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Public Participation in International Processes: Environmental Case Studies at the National and International Levels

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I. INTRODUCTION

The environment is now a highly productive area of concerted international activity. In recent years many environmental issues, such as stratospheric ozone depletion and exports of hazardous wastes, have become "internationalized" through shifts from domestic to international fora. Other environmental problems, such as the greenhouse effect, have been taken up in multilateral settings in the first instance, before any obvious prior domestic analogue was in place. Certainly this trend toward multilateral treatment of international environmental problems has much to recommend it. Multilateral agreements present opportunities to craft com-

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prehensive, effective, efficient regimes that are widely acknowledged as establishing international standards by a large number of countries and that minimize competitive disadvantages among them.

But on the international level, the primary, if not sole, actors are sovereign states as represented by their governments. In strong contrast to domestic processes, nonstate actors[1]—such as individuals, trade associations, and public interest organizations—often have rights that often are either nonexistent or poorly defined in multilateral fora. As a consequence, the otherwise desirable "internationalization" of environmental issues may provoke significant disparities between the treatment of similar or identical subject matter in domestic and international processes, most notably as those processes relate to the public. The greatest potential for clashes occurs on subject matter that is, or may be, the target of domestic requirements and that is treated sequentially or concurrently in both domestic and international fora.

Multilateral treaty negotiations—the principal venue for establishing international and, increasingly, domestic standards for environmental protection—are an obvious example of the potential for divergence between domestic and international procedures. The Congress, our national legislature, customarily publishes proposals for legislation, and that body's hearings and deliberations are ordinarily open to the public.[2] Similar requirements accompany the quasi-legislative function of promulgating regulations by the Executive Branch, which at a minimum must give public notice of proposed regulations, invite public comment on those proposals, and respond to public input in a final regulation.[3] Indeed, we are accustomed to thinking of public access to the workings of government as essential to the democratic process. But in multilateral treaty negotiations, where nongovernmental

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1. Unless the context requires otherwise, in this article terms such as "nonstate actor," "the public," "the private sector," and "private party" refer without distinction to any nongovernmental entity, including but not limited to individuals, nongovernmental environmental organizations, businesspersons, scientists, and media representatives.

2. *See* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment may require Secrecy"); 44 U.S.C. §§ 901–10 (specifying publication requirements for Congressional Record); Rules of the House of Representatives, Rule I(9)(b)(1) & (9)(b)(2), 101st Cong., 2d Sess. (1990) (The Speaker of the House shall "devise and implement a system subject to his direction and control for complete and unedited audio and visual broadcasting and recording of the proceedings of the House of Representatives. He shall provide for the distribution of such broadcasts and recordings thereof to news media. . . . All television and radio broadcasting stations, networks, services, and systems (including cable systems) which are accredited to the House radio and television correspondents' galleries . . . shall be provided access to the live coverage of the House of Representatives.").

3. *E.g.*, Administrative Procedure Act (APA) 5 U.S.C. § 553 (1994) (notice and comment rule making) [hereinafter APA].

"observers" may be excluded from drafting sessions and interim negotiating texts may be unavailable to the public, such guarantees are not to be taken for granted.

A related but distinct question concerns public participation in domestic processes that arise in a foreign policy setting. The Constitution assigns the President, the "sole organ of the nation in its external relations,"[4] and the Executive Branch which he heads, exclusive authority to negotiate international agreements on behalf of the United States (US). Those negotiations are vehicles for defining law simultaneously on both the international and domestic levels. Indeed, after the Senate gives its advice and consent by a two-thirds majority, a treaty has the same status in domestic law as a statute.[5] But the process of defining international commitments, which are determined in the first instance by the Executive Branch, differs considerably from that for domestic statutes enacted by the Congress. In contrast to the open, public procedure customarily followed by the Congress, international negotiations undertaken by the Executive Branch are often conducted in secret by agencies like the Department of State which have the authority to withhold important documents, such as negotiating drafts, from the public.[6]

Executive Branch activities on many domestic environmental issues are strictly regulated by clear, legislatively established requirements. Most administrative rule making must be accompanied by well-defined procedural guarantees, including publication of a proposed regulation in the *Federal Register*, an opportunity for public comment on that proposal, and a response to public comments in promulgating the final rule. By contrast, there has been little attempt at establishing statutory standards for the conduct of international negotiations, including those pertaining to the environment. Indeed, the principal legal authority on this point, the Admin-

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4. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

5. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) [hereinafter RESTATEMENT].

6. The executive order currently in force broadly authorizes classification of information concerning "foreign relations or foreign activities of the United States." Exec. Order No. 12,356, 3 C.F.R. 166 (1982). So, for example, a leak of what purported to be a draft of the North American Free Trade Agreement bore what appeared to be the US government classification of "confidential." *See infra* text accompanying note 66.

istrative Procedure Act, expressly exempts "a military or foreign affairs function of the United States" from otherwise applicable requirements for notice-and-comment rule making.[7]

To be sure, diplomacy, foreign policy, and national security have traditionally been associated with higher levels of confidentiality and secrecy than has domestic policy, a distinction generally reflected in the Constitution and the domestic law of foreign relations. This article raises the question whether actual practice with respect to public participation in the area of the environment and public health discriminates between domestic and foreign policy contexts in a rational manner, analyzing the competing policies of openness and secrecy in specific policy settings. Through the examination of concrete narratives, the article seeks to stimulate debate on the question whether these distinctions are warranted—a complicated issue that admittedly has no simple answer.

Accordingly, this article examines three case studies that highlight these disparities with particularity: (1) the first tuna dolphin decision under the auspices of the General Agreement on Tariffs and Trade (GATT)[8]; (2) environmental activities in the Organisation for Economic Co-operation and Development (OECD); and (3) a comparison of the negotiating histories of

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7. APA, *supra* note 3, § 553(a)(1). The exemption "is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those 'affairs' which so affect relations with other Governments, that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences." S. REP. NO. 752, 79th Cong., 1st Sess. (1946). Nonetheless, reliance on the exception has received judicial approval in a number of contexts, most notably international trade. *See, e.g.*, American Ass'n of Exporters and Importers Textile and Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985) (regulations relating to textile imports pursuant to Multifiber Arrangement); Mast Indus. v. Regan, 8 Ct. Int'l. Trade 214 (1984), *aff'd on other grounds sub nom.* Mast Indus. v. United States, 822 F.2d 1069 (Fed. Cir. 1987) (same). The exception has been criticized and its modification or repeal strongly recommended in the literature. *See* William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669 (1989); Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221 (1972) (advocating repeal of exception); Thomas M. Franck, *Public Participation in the Foreign Policy Process*, *in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 66, 75 (F. Wilcox & R. Frank ed. 1976) ("Total exemption of foreign affairs functions from administrative process is not justified. Many aspects of these functions are analogous to domestic issues now subject to process; the fact that they take on an international dimension does not necessarily or even probably mean that all forms of administrative process should be excluded.").

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, T.I.A.S. No. 1700, 55–61 U.N.T.S. [hereinafter GATT].

the Montreal Protocol on Substances that Deplete the Ozone Layer[9] and the North American Free Trade Agreement (NAFTA).[10] Taken together, these three factual and policy scenarios highlight: (1) variability in the treatment of nongovernmental observers among multilateral fora; (2) uneven public access to international negotiating processes on the national level through the Executive Branch; (3) disparate treatment of nonstate actors from industry and environmental organizations at the international level; and (4) lack of standardization among international institutions and within the Executive Branch in access to documentation produced by multilateral organizations.

The first case study, on the tuna dolphin report issued under the auspices of the General Agreement on Tariffs and Trade, shows that there are significant disparities between applying the law in domestic US courts on the one hand and in the quasi-adjudicatory GATT dispute settlement process on the other. The second case study, on environmental activities in the Organisation for Economic Co-operation and Development (OECD), highlights significant divergences in the domestic treatment of important documentation prepared by a key multilateral organization active on environmental issues. This case study also documents differential treatment within the OECD of industrial interests on the one hand and nongovernmental environmental groups on the other. The last case study, a comparison of the negotiating processes for the Montreal Protocol on Substances that Deplete the Ozone Layer and the North American Free Trade Agreement, documents differences in the treatment of nongovernmental observers and access to interim drafts in those two different contexts. These contrasting approaches among the international processes are mirrored on the domestic level, where the Executive Branch's policies in negotiating trade agreements differ substantially from those for the Montreal Protocol.

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9. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 100th Cong., 1st Sess. (1987), *reprinted in* 52 Fed. Reg. 47,515 (1987), 17 ENVTL. POL'Y & L. 256 (1987), Int'l Env't Rep. (BNA) 21:3151, 26 I.L.M. 1550 (1987), *adjusted and amended*, June 29, 1990, S. TREATY DOC. NO. 4, 102d Cong., 1st Sess. (1991), *reprinted in* 1 Y.B. INT'L ENVTL. L. 612 (1990), 30 I.L.M. 539 (1991), *adjusted and amended*, Nov. 25, 1992, S. TREATY DOC. NO. 9, 103d Cong., 1st Sess. (1993), *reprinted in* 32 I.L.M. 875 (1993) [hereinafter Montreal Protocol].

10. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, Dec. 17, 1992 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

II. THE GATT TUNA DOLPHIN DECISION: DISPARITIES BETWEEN DOMESTIC AND INTERNATIONAL ADJUDICATORY PROCESSES

This controversy concerns tuna fishing in the Eastern Tropical Pacific Ocean (ETP), where schools of tuna often travel below pods of air-breathing dolphins. Dolphins swim in the upper levels of the ocean, where they serve as a visible indicator of the presence of tuna below. Fishing boats employing the practice of "setting on dolphin" encircle pods of air-breathing dolphins with a purse-seine net to capture the tuna below. Setting on dolphin can result in widespread injury and death to the dolphins entangled in the nets. When both dolphin and tuna together are surrounded by purse-seine nets, the use of certain procedures can reduce injury or mortality to the dolphin.

A principal purpose of the 1972 Marine Mammal Protection Act (MMPA) is assuring that "the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."[11] The statute mandates a regulatory program to establish industry-wide tuna harvesting practices designed to prevent the incidental "taking" of marine mammals and, specifically, various species of dolphin. After protracted litigation, the US fleet generally has come into compliance with these requirements. However, foreign fleets not subject to US jurisdiction, primarily those of Mexico and Venezuela, have had considerably higher dolphin mortality rates. To address this problem, the MMPA requires the Department of the Treasury, in which the Customs Service is located, to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[12]

As a result of Executive Branch inaction with respect to foreign tuna caught with technologies that harm dolphins, Congress amended the MMPA in 1984 to clearly establish that yellowfin tuna harvested with purse-seines in the ETP can be imported into the United States only upon a demonstration by the government of the foreign nation that it: (1) has in place a regulatory program "comparable" to that of the US fleet for protecting ma-

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11. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a)(2) (1994) [hereinafter MMPA]. The House of Representatives held four days of public hearings on the bill that subsequently became the MMPA. *See* H.R. REP. NO. 707, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4144, 4145.

12. MMPA, *supra* note 11, § 1371(a)(2).

rine mammals from commercial fishing operations and (2) has an average incidental marine mammal taking rate "comparable" to that of the United States fleet.[13] In 1988 Congress, still dissatisfied with the slow pace of Executive Branch implementation of the statute, further amended the law to ensure that the average incidental taking of marine mammals by foreign vessels did not exceed that of the US fleet by more than twenty-five percent by the end of the 1990 fishing season.[14]

By 1990, the Secretary of Commerce had neither issued findings of comparability nor banned tuna imports from the offending nations. Frustrated with this delay, in June 1990 the Earth Island Institute and the Marine Mammal Fund, two private environmental organizations with a particular interest in marine mammal preservation, brought an action for mandamus in the United States District Court for the Northern District of California to compel the Executive Branch to comply with the MMPA. In August 1990 the court enjoined Executive Branch officials from permitting further imports of yellowfin tuna caught with purse-seine nets into the United States because no findings of comparability had been made.[15] This action affected tuna imports from Mexico, Venezuela, Vanuatu, Panama, and Ecuador.

Then, in September 1990, the Department of Commerce concluded that Mexico, Venezuela, and Vanuatu satisfied the MMPA's comparability requirements and consequently lifted the ban with respect to those countries. This finding was made in reliance on a domestic regulation[16] that had been promulgated by the National Oceanic and Atmospheric Administration (NOAA), an Executive Branch agency located in the Department of Commerce, after publication of a proposed rule and an opportunity for public comment on that proposal.[17] Panama and Ecuador later prohibited their fleets from setting on dolphin and were consequently exempted from the embargo.

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13. Pub. L. No. 98-364, § 101, 98 Stat. 440 (1984). *See* H.R. REP. NO. 758, 98th Cong., 2d Sess. 6 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 635, 639.

14. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4, 102 Stat. 4755 (1988). *See* H.R. REP. NO. 970, 100th Cong., 2d Sess. 14–19 (1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 6154, 6155–59.

15. Earth Island Inst. v. Mosbacher, 746 F. Supp. 964, 968 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

16. 50 C.F.R. § 216.24(e)(5)(iv)–(ix)(1995).

17. NOAA initially published a proposed rule to implement the 1984 amendments in 1986. 51 Fed. Reg. 28,963 (1986). The comment period on this proposal was subsequently extended, in particular to give potentially affected foreign nations a full opportunity to comment. 51 Fed. Reg. 36,568 (1986). NOAA then published an interim final rule with request for comments in 1988. 53 Fed. Reg. 8910 (1988). A second interim final rule with a request for comments, necessitated by the intervening amendments to the MMPA enacted in 1988, was promulgated in 1989. 54 Fed. Reg. 9438 (1989). The final regulation published in March 1990 reflected comments on the 1989 interim final rule.

The district court subsequently invalidated the finding for Mexico, concluding that the Executive Branch's method of computation based on the NOAA regulation was inconsistent with the MMPA and therefore illegal. After staying the district court's order directing the Executive Branch to renew the import prohibition, the United States Court of Appeals for the Ninth Circuit affirmed both orders of the district court,[18] and a ban on imports of Mexican tuna once again took effect on February 22, 1991.[19]

On November 5, 1990, Mexico requested consultations with the United States concerning the tuna import ban under the auspices of the GATT,[20] the principal multilateral instrument governing international trade relations among states. The consultations between Mexico and the United States, held on December 19, 1990, did not produce a result satisfactory to Mexico. If negotiations and consultations are unsuccessful, an aggrieved party may submit a complaint to the GATT Council, which can appoint a panel of experts to hear the dispute. Accordingly, on January 25, 1991, Mexico requested that the GATT Council establish a dispute settlement panel to further examine the matter.

On September 3, 1991, the three-member panel presented its final report.[21] That report noted that discrimination by importing states based on the methods by which foreign goods are produced, as opposed to characteristics of the foreign goods themselves, is not permitted by the GATT. Consequently, it might be inferred from the panel's reasoning that the GATT requires like treatment of imported products without regard to the environmental policies of the country of export. Further, according to the report, exceptions in the GATT for trade measures directed at the protection of animal life or health or the conservation of natural resources must be narrowly construed. In light of that interpretation, the drafting history of the agreement as interpreted by the panel, and the broader implications for international trade, the panel concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not within the scope of the exception from GATT obligations. According to the panel, the United States had failed to demonstrate that the import restriction was primarily aimed at

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18. Earth Island Inst. v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991).

19. The district court, on plaintiffs' motion, subsequently clarified the extent of a secondary ban on imports from intermediary nations that purchase yellowfin tuna abroad and export it to the United States. Earth Island Inst. v. Mosbacher, 785 F. Supp. 826 (N.D. Cal. 1992), *vacated and remanded on jurisdictional grounds sub nom.* Earth Island Inst. v. Brown, 28 F.3d 76 (9th Cir. 1994).

20. *See* GATT, *supra* note 8.

21. Report of the Panel on United States Restrictions on Imports of Tuna, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 155 (39th Supp. 1993), *reprinted in* 30 I.L.M. 1594 (1991).

conservation or that measures consistent with the GATT, such as an internationally agreed joint dolphin conservation program, were unavailable. For these reasons, the panel found that both the primary embargo on Mexican tuna and the secondary ban on imports of tuna from intermediary nations were inconsistent with US obligations under the GATT.[22] As of this writing, the panel report has not been adopted by the GATT Council and consequently does not represent an authoritative interpretation of that instrument by the contracting parties to it.[23]

On October 26, 1992, US President George Bush signed into law the International Dolphin Conservation Act of 1992.[24] The new statute is a modified version of a proposal by the Bush Administration, originally presented in March 1992, that had been discussed with the governments of Mexico, Venezuela, and Panama as a means of resolving their GATT concerns. The Act amends the MMPA to accommodate commitments from foreign nations like Mexico and Venezuela to make immediate reductions in dolphin mortality, culminating in a five-year moratorium on setting on dolphin beginning in March 1994. If the foreign country were to comply fully with these undertakings, the tuna import ban would be lifted. On the other hand, if the Secretary of Commerce could not verify that the foreign state was fully implementing its commitments in practice, the import ban would be instituted once again. As of this writing, no country has made a commitment of the sort contemplated by the new statute, and the ban consequently remains in effect.

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22. *See* Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10,268, 10,272–73 (1992).

23. Mexico did not seek the adoption of this report at the time of its release, and the GATT Council rejected a request by the European Union to adopt the report. *GATT Council Refuses EC Request to Adopt Panel Report on U.S. Tuna Embargo*, 9 Int'l Trade Rep. (BNA) 353 (1992). The European Union and the Netherlands then initiated a subsequent challenge to the secondary import ban, which is designed to discourage "tuna laundering" by intermediary nations that purchase yellowfin tuna abroad and export it to the United States. This panel report, like the first, found that the secondary import prohibition is inconsistent with the United States' obligations pursuant to the GATT. United States Restrictions on Imports of Tuna, *reprinted in* 33 I.L.M. 842 (1994). In a discussion of the second report, the GATT Council is reported to have rejected a proposal from the United States that would have opened further Council meetings on that case to the public, and Mexico was said to consider requesting adoption of the first report. Frances Williams, *GATT Shuts Door on Environmentalists*, FIN. TIMES, July 21, 1994, at 6. As of this writing, neither report has been adopted by the GATT Council and thus neither has yet acquired legal force. *See* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 94 (1987).

24. International Dolphin Conservation Act of 1992, 3425 (1992), 16 U.S.C. §§ 1411–1418 (1994).

The oral proceedings and written statements before the GATT panel, unlike the domestic legal proceeding for judicial review, were unavailable to the public.[25] Dispute settlement in the GATT, which is a government-to-government process, does not allow for participation by private parties like

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25. *See* Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 215 annex para. 6(iv) (26th Supp. 1980) ("Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute."). *See also* Decision on Improvements to the GATT Dispute Settlement Rules and Procedures § F, para. (f)(2), BASIC INSTRUMENTS AND SELECTED DOCUMENTS 61 (36th Supp. 1990), *reprinted in* 28 I.L.M. 1031, 1033 (1989) (referencing suggested working procedures, *found at id.* at 1038, establishing that panel sessions will be closed and submissions to the panel will remain confidential, stating that "the Parties to the dispute are requested not to release any papers or make any statements in public regarding the dispute"). The North American Free Trade Agreement contains similar requirements. NAFTA, *supra* note 10, art. 2012, para. 1(b) ("The panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."). The Uruguay Round of Multilateral Trade Negotiations in GATT, which was completed in late 1993 and signed on April 15, 1994, makes some salutary changes to this practice, but does not totally correct the deficiencies in the process. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes para. 18.2, 33 I.L.M. 112 (1994) ("Written submissions to the panel or the [newly created] Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statement [*sic*] of its own positions to the public. Members shall treat as confidential, [*sic*] information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."). The Uruguay Round implementing legislation establishes certain domestic statutory requirements for public notice, an opportunity for public comment, and public access to documentation as part of the panel dispute settlement process. Uruguay Round Agreements Act § 127, Pub. L. No. 103-465, 108 Stat. 4809, 4835–36 (1994) (access to the newly created World Trade Organization's dispute settlement process). However, similar concerns as to public access persist even under the Uruguay Round and within the World Trade Organization created by the Uruguay Round. *See News Leaders Demand Access to WTO Deliberations*, Bus. Wire, Sept. 14, 1994 *available in* LEXIS, News Library, WIRES File (reproducing text of letter signed by 51 leaders of major news organizations and journalism groups asserting that "[t]he public and press should be able to monitor deliberations of [World Trade Organization] dispute settlement panels"). *Cf.* Public Citizen v. United States Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (ordering the Executive Branch to make available for public inspection and copying submissions made by the US government to dispute resolution panels established pursuant to the GATT, based in part on the conclusion that "[t]he GATT procedural rules favor confidentiality of [governmental submissions to dispute settlement panels], but do not require it"). Anecdotal reports suggest that, even after this case, some requesters have encountered difficulties in acquiring publicly available documents and that there is no systematic mechanism at the Office of the United States Trade Representative (USTR) for the public to obtain access to those documents. In response to the second tuna panel report in the dispute settlement proceeding initiated by

the Earth Island Institute.[26] Many of the issues in the GATT dispute settlement proceeding were similar to those in the domestic lawsuit, and the relevant facts were virtually identical. Nonetheless, the environmental group that initiated the legal action at the domestic level had no formal right to make a

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the European Union and the Netherlands, *see supra* note 23, USTR announced that:

> The United States will challenge the dispute settlement panel's failure to provide a fair hearing and due process, and will ask for a full review of the report, both substantively and procedurally, by the GATT Council, or reconsideration by the panel in this case. The GATT Council or panel should hold further proceedings in public and allow non-governmental organizations (NGOs) to participate. In addition, all documents filed from any source should be immediately made public.

USTR Kantor to Challenge GATT Panel's Failure to Provide Open Hearings and Due Process Regarding U.S. Tuna Embargoes, Substantive Matters, Office of the United States Trade Representative Press Release (May 23, 1994). One of the principal authorities on the GATT has observed that:

> [T]he GATT tends too often to try to operate in secrecy, attempting to avoid public and news media accounts of its actions. In recent years, this has become almost a charade, because many of the key documents, most importantly the early results of a GATT dispute settlement panel report, leak out almost immediately to the press. For purposes of gaining a broader constituency among the various policy interested communities in the world, gaining the trust of those constituencies, enhancing public understanding, as well as avoiding the "charade" of ineffective attempts to maintain secrecy, the GATT could go much further in providing "transparency" of its processes.

John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1255 (1992). A central component of the Uruguay Round is the creation of a new World Trade Organization (WTO), whose purposes and procedures are very similar to those of the GATT. *See* Agreement Establishing the Multilateral Trade Organization, 33 I.L.M. 15 (1994). The Uruguay Round strengthens the GATT dispute settlement procedures by eliminating the process by which one GATT contracting party can frustrate consensus by refusing to accept a panel report, thereby "blocking" its adoption. *See* Davey, *supra* note 23, at 94. Instead, the Uruguay Round specifies that panel reports shall be finally adopted within 60 days of issuance unless an appeal is lodged with a newly established standing Appellate Body, whose reports must be adopted by the Council within 30 days of issuance unless rejected by WTO member states acting by consensus. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra*, paras. 16.4, 17.14.

26. Apart from the government-to-government character of the GATT dispute settlement procedures, those proceedings also differ from a case in a domestic judicial tribunal by virtue of their emphasis on negotiation and consultation. The GATT's dispute settlement mechanisms first encourage contracting parties to settle differences through direct negotiation before they resort to the panel process. *See* GATT, *supra* note 8, art. XXII (consultation). Even after a panel has been appointed, the governmental parties to the dispute may still reach an accommodation between themselves through a negotiated "settlement." Accordingly, the issue of confidentiality in the GATT dispute settlement process must be read against a background in which governments may state not only legal arguments but also negotiating positions at both the consultative and panel stages of the dispute settlement process.

submission directly to the GATT panel. The Institute's lawyer traveled to Geneva for the oral proceedings before the panel but was compelled to wait in the corridor while the panel heard arguments from representatives of the Mexican and US governments. However, according to the dispute settlement panel's report, ten other GATT parties and the European Community (now the European Union) made written submissions to the panel, all of which were critical of the MMPA ban and none of which argued that that action was consistent with the GATT.

Representation of the United States by the Executive Branch, which had implemented the tuna ban only under a court order and had previously attempted to lift the ban in a manner contrary to law, gave rise to additional questions concerning the adequacy of the spectrum of issues presented to the GATT panel. Although the Executive Branch solicited some input from certain members of the public while preparing its submission to the panel,[27] those views at most affected only the posture of the United States in the dispute. In any event the Executive Branch must articulate the government's position and does not necessarily reflect the interests of concerned nonstate actors. While helpful, this practice of public input cannot be considered a substitute for opportunities for affected private parties to submit written or oral statements, or both, directly to the dispute settlement panel. Moreover, the GATT panel, at least as a formal matter, did not seek, and may not have had access to, a variety of views that would have assisted in its ruling on one of the most contentious disputes in the GATT's history.

In the recently decided GATT challenge by the European Union to the US corporate average fuel economy (CAFE) standards,[28] one of the most promising policy options for reducing emissions of greenhouse gases in this country, the Office of the United States Trade Representative (USTR) did not respond to a request from concerned private parties, including the US consumer organization Public Citizen, to transmit a separate statement on their behalf directly to the panel as an attachment to the US government's own submission.[29] In that case, the European Union agreed to the release of its complaint to Public Citizen. The EU, however, did not consent to the release of its written submissions to the panel in support of its complaint. USTR released its responsive submissions on behalf of the United States, but deleted portions addressing the EU's arguments.

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27. *See* Letter from Julius L. Katz, Deputy United States Trade Representative, to Justin Ward, Senior Resource Specialist, and Al Meyerhoff, Senior Attorney, Natural Resources Defense Council (Apr. 17, 1992).

28. United States—Taxes on Automobiles, GATT Doc. DS31/R (Sept. 29, 1994), *reprinted in* 33 I.L.M. 1399 (1994).

29. In the proceeding initiated by the European Union (EU) and the Netherlands challenging the secondary embargo under the MMPA, *see supra* note 23, USTR attached newspaper clippings to the US submission to the GATT dispute settlement panel.

Even if the practice in the CAFE case were to become standard, it would still be inadequate because of the confidentiality of the complaining party's submission, which is unavailable to nongovernmental parties. Under these circumstances, the private party must conjecture as to the basis for the challenge, which necessarily renders its submission less informed, less effective, and less useful to the dispute settlement panel than would otherwise be the case.[30] There is still no mechanism for interested nonstate actors to communicate their views and arguments formally to the new World Trade Organization (WTO) dispute settlement panels that are the successors to those previously constituted under the GATT. Other documentation important to the integrity of a quasi-adjudicatory process like dispute settlement before the GATT or WTO dispute settlement panels may simply not exist. Transcripts are not maintained of oral hearings before the GATT panels, which similarly do not create a written record of their proceedings.

III. ENVIRONMENTAL ACTIVITIES IN THE OECD: NONSTATE ACTORS IN MULTILATERAL NEGOTIATIONS AND PUBLIC ACCESS TO INTERNATIONAL ORGANIZATION DOCUMENTS

The Organisation for Economic Co-operation and Development (OECD) has been one of the principal intergovernmental organizations active in the environmental area, chiefly through its Environmental Policy Committee, which was established in 1970. The OECD, created by multilateral treaty in

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30. Although not precisely analogous to government-to-government proceedings under international trade agreements, certain domestic proceedings addressing international trade provide for somewhat greater public access than GATT dispute settlement. The Trade Representative is authorized to take retaliatory action against foreign states that deny the United States rights under a trade agreement or unjustifiably restrict the importation of US goods. 19 U.S.C. § 2411 (1994). Before making a final determination, public consultation and a hearing may be required. 19 U.S.C. § 2414(b)(1)(A)(1994). For instance, in response to a petition from US exporters, USTR solicited public comment on, and held a public hearing concerning, Thailand's restrictions on access by US companies to the Thai cigarette market. *See* 54 Fed. Reg. 32,731 (1989) (notice of public hearing); 54 Fed. Reg. 23,724 (1989) (notice of initiation of investigation and request for written comments). This issue ultimately was addressed by a GATT dispute settlement panel. Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 200 (37th Supp. 1991), *reprinted in* 30 I.L.M. 1122 (1991). Similarly, antidumping and countervailing duties cases initiated by private parties involve the preparation of a public reading file. *See* 19 U.S.C. § 1677(f) (1994) (access to information); 1 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW §§ 20.27, 21.21 (1991) (access to information in antidumping and countervailing duties cases).

1960, consists of twenty-five member states, most of which have industrialized market economies. The Secretariat of the Organisation, whose primary mandate is to promote economic growth and trade, is located in Paris. The OECD serves as an arena for multilateral discussion of informational or analytical studies, the negotiation of recommendations that contain nonbinding undertakings for those OECD members that agree to them, and the adoption of decisions that are binding on member states that accept them.[31]

Among other subject matter areas, the OECD has provided a forum for the adoption of numerous recommendations on transboundary pollution[32] and environmental impact assessment.[33] Although perhaps less numerous than nonbinding recommendations in the environmental area, binding decisions have been adopted on such matters as exports of hazardous wastes.[34]

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31. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, art. 5(a) & (b), 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179. The original members of the organization are Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Australia, Finland, Mexico, Japan, and New Zealand later became OECD members in 1971, 1969, 1994, 1964, and 1973 respectively.

32. *E.g.*, Recommendation for Strengthening International Co-operation on Environmental Protection in Frontier Regions, OECD Doc. C(78)77, *reprinted in* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 154 (1986) [hereinafter OECD AND THE ENVIRONMENT], 17 I.L.M. 1530 (1978); Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, OECD Doc. C(77)28, *reprinted in* OECD AND THE ENVIRONMENT, *supra*, at 150, 4 ENVTL. POL'Y & L. 53 (1978), 16 I.L.M. 977 (1977); Recommendation on Equal Right of Access in Relation to Transfrontier Pollution, OECD Doc. C(76)55, *reprinted in* OECD AND THE ENVIRONMENT, *supra*, at 148, 2 ENVTL. POL'Y & L. 104 (1976), 15 I.L.M. 1218 (1976); Recommendation on Principles Concerning Transfrontier Pollution, OECD Doc. C(74)224, *reprinted in* OECD AND THE ENVIRONMENT, *supra*, at 142, 1 ENVTL. POL'Y & L. 44 (1975), 14 I.L.M. 242 (1975).

33. *E.g.*, Recommendation Concerning Measures Required to Facilitate the Environmental Assessment of Development Assistance Projects and Programmes, OECD Doc. C(86)26; Recommendation on Environmental Assessment of Development Assistance Projects and Programmes, OECD Doc. C(85)104, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 30; Recommendation on the Assessment of Projects With Significant Impact on the Environment, OECD Doc. C(79)116, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 29, 5 ENVTL. POL'Y & L. 154 (1979); Recommendation on the Analysis of the Environmental Consequences of Significant Public and Private Projects, OECD Doc. C(74)216, *reprinted in* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL IMPACT ASSESSMENT 69 (1979), OECD AND THE ENVIRONMENT, *supra* note 32, at 28.

34. *E.g.*, Decision Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations, O.E.C.D. Doc. C(92)39, *reprinted (in data format only) in* 3 Y.B. INT'L ENVTL. L. (1992); Decision-Recommendation on the Reduction of Transfrontier Movements of Wastes, O.E.C.D. Doc. C(90)178, *reprinted (in data format*

Coordinating national policies and reconciling rational regulatory approaches for toxic substances have been particularly active areas, primarily through the Chemicals Group, established in the early 1970s, which reports to the ministerial-level Environmental Policy Committee. The Chemicals Group has taken up the following issues, among others, which have produced a number of OECD decisions and recommendations: exports of pesticides and industrial chemicals,[35] chemical testing,[36] notification of industrial accidents,[37] and the treatment of confidential business information.[38]

In the late 1970s, the Office of Toxic Substances of the US Environmental Protection Agency (EPA) undertook to regularize public input into the Executive Branch's work related to the OECD Chemicals Group. To this end, the EPA designated the nonprofit Conservation Foundation (now part of the World Wildlife Fund) as the principal conduit and coordinator for input from the nongovernmental environmental community, and the Chemical Manufacturers Association has performed a similar function for industry. Since then, representatives of environmental organizations and industry have regularly participated in US delegations to Chemicals Group meetings as accredited private sector advisers on such issues as risk reduction for lead, pesticide regulation, chemical accidents, chemical testing, treatment of confidential business information, and exports of domestically

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only) in 2 Y.B. INT'L ENVTL. L. (1991); Decision on Transfrontier Movements of Hazardous Wastes, OECD Doc. C(88)90, *reprinted in* 28 I.L.M. 259 (1989); Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area, O.E.C.D. Doc. C(86)64, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 86, 25 I.L.M. 1010 (1986); Decision-Recommendation on Transfrontier Movements of Hazardous Waste, OECD Doc. C(83)180, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 78, 23 I.L.M. 214 (1984).

35. *E.g.*, Recommendation on Information Exchange Related to Export of Banned or Severely Restricted Chemicals, OECD Doc. C(84)37, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 137, 12 ENVTL. POL'Y & L. 116 (1984), 23 I.L.M. 664 (1984).

36. *E.g.*, Decision on the Minimum Pre-Marketing Set of Data in the Assessment of Chemicals, OECD Doc. C(82)196, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 122, 22 I.L.M. 909 (1983); Decision on the Mutual Acceptance of Data in the Assessment of Chemicals, OECD Doc. C(81)30, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 109.

37. *E.g.*, Decision-Recommendation Concerning Provision of Information to the Public and Public Participation in Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances, OECD Doc. C(88)85, *reprinted in* 28 I.L.M. 278 (1989); Decision on the Exchange of Information Concerning Accidents Capable of Causing Transfrontier Damage, OECD Doc. C(88)84, *reprinted in* 28 I.L.M. 249 (1989).

38. *E.g.*, Recommendation on the Exchange of Confidential Data on Chemicals, OECD Doc. C(83)97, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 129; Recommendation on the Protection of Proprietary Rights to Data Submitted in Notifications of New Chemicals, OECD Doc. C(83)96, *reprinted in* OECD AND THE ENVIRONMENT, *supra* note 32, at 128.

prohibited pesticides and industrial chemicals. On occasion, the EPA has provided financial support for travel by nonprofit environmental organizations that otherwise would be unable to participate in these activities. In recent years, the OECD's environmental agenda has been advanced through greater use of open workshops, to which environmental groups and industry interests have been invited in their own right. For example, such workshops were recently held on chemical release inventories and "right to know" issues.

As part of their relationship with the private sector on matters related to the work of the Chemicals Group and other OECD activities, EPA officials have freely made OECD documentation available to representatives of organizations that have participated in that work. Those documents include some designated as "restricted," including interim drafts of nonbinding recommendations or binding decisions on which comment has been requested from environmental organizations and industry. According to anecdotal accounts, the "restricted" designation, at least on occasion, has been interpreted both by the OECD Secretariat and by Executive Branch officials to imply only that documentation may not be distributed by the OECD Secretariat other than to officials of member state governments or cited as an official statement of the organization. According to this view, the "restricted" designation does not constrain the exercise of discretion by member state governments in communications with the private sector. Indeed, some private sector advisers to US delegations to OECD Chemicals Group activities believe that they receive OECD "restricted" documents in a representative capacity and that the EPA, as part of the preparatory process, expects recipients to transmit that documentation to other interested individuals and groups—for example, to other environmental nonprofit organizations or to other chemical companies. Anecdotal accounts from private sector advisers to US government delegations, including representatives of both industry and environmental groups, also confirm that on occasion the OECD Secretariat itself has provided "restricted" documentation directly to individuals who have been active over a period of time in the organization's activities on chemicals.

A relatively flexible and relaxed approach to the availability of OECD "restricted" documentation seems to be supported by such authority as is available from the organization. A 1962 OECD Council resolution defines the "restricted" category as consisting of "documents, information of [*sic*] texts which should not be communicated except for official purposes."[39]

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39. *Resolution Concerning the Classification of Documents and Security Precautions*, OECD Doc. C(62)11 § I, para. b. The United Nations similarly has three categories of documents: (1) general; (2) limited; and (3) restricted. "The designation RESTRICTED

"Restricted" is an intermediate level of designation, lying between "general distribution" and "confidential," the latter defined as "documents, information or texts[,] the unauthorized disclosure of which would seriously prejudice the interest of the Organisation or of any of its Members."[40] The resolution also requests that the "Members and the Secretary General take necessary action to ensure the security of confidential and restricted documents, information or texts."[41] The OECD's deputy legal counsel explains this language as follows:

> Most documentation of the Organisation is issued as "restricted." No agreed definition has been given to the term "official purposes." This rule is understood, prima facie, to restrict routine circulation to Government officials, but the Organisation and Members have, under this standard, made such documents available on a restricted basis to non-governmental organisations where necessary for consultations to occur.[42]

Practices that have evolved over time with respect to participation by nongovernmental actors in the OECD Chemicals Group have not been uniformly applied to other areas of US participation in the OECD's environmental work. Since 1993, the Joint Sessions of Trade and Environment Experts have met as part of a cooperative arrangement of the OECD's Trade Committee and its Environmental Policy Committee. The efforts of this group have produced, among other things, a set of procedural guidelines on integrating trade and environment policies.[43] A number of

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is used on documents and meeting records whose contents require at the time of issuance that they not be made public." *United Nations Documentation: A Brief Guide*, U.N. Doc. ST/LIB/34/Rev.1 para. 41(c) (1981). *See generally* U.N. Doc. ST/AI/189/Add.16 (principles concerning classification and declassification of documents by UN Secretariat). Interim drafts of multilateral environmental agreements negotiated under United Nations auspices generally seem to receive the designation "limited" or "restricted." These UN documents nonetheless circulate relatively freely both at the international and domestic levels, in part through access at UN depository libraries. The UN designations do not imply any obligation on the part of governments to refrain from public distribution of limited or restricted documents. The documentation of international organizations appears to be something of a gray area from the point of view of domestic law and practice. Documents of international organizations, including those designated by the OECD as "restricted," do not routinely receive an official US government classification. The Department of State reports that it has no general policy concerning public access to international organization documents but instead treats even those with identical designations from different international organizations on a case by case basis.

40. *Resolution Concerning the Classification of Documents and Security Precautions*, *supra* note 39, § I, para. b.

41. *Id.* § III.

42. Letter from David H. Small, Deputy Legal Counsel, Organisation for Economic Co-Operation and Development, to David A. Wirth (Sept. 21, 1993).

43. Trade and Environment, OECD Doc. GD(93)99 (1994).

representatives of nongovernmental environmental organizations have been invited to attend meetings of the Joint Sessions of Trade and Environment Experts as private sector advisers to their own national delegations, and in particular as accredited members of the US delegation.[44] In strong contrast to the EPA's practice with respect to the OECD Chemicals Group, the Office of the United States Trade Representative has required these individuals, as a condition of their participation on the US delegation to the OECD, to execute confidentiality agreements which include the following features:

- an express statement of an intent to be legally bound;
- a provision barring the release of OECD documents designated as "restricted";
- a promise not to reveal the contents of oral and written statements made by representatives of foreign governments or the OECD Secretariat;
- a prohibition on public disclosure of the existence of OECD "restricted" documentation or oral and written statements by representatives of foreign governments or the OECD Secretariat;
- a commitment to refrain from requesting such documents or information from foreign governments or international organizations, and a promise not to encourage others to attempt to obtain such documents or information;
- a requirement to return all OECD documentation designated as "restricted" to the United States Government; and
- provisions acknowledging the potential criminal consequences of violation of the agreement.[45]

According to Executive Branch officials, the differences between practice with respect to private sector advisers in the OECD's work on trade and environment on the one hand and chemicals on the other may be explained in part by the more policy-oriented focus of the environment and trade efforts. But in the early 1980s nongovernmental environmental representatives were included in US delegations to the Chemicals Group's undertaking on information exchange related to the export of banned or severely restricted chemicals—an issue with a similarly high policy component and one that

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44. Anecdotal reports suggest that there has been some objection to this approach, particularly as practiced by the United States, from OECD member states that do not have nongovernmental advisers on their delegations. Other OECD member states are said to have insisted on confidentiality as a condition of attendance by US nongovernmental advisers.

45. *See, e.g.*, Agreement between Durwood Zaelke and the United States of America (Jan. 29, 1993) (on file with author). The form of this agreement is said to be similar to that used for the statutorily created private sector trade advisory committees. *See infra* note 73 and accompanying text.

was enormously controversial at the time. More recently, discussions in the OECD over risk reduction for lead have been very contentious and definitely policy oriented. As demonstrated by the example of the conditions on the participation of private sector advisers on US delegations to the OECD Joint Sessions of Trade and Environment Experts, standards for public participation in OECD environmental activities both at the international and national levels have not been reduced to writing, and in practice are highly variable and ultimately dependent on the exercise of discretion by individual governmental officials. The willingness of other governments to accept the presence of nongovernmental representatives in each instance is also a policy factor, although questions remain as to the appropriateness or legal authority of foreign governments to determine the composition of US delegations in the OECD.

The undertakings described so far—the EPA program with respect to the Chemicals Group and the inclusion of environmental representatives in trade and environment delegations led by USTR—at least as a formal matter are intended strictly to provide advice to Executive Branch policy makers and membership for representatives of the public on official US government delegations to the OECD. Private sector advisers from industry and environmental organizations, accredited as members of US delegations to the OECD, are subject to "delegation discipline" via governmental instructions. Moreover, the consultative arrangements with industry and environmental organizations provide input principally into the US policy process and only indirectly create access to the multilateral forum of the OECD.

Industry and trade unions, through additional formal, official channels created by the multilateral forum of the OECD itself, have input and access directly to the organization and its Secretariat through the Business and Industry Advisory Committee (BIAC)[46] and the Trade Union Advisory Committee (TUAC). BIAC and TUAC are independent organizations whose representatives in the United States are the United States Council for International Business and the AFL-CIO, respectively. By comparison with BIAC,

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46. According to BIAC literature:

> [T]he Business and Industry Advisory Committee to the OECD (BIAC) was constituted in March 1962 as an independent organisation officially recognized by the OECD as being representative of business and industry. BIAC's members include the industrial and employers' organisations of the 24 OECD Member Countries. In the framework of its consultative status with the OECD, BIAC's role is to provide OECD and its Member Governments the benefit of constructive comments based on the practical experience of the business community. BIAC is the advocate of business, speaking and working in defense of free enterprise and the market economy.

. Business and Industry Advisory Committee to the OECD, BIAC: Annual Report (1993).

TUAC has had a relatively low profile with respect to the OECD's environmental work. Although the creation of a parallel environmental entity has been discussed from time to time, there is no comparable conduit for access directly to the multilateral forum of the OECD for nongovernmental environmental organizations in member countries.

A 1962 OECD Council decision[47] governing relations with international nongovernmental organizations does not mention BIAC or TUAC by name but instead sets out criteria for those nongovernmental organizations that may formally be designated by the OECD Council for purposes of ongoing consultation. Other nongovernmental organizations that have been granted consultative status include the International Association of Crafts and Small and Medium-Sized Enterprises, the International Federation of Agricultural Producers, and the European Confederation of Agriculture. Once granted that status, an international nongovernmental organization may

> hold exchanges of views with the [OECD] at meetings convened either at its own request or on the initiative of the Secretary-General dealing with subjects of common interest or subjects determined beforehand which have a bearing on the work of the [OECD][; and] receive general information on the work of the [OECD] and certain of the [OECD's] documents or summaries thereof, whenever the Secretary-General considers such documents or summaries useful for the study of a particular subject.[48]

With respect to documentation, the OECD's Deputy Legal Counsel notes that:

> [w]hile, in practice, BIAC and TUAC are often provided restricted documents necessary for meaningful consultations with various OECD bodies, they cannot be said to have the right to receive any particular documentation. OECD has granted no such right to any [nongovernmental organization], and retains complete legal freedom in the matter.[49]

In the Chemicals Group, the Secretariat regularly consults with BIAC and TUAC in advance of formal intergovernmental meetings as well as with representatives of environmental groups on occasion. The Bureau of the Chemicals Group, composed of governmental representatives, also meets frequently directly with BIAC and TUAC representatives. Additionally, BIAC and TUAC have the prerogative of circulating written materials to the Secretariat and governmental officials on national delegations. Although BIAC

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47. *Decision on Relations with International Non-Governmental Organizations*, O.E.C.D. Doc. C(62)45 (1962).

48. *Id.* at para. 3(a) & (b).

49. Letter from David H. Small to David A. Wirth, *supra* note 42.

may not have a right to receive any particular piece of official OECD documentation in advance of general distribution to the public at large, anecdotal reports from industry representatives and others confirm that in practice a significant amount of "restricted" documentation circulates through this channel. Tellingly, private parties in the United States received, through BIAC channels, some of the same "restricted" documents that were controlled by the confidentiality agreements USTR required of nongovernmental private sector advisers accredited to US delegations. So, for instance, the US Council for International Business transmitted its views to BIAC, which then commented on a draft of the procedural guidelines that were elaborated by the OECD Joint Sessions of Trade and Environment Experts.[50] Presumably, those comments were informed by, if they did not directly rely on, the "restricted" documentation provided on this OECD undertaking to BIAC, which was not generally available to other interested individuals and organizations.

Individuals representing industry interests that are also affiliated with BIAC have been accredited as members of national delegations from the United States, the Netherlands, Austria and other countries. In the Chemicals Group, BIAC does not customarily have access as a formal observer to intergovernmental meetings with a "seat at the table" in its own right. However, at a day-long OECD–sponsored expert-level Special Session on Pesticides in May 1992 organized under the auspices of the Chemicals Group, both a pesticides industry representative and the World Wildlife Fund, a nongovernmental environmental organization, were seated as observers in their own right. But sometimes BIAC has been accredited to intergovernmental meetings as a formal observer with the privilege to speak, with no comparable representation from the nongovernmental environmental community. The best example of this practice is probably the regular presence of a formally accredited BIAC observer who may speak in intergovernmental meetings of the OECD's Waste Management Policy Group, which reports to the Pollution Prevention and Control Group, which in turn is a subsidiary body created under the auspices of the ministerial Environmental Policy Committee.

In short, there appears to be no clear or standardized policy, or even a pattern of practice, as to how the officially recognized advisory committees, BIAC and TUAC, may participate in the environmental work of the OECD's intergovernmental forum. Nevertheless, it is clear that through these channels certain segments of the nongovernmental community, most notably business and industry, have greater access to OECD "restricted" documen-

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50. *See* BIAC Information, Jan.–Feb. 1993 (bimonthly review of BIAC plans and activities published in Paris).

tation than do ordinary members of the public. The role of the advisory committees formally recognized by the OECD also creates unwarranted distinctions among otherwise comparable segments of the private sector. In actual practice BIAC's special privileges most likely provide at most a marginal degree of extra input into the OECD's activities by comparison with other elements of the private sector, such as nongovernmental environmental organizations. But this is only true to the extent that documentation, information, and access through alternative channels to BIAC and TUAC are open and flexible. In some specific cases, such as the work of the Joint Sessions of Trade and Environment Experts, the lack of an analogue to BIAC or TUAC to serve the nongovernmental environmental community in OECD members states may result in significant disparities in terms of access between business and industry on the one hand and nongovernmental environmental organizations on the other.

IV. STRATOSPHERIC OZONE AND NORTH AMERICAN FREE TRADE: DISPARITIES IN PUBLIC ACCESS TO INTERNATIONAL NEGOTIATING PROCESSES ON THE DOMESTIC AND INTERNATIONAL LEVELS

In the mid-1970s, in work that has now been awarded the Nobel Prize in chemistry, scientists theorized that chlorine from chlorofluorocarbons (CFCs) could attenuate the stratospheric ozone layer that protects life on earth from harmful levels of ultraviolet (UV) radiation. By increasing the amount of UV radiation reaching the Earth's surface, stratospheric ozone loss could be expected to increase the incidence of human skin cancers and cataracts, suppress human immune systems, damage crops and aquatic organisms, exacerbate smog formation, and accelerate the degradation of outdoor materials. CFCs, which are nonflammable and biologically inert, have important industrial and consumer uses as aerosol propellants, as foam-blowing agents, as refrigerants, in air conditioning systems for buildings and motor vehicles, and as industrial solvents.

The Clean Air Act formerly directed the Environmental Protection Agency (EPA) to respond by regulation if there was reason to believe that human activities that damage the ozone layer might endanger public health and the environment.[51] In response to considerable public and scientific con-

51. Clean Air Act, 42 U.S.C. § 7457 (repealed 1990). In the Clean Air Act Amendments of 1990, section 157 was repealed and replaced with a new and considerably more detailed statutory directive tracking the Montreal Protocol. Clean Air Act, 42 U.S.C. §§ 7671–7671q (1994).

cern, in 1978 the EPA and the Food and Drug Administration (FDA), through domestic notice-and-comment rule making proceedings under related statutory authorities,[52] prohibited nonessential uses of ozone-destroying CFCs such as spray aerosol propellants as a matter of domestic US regulation.[53] A number of other countries, including Canada and the Nordic nations, enacted similar controls on nonessential aerosol uses of CFCs. By contrast, the European Community (now the European Union) established a limit, considerably above then-existing levels, on total CFC production.[54] These national efforts were coordinated, if at all, primarily through informal exchanges of information and bilateral consultations.

Recognizing the utility of greater coordination of international action on the ozone layer, the United Nations Environment Programme (UNEP) initiated a multilateral process for addressing this global issue in the late 1970s and early 1980s. Early in this process, governments negotiating under UNEP auspices made an explicit decision to bifurcate this undertaking. One product was to be a so-called "framework" multilateral convention. Ancillary agreements, known as "protocols," containing substantive regulatory measures, would be appended to this convention. The ozone umbrella treaty evolved into the Vienna Convention for the Protection of the Ozone Layer,[55] concluded in March 1985, which contains no regulatory requirements but instead is designed to encourage multilateral cooperation and exchange of information. Negotiations on the more substantive CFC protocol broke down, primarily due to differences in regulatory approaches between countries like the United States that had eliminated aerosol uses and the European Community, which had established controls on production generally.

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52. *See* Toxic Substances Control Act, 15 U.S.C. § 2605(c) (1994) (rule making); 42 Fed. Reg. 24,542 (1977) (EPA–proposed rule prohibiting most manufacture, processing, and distribution in commerce of CFCs); 42 Fed. Reg. 24,535 (1977) (FDA proposal to phase out nonessential uses of CFC propellants). The 1978 aerosol propellant bans were promulgated under the authority of the Toxic Substances Control Act and the Federal Food, Drug, and Cosmetic Act. However, the Clean Air Act contains rule-making procedures similar to those followed for the 1978 regulations promulgated by the FDA and EPA. *See* Clean Air Act, 42 U.S.C. § 7607(d) (rule making).

53. 21 C.F.R. § 2.125; 40 C.F.R. part 762; 43 Fed. Reg. 11,318 (1978) (EPA final rule prohibiting most manufacture, processing, and distribution in commerce of CFCs); 43 Fed. Reg. 11,301 (1978) (FDA final rule prohibiting use of certain CFCs as propellants).

54. *See* THOMAS B. STOEL JR. ET AL., FLUOROCARBON REGULATION: AN INTERNATIONAL COMPARISON (1980).

55. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, *reprinted in* 14 ENVTL. POL'Y & L. 72 (1985), 26 I.L.M. 1516 (1987) [hereinafter Vienna Convention].

Renegotiation of the protocol in late 1986 after a scheduled one-year "cooling off" period coincided with an upsurge in scientific and public concern about a seasonal, continent-sized thinning or "hole" in the ozone layer over Antarctica. By this time, it had become apparent that the limited US ban on a small number of CFC uses was insufficient to address grave threats to the integrity of the stratospheric ozone layer. Accordingly, after being prodded with a lawsuit,[56] the Executive Branch in effect chose UNEP's multilateral forum as the venue for crafting additional domestic and international policy responses for further mitigating stratospheric ozone depletion.

The resulting Montreal Protocol on Substances that Deplete the Ozone Layer,[57] which sets out a precise numerical reduction schedule with firm deadlines for phasing out chemicals that may deplete the ozone layer, is now widely regarded as an effective, potentially global solution to the problem of ozone depletion. Significantly, from the beginning of the reconstituted negotiations in 1986, it was assumed that a rule promulgated pursuant to the then-existing Clean Air Act would be the vehicle for domestic implementation of the international instrument. Nonetheless, the Executive Branch submitted both the Protocol and the framework Vienna Convention to the Senate for its advice and consent to ratification.[58] The Protocol has since

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56. Natural Resources Defense Council, Inc. v. Thomas, Civ. No. 84-3587 (D.D.C. May 19, 1987) (consent decree establishing schedule for regulatory action on CFCs).

57. *See* Montreal Protocol, *supra* note 9. *See generally* RICHARD E. BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET (1991) (describing negotiations).

58. *See* 134 Cong. Rec. 3718 (1988) (Senate resolution of advice and consent to ratification of Montreal Protocol); 132 Cong. Rec. 17560 (1986) (same for Vienna Convention). According to State Department policy, a choice between concluding an international agreement as, on the one hand, a treaty in the constitutional sense and, on the other, an executive agreement is determined by consideration of the following eight factors:

> (a) the extent to which the agreement involves commitments or risks affecting the nation as a whole; (b) whether the agreement is intended to affect State laws; (c) whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (d) past United States practice with respect to similar agreements; (e) the preference of the Congress with respect to a particular type of agreement; (f) the degree of formality desired for an agreement; (g) the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (h) the general international practice with respect to similar agreements.

State Department Procedures on Treaties and other International Agreements, partial text Circular 175, Oct. 25, 1974, 11 F.A.M. § 721.3, *reprinted in* 1 MICHAEL J. GLENNON & THOMAS M. FRANCK, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 205 (1980).

been revised twice, in 1990 and 1992, to reflect scientific projections and new empirical evidence of greater loss of stratospheric ozone than originally anticipated.

UNEP accredited nongovernmental environmental observers from a number of countries to working group meetings leading up to the diplomatic conference that adopted the Protocol. The international organization made drafts of the agreement's text and other UNEP documentation available to nongovernmental observers in a manner similar to that for communicating with governmental representatives. Accredited representatives of environmental organizations were permitted to circulate papers and to speak on the floor of the meeting after requesting permission in advance.

Although the negotiation of the Montreal Protocol did not track the requirements of a domestic regulatory proceeding, the EPA and the State Department nevertheless created a number of opportunities for public input into that process. The EPA described its initial program plan,[59] including a timetable of activities, in some detail in the *Federal Register*. The EPA sponsored workshops and conferences on stratospheric ozone,[60] also announced in the *Federal Register*, which were designed to inform the US negotiating position and to which members of the public were invited as participants and presenters. At least one of those conferences was cosponsored with UNEP, the international forum under whose auspices the Protocol was negotiated. The Department of State and the EPA produced an environmental impact statement (EIS),[61] the preparation of which involved both the solicitation of public comments and responses to those comments. During at least some sessions of the international negotiations themselves, the US delegation held daily briefings at which the input of nongovernmental observers, including both nonprofit environmental organizations and industry representatives, was expressly solicited. Although not officially published by the Executive Branch, successive negotiating drafts circulated freely among nongovernmental observers and the public generally.

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59. 51 Fed. Reg. 1257 (1986) (announcement of program plan).

60. 51 Fed. Reg. 21,576 (1986) (announcement of workshop in July 1986 concerning alternative control strategies); 51 Fed. Reg. 5091 (1986) (announcement of workshop concerning future use of CFCs and other ozone-modifying substances and the availability of technological controls to limit future emissions in March 1986 and conference jointly sponsored with UNEP in June 1986 concerning health and environmental effects of ozone modification and climate change).

61. U.S. Environmental Protection Agency, Environmental Impact Statement on Montreal Protocol on Substances That Deplete the Ozone Layer (Jan. 20, 1988) (prepared under the Stratospheric Protection Program by the Office of Program Development and the Office of Air and Radiation). *See also* 52 Fed. Reg. 29,110 (1987) (updated notice by the Department of State and EPA of intent to prepare environmental impact statement pursuant to National Environmental Policy Act and Executive Order No. 12,114); 49 Fed. Reg. 30,823 (1984) (notice of intent to prepare EIS).

From the point of view of public participation, the negotiating history of the Montreal Protocol contrasts significantly with that of another recent instrument accompanied by a significant level of environmental concern—the trilateral North American Free Trade Agreement (NAFTA).[62] According to the only court that has reached the question, the NAFTA could significantly and adversely affect the environment in the United States by, for example, constraining domestic regulatory activity in such areas as pesticide residue limitations.[63]

In giving notice of its intent to negotiate the NAFTA as specifically required by law,[64] the Executive Branch announced public hearings on that proposal in the *Federal Register* and solicited public comment on a variety of specific issues, including the environment.[65] During the NAFTA negotiations, an environmental study of generic bilateral issues[66] was prepared after public hearings in six cities and an opportunity for public comment on a draft of the document.

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62. *See* NAFTA, *supra* note 10.

63. Public Citizen v. United States Trade Representative, 822 F. Supp. 21, 27–29 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994) (enumerating potential adverse environmental effects in concluding that plaintiffs have standing to sue). *See also The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the House Comm. on Science, Space, and Technology*, 102d Cong., 2d Sess. 33 (1992) (testimony of David A. Wirth); Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,067 (1993). "[R]esolving questions pertaining to . . . unjustified phytosanitary and sanitary restrictions," such as pesticide residue limitations, was one of the principal trade negotiating objectives of the United States. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901(b)(7)(C) (1994).

64. Trade Act of 1974, 19 U.S.C. § 2153 (1994).

65. 56 Fed. Reg. 32,454 (1991) (notice of intent to negotiate North American Free Trade Agreement). *See also* 56 Fed. Reg. 41,151 (1991) (updated notice of public hearings); 56 Fed. Reg. 40,218 (1991) (same). Approximately a year later, the Executive Branch proposed a worker adjustment program to ameliorate dislocations that might result from the agreement and solicited public comment on that program. 57 Fed. Reg. 31,533 (1992).

66. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REVIEW OF U.S.–MEXICO ENVIRONMENTAL ISSUES (1992). The Clinton Administration released a successor to this document to the public on November 13, 1993, a scant four days before the House of Representatives voted on the NAFTA implementing legislation. THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES (1993). The EPA and its Mexican counterpart prepared a joint study of border issues, on which public hearings were held and public comment solicited, that coincided temporally with the NAFTA negotiations. *See* U.S. Environmental Protection Agency & Secretaria de Desarrollo Urbano y Ecologia, Integrated Environmental Plan for the Mexican–U.S. Border Area (First Stage, 1992–1994) Feb. 14, 1992. From the outset, however, this undertaking was expressly stated by the Executive Branch to be on a separate, "parallel" track from the NAFTA negotiations and in any event addressed only a subset of the environmental issues raised by that agreement.

As in the GATT,[67] however, nongovernmental observers were not permitted to attend negotiating sessions. The Executive Branch did not release interim texts of the NAFTA. Indeed, when a document purporting to be a draft of the agreement was leaked to the press in late March 1992, the Executive Branch would neither confirm nor deny the authenticity of that document.[68] Although there was a dialogue with environmental organizations during the subsequent negotiation of the NAFTA environmental "side agreement,"[69] interim drafts of that instrument similarly were not released to the public. Representative Richard Gephardt described the overall NAFTA drafting process as "the most secretive trade negotiations that I have ever monitored."[70]

Moreover, in contrast to the ordinary procedure for Senate advice and consent to ratification and enactment of statutes to assure the domestic application of most treaties as provided in the Constitution, the adoption of domestic implementing legislation for the NAFTA is subject to special "fast track" procedures that limit Congress's power of amendment and that, as applied in practice, have constricted public access to the post-negotiation domestic legislative process necessary before the international obligations in the agreement can be perfected.[71] Under the fast track procedures, the text

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67. As in the quasi-adjudicatory GATT dispute settlement process described above, only states as represented by their governments may participate in multilateral negotiations in the GATT. The public generally does not have direct access to law making in the GATT, either in the form of presence at negotiating sessions, such as the Uruguay Round of Trade Negotiations, or public availability of interim negotiating drafts, such as the recently adopted Agreement Establishing the World Trade Organization. *See* Rules of Procedure for Sessions of the Contracting Parties, rules 8 & 9, *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 10 (12th Supp. 1964) (limiting observers to governments and intergovernmental organizations).

68. *See Citizen Groups Say Leaked NAFTA Draft Would Undermine U.S. Standards*, Int'l Trade Daily (BNA), Mar. 26, 1992, *available in* LEXIS, BNA Library, BNAITD file.

69. North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480, 1482 (entered into force Jan. 1, 1994).

70. Remarks of House Majority Leader Richard Gephardt Before the 21st Century Conference, Washington D.C. (Sept. 9, 1992), *reprinted in* Fed. News Serv., Sept. 9, 1992, *available in* LEXIS, Daybok Library, NEWS file.

71. *See* Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903 (1994) (authorizing "fast track" procedures found in 19 U.S.C. § 2191 for the NAFTA and GATT Uruguay Round). The US has entered into most reciprocal trade agreements since the original GATT as executive agreements authorized by prior statute. *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902 (1994) (authorizing negotiation of trade agreements, including the NAFTA and GATT Uruguay Round); RESTATEMENT, *supra* note 5, § 303 comment (e) & reporters' notes 8 & 9. Ordinarily, such agreements can be expected to require the adoption of implementing legislation to

of the trade agreement proper is publicly available before congressional consideration of the domestic legislation for implementing that international instrument. Congress can, and in the case of NAFTA did, hold publicly accessible hearings on the agreement and, by implication, the legislation to implement it as a domestic legal matter. Members of Congress had access on a confidential basis to the draft bill and even participated in closed "non-markups" and "non-conferences" before it was formally introduced.

Certain congressional committees, however, had preferential access to this process. Moreover, the voluminous implementing legislation containing a large number of modifications to domestic US laws was formally released to the public less than two weeks before the House of Representatives voted on the bill on November 17, 1993. Even then, this documentation was not generally available as a practical matter until somewhat later.

Certain segments of the nongovernmental environmental community, as distinct from the public generally, had preferential access to the NAFTA negotiating process through membership on statutorily created private sector advisory committees to the United States Trade Representative. One representative of a nongovernmental environmental organization was appointed to the forty-five member Advisory Committee for Trade Policy and Negotiations. Four others were appointed to subsidiary policy advisory committees on such issues as investment, services, industry, and agriculture.[72] Those individuals, along with one additional staffer for each that also had access to interim texts, were subject to confidentiality restrictions authorized by the statute creating those advisory committees.[73] These confidentiality agreements, among other things, prohibit the signatory from releasing the text to the public or to other individuals within the organization. The subsid-

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ensure their efficacy as domestic law and, in turn, to confirm that the US can meet its international commitments. Questions have recently been raised concerning the constitutionality under some circumstances of this process, which does not require the Senate's advice and consent to ratification of the agreement by a two-thirds majority vote. *See* Letter from Laurence H. Tribe, Professor of Law, Harvard University, to Senator Robert Byrd (July 19, 1994), *reprinted in* Inside U.S. Trade, July 22, 1994, at S-1 (arguing that "the legal regime put in place by the Uruguay Round represents a structural rearrangement of state-federal relations of the sort that requires ratification by two-thirds of the Senate as a Treaty").

72. US President William Clinton established a new Trade and Environment Policy Advisory Committee (TEPAC) by executive order on March 25, 1994. Exec. Ord. No. 12,905, 59 Fed. Reg. 14,733 (1994). The TEPAC is part of the larger private sector trade advisory committee structure established by statute.

73. Trade Act of 1974, 19 U.S.C. § 2155(g)(3) (1994). The statutory language requires that rules issued by the Executive Branch "shall, to the maximum extent feasible, permit meaningful consultations by advisory committee members with persons affected by" trade agreements.

iary policy advisory committees are exempt by statute from specified statutory requirements for open meetings, public notice, public participation, and public availability of documents under certain circumstances.[74]

V. CONCLUSION

There are at least five lines of cleavage in current practice with respect to public participation in multilateral process on both the international and domestic levels that are illuminated by these three case studies.

A. Variability in the Treatment of Nongovernmental Observers by Intergovernmental Organizations

In the case of stratospheric ozone and many other negotiations under UNEP auspices, nongovernmental observers representing both industry and environmental organizations have been freely accredited as observers to formal intergovernmental meetings, with the prerogative of speaking in formal meetings and the entitlement freely to receive preparatory documentation. By contrast, the presence of nongovernmental observers is categorically precluded in trade negotiations in the GATT, such as the recently completed Uruguay Round, and access to drafts of significant documents is considerably more restricted. The OECD's advisory committee structure additionally discriminates between representatives of nongovernmental environmental organizations on the one hand and industry and labor representatives on the other. The latter have a certain degree of preferential access through BIAC and TUAC that environmental organizations do not. There appears to be no generally accepted standard of practice among multilateral fora on this question. Moreover, few intergovernmental organizations—even those such as UNEP that have relatively liberal practices—have formal, written policies or guidelines such as the United Nations Economic and Social Council's formal system for interacting with non-governmental organizations awarded consultative status with that body.[75] By contrast, in the International Labor Organization (ILO) members of the public—in that case workers' and em-

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74. *Id.* 19 U.S.C. § 2155(f)(2) (Policy advisory committees are exempt from certain provisions of the Federal Advisory Committee Act "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.").

75. A 1968 resolution establishes procedures for applying for and awarding consultative status to accredited nongovernmental organizations, which are divided into two principal categories and a "roster" of other organizations. E.S.C. Res. 1296, 44 U.N. ESCOR Supp. (No. 1) at 21–22, U.N. Doc. E/4548 (1968). Depending on their classifica-

ployers' organizations—are voting delegates to the annual International Labor Conference. Under the ILO's tripartite structure, these nongovernmental delegates are equal in total number to those representing governments.[76] As a first step, the OECD Council might require its committees to report on the extent to which nongovernmental organizations have been involved in their work and to identify opportunities for greater involvement by the private sector.

B. Absence of Standardization in Treatment of Documentation by Intergovernmental Organizations

Mirroring the variability in their treatment of nongovernmental observers, multilateral fora display a wide variety of approaches with respect to public access to their own documentation. For example, UNEP made no attempt to limit access to interim negotiating drafts of the Montreal Protocol. Much of the background documentation produced as part of the preparatory process leading up to the United Nations Conference on Environment and Development—the so-called "Earth Summit"—held in Rio de Janeiro in June 1992 was made widely available in advance of that meeting in electronic form. By contrast, the availability of OECD and GATT documentation from the professional staff of those organizations is considerably more restricted. International organizations themselves, and the United States as a member of those organizations, should work to improve access to all documents of all international organizations and to ensure that the vast majority of documentation is routinely made available to the public.

C. Disparate Treatment of Nongovernmental Sectors on the International Level

The OECD's formal advisory committee system is a compelling example of dissimilar approaches to representatives of different nongovernmental sectors, namely industry and environmental groups. Discrimination among nongovernmental sectors may have particularly pronounced effects on ac-

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tion, organizations awarded consultative status may be entitled to send representatives to meetings, to submit written statements to the Council, to make oral statements at meetings of the Council and its subsidiary bodies, and to request inclusion of items on the Council's provisional agenda. That resolution also establishes the rights of accredited organizations with respect to such questions as speaking on the floor of meetings, circulation of documents, and access to UN documentation. *See generally* R. SYBESMA-KNOL, THE STATUS OF OBSERVERS IN THE UNITED NATIONS 295–318 (1981).

76. *See* Constitution of the International Labor Organization, Oct. 9, 1946, arts. 3 & 4, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended*, June 25, 1953, 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143, *amended*, June 22, 1962, 14 U.S.T. 1039, T.I.A.S. No. 5401, 466 U.N.T.S. 323, *amended*, June 22, 1972, 25 U.S.T. 3253, T.I.A.S. No. 7987.

cess to the organization's documentation by private parties to the extent that that documentation may not be available through domestic channels, as in the case of the OECD's work on trade and environment. The need for either clear and liberalized rules guaranteeing broad and direct public access to OECD documentation or an advisory committee analogous to BIAC and TUAC that services private environmental interests, or both, is increasingly clear. Whether or not such a channel is established, both the OECD and the US government should work to minimize or eliminate these unjustified disparities in treatment of different sectors of the public.

D. Lack of Objective Standards for Public Participation in Domestic Processes Relating to International Affairs

As demonstrated by the contrast between the domestic treatment of the Montreal Protocol and NAFTA negotiations, procedures for public participation within the United States on issues of foreign policy vary widely. By contrast with analogous quasi-legislative activities in a strictly domestic context, there are no across-the-board, generally applicable standards required either by legislation or by internal Executive Branch policy. Instead, public access is determined largely on a case by case, ad hoc basis that does not necessarily acknowledge earlier precedents. A number of factors seem to influence the choice of approach, including: (1) demand for access from nongovernmental sectors; (2) the institutional culture of the Executive Branch agencies involved; (3) the culture, history, and context of the international setting in which the question of domestic access arises; and (4) the perceived sensitivity of the subject matter. The Executive Branch should explicitly address this question and regularize practice in this area through a vehicle such as an executive order. Alternatively, as in the GATT Uruguay Round implementing legislation,[77] a legislative analogue of the Administrative Procedure Act[78] governing issues of foreign affairs might be considered.

E. Absence of Standards for Domestic Release of Documents of International Organizations

Echoing the myriad approaches to this question on the international level, the Executive Branch's approach to intergovernmental organization documentation lacks uniformity. Indeed, as demonstrated in the case of the OECD, Executive Branch agencies have treated documents from the same international organization bearing the same "restricted" designation in entirely different ways on different occasions. While the most desirable solution,

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77. *See supra* note 25 and accompanying text.
78. *See* APA, *supra* note 3.

as discussed above, is greater public access on a multilateral basis, in the meantime the State Department should develop a clear policy with respect to this question on the strictly domestic level.

More generally, public participation in lawmaking functions, particularly those that are carried out by unelected officials in settings like administrative rule makings in the United States, furthers a number of important public policy goals. Citizen input in governmental decisionmaking processes has been justified as facilitating accountability to the public.[79] Similarly, public participation can assist informed, accurate, and efficacious governmental decision making by providing pertinent information to public authorities.[80] And citizen participation can improve the efficiency of govern-

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79. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981) ("Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall."); Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 316–18 (1986) ("[A]n administrative agency is not ordinarily a representative body, its deliberations are not usually conducted in public, and its members are not subject to direct political controls in the same way as legislators. . . . Broad citizen participation in the rulemaking process is therefore an excellent check on agencies that are unresponsive to public needs."); Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 546 (1989) (arguing that administrative process "should reflect democratic values and the intellectual contributions of democratic theory" notwithstanding the public's lack of technical expertise); Wesley A. Magat & Christopher A. Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 DUKE L.J. 301, 316–19; Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1637 (1985) ("The job of the public administrator is not merely to make decisions on the public's behalf, but to help the public deliberate over the decisions that need to be made. Rather than view debate and controversy as managerial failures that make policymaking and implementation more difficult, the public administrator should see them as natural and desirable aspects of the formation of public values, contributing to society's self-understanding.").

80. *See, e.g.*, National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672, 683 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (public participation in rule making "opens up the process of agency policy innovation to a broad range of criticism, advice and data"); Bonfield, *supra* note 79, at 316–17 ("An agency's accumulated knowledge and expertise are rarely sufficient to provide all the needed data for rulemaking decisions. Persons who are affected by agency actions are often in the best position to provide much of the specific information necessary for wise rule formulation. An opportunity for interested persons to inform appropriate administrators of facts, views, or arguments that they consider relevant to a proposed rule is, therefore, necessary for the sound operation of government."); James T. Harrington & Barbara A. Frick, *Opportunities for Public Participation in Administrative Rulemaking*, 15 NAT. RESOURCES LAW. 537, 537–38 (1983) ("Administrative agencies actively solicit detailed, technical information from the regulated community in recognition that it is impossible to draft appropriate regulations in a factual vacuum. . . . [I]t is not only a person's right, but his

mental processes by reducing the long-term costs of official decision making, particularly on controversial issues where public sentiment can be assessed in advance of a policy choice.[81] Requirements for notice-and-comment rule making in the Administrative Procedure Act,[82] generally applicable to a variety of domestic US administrative processes, are intended to ensure the responsiveness and efficacy of bureaucratic initiatives.[83] Although the details of the mechanisms obviously differ somewhat, other municipal legal systems reflect similar underlying policies.[84]

The need is just as great on the international level. Public participation in the OECD Chemicals Group has been described as not just desirable but necessary for realizing the goals of that entity. The Chemicals Group was charged with achieving demonstrable results. At the time of the Group's creation, much of the technical expertise with respect to chemicals resided in the nongovernmental private sector, including both business and environmental interests. Informing and mobilizing the environmental community in the United States was essential as a political matter to create public support at home for measures agreed to in the OECD. According to this view, public participation in the OECD Chemicals Group has been a "win-win" proposi-

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duty to provide agencies with . . . hard technical data and scientific information on the proposal and its economic effect."); Magat & Schroeder, *supra* note 79, at 317 ("Fairness and accuracy are interrelated, because techniques for ensuring fairness—adequate notice and the opportunity to participate meaningfully in proceedings affecting one's interests—will also ensure accuracy.").

81. *See, e.g.*, Magat & Schroeder, *supra* note 79, at 318 (defining efficiency as "the low-cost resolution of the business" before the decisionmaker). *But cf.* Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667 (1975) (identifying participation by a broader array of societal interests in administrative proceedings as a trend that involves tradeoffs between accountability on the one hand and accuracy and efficiency on the other).

82. *See* APA, *supra* note 3.

83. Administrative rule making has been described as " 'one of the greatest inventions of modern government.' . . . During coming decades, the prospect is that governments all over the world will adopt American ideas about rulemaking as a mainstay of governmental machinery." 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:1, at 448–49 (2d ed. 1978). *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 102 (1941) (rule making "should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses" and help decision makers obtain "the information, facts, and probabilities which are necessary to fair and intelligent action"). *See also* H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S. CODE CONG. & ADMIN. NEWS 1195, 1205 (The APA's "public information section is basic, because it requires agencies to take the initiative in informing the public)."

84. *See generally* PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE: CURRENT LEGAL SITUATION AND PRACTICAL EXPERIENCE (Martin Führ & Gerhard Roller eds. 1991).

tion, with the efforts of the governmental and private sectors reinforcing each other to realize the Group's and the OECD's goals and purposes. Both industry representatives and environmentalists can overcome obstacles to communication and create an atmosphere of trust in this international context in a way that is difficult to duplicate in domestic fora. Conversely, there appear to be few, if any, situations in which greater public access and participation has been a "lose-lose" proposition.

Distinctions should be made between those foreign policy domains—such as war and national security—that are appropriate for the highest level of secrecy at both the international and national levels and those—like environment and trade—that are not. Even so, domestic models cannot be incorporated into international decisionmaking processes without attention to the foreign policy context. The rules of intergovernmental organizations cannot be expected to be responsive to the national legal system of every country on Earth. Even such strictly domestic processes as crafting US positions in multilateral fora require application of outcome-neutral principles of public participation with sensitivity to a foreign policy setting. That does not mean, however, that basic tenets of US public law as access to proposals for new policies and an opportunity for public comment must be abandoned altogether. Even conceding the need for responsiveness to a variety of foreign policy settings, public participation on environmental issues in international processes appears to be ad hoc in the extreme and would benefit from attempts to regularize and standardize policy and practice to improve both consistency and predictability.

One channel already exists on the domestic level for expanding public participation in the negotiation of international agreements by the Executive Branch. To ensure that all proposed international agreements are consistent with US foreign policy objectives, the Department of State has adopted a procedure known as "Circular 175."[85] Pursuant to that process, the negotiation and conclusion of virtually all international agreements requires the prior approval of the Secretary of State or his designee. The State Department in necessary cases oversees an interagency consultation to solicit the views of interested and affected Executive Branch agencies. The request for State Department approval is accompanied by a memorandum of law setting out the constitutional and statutory authority supporting the proposed agreement and identifies additional laws or regulations that may be necessary for the agreement's domestic implementation.

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85. 22 C.F.R. § 181.4 (1995); 11 F.A.M. ch. 700. According to informed anecdotal accounts, no Circular 175 was prepared for the NAFTA environmental side agreement, *supra* note 69, because of that instrument's political sensitivity.

The Circular 175 process, as it stands now, is strictly an interagency procedure. Draft requests for negotiating authority are not public. Although, as in the case of stratospheric ozone depletion, there may be opportunities for public participation in negotiations, there is no opportunity for direct public input into the Circular 175 process itself. Depending on the subject matter, Circular 175 requests may be classified. In any event, Circular 175 documentation is not customarily made available to the public. In response to a request under the Freedom of Information Act, the State Department's policy would very likely result in withholding that documentation as exempt inter- or intra-agency memoranda.[86]

To improve public input into US negotiating positions, the Circular 175 process could be made more accessible to public comment. A notice of intention to negotiate a new international agreement might be published in the *Federal Register*, together with a statement of US objectives and a request for public comment to the US negotiators. Alternatively, either by statute or on the Executive Branch's own initiative, outcome-neutral procedures analogous to notice-and-comment rule making under the Administrative Procedure Act might be established, with processes tailored to meet the needs of governmental decision making in national, bilateral, and multilateral contexts. For instance, interim drafts of international agreements or other significant actions in multilateral fora might be published in the *Federal Register*, with a subsequent opportunity for formal public comment to US negotiators. In either case, whether through the Circular 175 process or through the adoption of free-standing arrangements for consultation with the public, international actions that are especially sensitive for military or security reasons could be subject to a modification or waiver of these requirements.

An environmental impact statement (EIS) under the National Environmental Policy Act (NEPA)[87] is another vehicle for public participation in governmental decisionmaking processes. For those federal activities anticipated to have a significant adverse impact on the environment, an EIS is required in advance of final action. The Council on Environmental Quality (CEQ), located, like the Office of the Trade Representative, in the Executive Office of the president, is the chief caretaker of the statute. CEQ regulations specifically state that proposed international agreements are subject to the statute's requirements.[88] The Department of State also has regulations that

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86. Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1994); 22 C.F.R. § 171.11(a)(5) (1995).

87. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–70 (1988).

88. 40 C.F.R. § 1508.18(b)(1) (1995) (definition of major federal actions to which NEPA applies, including "treaties and international conventions or agreements").

apply NEPA and the EIS requirement to international agreements.[89] In the past, various Executive Branch agencies have prepared environmental impact statements for proposed international agreements, such as the Panama Canal Treaty. Overall, approximately a dozen international agreements have been the subject of environmental impact statements, at least some of which explicitly rely on NEPA as the legal authority for their preparation.[90] But practice has been spotty, the standards for determining when an EIS should be prepared have not been uniformly applied, and many of the agreements subjected to the methodology have been intended to mitigate or eliminate environmental harms—the category of least, rather than greatest, concern.[91]

The EIS process is primarily designed to ensure that federal agencies integrate environmental considerations into their decisionmaking processes by analyzing potential environmental effects prior to taking action. Accord-

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89. 22 C.F.R. § 161.5 (1995).

90. Besides the Panama Canal Treaty, for which the Department of State prepared a draft environmental impact statement (EIS) in 1977, the Executive Branch has also prepared the following final EISs in connection with the negotiation of the following international agreements: Montreal Protocol on Substances That Deplete the Ozone Layer (Department of State & Environmental Protection Agency, 1988); Interim Convention o the Conservation of North Pacific Fur Seals (Department of Commerce & Department of State, 1985); U.S.–Canada Convention for the Conservation of the Migratory Caribou and Their Environment (Department of State, 1980) (draft EIS); Incineration of Wastes at Sea Under the 1972 Ocean Dumping Convention (Department of State & Environmental Protection Agency, 1979) Convention on the Convention on the Conservation of Migratory Species of Wild Animals (Department of State, 1979) (draft EIS); Renegotiation of Interim Convention on Conservation of North Pacific Fur Seals (Department of Commerce, 1976); Convention for the Conservation of Antarctic Seals (Department of State, 1974); Ratification of Proposed Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Department of State, 1973); World Heritage Convention (Department of Interior, 1973); and Negotiation of an International Regime for Antarctic Mineral Resources (Department of State, undated).

91. In 1979 the president issued an executive order that articulates less demanding requirements than NEPA for analyzing environmental effects of major federal actions with effects abroad. Exec. Order No. 12,114, 3 C.F.R. 356 (1979), *reprinted in* 42 U.S.C. app. § 4321 (1988). Post-1979 EISs have been undertaken pursuant to NEPA, the Executive Order, or both. The Executive Order, which expressly excludes from its coverage "votes and other actions in international conferences and organizations," *Id.* § 2–5(a)(vi), might limit the applicability of the EIS methodology in situations other than formal international agreements. A recent judicial decision, however, suggests that NEPA might nonetheless apply in certain contexts. *See generally* International Decisions, 87 AM. J. INT'L L. 626 (1993) (analysis of Executive Order in the context of Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993)). In another recent case, the US Court of Appeals for the District of Columbia circuit held that there was no legal necessity for the USTR to prepare an EIS for the negotiation of NAFTA or the adoption of that agreement's implementing legislation. Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994). The reasoning of that case, however, would not apply to most international agreements other than trade agreements.

ing to CEQ's regulations and a considerable body of case law, an EIS must contain the following elements: (1) a description of the proposed action; (2) an analysis of the potentially affected environment; (3) a description of the direct and indirect potential impacts on that environment resulting from the proposed action; (4) a consideration of alternatives, including the alternative of no action, and the potential impacts of those alternatives; and (5) an analysis of mitigating measures. But the EIS process is also an occasion for public information and public participation. CEQ rules ensure public participation in the preparation of an EIS through, at a minimum, an opportunity for public comment on a draft statement and the necessity for agencies to respond to those comments in the final document.[92] The availability of judicial review of the procedural adequacy and substantive content of an EIS pursuant to the Administrative Procedure Act[93] has long been established.[94]

At a higher level of abstraction, these case studies suggest that rules governing public participation in international arenas lack uniformity, are arbitrarily applied, or both. This conclusion has important implications for the integrity of democratic government. In particular, experience with public participation in international processes suggests that those procedures are not necessarily responsive to the concerns of a broad citizenry but, rather, to those with the resources or expertise to gain access to policy makers of all sorts—domestic, foreign, and the professional staff of international organizations.

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92. *See, e.g.*, 40 C.F.R. § 1500.2(d) (1995) (statement of federal policy to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment"); *Id.* § 1501.7(a)(1) (necessity as part of scoping process to "[i]nvite the participation of . . . interested persons (including those who might not be in accord with the action on environmental grounds)"); *Id.* § 1503.1(a)(4) (necessity, with respect to draft EIS, to "[r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected"); *Id.* § 1506.6 (instructions to agencies requiring public involvement in the NEPA process); Exec. Order No. 11,514 § 2(b), 3 C.F.R. 104 (1970), *reprinted in* 42 U.S.C. app. § 4321 (1988) (directing federal agencies to "[d]evelop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties"); Colony Fed. Sav. & Loan v. Harris, 482 F. Supp. 296, 304 (W.D. Pa. 1980) ("Citizen participation is a vital ingredient in the success of NEPA. . . . An opportunity for local citizens or other interested parties to participate in the preparation of the environmental analysis is *mandatory* under NEPA."); Burkey v. Ellis, 483 F. Supp. 897, 915 (N.D. Ala. 1979) ("[NEPA] and the CEQ Guidelines promulgated under it are designed to encourage public participation in the decision-making process.").

93. APA, *supra* note 3, §§ 701–706.

94. *See, e.g.*, Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Policy making increasingly seems to be shifting to international fora. Distance, resources, language facility, and familiarity with international procedures can all operate as barriers to international venues whose post-Cold War importance is increasing in such areas as population, trade, labor, public health, and the environment. If rules of access act as an additional barrier, the risk that policy makers in international settings will respond to a narrower, rather than broader, array of interests is greatly increased. And to the extent that international institutions are vehicles for domestic policy making in the first instance, principles of access that are restrictive or unevenly applied may in turn have an impact on the legitimacy of government at the national level.