

DEMOCRATIZING U.S. TRADE POLICY

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A Council on Foreign Relations Paper

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FOREWORD

Today there is no American consensus on trade policy. The public supports free trade in theory, but in practice voters have highly protectionist sentiments on individual trade issues. The congressional majority in favor of trade liberalization has shrunk over time. President Bill Clinton twice failed to obtain trade-negotiating authority from Congress, and President George W. Bush had no better luck in persuading Capitol Hill to give him such authority in his first six months in office.

The political and bureaucratic process by which Washington comes to some agreement on a trade policy is broken. To reform that policymaking process so that the nation can create a new set of trade policies that a majority of the American people will support, the Council on Foreign Relations assembled a group of representatives of diverse interests and points of view—including academics, former government officials, business leaders, environmentalists, labor union officials, and members of Congress.

This group, chaired by Representative Jim Kolbe (R-Ariz.) and Representative Sherrod Brown (D-Ohio), debated reforms in presidential trade-negotiating authority, the way Congress organizes itself to deal with trade, the relationship between the government's trade and regulatory agencies, the public advisory system used by the executive branch, and the operations of the World Trade Organization. This paper, *Democratizing U.S. Trade Policy*, written by Council Adjunct Senior Fellow Bruce Stokes and Pat Choate, vice chair of the board of directors of the Congressional Economic Leadership Institute, is based on those deliberations.

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ACKNOWLEDGMENTS

In the summer of 1999, when this project was first conceived, it was already clear that the public consensus over U.S. trade policy had broken down. As this paper goes to print in the fall of 2001, that breakdown is even more obvious.

In conceptualizing this project, our first instinct was to pull together a study group of high-profile Americans to formulate a new trade policy that could win broad voter support. But we quickly concluded that such an approach was a reflection of the problem facing the nation; it was not the solution. Gone were the days when a small group of self-selected individuals, no matter how diverse, could agree on a new national trade policy and then simply expect the public to accept it. Trade now affects the lives of an unprecedented number of Americans. They want and deserve a greater say in formulating U.S. trade policy. We realized that neither we, nor anyone we could assemble, should presume to know what American trade policy should be or how it could best serve the interests of the American people. Rather, we decided it would be best to focus our efforts on the trade policymaking process—how Washington and the nation go about developing a trade policy. We believe that if the trade policymaking process can better reflect the interests of diverse stakeholders—big and small businesses, environmentalists, consumers, organized labor, and others—the trade policy that will flow from that process is likely to have broad public support.

As co-directors of this project, we were fortunate to work with a unique group of individuals who shared that vision. First and foremost, we would like to thank Representative Jim Kolbe (R-Ariz.) and Representative Sherrod Brown (D-Ohio), co-chairs of the study group that served as a resource and sounding board for this paper. Their willingness to reach across the aisle that too often divides Congress on trade issues, and their ability to think outside the box of conventional wisdom are examples of public policy leadership

and creativity at its best. We have immense admiration for them both and will forever be deeply in their debt.

The members of the study group have our special thanks. Each has long experience in trade policymaking. They were a diverse group, with substantive differences on trade topics of the day. But, to their credit, they left those differences at the door and, in a spirit of cooperation, openly debated new approaches to trade policymaking. They contributed background papers to this project. They read and commented on drafts of this manuscript. And they contributed their time and their insights during numerous study group sessions.

All projects of this magnitude require financial angels, and we were blessed with two: the Ford Foundation and the Crafted with Pride in USA Council, Inc. Their support was invaluable.

We owe a special debt to John Weinfurter and the staff of the Congressional Economic Leadership Institute (CELI): Joleen Worsley and Dan Houton. CELI co-sponsored this project, hosted the dinner seminars for the group, and ensured that the project's results were available to Congress.

Leslie H. Gelb, the president of the Council on Foreign Relations, and Lawrence J. Korb, its vice president and director of studies, supported our effort from its inception. The Council provides a unique environment where intellectuals and practitioners with differing policy perspectives can work together.

We would also like to thank Council on Foreign Relations members and other local leaders in Atlanta, Houston, and San Francisco who helped bring a different perspective to this project. Organized by the Council's National Program, these sessions with business leaders, academics, and leaders of non-governmental organizations (NGOs) outside of Washington helped shape our recommendations on reforming the trade policymaking process.

We are indebted to Council Research Associates Jessica Duda and Mary Dinh, who spent many hours organizing study group sessions, writing up meeting minutes, and tracking down countless details. They are the Council's unsung heroes.

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Everett Eissenstat and Sean Mulvaney, Representative Kolbe's trade aides, and Donna Pignatelli, Representative Brown's chief of staff, went out of their way to help mesh busy legislative schedules with the time demands of the study group.

Patricia Lee Dorff, the Council's director of publishing, and other members of the Council's crack editorial team, headed by publisher David Kellogg, provided invaluable editorial advice and counsel.

In the end, the sole responsibility for this paper lies with us, the authors. The analysis and recommendations expressed here do not necessarily reflect the views of the co-chairs or of any of the study group members. The comments of some of them appear at the end of this volume.

Bruce Stokes
Pat Choate

EXECUTIVE SUMMARY

Storm clouds signaling trouble with American trade policy have been gathering for some time. In the early 1990s, Congress barely approved creation of the North American Free Trade Agreement (NAFTA), and only strenuous efforts by the Clinton administration and the business community ensured passage of legislation creating the World Trade Organization (WTO). In the late 1990s, President Clinton twice failed to obtain congressional renewal of his trade-negotiating authority. The massive demonstrations during the meeting of the world's trade ministers in Seattle in 1999 reflected a widespread public unease with the impact of trade policy on a range of issues, from clear-cutting practices in the forests of Indonesia to the price of AIDS drugs in southern Africa. Today, public opinion polls consistently demonstrate that, although the American public supports freer trade in theory, it often has profound reservations about trade liberalization in practice. And the current global economic slowdown may only further polarize public opinion on trade issues.

It should come as no surprise that trade policymaking is now a topic of public debate. The American economy has been globalizing at a rapid pace. As the lives of more and more Americans are touched by the workings of the international economy, more and more people have a stake in the outcome of trade policy decisions. But, in many cases, their ability to influence those decisions has not kept pace.

The only way to defuse the ongoing rancorous debate over future American economic engagement with the world and to rebuild public trust in American trade policy is to craft a new process for trade decision-making that engages new actors in the dialogue. It is time to further democratize the trade policymaking process. Those who have a stake in trade liberalization have a right to participate in crafting the policies that affect their interests. Those stakeholders are necessarily more numerous today thanks to the rapidly

evolving trade policy agenda, which includes heretofore domestic regulatory issues such as environmental policy and the safety of pharmaceutical products and foods. But no policy will be politically sustainable if it is not developed through an open, transparent process that accords all interested parties an opportunity for input.

Democratizing U.S. trade policy will require reform in Congress, in the executive branch, and at the WTO. To that end Congress should

- Reform procedures for granting the president trade-negotiating authority by allowing normal time limits on Senate debate over trade agreements. Requiring the votes of sixty senators to impose cloture and cut off such debate will ensure that future trade deals have widespread political support;
- Create a Congressional Trade Office to analyze the economic, social, and environmental implications of trade policy options. Appoint congressional trade advisers to be observers at all international trade negotiations, to work closely with the private-sector trade advisory committees, and, at congressionally determined checkpoints, to determine whether international trade negotiations are meeting the objectives set by Congress.

Meanwhile, the White House should

- Launch a national dialogue on U.S. trade policy through town hall meetings and a proactive use of the Internet to solicit public input on proposed trade policy initiatives;
- Make public access to documents and dispute-settlement proceedings and general transparency in WTO procedures a high-profile U.S. negotiating objective in future multilateral negotiations, in regional trade talks, such as those for the Free Trade Area of the Americas, in bilateral free trade negotiations, and in Washington's regulatory deliberations at both the international and country-to-country levels;

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- Lead by example in taking whatever unilateral actions it can—including the release of documents, appointment of members of Congress and of the public to U.S. litigation teams appearing before WTO dispute-settlement panels—to ensure that the WTO proceedings take place in the sunshine of public scrutiny;
- Apply the U.S. Administrative Procedures Act (APA), the Freedom of Information Act, and the Government in the Sunshine Act to U.S. regulatory deliberations with other countries to ensure public oversight of and input into decision-making; and
- Reform the Trade Advisory Committee process in the executive branch through a more diverse private-sector membership jointly appointed by Congress, through more open meetings, and with agendas set by the committees themselves.

Through such reforms new arenas will be created to engage new players in the formulation of American trade policy. Only through crafting a more open and participatory trade policymaking process will it be possible to overcome some of the substantive differences that now impede a public consensus on trade policy and stifle U.S. leadership on global trade liberalization.

THE BREAKDOWN IN CONSENSUS

The national consensus on U.S. trade policy has broken down. The effort to remold that consensus around the trade agenda of a specific interest group—the unfettered free trade vision of the business community or the labor rights and environmental standards championed by organized labor and environmental activists—has failed. Continued efforts to impose a particular vision of trade policy on the broader national agenda risk further stalemate and the squandering of the potential economic benefits from trade liberalization. Narrow party-line victories on trade may yet be possible in Congress, but such frank admissions of public division on policy of such national importance will only serve to undermine U.S. trade interests abroad. In trade policymaking, the status quo is counterproductive and doomed to failure. The only way to break this impasse is through the further democratization of U.S. trade policy.

The recent trade policy debate in the United States has focused on whether trade is good or bad for the economy, whether trade is the cause of wage stagnation or the creator of high-wage jobs, whether the president should have trade-negotiating authority, and whether a new round of multilateral trade negotiations or more regional trade pacts are best for the country and, if so, under what conditions. This debate is likely to continue for years, with each side marshaling its academic experts and research to “prove” the validity of its claims. In the end, it is unlikely that either side will win many of these arguments, because the process by which these disputes are conducted is no longer trusted by many of those who have a stake in the outcome.

When compromise on substantive national policy proves impossible it often reflects a failure in the policymaking process. The inability to successfully broker differences is a damning indictment of how Washington makes trade policy. The declining congressional support for trade legislation, the prolonged

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failure to grant the president negotiating authority, and the continued public ambivalence about America's economic engagement with the world highlight the futility of current procedures for resolving the growing diversity of American interests in international commerce.

A new, more democratic process for making trade policy is needed within the executive branch, between the White House and Capitol Hill, and among the various regulatory agencies, and it must involve the American people if a new national consensus is ever to emerge around trade. This new approach must include the direct participation of a rich new mix of players, including a stronger role for Congress, the directly elected representative of the people. The decision-making process will of necessity be more transparent and participatory. It must reflect the fact that trade policy now involves a range of regulatory issues affecting the environment, food and pharmaceutical health and safety, and other concerns once considered purely domestic in nature. It necessitates opening up the WTO and related international standard-setting bodies so that their work also accommodates widening public interest in trade. And it requires a national dialogue on the future direction of American trade policy. Only through such active participation in the policymaking process will a broader range of stakeholders buy into future U.S. trade initiatives, permitting new progress on global economic integration.

U.S. trade policymaking was long driven by the fact that the United States was largely an inward-looking, self-contained economy. For nearly two centuries, what mattered economically to most Americans happened between the Atlantic Coast in the East and the Pacific Coast in the West. The trade and investment that flowed across those oceans was of little material importance to the daily lives of most Americans.

Today, at the dawn of the 21st century, the U.S. economy is global. The livelihoods and the economic futures of an unprecedented number of Americans, their children, and their grandchildren are now wholly or partially dependent on imports, exports, and the two-way flow of international investment. By almost every measure—whether it focuses on trade or on direct foreign

investment—the American economy is now more global than it has ever been. And the way Washington makes trade policy is under increasing pressure to reflect that fact.

Half a century ago, international trade—the sum of U.S. exports and imports—made up about one-tenth of the U.S. economy. Today trade accounts for nearly a quarter of the economy. Export-related employment accounted for nearly a quarter of new private-industry job growth in the first half of the 1990s. Workers in exporting firms earn more than those employed in companies that have yet to tap into the global market, even within the same industry. U.S. exporting firms are creating more jobs than comparable companies that don't export. And lower-priced imports have helped hold down inflation, stretching the buying power of low-income American workers. As a result, trade is no longer simply a Wall Street issue. It's a Main Street issue that has transformed the communities where Americans live and work.

But America's transition from a continental to a global economy has been a painful one. In the 1980s, the first decade when the United States encountered serious competition from abroad, hundreds of thousands of Americans lost their jobs because of competition from imports. Gone forever were many of the well-paying, secure, unionized manufacturing jobs that had enabled a generation of Americans to buy homes, send their kids to college, and have comfortable retirements. People who lost their jobs generally found new ones, but their new earnings and benefits often fell short of their previous compensation.

It is little wonder, then, that many Americans see trade, especially imports, as a mixed blessing. In principal, Americans tend to support open markets. But on specific trade-related issues, they are much more conflicted. More than three out of five voters approve of free trade, and most agree that imports give American consumers a larger selection of goods to choose from, force U.S. companies to be more competitive, and help low-income families afford a higher standard of living by lowering prices. But when pollsters probe deeper, they find that these favorable public sentiments mask continued concern about many specific trade-related issues. More than half of Americans blame international trade

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for the income gap between the rich and the poor in the United States. A similarly large segment of those surveyed tell pollsters that even if new jobs come from exports, such trade is not worth the disruption caused when people lose their jobs because of imports.

“New” trade issues also have come to the fore. Three-quarters of Americans now believe that the United States has an obligation to ensure that the goods it imports are not made in harsh or unsafe conditions or in ways that harm the environment. And an overwhelming majority believes that imports of genetically modified organisms should be labeled so that consumers can decide for themselves whether to feed such products to their children.

As a result, voters send public officials profoundly contradictory messages about whether to further open markets or to close them, about whether only American economic interests should prevail in U.S. commercial relations with other countries or whether they should be tempered by human rights and environmental concerns.

The process for forging a common national trade policy is also under attack at all levels. The Constitution gives Congress final say over international commerce. In the 1930s, to shield itself from constituent pressures, Congress delegated much of that authority to the executive branch. In recent decades, Capitol Hill has attempted to reclaim some of that control. But the profusion of congressional interests in trade—with multiple committee jurisdictions and individual member concerns—threatens efficient consideration of legislation. Moreover, the current “fast-track” procedure for expedited congressional consideration of negotiated trade agreements has broken down.

International commercial deliberations increasingly involve negotiation of standards, testing, and other domestic regulations affecting the health, safety, and well-being of consumers. But traditional methods for developing and implementing trade policy never envisioned consideration of such concerns. And the domestic regulatory process that develops such regulation is rooted in an open, participatory culture alien to the confidential nature of trade negotiations.

In the 1970s, the office of the U.S. Trade Representative (USTR) created an industry advisory committee system to seek technical input from business and to build public consensus on trade policy. Labor and environmental groups have subsequently joined the committees. But increasingly, such advisers have operated as rubber stamps or irrelevant irritants with little input into the trade policy of a particular administration. There is widespread dissatisfaction with the work of these advisory committees, not because some such mechanism is not needed, but because the advisory system has become stultified.

Finally, the WTO, created in 1995, lacks much of the openness and due process needed to build public understanding of its rules, trust in its procedures, and faith in its decisions.

A new, more broadly based, democratic process is needed for trade policymaking to overcome these shortcomings and to engage disparate elements of society in formulating a consensus on trade policy for the 21st century. Such a new process will not be neat; democracies never are. But it can be guided by a set of principals that balance efficiency with legitimacy. A consensus-oriented trade policy process must

- Give equal weight to two goals: integration of the U.S. economy with the global economy and an equitable distribution of both the benefits and the costs of that globalization;
- Afford all those who have a stake in the outcome of trade policymaking an opportunity to participate in that policy process;
- Assure that decisions are made with input from a new and broader range of interests reflecting the rapidly evolving trade agenda; and
- Be open, transparent, and democratic to ensure that trade policy truly reflects the national will and is thus politically sustainable.

To be sure, such democratic process reform will prove no panacea. At best, it will be a work in progress. Today's stakeholders are certainly not tomorrow's. Those who gain a seat at the

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decision-making table are often the first to deny a seat to others. Each generation will need to assess the shortcomings of its decision-making on trade policy and make adjustments to meet the nation's new economic and political needs.

Moreover, it is the goal of some trade policy critics to throw sand in the wheels of global commerce, not to make trade policy work better. At the same time it has long been the practice of some industries to manipulate the trade policymaking process to maximize their narrow economic benefit, even at the expense of the broader national interest. Greater participation in decision-making by those bent on destroying or exploiting the system will undoubtedly create its own set of problems, which can be averted only through vigilance. This is the unavoidable price society pays for America's commitment to democratic values and its faith that the best policy is produced through the engagement of those most affected by government action.

Finally, defenders of the status quo argue that democratizing U.S. trade policy will only politicize it, as if trade policy has not been at the center of domestic U.S. political struggles since the founding of the country. Tariff debates preoccupied Congress throughout the nineteenth century. Only the convergence of a unique set of circumstances—the Depression, World War II, and American economic and strategic hegemony in the immediate postwar period—created (temporarily) a bipartisan consensus supporting ever-greater trade liberalization.

Trade policy has not become more political today. It has simply become divisive once again. The post-World War II public compact on trade policy has broken down, and no new consensus has emerged. Congress doesn't trust the executive branch to be tough enough on foreigners and to look out for U.S. commercial interests at home or abroad. The USTR assumes that many members of Congress will simply protect narrow constituent interests rather than the national interest. Labor, environmental, and consumer groups think business and government trade negotiators ignore their concerns. Business suspects the motives of NGOs, assuming they will be obstructionist or absolutist.

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This profound distrust has stymied the trade policymaking process, complicating efforts to grant the president trade-negotiating authority and making it impossible to resolve differences over the relationship between labor, the environment, and trade. The challenge that lies ahead is to restore public faith in that decision-making process so that a new consensus can emerge in support of U.S. economic engagement with the world.

PROCESS SHAPES SUBSTANCE

The policymaking process has long shaped the ultimate substance of U.S. trade policy. What Washington determines to be America's international commercial posture has generally been a function of who has the authority to make decisions, who is in the room when those decisions are made, and how meaningful is the input of those participants in that process. The inevitable struggles that have occurred throughout U.S. history over access to and influence on this decision-making process have been both defined and driven by the awkward marriage dictated by the Constitution, which gives Congress the ultimate authority "to regulate commerce with foreign nations" and accords the president the power to negotiate treaties with foreign governments. This sharing of power and authority has, in recent years, repeatedly led to stalemates over the substance or direction of U.S. trade policy. Reforming the policymaking process is a means of breaking that impasse in the hope that such process reform can point the way toward substantive compromise.

"There have been three distinct phases in the evolution of the U.S. trade policy process," wrote trade historian Alfred Eckes in a paper for this study group, reflecting the interplay of institutions, individuals, and ideas. "First, there was a long period of congressional direction, lasting from the inauguration of the federal government in 1789 to the Great Depression of the 1930s. A second shorter period of executive leadership extended from passage of Secretary of State Cordell Hull's reciprocal trade program in 1934 to the close of the Kennedy Round [of trade negotiations under the General Agreement on Tariffs and Trade, or GATT]. And finally, since the Trade Act of 1974 established a more structured and balanced partnership (fast-track) between Congress and the

Executive [branch], there have been periods of both close institutional cooperation and increased friction.”¹

Throughout this time, government actions affecting trade have been at the center of American policy deliberations. Since tariffs were to be the largest single source of revenue for the new United States, it is not surprising that the second law the first Congress enacted was the Tariff Act of 1789. For the next century and a half, tariff battles dominated congressional proceedings, because trade policy debates were in part fights over revenue. (Until 1910, tariffs accounted for about half of all federal revenues.)

Similarly, trade deliberations have historically provided a venue for battles over “trade-related” issues. Before the Civil War, for example, the antislavery movement promoted bans on the international shipment of slaves and products made by slaves to undermine the institution of slavery. And in the late nineteenth century, progressives supported the free trade cause as a means of attacking the privileged.

Throughout this long period, squabbles over trade were animated by many of the same tensions that drive the current trade policy debate. The politically well connected used their influence over tariff-setting to nurture and protect specific sectors of the economy. The disenfranchised attacked that access as undemocratic and inequitable.

For the most part, this debate took place within the halls of Congress. It was members of Congress who determined tariff levels, not the president. Interest groups seeking protection or trade liberalization made their pilgrimage to Capitol Hill, not the White House.

This constitutionally sanctioned monopoly of power was ultimately Congress’s undoing. In 1930, passage of the Smoot-Hawley Tariff Act set an average duty of nearly 53 percent, the highest level in U.S. history. Other countries quickly retaliated with higher tariffs of their own and U.S. trade fell by two-thirds in just four years. Smoot-Hawley was not the primary reason for this dramatic

¹Alfred E. Eckes, “The Trade Policy Process in Historical Perspective,” Council Study Group Paper, 1999.

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contraction in trade (world trade had already begun to shrink), but the tariff bill came to be the scapegoat for the Great Depression and Congress got the blame.

In 1934, in an effort to reinvigorate international commerce and create American jobs, the administration of Franklin Roosevelt proposed that Congress delegate to the president the authority to make trade agreements with foreign countries and to reduce U.S. tariffs by up to 50 percent by proclamation without requiring further approval by Congress, as long as U.S. trading partners granted the United States reciprocal tariff reductions. During congressional debate on the measure, some members of Congress argued that the legislation was an unconstitutional delegation of legislative power to the executive branch. They worried that Congress was, in effect, giving advance approval to trade agreements and vesting the president with too much power to conduct tariff negotiations. In the end, Congress gave the president “tariff proclamation” authority. To preserve democratic principles in the new policymaking process, Congress, overriding State Department objections, required public hearings to be held on tariff matters. Moreover, it required publication of any intention to negotiate new trade terms, along with a list of products on which the United States was considering granting concessions. And it sought to maintain control over trade liberalization by limiting the executive branch’s negotiating authority to three years, subject to review and reauthorization.

As a result, wrote trade historian Susan Aaronson in her paper for this study group, “Congress remained in the driver’s seat. The law kept the [president] on a tight leash, forcing him to return to Congress to obtain renewed authority as well as feedback on the agreements [he] had made. The law was designed to ensure that the State Department would be responsive to the needs of specific sectors and would balance export promotion with import protection.”² Nevertheless, the Reciprocal Trade Agreements Act of 1934 “was a profound structural shift in the balance of trade decision making that had an equally profound impact on the substantive

²Susan Aaronson, “Who Decides? Congress and the Debate over Trade Policy in 1934 and 1974,” Council Study Group paper, 1999.

outcome of the policy process,” noted Susan C. Schwab in *Trade-Offs: Negotiating the Omnibus Trade and Competitiveness Act*.³

Secretary of State Cordell Hull had responsibility for administering this new trade-policymaking authority. He moved aggressively to reduce tariffs, signing thirty-two trade agreements with twenty-seven countries by 1945. But the delegation of trade authority made the executive branch, not Congress, the new focal point of constituent complaints. To shield himself, Hull relied on a small group of academics and New Deal advocates with little private-sector experience who were spread throughout the administration. The identity of these working groups of technicians, economists, diplomats, and administrators was known only to a select few in the administration. The idea was that in the face of still-powerful protectionist political forces in the nation, those advising and implementing the New Deal trade policies could operate best outside the glare of the political spotlight. Their track record is evidence of their effectiveness in implementing trade liberalization, but the closed nature of their activities and their lack of accountability to Capitol Hill only confirmed some of Congress’s worst fears.

U.S. trade expanded dramatically in the post-World War II era in the wake of profound tariff cuts by the United States and its trading partners. At the same time, international commerce was also shifting from the exchange of agricultural products, raw materials, and finished goods to movements of capital, services, and technology. And, as tariffs fell, the nature of trade barriers changed. Nations used nontariff barriers, such as standards, quotas, and domestic purchase restrictions, to protect their markets from competition from foreign products and services. The adverse impact on U.S. producers and workers of these new patterns of trade and new forms of protectionism slowly became apparent.

Congress became increasingly restive about the Faustian terms of its delegation of trade responsibility to the executive branch. Since the president’s tariff-cutting authority needed periodic reautho-

³Susan C. Schwab, *Trade-Offs: Negotiating the Omnibus Trade and Competitiveness Act* (Boston, MA: Harvard Business School Press, 1994).

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rization, Congress used such votes to slowly claw back some of its lost influence. The Trade Expansion Act of 1962, for example, granted the executive branch its most wide-ranging negotiating authority yet. But, in return, Congress created the post of Special Representative for Trade Negotiations (now the USTR) to move trade policymaking out of the State Department, where it had often proven beyond Congress's reach, and into the White House, where it would be more politically accountable to Capitol Hill. Congress also mandated the creation of a trade policy coordination process among the various executive-branch departments, such as State, Commerce, and Agriculture, and appointed official congressional advisers to future U.S. negotiating delegations.

Then, in 1967, in a watershed event, U.S. trade negotiators returned from the Kennedy Round of multilateral trade negotiations with agreements on nontariff issues. Congress refused to implement them. Critics of the deal claimed it exceeded the executive branch's negotiating authority.

On Capitol Hill, as Aaronson recounted in her book *Taking Trade to the Streets: The Lost History of Public Efforts to Shape Globalization*, members of Congress finally confronted the changed reality: trade negotiations were no longer simply about import duties at the border.⁴ Trade agreements were increasingly about industrial standards, the environment, and consumer health and safety. These issues had long been considered a congressional prerogative and were highly charged politically. For the White House, Congress's effective rejection of elements of the Kennedy Round deal was a wake-up call. Trade negotiators realized that presidential "proclamation authority" for tariff cuts would no longer suffice for more complicated trade agreements and that they would need a much broader constituency of support if future trade agreements were to stand a chance of congressional passage.

The 1974 Trade Act thus dramatically recast the balance of power between Congress and the executive branch with regard to trade and opened up the trade policymaking process to new actors. To

⁴Susan Aaronson, *Taking Trade to the Streets: The Lost History of Public Efforts to Shape Globalization* (Ann Arbor, MI: University of Michigan Press, 2001).

ensure speedy and definitive action on trade matters, Congress promised to consider trade agreements on a “fast track,” which would allow limited debate, no amendments, and an assured up-or-down, simple-majority vote.

This legislation did not just alter the congressional process, however; it also expanded the scope of agreements that the executive branch could negotiate. Trade negotiators were granted express authority to negotiate nontariff trade barriers, such as regulations and standards. This expansion of negotiating responsibility was necessary given the changing nature of international trade. But this delegation of authority also set the stage for much of the trade strife that divides the nation today. The agendas of trade negotiators were dramatically expanded. Public concern was aroused because, unlike tariffs, the nontariff barriers involved in such negotiations often directly affect people’s lives. During the House hearings before passage of the 1974 Trade Act, these concerns were articulated by Representative Peter Frelinghuysen (R-N.J.), who worried that negotiations on “non-tariff barriers . . . are so inextricably intertwined in a web of domestic social, economic and political considerations that Congress would benefit by knowing what the executive branch has in mind before [it enters] into negotiations.”⁵

To address such concerns, many of those involved in the congressional debate advocated that trade policymaking become more democratic, involving a broader cross-section of Americans, as Aaronson has chronicled. The Emergency Committee for Foreign Trade (a leading supporter of trade liberalization) suggested that “the president consider the views of the public” on nontariff barriers, since the president already had to assess public views before entering into narrower tariff negotiations. In the end, the 1974 Trade Act made trade policymaking more transparent and accountable.

Congress got a degree of consultation and oversight not included in past extensions of trade-negotiating authority. In addition, an official private-sector advisory committee system was created that included labor, industry, farming, and consumer representatives; these members were to play an integral part in trade negotiations.

⁵Aaronson, “Who Decides?”

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Finally, in the Jackson-Vanik amendment to the 1974 Trade Act, Congress explicitly linked trade policy to the willingness of the Soviets and other communist governments to liberalize their emigration policies. By so doing, Aaronson concluded, “Congress made social results an acceptable objective for trade agreements, making it easier subsequently for groups not concerned with the economic effects of trade to influence trade policies.”⁶ Observed Schwab, “In exchange for delegating to the executive a generous measure of flexibility, the Congress gave itself and its constituents some assurance of ongoing input in the negotiating process.”⁷

Only subsequently did it become apparent that the circle of participants was still relatively small given the growing importance of trade policy to the nation’s economic health. And, without a concomitant expansion of the seats around the policymaking table, the seeds of distrust had been sown.

Conditions in the 1980s and 1990s only aggravated trade tensions among Congress, the executive branch, and those with a political and economic interest in trade, imperiling further trade liberalization. During the Reagan administration, in the face of a mounting trade deficit and amid a weak economy and high levels of unemployment, Americans’ frustration with the lack of executive urgency and leadership only grew. A widespread sense was shared on Capitol Hill that the White House briefed Congress and members of its advisory committees after trade decisions were made rather than engaging them in a dialogue in advance of such actions. The perception grew that appointments to advisory committees were increasingly made on a partisan political basis.

During the Clinton administration, while Congress still worked with the White House to pass NAFTA and the implementing legislation for the results of the Uruguay Round of multilateral trade negotiations, the margin of support for trade liberalization was steadily shrinking. The administration’s mishandling of efforts in 1997 and 1998 to reauthorize the president’s trade-negotiating authority highlighted the gulf separating Capitol Hill and the White House on how to conduct trade policy.

⁶Aaronson, *Taking Trade to the Streets*, p. 60.

⁷Schwab, “*Trade-Offs: Negotiating the Omnibus Trade and Competitiveness Act.*”

Signs that the process is breaking down have been evident for some time. The Trade Act of 1974 passed by an overwhelming margin: 72 to 4 in the Senate and 323 to 36 in the House. In 1988, the Omnibus Trade and Competitiveness Act, which included fast-track legislation, passed the Senate 85 to 11 and the House 376 to 45. The margin of trade support continued to erode in 1993, when a one-year extension of fast-track passed by 76 to 16 in the Senate and 295 to 126 in the House. And the vote on NAFTA in 1994 was 61 to 38 in the Senate and 234 to 200 in the House. By 1998, support had shifted sufficiently that fast-track legislation failed in the House by a vote of 180 to 243.

This erosion of support has not been a partisan affair. The number of Republicans in the House voting against fast-track rose from 11 in 1974 to 41 in 1988, 43 in 1994, and 71 in 1998. Thirty House Republicans also voted against the African Growth and Opportunity Act and the Caribbean Basin Initiative in 2000.

Democrats moved from substantial majorities in favor of fast-track in 1974 and 1988 to substantial majorities against it in subsequent years. The Trade Act of 1974 received the support of 41 Senate Democrats, with only 3 against, and the support of 176 House Democrats, with only 25 against. By 1993, Democrats were split 38 to 10 in the Senate and 145 to 102 in the House on the vote for a one-year extension of fast-track. NAFTA legislation received 102 votes from House Democrats (with 156 against) and 27 votes from Senate Democrats (with 28 against). In 1998, House Democrats voted against fast-track by a margin of 29 to 171. And in 2000, Democrats still showed reservations about trade, with 78 in the House and 13 in the Senate voting against the Africa and Caribbean trade deals.

These votes testify to the breakdown in the delicate balance of interests in the trade policymaking process. Of course, this shifting support reflects substantive differences over trade: a rise in protectionist concerns, a decline in support for free trade and a growing value placed on traditionally nontrade issues such as labor and the environment. And these differences will certainly be difficult to resolve. But the history of trade policymaking in the United States suggests that the challenge is not to ameliorate such policy differences, which after all are rooted in differing eco-

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conomic and political self-interest. Rather, the lesson for policymakers is the need to constantly re-equilibrate the policymaking process to accommodate changing substantive interests in the hope that the process can continue to produce a consensus on trade policy.

THE INTERNATIONAL PROCESS

The evolution of the trade policymaking process in the United States was paralleled by the progressive articulation of trade rule-making and dispute settlement internationally. Over the years, the domestic American debate about this global regulatory process has often been driven by a concern that such policymaking lacked fundamental democratic values.

In the closing days of World War II, the governments of the United States, the United Kingdom, and the liberated countries of Europe jointly devised a global economic system based on open markets and governed by clear rules, whose purpose was to stimulate the freer flow of goods among nations and thus avoid the protectionism that was blamed for both the Great Depression and the subsequent global conflict.

The three pillars of this system were the International Monetary Fund, designed to stabilize currency markets; the World Bank, intended to provide the capital to rebuild war-torn Europe and Asia; and the International Trade Organization (ITO), which was meant to set, monitor, and adjust global trade rules. The first two organizations were duly created, but a lack of U.S. support doomed the ITO.

Since international commerce needed some framework of rules, the world's trading nations had signed GATT as an interim pact in 1947. With the failure of the ITO, GATT became the principal global forum for multilateral trade negotiations.

By design, GATT was nothing more than a contract between nations, and its enforcement depended on the goodwill of the participating countries. If a country was found in violation of its GATT commitments, it could, with impunity, refuse to comply.

Frustration with noncompliance and a desire to broaden GATT's scope led to the creation of the WTO in 1995 after the Uruguay Round of multilateral trade negotiations. The new insti-

tution's agenda goes beyond tariffs to include agriculture trade, sanitary and phytosanitary measures, rules on textile and apparel production, trade-related investment measures, rules of origin, rules on subsidies and countervailing measures, safeguards, trade in services, and global intellectual property protections.

But the WTO remains an institution of 142 sovereign states. Its rules of procedure—such as which meetings are open, which documents are public—can be changed only by an affirmative vote by two-thirds of its members. Its institutional culture still reflects the mores and values of the more select GATT, which started out with only eight members. And many of the WTO's member governments themselves are democracies in name only, with domestic political and administrative processes that are far from being transparent or participatory.

Moreover, it is the interaction of the WTO's broader mandate for international trade rule-making and its new process of dispute settlement that animates the current public debate about trade and the WTO. Those from the business community who advocate definitive dispute settlement justify their case with an appeal for due process. It is unfair, they contend, for nations to violate their international commitments with impunity. Those from labor, consumer, and environmental groups who opposed the creation of the WTO argue that an ever-wider WTO agenda intrudes on domestic regulation. In subsequent years, as the WTO has begun to make decisions about environmental standards and the like, the long-standing domestic U.S. debate about who has a legitimate role in trade decision-making has become an international debate about openness, transparency, and due process at the WTO.

REDRESSING THE BALANCE OF POWER

Reform of how Congress deals with trade matters is long overdue. The economy has changed dramatically in the last three decades, with trade playing an ever greater role in the lives of voters in congressional districts all across the country. Constituent interest in trade has grown, coming not simply from farmers, leaders of business, and organized labor, but also from environmentalists, consumers, and animal welfare and human rights advocates. Moreover, those with a stake in the outcome of congressional trade debates will only grow in number in the future. Yet congressional practices for addressing such concerns were designed for an earlier era.

Reflecting this changing political and economic environment, the executive branch has dramatically expanded and restructured its handling of trade matters, first through creation of the National Economic Council (NEC) in the White House during the Clinton administration, then through closer coordination of trade policy between the NEC and the National Security Council in the Bush administration. There has been no comparable reorganization of how Congress deals with trade.

THE CHALLENGE

The Constitution accords the Senate and the House of Representatives the authority to regulate international commerce. At times Congress has fulfilled this role assertively, at times passively. In the nineteenth century, when tariffs were an important source of revenue for the federal government and when tariff policy was an instrument of national industrial policy, Congress was at the center of the trade policy debate. That central role waned in the second half of the nineteenth century with the general assertion of executive-branch power and the growing importance of trade as a tool of foreign policy. In recent years the pendulum has again

begun to swing back up Pennsylvania Avenue as Congress has become more engaged with trade issues.

This newfound interest and engagement poses a challenge. Congress's constitutional role as the final arbiter of trade policy has traditionally been most easily exercised as a blocking function. Thus the first measure of the success of any reform must be that it empowers Congress to make a positive contribution to the trade policy-making process, not simply slow the process down. (One thing is clear, however: efforts to limit Congress's role in the policymaking process will only increase the likelihood that Capitol Hill will play an obstreperous role in the future, because saying "no" will often be the only option available to it.) So looking forward, the question is not whether Congress's role should be enhanced, but how to enhance it in a manner that balances Congress's constitutionally mandated responsibilities with the need for efficient and effective trade decision-making.

Some congressional observers argue that Congress's handling of trade "ain't broke, so don't fix it." In 2000, Congress approved permanent normal trade relations with China, the Caribbean Basin Initiative, and the African Growth and Opportunity Act. This is hardly the track record of an institution tied in knots. When there is sufficient political support for legislative action on trade, Congress is still capable of moving trade legislation.

But Congress's recent performance belies its growing proclivity to micromanage trade policy, a clear sign of fears on Capitol Hill that the current policymaking process is broken. For example, the 1962 Trade Act was 31 pages long. The 1988 Trade Act was 467 pages long. The 1974 Trade Act had 29 amendments. The 1988 act had 129. Moreover, the 1988 act created 30 new agencies, offices, advisory panels, and commissions and required the filing with Congress of up to 165 new reports, studies, and reviews. Legislative sclerosis is progressively paralyzing both congressional capacity to fulfill its constitutional responsibilities and its capacity to accommodate itself to the changing political and economic debate over trade.

Congress has the right to enumerate objectives for U.S. trade negotiators in granting the president trade-negotiating authori-

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ty. It is a useful exercise, flagging national and constituent interests while laying down markers to measure the success of trade talks. But since 1997, congressional deadlock over negotiating objectives has become an impediment to trade liberalization. Years have been wasted haggling on Capitol Hill over whether enforceable labor rights and environmental standards should be objectives for trade talks that themselves will then take years to complete. At this pace, by the time Congress is finally asked to bless the next trade deal, constituent interests may well have evolved. Concern for human rights or animal welfare or something else may equal today's interest in labor and the environment.

Congress will never forgo its right to name negotiating objectives. Nor should it. But negotiating objectives are at best a snapshot of voters' concerns and the national need. Congress would do well to acknowledge the futility of guessing with any precision what will be important to the nation and to constituents years from now. To complement negotiating objectives, Congress should design an ongoing role for itself in monitoring trade negotiations to ensure that they produce deals that reflect evolving concerns of voters and the nation and thus have broad congressional support.

Such an approach would be pragmatic; it would also be good politics. Ensuring that Congress can constantly monitor trade negotiations should reassure organized labor and environmentalists—the current protagonists in the trade-objectives battle—that their concerns will be taken seriously. It would also empower business and other groups to ride herd on future trade negotiators to ensure that they don't stray off the reservation in their deliberations with other countries.

At the same time, jurisdictional disputes over trade have proliferated on Capitol Hill, thanks to the lengthening list of “trade-related” issues on the congressional agenda. The Agriculture committees have always been players on trade policy. The emergence of international financial services issues have engaged the Banking committees. Telecommunications trade liberalization has drawn in the Commerce committees. The House International Relations Committee's responsibility for legislation covering export controls and trade sanctions—effectively imposing limits

on trade—often works at cross-purposes to the trade-liberalizing goal of the House Ways and Means Committee.

In both 1962 and 1974 the House-Senate conference committees that were needed to iron out differences in trade legislation had a total of 14 conferees each. The legislative conference on the 1988 Trade Act, by contrast, involved 23 committees and 199 conferees. The conference on the Uruguay Round implementing legislation again involved numerous members of Congress.

Such desire to be part of the process on the part of both members and committees reflects constituents' growing interest in trade. But this trajectory does not bode well for the future. When so many members have a desire to be involved, it raises serious concerns about the continued effectiveness of the conference committee process. Unless properly structured, participation could increasingly be the enemy of efficiency.

The congressional staff available to deal with the proliferation of trade issues is inadequate and also spread too thin. (It has not always been this way. In 1913, the eleven staff members of the Senate Finance Committee outnumbered the ten-member White House staff.) The Senate Finance Committee and the House Ways and Means Committee have a handful of professional staff members handling trade issues. Additional staff members do work on trade issues from their perches in other committees. And trade experts are assigned to the Congressional Research Service (CRS), the General Accounting Office (GAO), and elsewhere within Congress's supporting agencies. But the core legislative trade work is still left to a small number of increasingly overworked people.

Growing constituent interest in trade-related issues has led more and more individual members of Congress to designate a legislative assistant as the member's personal trade aide. This development has empowered individual members to play a more active role in trade debates on Capitol Hill. But such personal staff often view international commerce through a narrow political or congressional-district lens. Failure to increase Congress's professional trade staff to accommodate particularistic member interest has only aggravated the politicization of trade issues.

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Of course, the biggest challenge facing congressional trade policymaking is redefining Congress's relationship with the executive branch. Meaningful congressional consultation with the White House on trade matters has broken down. Each of the last three USTRs claimed to have testified more on Capitol Hill and met privately with more members of Congress than did his or her predecessor. Yet each USTR has suffered criticism for inadequate consultation. Some such congressional carping is inevitable, but the volume and frequency of such complaints are on the rise. The problem is not lack of good faith on the part of either the USTR or Congress. The old mode of interaction simply no longer meets Congress's needs.

REFORMING THE PROCESS

As trade historian I. M. Destler noted in *American Trade Politics*, the market-opening orientation of U.S. trade policy in the postwar period was, in part, a product of the closed politics of congressional trade policymaking. The concentration of decision-making in the hands of a few members of Congress generally shielded lawmakers from protectionist pressures. The opening of congressional procedures and the diffusion of power within Congress since the 1970s have created more democratic accountability. But, Destler argued, they have "also allowed special interests to more easily identify who is responsible for thwarting their desires" and to bring pressure to bear to restrict competition from imports.⁸

But, whatever the benefits, there is no going back to the "good old days" of cozy congressional trade policymaking. On a range of issues from the budget to foreign policy, Congress no longer operates in a clubby fashion. More and more interest groups—organized labor, environmentalists, animal rights and human rights groups, consumers, and new industries—now want access

⁸I. M. Destler, *American Trade Politics*, 2nd ed. (Washington, DC: Institute for International Economics, 1992).

to the policymaking process because they believe they have a growing stake in the outcome. The challenge is how to integrate all these stakeholders into decision-making in a manner that preserves the benefits of trade liberalization while assuring those adversely affected by market opening that their interests are taken into account.

Reforming how Congress handles trade is not a new concern. It has been a perennial issue, either as an element of broader institutional transformation or as a means of dealing with specific trade issues. The 1974 Bolling Commission report suggested moving trade from the Ways and Means Committee to what the House at the time called its Foreign Affairs Committee. In 1986, the Senate Democratic Caucus debated shifting trade jurisdiction from the Finance Committee to the Commerce Committee. And, most recently, in 1994, after the Republican Party regained control of the House of Representatives, there was some discussion of moving trade from the Ways and Means Committee to the renamed International Relations Committee. None of these proposals prevailed. They all foundered on the shoals of congressional baronies, underscoring the difficulty of institutional reform on Capitol Hill. But history also teaches that restructuring is not impossible. When Congress faced gridlock in its handling of budget issues, the congressional budgetary process was changed dramatically. Reform is possible.

A variety of means can be used to improve congressional management of trade issues, ranging from minor adjustments to major surgery. To address current shortcomings and deal with anticipated needs, whatever path is taken, Congressional reform must

- Encompass the emerging range of congressional interests in trade in an effective institutional framework;
- Balance participation with efficiency. Procedural reforms must increase public access to the trade policymaking process. At the same time, the nation cannot have 535 trade negotiators. Congress must be able to produce trade legislation at the end of the day;

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- Provide broader and deeper professional support for congressional oversight of trade policymaking, analysis of trade issues, involvement in trade negotiations, and drafting of trade legislation; and
- Create new opportunities for greater, ongoing congressional engagement with trade negotiators.

WHAT NOT TO DO

Congress could simply strengthen the trade jurisdiction, powers, and staffing of the Senate Finance Committee and the House Ways and Means Committee. To do so the Senate parliamentarian and the Speaker of the House would have to more closely define committee jurisdiction.

This would be the easiest reform to implement because it would avoid resistance from the two most powerful trade-related committees. Concentrating control over trade in the committees that raise revenue and thus have negotiating leverage with their colleagues would make it easier to resist mischievous legislation, strike bargains on trade matters, and adequately weigh the overall economic costs and benefits of particular trade proposals.

However, such reform would be viewed by other committees as efforts by the two committees involved to reassert control over issues where jurisdiction has become diffused. It would therefore engender savage turf fights. Moreover, consolidation would weaken the necessary brokering process that now goes on between the various committees of jurisdiction in crafting trade legislation. Such give-and-take can be beneficial, serving as a governor on the runaway actions of any one committee.

As an alternative, Congress could create separate trade committees for both the Senate and the House. Throughout its history, as priorities have changed, Congress has often responded by creating new committees. Such committees would have jurisdiction over all proposed legislation relating to trade. The problem of unwieldy conference committees and committee turf fights

would largely be ended. With a single committee handling tariff changes, export controls, and economic sanctions, it would be possible to better assess the impact of proposed changes in U.S. law. A unique trade committee on each side of Capitol Hill would provide one-stop-shopping for citizens with trade concerns.

But such reform would challenge existing baronies in both houses of Congress. This head-on assault on the power of the Finance and Ways and Means committees, not to mention the Agriculture committees, and the undermining of the growing stake in trade held by the Senate Commerce Committee, the House International Relations Committee, and others would require an enormous expenditure of political capital with no assurance of success. Moreover, lacking the revenue powers of the Finance and Ways and Means committees, separate trade committees would not have the financial carrots and sticks so necessary in the process of crafting trade legislation.

WHAT TO DO

To adapt its procedures to the rapidly evolving importance and complexity of trade issues requires that Congress do the following:

- *Establish a Congressional Trade Office*

When Congress has confronted analytical and jurisdictional problems in the past it has created independent entities to bolster its institutional capacity. Such was the rationale for the creation of the Congressional Budget Office (CBO) in 1974. Today, establishment of a Congressional Trade Office (CTO) would help Congress meet its constitutional responsibility to fully regulate international commerce in its broadest modern context.

Like the CBO, the CTO would not recommend specific trade policies, but it could provide Congress with authoritative analysis of trade policy options. One task could be an independent assessment of the nation's trade statistics and policies proffered by the executive branch or by members of Congress. At the direction of the Senate Finance Committee or the House Ways and

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Means Committee, the CTO could, for example, assess the cost to the U.S. economy of the foreign trade barriers identified each year by the USTR. (The USTR's annual trade-barriers report lists obstacles to trade but gives no sense of their economic significance.) The CTO could calculate the cost to consumers of U.S. import restraints. It could analyze the impact of U.S. trade negotiating concessions or proposed foreign market openings on individual U.S. industries. It could conduct environmental and labor assessments of U.S. trade agreements. The CTO could also solicit public comment on draft texts of trade agreements. It could carry out a dispassionate analysis of the effectiveness or importance of various U.S. trade sanctions, such as the Iran-Libya Sanctions Act. It could help monitor foreign compliance with trade agreements. The CTO could also be charged with assessing the impact of the WTO dispute-settlement system on U.S. laws and regulations. And the reports of all trade advisory committees from the executive and legislative branches would be submitted to the CTO for review.

CTO staff would also be available to help with congressional oversight hearings, to provide expertise to any committee, to serve as congressional observers at WTO and other international dispute-settlement hearings, and to provide another congressional resource for U.S. trade negotiators. CTO analysts would give members of Congress, especially those not serving on committees with trade jurisdiction, with the professional staff assistance they need to assess the impact of the trade proposals they might be considering. The CTO professional staff would be appointed by the president pro tempore of the Senate and the Speaker of the House, after consultation with the chairs and ranking minority members of the Senate Finance Committee and the House Ways and Means Committee.

- *Appoint Congressional Trade Advisers*

The 1974 Trade Act created congressional advisers to international trade negotiations. Their engagement in the trade policymaking process has waned over time. The role of such advisers needs to be reinvigorated and enhanced by giving them greater respon-

sibilities and staff and a more formal role to play in the trade policymaking process.

This group would consist of the ranking members of the Senate Finance and the House Ways and Means committees, together with a small number of Senate and House members from the various committees with trade-related jurisdiction and individual members of Congress with strong trade interests. They would be selected by the Senate and House majority and minority leaderships. The congressional trade advisers would have a small, professional staff and a travel budget.

These advisers would serve as formal observers at all international trade negotiations, would work closely with the private-sector trade advisory committees, and, at congressionally determined checkpoints, would informally vote on whether international trade negotiations in progress are attaining the negotiating objectives set by Congress. Such a vote would signal to trade negotiators any congressional support or unease with their efforts. (Such votes have proven useful in the past. A tie vote by the Senate Finance Committee in the mid-1980s signaled U.S. negotiators working on a free trade agreement with Canada that they needed to redouble their efforts to craft an agreement they could sell to Congress.) The congressional advisers would also provide an opportunity for much-needed bipartisan, bicameral, intercommittee dialogue on trade policy.

Enhanced congressional engagement with trade officials from the executive branch, especially trade negotiators in the trenches, should be an overarching goal of congressional trade reform. Greater engagement would facilitate better two-way communication between Capitol Hill and the White House—an important commodity, both substantively and politically, as trade issues become increasingly complex. Engagement would give members of Congress a better sense of the context and nuance of a particular negotiation. Most important, it would promote congressional input and ownership in the executive branch's bargaining positions, strengthening the likelihood that Congress would eventually approve trade agreements once negotiations have been completed.

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The strengthening of Congress' trade capacities through the aforementioned reforms will naturally increase formal congressional-executive branch interaction on trade issues, if only through opportunities for more oversight hearings on Capitol Hill. But there are limits to the efficacy of such ritualistic and formalistic interactions in congressional hearing rooms.

Formal, arms-length interaction still reflects a clear-cut division of responsibility on trade matters—the executive branch negotiates and Congress passes judgment on that work. As neat as this approach to policymaking may be, it may also be out of date. Such separation of tasks reflected the once-insignificant impact of trade on the U.S. economy. It served the interests of trade officials in the executive branch, maximizing their independence. And, until recently, many would argue that it benefited the country. But trade's rising prominence in American economics and politics, as well as growing constituent demands for greater congressional assertiveness, cry out for a more participatory congressional engagement on trade.

Delineating that engagement will not be easy. Members of Congress are prohibited from negotiating with other governments, so directly involving members of Congress or their staffs in trade negotiations is not an option. Nor could one member speak for others in such settings. And aides participating even as observers could never formally sign off on a negotiating concession for their bosses. Most important, to preserve its role in a system of checks and balances, Congress should not want co-responsibility for U.S. international negotiating positions.

So opportunities must be created for greater informal interaction between trade negotiators and congressional staff. This indirect engagement could help ensure that future trade agreements have the widest possible political support within Congress at the time they are negotiated without completely blurring the distinction between the trade role of Congress and that of the executive branch.

Indirect engagement is not new, but it is increasingly rare. Tokyo Round negotiators claim that there was far more involvement of congressional staff in those multilateral talks—especially the presence of congressional staff in Geneva for informal con-

sultation—than existed during the subsequent Uruguay Round. Future trade rounds—which will undoubtedly involve a wider range of issues, from agriculture to the environment to electronic commerce—would undeniably benefit even more from congressional staff expertise and, more important, from staff political sensibilities. It is one thing for negotiators to fully understand the economic and political implications of a tariff cut; it is quite another to expect them to fully appreciate the consequences of the international harmonization of an environmental regulation.

More congressional trade staff would afford more people greater opportunities to spend more time with trade negotiators both in Washington and in Geneva. Staff might even sit in as informal observers in some trade negotiations. A larger professional staff should also help compensate for Congress's declining institutional memory on trade matters. Finally, more trade staff would enhance congressional capacity to fulfill its oversight responsibilities and to engage in much-needed review of other nations' compliance with trade pacts.

Mindful of current budgetary concerns about reining in the burgeoning congressional bureaucracy, growth in congressional trade staff—be it in the Finance and Ways and Means committees, in the CTO, or for the congressional trade advisers—could be offset by reductions in the trade staff at GAO, the CRS, and the International Trade Commission.

TRADE-NEGOTIATING AUTHORITY

The fast-track process established by the 1974 Trade Act enumerated trade negotiating objectives, laid out requirements for consultation with Congress and the private sector, set a deadline for conclusion of any trade deal under fast-track procedures, established rules for submitting implementing legislation to Congress, and, most important, committed Congress to vote on a piece of trade legislation within a defined period of time and to forgo its right to amend the trade legislation. These fast-track procedures were used to pass the results of the Tokyo Round, the U.S.-

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Canada Free Trade Agreement, NAFTA, and the results of the Uruguay Round. In 1994, however, fast-track authority lapsed and has not been renewed, despite two abortive efforts by the Clinton administration to fashion acceptable procedures.

The sticking point has been insistence by organized labor, the environmental community, and their allies that labor rights and environmental standards be U.S. trade negotiating objectives, that negotiators take these objectives as seriously as they do more traditional goals—such as reduction of agricultural subsidies—and that trade sanctions be used to enforce labor and environmental standards. The business community, the Bush administration, and many members of Congress have opposed such objectives and such enforcement.

Some kind of expedited congressional procedure for consideration of trade legislation is needed. The recent stalemate over reauthorizing fast-track—or what the Bush administration calls “trade promotion authority”—suggests how hard it will be for Congress, the executive branch, and various interest groups to get out of the blind alley they seem to be in.

WHAT NOT TO DO

Congress has multiple options in considering how it grants trade-negotiating authority. Each of them is flawed. Traditional negotiating authority could simply be renewed, an approach that has worked well in the past. But a majority of Congress may now oppose the old-style fast-track.

Negotiating authority could be restricted to specific negotiations with individual countries or groups of nations. Once a negotiation has been completed it should prove easier to mobilize interests that would gain from a particular trade deal to support congressional approval of implementing legislation. Depending on the countries involved, this approach could make it easier to strike a compromise over negotiating objectives. But negotiation-specific fast-track raises fears about setting precedents. How could Congress justify one set of negotiating objectives and

enforcement mechanisms for a deal with one country and not with another country? And such an approach would be cumbersome, requiring repeated congressional reauthorization of negotiating authority.

The executive branch could negotiate individual trade agreements and only then seek fast-track procedures for passing their implementing legislation. This approach would be likely to rally business support for the trade deal involved because it would be easy to point to the tangible benefits that had been achieved. At the same time, particular negotiating objectives might not appear as threatening once a concrete trade deal with another country was in hand. But the Clinton administration's decision to not seek fast-track before negotiating a free trade agreement with Jordan did not preclude a subsequent fight in Congress over the labor and environmental language included in the deal, suggesting that battles over negotiating objectives cannot simply be sidestepped.

Congress could grant the White House permanent fast-track authority that could be invoked only for specific negotiations once they are approved in advance by Congress. This approach, suggested by Destler, would allow the United States to negotiate trade deals whenever the opportunity arises, without a protracted fight with Congress over fast-track. It would force the executive branch to have a rather specific dialogue with Congress before embarking on a particular negotiation. It would assure those leery of future trade negotiations that fast-track would not be a blanket license to negotiate. But this approach would again require multiple congressional votes, never an easy task.

WHAT TO DO

Trade-negotiating authority should be accorded to the executive branch in a manner designed to ensure widespread support in Congress to implement whatever trade agreement is finally negotiated. To build that broad consensus, not just a simple majority, advocates of issues that have not traditionally played a role in U.S. trade negotiations must have some assurance that, when and

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where appropriate, their goals will be part of future trade pacts. This can best be achieved through a change in congressional voting requirements on trade agreements.

In the House of Representatives, the Rules Committee recommends how each piece of legislation will be handled, pending approval by the full House and precluding permanent House rules for implementing the results of trade negotiations. But the Senate could

- *Create a Consensus-Building Fast-Track*

The Senate should establish a rule specifying that, unlike past fast-track procedures, future trade-implementing legislation would be subject to normal debate. Thus, to cut off discussion and impose cloture, trade legislation would require the support of sixty senators. Amendments would still not be permitted. And the Senate could commit itself to take up implementing legislation on an accelerated schedule.

There are multiple benefits to a consensus approach to fast-track. The procedure would build new flexibility into a process that is becoming increasingly rigid with the addition of more and more negotiating objectives. Faced with the need to obtain sixty Senate votes, trade negotiators would be sure to include in trade agreements those provisions necessary to mobilize that support. What exactly those provisions might be—in some cases they might deal with labor rights, in others environmental concerns, in others simply improved tariffs or market access—would depend on the countries involved and economic conditions in the United States. The existence of the advisory vote of the newly created congressional trade advisers would help point trade negotiators in the right direction.

Trade agreements would thus be tailored to the circumstances. A trade deal with Europe might not need provisions on labor rights, because labor laws in Europe are generally stronger than those in the United States. An agreement with Brazil, whose rain forest serves as the lungs of the planet, might need an environmental provision to ensure congressional support. Over time, Congress might no longer feel the need to dictate trade negotiating

objectives at all because the higher threshold for Senate approval might generally ensure that trade deals had the provisions Congress deemed appropriate.

Most important, a requirement that future trade agreements have more than bare majority support would send a signal both to U.S. trade negotiators and to their foreign counterparts that, at a time of growing American public concern over the consequences of globalization, trade agreements will not pass muster on Capitol Hill if they are marginally attractive economically and ignore politically important issues. If the economic rationale for a trade deal is compelling enough to attract widespread congressional support, attention to other issues may not matter. At the same time, this new threshold would not impose an undue burden: all major recent U.S. trade legislation has received the support of more than three-fifths of the Senate.

DOMESTIC REGULATION AND TRADE

In the 21st century, trade negotiations and international commercial agreements are less and less about tariffs, quotas, and other formal at-the-border impediments to foreign commerce, and more and more about domestic regulatory environments and how they impede or enhance international competition. The Technical Barriers to Trade provisions of the Uruguay Round Agreement, the mutual recognition agreement talks now being implemented between the European Union (EU) and the United States, and aspects of the Clinton administration's framework talks between Tokyo and Washington all reflect governments' attempts to reduce the impact on trade of domestic regulations, standards, and testing procedures. In addition, various international standards-setting bodies—such as the Codex Alimentarius Commission, which helps set global food standards, and the World Forum for the Harmonization of Vehicle Regulations—are ever more important venues for deliberations on trade facilitation.

The trade agenda is rapidly melding with the domestic regulatory agenda. Developing rules for the use of genetically modified organisms, for example, has become both a domestic environmental health concern and a trade issue. Recent transatlantic efforts to standardize headlight design had both safety and trade implications. And, in a global economy, the U.S. Food and Drug Administration (FDA) effectively set health and safety rules for the Asian, European, and Latin American pharmaceutical industries by establishing norms for the world's largest market (the United States) and for some of the world's largest drug companies (American firms).

The inclusion of regulatory issues on the trade agenda brings a whole new cast of U.S. government players into the trade policymaking process, an acronym soup that includes the EPA (Environmental Protection Agency), OSHA (the Occupational Safety and Health Administration), and NHTSA (the National

Highway Traffic Safety Administration). Each of these agencies has its own hard-fought history of establishing a level of domestic regulation, its own experience (or lack thereof) in international deliberations, and its own bureaucratic priorities. Most important, the range of issues involved—the environment, food and drug health and safety, consumer well-being—engages in the trade policymaking process a disparate new group of stakeholders: members of Congress, leaders of industry, and citizen activists.

The internationalization of the long-running debate over appropriate regulation is no less contentious than its domestic counterpart. The business community views the inclusion of domestic regulations in the international trade negotiating agenda through an entirely different lens than do consumer and environmental advocates. Corporations see common global standards as logical cost-cutting initiatives. Activists are wary that the international harmonization of health and safety rules is a prescription for lowest-common-denominator regulation. Equally important, many of the U.S. domestic regulatory agencies do not place a high priority on facilitating trade, nor do they have the budget, personnel, or congressional mandate to pursue such an agenda.

Bridging this divide will require an artful balancing between the pursuit of economic efficiency and the protection of the environment and consumer health and safety. This has long been the challenge facing domestic regulators, but now, for the first time on this scale, it is also an international task.

History suggests that the highest quality, most efficient regulation is the product of the competition of ideas. And the best competition is created by the involvement of a broad array of stakeholders. To facilitate this effort and to give its outcome public credibility, the new process of trade-related international rule-making—mutual recognition agreements, global standard-setting and regulatory harmonization, and equivalencies—must be made more accessible and accountable to the people whose lives it affects.

As Pascal Lamy, the EU trade minister, said in a speech in Geneva in November 2000, “Trade rules, even if agreed internationally, cannot override the other concerns of society. The important

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point is to ensure that they are compatible.” Such compatibility will require

- Empowering and funding domestic regulatory agencies to more fully engage in international issues;
- Adaptation of the U.S. Administrative Procedures Act, the Freedom of Information Act, and the Government in the Sunshine Act to ensure greater public scrutiny of international trade and regulatory deliberations;
- International convergence of transparency as well as regulation, by making the opening up of the regulatory processes of America’s trade partners a U.S. negotiating priority;
- Tighter executive-branch coordination between trade and regulatory agencies; and
- Greater congressional oversight of the growing overlap between international commerce and domestic rule-making.

Failure to resolve the growing tension between trade and domestic regulatory activities will not, as some consumer and environmental activists seemingly hope, slow globalization and thus preserve high domestic standards in a pristine garden walled off from the international marketplace. A more likely scenario is that the economic rationale for international regulatory convergence will become increasingly compelling in the face of a failure to harmonize disparate domestic rules. In that commercial environment, business may simply find ways around domestic regulation or prevail upon Congress and the executive branch to force regulatory agencies to hew to international standards with insufficient regard for the level of protection those standards afford.

In the worst-case scenario, failure to act on regulatory convergence could lead to a new definition of the relationship between trade rules and domestic regulation emerging piecemeal through decisions of WTO dispute-settlement panels. Having trade experts pass judgment on health, safety, and environmental rules would prove unacceptable to domestic regulators and to citizen groups.

Moreover, it would further undermine public support for the multilateral trading system. None of these outcomes is optimal.

To ensure that trade concerns do not inexorably trump domestic regulatory interests in a manner that initially harms consumer interests and eventually stokes a public backlash against globalization, some way must be found to engage regulators and trade negotiators in a proactive effort to both liberalize international commerce and upwardly harmonize domestic regulation.

FRAMING THE ISSUE

There is nothing new about a debate over the relative merits of facilitating commerce versus protecting consumer health and safety. Only the focus has changed from domestic to international.

As Aaronson points out in *Taking Trade to the Streets*, the 1890 Meat Inspection Act, requiring microscopic examination of pork before its export, was in part designed to reassure European governments that American meat was safe to eat. In 1967, Council on Foreign Relations economist William Diebold warned Congress that “we are now seeing international discussion about the automobile safety arrangements which have been adopted in this country, because they cause problems for foreign producers.”⁹

In 1979, the European Court of Justice ruled in the Cassis de Dijon case that Germany had to recognize cassis, the French blackberry liqueur, as an alcoholic beverage and permit its importation even though it did not contain sufficient alcohol to meet Germany’s regulations governing fruit liqueurs. The principal of mutual recognition of existing standards was thus established in Europe, and, ever since, European efforts to create a single market have essentially been one giant exercise in using each others’ standards to tie together fifteen national markets.

The EU’s massive harmonization effort proved a wake-up call for U.S. companies. They belatedly realized that a common standard for a European market larger than that of the United States

⁹Aaronson, *Taking Trade to the Streets*, pp. 46 and 66.

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could rapidly become the world standard for everything from cell phones to pharmaceuticals. American demands for a seat at the table when such standards were set laid the groundwork for the 1995 creation of the Transatlantic Business Dialogue (TABD) and the Transatlantic Economic Partnership and for efforts to negotiate mutual recognition agreements affecting standards for a range of products.

THE RATIONALE FOR REGULATORY CONVERGENCE

The economic case for regulatory convergence is compelling. The U.S.-EU mutual recognition agreement aiming to reduce regulatory trade barriers was billed as having the potential to save U.S. exporters more than \$1 billion a year, the equivalent of at least a 2 percent tariff cut. And a survey of small manufacturers by the National Association of Manufacturers has found that two out of five of those surveyed felt that differences between U.S. and foreign standards, testing, and certification were the principal barrier to increasing their exports.

At the same time, multiple international standards simply create opportunities for protectionist abuse. South Korea, for example, requires the separate inspection of imported tires already approved by the U.S. Department of Transportation. This action might now seem prudent in the wake of the Firestone tire recall in 2000. But safety has not been Seoul's motivation; its goal has long been to protect Korea's fledgling domestic tire industry.

To overcome the complications of disparate regulation, the U.S. and European business communities, through the TABD, have urged governments on both sides of the Atlantic to pursue a strategy of harmonization of each others' regulations and standards or, where harmonization is impossible, mutual recognition of the functional equivalence of such regulations and standards. They have assessment systems. And, where appropriate, they advocate that the technical approval of goods be delegated from governments to third-party or suppliers' laboratories.

Such practices, the TABD argued in a communiqué issued following its sixth annual meeting in Cincinnati in November 2000, offer

“an opportunity to raise the level of product quality and regulatory compliance around the globe . . . and would also increase the speed and efficiency of the approvals process and lead us to a system in which products are ‘approved once, accepted everywhere.’ In this way, we [would] offer all constituencies the chance to maintain protection of health, safety and the environment while removing red tape. Our goal is not to descend to the lowest common denominator, but rather to rationalize the patchwork of existing national regulations with their varying criteria and ensure that products of high and equal quality are available to all.”¹⁰

Government regulators also see potential benefits from the development of global best practices. The Firestone tire recall highlighted the fact that U.S. tire safety standards were three decades old. Moreover, NHTSA’s failure to respond to the alarming number of Ford Explorer rollovers in Venezuela underscored the lack of communication between nations’ auto-safety agencies. Mutual recognition agreements can provide an opportunity to update standards, improve market surveillance, and facilitate future product recalls.

THE CRITIQUE

The critique of regulatory convergence by consumer, environmental, and labor groups questions the premises of both economic globalization and harmonization.

The Transatlantic Consumer Dialogue, the TABD’s parallel institution, argues that harmonization efforts must distinguish between standards and procedures that do not directly involve health and safety concerns (such as the size of a floppy disk or credit card, or customs and accounting procedures) and those that affect health and safety (such as standards for auto safety or medical devices,

¹⁰Transatlantic Business Dialogue, “Cincinnati Recommendations, Transatlantic Business Dialogue,” CEO Conference Report, November 16–18, 2000.

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or allowable levels of pesticide residues in food). The latter is obviously more controversial than the former.

Critics contend that provisions of the WTO and NAFTA agreements that call for domestic regulation to be the “least trade restrictive” implicitly ignore consumer interests by placing economic goals ahead of health and safety concerns. Opponents of regulatory convergence are also critical of WTO and NAFTA provisions that call for standards to be based on “risk assessment” implying that some level of risk is tolerable. The critics say “risk avoidance” is preferable. They also complain that although the WTO and NAFTA provide a means of challenging domestic standards that are higher than international standards, there is no means of challenging standards that are lower than those generally accepted around the world. Finally, they contend that the TABD mantra of “approved once, accepted everywhere” is a cynical attempt to bypass the FDA Modernization Act, which explicitly rejected this approach to multiple national standards.

And citizen groups argue that, even when harmonization seems like a good idea, the process can be fatally flawed. For example, to facilitate trade, the U.S. Department of Agriculture (USDA) has approved thirty-six foreign meat-inspection systems as equivalent to those used by the United States. But in June 2000, the USDA's own inspector general's office found that equivalency had been granted to six countries before the USDA had performed on-site reviews of their facilities, nineteen countries were allowed to ship meat to the United States even though they had not certified that all their establishments complied with U.S. standards, and the USDA allowed meat from plants no longer on its approved list to come into the United States. Such failings call into question the USDA's repeated assurances that foreign-inspected meat poses no threat to American consumers.

Moreover, despite the business community's rhetoric about upward harmonization of standards, critics contend that the practices of businesses often do not live up to their preaching. For example, Federal Communications Commission standards for exposure to electromagnetic fields emanating from mobile phones are higher than the standards set by the International Commission

on Non-Ionizing Radiation Protection. But critics contend that the business community has argued for harmonizing U.S. exposure regulations downward to the weaker international standards. From a process point of view, opponents of regulatory convergence contend that shifting regulatory decision-making from a domestic venue to an international one necessarily makes the process less publicly accountable.

Finally, critics from within the domestic U.S. regulatory agencies point out that international differences in regulatory philosophy raise serious questions about the potential for regulatory convergence. For instance, NHTSA allows American automakers to self-certify their compliance with safety standards. NHTSA tests cars only occasionally to ensure adherence to those standards. Most other nations grant their automakers “type approvals”—essentially blanket certifications of compliance. Type approvals lend themselves to mutual recognition, but they make enforcement harder because, if an automobile is found to be out of compliance, the automaker can shift the blame to the country that did the original type approval. Under a self-certification system, responsibility clearly rests with the manufacturer. NHTSA officials contend that the U.S. self-certification approach makes enforcement easier and thus better protects consumers.

AN UPHILL STRUGGLE

Whatever the economic rationale for international regulatory convergence, the process has proven an uphill struggle in practice. In 1995, Washington and Brussels launched the Transatlantic Economic Partnership with high hopes of hammering out half a dozen regulatory mutual recognition agreements per year. Yet, after six years, only a handful have been completed.

The political, economic, and regulatory complexity of regulatory convergence is clearly far greater than its advocates anticipated. And some of the technical problems encountered may simply be insurmountable. U.S. and EU negotiators attempting to standardize auto headlight design eventually gave up. European headlights cast

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a horizontal beam and thus European traffic signs are generally placed along the sides of the road. American headlights are designed to cast a vertical beam, leading U.S. traffic signs to generally be placed above the highway. Harmonizing headlight design might save automakers money, but the infrastructure cost of relocating road signs was prohibitive.

Moreover, the track record of many foreign regulators hardly inspires confidence in rushing toward “approved once, accepted everywhere.” The failure of the European Union to give the new EU food and drug administration meaningful enforcement powers, even in the wake of the “mad cow” disease scare and the controversy over beef from hormone-treated cattle, suggests that Europe has not yet gotten its act together about food safety regulation.

Nevertheless, many of the practical and political impediments to regulatory convergence in a globalizing economy are structural and institutional in nature and can be fixed, if there is sufficient political will.

Business leaders complain that U.S. regulatory agencies frequently manifest a “not invented here” mentality that belies both the global nature of the economy and the fact that regulators in other countries may have insights, experiences, and methodologies that could prove beneficial to Americans. NHTSA officials acknowledge, for example, that even though the agency eventually rejected U.S. automakers’ proposals to accept European side-impact crash tests as functionally equivalent to those conducted in the United States, in the process NHTSA learned much from the Europeans, including a means of improving American crash-test dummies.

The bonds of inbred, domestic regulatory philosophies will be difficult to break. They are deep-seated, the product of years of struggle by regulators to establish their own authority and independence. Any effort at regulatory convergence must respect that history. But regulators will fail in their broader obligation to consumers if they are constrained by their past. Regulators face the challenge of adapting to the rapidly evolving world economy, just as the businesses they regulate must accommodate themselves to change. “Not invented here” is a mentality that almost sunk the

U.S. auto industry in the early 1980s, a mind-set that could sentence regulators to constantly fighting rear-guard actions, eventually dooming them to being bypassed by the more nimble private sector.

This disconnect was graphically evident in the U.S.-EU controversy over the implementation of an mutual recognition agreement (MRA) on electrical product safety. The EU proposed that an initial OSHA certification role would be phased out after the European labs had been designated and an on-site assessment had been performed. In Brussels' view, the annual and routine lab inspections for product safety would eventually be performed by the EU. Citing the restrictions imposed by its statutory mandate, OSHA wanted a direct and ongoing role in designating which European testing labs did standards testing for electrical equipment destined for the U.S. market. "OSHA shows little or no commitment in practice to either the MRA or the pragmatic solutions we are proposing," complained EU trade minister Lamy in a letter to the USTR, Charlene Barshefsky.

Other impediments to regulatory convergence are more practical and easier to overcome. Trade promotion or facilitation is not part of the statutory mandate for NHTSA or OSHA. And although trade is now part of the FDA mandate, neither it nor any of the other domestic regulatory agencies has the budget or the personnel necessary to carry out their increasingly global responsibilities. For example, in the early 1990s the United States imported 1.5 million individual products—drugs, food, or medical devices—that are under the FDA regulatory purview. By the late 1990s, the United States imported 5.5 million such products. Yet the FDA had only four people handling its international negotiating work. NHTSA had three such people. The EPA had four, none of whom had an economics or trade background or training in international negotiation. The Department of Commerce repeatedly had to pay the travel expenses of these regulatory agencies to get them to participate in international meetings, such as the MRA talks with Europe.

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RECOMMENDATIONS

Whatever the failings of regulatory convergence to date, its economic rationale remains compelling, at least for the business community, and the process of regulatory convergence may well be inexorable. The experience with mutual recognition of auto standards in the TABD is illustrative. Automakers have shifted the venue for their efforts to Working Party 29 at the United Nations in Geneva, where governments arguably have even less input into the outcome. So unless globalization is to grind to a halt, some compromise needs to be found between the trade policymaking process and the domestic regulatory process, not simply to accommodate industry's needs, but to ensure that regulatory convergence accommodates public as well as private concerns.

To this end, trade officials and regulators need to

- *Harmonize Upward*

The business community talks a good game about the upward harmonization of standards. But government officials can provide no actual examples of upward harmonization. Public support for regulatory convergence demands substance, not rhetoric. The single most important thing business and trade officials could do to allay concerns about a regulatory race to the bottom would be a series of highly visible international agreements that demonstrably raise standards, not simply cut costs. To that end, regulatory officials might consider adopting NHTSA's policy of focusing its international harmonization activities on adopting those foreign standards that would require higher levels of performance than the counterpart U.S. standards.

Congress could encourage such upward harmonization by mandating that U.S. negotiators should generally use U.S. standards as the floor for any harmonization exercise. Negotiators should have to notify Congress and justify their actions whenever they intend to deviate from that principle.

- *Give Regulators a Trade Mandate*

Explicitly and implicitly, regulators routinely weigh the impact of their actions on the businesses they oversee. Now that those

businesses serve an international market, regulatory agencies should consider the trade implications of their actions. And they should have the personnel and the budgets to carry out that mandate.

Contrary to the arguments of those who fear that such new mandates will divert regulatory agencies from their domestic obligations, failure to provide a trade mandate and the resources to back it up may actually undercut the regulatory agencies' own responsibilities. A case in point involved an environmental review of the Free Trade Area of the Americas. In the Clinton administration, the EPA pushed for such a review but balked at paying for it. The USTR lacked the funds. Moreover, there was a perception of a conflict of interest in having trade negotiators assess the environmental impact of their own deal. As the environmental consequences of trade agreements become an ever-more controversial political issue, the EPA needs the money and the personnel to play its legitimate role in the trade arena.

- *Open Up the Regulatory Convergence Process*

At its fall 2000 meeting in Cincinnati, the TABD concluded that "transparent legislative and regulatory systems permit all stakeholders—business, labor, environmentalists, consumers and others—to be aware of legislative and regulatory proposals under consideration." Critics of regulatory convergence would not disagree.

The United States should apply the APA to all international negotiations involving regulatory convergence, to the extent that it is feasible. Some federal agencies already use the *Federal Register* to give public notice of meetings to discuss harmonization proposals, and some agencies even place draft harmonization proposals in the *Federal Register*. But more can be done to incorporate the public in harmonization deliberations. There should be advance notice of proposed rule-making, with time for comment, and the agency involved should respond to those comments on the record. Once the agency returns from international harmonization negotiations, it should hold public meetings and provide further opportunities for comment if the U.S. negotiating

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position changed during the course of the negotiation. When issuing a final rule, agencies should be required to describe in writing how and why they made their decision and on what basis they rejected other options. Whenever possible, agencies should follow FDA practice and place significant draft documents in the *Federal Register*. Similarly, the Freedom of Information Act and the Government in the Sunshine Act should apply to the MRA and equivalency process. And agencies should use the Internet proactively, both to post documents and to solicit public input via e-mail.

The USTR is currently not bound by APA rules, which apply solely to domestic rule-making. Trade negotiators object that such requirements are cumbersome and time-consuming and that their transparency would undermine the USTR's ability to negotiate because it would reveal America's bottom line.

These are not trivial concerns and they underscore the difficulty in striking a balance between the differing demands of making trade policy and making regulatory policy. Domestic regulatory rule-making governed by APA procedures can take eighteen months. Trade negotiators argue that they need to move more rapidly. But in practice the transatlantic MRA process has taken years, suggesting that opening up such deliberations to greater public scrutiny would not necessarily impose a debilitating delay.

Similarly, purely regulatory matters, even in an international context, require openness, because history teaches this is the best way to develop best practices. Confidentiality is appropriate only where the foreign policy interests of the United States are involved. In such cases the USTR has well-developed procedures through its advisory committee system for seeking private-sector input in a manner that protects U.S. negotiating strategy.

- *Improve Trade-Regulatory Coordination*

Interagency coordination between trade and regulatory agencies begins at the professional staff level in the Trade Policy Steering Committee (TPSC). The vast majority of issues are resolved there. If problems cannot be sorted out in the TPSC,

they are bucked up to deputy cabinet-level officials in the Trade Policy Review Group (TPRG). In fewer than one out of twenty cases, issues then get passed on to the cabinet. By executive order early on in the Clinton administration, the FDA and the EPA were part of the TPRG.

Veterans of this process say that in most cases interagency coordination works quite well. But the caseload is only likely to grow. And in the end, until the president establishes international regulatory convergence as an important aspect of national regulatory policy, friction between trade and regulatory interests will only worsen.

To that end, the National Economic Council, which has responsibility for both trade and regulatory matters, should be assigned to oversee the process of international regulatory convergence, with the authority to resolve interagency disputes.

- *Enhance Congressional Oversight*

Only Congress has the political authority and legitimacy to strike a better balance between trade interests and regulatory concerns. At the very least, regulators should be required to formally inform Congress when they are engaged in a negotiation that might raise or lower a U.S. regulatory standard.

One reason regulators and trade negotiators have trouble coordinating their work is that they are generally accountable to different congressional committees. Until the chairs of these committees make regulators responsible for trade facilitation and tell trade negotiators that they must accommodate themselves to the regulatory process, little change in procedures is likely to be accomplished.

So far, Congress has shown little interest in exercising its oversight responsibilities with regard to international regulatory convergence. Only one hearing has been conducted on the negotiation of mutual recognition agreements with Europe. Joint hearings on harmonization issues, involving both regulatory and trade committees, would be helpful in bridging the divide between philosophies and responsibilities. In Congress's defense, the business community has yet to make regulatory conver-

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gence a high priority in its dealings with Capitol Hill. So far only individual industries have pursued this agenda and they have failed to gain congressional attention.

Creation of a Congressional Trade Office (CTO) could help facilitate coordination of regulatory and trade oversight on Capitol Hill. In particular, the difficulty that NGOs have in participating in the international regulatory standards-setting process only reinforces the need for a CTO, with a professional staff that is capable of keeping abreast of the public interest in that effort.

- *Foster Parallel Regulatory Transparency*

Without internationally comparable public access to the regulatory process, efforts at global regulatory convergence are doomed to distrust and frequent failure. The TABD acknowledged as much, saying that “while there may be differences in philosophies and approaches, the principle of transparency is indispensable to the commonly shared objective of proactively avoiding regulatory divergences.” And although the openness of regulatory processes might once have been solely a national prerogative, disparities now have profound international trade implications.

Openness and access build public trust. But the lack of trust impedes trade. It was regulatory processes operating behind closed doors that failed to protect the European public from HIV-infected blood, mad-cow disease, and dioxin-laced chicken. It was these actions that created an environment of public distrust that, in turn, intensified recent European consumer opposition to imports of hormone-treated U.S. beef and genetically modified grains, worsening U.S.-EU trade relations.

The EU must be encouraged to invest the single European food agency with real powers. The current regulatory eunuch leaves enforcement up to the national governments. And the decision-making processes of this new entity must be open to public scrutiny.

The U.S. government should use its leverage to encourage international standards-setting organizations to adopt transparent rule-making procedures, including public notice of intended actions and ample time for public comment.

At the same time, the international community must coordinate time frames for regulatory decision-making. Currently the WTO's committee on technical barriers to trade meets once every four months. U.S. trade negotiators are frequently forced to respond to foreign regulatory proposals within that time frame. But the APA process in the United States does not permit such a fast turnaround. The WTO timetable may have to be lengthened as part of a broader effort to ensure public input to trade measures with regulatory implications.

In the end, uniform global regulation, common product standards and equivalent testing will prove difficult at best. Differences in culture, regulatory philosophy, and experience in consumer protection preclude widespread harmonization. Different stages of development will dictate different regulatory needs. And some degree of international competition is probably healthy in developing new approaches to regulation.

Nonetheless, in a globalizing economy, some convergence of national regulation is both inevitable and potentially beneficial. There is still likely to be growing friction between the interests of those intent on facilitating trade through regulatory convergence and the interests of those intent on preserving domestic regulatory standards. In the interest of economic efficiency and consumer safety, some way must be found to minimize this friction and maximize the benefits of high standards and liberalized trade. The best way to do this is by opening up the international regulatory policymaking process to new actors.

BROADENING THE INPUT

The USTR advises the president on trade matters. But who advises the USTR and Congress?

In the 1930s, after Congress delegated to the State Department greater power to make trade deals, Secretary of State Cordell Hull created two formal working committees within the executive branch and an informal group of technicians drawn from the various agencies to advise the executive branch on trade policy.

One of the formal committees, the Executive Committee on Commercial Policy, was composed of assistant secretaries from various government departments, providing a breadth of views in the policymaking process. The other formal entity, the Committee for Reciprocity Information, received industry petitions on proposed tariff reductions and took public testimony. This committee gave business, labor, agricultural, mining, and other interests affected by trade a contact point in government. But in actuality it had little influence. It was little more than a dead-letter box.

The real advisory power, according to Alfred E. Eckes in his book *Opening America's Market: U.S. Foreign Trade Policy Since 1776*, lay with the informal group of technicians who composed the Committee on Trade Agreements (CTA).¹¹ It was they, under Hull's guidance, who developed the Roosevelt administration's trade strategy and supervised its negotiations. At Hull's direction, moreover, the members of this committee operated secretly—supposedly to shield their work from the influence of lobbyists—and each member remained anonymous, as did the proceedings of the CTA.

The Hull advisory structure operated for almost two decades. Consequently, transparency in trade policymaking was quite limited, as was any public accountability for the decisions taken.

¹¹Alfred E. Eckes, *Opening America's Market: U.S. Foreign Trade Policy Since 1776* (Chapel Hill, NC: University of North Carolina Press, 1999).

Not surprisingly, given the State Department's dominant role in this advisory process, the foreign policy agenda came to heavily influence trade policy outcomes. When it was useful to cement relationships with other nations or to attain certain foreign policy goals, the State Department repeatedly used nonreciprocal tariff reductions as a diplomatic bargaining chip. U.S. domestic industries, of course, had little or no say when their interests were sacrificed for these strategic and foreign policy goals. Most often, American business would learn about the trade policies of its own government after decisions had been reached and were ready to be implemented.

The lack of transparency in executive-branch trade decision-making was increasingly unacceptable to business, labor, agriculture, and other stakeholders affected by those decisions. By the late 1960s, when the Kennedy Round trade pact reached Capitol Hill for implementation, Congress was under strong pressure from those domestic interests to alter various provisions of the draft agreement. The old way of doing trade policy had broken down. New mechanisms were clearly needed to broaden public involvement in trade negotiations to ensure a political constituency for future trade deals.

THE PRIVATE-SECTOR ADVISORY COMMITTEE SYSTEM

To that end, Congress created the private-sector advisory committee system as part of the 1974 Trade Act. Refined in three subsequent pieces of trade legislation, the Trade Policy Advisory Committee System's basic mission is twofold. First, it provides the USTR and the executive branch with information and advice on U.S. trade goals and positions before negotiations begin. Second, it provides advice on the implementation, administration, and efficacy of completed trade agreements.

The concept behind this advisory system is straightforward: seek a broad array of knowledgeable views as the national trade agenda is being prepared and then rely on those advisers during the negotiation and implementation phase of any subsequent trade deal.

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Most other advanced industrial nations have long done something similar, reaching deeply into affected sectors of their economies for advice on trade negotiations, often even including private-sector individuals as members of their official negotiating teams.

As it has evolved since 1974, the trade advisory system is now structured into three tiers. The first is the president's Advisory Committee for Trade Policy and Negotiations (ACTPN), whose members are appointed by the president. Membership is limited to forty-five people, who serve two-year terms each, but they may be reappointed an indefinite number of times. Members have a high national-security clearance and are privy to the U.S. negotiating positions in specific trade talks. Members also have access to officials who make and administer key trade policies that affect business interests.

The ACTPN's mission is broader than trade. The committee is mandated by the 1974 Trade Act to consider the overall national interest as it makes its recommendations. However, the USTR must give prior approval of the agendas for all ACTPN meetings and any reports from the ACTPN go to the USTR or a designee; they are not generally distributed throughout the government or made available to the Congress or the public. Ultimately, therefore, the ACTPN is not an independent advisory body. In recent years, it has been a captive of the USTR's agenda-setting and its interpretation of the ACTPN's recommendations.

The second tier of advisers consists of six policy committees. The USTR appoints and manages the members of two of these committees—the Intergovernmental Policy Advisory Committee and the Trade Advisory Committee on Africa. At the same time, the USTR jointly manages with another relevant cabinet officer the four other advisory committees in this tier: the Agricultural Policy Advisory Committee, the Labor Advisory Committee, the Defense Policy Advisory Committee, and the Trade and Environment Policy Advisory Committee.

The third tier of this system consists of four functional committees that provide advice on customs, standards, intellectual property, and electronic commerce. Also at this level are twenty-two sectoral and technical committees, each of which provides the USTR

and cabinet officials with advice on a specific aspect of the economy, such as aerospace equipment or agricultural commodities.

Membership on these twenty-six sectoral and functional committees comes via a joint appointment made by the USTR and another cabinet secretary. For trade officials, these appointees provide a unique, knowledgeable source of information about the problems and prospects of a particular industry or a specific issue, such as labor or the environment. For the appointees, membership on these committees provides an equally unique and invaluable source of inside information about the thinking of trade policymakers.

Together, the Trade Policy Advisory Committee System comprises almost one thousand members. Since the creation of this system in the mid-1970s, different presidents, USTRs, and other cabinet officers have relied on these advisers to varying degrees. Some have sought the advisers' active participation in formulating and conducting trade negotiations and subsequently in the administration and calibration of trade policies. Others have largely used the appointments to reward political supporters or to build a private-sector political support base for lobbying Congress on trade issues.

GROWING CRITICISM

In recent years, however, the Trade Policy Advisory Committee System has come under sharp criticism from a variety of sources. At its core, these complaints center on four principal concerns. The first is whether the existing advisory system is sufficiently broad in its focus to reflect a global trade and strategic environment that has changed greatly since the system's creation in 1974. Today, environment, health, food safety, and a host of regulatory activities are now considered trade-related. Yet advocates of these interests claim they are underrepresented in the advisory system. Equally important, some members of Congress have questioned whether the sectors represented in the current advisory system adequately reflect the structure of the 21st-century American economy.

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A second concern is whether the current system of appointments provides a sufficient range of views. Membership on these committees is often confined to those companies, trade associations, and business interests that are most politically active, as opposed to being representative of trade-affected industries. The concern is that some advisory committee members use their posts to pursue their company's or sector's interests, not the broader national interest.

A third concern involves the secrecy of advisory proceedings. Today, the advisory system operates behind closed doors, preparing recommendations and giving advice that can determine the fate of industries, companies, and workers who have little or no input into these deliberations. Although some of the work and materials discussed in those advisory sessions is classified or involves proprietary information, much (if not most) is not, raising questions about the need for such secrecy.

Finally, the existing advisory system is structured solely to counsel the president and the executive branch. Although Congress has the authority to nominate members of the committees, the actual appointments are made by the executive branch. The result is an imbalance in the quality and quantity of advice received by the two branches of government, particularly since the USTR and other cabinet officials often set the agendas of the various advisory committees.

As a result of these shortcomings, as Susan Aaronson points out in *Redefining the Terms of Trade Policymaking*, trade officials have fumbled the opportunity to “use the advisory system to build a broader public constituency in support of economic internationalism.”¹²

RECOMMENDATIONS

Although the Trade Policy Advisory Committee System has its critics and its flaws, it fills a need and still enjoys substantial support

¹²Susan Aaronson, *Redefining the Terms of Trade Policymaking* (Washington, DC: National Policy Association, 2001).

both within and outside the government. But if it is to adequately perform its needed advisory role, substantial changes are needed:

- *Link Congress to the Advisory Committee System*

With Congress's role in trade policymaking likely to increase, members of Congress also need independent, experienced private-sector counsel. Congress could establish its own counterpart advisory system, but that would be redundant. The best option would be for the executive branch and Congress to create a new, joint private-sector advisory committee system. To ensure political and substantive balance, the appropriate cabinet secretaries and the majority and minority leadership of each house of Congress could make an equal number of appointments. These private-sector advisers could report both to the executive branch and to the proposed CTO.

- *Give the Advisory Committees More Independence*

Advisory committees should be encouraged to initiate and create their own agendas. Some of the most creative and useful committee advice, such as the ACTPN report on Japan policy in the early 1990s, has come from committees that took initiative. Certainly, the needs of the USTR and Congress merit the committees' priority attention. But if these advisers are truly representative and knowledgeable, there will be times when they can also serve the national interest by generating new agenda items for review and discussion.

Though service on committees should be voluntary and members should bear their own expenses, the committees will require some independent funding to finance the collection of information and the preparation of special reports. This will provide a degree of independence required by any effective advisory system.

- *Broaden Public Advice*

Participation in the advisory process has periodically been broadened to include new members representative of new trade concerns, such as services, intellectual property, and the environment. The voices of consumers, labor that is not represented by unions, and small and medium-sized industries have traditionally been

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underrepresented in these proceedings. It will always prove difficult to find representatives of those interests because they are often not organized into cohesive groups. Nevertheless, Congress and the executive branch should appoint surrogate representatives for those interests drawn from academia, retired government officials, and community activists.

To supplement advisory committee advice, the USTR should routinely conduct town hall meetings across the country, not to sell the administration's "trade policy de jour" but to weigh the public's concerns about the impact of trade on citizens' lives. In addition, the USTR should interact with the general public on a regular basis via the Internet. Canada seeks public comment on its trade policy proposals over the Internet. There is no reason why the United States cannot do so as well.

The principal impediment to such initiatives in the past has been insufficient budget. More money for these activities would be a small price to pay for a broader trade consensus.

- *Operate in the Sunshine*

Government advisory committees face an irresolvable dilemma. If they operate behind closed doors, those on the outside understandably fear that those on the inside are cutting special deals, ignoring the broader public good. Moreover, without press and public scrutiny, there is no accountability for their actions. On the other hand, open meetings foster public posturing. Individuals with differing views defend established positions rather than explore compromise. Striking the proper balance between effectiveness and openness is no easy matter.

As a general principle, official advisory committees should operate in the open, with the media and citizens given access to proceedings and materials. But specific U.S. trade negotiating positions and proprietary business material should be withheld from the public to protect corporate and national interests. In practice, this means many advisory meetings will remain closed.

In the end, the solution to the closed nature of advisory committee proceedings is not totally open meetings, but a more diverse set of advisers who represent a broader set of public concerns in both open and closed sessions.

ENHANCING THE WTO'S DEMOCRATIC LEGITIMACY

For seven decades, a key foreign policy goal of the United States has been to expand global trade as a means of fostering democracy around the world. Yet, the WTO—the international rules-setting body that is the principal instrument for global trade liberalization—is structured and operates in a less-than-democratic manner.

The lack of public accessibility, transparency, and due process in the functioning of the WTO is the source of mounting public criticism of that organization, its decisions, and, most important, the trade that it regulates. The WTO's failure to follow transparency principles tarnishes its credibility, diminishes the legitimacy of its decisions, and threatens its political acceptance. Ultimately, the closed nature of the institution threatens public support for the global trade expansion that the United States seeks.

The WTO's shortcomings are of particular importance because the institution exercises profound influence on the formation and administration of U.S. trade and domestic policies. WTO rules prohibit unilateral U.S. action against those nations that the United States believes have violated international trade commitments and discriminated against U.S. producers. U.S. commitments to the WTO necessitate that Congress consider existing WTO agreements and procedures whenever it legislates on trade and trade-related matters. WTO rules set boundaries on many domestic policies and administrative practices as they relate to trade issues—such as permissible farm subsidies or enforcement of intellectual property laws. Finally, and perhaps most significantly, U.S. federal, state, and local laws, rules, and practices are subject to challenge at the WTO. If a WTO panel rules that such actions inhibit trade, they must be changed or the complaining country is allowed to retaliate against the United States.

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With so much at stake internationally and domestically, the public accountability of the WTO is of growing importance. In the immediate wake of the public demonstrations against the WTO at the trade ministerial meeting in Seattle in December 1999, the United States and the European Union publicly called on the WTO director-general to make a priority of institutional reform, including overcoming the body's lack of public accessibility and democratic procedures. In response, the WTO has hosted more meetings with NGOs, released more documents, and improved public access to its operations through its Internet site. But resistance from member nations and the WTO bureaucracy has stymied more sweeping reforms.

To reinvigorate the WTO reform process, the U.S. government should

- Make democratic procedural reform a negotiating priority in the next round of multilateral, regional, and bilateral trade negotiations;
- Take whatever unilateral actions it can—including releasing documents and appointing members of the public to U.S. litigation teams—to open up current WTO proceedings; and
- Lead a similar effort to open up the proceedings of international standards-setting organizations whose work influences the rule-making of the WTO.

UNDEMOCRATIC DISPUTE SETTLEMENT

The WTO was created to remove obstacles to free trade flows, to serve as a forum for trade negotiations, and to settle trade disputes. In its six-year existence, it has proven to be an evolving institution, moving from fragile beginnings to ever-growing strength. Its dispute-resolution panels are establishing a body of decisions and precedents that will provide a long-term reference point for trade policymakers and administrators in all nations. And the WTO is laying the groundwork for negotiating additional agreements

whose stated goal is fewer obstacles to global commerce and whose unstated result will be additional authority for the institution.

But for an organization with such a sweeping mandate and such influence, the WTO's deliberations, unlike those of the U.S. Congress or the United Nations, are remarkably closed to the public. This lack of transparency and public access is a particular problem in the operation of the WTO's dispute-resolution panels.

One of the WTO's most vital functions is the enforcement of its trade agreements. Accordingly, provision was made in the basic Dispute Settlement Understanding so that any member country of the organization could challenge certain trade-related policies and practices of another member. As of January 2001, the WTO had received 220 such complaints.

Cases brought to the WTO are heard by a dispute-settlement panel. A decision by this panel can be appealed, but the decision of such review is final. Moreover, the decisions of the dispute panels and the appellate board are binding and virtually unchangeable.

The dispute-settlement process operates with little accessibility by the public or the press. In fact, the WTO's formal Understanding on Rules and Procedures with regard to the settlement of disputes provides that panel deliberations are confidential, that opinions expressed in the panel report by individual panelists shall be anonymous, that submitted materials remain confidential, and that "friend of the court" or *amicus curiae* briefs submitted by NGOs or private citizens can be excluded from the deliberations of the dispute panels.

When *amicus* briefs are accepted, the WTO's practices sharply limit their scope. Specifically, those who wish to file such briefs must first secure permission from the WTO to submit the information. Moreover, the application rules are themselves strict. Submission of *amicus* briefs by NGOs and private individuals is permitted (although this is still unsettled in law), but no private group has ever actually been granted such permission. And panels are under no obligation to take such briefs into account. Even if a brief is allowed, it is limited to twenty pages, including any supplemental materials.

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This lack of public access and openness and these limits on public participation in dispute-settlement proceedings have been repeatedly criticized by the U.S. government. As a partial remedy to these problems and to ensure at least one-sided openness, the USTR has sought public comment, through a *Federal Register* notice, on all WTO disputes involving the United States. The USTR has also made public its written submissions to the dispute panels. At the same time, the USTR has requested that all other nations with whom it is involved in disputes release their written submissions and all non-confidential materials in cases. Additionally, the USTR has offered to open to the public all WTO dispute proceedings to which the United States is a party.

Despite these U.S. actions, the WTO dispute process remains a largely closed endeavor. Public observation of the arguments before the panels is not allowed. And other governments have generally been unwilling to release their submissions and related materials.

The closed, nontransparent nature of the dispute-settlement process is not helped by the procedures used to choose those who sit in judgment of disputes on panels. Normally, a panel consists of three persons drawn by the WTO staff from a list of experts nominated by the governments who are party to the dispute. They can be either current or former government trade officials from member countries or former GATT or WTO employees. They serve as needed on an ad-hoc basis and are not full-time WTO employees.

By limiting panel membership to such trade experts, a clear predisposition is built into panel proceedings. The short history of the WTO dispute-settlement process suggests that panelists view cases primarily through a trade lens and judge issues by how they impede or facilitate greater trade flows. The impact of a judgment on the environment, labor, or other trade-related concerns may be ignored.

The selection procedures for panelists also have disturbingly weak shields against conflicts of interest. Full disclosure of financial and other interests in the outcome of a case is not required of sitting panelists. Panelists are not required to remove themselves from a case if their country is targeted in a related, separate investigation

or trade action. And panelists in the appellate process are not disqualified for national conflicts of interest. The chair of the panel hearing the recent Japanese appeal of a case against alleged Japanese dumping of hot-rolled steel in the U.S. market was himself a Japanese citizen. The International Court of Justice has similar procedures, so this is not in any way a violation of international practice. Nevertheless, this ostensible and easily avoidable appearance of a conflict of interest in a commercial dispute contributes to public doubt about the impartiality of those who sit in judgment on cases.

CLOSED STANDARD-SETTING

While public attention is currently focused on the undemocratic nature of the WTO's dispute-settlement procedures, an equally important arena of WTO activities—in the field of standard-setting—suffers from a similar democratic deficit.

In the post-World War II era, as tariffs were reduced between nations, many countries turned to less visible national standards as a means of protecting their producers from imported goods and services. Even when nations adopted commonly accepted standards, they frequently administered them in a way, such as resorting to bureaucratic delays and burdens, that effectively excluded or significantly reduced imports. The use of such technical barriers to trade became an art form in some nations, so much so that the WTO was empowered to confront the issue.

Under the WTO, member nations are obligated to accept common standards, or at least to accept those of other nations as equivalent. The WTO harmonization effort is such that it will ultimately touch the lives of most people in almost all WTO member nations. To develop these standards, the WTO relies primarily on other organizations, such as the International Organization for Standardization (ISO), a nongovernmental, industry-standard-setting organization established in 1947 and headquartered in Geneva, Switzerland.

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The ISO's original mission was to develop common global standards for all technologies, except in electrical and electronic engineering. It was, for example, the driving force behind the standardization of telephone and banking cards, allowing such cards to be used worldwide. In addition to its traditional standard-setting in technical fields, the ISO has expanded its focus to include work on air and water quality, animal traps, and environmental management.

As a private, industry-funded organization, the ISO relies heavily on affected corporations, trade associations, and private companies to reach consensus and thereby establish the worldwide standards that it then promulgates. Often, if not generally, this process does not involve governments, NGOs, or citizen groups. When the matter at issue is almost totally technical, such as defining the standards for gears, the lack of public accessibility and comment has little or no social cost. However, when the issue is setting standards in areas such as toy safety, environmental codes, personal financial planning, and machine safety, a closed process, with participation limited to those industries with a pecuniary interest in the standards, is a matter of profound public consequence.

The WTO also relies on a UN organization—the Codex Alimentarius Commission—to set international standards for food quality, additives, residues, and contaminants. While Codex is composed of government representatives, its advisory and technical committees are overwhelmingly drawn from the industries, companies, and trade associations for which it sets standards. As with the WTO, the Codex meetings are closed to the public. And although citizens and other groups can petition to be observers, preliminary approval is required and meetings take place all over the world, making citizen observation difficult and expensive even when allowed.

The only effective way for consumer groups to learn about the ongoing work of Codex and its implications for food safety is to get their public representative at Codex meetings to share that information. U.S. law requires the U.S. representative to Codex to provide such information and to accept public comments on it. But

the U.S. representative is under no obligation to present those comments in Codex proceedings.

WTO dispute panels rely on such international standards in making decisions about whether national environmental, food, health, and safety regulations are trade impediments. Environmentalists and consumer activists worry that companies and industries that have been unable to weaken standards through the open legislative and rule-making processes in the United States will use the back door afforded by Codex and the ISO to set weaker international standards. The threat of such deregulation through lowered standard-setting was a major source of the global opposition to the WTO manifested in the demonstrations at the Seattle trade ministerial meeting in 1999.

THE OBSTACLES TO CHANGE

The WTO has responded to demands for open proceedings and American-style due process by providing more briefings for NGOs and by creating an expanded website. The chairman of the WTO General Council has also invited member nations to submit written recommendations for other democratic improvements.

Ultimately, however, the WTO director-general and its staff are limited in their ability to bring sunshine into the WTO's proceedings, even if they are disposed to do so. That limitation is imposed by WTO member governments themselves.

Whereas many nations, particularly the United States, support greater transparency, most nations are unconcerned about, if not hostile to the concept. These governments take the position that keeping the public informed is the responsibility of individual governments. They re-emphasize the intergovernmental character of the WTO as a venue for sovereign governments to talk to each other, not to citizens. And they argue that the WTO's priority should be the more substantive elements of its negotiating program.

The aversion of most WTO members to greater transparency—both internal and external—in the running of the organization,

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including greater public access to documents, greater public accessibility to meetings, and stronger protections against conflicts of interest for panelists should come as no surprise. After all, the WTO's basic Understanding and Agreement specifically mandates secrecy and closed-door processes. Since it requires a two-thirds vote of WTO members to change such procedures, prospects for greater openness are not promising. Equally important, it must never be forgotten that most WTO member governments do not themselves have full transparency, open meetings, and conflict-of-interest rules back home. If governments deny their own citizens such fundamental democratic rights, they are unlikely to support such practices in Geneva.

RECOMMENDATIONS

With the authority to rule against domestic laws and regulations that affect health, safety, environmental, and food standards, the WTO faces inevitable public scrutiny. If the WTO continues to make its decisions behind closed doors, without much input from those affected by its actions, the institution risks losing its legitimacy and public support in the United States and elsewhere. If that occurs, the WTO could quickly devolve into little more than a hollow talking shop. Yet in a rapidly evolving global economy, effective rules for governing trade are a necessity; a forum is needed for discussion and negotiation of those rules, as is a means of enforcing them.

For the good of all, the WTO must become a more accountable organization, one whose decisions can be presented and accepted as fair and impartial. Americans have a long history of an independent judiciary and respect for its decisions. Americans can and will accept WTO decisions if they have faith that such judgments were arrived at fairly, independently, and with due consideration of all points of view.

Even within the existing structure of the WTO, which presently limits sweeping democratic reforms, a number of positive actions are possible to open up WTO processes and procedures.

To that end, the United States government should undertake the following steps.

- *Make Democratic Procedural Reform a U.S. Trade Negotiating Priority at the Multilateral and Regional Level.*

Transparency in WTO procedures, public access to the WTO dispute-settlement process and general democratization of the WTO and its related standard-setting bodies should be a U.S. negotiating priority in the next round of multilateral trade negotiations. The opening up of the WTO will enhance public support for the outcome of those talks and will make enforcement of the newly negotiated rules and regulations easier. Greater openness may also minimize the pressure for specific negotiating objectives because interest groups will have a means of better monitoring the impact of WTO actions. For these reasons, U.S. negotiators should value procedural reform on a par with more substantive outcomes of forthcoming negotiations.

To achieve such change in the WTO, the United States should push for more openness and public participation in the functioning of regional and bilateral trade agreements as well, especially in their dispute-settlement procedures. In this manner, Washington can trigger an international competition in transparency, in which the public comes to support more open trade agreements and looks with less favor on more closed arrangements. This dynamic could, in turn, provide greater openness in trade arrangements across the board.

To bolster the USTR's negotiating leverage on institutional reform, Congress should make greater transparency in the WTO and in bilateral and regional trade agreements a specific U.S. negotiating objective when it grants the executive branch trade-negotiating authority. Regular congressional oversight hearings should be scheduled to review progress on such reforms.

- *Lead by Example*

WTO rules allow for the release of briefs in disputes, if the parties to a case agree. But only the United States has done so. Washington should continue to press its trading partners to

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grant greater public access to the dispute-settlement process on a case-by-case basis, including open hearings, publication of all panel submissions on the Internet (with due protection for confidential business information), and unencumbered submissions of *amicus* briefs.

Whatever the actions taken by other governments, the United States should constantly stretch the inside of the disclosure envelope, releasing more, not less, information whenever possible. It should widely publicize its own actions and highlight the failure of other members to open up proceedings in order to mobilize public opinion to press for greater openness all around. When other parties in a dispute refuse to open proceedings to the public, the United States should appoint representatives of Congress and interested private-sector parties to the U.S. litigation team to ensure that the dispute panels operate in the sunshine. If members of Congress and U.S. NGOs are participants, members of the European Parliament and European NGOs will demand similar participation, undermining the current objections of the European Commission to their participation. Very soon, the closed system will crumble.

- *Maximize Existing Transparency*

Current WTO efforts to reach out to the public should be amplified. Consultations with NGOs should be increased, with more symposia on substantive subjects such as labor rights, animal welfare, and the precautionary principal. Whenever possible such meetings and events should be open to the general public.

- *Broaden and Professionalize the Dispute-Settlement Panels*

A professional group of dispute-settlement panelists is needed, supported by their own clerks, to handle the burgeoning WTO caseload and to ensure that those making decisions have the greatest expertise, including a grounding in both trade law and trade-related matters. The pool of panelists should be expanded to include experts in environment, health, food safety, competition policy, intellectual property, and other previously nontrade issues. In all cases, to ensure the impartiality of decisions, full disclosure

of panelists' financial and other interests in a case should be required. And those with any potential conflict of interest should be disqualified.

- *Create a WTO Parliamentary Assembly*

Members of Congress and members of the European Parliament, along with other interested legislators, should meet annually to discuss the workings of the WTO and topics relating to ongoing multilateral trade negotiations. Such gatherings would afford an opportunity to build public support for the multilateral system and put pressure on the WTO to improve its democratic accountability.

- *Democratize International Standard-Setting*

Opening Codex and ISO proceedings to greater public participation would go a long way toward allaying fears that globalization will undermine domestic health and safety regulations. The U.S. government should issue a public notice of proposed rule-making, allow public comment before it goes to Codex meetings, and make all public comments widely available to facilitate citizen participation in Codex proceedings. Since these proceedings are often dominated by private industry, the executive branch, Congress, and the private sector should work together to find ways to fund participation in the meetings by NGOs.

The extent to which the WTO enjoys public support in the future and is able to fulfill its vital global mission of liberalizing trade will be heavily influenced by its success in transforming itself into a more open and democratic body. It ignores that challenge at its own peril.

CONCLUSION

Rebuilding public consensus is the first step toward devising a U.S. trade policy that is politically sustainable in the years ahead. That common agreement can come only from a trade decision-making process that affords a wider range of stakeholders a say about U.S. international commercial policies that affect their interests. This democratization of U.S. trade policy will require fundamental reform of how Congress organizes itself to deal with trade matters, greater congressional oversight and involvement in trade negotiations, more rigorous procedures for congressional approval of trade agreements, greater public input to trade negotiations that affect domestic regulations, a more active and inclusive Trade Policy Advisory Committee System, and a more open and accountable WTO.

None of these reforms will be easy. All require delicate balancing of public participation with the need for getting something done. But the old, closed-door, insider-driven means of crafting U.S. trade policy has broken down. If the president is going to continue to be granted trade-negotiating authority, if Congress is going to approve future trade agreements, if the public is going to have faith that such deals are in its interest, and if Americans are going to trust the WTO, its time for more democracy, more transparency, and more accountability in the trade policymaking process.

ADDITIONAL VIEWS

This paper represents a fine job on a difficult subject. I congratulate the authors on their excellent contribution and urge review by policymakers in Congress and in the administration of the recommendations and, by and large, the adoption of the recommendations. My areas of agreement with the paper are extensive and the areas of difference are few but I believe important.

The authors of this study are correct that democratic responsiveness of the trade policy process both at the WTO and at home has eroded and this is cause for serious concern for all those who believe that trade liberalization is important and should continue. The following steps are imperative:

- Restore the balance between the Congress and the executive. I agree that there should be formation of a Congressional Trade Office to provide expertise for Congress's trade-oversight functions. But I suggest that the vote of the Congressional Trade Advisers not be advisory, as Bruce Stokes and Pat Choate suggest, but be used to determine whether fast-track (a.k.a., trade-negotiating authority) procedures are available for approval of an agreement.
- Establish a WTO Dispute-Settlement Review Commission. The Clinton administration agreed with the ranking members of the Senate Finance Committee at the time of the Uruguay Round's conclusion that a U.S. commission consisting of U.S. retired judges would review whether cases involving the United States were decided in accordance with established standards. Independent outside review is needed as a curb on panels in Geneva legislating new obligations for WTO members, going beyond the bounds of what government negotiators were able to agree to at the bargaining table.

- Upward harmonization of environmental standards. This is a sentiment that clearly appears sound in the abstract, but may be counterproductive in concrete cases. An international standard may not be technically or economically feasible to meet, and the use of substitutes may cause greater harm to the environment than the standard being replaced.

Alan Wolff

I would like to share my perspective regarding trade as an appointee to the president's Advisory Committee on Trade Policy and Negotiations. Contrary to the impression suggested by Choate and Stokes, I do not represent any one sector or industry. Rather, what I bring to ACTPN is my academic training; political experience working and writing on Congress's role in foreign commerce; nine years of experience on the U.S. International Trade Commission, where I served as chairwoman; a small-business owner's viewpoint; and perceptions as a female consumer. In effect, I try to use this background to counterbalance any shortcomings described by Choate and Stokes. Further, when I was first appointed to the ACTPN, I took the initiative to demonstrate the positive and independent role that it can play in laying the groundwork for issues that go beyond a narrow USTR negotiating agenda. As a member of an independent advisory group concerned about the national interest, I initiated a subcommittee that produced one of the earliest public critiques of unilateral sanctions. This topic was one trade issue that did not drive a wedge between business, labor, and other NGO representatives who were also members of the ACTPN.

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