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Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?

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The separation of powers doctrine is a central tenet of democracy in the United States.¹ As a consequence of power vesting in separate branches of government, the legislative and executive branches cooperate to carry out most governmental functions, including the formation and administration of foreign trade agreements.² Article I of the U.S. Constitution gives Congress the power to regulate commerce with foreign nations,³ while Article II provides the executive with the power to negotiate treaties with the advice and consent of the Senate⁴ and to administer congressional initiatives.⁵

1. See THE FEDERALIST NOS. 47, 57 (James Madison).

2. See DANIEL VERDIER, *DEMOCRACY AND INTERNATIONAL TRADE: BRITAIN, FRANCE, AND THE UNITED STATES, 1860-1990* (1994).

3. Congress shall have the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Additionally, the "necessary and proper clause" gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that implied within the Constitution is the power to do what is necessary and proper to carry out its terms). Therefore, Congress may transfer its power to regulate commerce with foreign nations to the executive, or to departments which Congress has previously established within the executive.

4. The president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. Under this arrangement, the executive is charged with the duty of negotiating treaties and trade agreements which are submitted to Congress for ratification. Trade agreements are a special type of treaty concerned with tariffs placed on foreign goods imported into the United States and on U.S. goods exported to foreign nations. See RAOUL BERGER, *THE PRESIDENTIAL MONOPOLY OF FOREIGN RELATIONS*, 71 MICH. L. REV. 1, 33-37 (1972). Therefore, absent congressional intervention, the Constitution requires that trade agreements be executed in the same manner as treaties.

5. The U.S. Constitution calls upon the president to "take Care that the Laws be faithfully executed." U.S. CONST. art II, § 3. Additionally, as the administrative branch of government, the executive has the responsibility of assuring that the terms of those executed agreements are followed. This is authorized by the United States Constitution which states that "the executive

Conspicuously lacking in the international trade agreement negotiation and implementation process, however, is an opportunity for consistent, meaningful public involvement. This is especially true in the negotiation process where the American public is afforded few affirmative constitutional rights. One right granted to the public is the opportunity to select their leaders by way of election.⁶ When the public is apprised of government activities, the collective force of public sentiment plays a critical role in this selection process and places limits on the reach of the government.⁷ Yet, international trade agreements, with the notable exception of the North American Free Trade Agreement (NAFTA),⁸ have historically been negotiated and implemented in relative obscurity, away from public scrutiny. For the most part, this has left the public outside of the trade agreement-making process.

This Note argues that increased public participation in international trade negotiations should be encouraged. However, while the United States values open government and individualism, and citizen involvement is a requisite of democracy, participation must be limited to those methods best equipped to serve U.S. public policy objectives. In the context of international trade negotiations, the needs of government negotiators require that limits be placed on public participation. These limits create the confidentiality needed to negotiate effectively with foreign nations.

Part I of this Note provides a historical background of public participation in international trade negotiations. Part II discusses the importance of public participation in U.S. trade negotiations and agreements. Part III details the current legal structure of public involvement in international trade negotia-

Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

6. U.S. CONST. art I, § 2, cl. 2; § 3, cl. 1; art. II, § 1, cl. 2. *See generally* JOHN STUART MILL, *LIBERTY OF THOUGHT AND DISCUSSION* (1859) (discussing the freedom of speech and the important role public sentiment plays in a democracy).

7. *See* MILL, *supra* note 6.

8. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 and 32 I.L.M. 605 [hereinafter NAFTA]. NAFTA creates an economic free trade area between the United States, Canada, and Mexico. NAFTA was completed on September 6, 1992, and was signed on December 17, 1992, by U.S. President Bush, Canadian President Mulroney, and Mexican President Salinas. The agreement has been adopted by the government of each party. *See infra* notes 70-77 and part II.C. (discussing why NAFTA was an exception to the general practice that trade agreements are negotiated outside of public scrutiny).

tions and the different approaches to public participation. Part IV examines potential changes to and the likely evolution of public participation in international trade negotiations. This Note concludes that formal-direct methods⁹ of public participation lead to more productive and efficient trade negotiations by balancing the needs of the public with the requirements of government negotiators.

I. THE COURSE OF PUBLIC PARTICIPATION IN U.S. TRADE NEGOTIATIONS

Historically, the American public participated only indirectly in the trade negotiation process. Public involvement principally centered on electing representatives who were responsible for shaping U.S. trade policy.¹⁰ From the 18th century until the 1930s, U.S. international trade relations¹¹ were left to the interplay between these public delegates in the legislative and executive branches and similar officials in foreign nations.¹² This trend first began to change with the Great

9. See *infra* notes 98-99, for examples of formal-direct methods of public participation.

10. As delegates, elected representatives act on their constituents' behalf in both foreign and domestic affairs. Interested private parties or organizations meet with their elected officials to discuss U.S. foreign trade policy when current issues pertain to their particular businesses. Typically, these occasions arise when issues are "intermestic." Intermestic issues are those that effect both domestic and international policies. JOHN W. SPANIER & ERIC M. USLANER, *AMERICAN FOREIGN POLICY MAKING AND THE DEMOCRATIC DILEMMAS* 28 (1994). Intermestic issues, such as trade and energy issues, attract increased interest group representation, articulation, and influence. *Id.* Often "so many groups have interests in the outcome of policies and see the stakes as so high that these groups may control much of the policy process. Businesses, banks, agriculture and shipping interests, and labor organizations have a natural interest in trade, foreign investment, and tariff issues." *Id.*

11. For most of our nation's history, international trade relationships were considered a relatively minor area of government activity. Generally, domestic issues are more important than foreign issues to Americans because the public considers those issues that most closely affect daily life to be most important to them. According to the Gallup Poll, since the late 1960s, Americans have consistently placed domestic issues far above foreign issues when considering the most important problem facing the country. HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 164 (4th ed. 1994). In most years after 1972, over 80% of those surveyed chose a domestic issue over a foreign one. *Id.* While international trade most certainly affects life in the broad sense by creating new markets for goods and increasing the size of the economy, many Americans do not see it as a pressing issue, central to the way in which they live their lives. *Id.*

12. JOHN DAY LARKIN, *TRADE AGREEMENTS: A STUDY IN DEMOCRATIC METHODS* 122-28 (1940). For example, the Fordney-McCumber Act of 1922, though it delegated some congressional tariff-making powers to the president, still led to

Depression and the enactment of the Trade Agreements Act of 1934.

A. TRADE AGREEMENTS ACT OF 1934

In 1934, Congress passed the Trade Agreements Act ("the 1934 Act").¹³ The 1934 Act gave the president the power to enter into trade agreements with foreign nations to promote U.S. interests at home and abroad¹⁴ and, thus, was a radical

increased tariffs because the president found himself under too much congressional scrutiny to act in the best interests of the nation. *Id.* at 3-4. Overall, when considering international trade agreements, most members of Congress may be divided into two groups: those who are protectionist at all times and give interest groups whatever they need to retain their tariffs; and those who do not, in principle, favor protectionism but feel they must not let their constituents down while a tariff bill is pending. *Id.* at 3. As a result, allowing legislative input into the process of enacting trade agreements led only to increased tariffs with relatively few instances of tariff reductions. To avoid the evils of logrolling and partisan politics, Congress enacted legislation establishing general policies to be carried out by the administration. *Id.* This action was the only way to lower tariffs "in the public interest without opening up a logrolling orgy." *Id.* at 5.

13. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified at 19 U.S.C. § 1351), as amended by Joint Resolution of March 1, 1937, ch. 24, 50 Stat. 24 (three-year extension); Joint Resolution of April 12, 1940, ch. 96, 54 Stat. 107 (three-year extension); Joint Resolution of June 7, 1943, ch. 118, 57 Stat. 125 (two-year extension); Act of July 5, 1945, ch. 269, § 1, 59 Stat. 410 (three-year extension); Act of June 26, 1948, ch. 678, § 2, 62 Stat. 1053 (one-year extension); Act of September 26, 1949, ch. 585, § 3, 63 Stat. 697 (three-year extension); Act of June 15, 1951, ch. 141, § 2, 65 Stat. 72 (two-year extension); Act of August 7, 1953, ch. 348, Title I, § 101, 67 Stat. 472 (one-year extension); Act of July 1, 1954, ch. 445, § 1, 68 Stat. 360 (one-year extension); Act of June 21, 1955, ch. 169, § 2, 69 Stat. 162 (three-year extension); Act of August 20, 1958, Pub. L. No. 85-686, § 2, 72 Stat. 672 (four-year extension); Act of October 11, 1962, Pub. L. No. 87-794, 76 Stat. 872 (five-year extension); Trade Act of 1974, Pub. L. No. 93-618, Title I, § 101, 88 Stat. 1978, 19 U.S.C. § 2111 (extended through January 1980); extended through the present by the Trade Act of 1974, § 102, as amended by Trade Agreements Act of 1979, Pub. L. 96-39, Title XI, §§ 1101, 1106(c)(1), 93 Stat. 307, 311, 19 U.S.C. § 2112. The Act is currently cited as the Trade Act of 1974. 19 U.S.C. § 2101 (1988).

14. 19 U.S.C. § 1351(a) (1934) (current version at 19 U.S.C. § 1351 (1988)). The 1934 Act's purposes include:

[E]xpanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American population so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corre-

change from pre-existing constitutional authority.¹⁵ Prior to the passage of the 1934 Act, trade agreements and treaties were created in a similar manner. Both were negotiated by the executive branch under the command of the president and sent to the Senate for advice and consent.¹⁶ When supported by two-thirds of the Senate, trade agreements were sent back to the president to be signed into law and delegated to an executive agency for implementation.¹⁷

The 1934 Act essentially removed Congress from the trade agreements process. Congress granted the executive more authority when negotiating with other nations by, in effect, transferring the Senate's traditional advice and consent power to the president.¹⁸ The 1934 Act empowered the president to unilater-

sponding market opportunities for foreign products in the United States.

Id.

15. Through the 1934 Act, Congress explicitly delegated broad implementing authority to the president. 19 U.S.C. § 1351(a)(1-2) (1934) (current version at 19 U.S.C. § 1351 (1988)). Prior to the Act, the president had only negotiating power and a limited ability to issue proclamations. See generally John H. Jackson, *The General Agreement on Tariffs and Trade in United States Democratic Law*, 66 MICH. L. REV. 249, 283-84 (1967); S. REP. No. 258, 78th Cong., 1st Sess. 47, 48 (1943) (discussing the ramifications of the 1934 Act).

16. For a discussion of the president's power to enter into treaties and trade agreements, see *supra* note 4.

17. Numerous executive departments and agencies are involved in the establishment and implementation of U.S. trade agreements and policy. The Office of the United States Trade Representative (USTR) is the most significant agency on trade matters in the executive branch. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 157 (2d ed. 1986). The USTR is charged with negotiating "with foreign nations on trade and a number of other economic matters, and coordinates much of the United States government policy formulation on such matters." *Id.*

Although not as influential in international trade as the USTR, the Department of State is the principle U.S. department for foreign affairs, and as a result, the Department is very involved with international economic issues. The Department's Bureau of Economic and Business Affairs focuses its attention on international trade and policy. *Id.* at 158. In addition, the Department of the Treasury directly controls the implementation of some of the key regulations of international economic affairs. *Id.* The Department of Commerce has direct implementing power over export control legislation and regulations and, since 1980, for countervailing and antidumping duties. *Id.* Congress delegated numerous responsibilities relating to international trade in agricultural and commodity goods to the Department of Agriculture. *Id.* at 159. These responsibilities include shipping food aid abroad, setting credit terms for the exportation of American goods, and limiting the importation of food from U.S. trading partners. *Id.* Many additional government departments and agencies are active in the international trade process.

18. After the power to enter into trade agreements was concentrated in the executive, American trade negotiators were able to coordinate the American

ally "enter into foreign trade agreements with foreign governments or instrumentalities" and to proclaim and modify duties and trade restrictions.¹⁹ As an economic stimulus, the 1934 Act also authorized the president to attack economic stagnation by reducing tariffs on foreign goods by as much as fifty percent.²⁰ When the president took such an action, America's trading partners reciprocated by reducing tariffs placed on U.S. goods, thereby stimulating the U.S. economy.²¹ Faced with the Great Depression and the subsequent deterioration of the global economy, the 1934 Act called for a single, strong voice to deal effectively with foreign nations.²² Thus, the president, with this congressional mandate, assumed the position of chief American trade negotiator with complete and unrestricted authority to enter into binding international trade agreements.

The 1934 Act also created the first formal method of public participation in the international trade negotiation process. Section 4 of the 1934 Act required "reasonable public notice" of the president's intention to enter into agreements with foreign states.²³ This gave American citizens the opportunity to know

viewpoint and in turn bargain more effectively with foreign nations. See LARKIN, *supra* note 12, at 22-32.

19. 19 U.S.C. § 1351(a) (1934) (current version at 19 U.S.C. § 1351 (1988)).

20. 19 U.S.C. § 1351(a)(2) (1934) (current version at 19 U.S.C. § 1351 (1988)) ("No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists").

21. From 1934 to 1939, the reciprocal trade agreements stimulated the domestic economy enormously. WALTER LAFEBER, *THE AMERICAN AGE* 356 (1989). U.S. exports rose by nearly one billion dollars and the U.S. favorable trade imbalance increased from one-half billion dollars to one billion dollars. *Id.*

22. Professors Paterson, Clifford, and Hagen agree that:

The depression raised havoc with the international economy. Economic nationalism guided most countries as they tried to protect themselves from the cataclysm with higher tariffs, import quotas, and preferential and discriminatory trade agreements. World trade declined 40 percent in value and 25 percent in volume from 1929 to mid-1933. In 1933 the United States exported goods worth \$2.1 billion, down from the 1929 figure of \$5.4 billion.

THOMAS G. PATERSON ET AL., *AMERICAN FOREIGN POLICY* 313 (1991). In 1934, President Franklin D. Roosevelt, persuaded by Secretary of State Cordell Hull that lowered tariffs would increase American foreign trade and spark a recovery at home, called for the passage of legislation to effectively attack the rising tariffs. *Id.* Hull, the chief proponent of the Trade Agreements Act of 1934, believed that "international commerce is not only calculated to aid materially in the restoration of prosperity everywhere, but it is the greatest civilizer and peacemaker in the experience of the human race." *Id.*

23. As codified in 19 U.S.C. § 1354 (1934), the 1934 Act provided:

Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of Part III of

with which foreign nations the U.S. government proposed to negotiate. The 1934 Act failed, however, to insure formal public notice concerning the substance of agreements,²⁴ thereby restricting any significant public participation regarding the subject matter of pending agreements.²⁵

this title, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe; and before concluding such agreement the President shall seek information and advice with respect thereto from the United States Tariff Commission, the Departments of State, Agriculture, and Commerce and from such other sources as he may deem appropriate.

19 U.S.C. § 1354 (1934) (current version at 19 U.S.C. § 1354 (1988)).

24. The notice provision in § 4 of the Act, as codified in 19 U.S.C. § 1354 (1934), is limited to giving public input to the president or designated agency head concerning conflicts over whether a specific country would make a good trading partner. The Act does not provide for public notice on the specific issues being negotiated or provisions of an agreement. *See id.*

Pursuant to the Act, the president established the Trade Agreements Committee which was composed of high ranking members of the executive branch. LARKIN, *supra* note 12, at 48-58. The Trade Agreements Committee, commonly known as the Committee for Reciprocity Information, conducted public hearings at which specific items up for negotiation with a particular country would be discussed. Interested parties were required to conform to a series of procedures when requesting to participate. *Id.* at 75-79. The Committee, however, made no assurances and could revert back to the simple § 4 notice at any time. *Id.* at 67.

25. Overall, the president had the power to keep the doors of the trade process closed, giving the public a false sense of involvement. *See* 19 U.S.C. § 1354 (1934) (current version at 19 U.S.C. § 1354 (1988)). While some executive-initiated public participation procedures were established, *see supra* note 23 and accompanying text, consistent public involvement was still lacking.

By concentrating both negotiation and ratification power in the executive, the 1934 Act did streamline the trade agreement process. Trade agreements no longer needed to conform to the treaty ratification process established in the Constitution. *See supra* note 4. The executive could both negotiate and execute trade agreements. 19 U.S.C. § 1351(a)(1-2) (1934) (current version at 19 U.S.C. § 1351 (1988)). In case the executive moves outside the scope of Congress' intent, the 1934 Act provides two contingency arrangements to allow for reassertion of congressional authority. First, Congress retained its control over the actual transfer of power by requiring the 1934 Act's reauthorization on a periodic basis, typically every three or four years. 19 U.S.C. § 1352(c) (1934) (current version at 19 U.S.C. § 1352 (1988)); *see also supra* note 13 (listing the various reauthorizations of the Trade Agreements Act). Failure to reauthorize automatically stripped the executive of the congressional transfer of power, causing the trade agreements process to revert back to the pre-1934 Senate advice and consent procedure.

Second, Congress required all specific trade agreements implemented under the 1934 Act to be automatically terminated, renegotiated or reauthorized after being in existence no longer than three years from the enforcement date of the agreement. 19 U.S.C. § 1352(b) (1934) (current version at

The 1934 Act not only was ineffective in its attempt to increase public participation, but actually reduced public awareness and involvement by eliminating the role of Congress—the federal government branch most closely aligned with the people. While the 1934 Act was in force, Congress was left almost completely outside the trade negotiation process, leaving most agreements to be concluded and implemented in relative obscurity, away from the critical eye of Congress and the public.²⁶ With members of Congress no longer confronted by pending foreign trade agreements, Congress' attention and that of the public turned more toward pressing domestic issues.²⁷

The 1934 Act proved to be one in a series of congressional enactments used to lead the country out of economic depression.²⁸ As a result of the delegation of authority by Congress to

19 U.S.C. § 1352(b) (1988)). This clause provided Congress an important check on the terms of specific agreements. By creating the Act with an agreements termination clause, Congress may reassert itself on any issue or agreement within three years (plus six months notice to the other country involved) of its creation under presidential authority established under the Act. *Id.*

26. Consider, for example, the following observation by John W. Spanier and Eric M. Uslaner:

Americans . . . are poorly informed and uninterested in foreign policy issues. Their knowledge and experience, like that of most senators and representatives, relate to affairs nearer home, such as family and professional life; the political opinions they do hold are more likely to be about national politics In general, it would be more accurate to say that public opinion on foreign policy is a response to the policy makers' decisions and to public presentation of the issues.

SPANIER & USLANER, *supra* note 10, at 28. By passing the Act, Congress delegated its power to make trade agreements to the president and those agencies within the executive branch charged with negotiating international trade agreements. Therefore, except for the reauthorization sections (§ 1352(b) & (c)) and the public notice section (§ 1354), Congress and its constituents were removed from the creation and implementation of reciprocal trade agreements. See 19 U.S.C. § 1351 (current version at 19 U.S.C. § 1351 (1988)).

As noted in *supra* note 1, under the separation of powers system established under the United States Constitution, Congress provides a vital check on the executive and judicial branches of government. That function is diminished when Congress makes broad delegations of power to another branch. On trade issues, the president may execute agreements which are within the broad limits of a congressional delegation of power. See VERDIER, *supra* note 2, at 36-47.

27. See *infra* notes 33-38; M. MARGARET CONWAY, POLITICAL PARTICIPATION IN THE UNITED STATES 81-92 (2d ed. 1991). With Congress turning away from trade agreements and the press following Congress' lead, the executive was left to negotiate and implement trade agreements in relative secrecy. As long as the executive maintained and controlled its negotiations with other countries, information was kept within the executive branch.

28. Congress supported many of President Roosevelt's New Deal programs. The Supreme Court supported the New Deal programs as well, with the exception of portions of the National Recovery Act struck down in *U.S. v. Butler*, 297

the president, the public kept its distance from international issues in general and international trade issues in particular. In the post-Depression era, domestic issues became even more important to the general public and its representatives.²⁹ The emphasis on domestic problems, the tension between the executive and legislative branches of government when addressing domestic issues, and the 1934 Act, combined to leave the nation with unity and consensus on international issues.³⁰ For the most

U.S. 1 (1936). These Acts, like the Social Security Act and National Labor Relations Act, created unprecedented levels of government involvement in the everyday lives of Americans. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 225-29 (3d ed. 1994). Yet these programs apparently failed to pull the country out of economic depression. With the Trade Agreements Act of 1934, the President resorted to the traditional economic stimulus, increased free trade.

Under the act, the administration could bargain with other governments for a reciprocal lowering of tariffs without the need of congressional approval for each agreement since Congress had given blanket approval beforehand. By making concessions on foreign imports, the government could persuade other countries to reduce their duties on American goods. Actually, the concessions the United States made, not the lower foreign duties, expanded American exports. For in a world short of dollars, the purchase of American exports depended largely on the number of dollars made available to foreigners.

ALEXANDER DECONDE, *A HISTORY OF AMERICAN FOREIGN POLICY* 564 (1971).

Globally, between 1934 and 1945, twenty-nine [Trade Act] treaties were made that reduced the U.S. tariff by nearly three-quarters. In the five years following the first act in 1934, U.S. exports rose more than \$1.0 billion, and the nation's favorable trade balance . . . soared from \$0.5 billion to nearly twice that amount.

LA FEBER, *supra* note 21, at 356.

29. In his first inaugural address in 1933, President Franklin D. Roosevelt announced that "our international trade relations, though vastly important, are, in point of time and necessity secondary to the establishment of a sound national economy. I favor as a practical policy the putting of first things first."

DECONDE, *supra* note 28, at 562.

30. As explained by Professors Spanier and Uslaner:

Most legislators remain primarily concerned with domestic policies— and with their reelection campaigns. Most foreign policy questions are not salient to voters, so members of Congress tend to downplay their importance and devote their time to issues and services that are more rewarding. Thus, only a minority of legislators are strongly concerned about foreign policy and even they tend to be supportive of the president in crisis situations.

SPANIER & USLANER, *supra* note 10, at 27.

During this period, the typical conflict between the separate powers in the federal government was not present with regard to foreign policy issues.

The Congress has been traditionally supportive of the president in foreign policy. Legislators to a large extent felt a lack of familiarity and sense of incompetence on foreign affairs. Viewing them as esoteric matters beyond their personal experience, in contrast to farm or labor problems, confronted with expert civilian and military witnesses at committee hearings, they usually have tended to subordinate their

part, Congress and the public remained disinterested in international issues until the 1970s.

B. TRADE ACT OF 1974

The Trade Act of 1974 ("the 1974 Act") was a product of the changing times in America. Continued Cold War maneuvering³¹ and the lingering Vietnam War³² made international relations increasingly more important to the general welfare of the United States.³³ By the mid-1970s, America's post-World War II economic dominance began to deteriorate.³⁴ Led by Japan, Asia began gaining economic strength, quickly joining Europe as

own presumed expertise—political judgment of the feasibility and acceptability of administration policies—to that of the president and his phalanx of bureaucratic help.

Id.

31. The Cold War between the United States and the Soviet Union led to a unification of foreign policy power behind presidential initiatives. Many commentators call this period the Cold War consensus. JEREL A. ROSATI, *THE POLITICS OF UNITED STATES FOREIGN POLICY* 375 (1993). As Rosati states:

The cold war years led to the development of an ideological and foreign policy consensus throughout American society and government, an extraordinary time in American history. This consensual view fostered the rise of presidential power, the expansion of the foreign policy bureaucracy, the development of an acquiescent Congress, and the rise of a national security ethos and free market ethos throughout government and society.

Id.

32. Professors Spanier and Uslaner believe that:

[S]ince Vietnam, Congress has become more assertive and less willing to accept presidential dominance on foreign policy. There has been a renewed concern for the establishment of a balance of power between the president and Congress in policy making, although this reassertion of congressional power does not mean the legislature has become an equal partner with the president.

SPANIER & USLANER, *supra* note 10, at 27. Overall, "[t]he reassertion of congressional authority in foreign policy occurred for a number of complementary reasons, most of which had to do with the Vietnam War." ROSATI, *supra* note 31, at 296.

33. According to the Gallup Poll, for a period during the height of the Vietnam War, Americans considered international issues more important than domestic issues. STANLEY & NIEMI, *supra* note 11, at 164. Finally, after intense media coverage of the quagmire in Southeast Asia, Congress reasserted itself in the international arena by passing the War Powers Act. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973). The Act limited the president's power to send troops abroad, effectively ending the longstanding American foreign policy consensus.

34. According to the Economic Report of the President, 1975 was the last year the United States experienced a merchandise trade surplus (i.e., the value of exports was greater than the value of imports). STANLEY & NIEMI, *supra* note 11, at 370. Moreover, in 1974 and 1975, America's gross domestic and national products declined as the nation suffered a recession. *Id.* at 417.

a major global industrial competitor to the United States.³⁵ At the same time, increased media coverage brought international trade issues to the public's attention³⁶ and motivated individuals and groups to challenge the traditions, institutions, and authority of government with respect to trade issues.³⁷ The 1974 Act and its amendments, combined with increased public criticism and demand for open government, contributed to a rekindled awareness of government activities and their impact on the public.³⁸

Under the same swell of public activism that spurred the reclamation of its war powers,³⁹ Congress reanalyzed its transfer of power on international trade issues. In 1974, after multiple extensions of the Trade Agreements Act of 1934, creating forty years of continuous presidential authority over international trade matters,⁴⁰ Congress passed a revised version of the

35. Professor Rosati has posited that:

As a consequence of [the economic recovery and rise of Western Europe and Japan], it has become more difficult for great powers to successfully exercise influence abroad, especially through the use of force, and economic issues have climbed to the top of the global agenda Although the European and Japanese economies were destroyed by [World War II], it was only a matter of time before economic recovery took place, given their technological know-how and previous level of economic development The growth of economic pluralism and interdependence made it more difficult for the United States to successfully pursue its foreign economic policy abroad and promote economic prosperity at home. The U.S. economy, in other words, became increasingly dependent upon and affected by forces beyond its borders.

ROSATI, *supra* note 31, at 575-76.

36. One issue that raised public awareness with regard to international trade was the oil embargo of 1973. The Organization of Petroleum Exporting Countries (OPEC) agreed on reduced production levels that increased world prices. This action was taken in retaliation for the U.S. support of Israel in the Arab-Israeli War. As a result of America's dependence on Middle-Eastern oil, prices skyrocketed and long lines at the gas pump led to a wave of economic insecurity across America. *See generally* IBRAHIM F.I. SHIHATA, *THE CASE FOR THE ARAB OIL EMBARGO* (1975) (discussing the history and politics surrounding the 1973 Arab oil embargo).

37. *See generally* V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 500, 524-31 (1961) (discussing the prominent place occupied by pressure groups in American politics as a result of the official government deference to public participation, freedom of speech, and freedom of association).

38. Watergate led to increased public criticism of government activity in the 1970s and to increased public and congressional involvement in executive activities. CONWAY, *supra* note 27, at 11. This is exemplified by legislation such as the War Powers Act, Pub. L. No. 93-148, 87 Stat. 555 (1973), and the Trade Act of 1974, 19 U.S.C. § 2101-2487 (Supp. V 1975) (current version at 19 U.S.C. § 2101-2487 (1988)).

39. *See supra* note 33.

40. *See supra* note 13.

1934 Act.⁴¹ The 1974 Act provided for increased levels of public involvement in international trade negotiations,⁴² moving far beyond the 1934 Act's required notice of a proposed trading partner.

First, the 1974 Act required international agreements to include provisions creating domestic procedures through which interested public parties could participate in the international trade process.⁴³ Second, the 1974 Act required the president to seek information and advice from both private and public sectors.⁴⁴ Toward that end, it incorporated the use of advisory committees and included spontaneous opportunities for acceptance of information from the public.⁴⁵ Thus, the 1974 Act, supplemented by several amendments passed in 1979 and 1988,⁴⁶ opened the door for unprecedented formal and direct public participation⁴⁷ in the negotiation of international trade agreements.

C. RECENT DEVELOPMENTS

In the latter half of the 1980s, government leaders and trade experts once again began advocating reduced barriers to trade as an answer to economic difficulty. The idea of increasing the size and strength of the national economy by reducing the restrictions on foreign trade became the driving force behind

41. Trade Act of 1974, 19 U.S.C. § 2101-2487 (Supp. V 1975) (current version at 19 U.S.C. § 2101-2487 (1988)). With regard to the Act of 1974, Professors Jackson and Davey have stated that "[i]n many ways, the struggle of Congress to regain some authority over international economic affairs was best manifested in the passage of the 1974 Trade Act . . ." JACKSON & DAVEY, *supra* note 17, at 77.

42. 19 U.S.C. § 2155 (Supp. V 1975) (current version at 19 U.S.C. § 2155 (1988)).

43. *Id.*

44. The president must seek information and advice on negotiating objectives, bargaining positions, the operation of a trade agreement once entered into, and other matters arising in connection with the development, implementation, and administration of U.S. trade policy. 19 U.S.C. § 2155(a).

45. *Id.* § (a)-(c).

46. The 1974 Act was amended by Pub. L. No. 96-39, title XI, § 1103, 93 Stat. 308 (effective July 26, 1979) and by Pub. L. No. 100-418, title I, § 1631, 102 Stat. 1264 (effective Aug. 23, 1988).

47. *See supra* note 44. Additionally, § 2155 of the 1974 Act created the Advisory Council for Trade Policy and Negotiations (ACTPN). That group was established as a permanent group to provide constant policy advice on matters such as negotiating objectives, bargaining positions, and the operation of trade agreements. 19 U.S.C. § 2155.

trade agreements such as NAFTA.⁴⁸ Ultimately, many government leaders and trade experts became convinced that an increased emphasis on free global trade was the key to future economic prosperity.⁴⁹

In the 1990s, the changing nature of world politics and economics focused international issues on economic well-being rather than political and military supremacy. Fearing environmental destruction and increased unemployment, members of Congress, commentators, and special interest groups have used trade agreements such as NAFTA and the mass media to increase public awareness and participation in international trade relationships.⁵⁰ Congress has also amended its fast-track legislation⁵¹ to balance the public's call for openness against the government's need for confidentiality.

48. As a result of a similar economic climate which, during the Great Depression, spurred the passage of the 1934 Act, the Reagan and Bush Administrations initiated the concept of reducing barriers to trade between Mexico, Canada, and the United States in order to increase the economies of all three nations involved. President Clinton supported and Congress passed the North American Free Trade Agreement in December 1993.

49. Professor Stuart S. Malawer of George Mason University has stated that "international trade is the issue of the 1990s. . . . International trade in this decade will determine the success or failure of millions of people and the future of nations—their economic development and their political freedom." *Advice on Weathering the Trade Policy Storm*, THE RECORDER, Mar. 4, 1993, at 13.

50. James O. Goldsborough notes that the public is becoming more engaged in U.S. foreign policy in the post-Cold War period. "The idea is that foreign and domestic policy are becoming one, and that presidents no longer can treat foreign policy as their own privileged—and private—domain." James O. Goldsborough, *Whose View? Despite Heightened Public Interest in Foreign Policy, the President Must Prevail*, SAN DIEGO UNION-TRIB., Jun. 14, 1993, at B5. Goldsborough also states that the public will continue to demand a stronger voice in international affairs. See *id.*

In an era of free trade with Mexico, fair trade with Japan and environmental treaties that attempt to preserve the earth for future generations, foreign policy has achieved a domestic content it has not had before. There is nothing 'foreign' about such issues. They have a direct impact on the quality of life of individuals.

Id.

51. 19 U.S.C. § 2191 (1975), amended by Pub. L. 100-418, title I, § 1107(b)(1), 102 Stat. 1135 (1988) and Pub. L. 101-382, title I, § 132(b)(2), 104 Stat. 645 (Supp. III 1991). Fast-track gives the executive the freedom and credibility to negotiate effective trade agreements while it gives Congress the ability to vote them down if it believes the pacts are not in the best interests of the United States. The fast-track process prohibits amendments by Congress, forcing a yes or no vote on the issue. *Id.* § (d). This gives negotiators more credibility when asserting that they represent the view of their country and may negotiate on its behalf. See *infra* notes 161-68 and accompanying text.

The events of the 1990s have led the American public to realize that international trade issues have a direct impact on their standard of living and way of life.⁵² The debate now focuses on whether the current methods of public participation are more destructive than constructive with regard to the negotiation and implementation of international trade agreements. Before choosing a proper form of public participation, however, it is necessary to examine its importance in the trade negotiation process.

II. THE IMPORTANCE OF PUBLIC PARTICIPATION IN TRADE NEGOTIATIONS

Public participation affects international trade negotiations in two distinct ways.⁵³ First, public involvement serves as a check on the power of elected and bureaucratic leaders by generating and limiting the issues which require government action. Second, public participation provides those in positions of power and influence with specific, detailed information upon which to base their decisions. Without public input, government officials risk making decisions based on incomplete information, thereby compromising public policy.

A. PUBLIC PARTICIPATION AS A CHECK ON GOVERNMENT POWER

The U.S. Constitution establishes treaties as the supreme law of the land.⁵⁴ For the most part, provisions of treaties and trade agreements supersede existing national, state, and local laws concerning issues such as the environment, public health,

52. "[N]ow, for the first time, ordinary Americans are beginning to discover that national and international trade decisions have critical relevance to their daily lives. And as they increasingly seek a greater voice . . . the trading game will never again be the same." Charles Lewis, *The Treaty No One Could Read: How Lobbyists and Business Quietly Forged NAFTA*, WASH. POST, June 27, 1993, at C1.

53. It is important to note that a specific due process right of participation does not apply in global trade negotiations. Trade barriers do not carry with them a property interest for those being assisted by them. The ideas of due process notice and opportunity to be heard, provided by the U.S. Constitution's 5th and 14th amendments, are only available when an individual has been granted an affirmative right by government to a thing that government is now resolved to take away. See *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441 (1915).

54. See *Missouri v. Holland*, 252 U.S. 416 (1920).

safety, welfare, and worker rights.⁵⁵ Without access to the international trade agreement negotiation process, U.S. citizens do not have access to instruments which may adversely affect their standard of living. Public participation thus provides an important check on government action in such critical areas.

The checks and balances provided by the separation of powers are fundamental to the U.S. Constitution.⁵⁶ Unfortunately, when Congress delegates its power to another branch of government, the network of checks and balances is disrupted. Under the Trade Agreements Act of 1934, for instance, the executive had complete authority over trade agreements. Such absolute presidential authority, without congressional or judicial oversight, creates the potential for abuse.⁵⁷

In trade negotiations, the public acts as an important check on government power, filling gaps and pressuring government leaders to act in accordance with public opinion. As early as the Revolutionary War and its slogan of "no taxation without representation,"⁵⁸ the values of those who established the United States were evident. If persons are not afforded an opportunity to influence the creation of laws, they should not be forced to live under them.⁵⁹ For the same reason, public participation in international trade agreements is important to the maintenance of America's system of democracy.

55. *E.g.*, General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

56. *See* THE FEDERALIST Nos. 48, 51 (James Madison).

57. The Constitution, in charging the executive with ensuring that the laws are faithfully executed, *see supra* note 5, provides for delegations of power by Congress to the executive. When examining the intent of the Founders, however, it is unlikely that delegating all power with respect to an issue as important as international trade to a single branch of government was contemplated during the drafting and debates surrounding the "Faithfully Executed" clause. *See supra* note 1.

58. In March of 1765, the British Parliament passed the Stamp Act; the first tax on the Colonies. While the purpose of the Act was the legitimate one of meeting part of the cost of the British military establishment in America, the resulting tax was opposed by nearly everyone. An official stamp was required on nearly all paper, from newspapers to playing cards. This action was no mere matter of the control of external commerce but of internal taxation. Hence the sentiment: "No taxation without representation." That sentiment became one of the hallmarks of the American Revolution. DUMAS MALONE, THE STORY OF THE DECLARATION OF INDEPENDENCE 41-46 (1954).

59. *See id.*

B. PUBLIC PARTICIPATION AS AN INFORMATION SOURCE

Only for the past fifty years has the U.S. government realized the importance of the public as an information source which is needed to make fully informed decisions. In 1946, the Administrative Procedure Act (APA)⁶⁰ was established to provide decision-makers in government agencies with adequate information upon which to establish national policy.⁶¹ By providing the public a role in the decision-making process, the APA indirectly codified two notions central to a democracy and public participation: first, rational treatment of its citizens by government is critical; second, a government must be accountable for its actions.⁶²

Rational treatment of the people by their government is important for two reasons. First, "[i]t anticipates a governmental determination based on correct factual predicate; in other words, a decision making process that is likely to be effective in getting at the truth."⁶³ The truth is determined through the input of those with relevant information and those who will be affected by the decision. Second, "it requires a tenable connection between facts and the government action taken under the applicable legal standard."⁶⁴ The testimony and involvement of individuals affected by the proposed decision ensures that such a connection exists. These elements are critical checks on the arbitrary imposition of rules and regulations by the government.

Accountability in government is also important. Accountability differs from rational treatment in that accountability emphasizes protecting individual rights while rational treatment emphasizes the importance of "good government."⁶⁵ Here, ac-

60. The APA established numerous avenues for the public to participate in administrative proceedings being conducted by the federal government. See Administrative Procedure Act, 5 U.S.C. §§ 551-59, §§ 701-06 (1988). For instance, § 553 creates a procedure whereby interested members of the public may request an opportunity to submit their perspective in writing or testify in person to the agency making the rule. 5 U.S.C. § 553.

61. See generally FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, AT THE REQUEST OF THE PRESIDENT, TO INVESTIGATE THE NEED FOR PROCEDURAL REFORM IN VARIOUS ADMINISTRATIVE TRIBUNALS AND TO SUGGEST IMPROVEMENTS THEREIN, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941) (discussing the reasons behind the need for the APA and avenues for public participation).

62. See Robert L. Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301, 302-04 (1979).

63. *Id.*

64. *Id.*

65. *Id.*

countability means "some sense of assurance that decisions are being reached in an impartial and rational fashion; that is, that a disinterested observer could examine the administrative record and determine that the agency is acting consistently with its legal mandate."⁶⁶ Therefore, accountability ensures that government activity has not extended beyond what is justified by the enabling legislation, or more generally, beyond the system of government within which the activities take place.

There are costs, of course, in allowing the public to participate in facilitating rational treatment and accountability in government activities, initiatives, and programs.⁶⁷ Providing access to government, whether through hearings or advisory committees, requires sacrificing individual and government time and resources.⁶⁸ The needs of the public, however, are at the heart of public policy and demand that the public be involved and consulted, especially when other built-in checks are compromised by the delegation of power. As Justice Oliver Wendell Holmes, Jr. wrote:

The very considerations which judges most rarely mention, and all with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to the views of public policy in the last analysis.⁶⁹

Despite the costs associated with public participation, recent trade agreements, such as NAFTA, demonstrate that such costs are outweighed by the benefits.

C. THE NAFTA EXAMPLE

The importance of public participation as both a check on governmental action and a source of information was demonstrated in the recent public debate surrounding NAFTA.⁷⁰

66. *Id.*

67. Two obvious costs are the financial requirements and time delays surrounding providing the public with opportunities for participating in government policy-making.

68. See Rabin, *supra* note 62.

69. OLIVER W. HOLMES, JR., *THE COMMON LAW* 35-36 (1936).

70. See *supra* note 8. NAFTA "is a process by which Mexico, the United States, and Canada have agreed to surrender their control and sovereignty over certain limited aspects of their trade policy . . . in order to achieve the benefits that are available from mutual relaxation of protectionism and the cementing of this resolve in the form of an international agreement." STEVEN GLOBERMAN &

Many families perceived that their livelihoods would be threatened by pro-NAFTA employers.⁷¹ Some believed that NAFTA would encourage U.S. companies to lay-off workers and close plants due to Mexico's lower labor costs.⁷² Conversely, NAFTA's principal supporters, namely government and big business,⁷³ conceded that difficult societal shifts were likely to occur due to economic realities, but contended that Americans have historically thrived on innovation and challenge.⁷⁴ Their position encompassed the idea that economic growth forces societal change, which in turn, necessitates employee, family, and government acceptance.

During the NAFTA debate, many decision-makers asked their constituents to comment on the various aspects of the agreement.⁷⁵ Leaders called on individuals and groups to determine how each segment believed the agreement would affect them. For instance, the Advisory Committee for Trade Policy and Negotiations, a group of business and organizational representatives, was called upon to provide Congress with a summary of and opinion on the agreement.⁷⁶

With the advantages and disadvantages of the pact outlined, Congress, under the fast-track process,⁷⁷ was able to make a fully informed decision. By being consulted in an open system of government, the public's check was fully utilized. With a better understanding of the role which public participation plays in international trade agreements, the question be-

MICHAEL WALKER, ASSESSING NAFTA: A TRINATIONAL ANALYSIS ix (1992). The United States Congress enacted NAFTA in November, 1993, after significant public scrutiny.

71. See generally Bob Davis, *The New Demon: In Debate Over Nafta, Many See Global Trade As Symbol of Hardship*, WALL ST. J., Oct. 20, 1993, at A1, A5 (discussing the public's perception of the NAFTA agreement).

72. See Jill Dutt, *Trading Opinions: Making Sense of the Hype Over NAFTA*, NEWSDAY, Nov. 7, 1993, at 5.

73. See *infra* note 76 and accompanying text.

74. See *Merck Chairman Calls on U.S. Congress to Approve NAFTA*, Bus. Wire, Oct. 20, 1993, available in LEXIS, News Library, Bwire File.

75. See James Gerstenzang, *Clinton Maps an Uphill Battle for Trade Pact*, L.A. TIMES, Sept. 13, 1993, at A1.

76. Congress relied upon the Committee's position when deciding whether to support NAFTA. Their Committee vote on NAFTA was unanimous, with the exception of the AFL-CIO representative. See *International Trade: Private Sector Panel Begins Work Advising Congress on GATT Agreement*, Daily Report for Executives (BNA), Dec. 20, 1993, at 242, available in LEXIS, News Library, Drexec File.

77. 19 U.S.C. § 2191 (1988 & Supp. 1990). Congress reasserted itself with regard to trade agreements through the Trade Act of 1974 and various amendments which have created the current fast-track procedure. See *supra* note 51.

comes not whether public participation is important, but rather which methods of public participation best meet the conflicting needs of both government and its citizens.

III. CURRENT PUBLIC PARTICIPATION APPROACHES

Public involvement in international trade negotiations has become increasingly important as global markets become more closely intertwined.⁷⁸ Through open discussions of trade agreements like NAFTA, the public has become more aware that international economic issues are important to future domestic prosperity.⁷⁹ Taxing and spending policies, long seen as catalysts of public interest in government, are now joined by international economic issues such as tariffs, dumping, and trade deficits.⁸⁰ With increasing opportunities for public participation, this awareness has given the public the incentive to influence government leaders on international economic issues by participating in the trade agreement negotiation process.

The public participates in trade negotiations in several ways. Individuals influence governmental action by electing the president and members of Congress,⁸¹ joining special interest groups which lobby influential members of the executive and

78. See *supra* note 50. From the mid 1970s through the 1980s, the Gallup Poll found that individual economic prosperity was the most important issue facing Americans. STANLEY & NIEMI, *supra* note 11, at 165.

79. In the late 1980s a sharp rise in the importance of foreign issues occurred. Those selecting a foreign issue as the most important problem facing the United States rose from less than 5% to more than 35%. *Id.* at 164. Also, in the late 1980s, only 20% of the population saw the economy as the most important issue facing the United States, while in 1993, the economy was chosen by nearly 60%. *Id.* at 165.

80. Issues surrounding the domestic economy dominate reasons for public interest in government. STANLEY & NIEMI, *supra* note 11, at 164-65. Consumer confidence has long been an indicator of the public's happiness with government activities. It is measured by looking at the Index of Current Economic Conditions and the Index of Consumer Expectations prepared by the Institute for Social Research at the University of Michigan. *Id.* at 434-35. These indexes are a compilation of questions such as: are you better off or worse off now than you were last year, is it a good time to purchase major household items, and where do you think you will be financially a year from now? *Id.* The index was at a low point during the 1970s, reflecting the idea that people were upset about government policies and how they affected their future. As a result, activism increased. *Id.*

For nearly 40 years the Gallup Poll has asked Americans what they think is the most important problem facing the country today. *Id.* at 164. Between 1950 and the 1970s the importance of domestic and foreign issues were about equal. *Id.* Beginning in the 1970s, the most important issues facing Americans became the domestic economy. *Id.* at 164-65.

81. See *supra* notes 6-8 and accompanying text.

legislative branches,⁸² initiating litigation,⁸³ serving on presidentially appointed advisory committees,⁸⁴ testifying at international trade commission hearings,⁸⁵ and protesting individually or as a group.⁸⁶ Ultimately, however, the degree of public involvement in any area of government policy depends on the amount of available access.⁸⁷

Public access to the international trade agreement process has been continually expanding over the past few years.⁸⁸ Individuals are now allowed to help shape future agreements, rather than simply being left to point out failures in already existing agreements.⁸⁹ In reemphasizing the open government mentality of the 1970s, the 1990s have marked the beginning of a new

82. See John Harwood & Jackie Calmes, *Freshman House Democrats Feel Special Bind as Labor Applies Pressure for Anti-NAFTA Votes*, WALL ST. J., Oct. 25, 1993, at A20.

83. See *Public Citizen v. United States Trade Representative*, 822 F.Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), and *cert. denied*, 114 S.Ct. 685 (1994). In *Public Citizen*, a public interest group challenged the NAFTA negotiation and ratification process. It charged that, under the National Environmental Policy Act (NEPA), an environmental impact statement must be prepared and submitted with the proposed treaty to Congress. While it did not occur in this case, a judicial ruling in *Public Citizen's* favor would have held up the passage of NAFTA beyond the period available for ratification and implementation. See *infra* note 122 and accompanying text.

84. See 19 U.S.C. § 2155.

85. See, e.g., *Trade Commission Plans Public Hearings on NAFTA*, J. COM., Oct. 29, 1992, at A4.

86. See, e.g., *Merck Chairman Calls on U.S. Congress to Approve NAFTA*, *supra* note 74.

87. Access is gained to the institutions of public policy formation in many different ways, from affirmative rights granted by legislation, like the Administrative Procedure Act, 5 U.S.C. § 553 (1988), to public rights not prohibited by law, like a public demonstration. When an avenue of access is identified, the public may legally assert itself in the hope of changing government policy. See CONWAY, *supra* note 27, at 3-6.

88. Most expansion has occurred due to pressure applied by individuals demanding to be heard on specific issues. Interestingly, three major acts providing access to government actually restrict public access to the international trade process. Sections 552-54 of the Administrative Procedure Act exempt foreign affairs functions from the Act's rule-making procedures, adjudicatory procedures, and its information-supplying requirements. 5 U.S.C. §§ 552-54. The Freedom of Information Act exempts foreign policy issues that are specifically authorized by Executive Order to be kept secret. *Id.* § 552b(c)(1)(A). The Federal Advisory Committee Act was only partially incorporated into the Trade Act of 1974. Provisions for closed meetings were added to assure secrecy. 5 U.S.C. app. § 10(a)(2)(d) (1988).

89. For example, in NAFTA, the Advisory Committee on Trade Policy and Negotiations played a critical role in briefing Congress on the provisions of the pact. The ACTPN is a group of approximately 40 leaders representing a cross-section of American industry and labor. See *supra* note 76.

era in trade negotiations.⁹⁰ Private individuals now play an important role in many areas throughout the international trade agreement process.⁹¹

Participation methods in international trade negotiations may be analyzed by creating four categories using two participation characteristics: formal or informal, and direct or indirect. Formal participation techniques are established by law as a way for the public to influence governmental action.⁹² Examples are found in the Constitution, federal statutes, and administrative regulations.⁹³ Informal participation techniques are those that are not established by law.⁹⁴ This approach is often displayed by individuals maneuvering outside the established legal regime to force those inside government to consider a particular view or position.⁹⁵

Direct participation techniques are those that place individuals in contact with the actual representatives negotiating the treaties or influencing the laws without the use of an intermediary or third party.⁹⁶ Indirect participation techniques are those which use intermediaries to advocate a particular position or influence the creation of legislation or agreement-making process.⁹⁷ This method provides participants with less control over the impact of their advocacy, as they seek to influence the negotiation process from the outside.

Each method of public participation may be classified under one of four public participation variations. These variations, whether formal-direct, formal-indirect, informal-direct, or informal-indirect, possess distinctive characteristics which allow for different levels of access and impact in the trade negotiation process. The government ultimately plays the decisive role in promoting or restricting public involvement by deciding which variations are available to the public through the regulation of the formality and directness of participation. Since each method

90. See *supra* notes 49-50, 52.

91. See *infra* notes 98-99 and accompanying text.

92. See *infra* notes 98-99 and accompanying text.

93. See *supra* notes 6, 44. Examples include the power to vote provided for in the Constitution, advisory committees established under U.S. law, 19 U.S.C. § 2155, and public hearing procedures and requirements created by administrative regulation, 5 U.S.C. § 553.

94. See *infra* note 112 (discussing the role and influence of political action committees).

95. See *infra* note 112.

96. For examples of direct methods of public participation, see *infra* notes 98-99.

97. See *infra* note 113.

of public participation has a distinctly different impact on the trade negotiation process, it is important to discuss them each in turn.

A. FORMAL-DIRECT METHODS OF PUBLIC PARTICIPATION

Public participation methods which are both formally established and allow for direct involvement are typically the most effective way for the public to influence the trade negotiation process. Through formal-direct methods, individuals work within the established government system to influence trade agreements. Formal methods of public involvement require legislative or regulatory establishment; direct methods of public participation entail actual contact between those seeking to impact the process and the government representatives negotiating the agreement. The two primary examples of formal-direct public participation are federal advisory committees⁹⁸ and public hearings.⁹⁹

The Trade Act of 1974 established a system of federal advisory committees to provide a communication link between the public and the executive branch of government.¹⁰⁰ Committees made up of persons from the private and non-governmental public sectors are typically consulted on negotiating objectives and

98. Advisory committees are good examples of formal-direct methods of public participation because typically, these committees are formally established by law and have a direct impact over the negotiation and implementation of the trade agreement. The best example of a trade policy advisory committee is the ACTPN. See *infra* note 102. ACTPN, under 19 U.S.C. § 2155, is called upon to provide wide-ranging advice and information to the president, agencies, departments, and Congress. See *supra* note 47. This kind of immediate impact on the trade process makes the ACTPN a powerful force in the trade process. See *supra* note 76.

99. Public hearings provide an example of the formal-direct method of public participation because individuals or groups participating in the hearing typically act under formally established law and have a direct impact over the negotiation and implementation of the trade agreement. The best example of statutory trade policy public involvement is contained in the Trade Act of 1974. 19 U.S.C. § 2155 states, in general, that the president must seek information and advice from representative elements of the private and non-federal government sector regarding negotiating objectives and bargaining positions before entering into a trade agreement, and the operation of any trade agreement once entered into. 19 U.S.C. § 2155(a). The president may call upon the ACTPN to provide advice, a special advisory committee may be formed, or public hearings may be conducted by relevant agencies. 19 U.S.C. § 2155. Oftentimes, both advisory committees and public hearings are utilized when considering the same agreement. General public hearing requirements may be found in the Administrative Procedure Act rulemaking process, 5 U.S.C. § 553.

100. 19 U.S.C. § 2155.

bargaining positions, the operation of a trade agreement once entered into, and other issues pertaining to the development, implementation, and administration of United States trade policy.¹⁰¹ These committees have no statutory authority to conclude agreements or alter the trade process. Their role is simply to advise the president and agency leaders on international trade issues.

Specifically, the 1974 Act required that the president establish the Advisory Committee for Trade Policy and Negotiations (ACTPN).¹⁰² This committee, composed of not more than forty-five members covering broad sectors and groups of the economy, is coordinated by the Office of the United States Trade Representative.¹⁰³ Individuals appointed to this committee have a unique opportunity to directly influence the goals, emphasis, and reach of foreign trade agreements. For example, in December of 1993, the ACTPN was instructed to submit to Congress their preliminary assessments of the Uruguay Round GATT agreement.¹⁰⁴ Its members, representing key sectors of the U.S. economy affected by international trade,¹⁰⁵ were personally briefed by U.S. trade negotiators on the advantages and disad-

101. 19 U.S.C. § 2155(a).

102. 19 U.S.C. § 2155(b). ACTPN, as set up under the Trade Act of 1974, has a team of staffers led by the director of the Office of Private Sector Liaison, which is housed in the Office of the United States Trade Representative. The "Committee advises, consults with, and makes recommendations to the President of the United States, the U.S. Congress, and the U.S. Trade Representative with respect to the operation of trade agreements entered into by the United States and with respect to other matters arising in connection with the administration of the trade policy of the United States." *ENCYCLOPEDIA OF GOVERNMENTAL ADVISORY ORGANIZATIONS* § 714 (Donna Batten ed., 9th ed. 1993).

103. *Id.* The president is also authorized to establish any other general policy or sectoral or functional advisory committees as needed. 19 U.S.C. § 2155(c).

104. *See supra* note 76. The Uruguay Round is an attempt to improve the existing General Agreement on Tariffs and Trade (GATT) rules governing trade in goods and to extend the coverage of GATT regulations to international trade in services, trade in farm products, intellectual property protection, and trade-related investment issues. THOMAS R. HOWELL ET AL., *CONFLICT AMONG NATIONS: TRADE POLICIES IN THE 1990s* 2 (1992).

105. The ACTPN is dominated by representatives of multinational corporations. The chief executive officers of companies like AT&T, Motorola, Caterpillar, Philip Morris, Boeing, Merck, and Phillips Petroleum make up the majority of the board. There are, however, representatives from other sectors of interest including the director of the World Wildlife Fund, AFL-CIO, and Consumers for World Trade. *See International Trade: Private Sector Panel Begins Work Advising Congress on GATT Agreement*, *supra* note 76.

vantages of the agreement.¹⁰⁶ Many commentators agree that although Congress has "the final word on the [GATT] agreement, . . . the opinion of industry and other private sector interests, as represented by the private sector advisory committees, will clearly count enormously in the final analysis."¹⁰⁷

Both Congress and the International Trade Commission provide additional opportunities for individuals and representatives of interested groups to participate in the trade process through public hearings. Congress often provides public notice of international agreements.¹⁰⁸ As a result, agencies involved in foreign trade normally conduct public hearings prior to implementation or passage of an agreement.¹⁰⁹ At these hearings, interested and affected members of the public, private enterprise, and government testify before congressional or administrative committees.

Public hearings also provide access to the negotiation process for individuals not associated with a presidentially appointed advisory committee. Individuals participating in public hearings on trade policy issues serve an important role in opening up the trade agreement process and providing those in power with important information. Public hearings thus serve a dual role. First, they help connect the public with those preparing to make important trade-related decisions, and second, they provide government officials with the information they need to make those decisions.

Formal-direct methods of public participation provide individuals with an established mechanism through which they can personally affect the trade negotiation process. These methods provide a level of intimacy and legitimacy lacking in other forms of public participation. As a result, formal-direct methods of

106. *See id.*

107. *See id.*

108. When Congress considers a bill or piece of legislation, it typically assigns it to a committee to be thoroughly evaluated. As a representative body of delegates, Congress demands input from various elements of its constituent base prior to deciding a matter. That input is usually provided at the committee level through public hearings. WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 270-75 (6th ed. 1985). Typically, notices of public hearings are published in the Federal Register about two months in advance of the hearing date. Those notices are picked up by various news services and disseminated further into society. For example, the Bureau of National Affairs, International Trade Reporter, regularly publishes public hearing announcements including the time, date, and place of the hearing. *See, e.g., Trade Commission Plans Public Hearings on NAFTA*, 10 *Int'l Trade Rep.* (BNA) 1860 (Nov. 3, 1993).

109. *See id.*

public participation provide the public with a superior opportunity to influence international trade.

B. FORMAL-INDIRECT METHODS OF PUBLIC PARTICIPATION

Formally established methods of public participation, which do not allow for direct involvement, are the most common approach used to impact the international trade process. Through this approach, private individuals and groups work with and through government officials to directly impact the trade negotiation and implementation process. Special interest groups use these methods effectively when seeking to influence trade negotiations. Formal methods of public participation require legislative or regulatory establishment, while indirect methods of public participation involve lobbying leaders and policy makers to eventually influence those persons actually negotiating the agreement. Two primary examples of this method of public participation are the election of public leaders and utilization of the court system.¹¹⁰

Electing representatives to serve in government is the most obvious method of public participation.¹¹¹ As a result of pluralism and special interests, increasing numbers of individuals and groups select or endorse candidates for public service based on specific issues.¹¹² As public interest in the area of international

110. Although only a small minority of individuals decide who to vote for, or initiate litigation, based on international trade issues, these avenues for participation are available and widely utilized. In 1992, 61% of the voting age population reported that they had voted in the presidential election. STANLEY & NIEMI, *supra* note 11, at 88. Individuals like Ross Perot have vowed to use the popular vote as a weapon against those he feels are not serving the interest of the American people. See William Schneider, *Is the Two-Party System Near its End?*, NAT'L J., Jan. 8, 1994, at 98.

111. See STANLEY & NIEMI, *supra* note 11, at 88 (percent of Americans voting in the last election). The president is the most important elected official controlled by the elective process. However, members of Congress are also important for they decide whether to reauthorize the Trade Acts. Additionally, senators confirm presidential appointees that dominate the American foreign trade apparatus, and play a direct role when deciding the fate of trade agreements under the fast-track or advice and consent procedures. 19 U.S.C. § 2191.

112. Political action committees (PACs), which advocate special interests above all else, have increased in total number from 608 registered PACs in 1974, to 4195 registered PACs in 1992. STANLEY & NIEMI, *supra* note 11, at 175. They have increased their annual contributions to congressional candidates from \$22.6 million in 1975-76, to \$178.4 million in 1991-92. *Id.* at 178. These groups advocate direct political action in the form of political funds and assistance in campaigns. Since parties or candidates rarely judge their campaign resources to be adequate, they find it difficult to ignore an open treasury.

trade increases, voters will likely consider trade policy as an increasingly important election criterion.¹¹³

The power of the vote controls elected officials and thereby indirectly influences the goals, emphasis, and reach of foreign trade agreements.¹¹⁴ During the NAFTA debates in Congress, for example, President Clinton watched public approval ratings with great interest.¹¹⁵ Richard Gephardt, former majority leader of the U.S. House of Representatives, stated that "[p]eople have really tuned in to this" and that they seem to care more deeply about this issue than any other of his political career.¹¹⁶ The relationship between public opinion and election results can thus have a serious impact on international trade agreements.

The courts have also become an increasingly important tool for influencing the trade negotiation process. The court system has traditionally been viewed as a last resort for organizations wishing to resist activities which they feel are detrimental to their special interests.¹¹⁷ However, by initiating litigation, a small, unknown organization gains, along with an opportunity

This, in turn, gives PACs a great deal of influence with and access to legislators. KEEFE & OGUL, *supra* note 108, at 277-81.

113. The NAFTA debate raised awareness of the importance of international trade to overall quality of life and well-being, and will raise the importance of trade in the minds of most Americans. See Charles Lewis, *supra* note 52, at C1. In fact, studies have concluded that NAFTA will lead to the loss of between 290,000 and 490,000 U.S. jobs over 10 years as a result of the diversion of investment from the United States to Mexico. GLOBERMAN & WALKER, *supra* note 70, at 22, (citing Jeff Faux & Thea Lee, *The Effect of George Bush's NAFTA on American Workers: Ladder Up or Ladder Down*, ECON. POL'Y INST. (1992)). The publicity of such data demonstrates to the general public that trade agreements can powerfully impact their lives.

114. Elected officials are fully aware of the power the people have over their future. During the NAFTA debate on the floor of the House of Representatives, Rep. Gerry Solomon (R-NY), speaking for many elected leaders stated, "the American people don't care whether you're Republicans or Democrats, they are going to throw your butts out of here if you don't turn around and stop taxing and spending and regulating on the American people." The Big Story 8:30 a.m. ET, *The Trade Battle*, Nov. 20, 1993, transcript #70 (CNN), available in LEXIS, Nexis Library, Curnws File.

115. See Bruce Stokes, *A Hard Sell*, 25 NAT'L J. 2472 (Oct. 16, 1993).

116. See Dutt, *supra* note 72.

117. One organization utilizing the court system as its dominant means of influence is the American Civil Liberties Union. See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990). Through the use of the court system, the ACLU, founded in 1920, has helped create a substantial body of law in all the major areas of civil rights, including: freedom of speech and press, separation of church and state, free exercise of religion, due process of law, equal protection, and privacy. *Id.* at 3.

to be heard, instant access to those with the power to influence the trade process. While a favorable ruling is certainly the goal, if the case is significant or timely, even a dismissal or unfavorable ruling can be viewed as a success.¹¹⁸ The media attention alone may help place the issue in the minds of the public and its leaders. That, in turn, may spur renewed debate on the issue, possibly in a different and more sympathetic light. It is this opportunity that makes legal action an effective technique for influencing foreign trade agreements.

Public Citizen v. United States Trade Representative,¹¹⁹ which involved NAFTA environmental impact statements, exemplifies the impact which legal action can have on international trade. The plaintiffs in *Public Citizen* argued that the Office of the United States Trade Representative (USTR) was an agency subject to the National Environmental Policy Act (NEPA), and therefore, NEPA required the USTR to submit NAFTA to Congress with an accompanying environmental impact statement (EIS).¹²⁰ Ultimately, the court held that an EIS was not required, as the USTR was merely making a recommendation to Congress rather than promulgating a rule.¹²¹

If successful, *Public Citizen* could have delayed NAFTA for many months while the EIS was prepared. That delay, in turn, would have pushed the agreement beyond the time limits established by Congress under fast-track, leading to the immediate failure of the pact.¹²² Thus, *Public Citizen* demonstrates that

118. In seeking to force an environmental impact statement on the provisions of NAFTA, the plaintiffs in *Public Citizen v. United States Trade Representative* looked beyond the particulars of their case. *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993). "We would like to get a ruling that will shape trade policy-making in the future," with the hope that an environmental impact statement will be performed before a trade deal is presented to Congress. *Appeals Court Overturns Decision Calling for NAFTA Impact Statement*, Banking Report (BNA), Oct. 4, 1993, available in LEXIS, Nexis Library, News File.

119. 5 F.3d 549 (D.C. Cir. 1993).

120. *See id.* However, in drafting NEPA, Congress did not create a private right of action. *Public Citizen* was thus forced to base its claim on the APA. *Id.* The APA provides citizens with a right to challenge final agency actions. 5 U.S.C. § 702 (1988). The Court of Appeals ultimately found that no final agency action could be found. 5 F.3d at 553. The Court also found that NAFTA was not proposed by an agency but by the president. The president is not an agency and is not covered under the EIS provisions of the NEPA. Therefore, the president's action in submitting an international trade agreement to Congress did not constitute "final agency action" reviewable under the APA. *Id.*

121. *Id.*

122. Fast-track places time limits on the passage of trade agreements. 19 U.S.C. § 2903.

taking action through the court system may provide public interest groups with a powerful, formal, yet indirect method of affecting international trade agreements.

C. INFORMAL-DIRECT METHODS OF PUBLIC PARTICIPATION

Informally established methods of public participation, which allow direct involvement, offer opportunities for significant impact but are quite difficult to utilize. It is more appropriate to consider these methods as quasi-public participation, as only a select group of individuals and organizations are called upon to participate. When accessible, however, these methods are an effective way to influence the trade negotiation process. Through this method, individuals work closely with government officials, creating or influencing trade agreements. The primary, and possibly only, example of informal-direct public participation is when a private citizen or group is called upon to serve as a special resource to the negotiating or implementing government group.

For example, the president has delegated power to the USTR¹²³ to solicit and recruit various private individuals to lobby, provide information, or even negotiate trade agreements on behalf of the U.S. government. The USTR holds a central position in all trade agreement issues, reporting to both Congress and the president, and serving "as the principle spokes[person] of the president on international trade."¹²⁴ Most importantly, "[t]he United States Trade Representative may delegate any of his [or her] functions, powers, and duties to such officers and employees of the Office as he [or she] may designate."¹²⁵ That provision authorizes the USTR to select private individuals to advise the executive and Congress on international trade issues.

Serving as a special resource for a negotiation group can place a non-elected person in the middle of the policy-making process. The USTR often calls upon chief executive officers of

123. Congress delegated power to the president to "seek information and advice from representative elements of the private sector and the non-Federal governmental sector." 19 U.S.C. § 2155(a)(1). The Office of the United States Trade Representative was created as the Office of the Special Representative for Trade Negotiations by Exec. Order No. 11,075, 3 C.F.R. 652 (1959-63), reprinted in 76 Stat. 872, on January 15, 1963. The Trade Act of 1974 established the Office as an agency of the Executive Office of the President charged with administering the various trade agreement programs. See 19 U.S.C. § 2171.

124. See *id* § (c)(1)(E-G).

125. See *id* § (c)(3)(A).

major corporations to provide information or expertise to government negotiators. Academics and members of private sector think-tanks are also invited to assist in policy formulation, or to provide information on a specific area or issue.¹²⁶ These individuals can contribute in many ways, including serving for a limited time on the staff of one of the agencies.¹²⁷ Not surprisingly, such intimate involvement of a person or group allows this informal-direct method of public participation to be extremely effective. However, instances of informal-direct public participation are quite rare.

D. INFORMAL-INDIRECT METHODS OF PUBLIC PARTICIPATION

Public participation methods which are both informal and indirect are the fastest growing technique for the public to influence the trade negotiation process.¹²⁸ Through this method, individuals work outside the established system to influence the trade agreement negotiation and implementation process. Informal public participation adheres to few rules, and indirect public participation requires creativity and perseverance to attain the level of effectiveness necessary to actually impact those negotiating the trade agreements. The primary examples of informal-indirect public participation are lobbying and public protest, by both individuals and groups.

126. During the NAFTA debate, the Clinton Administration elicited the assistance of three former presidents and 300 economists, including twelve Nobel laureates. *North American Free Trade Agreement (NAFTA) and Side Agreements, Hearing of the House Ways and Means Committee*, FED. NEWS SERVICE, Sept. 14, 1993 (statement of Mickey Kantor, U.S. Trade Representative) available in LEXIS, Nexis Library, Curnws File.

127. For instance, Former Congressman Bill Frenzel (R-MN) was called from his duties as a guest scholar with the Brookings Institution to serve as a Special Advisor to the President on NAFTA throughout the trade agreement's journey through Congress. See *Grocery Manufacturers of America, Inc. (GMA) Press Conference*, FED. NEWS SERVICE, Nov. 9, 1993, available in LEXIS, Nexis Library, Curnws File. Additionally, the Clinton Administration assisted in the formation of USA*NAFTA, a coalition of 2700 businesses and trade associations widely recognized as the nation's principle business lobby supporting NAFTA. T.R. Goldman, *USA*NAFTA, Finding First Gear; Leadership Woes, Wait-and-See Stance Leave Business Groups Playing Catch-Up in Trade Fight*, LEGAL TIMES, Sept. 20, 1993, at 1, available in LEXIS, Nexis Library, Curnws File. The group set out to raise approximately \$7.0 million to wage a national media campaign in favor of the pact. *Id.*

128. Informal and indirect participation is what makes up the Perot revolution, giving ordinary individuals a voice and influence over the processes of government. See H. ROSS PEROT, *UNITED WE STAND: HOW WE CAN TAKE BACK OUR COUNTRY* (1992).

Special interest groups have become an increasingly important and influential component of the government process.¹²⁹ Ordinarily, these groups advocate a specific set of interrelated issues to both the public and government. They obtain support and strength through the depth and breadth of their membership. In order to effectively influence government, these groups attempt to demonstrate to government leaders that they hold the key to their political future.¹³⁰ Accordingly, this public constituency, whether through formal-direct methods like voting, or informal-indirect methods like campaign contributions, carries enormous weight.¹³¹

Non-governmental organizations,¹³² like special interest groups, spend a great deal of their time and resources lobbying members of Congress and the executive to influence issues in their favor. Non-governmental organizations have become a major force in domestic politics and have become actively involved in global environmental issues.¹³³ The strength of their views, however, may lead to deadlock and an inability to compromise and identify workable solutions.¹³⁴ Overall, lobbying by special interest groups is a way for individuals to unify their message for maximum impact,¹³⁵ but their effect may be debilitating.

During the NAFTA debate, representatives of organized labor, including the AFL-CIO, pressured members of Congress to

129. See *supra* note 112 (discussing the number and influence of interest groups).

130. See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 304-14, 502-16 (1951).

131. See *INTEREST GROUP POLITICS* 205-12 (Allan J. Cigler & Burdett A. Loomis eds., 3rd ed. 1991).

132. Non-governmental organizations (NGOs) is a term used to describe large special interest groups that are not directly controlled by the government under which they operate. Examples of NGOs are found on the local, state, federal, and international levels and include organizations such as Greenpeace, the United Way, the Red Cross, and Amnesty International. See LOWELL LIVEZEY, *NONGOVERNMENTAL ORGANIZATIONS AND THE IDEAS OF HUMAN RIGHTS* (1988).

133. See Bruce Stokes, *Greens Talk Trade*, *NAT'L J.*, Apr. 13, 1991, at 862.

134. See THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1979).

135. Individuals, as well as organizations, may utilize lobbying as a means of public intervention. As public and private constituencies realize the sheer power of the media, they increasingly seek access to sources of mass communication. See *generally* CONWAY, *supra* note 27, at 81-92. Advocates like Ross Perot, for example, have raised public awareness through the creative use of the media. See Dutt, *supra* note 72, at 5.

vote against the pact.¹³⁶ Union leaders threatened their elected officials with the potential loss of campaign contributions and votes.¹³⁷ Even if a congressperson does not need union-related votes, many cannot afford to lose the financial support.¹³⁸ Clearly, lobbying becomes much more effective when an elected official is dependent on the financial or popular support of the lobbyist.

The second primary example of informal-indirect public participation is public protest. Forms of public protest, like constituent letter writing or calling government officials, carry great potential influence when done *en masse*.¹³⁹ Individuals, through use of the mail, telephone, and media, are able to get involved immediately, affecting public opinion and the position of their elected and appointed representatives. Given that national organizations conduct public opinion surveys on nearly a daily basis, political leaders adjust positions and arguments accordingly. Conveying public dissatisfaction to those responsible for crafting a remedy helps address and ultimately resolve problems.

However, the public must have access to information in order to form an opinion and convey it to those in power.¹⁴⁰ The public notice requirements in the 1974 Act, the Freedom of Information Act,¹⁴¹ and the remainder of the Administrative Procedure Act,¹⁴² all assist the public in obtaining the information it needs. The Freedom of Information Act requires agencies of the federal government to make available to the public large amounts of information on the activities, procedures, internal rules, and opinions of each agency.¹⁴³ The Administrative Procedure Act as a whole also requires agencies to give the public notice and an opportunity to comment regarding the actions and policies of those agencies.¹⁴⁴ While individually limited, collectively, these public involvement tools provide access to the infor-

136. John Harwood & Jackie Calmes, *Freshman House Democrats Feel Special Bind As Labor Applies Pressure for Anti-NAFTA Votes*, WALL ST. J., Oct. 25, 1993, at A20.

137. *Id.*

138. During the 1991-92 election period, veteran Democrats received 31% of their political action committee contributions from labor union political action committees. *Id.*

139. See PEROT, *supra* note 128.

140. See TRUMAN, *supra* note 130.

141. Freedom of Information Act, 5 U.S.C. § 552 (1988 & Supp. 1993).

142. Administrative Procedure Act, 5 U.S.C. § 553 (1988 & Supp. 1993).

143. 5 U.S.C. 552(a).

144. 5 U.S.C. § 553(b), (c).

mation which is required to fully understand and comment on government policy.

Overall, unrestricted informal-indirect public participation disrupts the international trade negotiation process more than any other method of public involvement.¹⁴⁵ Public opinion forces government negotiators to open the door to delicate discussions that require strict confidentiality and trust in order to succeed. As a result, the fast-track procedure and other methods of balancing the desires of the public and the needs of negotiators are positive steps toward increasing beneficial public participation.

IV. LIKELY EVOLUTION AND PROPOSALS FOR CHANGE

Trade agreements are unique international legal instruments. They are hybrids of legal and political systems that require a delicate balance between competing forces.¹⁴⁶ In many ways trade agreements may be viewed as both legislation and contracts.¹⁴⁷ The inherent conflict in trade agreements lies in the basic idea that legislation requires a different environment and formulation process than does a contract.¹⁴⁸ This conflict is likely to shape the future of public participation in U.S. trade policy.

145. Individuals and groups create this disharmony by placing pressure on their leaders. *See supra* note 112.

146. Professors Jackson and Davey describe this dilemma as one where:
 [T]here appears to be a need to limit or circumscribe the very extensive authority that has grown up in the Executive Branch over international economic affairs; on the other hand, it is not clear that the United States will be able to bargain effectively in international economic negotiations if such limitations are imposed. The Executive Branch appears to be the only viable agent for such negotiations, and the feebleness of its power, the less effective will be its negotiating ability, unless it can somehow persuade its trading partners that Congress is prepared to deliver on those commitments that require congressional action.

JACKSON & DAVEY, *supra* note 17, at 78.

147. The power to regulate foreign commerce is vested in Congress. *See supra* note 3. Congress, as a legislative body, conducts its business in public via the introduction and passage of legislation. The power to make treaties is shared by the executive and legislative branches. *See supra* note 4. Thus, the president negotiates contracts with other countries, and the president is responsible for their terms and ensuring that they are faithfully executed. *See supra* note 5.

148. *See infra* notes 150-51.

A. THE LEGISLATION/CONTRACT PARADOX

The legislative process in a democracy demands an open structure. Elected officials debate in an environment where each person has an opportunity to influence the process through contacting his or her legislators or possibly testifying at a hearing. Public input is crucial to the legislative process because the results of the law-making enterprise establish policy for the entire nation.¹⁴⁹

Conversely, the delicate atmosphere surrounding most complex contract negotiations requires a closed structure. Contracts represent compromises between two divergent positions initially advocated by the contracting parties.¹⁵⁰ Throughout the negotiation process, the parties propose terms to which the opposing side may or may not agree. Ultimately, only those ideas agreed upon are incorporated into the contract.

Treating trade agreements as either contracts or legislation causes negotiation and implementation difficulties. Allowing third party involvement and openness throughout the fragile negotiation process leads to mistrust and a lack of confidence.¹⁵¹ Even worse, the parties may never find a workable middle ground if all aspects of the agreement become open to public scrutiny during the process of negotiation.¹⁵²

Indirect methods of public participation create situations where it is virtually impossible to maintain the requisite level of confidentiality. Generally, an overabundance of public participation through activities such as lobbying and public protest has contributed to the federal government's lethargic pace and ineffectiveness.¹⁵³ Most criticism focuses on special interest groups which often apply extensive pressure, thereby causing federal government inaction.¹⁵⁴ Such intense public involvement can

149. See U.S. CONST. art. VI, § 2.

150. See Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982).

151. In international trade relationships concerning the United States, the problem centers around Congress, as the third party, and whether the executive has the appropriate "negotiation credibility" to induce foreign nations to bargain. See JACKSON & DAVEY, *supra* note 17, at 113.

152. See LARKIN, *supra* note 12, at 65-69.

153. See Dutt, *supra* note 72. The corruption of modern democratic government began with the emergence of interest-group liberalism as the public philosophy. Too many interest groups and individuals involved in the political process deranges and confuses expectations about democratic institutions, keeps governments from planning, denies justice, and allows for corruption. *Id.*

154. *Id.*

keep government leaders from acting in the best interest of American citizens.

Mass public involvement in government is typically not destructive in its own right. It is only destructive when what is sought is absolutely unable to be compromised.¹⁵⁵ The difference between mass public participation paralyzing government and mass public participation inspiring change in government is in the spirit and mission of the special interest groups. Those groups seeking to join with government to change things in the overall national interest make a positive contribution to society. On the other hand, those seeking to halt government progress in any way possible, relentless in their effort to get exactly what they desire and unwilling to sacrifice to move progressively closer to their desired goal, contribute negatively. It is the practices of the latter group that call for reduced mass public participation in government.¹⁵⁶

The solution to the problem of increasing public involvement without compromising the confidentiality of the negotiation process lies with formal-direct public participation, such as involvement by advisory committees. Increasing formal participation leads to legitimate and inclusive agreements.¹⁵⁷ This progressive approach breaks down barriers between those who are traditionally parties to trade negotiations and those who are not. It also provides an orderly system within which to work. Increasing direct participation leads to increased impact and control by the general public, ultimately satisfying both the informational needs of government and the oversight requirements of a democracy.¹⁵⁸

People with direct access to the trade process are likely to be better informed and more willing to work toward obtaining a clear and complete view of the issue prior to making a recommendation to the president or Congress.¹⁵⁹ Increasing and pro-

155. *Id.*

156. See V.O. KEY JR., PUBLIC OPINION AND THE AMERICAN DEMOCRACY 500, 524-31 (1961) (discussing private pressure groups and the extent to which they are links between public opinion and government). Key concludes that pressure group participation in government more often than not reflects highly limited participation by the active elements of these groups. Often, a very small number of individuals both in government and in the private sphere create public policy. *Id.*

157. See *supra* notes 98-99.

158. See Rabin, *supra* note 62.

159. Direct involvement in the trade agreement negotiation process gives a select group of people the necessary access to stay highly informed on the issues facing them. For example, U.S. negotiators fully brief the ACTPN before

moting formal-direct public participation over informal-indirect public participation leads to increased reconciliation of public and governmental interests. Informal-indirect public participation seeks complete government openness. Formal-direct public participation, however, creates public involvement opportunities in a closed system. Simply put, the confidentiality needed in trade agreement negotiation is joined with public input from the people, satisfying the needs of both the government and the public.¹⁶⁰ As a result, the needs of legislation will more completely mesh with the requirements of contracts.

B. FAST-TRACK: AN EXAMPLE OF TRADE NEGOTIATION EFFECTIVENESS

Although the current trade negotiation system is far from ideal,¹⁶¹ some integrative ideas have recently surfaced in an attempt to find an amicable compromise between divergent interests. One such idea is the fast-track process,¹⁶² whereby the president submits to Congress an agreement which Congress must accept or reject "as is," requiring that the negotiated agreement be left intact.¹⁶³ This trade agreement negotiation and ratification technique is a positive step toward limiting infor-

ACTPN's decision is made and sent to the executive and Congress. See 19 U.S.C. § 2155.

160. A representative democracy is open to the point where constituents are reasonably informed as to how their elected leaders are using the power provided to them through the ballot box. See KEEFE & OGUL, *supra* note 108, at 54-63.

161. Patti A. Goldman, an attorney with the Public Citizen Litigation Group, stated that:

The trade system, both in terms of its international operations and the way in which the United States participates in it, is at odds with [the] principles of openness and access. Thus, the public is shut out of international trade negotiations by the secrecy that pervades the negotiating process. International trade negotiations are conducted in a far more secret manner than international environmental negotiations, where drafts and alternative positions are discussed openly, presumably because national leaders recognize that they need to mobilize support for environmental solutions and that publicity is one way to do so. If the intersection between trade and the environment is resolved in trade negotiations, the public will be kept in the dark until the result is announced.

Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1283 (1992).

162. See 19 U.S.C. § 2191. Fast-track legislation was initially enacted by Pub. L. 93-618, 88 Stat. 2001, January 3, 1975.

163. *Id.*

mal-indirect methods of participation, while promoting formal-direct methods.¹⁶⁴

Nevertheless, during the NAFTA debates, the term fast-track took on a pejorative connotation, leaving many citizens feeling that they were shut out of the process.¹⁶⁵ Negative congressional attitudes based on Congress' inability to politically reshape the treaty, frustrated by fast-track's more efficient and effective process, fueled public resentment.¹⁶⁶ Yet, through it all, fast-track laid claim to an effective middle ground between the requirements of legislative openness and contractual confidence.

From a legislative perspective, the agreement was placed "on the table" for all to scrutinize. As a trade agreement with tax ramifications, NAFTA provided both the House and Senate an opportunity to view the treaty.¹⁶⁷ Congress, the media, and the public were given several months to discuss and debate it. From a contractual perspective, each negotiating country could put its best offer forward knowing that Congress would not, and could not, fatally reshape the agreement. The important power of the negotiator to create a deal, effectively binding the nation, was maintained. In a sense, fast-track forced Congress to dispose of a great deal of political maneuvering to do what was best for the United States as a whole. For the most part, fast-track was a successful attempt at reducing the special interest politics which often plague the federal government.¹⁶⁸

By increasing formal-direct public participation, the public is allowed to play an important role without hindering the confidentiality necessary to negotiate a contract effectively. Public advisory committees, for example, serve as a check on the trade

164. Fast-track limits informal-indirect public participation by not allowing amendments by Congress. 19 U.S.C. § 2191(d). The fast-track process supports formal-direct public participation by creating an atmosphere where emphasis is placed on the creation of the agreement, with its advisory committee and public hearing inputs, rather than on the congressional ratification during which informal-indirect public participation methods are influential.

165. See Davis, *supra* note 71.

166. *Id.*

167. Through fast-track, Congress considered NAFTA as a tax bill, which requires the support of both houses, rather than as a treaty, which only requires the advice and consent of the Senate. See *supra* note 4.

168. This ideal was diminished, however, by the many side agreements President Clinton signed in order to secure the 218 votes needed for passage in the House of Representatives. See *Labor Side Agreement*, 10 Int'l Trade Rep. (BNA) No. 42, at 1822 (Oct. 27, 1993); see also *North American Free Trade Agreement Side Accord on Environment*, 10 Int'l Trade Rep. (BNA) No. 36, at 1536 (Sept. 15, 1993).

process and provide the executive and Congress with the information and perspective needed to make informed judgments. Also, members of the general public may participate in the process through hearings conducted by Congress and administrative agencies. While there may not be a perfect solution to the conflicting demands placed on the trade agreement process, fast-track, with its simple yes or no vote, reduces the haggling, pork-barreling, and log-rolling typically associated with important political issues. Fast-track is an integrative idea which increases constructive public participation without sacrificing the confidentiality needed to negotiate a useful trade agreement.

As international relationships continue to play an increasingly important role in the U.S. economy, the future of foreign trade negotiations will require an open yet productive procedure. Such a procedure, like fast-track, must provide ample opportunity for public input while allowing negotiators an adequate level of confidentiality. When harmony between the requirements of contract and legislation is achieved, everyone will benefit.

V. CONCLUSION

During his presidency, Woodrow Wilson advocated "open covenants openly arrived at."¹⁶⁹ Not until recently, however, has such an idea become a public priority. Although for most of the 20th century international trade agreements were privately negotiated by members of the executive branch, a critical shift took place in the 1970s when government leaders began to emphasize trade along with world security issues.¹⁷⁰ The resulting increase in public participation serves as a check on government power and provides information to decision-makers. While open government is likely to remain a fixture in U.S. politics, it is important that only appropriate public participation measures be crafted and supported. These measures should result in international trade agreements in the best interests of the United States.

Formal-direct public participation is the most effective and efficient way to allow the public access to trade negotiation processes without sacrificing the confidentiality of the negotiation strategy. Through increased use of presidentially appointed advisory committees and public hearings, the public plays an

169. LEROY N. RIESELBACH, *PEOPLE VS. GOVERNMENT* 48 (1975).

170. *See supra* notes 31-38 and accompanying text.

important role in setting the trade agenda and shaping discussion. Such formal-direct methods of public participation strengthen the government's ability to negotiate with its trading partners in confidence and provide the power to carry out promises made at the conference table. The use of fast-track during the NAFTA process proved to be a successful way to do just that. Fast-track's requirement of yes or no voting on the agreement as a whole, without opportunity to amend, enabled Congress to overcome much of the special interest influence and partisan politics which has plagued many government initiatives. This maximizes the productive aspects of formal-direct public participation while minimizing the debilitating effects of informal-indirect public participation, leading to more effective international trade agreements, thereby making Woodrow Wilson's dream a reality.