1-1-1997

Government by Trade Agreement

David A. Wirth

*Boston College Law School, wirthd@bc.edu*

---

Follow this and additional works at: [https://lawdigitalcommons.bc.edu/lsfp](https://lawdigitalcommons.bc.edu/lsfp)

Part of the [Environmental Law Commons](https://lawdigitalcommons.bc.edu/lsfp), [International Law Commons](https://lawdigitalcommons.bc.edu/lsfp), and the [International Trade Law Commons](https://lawdigitalcommons.bc.edu/lsfp)

---

**Recommended Citation**


---

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
Chapter Six

GOVERNMENT BY TRADE AGREEMENT

by David A. Wirth*

1. INTRODUCTION

During the debate over the North American Free Trade Agreement (NAFTA), George Will published a column in which he criticized environmental elitists and others who would impede the “exhilaratingly unknowable future”, catalyzed by that compact. Mr. Will notwithstanding, some of the less desirable aspects of the agreement were anything but “unknowable,” and indeed quite predictable, at the time of the negotiation and the subsequent domestic implementation of the pact. Moreover, particularly with the benefit of hindsight, certain aspects of the agreement are plainly anything but “exhilarating,” especially from an environmental point of view.

The purpose of this chapter is, first, to identify and analyze some of the undesirable distortions in governmental processes resulting from NAFTA’s negotiation and domestic implementation — an effect that might be described as “government by trade agreement.” Second, the chapter suggests reforms that might mitigate or eliminate some of the more objectionable of these aspects without doing a disservice to the underlying goals and purposes of international trade

* This work was supported by grants from the Creswell Foundation and the Frances Lewis Law Center of Washington and Lee University. Portions of this paper are based on the author’s previously published work.


agreements and that, indeed, might enhance their efficacy and legitimacy. In particular, the chapter identifies the following ways in which international trade agreements such as NAFTA, at least as currently structured, distort our national governmental processes:

- by constraining governmental regulatory authority;
- by subordinating multilateral environmental agreements to the international trade regime;
- by significantly reducing the opportunities for public participation in domestic lawmaking through the “fast track” process;
- by precluding public access to dispute settlement panels constituted under international trade agreements;
- by disrupting domestic federalism and federal-state relations; and
- by adversely affecting the administrative process in matters of domestic jurisdiction that fall within the scope of an international trade agreement.

2. ENVIRONMENTAL REGULATIONS AS BARRIERS TO TRADE

International trade agreements, at least to the extent that they govern national regulatory measures in the areas of environment and public health, contain primarily “negative” obligations. That is to say, international trade agreements do not generally contain affirmative requirements directing national governments to achieve certain minimum criteria in these areas. Rather, most obligations in trade agreements establish constraints on governmental actions -- the establishment of tariffs, quotas, standards that discriminate between imported and domestically manufactured goods, and the like. In other words, in international trade agreements governments generally promise to refrain from taking certain actions, as opposed to obligating themselves to undertake any affirmative steps. This approach arises from a view of liberalized trade as a situation of less, rather than greater, intervention by national governments in an international market in which, but for impediments in the form of national measures, goods would circulate freely.

So, for instance, both NAFTA and the GATT Uruguay Round\(^3\) articulate so-called “trade disciplines” designed to prevent the adoption of arbitrary or exces-

\(^3\) Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9 (1994).
sive limitations on pesticides in food that could interfere with trade. The trade
disciplines contained in recent international trade agreements are intended to
circumscribe the regulatory authority of national governments so as to limit the
abuse of putative environmental or public health claims for protectionist pur-
poses, and not to establish minimum benchmarks for protection of the environ-
ment and public health. To that extent, these international trade agreements can
be considered deregulatory instruments.

By contrast, environmental protection anticipates affirmative, governmental-
ly-established requirements. Domestic and international environmental policies
depend almost totally on governmental intervention in the marketplace to remedy
market failures and to offset externalities. The trade and environment debate in
large measure is a confrontation between these two central driving forces, both
of which are intended to improve human welfare: one, environment, by encour-
aging greater governmental regulation; and the other, liberalized trade, by press-
ing toward less. If the balance is struck incorrectly, there is an obvious potential
for trade agreements unduly to constrain domestic and international regulation to
protect the environment and public health.

One of the principal flash points in the trade and environment debate has been
the potential for environmental measures to act as non-tariff barriers to trade;
that is, the abuse of environmental or public health regulations to achieve trade-
related goals, such as preventing competition from foreign goods for protection-
list purposes. The paradigm for the non-tariff barrier problem has been a ban
imposed by the European Union (EU) on the use of growth hormones in beef,
including imported meat. The United States, where these chemicals are per-
mitted, has strongly objected to the ban as a non-tariff barrier to trade because
that measure supposedly is not supported by scientific evidence. Attention from
the trade point of view to environmental and public health measures as potential
non-tariff barriers to trade has sparked a reciprocal concern from the environ-
mental side about the possibility that the net could be cast too widely, potentially
exposing legitimate environmental, health and safety measures to attack from a
trade perspective.

See generally Wirth, "The Role of Science in the Uruguay Round and NAFTA Trade

See generally Rothberg, Note, "From Beer to BST: Circumventing the GATT Standards
Code's Prohibition on Unnecessary Obstacles to Trade," 75 Minn. L. Rev. 505 (1990);
Froman, "Recent Developments, The United States-European Community Hormone Treated
Controversy and the Standards Code: Implications for the Application of Health Regulations
As it stands now, from the point of view of environmental and public health regulation, such as measures to protect the integrity of the food supply, the international trade regime is pretty much a no-win proposition. Consistent with the “negative” character of the obligations in international trade agreements, there are no mechanisms in NAFTA for assuring the implementation of minimum governmental measures. Moreover, once those policies that do exist are subjected to trade-based scrutiny, nothing more than maintenance of the status quo can be expected to result even in the best possible case. The NAFTA disciplines must also be read against the background of a persistent tightening of trade-based constraints in this area under the 1947 GATT. Only one of the environmental, conservation, and public health measures examined by a GATT dispute settlement panel whose validity turned on the availability of the article XX exceptions in that instrument has withstood such scrutiny. Moreover, there is little or no evidence that any of the NAFTA countries have abused regulatory measures designed to protect human health -- the area of greatest concern from the point of view of attenuation of domestic regulatory authority -- as opposed to that of animals or plants.

Fortunately, this conflict between the “negative” obligations in trade agreements and the affirmative governmental action required to assure environmental quality is not inevitable or irreconcilable. Trade agreements could very well articulate minimum environmental standards. In fact, there is even a theoretical underpinning for this approach that is entirely consistent with the underlying goals of these trade agreements.

The failure to meet minimum environmental standards can be characterized from a trade point of view as an export subsidy that should be prohibited by, and actionable under, a trade regime. As it stands now, a nation’s environmental policy is part of its inherent comparative advantage in international trade. The international trade regime creates incentives for exporting nations to relax their environmental policies to lower the prices of their exported goods and consequently to improve their international competitiveness. While some might feel otherwise, it is at least arguable that lax environmental policies ought not be

---

encouraged in this manner and rewarded in the international marketplace. Moreover, this dynamic tends to discourage states from internalizing environmental costs rather than encouraging governments to take regulatory action to assure that the prices of manufactured goods reflect the environmental costs associated with them -- a maxim that is well-recognized at the international level as the Polluter-Pays Principle. Equating inadequate environmental policies with export subsidies changes the incentive structure by eliminating the benefits of "race to the bottom" and assures a level playing field for all exporting states.

The actual text of NAFTA, however, contains only one provision that could even remotely be considered an affirmative environmental obligation: article 1114, which very tepidly states that "[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." Tellingly, this is one of the very few provisions of NAFTA that is expressly unenforceable through the ordinary panel dispute settlement process. By contrast, both the Uruguay Round and NAFTA contain affirmative, minimum standards in the area of intellectual property that have been strongly advocated by the United States. For example, the Uruguay Round requires a minimum 20-year patent term from the date of application by contrast with previous U.S. law, which awarded a patent for 17 years from the date of issue. This provision, which was controversial both internationally and domestically, required a major change in domestic law effected through the Uruguay Round implementing legislation extending the term of U.S. patents. Although one might quibble about the extent to which environmental and public health regulation is analogous to patent protection, the door has certainly been opened wide to the inclusion of affirmative, minimum obligations in international trade agreements.

---


3. MULTILATERAL ENVIRONMENTAL AGREEMENTS

Another thorny issue is the relationship between multilateral environmental agreements containing trade measures and international trade agreements. Three principal examples are:

- the Basel Convention on hazardous waste;\(^{12}\)
- the Convention on International Trade in Endangered Species (CITES);\(^{13}\) and
- the Montreal Protocol on Substances that Deplete the Ozone Layer.\(^{14}\)

The entire purpose of the first two of these agreements is to control trade in environmentally sensitive products, and the third utilizes trade measures as an affirmative vehicle to promote the goals of the agreement.

To the extent that these agreements contain measures that are inconsistent with the requirements of trade agreements -- which they almost certainly do -- two GATT panel reports from 1991 and 1994 called their validity into question. To reduce the incidence of death and injury to dolphins snared in tuna fishing operations in the Eastern Tropical Pacific Ocean, U.S. legislation known as the Marine Mammal Protection Act (MMPA)\(^{15}\) directs the Executive Branch to ban the importation of yellowfin tuna caught by vessels of foreign nations unless there has been a finding that the incidental take of marine mammals is comparable to that of United States vessels. Under the auspices of GATT, Mexico successfully challenged just such a ban on imports of yellowfin tuna from that


country. The three-member GATT dispute settlement panel concluded among other things that trade measures to protect resources outside the jurisdiction of a GATT party are not permissible. A second successful challenge, initiated by the European Union and the Netherlands, addressed a secondary import ban designed to discourage "tuna laundering" by intermediary nations which purchase yellowfin tuna abroad and export it to the United States and reached a similar conclusion.

Article 104 of NAFTA grandfathers these three agreements by name, but requires consensus among NAFTA parties for inclusion of additional or future multilateral agreements. In effect, then, Mexico and Canada retain unilateral vetoes over future participation by the United States in multilateral environmental agreements with inconsistent trade measures, even those whose parties are virtually universal. The treatment of these agreements in the GATT/World Trade Organization (WTO) system is still unresolved despite several years of debate. One likely possibility, however, is that the WTO will conclude that there is a necessity for a so-called "waiver" of the obligations contained in these agreements under article XXV of the 1947 GATT, which requires the affirmative approval of two-thirds of the WTO member states. This situation raises the serious possibility that the obligations contained in the 1947 GATT might trump trade measures in an international environmental agreement, as is already the case with NAFTA.

In addition, there is the very disturbing possibility that objections from the WTO Secretariat may prevent such measures from being adopted in the first place -- an approach that might be referred to as the "raised eyebrow." For example, during the negotiation of the Montreal Protocol, the GATT Secretariat was consulted about the consistency between the text of the proposed Protocol and that of the GATT. If the GATT Secretariat had identified difficulties with the Protocol's text, those states that were more reluctant, as opposed to more


17 United States -- Restrictions on Imports of Tuna, reprinted in 33 I.L.M. 842 (1994). Mexico did not seek the adoption of the first report at the time of its release. However, the GATT Council rejected a request by the European Union to adopt the report. See "GATT Council Refuses EC Request to Adopt Panel Report on U.S. Tuna Embargo," 9 Int'l Trade Rep. (BNA) 353 (1992). In a discussion of the second report, the GATT Council is reported to have rejected a proposal from the United States that would have opened further Council meetings on that case to the public, and Mexico was said to consider requesting adoption of the first report. Williams, "GATT Shuts Door on Environmentalists," Financial Times (London), July 21, 1994, at 6. As of this writing, neither report has been adopted by the GATT Council and hence neither has yet acquired legal force. See Davey, "Dispute Settlement in GATT," 11 Fordham Int'l L.J. 51, 94 (1987).
enthusiastic, about reducing emissions of ozone-depleting chemicals would have

gained a significant strategic advantage in the negotiations. Alternatively, the

trade provisions, which are desirable if not essential contributions to the efficacy

of that agreement, might have been excised altogether.

Instead, international environmental agreements that meet certain criteria or

have certain attributes ought to be deemed consistent with NAFTA or the

GATT. The legal vehicle for reaching this conclusion already exists in the form

of article XX of the 1947 GATT text, which exempts certain public health,
environmental, and conservation measures from the coverage of that agreement.
The criteria employed to determine whether the article XX exceptions are sat-

tisfied might include the number of parties to the agreement, the relationship of

the trade measures to the goals of the agreement, the urgency of the environ-

mental problem, whether the agreement in question is potentially open to univer-
sal membership, and the like.

4. DISTORTIONS FROM THE FAST TRACK PROCESS

Trade agreements such as NAFTA can also disrupt our democratic processes on

the national level. In some quarters, including what are commonly considered

both “conservative” and “liberal” camps, there have been objections to obliga-
tions that constrain or limit governmental authority on the theory that they com-

promise U.S. sovereignty. This is incorrect, because trade agreements and inter-
national institutions created by them, such as the World Trade Organization, are

established by a consensual process. Still, the prospect of some loss of freedom

in national decision making, whether consensual or not, has been quite troubl-
ing.

The domestic 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 also has the exclusive power to negotiate international agree-
ments with foreign sovereigns. Presumably to dovetail these two functions, after

World War II the practice has arisen whereby Congress authorizes the President
to negotiate trade agreements by prior statute, within certain broad parameters,
on the condition that those agreements 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 that appears to be a minority view.

Regardless of the domestic implementation process, the negotiation of trade agreements such as NAFTA is clearly a lawmaking activity, on both the international and national levels. Despite the importance of NAFTA's content both domestically and internationally, Representative Gephardt tellingly described the drafting process as "the most secretive trade negotiations that I have ever monitored," in which the Executive Branch had virtually sole control. 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.

One important feature of the domestic process is that the implementing legislation for NAFTA, the GATT Uruguay Round, and other recent trade agreements is adopted under procedures commonly known as the "fast track." Under this procedure, once the implementing legislation is introduced, no amendments are permitted, contrary to ordinary procedure in the Congress. The reason for this is to prevent the Congress from, in effect, 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 NAFTA did, hold publicly accessible hearings on the agreement and, by implication, the legislation to implement it as a domestic legal matter. Members of Congress had access on a confidential basis to the draft bill

---

18 See Letter from Laurence H. Tribe, Professor of Law, Harvard University, to Senator Robert Byrd (July 19, 1994), reprinted in Inside U.S. Trade, July 22, 1994, at 1 (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").


20 See "Citizen Groups Say Leaked NAFTA Draft Would Undermine U.S. Standards," Int'l 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, U.S.-Can.-Mex., reprinted in 32 I.L.M. 1482 (1993), 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.
and even participated in closed “non-markups” and “non-conferences” before it was formally introduced.

Even so, the domestic implementing procedures exacerbated, rather than ameliorated, the lack of public access to the NAFTA negotiation process. 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. Moreover, the voluminous implementing legislation containing a large number of modifications to domestic U.S. laws was formally released to the public less than two weeks before the House of Representatives voted on the bill on November 17, 1993. Even then, this documentation was not generally available as a practical matter 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.21 Whether or not that might be true in some cases, NAFTA certainly demonstrated the potential for the fast track approach significantly to disrupt the lawmaking process. The fast track process as a whole and the no-amendment rule in particular are purposely designed to affect numerous laws simultaneously and invite a particularly unprincipled sort of horse-trading among issues that would rarely be so closely linked in a typical legislative session, such as the health effects of pesticide residues and intellectual property. Add in the closed nature of the negotiating process, and one truly arrives at “government by trade agreement,” characterized by an aggrandizement of Executive prerogatives to a much greater extent than in any other area of domestic law.

Even if the no-amendment rule were to be retained, there are significant opportunities for improving public access to both the negotiation and domestic implementation of future trade agreements. For instance, future legislation authorizing the negotiation of subsequent trade agreements might require that successive interim drafts of any such agreement be made available to the public. Although those procedures are specifically applicable to “treaties and international conventions or agreements,”22 the National Environmental Policy Act’s requirement for preparation of an environmental impact statement (EIS)23 were

---

22 40 C.F.R. s. 1508.18(b)(1).
23 42 U.S.C. s. 4332(C).
held by the D.C. Circuit to be inapplicable to the negotiation of, and adoption of implementing legislation for, NAFTA. Legislation specifically providing for the preparation of an EIS for future trade agreements at both stages would not only facilitate improved governmental decision making with respect to the environmental aspects of the agreement, but would also serve the larger salutary process of improving public participation in the formulation and implementation of the agreement and it implementing legislation.

5. PUBLIC PARTICIPATION IN DISPUTE SETTLEMENT

Another serious issue on both the domestic and international levels concerns public participation in dispute settlement under NAFTA and other trade agreements. The history of the tuna dolphin dispute with Mexico in the GATT, whose dispute settlement procedures are very similar to NAFTA’s, is a good example of the need for reform in this area.

As briefly discussed above, 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 in essence 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 not meeting 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 promulgated by the National Oceanic and Atmospheric Administration (NOAA), located in the Department of Commerce, and adopted after publication of a proposed rule and an opportunity for public comment. Relying on that regulation, NOAA made a finding that Mexico had satisfied the statutory standard and lifted the import prohibition. 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.

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 fora 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. Dispute settlement in GATT does not provide for participation by private parties as intervenors or amici. The Earth Island Institute’s lawyer, who had initiated the case at the domestic level, travelled 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 is inconsist-

29 Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), aff’d, 929 F.2d 1449 (9th Cir. 1991).
32 Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991).
33 See, e.g., Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Annex para. 6(iv), Basic Instruments and Selected Documents, 26th Supp. at 210 (1980) (“Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute.”) See also Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, reprinted in Basic Instruments and Selected Documents, 36th Supp. at 61 (1990), reprinted in 28 I.L.M. 1031 (1989) (referencing suggested working procedures establishing that submissions of parties to panels confidential and panel sessions closed).
ent 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 the GATT process, questions as to 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 must reflect the Government’s position. While helpful, that practice is not a substitute for opportunities for written and oral submissions directly to dispute settlement panel.

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 are taken up in an international trade setting, example 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 this even this newly-established, although still unsatisfactory, “good practice standard.” Under both agreements, there is still a significant potential for the “removal” of a dispute from a domestic to an international forum in which the procedural and participatorial rights of interested private parties are attenuated or eliminated altogether.

34 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).
35 See Understanding on Rules and Procedures Governing the Settlement of Disputes para. 18.2, 33 I.L.M. 112 (“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.”)
36 See North American Free Trade Agreement, supra note 1, art. 2012, para. 1(b) (“The panel’s hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential.”)
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 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 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, can be expected substantially to improve public access to the trade agreement dispute settlement process without disrupting that process.

6. FEDERAL-STATE RELATIONS

Another major structural issue is the effect of NAFTA, the WTO, and the Uruguay Round agreements on 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\(^3\) 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 state attorneys general wrote to the President requesting what they described as a summit meeting on this issue.\(^4\)

Because of concerns such as these, the NAFTA implementing legislation


established a federal-state consultation process in the event of a challenge by one of the other NAFTA parties to the law of a state or any of its political subdivisions. Ultimately, however, the NAFTA 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. 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 United States 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. In the pesticide area, for instance, the states may take certain actions that are more stringent than provided in federal law.

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 as a vehicle for the expansion of Executive Branch power, in this case at the expense of the states. The inclusion of the Congress in the implementation process is highly desirable 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 sub-national level if virtually any state or local law, regulation, or ordinance can be “federalized” through the avenue of a trade agreement -- again, “government by trade agreement.”

7. FEDERAL ADMINISTRATIVE LAW

Trade agreements may also disrupt administrative processes and law at the federal level. Contrary to the assertions of some, it is well established that adverse

40 Id. s. 101(b)(1).
reports of GATT dispute settlement panels cannot repeal federal statutes. But as any student of administrative law will attest, statutory law is but one component of the regulatory process. Most federal environmental statutes require subsequent implementation through administrative rulemaking or other unilateral Executive Branch action. In this realm of purely Executive prerogative, there may be little or nothing to keep the Executive from unilaterally relaxing a domestic standard in response to an adverse panel report. And because of the "negative" character of trade agreements, the change will always have a weakening effect on the rigor of domestic regulatory requirements.

An excellent example of precisely this phenomenon has recently occurred. Pursuant to the Clean Air Act, the Environmental Protection Agency in early 1994 promulgated rules concerning "reformulated" gasoline, which reduces ground-level ozone in highly polluted areas. Those regulations establish standards for reformulated gasoline as measured against a baseline, the calculation of which is specified in the rules. Domestic refiners are permitted to choose among three methods of calculating this baseline. For reasons related to differences between imported and domestically produced gasoline, however, fewer options are available for establishing the baseline in the case of gasoline produced at foreign refineries. The Venezuelan national oil company protested that the EPA rules discriminate against imported gasoline in contravention of the GATT. Subsequently, EPA in May 1994 published a proposed amendment to its reformulated gasoline regulations to address these complaints. Congress in an appropriations measure subsequently prohibited EPA from finalizing the proposed rule, and Venezuela's challenge to the reformulated gasoline regulations will be the subject of the first dispute settlement panel established under the auspices of the WTO.

Entirely apart from the effect of EPA's proposed amendment on air quality in the United States and the merits of Venezuela's challenge in the WTO, both of which are complex, this situation is revealing for its impact on domestic administrative processes. In such a situation, there is every reason to believe that back-channel negotiations with foreign governments might subvert the integrity of the notice-and-comment rulemaking process and could serve as an invitation to circumvent statutory standards. The House Committee on Energy and Com-

---

42 42 U.S.C. s. 7545(k).
merce, which held hearings on this matter, articulated precisely this concern 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 such a case, the courts and the institution of judicial review may provide the only meaningful remedy to assure that the Executive Branch satisfies domestic statutory criteria, both substantive and procedural. However, in federal court an issue like the reformulated gasoline rule appears not just as an ordinary regulation in a garden-variety proceeding for judicial review, but also as a foreign relations issue. As anyone who has worked in this area will confirm, the courts are much more deferential to the Executive Branch in a foreign relations setting. In fact, in subsequent judicial proceedings in the tuna dolphin controversy concerning the secondary import ban from tuna processed in intermediary nations, the Executive Branch did not hesitate to emphasize the potential harm to foreign relations if the court were to rule against the Government.

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 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. By contrast, in response to assertions from the Department of State that the ban would damage the economies of friendly exporting countries, EPA promulgated a tolerance permitting 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 EPA was required by statute to base pesticide residue limitations on health considerations, the agency’s reli-


48 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 MMPA, 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. R.F. Housman and D. J. Zaelke, “The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision,” 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,268 (1992).
ance solely on concerns of foreign affairs was illegal.  

On remand, EPA reaffirmed the residue limitation for imported mangoes, but came up with new justifications for that tolerance. 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 pests like the Mediterranean fruitfly, diseases, and unsafe levels of pesticides. Moreover, mango-producing nations were channelling export revenues into the search for alternatives for EDB. Accordingly, 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 pesticide-laced produce. To put it kindly, this reasoning is counterintuitive. Nonetheless, after EPA provided assurances with respect to the limited term of the standard for imported mangoes, the Court of Appeals, accepting this rationalization, approved the very same tolerance that that court had earlier 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 in the case of state laws, this “internationalization” of federal law is not a healthy thing for democratic decision making processes. Moreover, this situation could easily be corrected by an express statement in the domestic implementing legislation establishing that the conclusions of dispute settlement panel reports shall be without legal effect in administrative or judicial proceedings. Without such guarantees, there is a significant likelihood that the Executive Branch can 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 -- again, “government by trade agreement.” The proposed reform, moreover, is entirely consistent with the principle that dispute settlement panel reports have no domestic legal effect. Of course, Congress could still act to overturn a regulation that did not conform to the expectations of a dispute settlement panel constituted under an international trade agreement. That check, however, is highly desirable to assure multi-branch action on behalf of the United States Government and to guarantee adequate public access

49 Nat'l Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d 875 (D.C. Cir. 1987).

50 Nat'l Coalition Against the Misuse of Pesticides v. Thomas, 815 F.2d 1579 (D.C. Cir. 1987).
to domestic decision making processes in areas affected by the actions of multi-
lateral trade bodies.

8. CONCLUSION

This chapter is not an argument against NAFTA or international trade agree-
ments more generally. Instead, it is a plea for a sense of proportion or perspec-
tive concerning the importance of liberalized trade by comparison with other
social welfare concerns, such as environment and public health. Significantly,
every one of the problems identified here can be solved, or at least ameliorated,
through sound choices in negotiating future trade agreements and in drafting
their implementing legislation. In that regard, we would be wise to continue to
heed the words of Benjamin Disraeli who, more than a century and a half ago,
remarked that “[f]ree trade is not a principle; it is an expedient.”51 That obser-
vation is as valid today as it was then.

51 Speech on Import Duties (Apr. 25, 1843).