

Michigan Law Review

Volume 94 | Issue 5

1996

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Recommended Citation

Aubry D. Smith, *Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal To Increase Public Participation*, 94 MICH. L. REV. 1267 (1996).

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Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal To Increase Public Participation

Aubry D. Smith

INTRODUCTION

On March 23, 1994, the Environmental Protection Agency (EPA) announced a proposed agreement with Venezuela to alter the Clean Air Act rule.¹ The agreement would have eliminated a discrepancy between the regulatory treatment of Venezuelan and American oil producers, thus facilitating Venezuelan exports to the United States.² At the same time, however, it would have led to a slight increase in pollution levels in the northeastern United States and would have made it more difficult for the EPA to monitor the compliance of Venezuelan producers with the Clean Air Act rule.³ The EPA offered the rule change in return for Venezuela's promise not to pursue a complaint alleging that the Clean Air Act rule violated U.S. obligations under the General Agreement on Tariffs and Trade (GATT).⁴

1. *See EPA Announces Fuel Plan for Venezuela; Threatened GATT Complaint Is Shelved*, [11 Current Reports] Intl. Trade Rep. (BNA) 504, 504 (Mar. 30, 1994) [hereinafter *EPA Announces*].

2. Under the scheme of the final rule, U.S. refiners can use their own 1990 levels of the regulated pollutants as a baseline from which to reduce pollutant levels according to the rule's schedule. *See Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline*, 59 Fed. Reg. 7,716 (1994) (to be codified at 26 C.F.R. § 80). Venezuela and other foreign producers will be subject to a baseline provided by the Clean Air Act. *See EPA Announces, supra* note 1, at 504. The deal struck with Venezuela would have allowed that country to operate under the regime applied to U.S. domestic refiners. *See id.*; *see also Regulation of Fuels and Fuel Additives: Individual Foreign Refinery Baseline Requirements for Reformulated Gasoline*, 59 Fed. Reg. 22,800 (1994) (to be codified at 40 C.F.R. § 80).

3. The olefin content of Venezuelan gasoline is three times higher than the U.S. refinery-industry average. *See EPA Announces, supra* note 1, at 504. Olefins contribute to ozone formation. *See id.* In testimony designed to persuade Congress that the policy was unnecessary, Mary Nichols of the EPA testified that shifting to a nondiscriminatory policy would mean a less-than-one-percent increase in nitrogen oxide in the Northeast. *See Marianne Lavelle, GATT Complaint Fouls Feds' Clean Air Oil Deal*, NATL. L.J., June 13, 1994, at B1, B3. Reacting to this comment, Robert F. Housman, attorney with the Center for International Environmental Law in Washington D.C., stated that, "[a] 1 percent increase presents a significant environmental impact in a part of the country where states are struggling to achieve reductions of 5 percent per year." *Id.* at B3.

4. *See EPA Announces, supra* note 1, at 504; Lavelle, *supra* note 3, at B1. The term GATT in the past was used to refer both to the treaty, *see General Agreement on Tariffs and Trade, opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT], and to the administering organization based in Geneva, Switzerland. As an organization, the GATT now has been superseded by the World Trade Organization. *See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, 33

The details of this negotiated settlement had been hammered out during the course of secret meetings between Venezuela, the EPA, the Energy Department, and the office of the U.S. Trade Representative.⁵ Congress and the public learned of the compromise after the leaking of a confidential cable from Secretary of State Warren Christopher to the U.S. Ambassador to Venezuela.⁶ Shortly thereafter, Congress forced the EPA to abandon the deal by inserting a rider in a subsequent EPA appropriations bill that precluded the rule change.⁷

After the EPA abandoned the rule change, Venezuela relogged its complaint, this time before a dispute-settlement panel of the World Trade Organization (WTO).⁸ The United States has had a difficult time defending its policy under the rules of the GATT.⁹ The policy would reduce pollution in the United States,¹⁰ but it clearly would discriminate against foreign producers. The United

I.L.M. 1143 [hereinafter Uruguay Round Final Act]; Agreement Establishing the World Trade Organization, done on Apr. 15, 1994, 33 I.L.M. 1144 [hereinafter WTO Agreement].

5. See *EPA Announces*, supra note 1, at 504.

6. See *id.* at 504.

7. See Pub. L. No. 103-327, 108 Stat. 2298, 2319 (1994). One administration official, however, contended that, given the largely negative comments received, the proposed rule change might not have been adopted even without the congressional action to block it. See *U.S. Defends Gas Rules in WTO Against Charges of Discrimination*, INSIDE U.S. TRADE, July 7, 1995, at 9 [hereinafter *U.S. Defends Gas Rules*]. The official characterized the proposed rule change as "a limited attempt by EPA to determine whether there was a better solution." *Id.*

8. Venezuela originally filed its complaint with the dispute-settlement mechanism of the GATT. However, it withdrew the complaint from the GATT mechanism and relogged it on January 20, 1995, with the newly established dispute-settlement mechanism of the WTO. This was the first case brought against the United States in the WTO. See *Venezuela Moves Toward WTO Case in Reformulated Gas Dispute*, INSIDE U.S. TRADE, Feb. 3, 1995, at 4. For an explanation of the WTO and its dispute-settlement proceedings, see *infra* Part I.

9. At the time this Note went to press, a WTO dispute-settlement panel had ruled against the United States. See *Kantor Says He's Inclined to Appeal Panel's Ruling in Venezuela Gas Case*, [13 Current Reports] Intl. Trade Rep. (BNA) 100 (Jan. 24, 1996). United States Trade Representative Mickey Kantor stated that he intended to appeal the ruling but would consider the views of Congress before making a final decision. Venezuela argued that the EPA's rule discriminates against foreign refineries and violates, among others, Articles I (most-favorite-nation principle) and III (national-treatment principle) of the GATT. See *U.S. Defends Gas Rules*, supra note 7, at 8. Countering that allegation, the United States contended that the EPA rule, though facially discriminatory, did not discriminate in practice. By contrast, when it defended the ill-fated bargain with Venezuela to settle out of court, the United States expressed the view that the final EPA rule probably was incompatible with provisions of the GATT. Ira Shapiro, General Counsel for the U.S. Trade Representative, testified before Congress that the United States would have a difficult time defending its policy as compatible with the GATT. He stated that the burden would be on the United States to show that the discrimination is necessary, a difficult task given that the EPA has said that discrimination is not necessary within the meaning of the GATT Article XX to achieve the objectives of the Clean Air Act. See *Venezuela Vows GATT Challenge Following House Vote on Gas Rules*, INSIDE U.S. TRADE, Sept. 16, 1994, at 6. On the exception contained within Article XX of the GATT and the burden of proof to meet the definition of "necessary" within the meaning of that provision, see *infra* notes 36-37.

10. See *supra* note 3.

States must prove that this discrimination is necessary — not in the view of U.S. regulators but under the terms of the GATT — to promote environmental protection.¹¹

The dispute with Venezuela — referred to as the “Reformulated Gasoline Case” — is just one in a series of conflicts between environmental protection and free trade arising in the context of the world’s multilateral trade regime, first under the GATT and now under the WTO.¹² But the Reformulated Gasoline Case also exemplifies two broad consequences that global interdependence has had for the U.S. government. First, fewer matters of policy can be determined solely by reference to domestic preferences. An increasing range of national policies derives not from internal government but from government’s interaction with foreign powers. This interaction leads to the second consequence of global interdependence — a change in the nature of government. Domestic policymaking traditionally has been shared among the three branches and opened to public scrutiny, while the government of foreign affairs has tended to be concentrated in the Executive Branch¹³ and conducted in secrecy.¹⁴ With the rise in global interdependence, matters of domestic government and foreign affairs overlap, and the domestic mode of government tends to give way to that of foreign affairs.

As the Reformulated Gasoline Case suggests, this encroachment threatens the democratic integrity of our domestic policy. It well may be that national rules often fail to reflect the legitimate concerns of foreign powers. This Note proceeds on the premise, however, that it would be against the public interest for executive-branch agencies to seek to accommodate those concerns by negotiating with foreign powers in utter secrecy without engaging in some

11. On what discrimination is exempted under GATT Article XX from the GATT’s general ban on discriminatory treatment on grounds of “necessity,” see *infra* notes 36-37.

12. See generally Symposium, *Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?*, 49 WASH. & LEE L. REV. 1219 (1992); Symposium, *Greening the GATT: Setting the Agenda*, 27 CORNELL INTL. L.J. 447 (1994).

13. See, e.g., HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 117-49 (1990) (describing the gradual monopolization of the nation’s foreign policy by the Executive Branch through a combination of executive initiative, congressional acquiescence, and judicial tolerance).

14. Laws promoting open government typically provide some sort of exemption when foreign affairs are concerned. See, e.g., 5 U.S.C. § 552(b) (1994) (allowing the President to declare by executive order the parameters of a broad national-security exemption that agency officials may invoke when information is requested under the Freedom of Information Act); 5 U.S.C. § 553(a)(1) (1994) (exempting administrative rulemaking from the public-notice-and-comment requirements of the Administrative Procedure Act (APA) when a “foreign affairs function of the United States” is involved); Federal Advisory Committee Act, Pub. L. No. 92-463, § 10, 86 Stat. 770, 774, *reprinted in* 5 U.S.C. app. at 1375 (1994) (allowing the President or agency head to take exception to the Federal Advisory Committee Act’s provisions relating to open meetings, public notice, public participation, and public availability of documents when necessary in the interests of foreign policy).

form of systematic consultation with the range of domestic parties concerned.¹⁵

Although the denouement of the Reformulated Gasoline Case appears as something of a triumph for popular sovereignty and open government, the forces that halted the rule change in that case do not operate consistently. Concern for environmental protection will not always comport with the interests of the U.S. oil industry, and thus congressional opposition will not always rise to the level it did in the Reformulated Gasoline Case.¹⁶ In the absence of a high-profile concern, Congress rarely will interfere with executive-branch rulemaking, and therefore the administrative agency responsible for a particular issue will control the development of policy. This is troubling because the general requirements ensuring public participation in agency rulemaking currently do not apply when that rulemaking is pursuant to an international agreement.¹⁷ Given the rise in global interdependence, this foreign-affairs exception could result in a steady erosion of direct democratic control over domestic regulatory policies that conflict with free-trade rules.

This Note argues that, because the Executive Branch increasingly will be promulgating domestic regulatory rules intended to comply with the rules of the world-trading system, it is necessary to increase formal oversight of the Executive Branch's role in that context. Part I argues that the United States' participation in the WTO implies a substantial increase in the impact of foreign policy on domestic policy. Part II points out a loophole in Congress's attempt to compensate for this increase by installing various devices to ensure political oversight of the Executive: the Executive Branch is subject, under the Uruguay Round Agreements Act (URAA),¹⁸ to formal oversight during the WTO dispute-settlement process only in connection with *adjudicated* settlements, not in connection with *negotiated* settlements. Part III proposes that Congress expand the application of provisions of the Trade Act of 1974 that currently require the U.S. Trade Representative to consult pri-

15. See Brian J. Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 116-19 (1995) (arguing that public participation in trade negotiations would serve to check the power of government officials and better inform their decisions).

16. Citgo, a Venezuelan refinery that currently commands five percent of the U.S. market in reformulated gasoline, would have been largely excluded from the U.S. market for three years, to the benefit of the Mobil and Sun oil companies. See Lavelle, *supra* note 3, at B1.

17. See 5 U.S.C. § 553(a)(1) (1994) (exempting rulemaking from the public-notice-and-comment requirements of the APA "to the extent that there is involved . . . [a] foreign affairs function of the United States"). As currently interpreted, the APA's foreign-affairs exception applies, among others, when agencies issue, modify, or rescind rules in order to implement an international agreement. See, e.g., *International Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (holding that a rule modification pursuant to a mutual understanding with Mexico was within the foreign-affairs exception of § 553).

18. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

vate-sector representatives representing both trade and nontrade interests while negotiating settlements. This Part also argues that Congress should extend the URAA procedures currently applicable to rulemaking pursuant to *adjudicated* settlements to rulemaking pursuant to *negotiated* settlements.

I. THE IMPACT OF THE WORLD TRADING SYSTEM ON U.S. DOMESTIC POLICY

This Part argues that the expanding scope of law issued under the auspices of the WTO is cause for concern because the dispute-settlement process may fail to consider the full range of national interests in the domestic government policies it affects. Section I.A describes the potentially vast scope of international trade law and how it can spill over into traditional domestic policy areas. Section I.B asserts that the WTO's dispute-settlement process, which determines the concrete impact of international trade law on domestic law, is biased in a way that threatens the integrity of domestic policy.

A. *The Expanding Scope of International Trade Law*

The range of issues affected by international trade law has expanded greatly for three reasons. First, in recent years, the international trade regime has sought to broaden the scope of trade-related issues that are regulated. Originally, that regime was based on the founding GATT treaty, which only sought to alleviate restrictions on trade in goods.¹⁹ With the completion of the last round of multilateral trade negotiations, the general scope of the WTO's regime has broadened to include the trade in services.²⁰ The treaty on services creates a framework within which WTO members may commit to open their markets in the service sectors of their choice and to the degree that they specify. Commitments can involve arrangements such as the mutual recognition of professional qualifications, operating licenses, such as banking licenses, and standards, such as solvency ratios and other prudential regulations.²¹

19. See GATT, *supra* note 4, 61 Stat. at A3, 55 U.N.T.S. at 188.

20. See General Agreement on Trade in Services, *annexed to* WTO Agreement, *supra* note 4, 33 I.L.M. at 1167. Fifteen other treaties, all appended to the Uruguay Round Final Act, see Uruguay Round Final Act, *supra* note 4, deal with specific trade sectors or issues. Most relevant to the non-trade concerns — such as consumer health and safety — addressed in this Note are the Agreement on the Application of Sanitary and Phytosanitary Measures, *done on* Apr. 15, 1994, *annexed to* WTO Agreement, *supra* note 4, 33 I.L.M. at 1381; and the Agreement on Technical Barriers to Trade, *done on* Apr. 15, 1994, *annexed to* WTO Agreement, *supra* note 4, 33 I.L.M. at 1427.

21. See General Agreement on Trade in Services, *annexed to* WTO Agreement, *supra* note 4, 33 I.L.M. at 1167.

The second cause for the expanding impact of international trade law is the increased rigor of the regime. International trade law is now far less tolerant of measures that, though not designed to regulate trade, nonetheless impede it — so-called nontariff barriers. Initially, the international trade regime was concerned mainly with altering or eliminating national laws whose sole purpose was to regulate trade, such as the laws setting tariff rates and restricting imports and exports through the use of quotas. Recently, however, as a consequence of international trade law's increased attention to nontariff barriers, few regulatory fields have escaped the reach of the international trade regime.

Naturally, the more vigorously the architects of the international regime have sought to free trade from the various national regulations that hamper it, the more their efforts have tended to impinge on the designs of other regulators. Conflict with the regulation of environmental law has been most controversial,²² but health-and-safety rules also have been affected. For example, the United States has claimed that a European Union ban on the use of hormones in beef production, enacted following a vigorous campaign by consumer groups, violated the Agreement on Technical Barriers to Trade, which prohibits nondiscriminatory measures that constitute unnecessary barriers to trade.²³ Similarly, U.S. health rules came under fire in a transatlantic dispute over procymidone residues in French and Italian wines. United States officials banned these wines because the Food and Drug Administration (FDA) had not yet established tolerance levels for procymidone in wines. Though scientific studies suggested that procymidone is a carcinogen and a reproductive toxin, Europeans prevailed upon the FDA hastily to set tolerance levels by accusing the United States of a trade violation similar to that alleged by the United States in the hormones dispute.²⁴

22. See generally *supra* note 12.

23. See John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade after the Uruguay Round*, 14 U. ARK. LITTLE ROCK L.J. 429, 435 (1992). The United States now contends that the hormone ban is not based on "sound science" and so violates the Agreement on Sanitary and Phytosanitary Measures. See *U.S. Wants End to Farm Dispute*, FIN. POST, June 6, 1995, at 6. For further evidence that health-and-safety rules have been affected, see *Thailand: Restrictions on Importation of and Internal Taxes on Cigarette* [hereinafter *Thailand Restrictions on Importation*], in GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 200, 225-26 (37th Supp. 1991) [hereinafter *BASIC INSTRUMENTS*] (finding that Thailand's measures restricting the importation of cigarettes in the name of a national health policy were not "necessary" within the meaning of Article XX(b) of the GATT).

24. See Tina E. Levine, *Assessment and Communication of Risks from Pesticide Residues in Food*, 47 FOOD & DRUG L.J. 207, 211 (1992) (noting that the State Department exerted considerable pressure on the EPA to establish tolerance levels more quickly); see also Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INTL. L.J. 631, 638 n.24 (1994) (asserting that "it is not at all clear that the proposed

Third, the reach of trade law is often expanded, not through specific treaty language, but rather through a case-specific application of broad treaty prohibitions. For example, the WTO's general prohibition against discrimination in trade can lead to far-reaching consequences similar to those resulting from the expansive interpretation of the Dormant Commerce Clause and Article 30 of the Treaty of Rome.²⁵ Though the adjudicators of a WTO dispute are not at liberty to employ the broad constitutional methods of interpretation applied to the U.S. Constitution and the Treaty of Rome, even more conservative modes of interpretation leave the WTO adjudicative process with a central role in expanding the horizons of WTO law.

The GATT ruling in the Thai Cigarettes case has advanced a potentially far-reaching formula for the scope of Article XX's exception to the general ban on discrimination, which allows discrimination if it is "necessary" to protect public interests such as health and the environment. The panel stated:

[A] contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" . . . *if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.* By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.²⁶

Under this formula, though it is the prerogative of national regulators to set levels of health and environmental protection, they must achieve these levels by the least-trade-restrictive means — and it is the panel that makes this determination.²⁷

tolerance comports with the statutory standard of public health protection because EPA did not conduct its health assessment at the level of the proposed tolerance").

25. For a comparison of the Supreme Court's expansive interpretation of the Dormant Commerce Clause and the European Court of Justice's similar interpretation of Article 30 of the Treaty of Rome in the context of European economic integration, see ERIC STEIN & TERRANCE SANDALOW, *On the Two Systems: An Overview*, in 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 3, 24-30 (1980).

26. *Thailand: Restrictions on Importation*, *supra* note 23, at 223 (quoting *United States: Section 337 of the Tariff Act of 1930*, in BASIC INSTRUMENTS, *supra* note 23, at 345, 392 (36th Supp. 1990)).

27. The language of the Thai Cigarettes case is strikingly similar to that employed by the European Court of Justice in limiting the scope of Article 36 of the Treaty of Rome, which is analogous to GATT Article XX. According to the Court of Justice, under Article 36, public-health "measures are justified only if it is established that they are necessary in order to attain the objective of protection referred to in Article 36 and that such protection cannot be achieved by means which place less of a restriction on the free movement of goods within the Community." Case 155/82, *Commission v. Belgium*, 3 E.C.R. 531, 543 (1983). For the general trend in the findings of GATT panels, see 1 WORLD TRADE ORG., GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 151-55 (1994) (noting that GATT panels consistently have expanded the scope of the national-treatment clause's ban on discrimination against foreign products, extending the notion of discrimination beyond facial discrimination

B. *The Role of the Dispute-Settlement Process*

As the preceding discussion suggests, the degree to which free-trade commitments affect other domestic policies is determined in great part by the dispute-settlement process of the WTO. This process is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).²⁸ Under the DSU, parties first must try to settle their dispute by negotiating.²⁹ If they fail to resolve the dispute within sixty days, the complaining party may choose to submit the dispute to adjudication by a panel of experts.³⁰

When dispute settlement results in a negotiated settlement, the impact of WTO law on nontrade areas of policy is potentially greater than it is when disputes are adjudicated.³¹ As the Reformulated Gasoline Case illustrates, countries whose laws allegedly violate WTO law may have strategic reasons to settle even if they believe they may win an adjudicated case.³² Although the WTO provides a safeguard against negotiated settlements that undermine free trade,³³ no similar safeguard exists to protect against the pressure, inherent in the give and take of trade disputes, to dismantle domestic laws in an effort to reach an agreement.³⁴

to a notion of de facto discrimination including "unequal competitive opportunities"). The Agreement on Sanitary and Phytosanitary Measures, *supra* note 20, 33 I.L.M. at 1381, sets a judicial standard that explicitly goes beyond facial nondiscrimination.

28. Understanding on Rules and Procedures Governing the Settlement of Disputes, *annexed to* WTO Agreement, *supra* note 4, 33 I.L.M. at 1226 [hereinafter Dispute Settlement Understanding].

29. *See id.* 33 I.L.M. at 1229.

30. *See id.* For a brief description and analysis of the DSU and its impact on international trade dispute settlement, see Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INTL. L. 477 (1994).

31. In the case of negotiated settlements, the source of legal obligation is not WTO law but rather the general international law commitment created by the agreement between the settling parties. To give rise to an international law obligation, the agreement need not be referred to as a treaty. *See Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982) (referring to Article 2 of the Vienna Convention as denying the importance of distinctions between treaties and other international agreements). Oral commitments may even be binding as a matter of international law. *See, e.g., Nuclear Test (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472-74 (Dec. 20); *Nuclear Test (Austl. v. Fr.)*, 1974 I.C.J. 253, 269-71 (Dec. 20).

32. For example, in the Reformulated Gasoline Case, *see supra* notes 1-9 and accompanying text, the EPA noted that the terms of its settlement involved changing its rule with regard to reformulated gasoline only, whereas it felt the alternative of adjudication might lead to a finding that the EPA rule provisions on regular gasoline would have to be altered also. *See EPA Announces*, *supra* note 1, at 504.

33. The terms of negotiated settlements must be reported to the WTO. *See* Dispute Settlement Understanding, *supra* note 28, art. 3(6), 33 I.L.M. at 1227. A requirement that these terms be consistent with WTO law, *see id.* art. 3(5), 33 I.L.M. at 1227, ensures that parties will not undermine the trade regime by settling on terms that are more trade-restrictive than those that would be imposed through adjudication.

34. Naturally, no DSU provision prohibits settlements that undermine nontrade rules more than the trade regime requires. But the dynamics of negotiated settlements may create this result. The synergy between the hormone and procymidone disputes exemplifies the

In addition to generating far-reaching effects on domestic policy, the dispute-settlement process naturally produces results that favor free trade over other public-policy concerns.³⁵ Although WTO rules contain exceptions designed to prevent undue encroachment on national governments' efforts to pursue legitimate nontrade policies,³⁶ these exceptions require the country whose rule is at issue to prove its nondiscriminatory basis — a difficult burden.³⁷

Moreover, the international law that is designed to promote interests other than free trade fails to offset the impact of international trade law. No worldwide mechanism approaching the level of efficacy of the WTO enforces countervailing international norms,³⁸ and WTO law does not incorporate them by reference.³⁹

pressures that the free-trade rules may exert on domestic laws outside of any formal adjudication. The desire of the United States to press cases such as the one against the European Union ban on hormones in beef production created pressure on the EPA to establish hastily procymidone-tolerance levels since any appearance of protectionism on the part of the United States would undermine its position with regard to the European Union. See *supra* note 24 and accompanying text.

35. For more on this imbalance — called “trade bias” by environmentalists — see Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1289-96 (1992) (arguing that GATT trade rules — developed at a time when international economic matters were not associated with health and environmental considerations — fail to account for environmental externalities and thwart needed domestic legislation, as well as unilateral efforts to force higher environmental standards worldwide).

36. When a national provision is found to discriminate against or among foreign goods, that provision may be justified as “necessary” under GATT Article XX, which states:

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 [necessary to protect environment, human health, etc]. GATT, *supra* note 4, 61 Stat. at AGO, 55 U.N.T.S. at 262.

37. See *United States: Restrictions on Imports of Tuna*, in BASIC INSTRUMENTS, *supra* note 23, at 155, 197 (39th Supp. 1993) (“[T]he practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.” (footnotes omitted)).

38. See, e.g., Jeffrey L. Dunoff, *Institutional Misfits: The GATT, The ICJ and Trade-Environment Disputes*, 15 MICH. J. INTL. L. 1043, 1046 (1994) (concluding, after surveying studies of the relevant international institutions, that “nations have been reluctant to use international tribunals in the past, and the advocates of adjudication offer little reason to think that global environmental disputes will find their way to international courts more frequently in the future”).

39. Although the North American Free Trade Agreement (NAFTA) contains a clause stating that international environmental protection agreements trump NAFTA provisions, the GATT offers no such general deference to environmental norms. See North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 104, 32 I.L.M. 289, 297-98 (“In the event of any inconsistency between this Agreement and the specific trade obligations set out in [certain major environmental conventions as well as the agreements listed in Annex 104.1 of the NAFTA], such obligations shall prevail to the extent of the inconsistency . . .”). For a more modest but similar approach to the GATT, see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1271 (1992) (suggesting that, without amending the GATT treaty, countries could waive each

Thus, when international law prevails over national law, the world-trading system, unimpaired by other international forces or its own terms, may run roughshod over the many policies it affects but is not designed to promote.

II. THE LOOPHOLE IN CONGRESS'S ATTEMPT TO CONTROL THE IMPACT OF THE WORLD-TRADING SYSTEM ON DOMESTIC POLICY

Concerns over the impact of the world-trading system on domestic policy pervaded the congressional debates over U.S. accession to the WTO.⁴⁰ In the statute implementing the WTO, the URAA, Congress established a scheme designed to assert political control over the United States' interaction with the WTO.⁴¹ Section II.A points out that the URAA's provisions enable Congress to control the Executive Branch's role in settling trade disputes through adjudication but fail to control the Executive when it *negotiates* settlements as an alternative to adjudication. Section II.B asserts that this loophole is of particular concern in cases when the Executive Branch negotiates settlements it can implement on its own authority.

A. URAA Inapplicability to Negotiated Settlements

The URAA contains elaborate provisions to control the Executive Branch when it represents the United States in dispute-settlement proceedings before the WTO.⁴² The URAA establishes information and consultation requirements designed to keep Congress, various quasi-representative bodies, and the public informed about the Executive Branch's participation in WTO activities. One set of provisions is designed to give the general public access to information about adjudicative proceedings by requiring that they be as transparent as possible within the constraints of WTO rules.⁴³

other's GATT obligations, allowing them to apply standards prescribed in certain specified international environmental agreements though this otherwise would result in a GATT violation).

40. See, e.g., H.R. Con. Res. 246, 102d Cong., 2d Sess. 1 (1992) (expressing the "sense of Congress" that trade agreements negotiated in the Uruguay Round must be compatible with U.S. health, safety, labor, and environmental laws).

41. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127, 108 Stat. 4809, 4835-36 (1994).

42. For a brief explanation of WTO dispute-settlement proceedings, see *supra* notes 28-30 and accompanying text.

43. Recognizing that WTO rules governing disclosure are at present too restrictive, Congress in the URAA exhorted the U.S. Trade Representative (USTR) to "seek [within the WTO] adoption . . . of procedures that will ensure broader application of the principle of transparency . . . through the observance of open . . . procedures." Uruguay Round Agreements Act, Pub. L. No. 103-465, § 126, 108 Stat. 4809, 4834 (1994). The USTR must give notice of the existence of panel proceedings and the issues involved. When the United States or its adversary in a dispute requests that the case be brought before a panel, the USTR must

Another set of URAA provisions establishes procedures designed to subject the Executive Branch's interaction with the WTO during adjudication to oversight⁴⁴ by congressional committees and quasi-representative bodies.⁴⁵ A third set of provisions applies similar oversight provisions to the regulatory implementation of WTO rulings.⁴⁶

Extensive though they are, none of the URAA's oversight and transparency provisions applies to negotiated settlements because those provisions apply only after a complainant requests that a dispute be brought before a panel.⁴⁷ This is a substantial omission,

publish a notice in the *Federal Register* setting forth the major issues raised by the complainant and indicating what, if any, state or federal law is at issue. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(b), 108 Stat. 4809, 4835 (1994). Promptly after a dispute-settlement panel is established in a case alleging an inconsistency of federal or state law with WTO law, the USTR must notify the "appropriate Congressional committees" of the nature of the dispute, the composition of the panel, and whether the members of the panel were appointed by consensus. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(d), 108 Stat. 4809, 4831 (1994). Also, the submissions of the parties and the findings of the panel must be made available to the public to the extent disclosure is permitted by WTO rules. The USTR's written submissions must be made available to the public promptly after they are presented to the panel. As to other parties' submissions, the USTR must request each other party to allow the USTR to make them available to the public. If permission is refused, then the USTR must request the nonconfidential summary that parties to a WTO dispute are required under the Understanding to provide on request. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(d), 108 Stat. 4809, 4835 (1994). Panel decisions must be made available to the public promptly after their adoption. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(c), 108 Stat. 4809, 4835 (1994).

44. For a description of this oversight mechanism, see *infra* section III.B.1.

45. For the composition of these representative bodies, see *infra* note 69 and accompanying text.

46. Section 135 of the Trade Act of 1974, 19 U.S.C. § 2155 (1994), contains oversight provisions, applicable to WTO negotiated settlements, that are roughly analogous to some of the URAA provisions governing WTO adjudicated settlements. For a description of the oversight provisions of the Trade Act of 1974 and their shortcomings, see *infra* note 84 and accompanying text. For a description of the URAA's oversight provisions analogous to those of § 135 of the Trade Act of 1974, see *infra* section III.B.

47. The provisions apply when the United States is involved in proceedings *before a panel*. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994); see also Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(d), 108 Stat. 4809, 4830 (1994) (requiring the USTR to consult congressional committees "[p]romptly after a dispute settlement panel is established").

A different series of consultation provisions applies from the time negotiations begin when state law is concerned. These are part of a set of provisions entitled "Federal-State Cooperation." See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C), 108 Stat. 4809, 4816 (1994). These provisions require the USTR to consult with state governments during trade disputes when state laws are at issue. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(i), 108 Stat. 4809, 4816 (1994). Unlike the analogous provisions requiring consultations at the federal level, the state consultation provisions cover the negotiations as well as the adjudicative phase in WTO dispute settlement. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(i), 108 Stat. 4809, 4816 (1994). However, the USTR is to consult only with the members of the executive branch of the state government. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(i), 108 Stat. 4809, 4816 (1994). Thus, these provisions do not ensure democratic control in the manner of the provisions applying to adjudicated settlements.

given that many disputes are likely to end in a negotiated settlement before either party requests a panel hearing.⁴⁸

Congress's failure to cover negotiated settlements under the URAA is difficult to justify. As noted in Part I, the impact of WTO law on U.S. domestic law is potentially even greater when it results from negotiated, as opposed to adjudicated, settlements.⁴⁹ The difference in treatment of negotiated and adjudicated settlements may derive some justification from the fact that Congress is more likely to refuse to implement a negotiated settlement than an adjudicated settlement. Even though both WTO adjudicative rulings and negotiated settlements create international law obligations, a WTO ruling is likely to carry greater moral force than a negotiated settlement.⁵⁰ Thus, in the case of negotiated settlements, Congress may be more inclined to implement a negotiated settlement, acting as a democratic buffer between the international process and its impact on domestic law. Congress's inclination to refuse to implement settlements, however, will always be tempered by concern for the United States' credibility in future negotiations, and this concern often will stand in the way of Congress's ability to act as a democratic buffer.

B. *Executive-Implemented Settlements*

Though this discussion thus far has assumed that implementing a negotiated settlement would require the intervention of Congress, those settlements calling for regulatory — rather than statutory — changes would not require congressional intervention. The Reformulated Gasoline Case discussed in the Introduction is a good example. This section argues that the current law offers virtually no democratic control over the Executive Branch when it negotiates settlements and implements them using its regulatory authority. Section II.B.1 notes that congressional control is insubstantial, and

48. If a silent legislative history is any indication, Congress did not consider the discrepancy between its treatment of adjudicated and negotiated settlements. *See, e.g.*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 656, 656-57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4040-41 (Statement of Administrative Action) (discussing URAA provisions for consultations regarding adjudicated settlements and making no reference to negotiated settlements); H.R. REP. NO. 826(I), 103d Cong., 2d Sess. 32-33 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3804-05 (same).

49. The strategic incentives that come into play during negotiations can lead to modifications of U.S. law not required by WTO law. *See supra* notes 31-34 and accompanying text.

50. Whereas a negotiated settlement expresses only the terms of an ad hoc arrangement between the parties giving rise to an international law obligation, a panel ruling is an authoritative statement of WTO law. Disrespecting a panel ruling would call into question the authority of WTO law itself and the institutional authority of the WTO embodied by the panel. This would undermine the WTO dispute-settlement system. The United States, which has used the GATT dispute settlement to its benefit more than any other trading partner, cannot afford to undermine the WTO system. *See, e.g.*, Gary Horlick, *Dispute Resolution Mechanism: Will the United States Play by the Rules?*, J. WORLD TRADE, Apr. 1995, at 163.

section II.B.2 asserts that alternatives to congressional control are inadequate.

1. *A Near Absence of Congressional Control*

Congress can control executive regulatory action by using the power of the purse or passing a law to reverse a particular line of regulatory conduct. But there are two factors militating against congressional control by such means. First, concern for the credibility of the United States as a contracting party weighs against reversing a policy the Executive Branch has developed in conjunction with a trading partner. Second, Congress's role in this context depends on its willingness to intervene actively. This is quite different from its role when a settlement requires statutory changes. In the latter case, Congress can control the impact of WTO law merely by refusing to modify laws to comply with the agreement. Congressional control over the WTO's impact on regulatory policy, on the other hand, supposes aggressive congressional intervention in fields where Congress has abandoned day-to-day control. This occurred in the Reformulated Gasoline Case. But few would expect Congress to intervene every time international negotiations led to rule changes. Indeed, many regulatory issues will simply escape the attention of Congress.

2. *The Inadequacy of the Normal Alternatives to Congressional Control*

Administrative law provides other procedures for ensuring the democratic integrity of the rules it produces, precisely because most regulatory activity will not draw the attention of Congress. Agencies normally create, modify, or rescind rules following procedures guaranteeing public participation, which are set out in the Administrative Procedure Act (APA).⁵¹ These procedures generally involve a period of public notice and comment.⁵² Agencies, however, may dispense with those procedures under a foreign-affairs exception applicable when rulemaking is pursuant to an international agreement.⁵³

51. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06, 3105, 3344 (1994)).

52. The most common type of rulemaking, informal rulemaking, follows a three-step process. First, notice of the proposed rule must be published in the *Federal Register*. See 5 U.S.C. § 553(b) (1994). Second, interested persons must be allowed to submit their views on the proposed rule. See 5 U.S.C. § 553(c) (1994). Third, the agency adopting the rule must create a general statement of the rule's basis and purpose. See 5 U.S.C. § 553(c) (1994).

53. See *supra* note 17.

Even if an agency waives the foreign-affairs exception to the APA,⁵⁴ the international negotiations giving rise to the rule change will tend to undermine the significance of the public-notice-and-comment process. Before submitting the necessary rule changes to public notice and comment, the agency must have reached at least a tentative agreement with another country.⁵⁵ At this point, the agency has a number of incentives to ignore legitimate domestic interests unless they can be accommodated without altering the terms of the tentative agreement. First, the agency and the foreign power often will have expended great efforts to reach a delicately balanced solution, and thus the parties naturally will be disinclined to return to the negotiating table to work out a new solution. Second, the agency generally will prefer to implement an agreement as negotiated to avoid losing credibility in future negotiations. The fact that the U.S. Trade Representative (USTR) always leads U.S. negotiating teams⁵⁶ in trade matters makes the concern about future negotiating clout even more pressing. Third, the leading role of the USTR creates an institutional bias in favor of promoting free trade and against concerns specific to the domestic regulatory field involved that militate in favor of renegotiating.

III. CLOSING THE LOOPHOLE

The erosion of democracy resulting from the Executive Branch's dual role as advocate for the United States in WTO negotiated settlements and domestic lawmaker presents a dilemma. International negotiations require that the United States speak with one voice. The particular context of dispute resolution also often requires secrecy.⁵⁷ But although secrecy is an effective way to strike a deal in an individual case involving international law, it is an unsatisfactory way to make domestic policy. The challenge is thus to balance the conflicting imperatives of the international and domestic systems in which the Executive Branch simultaneously must operate.

54. Agencies do not always invoke the foreign-affairs exception when issuing rule changes pursuant to an international agreement. One such instance was the EPA's notice for public comment on its final rule implementing the Montreal Protocol on Substances that Deplete the Ozone Layer. See *Protection of Stratospheric Ozone*, 53 Fed. Reg. 30,566 (1988).

55. Under an even less ideal scenario, the agency formally might conclude the agreement before submitting the necessary rule changes for public notice and comment. Under these circumstances, the only role of the notice-and-comment process would be to aid the agency in choosing among any regulatory options left open by the agreement.

56. See 19 U.S.C. § 2171(c)(1)(C) (1994).

57. If negotiators must work in public, the political concerns of both sides will lead to posturing, thus obstructing the path to a mutually agreeable solution. In the particular instance of negotiated settlements within the WTO, the governing rules require that negotiations be confidential. See *infra* note 61 and accompanying text.

This Part contends that a balanced solution lies in a formal mechanism subjecting the Executive Branch to timely political oversight that allows it to operate independently and, when appropriate, under conditions of secrecy. Section III.A explains the four attributes that such a solution should seek to achieve. Section III.B points out that the URAA's scheme for political oversight of the Executive Branch's role in connection with WTO *adjudicated* settlements suggests a scheme well-suited to achieve similar oversight of the Executive's role in connection with *negotiated* settlements. Section III.C proposes enacting such a scheme through two minor amendments. One amendment would alter the Trade Act of 1974 to make advisory committee meetings under that Act mandatory during negotiated settlements. This amendment also would trigger an existing provision of that Act requiring consultations with congressional advisors. Another amendment would alter the URAA itself and extend its procedures that now only govern agency action pursuant to a WTO *adjudicated* settlement to agency action pursuant to a *negotiated* settlement.

A. *The Parameters of a Solution*

Four general policies should guide a solution in order to accommodate the conflicting exigencies of diplomacy and domestic policymaking: (1) control over the President should result from increased political scrutiny, not binding congressional or judicial control; (2) any means of increasing political scrutiny should accommodate the occasional need for secrecy in international negotiations; (3) political scrutiny should be timely; and (4) it should be ensured through procedural requirements. This section briefly describes the importance of each of these policy goals.

1. *Political Scrutiny*

An oversight mechanism should achieve democratic control, not by limiting the ultimate authority of the President, but rather by subjecting the exercise of that authority to political scrutiny. The binding control of Congress is not necessary to achieve policies responsive to the public because, as many advocates of executive-branch preeminence in foreign affairs will point out, the President was elected too.⁵⁸ Further, sharing power with Congress in this context is not only unnecessary but undesirable. Congressional decisionmaking in the area of international trade leads to the preva-

58. An even stronger view has been expressed by Professor Trimble.

[I]t is at least unclear why Congress, especially its Senate half, should be considered more "democratic" than the President. Each institution — House, Senate, President — has its own electoral cycle and its distinctive constituencies. The House is elected more frequently, and thus is presumably more susceptible to the immediate moods of its constituencies. But only the President has the entire people as his constituency.

lence of parochial concerns over broader national interests.⁵⁹ Judicial control by means of adjudicating private suits seeking review of negotiated settlements almost certainly would engender the undue influence of special interests.⁶⁰

2. *A Selective Approach to Secrecy*

Although negotiations sometimes must take place under conditions of secrecy, the domestic rulemaking process connected with negotiations need not. The WTO's DSU requires the confidentiality of negotiations held within the framework of that Understanding.⁶¹ But domestic rulemaking pursuant to the resolution of a dispute within the WTO need not⁶² and should not⁶³ take place outside the normal procedures ensuring public input.

3. *Timing*

When regulatory policy is tributary to international agreements, the timing of political scrutiny is crucial. Domestic political forces should weigh in before these agreements are concluded. Once an agreement is in place, those in charge of implementing the agreement are faced with the choice of either ignoring domestic resistance to the policy changes dictated by the agreement or renegeing on

Phillip R. Trimble, *The President's Constitutional Authority to Use Limited Military Force*, 89 AM. J. INTL. L. 84, 87 (1995). Trimble goes on to argue that sole presidential authority at times may serve democracy better than shared power:

One of the hallmarks of democracy is accountability. The Haiti experience dramatically demonstrates the accountable, and hence quintessentially democratic, nature of the presidency. The President and his advisers have discussed the Haiti situation in news conferences, radio addresses, press releases and innumerable other interactions with interested constituencies. Most importantly, Haiti seems quite likely to figure in the President's campaign for reelection (as it did in his 1992 campaign).

No member of Congress, on the other hand, has addressed anyone on the congressional position (there really is none). No member of Congress will be asked to account for that institution's votes, or failures to vote, on Haiti. To be sure, a member of Congress may be attacked for a particular vote, or for being too "inside the Beltway" or otherwise identified with Washington, but Congress as a whole is never accountable to any constituency, let alone the American people as a whole.

Id.

59. See I.M. DESTLER, AMERICAN TRADE POLITICS 4-8 (1995) (explaining that protectionist interests tend to be concentrated and free-trade interests tend to be diffused and that members of Congress — who must respond to concentrated interests — are thus under great pressure to vote for protectionist policies and asserting that this was a major factor prompting Congress to delegate much trade-policy-making authority to the President, who is better equipped to ignore concentrated interests in favor of the general interest).

60. See, e.g., Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POLY. INTL. BUS. 263, 317 (demonstrating that § 301, which operates under the highly discretionary control of the USTR, has not been "captured" by private interests to assert a protectionist policy, as opposed to other trade statutes that provide for a great number of judicially enforceable private rights).

61. See Dispute Settlement Understanding, *supra* note 28, art. 4(6), 33 I.L.M. at 1229.

62. See *infra* section III.B.2.

63. See *infra* section III.C.2.

the agreement. It is preferable to avoid this dilemma by engaging in as much domestic political discussion as possible before the agreement is finalized.⁶⁴

4. *The Need for Formal Procedures*

Although political scrutiny often will occur spontaneously, the force and pervasiveness of the WTO's influence over U.S. policy call for an institutional response to ensure timely, consistent political scrutiny. In the Reformulated Gasoline Case, the EPA did provide opportunity for public notice and comment — after the impending deal with Venezuela was leaked — before closing the deal with Venezuela.⁶⁵ But the EPA and other agencies do not have to submit rulemaking that is pursuant to internationally negotiated agreements to public notice and comment, and they have used this loophole on at least one important occasion.⁶⁶ As argued in Part II, many regulatory changes may not elicit a congressional response. Yet public influence over executive policies should not depend on the level of congressional interest. For example, though Congress may not be moved to combat higher-than-optimal tolerance levels for procymidone,⁶⁷ the public ought to have some input into the decision whether to pay the price of such a policy for the sake of increasing free trade. If, however, the Executive Branch is permitted to alter trade-related domestic policy by presenting the public with a series of *faits accomplis*, negotiated settlements are likely steadily to erode nontrade domestic policies. It is not enough to assume that the Executive Branch will react to public disapproval of the general trend in policy. The trend will be too gradual to provoke a sharp reaction. Thus, political scrutiny should operate through some institutional device that puts the spotlight on each incremental step the Executive takes to adapt U.S. rules to the requirements of the international trade regime.

64. If domestic political forces can weigh in before the conclusion of an agreement, the result is likely to be an agreement more reflective of the interests concerned. In the event that domestic resistance precludes any negotiated settlement, the ensuing adjudication will force only the undesired policy change if this is required by WTO law.

65. See *EPA Announces*, *supra* note 1, at 504.

66. On November 21, 1991, the Federal Highway Administration (FHA) entered into a memorandum of understanding with Mexico involving the mutual recognition of commercial drivers' licenses. The FHA later promulgated a rule implementing the agreement, *see* 57 Fed. Reg. 31,454 (1992), without, however, following the APA's public-notice-and-comment procedures. *See* *International Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486 (D.C. Cir. 1994). For an account of the events surrounding that case, see Goldman, *supra* note 24, at 653.

67. *See supra* notes 23-24 and accompanying text.

B. *The URAA's Formal-Oversight Requirements*

The URAA procedures governing *adjudicated* settlements offer good models for developing procedures to guarantee political control over the President in *negotiated* settlements. These procedures achieve the policy goals described in the previous section. Section III.B.1 examines the URAA's use of congressional and private-sector advisory committees to oversee the Executive Branch as it participates in adjudicated settlements. Section III.B.2 examines the URAA procedures governing agency action pursuant to adjudicated settlements.

1. *Political Control During Negotiations*

Whenever the United States is a party in WTO adjudicative proceedings, the URAA requires the USTR to consult representative bodies "at each stage of the proceeding[s]."⁶⁸ These bodies include "advisory committees," representing a cross-section of the private sector, as well as representatives of state and local governments.⁶⁹ The USTR also must consult congressional committees according to the same schedule.⁷⁰ The congressional committees to be con-

68. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994). The URAA contains other provisions, not directly relevant to this Note, that also are designed to assert democratic control over the United States' interaction with the WTO. Certain provisions designed to give the public access to the adjudicative proceedings before the WTO would not be adapted easily to negotiations because the terms of the WTO require that dispute-settlement negotiations be confidential. See *Dispute Settlement Understanding*, *supra* note 28, art. 4(6), 33 I.L.M. at 1229. For an argument in favor of transparency in negotiated settlements under the pre-WTO regime of GATT's dispute-settlement mechanism, see Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 96-98 (1992). In addition to the devices designed to ensure political oversight of the President's role of representing the United States in WTO dispute-settlement proceedings, the URAA contains similar provisions with respect to decisionmaking in the WTO. These mainly require consulting congressional committees before "any vote is taken by the Ministerial Conference or the General Council" of the WTO and systematically reporting to Congress on any decisions taken. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 122, 108 Stat. 4809, 4829-30 (1994). More general requirements involve a yearly report to Congress on participation in the WTO, see Uruguay Round Agreements Act, Pub. L. No. 103-465, § 124, 108 Stat. 4809, 4832-33 (1994), and a more general assessment of participation in the WTO to be submitted to Congress every five years, see Uruguay Round Agreements Act, Pub. L. No. 103-465, § 125, 108 Stat. 4809, 4833-34 (1994).

69. The advisory committees are made up of various representatives of industry, labor, environmental, and consumer interests, as well as state and local government. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994). For a general discussion of the history of advisory committees and their relations to the President and Congress, see Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994). For criticism of the insufficient breadth of interests represented on advisory committees, see *infra* note 81.

70. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994). Congressional committees also are consulted as to the identity of the experts appointed to serve on an ad hoc basis as members of the panels that function as WTO courts of first instance, including: whether those persons were appointed by the normal rule of consensus, see Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(d), 108 Stat. 4809, 4830-31 (1994); with respect to any panel report, the nature of any appeal that may be

sulted include the Senate Finance Committee, the House Ways and Means Committee, and any other congressional committees having jurisdiction over the matter under consultation.⁷¹

This set of provisions subjects the negotiating process to acute political scrutiny, yet it provides the Executive Branch with sufficient flexibility in negotiations. The Executive Branch is not bound by the advice it receives.⁷² The URAA provisions also allow for secrecy when necessary. Although the URAA does not require the confidentiality of communications to the congressional committees, confidentiality can be secured through an injunction of secrecy.⁷³ The USTR also may consult the advisory committees confidentially if need be.⁷⁴ As to timing, by requiring consultation *during* the proceedings, the URAA enables the congressional and advisory committees to influence the USTR while it is still in a position to affect the course of WTO proceedings, not afterwards.

2. Political Control Over Agency Regulatory Action

If WTO adjudication results in a finding that a U.S. agency's regulation or practice is inconsistent with WTO law, the URAA provides for political scrutiny of the Executive Branch's efforts to

taken, *see* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(f)(2), 108 Stat. 4809, 4831 (1994); the issues raised on any appeal and the identity of the persons serving on the appellate body, *see* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(e), 108 Stat. 4809, 4831 (1994); in the case of an adverse panel report, "whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation." Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(f)(3), 108 Stat. 4809, 4831 (1994).

71. The URAA refers to "appropriate congressional committees," defined as the House Committee on Ways and Means and the Senate Committee on Finance, *see* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 121(3)(B), 108 Stat. 4809, 4829 (1994), and "any other committees of Congress that have jurisdiction involving the matter with respect to which consultations are to be held." Uruguay Round Agreements Act, Pub. L. No. 103-465, § 121(3)(A), 108 Stat. 4809, 4828 (1994).

72. This statement is nowhere explicitly made in the URAA, but it is implicit in the use of the term "consult." *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g), 108 Stat. 4809, 4831-32 (1994) (permitting the House Ways and Means Committee and the Senate Finance Committee to "vote to indicate the[ir] agreement or disagreement" with final rules adopted by agencies pursuant to a panel ruling but specifying that the vote is not binding on the USTR.).

73. For an example of a statute providing for similar confidential communications between the President and Congress, *see* 1 U.S.C. § 112b(a) (1994) (requiring that the President transmit to Congress any international agreement, other than a treaty, to which the United States is a party, but that, when disclosure of the agreement would "in the opinion of the President, be prejudicial to the national security of the United States," the agreement "shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President").

74. The advisory committees referred to in the URAA are those generally governed by § 135 of the Trade Act of 1974, 19 U.S.C. § 2155 (1994). *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 123(g)(1)(B), 127(a), 108 Stat. 4809, 4831, 4835 (1994). Section 135 of the Trade Act authorizes nonpublic consultations with the advisory committees when necessary to maintain the integrity of trade negotiations. *See* 19 U.S.C. § 2155(f) (1994).

bring the regulation or practice into compliance with WTO law.⁷⁵ Before modifying any regulation or practice, the relevant agency or department must seek advice from the advisory committees, consult the appropriate congressional committees, submit to the congressional committees a report explaining and justifying the proposed rule or practice modifications, accompanied by a summary of the advice obtained from the advisory committees, and *engage the public* by providing notice and opportunity for public comment.⁷⁶ The USTR and the head of the relevant department or agency must have consulted the appropriate congressional committees on the proposed *final* rule or other modification sixty days before the change goes into effect.⁷⁷ The Senate Finance Committee or the House Ways and Means Committee may cast a nonbinding⁷⁸ "vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification."⁷⁹

This set of provisions unleashes the full range of political scrutiny, calling on, not only the input and influence of congressional and advisory committees, but also public participation. The circumstances of agency rulemaking, as opposed to those of the international negotiating process, allow for this more extensive democratic control. This is because rulemaking intervenes *after* WTO adjudicative proceedings have run their course, as the agency takes action to implement the settlement. At that point, there is no need for secrecy.

The existence of a public-notice-and-comment component in the provisions described above indicates that, where the WTO was concerned, Congress felt the need to make an exception to the APA's

75. This requirement is triggered "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements." Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1), 108 Stat. 4809, 4831 (1994).

76. The URAA provides that a regulation may not be changed unless:

(A) the appropriate congressional committees have been consulted . . .

(B) the Trade Representative has sought advice . . . from relevant private sector committees . . .

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and an explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained [from the advisory committees].

Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1), 108 Stat. 4809, 4831 (1994).

77. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(2), 108 Stat. 4809, 4832 (1994).

78. The vote is not binding on the relevant department or agency. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(3), 108 Stat. 4809, 4832 (1994).

79. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(3), 108 Stat. 4809, 4832 (1994).

foreign-affairs exception.⁸⁰ Indeed, the URAA establishes procedures more elaborate than those required by the APA inasmuch as the URAA requires the consultation of Congress and advisory committees.

C. *The Mechanics of a Solution*

The preceding URAA provisions merited consideration not only by way of example but also because they suggest the current inclinations of Congress about how to achieve democratic control over the Executive Branch in the context of the WTO. This section suggests some minor reforms that would expand upon the work Congress began with the URAA in 1994. Section III.C.1 proposes amending the Trade Act of 1974 to require advisory committees to convene *during* the negotiation of settlements. Section III.C.2 proposes amending the URAA itself. This amendment would extend to agency rulemaking pursuant to *negotiated* settlements the URAA provisions currently governing agency rulemaking following *adjudicated* settlements. In combination, these amendments would ensure that important domestic concerns are not ignored in the process of reaching international trade agreements.

1. *Amending the Trade Act of 1974*

Section 135 of the Trade Act of 1974 already offers most of the components of a device to ensure political scrutiny during negotiations.⁸¹ Section 135 requires the President to seek information and advice from advisory committees on matters relating to U.S. trade policy, including the development of negotiating positions.⁸² The

80. On the APA's foreign-affairs exception, *see supra* note 17.

81. *See* 19 U.S.C. § 2155 (1994). Section 135 was introduced at the insistence of industry representatives concerned about being kept in the dark during the Tokyo Round trade negotiations in the 1970s. *See* John H. Jackson et al., *Implementing the Tokyo Round: Legal Aspects of Changing Economic Rules*, 81 MICH. L. REV. 267, 352 (1982). Originally, the advisory committees were to represent "non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, and consumer interests." 19 U.S.C. § 2155(b) (1988). During the Uruguay Round trade negotiations, however, the public and members of Congress voiced concern that these committees were being dominated by industry. *See* Goldman, *supra* note 24, at 673. In response, the URAA has added "nongovernmental environmental and conservation organizations" to the list of interests to be represented in § 135 advisory committees. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 128, 108 Stat. 4809, 4836 (1994). Some still argue that advisory committees inadequately represent the range of interests affected by international trade law. *See* Goldman, *supra* note 24, at 672-77 (arguing that the membership of advisory committees is made up almost exclusively of representatives of industry, that nonindustry representatives are picked only from the trade-friendly ranks of consumer environmental and labor movements, and that this skewed representation violates the Federal Advisory Committee Act's balanced-viewpoint requirement).

82. *See* 19 U.S.C. § 2155(a)(1)(C) (1994). Under § 135, the USTR must: seek information and advice from representative elements of the private sector and the non-Federal governmental sector with respect to—

advisory committees set up to operate under section 135 are the same as those referred to in the URAA, and the same provisions ensuring the confidentiality of consultations apply.⁸³

The timing provision of section 135 could be improved, however, because it does not require the USTR to convene advisory committees *during* negotiations. Although section 135 appears to mandate that the USTR consult advisors individually before and during negotiations when feasible, that provision does not impose requirements as to the timing of advisory committee meetings.⁸⁴ The required timely consultation of advisors on an *individual basis* is laudable, but a similar requirement as to the timing of advisory committee *meetings* would improve upon the existing consultation mechanism for a number of reasons. First, a requirement to consult advisors independently amounts only to ensuring that lobbying is more equitable and timely and that the government is better informed. Convening advisors, on the other hand, would create a political forum that intensifies the Executive Branch's accountability for the course of action it chooses. Advisors would hear the concerns other domestic constituencies have expressed and thus see clearly which interests weighed more heavily in the Executive's choices. The proposed system of confidential consultations thus provides a rough surrogate for public scrutiny as a means of ensuring the political accountability of the Executive Branch without compromising secrecy.⁸⁵

(A) negotiating objectives and bargaining positions before entering into a trade agreement . . .

(B) the operation of any trade agreement once entered into, including preparation for dispute settlement panel proceedings to which the United States is a party; and

(C) other matters arising in connection with the development, implementation, and administration of the trade policy of the United States

To the maximum extent feasible, such information and advice on negotiating objectives shall be sought and considered before the commencement of negotiations.

19 U.S.C. § 2155(a)(1)(C) (1994).

83. See *supra* note 74.

84. Although the URAA consultation provisions may trigger an obligation on the part of the USTR to consult advisory committee members *individually* during negotiations, those provisions do not trigger an obligation to *convene* advisory committee meetings. The amending history of § 135 suggests that the Executive is not obligated to convene meetings according to the rhythm of negotiations. A 1979 amendment changed the words "shall meet at the call of the [USTR], before and during any trade negotiations" to "shall meet at the call of the [USTR]." Compare Trade Act of 1974, Pub. L. No. 93-618, § 135(d), 88 Stat. 1996 with Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1103(5), 93 Stat. 309.

The only court to interpret language similar to the current version of § 135 concluded that the relevant federal agency was not under an obligation to convene advisory committee meetings. See *Dabney v. Reagan*, 559 F. Supp. 861, 865 (S.D.N.Y. 1982).

85. Members of consulted bodies may not be permitted to convey all the details of consultations, but they are not prohibited from communicating all aspects of the policies under consideration to the interest groups that they represent. Section 135 provides that rules about information from the public sector should "to the maximum extent feasible permit meaningful consultations by advisory committee members with persons affected by [trade negotiations]." 19 U.S.C. § 2155(g)(3) (1994).

Second, advisory committee meetings in principle are not necessarily confidential,⁸⁶ so that a selective approach to secrecy may allow public scrutiny of whatever discussion in the meetings can be disclosed without infringing on the secrecy of the international negotiations required under the terms of the WTO DSU.

Third, the requirement to convene committees during negotiations also would enhance political scrutiny of the negotiations by involving not only the advisory committees but Congress as well. Section 135 requires that “in the course of consultations with the Congress . . . information provided by advisory *committees* shall be made available to congressional advisers.”⁸⁷ Negotiated settlements would trigger this requirement to inform congressional advisors because section 2211 of title 19 of the U.S. Code mandates consultations with Congress concerning “the resolution of trade disputes.”⁸⁸

Congress can remedy the shortcoming in the timing of advisory committee meetings by requiring committees to meet “at the call of the USTR and, when the USTR is negotiating with a view toward resolving a dispute susceptible of adjudication under the WTO DSU, during those negotiations.” This adjustment would align, when WTO dispute resolution is concerned, the role of advisory committees in *negotiated* settlements under the Trade Act of 1974 with the role Congress assigned these same committees regarding *adjudicated* settlements under the URAA, which requires advisory committees to meet “at each stage” of adjudicative proceedings.⁸⁹

Such a formal requirement to convene advisory committees might seem an excessive burden to place on the USTR, but current URAA provisions already impose most of this burden.⁹⁰ First, though convening during negotiations will require many more committee meetings, the USTR must make the necessary adjustments in any case to accommodate the current URAA provisions requiring consultations during each stage of WTO adjudicative proceed-

86. Information submitted to advisory committees may be disclosed according to rules promulgated by the USTR. See 5 U.S.C. § 2155(g)(3) (1994). Also, advisory committee meetings are not necessarily closed to the public. Public-interest groups have sued to compel the USTR to rescind a blanket-closure order making all advisory committee meetings confidential. See *Public Citizen v. Kantor*, No. 94-2236 (D.D.C. filed Oct. 17, 1994). For a description of the legal arguments presented in this suit, see Goldman, *supra* note 24, at 674.

87. 19 U.S.C. § 2155(i) (1994) (emphasis added).

88. 19 U.S.C. § 2211(c) (1994).

89. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994).

90. Whatever the practical considerations, the requirement to seek advice from and consult advisory committees does not appear to raise separation-of-powers issues. See Bybee, *supra* note 69, at 55 (contrasting statutory requirements of consultation with unconstitutional statutory restrictions of consultation).

ings.⁹¹ Second, under current URAA provisions, the USTR must consult representatives of state governments during negotiations.⁹² Those provisions require the USTR to give notice to government officials of concerned states that a foreign power has opened the WTO's pre-adjudicative negotiation process. Notice must be served within seven days of the opening of those WTO procedures.⁹³ Within thirty days of that opening, the USTR must "consult with representatives of the State concerned regarding the matter."⁹⁴ When the international negotiations involve the laws of a number of states, the USTR "may consult with an appropriate group of representatives of the states concerned, as determined by those States."⁹⁵ This means that the USTR will have to entertain the possibly divergent views of an ad hoc group of states.⁹⁶ Advisory committees, on the other hand, are standing bodies, requiring considerably less effort to convene.

Thus, in light of these two current requirements of the URAA, the proposed additional requirement to convene advisory committees would appear to impose little cost, which, given the importance of WTO negotiated settlements,⁹⁷ is well worth the gains that advisory committees would offer.

2. *Extending the URAA Provisions Applicable to Adjudicated Settlements to Negotiated Settlements*

Congress should amend the URAA to extend to rulemaking pursuant to negotiated settlements the procedures currently applicable to rulemaking pursuant to WTO adjudicative rulings.⁹⁸ This section proposes a way to accomplish this objective: amending sec-

91. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 127(a), 108 Stat. 4809, 4835 (1994) ("[T]he [USTR] shall, at each stage of the proceeding before the panel or the Appellate Body, consult with the appropriate congressional committees . . . and relevant private sector advisory committees established under section 135 of the Trade Act of 1974 . . ."). For discussion of the URAA consultation provisions, see *supra* notes 44-45, 47 and accompanying text.

92. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C), 108 Stat. 4809, 4816-17 (1994). For a brief description of this provision, see *supra* note 47.

93. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(i), 108 Stat. 4809, 4816 (1994).

94. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(ii), 108 Stat. 4809, 4816 (1994).

95. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(1)(C)(ii), 108 Stat. 4809, 4816 (1994).

96. Also, the USTR first will have to go through the exercise of determining what state laws are likely to be affected. On the other hand, consulting advisory committees would occur under far more routine and convenient conditions. The USTR would consult advisory committees without having to discuss separately with each committee member and without having to go through the exercise of determining which state laws were affected.

97. See *supra* Part I.

98. See *supra* section III.B.2.

tion 123(g)(1) of the URAA, which provides for scrutiny of agency rulemaking pursuant to WTO adjudicated settlements.⁹⁹ The new section would provide that:

In any case in which negotiations regarding an issue susceptible of adjudication under the WTO Dispute Settlement Understanding lead to a commitment on the part of the United States concerning a regulation or practice of a department or agency of the United States, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such negotiations unless and until that department or agency has complied with the terms of paragraph (1) above, except subparagraph (1)(A).¹⁰⁰ The procedures required by those terms shall apply before the United States commits to amend, rescind, or otherwise modify any such regulation or practice.

This amendment of the URAA would enhance democratic control over domestic policymaking growing out of negotiated settlements in four ways. First, like the current URAA provisions governing agency implementation of adjudicated settlements, the provisions suggested above allow public input to guide the relevant agency in choosing among the regulatory alternatives permitted by the terms of the international commitment the agency is implementing.

Second, the provisions suggested above impose political scrutiny *before* a final agreement emerges.¹⁰¹ The agency thus presumably

99. Section 123(g)(1) currently provides:

(1) CHANGES IN AGENCY REGULATIONS OR PRACTICE.—In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, *that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—*

(A) *the appropriate congressional committees have been consulted* under subsection (f);

(B) the Trade Representative has sought *advice regarding the modification from relevant private sector advisory committees* established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155);

(C) the head of the relevant department or agency has provided an *opportunity for public comment* by publishing in the Federal Register the proposed modification and an explanation for the modification;

(D) the Trade Representative has *submitted to the appropriate congressional committees a report describing the proposed modification*, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification.

Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1), 108 Stat. 4809, 4831 (1994) (emphases added).

100. Section 123(g)(1)(A) is not incorporated by reference into proposed § 123(g)(1)(B) because the proposed subsection refers specifically to the adjudicative process. It requires that Congress be consulted during adjudication not only at the stage of agency action.

101. This scrutiny results from the last sentence of the proposed new section, which requires the oversight procedures to apply “before the United States commits.” The URAA contains no such requirement as to rulemaking pursuant to adjudicated settlements because a panel ruling is not negotiated and so cannot be renegotiated. However, the URAA’s provisions governing adjudicated settlements do contain a roughly analogous requirement requiring the USTR to “consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of [a WTO ruling].” Uruguay Round Agreements

would propose rule changes on the basis of a draft settlement. This would allow some possibility of influencing the content of the final agreement, rather than just influencing whatever choices the terms of the agreement happen to leave open.

Third, the public nature of the rulemaking procedures proposed in this section would reinforce the efficacy of the consultations that occur during negotiations. During negotiations, the Executive is more likely to give appropriate weight to the views of its critics on the advisory committees if U.S. negotiators know that they will have to face the "constituencies" of those critics in an ensuing public debate.

Finally, the procedures prescribed to oversee rulemaking go beyond the public-notice-and-comment provisions that normally would apply under the APA absent agency invocation of the foreign-affairs exception.¹⁰² The rulemaking procedures of the URAA that this section proposes to extend to rulemaking pursuant to negotiated settlements require the agency to submit rule changes to advisory¹⁰³ and congressional committees.¹⁰⁴ In particular, the procedures allow congressional committees to cast a nonbinding vote against the proposed rule.¹⁰⁵ Such a vote, if negative, often may be enough to send the negotiating agency back to the bargaining table to obtain a settlement more consonant with domestic political sentiment.

CONCLUSION

The purpose of drawing attention to the influence of negotiated settlements on the formulation of domestic rules is not to protest the institutionalized influence of the world-trading system upon domestic policy. In a world characterized by an increasingly global economy, some loss of sovereignty is inevitable. In an era when one nation's choices increasingly affect the welfare of others, the United States has done well to participate in institutions that formalize the ability of nations to influence each other's policies. The trick, however, is to relinquish sovereignty without compromising

Act, Pub. L. No. 103-465, § 123(f)(2), 108 Stat. 4809, 4831 (1994). This requirement regarding adjudicated settlements and the one proposed here regarding negotiated settlements are roughly analogous in that both promote the same general concern to impose political scrutiny before the writ of international law becomes final.

102. On the foreign-affairs exception, see *supra* note 17.

103. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1)(B), 108 Stat. 4809, 4831 (1994) (quoted *supra* in note 99).

104. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(1)(D), 108 Stat. 4809, 4831 (1994) (quoted *supra* in note 99).

105. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 123(g)(3), 108 Stat. 4809, 4832 (1994) (quoted *supra* in note 72) (incorporating by reference in the provisions governing rulemaking pursuant to negotiated settlements proposed in this Note).

democracy. As has been suggested in this Note, the United States could improve in this regard, particularly when negotiated settlements require regulatory changes. By allowing executive-branch agencies to make rule changes in the course of clandestine negotiations, the United States' current foreign-affairs regime fails to ensure democratic participation and accountability in the administrative state. The statutory amendments proposed in this Note accommodate the exigencies of diplomacy without forsaking direct public influence on domestic policy.