International Trade Agreements: Vehicles for Regulatory Reform?

David A. Wirth

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1997/iss1/11

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
International Trade Agreements: Vehicles for Regulatory Reform?

David A. Wirth†

The difficulties encountered in meshing obligations contained in international agreements with domestic law and policy have been a recurring theme in United States foreign relations. This leitmotif has recently resurfaced in the context of international trade agreements, especially as those instruments interact with other social welfare goals such as labor rights and environmental quality. At the same time, there has been continuing attention to the potential for improving the efficiency, cost-effectiveness, and efficacy of federal regulation, particularly in the environmental field. This Article clarifies the relationship between these two major strains of policy debate, examines the effect of international trade agreements on domestic environmental regulation, analyzes the impact of international trade law on domestic questions of process and governance, and evaluates the extent to which international trade agreements might serve as suitable vehicles for regulatory reform.

International agreements generally have received a great deal of attention for their capacity to facilitate multilateral cooperation on such environmental problems as stratospheric ozone depletion, climate disruption, species loss, and transnational shipments of wastes, pesticides, and hazardous chemicals. Much of that discussion has emphasized how international agreements can overcome institutional and structural impediments to achieving critical environmental goals. Multilateral

† Visiting Associate Professor of Law, University of Virginia, Charlottesville, Virginia, Associate Professor of Law, Washington and Lee University, Lexington, Virginia, and Director, Trade, Health, and Environment Program, Community Nutrition Institute, Washington, D.C. This work was supported by grants from the Frances Lewis Law Center of Washington and Lee University, the Pew Charitable Trusts, and the Charles Stewart Mott Foundation. The author gratefully acknowledges the helpful comments on earlier drafts provided by Douglas J. Caldwell, Steve Charnovitz, Philip J. Harter, Patti A. Goldman, James Salzman, and participants in the Legal Studies Workshop at the University of Virginia School of Law. Portions of this Article are based on the author’s previous published writings, including in particular Parts II.B, II.D, and II.E, and Part III, which are drawn from David Wirth, Government by Trade Agreement, in Dorinda G. Dallmeyer, ed, Joining Together, Standing Apart: National Identities after NAFTA 111 (Kluwer 1997).
agreements can lead to effective international structures that advance environmental priorities while meeting the needs of all states.

With a few exceptions, multilateral environmental agreements have received considerably less attention than domestic statutes and regulations by reference to such tests as cost-benefit balancing and scientific integrity, which have been so prominent on the domestic level in the public policy discussion over regulatory reform. Rather, if the frequently major hurdle of generating sufficient political will behind a multilateral policy consensus can be surmounted, there is often general relief and little scrutiny of the adequacy or rationality of the actual obligations from either a scientific or economic point of view. For example, a 1985 European agreement on acid rain mandated a uniform 30 percent reduction in emissions of sulfur compounds as a principal way to combat acid rain. Economists would likely respond that this flat percentage reduction obligation for individual countries is economically inefficient because some countries can make reductions at a lower cost than others. Some countries, moreover, already may have reduced emissions when the agreement enters into force, while others may not. An ecologist would likely observe that the flat percentage reduction approach is not necessarily the most scientifically desirable because it fails to consider that emissions from some sources may affect the environment more significantly than do others. For example, some emissions may blow out to sea without causing any appreciable environmental harm.

As the international colloquy over environmental and public health hazards reaches an increasingly higher level of sophistication, one might expect questions of economic efficiency and scientific integrity to acquire greater prominence in multilateral forums devoted to addressing those risks. While such an agenda

---

1 See, for example, Robert N. Stavins, Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?, 1997 U Chi Legal F 293.


3 See, for example, Amy A. Fraenkel, The Convention on Long-Range Transboundary Air Pollution: Meeting the Challenge of International Cooperation, 30 Harv Intl L J 447, 459 (1989) (discussing the difficulty of linking specific emissions with damage). Many of these concerns have been addressed in a "second cut" at this issue in the form of a subsequent agreement. See Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reductions of Sulfur Emissions, June 14, 1994, 33 ILM 1540 (1994).
is already very much in evidence, it has appeared in an entirely different setting, namely that of international trade agreements.

At first blush, international trade agreements, as opposed to multilateral environmental treaties, might be considered good candidates for facilitating deregulation at the domestic level. Modern international trade agreements, such as the Uruguay Round of Multilateral Trade Negotiations under the auspices of the General Agreement on Tariffs and Trade ("GATT") and the North American Free Trade Agreement ("NAFTA"), address environmental matters expressly or implicitly. The primary purpose of these instruments, however, is not to develop minimum environmental regulatory standards but to assure open access to global markets, a freer movement of goods, and, more generally, the dissemination of free market principles. These agreements equate liberalized trade with the absence of governmental intervention in the marketplace through tariffs, subsidies, prescriptive regulations, and the like. Particularly since World War II, the overarching goal of the international trade regime has been to liberalize trade by systematically eliminating governmental measures such as tariffs. The history of GATT and, more generally, the multilateral trade regime exhibits incremental though steady progress toward extending this effort to include not only tariffs but export subsidies and non-tariff barriers. Indeed, the efficacy of the international trade regime can be largely explained by the simplicity of the central message that the way to promote liberalized trade is to constrain governmental interventions that perturb the international marketplace.

From that perspective, environmental regulation is by definition a subcategory of governmentally established requirements that may act as barriers to international trade. The operative structure of international trade agreements mirrors this viewpoint by articulating "negative" obligations in which states party to the instrument agree to refrain from certain actions such as unjustified regulatory requirements. For example, the tests of scientific validity found in recent international trade agreements are intended to circumscribe the regulatory authority of national governments and consequently to limit the abuse of putatively

---

4 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr 15, 1994, Legal Instruments—Results of the Uruguay Round vol 1, 33 ILM 1125 (1994) ("Final Act").

scientific claims for protectionist purposes, not to establish minimum protections for the environment and for public health. Unlike international trade agreements, international and domestic environmental programs anticipate and require the implementation of affirmative governmental actions. Indeed, this fundamental tension encapsulates the recent clash between trade and environment, as evidenced by the conflict between the "negative" obligations in trade agreements and the prophylactic governmental action required to ensure environmental quality. One regime—the environment—is designed to facilitate the implementation of affirmative governmental measures, and the other—trade—is intended to ensure the absence of such measures. 

This approach of constraining governmental authority is remarkably similar to that of recent regulatory reform proposals, including the House Republicans' Contract with America as well as subsequent unsuccessful legislative initiatives of the 104th Congress. Depending on one's point of view, international trade agreements represent either an opportunity or a temptation to accomplish substantive goals similar to those in the domestic regulatory reform debate through international processes in the face of domestic obstacles to achieving those same aims at the national level.

This Article examines the extent to which trade agreements such as NAFTA or the GATT/World Trade Organization ("WTO") regime of agreements and rules are appropriate vehicles for encouraging or requiring domestic regulatory reform in the United States. To that end, the Article assesses the capacity of international trade agreements to foster scientific integrity and the economic efficiency of domestic regulation. Second, the Article evaluates international trade agreements in the context of domestic process and governance, including (1) the role of private standard-setting processes; (2) legislative procedures, in particular the "fast track" process; (3) administrative procedure, especially ex parte communications; (4) judicial review; and (5) the distribu-

---

6 Compare Sanford E. Gaines, Rethinking Environmental Protection, Competitiveness, and International Trade, 1997 U Chi Legal F 231.
8 See, for example, Comprehensive Regulatory Reform Act of 1995, S 343, 104th Cong, 1st Sess (Feb 2, 1995), in 141 Cong Rec S 1711 (Jan 27, 1995). See also John D. Graham, Legislative Approaches to Achieving More Protection Against Risk at Less Cost, 1997 U Chi Legal F 13, 56-58.
tion of regulatory authority between federal and state governments. Finally, the Article addresses question of international governance, including public participation in negotiating international trade agreements and the settlement of disputes under them.

I. SUBSTANTIVE REGULATORY REFORM

Recent proposals for regulatory reform stress both scientific integrity, especially as measured by quantitative risk assessment techniques, and economic efficiency, as established through cost-benefit analysis, as principal touchstones for the legitimacy of environmental and public health regulation. While the basic GATT obligations, often known as "disciplines," share the same purpose of constraining governmental abuses, they track this agenda poorly, if at all. There is considerable potential for a serious mismatch between, on the one hand, domestic measures based on sophisticated scientific assessments and, on the other hand, international trade rules based on simplistic tests of questionable integrity.

Fundamental GATT/WTO obligations that apply to environmental and public health regulation, as in other areas, include the most-favored-nation ("MFN") principle, specifying non-discrimination among imported products on the basis of their national origin, and national treatment, a complementary requirement for non-discrimination between foreign and domestic products. A third fundamental GATT/WTO discipline is a prohibi-

---

9 For example, according to the House Republicans' Contract with America:

Congress is never forced to ensure that the benefits of regulation, better health and productivity, outweigh the costs, lost jobs, and lower wages. Nor does Congress pursue integrated health and safety goals. Instead, Congress and federal regulators often attack whatever health risk has caught the public's attention, even if its regulatory solution exacerbates other health risks.

The Job Creation and Wage Enhancement Act [proposed in the Contract] requires each federal agency to assess the risks to human health and safety and the environment for each new regulation. Agencies must also provide the cost associated with the regulation and an analysis comparing the economic and compliance costs of the regulation to the public. Each agency must form an independent peer review panel to certify the assessment and incorporate the best available scientific data. The review panel members must either possess professional experience conducting risk assessment or in the given field of study [sic].


11 Id, Art III.
tion on quantitative restrictions for imports or exports. This requirement can be seen as something of a corollary to the basic national treatment obligation, clarifying that numerical limitations are not available as a way of discriminating between imported and domestic goods. Taken in its entirety, the basic strategy might be taken as a sort of "equal protection clause" for foreign and domestic goods, specifying treatment of foreign goods on the same footing as domestic ones and prohibiting discrimination among various foreign sources.

These three fundamental GATT/WTO disciplines address the coverage of governmental activities without paying much attention to their content. For example, a state with a substantively absurd policy will satisfy these tests as long as it treats imports from all sources no worse than it treats the same products manufactured domestically. Compared with modern environmental law, these basic requirements or disciplines are also quite ancient. For instance, MFN clauses were well established as standard components in bilateral trade agreements by the mid-nineteenth century, at the latest.

The GATT specifically addresses environmental and public health regulation only in Article XX, which exempts several categories of national measures from the General Agreement. Particularly important in the fields of environmental protection and public health are two of these express exceptions: one in paragraph (b) for measures "necessary to protect human, animal or plant life or health" and another in paragraph (g) for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These "escape valves," however, have been interpreted rather restrictively. As

---

12 Id, Art XI.
13 Id, Art XX.
14 The relevant passage provides as follows:

**Article XX**

**General Exceptions**

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... (b) necessary to protect human, animal or plant life or health; [or]
... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

GATT, Art XX (cited in note 10).

15 See, for example, United States-Restrictions on Imports on Tuna, GATT BISD 39th
a result, environmental and public health regulation, until recently, has tended to receive generic, one-size-fits-all treatment through application of the same basic GATT disciplines that would govern any international trade situation; few, if any, special rules governing this particular class of governmentally established measures have set out either more rigorous or less restrictive requirements. More recently, as the overall water level on the sea of international trade has dropped through progress on other impediments such as tariffs, non-tariff barriers such as environmental regulations have been perceived as increasingly significant outcroppings that impede navigation. Consequently, momentum has been increasing for the development of trade-based disciplines to address regulatory measures in general and environmental requirements in particular.

A. Scientific Integrity of Regulation

To a large extent, an emphasis on the substantive scientific integrity of environmental regulation has coincided with both the domestic regulatory reform debate and the negotiation of major new trade agreements. As discussed above, the regulatory reform debate has recently focused on the scientific integrity of governmentally established standards and on the need for sound science in the regulatory process. Certain regulatory reform proposals, for example, would use risk assessment techniques as a screening device to rationalize priorities in risk regulation and, in particular, to ensure that governmental resources and authority are directed toward substantial risks as opposed to small or trivial ones. If anything, provisions in both the Uruguay Round agreements and NAFTA that require justifying food safety measures with “sound science” are more aggressive than what has generally been accepted in the domestic regulatory reform debate, judging by the failure of recent bills on this topic and by the overall paucity of such express requirements in existing environmental and public health legislation. Both these international


instruments require a risk assessment as a condition precedent to the validity of domestic food safety regulation.\(^{17}\)

The scientific validity of domestic environmental and public health regulations alleged to impede trade is now a front-burner public policy question. A festering trade dispute between the United States and the European Union ("EU") over hormone-treated beef, a dispute emblematic of the larger public policy concern, is the subject of two recent reports of WTO dispute settlement panels.\(^{18}\) The EU prohibits the use of six growth hormones in the breeding of cattle, proscribes the sale of beef treated with those hormones, and bans the importation of such meat. The United States, where those hormones are permitted, has strongly objected to the ban as a non-tariff barrier to trade unsupported by scientific evidence. The 1994 Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures,\(^{19}\) which was motivated in large measure by this dispute and which is designed to prevent the abuse of food safety measures as non-tariff barriers to trade, establishes new science-based disciplines for food safety measures.

The panels in the two beef hormone disputes found that the EU measures were inconsistent with the SPS agreement. Contrary to the expectations of the parties,\(^{20}\) the panel directed detailed scientific questions to six experts on the scientific issues raised by the disputes.\(^{21}\) The panel went on to weigh the merits

\(^{17}\) See note 16.


\(^{19}\) SPS Agreement (cited in note 16).

\(^{20}\) See United States—EC Measures Concerning Meat and Meat Products (Hormones) para 8.7 (cited in note 18).

\(^{21}\) See id § VI (panel's consultation with scientific experts, including experts' responses to written questions). The SPS agreement provides that national measures that conform to international standards, such as those established by the Codex Alimentarius Commission, are presumptively valid. SPS Agreement para 10 (cited in note 16). The Codex Alimentarius Commission was created in 1962 as a joint undertaking of the UN Food and Agriculture Organisation ("FAO") and the World Health Organization ("WHO"). The Commission, membership in which is open to all FAO and WHO member states, has a dual function: "protecting the health of the [sic] consumers and ensuring fair practices in the food trade." Statutes of the Codex Alimentarius Commission, art 1, para a, reprinted in Codex Alimentarius Commission, Procedural Manual 5 (Joint FAO/WHO Food Standards Programme 9th ed 1993). To this end, the Commission is specifically charged with adopting advisory multilateral "good practice" standards on such matters as the composition of food products, food additives, labeling, food processing techniques, and inspection of foodstuffs and processing facilities. See generally Lewis Rosman, Public Participation in International Pesticide Regulation: When the Codex Commission Decides,
of the scientific evidence offered by the EU and concluded that it was insufficient to justify the hormone ban. Significantly, the SPS Agreement does not articulate any notion of deference to the scientific findings of national regulatory authorities and the panel did not purport to find any such notion implicit in the agreement. To the contrary, the panel expressly examined and reviewed the evidence proffered by the EU as the scientific justification for the measure, concluding that the EU’s interpretations of the data represented minority views in the scientific community and therefore were unavailable as support for the ban.

Who Will Listen?, 12 Va Envir L J 329 (1993). After a lengthy and contentious debate, the Codex Commission, in 1995, adopted maximum residue limitations (MRLs), thus approving the use of two of the synthetic hormones at issue in this dispute, and concluded that no such limits were necessary for three of the hormones that occur naturally. See Foreign Agricultural Service, United States Department of Agriculture, Chronology of the European Union’s Hormone Ban (June 26, 1996). See also United States—EC Measures Concerning Meat and Meat Products (Hormones) para 8.67 (cited in note 18) (noting that Codex action on the five hormones was taken by a vote of 33 to 29, with 7 abstentions). Despite the Codex Commission’s involvement with the hormone issue in a manner that had legal significance in the outcome of the dispute, and notwithstanding the concerns of the EU, see id § 6, para 3, the panel nonetheless sought information from the Codex Commission secretariat and requested nominations of experts from the secretariat. Id paras 6-7.

The Uruguay Round SPS Agreement introduces the concept of a WTO member’s appropriate level of sanitary or phytosanitary protection, which is a social policy choice that is the unilateral prerogative of each WTO member state. SPS Agreement para 10 (cited in note 16). If a WTO member state determines, as the EU did in this case, that harmonized international standards such as Codex MRLs are not adequate to achieve its chosen level of protection, then that state may adopt measures more stringent than international standards so long as those measures are supported by “a scientific justification.” Id para 11. Instead of starting with the EU’s appropriate level of protection—identified by the EU as “zero risk” for hazards arising from ingestion of hormones administered for growth promotion—the panel commenced by examining and rejecting the scientific evidence justifying the ban, arguably turning the review contemplated by the SPS agreement on its head. Consequently, the panel concluded that the ban was not “based on” the scientific evidence as required by the SPS Agreement, id para 6, and therefore not an appropriate regulatory measure to be employed to achieve the EU’s stated policy goal. United States—EC Measures Concerning Meat and Meat Products (Hormones) para 8.156 (cited in note 18). The panel also found the “precautionary principle,” which asserts the need for policy action in cases of scientific uncertainty, to be inapplicable. Id paras 7.146-7.147. See generally David A. Wirth, The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?, 29 Ga L Rev 599 (1994) (discussing precautionary approaches).


The EU has appealed the panel decision to the WTO's Appellate Body.

Quantitative risk assessment is not a purely technical exercise; rather, it involves the application of policy preferences in the form of assumptions, extrapolation from animal data to humans and from high to low doses, management of incomplete data sets, and treatment of scientific uncertainties. Social policy choices are firmly embedded in much of the practice of risk assessment methodologies.\(^2\) A recent publication of the National Research Council of the National Academy of Sciences implies as much: it advocates abandoning the artificial division between risk assessment and risk management on which the SPS Agreement is based and replacing it with a more integrated concept of "risk characterization."\(^3\) Quantitative risk assessment can be useful as one of a number of regulatory tools, but it is susceptible of abuse if applied in an excessively rigorous manner.\(^4\) This appears to have been one of the lessons of the 104th Congress, which introduced relatively aggressive proposals to deploy quantitative risk assessment in an excessively harsh manner. These proposals were perceived as overreaching by industry and were ultimately rejected as public policy, albeit by a narrow margin.

Both the proposals for enhancing quantitative risk assessment domestically and the emphasis on scientific disciplines in these recent international trade agreements anticipate the need to determine scientific validity in a particular case, such as the U.S.-E.U. beef hormone dispute. The role of judicial review of the scientific basis for regulation, traditionally an area of great deference,\(^5\) has been of particular concern in the domestic regulatory


\(^4\) In a seminal case involving precisely this question, the United States Court of Appeals for the District of Columbia Circuit observed as follows:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.
reform colloquy. Internationally, the explicit risk assessment requirements in recent global trade agreements, particularly in the area of food safety, may be more consonant with an appropriate role for methodology than is apparent from the unadorned Uruguay Round and NAFTA texts. In response to questions about these requirements in the Uruguay Round SPS Agreement, the Executive Branch has explained:

It is clear that the requirement in the [SPS] Agreement that measures be based on scientific principles and not be maintained “without sufficient scientific evidence” would not authorize a dispute settlement panel to substitute its scientific judgment for that of the government maintaining the sanitary or phytosanitary measure. For example, by requiring that a measure be based on scientific principles (rather than, for instance, requiring that a measure be based on the “best science”) and not to be maintained without sufficient scientific evidence (rather than, for instance, requiring an examination of the “weight of the evidence”), the [SPS] Agreement recognizes the fact that scientific certainty is rare and many scientific determinations require a judgment among differing scientific views. The [SPS] Agreement preserves the ability of governments to make such judgments. 29

It would be difficult to imagine a different outcome as a matter of principle. Before a trade agreement dispute settlement panel—the international analogue of domestic judicial review—serious questions surround scientific determinations in an adversarial, adjudicatory context, not only by lay panelists but

---

29 Uruguay Round Agreements Act, Statement of Administrative Action, HR Doc No 103-316, 103d Cong, 2d Sess 656, 746 (1994), reprinted in 1994 USCCAN 4040, 4105. See also Office of the United States Trade Representative, Report on U.S. Food Safety and the Uruguay Round: Protecting Consumers and Promoting U.S. Export 5 (June 1994). Compare North American Free Trade Agreement Implementation Act, Statement of Administrative Action, HR Doc No 103-159, 103d Cong, 1st Sess 450, 542 (1993) (“[t]he question is . . . not whether the measure was based on the 'best' science or the 'preponderance' of science or whether there was conflicting science. The question is only whether the government maintaining the measure has a scientific basis for it.”
also by scientific experts. Both the GATT Uruguay Round texts and NAFTA anticipate creating bodies of technical experts to assist dispute settlement panels composed of laypersons in situations that raise scientific questions such as the beef hormone controversy. Determining the appropriate role of such bodies, however, raises more questions than it answers. For instance, it is difficult for a trade agreement dispute settlement panel to pose questions to scientists without engaging with the social policy-driven assumptions, hypotheses, and theories on which a risk assessment is based. The notion of deference by one scientist to another's defensible, but arguably incorrect, scientific determination is not necessarily well internalized among the scientific community. The composition of these expert groups is obviously crucial, but there is no requirement in the texts of the agreements that the members of such groups be broadly representative of the range of scientific thought on the questions posed. The very notion of "representativeness" in scientific disciplines, which involve the systematic consideration and analysis of competing falsifiable hypotheses, raises conceptual difficulties. Nor, as demonstrated by the rejection of the notion of "science courts" in the 1970s, are scientific "facts" of relevance to regulatory decisions that are hotly contested or at the frontiers of scientific inquiry necessarily amenable to "adjudication" by scientists through an adversarial process.

Instead, the scientific method more typically relies on peer review, a more conciliatory process with a sometimes protracted give-and-take among experts. Significantly, scientific peer review does not anticipate the sort of bipolar, "yes or no" result contemplated by an adjudicatory process. Instead, the peer review process is considerably more responsive to the inherent character of scientific inquiry—an ongoing search for knowledge, which by its

---

30 Significantly, the scientific advice sought by the WTO panel in the beef hormone disputes was undertaken on an ad hoc basis and not through the mechanism of an "expert review group," as expressly anticipated by the Uruguay Round. See Understanding on Rules and Procedures Governing the Settlement of Disputes para 13.2, 33 ILM 1226 (1994) (specifying that, "[w]ith respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group").

31 See, for example, United States—EC Measures Concerning Meat and Meat Products (Hormones) para 8.152 (cited in note 18) (noting that, according to scientific experts consulted by panel, science cannot exclude all possibility of adverse health effects and that therefore EU policy objective of "zero risk" is not based on risk assessment).

32 Wirth, 27 Cornell Int'l L J at 852 (cited in note 26).
very nature is always operating at new frontiers against a constantly shifting and evolving background.

Although better science is always preferable, it may not be possible to reduce meaningful scientific distinctions to legal tests applied in the essentially adjudicatory setting of a dispute settlement panel. And deploying science-based tests in the international equivalent of a proceeding for judicial review may be so fraught with peril that the potential chilling effect on legitimate domestic regulation will likely outweigh the benefits of increased market access. Most unfortunately, the panels in the WTO beef hormone disputes, which engaged in a highly intrusive review of the merits of the EU’s scientific evidence in a manner that would be well nigh unthinkable at the domestic level, appear to have appreciated none of these critical issues. A clarification from the WTO’s Appellate Body on the crucial points of standard of review and deference to the scientific determinations of national decision-makers would not only be most welcome; establishing a credible standard in this area is essential to the integrity of the SPS Agreement and, more generally, the actual and perceived legitimacy of science-based tests in trade agreements, a trend which will likely only intensify in the future.

B. Cost-Benefit Analysis

Economic efficiency, as measured for a specific regulatory measure through cost-benefit analysis, has also been a potent theme in the domestic regulatory reform debate. In the trade agreement context, this issue is analogous to the question of scientific integrity, with the difference that it raises the question of trade-related disciplines in the risk management phase of the regulatory process instead of risk assessment. Perhaps surprisingly, economic efficiency and cost-benefit analysis have had considerably less vigor as criteria imposed on national governments by international trade agreements than have tests of scientific validity.

There is no explicit language in GATT, the Uruguay Round texts, or NAFTA speaking to economic efficiency or a favorable balance of costs and benefits as conditions precedent under those agreements to the application of domestic regulatory measures.

---

33 See notes 20-24.
The closest example is the report of a dispute settlement panel convened under the auspices of the United States-Canada bilateral free trade agreement, a precursor to NAFTA. At issue were Canadian regulations requiring that all commercial harvests of roe herring and five species of salmon caught commercially in Canadian waters, including that intended for export from Canada, be off-loaded, or “landed,” in Canadian territory. The panel concluded that the “landing” requirement constituted an impermissible export restriction contrary to GATT, the relevant provisions of which are incorporated by reference into the bilateral agreement.

The panel inferred an implicit test under GATT that balances the costs and benefits of the challenged measure, taking into account the regulatory burdens to foreign commercial interests. According to the report, international trade agreement dispute settlement panels should assume that governments will act in a minimally rational economic manner, and those panels consequently may use a cost-benefit analysis as a criterion to reevaluate the desirability or utility of a disputed national regulatory requirement. Thus, the panel must determine “whether the government would have been prepared to adopt that measure if its own nationals had to bear the actual costs of the measure.” This aspect of the panel’s decision has been criticized as an “idealistic but dubious proposition” and as “a mode of analysis so inherently subjective” that it “leaves environmental regulations vulnerable to a broad array of challenges.”

The requirement at issue in the Canadian salmon and herring dispute is representative of a very large class of regulatory measures which, while nondiscriminatory on their face, can nonetheless have disparate impacts on domestic and foreign interests when applied. Certainly, one can appreciate the panel’s sensitivity to the problem of shifting regulatory burdens to foreigners who

---

36 Id.
37 Id paras 7.08-7.10.
38 Id para 7.11.
39 Canada’s Landing Requirement para 7.09 (cited in note 35).
are not represented in the political process that imposed those burdens. But a cost-benefit test of the sort articulated by this panel has been expressly rejected in much environmental regulation, including a great deal of federal legislation in the United States, whose legitimacy from a trade perspective has never been challenged. Taken to its logical conclusion, the panel’s approach could overlay a cost-benefit criterion on all environmental standards with incidental trade effects, a result that would clearly be an excessively sweeping and blunt-edged instrument. At present, an economic efficiency or cost-benefit criterion, in contrast to an emphasis on scientific validity, appears to have little constituency in the international trade regime. Moreover, methodological questions about the validity of cost-benefit analysis, particularly about the measurement and quantification of environmental or public health benefits, are only exacerbated in international multilateral organizations such as the WTO that have limited experience with such matters.

---


42 International trade agreements and dispute settlement panels have articulated, variously, tests that turn on the least inconsistency with GATT or that require the choice of the least trade restrictive national measure. See, for example, Agreement on Technical Barriers to Trade, Apr 15, 1994, Uruguay Round Final Act, Annex 1A, Legal Instruments—Results of the Uruguay Round vol 27, 22051 (“TBT Agreement”) (requiring that “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective” and specifying that “[t]echnical regulations shall not be maintained . . . if . . . changed circumstances or objectives can be addressed in a less trade-restrictive manner”); United States—Standards for Reformulated and Conventional Gasoline, 35 ILM 603, 611 (1996) (report of WTO Appellate Body) (identification of failure “to explore adequately means . . . of mitigating the administrative problems [justifying disparate treatment of domestic and foreign refiners] and to count the costs for foreign refiners that would result” as basis for conclusion of GATT-inconsistency of measure); Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, paras 74-81, GATT BISD 37th Supp 200 (1991), 30 ILM 1122, 1138 (1991) (stating that import restrictions on cigarettes for public health reasons not justified by Article XX(b) in light of availability of GATT-consistent or less GATT-inconsistent measures). While of significant concern in the context of environmental, public health, and safety regulations, these tests are different in nature and intent from an economic efficiency criterion. One possible entry point for a cost-benefit test in the case of environmental regulation, as of this writing largely unexplored in GATT/WTO jurisprudence, would be the requirement in the ‘chapeau’ of GATT Article XX making the exceptions in that provision unavailable in cases of “a disguised restriction on international trade.” GATT, Art XX (cited in note 10). Compare Daniel C. Esty, Greening the GATT 48 n 15 (Institute for International Economics 1994) (“A ‘least GATT-inconsistent’ or ‘least trade-restrictive’ test could work as an efficiency precept, forcing attention to the means chosen to pursue environmental goals, without threatening the goals chosen. Unfortunately, the GATT jurisprudence has developed without regard to this ends-means distinction . . . ”).

43 The relationship between GATT nondiscrimination requirements and cost-benefit analysis has been considered in some detail as a generic matter by one of the panelists in
II. DOMESTIC GOVERNANCE

In addition to substantive questions, trade agreements also engage issues of governance concerning the manner in which such agreements affect domestic legal processes. In the American dualist system, the international and domestic regimes are conceptually and legally distinct. Accommodating one to the other can invite tradeoffs in the integrity of one or the other, or both. Among the principal concerns currently raised by the newly established WTO are (1) the role of voluntary international standard-setting processes; (2) the integrity of legislative processes for implementing trade agreements; (3) appropriate administrative procedures for implementing adverse reports of dispute settlement panels; (4) the role of judicial review of administrative actions that respond to adverse dispute settlement panel reports; and (5) the distribution of authority between federal authorities and subsidiary governmental units in our federal system. All of these subject matter areas entail serious policy questions concerning the potential of domestic implementation of international trade agreements to disrupt domestic decision making processes, and a number raise analogous legal questions as well. Perhaps not coincidentally, all of them also involve a considerable augmentation of Executive Branch power vis-à-vis the Congress, the federal courts, and the states.

the Canadian salmon and herring dispute. Daniel A. Farber and Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 Vand L Rev 1401, 1431-40 (1994). The authors note that, with respect to the large category of non-facially discriminatory regulatory measures, we have no "quick fix" to propose for the hard cases. We somewhat gingerly attempted that task in an earlier version of this article, but are now convinced that the effort was misplaced. The general problem we are addressing has resisted the best efforts of the Supreme Court (for over 150 years), GATT tribunals, international negotiators, and a host of talented legal scholars. The reason, we believe, is that in some ultimate sense the problem is unsolvable. Taken to their logical conclusion, either free trade or local autonomy could virtually eliminate the other . . .


"For another view of this question, see Paul B. Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 Nw J Intl L & Bus 681 (1996-97).

For an interesting recent treatment with considerable relevance to the trade agreement setting, see Johnathan Turley, Dualistic Values in the Age of International Legisprudence, 44 Hastings L Rev 185 (1993).
A. Voluntary International Standard-Setting Processes

A key emerging issue in negotiating and implementing international trade agreements concerns the role of voluntary international standard-setting bodies, of which the quintessential example is the International Organization for Standardization ("ISO"). ISO, established after World War II around the same time as the GATT, is an international federation of standardizing bodies from 118 countries. ISO is not an intergovernmental organization like the WTO, established by multilateral agreement with members that are states represented by governmental authorities. Some countries are represented in ISO by national standardizing bodies that are governmental entities. The U.S. member of ISO, however, is the American National Standards Institute ("ANSI"), a private entity. For the United States, the primary, although not sole, participants in ISO processes are representatives of private industry. ISO work product consists of voluntary standards. In contrast to some of the output of intergovernmental organizations, ISO standards are voluntary, are addressed directly to private parties, and are not binding under international law. At least for the United States, the private, voluntary character of the international standards adopted by ISO mirrors similar domestic undertakings.46

Although ISO standards are voluntary, they often have considerable influence. Probably the best-known ISO standards are those established for film speeds. The public obviously benefits from near-universal access to film with standardized speeds of 100, 200, or 400 ASA that is compatible with essentially all cameras. ISO recently adopted its 14000 series of standards, which emphasize a process-oriented approach to environmental management designed to "help an organization to establish and meet its own policy goals through objectives and targets, organizational structures and accountability, management controls and review functions, all with top management oversight."47 Although

"[t]he focus on 'management' distinguishes these standards from 'performance' standards"44 of the sort typically found in federal law, a potential for overlap clearly exists. Ecolabelling and life-cycle assessment are also among the topics addressed in the ISO 14000 series of standards.45

The municipal legal and policy implications of ISO standards inevitably vary from country to country. In the United States, federal officials are encouraged to participate in establishing voluntary consensus standards, which may then become appropriate candidates for binding regulatory requirements.60 At least under certain circumstances, such private efforts have many advantages. The cross-fertilization and coordination with governmental policy that results from participation in these voluntary undertakings by federal officials is most likely beneficial, and private voluntary standards may occasionally be appropriate alternatives to mandatory, governmental regulation. For example, a voluntary consensus process may generate better data than the regulatory process, may be an effective way to educate regulatory officials, and may obviate the need for regulatory intervention altogether.

---


44 U.S. Environmental Protection Agency, ISO 14000 (cited in note 47).

45 See generally id.

60 See, for example, National Technology Transfer and Advancement Act of 1995 § 12(d), Pub L No 104-113, 110 Stat 775, 783 (specifying that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments" and that "Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall... participate with such bodies in the development of technical standards"); Office of Management and Budget Circular No A-119, 58 Fed Reg 57643, 57645 (Oct 26, 1993) (declaring "the policy of the Federal Government in its procurement and regulatory activities to: a. Rely on voluntary standards, both domestic and international, whenever feasible and consistent with the law and regulation pursuant to law; [and] b. Participate in voluntary standards bodies when such participation is in the public interest and is compatible with agencies' missions, authorities, priorities, and budget resources."); Office of Management and Budget, Federal Use of Standards, 61 Fed Reg 68312 (Dec 27, 1996) (proposed revisions to OMB Circular A-119); Recommendation 78-4: Federal Agency Interaction with Private Standard-Setting Organization in Health and Safety Regulation, in Administrative Conference of the United States, Recommendations and Reports 1978 13 (1978); U.S. Environmental Protection Agency, Role of Voluntary Standards (EPA Standards Network Fact Sheet, May 1995); Hamilton, 56 Tex L Rev 1329 (cited in note 46).
But it is equally clear that a federal agency must abide by the statutory standards that govern its activities. Whatever their policy merits, domestic ISO standards are private, voluntary undertakings. Accordingly, federal agencies may use governmental standards adopted by a non-governmental entity such as ISO, regardless of the respect accorded such a body, only as hortatory guidance to be reevaluated in light of applicable statutory standards.51 This result is self-evident, since ISO, whose members represent affected industries, does not necessarily represent the broader public interest. Indeed, one can imagine a scenario in which the array of interests that shape an industry-dominated, voluntary standard-setting processes are in direct conflict with the well being of the public both here and abroad.

The benefits of voluntary standards for facilitating international trade are readily apparent. As a result, one of the major Uruguay Round instruments, the new Agreement on Technical Barriers to Trade ("TBT Agreement"),52 expressly references voluntary international standards. The TBT Agreement establishes that "standards," as the term is used in that text, may include voluntary guidelines adopted by an "international standardizing body," a term that appears to include ISO.53 Although standards adopted by ISO are non-binding instruments addressed directly to private entities, the TBT Agreement goes on to specify that governmentally established requirements, known in the agreement as "technical regulations," shall be based on those stan-

---

51 See, for example, 58 Fed Reg at 57646-47 (cited in note 50) (explaining that the policy should not be "construed to commit any agency to the use of a voluntary standard which, after due consideration, is, in its opinion, inadequate, does not meet statutory criteria, or is otherwise inappropriate"); 61 Fed Reg 68312 (cited in note 50) (proposing revisions to OMB Circular A-119, para 6, clarifying that that proposal "does not preempt or restrict agencies’ authorities and responsibilities to make regulatory decisions authorized by statute. Such regulatory authorities and responsibilities include determining the level of acceptable risk; setting the level of protection; and balancing risk, cost, and availability of technology in establishing regulatory standards. Agencies retain discretion to decline to use existing voluntary consensus standards if the agency determines that such standards are inconsistent with applicable law or otherwise impractical"); Recommendation 78-4 para 6(b) (cited in note 50) (necessity to consider "[t]he nature of the agency’s statutory mandate to develop health or safety regulations and the consistency of the provisions of the voluntary consensus standard with that mandate").

52 TBT Agreement (cited in note 42). The TBT Agreement includes as an annex a Code of Good Practice for the Preparation, Adoption and Application of Standards, which similarly refers to international standards. The Code of Good Practice, referenced in the text of the TBT Agreement with respect to the obligations of WTO member states, is also open for acceptance by national and regional standardizing bodies such as ANSI.

53 Id para 1.1.
Governmental regulations that conform to the standards adopted by such an international standardizing body are entitled to a rebuttable presumption of legitimacy. A wide range of regulatory requirements with environmental or public health implications, including specifications for consumer products and children's toys, appliance efficiency criteria, and vehicle fuel efficiency standards, are potentially covered by the Uruguay Round TBT Agreement.

Thanks to the structure of the TBT Agreement, those national regulatory requirements that are not based on the output, when it exists, of such a body are therefore particularly vulnerable to challenge as unnecessary obstacles to international trade. And the sorts of governmental requirements most likely to impede international trade are those that are more rigorous than the international requirements and which may stem from a least-common-denominator consensus in an industry-dominated forum. As a result, trade agreements can transform the expectations of what is, at least so far as the United States is concerned, a private standardizing organization into an outer limit of rigor—a ceiling—for public domestic health and environmental regulations. Like all international trade agreements except one, the Uruguay Round TBT Agreement is asymmetric in that it establishes no analogous minimum standards of performance.

At first blush, the requirements of the Uruguay Round TBT Agreement and of other trade agreements may appear similar to those in domestic law and policy, such as OMB Circular A-119, which promotes reliance on ISO standards to the extent consistent with statutory mandates. In reality, however, the two sit-

---

54 Id para 2.4.
56 See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994, Uruguay Round Final Act, Annex IC, Legal Instruments—Results of the Uruguay Round vol 31, 33 ILM 1197 (1994) (establishing minimum standards of performance for national measures on intellectual property). See also NAFTA, Art 1114 (cited in note 55) (establishing that “it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures” but exempting provision from ordinary trade agreement dispute settlement mechanisms).
57 58 Fed Reg 57643 (cited in note 50).
uations are very different. While authorizing consistency where possible with ISO standards as non-binding advisory guidelines, the OMB Circular, as it must, reasserts the primacy of congressionally enacted legislative requirements. In a domestic proceeding for judicial review, a court as a matter of principle should apply the statutory test without regard to a privately agreed standard in a forum such as ISO. By contrast, these recent trade agreements establish the private standard as a reference point and require public authorities to justify departures from those privately agreed expectations, especially departures tending toward more rigorous requirements. This situation in effect bootstraps a non-governmental standard into one with binding significance for governmentally established regulatory requirements, at least as a matter of international law. Departures from the benchmark standard by domestic regulatory authorities can then be challenged by foreign governments through the trade agreement dispute settlement process, among the more efficacious known in the international legal system. In other words, when non-binding ISO standards operate through the TBT Agreement, they may acquire international legal significance, may be transformed from minimum standards of performance into regulatory ceilings from which governments must justify departure in terms of greater rigor, and, at least from the U.S. point of view, may metamorphose from strictly private, non-governmental instruments into standards with significant public law implications.

The domestic impact within the United States may be considerable. Adverse reports of trade agreement dispute settlement panels, like the agreements themselves, are binding on the United States as a matter of international law. While such reports do not alter domestic statutory or regulatory standards of their own force, they may have considerable legal impact in domestic administrative and judicial proceedings, as discussed in Parts C and D below. Moreover, through their implementing legislation, these trade agreements are treated as binding domestic law that may preempt state law.

“Ecolabelling” is a concrete example of the potentially disruptive effect of the ISO standard-setting process. Ecolabelling schemes are designed to help consumers make environmentally preferable product choices by comparing the relative environmental impact of competing products. Foreign ecolabels have been the
subject of criticism from U.S. industry, which has asserted in particular that a governmentally sponsored, voluntary program currently being implemented by the European Union discriminates against U.S. exports. It is unclear whether the Uruguay Round TBT Agreement applies to all or even most ecolabelling programs or, even if such schemes were to fall within its purview, whether that agreement effectively addresses the potential for protectionist abuse. Accordingly, U.S. industry provided the Executive Branch with a series of stringent new disciplines to present to the WTO. This proposal would have circumscribed not just the activities of governments and private parties in foreign countries, but also in the United States, including such governmental programs as the Environmental Protection Agency’s voluntary Energy Star logo for identifying energy-efficient personal computers and private certification schemes such as the non-profit Green Seal. The Executive Branch declined to advocate these new requirements, which would have articulated a rigorous standard of scientific proof in an area that involves, like risk assessment, a significant measure of policy judgment. Nonetheless, a similar requirement that ecolabels be based on "scientific methodology that is sufficiently thorough and comprehensive to support the claim and that produces results that are accurate and reproducible" is now circulating as part of ISO’s ecolabelling principles. Operating through the TBT Agreement as standards adopted by an international standardizing body, ecolabelling principles adopted in ISO may very well require states to justify departures from those standards even though no consensus has been reached on the need for similar requirements among the member states of the intergovernmental WTO.

Ecolabelling is but one example of a phenomenon that may have broader ramifications. While the long-term implications are not yet fully apparent, concerns about the effect of ISO standards on American public law are not merely theoretical. The interaction between ISO standards and the Uruguay Round TBT Agree-

---

59 See, for example, Ben Wildavsky, Sticker Shock, Natl J 533 (Mar 9, 1996).
ment, as demonstrated by recent developments on ecolabelling, may turn out to be highly corrosive for domestic governance.

B. Legislative Procedures

The status of post-World War II trade agreements in domestic law is somewhat unusual. Congress has the exclusive authority under Article I, Section 8 of the Constitution to regulate foreign trade. However, under Article II, Section 2, the President has the exclusive power to negotiate international agreements with foreign sovereigns. Presumably to dovetail these two functions, Congress, in recent decades, has authorized the President to negotiate trade agreements by prior statute, within certain broad parameters, on the condition that those agreements do not enter into force until given effect by Congress through subsequent implementing legislation. Some have suggested that this "Congressional-Executive" process illegally bypasses the constitutional requirement for the Senate to give its advice and consent to ratification of treaties by a two-thirds majority, but this appears to be a minority view.

One important feature of the domestic process is that the implementing legislation for the GATT Uruguay Round, NAFTA, and other recent trade agreements is adopted under procedures commonly known as the "fast track." Under this process, once the implementing legislation is introduced, no amendments are permitted, contrary to ordinary procedure in Congress. The no-amendment rule is designed to prevent Congress from effectively renegotiating or undermining the agreement by second-guessing the President's decisions in the negotiation on a case-by-case, individual basis. Nonetheless, there is a process that duplicates the normal legislative process to a certain extent. Under the fast track procedures, the text of the trade agreement proper is publicly available before congressional consideration of the domestic legislation for implementing that international instrument. Congress can, and in the case of the Uruguay Round and NAFTA did, hold public hearings on the agreements and, by implication, the legislation to implement it as a domestic legal matter. Mem-

---

64 See Letter from Laurence H. Tribe, Professor of Law, Harvard University, to Senator Robert Byrd (July 19, 1994), reprinted in Inside US Trade 1 (July 22, 1994) (arguing that "the legal regime put in place by the Uruguay Round represents a structural rearrangement of state-federal relations of the sort that requires ratification by two thirds of the Senate as a Treaty").
65 19 USC §§ 2191(d), 2903 (1994).
bers of Congress had confidential access to the draft bills and even participated in closed "non-markups" and "non-conferences" before the bills were formally introduced.

Even so, the domestic implementing procedures have exacerbated, rather than improved, the lack of public access to the trade agreement negotiation process discussed in Part III below. The "non-markup" and "non-conference" processes are strictly closed to the public and in practice quite impenetrable. Certain congressional committees have preferential access to this process. In the case of NAFTA, the voluminous implementing legislation, which contained a large number of modifications to domestic U.S. law, was formally released to the public less than two weeks before the House of Representatives voted on the bill. Even then, this documentation was not readily available until somewhat later. The Executive Branch released the final version of an environmental analysis of NAFTA to the public a scant four days before the House vote.

Some have defended the fast track process as duplicating all the essential elements of our democratic procedures. Whether or not that might be true in some cases, NAFTA certainly showed how the fast track approach can significantly disrupt the legislative process. The fast track process as a whole and the no-amendment rule in particular are expressly designed to affect numerous laws simultaneously and to invite a particularly unprincipled sort of horse-trading among issues such as the safety of imported food and intellectual property that would rarely be so closely linked in a typical legislative session. The implementing legislation for the Uruguay Round made significant and controversial changes to the terms of patents. The same statute relaxed the test for the inspection by foreign states of poultry imported into the United States, from requiring "the same" standards as apply domestically to allowing standards that produce "sanitary protection equivalent to that achieved under United States standards," and made similar changes that arguably will attenuate the rigor of inspection of foreign meat intended for U.S. consumers. These amendments to the patent and food inspection laws, along with any number of other components of the implementing legislation,

---

68 Id § 431(k) at 4969-70, amending 21 USC § 466 (1994).
69 Id § 431(l) at 4970, amending 21 USC § 620(e) (1994).
INTERNATIONAL TRADE AGREEMENTS

represented major public policy initiatives that ought to have received a full domestic airing. Instead, these proposals were bundled in a trade agreement negotiation, which is extremely difficult for members of the public to penetrate on both the domestic and international levels, as described in Part III below. Moreover, the shape of the legislative debate has already been predetermined well in advance by the Executive Branch, during the negotiation of the trade agreement proper.

The fast track no-amendment rule, instead of ameliorating these impediments to full participation through an open process, exacerbates those obstacles for those public policy matters that, by happenstance or design, get caught up in the trade agreement negotiation process. The no-amendment rule would thus seem to be least—and not most—appropriate to situations involving omnibus legislation adopted to implement a trade agreement.

C. Administrative Procedures

Dispute settlement under the auspices of an international trade agreement poses unique difficulties in interweaving the results of an international adjudication and domestic regulatory procedures. A recent WTO panel proceeding on reformulated gasoline in the WTO—the first in that body and, not coincidentally, yet another major juncture in the trade-and-environment debate—presents the general case in microcosm.

Pursuant to the Clean Air Act, the Environmental Protection Agency ("EPA"), in late 1993, promulgated rules concerning "reformulated" gasoline, which reduces ground-level ozone in highly polluted areas. The rules specify the composition of reformulated gasoline and require reductions in the emissions of certain pollutants. The EPA's regulation requires domestic refiners that were in operation for at least six months in 1990 to establish an individual baseline, reflecting that refiner's actual historical performance, for determining compliance with the regulatory requirements. Domestic refiners in effect may choose one of three specified methods of calculation set out in the regulations. Other entities, including foreign refiners, are assigned a baseline specified in the Act. At the same time, the statute and regulations require that conventional gasoline sold in the rest of

---

70 42 USC § 7545(k) (1994).
71 Environmental Protection Agency, Regulation of Fuels and Fuel Additives; Standards for Reformulated and Conventional Gasoline, 59 Fed Reg 7715, 7789 (Feb 16, 1994).
the country remain as clean as it was in 1990. Similar to the situation for reformulated gasoline, in cases in which a refiner's historical baseline cannot be calculated for conventional gasoline, a default statutory baseline is assigned as a benchmark against which subsequent performance is measured. While the different methods of calculating baselines for reformulated gasoline expire at the beginning of 1998, differences in the methodology for calculating baselines for conventional gasoline will persist thereafter.

The Venezuelan national oil company, Petroleos de Venezuela, S.A. ("PDVSA"), protested that the EPA rules discriminate against imported gasoline in contravention of the GATT. Apparently in response, the EPA, in May 1994, published a proposed amendment to its reformulated gasoline regulations to address these complaints. In an appropriations measure, however, Congress prohibited the EPA from expending funds to finalize the proposed rule. The subsequent challenge by Brazil and Venezuela to the merits of the existing reformulated and conventional gasoline regulations was consequently the subject of the first dispute settlement panel established under the auspices of the WTO. Both the dispute settlement panel and the WTO's Appellate Body ruled against the United States. After the release of the WTO Appellate Body's report, the EPA published a notice requesting that the public identify options for domestic compliance with that determination and supply data concerning the way various alternatives will affect the environment and public health. The Agency then promulgated proposed and final rules revising the requirements for imported gasoline in a manner intended to implement the WTO ruling.

This situation illustrates the difficulties inherent in resolving international trade disputes through the regulatory process even

---

77 62 Fed Reg 24776 (May 6, 1997).
in apparently simple cases. Certain instrumentalities of the United States Government, and in particular the Office of the United States Trade Representative, appear to have been engaged in ongoing discussions with entities of the Government of Venezuela concerning subsequent aspects of the resolution of this dispute, presumably including, of necessity, the outcome of the regulatory process underway at the EPA.\(^7\)

As a practical matter, ongoing negotiations with the Government of Venezuela make sense. Factoring the Venezuelans' needs and preferences into a revision of the regulatory requirements could have a beneficial effect on foreign relations between the United States and Venezuela and could avoid needlessly reinvigorating the trade dispute through a regulatory amendment that is not responsive to the foreign government's interests. From the point of view of GATT/WTO law and jurisprudence, ongoing consultations also have much to recommend them. The trade agreement dispute settlement process in principle is intended to facilitate mediation or conciliation of trade disputes, and dispute settlement panels are not wholly analogous to domestic courts acting in a strictly adjudicatory capacity. To that end, Article XXII(1) of GATT, which is a binding international legal obligation of the United States, expressly specifies that each WTO member "shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another [WTO member] with respect to any matter affecting the operation of this Agreement."\(^8\)

At the same time, there are entirely legitimate concerns about the way such consultations might distort the regulatory process. The United States and the Government of Venezuela are parties to a formal dispute in the WTO. Subsequent regulatory

---

\(^7\) See, for example, Richard W. Stevenson, U.S. to Honor Trade Ruling Against It on Foreign Fuel, NY Times D4 (June 29, 1996); US, Venezuela Agree to Phase Out Reformulated Gas Rules Over 15 Months, Intl Trade Daily (BNA) (Dec 4, 1996) (reporting in discussions between USTR and entities of Venezuelan government). So far as can be determined from the dockets for both rulemakings, initiated by notices of proposed rulemaking in 1994 and 1997 respectively, relevant conversations between EPA employees and Venezuelan governmental authorities appear in the record. It is by no means clear, however, that oral communications between staffers of other agencies, including in particular USTR, and Venezuelan authorities were similarly docketed. See note 88 (discussing docketing requirements for "conduit" communications transmitted via other agencies).

\(^8\) General Agreement on Tarriffs and Trade, Oct 30, 1947, Art XXII, 55 UNTS 188 (1950).
actions, as is made clear by the EPA’s Federal Register notices, were intended to serve as vehicles for resolving this intergovernmental dispute. Absent objective evidence to the contrary, one should assume that such discussions have the adversarial qualities characteristic of “settlement” negotiations in general. In such a situation, back-channel negotiations with foreign governments might well subvert the integrity of the notice-and-comment rulemaking process and could serve as an invitation to compromise statutory standards. WTO reports have no binding force under domestic law. For federal authorities to determine the outcome of a rulemaking that has yet to take place or that is underway in the context of settlement negotiations with a foreign government would be inappropriate, if not illegal. The House Committee on Energy and Commerce, which held hearings on this matter, articulated precisely this fear by observing that “the State Department had made commitments regarding the rule to the Venezuelans which made the public participation requirements of the [Clean Air Act] ineffective.”

In situations such as this one in which regulatory decisions are intended to implement outcomes in trade agreement dispute settlement reports adverse to the United States, communications with the complainant government may constitute ex parte contacts. While the Administrative Procedure Act prohibits such ex parte communications in formal adjudications and formal rulemakings, it does not speak to ex parte contacts in informal rulemakings. Neither does Section 307 of the Clean Air Act, the provision establishing rulemaking procedures that apply to the reformulated gasoline regulations. But perhaps not so fortuitously, the leading case on ex parte contacts in an informal

---


82 See, for example, Statement of Ambassador Mickey Kantor, United States Trade Representative (Jan 18, 1996) (responding to initial WTO panel report on reformulated and conventional gasoline, noting that “WTO panel reports have no force under U.S. Law. In particular, federal agencies are not bound by any finding or recommendations included in WTO panel reports, and such reports do not provide legal authority for federal agencies to change their regulations or procedures”).


84 Administrative Procedure Act, 5 USC § 551(14) (defining “ex parte communication” as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given”).
rulemaking setting, *Sierra Club v Costle*, arose under Section 307. In that case, the United States Court of Appeals for the District of Columbia Circuit, reaffirming earlier precedents, noted that ex parte contacts are prohibited in an informal rulemaking involving "conflicting private claims to a valuable privilege." This constraint is of constitutional dimension, originating in the due process clause. In other informal rulemakings that are less adjudicatory and more policy-oriented, ex parte contacts are permitted but must be docketed in summary form if they are of "central relevance" to the administrative proceeding.

Some aspects of the reformulated gasoline situation may be controlled by the technical parameters articulated by earlier precedent, such as *Sierra Club v Costle*. The policy setting, however, appears to be a case of first impression that is, moreover, highly likely to recur as regulatory actions become the subject matter of trade agreement challenges. Administrative actions taken in such settings will necessarily be in response to a formal, intergovernmental dispute resolved through a quasi-adjudicatory, third-party mechanism that the United States has already lost. Although formally cast as a dispute between states, such controversies can have significant impacts on private parties and strong commercial overtones. Discussions with representatives of the complainant government will very likely have the character of settlement negotiations between parties to an adversarial, adjudicatory proceeding. While the WTO's adverse panel and Appellate Body reports have no binding legal character of their own force domestically, they can catalyze a realignment of domestic interests, generate considerable policy pressure, and give rise to rights

---

657 F2d 298 (DC Cir 1981).

66 Id at 400, quoting *Sangamon Valley Television Corp. v United States*, 269 F2d 221, 224 (DC Cir 1959).

67 Id at 402.

68 Id. Existing precedent is less than comprehensive on some key questions that may arise in this situation. For example, the court in *Sierra Club v Costle* did not reach the question of the need to document oral interagency communications other than with the President, see id at 404-09, or "conduit" communications in which Executive Branch officials transmit the views of private parties, see id at 405 n 520, both of which are likely to be relevant in this context. In the trade agreement situation, the uncertain state of the law as set out in *Sierra Club v Costle* may well have perverse effect. The docketing requirement could constrain the capacity of the agency whose regulation was challenged, the EPA in the case of the reformulated gasoline rule, from obtaining useful information. At the same time, other agencies, especially those engaged in the conduct of international relations such as the State Department and USTR, may well have unfettered license to communicate directly with the complainant government, potentially increasing the leverage of those agencies in influencing the outcome of any subsequent regulatory proceeding.
and responsibilities in the international legal system. Administrative actions taken in such situations are thus likely to fall into neither of the categories articulated in Sierra Club v Costle: either "conflicting private claims to a valuable privilege," on the one hand, or generic policymaking, on the other.\textsuperscript{3} Although rulemakings undertaken to comply with the rulings of domestic courts are not uncommon, administrative actions in response to an adverse trade agreement panel report are unusual, if not unprecedented, in the health and environmental field as a response to an international third party dispute settlement process whose action has no domestic legal force. Such a situation may call for particular sensitivity to the need to preserve the integrity of domestic administrative procedures in a setting that, of necessity, also has international overtones.

D. Judicial Review

As in the case of administrative proceedings, adverse trade agreement dispute settlement panel reports challenge the integrity of judicial review. It is well established that adverse reports of WTO and NAFTA dispute settlement panels cannot repeal federal statutes.\textsuperscript{4} Statutory law, however, is but one component of the regulatory process. Most federal environmental statutes require subsequent implementation through administrative rulemaking or other Executive Branch action. In this realm of Executive Branch prerogative, there may be little or nothing to keep the Executive from unilaterally relaxing a domestic standard in response to an adverse trade agreement dispute settlement panel report such as that on reformulated gasoline discussed in Part II.C. And because of the "negative" character of trade agreements, the change will always reduce the rigor of domestic regulatory requirements.

In such a case, the courts and the institution of judicial review may provide the only meaningful remedy to assure that the Executive Branch satisfies both substantive and procedural domestic statutory criteria. However, in federal court a controversy like the reformulated gasoline rule described in the previous Part appears not only as an ordinary regulation in a garden-variety proceeding for judicial review, but also as a foreign relations

\textsuperscript{3} 657 F2d at 402.

\textsuperscript{4} Compare note 93 (discussing domestic legal force of adverse reports of trade agreement dispute settlement panels).
issue. After an earlier, adverse panel ruling in the tuna dolphin controversy, discussed in greater detail in Part III below, the Executive Branch did not hesitate to emphasize the potential harm to foreign relations, notwithstanding the lack of legal force to the earlier determination, if the court were to rule against the government on a question of statutory interpretation.\textsuperscript{91} It is axiomatic that the courts are much more receptive to such appeals from the Executive Branch in a foreign relations setting than in a domestic context.\textsuperscript{92} Such arguments can create a serious dilemma for some judges, who can be understandably wary of taking actions that by judicial fiat will preclude the other branches of government from fulfilling the international legal commitments of the United States.\textsuperscript{93}


While the [Executive Branch] did not argue that the court was legally bound by the Panel's decision in interpreting the intermediary embargo nation provisions of the [U.S. Marine Mammal Protection Act], the government did go to great lengths to make the court aware of the Panel's decision. Implicit in this effort to present the court with the Panel's decision was the notion that the court should be aware of, and consider in its decision, the effects of its decision on foreign trade relations. The United States pointed to the Panel's decision as evidence of the substantial friction that could result from a more stringent reading of the intermediary nations embargo provisions of the MMPA.

\textsuperscript{92} See, for example, Louis Henkin, \textit{Constitutionalism, Democracy, and Foreign Affairs} 71 (Columbia 1990) (noting "sometimes extravagant judicial interpretations of statutes in order to support a conclusion that a questionable executive act was done by authority of Congress"); Thomas M. Franck, \textit{Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?} (Princeton 1992).

\textsuperscript{93} This situation in some ways is analogous to that of so-called "sole" executive agreements concluded with foreign states by the President without Senate advice and consent to ratification, as specified in Article II, Section 2 of the Constitution, or other explicit congressional authorization. Executive agreements that do not have clear legal authority, either in statute or a treaty ratified after Senate advice and consent, have an uncertain legal force. See \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 115 (1987). Although possible as a matter of principle, the number of instances in which courts have invalidated executive agreements as inconsistent with statutory law is very small. See, for example, \textit{United States v Guy W. Capps, Inc.}, 204 F2d 655 (4th Cir 1953), aff'd on other grounds, 348 US 296 (1955) (invalidating executive agreement as inconsistent with statute); \textit{Swearingen v United States}, 565 F Supp 1019 (D Colo 1983) (same). The situation with respect to trade agreement dispute settlement panel reports, however, is quite different from that pertaining to executive agreements. For one, the domestic legal status of such reports is much more clearly settled than that of executive agreements. For another, most international trade agreements anticipate the payment of compensation as an alternative means of delivering on the obligations in those agreements if the offending measure cannot be removed. See, for example, \textit{Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr 15, 1994, Art 22, Uruguay Round Final Act, Annex 2, Legal Instruments—Results of the Uruguay Round vol 31, 33 ILM 1226 (1994)} (Uruguay Round instrument addressing compensation and sus-
An earlier series of judicial proceedings clearly demonstrates the potential for difficulties when questions of statutory interpretation and the integrity of agency regulatory process appear in a foreign relations context. In the mid-1980s, the EPA, acting on evidence that the fumigant ethylene dibromide ("EDB") causes cancer, genetic mutations, and adverse reproductive effects in human beings, banned that pesticide for use on domestic produce. In contrast, in response to assertions from the Department of State that the ban would damage the economies of friendly exporting countries, the EPA promulgated a regulation or "tolerance" that continued to allow residues of 30 parts per billion ("ppb") of EDB in imported mangoes. The United States Court of Appeals for the District of Columbia Circuit set aside the tolerance, concluding that, because the EPA was required by statute to base pesticide residue limitations on health considerations, the agency's reliance on foreign affairs concerns alone was illegal.94

On remand, the EPA reaffirmed the residue limitation for imported mangoes, but came up with new justifications for that tolerance.95 The Agency concluded that the special exemption was warranted by ongoing cooperative efforts with food-exporting nations to assure that fruit and vegetables enter the United States free of disease, of pests such as the Mediterranean fruitfly, and of unsafe levels of pesticides.96 Moreover, mango-producing nations were channeling export revenues into the search for alternatives to EDB. Accordingly, the EPA concluded that revoking the EDB tolerance and prohibiting the importation of contaminated mangoes into the United States would pose greater risks to the food supply than continuing to allow the entry of the pes-

94 National Coalition Against the Misuse of Pesticides v Thomas, 809 F2d 875, 883 (DC Cir 1987).
95 National Coalition Against the Misuse of Pesticides v Thomas, 815 F2d 1579, 1582 (DC Cir 1987).
96 Id at 1581.
To put it kindly, this reasoning is counterintuitive. Nonetheless, after the EPA provided assurances that the standard for imported mangoes was only temporary, the Court of Appeals accepted this rationalization and approved the very same tolerance that it had previously set aside as a violation of the statutory standard. Although the D.C. Circuit's second review of the mango tolerance was phrased as a pure question of statutory interpretation of the health-based standard in the governing statute, the court could hardly have been deaf to the Government's clear assertions of harm to foreign relations.

As this example shows, such "internationalization" may be unhealthy for the democratic decisionmaking process. With international trade agreements, the situation could easily be corrected by including in the domestic implementing legislation an express statement that the conclusions of dispute settlement panel reports shall be entirely without legal effect in administrative or judicial proceedings. Without such guarantees, there is a considerable risk that the Executive Branch will act unilaterally with few if any restrictions, either from the legislative or judicial branches, in areas of domestic jurisdiction that happen to fall within the purview of international trade agreements. Such a provision, moreover, would be entirely consistent with the principle that dispute settlement panel reports lack domestic legal effect. Of course, Congress could always act to overturn a regulation that did not conform to the expectations of a dispute settlement panel constituted under an international trade agreement. Such a check, which in effect establishes the Congress as the forum for settling such trade disputes, is highly desirable to assure multibranched action on behalf of the United States Government, to guarantee adequate public access to domestic decisionmaking processes in areas affected by the actions of multilateral trade bodies, and to counterbalance to the considerable aggrandizement of unilateral Executive Branch power otherwise fostered by the domestic implementation of international trade agreements.

97 Id.
98 Id at 1582.
99 Compare Turley, Dualistic Values at 262-70 (cited in note 45) (criticizing presumption in favor of international law).
E. Federal-State Relations

Another major structural issue is the manner in which the WTO, NAFTA, and the Uruguay Round agreements affect state and federal law. These agreements have not just the potential, but the strong likelihood, of disrupting federal-state relationships by “federalizing” issues that were previously the prerogatives of the states.

A report published in 1994 by the European Union\(^{100}\) emphasizes how much is at stake. That report explicitly targets a number of federal and state-level environmental and public health requirements as non-tariff barriers to trade. Of particular concern are state laws that may have more stringent environmental and public health standards than federal statutes or regulations. Presumably as a consequence, during the debate over the Uruguay Round implementing legislation, forty-four state attorneys general wrote to the President requesting what they described as a summit meeting on this issue.\(^{101}\)

Because of concerns such as these, the implementing legislation for both the Uruguay Round\(^{102}\) and NAFTA\(^{103}\) establishes a federal-state consultation process in the event of a dispute initiated by one of the other parties to the agreement challenging the law of a state or any of its political subdivisions. Ultimately, however, that implementing legislation, like that for other trade agreements before it, preserves judicial remedies for federal authorities to sue state governments to compel compliance with trade agreements and actions taken under them.\(^{104}\) Of course, in a federal state like the United States, there must be a mechanism to assure that subsidiary governmental units such as the states in the U.S. and the provinces in Canada observe international law. However, the real question is the form of that mechanism, consistent with our notions of federalism and preemption.\(^{105}\) In the pesticide area, for instance, the states may take

\(^{100}\) European Union, Report on United States Barriers to Trade and Investment (1994).

\(^{101}\) State Groups, Lawmakers Oppose Pre-Emption Of State Law Under GATT, 11 Intl Trade Rep (BNA) 1136 (1994).


\(^{104}\) See notes 102 and 103.

\(^{105}\) Even in the absence of specific legislation, state courts have interpreted the GATT, operating through the Supremacy and Foreign Commerce Clauses of the Constitution, to preempt state and local initiatives. See, for example, Bethlehem Steel Corp. v Board of Commissioners of the Department of Water & Power of the City of Los Angeles, 276 Cal App 2d
certain actions that are more stringent than provided in federal law.\textsuperscript{106}

An entirely viable alternative to allowing the Executive Branch to extinguish these rights by judicial action would be to preserve the full autonomy of subsidiary governmental units after the agreement enters into effect. Then, if a problem were to arise concerning implementation at the state or local level, the Executive Branch could negotiate with those bodies. If those negotiations were to fail, special legislation preempting the rights of the state in question on a particular issue could be adopted by Congress, specially tailored to that problem situation. This is yet another area in which trade agreements unnecessarily serve to expand Executive Branch power, in this case at the expense of the states. The inclusion of Congress in the implementation process is highly desirable as an additional forum in which to debate the merits of any adverse dispute settlement panel report and the form of compliance by the United States. Otherwise, we may have no way of even knowing what we are giving up at the subnational level if virtually any state or local law, regulation, or ordinance can be “federalized” through the avenue of a trade agreement.

III. Governance at the International Level

Purely on the international level, the processes and procedures set out in international trade agreements and implemented in such settings as the WTO also raise significant concerns that might be characterized as falling within the realm of “good governance.” While there is no legal impediment to the United States becoming a party to international trade agreements and participating in activities organized under the auspices of those agreements, there is nonetheless a powerful “cognitive dissonance” between, on the one hand, our domestic legal traditions of open-

\textsuperscript{106} See, for example, Wisconsin Public Intervenor v Mortier, 501 US 597 (1991).
ness and accountability and, on the other, the very closed policies pertaining to negotiation and implementation adopted under these agreements. When a subject of domestic regulatory activity, such as food safety or reformulated gasoline, is addressed in a trade agreement setting, the public policy debate in effect is relocated to a forum in which the public has significantly less input in making and adjudicating the law than on the domestic level. While it is unreasonable to expect multilateral trade agreements to fully mirror the minutiae of every legal system on Earth, it is also important to preserve the core values of municipal legal systems through which the expectations of international trade agreements are implemented.

A. Lawmaking Through International Trade Agreements

Negotiating trade agreements such as the GATT Uruguay Round and NAFTA is clearly a lawmaking activity, on both the international and national levels. Only states as represented by their governments may participate in multilateral WTO negotiations. The public generally does not have direct access to lawmaking in the WTO, either in the form of presence at negotiating sessions, such as the Uruguay Round of Trade Negotiations, or public availability of interim negotiating drafts. As a result of complaints about such exclusions, the WTO recently released a policy governing relations with non-governmental organizations.107 As a result of complaints about such exclusions, the WTO recently released a policy governing relations with non-governmental organizations.108 While generally encouraging greater communication with members of the public as a desirable goal, that instrument in effect reaffirmed the status quo:

As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs [non-governmental organizations] to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public

108 Guidelines for Arrangements on Relations with Non-Governmental Organizations, WTO Doc WT/L/160 (July 18, 1996).
interest which are brought to bear on trade policy-making.\textsuperscript{109}

Many other international organizations are, by contrast, far more open in their dealings with the public.\textsuperscript{110}

Notwithstanding the optimism of the WTO with respect to the alternative of national legal and policy channels, domestic points of public access in the United States to the negotiation of trade agreements are few. Compared with familiar legislative and administrative law-making processes, those opportunities that do exist provide considerably less notice and information to the public. Representative Gephardt tellingly described the drafting process for NAFTA as "the most secretive trade negotiations that I have ever monitored."\textsuperscript{111} The Executive Branch did not release interim texts of NAFTA. Indeed, when a document purporting to be a draft of the agreement was leaked to the press in late March 1992, the Executive Branch would neither confirm nor deny the authenticity of that document.\textsuperscript{112} Although the GATT secretariat itself released an interim negotiating text,\textsuperscript{113} the Uruguay Round negotiations were similarly closed to the public.

A web of statutorily created private sector advisory committees, including a Trade and Environment Policy Advisory Committee,\textsuperscript{114} designed to provide private sector input to the United States Trade Representative ("USTR") is less than fully satisfactory as a conduit for public access to the trade agreement negotiation process. Subsidiary policy advisory committees are exempt by statute from specified statutory requirements for open

\textsuperscript{109} Id.

\textsuperscript{110} See, for example, David A. Wirth, Public Participation in International Processes: Environmental Case Studies at the National and International Level, 7 Colo J Intl Envir L & Pol 1 (Winter 1996).


\textsuperscript{112} Citizen Groups Say Leaked NAFTA Draft Would Undermine U.S. Standards, Intl Trade Daily (BNA) (Mar 26, 1992). Although there was a dialogue with environmental organizations during the negotiation of the so-called "environmental side agreement" to NAFTA, North American Agreement on Environmental Cooperation, Sept 8-14, 1993, 32 ILM 1482 (1993) ("NEAAC"), interim drafts of that instrument also were not released to the public. In any event, the side agreement does not modify the basic NAFTA text.

\textsuperscript{113} Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc MTN TNC/W/FA (Dec 20, 1991) ("Dunkel Draft").

\textsuperscript{114} The President established a new Trade and Environment Policy Advisory Committee ("TEPAC") by executive order on March 25, 1994. Executive Order No 12,905, 3 CFR 880 (1994). The TEPAC is part of the larger private sector trade advisory committee structure established by statute.
meetings, public notice, public participation, and public availability of documents under certain circumstances. A recent lawsuit established that the USTR had interpreted these restrictions in an excessively broad manner so as to further constrict public access through this channel. Even after that case, the members of the subsidiary policy advisory committees, along with one additional staffer for each committee who may also have access to interim negotiating texts, are subject to confidentiality restrictions authorized by the statute creating those advisory committees. These confidentiality agreements, among other things, prohibit the signatory from releasing the text to the public or to other individuals within the individual's own organization.

While perhaps somewhat sensitive from a strategic point of view, trade negotiations on such questions as food safety are not fundamentally issues of national security. The Executive Branch, which represents the United States in the WTO and other trade negotiations, has considerable discretion to make interim drafts and other documentation available to its own public. As more and more domestic regulatory issues concerning environment and public health become "internationalized" through trade agreements, as they have, it is only reasonable to expect a degree of openness and accountability commensurate with the political and legal culture surrounding those issues domestically. If the Executive Branch does not undertake such an initiative on its own, then Congress, which has the exclusive, expressly enumerated constitutional authority to regulate international trade, ought to address the need by statute.

115 19 USC § 2155(f)(2) (1994) (Exempting policy advisory committees from certain provisions of the Federal Advisory Committee Act "whenever and to the extent it is determined by the President or his designee that such meetings will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives or bargaining positions . . . ").
117 19 USC § 2155(g)(3). The statutory language requires that rules issued by the Executive Branch "shall, to the maximum extent feasible, permit meaningful consultations by advisory committee members with persons affected by [trade agreements]."
118 See Part II.B.
B. Dispute Settlement Procedures in International Trade Agreements

Another serious international problem concerns public participation in dispute settlement in the WTO, under NAFTA, and in other trade agreements. The history of the tuna dolphin dispute with Mexico in the GATT is a good example of the significant disjunction between domestic and international processes on very similar issues that revolve around the same set of facts.

This dispute involved a provision of the Marine Mammal Protection Act ("MMPA"), a statute enacted in 1972 and amended in major respects in 1984 and 1988, but never fully implemented by the Executive Branch. The statute essentially requires that the kill of dolphin by foreign fleets incidental to fishing for yellowfin tuna with "purse-seine" nets be commensurate with that of the United States fleet. The remedy for failing to meet this standard is trade restrictions on imports of tuna from the offending country. The Earth Island Institute and the Marine Mammal Fund, two private nonprofit organizations, sued in the United States District Court for the Northern District of California under a theory of judicial review and obtained a court order directing the Executive Branch to carry out its nondiscretionary duties under the MMPA by imposing a ban on imports of yellowfin tuna from Mexico and other countries.

The Executive Branch then applied an administrative regulation that was promulgated by the National Oceanic and Atmospheric Administration ("NOAA"), located in the Department of Commerce, and adopted after notice-and-comment. Relying

---

119 Domestic legal and policy questions surrounding the trade agreement dispute settlement process are discussed in Part II above.
120 16 USC § 1371 (1982).
124 Earth Island Institute v Mosbacher, 746 F Supp 964 (ND Cal 1990).
125 50 CFR § 216.24(e)(5)(iv)-(ix).
126 NOAA initially published a proposed rule to implement the 1984 amendments on August 13, 1986. 51 Fed Reg 28963 (Aug 13, 1986). The comment period on this proposal was subsequently extended, in particular to give potentially affected foreign nations a full opportunity to comment. 51 Fed Reg 36568 (Oct 14, 1986). NOAA then published an
on that regulation, the National Marine Fisheries Service ("NMFS") found that Mexico had satisfied the statutory standard and thus lifted the import prohibition.\textsuperscript{127} Subsequently, the District Court issued a second order reaffirming the ban after concluding that the regulation was inconsistent with the MMPA and therefore illegal. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed both orders of the District Court.\textsuperscript{128}

Mexico initiated a dispute settlement process in GATT, challenging the import ban as a non-tariff barrier to trade. In contrast to the opportunities for public input into the judicial forums in which this dispute was treated on the domestic level, but consistent with standard GATT procedures, the documents and oral proceedings in the case were not accessible to the public.\textsuperscript{129} Dispute settlement in GATT does not provide for participation by private parties as intervenors or \textit{amici}. The Earth Island Institute's lawyer, who had initiated the case on the domestic level, traveled to Geneva for the oral proceedings before the panel, but was compelled to wait in the corridor while the panel heard arguments from representatives of the governments of Mexico and the United States.

In this proceeding, however, ten other GATT parties and the European Economic Community made written submissions to the panel, all of which were critical of the MMPA ban and most of which argued that that action was inconsistent with the GATT. No other contracting parties to the GATT sided with the United States. Further, the United States was represented in the GATT dispute settlement process by the Executive Branch, which had flouted three statutory directives, adopted an illegal regulation, and reluctantly implemented the import ban only under court order. Particularly against the background of the closed nature of

\textsuperscript{127} Earth Island Institute v Mosbacher, 929 F2d 1449, 1451 (9th Cir 1991).
\textsuperscript{128} Id at 1449.
\textsuperscript{129} See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Annex § 6(iv), Nov 28, 1979, GATT BISD 28th Supp 217 (1980) (stating that "written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute."). See also Improvements to the GATT Dispute Settlement Rules and Procedures, April 12, 1989, GATT BISD 36th Supp 61 (1990) (referencing suggested working procedures establishing that submissions of parties to panels confidential and panel sessions closed).
the GATT process, questions about whether the Executive Branch vigorously defended the validity of the ban naturally arose. The inaccessibility of the proceedings to members of the public strongly suggests that important perspectives were not adequately presented to the GATT dispute settlement panel, at least as a formal matter. Although the Executive Branch solicited some input from certain members of the public in the preparation of its submission, those views, at most, affected only the United States submission to the panel, which in any event had to reflect the Government's position. While helpful, that practice cannot replace direct written and oral submissions.

In short, the many entry points for the public in implementing and adjudicating law on the national level are duplicated poorly if at all in the international trade regime. And as more and more domestic regulatory issues arise in an international trade setting, examples of these divergences will very likely increase in number and frequency. The Uruguay Round relaxes the confidentiality requirements for the dispute settlement process somewhat, but NAFTA does not reflect even this newly established, although still unsatisfactory, "good practice standard." Under both agreements, there is still a strong chance that a dispute will be "removed" from a domestic forum to an international one in which the procedural and participatory rights of interested private parties are attenuated if not altogether eliminated.

It would be entirely feasible to allow private parties to submit additional statements or arguments to dispute settlement panels in a capacity similar to that of amicus curiae in domestic

---

130 See Letter from Julius L. Katz, Deputy United States Trade Representative, to Justin Ward, Senior Resource Specialist, and Al Meyerhoff, Senior Attorney, Natural Resources Defense Council (Apr 17, 1992).

131 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr 15, 1994, para 18.2, Uruguay Round Final Act, Annex 2, Legal Instruments—Results of the Uruguay Round vol 31, 33 ILM 1226, 1237 (1994) (stating that "written submissions to the panel or the [newly created] Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statement [sic] of its own positions to the public. Members shall treat as confidential, [sic] information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.")

132 See North American Free Trade Agreement, Dec 17, 1992, Art 2012, § 1(b), 32 ILM 289 (1993) ("NAFTA") (stating that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential.")
law. If amicus status could be granted only after submission and approval of a written application, to which the states that are parties to the underlying case could respond, then the panel would have the authority to assure that there is no disruption to the orderly administration of justice. An application might be required to document the applicant's interest, the adequacy of representation of that interest by existing parties, the applicant's potential contribution to a satisfactory resolution of the dispute, the prejudice to the original parties if participation is permitted, and the scope of the proposed submission as amicus curiae. If the applicant is permitted to present a written submission, the panel could then decide the additional, distinct question of whether to hear the applicant during oral proceedings. Although as a matter of principle all written submissions to trade agreement dispute settlement panels ought to be made available to the public, as a second best alternative potential amici might be requested as a condition of participation to agree to keep documentation submitted by governments confidential. Such proposals, if implemented, could be expected to substantially improve public access to the trade agreement dispute settlement process while leaving that process intact.

**CONCLUSION**

International trade agreements represent an opportunity to some and an enticement to others to accomplish substantive goals through international channels in the face of domestic impediments to achieving those same aims at the national level. Certainly, this is a valid use of international pacts of all kinds, including both multilateral environmental treaties and international trade agreements. Because of the lack of institutional and technical expertise resulting from a quite divergent mission, however, trade agreements, at least as currently structured, are poor candidates to serve as vehicles for facilitating regulatory reform of domestic public health and environmental regulation.

For one, trade agreements address only a portion of the overall situation, namely the potential for abuse of regulatory measures, in isolation from the benefits of regulation. Even then, only adverse trade-related impacts are scrutinized; not economic, social, or other effects. The result is a high degree of asymmetry in the representation of social welfare considerations aside from trade. Trade agreements therefore provide little guidance for restructuring domestic or, indeed, international regulation so as to be more effective or even more efficient. In areas such as envi-
ronmental protection and public health, questions of the scientific integrity and economic efficiency of domestic regulation are better addressed in forums that are equipped with the technical capabilities needed to address with those issues. Further, serious questions of procedure and governance strongly suggest that, from the point of view of accountability and legitimacy as traditionally viewed in the United States, international trade agreements are unsatisfactory arenas in which to formulate domestic regulatory policies.

Consequently, deregulatory efforts undertaken in trade agreement forums should be exceptionally cautious. Indeed, there is much to suggest that such initiatives ought not to be attempted there at all.