

Democratizing International Trade Decision-Making

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Introduction

We live in an unprecedented time for democracy.¹ The walls, political and physical, that maintained communist authoritarianism in the former Soviet Union have largely crumbled.² Peasant revolts throughout Mexico have convinced the powers that be that it is time for the Mexican government to loosen its hold on the country's political system and to cede greater control to its citizens.³ The World Bank, once referred to as a "lawless institution,"⁴ recently agreed to form an independent inspection panel to receive and review citizens' complaints concerning its activities.⁵ While threats to democratic principles, such as the rise of fascist hate groups, still exist,⁶ democracy is highly contagious at this moment.

While it may seem self-evident, it bears repeating that democracy, and the increasing recognition of democratic principles internationally, advances the interests not only of the United States, but also of the world community. The spread of democracy diminishes the opportunities for international conflicts, thereby increasing international security and stability.⁷ The spread of democracy is also in our economic interests—democ-

1. See Nicholas N. Kittrie, *Democracy: An Institution Whose Time Has Come—From Classical Greece to the Modern Pluralistic Society*, 8 AM. U. J. INT'L L. & POL'Y 375, 377 (1990) ("According to the reports of Freedom House in New York City, the largest percentage ever of the world's population now lives under democracy.") (citing *Freedom in the World—1990*, FREEDOM AT ISSUE, (Freedom House Report, New York, N.Y.) Jan.-Feb. 1990). Moreover, "the Freedom House data [does not] measure the enormous growth of prodemocracy sentiment in countries that are still far from being democratic." JOSHUA MURAVCHIK, EXPORTING DEMOCRACY: FULFILLING AMERICA'S DESTINY 69 (1991).

2. See Michael Mandelbaum, *Coup de Grace: The End of the Soviet Union*, FOREIGN AFF., America and the World 1991/92, at 164.

3. See, e.g., Anthony DePalma, *Mexican Government Is Moving To Open Up Presidential Election*, N.Y. TIMES, Mar. 1, 1994, at A10.

4. Conversation with David Hunter, at the American University's Panel Discussion on International Environmental Law (Sept. 19, 1993).

5. See *The World Bank Inspection Panel*, International Bank for Reconstruction and Development, International Development Association, Res. No. 93-10, IDA Res. No. IDA 93-6 (Sept. 23, 1993).

6. See, e.g., Ronald Smothers, *Hate Fliers Inflammate Mayoral Race in New Orleans*, N.Y. TIMES, Feb. 27, 1994, at A20; Alan Cowell, *Italy's Far-Right Party: Is it Fascism with a Human Face?*, INT'L HERALD TRIB., Apr. 1, 1994 available in LEXIS, News Library; Howard LaFranchi, *Europeans Ponder Remedies for Intolerance*, CHRISTIAN SCI. MONITOR, Mar. 9, 1994, at 1. While these groups represent the "ugly side" of democratic participation, their views tend to threaten the very principles that allow for their expression.

7. Nations, like the United States, are founded upon moral, ethical principles concerning the responsibilities of governments towards their citizens. When the actions of others offend these principles we feel an ethical or moral imperative to act. Likewise, other nations that hold different undemocratic beliefs feel the same imperative when

racies make the best trading partners.⁸ This is so not only because democracies promote a stable playing field for international business activity, but also because citizens in democracies are free to make consumer choices. Moreover, to the extent that the spread of democracy causes there to be fewer competing values to impose upon international economic activity, the broader recognition of democratic principles can help prevent value-based economic clashes.⁹ It is democracy's role in advanc-

U.S. actions conflict with their values. Nothing reflects the dangers inherent in clashes between democratic values and nondemocratic values better than the Cold War. The expansion of democracy internationally does have one negative effect on stability: the conflicts that stem from the rise of nationalism. See, e.g., Michael Lind, *In Defense of Liberal Nationalism*, FOREIGN AFF., May-June 1994, at 87, 89-92 (discussing "stabilitarian" school of thinking).

8. Much attention, however, has recently been focused on the economic success of countries, particularly in Asia, where market reforms have proceeded apart from social reforms—perestroika sans glasnost. See, e.g., Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 109, 109-26. Despite outward signs of success many of these societies display hidden social fault lines that threaten their economic and social well being. See, e.g., Richard Hornik, *Bursting China's Bubble*, FOREIGN AFF., May-June 1994, at 28, 29 ("China's government appears no more capable of imposing fiscal and monetary discipline—the supposed advantage of authoritarianism—than a corrupt democracy.").

9. Cf. Clint N. Smith, *International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade*, 10 INT'L TAX & BUS. LAW 97, 131 (1993) ("Since societies on both sides of the Atlantic generally share conditions of developed democracies, a GATT panel of impartial experts should rule that European moral standards are not so distinct from American standards as to be threatened by U.S. television programs."). The GATT/Tuna Dolphin case is perhaps the best example of how value system clashes can cause economic conflicts. See *United States—Restrictions on Imports of Tuna*, GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD), 39th Supp. 155 (1993) [hereinafter *Tuna Dolphin Report*]. If one assumes, as many have, that the U.S. Marine Mammal Protection Act was based on a moral, or Kantian, imperative to protect dolphins, then the entire dispute can be revealed as an economic conflict driven by a clash of value systems. See Richard B. Stewart, *International Trade and the Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1360-61 (1992); Jagdish Bhagwati, *Trade and the Environment: The False Conflict*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY 159, 165 (Durwood Zaelke et al. eds., 1993). The U.S. moral imperative to protect dolphins, when imposed on the trade system, conflicted with the Mexican system of values, which shared no common imperative to protect these dolphins at the cost of the economic activity. Although William Snape's article in this volume nimbly demonstrates that this is a far too pedestrian analysis of this complex dispute, it cannot be denied that the dispute was grounded, at least in part, in a clash of values. See William J. Snape, III & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777 (1994). These reflections however, should not in anyway be seen as disparaging ethically or morally driven trade policies. See generally Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1373-88 (1992). Quite the contrary, often when the issues that confront policy-makers are particularly difficult, ethical or moral beliefs are the only obstacles to simply bad policies. Chester Bowles, Undersecretary of State during the Kennedy administration, articulated this point in his analysis of that administration in his private diary:

The question which concerns me most about this new Administration is whether it lacks a genuine sense of conviction about what is right and what is wrong. . . .

ing these vital interests that makes it so appealing internationally.

Yet, at a time when the democratic preachings of the developed world seem to be having their greatest effect on the actions of developing and transition nations, these same developed nations are rushing head first into international trade agreements that offend the essential principles of democracy. Part I of this article provides a definition of democracy as applied here. Part II of this article discusses the undemocratic aspects of international trade decision-making.

While these international trade agreements can provide a number of important economic and other benefits, from a democracy perspective, the continued strengthening of undemocratic international trade decision-making is troubling. Failures to democratize trade decision-making are troubling because these failures squander an important opportunity to further the recognition of democratic principles in undemocratic nations. These democratic failures also undermine the role of democracy in already democratic nations. Strengthening undemocratic trade decision-making also serves as an obstacle to the wider development of democracy within international relations, institutions, and law. Part III of this article examines the negative effects of the undemocratic nature of international trade decision-making.

The serious detrimental effects caused by the lack of democratic processes in international trade decision-making require that the international trade decision-making system must be "democratized." Part IV of this article provides a prescription for democratizing the international trading system while preserving the important benefits the system provides.¹⁰

I. Defining Democracy

Because the word democracy means different things to different people,¹¹

Anyone in public life who has strong convictions about the rights and wrongs of public morality, both domestic and international, has a very great advantage in times of strain, since his instincts on what to do are clear and immediate. Lacking such a framework of moral conviction or sense of what is right and what is wrong, he is forced to lean almost entirely upon his mental processes; he adds up the pluses and minuses of any question and comes up with a conclusion. Under normal conditions, when he is not tired or frustrated, the pragmatic approach should successfully bring him out on the right side of the question. What worries me are the conclusions such that an individual may reach when he is tired, angry [or] frustrated. . . .

DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 69 (1972) (quoting the diary of Chester Bowles).

10. This article does not discuss the serious democratic flaws of trade decision-making at the national level within the United States. For an excellent discussion of these flaws and a well considered approach to rectifying them, see Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 *CORNELL INT'L L.J.* 631 (1994).

11. See DAVID HELD, *MODELS OF DEMOCRACY* 2 (1987) ("The history of the idea of democracy is complex and is marked by conflicting conceptions."). For example, the word democracy can be expressed in such divergent ways as classical or liberal democracy (which in turn can mean either protective democracy or developmental democracy), or the Marxist concept of direct democracy, or such contemporary visions as

in order to describe the undemocratic nature of international trade decision-making, it is first necessary to define democracy in this context. In the most simplistic sense, democracy means government by and for the people.¹² However, because many of the elements of democratic governance at the national level (for example, the election of representatives in free and fair elections) are inapplicable in the statially oriented world¹³ of international trade decision-making,¹⁴ this article focuses more narrowly on the element of democracy that is most applicable to international relations: the democratic right of citizens to have knowledge of and participate in decisions that will effect their interests.¹⁵ The idea of democracy as discussed in this article is not one of representative democracy, but of participatory democracy.

II. The Undemocratic Nature of International Trade Decision-making

A. Multilateral Trade Agreements

1. *The GATT*

The vast majority of international trade is currently conducted under the rules of the General Agreement on Tariffs and Trade (GATT).¹⁶ To

pluralism, or elitist democracy. *Id.* at 4. Real differences exist not only at the theoretical level (how should we define "democracy") but also at the operational level (how real democracies work). AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 37-222 (1984) (contrasting how 21 "democratic" nations operate).

12. See Kittrie, *supra* note 1, at 379.

13. For example, a great deal of dissension among democratic thinkers focuses on what voting rights are necessary in a "democracy." Compare LIJPHART, *supra* note 11, at 18 (discussing voting in a "Westminster" model of democracy) with LIJPHART, *supra* note 11, at 28 (discussing proportional representation).

14. See JOHN RAWLS, *A THEORY OF JUSTICE* 377-82 (1971) (noting that while principles of justice that apply at the national level may be inapplicable at the international level, the law of nations may require derivative principles based on these national principles). While Rawls focuses on the rights of states in the international system, his reflections are in many ways equally applicable to the relationship between states and individuals in international affairs.

15. See generally CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970) (discussing participatory elements of democracy). This narrow focus should not be seen as prejudicing debate over the potential applicability of other elements of democracy to international affairs generally or international trade decision-making particularly. Depending on the interest at stake, participation here may be direct or indirect.

In many instances this narrow definition will, in practice, allow participation by interest groups (e.g., environment, labor, human rights, and business) in principle. The fact that interest groups may represent their constituents does not, however, diminish the fact that the right to participate is at the individual level.

16. General Agreement on Tariffs and Trade, Oct. 30, 1947, as amended, Basic Instruments and Selected Documents, vol. IV, 61 Stat. (pt. 5), T.I.A.S. No. 1700, 55 U.N.T.S. 188 [hereinafter GATT]. The GATT has never been formally ratified by the United States Senate. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35 (1989). Instead, the United States and seven other nations agreed through the Protocol of Provisional Application, an executive agreement, to provisionally apply the GATT "on and after 1 January 1948." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (pt. 6), at A2051, 55 U.N.T.S. 308; Proclamation No. 2761A

understand why the GATT is not currently democratic it is necessary to have an understanding about the agreement's genesis.

The trade negotiations that led to the GATT's creation were in actuality a series of three somewhat distinct sets of negotiations that were intended ultimately to form a package deal under the auspices of the International Trade Organization (ITO).¹⁷ The first part of these negotiations involved the drafting of a multilateral tariff reduction treaty.¹⁸ The second part dealt with the establishment of general obligations relating to tariffs.¹⁹ Together these first two parts were the GATT.²⁰ The third part dealt with establishing an international institutional structure for trade decision-making: the ITO.²¹ The GATT itself was conceived of as merely a treaty and not as having even the "suggestion of an organization."²² In fact, the GATT contained a clause recognizing the ITO.²³

Nongovernmental organizations (NGOs) played a role in the negotiations that crafted the ITO Charter. For example, during the ITO negotiations public hearings were held in the United States to assist the government in formulating its positions.²⁴ Additionally, representatives from NGOs participated in the Havana Conference negotiations, the final ITO negotiation that dealt with issues about the composition of and participation in the Charter.²⁵

The final ITO Charter reflects the more participatory character of the negotiations that lead to its drafting. Unlike the GATT, which provides no role for NGOs, the preceding ITO Charter explicitly provided that the ITO was to "make suitable arrangements for consultation and cooperation with non-governmental organizations concerned with matters within the scope of this Charter."²⁶ Indeed, the Annex to the ITO Charter went so

[Carrying Out General Agreement on Tariffs and Trade Concluded at Geneva, October 30, 1947] [sic], 12 Fed. Reg. 8863 (1947); JACKSON, *supra*, at 34-35.

17. JACKSON, *supra* note 16, at 32.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* For excellent historical discussions of the ITO's development, see CLAIR WILCOX, A CHARTER FOR WORLD TRADE 37-52 (1949); JACKSON, *supra* note 16, at 32-37.

22. JACKSON, *supra* note 16, at 33.

23. *Id.*

24. William Diebold, Jr., *The End of the ITO*, in ESSAYS IN INTERNATIONAL FINANCE 19 (International Finance Section of the Department of Economics and Social Institutions in Princeton University, ed., No. 16, Oct. 1952).

25. See Norman Burns, *The American Farmer and the ITO Charter*, 20 DEP'T ST. BULL. 215, 219-20 ("Representatives of the American Farm Bureau Federation, the National Grange, and the National Council of Farm Cooperatives served as advisers in the U.S. Delegation during the Havana conference in 1947-1948."); Diebold, *supra* note 24 (A Havana Conference representative of the National Association of Manufacturers commented that the article in ITO on foreign investment, offers foreign investors greater protection than they ever had previously against unjust, arbitrary acts by government.). For a discussion of the negotiations during the Havana Conference, see WILCOX, *supra* note 21, at 45-53.

26. Havana Charter for an International Trade Organization, Mar. 24, 1948, art. 87.2, reprinted in HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION AND FINAL ACT AND RELATED DOCUMENTS (Department of State ed., 1947). Such a provision

far as to provide that the Commission established under the Charter would be responsible for “. . . prepar[ing], in consultation with non-governmental organizations, for presentation to the first regular session of the Conference recommendations regarding the implementation of the provisions [concerning the participation of nongovernmental organizations within the ITO].”²⁷ Thus, NGOs were not only supposed to play a role in the ITO, they were also supposed to help decide what that role should be.

While the ITO Charter was being negotiated, a number of parties desired to speed the application of the GATT tariff related parts of the package.²⁸ In order to do this, eight parties developed the Protocol of Provisional Application, an agreement committing these parties to apply provisionally the GATT as of January 1, 1948.²⁹

Although the Havana Conference of 1948 completed the ITO Charter, the ITO never came into being.³⁰ This failure was caused in great measure by the United States Congress’ refusal to approve the treaty.³¹ With the failure of the ITO, the GATT, although not intended as an institution, stepped in to fill the vacuum.³²

Thus, from a historical perspective, it seems likely that the GATT’s failure to provide more democratic procedures is the result of mere oversight. Because the GATT was never intended to function as an institution, policy choices as to the make up of the GATT as an institution were never addressed; public participation and transparency were not provided because they were matters for the Havana negotiations of the ITO, not in the Geneva GATT negotiations. When the ITO failed, the institutional decisions that were made in its Charter, such as public participation, inadvertently rolled with the ITO—GATT’s severed head.

Even assuming that the GATT’s failure to incorporate the ITO provisions on public participation was an oversight, the ITO provisions on public participation, though greater than the GATT’s, were themselves rather limited. The failure of the GATT (and the ITO) to adopt more democratic procedures is a reflection of the period surrounding its creation. Conceived in 1947, the GATT is a product of the post-World War II drive for economic stability and military security through the mutual dependence of nations,³³ traditional notions of state sovereignty, and the ideolo-

has recently been resurrected in the Final Agreement of the Uruguay Round. *See infra* note 78.

27. Resolutions Adopted by the Conference, Resolution Establishing an Interim Commission for the International Trade Organization, U.N. Conference on Trade and Employment, Annex, art. 2(e), *reprinted in* HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION AND FINAL ACT AND RELATED DOCUMENTS, *supra* note 26, at 71.

28. JACKSON, *supra* note 16, at 34.

29. *See* Protocol of Provisional Application of the GATT, *supra* note 16; *see also* JACKSON, *supra* note 16, at 35-37.

30. JACKSON, *supra* note 16, at 34.

31. *Id.*

32. *See id.* at 37.

33. *See id.* at 30-31.

gies of the then emerging Cold War.³⁴

At the time of the GATT's conception there was little reason to believe that individuals or NGOs would need to participate in international trade decision-making. By 1947, with the singular exception of the International Labor Organization (ILO),³⁵ the Grotian concept of the sovereign nation-state singularly dominated international affairs.³⁶ Although "tremors shaking the foundations of sovereignty, were felt, at least among scholars, prior to World War II,"³⁷ in the aftermath of the war, international law and institutions remained firmly the province of nation-states.

The primacy of nation-states continued through the second World War and it remained the dominant force in international relations at the

34. See *supra* notes 16-33 and accompanying text (discussing the historical underpinnings of GATT's antidemocratic traditions).

35. The International Labor Organization (ILO) adopted a dramatically more participatory model for international institutions. Labor, employers, and national governments all participated in the negotiations leading up to the ILO's creation. See INTERNATIONAL LABOUR OFFICE, TRADE UNIONS AND THE ILO: A WORKER'S EDUCATION MANUAL 5 (1979). In addition, the ILO's Constitution adopts a far more participatory structure than that included in the GATT. Under the ILO Constitution the representatives of nongovernmental organizations serve as members of each parties' delegation. International Labour Office, Constitution of the International Labor Organization and Standing Orders of the International Labour Conference, 1969, art. 56.1. As delegates these individuals have the same rights as delegates from the governments of member states (e.g., the right to make statements and vote). *Id.* arts. 57.9, 15.10, 3.1. 3.2, 3.5, 4.1., 4.2. Even nongovernmental organizations which are not members of a delegation may serve as advisors to the ILO. Moreover, NGOs can also bring complaints to the ILO as to certain labor practices of a party. The ILO, however, was created well prior to the United Nations and the Bretton Woods institutions. Thus, its creation was free from the constraints of the Cold War era. The ILO may be somewhat of a democratic outlier in the world of international institutions because of the inherently nongovernmental nature of the problems it addresses.

36. The dominant role of nation states in international affairs is commonly traced to the seventeenth century writings of Hugo Grotius. See HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE paras. 14-17 (F. Kelsey trans. 1957); Ali Khan, *The Extinction of Nation-States*, 7 AM. U. J. INT'L L. & POL'Y 197, 202-210 (1992). The Treaty of Westphalia ending the Thirty Years War enshrined Grotius' theories into practice by creating a Europe of nation states. See *id.* at 205. Over the course of the ensuing centuries the Grotian tradition came to dominate public and private international law and institutions. See M. McDUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1295 (1981); PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 249 (1990) ("The misconceiving of international society as a system of closed sovereignties, externalized state-systems, undemocratized and unsocialized, spread throughout the world.").

Under the Grotian concept of international law and relations, the individual is the "object," not the "subject." Michael Scaperlanda, *Polishing the Tarnished Door*, 1993 Wis. L. REV. 965, 1004 (1993); ALLOTT, *supra*, at 245 ("All interacting of persons and societies other than the state-societies and their governments is conceived as being outside the vestigial social process of the interstatal unsociety."). Thus, the individual may be acted upon by the international affairs conducted by nation states, but he or she may not act in these dealings. See Scaperlanda, *supra*.

37. See Scaperlanda, *supra* note 36, at 1010 n.225, citing CHARLES FENWICK, INTERNATIONAL LAW 60 (2d ed. 1934) ("[A] number of scholars have come to the belief that a new theory of international relations is needed, that the old emphasis upon 'sovereignty' must give way to a more realistic acceptance of the actual interdependence of nations. . . .").

middle of the century. The strongest evidence of the primacy of nation-states in international affairs during this period is the 1945 Charter of the United Nations.³⁸ For example, the Charter limits membership, and therein the actors who can partake in international affairs conducted under U.N. auspices, to recognized nations.³⁹ Thus, it is not surprising that the GATT agreement of 1947 similarly follows the Grotian tradition and excludes both individuals and NGOs.

Moreover, at the time of the GATT's conception there was little impetus to challenge these notions of national sovereignty and the preeminence of nation-states in international affairs. Democratic nations were far fewer in number than they are today.⁴⁰ Further, even within existing democracies, the reach of citizens' rights was still being developed. For example, in the United States, the original Administrative Procedures Act (APA) was signed into law only 16 months prior to the GATT's creation.⁴¹ The publication of the Attorney General's Manual, which to this day remains the principle guide to the APA, only pre-dates the GATT by 64 days.⁴² At the time of the GATT's creation, the most democratic of nations were still attempting to find the right balance for citizens' involvement in even purely domestic affairs.

At that time even industries, the principal actors in international trade, were not perceived as needing a major independent voice in international trade decision-making. International trade was far more limited at that time than it is now,⁴³ so international trade decisions were of less importance than they are today. Additionally, in 1947, industries were largely national, as opposed to multinational. The needs of these national industries tended to coincide with the needs of their home country.⁴⁴ "Engine Charlie" Wilson summed up this view when he proclaimed that

38. See, e.g., U.N. CHARTER art. 1, para. 4 (goal of harmonizing the actions of nations); art. 4, para. 1 (membership made up of nations). The Grotian statial world of international relations has, however, come under attack beginning largely in the 1960s. See A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI-KENT L. REV. 61, 67-68 (1992) (discussing writings of McDougal and Friedman); see also WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

39. See U.N. CHARTER art. 4, para. 1 (membership made up of nations).

40. See Kittrie, *supra* note 1, at 377.

41. See 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1988); (originally enacted Pub. L. No. 404, 60 Stat. 237, Ch. 324 §§ 1-12, (June 11, 1946), repealed and amended Pub. L. No. 89-554, 80 Stat. 381 (Sept. 6, 1966)); see also ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS* 1-3 (2d ed. 1992).

42. See United States Department of Justice, Attorney General's Manual on the APA (Aug. 27, 1947), reprinted in *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS*, *supra* note 40, at 67-139.

43. See ROBERT REICH, *THE WORK OF NATIONS* 63 (1991) ("America at midcentury was not a major trading nation . . . Even by 1960, only 4 percent of the cars Americans purchased were built outside of the United States . . .").

44. See *id.* at 46. Reich provides:

At [the American economy's] core stood about five hundred major corporations which, by midcentury, produced about half of the nation's industrial output . . . owned roughly three-quarters of the nation's industrial assets,

“what was good for our country was good for General Motors, and vice versa.”⁴⁵ In this world of 1947, citizens felt their governments knew what was in their best interests domestically and internationally.

Additionally, a greater role for citizens in the international institutions of 1947 cut against emerging Cold War ideologies.⁴⁶ The Cold War provided substantial justification for limiting citizens’ access to international negotiations and deliberations; these were areas firmly within the secretive realm of national security interests and were not for public consumption.⁴⁷

Thus, the undemocratic GATT of today is rooted in the circumstances surrounding its creation in 1947. Since its creation in 1947, the GATT has not adapted to or accommodated the sweeping democratic changes that have in the interim fundamentally altered the world.⁴⁸

Although in this regard the GATT’s procedures and practices have been unchanged largely since 1947, historically little was made of their democratic shortcomings. As noted above, industry, the core constituent

accounted for about 40 percent of the nation’s corporate profits, and employed more than one out of eight of the nation’s nonfarm workers.

Id. Reich goes on to state that these corporations “were the champions of the national economy; their success were its successes. They were the American economy.” *Id.* at 47.

45. See *Nomination of Charles Wilson for Secretary of Defense Before the Senate Armed Services Committee*, 83d Cong., 1st Sess. (1953), as reported in N.Y. TIMES, Jan. 24, 1953, at 8; REICH, *supra* note 43, at 119. The globalization of economic activities in general and corporations in particular has largely delinked the interests of nations from the interests of specific multi-national corporations that hail from within their borders. *Id.* at 119-53.

46. See LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE* 8 n.13 (1984) (noting 1946 as the start date for the Cold War).

47. Cf. Scaperlanda, *supra* note 36, at 1011. The demise of the Universal Declaration of Human Rights exemplifies how Cold War ideologies limited individual rights in international institutions and law. *Id.* The Universal Declaration, drafted by the Commission on Human Rights, was conceived of as a focal point for the further development of new internationalized norms of human rights. *Id.* The advent of the Cold War, however, caused the issue of a binding covenant on human rights to become caught up in the polarized struggles between the free and communist worlds. *Id.* Once the Universal Declaration got caught up in the ideological struggles of the day its potential for success ended. *Id.* See generally *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

48. Certainly the same criticism can be levied against a host of other international institutions, particularly the United Nations, which are, in most instances, similarly undemocratic. The GATT differs from these institutions, however, in that the GATT is more vulnerable to democratic challenge because of the nature of its endeavours. First, unlike international organizations like the International Atomic Energy Agency, the GATT deals with matters that affect the day-to-day affairs of virtually every person, are inherently commercial or private, and that increasingly impinge on areas, such as local police powers, that have generally been outside the province of international affairs. Even when compared with other international organizations, such as the World Health Organization or the United Nations Conference on Trade and Development, which appear to have similar characteristics, one other important difference must be recognized: these other institutions facilitate the development of policies, but the GATT actually makes binding policies for its member states.

of trade rules, felt comfortable with the GATT system.⁴⁹ The public, as consumers, have, until late, paid little attention to the GATT.⁵⁰ Labor, which has long dealt with trade-related issues, has been generally unable to substantively advance its issues at GATT, making procedural issues secondary.⁵¹

Attention to GATT democracy issues really only began with the advent of the trade and environment debate.⁵² In 1992, a GATT dispute panel was convened to hear a complaint by Mexico that the application of U.S. law designed to protect dolphin in the Eastern Tropical Pacific Ocean to Mexican tuna and tuna products exported to the United States were in violation of the U.S. obligations under the GATT.⁵³ The panel's decision, which was never adopted, that the U.S. Marine Mammal Protection Act violated the rules of the GATT, touched off a furor around the globe, and in particular in the U.S. environmental community.⁵⁴ In response to this decision, the U.S. environmental community embarked on an ongoing crusade to reform the GATT to make it more environmentally sustainable.⁵⁵ These environmental reform efforts quickly spread beyond the United States.⁵⁶

Environmentalists involved in GATT reform efforts realized early on that their work was being stymied by the GATT's procedural rules. Thus, democratic reforms of the GATT became a critical issue to environmental-

49. See *supra* notes 43-45 and accompanying text (discussing industry and trade history).

50. See, e.g., Walter Russell Mead, *Bushism, Found*, HARPER'S, Sept. 1992, at 37 ("The average reader sees the acronym GATT, followed, say, by a reference to the European Community or the Group of Seven industrial nations, and soon the eyes begin to glaze and a hand reaches mechanically to turn the page.").

51. Cf. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L LAB. REV. 565, 574-75 (1985) (discussing long-term efforts to raise labor issues in GATT).

52. For a general discussion of the trade and environment debate, see DURWOOD ZAEELKE ET AL., *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY* (1993).

53. *Tuna Dolphin Report*, *supra* note 9. For additional discussion about the tuna/dolphin decision, see Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect*, 49 WASH. & LEE L. REV. 1407, 1409-22 (1992); Thomas E. Skilton, Note, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455 (1993); Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. 10268 (1992).

54. Stuart Auerbach, *Raising a Roar Over a Ruling: Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991, at D1.

55. See, e.g., *Impacts of Trade Agreements on U.S. Environmental Protection and Natural Resource Conservation Efforts: Hearing Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess., 23-24 (1993) (statement of John Audley, Trade Analyst, Sierra Club); *The Environmental Implications of the Uruguay Round of GATT: Hearing Before the Subcomm. on Economic Policy, Trade and Environment, of the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (statement of Alex Hittle, International Coordinator, Friends of the Earth).

56. See, e.g., Environmental News Network, *GATT: The Environment and the Third World* (undated); Charles Arden-Clarke, *The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development*, June 1991 (World Wildlife Fund-Europe paper).

ists. As environmentalists increasingly focused on changing the GATT's antidemocratic procedures, advocates for other areas of social policy, such as human rights and labor, also began to focus more heavily on the GATT and democracy issues.⁵⁷ Interestingly, many business interests and "GATTologists," often times perceived as the GATT's natural constituency, joined this call for democratic reforms of the GATT.⁵⁸ Like those who seek to advance a social agenda, these economically interested parties are similarly concerned that the GATT's closed processes can at times undermine their interests. GATT supporters in favor of democratic reforms fear that the GATT's failure to follow corrent democratic trends may ultimately undermine the legitimacy of the international trading systems.

2. *The GATT's Relevant Provisions and Policies*

The GATT is an agreement among member nation-states,⁵⁹ which fully embraces traditional notions of sovereignty in international affairs. As such, the GATT's policies and practices afford citizens with virtually no democratic rights of direct participation.⁶⁰ Although the GATT agreement itself is silent on secrecy, official GATT meetings are conducted in secret.⁶¹ No record or transcript of these meetings or negotiations are made public. The vast majority of GATT created documents, and member state documents created for GATT activities, are classified and cannot be obtained by the general public.⁶² When the GATT does declassify a document, it does so at a glacial pace rendering most of these declassified documents outdated and of little value to anyone but GATT history scholars.

The secretive nature of GATT negotiations and discussions is particularly disconcerting when one considers the types of issues the GATT addresses. Although the resolution of trade disputes has always been in

57. See e.g., Martin Khor Koh Peng, *GATT Threatens Third World Sovereignty*, EARTH ISLAND J., Winter 1992, at 30, 30-31 (Mr. Peng is Director of the Consumers' Association of Penang).

58. See e.g., Robert J. Morris, *A Business Perspective on Trade and the Environment*, in TRADE AND THE ENVIRONMENT, *supra* note 9, at 121, 129-30 (Mr. Morris is the Washington Representative of the United States Council for International Business); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, in TRADE AND THE ENVIRONMENT, *supra* note 9, at 219, 230-32 (Mr. Jackson is one of the foremost authorities on GATT).

59. GATT does not limit membership to "sovereign nations." See JACKSON, *supra* note 16, at 46. Separate customs territories that are autonomous in their external relations can become contracting parties. *Id.* National independence movements have, however, converted the vast majority of non-independent customs territories into sovereign states, and so for all practical purposes the GATT is an agreement among nation-states.

60. Kantor Rejects Call for GATT Moratorium on Environmental Disputes, INSIDE U.S. TRADE, Mar. 4, 1994, at 3, 4 ("There is no transparency in the processes that surround the GATT today . . .") (quoting the U.S. Trade Representative, Ambassador Mickey Kantor). The GATT is among the best international institutions with regard to representative democracy, as each nation holds one equal vote.

61. Cf. Jackson, *supra* note 58, at 231 ("GATT tends too often to try to operate in secrecy, attempting to avoid public and news media accounts of its actions.")

62. *Id.* (Professor Jackson calls this a "charade" because many of these documents leak out almost immediately anyway).

the GATT's portfolio, in its earlier days most of the GATT's time was spent discussing tariff reductions. Today, however, tariff reduction negotiations are just one of many wide ranging issues discussed. Other GATT discussions of late have focused, either directly or indirectly, on: (1) environmental policy;⁶³ (2) tax policy;⁶⁴ (3) labor policy;⁶⁵ (4) antitrust policy;⁶⁶ and (5) cultural policy.⁶⁷ The concern here is not that the GATT is discussing the inter-relationships between these areas of domestic policy and international trade. Rather, the GATT is essentially determining the validity of vital domestic policies in an undemocratic manner.

The application of these ironclad rules of secrecy is perhaps most troubling in the area of GATT dispute resolution. The GATT dispute resolution procedures which review national laws are notoriously undemocratic.⁶⁸ Ambassador Kantor, the United States Trade Representative, called GATT panels "star chambers."⁶⁹ Citizens whose laws are being challenged may have no knowledge of that fact. Neither the GATT nor the parties are required to provide notice of disputes to the general public. The hearings of a GATT dispute panel and the pleadings are closed to all but the involved parties.⁷⁰ Moreover, citizens may be denied access to the final decisions of dispute panels.⁷¹ Individual citizens or NGOs who have a personal stake in the outcome may neither appear before the panel hearing a dispute, nor independently submit information to that panel.⁷² While there is nothing to prevent a party from releasing its own pleadings, it cannot, without permission of the other party or parties, either release their pleadings or make their arguments public.

63. See, e.g., *GATT Trade and Environment Subcommittee Sets Workplan for Fall*, INSIDE U.S. TRADE, July 15, 1994, at 22; *GATT Argues Over Response to Earth Summit on Trade and Environment*, INSIDE U.S. TRADE, Oct. 30, 1992, at 1, 16.

64. See, e.g., *U.S. Seeks Derogation From Services Framework Tax Provision*, INSIDE U.S. TRADE, Oct. 29, 1993, at 1, 19.

65. See, e.g., *Kantor Links Trade to Labor Rights, But Questions French Approach*, INSIDE U.S. TRADE, Mar. 25, 1994, at 8-11; *U.S. Concedes on Foreign Workers to Boast Financial Services Offer*, INSIDE U.S. TRADE, Dec. 10, 1993, at 1, 18.

66. See, e.g., *New Steel Report Shows U.S. Focus on Anticompetitive Practices*, INSIDE U.S. TRADE, Sept. 10, 1993, at S1, S8-9.

67. See, e.g., *EC Spells Out its Goals For Uruguay Round Audiovisual Talks*, INSIDE U.S. TRADE, Oct. 15, 1993, at 1, 17-19.

68. See *Kantor Rejects Call for GATT Moratorium on Environmental Disputes*, *supra* note 60, at 4 ("[N]o one knows what those decisions are, what the basis was, who is making the decision, how they're being made, what pieces of paper we'll put in front of them.") (quoting Ambassador Kantor).

69. *Id.* Steve Charnovitz, *Trade Negotiations and the Environment*, Int'l Env't Rep. (BNA) 144, 147 (Mar. 11, 1992).

70. *The Texts of the Tokyo Round Agreements, Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Annex (Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement (Article XXIII:2)), para. iv, GATT, Doc. L/4907 (Nov. 28, 1979), reprinted in GATT, THE TEXTS OF THE TOKYO ROUND AGREEMENTS 205, 207 (1986).

71. See Jackson, *supra* note 58, at 231-32. Decisions are typically derestricted once they are adopted. However, the delay between a decision and its adoption seriously prejudices the interest of citizens. See Charnovitz, *supra* note 69, at 147.

72. See Charnovitz, *supra* note 69, at 147; *supra* note 71 and accompanying text (discussing the confidentiality of pleadings in disputes).

In practice, the only party that has made its submissions public is the United States—and it originally only did so begrudgingly.⁷³ However, in order to not compromise the arguments of contesting parties, the United States has had to redact substantially the briefs it has provided to the public, making them relatively worthless.⁷⁴ Reading these briefs has been equated with “reading a baseball scorecard that only lists the performance of one of the two teams; there is no way to know who is playing and how the game is going.”⁷⁵

These undemocratic dispute resolution processes can have very real effects on the national laws they judge. While a GATT dispute panel cannot actually overturn a party's laws, or force a party to change its laws, a challenged party whose law violates the GATT must provide offsetting concessions or be subject to substantial penalties in the form of countervailing duties.⁷⁶ The costs of these concessions or penalties can be so great as to encourage, or in the eyes of others coerce, a losing party into changing its laws to make them consistent with the GATT.⁷⁷

3. *The Final Agreement of the Uruguay Round*

The product of roughly seven years of exhaustive efforts, the currently proposed Final Agreement of the Uruguay Round of the GATT (the Final Agreement) would replace the existing GATT.⁷⁸ In replacing the existing GATT, the Final Agreement would substantially strengthen and amend the current GATT rules, as well as providing a long awaited international organization to oversee the conduct of international trade—the World Trade Organization (WTO).

73. See *Trade and the Environment: Hearing Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 49, 51, 52-62 (1994) (statement of Robert F. Housman, Staff Attorney, The Center for International Environmental Law, on behalf of the Sierra Club and Defenders of Wildlife) [hereinafter Housman Testimony of Feb. 3, 1994]. At first, the United States only released its briefs under great pressure. Under the Clinton administration the United States has seemed more willing to do so.

74. *Id.* For example, the public version of the U.S. brief in Corporate Average Fuel Economy Standards GATT Challenge begins:

“5.[

] As addressed below, there is no support in the General Agreement for this theory.”

See Second Submission of the United States to the Panel on United States—Taxes on Automobiles (Nov. 24, 1993) (public version) at 2 (brackets and blank spaces in the original) (on file with author).

75. See Housman Testimony of Feb. 3, 1994, *supra* note 73, at 53.

76. See Naomi Roht-Arriaza, *Precaution, Participation, and the “Greening” of International Trade Law*, 7 J. ENVTL. L. & LIT. 57, 95 (1992).

77. See USTR, *THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES* 58-59 (1994).

78. See *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* [hereinafter *Final Agreement*], GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994), reprinted in OFFICE OF THE U.S. TRADE REPRESENTATIVE, *FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (VERSION OF 15 DECEMBER 1993)* (1993).

Unfortunately, the furor raging over the GATT's undemocratic ways during the last two years of negotiation of the Uruguay Round had virtually no effect on the Final Agreement. Democratic improvements to the current GATT decision-making processes are not generally among the Final Agreement's ambitious program of reforms.

4. *The Relevant Provisions and Policies of the Final Agreement*

While the Uruguay Round did not generally deal with democratic improvements, article V.2 of the Final Agreement's Agreement Establishing the WTO does take a small step forward in improving the *potential* for more democratic GATT procedures and practices. Article V.2 provides that the WTO "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."⁷⁹ This provision, which resurrects the similar provision in the failed ITO charter,⁸⁰ may provide a mechanism for encouraging greater democracy within WTO decision-making than had been the tradition in the GATT.

Apart from this resurrected provision for consultations, the Final Agreement changes little. Under the terms of the Final Agreement, GATT meetings will still be conducted in secret, and no record or transcript of these meetings for the general public is required.⁸¹ Thus, it is likely that documents produced by the WTO or by the parties for future GATT meetings will also remain classified. Proof of this can be found in the top line of the December 15 Final Agreement, which reads: "Restricted."⁸²

The Final Agreement also largely carries over GATT's undemocratic ways in the troubling area of dispute settlement. Under the Final Agreement, the hearings of dispute panels and of the newly created appellate body will proceed in secret; citizens may not attend.⁸³ Citizens and NGOs are also precluded from appearing before, or independently providing information to panels.⁸⁴ Whereas in the past the inability of citizens to

79. *Agreement Establishing the World Trade Organization*, GATT Doc. MTN/FA II, art. V.2 (Dec. 15, 1993) [hereinafter *WTO Agreement*], in *Final Agreement*, *id.*

80. See *supra* note 26 (discussing article 87.2 of the Havana Charter).

81. Although, the Final Agreement is silent as to whether meetings will be closed, secrecy is likely to continue out of default and tradition. A combination of several of the Agreement's provisions seems to reflect this likelihood. Article IV.1 of the Agreement establishing the World Trade Organization (WTO), provides that the WTO is composed of only representatives of the parties. See *WTO Agreement*, *supra* note 79, art. IV.1. Article IX provides that WTO decisions will be taken at meetings of the parties. *Id.* art. IX.1-5. Article V provides as to NGOs that the WTO may only "make appropriate arrangements for consultation and cooperation . . ." *Id.* art. V.2.

82. *Final Agreement*, *supra* note 78, at 1.

83. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, GATT Doc. MTN/FA II-A2, app. 3, para. 2 (Dec. 15, 1993) [hereinafter *Dispute Understanding*], in *Final Agreement*, *supra* note 78 ("The panel will meet in closed session. The parties to the dispute, or other in parties, will be present at the meetings only when invited by the panel to appear before it."). See also Charnovitz, *supra* note 69, at 147.

84. *Dispute Understanding*, *supra* note 83, § 12.6 (submissions), app. 3, para. 2 (appearances). Panels may, however, request information from private parties. *Id.* § 13.1. See also Charnovitz, *supra* note 69, at 147.

participate arose out of bureaucratic fiat, the Final Agreement's incorporation of these customs disturbingly serves to legalize them. The Final Agreement is silent as to whether the public may have access to the reports of dispute panels and the appellate body. In the face of the Final Agreement's failure to alter expressly the status quo and require that these reports be made public, it is unlikely the public will gain access to the decisions in GATT disputes.

While the Final Agreement generally follows the GATT's undemocratic habits, two of its provisions go well beyond the GATT's in diminishing the role of the public. First, the Final Agreement provides a mechanism for the further evolution of the GATT through ongoing negotiations in standing committees.⁸⁵ These committees are empowered to develop changes to the GATT, which may be adopted by the parties, in many instances by a mere two-thirds vote.⁸⁶ In the United States, the need for the President to obtain approval from Congress to enter into a new negotiating round has provided the public with one of its most important leverage points for participation. At the time of this writing it is unclear how this new system of ongoing negotiations will be reconciled with the requirement of congressionally approved negotiating authority. If this new system replaces the current incremental system of congressional approval with longer-term or ongoing grants of authority, the Final Agreement will significantly diminish public access into international trade decision-making.⁸⁷ It is possible, however, that these ongoing negotiations will be grouped into cross-sectional, round-like closing negotiations.⁸⁸ Presumably, these closings would require the President to obtain congressional authority to participate in them and congressional approval for their results to enter into law.

Alternatively, these new negotiating procedures could, however, prove to be an asset to those who seek democratic reform of the GATT. If the GATT parties decide to provide greater democratic rights in GATT procedures, these new procedures will facilitate the enactment of the necessary changes to the GATT rules. Unfortunately, given the current

85. *WTO Agreement*, *supra* note 79, art. X.

86. *Id.* art. X, §§ 3-5.

87. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *BROOK. J. INT'L L.* 143, 166-69 (1992). Professor Koh states:

The Fast Track critics' most persuasive critique is of the President's tactic of *bundling* disparate trade proposals, both within the NAFTA, and between the NAFTA and the Uruguay Round and placing them before Congress for a single vote. Taken to extremes, they argue, bundling makes it too painful for Congress to vote against a completed trade accord, in much the same way that the bundling of many appropriations bill[s] into a single continuing resolution virtually immunizes such a resolution against a presidential veto. For that reason, opponents muster policy arguments against the Fast Track similar to those mustered by advocates of a presidential line-item veto.

Id. at 168 (emphasis in the original, citations omitted).

88. This is the more likely option because individual sector negotiations may lack both the political will and the cross-sectional ability to make trade-offs that have allowed GATT rounds to succeed to date. This system is also appealing because it provides a distinct, or somewhat distinct, beginning and end.

undemocratic nature of the GATT, and the GATT's persistent refusal to even consider democratic reforms, the ability to alter easily GATT rules seems more likely to be used to undermine democracy rather than to advance it.

The second provision of the Final Agreement that impairs the democratic rights of citizens deals with the remedies available to a prevailing party in a post-Uruguay Round dispute. Under the existing GATT a challenged party cannot be forced to change its laws; dispute panels may merely recommend such changes.⁸⁹ Most trade disputes end in a negotiated settlement. However, if such a settlement cannot be reached, the prevailing party's only recourse is to request permission to take retaliatory measures.⁹⁰ While parties have retaliated without authorization, they do so in violation of the GATT.⁹¹ Approvals for retaliatory measures are rarely granted.⁹² All this, however, will change under the Final Agreement. Under the Final Agreement, if a losing party fails to make its practices or laws GATT-consistent and the winning party elects to move forward, the losing party must pay mutually acceptable compensation or face GATT-authorized retaliation.⁹³

The one somewhat positive change included in the Final Agreement pertains to the pleadings of the parties in disputes. Under the Final Agreement, a party to a dispute may request that another make a copy of its brief or a summary of its arguments public.⁹⁴ While this is a step in the right direction, its length is arguably quite short. By allowing a party to substitute a summary of its brief in place of its actual brief, the Final Agreement invites abuse.⁹⁵ It is likely that the parties, which have to date shown no willingness (with the exception of the United States) to democratize GATT disputes in general, or release briefs in particular, will provide summaries in place of their briefs. The potential reliance on summaries for compliance with article 18.2 of the Final Agreement raises serious concerns with respect to the comprehensiveness of the information the public will be able to obtain through this process. The lack of any substantive requirements as to what constitutes a bona fide summary may create a loophole that will swallow the rule.⁹⁶

89. See Charnovitz, *supra* note 69, at 147; Roht-Arriaza, *supra* note 76, at 95.

90. Roht-Arriaza, *supra* note 76, at 95.

91. See Charnovitz, *supra* note 69, at 147.

92. Roht-Arriaza, *supra* note 76, at 95.

93. *Dispute Understanding*, *supra* note 83, § 22.2. See generally Charnovitz, *supra* note 69, at 147. The GATT, under the Final Agreement, does not itself impose a sanction; it authorizes the winning party to do so if it so elects. *Dispute Understanding*, *supra* note 83, § 22.2.

94. *Dispute Understanding*, *supra* note 83, § 18.2, app. 3, para. 3.

95. See Housman Testimony of Feb. 3, 1994, *supra* note 73, at 3.

96. *Id.* at 3-4. Under the U.S. Pelosi Amendment, nations seeking a loan from a multilateral development bank must make public a summary of an environmental assessment for the loan activities 120 days prior to the vote on the loan. 22 U.S.C. § 262m-7(a) (Supp. V 1993). If a loan applicant fails to meet this requirement the United States Executive Director to the respective multilateral development bank is forbidden by law from voting in favor of the loan. *Id.* The Pelosi Amendment, like the

B. Other International Institutions

Although the GATT is the principal body of international trade decision-making, two international organizations also play major roles in setting the stage for GATT decisions: the Organization for Economic Cooperation and Development (OECD), and the *Codex Alimentarius* Commission (Codex).⁹⁷ Like the GATT, both the OECD and Codex also exhibit undemocratic characteristics.

1. The OECD

In the area of international trade the OECD serves as a coordinating body to allow its developed-nation membership to forge unified positions that can then be advanced through the GATT. Because the trade policies formulated at the OECD have a major bearing on the direction that GATT policies will ultimately take, the inability of the public to have access to and participate in the policy-making processes of the OECD is most disturbing.

Like the GATT, OECD documents are restricted unless the OECD decides to derestrict them.⁹⁸ These restrictions on documents prevent the public from tracking the development of the OECD's policies, which in turn diminishes the public's ability to influence international trade decision-making. Additionally, this OECD classification system is as puzzling as it is troubling. For example, while some OECD documents are negotiat-

Final Agreement's provision on the use of summaries of briefs, provides no standard for objectively determining what level and type of information must be provided in order for a summary to be bona fide. Compare *id.* with *Dispute Understanding*, *supra* note 83, § 18.2, app. 3, para. 3. "The summaries that have been produced under the Pelosi Amendment for multi-million dollar mega-projects are often times little more than a page or two in length." Housman Testimony of Feb. 3, 1994, *supra* note 73, at 4. Although the Pelosi Amendment remains an important tool for environmental protection and democracy, this loophole has markedly diminished its potential for advancing these causes. There is "no reason to believe that many of the same governments who supply these useless summaries will be more forthcoming in the trade context where the stakes in real dollars are much higher." *Id.*

97. A host of other international organizations also help to form trade policy, such as the United Nations Conference on Trade Development, however these are not dealt with here.

98. See *Resolution of the Council Concerning the Classification of Documents and Security Precautions*, OECD Doc. C/M(62)11(Final), Item 109 a), b), and c) (May 22, 1962); see also, e.g., *Environment Directorate, Joint Session of Trade and Environment Experts, Environmental Reviews of Trade Policies and Agreements*, OECD Doc. COM/ENV/TD (94) 14 (Mar. 8-10, 1994) [hereinafter *OECD Joint Session of Trade and Environment Experts*] (marked "Restricted"). This OECD classification has not always worked this way. In the past, the United States position was that such a restricted classification was for OECD and not United States government purposes. Conversation with Ambassador Joseph Greenwald, former U.S. Ambassador to the OECD, in Washington, D.C. (Aug. 8, 1993). This allowed the United States government to disseminate more widely OECD documents for comment. *Id.* Although it is impossible to pinpoint the exact time of the change in positions, the current U.S. policy is to closely adhere to the restrictions placed on documents by the OECD. This policy, however, is not currently followed by all OECD member governments, many of which feel free to routinely distributed restricted OECD documents to their constituencies. Cf. Jackson, *supra* note 58, at 231 (discussing same problem in GATT context).

ing texts of member governments that might properly be restricted, others are papers by outside experts commissioned by the OECD.⁹⁹ These papers do not generally contain classified or confidential information and they clearly do not represent the views of the OECD or its members.¹⁰⁰ Yet, for no readily apparent reason, they are still restricted.

The public is also restricted from attending most OECD meetings.¹⁰¹ OECD ministerial meetings are closed to everyone but the delegations of its members. Beginning in 1992, the United States has, in the trade and environment area, made representatives of interested NGOs part of the U.S. delegation to OECD meetings.¹⁰² This U.S. action has been met by intense criticism from other OECD countries, none of which have followed the U.S. lead and expanded their delegations to include nongovernmental representatives. While this U.S. action is an important symbolic step towards greater openness at the OECD, its practical value is limited. NGO members of a delegation may only be present for general discussions and must leave the room during any negotiating sessions.¹⁰³ Because of this limitation, NGO representatives only hear rhetoric and posturing. Similarly, individual NGO members of delegations can be vetoed by any OECD member who finds the particular NGO representative, or their views, offensive.¹⁰⁴ While this veto has not yet been utilized, it hangs, like a sword of Damocles, as a means of subtle control over the head of every potential NGO representative.

The OECD does provide a very limited number of NGOs certain additional participatory opportunities. In accordance with the decision of the OECD Governing Council of March 13, 1962, NGOs that are deemed to be widely representative in general economic matters or in a specific economic sector can be granted consultative status.¹⁰⁵ This status allows them to discuss subjects of common interest with a Liaison Committee chaired by the OECD Secretary General, and to be consulted on particular OECD activities by the relevant OECD officials or committees.¹⁰⁶ Because of their consultative status, these NGOs also are given access to certain documents that the public does not have access to.¹⁰⁷ However, the other lim-

99. See, e.g., *OECD Joint Session of Trade and Environment Experts*, *supra* note 98.

100. See, e.g., *id.*

101. See *The Impacts of Trade Agreements on Environmental Protection and Natural Resource Conservation Efforts: Hearing Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, *supra* note 55, at 25, 87 (statement of Robert Housman, Attorney, and Paul Orbuch, Attorney, Center for International Environmental Law).

102. See *id.* at 5-6.

103. See *id.* at 6.

104. See *id.*

105. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE OECD IN BRIEF 17; Decision of the Council on Relations with International Non-Governmental Organizations*, OECD Doc. C/M(62)7(Final), Item 59 (a), (b), and (c)—Doc. No. C(62)45 (Mar. 13, 1962) (the NGO must also meet certain additional requirements).

106. *Id.*

107. See Letter from David H. Small, Deputy Legal Counsel, OECD, to David Wirth, Professor, Washington & Lee Law School, Sept. 21, 1993.

its to participation—for example, the inability to attend negotiating sessions and to obtain documents—still generally apply even to these consultative NGOs.

The number of NGOs that have been granted consultative status is quite limited and their industry orientation further skews OECD decision-making. To date, only the Business and Industry Advisory Committee (BIAC) to the OECD, the Trade Advisory Committee to the OECD, the International Association of Crafts and Small and Medium-Sized Enterprises, the International Federation of Agricultural Producers, and the European Confederation of Agriculture have been granted special status by the OECD.¹⁰⁸ Organized labor also consults with the OECD through the Trade Union Advisory Committee (TUAC).¹⁰⁹ The TUAC is the only non-industrial interest represented.

The OECD is of special importance to trade policy making because of the manner in which it is used by developed countries—the most powerful nations in international trade—to develop common positions to advance through the GATT. The closed-door nature of OECD proceedings, and its at times hostile attitude toward providing greater participation, allows for the development of OECD policies that do not necessarily reflect the views of the citizens of its member nations—nations referred to throughout the Cold War as the leaders of the free world.

2. Codex

Unlike other international trade decision-making bodies that have been openly hostile to participatory decision-making, Codex has a history of openness. Codex is an intergovernmental organization within the United Nations system whose primary goals are to ensure food safety, and to protect against unfair trade practices in food trade.¹¹⁰ One of Codex's most important tasks is the harmonization of food safety standards.¹¹¹ Codex standards are communicated to the GATT and receive substantial deference during both GATT negotiations and GATT dispute panel proceedings.¹¹²

Although only states can be voting members of Codex,¹¹³ the Secre-

108. See *id.* (BIAC and TUAC receive restricted documents for consultative purposes, but they have no right to those documents).

109. *Id.*

110. CODEX ALIMENTARIUS COMMISSION, PROCEDURAL MANUAL art. 1 (8th ed.). See DONNA U. VOGT, CONGRESSIONAL RESEARCH SERVICE, SANITARY AND PHYTOSANITARY MEASURES PERTAINING TO FOOD IN INTERNATIONAL TRADE NEGOTIATIONS 20-21 (Sept. 11, 1992).

111. CODEX ALIMENTARIUS COMMISSION, *supra* note 110, art. 1(d).

112. See *Agreement on the Application of Sanitary and Phytosanitary Measures*, GATT Doc. MTN/FA II-A1A-4, preamble (Dec. 15, 1993) [hereinafter *SPS Agreement*], in *Final Agreement*, *supra* note 78. The Preamble to the Agreement on the Application of Sanitary and Phytosanitary Measures provides that one of the GATT's goals is "to further the use of harmonized sanitary and phytosanitary measures between [Parties] on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission" *Id.*

113. See CODEX ALIMENTARIUS COMMISSION, *supra* note 110, art. 2.

tary General of Codex may invite NGOs to participate as observers.¹¹⁴ Observer status has been widely granted to a range of NGOs, including primary producer organizations, processor organizations, standards organizations, as well as to nations who are not Codex members. Observer status has also been granted to at least one consumer organization. Observers can receive Codex reports, take part in the preparatory work prior to meetings, and speak during meetings.

While Codex's procedures provide a participatory model for other international trade organizations, it is not without its own participatory flaws.¹¹⁵ Codex's principal participatory flaw is in the makeup of the individual country delegations—the actual Codex decision-makers. These country delegations commonly include a significant number of representatives from the agribusiness or pharmaceutical industry sectors.¹¹⁶ Consumer and food safety groups, which could offset the participation of the regulated community, are not generally found on Codex delegations or consulted on proposed standards.¹¹⁷ For example, a 1993 study by the National Food Alliance found that “over four-fifths of the nongovernmental participants on national delegations to Codex committees represented industry, while only one percent represented public interest organizations.”¹¹⁸ The undesirable result is that food safety votes taken by Codex are heavily and disproportionately influenced by the regulated community. The need to correct this imbalance was recognized at the 1991 FAO/WHO Conference on Food Standards, Chemicals in Food and Food Trade.¹¹⁹ However, despite this recognition, an October 1993 report by the International Organization of Consumers Unions found that little progress has been made in addressing this problem.¹²⁰

Codex also suffers from another major participatory flaw in that while nongovernmental participation is allowed in many of its activities, its standard setting processes are closed to the public.¹²¹ For example, the public may not obtain or directly submit comments on the standards for pesticide residues developed within either the Codex Committee on Pesticide Resi-

114. *Id.* at rule VII.4-5.

115. See generally PATTI GOLDMAN & RICHARD WILES, *TRADING AWAY U.S. FOOD SAFETY* 53 (1994).

116. See International Organization of Consumer Unions, *Consumer Involvement in Decision-Making in Relation to Food Standards and the Joint FAO/WHO Food Standards Programme*, Item 10, 1, 2, 3 (Oct. 1993) [hereinafter *International Consumer Unions Report*]; Daphne Wysham, *The Codex Connection: Big Business Hijacks GATT*, 251 *NATION* 770, 771-72 (1990); Mark Ritchie, *GATT, Agriculture and the Environment*, 20 *ECOLOGIST* 214, 216-17 (1990).

117. See *EPA Official Calls for Input on Food From Consumer and Industry Groups*, 9 *Int'l Trade Rep.* (BNA) 1231 (July 15, 1992) (paraphrasing a letter to the EPA from Patti Goldman of Public Citizen as “three U.S. agencies at least since 1985 have failed to comply with the Federal Advisory Committee Act because only industry representatives have been allowed to participate in an advisory committee process.”).

118. Goldman & Wiles, *supra* note 115, at 62 (citing *NATIONAL FOOD ALLIANCE, CRACKING THE CODEX: AN ANALYSIS OF WHO SETS WORLD FOOD STANDARDS* 67 (1993)).

119. See *International Consumer Unions Report*, *supra* note 116, at 1-2.

120. See *id.* at 2-4.

121. GOLDMAN & WILES, *supra* note 115, at 53-54.

dues or the Joint Meeting on Pesticide Residues; the public may only participate by commenting through their respective national delegation—the same delegations that are disproportionately industry oriented.¹²²

C. Regional Trade Agreements

Although the rules of the existing GATT and the Final Agreement both require the parties to extend most favored nation (MFN) trade status to the products, and in the case of the Final Agreement to the services, of all other contracting parties, these agreements also allow the parties to provide more favorable treatment within “free trade areas.”¹²³ The parties to such free trade area agreements are accorded wide latitude to deviate from the GATT and Final Agreement rules in crafting the rules to govern trade among the parties. This ability to craft new rules through free trade area agreements presents an important opportunity to democratize trade decision-making. Not only can these agreements alter the rules between limited number of parties, they can also serve as important testing grounds for developing workable reforms to trade rules that can then be internationalized at a later date.¹²⁴ Unfortunately, this opportunity has not been acted upon. This section analyzes the democratic failures of the North

122. *Id.*

123. See GATT, *supra* note 16, art. XXIV(8) (b); WTO Agreement, *supra* note 79, Annex 1A, para. 1.a (incorporating by reference 1947 GATT Agreement into the Final Agreement). The most commonly known form of free trade area agreements are regional trade agreements such as the North American Free Trade Agreement (the NAFTA). See *infra* notes 126-29 and accompanying text (discussing the NAFTA). GATT defines a free trade area as:

[A] group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

GATT, *supra* note 16, art. XXIV(8) (b). The trade community remains largely divided as to whether such free trade area agreements are good or bad for the international trading system. Compare C. Michael Aho, *More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do*, 22 CORNELL INT'L L.J. 25, 25-26 (1989) (outlining the harms caused by free trade agreements to the international trading system) with C. Michael Hathaway & Sandra Masur, *The Right Emphasis for U.S. Trade Policy for the 1990s: Positive Bilateralism*, 8 B.U. INT'L L.J. 207, 211-16 (1990) (discussing the benefits of free trade area agreements).

124. ROBERT F. HOUSMAN, RECONCILING TRADE AND THE ENVIRONMENT: LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT 4 (UNEP Environment and Trade Series No. 3, 1994) [hereinafter UNEP, LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT]. Cf. Hathaway & Masur, *supra* note 123, at 211-12 (discussing the role that the Reciprocal Trade Agreements Act of 1934 and related bilateral trade agreements played in setting the stage for the GATT). For example, the NAFTA's basic rights and obligations as to sanitary and phytosanitary (SPS) measures provide that the parties have the right to adopt a level of protection independent of any international standard. See NAFTA, *infra* note 125, art. 712.1. Once this provision had been secured in the NAFTA, the United States took it to the Uruguay Round table during the final days of negotiations and was able to secure changes in the SPS provisions of the Final Agreement that reflect the basic premise of the NAFTA SPS text. See GATT TBT Agreement Reveals Failure of U.S. to Secure Changes, INSIDE U.S. TRADE, Dec. 24, 1993, at 11.

American Free Trade Agreement (NAFTA)¹²⁵ as evidence of the failure of regional agreements to address the need for democratizing trade decision-making. The NAFTA is chosen here because it has been widely heralded as the most progressive trade agreement and because it is the broadest regional agreement to emerge of late.

1. *The NAFTA*

The NAFTA creates a regional trading agreement between Canada, the United States, and Mexico that "extend[s] from the polar extremes of the Yukon to the coral reefs of the Yucatan . . ." ¹²⁶ Although the NAFTA and its parallel agreements on labor¹²⁷ and environment¹²⁸ have garnered much praise for beginning the process of integrating trade and other areas of social policy, the NAFTA is strikingly deficient with regard to democracy.¹²⁹

By the time the NAFTA debate made its way into the public eye and onto the congressional radar screen, the trade and environment debate was already well underway and democracy issues had emerged as a critical cluster of issues.¹³⁰ The debate over democracy and the NAFTA, however, brought a new twist: Mexico's historical record of human rights abuses and democratic failures.¹³¹ Labor, environmental, and human rights groups argued that opening up the NAFTA to public participation was necessary not only to advance the democratization of trade, but also to advance democratic reforms in Mexico; NAFTA-driven democratic reforms would provide a wedge behind which democratic reforms in Mexico could follow.¹³² Despite these efforts, the parties steadfastly refused to

125. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA].

126. Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns Into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 722 (1993); see UNEP, LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT, *supra* note 124, at 1.

127. North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter PLA].

128. North American Agreement on Environmental Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter PEA].

129. See UNEP, LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT, *supra* note 124, at 33.

130. See, e.g., Ed Broadbent, *Human Rights and North American Free Trade*, TORONTO STAR, Mar. 9, 1992, at A15; Damian Fraser, *New Links Across the Border*, FIN. TIMES, Dec. 13, 1991, at 4.

131. See, e.g., MINNESOTA ADVOCATES FOR HUMAN RIGHTS, NO DOUBLE STANDARDS IN INTERNATIONAL LAW: LINKAGE OF NAFTA WITH HEMISPHERIC SYSTEM OF HUMAN RIGHTS ENFORCEMENT IS NEEDED (Dec. 1992); see also AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 156-59 (1991) (documenting Mexican human rights and democracies problems). "The widespread use of torture and treatment by law enforcement agents, in some cases leading to the death of detainees, continued to be reported . . . [A]llegations of electoral fraud by the governing *Partido Revolucionario Institucional* (PRI) . . . during state and local elections in December 1989 triggered widespread protests . . ." *Id.* at 156-57.

132. This pressure to use NAFTA to drive democracy may have been one of the major reasons why Mexico was one of the leading footdraggers on public participation in the NAFTA.

open regional trade decision-making to the public.¹³³

2. *The Relevant Provisions and Policies of the NAFTA*

The NAFTA's provisions on public participation in trade decision-making are for all practical purposes the same as those of the GATT and the Final Agreement. NAFTA decision-making will be conducted under the auspices of the NAFTA Free Trade Commission (FTC).¹³⁴ Because the NAFTA is silent as to public participation in FTC proceedings,¹³⁵ it seems likely that by default the FTC will continue the tradition of undemocratic trade decision-making. Thus, it is likely that the FTC and the other NAFTA trade decision-making bodies will sit in closed secret sessions. Similarly, it is likely that no transcripts or reports of the meetings of NAFTA decision-making bodies will be made available to the public.

The NAFTA's dispute resolution provisions also carryover at the regional level the democratic flaws of international trade dispute resolution under the GATT and the Final Agreement. Dispute panels formed under the NAFTA are open only to interested member states.¹³⁶ NGOs and members of the general public are precluded from participating in these hearings. Interested private parties are also prohibited from independently submitting information to panels. In fact, NGOs and individuals are even prohibited from merely attending these proceedings. In a similar vein of secrecy, the pleadings of the parties in NAFTA disputes are confidential and cannot be released to the public without the prior approval of the party in question.¹³⁷ Moreover, the public is precluded from knowing how each of the panelists ruled and why, and, under certain circumstances, can even be denied access to the final decisions of these panels.¹³⁸

3. *The Relevant Provisions and Policies of the NAFTA Parallel Agreements on Labor and the Environment*

The NAFTA parallel labor agreement¹³⁹ (PLA) and the parallel environmental agreement¹⁴⁰ (PEA) are seen by the NAFTA parties as playing a substantial role in addressing the public's concerns over the potential for NAFTA implementation to harm the interests of workers or the environment. These agreements offered a major opportunity to begin to bring

133. UNEP, LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT, *supra* note 124, at 33. The failure to democratize the NAFTA's decision-making processes has since been cited as one of the causes of the peasant uprisings in the Mexican state of Chiapas that have followed the implementation of the NAFTA. Cf. Todd Robberson, *How Mexico Brewed a Rebellion*, WASH. POST, Jan. 9, 1994, at A31.

134. NAFTA, *supra* note 125, art. 2001.

135. *See id.* art. 2001.4 (providing that the FTC's rules are still to be developed).

136. *See id.* arts. 2012.1(b), 2013.

137. *See id.* art. 2012.1(b).

138. *Id.* arts. 2017.2 (panelists associated with majority or minority opinions are not to be disclosed), 2017.4 (requirement to publish final reports may be avoided by consensus).

139. PLA, *supra* note 127.

140. PEA, *supra* note 128.

the public into trade-related decision-making. Given that (1) the NAFTA parallel agreements were directed at quelling NAFTA criticisms by the labor and environmental communities, (2) many of these criticisms focused on the undemocratic nature of the NAFTA, and (3) the issues to be addressed under these agreements, while trade-related, were not core trade issues, one might assume that the trade-related decision-making processes under these parallel agreements would be more open to democratic principles. Nothing, however, could be farther from the truth.

4. *The Parallel Environmental Agreement*

The PEA establishes four bodies or processes that directly relate to trade decision-making: (1) a Commission on Environmental Cooperation (the Environmental Commission) directed by a council of ministers (the Environmental Council), (2) a standing secretariat (the Environmental Secretariat), (3) a Joint Public Advisory Committee (the JPAC), and (4) a dispute resolution process to review cases concerning certain failures of the parties to enforce effectively their domestic environmental laws.¹⁴¹ The decision-making processes of all four of these newly established bodies are markedly undemocratic.

The newly established Environmental Commission is headed by the Environmental Council, which is composed of the environmental ministers of each of the parties.¹⁴² Under the rules establishing the Environmental Council, each of the Council's regular annual meetings must include a public component, and the Environmental Council may, at its own election, decide to hold other meetings in public.¹⁴³ While these provisions require certain public access to Environmental Council meetings, the PEA fails to provide any requirements as to the amount or percentage of the Environmental Council's time that must be spent in public meetings. Thus, the Environmental Council could fulfill the PEA's requirements by merely holding a public press conference at the close of each of its annual meetings. The PEA is also silent as to what role the public can play within these meetings. For example, it is unclear whether the public may present oral testimony as to matters under the Environmental Council's purview. Moreover, although the PEA provides that "decisions and recommendations of the Council shall be made public," the Environmental Council may elect to keep any of its recommendations or decisions confidential.¹⁴⁴ The only Environmental Commission document that the PEA requires to be made public is the Environmental Commission's annual report.¹⁴⁵

In order to conduct the day-to-day affairs of the Environmental Commission, the PEA also establishes a standing Environmental Secretariat. The Environmental Secretariat's most important responsibilities are to

141. See PEA, *supra* note 128, arts. 8-16, 22-45.

142. *Id.* art. 9.1.

143. *Id.* art. 9.4.

144. *Id.* art. 9.7.

145. See *id.* art. 12.1.

prepare factual records concerning submissions on enforcement matters¹⁴⁶ and to prepare reports on a wide range of issues not related to enforcement matters.¹⁴⁷

From a public participation perspective several things are troubling about the Environmental Secretariat's factual record powers. First, the Environmental Secretariat requires a two-thirds vote of the Environmental Council before proceeding on a citizen's or NGO's submission, and the Council partially consists of the most senior environmental officials of the very governments whose environmental actions are the subject of the complaint.¹⁴⁸ Second, the ability of the complainant and the public to gain access to these records is entirely dependent upon the Environmental Council's determination as to whether these documents should be made public.¹⁴⁹ Third, even where a public submission successfully passes through the screening, response, and report phases of the submission process, the only thing that the public has to show for its efforts is a report.¹⁵⁰ This end result stands in sharp contrast to the real teeth provided under the NAFTA dispute resolution processes.¹⁵¹

146. *Id.* art. 14. Under the terms of the agreement the Secretariat is empowered to consider qualifying submissions from NGOs and private individuals. *Id.* art. 14.1. In order for a submission to be considered by the Secretariat, it must: 1) be written in a designated notification language, 2) clearly identify the person or NGO making the submission, 3) provide sufficient information to allow the secretariat to review the submission, 4) appear to be aimed at promoting enforcement rather than at harassing industry, 5) indicate that the matter was previously communicated to the party in question and discuss the party's response, and 6) be filled by a person or NGO residing in the territory of a party. *Id.* art. 14.1(a)-(f). If the secretariat determines that a submission meets these criteria, then the secretariat is required to determine whether the submission warrants requesting the party in question to respond. *Id.* art. 14.2. In making this second determination the Secretariat is instructed to look at whether: 1) the submission alleges a harm to the person or NGO making it, 2) the submission alone or taken with other submissions raises matters "whose further study . . . would advance" the agreement's goals, 3) available private remedies have been pursued, and 4) the submission is drawn exclusively from mass media reports. *Id.* art. 14.2(a)-(d).

If after reviewing all these factors the Secretariat determines that further action on a submission is warranted, the Secretariat can ask the party or parties involved to respond. *Id.* art. 14.2. The PEA is silent as to whether the response of a party is to be made available to either the complaining person or NGO or to the general public, raising the inference that these responses are to be kept confidential. If the party responds that the matter is the subject of "pending judicial or administrative proceedings" the entire process ends. *Id.* art. 14.3(a). In all other cases, once the Secretariat has received and considered the party's response, it may request permission from the Council to develop a factual record. *Id.* art. 15.1. The Commission can by a two-thirds vote block the Secretariat from proceeding. *Id.* art. 15.2. In cases where the Secretariat is permitted to prepare a factual record, this record is submitted to the Council. *Id.* art. 15.6. Here again, the Council can block publication of the report by a two-thirds vote against making the record public. *Id.* art. 15.7.

147. *Id.* art. 13.1.

148. *Id.* art. 15.2.

149. *Id.* art. 15.7.

150. See UNEP LESSONS FROM THE NORTH AMERICAN FREE TRADE AGREEMENT, *supra* note 124, at 42.

151. See NAFTA, *supra* note 125, art. 2019 (suspension of benefits).

In addition to its responsibility to oversee submissions from the public on enforcement matters, the PEA also allows the Environmental Secretariat to prepare factual reports on a wide range of topics, so long as they are unrelated to a party's failure to effectively enforce its domestic environmental laws.¹⁵² Where the Environmental Secretariat is allowed by the Council to prepare such a report,¹⁵³ the Environmental Secretariat may rely upon information that is, *inter alia*, provided by the public, the JPAC, or gathered through public consultations.¹⁵⁴ Unfortunately, the public can be denied access to these Environmental Secretariat reports by a consensus vote of the Environmental Council.¹⁵⁵

The one participatory mechanism built into the Environmental Commission's structure is the JPAC.¹⁵⁶ However, despite the fact that the JPAC is intended to serve as the public's principal access point into the Environmental Commission, essential issues with regard to its membership and workings are undefined in the PEA. For example, although the JPAC is called the "Joint Public Advisory Committee," the PEA does not actually require that its membership be drawn from the private sector.¹⁵⁷ This stands in sharp contrast to the rule on membership of the optional National Advisory Committees (NACs).¹⁵⁸ If a NAFTA party opts to form a NAC, the PEA requires that its membership come solely from the private sector.¹⁵⁹

Moreover, although the JPAC is ostensibly the public's NAFTA environmental eyes and ears, the Environmental Commission can block the JPAC's access to factual records prepared by the Secretariat under article 13 of the PEA.¹⁶⁰ The PEA's limits on the powers of the JPAC, coupled with its vagaries concerning the JPAC's composition raise serious issues with regard to the JPAC's ability to further democratize international trade decision-making.

The PEA also provides for a special dispute resolution process, to be carried out under the auspices of the Environmental Commission, which is intended to ensure that NAFTA-driven trade liberalization does not provide a party with a competitive advantage from the failure to effectively implement its own domestic environmental laws.¹⁶¹ In addition to the substantial substantive flaws that plague this dispute resolution process,

152. PEA, *supra* note 128, art. 13.1.

153. *See id.* Secretariat's ability to report on environmental matters is dependent on a decision of the Council. *Id.* Prior to beginning work on a report, the Secretariat must notify the Council of its intention to prepare a report on a given topic. *Id.* The Council by a two-thirds vote can prohibit the Secretary from moving forward with the report. *Id.*

154. *Id.* art. 13.2.

155. *Id.* art. 13.3.

156. *Id.* art. 16. Under the terms of the PEA, and unless the Environmental Council decides otherwise, the JPAC will be comprised of 15 members. *Id.* art. 16.1. Each party is responsible for appointing an equal number of these members. *Id.*

157. *See id.* art. 16.

158. *Id.* art. 17.

159. *Id.*

160. *Id.* art. 16.7.

161. *See id.* arts. 22-45.

the process makes virtually no democratic improvements over traditional trade dispute rules.

Under the PEA, enforcement disputes will be resolved between the parties and an arbitral panel.¹⁶² The agreement provides little guidance as to the actual rules of procedure that will govern the conduct of these disputes, opting instead to place responsibility to develop these model rules on the Environmental Council.¹⁶³ The parties' consistent reluctance to open the NAFTA and NAFTA-related processes to the public, coupled with the PEA's provisions limiting disputes to the parties, are grounds for concern that once adopted these model rules will not deviate far from the restrictive participatory rules provided for under the NAFTA's dispute resolution provisions.

5. *The Parallel Labor Agreement*

Similar to the PEA, its environmental counterpart, the PLA, also establishes a Commission for Labor Cooperation (the Labor Commission), headed up by a Council of Ministers (the Labor Council), and a standing secretariat (the Labor Secretariat).¹⁶⁴ In addition, the PLA also tracks the PEA by providing a dispute mechanism to ensure that the failure of a party to effectively enforce its labor laws does not result in a competitive advantage.¹⁶⁵ The PLA, however, differs from the PEA by placing many of the equivalent implementation responsibilities on National Administrative Offices (NAOs), rather than on the Labor Secretariat.¹⁶⁶ The democratic limits inherent in the PLA structure are arguably far worse than even those that plague the PEA.

Unlike the Environmental Council, which must meet in public during at least some portion of its regular annual meetings, the Labor Council is not required by the PLA to meet in public. The PLA provides only that "[t]he [Labor] Council may hold public sessions to report on appropriate matters."¹⁶⁷ By limiting the Labor Council's ability to meet in public only to reporting on such matters, this provision seriously curtails the public's access to the activities of the Labor Council.

The actions of the Labor Secretariat that provide access to the public into aspects of trade decision-making are also far more constrained. Unlike the PEA, the PLA fails to provide a mechanism for the public to submit complaints to the Labor Secretariat. Instead, oversight of the parties' labor practices will be the responsibility of the NAOs. The NAOs are federal offices formed within the governments of each party.¹⁶⁸ Where a NAO believes that a problem exists with another party's labor practices, the NAO is empowered to request the other party's NAO to engage in

162. *Id.* arts. 24, 28.

163. *Id.* art. 28.1.

164. PLA, *supra* note 127, art. 8.

165. *Id.* arts. 27-41.

166. *Id.* arts. 15-16.

167. *Id.* art. 9.4.

168. *Id.* art. 15.1.

consultations on the matter.¹⁶⁹

In addition to the NAO oversight processes, the PLA also provides for the establishment of an Evaluation Committee of Experts (ECE) to review disputes under the PLA. ECEs will be comprised of three members who are independent of, and not affiliated with or answering to, any party or the Labor Secretariat.¹⁷⁰ This ECE membership mandate would seem to require that many of these ECE members will be nongovernmental experts selected from the public at large. In evaluating a dispute, ECEs may invite comments from members of the public and NGOs with relevant expertise.¹⁷¹ At the end of their evaluations, ECEs are required to prepare a final report.¹⁷² Here again, the Labor Council can block publication of these reports by a consensus vote.¹⁷³

Also in the area of disputes, the PLA's dispute resolution mechanism also suffers from the same flaws found in the similar provisions of the PEA. The PLA's rules of procedure for disputes remain to be determined by the Labor Council.¹⁷⁴ It remains to be seen whether the same NAFTA parties that refused to democratize the dispute resolution provisions of chapter 20 of the NAFTA, will now provide more democratic rules for PLA disputes.

In addition to the PLA's limits to democracy in the context of disputes, the reporting abilities of the Labor Secretariat are highly constrained. Although the PLA may report on certain NAFTA-related issues, PLA reports are limited to the review of publicly available information supplied by the parties.¹⁷⁵ Thus, the public cannot look to the Labor Secretariat to develop new and independent information. Moreover, the Labor Council must approve all reports and studies of the Labor Secretariat before they can become public.¹⁷⁶

Finally, the PLA fails to provide for a Labor JPAC or any other mechanism for members of the public to provide direct guidance to the Labor Council. Thus, the PLA lacks even the PEA's flawed advisory mechanisms for public input and oversight. The PLA does, however, provide that each party may, if it so chooses, convene a Labor NAC to advise it on the implementation of the PLA.¹⁷⁷

169. *Id.* art. 21.

170. *Id.* art. 24.1(a)-(c).

171. *Id.* art. 24.1(e).

172. *Id.* art. 26.1. The ECE does not have to submit a final report if the Council otherwise decides. *Id.*

173. *Id.* art. 26.2.

174. *Id.* art. 33.1.

175. *Id.* art. 14.1.

176. *Id.* art. 14.4.

177. *Id.* art. 17.

III. The Effects of the Lack of Democracy in International Trade Decision-making

The failure of international trade agreements, like the GATT, the Final Agreement, and the NAFTA, to provide avenues for democratic participation by citizens has a number of very real and disturbing consequences. These consequences not only effect the spread of democracy, but also hamper the conduct of democracy in nations that have already adopted democratic forms of government.

One of the most disturbing consequences of the democratic failures of international trade agreements is the impact that such failures have on the spread of democracy around the world. Just as the spread of democracy can promote expanded liberalized trade, so too can the spread of trade, if properly carried out, promote democracy.¹⁷⁸ The failure to provide for democracy in international trade decision-making squanders an important opportunity to advance the expansion of democracy in nations that are currently undemocratic.¹⁷⁹ This failure also neglects the opportunity to use the expanded economic opportunities of trade agreement membership as an inducement, or carrot, to encourage nations to democratize.¹⁸⁰

Properly constructed, international trade rules could ensure, at least as to the matters covered under these agreements, that the citizens of nondemocratic countries would have access to democratic processes. By providing access to democracy in trade-related areas, democratized trade agreements would make it more difficult for non-democracies to deny their citizens similar rights in other contexts.¹⁸¹ Presented with working democratic models in trade-related areas, nondemocratic governments would find it more difficult to argue that democracy is not feasible given their situation. Granting citizens the right democratically to participate in trade-related areas would also furnish them with a taste for democracy, spurring them to demand greater democratic rights from their governments. Moreover, by participating, even on a limited basis, in democratic systems, these citizens would learn how democracies function, which

178. See, e.g., James Lilley, *Freedom Through Trade*, 94 FOREIGN POL'Y 37 (1994) (discussing the role of international trade in the expansion of democracy in China).

179. Cf. Marcellus S. Snow, *Trade in Information Services in Asia, ASEAN, and the Pacific: Conceptual Issues and Policy Examples*, 28 CAL. W. L. REV. 329 (1991-1992) (discussing the ASEAN-U.S. Initiative report, a study funded in part by the U.S. government, which concludes that the expansion of liberalized trade is linked to the growth of democracies).

180. See Kittrie, *supra* note 1, at 376 ("To benefit from 'Most-Favored-Nation' treatment in their trading with the United States or Common Market countries, some of the most oppressive regimes of yesteryear now seek certification as adherents of the democratic ideal and process.").

181. Cf. Sidney Weintraub & Delal Baer, *The Interplay Between Economic and Political Opening: The Sequence in Mexico*, WASH. Q., Spring 1992, at 187, 200. In discussing the role expanding economic rights play in pushing the expansion of democratic rights in Mexico, Weintraub and Baer provide: "[a]s economic reform proceeds, Mexican authorities will not then have the luxury of compartmentalizing politics and economics. These two strands of national life will rapidly become part of the same process." *Id.*

would ease the transition to democratic systems of government. However, the seeds of democracy will be difficult to sow abroad if international trade decision-making remains undemocratic in nature.¹⁸²

The failure of international trade decision-making to reflect democratic principles also serves as an obstacle to the current trend towards the democratization of international law. In a host of other international fora there is an increasing recognition of the role of the individual and of NGOs in the making and conduct of international law.¹⁸³ Foreign investors and businesses involved in trade are increasingly tearing down the artificial walls that have long separated public and private international law.¹⁸⁴ In addition, advances in the area of international human rights law represent a growing recognition of the rights of individuals as separate and distinct from the rights of national governments.¹⁸⁵ However, the failure of international trade law to provide individual democratic rights in social areas undercuts this trend of development.

The undemocratic nature of international trade decision-making not only squanders an opportunity to foster greater democracy around the

182. Two other aspects of international trade can serve to increase democracy even absent the democratization of trade agreements. First, the information revolution that normally accompanies a country's opening of its markets serves as an important tool for democracy. The phones, faxes, satellites and televisions that are needed to compete bring more than just commodity reports. These tools bring openness and provide citizens access to the rest of the world. See Lilley, *supra* note 178, at 40.

Second, the decentralization of economic activities necessary to compete in international markets with free market economies undercuts the centralized state control found in many undemocratic countries. See *id.* "For example, the basic unit of communist control in China, known as the *danwei*, or work unit has virtually disappeared in [China's] prosperous south . . ." *Id.*

While these two factors are important to the spread of democracy, they cannot replace the rule-based changes that democratic trade agreements could bring. The essential difference here is that the two factors discussed above are changes of convenience, while the changes required by democratic trade agreements are changes rooted in law. Law-based democratic changes have at least two important advantages. First, they encourage nations to adopt democratic legal systems. Second, they are harder to rescind than changes of convenience.

183. See John H. Barton & Barry E. Carter, *International Institutions for a New Age*, 81 GEO. L.J. 535, 538-40 (1993) (noting that the recognition of "persons" in international law is the "inevitable result of the increasing global interactions and shared interests . . . across frontiers").

184. See, e.g., NAFTA, *supra* note 125, arts. 1715, 1716 (providing private intellectual property rights holders with the trans-NAFTA right to judicial and administrative procedures to enforce their rights); see also Barton & Carter, *supra* note 183, at 539; Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 152-53 (1988); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

185. See, e.g., United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/506 (1984) entered into force June 26, 1987, reprinted in 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 93 U.N.T.S. 4; see also Barton & Carter, *supra* note 183, at 540; Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

world, but it also serves to undermine the role of democracy in nations that already have democratic systems of government. In the case of trade negotiations, international diplomats—beholden only to their heads of state—can in closed door sessions, the results of which are generally overlooked by the public,¹⁸⁶ essentially negotiate away standards that are enacted by democratically elected legislators—who are directly responsible to their constituents—through open and democratic national legislative processes.¹⁸⁷

Although the heads of state of most democratic nations are elected, they are often times further removed from the average citizen than are representatives in the legislative branches of government.¹⁸⁸ Thus, by subtly, or not so subtly, shifting power away from legislative bodies, which are most accountable to citizens, to heads of state, who are less accountable to their national constituencies, current trade agreements constrain the

186. See Mead, *supra* note 50 ("The average reader sees the acronym GATT, followed, say, by a reference to the European Community or the Group of Seven industrial nations, and soon the eyes begin to glaze and a hand reaches mechanically to turn the page.")

187. See William Greider, *The Global Marketplace: A Closet Dictator*, in *THE CASE AGAINST FREE TRADE* 195, 207 (Earth Island Press ed., 1993).

The overall political effect of globalization is to further enhance the power of the presidency . . . at the expense of representative forums, public debate and accountability. Once an issue has become part of high-level diplomatic exchanges, all of the details naturally become murkier, since negotiators do not wish to talk too freely about their negotiating strategies. The discussions often literally move offshore and behind closed doors—more irregular deal making that will have the force of law.

Id.

188. See, e.g., LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 37-38 (1990). Professor Henkin provides:

[O]urs is a unique, dual democracy . . . Both Congress and the President are representative; . . . both accountable. But their representative character and their accountability are different, and the differences should reflect and be reflected in their authority . . . In foreign affairs, the President represents the people of the United States to the world. Congress represents the people at home, the different regions, groups, constituencies, and interests (general and special) . . . The presidency is confidential, classified; Congress is open and more accessible for citizen participation. Both are accountable, but the President's accountability is essentially plebiscitarian quadrennially. Congress—its members—are accountable directly, daily.

Id.; Phillip R. Trimble, *1991 Survey of Books Relating to Law and Theory—Foreign Affairs, Law and Democracy*, 89 MICH. L. REV. 1371 (1991):

[O]f the three political institutions, members of the House of Representatives represent the smallest constituencies, and hence are more likely to be immediately responsive to local and grassroots interests. Biennial elections assure regular accountability; members of the House should in theory most clearly represent the will of the majority or plurality of the people in their districts because they face reelection every two years. Congress, especially the House, may also be better positioned to know the views of citizens because its members are in close touch with constituents, and the constituency is smaller than the nation as a whole.

operation of democracy within national governments.¹⁸⁹ Moreover, even if one believes that legislative bodies are subject to capture by narrow interests, current trade agreements also inhibit the actions of democratic executive branches. The following examples show how current trade agreements inhibit democratic representation. While these examples focus on the system in the United States, similar effects can occur within virtually any democratic national system of government.¹⁹⁰

Id. at 1378.

189. See Koh, *supra* note 87, at 171. "[A]t the core of the Fast Track critics' 'democracy' objection may lie the nub of a valid concern, namely, that the Fast Track gives the President greater freedom to shape trade agreements to his programmatic agenda than would otherwise be possible under ordinary legislative process." *Id.* See also Mead, *supra* note 50, at 37-45. Mr. Mead, who is one of the strongest critics of the shift away from representative democracy that current trade agreements represent, provided the following critique of the Final Agreement and the Bush administration's support for the Final Agreement:

[The Final agreement would create a world government] in which career insiders will have greater say than legislators—a circumstance that will elicit no outcry from [President Bush]

....

The idea of a political end run—of using international trade agreements to force changes in U.S. law—attracts the administration on constitutional as well as on economic grounds. Should George Bush be re-elected and the GATT treaty and NAFTA be signed, the result will be a historic shift in the constitutional system of checks and balances among the three branches of the federal government

....

But Bush's trade strategy will, if successful transfer critical powers away from Congress for good

....

The Bush approach . . . would assign virtually all commercial authority to the executive. International trade agreements negotiated in secret by the executive branch would take precedence over previously existing laws. . . .

The congressional role in international commerce, and therefore to an increasing extent in interstate commerce as well, would be limited to the periodic ratification of trade agreements.

Id. at 38-39, 42-43.

Despite the substantial shift in power that trade agreements effect, this delegation of authority to the executive does not offend the legal accountability of Congress because the nondelegation doctrine "does not apply with equal force in the foreign affairs realm." Koh, *supra* note 87, at 168 & n.67 (comparing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), with *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

190. See, e.g., F.G. Jacobs, *Constitutional Developments in the European Community and the Impact of the European Single Market After 1992*, 11 MICH. J. INT'L L. 887 (1990). Mr. Jacobs provides:

In the United Kingdom it had been thought that, because of the sovereignty of Parliament, the European Communities Act of 1972, which gives effect to Community law in the United Kingdom, could be overridden by a subsequent conflicting act of Parliament. However, in the *Factortame* case in 1989, it appears to have been accepted that acts of Parliament must yield to the case-law of the European Court, and it appears to follow from the decision of the House of Lords in that case that any act of Parliament subsequent to the European Communities Act must be read as subject to directly enforceable rights arising under Community law. In France, where the supreme administrative court (Conseil d'Etat) had taken the position that it could review administrative measures but not legislation, the decision of October 20, 1989 in the *Nicolo* case

A. Effects on a Democratic Congress

First, the process of creating a trade agreement and bringing it to Congress prevents citizens from fully understanding what is contained in a given agreement at a time early enough to truly effect the implementation of the agreement. Trade negotiations are conducted behind closed doors.¹⁹¹ Trade agreements and their implementing legislation are considered restricted documents.¹⁹² Frequently, as with the NAFTA, they are only made available to the public a week or two prior to the Congressional vote.¹⁹³ This secrecy shelters the agreements and their implementing legislation from critical analysis.¹⁹⁴ Thus, while theoretically individuals may debate a trade agreement over some time, the actual legal requirements for implementing the agreement receive little in the way of attention. By the time citizens receive an agreement and its implementing language, and have a chance to analyze it, it is often too late to stop these all-or-nothing package deals.

Similarly, Congressional review of trade agreements is overly constrained to the detriment of democracy. Although, for example, in the United States, the Trade Acts require the U.S. Trade Representative to consult with Congress during negotiations,¹⁹⁵ because the information provided to Congressional members is classified, they are prohibited from sharing this information. This prevents Congressional members, who rely heavily on NGOs and other experts to formulate their positions, from obtaining in a timely manner the information they need to review the agreements.

Moreover, the Congressional members selected for consultation are typically drawn from a limited number of Committees that have economic concerns as their principal jurisdiction.¹⁹⁶ Consequently, social issues, such as human rights or labor concerns, are less likely to receive oversight through the Trade Acts consultation mechanism.

Some also argue that apart from the legally mandated consultation

marks a new departure. There, the Court appeared prepared to give effect to the provisions of the EEC Treaty as overriding French legislation in the event of conflict.

Id. at 895.

See also Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990). These constraints will, of course, function differently in parliamentary states versus presidential states. However, the constraints on democracy will exist nonetheless in both systems.

191. See Lori Wallach, *Hidden Dangers of GATT and NAFTA*, in *THE CASE AGAINST FREE TRADE*, *supra* note 187, at 23, 50.

192. *Id.*

193. See generally *id.*

194. See *id.* at 50-51.

195. 19 U.S.C. § 2211 (1988). See Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 498 (1990). Congressional advisers are selected upon the recommendations of the Chairs of the House Ways and Means Committee and the Senate Finance Committee by, respectively, the Speaker of the House and the President Pro Tempore of the Senate. 19 U.S.C. § 2211(a)(1) (1988).

196. See Sim, *supra* note 195.

process, the politically required "non-process"¹⁹⁷ provides Congress generally, and the interests its members represent, with more than sufficient input regarding the shaping of trade agreements and their implementing legislation.¹⁹⁸ Proponents of this argument assert that the non-process effectively rescues democracy from a fast track assault.¹⁹⁹

This argument, however, at times miscasts how the non-process works in practice. Although key Congressional committees can derail a trade agreement in the prenegotiation stage,²⁰⁰ derailing negotiations prevents any agreement, not just a bad agreement, which is a most difficult choice in this free trade era. Once a President is granted the authority to negotiate, the ability of Congressional members to alter the course of an agreement drops precipitously. This grant of authority allows the president to turn attention away from anything but the bare Congressional up-down minimum and to his or her own agenda. While the president must consult with both Congress and certain private advisors during negotiations,²⁰¹ this shift to a bare minimum allows the president far greater leeway than the typical legislative process.

The non-process kicks in again after the presentation of an agreement to Congress by nonconferences and nonhearings. However, at this

197. During the period of time between the president's notification to Congress of an intent to enter into a trade agreement, Congress conducts a non-legislative process concerning a trade agreement. *See id.* at 500-02; Koh, *supra* note 87, at 164-65. During these non-processes, Congressional committees conduct "nonhearings," hold "nonmarkups," and "nonconferences." *Id.* at 164.

198. *See* Koh, *supra* note 87, at 164-65.

199. *Id.*

200. *Id.* at 150-51. During the prenegotiation stage of the United States-Canada free trade negotiations, "a majority of the Senate Finance Committee threatened to disapprove the negotiations." *Id.* at 150. Only presidential concessions and a change in position by one of the Committee's members allowed negotiations to go forward. *Id.*

201. *Id.* at 165. Even within the consultation process, the balance of democratic access is dramatically skewed. *Id.* Consultations occur through the Private Sector Advisory Committee System established under the 1974 Trade Act. Jan C. McAlpine & Pat LeDonne, *The United States Government, Public Participation, and Trade and Environment, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY* 203, 210 (Durwood Zaelke et al. eds., 1993). This three-tiered system consists of one over-arching committee (the President's Advisory Committee on Trade Policy and Negotiations), seven policy advisory committees and more than thirty technical or sectoral committees. *Id.* These committees have a total membership of roughly one thousand advisors. *Id.* These members, "however, represent the interests of their companies, not a wider public constituency." *Id.*

Within this advisory structure the only non-business interest committee is the Labor Advisory Committee. *See* USTR, Memorandum on Private Sector Advisory System 1-3 (Sept. 1992). However, because this committee is made up of only labor members and has traditionally come down against new trade agreements, its advice has been somewhat ignored. For example, the Labor Committee was the only advisory committee not to endorse the NAFTA, and none of the changes suggested by the committee were adopted by either the Bush or Clinton administrations. *See* Letter from James D. Robinson, III & Kay R. Whitmore to President Bush (Sept. 11, 1992) (reprinted in ACTPN Report). In 1992, five nongovernmental representatives from the environmental community were also put onto various existing committees. McAlpine & LeDonne, *supra*, at 211. Taken together, however, the labor and environmental advisors represent only the smallest percentage of what is otherwise a business dominated advisory structure.

stage, the non-process procedures are constrained by the no amendment rule—nothing done at this stage can either amend or conflict with the agreement before Congress. For example, these non-procedures did not provide Congress with a vehicle to build democratic procedures into the NAFTA institutions because the institutions were already locked in by the NAFTA itself.

Second, the argument that non-process procedures save representative democracy under fast track also miscasts the power dynamic during this legislative period. In practice, narrow industrial interests have held the greatest sway during the non-process period. Last minute NAFTA deals in industries ranged from orders for more C-17 military cargo planes to limits on peanut butter imports from Canada.²⁰² In many instances these deals not only advanced narrow industrial interests, but they did so at the expense of larger constituent interests. For example, in the final days before the NAFTA vote in the House of Representatives, the USTR cut a deal on a chemical known as methyl bromide with members of the Florida delegation on behalf of the Florida Fruits and Vegetables Association.²⁰³ Methyl bromide is a highly toxic substance that is regulated internationally because its use depletes the earth's ozone layer.²⁰⁴ The NAFTA methyl bromide deal, which would have allowed the chemical to go unregulated until the year 2000, cut directly against a then proposed EPA rule

202. See Sarah Anderson & Ken Silverstein, *Oink, Oink*, 257 NATION 752 (reciting a list of 19 confirmed NAFTA deals compiled by Public Citizen). The NAFTA list of confirmed deals also includes: a promise to site a \$10 million Center for the Study of Trade in the Western Hemisphere in a specific Congressional district; limits on Canadian shipments of subsidized durum wheat; pressure on Mexico to extradite a man suspected of raping the niece of a Congressional staff member; \$250 million in funding for the North American Development Bank; the award of two international air routes to American Airlines; a promise not to raise grazing fees on federal lands; a written promise from the president to consider a certain district for the location of the \$500,000 to \$3 million dollar National Institute of Standards and Technology; a promise to put pressure on Mexico to hasten tariff reductions on certain appliances; \$16 million to complete an agricultural research center; special protection for Louisiana and Florida citrus, sugar, and vegetable producers; an agreement to provide an extra \$15 million for additional customs inspectors to enforce laws on textile imports; a pledge to push for an additional five years of protection for the U.S. textile industry during GATT negotiations; an agreement to reverse a recommendation to cut helium subsidies; a promise to protect the cut-flower industry; a pledge to protect "glass procedures;" a pledge to pressure Canada to reduce subsidies to a Quebec chemical plant; and a promise of special protection for flat glass and broomcorn producers in a specific Congressional district. *Id.* at 752-53. The only deal that this author is aware of that did not go to a specific industrial interest was an agreement to develop an executive order on U.S. procedures for public participation in the NAFTA environmental institutions. See Federal Implementation of the North American Agreement on Environmental Cooperation, Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (1994). Congressman Studds was responsible for this agreement, and he should be congratulated for his willingness to deviate from the pork barrel norm of his colleagues.

203. See David Lauter, *Pesticide Flap Threatened Crucial Deal*, L.A. TIMES, Nov. 18, 1993, at A17; *Reduction in Methyl Bromide Production Raises Questions About Administration Deal*, Nat'l Env't Daily (BNA) (Nov. 19, 1993).

204. Lauter, *supra* note 203.

that would have begun to immediately phase out the chemical.²⁰⁵ Although the methyl bromide deal was killed,²⁰⁶ many of the most significant NAFTA deals that emerged from the non-process procedures and were accepted displayed a similar emphasis on the needs of particular industrial constituent interests.²⁰⁷ Environmental interests were not the only larger social interests sacrificed during NAFTA deal making; labor interests also suffered. For example, the Clinton administration agreed to reductions in the proposed taxes on airline and cruise ship passengers that had been earmarked to fund NAFTA worker retraining.²⁰⁸ These examples reveal that the non-processes accompanying trade agreements through Congressional consideration in the United States cannot be relied on to address the democratic flaws of trade agreements.

Third, the take-it-or-leave-it way trade agreements tend to be presented to domestic legislators also creates problems for democratic countries. For example, in the United States, trade agreements typically are considered under fast track rules that are designed to speed and ease Congressional approval. "These procedures balance the Constitutionally mandated need for Congressional input into trade agreement negotiations with the need for efficiency in these negotiations (and the perception that full Congressional participation in such agreements is overly cumbersome)."²⁰⁹ The theory behind fast track is sound. Because trade agreements encompass such a wide range of interests, they could easily be picked to a legislative death if pieces of the package could be pulled off.²¹⁰ However, the very enormity of these trade deals that causes the need for fast track, also undermines the democratic ability of citizens to halt a bad trade agreement; these deals have grown so big that they have become make or break requirements for global economics, presidents, and the like.²¹¹

Moreover, the fast track procedures themselves also reduce the democratic nature of the only democratic check on these secretive agreements.²¹² As a practical matter fast track procedures limit the amount of

205. *Id.*

206. *Id.* The deal was killed in that the final rule essentially adopted the provisions of the originally proposed rule. See EPA, *Protection of Stratospheric Ozone, Final Rulemaking*, 58 Fed. Reg. 69,238 (1993). Whether this means that the deal was fully killed never to rise again is impossible to determine.

207. See, e.g., *supra* note 202.

208. *Id.* Representative Thomas Ewing (R-Illinois) suggested that the funds for worker retraining come, instead, from cuts to the food stamp program. *Id.*

209. Housman & Orbuch, *supra* note 126, at 723.

210. *Id.* at 723; Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183, 184 (1992). Fast track is the last in a long line of efforts that attempt to find a balance between the need for Congressional oversight in trade matters and the need to control Congress' protectionist impulses as displayed by the Smoot-Hawley tariff fiasco. See I.M. DESTLER, *AMERICAN TRADE POLITICS* 32-33 (2d ed. 1992).

211. See Koh, *supra* note 87, at 168.

212. While this article does not address reforms to domestic U.S. trade procedures and policies, this author wishes to emphasize that the cure to correcting the flaws of fast track is to substantially amend the process, not to reject it.

time Congress can consider a trade agreement's implementing legislation,²¹³ restrict the time that Congress may debate the legislation,²¹⁴ constrain the number of committees that can exercise jurisdiction over the agreement,²¹⁵ and prohibit amendments to the implementing legislation.²¹⁶

In addition, because, in a technical sense, only the president sends a trade agreement to Congress—even though a host of agencies may have expended countless hours negotiating a final agreement—the fast track procedures have been held to include no final agency action. The absence of a final agency action prevents the triggering of the Administrative Procedures Act, which prevents the use of judicial review by citizens seeking the application of, among other things, the participatory requirements as environmental assessments under the National Environmental Policy Act.

By facilitating the passage of these sweeping secretive trade agreements, fast track also facilitates the passage of internationally negotiated changes to domestic laws—changes that could not be arrived at through normal legislative process.²¹⁷ For example, despite the Bush and Clinton administrations' claims that the NAFTA would not require the United States to compromise its existing environmental, health, and safety laws, the NAFTA implementing legislation did precisely that—it lowered certain U.S. standards. Under the NAFTA Implementation Act the United States amended a series of its food inspection laws to ease the entry of foodstuffs from Mexico and Canada.²¹⁸ These amendments have diminished the degree of confidence U.S. citizens may rightfully have in the notion that the foods they eat are safe.²¹⁹ Still another provision of the NAFTA Implementation Act changed the way in which the United States calculates the Corporate Average Fuel Economy Standards (CAFE) for automobiles

213. See 19 U.S.C. §§ 2191(e) (1988); Goldman, *supra* note 10; Sim, *supra* note 195, at 499.

214. See 19 U.S.C. §§ 2191(f)(2), 2191(g)(2); Goldman, *supra* note 10; Sim, *supra* note 195, at 504.

215. See Goldman, *supra* note 10; Sim, *supra* note 195, at 498; John H. Jackson, *United States Law and Implementation of the Tokyo Round Negotiation*, in IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 139, 163 (1984).

216. 19 U.S.C. §§ 2191(d); see also Goldman, *supra* note 10. While it is true that the fast track procedures are merely internal rules of procedure that may be changed, the procedures for changing these rules make a withdrawal of fast track difficult if not impossible.

217. See Koh, *supra* note 87, at 171.

218. See Goldman, *supra* note 10; NAFTA Implementation Act, Pub. L. No. 103-182, § 361(b), (e), (f), 107 Stat. 2057, 2122-24 (1993).

219. See *USTR Draft Reveals Intention to Implement GATT Dispute Panels*, INSIDE U.S. TRADE, Mar. 4, 1994, at S1, S2. Given that the Clinton administration has already expressed its intent to use the Final Agreement's implementing legislation to expand these NAFTA changes to embrace similar products from all Parties, the extent of this diminution is likely to increase exponentially. *Id.* at S1.

originating from Mexico.²²⁰

The food safety and CAFE examples reflect the danger present here. Neither of these changes were subject to informed public or Congressional debate because they were the products of secret negotiations, which were then buried away in voluminous sleep-inducing texts, that were only provided to Congress and the public at the eleventh hour. These examples also demonstrate that the power of international trade decision-making processes over democratic domestic political processes is substantial; it is hard to imagine that at that time the United States Congress under any other circumstances would have lowered U.S. food safety or air pollution prevention standards.

Moreover, not all changes to domestic protections dealt away in closed international trade negotiations receive even Congressional scrutiny. Many of these changes are made by agencies through what they perceive as an appropriate level of discretion regarding the implementation of a given piece of legislation.²²¹ In addition, such trade-driven changes to the way laws are implemented frustrate the Congressional purpose behind the law in question. For instance, in December of 1993, the U.S. EPA promulgated regulations under the 1990 Clean Air Act Amendments for reformulated gasoline.²²² These regulations imposed more stringent certification information requirements on foreign importers of gasoline than they imposed on domestic gasoline producers.²²³ Venezuela argued that this rule discriminated against their gasoline products and requested GATT consultations with the United States.²²⁴ As a result of these consultations the United States agreed to change the reformulated gasoline rules in order to remove the perceived discrimination.²²⁵ Environmentalists believed that this change in policy would allow for the sale of dirtier Venezuelan gas in the United States, which, in turn, would cause increased levels of airborne toxins and smog build up.²²⁶ Had Congress not been able to halt funding for the EPA program, as modified for trade concerns, the EPA would have directly contradicted the Congressional purpose of the reformulated gasoline requirements.²²⁷ Subsequently, in order to

220. See Goldman, *supra* note 10; NAFTA Implementation Act, § 371; 15 U.S.C. § 2003(b)(2) (1988); *Revisions to CAFE Calculations Pursuant to the NAFTA Implementation Act of 1993*, 59 Fed. Reg. 677 (1994) (to be codified at 40 C.F.R. pt. 600).

221. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing the high degree of deference provided to regulatory agencies in implementing statutes).

222. Regulation of Fuels and Fuel Additives; Standards for Reformulated and Conventional Gasoline, 57 Fed. Reg. 13,416 (1992) (to be codified at 40 C.F.R. pt. 80).

223. See Michael Bergsman, *EPA to Change Clean Air Rule to Ward Off Threatened GATT Challenge*, INSIDE U.S. TRADE, Mar. 25, 1994, at 1, 13-14.

224. See *id.*

225. See *id.*

226. See *id.* at 14.

227. See 42 U.S.C. § 7545(k)(1) (Supp. V 1993). Section 7545(k)(1) provides that the goal of the reformulated gasoline requirements is to achieve:

the greatest reduction in emissions of ozone forming volatile organic compounds . . . and emissions of toxic air pollutants . . . achievable . . . taking into consideration the cost of achieving such emission reductions, any nonair-qual-

avoid the frustration of its purpose, Congress was forced to take the extreme step of prohibiting the use of funds for the EPA's modified program.²²⁸

While trade negotiations use closed door means to force actual changes in domestic laws, trade challenges use economic and political leverage to reach the same goal. Trade panels cannot force a losing party in a dispute to alter its domestic laws. Instead, victorious parties are permitted to exact costly concessions or to use coercive trade sanctions in order to raise the stakes of maintaining a democratically enacted law. Raising the stakes often compels the losing party to change their GATT-offensive laws or practices.²²⁹ If a domestic law is only slightly trade-intrusive, then paying for some social protection, like an antitrust, labor, health, or environmental law is not an onerous burden. However, where the law in question is highly trade-intrusive, the costs of protecting one's citizens may begin to mount up. Legislators who never dreamed that they would have to pay to protect their constituents from social, environmental, health, or safety threats, are confronted with the bill—literally and figuratively—for the domestic protections they have enacted. These legislators are forced to make a choice between paying to preserve the current social protections or minimizing expenditures by eliminating the protection.²³⁰ By forcing Congressional members to make choices that, absent some trade agreement, they would not be confronted with, the decisions of undemocratic trade panels make it more difficult for democratic legislators to pro-

ity and other air-quality related health and environmental impacts and energy requirements.

Id.

228. See *House Approves Report on EPA Budget, Blocks EPA Rule on Imported Gasoline*, *Env'tl. Rep. (BNA)*, Sept. 16, 1994, at 985.

229. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 *WASH. & LEE L. REV.* 1227, 1257, n.70. In a large number of recent cases the United States has "revised its legislation or other measures in order to comply with [a] GATT panel report." *Id.* (citing GATT, *United States—Customs User Fee*, Doc. L/6264 (Feb. 2, 1988), *BISD* 35th Supp. 245; *United States—Taxes on Petroleum and Certain Imported Substances*, Doc. L/6175 (June 17, 1987), *BISD* 34th Supp. 136; GATT, *United States—Tax Legislation (DISC)*, Doc. L/4422 (Nov. 12, 1976) *BISD* 23rd Supp. 98).

230. Even when a country is not persuaded by costly concessions or coercive retaliatory measures to make changes in its laws, the substance of a contentious panel decision can find its way into future trade agreements. Once the logic of a panel decision becomes part of one of these massive package deals, the changes that were previously rejected are oftentimes made.

For example, as part of the implementing legislation for the Final Agreement, the Clinton administration intends to implement two highly contentious panel decisions that the United States has heretofore refused to change its laws to comply with. See *USTR Draft Reveals Intention to Implement GATT Dispute Panels*, *supra* note 219, at S1. The first panel decision called for the United States to "eliminate a preferential excise tax for small producers of beer and wine . . ." *Id.* The second panel decision called for changes to section 337 border protections against products that infringe on intellectual property rights. *Id.* Whether or not these decisions have merit, the fact is that the United States, which had refused to implement them, did so as part of the Uruguay Round deal.

tect their constituents.²³¹

Moreover, in addition to requiring legislators to rethink protections that have already passed democratic muster, both trade rules and panel decisions also constrain democracy by the chilling effect they have on new laws and regulations. Regressives in any national government can squelch virtually any new law or regulation by claiming that the law or regulation conflicts in some way with a trade rule or policy. For example, during the 1994 deficit reduction legislation, the Clinton administration proposed a British Thermal Unit (BTU) energy tax. In killing the proposed BTU tax, opponents relied heavily on the argument that this tax would violate the GATT. Certainly opposition to the BTU tax was really grounded in the economic self-interests of the opponents. However, the specter of a trade problem provided the opponents with a tool to hammer away at the Clinton proposal. A similar fate almost befell the Wild Bird Conservation Act.²³²

B. Effects on a Democratic Executive Branch

Some will undoubtedly find the above discussion of the undemocratic effects of international trade decision-making on congressional bodies ironic at best. These individuals believe, at times rightly, that the U.S. Congress, particularly in matters of international trade, does not serve the interests of the general public. Instead they believe that narrow special interest groups control Congress and drive trade policy, generally in a protectionist direction.²³³ Their arguments are not without merit. Proponents of the "captured Congress" school of thinking argue that providing to Congress a greater role in trade policy will undermine, not strengthen, democracy. Many of these individuals believe that granting greater control to the centralized executive, which can act more easily in the overall national interest, will lead to the democratization of trade. Even proponents of the "captured Congress" school of thinking should, however, be distressed by the effects of undemocratic international trade decision-making on democratic executives.

231. See, e.g., *Clinton Energy Tax Staggers into Senate*, ENERGY ECON. & CLIMATE CHANGE (1993), available in LEXIS, News Library, Curnws File; W. Lynn Garner, *Clinton Administration to Shift BTU Tax from Oil to Products*, OIL DAILY, Mar. 11, 1993, at 1, available in LEXIS, News Library, Curnws File.

232. Wild Bird Conservation Act of 1992, 16 U.S.C. § 4901 (Supp. V 1993). See Letter from Defenders of Wildlife et al. to Ambassador Carla Hills, United States Trade Representative, 1-4 (Apr. 3, 1992) (on file with author) ("We understand your office has expressed concern that the proposed Department of the Interior legislation might be in direct conflict with the General Agreement on Tariffs and Trade (GATT) and that this has effectively stopped the release of the proposed bill from the Office of Management and Budget.")

233. Cf. JAMES BOVARD, *THE FAIR TRADE FRAUD* 272-300 (1991); Anderson & Silverstein, *supra* note 202, at 752 (reciting list of 19 NAFTA deals). While it is easy to blame President Clinton for complicity in the NAFTA deal-making, much of the blame does fall upon the Congressional members who, in deciding what issues would determine their votes, opted for pork for their contributors and their districts.

As the BTU tax example reflects, although the constraining effects of these trade agreements are most pronounced with regard to the legislative branch, this need not always be the case. The concentration of consequences on the legislative branch is due largely to the fact that both the Clinton and Bush administrations have been supportive of both the GATT and the NAFTA and have gone to great lengths to avoid conflicts between the terms of these agreements and their policies.²³⁴ It is, however, possible that a future president, who unlike his predecessors had no part in the negotiation of either the GATT or the NAFTA, might want to take a more aggressive approach to international human rights, labor, or environmental concerns. Because trade measures are one of the few tools available to encourage other countries to alter their policies, it is not unlikely that such a proactive presidential program might run afoul of either GATT or NAFTA rules.

While the executive's ability to participate in both international trade decision-making and trade disputes limits, to a certain degree, the anti-democratic constraints on his or her ability to effect the programs desired by his or her electorate, it does not do away with them. For example, while democratic executives can participate in the conduct of trade disputes, the interested parties that they represent cannot. This hurts the strength of the executives' case. By way of analogy, *amici* that write in support of the government's position in U.S. federal court cases do so to bolster the arguments of the government and to show broad support for the government's position. If such *amici* could no longer voice their opinions to the courts, then the government's case would be weakened. The closed door nature of trade disputes thus harms the actions of democratic executives.

Moreover, the fact that a democratic executive participates in undemocratic disputes does not alleviate the undemocratic effect that a dispute panel can have on the executive's ability to conduct the policies and programs that his or her constituents want. For example, assume that in the year 2000 a new president sweeps into office riding a wave of concern over the fate of the middle class American worker. Upon taking office, this President introduces and obtains passage of legislation designed to protect American workers that may have a substantial effect on international trade flows. Assume also that the 2000 election was essentially a referendum on the plight of the American worker and that the proposal for this legislation was the centerpiece of the President's election campaign. Following the mandate provided by the American public, the newly elected President implements the legislation in a way that is most protective to workers but also most disruptive to trade. She is immediately confronted with a GATT or NAFTA challenge by another party to one of these agreements. The new President must then defend her democratically-enacted year 2000 labor program under the rules of these preceding trade agreements that were crafted by previous executives without suffi-

234. See Bergsman, *supra* note 223.

cient direct public participation or transparency. This defense, assuming that by the year 2000 no changes have been made to existing GATT or NAFTA rules against democratic participation, will occur without public participation or access to information. If the panel decides against the President's labor program, then the President will have to choose from one of three options: 1) go to Congress and ask them to repeal the law that was the centerpiece of her election campaign, 2) consistent with the underlying legislation, change the implementation of the law to make it as consistent as possible with trade rules, and/or 3) pay by way of concessions or sanctions for any continuing inconsistencies between the trade rules and the program. Regardless of the President's final decision as to how to reply to the panel's findings, it is clear that the President is severely constrained by decisions made in undemocratic international trade fora.

C. Effects on Democratic Sub-federal Governments

The constraints of international trade decision-making on democratic governance exist not only at the federal level, but also at the sub-federal level.²³⁵ Even though sub-federal governments—localities, states, and provinces—are not included in either trade negotiations or disputes, they are through their federal governments bound by these agreements and decisions.²³⁶ The imposition of trade rules and decisions on sub-federal governments can constrain democracy even at the local level. For example, as part of the NAFTA deal, but well before any legislation was brought before the U.S. Congress, the Administrator of the U.S. Federal Highway Administration issued a final rule preempting states from requiring or issuing state drivers licenses to Mexican commercial drivers operating in the United States.²³⁷ This federal rule removed from the states the traditional police power of using licensing requirements to ensure the health and safety of their citizens.

D. The Trade Justifications Against More Democratic Procedures

Those who wish to maintain undemocratic trade decision-making processes argue that the nature of international trade negotiations requires that governments restrict documents and conduct negotiations behind closed doors; governments must be able to keep their positions confidential and they must be free to negotiate candidly otherwise it will be impossible to reach agreement.²³⁸ Most importantly proponents of secrecy argue that openness and participation will subject trade negotia-

235. See Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143 (1993).

236. *Id.*

237. See *Commercial Driver's License Reciprocity with Mexico*, 57 Fed. Reg. 31,454 (1992) (to be codified at 49 C.F.R. pt. 383). This rule was issued in final form without any notice and comment period. *Id.*

238. See DANIEL ESTY, *GREENING THE GATT* 36 (1994). Professor Esty provides, "[Trade negotiators] are comfortable with the diplomatic practice of working in secret . . . particularly since they understand that trade liberalization produces diffuse benefits . . . that may fail to rouse significant public support in the face of special interests." *Id.*

tions to capture by protectionist interests. Similar justifications are advanced for trade dispute processes; because trade disputes have traditionally been less adjudicative and more negotiative, these disputes must similarly be insulated.²³⁹

These rationales and the fears upon which they are founded are, however, overstated.²⁴⁰ While a certain degree of secrecy is needed in virtually all negotiations, substantial middle ground exists that would allow democratic transparency in international trade negotiations without compromising the ability of the negotiations to reach successful conclusions.²⁴¹ Additionally, the captive argument fails to recognize that, through the resources available to them, those who wish to advance protectionist economic self-interests already have greater access to and participate, albeit still indirectly, more fully in these negotiations. Rather than preventing protectionism, secrecy allows for the inequitable status quo that at times favors the continuation of protectionism—protectionist players are already essentially in the room and the closed door just prevents others from entering.²⁴²

The rationales for undemocratic dispute resolution are even more vacuous. The trend in trade dispute resolution, as reflected by the Final Agreement, is increasingly towards adjudicative processes. As this trend continues, the need for secrecy in dispute resolution sharply diminishes. Further, as with trade negotiations, the availability of simple middle ground approaches to democratization reflects the notion that trade dispute processes need not be so closed.²⁴³ In fact, the only real rationale for the closed nature of trade decision-making is tradition; that is how it has always been done, and resistance to change is always present.

239. See Joint Answer to Written Questions Nos. 1644/92 to 1647/92 and 1649/92 given by Sir Leon Brittan on behalf of the Commission (29 July 1993), 1993 O.J. (C 333) 3, 4 ("The Commission does not agree that the GATT dispute-settlement system is characterized by its secrecy. An alternative system under which private parties had direct access to GATT dispute settlement would be administratively unworkable and, more importantly, fundamentally change the inter-governmental nature of the GATT.").

240. See Daniel C. Esty, *Toward a Greener GATT*, INT'L ECON. INSIGHTS, Mar./Apr. 1994, at 17, 20. Perhaps the most accurate justification for the GATT's undemocratic ways is tradition. Following the demise of the International Trade Organization—GATT's failed precursor—GATT supporters surmised that the way for a stronger GATT to evolve was through "low visibility." See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 55 (1975). It is possible, if not likely, that the GATT's current secrecy results from the continuation of this belief as entrenched tradition.

241. See Esty, *supra* note 240, at 20.

242. Cf. Michael Wines, *For New Lobbyists, It's Now What They Know*, N.Y. TIMES, Nov. 3, 1993, at B14. Industries seeking special trade consideration have relied on former senior government trade officials to gain inside access to knowledge and people.

243. See Esty, *supra* note 240, at 20.

IV. A Prescription for Democratizing International Trade Decision-making

The detrimental effects of international trade decision-making on democracy, however, require that the entropy of tradition must be overcome. Trade decision-making must be democratized. The following are nonexclusive suggestions for how this democratization can begin.²⁴⁴

A. Democratizing Trade Negotiations

Providing greater participation in trade discussions and negotiations presents the greatest challenge in the democratization of trade decision-making. In democratizing trade negotiations, the substantial need for participation must be balanced with both the recognition that states will remain the principal actors in trade negotiations and the understanding that a certain degree of confidentiality is necessary in these negotiations. Notwithstanding the difficulty in striking the proper balance, a number of simple democratic advances can be imparted without undermining the trade decision-making system.²⁴⁵

First and foremost, citizens and NGOs should receive full observer status at trade negotiations and at the meetings of trade organizations, such as the OECD and the GATT. Observer status should also provide for the participation of interested NGOs and citizens, not just at the plenary level but also at the committee level, including both expert and working groups. In general, observer status should also accord citizens and NGOs the right to make interventions in support of their positions. The procedures of Codex discussed above provide one model for how observer status could be effectuated. An alternative model can be found in the workings of the ILO, which includes NGO members as part of each nation's official delegation.²⁴⁶ The adoption of the Codex model here would, however, have to address the other participatory flaws that plague Codex.²⁴⁷ The involvement of NGOs in the Eighth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna and in the ILO demonstrates that NGO participation is not only possible but can be beneficial.²⁴⁸ While allowing private parties to serve as observers may push certain discussions into smaller more private sessions, this effect is outweighed by the value of the participation and transparency observer status would provide. The adoption of

244. These recommendations are focused on democratizing international trade decision-making. For an excellent discussion of means to democratize domestic trade decision-making in the United States, see Goldman, *supra* note 10.

245. See Jackson, *supra* note 58, at 234.

246. See *supra* note 35.

247. See *supra* part II.B.2.

248. See Chris Wold, *Discovering the Limits of Democracy in International Law*, 12 *Advoc.* 7, 8-11 (1992). Despite the fact that numerous hurdles were erected to prevent Mr. Wold from participating in the CITES negotiations, his participation ultimately played a significant role in the final agreements that were crafted. See *id.* Mr. Wold's participation, most notably, assisted the parties to remain in compliance with the underlying CITES agreement. See *id.*

the ILO model, which allows NGO representatives as members of delegations,²⁴⁹ may address this problem by ensuring participation, albeit more limited participation, even within these smaller discussions.

In addition to observer status, social interests must also be further integrated into the work of organizations like OECD and Codex. Within the OECD structure, social interest NGOs must apply for and receive consultative status. Here one can imagine the OECD's list of consultative NGOs being augmented by human rights, environmental, development, and consumer groups. Similarly, changes are required within Codex membership. The membership of Codex delegations must be rebalanced by adding consumer and environmental groups within the participating country delegations.²⁵⁰

Additionally, documents that are widely circulated within these trade fora should be made public in a timely manner. This rule of public availability should apply not only to reports, but also to negotiating texts. International trade organizations and countries should be allowed a certain degree of leeway to keep draft proposals and texts confidential. However, once a proposal or text is circulated to the general membership, it should also be made available to the general public. The rules for access to documents should provide a limited, narrowly-tailored exception for protecting information that is proprietary or could endanger national security. Such a provision should, wherever possible, favor redaction of protected information over blanket protection for documents.

Lastly, all procedures should be transparent; they should be based on publicly available, pre-established rules, that are equally applied to all interests. As part of this strategy of transparency, a period of notice and comment should be provided prior to the adoption of any policy.²⁵¹ Absent such a commitment to transparency, any participatory advances are easily circumvented or arbitrarily applied.

B. Democratizing Trade Dispute Resolution

Trade disputes must also be democratized. The proposals set out below assume that the trend in trade dispute settlement will continue to be away from negotiations and towards more judicial settlements. Thus, these reforms focus on providing the public the same forms of access that they enjoy in other judicial settings within trade dispute resolution.²⁵²

In order to allow citizens to monitor both the actions of international trade bodies, such as the newly created WTO, and of their national governments, citizens should be allowed full access to all the pleadings and

249. See *supra* note 35.

250. International Consumer Unions Report, *supra* note 116, at 1, 3.

251. Roht-Arriaza, *supra* note 76, at 96.

252. At least one commentator has proposed, in the alternative, that democratic reforms of trade dispute settlement occur within the context of negotiated settlements. See *id.* at 96-98.

other documents filed in trade disputes.²⁵³ These documents should be made publicly available at the time of their filing with the panel. Exceptions to this rule of access should be made only where necessary to protect national security or the confidentiality of proprietary information. Here again, this exception should be narrowly tailored and should favor redaction over exclusion.

Similarly, citizens should have the right to attend all hearings of a sitting trade panel.²⁵⁴ Panels should have limited discretion to hold private sessions to protect the national security of a party and to preserve the confidentiality of proprietary information. Settlement negotiations could still be conducted in private. However, if a negotiated conclusion is agreed upon, it should have to be filed with the panel and made public. Similarly, final reports of a panel, along with any supporting documents should be made available to the public without delay.²⁵⁵ The publication of decisions of international tribunals is already well established in both the International Court of Justice (ICJ)²⁵⁶ and the European Court of Justice.²⁵⁷ There is no reason why the substance of trade disputes should deserve more secretive treatment than that provided to the delicate and contentious international matters taken up, for example, by the ICJ.²⁵⁸

Additionally, interested citizens and NGOs should also be provided with the right to submit *amicus curiae* briefs to trade panels.²⁵⁹ These briefs would provide panels with important supplementary information that may not, for political or other reasons, be reflected in the briefs of the parties. Opponents of allowing private parties to submit *amicus* briefs fear that trade panels will be inundated by worthless documents that will prevent them from giving proper consideration to the briefs of the actual parties to disputes. This fear that trade panels are incapable of separating the wheat from the chaff seems odd coming from the very individuals who trust trade panels with cases involving huge dollar amounts that hinge on the application of trade rules to complex domestic laws and policies. In fact, *amicus* briefs would not substantially impair the workings of interna-

253. See Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 570 (1993); Esty, *supra* note 240, at 17, 18.

254. See Housman & Zaelke, *supra* note 253, at 570.

255. It would, however, be proper for reports to be provided to the parties to a dispute prior to making them public in order to allow the parties time to prepare for their publication. This delay should, however, not be longer than one day.

256. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3 (April 8); see also Ignaz Seidl-Hohenveldern, *Changes in the Publication of I.C.J. Reports: Effects of These Suggestions on Teaching International Law*, 10 MICH. J. INT'L L. 679, 679-80 (1989).

257. See, e.g., *The Proceedings of the Court of Justice and Court of First Instance of the European Communities*, Week of 18 to 22 May 1992, No. 15/92.

258. See J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129, 137 (1989) (discussing thirteen cases involving state use of military force); see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 256, at 3.

259. See Roht-Arriaza, *supra* note 76, at 96.

tional trade dispute panels. The United States Supreme Court, which hears far more cases in a given year than any trade panel, receives countless *amicus* briefs and this does not detract in any way from the Court's ability to give proper consideration to both the arguments of the parties and the information provided by *amici*. Still drawing from the U.S. federal system for *amicus* participation, another way to prevent panels from being inundated with information would be to provide panels with the ability to require that *amici* with similar positions must consolidate their briefs.

The reforms above attempt to develop more participatory trade dispute settlement mechanisms that preserve the basic framework of traditional trade dispute settlement. Other types of trade dispute settlement are rapidly emerging in international fora, which provide alternative models for how to provide the global public with greater democracy in trade disputes. Two such alternative trade dispute models developed in the NAFTA are worth noting. First, with regard to holders of intellectual property rights, the NAFTA provides that the first means for settling trade disputes regarding intellectual property rights shall be in the domestic courts of the NAFTA parties.²⁶⁰ Second, with regard to the NAFTA investment disputes, the first means provided to settle such disputes is binding arbitration between the aggrieved private investor and the NAFTA party in question.²⁶¹ Similar alternative forms of trade dispute settlement mechanisms might provide the means necessary to democratize other forms of trade disputes.²⁶²

Conclusion

In this era of economic belt tightening, international trade agreements hold considerable sway over the domestic policies of nations. The strength of these agreements can be an important tool to encourage the growth of democracy internationally. However, in their current form, the institutions and agreements of international trade not only fail to export democracy around the globe, but also undercut the exercise of democratic governance in nations that are currently democratic in nature. These threats to democracy must be corrected. The rules of international trade decision-making must be changed to incorporate basic elements of democratic governance, namely the rights of citizens to have access to these decision-making fora and to participate in decisions that affect their interests. These changes must take care not to undermine the efficacy of the international trade decision-making bodies. However, substantial middle ground exists for changes that will provide greater democratic rights, yet not endanger the strengths of these institutions and agreements. In order for international trade decision-making to further and not inhibit democracy, as well as to preserve its legitimacy among the citizenry of the world,

260. See NAFTA, *supra* note 125, arts. 1714-15.

261. See *id.* arts. 1116-18.

262. See Housman & Zaelke, *supra* note 253, at 570-71.

basic democratic changes to international trade decision-making can and must be made in short order.

