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Democratizing International Trade Decision-making

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27 CORNELL INT'L L.J. 699 (1994)

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-

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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 Inflame 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-

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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. Lefkovitz, *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 world[13] 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

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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

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[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 od 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-

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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

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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, PROLEGMENA 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. MCDOUGAL & 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 then 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

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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

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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-

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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 ZAELKE 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 "GAT-Tologists," 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

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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.

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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).

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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

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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

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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]

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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-

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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 meet 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-

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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-

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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-

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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. Goldam & 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

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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 labor[127] and environment[128] 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

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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 agreement[139] (PLA) and the parallel environmental agreement[140] (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

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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 matters[146] 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]

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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,

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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]

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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

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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.*