The Democratization of the Development of United States Trade Policy

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The Democratization of the Development of United States Trade Policy

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Introduction

During the recent debates over the North American Free Trade Agreement (NAFTA), the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), and the extension of fast-track rules to both the NAFTA and the Uruguay Round, many charged that international trade agreements clash with democratic principles. This charge rings true.

The international trade system operates contrary to every principle of democracy and government accountability imbedded in U.S. domestic policymaking. Secrecy pervades the entire system. Trade officials operate behind closed doors with no public record of their activities when they negotiate or implement trade agreements or when they resolve disputes arising under them. As a result, there are no mechanisms for the public to monitor the development or implementation of international trade policy. To compound matters, trade decision-makers owe their allegiances to the trade regime and make no attempt to invite or incorporate other views. There are no avenues for public participation to ensure that other perspectives are taken into account. Thus, in the coming era of "government by trade agreements," domestic prerogatives will be foreclosed or made more costly by trade bureaucrats secretly negotiating agreements and adjudicating disputes thousands of miles away.

As trade agreements extend into a vast array of domestic environmental and health initiatives, the development and implementation of those agreements must be democratized to incorporate the openness, public participation, and accountability that are fundamental to our system of government. When confronted with this demand, U.S. trade negotiators complain that they are only one participant in the international system and cannot reform it alone.

The same rationale cannot excuse the anti-democratic processes for developing domestic trade policies. The U.S. agencies that establish trade policy model their operations after the foreign policy and national security agencies. That model is poorly suited to many of the environmental, health, and other non-trade issues being addressed in trade policies. It is time for the United States to democratize its own development and implementation of trade policies. Reforming the U.S. trade policy-making process will improve the viability, responsiveness, and integrity of U.S. trade policies. Further, the U.S. action will serve as a model for reforming the international trade system.

Part I of this article describes how trade policies are shaping a vast array of domestic health, safety, environmental, and other policies that are established through open, participatory, and accountable processes. Part II discusses how the international trade system deviates from the demo-
cratic principles used to develop domestic policies. Part III contains an analogous assessment of U.S. trade policy-making. Part IV presents a series of reforms designed to democratize U.S. negotiation and approval of trade agreements (subpart A), U.S. implementation of trade agreements (subpart B), and U.S. participation in dispute settlement proceedings under trade agreements (subpart C).

I. Trade Agreements Are Shaping Health, Safety, Environmental, and Other Domestic Policies

International trade agreements are no longer limited to trade matters such as tariff schedules, import quotas, border taxes, and anti-dumping rules. Instead, today's trade agreements are restricting governmental actions in non-trade areas that only peripherally affect trade.

Recent trade agreements reach out to cover new areas of domestic regulation that had previously been outside the purview of trade agreements. For example, NAFTA establishes elaborate rules limiting the extent to which food safety measures, bank and insurance regulation, and energy conservation programs may restrict trade. The Uruguay Round of GATT imposes an even more restrictive set of limitations on food safety measures. Both the NAFTA and the Uruguay Round tighten many existing trade rules, such as those controlling product standards, government subsidies, and procurement, in ways that may significantly limit the extent to which governments may promote environmental, health, and safety goals.

In addition, international standard-setting activities are being conducted under trade agreements, and the standards established by international bodies are being given preferred trade status. For example, both NAFTA and the Uruguay Round Agreements on the Application of Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT) require countries to use relevant international standards as the basis for domestic standards, unless certain conditions are met.1 Both agreements also establish committees to develop uniform standards and to promote international harmonization of domestic food safety and technical standards.2

These and other provisions of trade agreements are key to the viability of existing and future domestic initiatives. This is because approved

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2. NAFTA, supra note 1, arts. 722, 913; SPS Agreement, supra note 1, paras. 38-44; TBT Agreement, supra note 1, art. 13.
trade agreements are binding international legal obligations that require
the parties to change their laws to comply with the terms of the agree-
ments. It is for this reason that legislation approving a trade agreement
typically includes an array of modifications to bring existing federal stat-
utes into conformity with the agreement. Indeed, under the current U.S.
statutory scheme, "if changes in existing laws or new statutory authority is
[sic] required to implement such trade agreement or agreements, provi-
sions, necessary or appropriate to implement such trade agreement or
agreements, either repealing or amending existing laws or providing new
statutory authority" must be included in the legislation approving the
trade agreement.3

For example, the NAFTA Implementation Act amended several
animal and food inspection statutes to give agencies the discretion to per-
mit imports from Canada and Mexico that do not meet U.S. standards that
had previously been absolute barriers to imports. One such amendment
allows the U.S. Department of Agriculture (USDA) to issue regulations
excepting imports of animals, specifically live Mexican and Canadian cat-
tle, sheep, and swine from a federal statute that prohibits imports of dis-
eased or infected animals or animals exposed to infection within sixty days
prior to export.4 Another amendment provides that poultry imports from
Mexico and Canada need not comply with U.S. standards if the imports
are "subject to inspection, sanitary, quality, species verification and residue
standards that are equivalent to United States standards" and "have been
processed in facilities and under conditions that meet standards that are
equivalent to United States standards."5 Still another amendment permits
meat imports from Mexican and Canadian plants if USDA certifies that
the foreign plants either comply with U.S. standards or with equivalent
requirements regarding inspection, building construction, and other stat-
utory and regulatory requirements.6 Previously, USDA could issue such a
certification only if it determined that the foreign plants "complied with
requirements that are at least equal to all inspection and building construc-

4. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-
1993)) [hereinafter NAFTA Implementation Act] (excepting Canadian and Mexican
1993), which requires official inspections of animals to ascertain whether they have
been infected or exposed to contagious diseases, with respect to shipments from Mex-
ico or Canada).
5. NAFTA Implementation Act, § 361(f) (exemption from 21 U.S.C. § 466(d)
(1988 & Supp. V 1993)). This standard has been construed by the Fifth Circuit to
require identical facilities and conditions to similar ones in the United States. Accord-
ingly, the court struck down a USDA regulation allowing imports that meet require-
ments "at least equal to those applicable to the Federal System in the United States."
Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359 (5th Cir. 1993) (quoting 52 Fed.
Reg. 15963 (1987)), amended, 9 F.3d 1113 (5th Cir. 1993), reh'y granted, 9 F.3d 1116 (5th
Cir. 1993).
6. NAFTA Implementation Act, § 361(f).
tion standards and all other provisions" of the statute and regulations. These amendments substitute agency discretion for absolute bans on certain imports and mandatory compliance with statutorily prescribed inspection procedures.

The NAFTA Implementation Act also amended the Motor Vehicle Information and Cost Savings Act to change the way that Corporate Average Fuel Economy (CAFE) will be calculated for automobiles produced in Mexico. Because the NAFTA Implementation Act mandated the changes, the Environmental Protection Agency (EPA) subsequently amended its CAFE regulations to embody the new calculation methods without complying with notice and comment procedures applicable to agency rule-making under the Administrative Procedure Act. In its final rule, EPA explained that it had dispensed with prior notice and public comment procedures because “the rule issued today merely conforms pre-existing regulations as required by the NAFTA Implementation Act and does not involve an exercise of discretion by the Administrator” and because “it is impracticable to have notice-and-comment rule-making completed in [the] less than one month between the date of enactment and the date by which the regulations must be effective.” This example of EPA's truncated rule-making process illustrates the effect that a trade agreement can have on regulatory proceedings. When a trade agreement mandates a particular action and the domestic rule-making agency no longer has discretion to consider alternatives, the public's ability to influence the agency's action is lost.

Aside from amending specific federal statutes and compelling regulatory changes, the federal law implementing a trade agreement normally contains a provision prescribing its effect on state law. As a matter of international law, and under the terms of most trade agreements, the federal government is held responsible for state laws that violate a trade agreement. The federal government has a legal obligation to ensure that states comply with the agreement. Accordingly, federal statutes implementing trade agreements typically make it clear that the trade agreement prevails over inconsistent state laws. Thus, the legislation implementing the U.S.-Canada Free Trade Agreement explicitly states that "[t]he provisions of the Agreement prevail over (A) any conflicting State law; and (B) any conflicting application of any State law to any person or circumstance; to the

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8. The same amendments have been included in the Uruguay Round implementing legislation which would change the statutory mandates for all countries, not simply Mexico and Canada. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 43(h)-(l), 1994 U.S.C.C.A.N. (108 Stat.) 4809, 4969-70.
11. EPA Final Rule, supra note 10, at 678.
The legislation implementing the trade agreement may also provide a specific mechanism for the federal government to bring conflicting state laws into compliance with the agreement. For example, the U.S.-Canada Free Trade Agreement law authorizes the United States to “bring an action challenging any provision of State law, or the application thereof to any person or circumstance, on the ground that the provision or application is inconsistent with the Agreement.” Similarly, the NAFTA Implementation Act retains this authority for the federal government, as would the Uruguay Round implementing legislation.

Even when the trade agreement does not compel an immediate change in domestic law, it often shapes and limits the discretion of domestic lawmakers in carrying out their lawmaking, regulatory, and enforcement functions. An illustration of the complete removal of agency discretion is EPA’s rule-making to refine the CAFE calculations to comply with NAFTA.

In other situations, the effect is more subtle. For example, the Pelly Amendment grants the President the discretion to impose trade sanctions on countries that have been found by the Secretary of Commerce to diminish the effectiveness of international fishery conservation agreements. In a recent trade challenge, a GATT panel suggested that any exercise of that discretion would violate GATT. Thus, the President may choose to exercise self-restraint to avoid a GATT confrontation. Under a companion statutory provision intended to give the President less discretion than the Pelly Amendment, the President has an obligation to impose economic sanctions against countries identified by the Secretary of Commerce as diminishing the effectiveness of the International Conference for the Regulation of Whaling (ICRW). To avoid triggering this statutory obligation, the Secretary of Commerce refused to certify Japanese whaling activities as diminishing the effectiveness of a five-year ICRW moratorium.

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13. Id. § 102(b)(3).
14. NAFTA Implementation Act, § 102(b)(2); Statement of Administrative Action, North American Free Trade Agreement Implementation Act, at 12 (1993), reprinted in H.R. Doc. No. 159, 103d Cong., 1st Sess. 45Q, 461 (1993); Uruguay Round Agreements Act, § 102(b), (c). The Uruguay Round implementing legislation would also give the U.S. Trade Representative the power to direct other agencies to change certain determinations that have been found by a GATT dispute settlement body to conflict with GATT. Id. § 129(a), (b)(2)-(4).
The Secretary pointed to an agreement negotiated between Japan and the United States that permitted Japanese whaling at a reduced level for several years and that provided for the cessation of Japanese commercial whaling at the end of a five-year moratorium. In a challenge to the President's refusal to impose sanctions against Japan, the Supreme Court held that the statute gave the Secretary of Commerce sufficient latitude to refuse to certify Japanese whaling activities despite its mandatory language.\(^\text{19}\)

Similarly, trade concerns have shaped EPA's approach to pesticide regulation. In 1983, EPA banned the use of ethylene dibromide (EDB) on domestic produce based on evidence linking EDB to cancer and reproductive risks. For imported fruit, most notably mangoes, EPA regulations permitted EDB residues until September 1, 1985. However, as that deadline approached, the State Department pressured EPA to extend it because the EDB ban threatened to damage the economies of mango-producing countries. EPA relented and extended the deadline. The Court of Appeals for the District of Columbia Circuit held that EPA had acted arbitrarily and capriciously by relying exclusively on the potential harm to foreign economies in making its decision.\(^\text{20}\) On remand, EPA again extended the deadline, concluding that mangoes with EDB residues would cause less harm than would occur if mango-producing countries chose not to cooperate in ensuring the safety of foods exported to the United States. The D.C. Circuit upheld this determination.\(^\text{21}\) Thus, EPA incorporated trade concerns into its pesticide residue decision under a statute that appears to make public health concerns paramount.\(^\text{22}\)

A subsequent pesticide decision illustrates another way that trade concerns shape agency actions. In 1990, the FDA discovered residues of the pesticide procymidone in imported wine. The pesticide was not used in the United States and thus had no U.S. tolerances. The manufacturer petitioned EPA to establish a tolerance on an expedited basis.\(^\text{23}\) Scientific studies suggested that procymidone is a carcinogen and a reproductive toxin, but the data were inadequate to permit the full analysis required under domestic law. Nevertheless, EPA established an interim tolerance based on the available data.\(^\text{24}\) Thus, trade disruptions precipitated an EPA

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24. Pesticide Tolerance for Procymidone, 56 Fed. Reg. 19,518 (1991) (to be codified at 40 C.F.R. pt. 180). EPA recently proposed a permanent tolerance for procymidone that is identical to the tolerance established by the Codex Alimentarius Commission, a U.N. standard-setting body, whose standards are given preferential status under both the NAFTA and the Uruguay Round of GATT. Proposed Pesticide Tolerance for Procymidone, 59 Fed. Reg. 15,144 (1994) (to be codified at 40 C.F.R. pt. 180). However, it is not at all clear that the proposed tolerance comports with the statutory
decision permitting the use of this pesticide based on inadequate data and an incomplete analysis of its public health effects.

In both the EDB and procymidone situations, a foreign affairs agency played a significant role in shaping EPA's domestic health regulatory decisions. The State Department exerted strong pressure on EPA to weaken public health protections in both instances to promote international trade.25

The U.S. Trade Representative (USTR) may have played a similar role in connection with the phaseout of methyl bromide. This compound is a soil sterilant that is a powerful ozone-depleter, is highly toxic to workers, and is a suspected human carcinogen. In early 1993, in response to a petition from three environmental organizations, EPA proposed to list methyl bromide as an ozone-depleter under the Clean Air Act and to phase out its production and consumption by the year 2000. In an attempt to gain support for NAFTA from several Florida Representatives, Michael Kantor, the USTR, delivered a letter to the Florida Fruit and Vegetable Association on November 9, 1993 (one week before the NAFTA vote), which promised that EPA would not restrict the use or manufacture of methyl bromide until the year 2000 and that USDA would support full funding for research into alternatives.26 The letter also stated:

The President wants to assure you that if no satisfactory alternative is found, the Administration will consider appropriate action to guarantee that our agricultural producers are not left without a commercially viable means of achieving the necessary soil and post-harvest fumigation. Given the critical nature of this substance to our trade interests, you can be certain of my personal involvement in this matter to ensure that your commercial interests are not affected by any future restrictions.27

The Florida fruit and vegetable producers understood this letter to promise that EPA would not finalize the proposed methyl bromide phaseout. Thus several Florida Representatives reportedly decided to support NAFTA after the Administration satisfied the Florida producers' demands.28 When the deal became public, EPA sought to assure the environmental organizations that supported NAFTA that EPA would not

25. National Coalition, 809 F.2d 875; Tina E. Levine, Assessment and Communications of Risks from Pesticide Residues in Food, 47 Food & Drugs L.J. 207, 211 (1992) (Special assistant to the director of EPA's Office of Pesticide Programs disclosed that "[t]hroughout the Agency's deliberations, there was considerable pressure [from the State Department] to act more quickly so that the busy Christmas season would not be lost.")

26. Letter from Michael Kantor, Ambassador, USTR, to Michael J. Stuart, Executive Vice President and General Manager, Florida Fruit and Vegetable Association (received Nov. 10, 1993), reprinted in Administration Drops NAFTA Promise to Undo Limits on Fungicide, Inside U.S. Trade, Nov. 19, 1993, at S-3 [hereinafter Kantor letter].

27. Id. at S-4.

weaken the phaseout. On November 30, 1993, EPA issued its final rule phasing out methyl bromide use and production by the year 2001, one year longer than under the proposed rule. Regardless of whether the extension was connected to the NAFTA deal with the Florida growers, and EPA contends that it was not, this incident raises the specter of a foreign affairs agency intervening in an environmental regulatory matter exclusively within the statutory jurisdiction of EPA.

The effect of a trade agreement is not limited to the amendments to domestic law contained in the implementing legislation or to the voluntary actions undertaken by federal agencies. Rather, trade agreements establish principles that existing and future laws, regulations, and enforcement activities must satisfy.

To ensure that countries abide by their legal obligations, trade agreements provide a mechanism for countries to bring trade challenges against other countries that are alleged to be in violation of the trade agreement. In recent years, trade challenges have been mounted to domestic health and environmental measures that had previously been thought to be the province of domestic law. Examples include measures designed to reduce tobacco use, to promote automobile fuel efficiency, to ensure that milk is produced in accordance with sanitation and health standards, and to institute effective recycling programs.

One of the most prominent dispute settlement decisions came in 1991 when a dispute panel accepted Mexico’s claim that the U.S. Marine Mammal Protection Act impermissibly restricts tuna imports. That Act prohibits tuna imports from countries whose fishing methods result in excessive incidental killing or maiming of dolphins. The panel concluded that these restrictions on tuna imports violate GATT’s prohibition on import bans and do not fall within any exceptions to that prohibition because: (1) they bar tuna imports based not on a product characteristic, but based solely on the process by which the tuna is caught; (2) they seek to protect a species outside U.S. territorial jurisdiction; and (3) the United States did not show that less trade-restrictive measures, including coopera-

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tive international arrangements, were unavailable. Recently, a second GATT panel found that the U.S. embargo on tuna imports from intermediary countries that continue to import tuna from countries that violate the statutory dolphin protections violate GATT. This panel's rationale, however, differs somewhat from the first tuna-dolphin decision.

If a trade panel finds that a measure violates a trade agreement or otherwise impairs an expected benefit from the agreement, it typically directs the losing country to remove the offending measure even if that requires a change in domestic law. These enforcement mechanisms are being greatly enhanced in the most recent trade agreements, which contain automatic authorization for the winning country to impose trade sanctions if the losing country does not comply with the panel ruling within a specified (relatively short) period of time. The NAFTA and Uruguay Round also eliminate a country's ability to block adoption of a dispute panel decision, which has binding force only once it is adopted unanimously by the parties to the agreement. The United States has thus far blocked adoption of the tuna-dolphin reports by the GATT contracting parties by holding out on the consensus needed for their adoption. The Uruguay Round dispute settlement rules make adoption of panel reports automatic unless all member countries decide, by consensus, to block their adoption.

The United States has historically taken its GATT obligations seriously. For example, when the Agricultural Adjustment Act was amended to permit certain import quotas on agricultural goods, the Executive Branch obtained a GATT waiver to avoid a possible breach. Similarly, when the United States has been found in violation of GATT, it has often changed the offending law. Thus, in the wake of the tuna-dolphin panel decision, the United States adopted the International Dolphin Conservation Act, although that Act has not yet led to a satisfactory resolution of the dispute.

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33. Tuna-Dolphin I, supra note 16, paras. 5.10, 5.24.
36. NAFTA, supra note 1, arts. 2017-19; Dispute Settlement, supra note 35.
37. Dispute Settlement, supra note 35, §§ 17.6, 17.14; see id., §§ 16, 17, 21, 22. A losing party may appeal the legal basis for the panel ruling to another internal GATT tribunal. Although an appeal stays the panel ruling, appeal decisions are also automatically adopted within 30 days of their issuance and sanctions are automatically authorized unless all the GATT parties unanimously reject the appeal ruling. Id.
The United States has often gone to great lengths to avert a trade challenge. On December 15, 1993, more than two years after the statutory deadline, EPA issued final regulations implementing the reformulated gasoline mandates of the Clean Air Act Amendments of 1990.\(^{40}\) The Clean Air Act Amendments require EPA to establish requirements for reformulated gasoline to be used in specified nonattainment areas which require the greatest reduction in emissions of ozone forming volatile organic compounds (during the high ozone season) and emissions of toxic air pollutants (during the entire year) achievable through the reformulation of conventional gasoline, taking into consideration the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements.\(^{41}\)

Certain emissions are to be less than or at least no greater than their level in a baseline year.\(^{42}\)

In the final rule, EPA permitted domestic refiners to use several methods of calculating their baselines. Importers, however, were permitted to use only one method, a method which most importers lack adequate documentation to utilize.\(^{43}\) Foreign refiners could also use a statutory baseline, but domestic refiners could use the statutory baseline only if EPA lacked confidence in their data to support the other calculation methods. The Venezuelan national oil company commented on the proposed rule and argued that importers should be subject to the same baseline provisions as domestic companies. EPA, however, was concerned that foreign companies did not have adequate documentation of the quality of their gasoline sold in the United States in the baseline year and that EPA would be unable to verify such data or enforce a scheme that would permit individual foreign refinery baseline calculations.

After issuance of the final rule, Venezuela sought consultations under the GATT and was prepared to seek establishment of a dispute settlement panel to hear the case. To avoid a showdown and a possible adverse GATT ruling during the congressional debate over whether to approve the Uruguay Round, the USTR and the State Department brokered a resolution of the dispute. In the resolution, EPA agreed to propose an amendment to its rule which would allow Venezuela more flexibility in establishing its own baseline for imports up to the amount of its 1990 imports. EPA also agreed to issue its proposed rule prior to the deadline for placing items


\(^{41}\) 42 U.S.C. § 7545(k)(2) (1988 & Supp. V 1993). Gasoline sold in metropolitan areas with the most severe air pollution must be reformulated to reduce vehicle emissions of toxic and ozone-forming compounds. Other areas may opt into the program. In order to prevent the dumping of dirty gasoline, the amendments prohibit conventional gasoline sold in the rest of the country from becoming more polluting than it was in 1990. Compliance with the reformulated gasoline requirements is measured from 1990 baseline emissions. Id.


(including requests for the establishment of dispute panels) on the agenda for the next GATT meeting, which it did.\textsuperscript{44} Although EPA is adhering to notice and comment rule-making procedures, a State Department cable suggests that the United States committed itself to adopt the proposal in order to resolve the trade dispute.\textsuperscript{45} Ultimately, EPA refrained from finalizing the proposed rule only because Congress passed a budget rider preventing it from doing so.\textsuperscript{46} Many have charged that the proposed modifications would significantly worsen air pollution in the Northeast, possibly in violation of EPA's statutory mandates in the Clean Air Act Amendments.\textsuperscript{47}

In sum, there can be little doubt that the trade system is expanding its influence over a wide range of domestic policy-making activities. Indeed, the Uruguay Round would, if approved, establish a World Trade Organization, a new international organization with a pervasive infrastructure and self-perpetuating powers to implement, enforce, and expand the multilateral trade rules.\textsuperscript{48} Although the negotiation, implementation, and resolution of disputes under international trade agreements has significant implications for domestic policy-making, the trade rules are neither developed nor implemented in accordance with the core democratic principles that govern the domestic policies being affected by the trade agreements.

\section{II. International Trade Policies Are Not Formulated in Accordance with the Democratic Principles Applicable to Domestic Environmental, Health, and Safety Policies}

The current trade system deviates from the core democratic principles that enable domestic governmental bodies to forge solutions to controversial environmental, health, and safety problems. Many trade officials consider trade issues matters to be negotiated between sovereign nations, rather than policies to be developed in accordance with democratic procedures. Such negotiations, whether to develop the terms of a trade agreement, to implement it, or to resolve disputes under it, adhere to the model of the most sensitive international negotiations.

International trade negotiations are carried out in secret without any mechanisms for informing the public about the matters being negotiated,


\textsuperscript{45} Cable from U.S. State Department to U.S. Embassy in Caracas, Venezuela (Mar. 14, 1994) (on file with the \textit{Cornell International Law Journal}).


\textsuperscript{47} Letter from James K. Hambright, Mid-Atlantic Regional Air Management Association to Carol Browner, Administrator, EPA (Nov. 15, 1993) (on file with the \textit{Cornell International Law Journal}); Letter from 14 U.S. Senators to Michael Kantor, USTR (Mar. 18, 1994) (on file with the \textit{Cornell International Law Journal}).

\textsuperscript{48} Agreement Establishing the World Trade Organization (WTO), GATT Doc. MTN/FA II (Dec. 15, 1993) [hereinafter WTO Agreement], in \textit{Uruguay Round, supra} note 1.
for obtaining public input, or for ensuring that the decision-makers are neutral and have a complete record on which to make decisions. The negotiators are trade officials who rarely have expertise or experience in other social policies that are affected by the end product of the negotiations. Although the negotiators claim that negotiations and foreign relations would be impaired if the public were made privy to information about proposals on the table, draft agreements are routinely made available to hundreds of industry advisors and are sometimes leaked when it suits the purposes of the negotiators. Aside from sporadic leaks, the public is kept in the dark until the terms of the agreement have been cast in stone.

The secrecy and trade bias of the decision-makers extend to implementation of, and dispute resolution under, the trade agreement after it is concluded. International standard-setting bodies generally have a mandate to promote international trade that eclipses their public health mandate. For example, both the NAFTA and the Uruguay Round SPS Agreement designate the Codex Alimentarius Commission (Codex) as the international body establishing presumptively trade-legitimate food safety standards. Codex is a voluntary standard-setting body of the World Health Organization and the U.N. Food and Agriculture Organization established in 1962 to facilitate international trade. Codex is made up of government officials assisted by industry advisors. National food corporations and trade groups such as Hershey Foods, Nestle U.S.A., Kraft General Foods, Coca-Cola Company, Pepsi Company, Grocery Manufacturers of America, and the National Food Processors Association have been present at Codex meetings.

A recent study reported that over eighty percent of the non-governmental participants on national delegations to recent Codex committees represented industry, while only one percent represented public interest organizations. Although Codex unquestionably deals with matters of significant public importance, it has historically operated without adequate mechanisms for obtaining public input. Codex meetings are closed to the general public. Draft standards are not made public until well into the process, and the public may not provide input directly into the process. Rather, members of the public must persuade a governmental participant to present their positions to Codex. In recent years, some consumer and environmental organizations have attended Codex meetings and have sought to make Codex more open and participatory. Consumer and environmental representation, however, has remained sporadic and Codex has not yet significantly reformed its processes to ensure more meaningful public

49. See infra part IV.A.5.
50. See, e.g., Citizen Groups Score Leaked NAFTA Draft; USTR Declines to Verify Its Accuracy, 9 Int'l Trade Rptr. (BNA) at 516 (Mar. 25, 1992); U.S., Mexico and Canada Plan to Establish Trade Commission, 9 Int'l Trade Rptr. (BNA) at 1328-29 (Aug. 5, 1992).
participation.  

The process for resolving disputes under trade agreements further underscores the flaws in the system. Again the process is characterized by excessive secrecy, input limited to governmental representatives, and decision-makers with an inherent bias toward trade liberalization at the expense of other values.

A GATT dispute is resolved in a manner that is roughly analogous to a judicial proceeding. If consultations fail to resolve a dispute, a party may file a complaint which leads to the establishment of a dispute settlement panel composed of trade bureaucrats and attorneys. Then, the parties prepare written submissions laying out their respective positions, and they present oral arguments to the panel. Both the submissions and the oral arguments present factual information and legal analysis. Although GATT panel decisions do not technically have precedential value, submissions and decisions cite past panel decisions as authority for controlling interpretations of GATT provisions.

Although the purpose and tenor of the proceeding is analogous to a U.S. judicial proceeding, the manner in which it is conducted is completely different. First, the decision-makers are not neutral. GATT panels have historically been comprised of individuals who are schooled in the GATT system and who favor trade deregulation. The Uruguay Round would perpetuate this bias in its explicit requirements that panel members have experience in the international trade system.

Second, not only are trade panels comprised of proponents of the current trade regime, but there are no safeguards against conflicts of interest. Panel members need not disclose financial interests related to the outcome of the dispute. Further, panel members are not precluded from serving on a dispute settlement panel if they have such an interest. In a recent dispute involving Canadian lumber under the U.S.-Canada Free Trade Agreement, the United States charged that the panel decision is tainted because two Canadian members of the panel belong to law firms that have represented the Canadian lumber industry or the Canadian government. A U.S.-Canada dispute settlement panel found such a conflict

53. The International Organization of Consumers Unions (IOCU) attends Codex meetings as an official observer. It has advocated for increased consumer participation in Codex proceedings, and in 1991, Codex endorsed an IOCU recommendation to do so. Joint FAO/WHO Food Standards Programme, Codex Alimentarius: Report of the Nineteenth Session, 10, 11, app. 4 (1991) [hereinafter Report of the Nineteenth Codex Session]. However, citizen participation has not increased since that time. PUBLIC CITIZEN AND ENVIRONMENTAL WORKING GROUP, TRADING AWAY U.S. FOOD SAFETY 54 (1994).


56. Peter Behr, Administration Pursuing Canadian Lumber Action, WASH. POST, Mar. 8, 1994, at Cl, C4.
of interest perfectly permissible.

Third, there is no mechanism for appealing a GATT panel decision to a neutral, outside body. Currently, a GATT panel decision is presented to the contracting parties who routinely adopt it soon after its issuance. The only check is the practice of adopting panel reports by consensus. This practice enables a single GATT member to block adoption of the report, if it is willing to take the political heat for doing so. However, the practice of blocking would be eliminated under the Uruguay Round, and it is not incorporated into other recent trade agreements.

Although the Uruguay Round would establish a right to appeal a panel decision, that appeal would be decided by a standing body of trade lawyers under the auspices of the World Trade Organization. Since the GATT and the WTO have a vested interest in the GATT rules and their trade liberalization goals, it is fundamentally unfair to make these institutions the final arbiters of disputes arising under GATT rules.

Fourth, when a GATT contracting party lodges a trade challenge, GATT rules and informal procedures cloak the dispute in secrecy until the GATT Council adopts the determination of the dispute settlement panel. It is only then that the GATT Secretariat will release the panel decision to the public, even though prior to that time it is released to the more than 100 countries who are contracting parties to the GATT, and leaks are not uncommon. Panel proceedings are held in closed session, with only governmental representatives of the disputing parties permitted to attend. Even after the proceeding has been concluded, no transcripts of panel hearings are made public.

The express terms of the most recent trade agreements mandate this secrecy. Previously, secrecy was not an explicit requirement of the agreement, but was derived solely from internal working procedures which easily could be changed. Thus, NAFTA requires that "the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential." It also prohibits the panels from "disclos[ing] which panelists are associated with majority and minority opinions" in their initial and final reports. Even its provision for making panel decisions public is neither immediate nor absolute; it requires that the final report be published 15 days after it is distributed to the parties, but permits the parties to decide not to make it public at that time.

Similarly, the Uruguay Round requires that written submissions and panel proceedings be confidential and that any opinions expressed by

60. NAFTA, *supra* note 1, art. 2012(1)(b).
61. *Id.* art. 2017(2).
62. *Id.* art. 2017(4).
individual panelists be anonymous.\textsuperscript{63} Although a country may make its own submissions public, which it obviously must retain the power to do, it may not disclose any information that another country has designated confidential.\textsuperscript{64} Nothing in the agreement defines confidential or imposes any other limits on a country's ability to designate information confidential.

One of the few procedural gains in the Uruguay Round is that a party to a dispute must, "upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."\textsuperscript{65} Only a Member country can make such a request, and there are no safeguards to ensure that the summary will reveal the full thrust of the secret submission. Public Citizen pressed the European Union (EU) to release its submissions in support of its challenge to the U.S. fuel economy penalties and gas guzzler tax. Although the EU eventually released its complaint, that document devoted less than one page to describing both the penalties and tax with a citation to the GATT articles on which the challenge was predicated.\textsuperscript{66} In preparing their defense of the measures, Public Citizen and the Center for Auto Safety were able to address many of the EU's arguments only after they reviewed the redacted version of the U.S. submission. Although the U.S. submission disclosed the gist of many of the EU's arguments, the redactions concealed many key contentions and much of the factual support. Public Citizen and the Center for Auto Safety supplied the USTR with factual information to rebut many of the EU's arguments and almost certainly would have been able to assist further in this manner had they been able to review the full EU submissions. The excessive secrecy likely deprived the panel of relevant information.

Fifth, dispute settlement panels generally lack the perspective of the proponents of measures that restrict trade in order to promote other social values. Given their trade backgrounds, the panelists do not have this expertise. Although recent trade agreements permit dispute panels to obtain expert input from individuals or expert bodies, the desire to obtain such input must come from the panel or the disputing parties.\textsuperscript{67} Outsiders (which includes states, members of Congress, and even the nontrade agencies who are not presenting the case) have no way to alert the panel to the need for experts or to supply information or arguments that would be useful. There are no safeguards to ensure that the expert input is objective, balanced, or free of conflicts of interest. There also is no mechanism for nongovernmental entities and other outsiders to make amicus submissions to trade dispute settlement panels. Public Citizen and the

\textsuperscript{63} Dispute Settlement, supra note 35, §§ 14.1, 14.3, 17.10, 17.11, app. 3 § 3.
\textsuperscript{64} Id. § 18.2, app. 3 § 3.
\textsuperscript{65} Id. § 18.2.
\textsuperscript{66} United States—Taxes on Automobiles, Request for the Establishment of a Panel under Article XXIII.2 by the European Economic Community, GATT Doc. DS31/2 (Mar. 12, 1993).
\textsuperscript{67} NAFTA, supra note 1, arts. 2014-15; TBT Agreement, supra note 1, art. 14.2, annex 2, para. 1; SPS Agreement, supra note 1, para. 36; Dispute Settlement, supra note 35, § 13.
Center for Auto Safety prepared a defense of the fuel economy penalties and gas guzzler tax based on their longstanding advocacy for and monitoring of those measures, but there was no mechanism for them to present that document to the panel.68

As this discussion demonstrates, the process of negotiating and implementing international trade agreements is in dire need of reform. The establishment of global economic policy should not be shrouded in such extensive secrecy and should not be devoid of avenues for public participation. Reform is particularly imperative because international trade agreements and disputes are seeking to dictate other social policies. It is not surprising that trade experts meeting in secret without public input have decided that the goal of unencumbered trade should trump most other policy goals. It is both unwise and unfair to permit trade insiders to make decisions that affect environmental, health, and safety policy without opening the process to scrutiny and participation by the people affected by those decisions.

Of course, reforming a system comprised of more than 100 nations is no small task. For this reason, the place to start making reforms is at home. Domestic reforms will help facilitate international reforms and will ensure that the United States' own participation in the trade system abides by this nation's democratic values.

III. Core Democratic Principles Should Govern U.S. Formulation of Trade Policies

The U.S. government must reform the way it formulates trade policy and participates in international trade processes. The core democratic principles that should be incorporated into all facets of U.S. trade policy-making activities are openness, public participation, neutrality, and accountability of both the decision-makers and the decision-making process.

Domestic policy-making, whether in the form of law-making, rule-making, or judicial proceedings, is conducted in the public eye. This ensures that the public can learn what is being considered and what has been adopted by government decision-makers. It also allows the public to provide input into the process. Openness helps instill confidence in the process and garner public support for the results. It also enables the public to hold decision-makers accountable for their decisions and for the manner in which their decisions are reached.

Domestic legislative, rule-making, and judicial processes also afford the public opportunities to submit their views in the form of testimony, public comments, or amicus briefs. These avenues for public participation

68. Patti A. Goldman & Cornish F. Hitchcock, Public Citizen Litigation Group, Statement of Public Citizen & Center for Auto Safety on the European Communities' Challenge to the U.S. Fuel Economy Penalties and Gas Guzzler Tax (Nov. 24, 1993) (on file with the Cornell International Law Journal). Public Citizen asked the USTR to attach this document to the U.S. submission to the panel, but the USTR refused. Although Public Citizen then sent the document to the GATT, there was no mechanism to provide it to the panel.
maximize the range of relevant information, arguments, and perspectives available to the governmental decision-makers and often improve the quality of the final decision.

Numerous safeguards are built into our domestic decision-making processes to ensure accountability of both the decision-makers and the process. Openness and public participation support this goal, as does making public the identities of the decision-makers associated with particular decisions. Similarly, on-the-record decision-making ensures that all the information considered by the decision-maker is available to the public. This guards against secret, undue influence on the decision-maker. It also makes it easier to understand the basis for past decisions and to predict the outcome of future disputes.

In addition, domestic policy-makers, whether they are elected or appointed, are subject to numerous ethical and procedural safeguards. Unelected officials must not have a conflict of interest with respect to matters under consideration. Further, any interest, financial or otherwise, that does not rise to the level of a conflict, must be disclosed to ethics officers and often to the public. Advisory bodies must reflect a balance of viewpoints on the matters before them. They must also not be unduly influenced by special interests. In addition, decision-makers must not perform other functions that threaten their neutrality. Thus, mediators do not serve as judges, and advocates for one position may not also be the decision-maker.

These principles ensure that the process and its results are fair, easily accessible to the public, and based on a full airing of the underlying issues. When policies are established without adherence to these principles, the quality of the decision-making is diminished. If this happens, the public loses confidence in the process and may be unwilling to accept the results. Closed processes that lack avenues for public input tend to be skewed toward economic interests that often have the resources and/or connections to ensure that their views are heard by the decision-makers. Backroom deals and catering to special interests may prevail over reasoned judgments.

As discussed in the previous section, the international trade regime does not abide by these democratic principles. Accordingly, when trade policy-making is shifted from domestic arenas to international ones, the decisions are no longer made openly. There is no public input to officials who are accountable to the American public through the ballot box or through U.S. ethical and procedural safeguards. More importantly for the purposes of this article, the U.S. government has modelled its participation in the international trade system after closed domestic systems for dealing with foreign affairs and national security matters. That model does not fit the domestic policy issues being shaped by trade agreements.

Trade negotiations, implementation, and dispute resolution are conducted principally by a foreign affairs agency accustomed to operating behind closed doors with extensive industry input but little public oversight or citizen involvement. The existing trade policy structure has no mechanism for obtaining a balanced perspective on environmental, health, and safety issues. Nor is it designed to facilitate a full exchange of diverse viewpoints. These closed, one-sided proceedings lack credibility and are immediately suspect in the eyes of those who are excluded.

IV. Democratizing Domestic Trade Policy-making Activities

A comprehensive set of reforms is necessary to ensure that U.S. trade policy-making activities are governed by the democratic principles of openness, public participation, and accountability. This section describes various pitfalls of the current U.S. model, and proposes reforms to make U.S. trade policy-making more democratic with respect to: (A) the negotiation and approval of trade agreements, (B) domestic implementation of these agreements, and (C) U.S. participation in dispute settlement proceedings.

A. The Negotiation and Approval of Trade Agreements

Development of U.S. negotiation positions and U.S. participation in international trade negotiations is characterized by excessive secrecy, inadequate attention to and concern for environmental and public health values, a lack of opportunities for public input, undue industry influence, and unchecked executive branch power to trade away domestic prerogatives in an effort to promote social values in ways that impinge upon international trade. The executive branch's flawed negotiating activities are tolerated and even promoted by Congressional abdication of decision-making authority due to the fast-track procedures governing congressional approval of trade agreements.

Congress should ensure that agencies, whose missions are being affected by trade, and states have an institutionalized role in developing U.S. trade policy and that the negotiation, congressional oversight, and approval processes be reformed to give Congress greater control over the development of U.S. and international trade policies. In addition, to assist in achieving these goals, the process of negotiating trade agreements should be more open, environmental impact statements should be prepared on trade agreements, and the existing trade advisory committee system should be restructured to be more balanced and open.

1. Who Decides?—Environmental and Health Agencies Should Have a Statutorily Mandated Role in the Development of U.S. Trade Policy, and States Should Retain Their Authority Over State Laws.

The identities and perspectives of governmental decision-makers affect the policies that are developed. A U.S. agency charged with protecting the environment or food safety has a much different perspective than one
charged with promoting economic development or international trade. Similarly, federal trade officials may be more willing than state politicians and regulators to compromise state laws.

U.S. trade and foreign policy officials conduct international trade negotiations secretly. Until recently, environmental and health officials were excluded from the negotiating loop. The NAFTA negotiations embarked upon a new practice of including environmental and health agencies in the development of U.S. negotiation positions. Through this process, for example, EPA brought to the USTR's attention the adverse effects that some of the proposed NAFTA language might have on domestic environmental standards.

Ultimately, however, the USTR had full control over U.S. positions. The environmental and health agencies had a role only to the extent permitted by the USTR. Under this arrangement, the ability of the environmental and health agencies to affect trade policy is left to the whims of the USTR.

Although the Clinton Administration has reportedly been more receptive to the concerns raised by environmental and health agencies, it has ensured that trade and national security agencies maintain control over U.S. trade policy. Thus, when the Clinton Administration formulated a policy on the circumstances in which trade sanctions or other trade measures may be used to promote environmental objectives, it gave the National Security Council (NSC) primary responsibility for its development. The NSC proceeded without any public notification, without publishing a proposal in the Federal Register, and without soliciting public comments. It was not until January 1994, six months after the NSC began developing the policy, that a select group of environmental organizations was invited to attend a meeting at which the NSC provided a general description of the policy but did not reveal its actual terms.71

Because the policy was developed under the auspices of the NSC, few, if any, EPA staff were involved in its development. Nevertheless, even though the policy still has not been published or otherwise made public, it has been relied upon by officials from the State Department, the NSC, the Department of Justice, and the Office of the USTR to discourage EPA from supporting statutory restrictions on the export of domestically prohibited or restricted pesticides. The non-EPA officials argued that the so-called “circle of poisons legislation” would use trade restrictions to promote health and environmental goals outside the United States in violation of the NSC policy.

EPA, rather than the NSC, should direct the development of U.S. policy on the use of trade measures to pursue environmental goals. EPA (and the National Oceanic and Atmospheric Administration) are intimately familiar with the use of trade measures to promote environmental goals.

EPA's perspective is directed at promoting environmental goals, while the NSC, like the USTR and the State Department, is more concerned with trade and foreign relations implications. In addition, NSC staff may possess little familiarity with the underlying environmental goals and mechanisms for achieving them. Moreover, EPA routinely establishes policies through notice and comment rule-making. In contrast, the NSC rarely notifies or includes the public in its policy-making activities, and it even classifies (and thus conceals) many of its final policy decisions. The EPA model for developing policy statements is far more consistent with democratic decision-making than is the NSC approach.

To ensure that environmental and health protection concerns are given priority and to facilitate democratic decision-making, environmental and health agencies should have a statutorily mandated role in the development of U.S. trade policy. This would prevent NSC or USTR domination of the process of establishing U.S. policies on overlapping trade and environmental matters. It would also help to prevent the USTR from trading away food safety protections and injecting himself/herself into domestic environmental policy-making.\(^72\)

Congress should mandate that any agency with responsibility over a matter that would be affected by trade policies, negotiations, or policy implementation have an equal voice with the USTR in developing the U.S. position. To accomplish this, Congress should amend 19 U.S.C. § 2171(c)(1), which delineates the duties of the USTR and the Deputy USTRs. Thus, while the USTR would retain responsibility for the conduct of international trade negotiations, he/she would not have exclusive responsibility for developing U.S. negotiating positions that affect the missions of other U.S. agencies.\(^73\) Furthermore, the USTR would no longer have primary responsibility for developing and coordinating the implementation of international trade policy if such policies concern a matter within the jurisdiction of another domestic agency. Instead, the domestic agency would have primary responsibility.\(^74\)


\(^{74}\) 19 U.S.C. § 2171(c)(1)(A). Similarly, the USTR could continue to issue policy guidance to agencies on basic trade issues as long as it does not supplant the agencies' role in developing policies in their areas of jurisdiction, even where those policies affect international trade. 19 U.S.C. § 2171(c)(1)(D).
The Trade Acts should be amended to require that the USTR consult with states on trade issues that affect those states. The NAFTA Implementation Act provides for consultations with the states.\textsuperscript{75} Although the consultation system is principally concerned with ensuring state compliance with NAFTA, it allows states to submit their views to the USTR. Further, it requires the USTR to take those views into account when developing U.S. positions for implementation of NAFTA and for dispute settlement submissions that directly affect the states.\textsuperscript{76} This consultation system should be extended to other trade agreements and to the development of trade negotiating positions.

However, unless the states have final political control over trade-precipitated changes in state laws, there is no guarantee that their voice will be given any weight in the development of U.S. trade policy. Currently, the federal government has the power through preemption, withholding federal funds, and litigation to compel changes in state laws that conflict with a trade agreement.\textsuperscript{77}

However, the federal government has been more willing than the states to sacrifice state safety protections. For example, the United States and Mexico entered into a 1991 Memorandum of Understanding granting reciprocal recognition of Mexican commercial drivers' licenses. Thereafter, the Department of Transportation preempted the states from requiring Mexican drivers to obtain state commercial drivers' licenses and made it clear that non-complying states could lose federal highway funds.\textsuperscript{78} Mexican licenses are based on different medical requirements, hazardous materials proficiency standards, and sanctions, and they last more than twice as long as California licenses. Due to these differences, the California legislature directed the California Department of Motor Vehicles to continue enforcing California's commercial drivers' licenses requirements.\textsuperscript{79} When the Federal Highway Administration threatened to withhold federal highway funds, however, the California DMV decided to recognize the Mexican licenses.\textsuperscript{80}

During the NAFTA debates, California urged the USTR to leave the modification of state laws to state political processes, rather than permit the federal government to sue states to compel changes in their laws.\textsuperscript{81} California argued that state legislators and state regulators, rather than federal trade negotiators, should be empowered to decide whether to

\textsuperscript{75} NAFTA Implementation Act, § 102(b) (1).
\textsuperscript{76} Id. §§ 102(b)(1)(B)(iii), (iv), (v).
\textsuperscript{81} Letter from Ira H. Goldman, Governor's Trade Representative, and James Strock, Secretary, California Environmental Protection Agency, to Michael Kantor, USTR, (Aug. 3, 1993) (on file with the author).
change their laws to accommodate trade concerns. The NAFTA implementing legislation did not, however, leave modifications of state laws to the state political process. Instead, it authorized the federal government to bring lawsuits to compel changes in state laws.\textsuperscript{82} If the states are to participate meaningfully in the development of trade policies that affect their interests, they must retain control over the viability of their laws. With that power, the USTR may give their views more weight, even if the USTR retains full control over trade agreement implementation and dispute settlement positions.

2. Fast-Track Procedures Should Be Eliminated or Revamped to Give Congress Greater Control over the Development of U.S. Trade Policy.

   a. The current fast-track rules abdicate too much congressional control over trade policy.

   The process for congressional approval of trade agreements is in dire need of reform. At present, congressional approval of a trade agreement is not governed by ordinary congressional procedures, but by fast-track procedures, which drastically reduce the opportunities for Congress and the public to shape the terms of an agreement. These procedures were developed in the early 1970s after Congress refused to approve one aspect of the Kennedy Round of GATT agreements and undercut other provisions in the U.S. implementing legislation. The procedures are predicated on the postulate that the President and his Administration will be unable to negotiate multilateral trade agreements unless our trade partners know, in advance, that Congress will not dismantle those agreements.

   To initiate the fast-track process, the President must notify Congress that he is negotiating a trade agreement under fast-track procedures.\textsuperscript{83} Congress may remove the agreement from the fast-track process by a vote of both houses in any sixty-day period or by a disapproval vote of either the Senate Finance Committee or the House Committee on Ways and Means within sixty days of the President’s notification.\textsuperscript{84}

   To retain fast-track authority, the President must consult with certain congressional committees about the nature of the agreement, the extent to which the agreement will achieve statutory negotiating objectives, and the implementation of the agreement.\textsuperscript{85} The House Committee on Ways and Means and the Senate Finance Committee (the “gatekeeper committees”) must be consulted with respect to all trade agreements; other committees must be consulted when the agreement would affect subject matters over which they have jurisdiction.\textsuperscript{86} Most of these consultations take place in secret, although the committees occasionally hold public ses-

\textsuperscript{84} Id. § 2903(c)(1)(A), (c)(2).
\textsuperscript{85} Id. § 2902(d).
\textsuperscript{86} Id. § 2902(d)(1).
sions to report on general developments. Moreover, many of the health and environmental committees were not consulted regularly during either the NAFTA or the Uruguay Round negotiations.

The President must notify Congress ninety calendar days before he enters into a trade agreement.\textsuperscript{87} Typically, the President notifies Congress once the negotiations have led to a final agreement. Thus, the President issued the ninety-day-notice for NAFTA after the USTR released a text of the agreement; for the Uruguay Round, notification occurred as soon as the non-tariff trade barrier negotiations were completed.\textsuperscript{88}

The President may enter into (i.e., sign) the agreement at the expiration of the notice period. Thereafter, he may submit to Congress the signed trade agreement, legislation approving and implementing it, and the required supporting information.\textsuperscript{89} A non-tariff trade barrier agreement may not enter into force (i.e., become effective) with respect to the United States unless Congress has enacted legislation approving it.\textsuperscript{90}

The absolute bar on amendments to both the trade agreement and its implementing legislation is the most undemocratic feature of the fast-track rules.\textsuperscript{91} In other words, the legislation submitted by the President is the exact legislation upon which Congress must vote. Through the no-amendment rule, Congress relinquishes much of its power to determine the terms of trade agreements. That power accretes to the President, who can alone determine what will be negotiated and what limits will be placed on domestic prerogatives. Because they must vote "yes" or "no" on the entire package, the stakes are high; members of Congress may be unwilling to reject the entire agreement, even though they may disagree vehemently with particular components of it.

Although the trade agreement may not be amended, significant domestic issues are resolved in the implementing legislation. For example, the implementing legislation dictates the legal effect that the trade agreement will have on both federal and state laws. It also amends existing statutes to bring them into conformity with the trade agreement. Indeed, the NAFTA implementing legislation amended several public health statutes without any congressional hearings or debate, even though it is by no means clear that those particular amendments were compelled by the NAFTA legislation.\textsuperscript{92} In addition, at one point a draft of the Uru-

\textsuperscript{90} Id. § 2191(b)(1)(A); Id. § 2903(a)(1)(C). For the Uruguay Round, tariff agreements similarly may not become effective until after Congress has approved the non-tariff trade barrier Uruguay Round agreements. Pub. L. No. 103-49, 107 Stat. 239 (1993).
\textsuperscript{92} An early draft of the NAFTA implementing legislation incorporated the NAFTA's constraints on food safety measures, which would have given those rules domestic legal effect and made them enforceable against federal agencies under the Administrative Procedure Act.
guay Round implementing legislation included an extension of fast-track authority for future trade agreements, and the final bill contained budget cuts and revenue-raising measures to offset revenue losses from the Uruguayan Round tariff reductions.

Apart from statutory amendments, budget authorizations, and administrative mechanisms to implement NAFTA, the NAFTA implementing legislation also contained many special favors designed to win support for the NAFTA package.93 For example, the NAFTA Implementation Act provides for the establishment of a North American Development Bank, which reportedly convinced at least one Representative to support NAFTA.94 Similarly, an obscure provision pertaining to the retroactive effect of NAFTA's local content requirements for obtaining preferred tariff treatment reportedly wipes out millions of dollars in tariffs owed by the Honda Corporation for failing to meet the local content rules under the U.S.-Canada Free Trade Agreement.95

Because the President wants to avoid unexpected problems, and Congress wishes to participate, an informal process has evolved which includes Congress in the development of the implementing legislation. The House Ways and Means Committee and the Senate Finance Committee hold “nonhearings” and “nonmarkups” at which they consider and make changes to the proposed implementing legislation. Other committees with jurisdiction over matters affected by the agreement need not be included in this process.96 A “nonconference” committee reconciles any differences in the respective versions of the House and Senate texts.

The usual congressional open meeting rules do not apply to these non-proceedings. Therefore, they take place amidst greater secrecy than normal. In addition, no transcripts are prepared, which prevents the public from learning what transpired until a public report is issued. The only public report of the NAFTA implementing legislation did not become available until the legislation was introduced. This, of course, was too late to enable the public to influence the terms of the legislation.

Once the fixed legislative package is introduced, congressional consideration is truncated under fast-track procedures. Debate in either house is limited to a maximum of twenty hours.97 Congressional committees have only forty-five legislative days to review the package, at the end of which it is automatically referred to the full house. A floor vote must then

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94. NAFTA Implementation Act, §§ 541-544.
95. Id. § 202(c)(7); Peter Behr, Final Deals Produce Surge of Support, WASH. POST, Nov. 17, 1993, at A1.
be taken within fifteen legislative days. In other words, Congress must vote on the implementing legislation within sixty legislative days of its submission by the President. Under the fast-track's no-amendment rule, this is a straight "yes" or "no" vote on the entire package; Congress may not amend the trade agreement or the implementing legislation.

While the fast-track procedures establish a maximum timetable for a vote on the trade agreement, there is no requirement that the congressional approval process must take the entire sixty- or ninety-day period. Thus, for political reasons, the timetable for the congressional vote on NAFTA was accelerated. The President submitted the implementation legislation to Congress on November 4, 1993, although it was not made available to the public until several days later. The House voted less than two weeks later on November 17, 1993, and the Senate voted the following week on November 22, 1993.

In practice, the fast-track system has stymied Congress in ways that were neither envisioned nor intended when Congress first approved the fast-track scheme. Through fast-track procedures, Congress delegated international trade negotiation authority to the President on the theory that the President can make trade concessions because he represents the nation as a whole. In contrast, Congress is considered unable to make such concessions because its members protect the parochial interests of their constituents.

However, trade agreements are no longer limited to tariff reductions and other trade concessions. When fast-track rules originated, neither the provisions of trade agreements nor disputes under them had begun explicitly to address environmental, health, or safety matters. There were no separate trade agreement provisions constraining domestic product standards or food safety measures. International harmonization of such standards had not surfaced as a trade goal, let alone as a mandate in trade agreements. No trade disputes had been adjudicated with respect to health, safety, environmental measures, or the GATT exceptions for conservation of exhaustible resources or the protection of life or health.

Trade negotiations are now establishing principles for determining what types of domestic environmental, health, and safety protections will be permissible. Congress is well-suited to making such policy judgments. In fact, these matters are the subject of many titles of the U.S. Code, not to mention volumes of federal regulations, state statutes, and state regulations.

98. 19 U.S.C. § 2191(e) (1988 & Supp. V 1993). In calculating the time periods for action in either House, the days on which that House is not in session are excluded. Id. § 2191(e)(3).

99. Where the implementing legislation contains revenue measures, the approval period may be extended from 60 to 90 legislative days because revenue measures must originate in the House of Representatives, and the House is assured of the full 60 days to consider the trade package. Additional time is then permitted for Senate consideration. 19 U.S.C. § 2191(e)(2) (1988 & Supp. V 1993).

Fast-track procedures now permit the President to usurp congressional authority in environmental, health, and safety areas only tangentially related to trade. They enable the President alone to decide what matters will be the subject of trade negotiations and to negotiate terms that will limit Congress's (and the state legislatures') ability to adopt strong food safety protections, endangered species safeguards, or phaseouts of harmful chemicals. The horse trading is no longer limited to economic sectors. In fact, U.S. negotiators reportedly traded away certain food safety prerogatives in order to gain investment rights in Mexico. The President then presents those provisions as part of a take-it-or-leave-it package promulgated as a godsend for the economy. Although it may be that few, if any, members of Congress would have voted for NAFTA's food safety provisions standing alone, the stakes were too high for most members to vote against the whole package based solely on its food safety provisions.

Not only do the fast-track procedures severely truncate congressional consideration of international trade agreements but they also engender excessive secrecy and power plays by the few congressional committees that are involved in the process. While an administration may decide to release information about a trade agreement when the President is seeking authorization to negotiate it under fast-track rules, secrecy tends to develop once that authorization has been obtained. Thus, the USTR made public promises that NAFTA would in no way jeopardize health, safety, and environmental protections, but the USTR then denied the public the opportunity to evaluate whether any of the proposals would have such detrimental effects until after the agreement had been finalized.101

b. Fast-track procedures should be eliminated or greatly reformed.

Fast-track procedures have out-lived their usefulness and should not be renewed. The last minute NAFTA renegotiations demonstrate that the United States can return to its negotiating partners and exact additional concessions in order to obtain congressional support for bilateral and trilateral trade agreements. Long after the NAFTA agreement had been signed by President Bush and his counterparts, the three countries reopened the negotiations to create Supplemental Agreements on Labor and Environmental Cooperation, to establish a working-group on emergency actions taken in response to import surges, to establish a North American Development Bank, and to negotiate a price-based snapback of tariffs for frozen concentrated orange juice.102

A strictly non-amendable trade agreement was not essential to the successful negotiation of the entire agreement. If anything, the executive branch's complacency resulting from the fast-track process led the Bush

Administration to negotiate the NAFTA without adequate regard for congres- sional and public concerns. In order to obtain sufficient congres- sional support for the agreement, the successor administration ameliorated some of NAFTA’s harshest effects by negotiating side deals and by making many public statements about the agreement that conflicted with its actual terms. If the no-amendment rule were eliminated, the negotiators would pay more attention to public and congressional senti- ment. Thus, the negotiated agreement would be more reflective of those sentiments, even if Congress did not exercise its power to amend.

Since fast-track procedures stand in the way of effective congressional oversight and public participation, they should be eliminated. Every time an agreement has been negotiated and submitted under fast-track rules, Congress has expressed its dissatisfaction with the system and tinkered with the fast-track rules to give Congress more oversight. Thus, Congress has required more consultations and provided for additional opportuni- ties for Congress to vote on whether fast-track rules will apply. These refinements of the fast-track rules, however, have neither provided an ade- quate check on presidential power nor compensated for the loss of con- gressional control occasioned by the no-amendment rule.

The no-amendment rule should be eliminated. Instead, Congress should be able to consider a trade agreement fully and make reservations to specific provisions, as it does with international treaties. The NAFTA’s renegotiation demonstrated that the fast-track rules are not essential to the negotiation of trade agreements involving few countries. Therefore, at a minimum, there should be no fast-track process for bilateral trade agree- ments, multilateral agreements involving fewer than five countries, or accessions to NAFTA.

If fast-track rules are retained at all, they should be limited to trade agreements involving five or more countries. Even for such agreements, Congress should restructure the process to ensure that Congress and the public have a meaningful voice in what may be traded away to liberalize international trade.


105. Professor Harold Koh has argued that Congress still has the power to shape the terms of a trade agreement and its implementing legislation, citing power plays by a consortium of influential members of Congress who sit on the gatekeeper committees—Senate Finance and House Ways and Means—and by a powerful industry. Harold H. Koh, The Fast Track and United States Trade Policy, 18 BROOK. J. INT’L L. 143, 150, 152 (1992). These examples prove the point that the fast-track process and the secrecy and backroom deal-making that it generates enable powerful interests to have a role in the development of trade agreements, while denying any comparable role to those who are less powerful, such as consumers and the public at large.
i. An affirmative congressional vote should be required to invoke fast-track rules.

Instead of allowing the President to proceed under fast-track rules unless Congress votes to deprive him of that authority, affirmative congressional votes should be required to trigger fast-track authority. The President should still be required to notify Congress publicly that he intends to initiate negotiation of a particular trade agreement. Congress, however, should subsequently be required to vote in favor of applying fast-track rules to the negotiations.

ii. The President should be required to disclose to Congress and the public the specific sectors and issues under negotiation.

Early in the negotiations, the President should be obligated to submit to Congress a public report describing, with specificity, the nature of the matters under negotiation regarding every sector and set of issues (such as food safety, technical barriers, intellectual property, and dispute settlement). Had this been done for the NAFTA and Uruguay Round sanitary and phytosanitary agreements, the President would have been required to state whether there would be any provisions on such matters such as the level of protection a country could pursue, the scientific basis for such measures, risk assessment, equivalence, the least restrictive means for achieving the goals, and state laws.

When President Bush faced congressional opposition to his request for an extension of fast-track authority for the NAFTA and Uruguay Round negotiations, he submitted to Congress and made public an "Action Plan," which outlined U.S. goals for the NAFTA negotiations, provided background on controversial issues, and made certain commitments to appease NAFTA's opponents. Congress should institutionalize this type of formalized submission and specify its contents.

This report should be required independent of any presidential request for fast-track authority. As discussed below, it would also serve to inform both Congress and the public of the nature of the specific issues for which the President seeks fast-track authority.

iii. The President should be required to obtain fast-track authority separately for each sector and issue.

The President should be required to obtain fast-track authority separately for each of the various sectors and issues either by adhering to statutorily prescribed terms or by obtaining affirmative congressional authorization. By adhering to statutorily prescribed provisions for the particular sector or issue, the President could obtain fast-track authority. Congress would prescribe sets of permissible rules to govern particularly sensitive subjects, such as food safety and environmental standards, which have the potential to affect a vast range of congressional prerogatives. If the trade agreement

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were to incorporate those rules, it would be entitled to fast-track consideration. If not, it would be subject to congressional oversight throughout its development and possibly to congressional amendment later on.

If the trade agreement does not adhere to those rules, if there are no rules on point, or if the President wants to obtain fast-track authorization prior to the negotiation of rules in each of the statutorily prescribed areas, he may request that Congress vote affirmatively to provide such authority. However, he would need to obtain congressional fast-track authority separately for each sector or issue under negotiation. Thus, if the President identified twenty issues under negotiation, and Congress voted affirmatively with respect to fifteen, the President would have fast-track authority only for those fifteen. The President could still negotiate in the other five areas, but not under fast-track rules. Even as to the fifteen approved areas, fast-track authority could be removed by a vote of both Houses within a sixty-day period.107

The President would remain free to make additional public submissions to Congress and to ask for new votes on whether additional specific issues could be added to the fast-track rules package, even if Congress previously voted not to consider those matters under fast-track rules. However, if the final agreement deviates from the commitments made in the President's Action Plan or from the statutorily prescribed terms, Congress would be free to amend those aspects of the agreement and the implementing legislation to conform them to the promises made or to the statutorily prescribed terms.

Because the President would be required to obtain fast-track authority for each aspect of the agreement, this system would eliminate cross-sectoral horse trading at the whim of the negotiators. Congress would have a voice in whether food safety standards would be traded away for investment rights in other countries. It would also enable Congress to have greater scrutiny over some matters, either because they are more controversial and of greater public concern or because they have a greater effect on congressional prerogatives. Thus, Congress could refuse to grant fast-track authority in advance for matters for which it has not developed model provisions. Instead, Congress could wait until it has reviewed the text or sufficient details of that aspect of the agreement and then decide whether to apply the fast-track rules. This approach makes sense in areas where the particular words used in the text dictate the viability of a whole category of domestic measures, such as food safety and product standards provisions.108

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107. 19 U.S.C. § 2903(c)(1)(A) (1988) would need to be amended to allow the removal of fast-track authority for specific sectors or issues.

108. There are variations in the penultimate Uruguay Round draft, the NAFTA text, and the final Uruguay Round text on each of the matters listed above, which have led the USTR and others to conclude that their reaches are very different. See, e.g., NAFTA Statement of Administrative Action at 542-44; Rodrigo J. Prudencio et al., National Wildlife Federation, The Road to Marrakesh: An Interim Report on Environmental Reform of the GATT and the International Trade System (1994).
iv. The no-amendment rule should be eliminated.

The no-amendment rule should be eliminated except with respect to those aspects of the agreement that parallel relevant statutorily prescribed terms or that correspond to the specific terms set forth by the President in his request for fast-track authority. If the final agreement deviates from either the statutorily prescribed terms or the President’s action plan, then Congress may amend the agreement.

The no-amendment rule should also be abolished with regard to the implementing legislation. The implementing legislation deals with matters of domestic law. Congress should have the ability to determine the domestic legal effect of the agreement and the precise terms of statutory amendments to conform U.S. statutes to the agreement. The particular amendments to U.S. animal and meat inspection laws in the NAFTA implementing legislation are not the only modifications that would conform those laws to NAFTA. Certainly less discretion could have been given to USDA to achieve the same result. Yet because the amendments were included in the NAFTA package, Congress never debated alternatives, nor did the Administration ever justify the use of those particular amendments instead of some other approach.

Instead of the no-amendment rule, Congress should impose strict relevance requirements to limit the implementing legislation to what is required to approve and implement the trade agreement. Under the Trade Acts, the implementing legislation is, in theory, limited to what is required or appropriate to carry out the agreement. In practice, however, special deals have been inserted to garner support from reluctant members of Congress. Eliminating the no-amendment rule and relying on public scrutiny may curtail the insertion of special favors in the implementing legislation.

v. Ordinary legislative procedures should govern the development of implementing legislation.

The process for development of the implementing legislation needs to be revamped. The fast-track process operates under the fiction that the Executive Branch alone will develop and submit the implementing legislation to Congress for approval. In practice, certain select congressional committees play a crucial yet highly secretive role. Congress should remove this fiction and provide for the development of trade implementing legislation under ordinary legislative procedures.

The development of the legislation should occur in public. Proposed legislation should be made available to the public long before it is introduced. Hearings, mark-ups, and conference committee proceedings should also be public, and public transcripts should be prepared. All congressional committees with jurisdiction over issues affected by the agreement should have a full opportunity to hold hearings and debate aspects of trade agreements that affect matters within their jurisdiction.

This approach would stimulate public debate on the legislation at a
time when such debate could still affect its terms and could shape the
decision of whether to enact the legislation and approve the agreement.
Thus, proposals to make major changes in domestic laws, such as the
NAFTA Implementation Act's amendments to the animal and meat
inspection laws, would surface before introduction of the bill, when the
focus is on the agreement as a whole rather than its specific effects.
Congressional committees could hold hearings on the effects of such changes,
alternatives could be considered, and the final legislative product might
well be better.

Additional time beyond the ninety days in the current scheme should
be added to the timetable preceding submission of the implementing legis-
lation to Congress. This would provide more time to develop and review
the implementing legislation, including any modifications to domestic
law. Indeed, it took more than ninety days to develop the implementing
legislation for both NAFTA and the Uruguay Round. Once the legislation
is introduced, particularly if it is subject to a no-amendment rule, only
limited congressional debate and the final vote remain. This final stage
took less than three weeks for NAFTA. If amendments are not permitted,
less time can be allotted for congressional consideration of the final legis-
lation in order to give Congress more time to develop the legislation.110

vi. Fast-track rules should not apply to statutory amendments to implement
trade agreements.

As a related matter, fast-track procedures should not apply to statutory
amendments or enactments that implement trade agreements, as was per-
mitted for both the Tokyo Round of GATT and the U.S.-Canada Free
Trade Agreement.111 Defenders of the agreements respond to charges
that trade agreements undermine U.S. power to adopt domestic health
and environmental protections with the contention that any changes to
domestic statutes still must go through the law-making process. However,
application of fast-track procedures to domestic law-making severely limits
committee consideration, floor debate, and congressional ability to offer
amendments. Likewise, public participation in the process of determining
domestic environmental and health safeguards is largely curtailed. The
ability of both Congress and the public to engage in full-ranging debate
and to employ all law-making tools at their disposal in order to promote
strong environmental and health laws must be preserved. For this reason,
fast-track procedures should never be applicable to legislation affecting
environmental, health, or safety matters, or state authority in these areas.

111. 19 U.S.C. § 2504(e) (1988); Approval of U.S.-Can. Free Trade Agreement and
Relationship of Agreement to U.S. Law, Pub. L. No. 100-449, 102 Stat. 1851, § 102(e)
(1988).
vii. Congress should mandate that the United States work toward the democratization of the international trade system.

The current Trade Acts set forth the negotiating objectives of the United States. The negotiating objectives outline the framework for the Executive Branch's initiation and conduct of trade negotiations. They also form the foundation of various reports that are mandated by the Trade Acts to accompany trade agreements submitted for congressional approval. Under these fast-track reforms, Congress would legislate standard trade rules that would, if adhered to, give rise to automatic fast-track consideration. Although negotiating objectives would have less importance in such a system, Congress should still set forth goals that must be addressed in Executive Branch reports.

Most of the current negotiating objectives focus on eliminating barriers to trade without concern for other values. A noteworthy exception to this bias toward unencumbered trade is the directive:

(A) to promote respect for worker rights; (B) to secure a review of the relationship of worker rights to GATT articles, objectives, and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and (C) to adopt, as a principle of the GATT, that the denial of worker rights should not be a means for a country or its industry to gain competitive advantage in international trade.

However, none of the administrations negotiating the Uruguay Round heeded this directive, and thus, the worker rights objectives were not achieved in the Uruguay Round.

The ease with which trade negotiators have ignored stated congressional negotiating objectives underscores the ineffectiveness of the current system. Congress cannot compel meaningful reform of the international trade system through general directives unless it is given the power to force negotiators to comply with express congressional mandates. If Congress had the ability to ensure that trade negotiators would abide by such mandates, which it would have under the fast-track reforms proposed above, then Congress could direct the Executive Branch to democratize

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113. 19 U.S.C. § 2902(b)(2) (1988) (“A trade agreement may be entered into . . . only if such agreement makes progress in meeting the applicable objectives described in section 2901 of this title . . . .”); id. § 2903(a)(2)(B)(ii)(I) (President must explain how agreement makes and does not make such progress); id. § 2155(e)(2) (advisory committee reports must provide opinion on the extent to which agreement achieves the applicable negotiating objectives).
114. Under the WTO, there may be no more comprehensive rounds of GATT negotiations. Instead, the WTO would be permitted to initiate negotiations on an ongoing basis, and the results of those negotiations may, in some instances, become binding on the United States without a congressional vote. WTO Agreement, supra note 48, art. IX, § 2; id. art. X. Therefore, the evaluation of whether the United States is achieving its negotiating goals should no longer be tied to the submission of final agreements to Congress. Rather, Congress should mandate periodic federal agency and advisory committee investigations and reports on the achievement of these reforms.
the international trade system.\textsuperscript{116} 

In particular, Congress should restructure U.S. negotiating objectives and emphasize the need for openness, public participation, and neutral decision-makers and decision-making processes in international trade negotiations, implementation activities, and in the resolution of disputes under international trade agreements.\textsuperscript{117} Reform of the negotiating objectives for the international dispute settlement system should be even more explicit.

The current negotiating objectives concerning dispute settlement focus exclusively on making the system more effective and expeditious.\textsuperscript{118} The Uruguay Round and NAFTA negotiations effectuated dispute settlement systems that may well be expeditious and effective in promoting trade liberalization at the expense of other values. Congress should require the United States to take the lead in transforming this efficient

\textsuperscript{116} The recent attention to the adverse environmental and health consequences of trade agreements calls for negotiating objectives to achieve sustainable development and to lessen the adverse environmental, health, and safety effects of trade agreements. See, e.g., Office of Technology Assessment, U.S. Congress, \textit{Trade and Environment: Conflicts and Opportunities}, (Background Paper, 1992); NAFTA, \textit{supra} note 1, art. 1114; Organization for Economic Co-operation and Development, \textit{The Environmental Effects of Trade} (1994); \textit{Trade and the Environment: Law, Economics and Policy} (Durwood Zaelke et al. eds., 1993). President Clinton has promised to bring these issues to the forefront of future trade initiatives. Proclamation 6641—To Implement the North American Free Trade Agreement, and for Other Purposes, 29 \textit{Weekly Comp. Pres. Doc.} 2596 (Dec. 15, 1993). Congress should mandate that the principal negotiating objectives of the United States in future trade negotiations shall include: (1) promoting sustainable development, (2) ensuring the viability of the earth's resources, (3) facilitating trade rules that internalize the adverse health and environmental consequences of production and market activities, (4) creating disincentives for countries and their industries to permit degradation of the environment (in the broadest sense of the term) to gain a competitive advantage in international trade, and (5) maintaining full domestic prerogatives (including of state and local governments) to protect the environment, public health and safety, consumers, and animal welfare, including the employment of product standards and food safety measures. The United States should be directed to work toward the adoption of international trade rules that promote these objectives and to secure international reviews of the relationship between GATT and other international trade rules and the achievement of these goals.

\textsuperscript{117} The Trade Acts direct the United States “to obtain broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions through the observance of open and equitable procedures in trade matters by Contracting Parties to the GATT.” The concept of transparency is a more limited concept than openness because it is often designed to ensure that governments, but not necessarily the public, will receive information. For example, the Working Procedures appended to the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes provide that “[i]n the interest of full transparency,” panel proceedings will be held in the presence of both parties. \textit{Dispute Settlement, supra} note 35, app. 5, para. 10. At the same time, the procedures require that those proceedings be held in closed session. \textit{Id.} para. 2. Obviously, such “transparent” proceedings are not open, since the public is entirely shut out. The Uruguay Round implementing legislation would require the U.S. Trade Representative to “seek” greater transparency in GATT proceedings, including dispute settlement, and conflict of interest rules for dispute settlement panelists. Uruguay Round Agreements Act, § 123(c), 126. This is a step in the right direction.

dispute settlement machinery into a fair process. The U.S. negotiating objectives should require dispute settlement to be open, to have neutral decision-makers, and to provide opportunities for input from interested parties, including environmental and consumer interests. The United States should be directed to work towards the establishment of a dispute settlement system that operates outside and independently of the GATT and the WTO. This would ensure a neutral forum for determining the balance between trade and social values.

Not only should the Executive Branch be required to evaluate and report on its progress in achieving these negotiating objectives, but Congress should also direct the Office of Technology Assessment to develop methods of achieving these reforms and to assess the progress being made toward obtaining them. If sufficient progress is not made, Congress should compel the reforms through its power of the purse. Specifically, Congress should refuse to fund U.S. participation in the flawed international trade systems until reforms are made. Many members of Congress endorsed a proposal that would have placed a moratorium on GATT disputes until the flawed dispute settlement system could be overhauled.119 Unfortunately, no such moratorium was negotiated in the Uruguay Round. If U.S. negotiators are unwilling to advocate necessary reforms or are unable to obtain international agreement on them, Congress should eliminate funding for U.S. participation in all trade dispute settlements or at least in those involving domestic prerogatives such as environmental, health, safety, consumer, or animal welfare protection. Funding should cease until the international dispute resolution system is made more fair, open, participatory, and accountable.


Excessive secrecy permeates the process of negotiating and approving international trade agreements. This secrecy is promoted by the current fast-track process. Its detrimental effects are then compounded by the trade advisory committee system, which gives hundreds of industries access to information that is not shared with the general public. Meaningful reforms of fast-track procedures, such as those proposed above, would eliminate much of the secrecy facilitated by those procedures. Modifying the trade advisory system, as discussed below, would decrease the preferred access industries have to information and the trade policy-making apparatus.

In addition to those reforms, Congress should mandate that regular, objective, and complete disclosures would be made to the public at significant stages in the development of U.S. and international trade policies. When draft agreements are disclosed to the trade advisory committees, they should also be made available to the general public. By that time,

they can hardly be considered secret because the negotiating countries (which number more than 100 for GATT negotiations) and several hundred domestic advisers have been privy to their terms. If some portions of an agreement cannot be disclosed for discrete reasons, such as those set forth in the Freedom of Information Act exemptions, then the USTR should release as much as can be made public without revealing such information. A summary, however, of the exempted information should be prepared and released to the public.

Congress should also require each domestic agency to prepare an analysis of how the trade agreement will affect its laws, regulations, and programs. Many agencies prepared such an analysis of NAFTA, but those analyses were not made public. These analyses should be prepared by the substantive agencies, not the USTR, in order to provide a more informed and candid assessment of the agreement's effects. They could be prepared while the advisory committees are preparing their own reports on the trade agreement, i.e., within thirty days after the conclusion of the agreement. The WTO Agreement will transfer much of the international trade policy-making from the negotiation of trade agreements to other less formal mechanisms, many of which may not require congressional approval. Therefore it would be advisable for Congress to mandate periodic agency reports on the effect of trade agreements on agency programs.

As a matter of practice, the USTR does not make the text of the agreement available to the public until a final trade agreement has been completed. Of course, once the agreement has been completed, it is too late to ameliorate any adverse effects of its provisions. Even then, it often takes weeks, good connections, and money to obtain a copy of the agreement. Although the parties to the NAFTA negotiations announced on August 12, 1992 that they had reached a final agreement (in time for the Republican National Convention), the USTR did not release a copy to Congress or the public until early September. Similarly, the parties announced on December 15, 1993 that they had concluded the Uruguay Round agreements, but the USTR did not make copies available to the public until January 1994. Even then, the agreement made public did not include the Uruguay Round Agreement on Government Procurement of December 15, 1993. For months, the public was unable to obtain copies of that agreement from the USTR. Finally, in March 1994, the GATT Secretariat in Geneva, Switzerland, sent it to a U.S. organization in response to a request. The full impact of that agreement on minority set aside programs and state green procurement programs was set forth in other documents not made available to the public until April 1994.

Finally, Congress should ensure the public full and easy access to trade documents. It has also been exceedingly difficult for the general

120. 5 U.S.C. § 552(b) (1988).
public to obtain advisory committee reports, USTR reports, the implement-ning legislation, U.S. dispute settlement submissions, and other key documents that have, in theory, been public documents. Congress should require that all trade documents be made available to the public through widely distributed publications, such as the Federal Register, federal depository libraries, electronic means, and free copies at accessible locations.


The preparation of environmental impact statements is another way to remedy the lack of public information about the development of trade agreements and policies. An environmental impact statement objectively analyzes the environmental ramifications of a proposed action and alternatives to it.\textsuperscript{122} Environmental impact statements improve the quality of decision-making by involving the public in identifying and assessing the environmental and health consequences of the proposed action and its alternatives and by informing the decision-makers, the public, and Congress of those environmental consequences.

The USTR has never prepared an environmental impact statement on an international trade agreement. Rather, the USTR has maintained that the National Environmental Policy Act (NEPA), which contains the environmental impact statement mandate, is inapplicable to trade agreements. At the same time, the USTR has acknowledged that agreements it has negotiated in recent years will have significant environmental effects. Indeed, in response to public and congressional demands, the USTR has prepared analyses of these environmental effects, although it has refused to do so under the NEPA framework established by Congress.

At the beginning of the NAFTA negotiations, the USTR started on the right course. The USTR initiated an analysis of the environmental issues likely to arise in the NAFTA negotiations by preparing a draft document, soliciting public comment, holding public hearings, and issuing a final document describing these issues.\textsuperscript{123} Since this document was prepared at the outset of the negotiations, it informed the decision-makers of the issues that would require further consideration and analysis.

However, the USTR then abandoned the task of analyzing environmental effects for the next one and one-half years until a final version of the NAFTA had been negotiated. Although the USTR prepared a final environmental review at that time, it never acknowledged that NAFTA could have any adverse effects on environmental protections, sustainable development, or energy and other natural resources.\textsuperscript{124} In essence, the

\textsuperscript{122} National Environmental Policy Act, 42 U.S.C. § 4332(c) (1988).
USTR's final review was merely a political document designed to sell the NAFTA to Congress and the public in the waning days of the debate.

It is precisely to guard against this type of one-sided, self-serving report that NEPA requires a balanced, objective analysis of the environmental effects of the agreement and the alternatives to it, such as the status quo and variations on its terms. Under NEPA, this analysis must be prepared before final decisions have been made. In this way, an environmental impact statement serves as a vehicle for informing the public about the agreement and its environmental effects and for improving the information available to the negotiators and Congress. Ironically, by preparing the initial NAFTA environmental review with public comments and hearings, the USTR proved that such an endeavor is feasible.

Not only did the USTR prepare environmental reviews in connection with NAFTA, but it also prepared an environmental review on the Uruguay Round. Thus, the USTR itself has acknowledged that it is possible to assess the environmental effects of trade agreements. The key issue is whether the USTR will have unfettered discretion to choose what environmental aspects to access, when it will do so, and, most importantly, whether the USTR will include the public in this process.

There is no need to search far and wide for a workable model to assess the environmental effects of trade agreements; Congress established the model in NEPA more than twenty years ago. The issue of whether NEPA requires the USTR to prepare environmental impact statements (EIS) on trade agreements has been considered by the courts for three years without a definitive resolution. Although the only court to reach the merits held that "the plain language of the NEPA makes it a foregone conclusion that the [USTR] must prepare an EIS on the NAFTA." Although the court of appeals reversed because it concluded that the plaintiffs could not, under the Administrative Procedure Act (APA), obtain judicial review of the USTR's refusal to prepare an EIS on NAFTA, the court never suggested that the USTR had no obligation to comply with NEPA. Thus, under that decision, the USTR retains whatever obligations it has under NEPA, even though private litigants may not enforce those obligations under the APA.
Even if the USTR disagrees that NEPA applies to trade agreements, it should look to NEPA for guidance in developing a system to assess the environmental effects of trade agreements. No less an authority than Secretary of State Warren Christopher recognized, while acting Secretary of State in the Carter Administration, the value of an environmental impact statement of the Panama Canal Treaty negotiations:

The National Environmental Policy Act has provided useful guidance in drafting the Panama Canal Treaties so as to avoid or mitigate the adverse environmental effects which might result from the implementation of the treaties. We recognized the importance of NEPA procedures in formulating environmentally sound policies as well as the value of public participation in the NEPA review process.¹³⁰

The USTR and many other trade experts are opposed to the notion of applying NEPA to trade agreements. Their opposition is the result of a fundamental misunderstanding of NEPA's requirements.

NEPA does not contain a rigid environmental impact statement requirement that will tie the USTR's hands. Instead, the requirement is flexible and designed to be adapted to each agency's individual statutory responsibilities and programs.¹³¹ In fact, NEPA requires each agency to develop procedures to tailor NEPA to its activities.¹³²

The USTR should comply with this obligation by conducting a rule-making proceeding, in consultation with the Council on Environmental Quality and EPA, to determine precisely how to comply with NEPA for trade agreements. Such a proceeding would draw on the USTR's expertise in its trade activities and on other agencies' expertise in environmental impact statements. As a notice and comment proceeding, it would also include input from outsiders with expertise in related matters and would provide the USTR with a sense of the public demand for particular procedures. The rule-making proceeding would address many challenges in applying NEPA to this arena, such as the timing of the review and public comment and the extent to which extraterritorial effects would be considered.

To ensure that valuable information and a variety of perspectives are injected into the trade negotiation process, the USTR should adopt a hybrid of requirements for ordinary EISs and for EISs on legislative proposals. The procedures for ordinary and legislative EISs differ in three respects: (1) the scoping process through which the agency identifies the environmental issues to be considered in further analyses is not required for the legislative EIS, (2) only the draft EIS is prepared on legislative rules implementing NEPA was dismissed on jurisdictional grounds without a decision on the merits. Public Citizen v. Kantor, 864 F. Supp. 208 (D.D.C. 1994) (appeal pending).

proposals, and (3) public comments are solicited on the draft legislative EIS (after it is submitted to Congress) and are forwarded to Congress with agency responses.\textsuperscript{133} The principal reason for the truncated legislative EIS procedure is that the legislative proposal is raw material for the legislative process, which supplies ample means to develop an independent record on the environmental effects of the proposal and the viable alternatives.

Trade agreements do not fit the legislative model. Although the request for congressional approval is a legislative proposal under NEPA, that proposal is more than simply raw material for the legislative process. The core proposal, \textit{i.e.}, the trade agreement, is fixed. Moreover, fast-track rules limit congressional ability to develop its own informed analysis of the agreement's effects. As a result, an EIS prepared only at the legislative proposal stage would fail to inject environmental considerations into the decision-making process at a time when they may affect the core decisions being made. It is, therefore, critical to adhere to most of the ordinary EIS procedures, along the lines of the following model.

First, a public scoping (or identification) process should take place early in the negotiations.\textsuperscript{134} This process should be analogous to the preparation of the initial review on environmental issues likely to arise in the NAFTA negotiations. Since the scoping document looks at general issues warranting consideration, it would not disclose any sensitive negotiating positions. Therefore, it could be developed through a public process, with opportunities for public comment and hearings, as was done with the NAFTA review. Not only would this analysis inform the public and the negotiators of the issues likely to arise, but it would also serve as an early barometer of public and congressional reaction to the relevant environmental issues.

Second, a draft EIS should be prepared during the negotiations so that the decision-makers have an analysis of the environmental effects of the proposals under consideration.\textsuperscript{135} The draft EIS should focus on the trade agreement itself, something that was not done for NAFTA until more than one year after the agreement was completed and that was done for the Uruguay Round when the implementing legislation was being drafted. Since the USTR would draft the EIS, it can ensure that the EIS will not contain information that may compromise sensitive negotiating positions or that was shared by other countries in confidence.

One of NEPA's most important requirements is that a draft EIS must be released for public comment before the final decision has been made.\textsuperscript{136} That requirement is apt here. The draft EIS could be a useful mechanism for making information about the agreement public without releasing a full text of the provisions under negotiation. Moreover, the public should have an opportunity to provide input into the assessment of

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133. 40 C.F.R. § 1506.8 (1993).
134. 40 C.F.R. § 1501.7 (1993).
Third, the final EIS, responding to public comments, could be finalized after the conclusion of the trade agreement. The final EIS would focus on 1) any changes made in the trade agreement during the period after release of the draft EIS, 2) the comments to the draft, and 3) the specific provisions of the implementing legislation. It would supply a complete analysis of any aspects of the agreement or implementing legislation that had not yet been fully assessed in the draft.

The final EIS should be submitted to Congress (and made available to the public) along with the implementing legislation. While the Council on Environmental Quality regulations allow a legislative EIS to be submitted up to thirty days after legislation is submitted to Congress, they also require that the EIS be available before the proposal is subject to congressional hearings or consideration. To ensure that an EIS on a trade agreement is available for congressional consideration, it must be submitted along with the implementing legislation. Indeed, this is when the environmental reviews on NAFTA and the Uruguay Round were released.

The USTR should have the first opportunity to develop workable procedures for preparing EISs on trade agreements. However, if it fails to do so, or if its approach falls short of objective, balanced analysis and public participation, Congress should intervene and devise appropriate procedures.

5. **The Trade Advisory Committee System Should Be More Open and Balanced.**

The Trade Acts establish an extensive advisory committee system that gives advisory committee members access to inside information about trade negotiations and related matters and offers opportunities to participate in the development of those trade policies. The most influential of these committees, the Advisory Committee for Trade Policy and Negotiations (ACTPN), is charged with providing advice on virtually all aspects of trade negotiations and implementation of trade agreements and policies. More than three dozen other advisory committees have been established to reflect various policies, such as services, investment, and defense; many industrial sectors, including chemical products, tobacco, electronics, energy, wood products, paper products, and nonferrous metals; and "functions," which embrace intellectual property and customs.

These committees must be consulted and kept informed "on a continuing and timely basis" about "significant issues and developments and overall negotiating objectives and positions of the United States and other

137. For the Uruguay Round negotiations, this draft EIS could have been prepared on the Dunkel draft, which was released to the public in December 1991. Any changes to that text could then have been analyzed in the final EIS.

138. 40 C.F.R. § 1502.9(b) (1993).

139. 40 C.F.R. § 1506.8 (1993).

140. 19 U.S.C. § 2155(a), (b) (1988).
parties.\textsuperscript{141} In addition, the ACTPN and other committees whose subject matters are affected by a trade agreement must prepare a report on the trade agreement shortly after the conclusion of negotiations.\textsuperscript{142} This guarantees members of the advisory committees immediate access to the final trade agreement long before the agreement is generally available to the public. In addition, the advice given by these committees must be taken into account in determining the U.S. negotiating positions, and the committees must be informed of any "significant departures from such advice or recommendations."\textsuperscript{143}

Members of these committees have access to inside government information about the overall negotiating objectives and bargaining positions of the United States, even where such information is classified, contains trade secrets, or is otherwise confidential.\textsuperscript{144} A 1989 Commerce Department publication touting the benefits of serving on trade advisory committees during the negotiations leading to the 1979 Tokyo Round of GATT agreements reported that members had access to a vast store of classified documents concerning negotiations and a database that transmitted their views directly to government negotiators.\textsuperscript{145} With regard to the advisory committees' influence, the publication claimed:

The advisory committee members spent long hours in Washington consulting directly with negotiators on key issues and reviewing the actual texts of proposed agreements. For the most part, government negotiators followed the advice of the advisory committees . . . . [W]henever advice was not followed, the government informed the committees of the reasons it was not possible to utilize their recommendations.\textsuperscript{146}

More than 800 industry representatives serve on the advisory committees. Until recently, none had any representation of environmental or consumer interests. Rather, they had been comprised almost entirely of representatives of industry with a few representatives of labor organizations. Not only are these committees dominated overwhelmingly by industry, but a significant number of the industry members have poor environmental records and have worked to defeat strong environmental regulations.\textsuperscript{147}

In response to public and congressional objections at this skewed representation, expressed during the 1991 debates over extending fast-track authority, the USTR appointed representatives of environmental organizations to ACTPN and four other trade advisory committees in 1992. The remaining committees, even those dealing with important environmental and public health issues, such as those concerning chemicals, tobacco,

\begin{itemize}
  \item \textsuperscript{141} Id. \S 2155(i).
  \item \textsuperscript{142} Id. \S 2155(e).
  \item \textsuperscript{143} Id. \S 2155(a) (3), (i).
  \item \textsuperscript{144} Id. \S 2155(a)-(c), (g), (l).
  \item \textsuperscript{145} Government Seeks Advice from Industry on U.S. Trade Policy, Bus, Am., Jan. 16, 1989, at 8.
  \item \textsuperscript{146} Id. at 9.
  \item \textsuperscript{147} Tom Hillard, Public Citizen, Trade Advisory Committees: Privileged Access for Polluters (1991).
\end{itemize}
fruits and vegetables, energy, wood products, and paper products, still lack any environmental or consumer representation. In response to requests for additional appointments of environmental and consumer representatives to the trade advisory committees, the USTR has taken the position that no such representation is legally required, and for years it had refused to make any additional appointments. Recently, however, a consumer representative and an environmental representative were appointed to the ACTPN. In addition, President Clinton issued an Executive Order establishing a trade and environment advisory committee as part of the trade advisory committee network. Only some of the members of this committee, however, represent environmental and consumer interests.

Virtually all of the meetings of the trade advisory committees are held in closed session, and the USTR routinely withholds their records from the public. Indeed, the U.S. Trade Representative recently directed that all meetings to be held by twenty-one of the trade advisory committees will be closed from March 1, 1994 to March 1, 1996. He did this by making a determination that all such meetings will be concerned with matters that would, if disclosed, seriously compromise the government's negotiating objectives and bargaining positions. This blanket determination runs counter to longstanding open meeting principles requiring that agency officials make closure determinations with respect to particular meetings based on the agenda for the meeting, that only those portions of meetings requiring secrecy may be closed, and that the public should receive notice of closure determinations in order to have some way to challenge those determinations administratively or in court.

In addition, secrecy rules prevent trade advisory committee members, including the few environmental representatives, from sharing any of the information that they gain through their service on the committees, even with their own staffs. Therefore, the trade advisory committees enable more than 800 industry representatives and only a few specially chosen environmental representatives to obtain more information about trade negotiations and have far greater opportunities to provide input into those negotiations than the general public.

149. Letter from Joshua Bolten, General Counsel, Office of the U.S. Trade Representative to Public Citizen (Feb. 3, 1992) (on file with the Cornell International Law Journal).
150. The individuals are affiliated with Consumers Union and the Environmental Defense Fund. The appointments were announced days after Consumers Union announced its support for the Uruguay Round in a USTR press conference.
This system was devised before trade agreements injected themselves into a whole array of domestic health and environmental matters, and thus it is poorly suited to the types of problems now arising in the negotiations. The trade advisory committees grant preferred access to a large number of insiders at the expense of the interested public at large. Congress and the USTR should rethink the entire trade advisory committee system and consider replacing it with other mechanisms for expert and public input.

If the trade advisory committee system is retained, however, several reforms are in order to make it more balanced and open. First, all of the advisory committees must have balanced representation of interests including environmental and consumer interests affected by the trade matters under consideration. The Bush Administration belatedly and partially recognized the problem of unbalanced representation by appointing a few environmental representatives to some of the trade advisory committees. However, it left dozens of advisory committees without any environmental and consumer representation, including committees dealings with such matters as the chemical industry, tobacco, energy, and wood products. This type of one-sided advisory body is contrary to the Federal Advisory Committee Act (FACA) and rules of fair play. All trade advisory committees must be balanced in terms of the views represented.

The environmental and consumer representatives on the trade advisory committees should also present a balanced range of viewpoints. If, for example, all the environmental representatives supported NAFTA, an issue on which the environmental community was sharply divided, the committees would likely violate FACA's balanced viewpoint requirement and would, as a practical matter, lack the credibility and legitimacy that would enable them effectively to carry out their duties. The trade and environment advisory committee should also not be viewed as an excuse to maintain skewed memberships on other existing trade advisory committees; those committees should still be required to include consumer and environmental representation.

To achieve these goals, Congress should make it clear that all trade advisory committees are fully subject to the balanced membership requirements of the Federal Advisory Committee Act. In order to provide more explicit guidance to those appointing members to such committees, Congress should go further and spell out the precise interests that must be represented. The Trade Acts currently specify some interests that must be represented, and the USTR has justified excluding consumer and environmental representation where the statute does not explicitly require such

155. The same imbalance is created if, as is currently the case, the sole consumer representative on the trade advisory committees is affiliated with the only consumer (or environmental) organization that is supporting the Uruguay Round.
Therefore, it is critical that Congress specify that environmental and consumer representation is required on any advisory committee dealing with matters affecting the environment, health, or safety.

Under the Trade Acts, the ACTPN, the most powerful of the trade advisory committees, "shall include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, and consumer interests."158 The Trade Acts further require that the ACTPN "shall be broadly representative of the key sectors and groups of the economy, particularly with respect to those sectors and groups which are affected by trade."159 These mandates should apply not only to the ACTPN, but to all trade advisory committees.

The Trade Acts authorize the establishment of two other types of advisory committees but do not mandate that certain interests be represented. Lists of interests to be included on the committees are provided, but the Acts require their inclusion only "insofar as practicable" and do not specifically identify consumer or environmental interests.160 The USTR and the Department of Commerce have construed this omission to permit skewed trade advisory committees that exclude any environmental and consumer representation. To ensure representation of these interests, Congress should specifically identify them in the statute as ones that must (not "insofar as practicable") be represented on any trade advisory committee affecting environmental, health, safety, or consumer matters.

Second, the Trade Acts currently except the trade advisory committees from certain openness requirements of the FACA. In particular, their meetings are exempt from FACA's advance notice, openness, public participation, and open records provisions "whenever and to the extent it is determined by the President or his designee that such meetings will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives or bargaining positions ...."161 By invoking this language, the USTR can close virtually all trade advisory committee meetings and refuse to make transcripts of those meetings available to the public, even when they pertain to a trade agreement that has been

158. 19 U.S.C. § 2155(b) (1).
159. Id.
160. 19 U.S.C. § 2155(c) (1), (2).
concluded.\textsuperscript{162}

This authority should be repealed. The FACA itself incorporates the exemptions to the open meeting requirements of the Government-in-the-Sunshine Act,\textsuperscript{163} and the national security exemption protects foreign government information and other information that would, if released, harm foreign relations. Likewise, the Freedom of Information Act\textsuperscript{164} exempts national security information from its mandate that the records of agencies and, through the FACA, of advisory committees be made available to the public. These exemptions provide ample authority to close those portions of trade advisory committee meetings and to withhold those records that must be kept secret to protect sensitive negotiating positions. They do not, however, enable the government to cloak trade negotiations in excessive secrecy that keep the public in the dark about non-sensitive matters. The largely discretionary and unconstrained authority given to trade advisory committees to operate in secret should be repealed.\textsuperscript{165}

In sum, Congress and the USTR should conduct a public assessment of the trade advisory committee system. The system gives a large number of insiders preferred access and lessens the incentive to develop mechanisms for obtaining input from the public at large. At a minimum, the trade advisory committee system should be made more balanced and open. Ultimately, however, it may be appropriate to replace the entire system with other mechanisms for expert and public input.

B. The Implementation of Trade Agreements

Aside from establishing trade rules that domestic standards must meet, recent trade agreements create two mechanisms for directly shaping domestic standard-setting activities. First, they create incentives and a system for harmonizing domestic standards. Second, they require countries to permit imports of some goods that do not comply with domestic standards, where the goods satisfy different, but equivalent, standards. Because both processes are becoming regular features of international trade agreements, procedures should be established to ensure that they are conducted in an open, accountable manner with public participation.

\textsuperscript{162} Letter from Laura B. Sherman, Office of General Counsel, Office of the U.S Trade Representative to Public Citizen (Oct. 28, 1992) (on file with the Cornell International Law Journal); see supra notes 152-55 and accompanying text.

\textsuperscript{163} 5 U.S.C. § 552b(c) (1988).


\textsuperscript{165} At some point, disclosures of trade secrets or confidential business information to members of trade advisory committees may be so extensive that it amounts to industry-wide access and the information can no longer be said to be confidential. In those situations, further disclosures of the information would cause no competitive harm, but would simply even the playing field between insiders and outsiders. Congress should consider this issue expressly because a recent decision of the U.S. Court of Appeals for the D.C. Circuit may permit such extensively disclosed information to be withheld. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), \textit{cert. denied}, 113 S. Ct. 1579 (1993).
1. **Harmonization and U.S. Participation in International Standard-setting Activities**

Both NAFTA and the Uruguay Round would require countries to use international standards as a basis for their own. Domestic standards that conform to specified international ones are presumed to be consistent with both trade agreements, while domestic standards that do not conform to them must satisfy a battery of GATT or NAFTA tests in order not to be considered unfair trade barriers.\(^{166}\)

By subjecting domestic standards that provide greater public health protection to a separate set of stringent requirements, these trade agreements create strong incentives for the United States to avoid exceeding international standards. Moreover, these provisions require domestic decision-makers to begin with the relevant international standard and allow deviations from it only if certain conditions set forth in the agreement have been met.

As part of their promotion of international standards as the preferred ones, NAFTA and the Uruguay Round require countries to participate in international standard-setting activities.\(^{167}\) However, neither agreement establishes any openness or public participation requirements for such standard-setting bodies.

The NAFTA and the Uruguay Round also establish processes for harmonizing standards among the signatory countries.\(^{168}\) Representatives of each country will participate in committees to develop harmonized standards, which will become the preferred standards as far as the trade agreements are concerned.

The harmonization committees need not involve the public in their proceedings. Thus, there is no open meeting requirement, no right of access to their records and no requirement that the public be afforded an opportunity to comment on proposed standards. In this respect, these committees diverge sharply from domestic standard-setting processes in Congress or in federal agencies under the Administrative Procedure Act. Yet the final result of this process is the presumptively correct domestic standard.

Nor are states guaranteed a participatory role, even though they will be pressured to adopt the harmonized standard as their own. Moreover, a state standard that provides greater protection than the harmonized one will be suspect and vulnerable to challenge as an unfair trade barrier. For example, the Uruguay Round SPS and TBT Agreements prohibit domestic standards that are more restrictive than necessary to achieve the measure's objective. A recent GATT dispute panel concluded that a tax measure imposed by only five states was not "necessary" because other states had

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166. NAFTA, supra note 1, arts. 713(2), 905(1); SPS Agreement, supra note 1, paras. 9-10; TBT Agreement, supra note 1, arts. 2.4, 5.4.

167. NAFTA, supra note 1, art. 713(5); TBT Agreement, supra note 1, art. 5.5.

168. NAFTA, supra note 1, arts. 722, 913; SPS Agreement, supra note 1, paras. 38-44; TBT Agreement, supra note 1, art. 13.
found "alternative, and possibly less trade restrictive, and GATT consistent, ways of enforcing their tax laws."169 This rationale could be devastating if it were applied to the many health and environmental statutes that permit, but do not require, states to provide greater health or environmental protection than the federal government.170 Nonetheless, despite their strong interest in the harmonized standards, states are not included in their development.

Not only do the NAFTA and the Uruguay Round fail to incorporate any public participation procedures into the international standard-setting activities mandated in those agreements, but the United States has no existing procedures to ensure that its participation in such standard-setting activities adheres to democratic principles. Thus, although the United States has participated in the activities of the Codex Alimentarius Commission for three decades, it has never adopted any procedures for the public to participate in the development of the U.S. position on Codex standards. Instead, the United States has modelled the development of U.S. positions on the closed, industry-dominated Codex system, rather than on open and participatory domestic standard-setting procedures.

The principal avenue for outside participation has been through an advisory process established by the USDA and the FDA. The agencies have solicited advice from a broad group of industry advisors on the formulation of the U.S. position prior to Codex meetings. After providing the industry representatives with the agenda for upcoming Codex meetings, the draft U.S. position, and background materials, the agencies have convened meetings to obtain their input. In addition, the U.S. delegations to Codex meetings have included an array of industry representatives as nongovernmental advisors, representing every conceivable industry interest, ranging from the general, e.g., chemical manufacturers and food processors, to the specific, e.g., chocolate manufacturers and spice, banana, and peanut trade organizations. These industry representatives have been privy to the Codex deliberations and have been consulted by the official U.S. representatives throughout the process.

Prior to 1991, no consumer representatives were included in either the pre-meeting consultations or the U.S. Codex delegations. In December 1991, Public Citizen demanded that USDA and FDA open up the Codex advisory process and commit to making consumer representation a

170. See, e.g., Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v(a) (1988). Stronger state regulations may also be in jeopardy under the Uruguay Round requirement that a country must avoid arbitrary or unjustifiable distinctions in its levels of protection in different food safety situations. SPS Agreement, supra note 1, para. 20. Where a state is providing greater public health protection than the federal government or than other states, the United States might be considered to be pursuing inconsistent levels of protection in violation of this requirement.
permanent component of U.S. participation in Codex.171 In response, FDA convened a meeting with consumer and environmental organizations, and FDA, USDA, and EPA held a public forum on Codex.172

At the meeting, the agencies told the consumer and environmental organizations how they could participate in the existing advisory process. Thus, if an individual notifies the pertinent government official who coordinates U.S. participation in a particular matter, he or she will receive notices of Codex and U.S. advisory meetings, background material, and draft U.S. positions. The individual may attend the U.S. advisory meetings to discuss the U.S. position and may ask to be included as a nongovernmental advisor to the U.S. delegation to Codex meetings, although the United States has made no commitment to provide funding for consumer attendees.

The overture to include consumer and environmental organizations in the existing advisory process has not significantly improved public participation in U.S. Codex activities.173 First, only those organizations that were invited to the FDA meeting or attended the public forum know how to be included in the process. No other individuals or organizations (and perhaps none outside the Beltway) have received a comparable briefing on how to become an insider in the process. A local activist or academic working on a domestic issue that is being considered in Codex will still have no way of knowing that Codex is considering the matter and that he or she could have a role in shaping the U.S. position.

Second, the existing process caters to groups that have extensive resources to devote to Codex matters on short notice. Representatives of various industries have placed a high priority on monitoring and seeking to influence Codex activities for some time, and they have both the resources and the incentive to involve themselves in Codex matters. In contrast, consumer groups are new to this forum and are not accustomed to its methods of operation. Moreover, the resources of these organizations are often stretched to the limit in promoting their domestic agendas, with little to spare for this obscure international body.

Codex has recognized that consumer participation needs to increase if Codex standards are to have credibility and legitimacy. In 1991, the


Codex Commission endorsed a recommendation to improve consumer participation in Codex. Specifically, the Commission recommended that national governments: (1) stimulate consumer awareness of Codex through the media, existing organizations, and other means, (2) establish regular consultative procedures, such as a national Codex advisory committee, to ensure that consumers' views are given equal consideration in the formulation of national positions to those of producers, industry, and trade, and (3) support and fund the participation of consumer experts and representatives in Codex proceedings.\footnote{174} Despite these recommendations, the United States still has not established a systematic way to ensure balanced input into the development of Codex standards.

The International Conference on Harmonization (ICH) is another international harmonization activity that offers industry insider status but excludes consumer and public health organizations. ICH is co-sponsored by regulatory agencies and pharmaceutical trade groups in the United States, the European Union, and Japan to establish harmonized drug testing and approval requirements.\footnote{175} Despite the significance of its activities and the priority placed on them by FDA, no mechanism has been established to ensure consumer participation in ICH activities.

In April 1993, FDA sought public comment on several ICH draft guidelines and indicated that it was also considering whether to adopt the final guidelines domestically.\footnote{176} By this time, the ICH had been working on developing the guidelines for two years, and the FDA had only one remaining opportunity to comment on them. Despite the complexity of the issues, and the voluminous record underlying the guidelines, the public had only one month to submit comments. Not surprisingly, few outsiders submitted comments.

Moreover, when FDA sought public comment on the ICH guidelines, it indicated that it would decide, based on the comments received, whether to adopt the guidelines as the pertinent U.S. standard. Indeed, the FDA sought public comment for the first time on an ICH guideline on clinical safety data management in connection with its decision whether to adopt that guideline.\footnote{177} However, once the FDA has invested its resources in developing the ICH standard, it will have a vested interest in that standard and may balk at objections that were not raised in the ICH proceedings. As a result, the most opportune time for public input is during the development of the harmonized standard and not when the United States is deciding whether to adopt that standard as its own.

\footnote{174} Report of the Nineteenth Codex Session, \textit{supra} note 53.  
\footnote{176} 58 Fed. Reg. 21,074, 21,082, 21,086 (1993) (reproductive toxicity testing, geriatric studies, and stability testing).  
The Codex and ICH experiences demonstrate that the federal government should have uniform procedures for obtaining public input on the development of international standards. The United States should insist that international standard-setting bodies provide opportunities for public oversight and input. At home, Congress should prescribe uniform procedures for U.S. participation in international standard-setting activities.

These procedures should be modelled on the Administrative Procedure Act's requirements for notice-and-comment rule-making, the requirements for public access to records under the Freedom of Information Act, and the balance requirements of the Federal Advisory Committee Act. They should also borrow generally from the scientific data requirements for agency decision-making. At a minimum, these procedures should include the following recommendations.

a. Public information about international standard-setting activities

The federal government should periodically notify the public of all international standard-setting activities in which it is involved. For every international standard-setting body in which the United States participates, the lead U.S. agency should notify the public of the body's mandate, how it operates, and the people or offices that can supply further information. These notifications should be placed in the Federal Register and other widely distributed publications. The agencies should also take affirmative steps to ensure that consumer, health, and environmental organizations and interested academics receive information about these activities.178

b. Public input in setting the agenda

The lead U.S. agency should solicit public input in identifying matters that should and should not be included in the agenda of the international standard-setting body. Once the international body has set its agenda, the lead U.S. agency should publish that agenda to alert interested individuals that the international body is addressing specific matters and to invite interested individuals to submit relevant data.

c. Ensuring adequate databases for decisions

The lead agency should ensure that the standard-setting body (or the particular individual responsible for developing its proposals) has the most complete data available to any federal or state agency on matters under consideration. International standard-setting organizations often lack the power to compel industry to submit data, in contrast to domestic agencies.

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178. The GATT implementing legislation requires the Secretary of Commerce to make available to the public information regarding the membership of the federal, state, and local governments in international and regional standard-setting bodies. Uruguay Round Agreements Act, § 431 (a). It also requires responsible agencies to publish annually a notice in the Federal Register of the sanitary and phytosanitary standards under consideration or planned for consideration by international standard-setting organizations. Id. § 432.
In Codex, for example, an individual assigned to draft the Codex proposal relies on data available to him or her, but there has been no mechanism to ensure that the data set is the most complete available to Codex members. As a result, Codex standards have been criticized as being based on incomplete and inadequate data.

d. Notice and comment on draft standards
Whenever the standard-setting body distributes a proposal to the U.S. participants, that proposal should be made available to the public for comment. Early availability is critical because it is far more difficult to affect the decision-making process after significant deliberations have taken place. The U.S. participant should then consider the comments and explain publicly its rationale for accepting or rejecting them. If there are any substantial changes in the proposal, the U.S. participant should seek another round of comment on the redrafted proposal and consider further comments in developing its position.179

e. Publication of final standards and U.S. positions
When an international body adopts its final position, the U.S. participant should publish that position in the Federal Register, along with the U.S. response. If the United States must decide whether to give an international standard domestic effect or to permit imports that comply with it, the United States should make that decision through notice-and-comment rule-making. For example, the United States must decide what status to give Codex standards domestically (acceptance, free passage or nonacceptance). The results of that process should be made easily accessible to the public through publication in the Federal Register and the Code of Federal Regulations.

All standards adopted by international standard-setting bodies should be indexed and made affirmatively available to the public in accordance with the FOIA's affirmative disclosure provisions.180 Currently, Codex standards and the U.S. position with respect to them are not easily accessible to the public in the United States. The lead agency should prepare an index of all such standards and ensure that they are easily accessible electronically or through depository libraries.

f. State and local government participation
Where an international standard concerns a matter within existing state or local regulatory authority, the state or local governments should be included in the development of the U.S. position. The states should have the authority to select their representatives if it is not feasible to consult with all affected states.

179. The GATT implementing legislation requires responsible agencies to provide the public with an opportunity to comment on such standards and to take such comments into account when considering and proposing matters for consideration by such organizations. Id. § 432.
g. Advisory committees

In order to ensure a more open, inclusive process of developing the U.S. positions, agencies may wish to establish advisory committees with significant environmental and consumer representation. This would facilitate the development of ongoing relationships with interested groups and increase their knowledge and ability to be meaningful advisors.

h. Funding consumer and environmental involvement

The lead agency should also provide the funding needed to enable environmental, health, and safety experts and nongovernmental bodies to participate fully in international standard-setting activities. The organizations able to present environmental and consumer perspectives generally have resource limitations that prevent them from monitoring and attending meetings in other countries. As a matter of practice, the European Union funds nongovernmental participation in its proceedings. Such funding has been provided on a case-by-case basis by the U.S. government to public interest organizations participating in Codex proceedings. In contrast, industry representatives have the resources to participate in bodies such as Codex and are even co-sponsors of the ICH. It may be feasible to require industry participants to pay a stipend to help fund nongovernmental organization participation. In any event, environmental and consumer representation will improve only once there are sufficient resources to support their participation.

i. Balance in U.S. advisors

The United States should ensure that its advisors are balanced in terms of the perspectives and interests represented both in establishing its position and in participating at international standard-setting meetings.

2. Equivalence Determinations

In order to liberalize trade in goods, the most recent trade agreements (NAFTA and the Uruguay Round TBT and SPS Agreements) require countries to permit imports of some goods that do not satisfy their own standards if the goods meet different, but equivalent, standards. Similar requirements apply to conformity assessment procedures, which are inspection, certification, and approval processes to determine whether goods conform to domestic standards.

The concept of "equivalence" has led to controversy under the U.S.-Canada Free Trade Agreement (USCFTA) in the area of meat and milk inspection. Prior to the USCFTA, USDA conducted random inspections of meat imported to the United States from Canada. Under the USCFTA, USDA conducted an equivalence study and determined that the Canadian

181. NAFTA, supra note 1, arts. 714(2), 906(4); SPS Agreement, supra note 1, para. 14; TBT Agreement, supra note 1, art. 2.7.
182. NAFTA, supra note 1, art. 906(6).
meat inspection procedures were equivalent to U.S. ones.\textsuperscript{183}

The General Accounting Office has criticized this equivalence determination for overlooking important considerations and for reaching certain conclusions without outside review. The equivalence study did not assess the Canadian system's control of, or testing for, drugs approved for use in Canada but not in the United States.\textsuperscript{184} In addition, the study made professional judgments about the scientific and health implications of differences in the two systems, such as the U.S. testing of end products for listeria contamination, in contrast to the Canadian testing of workers and the work environment in which the food is processed.\textsuperscript{185} These professional assessments were not peer reviewed.\textsuperscript{186}

Pursuant to its equivalence determination, USDA ceased inspecting all Canadian meat imports in 1989. Instead, it instituted a cursory reinspection system designed not to ensure that the meat imports met U.S. standards, but rather to ensure that Canada maintained its equivalent inspection system.\textsuperscript{187} Only certain shipments were inspected; USDA would give Canadian plants advance notice when a shipment was selected for inspection and allow Canadian inspectors to select the samples to be inspected.\textsuperscript{188}

The General Accounting Office criticized the relaxed border inspections, contending that USDA documentation did not support the conclusion that the Canadian meat inspection was equivalent to the U.S. system.\textsuperscript{189} Meat inspectors complained that Canadian producers were taking advantage of the cursory re-inspections and shipping contaminated meat.\textsuperscript{190} Under this system, the rejection rate for Canadian imports dropped by half, even though the Canadian rejection rate for U.S. meat doubled over the same time period.\textsuperscript{191}

The Canadian meat inspection example illustrates the controversial public health issues that underlie equivalence determinations. Nonetheless, NAFTA, like the USCFTA and the Uruguay Round of GATT, entitles countries to such a determination without requiring the assessment of every potentially significant public health issue or every inspection process. Applying the concept of equivalence to performance standards and good manufacturing practice requirements will present an array of diffi-

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\textsuperscript{183} U.S. General Accounting Office, Food Safety and Quality: USDA Improves Inspection Program for Canadian Meat, but Some Concerns Remain 1-2, 4, 14 (1992) [hereinafter Food Safety and Quality Report].
\textsuperscript{184} Id. at 3, 6, 20.
\textsuperscript{185} Id. at 5, 18.
\textsuperscript{186} Id. at 2, 7.
\textsuperscript{187} Id. at 1.
\textsuperscript{188} Id. at 2.
\textsuperscript{189} Id.
\textsuperscript{190} Affidavit of William J. Lehman, Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916 (D.C. Cir. 1992) (on file with the Cornell International Law Journal).
\textsuperscript{191} Food Safety and Quality Report, supra note 183, at 3, 25.
\end{flushleft}
cult problems, similar to those presented by the different regulatory approaches to the detection of listeria contamination.

The concept of equivalence also fueled a formal trade challenge under the USCFTA to Puerto Rico's restrictions of Canadian exports of ultra-high temperature milk. In 1990, responding to FDA pressure, Puerto Rico adopted the standards and inspection procedures that are in place throughout the rest of the United States. This milk inspection system is preventive in nature, designed to ensure milk industry compliance with safe sanitation standards and practices. It relies heavily on inspections and certifications by state and local agencies. The Canadian UHT milk did not comply with the Puerto Rican standards, and neither Canada nor Quebec had joined the inspection and certification system used by Puerto Rico and the rest of the United States.

Although the Puerto Rican authorities were involved at the outset, the FDA soon took the lead role in trying to work out a solution. It urged Quebec to participate in the inspection system, in which case the FDA would certify its rating officers, but, because of the large expense involved, it agreed to do so only if Canada would participate fully in the system. As an alternative, the FDA suggested that Quebec contract with a northern state (such as Vermont) to have its authorized inspectors, laboratory officials, and rating officers carry out the required inspections and ratings. Canada rejected these options and argued that its standards were substantially equivalent, and thus its milk had to be accepted. In response, imports of Canadian UHT milk were barred at the end of 1991.

Canada demanded an equivalence study, but the two countries could not agree on the parameters of the study. In September of 1992, Canada requested establishment of a dispute settlement panel. The USTR then indicated that it would be too costly to conduct an equivalence study and participate in the dispute settlement process at the same time.

The panel convened under the USCFTA concluded that the United States had nullified and impaired Canada's expectations under the USCFTA by closing the Puerto Rican market to UHT milk during the course of negotiations on equivalence, and it recommended the expeditious completion of an equivalence study. The FDA is now conducting the equivalence study, but the study is quite costly and has required the FDA to divert funds from its other statutorily-mandated public health missions.

This dispute highlights the expense and commitment of resources involved in equivalence determinations from a domestic perspective and the absolute right to such a determination on an expeditious basis from a trade perspective. The confusion among the U.S. actors at the federal and state levels and in the USTR and FDA were partly responsible for the challenge. In order to avoid future confusion over the respective roles of federal and state agencies and to include the public in equivalence

determinations, the United States should establish a uniform, open, and participatory process for making such determinations.

Before turning to what that process should entail, one other recent equivalence experience warrants mention because it illustrates the effect that such a determination may have on state laws. After the Department of Transportation decided in 1991 to grant reciprocal status to Mexican commercial drivers’ licenses, it concluded that the Mexican standards were compatible with U.S. standards. It thus required states to recognize Mexican commercial drivers’ licenses and preempted them from requiring Mexican drivers to obtain state commercial drivers’ licenses. Moreover, the Department made clear that noncomplying states could lose federal highway funds.193

In July of 1992, the California legislature passed a resolution directing the California Department of Motor Vehicles to continue enforcing California requirements for commercial drivers.194 Nonetheless, when the Federal Highway Administration threatened to withhold federal highway funds, the California Department of Highway Patrol decided to recognize Mexican commercial drivers’ licenses.195

The International Brotherhood of Teamsters challenged the Department of Transportation’s recognition of Mexican commercial drivers’ licenses, contending (among other things) that the Department had failed to follow the notice-and-comment rule-making requirements of the Administrative Procedure Act (APA) in making its equivalence determination.196 The Department had announced that it had granted Mexican commercial drivers’ licenses reciprocity without affording the public an opportunity to comment on whether the Mexican standards are, in fact, compatible with U.S. safety standards.

The Teamsters contended that Mexican commercial drivers’ licenses are not equivalent to U.S. licenses because there is no assurance that Mexican drivers have sufficient knowledge of the English language to understand highway signs, respond to official inquiries, and file reports, which are critical for safeguarding hazardous materials. Nor are there comparable Mexican requirements for sufficient knowledge to operate equipment safely or for special authorization to operate double or triple trailers, passenger vehicles, tank vehicles, hazardous materials vehicles, or air brake-equipped vehicles. The Teamsters also complained that the reciprocity agreement did not require an adequate exchange of information to per-

194. Cal. Con. Res. 128, ch.70 (1992). The resolution highlighted concerns that Mexican licenses last 10 years as opposed to four-year California licenses, are based on different medical requirements, and do not require special certificates for driving double trailers, tank trucks, buses, or hazardous materials. It also stressed that there was no evidence that Mexico applies similar sanctions, such as barring drivers convicted of second drunk driving offenses from driving commercial vehicles, and that there was an inadequate communication link to check traffic offenses and license revocations.
mit identification of disqualified Mexican drivers.\textsuperscript{197}

The Department contended that it had complied with the APA by allowing the public to comment on the general issue of pursuing reciprocity and pointed out that it had received comments from the Teamsters and others indicating that reciprocity would be acceptable if the other country's licenses met U.S. safety standards. In the Department of Transportation's view, however, no public comment was required on the question of whether Mexican commercial drivers' license requirements are, in fact, equivalent to U.S. requirements, including those pertaining to safety.\textsuperscript{198}

In March of 1994, the U.S. Court of Appeals for the D.C. Circuit rejected the Teamsters' challenge. The court held that recognition of Mexican drivers' licenses was exempt from notice and comment rule-making either because it fell within the foreign affairs rule-making exception or because the international reciprocity agreement resolved the issue, and therefore the Department had no remaining discretion to exercise through rule-making.\textsuperscript{199}

The rationale of the D.C. Circuit decision could eliminate open and participatory processes for domestic health, safety, and environmental regulations where an international agreement or development resolves the issue. Yet none of the trade agreements with equivalence provisions—the U.S.-Canada FTA, NAFTA, and the Uruguay Round SPS and TBT Agreements—have any alternative procedures for ensuring a public role in equivalence determinations. Given the controversial and inherently subjective nature of equivalence determinations, public scrutiny and input is essential.

The United States should adhere to notice-and-comment rule-making requirements when making equivalence determinations. However, due to the unique nature of these requests for waivers of applicable laws and regulations, Congress should prescribe a process for making equivalence determinations that establishes both procedural and substantive safeguards.

a. All procedural and substantive requirements must be met or exceeded

Substantively, the rules should require that every potentially significant public health issue and every inspection process must be assessed in the equivalence determination, and they should ensure that the other country's standard meets or exceeds the goal of each procedural or substantive requirement of the standard.

The Canadian meat inspection equivalence determination did not assess whether the Canadian system tested for drugs that were approved in Canada but not in the United States. It turned out that neither the Cana-
dian inspectors nor the cursory U.S. border inspections tested for several drugs used in Canada. When the federal government preempted state commercial drivers' license requirements pursuant to its Memorandum of Understanding with Mexico, controversy arose over whether Mexico had adequate safety requirements, for example, to ensure the safe transport of hazardous materials. These examples show that it is imperative that each equivalence determination address every facet of the U.S. standard and the protection that it affords.

b. Environmental and public health protection must never be reduced

Another substantive limitation should be imposed on equivalence determinations: they should never lead to a reduction in the level of protection provided to the public, nor should they lead to less effective means of implementing or enforcing a level of protection or other goal.

The NAFTA implementing legislation replaced a standard that required imports to comply with requirements "at least equal to" our domestic standards. That language construes "equivalence" to ensure that it does not weaken the public health protection afforded in the United States. Although the NAFTA-implementing legislation abandoned this standard, the American public would probably not endorse the unfettered discretion offered in its place. Congress should adopt the now repealed "at least equal to" standard as the U.S. standard for equivalence.

Procedurally, the process should ensure that equivalence determinations are made on the basis of a public record and that there are opportunities for public input and peer review.

c. The agency responsible for the domestic standard must make the equivalence determination

The agency with responsibility for developing, implementing, or enforcing the domestic standard should be the entity responsible for making an equivalence determination. That agency has the best understanding of the scientific and policy underpinnings of the existing standard and of the health, safety, and environmental consequences of deviating in particular ways from the existing standard. For this reason, it should conduct the review and make the determination.

However, facilitating trade in goods that do not comply with domestic standards is not within the domestic mandate of most health, safety, and environmental agencies. Since equivalence determinations can be resource-intensive, they may detract from an agency's ability to promote its domestic public health, safety, or environmental agenda. While the substantive agencies should be responsible for making the equivalence determination, the funds for this task should come from the budgets of agencies charged with promoting international trade.

d. Public, on-the-record decision-making

The process should require that equivalence requests be made public and that they lead to the creation of an official docket on the matter. The
other country's justification for treating its standard as equivalent to our own must also be made public. The United States should refuse to entertain requests if the other country refuses to release both the request and its justification. The final determination should be open to the public and should be placed in the official docket.

e. Public participation
Upon receipt of a request for an equivalence determination, the lead agency should publish the request in the Federal Register and solicit public comments. It should take those comments into account in making its determination because it is promulgating the equivalent of a rule. The final equivalence determination should respond to all public comments and any peer review.200

f. Peer or other outside review
Equivalence determinations should be subjected to extensive peer review when issues arise concerning scientific, health, safety, or policy issues on which there is any substantial difference of opinion.

In assessing the equivalence of the Canadian meat inspection system, the USDA concluded that the Canadian goods manufacturing practice regulations were equivalent to U.S. testing of end products for listeria contamination. However, the General Accounting Office took the position that the scientific and health implications of these two approaches are controversial and should be reviewed by a neutral body of experts.201

g. The result of an equivalence determination
The equivalence determination should spell out precisely which requirements are waived for particular imports and prescribe a system of rigid monitoring to ensure that the equivalence determination continues to be valid. Public annual reports should describe the products that have been imported under the equivalence determination and the results of the ongoing monitoring. The reports should also disclose the costs of making and monitoring equivalence determinations to enable the public to assess the resources devoted to this endeavor. The equivalence determination should be redone periodically, but in no event should it be done less often than every five years.

C. U.S. Participation in Dispute Settlement Proceedings Under Trade Agreements
Trade agreements provide a mechanism for countries to bring trade challenges against measures of other countries that are allegedly in violation of

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200. The GATT implementing legislation requires the FDA to follow notice and comment procedures in making equivalence determinations. Uruguay Round Agreements Act, § 432. It is unclear why the FDA is made subject to this requirement but not the USDA, which has been involved in the most controversial equivalence determination thus far.

201. Food Safety and Quality Report, supra note 183, at 2, 5, 7, 18.
the trade agreement. These challenges are resolved by trade experts in secret, based on information supplied by governments without input from other entities. Trade dispute settlement bodies have rarely obtained input from outside experts even when they have had the authority to do so. If a trade panel finds that a measure violates a trade agreement, or otherwise impairs an expected benefit from the agreement, it typically directs the losing country to remove the offending measure, even if that requires a change in domestic law. The enforcement mechanisms have been greatly enhanced in the most recent trade agreements, which contain automatic authorization for the winning country to impose trade sanctions if the losing country does not comply with the panel ruling within a specified (relatively short) period of time.202

In recent years, trade challenges have been mounted to domestic health and environmental measures that had previously been thought to be the province of domestic law. Thus, laws and regulations designed to reduce tobacco use, to promote fuel economy, to inspect milk production for health reasons, to ban tuna imports to protect dolphins, to institute effective recycling programs, and to tax chemicals to fund the cleanup of toxic waste sites have been challenged as trade barriers.203 Several challenges have not been finally resolved, but others have been, thereby facilitating more cigarette exports to, and consumption in, several Asian countries, the invalidation of a reusable bottle component of Denmark's recycling program, and a U.S. regulation permitting residues of a suspected carcinogenic pesticide in imported wine.204

Because international trade disputes are considered sensitive international negotiations rather than formal adjudications, they are conducted in a closed environment. The secrecy and lack of public participation persists even though the proceedings have evolved into quasi-adjudicatory proceedings that rely on past decisions as precedent and establish rules to govern future matters.

The United States must work to open the international proceedings to public scrutiny, and to provide avenues for participation by affected interests in those proceedings. In addition, trade disputes calling for a decision as to whether certain health or environmental protections are impermissible trade barriers should not be made by trade panels, but instead should be resolved by a neutral forum. The United States should work to remove such disputes from the auspices of trade panels. Such reforms of the international trade dispute settlement system, by necessity, may not be accomplished by the United States alone. However,

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202. NAFTA, supra note 1, art. 2019; Dispute Settlement, supra note 35, § 22.
the United States can take immediate steps to ensure that its own participation in such proceedings is more open, participatory, and accountable.

1. The United States Should Select Panel Members with Expertise in Environmental and Consumer Matters

One place to start is with the selection of individuals to serve on international dispute settlement panels. An inherent bias is built into the dispute settlement system because the panels are composed of trade specialists and not individuals with more broad-based, diverse expertise. To counter this bias, the United States should ensure that candidates on the dispute settlement rosters and individuals selected to serve on particular panels have broader expertise and experience in environmental and consumer matters when a dispute implicates such matters. Section 106(b) of the NAFTA Implementation Act requires the United States to seek to ensure that panels dealing with environmental issues have environmental expertise. That principle should be expanded beyond environmental issues to other consumer, health, and safety issues, and beyond NAFTA to all international trade dispute settlement bodies.

As a related matter, there is currently no rule prohibiting an individual with a stake in the development of certain trade rules from serving on a panel. The only limitations concern the nationalities of the panelists. Recently, charges have been made that two members of a five-member panel hearing a softwood lumber dispute between the United States and Canada had failed to disclose that their law firms are or were representing the Canadian government and Canadian lumber interests. The United States should develop pervasive ethics and conflict of interest rules for trade panelists and a mechanism to ensure compliance with them. For example, candidates for inclusion on dispute settlement panel rosters should be required to complete financial disclosure forms and to abide by conflict of interest requirements analogous to those in the Ethics in Government Act. In addition, special conflict of interest rules should be developed for this purpose. The United States should establish such requirements for its nominees to international trade panels, and it should encourage other countries to do the same.

2. The Department of Justice Should Represent the United States in Trade Dispute Settlement Proceedings

Traditionally, the USTR has represented the United States in trade dispute settlement proceedings. At the same time, the USTR is the chief negotiator for the United States in international trade matters, and it is also the agency investigating trade practices of other countries and imposing retaliatory sanctions for trade barriers. Because the USTR is often a

205. Canada Unlikely to Yield to U.S. on Lumber Dispute Panel, J. COMM., Feb. 18, 1994, at 1A, 8A.
206. The Uruguay Round implementing legislation requires the USTR to “seek” the establishment of conflict of interest rules for dispute settlement panelists. Uruguay Round Agreements Act, § 123(c).
partisan player in the very trade matters that are the subject of trade challenges, it may have a tendency to bargain away one matter that is being challenged in return for an unrelated trade concession. That type of horse trading is anathema to the way that the federal government conducts domestic litigation.

It would be more appropriate for the Department of Justice to represent the United States before trade dispute settlement panels. Justice Department lawyers would, in essence, represent the USTR as the client agency. Where the matter at issue falls within the jurisdiction of another agency, that agency would be the client agency. For example, the Department of Transportation and the EPA would have been the client agencies in the European Union’s challenge to the U.S. fuel economy penalties and gas guzzler tax. If there is a conflict between the USTR’s trade goals and the other agency’s objectives, the Department of Justice would resolve that conflict and establish the U.S. position, as it does in domestic litigation. The Justice Department should be obligated to give due consideration to the views of all interested agencies and to any state with an interest in the challenged matter.

3. Dispute Settlement Records Must Be Easily Accessible to the Public

Trade disputes are shrouded in secrecy. The USTR has transplanted this secrecy from Geneva to its own offices. It has been virtually impossible to obtain timely access to submissions to trade panels and panel decisions.

Even though nothing in the text of the GATT mandated secrecy of these matters, until recently the United States had a practice of refusing to make public its submissions to GATT panels until after the GATT Council adopted the panel’s report. In the first Tuna Dolphin Case, this secrecy prevented the public from scrutinizing the U.S. position until after the culmination of the proceeding. Of course, the public had no ability to shape the U.S. position without earlier access. Alternatively, if the public had been able to review the initial submission when it was filed, it could have provided suggestions for the U.S. rebuttal submission.

Similarly, the U.S. Trade Representative has routinely refused to release GATT panel decisions until after the GATT Council has adopted them. This has enabled the USTR to place its gloss on the decision before the public and the media can evaluate it for themselves. For example, when the press reported the outcome of the first Tuna Dolphin challenge, the USTR commented publicly and briefed interest groups. However, the public was not able to review the decision until Inside U.S. Trade printed it several weeks later. By that time, the media had already covered the matter based on second-hand reports from those with a stake in the dispute.

In a lawsuit to compel the USTR to provide contemporaneous access to U.S. submissions and panel decisions, a federal district court declared

207. The GATT Council is comprised of all GATT contracting parties, and it may, by consensus, adopt panel reports, making them binding on the parties to the dispute and converting the decision into a legal interpretation of the GATT’s meaning.
that the USTR has no legal basis for withholding its submissions from the public until a GATT panel decision has been issued and adopted by the GATT Council. The court also declared illegal the policy of delaying public access to GATT panel decisions until after they are adopted by the GATT Council. The USTR did not appeal this decision. Accordingly, U.S. submissions to GATT panels should be publicly available once they are submitted to the panel, and future GATT decisions should be available to the public as soon as the United States receives them. In practice, however, it has still been difficult to obtain timely access to U.S. submissions and to panel decisions. Thus, long after the FOIA decision, several individuals have still been unable to obtain copies of U.S. submissions in recent high-profile disputes, despite making repeated requests for them to the USTR. In the face of these obstacles, the only way to obtain access to U.S. submissions is to file Freedom of Information Act requests and wait many months for a response. This approach creates unnecessary administrative burdens for both the USTR and the public.

The USTR has not catalogued or otherwise organized its dispute settlement records in a systematic manner that facilitates public access. In fact, the USTR has no system for ensuring that U.S. submissions and records documenting the resolution of past disputes are retained by the USTR after the attorney handling the case has left his or her position. As a result, the USTR cannot locate some past U.S. submissions and other records documenting the resolution of some disputes, and it often takes months for it to locate others. Although some recent submissions are available in the USTR reading room, that room is locked and accessible to the public only by appointment with an employee who is often unavail-

209. Id. at 388.
211. E.g., Discussion with Steve Charnovitz, Staff Director, Competitiveness Policy Council (May 4, 1994) (submissions in European Union’s challenge to intermediary tuna-dolphin embargo); discussion with Professor Kirsten Engel, Tulane University Law School (April 1994) (submissions in European Union’s challenge to fuel economy penalties and gas guzzler tax).
212. The Uruguay Round implementing legislation mandates that the USTR make the U.S. submissions available to the public promptly after they are submitted to a GATT panel. Uruguay Round Agreements Act, § 127(c). This affirmative disclosure obligation may force the USTR to comply with the district court decision. However, the implementing legislation permits the USTR to withhold information contained in the U.S. submission that another country treats as confidential. Id. The process of redacting such information itself delays public access. Moreover, the Center for Auto Safety and Public Citizen have filed a lawsuit seeking access under the Freedom of Information Act to the European Union’s submissions to the GATT panels considering the challenges to the U.S. intermediary tuna-dolphin embargo and to the U.S. gas guzzler tax and fuel economy penalties. Center for Auto Safety v. Office of the U.S. Trade Representative, No. 94-2238 (D.D.C. Oct. 18, 1994). If the plaintiffs succeed in that lawsuit, it would make no sense for the USTR to redact reference to the submissions from the U.S. submissions.
In order to ensure that dispute settlement records are preserved and easily accessible to the public, the USTR should adopt procedures for organizing and maintaining such records. Thus, the USTR should require that an official docket be maintained for every dispute settlement proceeding in which the U.S. participates. If some documents are not available to the public, a separate docket of the publicly available records could be maintained.

All submissions should be included in the appropriate docket as soon as they are filed. All panel decisions and other actions should be included in the public docket as soon as they are received by the United States. Any records disclosing any adoption of, or other action taken with respect to, the panel reports should immediately be made available to the public and included in the public docket.

The docket should be available at a location that is easily accessible to the public without pre-arranged appointments or other obstacles. Moreover, the official dockets should be preserved in an easily accessible location for historical purposes.

Congress should mandate that the USTR prepare a public report detailing the actions that it is taking to make both its participation in international trade disputes and the international trade dispute resolution processes more open. This report should specifically direct the USTR to spell out the efforts that it is taking to implement the district court decision on U.S. submissions and GATT panel reports and to adopt comparable procedures for disputes arising under other trade agreements. If the USTR does not establish procedures for making dispute settlement materials easily accessible to the public, Congress should mandate such procedures.

4. The United States Should Ensure that the Public has an Opportunity to Participate in the Development of the U.S. Position in Trade Dispute Settlement Proceedings

Once a dispute leads to a request for the establishment of a dispute settlement panel, the attorneys representing the United States should publish a notice in the Federal Register identifying the countries involved in the dispute, the challenged measures, the basis for the challenge, any domestic measures that are affected directly or indirectly by the dispute, the person to contact for further information, and the location of the official docket.

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214. The Uruguay Round implementing legislation requires the USTR to establish a public file for each dispute settlement proceeding in which the United States is a party. Uruguay Round Agreements Act, § 127(e). However, the file need not contain the other countries' submissions. See supra note 212.
The agency should also publish in the Federal Register the schedule for submissions to, and arguments before, the panel. The USTR has begun to publish a notice in the Federal Register at the outset of dispute panel proceedings. However, the notice tends to be cursory and is not followed up with other notices concerning the schedule.216

Where a U.S. measure is challenged, the Department of Justice should publish in the Federal Register a summary of the arguments made in the other country or countries' submissions and should solicit public comment and information to assist the United States in developing its submissions. This will enable the United States to obtain expert input from interested parties in an open way rather than by soliciting such input behind closed doors from only some of the affected interests as is currently done. Where the issue is particularly controversial or otherwise significant, the government should convene a public meeting to discuss the issues.

The United States should, as a matter of practice, routinely ask the other parties to a dispute to make their submissions available to the public. It is exceedingly difficult for interested individuals to assist the United States in responding to a challenge without access to the basis for that challenge. If the United States reveals some elements of the other disputants' arguments in its submission, it should insist that the other countries agree to waive confidentiality at least with respect to those portions of their submissions, even if they insist on keeping their own submissions secret. Currently, the USTR redacts those portions of its submission that reveal precise arguments made by the other disputants. It is often difficult to grasp the full thrust of the U.S. submission because of these redactions.217

The United States should permit outside interests to submit informative material to be attached to the U.S. submission, subject to reasonable rules to guard against duplication and frivolous submissions. When Public Citizen and the Center for Auto Safety prepared an amicus curiae brief defending the U.S. fuel economy penalties and gas guzzler tax and asked the USTR to attach that brief to the U.S. submission, the USTR refused to do so and never provided an explanation for its refusal. Amicus briefs attached to the U.S. submission would give outsiders the means to submit information to a dispute panel. It would also demonstrate to the panels

216. The Uruguay Round implementing legislation requires the USTR to publish a notice in the Federal Register describing a dispute settlement proceeding, to seek public comment, and to take such comments into consideration in preparing the U.S. submissions. Uruguay Round Agreements Act, § 127(b). It is important that this notice sufficiently inform the public about the nature of the dispute, so that meaningful comments and useful information can be supplied.

217. The Uruguay Round implementing legislation requires the USTR to request that the other countries involved in disputes in which the United States is a party make their submissions available to the public. Id. § 127(c)(2). Where the countries refuse, and in other disputes not involving the United States, the USTR must ask the other countries to prepare nonconfidential summaries of their submissions, which the USTR must then make available to the public. Id. § 127(d).
and other disputants that outsiders have valuable contributions to make to the dispute settlement process.

Conclusion
The global market is expanding its rules to shape matters that have previously been domestic prerogatives. Because of the growing and changing nature of trade policy, it should be subject to the same democratic and accountable processes that govern other domestic policy-making. The reforms proposed in this article would be useful first steps toward that goal.