law. Cooper, *supra* note 9, at 144-48. For an interesting discussion of the vulnerability of state laws under the Supremacy Clause, see Julie Long, *Ratcheting up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 MINN. L. REV. 231 (1995).

54. Long, *supra* note 53, at 242.

55. The obligation to reconcile subnational government regulations is recognized in GATT Article XXIV:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

GATT, *supra* note 13, art. XXIV:12.

56. One such panel decision was United States: Measures Affecting Alcoholic and Malt Beverages. United States: Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1992) (determining that discriminatory state regulations concerning the contents and packaging of beverages was inconsistent with GATT). See *infra* notes 75-76.

of the United States.<sup>57</sup> The federal government is responsible for ensuring that state laws comply with its international obligations—whether these obligations arise under the GATT or a WTO Dispute Settlement Body (DSB) decision.<sup>58</sup>

The consequences of a decision invalidating a state regulation differ greatly from a similar ruling on a federal law. If a federal law is found invalid, the United States has several options. First, Congress can correct the offending regulation. Subsequent legislation can simply alter the law to conform with GATT.<sup>59</sup> Alternatively, Congress may continue the status quo, and accept retaliatory measures.<sup>60</sup> GATT authorizes a successful claimant to retaliate by withdrawing previous concessions or suspending obligations if the offending country fails to correct the violation.<sup>61</sup> Finally, Congress could withdraw the United States from GATT.<sup>62</sup> However, withdrawal of the United States is an extremely drastic alternative that would have extremely destructive consequences for international trade, and is thus unlikely.<sup>63</sup>

State officials do not have nearly as many options. Under the U.S. Constitution, states are limited in their relations with foreign nations. The authority to negotiate and enter into agree-

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57. See JACKSON, *supra* note 17, and accompanying text. See also Aceves, *supra* note 1, at 463.

58. See *supra* note 19.

59. This is one of the powers Congress possesses to correct GATT illegal regulations under its preemptive authority. See *supra* note 35.

60. Such measures must be appropriate, and not excessive in comparison to the value of the violation. Article XXIII provides that the Contracting Parties may authorize a party to "suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances." GATT, *supra* note 13, art. XXIII:2. Determining the proper level of retaliation is itself a difficult measure. See Norway: Procurement of Toll Collection Equipment for the City of Trondheim, Apr. 28, 1992, GATT B.I.S.D. (40th Supp.), at 319 (1993) (compensation for past violations deemed inappropriate and indeterminate).

61. Understanding, *supra* note 3, art. 22, ¶ 1 (Compensation and suspension of obligations are temporary measures available to an injured party).

62. Agreement Establishing the World Trade Organization, art. XV, 33 I.L.M. 23 (1994) (Withdrawal). See also Aceves, *supra* note 1, at 436.

63. Ironically, withdrawal of the United States would destroy many markets, and in all probability, remove the injurious situation which created the need for the offending law. Thus withdrawal would not remedy the situation, but merely reinforce U.S. sovereignty. It is doubtful that withdrawal would ever result from an adverse panel decision. Furthermore, some scholars argue that the United States is strongly committed to the WTO dispute settlement process. Gary Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules*, J. WORLD TRADE, Feb. 1993, reprinted in 722 COM. LAW & PRAC. COURSE HANDBOOK (PLI) 685 (1995).

ments resides solely in the federal government.<sup>64</sup> States cannot accept trade sanctions by international bodies, nor agree to trade concessions at the request of a foreign state.<sup>65</sup> If an individual state is to voluntarily comply with the international obligations of the United States, the state has but one recourse, legislative compliance. The state would have to bring the regulation in line with the demands of the international body or foreign nation.<sup>66</sup>

However, the state also has the option to avoid compliance. By refusing to act in accordance with the obligations of the nation as a whole (e.g., GATT), the state shifts the onus of compliance onto the federal government.<sup>67</sup> As noted earlier, state regulations can easily be corrected at the federal level; since all federal legislation is superior to state regulation, an offending state regulation can be judicially challenged under the Supremacy Clause.<sup>68</sup> Furthermore, Congress need only preempt the offending state regulation with a complying federal law.<sup>69</sup>

### C. CONCERNS ABOUT THE WTO

The automatic adoption of panel reports by the DSB places state regulations in an especially precarious position. The states can no longer rely on the federal government to prevent adoption of an adverse decision. Automatic adoption therefore makes state regulations far more susceptible to attack.<sup>70</sup> In fact, before ratification of the WTO, the European Union issued

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64. The Commerce Clause provides that the Congress shall have the power "[t]o regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8, cl. 3.

65. See *supra* notes 31, 32 & 35.

66. Cooper, *supra* note 9, at 150.

67. *Id.* at 154.

68. See *supra* note 54.

69. See *supra* note 28. The potential for challenging state laws under the Supremacy Clause is discussed in the article *Ratcheting up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreement*. Long, *supra* note 53 (arguing Supremacy Clause is one basis on which to challenge GATT illegal or GATT inconsistent state laws).

70. The process by which a regulation can be challenged may follow several routes. First, the complaining nation might complain to the United States, which may either negotiate with the state for voluntary compliance, judicially challenge the law, or preempt the state law. Alternatively, the complainant may seek a panel decision, which will be adopted automatically. Once the decision is adopted, the United States may either accept sanctions, or (if the panel decision allows) change the offending state regulation. If the United States seeks to change the law, it can either negotiate for voluntary compliance, or challenge or preempt the law.

a list of over one hundred state and federal regulations that it intended to challenge.<sup>71</sup> This list underscores the drastic change wrought by the WTO's reversal of the panel report adoption process: before the WTO, a state regulation could have been found GATT illegal but never adopted because of a lack of consensus. Following the DSB understanding, however, panel findings can be readily adopted and thus challenges are more likely.<sup>72</sup>

In addition, history indicates that attacks upon state regulation are effective. Although only two complaints have focused on state laws, in both cases the state regulation was ultimately invalidated. In 1955, Australia complained of an Hawaiian law which required retailers of imported eggs to post a sign stating "We sell foreign eggs."<sup>73</sup> Ultimately, the regulation was invalidated under United States domestic law, which required Hawaii to conform to the requirements of GATT.<sup>74</sup> More recently, Canada complained of a host of state regulations discriminating against foreign producers of alcoholic beverages.<sup>75</sup> In this case, the GATT panel issued an adverse decision, finding against the United States.<sup>76</sup> Under pressure from the United States govern-

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71. David Rapp, *Will GATT Gut State Laws?*, GOVERNING, Sept. 1994, at 88. Such regulations included California's unitary tax law, discrimination against foreign owned banks and insurance companies, and local safety requirements on industrial products which are stricter than federal requirements. *Id.*

72. Even though automatic adoption of a decision is an innovation, the dispute settlement process has always been somewhat effective. As Professor Hudec notes: "[J]ust over half the rulings . . . achieved full compliance directly, two-thirds resulted in full compliance somehow, and nine out of ten produced a worthwhile positive result." Hudec, *supra* note 20, at 279. However, even if the former process was effective, the automatic adoption of decisions appears to be even more effective. Adoption increases the incentive for Members to resolve their differences before litigation, and, in the event the dispute is litigated, the result is immediately enforceable.

73. *Hawaii v. Ho*, 41 Haw. 565, 565 (1957).

74. *Id.* at 571.

75. In 1992, Canada sought invalidation of over thirty state alcohol regulations. Individual states maintained a variety of measures intended to protect each state's beer and wine industry. Measures ranged from ingredient restrictions to excise tax differentials and wholesale distribution restrictions. A GATT panel found a vast majority of these state regulations inconsistent with GATT. Several states maintained restrictions on the ingredients used in various alcoholic products, which usually took the form of regional procurement requirements—beverages could only be made from grains grown in a particular region of the state. Several states offered lower excise taxes on high volume producers. Some states required special licenses or maintained state trading monopolies. United States: Measures Affecting Alcoholic and Malt Beverages, *supra* note 56.

76. The panel recommended that the Contracting Parties request the United States to bring the regulations in line with its obligations under the

ment, a number of states have consequently changed their laws to comply with GATT requirements.<sup>77</sup> Thus, although the precedent is slight, it suggests that the federal government will uphold complaints against state regulations, especially those that discriminate against foreign products.<sup>78</sup>

Thus, as implementation of the Uruguay Round Agreements approached, state regulatory sovereignty seemed in danger of disappearing at the hands of an international agency.<sup>79</sup> State officials noted that without solid institutional protection, state laws might not be able withstand a contrary GATT panel decision.<sup>80</sup> It seemed unlikely that the United States would maintain a GATT illegal state regulation despite its international obligations, nor would Congress withdraw from GATT simply to preserve an offensive state regulation.<sup>81</sup> Instead, the federal government would likely force state compliance with the panel decision, judicially challenge the regulation, or simply preempt state law.<sup>82</sup> Indeed, it remains to be seen whether Con-

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General Agreement. *Id.* at 297-99. The outcome of the case clearly serves as warning to the states; it punctuated the near certainty of massive invalidation of similar state measures under the WTO.

77. Straight, *supra* note 4, at 242-43.

78. This note does not suggest that states should be allowed to discriminate against foreign producers. It is significant, however, that discrimination need not be as apparent or as blatant as it has been in the past. Regulations that appear evenhanded (and which were intended to be so) can affect foreign industries in disparate manners. Thus, concern exists not simply to protect discriminatory state laws, but to preserve a state's ability to regulate, despite disparate treatment.

79. Harvard Law Professor Lawrence Tribe expressed concern that proponents of the URAA ignored constitutional safeguards for the sovereign authority of the 50 states as semi-autonomous entities within the federal system. He further stated that GATT so altered the state of constitutional safeguards that it must be treated as a treaty. Professor Tribe considered the standard legislative process (through which an implementing act becomes law) insufficient. *Constitutional Law Expert Tribe Voices Concern Over State Sovereignty*, 11 INT'L TRADE REP. (BNA) 1166 (July 27, 1994).

80. State attorneys general sought assurances that the language of the URAA would provide the necessary protection against automatic invalidation of a state law upon an adverse WTO finding. Rapp, *supra* note 71, at 88.

81. See *infra* notes 146-48 & 156 (discussing the federal government's commitment to international trade).

82. Former Maine Attorney General Michael Carpenter noted that "a state law deemed inconsistent with our nation's GATT obligations . . . could easily be overturned by [the] federal government in U.S. District Court." *Amendments to GATT laws to Protect States: Nations Attorneys General Urged*, BANGOR DAILY NEWS, July 28, 1994. Note that coercion cannot be outright. See generally *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (holding that Congress may not directly require a state to enact a law, but may require certain regulations before dispensing funds).

gress would accept trade sanctions or retaliatory measures in order to allow a state to maintain an offending regulation.

State officials sought protection from this potential regulatory ruin.<sup>83</sup> Among other efforts, the state attorneys general demanded protective provisions in the implementing legislation.<sup>84</sup> Their demands focused on safeguarding their sovereignty through changes in the implementing legislation (and not a wholesale rejection of the WTO).<sup>85</sup> As a result of these efforts, the implementing legislation (the URAA) accorded protection for state regulations through a variety of provisions.<sup>86</sup>

The attorneys general wanted to assure protection of state laws under the implementing act.<sup>87</sup> To this end, they sent a letter to the Clinton Administration urging resolution of several concerns, including:

- i. Whether the federal government would seriously consider accepting trade sanctions rather than pressuring states to change state laws that are successfully challenged in the WTO;
- ii. Whether states are guaranteed a formalized process to participate in the defense of their regulations;
- iii. Whether private parties would be able to challenge state regulations, under either GATT or federal law;

83. State officials were not alone in questioning the constitutionality of GATT. *See supra* note 79.

84. An attorney general is "the chief law officer of the state. She gives advice and opinions to the governor and to executive and administrative departments or agencies." BLACK'S LAW DICTIONARY 129 (6th ed. 1990). As such, she is responsible for securing the legitimacy of state regulations, and upholding state law from attack.

85. *Forty Two State Attorneys General Question GATT*, U.S. NEWSWIRE, July 7, 1994, available in LEXIS, News Library, WIRES File.

86. Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994).

87. This heightened concern of state officials with international trade issues can be traced to several recent developments. First, the scope of the Uruguay Round was much greater than any previous series of negotiations. The inclusion of services and intellectual property in the agreements, as well as the growth of membership in GATT, resulted in a twenty fold increase in affected trade over the previous round; nearly \$3.7 trillion of trade will be affected. *See JACKSON, supra* note 3, at 314 (providing a table of Rounds, number of participants, and amounts involved). The Tokyo Round, involving 99 countries, affected \$155 billion. The first Round, Geneva 1947, involved 23 countries and affected \$10 billion. In comparison, the Uruguay Round involved more than 120 countries, and affected \$2.7 trillion in goods, as well as \$1 trillion in services. The size of the Uruguay Round suggests that with such a large amount of trade affected, it is inevitable that state regulations will be involved in future disputes.

Furthermore, recent dispute settlement cases underscore the vulnerability of state regulations to invalidation at the hands of a GATT dispute resolution panel. *See supra* notes 75 & 76.

- iv. Whether the federal government could challenge a state regulation without an adverse WTO panel decision; and
- v. Whether WTO decisions are binding in federal courts.<sup>88</sup>

These concerns embody a key principle: regulatory freedom is necessary for effective state sovereignty.<sup>89</sup> Widespread invalidation or preemption of state laws could destroy whatever regulatory freedom the states currently exercise.<sup>90</sup> Most of these concerns focus on determining the possibility and extent to which state regulations can be invalidated—either by judicial challenge or legislative preemption. Resolution of these problems is necessary to assure the future regulatory vitality of the states.

Of these concerns, most are covered under provisions of the URAA.<sup>91</sup> Serious questions remain, however, with regard to the federal government's commitment to safeguarding state interests. It remains to be clarified whether the United States federal government will seek to invalidate all GATT inconsistent state regulations or accept trade sanctions and retaliation.

### III. Uruguay Round Agreements Act

Congress adopted the results of the Uruguay Round in the 1994 implementing legislation.<sup>92</sup> Accordingly, the federal government is bound by its international obligation to the terms of GATT as well as WTO DSB panel decisions.<sup>93</sup> The URAA, particularly section 102, outlines exactly how GATT affects domestic law and the manner in which these international obligations are enforced. Section 102 codifies the protections that were included at the request of the state officials.

The URAA guarantees a formalized process through which the federal government and states can cooperate to resolve offending regulations, and satisfy the United States' international

88. *Forty Two State Attorneys General Question GATT*, *supra* note 85.

89. *DYE*, *supra* note 38, at xvi (noting that federal and local governments need independent responsibility for various aspects of their citizens welfare).

90. *See supra* notes 79, 80 & 82.

91. *See infra* section III.

92. Section 101 of the URAA states:

[T]he Congress approves . . . the trade agreements . . . resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade . . . and the statement of administrative action proposed to implement the agreements that was submitted to the Congress . . . .

Uruguay Round Agreements Act § 101, 19 U.S.C. § 3511(a) (1994).

93. This remains true until and unless there is subsequent overriding legislation (i.e. withdrawal of GATT or alteration of the commitment to WTO and GATT as outlined in the URAA). *See supra* note 4.

obligations.<sup>94</sup> The Federal-State consultation process is a recognized tool for harmonizing federal and state government; former trade implementing acts have included similar consultation mechanisms for developing and implementing overall trade policy.<sup>95</sup>

Section 102, however, by introducing a consultation process for dispute settlement,<sup>96</sup> seeks to integrate state governments into the dispute settlement process and thus improve the safeguards provided in earlier implementing acts.<sup>97</sup> Under section 102, in the event a state regulation is challenged in the WTO, the federal government must consult closely with the state governments to achieve an outcome satisfactory to all parties (state government, federal government, and the WTO):<sup>98</sup>

The Trade Representative shall make every effort to ensure that the State concerned is involved in the development of the position of the United States at each stage of the consultations and each subsequent stage of dispute settlement proceedings regarding the matter.<sup>99</sup>

This consultation process is triggered automatically when a foreign nation requests that the federal government negotiate to resolve an offending statute.<sup>100</sup> The USTR must consult closely with the states throughout the dispute settlement process, from initial contact with the foreign state through the adoption of a panel decision by the DSB.<sup>101</sup> Should the DSB adopt a panel decision rendering a state law GATT illegal, the USTR will include the states in the formulation of the U.S. response—either altering the regulation or accepting retaliation.<sup>102</sup>

Ideally, the consultation process will achieve a mutually agreeable outcome. This may involve some compromise by either the federal or state governments. If the parties, however,

94. 19 U.S.C. § 3512(b)(1)(C) (1994).

95. A development-oriented consultation process is outlined in the Trade Act of 1974; this process was expanded in 1984 to include the Trade Representative, reiterated in NAFTA, and revamped in 1994.

96. Section 102 provides:

The Trade Representative shall establish . . . a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreements that directly relate to, or will potentially have a direct effect on, the States.

Uruguay Round Agreements Act § 102(b)(1)(B), 19 U.S.C. § 3512(b)(1)(B) (1994).

97. See Aceves, *supra* note 1, at 450.

98. Section 102(b) contains several other provisions for consultation. 19 U.S.C. § 3512(b) (1994).

99. *Id.* § 3512(b)(1)(C)(iii).

100. *Id.* § 3512(b)(1)(C)(i).

101. Aceves, *supra* note 1, at 450-53.

102. 19 U.S.C. § 3512(b)(1)(C) (1994).

cannot reach a solution—if the state proves inflexible—the federal government may bring a lawsuit seeking to invalidate the state law as conflicting with existing federal law or international obligations.<sup>103</sup> It is also possible that Congress can exercise its legislative authority to preempt the offending state regulation, although this may require greater time and effort.<sup>104</sup>

The URAA, however, limits the ability of both government and private individuals to challenge GATT illegal state regulations.<sup>105</sup> As plaintiff, the United States must bear the burden of proving the state regulation is GATT illegal.<sup>106</sup> The adverse WTO panel ruling is in itself inconclusive and "shall not be considered as binding or otherwise accorded deference."<sup>107</sup> Consequently, to challenge a state regulation, the United States must have more persuasive evidence than merely an adverse WTO panel finding.<sup>108</sup>

Furthermore, before the United States can bring such an action, the USTR must attempt to secure a negotiated settlement with the state.<sup>109</sup> In other words, the federal government can institute a lawsuit only if the Federal-State consultation process fails. Indeed, challenging a state law is intended as a "last resort," to be used only when negotiations break down and com-

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103. The government could seek to invalidate the law on the grounds that it violates GATT as implemented under the URAA, or upon some other grounds, including violation of the Commerce Clause or Dormant Commerce Clause.

104. Cooper, *supra* note 9. See also *supra* notes 69 & 70; *infra* section IV (discussing the possibility that Congress may preempt state law).

105. The URAA provides that no person other than the United States shall have any cause of action or defense under any of the Uruguay Round Agreements. 19 U.S.C. § 3512(c)(1)(A) (1994).

106. *Id.* § 3512(b)(2)(B)(ii) ("[T]he United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question.").

107. *Id.* § 3512(b)(2)(B)(i). This subsection provides that in any action brought by the United States under the URAA, "a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference." *Id.*

108. Note that the evidence will most likely be the same in both instances. The judicial decision cannot simply be the application of the panel decision. Rather, a judge must consider all information, and render an independent decision. See section IV(A), *infra*, for a discussion of whether the United States can challenge a state law in the absence of a WTO decision.

109. The URAA requires the USTR to verify to the relevant committees in Congress that it has substantially complied with the consultation process before the federal government may challenge a state regulation. 19 U.S.C. § 3512(b)(2)(C) (1994).

promise becomes impossible.<sup>110</sup> Thus, these evidentiary and procedural qualifications may protect state laws from invalidation, even at the hands of the federal government.<sup>111</sup>

Given the restrictions on the federal government's ability to challenge regulations, it is no surprise that private individuals may not challenge state laws on the basis of an adverse WTO panel ruling.<sup>112</sup> Such a provision is not revolutionary in itself; NAFTA contained a similarly restrictive provision, as did the 1979 Trade Act.<sup>113</sup> Both the text of the URAA and its legislative history indicate that a GATT illegal state regulation cannot be declared invalid except in an action brought by the United States. Section 102(c)(A) provides that

No person other than the United States . . . shall have any cause of action or defense under any of the Uruguay Round 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

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110. The Administrative Action Statement states that the Uruguay Round Agreements Act does not automatically invalidate a state regulation that is inconsistent with GATT. Administrative Action Statement, *reprinted* in 1994 U.S.C.A.N. 4040, 4050. It recognizes that the United States, as a WTO member, is free to determine how it will comply with its international obligations. *Id.* Furthermore, the statement provides evidence that challenges or preemptions are a last resort:

The Administration has traditionally worked very closely with the states involved in any dispute settlement proceedings, both before and after any panel consideration, in a cooperative effort to determine the best course of action. Although ultimately the federal government, through its Constitutional authority and the implementing bill, retains the authority to overrule inconsistent state law through legislation or civil suit, use of this authority has not been necessary in the nearly half century that the GATT has been in effect.

*Id.* at 4053.

The Statement also notes that the federal government retains the power to overrule a state regulation. *Id.* at 4050. Given the changing conditions of international trade, and the disparity of the modern dispute settlement process as compared to the past half century (i.e. automatic adoption), federal corrective action should not be discounted.

The Administrative Action Statement is codified as part of the URAA. 19 U.S.C. § 3511(a)(2) (1994).

111. Furthermore, it is significant that any successful challenge would only be prospective. 19 U.S.C. § 3512(b)(2)(B)(iv) (1994). Arguably, as another concession to the states, the effect of a successful lawsuit cannot be retroactive. Such a qualification is particularly important in revenue legislation; if the ruling were retrospective, a successful challenge might require state governments to refund considerable amounts of money. By making the effect of a successful challenge solely prospective, the state will not be severely and debilitatingly penalized, although it will lose a source of future revenue.

112. *Id.* § 3512(c)(1).

113. *Id.* § 3312(c).

on the ground that such action or inaction is inconsistent with such agreement.<sup>114</sup>

Without standing, a private party cannot challenge a state regulation on the grounds that it is inconsistent with any provision of the URAA (including the international obligations of GATT). Indeed, the Administrative Action Statement indicates that private parties cannot challenge GATT illegal state regulations solely on the basis of the URAA or Congress' Commerce Clause authority.<sup>115</sup> Private parties cannot simply argue that state regulations are inconsistent with the URAA. Nor can a party argue that state law interferes with Congress' exclusive power over foreign commerce.<sup>116</sup> Such claims would be inconsistent with the determination, by both Congress and the Administration, that private lawsuits are an inappropriate means to enforce compliance with international obligations.<sup>117</sup> In a single sweeping restriction, the URAA prohibits challenges—by private parties—of any state regulation that violates GATT but does not violate a federal statute other than the URAA.

A survey of section 102 thus reveals that it protects certain aspects of state regulatory authority (see Figure 1). Nonetheless, it leaves key questions unanswered.

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114. *Id.* § 3512(c)(1). See also Administrative Action Statement, *supra* note 110, at 4055.

115. Administrative Action Statement, *supra* note 110, at 4055.

116. In essence, Congress seeks to completely preclude any action or defense based on the Uruguay Round Agreements. *Id.*

117. *Id.*

Concern of State Officials	Relevant Section of the URAA	Definitive Answer
Will the federal government seriously consider accepting trade sanctions, or pressure states to change laws which are successfully challenged in the WTO?	Section 101(a)(2) [Administrative Action Statement]	No Resolution
Can the federal government challenge state regulations without an adverse WTO panel decision?	Section 102(b)(2)(B)	No Resolution
Will the federal government guarantee states a formalized process in which to participate, in order to defend their regulations?	Section 102(b)(1)	Yes
Can private parties challenge state laws under either GATT or federal law?	Section 102(b)(2)(A) Section 102(c)	No
Are WTO decisions binding on federal court proceedings?	Section 102(b)(2)(B)(1)	No

Figure 1. Correlation between the Concerns of State Officials and the Resulting Provisions of the URAA

Can the United States challenge a possibly GATT inconsistent state regulation without a WTO panel ruling? Will the United States accept retaliatory measures or seek domestic invalidation of the offending regulation? Resolving these questions may help determine the future of state regulatory freedom. The remainder of this Note will attempt to resolve these questions.

#### IV. Efficacy of Protection Afforded State Regulations under the URAA

The effectiveness of the protections extended to the states in the URAA—namely, the consultation process and the restrictions on challenges to state regulations—depends in large part on the commitment of the federal government to protecting state regulations. If the federal government is committed to maintaining state regulatory sovereignty, it will be less likely to challenge state regulations. Codified restrictions, such as the

procedural and evidentiary requirements of section 102, represent such a commitment.<sup>118</sup>

However, political climates, economic commitments, and practical considerations must also play a role in determining the likelihood of a challenge to state regulations.<sup>119</sup> It is therefore important to determine if and when the federal government may (or must) challenge state laws, as well as the likelihood of the federal government doing so when it has discretion.

#### A. CHALLENGES TO STATE LAWS IN THE ABSENCE OF A DSB RULING

It is unclear whether a federal challenge to a state regulation requires an adverse WTO panel decision. Looking to the structure of Section 102(b)(2)(C), challenges to state law appear to be divided into two types—challenges to state law on the basis of its inconsistency with the Agreement, and challenges to state law that are the subject of DSB proceedings.<sup>120</sup> Hence, the language and structure of the URAA suggest that the federal government may act even in the absence of a WTO decision.<sup>121</sup>

Distinguishing between these two situations—the existence of an adverse WTO panel decision and the absence of a WTO decision—seems immaterial in light of the fact that a WTO panel report is not binding evidence in a court (although it may be used to support the government's argument).<sup>122</sup> To some extent, the evidence proffered at a challenge where there is no

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118. See *supra* section III (describing the restrictions on challenges to state laws).

119. Long, *supra* note 53, at 233-34 (noting that widespread invalidation of state laws is neither politically feasible nor is it good policy).

120. Section 102(b)(2)(C) provides generally for USTR accountability for procedures followed in challenging a state law. Subsection (iii) of that same section provides additional accountability if the state law was the subject of DSB proceedings. 19 U.S.C. § 3512(b)(2)(C) (1994).

121. Note that Section 102(b)(2)(C) does not differentiate between state laws that are the subject of DSB proceedings and those that have not received DSB scrutiny. *Id.* § 3512(b)(2)(C).

122. Under the Administrative Action Statement,

[T]he United States will not seek to introduce into evidence in a federal court any panel or Appellate Body report issued under the [Understanding] with regard to the state measure at issue. The United States would base any such proceeding on the provisions of the relevant Uruguay Round agreement—not a panel report—and the court would thus consider the matter *de novo*.

Administrative Action Statement, *supra* note 110, at 4054. In such a case, the panel report could only be considered a well reasoned supporting argument.

panel decision must be similar to the instance where there is an adverse panel report; the federal government cannot depend solely on a WTO decision to invalidate a state law.<sup>123</sup> This being the case, there must be outside grounds for invalidating the regulation.<sup>124</sup> Thus, it would be disingenuous to require a WTO panel report before a decision can be made on alternate grounds.

Consequently, it appears that a challenge to a state law does not require an adverse WTO decision. This is consistent with the general conception that GATT, once codified as federal law, is superior to state law.<sup>125</sup> The federal government could challenge a state regulation simply on the ground that it is inconsistent with federal law, whether that law is the URAA or any other federal statute.

Furthermore, neither private parties nor foreign governments can seek to invalidate the law on the basis of its GATT illegality, since neither have standing.<sup>126</sup> Indeed, only the federal government can pursue such a claim.<sup>127</sup> If there had been a DSB ruling, a foreign government could exert pressure on the United States in the form of trade sanctions.<sup>128</sup> The United States, however, need not await sanctions before it attempts to reconcile offending state regulations. Indeed, negotiations outside the DSB may produce better results than an actual decision.<sup>129</sup> The WTO has in fact even stated its preference for negotiations over actual settlement proceedings.<sup>130</sup> Given this preference, it seems likely that the foreign nation would pressure the United States even in the absence of a DSB decision (or even in the absence of a DSB hearing). This would, in turn, pressure the states to alter their regulations to comply with demands not yet voiced in the DSB.

In sum, it appears that a DSB ruling is not a necessary prerequisite to challenge a potentially GATT illegal state regulation.

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123. 19 U.S.C. § 3512(b)(2)(B)(ii) (1994).

124. *Id.*

125. Hudec, *supra* note 10, at 199.

126. 19 U.S.C. § 3512(c) (1994).

127. *See supra* note 112 and accompanying text.

128. GATT permits withdrawal of concessions. GATT, *supra* note 13, art. XXIII:2.

129. *See supra* note 3 (noting that negotiation is preferred over official DSB proceedings).

130. Understanding, *supra* note 3, at 115.

## B. CHALLENGES TO STATE LAWS FOLLOWING AN ADVERSE DSB RULING

The Federal-State consultation process outlined in the URAA provides detailed procedures which the federal government must follow in the event of a DSB proceeding against a state regulation.<sup>131</sup> The Act also provides for continuing consultations, to develop a mutually agreeable solution if an adverse DSB decision is adopted.<sup>132</sup> If a negotiated settlement is impossible, the United States *may* challenge the state law in order to comply with its international obligations.<sup>133</sup>

Although the DSB panel decision is a binding international obligation, the WTO agreements may not *require* the federal government to challenge inconsistent state law. An Understanding on Article XXIV:2, adopted during the Uruguay Round, requires each member to seek compliance with GATT at the sub-national level.<sup>134</sup> The provision requires only that each member nation take "such reasonable measures as may be available to it to ensure observance . . . by regional and local governments."<sup>135</sup> Essentially, the debate is whether judicial challenge or legislative preemption is a reasonable measure.<sup>136</sup> Under accepted interpretation of GATT, the federal government must correct the law—comply with its international obligation—unless doing so would cause a sudden and serious disruption of government.<sup>137</sup>

Under GATT, a law will be held invalid only after a judicial decision. Damages cannot be imposed for violations prior to that date. This prospective application of judicial challenges lessens the burden on state government. A state will not be held liable for revenues collected under a tax regulation that is subsequently deemed GATT-illegal. Consequently, a successful challenge will not deplete the state's treasury by requiring it to turn over previously collected revenue.<sup>138</sup> This minimizes the poten-

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131. 19 U.S.C. § 3512(b)(1) (1994).

132. *Id.* § 3512(b)(1)(C)(iv).

133. See *supra* note 55 and accompanying text.

134. Understanding, *supra* note 3, art. 22, ¶ 9.

135. GATT, *supra* note 13, art. XXIV:12.

136. The drafting history of GATT indicates that forcing corrective measures at the state level would be reasonable, provided there is not a sudden disruption of government. Cooper, *supra* note 9, at 150.

137. *Id.*

138. The Clinton Administration has stated that GATT will not require any significant changes in state tax regulations, as these are believed to be consistent with GATT rules regulating tax measures (as well as the GATT requirement of national treatment). *The GATT, the WTO and the Uruguay Round*

tial for disrupting government programs. The inclusion of the prospective application provision makes judicial challenge or preemption more palatable to the states.<sup>139</sup>

### C. LIKELIHOOD OF CHALLENGES TO STATE LAWS

The protections of Section 102, intended to limit challenges to state regulations, may prove ineffective. An active federal government, which will readily challenge state laws, could be just as devastating to state regulations as private challenges would be if they were allowed. Consequently, in order to understand the extent of protection afforded to state regulations, it is necessary to determine whether the federal government is willing to accept alternatives, such as trade retaliation or sanctions, instead of challenging or preempting state regulations.

The complex procedure required for a challenge to state regulations under the URAA may not dissuade the federal government from challenging state law. In this regard, the evidentiary and accountability requirements could be ineffectual in limiting judicial challenges.<sup>140</sup> Furthermore, the federal government has other alternatives; it is not limited solely to judicial challenge. Congress has the authority to preempt state laws.<sup>141</sup>

The practicability of challenging state laws is not solely procedural, but is also political.<sup>142</sup> A strong commitment to free international trade, balanced against a minor state regulation, may result in federal intervention.<sup>143</sup> Alternatively, a strong

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*Agreements Act: The Uruguay Round Agreements Act: Statement of Administrative Action*, 722 COM. L. & PRAC. COURSE HANDBOOK (PLI) 805, 823 (Sept. 1995).

139. History provides few lessons for the future of state challenges. Until the 1992 Alcoholic Beverages Case, there had been no panel reports finding a state regulation inconsistent with GATT. Cooper, *supra* note 9, at 148. See also *supra* notes 75 & 76. The only other case which challenged state regulations, the Australian complaint against Hawaii's restriction on egg imports, was decided under U.S. domestic law, without a conclusive panel decision. See *supra* notes 73 & 74 and accompanying text.

140. See *supra* notes 110 & 111 and accompanying text.

141. See *supra* notes 35 & 53. Indeed, the Supremacy Clause may prove a more favorable basis on which to challenge state laws, given the lack of evidentiary and procedural restrictions (which Section 102 requires). See generally Long, *supra* note 53. There is scholarship, however, which suggests that Congress will only preempt state regulations if the states fail to adjust their regulatory schemes to meet evolving needs. Hugh L. Makens, *State Regulation of International Transactions*, 610 COM. L. & PRAC. COURSE HANDBOOK (PLI) 513, 515 (July 1988)

142. See *supra* note 119.

143. President Clinton has noted the dependence of economic growth upon honoring international obligations and commitments. See 139 CONG. REC.

commitment to state regulatory freedom, weighed against a nominal sanction, might discourage intervention and lead to the acceptance of trade retaliation.

Although the currents of political support fluctuate, general observations indicate the federal government is committed to promoting free trade, but not to preserving state sovereignty.<sup>144</sup> The United States has been a Contracting Party of GATT since 1947.<sup>145</sup> Indeed, it was under President Truman's initiative that the earliest conception of an international WTO-like structure took shape.<sup>146</sup> Successive Administrations have voiced a strong commitment to free trade.<sup>147</sup>

The benefits of a free trade policy are particularly important to economic growth and consequently to political support.<sup>148</sup> While an economic analysis of the effects of international trade on the U.S. economy is beyond the scope of this Note, it should suffice to mention that the amount of goods and services affected by the Uruguay Round is nearly \$4 trillion.<sup>149</sup> A rejection of international trade, and GATT in particular, would be politically and economically unacceptable.<sup>150</sup>

Moreover, accepting sanctions because of a GATT illegal state regulation is impractical. A WTO Member who receives a favorable DSB ruling may suspend or withdraw concessions

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H904 (daily ed. Mar. 1, 1993) (Statement of Rep. Bereuter) (noting that President Clinton had recently discussed this in a speech).

144. An answer to this issue must focus on the Administration (since it is the Attorney General who would challenge a state law under her Executive branch authority) as well as Congress (which has the legislative authority to preempt).

145. See Shell, *supra* note 8, at 840.

146. Although the International Trade Organization was supported by the Administration, it failed because of Congressional opposition. Michael P. Malloy, *Shifting Paradigms: Institutional Roles in a Changing World*, 62 *FORDHAM L. REV.* 1911, 1919-20 (1994).

147. In the words of Ronald Reagan: "[T]he United States remains fully committed to an active world trade role in the context of an increasingly inter-related international economy. A reciprocal spirit of world cooperation, permitting fair trade and investment between our country and the rest of the world, is indispensable to all of us." Proclamation No. 4823, 3 C.F.R. 12 (1982). See also Jack I. Garvey, *Current Development: Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 *AM. J. INT'L L.* 439, 452 (1995).

148. Many consider presidential support of international trade as a sign of government interest in industrial and economic growth. Tamim Bayoumi, *The Postwar Economic Achievement*, *FINANCE & DEVELOPMENT*, June 1995, at 48, 49-51.

149. See *supra* note 87.

150. See *supra* note 63.

from the offending nation.<sup>151</sup> These concessions may affect an industry, or a sector of an industry, that has little or no connection to the offending state.<sup>152</sup> The industry of one state may be punished for the GATT illegal regulation of another state.<sup>153</sup> Arguably, in such a situation the affected industry and the injured state may persuade the federal government to pursue corrective measures.<sup>154</sup> Since retaliation would most likely affect states or industries other than the offending state, accepting sanctions in order to preserve a GATT-illegal regulation is not a viable solution.

The Administration thus appears ready to judicially challenge GATT illegal state laws in the face of conflicting international obligations. It is also necessary, however, to consider Congress' preemptive authority. Indeed, Congress can preempt state laws that do not even conflict with an international obligation.<sup>155</sup> A Congress committed to free trade could preempt state laws that survive judicial challenge, or that have never been considered to be GATT-illegal.<sup>156</sup> Alternatively, Congress can

151. GATT, *supra* note 13, art. XXIII:2.

152. GATT provides that:

If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations . . . as they determine to be appropriate in the circumstances.

GATT, *supra* note 13, art. XXIII.

153. William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 100-01 (1987) ("[o]nce retaliation occurs . . . another domestic constituency will be consider its interests harmed by the failure to resolve the dispute. If the other country has carefully targeted its retaliation, that constituency will be a relatively powerful one, such that there will be considerable pressure placed on the government to resolve the trade dispute. Since the domestic pressures will to some degree be offsetting, it will be easier to act contrary to the interest defending the condemned practice.").

154. The Statement of Administrative Action suggests that the Administration will weigh the effect of retaliation on possible adverse interests against the size of the economic sector affected by the required change in law. Richard O. Cunningham, *Dispute Settlement in the WTO: Did We get what the United States, or Did we give up the only Remedy that Really Worked*, 722 *COM. L. & PRAC. COURSE HANDBOOK (PLI)* 547, 566 (Sept. 1995).

155. Congress' preemptive powers exist regardless of whether the state law affects foreign commerce, provided Congress possesses the authority to regulate the underlying activity. See Long, *supra* note 53, at 253-60 (outlining the prerequisites to a legal challenge based on preemption).

156. Members of Congress have voiced their support for open trade: "The United States must continue to affirm its commitment to a free and open trading system, reflecting the notions of trade embodied in the General Agreements on Tariffs and Trade and our other international agreements." 131 *CONG. REC.* S10,120 (daily ed. July 25, 1985) (statement of Sen. Moynihan). "To maintain a

also protect regulations which do conflict with an international obligation. A Congress that is opposed to free trade, and committed to the protection of domestic industries and state sovereignty, could preserve state regulations by overriding executive opposition. Under Section 102(b)(2)(C), the USTR must consult with Senate and House committees before instituting a challenge.<sup>157</sup> If Congress wishes to protect the state regulation, the committees could propose a compromise favorable to the states or, in the extreme, introduce legislation removing federal jurisdiction over the controversy.<sup>158</sup> It is essential to note, however, that Congress is taking an increasing interest in international trade policy, a development which may preclude such protections.<sup>159</sup>

Furthermore, even if Congress were inclined towards protectionism, that tendency would not necessarily ensure state sovereignty. A large body of academic work suggests that Congress is generally not committed to protecting state regulatory power.<sup>160</sup> This is especially true when the states regulate activities that are clearly regulable by the federal government.<sup>161</sup> Indeed, there is evidence that the federal government tends to accumulate power, reducing the scope of state regulations.<sup>162</sup>

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fair and open trading system we must actively enforce trade agreements and laws and modify them where necessary." 131 CONG. REC. S15,986 (daily ed. Nov. 20, 1985) (statement of Sen. Mattingly).

157. Note that under Section 102(b)(2)(C), the USTR need not obtain congressional approval before the government proceeds with the challenge. 19 U.S.C. § 3512(b)(2)(C) (1994).

158. Section 102(c) is essentially such a restriction of jurisdiction, since it prohibits private parties from bringing an action. *Id.* § 3512(c).

159. Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 29 INT'L LAW. 15, 19 (1995).

160. Indeed, there is evidence that the federal government tends to accumulate power, reducing a state's freedom to regulate. See Pete Du Pont, *Federalism in the Twenty First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137 (1993) (proposing that the scope of local government has been continually narrowed over the years). In essence, Du Pont argues that since *United States v. Darby*, Congress has been able to infringe upon traditional state regulation. *United States v. Darby*, 312 U.S. 100 (1941) (upholding Congressional regulation of wages and hours of intrastate workers). In recent years, Congress has regulated state and municipal employees and garbage, while the federal judiciary has overseen schools (desegregation) and family matters (divorce and alimony). *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (upholding application of federal labor laws to municipal employees); *Philadelphia v. New Jersey*, 437 U.S. 617, 628-629 (1978) (requiring New Jersey to accept hazardous waste from nearby states); Du Pont, *supra*, at 141.

161. See *supra* notes 41, 42, 47 & 53. See also NOWAK, *supra* note 41, at 311.

162. See generally Du Pont, *supra* note 160.

In sum, the federal government lacks a strong commitment to state regulatory freedom, particularly when those regulations negatively affect international trade. Given the federal government's willingness to explicitly correct GATT illegal state regulations, the use of informal pressure on the states to correct their own regulations is even more probable.<sup>163</sup> An informal method would avoid damaging political choices, and would hopefully correct the offending regulation. In order for informal pressure to succeed, however, judicial challenge or legislative preemption must be a viable option.<sup>164</sup> A federal government unwilling to pursue formal channels to invalidate a state regulation will be unable to exert the pressure necessary to change the law through an informal process. As demonstrated above, the federal government may be willing to use formal measures. Consequently, it would be at least as likely to pursue informal measures. Where these fail, the federal government may easily resort to formal challenges or preemption of a GATT illegal state regulations.

### Conclusion

The URAA provides some protection for state regulations subject to adverse DSB panel decisions. It prohibits private challenges to state regulations on the basis of GATT illegality, and places evidentiary, procedural, and accountability requirements on challenges by the federal government. However, in the absence of a clear commitment to those state regulations that affect international trade, such protections are simply ephemeral. The federal government is not sympathetic to GATT-illegal regulations, and has the authority to challenge or preempt these laws. Given the political climate in which such decisions are made, GATT-illegal state regulations have little hope of actual protection.

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163. See *supra* notes 110 & 153-54.

164. The Supreme Court in *South Dakota v. Dole* noted that the direct coercion of states by the federal government is unconstitutional. *South Dakota v. Dole*, 483 U.S. 203, 208-11 (1987). However, the federal government may condition funding on the fulfillment of certain actions, one of which may be regulatory conformity. *Id.* at 209-10. Note that this does not affect the application of informal pressure on state governments by the executive or his agents.