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International Trade Law and Information Policy: A Recent History

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Introduction

In September 2008, the United States Trade Representative (USTR) announced the United States' intention to join Singapore, New Zealand, Brunei, and Chile in what was then called the Trans-Pacific Strategic Economic Partnership Agreement, a preferential trade agreement.[1] Since then, the agreement has grown in scope and ambition. The negotiations to create what is now known as

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[1] Press Release, United States Trade Representative, Trans-Pacific Partners and United States Launch FTA Negotiations (Sept. 22, 2008). The agreement was first commonly known as the "Pacific 4" or "P4" agreement. *See* Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129, 1130 (2014).

the Trans-Pacific Partnership (TPP) have expanded to include seven other nations.[2] The USTR wants the TPP to be "an ambitious, next-generation, Asia-Pacific trade agreement that reflects U.S. economic priorities and values."[3] According to the USTR's webpage dedicated to the agreement, the administration is "working in close partnership with Congress and with a wide range of stakeholders, in seeking to conclude a strong agreement that addresses the issues that U.S. businesses and workers are facing in the 21st century."[4]

During this time the USTR has described the TPP negotiating process as one of "unprecedented" transparency. In addition to soliciting the views of its advisors from the private sector, the agency has also extended invitations to "[r]epresentatives from academia, labor unions, the private sector, and non-governmental organizations from around the world" to visit the sites of negotiating rounds and make presentations to the delegates.[5] Some journalists, academics, activists, and politicians, however, are critical of the USTR's approach to transparency and have characterized its information-sharing policies as mere posturing,[6] or "transparency theater."[7] As one critic pointed out, the promise of 'transparency' is that the governed have a clear view of what their government is doing, as opposed to the mere offer of a forum in which to share their opinions.[8] These complaints are largely based on USTR's refusal to share drafts of the agreement as well as its insistence on binding all negotiating parties to secrecy.[9] Despite these efforts, multiple sections of the draft agreement have been leaked online.[10]

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[2] Australia, Canada, Japan, Malaysia, Mexico, Peru, and Vietnam.

[3] UNITED STATES TRADE REPRESENTATIVE, THE UNITED STATES IN THE TRANS-PACIFIC PARTNERSHIP, http://www.ustr.gov/about-us/press-office/factsheets/2011/november/united-states-trans-pacific-partnership (last visited Jul. 24, 2014).

[4] *Id.*

[5] UNITED STATES TRADE REPRESENTATIVE, DIRECT STAKEHOLDER ENGAGEMENT, http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/direct-stakholder-engagement (last visited Jul. 24, 2014).

[6] *See, e.g.*, Finlay Lewis, *Demand for Transparency in Trade Talks Masks Broader Skepticism*, CQ WEEKLY, Jul. 29, 2013, at 1318.

[7] Margot E. Kaminski, *The U.S. Trade Representative's Democracy Problem: The Anti-Counterfeiting Trade Agreement (ACTA) as a Juncture for International Lawmaking in the United States*, 35 SUFFOLK TRANSNAT'L L. REV. 519, 523 (2012) (referring to the USTR's role in negotiating the Anti-Counterfeiting Trade Agreement).

[8] *See* Sherwin Siy, *TPP and a Very Basic Point About Transparency*, PUBLIC KNOWLEDGE (May 14, 2012), https://www.publicknowledge.org/news-blog/blogs/tpp-and-very-basic-point-about-transparency ("So long as no actual proposed text comes to light...the process remains opaque, and no amount of input from whatever stakeholders into the TPP process makes up for a lack of real information flowing the other way.").

[9] *See* Yu, *supra* note 1, at 1131.

[10] *See* notes 263-264, *infra*, and accompanying text.

The controversy surrounding the TPP is only the most recent example of how transparency and information policy can eclipse other issues in trade diplomacy. Almost twenty years ago, negotiations to create a Multilateral Agreement on Investment (MAI) became the focus of heated resistance among a range of groups that feared that the treaty would elevate business interests above state sovereignty, the environment, labor, and local culture.[11] This resistance was catalyzed by early netroots organizing and the publication of a leaked draft of the agreement on the Internet.[12] The eventual failure of the MAI was an important precedent for the large-scale globalization protests of the late 1990s, as well as the eventual liberalization of the classification and information sharing policies of intergovernmental organizations like the World Trade Organization (WTO) and Organization for Economic Cooperation and Development (OECD).

Closed-door bilateral and regional trade agreement negotiating practices have become increasingly controversial over the same time period. The talks organized around the Free Trade Area of the Americas (FTAA) and the Anti-Counterfeiting Trade Agreement (ACTA) were both punctuated by demands for publication of draft texts and negotiating agendas, as well as increased access to the negotiations by non-governmental organizations (NGOs) and the press.[13]

Can international diplomacy be unprecedentedly transparent while at the same time being undemocratic, perhaps even captive to private interests? The disputes surrounding the negotiations of the MAI, FTAA, ACTA, and now the TPP illustrate how the informational aspects of international trade lawmaking have shifted since the popularization of the Internet, and how official efforts towards greater transparency have continuously fallen short of civil society's incrementally heightened expectations.

As Professor Peter Yu noted about the negotiation of ACTA, secret negotiations and restrictive information policies raise the kinds of transparency and accountability concerns that may "transform[] issues that were too technical to capture public consciousness into matters lay people could understand and relate to."[14] Secrecy creates the threshold perception of a democratic deficit and invites further questions about the balance of legislative and executive power, industry capture, and freedom of information. By looking at the practices of both the USTR and selected international treaty-making bodies, this paper will explore the origins of the current conflict over information access in trade diplomacy and identify what these trends may portend for information access regarding future agreements.

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[11] *See* section V(A), *infra*.

[12] *See id.*

[13] *See* sections V(C) and V(D), *infra*.

[14] *See* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1002 (2011).

I. Why Keep Secrets? Discretion in Diplomacy

Managing foreign affairs is generally an executive's responsibility. The "classic diplomatic function" hails back to the era when "sovereigns, personally vested with full authority, commissioned ambassadors plenipotentiary to transact their business with other states."[15] In the words of Blackstone, it is "the king's prerogative to make treaties, leagues, and alliances with foreign states and princes."[16] The diplomat was an alter ego of his monarch.[17] As such, treaty-making has not historically been subject to populist appeals for power- and information-sharing.

Diplomats traditionally prefer secrecy so that they may act in the assurance that their nations will support, and not second-guess, their efforts.[18] Indeed, "the central virtue of the old diplomacy" was "the ability to conduct confidential negotiations confidentially."[19] There is the adage about too many cooks spoiling the soup: within a theory of rational decision-making, increasing the number of private participants to treaty negotiations increases the chances that their numbers may "impede consensual agreement, [which] might raise the cost of making international treaties and therefore limit their scope and influence."[20]

Secrecy is defensible from the perspective "of the trader who looks for a better bargain through not having given away his entire hand at the beginning."[21] A secretive approach may also "help insulate the negotiations from external influences, which range from political complications in the capitols to opposition from civil society groups at both the national and international levels."[22] Confidentiality and discretion allow negotiators to speak frankly and make compromises with one another, and hopefully maintain amicable relations from one agreement to the next.[23] Keeping the grittiest details out of the written

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[15] Hubert H. Humphrey, *The Senate in Foreign Policy*, FOREIGN AFFAIRS (July 1959) 525, 527.

[16] 1 WILLIAM BLACKSTONE, COMMENTARIES 257 (Lippincott ed., 1859).

[17] *See* PAUL S. REINSCH, SECRET DIPLOMACY: HOW FAR CAN IT BE ELIMINATED? 23 (1922).

[18] *See* WALTER LIPPMANN, THE STAKES OF DIPLOMACY 34 (1932).

[19] Humphrey, *supra* note 15, at 527.

[20] Paul B. Stephan, *Privatizing International Law,* 97 VA. L. REV. 1573, 1600-1601 (2011). On the other hand, "[c]ultural theories about group dynamics might generate the opposite hypothesis by positing that greater inclusion and more deliberation will build confidence, leading to more and greater agreements." *Id.* at 1601.

[21] REINSCH, *supra* note 17, at 167.

[22] Yu, *supra* note 14, at 1005.

[23] *See* William J. Katt, Jr., Note, *The New Paper Chase: Public Access to Trade Agreement Negotiating Documents,* 106 COLUM. L. REV. 679, 690-691 (2006); *see also* Yu, *supra* note 14, at 1006 ("For example, the benefits of an amicable relationship during

record also allows a party the flexibility to revise its stance from one agreement to the next.[24] Shielding diplomatic negotiations and treaty texts from a nation's own legislature, press, or population also allows the executive to avoid or delay opposition and interference and, if needed, distance itself from failure.[25] This benefits the ambassador "who desires to work quietly without interruptions from an excitable public, who desires to avoid difficulties and smooth away contrasts which publicity would tend to exaggerate."[26]

Even in the earliest days of American democracy, the ideal of a fully-informed self-governing public was tempered with acknowledgement that some executive secrecy would always be necessary. During the Constitutional Convention in 1789, delegates recognized a need to preserve secrecy related to treaties and military operations.[27] In the Federalist Papers, John Jay describes the importance of the treaty power, "especially as it relates to war, peace, and commerce"; to negotiate such treaties "perfect *secrecy* and immediate *dispatch* are sometimes requisite."[28] Jay argues that secrecy and expediency are inoffensive to democracy in part because they are most often necessary in the case of "those preparatory and auxiliary measures, which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation."[29]

Most executive actors would likely argue that secrecy "is not directed *against* the legislature or the public, but is merely designed to achieve security

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the ACTA negotiations could be easily extended to cover the ongoing negotiations of the [TPP].").

[24] *See* Katt, *supra* note 23, at 692; *see also* notes 101-108, *infra*, and accompanying text (regarding a FOIA lawsuit in which the USTR argued that it should not be forced to disclose information that could arguably limit its ability to negotiate alternative interpretations of a particular phrase in subsequent diplomatic engagements).

[25] *See* Thomas M. Franck & Edward Weisband, *Secrecy in the Foreign Relations of Three Democracies: A Comparative Analysis,* 50 CHI.-KENT L. REV. 1, 12-13 (1973) (offering a "Taxonomy of Principle Foreign Affairs Secrets). The freedom to rewrite the rules, as it were, may have a different meaning when so many contemporary agreements tackle continuous regulatory obligations; "Managerial forms of treaty-making, in areas such as trade, the environment, and human rights, attempt to secure the benefits of institutionalization on an on-going basis and not only when treaties are initially concluded." Jose E. Alvarez, *The New Treaty Makers*, 25 BOSTON COL. INT'L & COMP. L. REV. 213, 221 (2002)

[26] REINSCH, *supra* note 17, at 167-168.

[27] *See* Kiyul Uhm, *The Founders and the Revolutionary Underpinning of the Concept of the Right to Know*, 85 JOURNALISM & MASS COMMC'NS. Q. 393, 398 (2008).

[28] THE FEDERALIST NO. 64, at 360 (John Jay) (Clinton Rossiter ed. 1961) (emphasis in original).

[29] *Id.*

objectives which are to everyone's benefit."[30] Proponents of a strong system of international free trade make a similar argument.[31]

At the beginning of the twentieth century, documentation of diplomatic negotiations was largely a matter of the convener's preference with some room for happenstance.[32] The cataclysm of World War I introduced some new ideas about democracy and transparency in foreign affairs. Writing in 1922, Paul Reinsch proclaimed that it was "indeed worth inquiring how far our secretive methods in foreign affairs are to blame for the pitiful condition in which the world finds itself to-day."[33] Arguing for a greater role for Parliament in British foreign affairs circa 1921, George Young quipped: "[W]hen we come to the fundamental issues of peace and war, the danger of concealing the principles of the national policy from Parliament is far greater than any danger that could be created by a sensational Press and an emotional public out of a measure of publicity. Secret diplomacy not only increases the danger of war, but it increases

[30] Franck & Weisband, *supra* note 25, at 15. Indeed, Congress at one time tacitly acknowledged limitations on its own entitlement to sensitive records in foreign affairs. *See* Franck & Weisband, *supra* note 25, at 26 (comparing the laws governing Congressional Access to the Executive Department of Foreign Affairs with that of the Department of the Treasury, circa 1789). Political opportunism was supposed to halt at the water's edge, to allow America to "speak[] with maximum authority." Humphrey, *supra* note 15, at 533 (quoting Senator Arthur Vandenberg); *see also* Lippmann, *supra* note 18, at 16.

[31] *See* Katt, *supra* note 23, at 693. For so long as the USTR plans to negotiate trade agreements, "it is in the best interests of U.S. citizens that their government be well positioned to extract diffuse benefits in those negotiations ... secrecy for negotiating documents serves this goal." *Id.*

[32] At the Second Hague Peace Conference in 1907 a private citizen, enthusiastic peace advocate, and unofficial "delegate at large" named William T. Stead took it upon himself to record the entire proceedings for posterity:

> The Second Conference, like the First, desired to conduct its proceedings in private, but decided to supply certain information to the public, in such form and in such quantities as not to interfere with the orderly course of its deliberations. But the Conference was very large, and it might well happen that delegates...might not be fully abreast of the proceedings.... Mr. Stead established, published, and supplied at his own expense to the members of the Conference, a daily chronicle of its proceedings.... including the official and social life, contained accounts of the meetings, abstracts of reports, and at times the full text of important addresses....it is not too much to say that [Stead's publication] gives the best daily picture of the Conference, its hopes, its fears, its actual work, which is likely to appear.

JAMES BROWN SCOTT, 1 THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 172-173 (1909).

[33] REINSCH, *supra* note 17, at 5.

the dangers of it."[34] There must be limits, however: "Of course, no one is proposing anything as absurd as that the actual negotiations between two Foreign Offices should be published as they proceeded."[35]

In addition to fervent nationalism, World War I revealed "a vague but grudging recognition that trade and finance are involved in diplomacy, and there has appeared a mass of literature interested not so much in the machinery of peace as in dealing with the provocations to war."[36] The war had largely dismantled the existing network of bilateral cooperation, and attempts to re-establish trade agreements during the interwar years were largely unsuccessful. In addition to the tumult of new governments, re-drawn borders, and worldwide economic depression, the "emergence of huge, urban working populations began to manifest itself, not only through the widespread organization of labor, but also in the more popularly responsive nature of governments."[37]

Calls were made for the creation of international, inter-governmental bodies to anticipate and manage crises, as such bodies "are needed wherever the prizes are great, the territory unorganized, and the competition active."[38] In addition to international oversight, increasing public participation in international affairs would, hopefully, be good for peace and for trade. As Walter Lippmann forecast, "bring[ing] diplomacy under the scrutiny of business men" and broadening its base through foreign trade and investment would realign foreign policy.[39] "Agreements and disagreements will cross frontiers. Men will discover that they are more in sympathy with a group in some foreign country than with some of their own fellow-citizens....The real effect of democracy on foreign affairs will be to make them no longer foreign."[40]

This process took time. During the negotiation of the Treaty of Versailles, which established uneasy peace in Europe in 1919, access to information was limited on the grounds that it would "inflame public opinion and render impossible a compromise."[41] "The bald statements given to the press concerning the negotiations did not satisfy any one. Most of what was going on became known to outsiders. But its authenticity was so uncertain and it was so commingled with mere rumor that the public soon gave up in despair."[42]

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[34] GEORGE YOUNG, DIPLOMACY OLD AND NEW 58-59 (1921).

[35] *Id.* at 61.

[36] LIPPMANN, *supra* note 18, at 7 (Introduction, 1915).

[37] *Id.* at 67. This is possibly the first time that social opposition to international trade policy emerged as a policy issue.

[38] *Id.* at 135.

[39] *Id.* at 194; *see also id.* at 196-198.

[40] *Id.* at 195.

[41] REINSCH, *supra* note 17 at 7.

[42] *Id.* at 7-8.

Some nations also resisted the publication of treaty documents. Although the covenant that established the League of Nations contained a provision for the registration and publication of all international agreements entered into by League Members,[43] some of the "strongest contracting powers" in the League did not comply.[44] The movement towards publishing treaties had taken root, however, and when the United Nations Charter was signed in 1946 it included a provision requiring UN members to register every treaty and international agreement to which they would thereafter enter into for publication.[45]

While publishing concluded treaties eventually became less remarkable, there was little impetus at the time to reveal anything more about the international lawmaking process. The simmering anxiety of the Cold War "provided substantial justification for limiting citizens' access to international negotiations and deliberations; these were areas firmly within the secretive realm of national security interests and were not for public consumption."[46]

From 1948 to 1994, the majority of international trade was conducted under the rules of the General Agreement on Tariffs and Trade, or GATT.[47] The GATT stated that "Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall ... be published."[48] This provision, however, "shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice

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[43] League of Nations Covenant art. 18 ("Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.").

[44] REINSCH, *supra* note 17, at 7. Interestingly, "[s]ome outsiders, indeed, such as Russia, have quite willingly published their treaties and furnished them to the bureau of the league." *Id.*

[45] U.N. Charter art. 102, para. 1. Since that time, the UNITED NATIONS TREATY SERIES has compiled over 200,000 treaties in over 2,600 volumes. The UN Charter also provides for consultations with non-governmental organizations regarding matters within their competence. *See* Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance,* 18 MICH. J. INT'L L. 183, 250 (1997). At the invitation of President Roosevelt, 42 NGOs sent representatives as part of the U.S. delegation to the U.N. Conference on International Organization, where they contributed to the drafting of the Charter. *Id.* at 250-251.

[46] Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699, 708 (1994).

[47] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (*hereinafter* GATT); *see also generally* Housman, *supra* note 46, at 703-715.

[48] GATT, *supra* note 47, at Art. X, para. 1.

the legitimate commercial interests of particular enterprises, public or private."[49] Bilateral trade agreements during this period were typically rules-based arrangements for mutual trade liberalization, and would often "include tariffs, quotas, financial data, number of shipments, or other sensitive information" which was kept confidential.[50] The GATT did not provide for transparency or public participation in decision-making, in part because it was not originally conceived as an institution,[51] and in part because there was little perceived need for non-state actors to participate; "even industries, the principal actors in international trade, were not perceived as needing a major independent voice in international trade decision-making."[52]

Although the GATT itself was not specific about confidentiality or information policy, official GATT meetings were conducted in secret.[53] The majority of documents created under its auspices were classified and publicly unavailable; "[w]hen the GATT does declassify a document, it does so at a glacial pace rendering most of these declassified documents outdated and of little value to anyone but GATT history scholars."[54]

While disclosure and publication of treaties generally increased as such agreements themselves multiplied, the arguments for discretion and judicious secrecy remained fundamentally the same: exposing negotiating aims and strategy would sacrifice critical advantages and undermine prosperity and security. For some policy-makers, nothing that has happened in the intervening years has altered this fundamental truth. In the words of Brian A. Pomper, former chief international trade counsel to Senator Max Baucus, referring to the TPP talks, "We can't give our trade partners a road map into how we plan to get what we want out of negotiations. That just makes no sense. We don't do that with any other kind of negotiations. It is beyond me why some people think we should do it here."[55]

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[49] *Id.* Note that the GATT was not originally intended to operate institutionally and thus its lack of provisions for transparency or cooperation with NGOs may be partially attributable to the circumstances surrounding the failure of negotiations to create an International Trade Organization to implement the GATT itself. *See* Housman, *supra* note 46, at 704-705.

[50] *See* Yu, *supra* note 14, at 1007; *see also id.* at 1007 n. 198.

[51] *See* Housman, *supra* note 46, at 705 (discussing the failure of the talks to create an International Trade Organization and the impact of this failure on transparency within GATT).

[52] *Id.* at 707.

[53] Housman, *supra* note 46, at 710.

[54] *Id.*

[55] Lewis, *supra* note 6.

II. Private Participation and Information Sharing in International Lawmaking

While the classical diplomatic model has many justifications for its secrecy, there are historical examples of information sharing and extra-governmental consultations in international governance.

The United States began publishing an annual collection of State Department correspondence and other documents in 1861, originally called *Papers Relating to the Foreign Relations of the United States*.[56] From those volumes, attorney and law professor Francis Wharton distilled many of the principles of the United States' diplomacy into his influential *Digest of International Law*, first published in 1886.[57] These publications were viewed by some as examples for other nations, and any risk they might have posed to future diplomatic action was tolerable: "The fact that a precedent reported in [Wharton's] digest, might be cited against the American Government as an admission, does not imply a disadvantage which would at all offset the benefits resulting in general from public knowledge."[58]

Private groups have served many roles in the development of international law and policy, especially the "gathering, analysis, and dissemination of information relevant to decisionmaking."[59] Non-governmental parties interested in international lawmaking have historically included both commercial and issue-driven organizations, as is still the case today. Some of the earliest "NGOs," such as the British group the Society for Effecting the Abolition of the Slave Trade, founded in 1787, sought to impart a social and moral conscious to international economic relations.[60]

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[56] This continuous publication has undergone several name changes and is now called simply FOREIGN RELATIONS. An earlier work, DIGEST OF THE PUBLISHED OPINIONS OF THE ATTORNEYS-GENERAL, AND OF THE LEADING DECISIONS OF THE FEDERAL COURTS, WITH REFERENCE TO INTERNATIONAL LAW, TREATIES AND KINDRED SUBJECTS, was edited by Assistant Secretary of State John L. Cadwalader in 1877; it was a single-volume of less than 300 pages.

[57] FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES (1886). The DIGEST was revised and expanded by Professor John Bassett Moore in 1906. A subsequent DIGEST OF INTERNATIONAL LAW, prepared by Green Haywood Hackworth, was published beginning in 1940; this DIGEST did not reprint material from the earlier versions. The most recent iteration of this work, prepared by Marjorie M. Whiteman, was first published in 1963 and does not revisit material from Hackworth or the earlier publications.

[58] REINSCH, *supra* note 17, at 196.

[59] Charnovitz, *supra* note 45, at 271.

[60] *Id.* at 192.

Beginning in the mid-nineteenth century free trade became a focus of private mobilization.[61] Technical experts have joined international negotiating tables since at least the mid-nineteenth century, particularly in conferences relating to the sciences.[62] Early international efforts to establish protections for "industrial property" brought government delegates together with interested private individuals.[63] At the first International Congress of Chambers of Commerce in 1905, participants included government officials and businesspeople.[64] Throughout this time, however, the work of NGOs was primarily directed towards "pre-normative processes, i.e. agenda setting."[65]

Private parties have over time increased their participation, and thereby their influence, over international lawmaking.[66] This can be attributed to several factors, including the pace of scientific and technological change. Such dynamism "has required state law-making institutions to resign a substantial amount of competence to the informal law-making of the economic sectors concerned, because national legislatures have simply been unable to keep up."[67]

In hearings on what would become the Trade Act of 1974, Special Trade Representative William D. Eberle spoke of the need to solicit input from business and civil society groups in the formulation of trade policy, but also of the challenges that such openness could pose:

> The industrial, agricultural, labor, and public interests generally must also be weighed in a more direct manner. There has been repeated criticism that past efforts to use advice from these elements of our economy have been inadequate. We agree, they have been inadequate. On the other hand, the sheer enormity of the task of hearing and weighing advice from every quarter of American life must be recognized. We will need great ingenuity both in the Government and in

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[61] *Id.* at 194.

[62] *Id.* at 198.

[63] *Id.* at 201.

[64] *Id.* at 208-209. *See also* H. Rep. No. 62-438 (1912) (regarding the Fifth International Congress of Chambers of Commerce).

[65] Stephan Hobe, *The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law-Making and the Development of Customary International Law, in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 324 (R. Wolfrum & V. Roben eds. 2005).

[66] Stephan, *supra* note 20, at 1599.

[67] W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application, in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 22 (R. Wolfrum & V. Roben eds. 2005).

the private sector to develop a better apparatus for distilling the essence of advice from so many people.[68]

As discussed below, the framework that was ultimately established by the Trade Act has successfully linked American diplomats to expertise from many sectors of the economy. More generally, however, the close relationship between trade officials and industry representatives has created information disparities between them and other civil society groups, which in turn has aggravated perceptions of corporate capture in trade policy.[69] When it comes time to negotiate trade agreements, these perceptions contribute to a vicious cycle of secrecy and protest.

III. International Organizations and Transparency

The move to establish intergovernmental organizations for the regulation of global affairs was itself a move towards transparency. Rather than isolated conversations between two states or ad hoc conferences,[70] "the practice of meeting together in larger groups is itself inimical to the strict maintenance of the older methods [of secretive diplomacy] and we may expect a natural growth of more simple and direct dealings."[71]

The introduction of international organizations, like the UN, into international lawmaking has been transformative.[72] For example, the use of international organizations as negotiation venues and depositories for concluded agreements has empowered smaller and less powerful states and increased the diversity of participants in treaty-making.[73] Most importantly for purposes of this discussion, "[s]tructural aspects of [international organizations], including provisions for access to documents and for observer and other forms of non-voting status, have, in addition, provided entry points for NGOs growing participation in various forms of interstate diplomacy, including treaty-making."[74]

Secrecy in multilateral trade negotiations has been a repeated source of criticism, however, even when held within an institutional forum. In a 2010 study of international institutions involved in intellectual property issues,

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[68] *The Trade Reform Act of 1973:* Hearings Before the S. Comm. on Finance, 93rd Cong. 216 (Mar. 5, 1974) (testimony of Ambassador William D. Eberle, Special Representative for Trade Negotiations).

[69] *See generally* Section VI, *infra*.

[70] *See* Alvarez, *supra* note 25, at 218 (describing the use of ad hoc conferences as the "fundamental mechanism" for multilateral treaty-making in the 19th century).

[71] REINSCH, *supra* note 17, at 15-16.

[72] *See* Alvarez, *supra* note 25, at 227 ("The very existence of [international organizations] conditions the traditional use of state power.").

[73] *See id.* at 223.

[74] *Id.*

including the World Trade Organization, the Organization for Economic Cooperation and Development, the World Intellectual Property Organization (WIPO), and the Commission on Science and Technology for Development (CSTD), Jeremy Malcolm observed that "in general, an inverse relationship exists between the openness to participation in an organization, and the degree of 'legalization' or 'hardness' of its output."[75] Institutions such as the WTO and WIPO that routinely administer and oversee the creation of binding agreements are less transparent than organizations that are better known for creating only "soft law" or policy recommendations.[76]

The World Trade Organization was established in 1994 and was originally intended to strengthen and enhance the multilateral trade regime by finally situating GATT within a permanent institution.[77] Unfortunately, the WTO inherited the GATT's poor reputation for transparency to non-state actors, and was promptly denounced by some outside groups which argued that it lacked accountability and is solely a front for moneyed interests.[78]

Writing in 1994, just months before the World Trade Organization was formally recognized, environmental attorney Patti Goldman stated the complaint:

> International trade agreements are carried out in secret without any mechanisms for informing the public about the matters being negotiated, for obtaining public input, or for ensuring that the decision-makers are neutral and have a complete record on which to make decisions. The negotiators are trade officials who rarely have expertise or experience in other social policies that are affected by the end product of the negotiations. Although the negotiators claim that negotiations and foreign relations would be impaired if the public were made privy to information about proposals on the table, draft agreements are routinely made available to hundreds of industry advisors, and are sometimes leaked

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[75] Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions*, PIJIP Research Paper No. 6, American University College of Law (Sept. 2010) at 18, *available at* http://digitalcommons.wcl.american.edu/research/6/ (last visited Jul. 24, 2014). Malcolm is a senior policy analyst at the Electronic Frontier Foundation and currently a Steering Committee member of the OECD's Civil Society Information Society Advisory Council.

[76] *Id. But see* Pamela Samuelson, *The U.S. Digital Agenda at WIPO,* 37 VA. J. INT'L L. 369, 381 (1997) (describing her analysis of the defeat of certain U.S. proposals at WIPO through analysis of draft treaties and alternative language proposals offered during the conference, suggesting broad and timely access to relevant documents).

[77] ANDREW G. BROWN, RELUCTANT PARTNERS: A HISTORY OF MULTILATERAL TRADE COOPERATION 152 (2003).

[78] Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization,* 2 CHICAGO J. INT'L L. 403, 403 (2001).

when it suits the purposes of the negotiators. Aside from sporadic leaks, the public is kept in the dark until the terms of the agreement have been cast in stone.[79]

IV. Trade and Transparency in the United States

A. Treaties and Executive Agreements

Why is access to information and public notice of international law-making an issue in the first place? In the U.S., the answer is connected to the division of power between the executive and the legislature, as discussed below in Section D, and the growing overlap between the domains of domestic and international law.[80]

International agreements may have a significant impact on domestic law.[81] For example, the United States' implementation of the Berne Convention for the Protection of Literary and Artistic Works granted copyright protection to preexisting works from Berne member countries.[82] Prior to passage of the

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[79] Patti Goldman, T*he Democratization of the Development of United States Trade Policy,* 27 CORNELL INT'L L.J. 631, 646-644 (1994).

[80] A treaty, by any other name, is an "international agreement concluded between States in written form and governed by international law." Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 2(1)(a). In the United States, the Constitution vests treaty-making authority with the President, with the advice and consent of the Senate. U.S. CONST., art. II, §2. By some estimates, however, only approximately five percent of international agreements to which the U.S. is a party have been subject to this formal approval process. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 208 (2006). These non-treaty agreements are referred to as "executive agreements" or "congressional-executive agreements" and are sanctioned by other legal mechanisms. *See id.* at 208-210; *see also* Oona A. Hathaway, Treaties' End: The Past, Present, and Future of International Lawmaking in the United States, 117 YALE L.J. 1236, 1239 (2008). Such agreements have become more common over time, in part because they may elude certain kinds of political gridlock in Congress. *See id.* at 1287, 1312-1316. They can be frustrating, from a researcher's perspective, because there is "no single comprehensive database available that delineates solo executive agreements, congressional-executive agreements, and Article II treaties." *Id.* at 1253.

These distinctions are irrelevant to the nations on the other side of the table, who consider all concluded agreements to be on equal footing. *See* Treaties and Other International Agreements: The Role of the United States Senate, S. Rpt. 106-71 (Jan. 2001), at 4.

[81] This includes U.S. regulatory law. *See generally* Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435 (2002).

[82] *See* Golan v. Holder, 132 S.Ct. 873, 874 (2012). The Berne Convention took effect in 1886, but the United States did not become a party to the treaty until 1989, and

implementing legislation, many "foreign works 'restored' to protection by the measure had entered the public domain in this country."[83] A group of musicians, publishers, and other creative-types challenged the constitutionality of the implementing legislation, which effectively clawed-back many works that had previously been available for royalty-free use. The Supreme Court, however, upheld the law and Congress' prerogative to further the United States' interest in "ensuring exemplary compliance with our international obligations."[84] The treaty broadened the scope of U.S. copyright. As discussed below, such an upward ratchet of IP protection in the form of an international *fait accompli* was one of the most significant points of public opposition to ACTA.[85]

Over the past three decades, trade agreements have increasingly sought to create transnational regulatory regimes that, in turn, may impact domestic law, especially in the areas of intellectual property, labor, and environmental protection.[86] In the U.S., federal statutes governing these topics are proposed, debated, and voted on in public. The legislative process provides ample opportunity for lobbyists, journalists, lawyers, and laypeople to provide feedback and keep tabs on bill status and member voting records. The high level of transparency that Americans are accustomed to in domestic lawmaking has influenced expectations for international lawmaking with domestic ramifications. Yet the U.S. is one of only "a small handful of countries that combine two features in their Constitution—an international lawmaking process that provides for less involvement by part of the legislature in international treaty making than in domestic lawmaking and the automatic incorporation of the results of that process into domestic law."[87] Moreover, the domestic ramifications of such agreements may only be clear after they have come into force.

B. Trade Negotiations and National Security

Although several federal agencies have jurisdiction over some aspect of U.S. trade, the Office of the United States Trade Representative has primary responsibility for developing the United States' international trade policy and

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did not actually implement the relevant provision of the Berne Convention until 1994, pursuant to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). *Id.*; *see also* Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (Dec. 8, 1994).

[83] *Golan v. Holder,* 132 S.Ct. at 874.

[84] *Id.* at 894.

[85] *See* Section V(D), *infra*; *see also* Yu, *supra* note 14, at 1019-1021.

[86] *See* Simon Lester, *The Role of the International Trade Regime in Global Governance,* 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 221-222 (2011).

[87] Hathaway, *supra* note 80, at 1272.

advising and speaking for the President on international trade issues, among other duties.[88]

Today, the USTR's stated policy is to make publicly available "as much information concerning its activities as is possible, consistent with its responsibility to protect national security."[89] "National security," however, means much more than preventing terrorist attacks and securing America's resources and borders. Under the current Executive Order governing the classification of government information, material may be classified if "its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security" and it pertains to, among other things, "foreign government information."[90]

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[88] 19 U.S.C. 2171(c); *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 98 (2d ed. 1997). The role of today's USTR dates back just over fifty years. In January 1963, President John F. Kennedy signed Executive Order 11075 creating the Special Representative for Trade Negotiations within the Executive Office of the President. Exec. Order 11,075, 28 Fed. Reg. 473, Sec. 2(a) (Jan. 18, 1963); subsequently amended by Exec. Order 11,106, 28 Fed. Reg. 3,911, Sec. 3 (Apr. 20, 1963); Exec. Order 11,113, 28 Fed. Reg. 6,183 (June 13, 1963). This order provided for the administration of the Trade Expansion Act of 1962, Pub. L. 87-794, 76 Stat. 872 (1962). The Special Representative was tasked with advising and assisting the President in all matters related to the negotiation or administration of trade agreements, other than treaties. Exec. Order 11,106, 28 FR 3,911, §§ 2, 4 (Apr. 20, 1963). Originally called the office of the Special Representative for Trade Negotiations, it received a new title under the Trade Act of 1974, which also provided a legislative charter and made the Office accountable to Congress, as well as the President. Pub. L. 93-618, 88 Stat. 1978, § 141(b)(3)(B) (directing the Special Representative to "report directly to the President and the Congress, and be responsible to the President and the Congress for the administration of trade agreements programs under this Act, the Trade Expansion Act of 1962, and section 350 of the Tariff Act of 1930) and 141(b)(3)(C) (requiring the Special Representative to "be responsible for making reports to Congress" with respect to its duties). In an accompanying report, the Senate finance committee stated that "[i]t is essential that the Congress, which as the constitutional authority to lay and collect duties and to regulate commerce with foreign nations, provide a mandate for the Executive to enter into [international trade] negotiations. It is also essential, however, that the Congress and the various segments of our economy which are likely to be importantly affected by trade negotiations, be fully involved in the negotiating process." S. Rept. 93-1298 at 69 (1974).

[89] 15 C.F.R. § 2008.4 (2013). Consistent with the general guidelines for the classification of government documents, USTR information that has been classified since December 1, 1978 is subject to automatic declassification after six years. 15 C.F.R. § 2008.6 (a) (2013).

[90] Exec. Order 13,526, Sec. 1.4(b), 3 C.F.R. 298 (2010). "Foreign government information" is a very broad category, encompassing:

> (1) Information provided to the United States Government by a foreign government or governments, an international organization of governments, or

Under this classification structure, the USTR enjoys broad discretion to treat as confidential not only the information it receives from foreign governments during trade negotiations, but also its own information and documentation, as long as the information is produced within the context of confidential international negotiations. The USTR has not, as a matter of practice, made the text of its agreements publicly available until they are completed.[91] The confidentiality agreement between among the parties to the TPP is consistent with this policy.[92]

Information-seekers outside of government (and who do not have privileged access as USTR advisors, discussed below), must rely on the Freedom of Information Act (FOIA) for access to unpublished information about trade negotiations.[93] FOIA grants any person the right to obtain access to federal agency records, and has been a useful tool for improving the transparency of the federal government. [94] FOIA is limited, however, by several exceptions. These exceptions were designed to "reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."[95] First among the exceptions to FOIA's general mandate of disclosure is an exemption for material classified as secret in the interests of national security.[96]

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any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) Information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) Information received and treated as 'foreign government information' under the terms of a predecessor order.

Id. at § 6.1(s).

[91] *See* Goldman, *supra* note 79, at 667.

[92] *See* notes 256-257, *infra*, and accompanying text.

[93] *See* 5 U.S.C. §552 (2012); *see also* Marsha West, Classified Information Policy, Government Transparency, and WikiLeaks, DTTP: DOCUMENTS TO THE PEOPLE, Summer 2013, at 13.

[94] *See, e.g.*, David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws,* 86 TEX. L. REV. 1787, 1797 (2008).

[95] H. Rept. 89-1497 (1966) at 27 ("Clarifying and Protecting the Right of the Public to Information").

[96] 5 U.S.C. §552(b)(1) (2013) (exempting material "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."). FOIA also exempts "trade secrets and commercial or financial information obtained from a person and privileged and confidential" and "inter-agency or

USTR regulations provide for the agency to "generally withhold[] predecisional, deliberative documents and classified trade negotiating and policy documents" pursuant to one or more FOIA exceptions.[97] The USTR has taken the position that disclosure of negotiating documentation, including information about its own policy positions, must be kept secret in order to preserve "the negotiating flexibility of both the United States and our negotiating partners when considering...trade and investment treaties."[98]

USTR has occasionally been sued in response to its decision to withhold documents under one or more FOIA exceptions, including the national security exception.[99] Courts generally give deferential treatment to the executive's designation of national security information.[100] The USTR's conservative approach was recently vindicated by the federal court of appeals for the D.C. Circuit,[101] which reversed a lower court decision that directed USTR to turn over

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intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(4), (5) (2013).

[97] 15 C.F.R. § 2001.4 (2013). It is unsurprising, then, that a report prepared by the USTR's Chief FOIA Officer found that "[t]he majority of FOIA requests [to the USTR] require special handling." Office of the United States Trade Representative, *FOIA Plan Under Executive Order 13,392* (2006), *available at* http://www.ustr.gov/sites/default/files/Office-of-the-US-Trade-Representative-FOIA-Plan.pdf. Executive Order 13,392 required federal agencies to conduct internal audits to assess their FOIA compliance and promote a "citizen-centered and results-oriented approach." Exec. Order No. 13,392, Section 1(d), 3 C.F.R. 216 (2006).

[98] Final Brief for the Appellants, Nov. 27, 2012, Center for International Environmental Law v. Office of the United States Trade Representative, 12-5136 (D.C. Cir.), at 26.

[99] For example, see Brayton v. Office of the United States Trade Representative, 657 F.Supp.2d 138 (D.D.C. 2009). In 2008, the non-profit public interest advocacy organizations Electronic Frontier Foundation and Public Knowledge sued USTR seeking records related to ACTA, then under negotiation. Complaint, Electronic Frontier Foundation v. Office of the United States Trade Representative, 1:08-CV-1599-RMC, Sep. 17, 2008. The plaintiffs ultimately dropped the suit after it became clear that ACTA would likely be concluded (and its terms become public) before the resolution of the litigation. Press Release, EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA (June 17, 2009), *available at* https://www.eff.org/press/archives/2009/06/17 (last visited Jul. 24, 2014).

[100] *See, e.g.*, Center for Nat. Sec. Studies v. U.S. Dept. of Justice, 331 F.3d 918, 927 (D.C.C., 2003). Under this structure, then, it is not surprising that FOIA requests for information withheld under the NSI exception are less likely to succeed than requests that confront other FOIA exceptions. *See* Katt, *supra* note 23, at 694.

[101] Center for International Environmental Law v. Office of the United States Trade Representative, 718 F.3d 899 (D.C.C. 2013).

a contested document under FOIA.[102] In that case, the non-profit Center for International Environmental Law (CIEL) sought a one-page position paper created by the USTR during negotiations over the Free Trade Agreement of the Americas.[103] This document included the United States' initial proposed position on the meaning of the phrase "in like circumstances," which was relevant to how nations would treat foreign investors relative to local or other foreign investors.[104] The USTR classified this document and refused to disclose it pursuant to a FOIA request.[105] The USTR argued that forced disclosure would cause foreign nations to lose trust in the United States and hamper the USTR's ability to negotiate an alternative interpretation of a particular phrase in another setting.[106]

CIEL countered that the risk that foreign governments would lose trust in the United States if USTR was forced to disclose its own negotiating document was unsubstantiated, and further argued that USTR failed to demonstrate that reduced flexibility in future negotiations would harm national security.[107] The district court agreed that USTR had failed to assert a plausible explanation for why disclosure of the document could be expected to harm foreign relations.[108]

On appeal, however, the court focused on the agency's argument that disclosure would restrict its flexibility in negotiating future agreements. "Whether—or to what extent—this reduced flexibility might affect the ability of the United States to negotiate future trade agreements is not for us to speculate," the court wrote.[109] "The question is not whether the court agrees in full with the Trade Representative's evaluation of the expected harm to foreign relations.... Rather, the question is 'whether on the whole record the [a]gency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility.'"[110] The USTR's power to keep its secrets was vindicated.

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[102] Center for International Environmental Law v. Office of the United States Trade Representative, 845 F.Supp.2d 252 (D.D.C. 2012).

[103] *Id.* at 253-254.

[104] *Id.* ("[*I.*]*e.*, when 'national' treatment or 'most-favored-nation' treatment applies." *Id.*

[105] The document was classified pursuant to then-governing Executive Order 12,958 § 1.2(a)(4), which was subsequently revoked by Executive Order 13,526.

[106] Center for International Environmental Law, 845 F.Supp.2d at 255.

[107] *Id.*

[108] *Id.* at 260.

[109] Center for International Environmental Law v. Office of the United States Trade Representative, 718 F.3d 899, 903 (2013).

[110] *Id.* (internal citations omitted) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

C. Private Advisors and Trade Policy

One way that the federal government has sought to improve its policy-making is to seek expert advice outside of its own bureaucracy. The 1972 Federal Advisory Committee Act (FACA) provides for the creation and oversight of the various committees, councils, and other groups that may advise executive branch officers and agencies.[111] Under FACA, advisory committees should only be established when their contribution is found to be "essential,"[112] should convene for limited durations,[113] and are subject to Congressional oversight.[114] FACA also provides that all advisory committee meetings must be open to the public, and the records of each committee must be available for public inspection.[115]

The Trade Act of 1974 further established that the executive branch must seek information and advice from "elements of the private sector" regarding trade negotiating objectives and bargaining positions, the operationalization of trade agreements after their conclusion, and other matters of U.S. trade policy.[116] This advice is procured through the Advisory Committee for Trade Policy and Negotiations, the membership of which is recommended by USTR.[117] There are also currently sixteen Industry Trade Advisory Committees (ITACs) "created to reflect the manufacturing and service sectors of the U.S. economy, as well as issue-oriented matters that cut across all sectors."[118] The mechanisms established by the Trade Act were designed to require "by far the most extensive consultations with the private sector ever undertaken in preparation for trade negotiations."[119]

The work of USTR's advisory committees, however, is itself often not open to public scrutiny. The Trade Act of 1974 also provided that while FACA

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[111] Federal Advisory Committee Act, 5 U.S.C. [Appendix] § 2(a), (b) (2012).

[112] 5 U.S.C. [Appendix] § 2(b)(2).

[113] 5 U.S.C. [Appendix] § 2(b)(3) (2012).

[114] 5 U.S.C. [Appendix] § 5 (2012).

[115] 5 U.S.C. [Appendix] § 10(a), (b) (2012).

[116] 19 U.S.C. §2155(a)(1)(A)-(C) (2012).

[117] 19 U.S.C. §2155(b)(1) (2012). The current membership of the committee is published on the USTR's website, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/advisory-committee-trade-policy-and-negotiati (last visited Jul. 24, 2014) and includes representatives from Congress, private companies, organized labor, think tanks, and non-profit issue-oriented organizations.

[118] UNITED STATES TRADE REPRESENTATIVE, INDUSTRY TRADE ADVISORY COMMITTEES (ITAC), http://www.ustr.gov/about-us/advisory-committees/industry-trade-advisory-committees-itac (last visited Jul. 24, 2014).

[119] *The Trade Reform Act of 1973: Hearings Before the S. Comm. on Finance*, 93rd Cong. 293 (Mar. 5, 1974) (prepared statement of Ambassador William D. Eberle, Special Representative for Trade Negotiations) (*hereinafter* Eberle statement).

applies to both the Advisory Committee for Trade Policy and Negotiations and all other trade advisory committees established for specific industries, these committees are exempt from FACA's requirements related to open meetings, public notice, public participation, and public availability of documents, whenever the executive branch determines that the meetings "will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives, or bargaining positions."[120]

Moreover, public access to an agency's meeting with its advisory committee(s), or information about such a meeting, can be limited or eliminated when the agency properly determines that public disclosure is likely to touch on matters "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order."[121] These exemptions were added "to ensure an effective two-way liaison between the private sector and government which cannot take place if negotiating objectives, tactics and strategy, as well as business confidential information is available to the public in open meetings including the press and representatives of foreign governments."[122]

The USTR may share otherwise secret materials regarding trade agreements and negotiations with its private advisors without triggering any obligation to disclose this material under FOIA.[123] Case law tells us that members of agency advisory committees are not considered members of the public, and therefore an agency's decision to share its information with these committees does not vitiate application of, at least, FOIA's fifth exemption, which limits release of intra-agency material that would not be publicly available short of discovery in litigation.[124] To do so, the Court of Appeals for the D.C. Circuit reasoned, would frustrate the law's intent "to encourage a free and candid exchange of ideas during the process of decision-making and to prevent

[120] 19 U.S.C. §2155(f)(1), (2) (2012).

[121] 5 U.S.C. §552b(c)(1) (2012).

[122] Eberle statement, *supra* note 119, at 292.

[123] *See* David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 116 (2012) ("Today … the public does not get useful information from government whereas private companies do. Thus, private corporate interests largely control the flow of information to USTR.").

[124] In Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 108 (D.C.C. 1976), the D.C. Circuit declined to hold that "the mere disclosure of an intra-agency memorandum to an advisory committee makes the memorandum public information to which exemption five is inapplicable."

predecisional disclosure of incipient policy or decisions that could disrupt agency procedures."[125]

In practice, this arrangement allows USTR to provide "key briefings" and disclose working drafts of agreement text to its private advisors.[126] As the experience of ACTA and the TPP has demonstrated, such selective disclosure opens the door for conflict between stakeholders and challenges to the fundamental fairness of any ensuing agreement.[127]

D. The Role of Congress

While the President and his or her delegates enjoy the power to negotiate treaties, Congress has ultimate Constitutional authority over the regulation of commerce with foreign nations.[128] This relationship exemplifies the contradictions inherent within a government that seeks a democratic distribution of power but also wants effective and efficient leadership in exigent situations.[129] It also gives rise to one of the arguments for why trade negotiations must be conducted in private: the fear that forcing diplomats to negotiate in public would make them more likely to espouse and promote only uncontroversial, popular, or otherwise 'safe' positions and avoid creative approaches.[130]

Congress has repeatedly delegated its authority in this arena in times of financial need. During the Great Depression Congress passed the Trade Act of 1934 which conferred wide powers on the President to enter into foreign trade agreements with the goal of expanding international markets for U.S. goods.[131] In exchange, the law mandated that "Before any foreign trade agreement is concluded with any foreign government ... reasonable public notice of the intention to negotiate an agreement ... shall be given in order that any interested person may have an opportunity to present his views to the President" or his agents.[132] Furthermore, the executive branch was required to consult with the Tariff Commission and with, at least, the departments of State, Agriculture, and

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[125] *Id.* at 107-108.

[126] *See* Yu, *supra* note 14, at 1012 (describing application of this practice in the development of ACTA); Goldman, *supra* note 79, at 672-674.

[127] *E.g.*, Yu, *supra* note 14, at 1012-1013.

[128] U.S. CONST. art. I, §8, cl. 3.

[129] "The executive champions functional utility. The demos argues for the supremacy of the democratic process." Franck & Weisbrand, *supra* note 25, at 4.

[130] *See, e.g.*, Katt, *supra* note 24, at 691 (citing examples). Secret negotiations, of course, can just as easily shield diplomats making unoriginal or poor decisions, or acting at the behest of self-interested advisors.

[131] Pub. L. 73-316, 48 Stat. 943 (1934).

[132] *Id.* at § 4.

Commerce, before finalizing any agreement.[133] What the law lacked, however, was any mechanism to convey the substance of a potential agreement to the public, making meaningful input unlikely.[134]

With each extension of the 1934 Act, however Congress added guidelines and other restrictions on Presidential autonomy in trade negotiations.[135] This shifting division of power risked creating uncertainty among negotiators (will Congress sign off on the President's deal?) and delay (if Congress does sign off, how long will it take to ratify the agreement)?[136] To address these issues, the so-called Fast Track process was introduced as part of the Trade Act of 1974, which dramatically changed the American approach to concluding trade deals.[137] The law granted the President new authority to negotiate agreements affecting nontariff barriers, such as subsidies, quality standards, labeling and health and safety regulations.[138] Congress would set guidelines and negotiating objectives for the Executive branch, which in turn would be required to consult with Congressional committees and private advisors.[139] In exchange, the Executive branch would be assured of a simple yes-or-no vote on any resulting legislation, to which no amendments or other changes would be permitted.[140]

Fast Track was renewed multiple times[141] and the process was used to negotiate and implement the Tokyo round of the GATT, the Canada-US Free Trade Agreement, and the North American Free Trade Agreement (NAFTA).[142] The 1991 renewal legislation was hotly contested, however, functioning as "an early referendum" on the development of NAFTA, then in progress.[143] Fast Track expired in 1994, when it was excluded from the implementing legislation

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[133] *Id.*

[134] *See also* Brian J. Schoenborn, *Note, Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?* 4 MINN. J. GLOBAL TRADE 103, 108-109 (1995).

[135] *See* Laura L. Wright, *Trade Promotion Authority: Fast Track for the Twenty-First Century?*, 12 WILLIAM & MARY BILL OF RIGHTS J. 979, 984 (2004).

[136] *See* 1 CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL D. WATKINS, CASE STUDIES IN U.S. TRADE NEGOTIATION 193 (2006).

[137] *See* Pub. L. 93-618, 88 Stat. 1978 (1975), § 151 *et seq.*; *see also* Wright, *supra* note 135, at 984.

[138] *See* Wright, *supra* note 135, at 984 n. 47.

[139] *See* 88 Stat. 1978 at §135.

[140] *See id.* at § 151(d).

[141] The law was renewed in 1979, 1984, 1988, and 1991. *See* Trade Agreements Act of 1979, P.L. 96-39, 93 Stat. 144; Trade and Tariff Act of 1984, P.L. 98-573, 98 Stat. 2948; Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107; *see also* DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 195-197 (regarding "renewal" of Fast Track in 1991).

[142] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 194.

[143] *See id.* at 195.

for the Uruguay round of the GATT, passed the same year.[144] An effort the following year faced bipartisan opposition and also failed.[145] Despite repeated attempts, the Clinton administration was unable to renew Fast Track, which hampered its ability to negotiate new trade deals.[146] It was not until 2002 that Congress restored a Fast-Track-style arrangement, rebranded as Trade Promotion Authority (TPA).[147]

Fast Track was, at least from the early-1990s, a source of concern to open-government advocates.[148] Such objections generally rested on Fast Track's self-imposed limits on Congressional procedure (such as formally eliminating committee deliberations, amendments, and filibuster), and the potential lack of accountability for specific provisions engendered by the up-or-down voting requirement.[149] In a 1992 analysis of Fast Track and its opponents, Professor Harold Koh noted that this "democracy objection," unlike complaints about the substance of trade agreements themselves, "go to the very nature of the Fast Track procedure itself. Hence, it can and almost certainly will be heard again."[150]

TPA was not renewed in 2007.[151] Its absence is sorely felt among proponents of new trade agreements like the TPP, who fear that without clear

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[144] *See id.* at 201-202.

[145] *See id.* at 203-204.

[146] *E.g.*, Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts,* 1 LOY. INT'L L. REV. 121, 127 (2004) (describing how, in the absence of Fast Track authority, the United States' ability to negotiate the FTAA was "completely hamstrung.").

[147] *See* Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801-3813 (2012). In the wake of the terrorist attacks of September 11, 2001, the Bush administration argued that the U.S. should "counter terror with trade," and that delegating negotiating authority to the executive branch would enable USTR to "build a coalition of countries that cherish liberty in all its aspects." Robert Zoellick, *Op-Ed., Countering Terror with Trade,* WASH. POST, Sept. 20, 2001, at A35.

[148] *See* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOKLYN J. INT'L L. 143, 161 (1992). Twenty years later Professor Koh, while on leave from Yale Law School to serve as Legal Adviser to the State Department, was the one to advise Senator Ronald Wyden that the Executive branch had determined that it was authorized to conclude and accept ACTA pursuant to the 2008 PROTECT-IP Act. Letter from Harold Hongju Koh, Legal Adviser, Dept. of State, to Sen. Ron Wyden (Mar. 6, 2012), *available at* http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf (last visited Jul. 24, 2014).

[149] *See* Koh, *supra* note 148, at 163-169.

[150] *Id.* at 162.

[151] The expiration of TPA before the conclusion of ACTA is likely the reason that the USTR initially insisted that ACTA was negotiated as a sole executive agreement (without need for implementing legislation) and eventually pinned its authority on the

lines of authority and the promise of expeditious treatment in Congress, new trade deals will wither on the vine.[152] New TPA bills are currently pending in the House and Senate.[153] Notably, the "Bipartisan Congressional Trade Priorities Act of 2014" calls for USTR, in consultation with the leaders of the House Ways and Means committee and the Senate Finance committee, to develop written guidelines for public access to information regarding trade negotiations conducted under the law's auspices.[154]

V. Information Access and International Trade Case Studies

The following section will describe how disputes over transparency, including in the negotiation of four different trade agreements from the mid-nineties to the present, have contributed to the current conflict over access to information in the creation of trade law.

A. The Multilateral Agreement on Investment

The Multilateral Agreement on Investment is the first example of how a real or perceived lack of transparency can create political liability in the information age. In recent decades, some trade agreements have sought compromise on rules governing international investment, as investment is often complementary to trade.[155] The North American Free Trade Agreement, for example, specified rules to liberalize investment between its member countries, as well as a private enforcement mechanism for those rules.[156] Since the 1980s, hundreds of bilateral

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2008 PROTECT-IP Act (Pub. L. 110-403, 122 Stat. 4266 (2008), *codified at* 15 U.S.C. 8113(a) (2012)).

[152] *See, e.g.*, The Trans-Pacific Partnership: Opportunities and Challenges: Hearing Before the Senate Comm. on Finance, 113th Cong. 4 (Apr. 24, 2013) (statement of Sen. Orrin Hatch, Member, S. Comm. on Finance), 14 (colloquy between Sen. Hatch and witness Hon. Karan Bhatia); *The Trans-Pacific Partnership Agreement: Challenges and Potential: Hearing Before the Subcomm. On Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Affairs,* 112th Cong. 5 (May 17, 2012) (statement of Rep. Edward Royce, Member, H. Comm. on Foreign Affairs); 15 (testimony of witness Linda Menghetti).

[153] Bipartisan Congressional Trade Priorities Act of 2014, H.R. 3830, 113th Cong. (2014); Bipartisan Congressional Trade Priorities Act of 2014, S.1900, 113th Cong. (2014). The bills are identical.

[154] H.R. 3830 § 4(d)(1)(A).

[155] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 136.

[156] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), Ch. 11 (*also available at* http://www.sice.oas.org/trade/nafta/chap-111.asp).

investment treaties have forged ties between developed and developing nations, including over forty to which the U.S. is a party.[157]

In the mid-90s, negotiators began work on a multilateral agreement on investment, known as the MAI, which would replace the network of bilateral investment treaties and establish a common system.[158] The United States, as the largest investor and recipient of foreign investment, lobbied actively for such an agreement to be put into place.[159]

The MAI was negotiated within the Paris-based Organization for Economic Cooperation and Development, a relatively low-profile international institution dedicated to law-making, directed research, and "the creation of communities of influence that set the agendas of international policy."[160] Its membership included most of the world's most affluent nations and some developing countries.[161] Negotiations on the MAI began in 1995.[162] Participation in the talks was limited, however, and some parties were concerned that excluding the majority of developing countries would stall acceptance of an accord. According to a *Wall Street Journal* report, the negotiating countries intended to seek some participation from "strong non-member economies" such as South Korea, Singapore, and Taiwan, and later confer with other nations, including China, India, South Africa, and Israel.[163] Sir Leon Brittan, the top trade negotiator for the European Commission, suggested that there should be parallel

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[157] *See* TRADE AGREEMENTS COMPLIANCE PROGRAM, OFFICE OF TRADE NEGOTIATIONS AND COMPLIANCE, U.S. DEPT. OF COMMERCE, BILATERAL INVESTMENT TREATIES, http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/exp_002640.asp (last visited Jul. 24, 2014); *see also* DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 137.

[158] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 140-141.

[159] *Id.* at 141.

[160] James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 773 (2000).

[161] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 149. The OECD member nations, as of the spring of 1995, were Australia, Austria, Belgium, Britain, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the U.S. See ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MEMBERS AND PARTNERS, http://www.oecd.org/about/membersand partners/list-oecd-member-countries.htm (last visited Jul. 24, 2014). Today the membership also includes Chile, the Czech Republic, Estonia, Finland, Hungary, Israel, Korea, Poland, the Slovak Republic, and Slovenia. *Id.*

[162] *See OECD Negotiations Begin on Multilateral Agreement on Investment,* AGENCE EUROPE, Oct. 4, 1995.

[163] Eduardo Lachica, *OECD Nations Ask Outsiders to Join Investment Treaty,* WALL ST. J., Nov. 9, 1995, at A17.

negotiations in the WTO, with its far larger membership, "in order to involve the developing countries and not to present a treaty to them as a fait accompli."[164]

In January 1997, the OECD Secretariat had produced a first draft of the MAI.[165] Before that draft was distributed, however, a Canadian citizen's group acquired and released a working draft of the agreement not intended for publication.[166] In April, the draft agreement was parsed on the front page of Canada's *Globe and Mail* newspaper.[167] Many groups cheered the leak "as the first step in tearing down the wall of secrecy cloaking the talks."[168] The leaked document spread widely online, increasing awareness of the negotiations among politicians and other NGOs.[169] Its usefulness, however, was limited by its shady origins. In the words of one negotiator:

> The OECD, like the WTO, has a policy of restricting certain documents, and who knows, maybe the days are numbered for that process. So suddenly, this document appeared on the Internet—everybody had a copy. It was complicated by the fact that it did not remain the right version for long. At each monthly meeting, pieces of the text were renegotiated intensively while the NGOs were still wanting to talk about this document that was no longer relevant.[170]

The MAI's critics were a mixed group, including major labor unions, the Sierra Club, and the Western Governors' Association.[171] These organizations shared concerns about how the MAI could allow business interests to curtail national sovereignty and elevate "the rights of investors above those of governments, local communities, citizens, workers and the environment."[172] The

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[164] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 155. The United States, however, did not support this position. *Id.*

[165] *Id.* at 161.

[166] *Id.* The U.S. group Public Citizen also obtained a copy of the leaked draft, "replete with contradictions," and helped speed its spread online. *See* Stephen J. Kobrin, *The MAI and the Clash of Globalizations,* FOREIGN POLICY, Fall 1998, at 98.

[167] *See* Laura Eggertson, *Treaty to Trim Ottawa's Power: Equal Treatment Rules for Foreign Firms Could Limit Research, Job-Creation Targets*, GLOBE & MAIL (Canada), Apr. 3, 1997, at A1.

[168] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 161.

[169] *Id.* at 162.

[170] *Id.* at 161-162.

[171] *See* Kobrin, *supra* note 166, at 98.

[172] JOINT NGO STATEMENT ON THE MULTILATERAL AGREEMENT ON INVESTMENT (Oct. 27, 1997), *available at* http://www.gp.org/position/mai.shtml (hereinafter JOINT NGO STATEMENT); WESTERN GOVERNORS' ASSOCIATION, MULTILATERAL AGREEMENT ON INVESTMENT: POTENTIAL EFFECTS ON STATE & LOCAL GOVERNMENT (1997). The Western Governors' Association report concluded that the MAI "may protect investors by curtailing both sovereign powers and sovereign immunity." *Id.*

leak of the draft agreement also triggered wider dismay over the exclusivity and secrecy of the negotiations. A Canadian House of Commons trade subcommittee issued a critical report recommending that in the future, "the government should undertake an open and transparent process so that public disclosure and consultations can be carried out in a timely manner, to the extent that this is strategically possible."[173]

Margrete Strand, of Public Citizen's Global Trade Watch, noted that there had been selective access afforded to the business community, which was particularly offensive: "The fact that business had a seat at the table and we didn't—I think it raised the stakes and got both NGOs and activists incredibly angry. Whatever happened to democracy?"[174] Yet even after the negotiations came under scrutiny from activists, largely online, the MAI received scant attention from major news outlets in the U.S., marginalizing the agreement's detractors. By the end of 1997, as one commenter noted, "neither *The New York Times*, *The Washington Post*, *The Christian Science Monitor*, nor *The Los Angeles Times* has devoted a full news story to [the MAI]. Many in Congress complain they have been left in the dark. A State Department spokesman dismisses the people pummeling the MAI on the Internet as 'the flat earth and black helicopter crowd.'"[175]

OECD negotiators were surprised by the negative response. They also disputed that the talks were secretive or exclusive. Rainer Geiger, an OECD deputy director, suggested that "In hindsight, the participating governments made a mistake in negotiating within tightly set deadlines without exposing key concepts of the agreement to public debate at an early stage."[176] He argued, however, that "Public information was available early in the process and business and trade unions were informed and consulted through their advisory bodies at OECD. Nonmember countries were aware of the MAI negotiations through regular briefings after each meeting of the Negotiating Group and were consulted through regional meetings held in Latin America, Asia, and Africa."[177]

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[173] Heather Scoffield, *Ottawa Chided for Secrecy in Trade Talks*, GLOBE & MAIL (Canada), Dec. 12, 1997, at B6.

[174] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 163.

[175] Peter Beinart, *The Next NAFTA*, NEW REPUBLIC, Dec. 15, 1997, at 45.

[176] Rainer Geiger, Toward a Multilateral Agreement on Investment, 31 CORNELL INT'L L.J. 467, 474 (1998)

[177] *Id.*; *see also* William Crane, *Note, Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment,* 9 COLO. J. INT'L L. 429, 437 (1998) (describing OECD meetings with investment policy officials at workshops and symposia in 1997).

The talks had been announced at their initiation, although the announcement received little media attention.[178] Yet the public was not, as a general matter, welcome to attend or observe OECD meetings.[179] Furthermore, at the time, OECD internal documents could not be publicly released without "derestriction," or approval from all Member countries.[180] This process afforded the OECD's working papers the ability to "be quite explicit with pointed recommendations and detailed case studies. As a result, internal drafts may differ from public OECD documents. Derestriction can sometimes result in lengthy internal negotiations prior to publication (and some contentious reports are never published)."[181] Moreover, "[t]hese restrictions on documents prevent the public from tracking the development of the OECD's policies, which in turn diminishes the public's ability to influence international trade decision-making."[182]

In May 1997, the negotiations were extended for one year with instructions from OECD to consult with "civil society."[183] Later that year, the OECD held informal discussions with representatives from about 50 NGOs.[184] The discussions were not productive; the NGOs subsequently released a statement promising to campaign against the MAI unless substantive changes were made.[185] The statement specifically requested that the OECD "Increase transparency in the negotiations by publicly releasing the draft texts and individual reservations and by scheduling a series of on going [sic] public meetings and hearings in both member and non member [sic] countries, open to the media, parliamentarians and the general public."[186]

By 1998 the OECD had established an official website for its work on the MAI, including the agreement's mandate, annual reports from the MAI negotiating group, the draft text, and a list of frequently asked questions.[187]

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[178] *See OECD Negotiations Begin on Multilateral Agreement on Investment,* AGENCE EUROPE, Oct. 4, 1995; DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 168.

[179] *See* Housman, *supra* note 46, at 717 (writing in 1994 that "[t]he public is also restricted from attending most OECD meetings. OECD ministerial meetings are closed to everyone but the delegations of its members.").

[180] Salzman, *supra* note 160, at 778; Housman, *supra* note 46, at 716.

[181] Salzman, *supra* note 160, at 778.

[182] Houseman, *supra* note 46, at 716.

[183] DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 167.

[184] *Id.* at 167.

[185] JOINT NGO STATEMENT, *supra* note 172.

[186] *Id.*

[187] Although the original OECD website for the MAI is no longer live, it may be viewed (circa 1998) via the Wayback Machine on Archive.org, using the following URL: http://www.oecd.org/daf/cmis/mai/reports.htm. *See also* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MULTILATERAL AGREEMENT ON INVESTMENT:

These efforts were insufficient, however, to make up for the agreement's poor first impression. In the spring of 1998 the OECD announced that negotiators would take a six-month pause to allow "for consultation among the parties 'with interested parts of their societies.'"[188] No further work was done on the agreement and negotiations formally ceased in December 1998.[189] While the well-organized and internet-savvy NGOs were not the sole cause of the MAI's failure, their protest and their focus on transparency played an important role in undermining the agreement.

Although the MAI negotiations failed to produce a comprehensive, high-quality agreement on the regulation of foreign direct investment, the process did spur changes in information handling within OECD. In July 1997, the OECD Council repealed its thirty five-year-old document classification policy, opting to consider information unclassified until determined otherwise.[190]

B. Transparency at the WTO

With the benefit of hindsight, it is somewhat ironic that early critics of the MAI negotiation process held hopes that negotiations at the WTO would be less likely to engender conflict. Within just a few years, the WTO would be synonymous with public protest.

Like the GATT, the WTO's goal has been to provide for competitive, predictable, and non-discriminatory trade between nations through agreements, monitoring, and dispute resolution.[191] While it has functioned well as a check on national protectionism, it has also been denounced by some outside groups

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DOCUMENTATION FROM THE NEGOTIATIONS, *available at* http://www1.oecd.org/daf/mai/htm/2.htm (last visited Jul. 24, 2014).

[188] Kobrin, *supra* note 166, at 98.

[189] *See* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MULTILATERAL AGREEMENT ON INVESTMENT: DOCUMENTATION FROM THE NEGOTIATIONS, *available at* http://www1.oecd.org/daf/mai/intro.htm (last visited Jul. 24, 2014).

[190] Organisation for Economic Cooperation and Development, Council Resolution on the Classification and Declassification of Information, C(97)64/REV1/FINAL (Jul. 4, 2008). Note that, within OECD, "declassification should not be confused with the dissemination or wider distribution of material. There is no obligation to distribute material, whether *Unclassified* at origin or subsequently declassified." OECD, Council Resolution on the Classification and Declassification of Information, C(97)64/FINAL Annex, *Guidelines for Implementation*, para. 9. "The question of the wider dissemination of the material, whatever form it may take ... is a separate issue, to be addressed in the context of the Organisation's overall information and publications policy." *Id.* at para. 10.

[191] *See* WORLD TRADE ORGANIZATION, WHAT IS THE WTO? WHAT WE DO, http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (last visited Jul. 24, 2014). The WTO has in large part realized a foundational goal to become a "virtual treaty machine[]." Alvarez, *supra* note 25, at 221.

arguing that it lacks accountability and "is merely a front for multinational corporations and dehumanizing capitalist values."[192] Conservative scholar Claude Barfield characterized the WTO's loudest NGO critics as "politically and rhetorically powerful 'citizen activists,'" many of which "directly challenge the predominant capitalist beliefs of wealth creation."[193] The WTO's 1999 Ministerial in Seattle was famously disrupted by large-scale protests.[194] The secrecy of the organization's proceedings was an especially sore point, such that even President Bill Clinton remarked that "'the sooner the W.T.O. opens up the process of rule-making to outside groups, 'we'll see less demonstrations and more constructive debate.'"[195] Shortly after its formation, the WTO adopted procedures for offering limited public access to its documents.[196]

Initially, all WTO working documents were derestricted only upon adoption of the a final report or decision, or were considered for derestriction six months after having been circulated to WTO-member's delegations, whichever came earlier.[197] After the debacle in Seattle, WTO members changed the policy to expand public access to their documents.[198] The current regime calls for all official WTO documents to be unrestricted by default, subject to various exceptions (such as the minutes of meetings, which are restricted but subject to automatic derestriction 45 days after circulation).[199]

The role of NGOs within the WTO remains less than satisfactory for both sides. In a 2012 working paper, the WTO's Economic Research and Statistics Division concluded that the WTO had done all that it could to engage

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[192] Barfield, *supra* note 78, at 403 (2001).

[193] *Id.* at 405.

[194] *See* Same Howe Verhovek & Steven Greenhouse, *National Guard is Called to Quell Trade-Talk Protests; Seattle is Under Curfew After Disruptions*, N.Y. TIMES, Dec. 1, 1999, at A14.

[195] David E. Sanger, *Talks and Turmoil: The Overview; President Chides World Trade Body in Stormy Seattle*, N.Y. TIMES, Dec. 2, 1999, at A1.

[196] Elizabeth Smythe & Peter J. Smith, *Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics*, GLOBAL GOVERNANCE, Jan.-Mar. 2006, at 41.

[197] *See* World Trade Organization, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/160/Rev.1 (2006).

[198] Maria Perez-Esteve, WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations, World Trade Organization Staff Working Paper, ERSD-2012-14 at 7 (2012). The WTO's website is the primary access point for its official documents; traffic on the site increased significantly after the Seattle ministerial. *See* Smythe & Smith, *supra* note 196, at 42.

[199] *See* World Trade Organization, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452 (2002).

with civil society groups within the limits of its mandate and organizational structure.[200]

> Although nobody contests the added value that greater participation of NGOs would bring to the work of the WTO including, [sic] additional information and technical expertise, on-the-ground experience, perspectives that transcend national interests in dealing with economically and politically sensitive issues, and enhanced accountability of the WTO to the public at large, there are certain WTO members that challenge NGOs' direct involvement in the WTO, particularly in the decision-making process.... The reluctance to reconsider WTO procedures on relations with NGOs and civil society actors is due to a lack of consensus among Members.[201]

Instead, the paper suggests that NGOs can most effectively influence trade policy formulation at the WTO by lobbying its constituent governments; "[t]his practice has enabled NGOs to provide governments with expertise, training and policy advice at different levels."[202] This presumes, however, that NGOs will have greater access to relevant information about decision-making at the national level. As the FTAA, ACTA and TPP negotiations demonstrate, this may not always be the case.

C. The Free Trade Area of the Americas

The Free Trade Area of the Americas began at a meeting of presidents from western hemisphere nations in 1994.[203] As originally conceived, the FTAA

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[200] *See* Perez-Esteve, *supra* note 198, at 3.

[201] *Id.* This lack of consensus may be attributable in part to power imbalances among the WTO's member states, and the potential for some member states to fear further marginalization from outside groups. Smythe and Smith have noted that certain "developing country members, such as India and Malaysia, see increased transparency as a stalking horse for powerful, primarily Northern members.... The lack of progress on fairly basic principles of transparency in decisionmaking procedures reflects enormous challenges ahead to reform internal processes, made more urgent with the increased membership and huge majority of developing countries [in the WTO]." Smythe & Smith, *supra* note 196, at 45; *see also* Barfield, *supra* note 78, at 405-406 ("Though many NGOs are local and small, the environmental and consumer groups that have taken the lead in challenging the WTO and the doctrine of free trade have very large budgets and payrolls and operate in many countries....These formidable resources mean that the largest and most powerful NGOs can heavily outmatch the resources that many members of the WTO can bring to bear...").

[202] Perez-Esteve, *supra* note 198, at 25.

[203] *See* DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY & PRACTICE 263 (2009).

would be based on NAFTA and would create a free trade area for goods and services, agriculture, investment, IP, government procurement, competition rules, and dispute resolution stretching from Alaska to Tierra del Fuego.[204] It would weave together the seven regional trade agreements and over 25 bilateral trade agreements then existing between the participating countries.[205]

After several initial discussion rounds, academics and NGOs representing organized labor and environmental interests were invited to contribute to the FTAA ministerial held in Toronto in 1999.[206] The experience, unfortunately, contributed "little real dialogue."[207] A Committee of Government Representatives on the Participation of Civil Society was created to receive and distribute submissions from interested parties.[208] From 1998 to 2002, however, the Committee "seemed to serve as little more than a post office box" for civil society groups.[209] The process was criticized as being "undifferentiated (it dealt with all issues that may arise from civil society without specialization), unidirectional (comments were a one-way street with no response from government and no dialog), and superficial (no depth of expertise was expressed or implied in the committee itself)."[210] The Committee eventually took it upon itself to broaden its role, holding periodic "issue meetings" and even becoming "something of an advocate for integrating citizens in the administration of the FTAA."[211]

Meetings of the ministers negotiating the agreement were routinely met with demonstrations. In addition to "the usual protests, riots and tear gas that have marked every major trade meeting since the World Trade Organization's disastrous ministerial in Seattle in 1999,"[212] protesters specifically demanded the release of the draft agreement, arguing that the negotiations were "undemocratic and secretive."[213]

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[204] *See id.*; Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts*, 1 LOY. INT'L L. REV. 121, 121-122 (2004). All nations in the western hemisphere, excluding Cuba, were represented.

[205] Kennedy, *supra* note 204, at 122.

[206] Eric Dannenmaier, *Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*, 27 FORDHAM INT'L L.J. 1066, 1089 (2004).

[207] *Id.*

[208] Kennedy, *supra* note 204, at 126-127; *see also* Dannenmaier, *supra* note 206, at 1080-1081.

[209] Dannenmaier, *supra* note 206, at 1081.

[210] *Id.*

[211] *Id.* at 1081-1082.

[212] Helene Cooper, *Officials Plan to Disclose Draft on Pan-American Free Trade Talks*, WALL ST. J., Apr. 9, 2001, at A4.

[213] *Dozens of Anti-Free Trade Protesters Arrested in Ottawa*, DOW JONES INT'L NEWS, Apr. 2, 2001, 7:44 PM GMT.

> In a slow, methodical routine, protesters approached the barricades [surrounding Canada's International Trade Department] two at a time and read out a statement about why they want the text released. They then climbed over the metal blockades and sat down on the grass, ignoring police demands that they retreat. In a scene repeated many times, police dragged the demonstrators away.[214]

Days later, after repeated protests and presumably some internal wrangling, ministers from all 34 participating countries reached consensus on making the negotiating text public.[215] Calling the publication "an unprecedented effort to make international trade and its economic and social benefits more understandable to the public," United States Trade Representative Robert Zoellick added that "This is an important step in an international trade negotiation—to make public at such an early stage the text under negotiation ... we believe that the availability of the text will increase public awareness of and support for the FTAA."[216]

The initial and subsequent drafts were published on a website created for the nascent agreement.[217] In addition to issuing a press release, the USTR published a notice and request for comment on the draft in the *Federal Register*.[218] Many of the most important provisions, however, were bracketed, indicating that the parties had not agreed to the language.[219] No interpretation was included that might identify the technical issues that prompted the bracketing.[220] This meant that the disclosed text was disappointingly hypothetical.[221]

Unlike representatives from industry, civil society groups struggled to gain an in-person audience with FTAA negotiators for most of the time that the agreement was in play.[222] In November 2003, however, NGO representatives

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[214] *Id.* ("Protest organizers said earlier that they would attempt to retrieve the draft text from the Foreign Affairs and International Trade Building.").

[215] *See* Cooper, *supra* note 212, at A4.

[216] Press Release, United States Trade Representative, USTR Zoellick Says Publication of Free Trade Area of the Americas (FTAA) Will Help Explain Trade Benefits (Jul. 3, 2001).

[217] *See* ALCA-FTAA-ZLEA OFFICIAL WEBSITE, DRAFT FTAA AGREEMENT, *available at* http://www.ftaa-alca.org/ftaadrafts_e.asp (last visited Jul. 24, 2014; site last updated on June 21, 2006).

[218] 66 Fed. Reg. 36614 (July 12, 2001).

[219] *See* Kennedy, *supra* note 204, at 128. ("Although I have not actually counted, I have heard that there are over 7,000 brackets in the draft text.").

[220] Dannenmaier, *supra* note 206, at 1082-1083. The USTR did publish "[o]verall U.S. Government positions on the substantive areas covered by the FTAA negotiations" on its website. *See* 66 Fed. Reg. 36614 (July 12, 2001).

[221] Dannenmaier, *supra* note 206, at 1083.

[222] *Id.* at 1085.

were for the first time invited inside the "hard security perimeter" at the Eighth Meeting of Trade Ministers of the Americas in Miami to communicate directly with negotiators.[223] By that point, however, things were not looking good for the FTAA. Its negotiation had overlapped with the WTO's Doha development round, which collapsed when the participants could not agree on thorny issues like investment and competition policy.[224] Brazil and the United States did not agree on the scope of the agreement.[225] The negotiations were eventually suspended in 2004.[226]

While transparency issues emerged during the FTAA negotiations, they did not play the role in shaping the historical narrative about the agreement that they did in the case of the MAI. Ironically, because of the voluntary release of the draft agreement at a mid-point of negotiations, the FTAA is now more likely to be cited as a positive example of transparency in action.[227]

D. The Anti-Counterfeiting Trade Agreement (ACTA)

The Anti-Counterfeiting Trade Agreement is a multilateral agreement focused specifically on intellectual property enforcement measures in the context of international trade.[228] The USTR participated in the negotiations and signed the final agreement on behalf of President Obama in October 2011.[229] While it was being negotiated, however, ACTA became increasingly controversial. This was in large part attributable to the secrecy with which it was negotiated.[230] After a draft of the agreement was leaked in early 2010, it came under intense scrutiny

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[223] *Id.* at 1104-1105.

[224] *See, e.g.*, Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573, 578-579 (2010).

[225] *See* GANTZ, *supra* note 203, at 266-268. As an aside about the importance of looking at such agreements in context: shortly before the talks were suspended, Brazilian Ambassador Adhemar Bahadian was quoted in a newspaper comparing the FTAA to "a stripper in a cheap cabaret. At night under dim lights, she is a goddess. But in the daytime she is something different. Maybe not even a woman." *Id.* at 268.

[226] *See id.* at 269.

[227] *See* notes 304-306, *infra*, and accompanying text.

[228] *See* Kimberlee Weatherall, *Three Lessons from ACTA and Its Political Aftermath,* 35 SUFFOLK TRANSNAT'L L. REV. 575, 575 (2012). ACTA was negotiated by the United States, Japan, Australia, twenty-seven countries within the European Union, Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco, and Mexico. *Id.*

[229] *See id.* at 575; UNITED STATES TRADE REPRESENTATIVE, ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), http://www.ustr.gov/acta (last visited Jul. 24, 2014).

[230] *See* Weatherall, *supra* note 228, at 576-577; Margot E. Kaminski, *The U.S. Trade Representative's Democracy Problem: The Anti-Counterfeiting Trade Agreement (ACTA) as a Juncture for International Lawmaking in the United States,* 35 SUFFOLK TRANSNAT'L L. REV. 519, 529 (2012).

from civil society groups concerned that its provisions were inconsistent with existing IP laws, particularly those in the U.S. and European Union.[231]

After announcing its intention to participate in ACTA negotiations, USTR proceeded with minimal contact with the public. [232] Aside from the occasional press release, USTR was a black box. The "cloak-and-dagger aura" of the talks fueled fears and rumors about the agreement's contents.[233] Newspapers published stories suggesting that the agreement would give customs officials the right to search travelers' laptops and mobile phones for illegally-downloaded content, and expose internet service providers and social media sites to new liabilities for user content.[234] The exclusion of developing nations thought to be IP-infringers created additional tension.[235] An email eventually turned over by USTR in partial response to a FOIA request revealed that the lead negotiator was not terribly sympathetic to the concerns of outsiders; he offered suggestions for appeasing NGOs as "possible ingredients" in a "transparency soup."[236]

The public outcry over the secrecy of the negotiations reached such a volume that the chairman of the Motion Picture Association of America (an organization staunchly in favor of strong IP protections, as well as a member of USTR's intellectual property ITAC[237]) wrote to the USTR in November 2009 urging him to provide "meaningful opportunities for the public to provide input."[238] In March and September 2010, the European Parliament issued

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[231] Weatherall, *supra* note 228, at 577.

[232] Press Release, United States Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007) (available at http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes). The USTR did post an initial solicitation for public comment regarding the U.S. agenda for ACTA in the Federal Register in February 2008. *See* 73 Fed. Reg. 8910 (Feb. 15, 2008). The USTR also held a two-hour public meeting "to inform stakeholders about ACTA and to receive comments from stakeholders about their views regarding this initiative" later that year. 73 FED. REG. 51860 (Sept. 5, 2008).

[233] Yu, *supra* note 14, at 998.

[234] *See, e.g.*, *Security Talks Prompt Laptop Fears*, CANBERRA TIMES, Jul. 6, 2008, at A28; Aislinn Simpson, *Customs Officials May Check iPods*, DAILY TELEGRAPH (London), Jul. 11, 2008, at 6.

[235] *See* Weatherall, *supra* note 228, at 577.

[236] Email from Stanford McCoy, Assistant U.S. Trade Representative for Intellectual Property and Innovation, to Elizabeth Baltzan *et al.*, Feb. 10, 2009, 4:29 PM, *available at* http://keionline.org/sites/default/files/stand_mccoy_transparency_soup.pdf (last visited Jul. 24, 2014); *see also* David S. Levine, *Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking,* 26 AM. U. INT'L L. REV. 811, 813-814 (2011).

[237] *See* U.S. INT'L TRADE ADMINISTRATION, INDUSTRY TRADE ADVISORY COMMITTEE ON INTELLECTUAL PROPERTY, ITAC 15, http://ita.doc.gov/itac/committees/itac15.asp (last visited Jul. 24, 2014).

[238] Yu, *supra* note 14, at 999.

statements on the lack of a transparent process for concluding the agreement and called for the immediate publication of all documents related to the negotiations.[239] This was shortly after the crucial Internet chapter of the draft agreement was leaked online,[240] and just days before a leak of the chapters on international cooperation and institutional issues.[241] The negotiating parties eventually agreed to publish the draft text officially in April 2010, but without indication of country positions on bracketed issues.[242] Eight months later the USTR published a request for written comments on the text in the Federal Register but noted that the negotiations were concluded and that the text was final.[243]

As David Levine has pointed out, the USTR insisted on a level of secrecy during the ACTA negotiations unmatched by any of the major IP treaty bodies, including the World Health Organization, the World Trade Organization, and the United Nations Commission on International Trade Law.[244] Yet, despite seeking a strictly closed-off negotiating space, USTR and its counterparts needed over three years to reach an agreement.[245] "[T]he fact that WIPO and WTO are more transparent, yet have been able to facilitate the conclusion of major recent international IP agreements in comparable or less time than ACTA," he

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[239] *See* European Parliament Resolution of 10 March 2010 on the Transparency and State of Play of the ACTA Negotiations, P7_TA(2010)0058 (Mar. 10, 2010); Declaration of the European Parliament of 9 September 2010 on the Lack of a Transparent Process for Anti-Counterfeiting Trade Agreement (ACTA) and Potentially Objectionable Content, P7_TA(2010)0317 (Sept. 9, 2010).

[240] *E.g.*, Nate Anderson, *World, Get Ready for the DMCA: ACTA's Internet Chapter Leaks*, ARS TECHNICA (Feb. 22, 2010, 2:23 PM EDT), http://arstechnica.com/tech-policy/2010/02/world-get-ready-for-the-dmca-actas-internet-chapter-leaks/.

[241] Cory Doctorow, *New ACTA Leak: It's a Screwjob for the World's Poorest Countries*, BOINGBOING (Mar. 19, 2010, 9:02 AM), http://boingboing.net/2010/03/-19/new-acta-leak-its-a.html.

[242] *See* International Centre for Trade and Sustainable Development, *Under Scrutiny, ACTA Negotiators Release Draft Text*, BRIDGES, Apr. 21, 2010, *available at* http://www.ictsd.org/bridges-news/bridges/news/under-scrutiny-acta-negotiators-release-draft-text.

[243] 75 Fed. Reg. 79069 (Dec. 17, 2010). Note that the USTR did publish an earlier version of the text on its website in April 2010. *See* UNITED STATES TRADE REPRESENTATIVE, PREVIOUS ACTA TEXTS, http://www.ustr.gov/trade-topics/intellectual-property/anti-counterfeiting-trade-agreement-acta/previous-acta-texts (last visited Jul. 24, 2014).

[244] Levine, *supra* note 236, at 831.

[245] The agreement was first proposed by Japan in 2005, and the US formally joined negotiations in 2007. *See* Yu, *supra* note 14, at 980-984. The agreement went through eleven rounds of negotiations and was signed in October 2011. Weatherall, *supra* note 228, at 575.

concluded "challenges the notion that secrecy inevitably leads to a streamlined and efficient negotiating process in IP lawmaking."[246]

The controversy surrounding ACTA's formative years has indelibly tainted the agreement, as even today it "continues to be seen as the 'secret' treaty."[247] Critics of the agreement effectively linked its enforcement provisions to those found in aggressive and widely-reviled domestic legislation, specifically the Stop Online Piracy Act (SOPA) and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA).[248] In Europe, the effort to secure European Parliament approval for ACTA met with strong resistance, including massive street protests and a petition opposing its adoption sporting two million signatures.[249] These efforts led the European Parliament to reject the agreement in June 2012.[250] ACTA will not enter into force until six instruments of ratification, acceptance, or approval are deposited with the Japanese government.[251] Meanwhile, its status remains uncertain.

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[246] Levine, *supra* note 236, at 832.

[247] Weatherall, *supra* note 228, at 592.

[248] *See id.* at 580-586; *see also* Levine, *supra* note 123, at 137-140; Yu, *supra* note 1, at 1172:

> In the United States, the entertainment industry's push for controversial domestic copyright legislation, such as [SOPA/PIPA], also led to an unprecedented, massive service blackout launched by Wikipedia, Reddit, WordPress, and other internet companies. This blackout, in turn, caused Congressional representatives to quickly withdraw their support for the controversial bills, leading SOPA and PIPA to die in the 112th Congress. As Senator Ron Wyden succinctly summarized in his reminder to then-USTR Ronald Kirk in a Senate Finance Committee hearing, "[t]he norm changed on Jan. 18, 2012, when millions and millions of Americans said we will not accept being locked out of debates about Internet freedom."

[249] Yu, *supra* note 1, at 1171.

[250] *Id.*

[251] Anti-Counterfeiting Trade Agreement (May 2011), Article 40, para. 1, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Jul. 24, 2014). Note that the USTR insisted, until 2012, that no domestic legislative action regarding ACTA would be necessary because ACTA was negotiated as a sole executive agreement. *See* Sean Flynn, *ACTA's Constitutionality Problem: The Treaty is not a Treaty*, 26 AM. U. INT'L L. REV. 903, 916-919 (2011). The administration later changed its position, arguing that it had negotiated with ex ante Congressional authorization under the 2008 PRO-IP Act. Kaminski, *supra* note 230, at 523.

E. The Trans-Pacific Partnership

The TPP began as preferential trade agreement between Chile, New Zealand, Singapore, and eventually Brunei.[252] In 2008, the outgoing Bush administration announced its intention to join the negotiations,[253] in part due to concerns that the U.S. could be excluded from a growing network of bilateral and regional trade agreements being negotiated among Asian and Pacific-rim countries.[254]

The Doha round of negotiations at the WTO was falling apart and policy-makers in the U.S. viewed the TPP as an alternative way to open markets and maintain U.S. access to goods, services, and investment opportunities.[255] At the behest of the United States, each of the negotiating parties has signed a confidentiality agreement, requiring them to hold the "negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations" in confidence until the agreement is concluded.[256] The confidentiality agreement further stipulates that all of these documents must also be kept confidential for at least four years after the treaty comes into force, or, if the treaty is never ratified, for four years after the final round of negotiations.[257] In keeping with this agreement, no official version of the draft text has ever been released.

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[252] *See* Yu, *supra* note 1, at 1130. In addition to the treaties and dispute resolution conducted under the auspices of the WTO, the expanding network of preferential trade agreements (often abbreviated "PTAs") complicates the governance of international trade. At the time the WTO was created in 1995, there were about 50 active PTAs; that number had quadrupled by 2008. Henrik Horn, Petros C. Mavroidis & Andrė Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements,* 33 WORLD ECON. 1565, 1565 (2010).

[253] Press Release, United States Trade Representative, Trans-Pacific Partners and United States Launch FTA Negotiations (Sept. 22, 2008).

[254] *See The Trans-Pacific Partnership Agreement: Challenges and Potential: Hearing Before the Subcomm. On Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Affairs,* 112th Cong. 8 (May 17, 2012) (testimony of Susan C. Schwab, former United States Trade Representative).

[255] *Id.*

[256] *See* AUSTRALIAN GOVERNMENT DEPT. OF FOREIGN AFF. & TRADE, TRANS-PACIFIC PARTNERSHIP AGREEMENT NEGOTIATIONS, RELEASE OF CONFIDENTIALITY LETTER, https://www.dfat.gov.au/fta/tpp/111221-tpp-confidentiality-letter.html (last visited Jul. 24, 2014).

[257] *Id.*

The USTR has repeatedly pointed out that it has invited civil society actors to present to negotiators at TPP negotiating sessions.[258] While there have been fora provided for NGOs and other interested parties at negotiation rounds, the level of access to negotiators and the time provided for presentations has varied, and many attending stakeholders have expressed disappointment with the process. Accommodations for public stakeholders appear to becoming more limited as the talks wear on. For example, at the TPP's 19th round of negotiations in Brunei, Knowledge Ecology's Krista Cox reported that the logistics and schedule of the meeting made meaningful interactions with the national delegations difficult.[259]

> Initially, we were told that there would be no tables and no presentations, a huge change from any of the previous rounds. At the last minute, and with just two days of notice, we were told that we could register to make presentations. However, the presentations are limited to 7 minutes each, less than half of the 15 minutes we have been traditionally allotted at the most recent TPP rounds, and quite a bit less than the 20 minutes allotted at some early rounds. It is obviously quite difficult to give a presentation when only allotted a 7 minute speaking slot.[260]

After attending a four-day TPP ministerial in Singapore in December 2013 Australian public health scholar Deborah Gleeson reported that, unlike

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[258] *See, e.g.*, Press Release, United States Trade Representative, USTR Ron Kirk Comments on Trans-Pacific Partnership Talks (June 18, 2010) ("I am particularly proud of the degree to which USTR kept President Obama's promise this week to conduct trade talks in a new way, by inviting U.S. stakeholders to be on-site throughout these negotiations and ensuring that Americans who want to help shape U.S. trade policy had the chance to be heard."); Press Release, USTR Statement Regarding the Trans-Pacific Partnership Negotiations (Sept. 5, 2011) ("We have invited stakeholder attendance during every subsequent round [of negotiations]. Thanks to this and other outreach, we already have had considerable input from the broadest range of stakeholders..."); Press Release, Trans-Pacific Partnership (TPP) Talks Advance in Texas (May 16, 2012) ("At this round, the United States introduced a new format for negotiators to engage with the more than 300 stakeholders from the United States and other TPP countries who accepted the U.S. government's invitation to be on-site throughout the talks.").

[259] Krista Cox, *Updates from the 19th Round of Trans-Pacific Partnership Agreement (TPP) Negotiations in Bandar Seri Begawan, Brunei,* KNOWLEDGE ECOLOGY INTERNATIONAL (Aug. 22, 2013), http://www.keionline.org/node/1788; *see also* Jeremy Malcolm, *Questions Remain—Civil Society Media Release from TPP Negotiation Round, Brunei Darassalam*, CONSUMERS INTERNATIONAL (Aug. 29, 2013), http://a2knetwork.org/questions-remain-civil-society-media-release-tpp-negotiation-round-brunei-darassalam.

[260] Cox, *supra* note 259.

earlier rounds, "[t]his time stakeholders had no role as participants and no avenues for interacting with negotiators except through personal contacts. It was clear that ministers were getting down to business. And it was even more difficult than usual to get any information about what was happening."[261]

In this way, the TPP negotiations represent the USTR's commitment to private negotiations in the face of multi-faceted opposition, which "shows that the lessons of the ACTA are not being learned."[262] For starters, efforts to preserve the secrecy of negotiations have not prevented information about the agreement in progress from becoming public. Excerpts from the text were first leaked in February 2011, spurring a flurry of interest in the agreement.[263] In November 2013, WikiLeaks published the intellectual property chapter, which had purportedly been distributed to negotiators earlier that year.[264] The leaked draft included detailed footnotes and annotations describing each party's position on many sensitive topics. These leaks have sparked further negative press.[265]

Politicians and civil society groups in the US and other countries have been expressing frustration with the secrecy of the process and asking for the publication of an official draft of the TPP.[266] In May 2012, 36 law professors

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[261] Deborah Gleeson, *Update from the Latest Trans Pacific Partnership Meeting*, THE CONVERSATION (Dec. 12, 2013, 5:26 AM GMT), http://theconversation.com/-update-from-the-latest-trans-pacific-partnership-meeting-21416. Dr. Gleeson noted in the same blog post that the Australian government had recently blocked an order by its Senate to publish the TPP text prior to conclusion of the agreement.

[262] Weatherall, *supra* note 228, at 601.

[263] A thorough collection of leaked drafts and chapters of the TPP, alongside commentaries and analysis, is available from InfoJustice.org, a website hosted by the American University Program on Information Justice and Intellectual Property, at http://infojustice.org/resource-library/tpp#.

[264] *See* Margot Kaminski, *Capture, Sunlight, and the TPP Leak*, CONCURRING OPINIONS (Nov. 14, 2013), http://www.concurringopinions.com/archives/2013/11-/capture-sunlight-and-the-tpp-leak.html.

[265] *See, e.g.*, Paul Krugman, Op-ed., *No Big Deal*, N.Y. TIMES, Feb. 27, 2014, at A23; Michael Geist, Op-Ed., *TPP Remains Largely Hidden from Public View*, TORONTO STAR, Jul. 5, 2014, at B7; Joseph E. Stiglitz, Op-Ed., *On the Wrong Side of Globalization*, N.Y. TIMES, Mar. 16, 2014, Sunday Rev. pg. 12.

[266] For example, a group of parliamentarians from TPP-participating nations signed a joint letter seeking access to the text "before any final agreement is signed with sufficient time to enable effective legislative scrutiny and public debate." TPP LEGISLATORS FOR TRANSPARENCY, http://www.tppmpsfortransparency.org/ (last visited Jul. 24, 2014).

The Australian Pirate Party has been petitioning the Australian government for information about the TPP since 2012; the Guardian newspaper also made Freedom of Information Act requests, quickly funded by crowdsourcing. *See* Brendan Molloy, *Why Can't Australian Citizens Read the Trans-Pacific Partnership Agreement?* TheGuardian.com (Oct. 29, 2013 11:11 PM EDT), http://www.theguardian.com/com-

wrote a joint letter to the USTR criticizing its moves to scale back public participation at negotiating rounds and refusal to release information about the agreement under FOIA on national security grounds. "While we are sympathetic to the need for some confidentiality in the negotiation of international agreements, just as there is in domestic law-making," they wrote, "there can be no national security justification, much less one sounding in good governance concerns, for preventing the United States public from seeing its own government's proposals to restrain its own domestic legislation."[267]

The TPP is a substantially different agreement than ACTA, but its potential impact on domestic IP law (among other things) has agitated many of the same activists that protested the ACTA negotiations.[268] For example, a leaked version of the TPP's intellectual property chapter raises issues about copyright damages, access to medicines, the patenting of surgical methods, intermediary liability, and other issues that are likely to remain challenging.[269] The concerns are not limited to IP. Senator Elizabeth Warren, has publicly worried that the negotiations could allow large banks to avoid or roll back

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mentisfree/2013/oct/30/trans-pacific-partnership-tpp-dfat. Vermont state lawmakers, who passed a resolution in 2013 asking the USTR to "respect the sovereignty of individual states," refused to meet with USTR officials to discuss the TPP if the media would not be permitted to attend. David Gram, *Vt. Lawmakers Balk at No-Media Trade Talks*, ASSOC. PRESS FINANCIAL WIRE, Feb. 7, 2014, 3:18 PM GMT.

[267] Letter to Ron Kirk, United States Trade Representative, from Prof. David S. Levine *et al.*, May 9, 2012, *available at* http://infojustice.org/archives/21137 (last visited Jul. 24, 2014).

[268] *See, e.g.*, Cory Doctorow, *Leaked! TPP: the Son of ACTA Will Oblige America and Other Countries to Throw Out Privacy, Free Speech and Due Process for Easier Copyright Enforcement*, BOINGBOING (Aug. 25, 2012), http://boingboing.net/2012/08/25/leaked-tpp-the-son-of-acta-w.html; Katitza Rodriguez & Maira Sutton, *What is TPP? Biggest Global Threat to the Internet Since ACTA*, ELECTRONIC FRONTIER FOUNDATION (Apr. 29, 2013), https://www.eff.org/deeplinks/2013/04/tpp-biggest-global-threat-internet-acta; Glyn Moody, *TPP IP Chapter Leaked, Confirming It's Worse Than ACTA*, TECHDIRT (Nov. 13, 2013), https://www.techdirt.com/articles/20131113/08405625230/tpp-ip-chapter-leaked-confirming-its-worse-than-acta.shtml.

[269] *See* Miriam Bitton, *Examining the Trans-Pacific Partnership Agreement,* 17 J. INTERNET L. 25, 33-36 (2014). The close relationship between industry, Congress, and the USTR certainly creates the opportunity for IP-maximalist views to go unchallenged. This opens the door for adoption of international rules that are more stringent than what might feasibly pass public scrutiny in Congress. At a 2013 hearing, Sen. Orrin Hatch asked David Hirschmann, a witness representing the Global Intellectual Property Center at the U.S. Chamber of Commerce, how the USTR could negotiate the most effectively to benefit US IP-owners. *The Trans-Pacific Partnership: Opportunities and Challenges: Hearing Before the Senate Comm. on Finance*, 113th Cong. 15 (Apr. 24, 2013). "Just as a matter of negotiating," Mr. Hirschmann replied, "U.S. negotiators should always start, *at a minimum*, with U.S. law." *Id.* (emphasis added).

regulations under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[270] Warren voted against the confirmation of the current Trade Representative, Michael Froman, citing his refusal to make public the bracketed text for the TPP or to share details about what information was going to the USTR's trade advisers.[271]

USTR has stated that its consultations with Congress satisfy any objection that the TPP negotiations are un-democratic.[272] The public record of TPP-related Congressional hearings, however, suggests that selective access to the text and other non-public information about the agreement creates information disparities that make discussion less fruitful.

In December 2011, the House Ways and Means Committee's subcommittee on trade held a hearing on the status of TPP negotiations. Deputy Trade Representative Demetrios Marantis described how USTR had "undertaken unprecedented outreach with stakeholders, and [] had input from a broader range of groups than in any previous negotiation."[273] Yet in written testimony submitted to the committee in connection with the same hearing, Krista Cox outlined several concerns about the agreement's provisions on intellectual property based on a leaked copy of the TPP's text, while reiterating that such

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[270] *See Nomination of Fred P. Hochberg, Hearing Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 113th Cong. 12 (May 7, 2013).

[271] *See* Cong. Rec. S4662 (daily ed. Jun. 19, 2013). Froman's nomination was ultimately confirmed by a vote of 93-4. *Id.* at S4663.

[272] *See, e.g.*, Thomas B. Edsall, Op-Ed., *Free Trade Disagreement*, N.Y. TIMES.COM (Feb. 4, 2014), http://www.nytimes.com/2014/02/05/opinion/edsall-free-trade-disagreement.html?_r=1 (quoting a USTR spokesperson: "Negotiators are available to walk Members and committee staff through that text and have done so on request. Moreover, USTR regularly briefs additional Congressional staff on the negotiations and U.S. approaches, taking input there as well. All told, we've held more than 1,100 briefings on Capitol Hill on TPP alone.").

[273] *Hearing on Trans-Pacific Partnership, Hearing Before the Subcomm. On Trade of the H. Comm. on Ways and Means*, 112th Cong. 13 (Dec. 14, 2011). In addition to hearing testimony from the deputy U.S. trade representative, the subcommittee invited corporate representatives from Cargill, Inc., Wal-Mart Stores, and a public affairs consulting firm to share their views. Cargill and Wal-Mart each favor the rapid conclusion of the TPP (as they would envision it) as an essential tool to improve the American economy and the business climate. *Id.* at 35, 43. Other contributors were limited to offering written testimony; these witnesses advocated a balanced approach to IP enforcement (The Computer & Communications Industry Association), *id.* at 78-81; greater transparency in TPP negotiations and protection for access to medicines (the civil society group Knowledge Ecology International), *id.* at 82; and exclusion of tobacco products from favorable treatment under the agreement (a consortium of medical and public health groups), *id.* at 93.

leaks are "an infrequent and unreliable source and the public should not be forced to rely on information through this channel."[274]

In an August 2013 hearing before the House Foreign Affairs Committee's Subcommittee on Terrorism, Nonproliferation, and Trade Rep. Brad Sherman (D-Cal.), a critic of U.S. free trade policy, expressed concerns about the TPP and national security, but in a manner that illustrates the lack of concrete information available: "I am told that, apparently, the USTR has agreed to text in which our right to impose sanctions is subject to a tribunal's review....This agreement, therefore, poses a threat to our national security, as well as our economy."[275] Subcommittee chair Ted Poe (R-Tex) responded that this was "exactly why we are having this hearing, to find out the good, the bad, and the ugly about the TPP, to put it bluntly."[276]

But at no point in the hearing did the committee hear testimony from any official TPP negotiators, or make reference to specific language in the draft agreement.[277] Witness Celeste Drake, representing the AFL-CIO, praised the USTR for being "open and accessible," but expressed frustration that "based on publicly available information, few, if any, of the detailed proposals we have submitted have been translated into transformative changes in the still-secret text."[278] In response to a question from Congressman Sherman about potential trade deficits, policy analyst Edward Gerwin declined to comment on the grounds that "I don't know exactly what is being discussed in the current context of the TPP."[279]

By contrast, in a Senate hearing on the agreement earlier that year, a witness representing the Global Intellectual Property Center at the U.S. Chamber of Commerce, a large business lobbying organization, mentioned to the committee that "there are 29 chapters [in the TPP draft agreement], and we have teams at the Chamber working on just about all of them."[280] It should be noted that a

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[274] *Id.* at 83.

[275] *The Trans-Pacific Partnership: Outlook and Opportunities: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Affairs*, 113th Cong. 3-4 (Aug. 1, 2013).

[276] *Id.* at 4.

[277] The USTR was reportedly invited to send a representative to testify at this hearing, but declined. *Id.* at 60. (Rep. Poe: "[T]he United States Trade Representative was invited to testify and refused to testify. You can take that however you want to take it.") Later in the hearing, Rep. Poe asked the witnesses "Our negotiators, are they good negotiators? Are diplomats negotiating this or do we have some horse traders in there fighting for America? *Id.* at 64.

[278] *Id.* at 33.

[279] *Id.* at 59.

[280] *Id.* at 13.

U.S. Chamber of Commerce executive currently sits on the USTR's Advisory Committee for Trade Policy and Negotiations.[281]

Speaking at a press conference in Kuala Lumpur, President Obama addressed concerns about the TPP's impact on the costs of medical supplies by suggesting that critics of the agreement are uninformed. Both IP protection and humanitarian values "are reflecting in the conversations and negotiations that are taking place around TPP. So the assumption that somehow that right off the bat that's not something we're paying attention to, that reflects a lack of knowledge of what is going on in the negotiations....you shouldn't be surprised if there are going to be objections, protests, rumors, conspiracy theories, political aggravation around a trade deal."[282] This sidesteps the fact that many objectors are focused on the lack of unmediated information available about the agreement.

As with the MAI and ACTA, the gap between the deal-makers professions of transparency and the perceptions of its critics has created a controversy that threatens to overshadow the substance of the agreement (to the extent the substance is knowable to anyone outside of the negotiations). David Levine's analysis of ACTA could just as easily describe the TPP and future closed-door agreements: "[b]ecause of its forceful attempts to maintain unprecedented levels of secrecy, the USTR must expect a negative public reaction once the existence of the negotiations is revealed."[283]

VI. Shifting Definitions and Higher Expectations

These examples raise the question: when democratic diplomacy is barely a century old, and the modern international trade regime is even younger, is it fair to say that agreements like the TPP are being negotiated contrary to precedent? As I seek to demonstrate in this analysis, trade negotiators like the USTR and their critics are both correct within their own frames of reference. But not only are the two sides measuring transparency by different standards, the dynamism of information technology is creating an environment in which conflict between these standards is increasingly likely and irreconcilable. When

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[281] UNITED STATES TRADE REPRESENTATIVE, ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/advisory-committee-trade-policy-and-negotiati (last visited Jul. 24, 2014).

[282] Joint Press Conference with President Obama and Prime Minister Najib of Malaysia (Apr. 27, 2014) (transcript available at http://www.whitehouse.gov/the-press-office/2014/04/27/joint-press-conference-president-obama-and-prime-minister-najib-malaysia).

[283] Levine, *supra* note 236, at 834.

the League of Nations Charter was adopted in 1924, the idea that all concluded treaties should be made public was novel and transformative.[284]

During the twentieth century, international lawmakers have begun releasing agendas and statements to the press, addressing information directly to civil society, publishing draft versions of agreements, and providing access, in some cases, to negotiating delegates. International organizations have created frameworks that encourage multilateralism and transparency. This has made it possible for people outside of government to know more than ever before about what their leaders are doing on their behalf.

As transparency has generally increased, secrecy has become more noticeable. This appears to be fed by two major factors. First, the institutions that develop trade policy have gradually moved to create and enforce rules that go beyond commercial fundamentals.[285] The success of GATT in establishing low tariffs and combating protectionism has allowed trade policy thinkers to address regulatory issues, like intellectual property, labor, and environmental protection, which were traditionally within the exclusive jurisdiction of individual countries.[286] To achieve these aims, some or all participating nations must change at least some of their domestic laws. One thing that each of the agreements described in this article share is that they attracted a motley crew of opponents, rallied around their common concern about the impact of the agreement on domestic law.[287]

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[284] Covenant of the League of Nations, *supra* note 43, at art. 18; *see also* REINSCH, *supra* note 17, at 188.

[285] *See, e.g.*, Goldman, *supra* note 79, at 634-635.

[286] *See* Horn, Mavroidis & Sapir, *supra* note 252, at 1566; *see also* Miles McKenna & Ian Gillson, *TPP & TTIP: More Questions than Answers*, TRADE POST (Feb. 12, 2014), at http://blogs.worldbank.org/trade ("[T]rade agreements are moving beyond narrow 'GATT-style' agreements to cover deeper issues of trade integration such as investment, regulations, and services—the 'high-hanging fruit' of a well-picked field.").

[287] *See, e.g.*, Kobrin, *supra* note 166, at 98 ("A coalition of strange bedfellows arose in opposition to the [MAI], including the AFL-CIO, Amnesty International, Australian Conservation Foundation, Friends of the Earth, Oxfam, Public Citizen, Sierra Club, Third World Network, United Steelworkers of America, Western Governors Association, and World Development Movement."); John-Thor Dahlburg, *Protesters Tell a Different Tale of Free Trade*, L.A. TIMES, Nov. 20, 2003, at A3 (describing "a motley collection of activists, academics and private citizens" assembled to protest FTAA talks in Miami); The Baptist Death Ray, *Darrell Issa Does Something Right (Stop ACTA)*, DAILY KOS, (Mar. 8, 2012), http://www.dailykos.com/story/2012/03/08/1072361/-Darrell-Issa-Does-Something-Right-Stop-ACTA# (demonstrating unlikely agreement of U.S. liberals and conservatives on opposition to ACTA); Dave Pruett, Op-Ed., *Secret Pact Endangers U.S.*, DAILY NEWS-RECORD (Harrisonburg, Virginia), June 1, 2013 (noting that opponents of the TPP include the liberal group Public Citizen and the conservative group World Net Daily).

A ratified trade agreement today likely means changes in domestic laws and regulations today *and tomorrow*; after all, "trade agreements establish principles that existing and future laws, regulations, and enforcement activities must satisfy."[288] Moreover, there is reason to fear that the executive branch may turn to international law to secure policy changes that have proved politically challenging at home.[289]

Policymakers who believe strongly in the positive impact of free trade on the global economy often find it perplexing or ridiculous that anyone could object to efforts designed to increase net global prosperity.[290] They may fall sway to the belief that if they "share information and consult, 'they'—that is, NGOs critical of trade policy—will come to understand and accept the official position."[291] Many NGOs, however, "refer to this as the 'tell and sell' strategy and find it unacceptable."[292] In the U.S., there is an expectation that matters within the ambit of domestic law should be regulated pursuant to the kinds of open, democratic, and participatory processes that characterize domestic lawmaking. Information disclosed solely at the government's discretion falls short of that standard.

Second, the increasing accessibility and sophistication of the Internet and other technologies has made spreading information and opinions faster and easier than ever before, certainly more so than anyone could have imagined when the GATT came into force in 1948. The internet has allowed inter-governmental organizations (like OECD and the WTO) and individual governments to increase the amount of internal material that they disclose, and to make these disclosures faster and with greater efficiency. Indeed, the only way to stay fully informed about trade negotiations, or to review the full text of a concluded

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[288] Goldman, *supra* note 79, at 640. Today, the possibility of provisions touching on digital services and consumer goods seems particularly resonant. As Professor Yu has described regarding the TPP, "as the negotiations became more intrusive on one's personal life and as the negotiated agreements began to include provisions concerning the internet and the digital environment, civil society organizations and the public at large have begun paying greater attention to the standards included in these agreements." *See* Yu, *supra* note 1, at 1170-1171.

[289] *See generally* Samuelson, *supra* note 76 (describing the Clinton administration's attempt to push a controversial digital agenda at a 1996 diplomatic conference in Geneva that had failed to progress in Congress).

[290] *E.g.*, DEVEREAUX, LAWRENCE & WATKINS, *supra* note 136, at 167 ("OECD negotiators and officials 'tend to be lawyers and economists who believe free trade is good for countries and investment liberalization is similarly good. Most trade negotiators were unprepared for dealing with people who fundamentally opposed what they did.'") (quoting USTR negotiator Joseph Papovich).

[291] Smythe & Smith, *supra* note 196, at 47.

[292] *Id.*

agreement that has not entered into force, like ACTA, is through discerning internet research.[293]

The expectations of civil society groups have grown apace. As demonstrated during the negotiation of the MAI, NGOs were able to harness the power of early web-based communication to organize opposition to the agreement. By publicizing a leaked internal draft of the agreement, the Council of Canadians and Public Citizen were able to color many first impressions of the text and the negotiations. In doing so they both initiated a wider conversation about the agreement and influenced the outcome of that conversation.

The OECD's subsequent efforts to increase transparency and share its goals for the agreement could not satisfy the demands of groups that had come to oppose it in any form. Similarly, the parties' refusal to publish official draft texts during the first two years of ACTA's negotiations allowed critics to brand it as "the secret agreement" and suggest that the participating countries would soon be cracking down on individuals' digital freedoms.[294] Negotiators ended up on the defensive. Even when a government is proactive about using online platforms to make the case for an agreement, as the USTR has been with respect to the TPP, it may fare poorly against well-networked and motivated opponents who are far more prolific.[295]

Fundamentally, the definition of 'transparency' has shifted. Post-negotiation document releases are no longer satisfactory.[296] Todays' NGOs are demanding something closer to real-time information; a virtual seat at the table.

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[293] By the terms of the Case Act, the Secretary of State is required to send Congress the text of any international agreement to which the U.S. is a party (other than an Article II treaty, which would have already been dispatched to the Senate) within 60 days of the agreement's entry into force. 1 U.S.C. 112b(a) (2012). When an agency, like USTR, enters into an international agreement on behalf of the U.S. government, it must send the text of that agreement to the State Department within 20 days of signature. *Id.* An agreement like ACTA, which has been signed for years but not yet entered into force, is virtually invisible on the U.S. State Department's website, an otherwise excellent source for information on international law. Given, also, the significant delays in print publication of any government documents, the internet is clearly the present and the future of international legal research.

[294] *See* Yu, *supra* note 14, at 999.

[295] For example, as of July 23, 2014, a Google search for "Trans-Pacific Partnership" returns the USTR's website as the first hit, but also highly ranks several critical assessments of the agreement from newspapers, the Electronic Frontier Foundation, Public Citizen, and other websites, as well as the purloined drafts from Wiki Leaks. Google also suggests the related search "the trans-pacific partnership global corporate coup d'etat."

[296] Smythe & Smith, *supra* note 196, at 46 ("While the trend is to release greater amounts of information, partly because the technology permits it makes it cost effective, public expectations are also increasing. If the release is incomplete or partial, questions arise and charges of secrecy are heard.").

Ironically, in the U.S. this push for greater transparency derives in part from discrepancies in access resulting from the law originally designed to force trade negotiators to accept input from outsiders. When the Trade Act of 1974 created the ITAC system, the purpose was to better inform trade negotiators about the needs of stakeholders affected by trade policy.[297]

But the privileged access of private advisors, so heavily drawn from industry, "at earlier stages in the negotiations undercuts any argument by supporters that the negotiations were transparent because press releases were issued during negotiations, or because of the late publication of text."[298] Corporate or industry capture speaks directly to the deepest fears of those who oppose liberalized global trade. Thus, the USTR's online efforts to publicize its goals for the TPP—creating a dedicated webpage, frequent press releases, and a blog—in addition to its solicitation of "direct stakeholder engagement," will continue to disappoint critics as long as such efforts are merely simulacra of the access afforded to insiders.

In addition to this shift, the transparency conflict is a matter of framing. The USTR frames its approach to the TPP negotiations with comparisons to previous bilateral and regional trade agreements, which have historically been more narrowly tailored and more likely to incorporate sensitive and specific business information.[299] It also views its approach to trade diplomacy as fundamental to the nation's economic well-being, and thereby its national security. Critics focused on transparency compare wide-ranging agreements like the TPP to the treaties that regulate non-trade issues, like IP or the environment, which are more likely to be negotiated in international fora and to integrate a wider range of stakeholders into the drafting process.[300]

This makes it difficult to discern which side is actually correct. Consider how the passage of time has created a counter-narrative about the transparency of previous negotiations used to support critics' assertions that the USTR is being regressive. When negotiations around the FTAA came under protest and were accused of secrecy, a draft of the agreement text was reluctantly released.[301] The USTR noted that the move was a "big deal" and expressed hope that the move would appeal to NGOs and help convince critics of the need for

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[297] *See* S. Rep. 93-1298, at 102 (1974) ("[T]he purpose of the procedures provided is to strengthen the hand of U.S. negotiators by improving their knowledge and familiarity with the problems domestic producers face in obtaining access to foreign markets.").

[298] Weatherall, *supra* note 228, at 592.

[299] *See* note 50, *supra*, and accompanying text.

[300] *See* note 86, *supra*, and accompanying text.

[301] *See* section V(C), *supra*.

the agreement to succeed.[302] But many critics were not appeased, arguing that the disclosure was too little, too late.[303]

But less than a decade after the FTAA fell apart, two directors of the Electronic Frontier Foundation, a non-profit organization focused on civil liberties issues raised by digital technology, favorably compared the transparency process of FTAA to that of ACTA.[304] Professor Margot Kaminski, in a critique of ACTA, cited the FTAA to demonstrate the possibility of sharing draft texts and related materials during negotiations.[305] Professor Peter Yu has recently made the same comparison with respect to the TPP.[306] Reliance on the FTAA analogy suggests that there is underwhelming precedent for transparency in American bi- or multilateral trade deals. But at the same time, there is evidence of a lack of international consensus about the value of secrecy to modern trade negotiations. For example, according to (leaked) U.S. embassy cables, the ACTA talks were criticized by Fabrizio Mazza, head of Intellectual Property issues at the Italian Ministry of Foreign Affairs, who found that the "level of confidentiality in these ACTA negotiations has been set at a higher level than is customary for non-security agreements" making it "impossible for member states to conduct necessary consultations" with relevant stakeholders and legislators.[307]

Ultimately, a government's preference for complete control over the scope and timing of disclosures may be untenable in the age of information. As Professor Levine has noted, "[t]he existence of the Internet broadly, and WikiLeaks specifically, only exacerbates the failings of USTR's policy."[308] When information acquires the status of a leaked secret, it takes on new narrative dimensions. If strict secrecy is unattainable, it cannot be credited with smoother and more efficient negotiations, and it does nothing to decrease the interest, and frustration, of information-seekers who are excluded from the negotiating process. Even when confidential negotiations culminate in a signed agreement, secrecy may negatively impact its public reception to the point that threatens the

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[302] Cooper, *supra* note 212, at A4; Kennedy, *supra* note 146, at 128.

[303] *See* Smythe & Smith, *supra* note 196, at 46.

[304] Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy,* 35 YALE J. INT'L L. ONLINE 24, 31-32 (2009).

[305] Kaminski, *supra* note 7, at 530 n.50.

[306] Yu, *supra* note 1, at 1170.

[307] *See US Embassy Cables: Italy, the EU, and the Anti-Counterfeit* [sic] *Trade Agreement*, THEGUARDIAN.COM, Dec. 22, 2010, http://www.theguardian.com/world/-us-embassy-cables-documents/176810.

[308] Levine, *supra* note 236, at 834.

viability of the finished product. ACTA is a case in point, and the TPP may soon be another.[309]

There is still plenty of motivation for negotiators to resist disclosing draft agreements and incorporating public participation into trade talks. Such efforts take money and time, increase the burden on trade officials, and add complexity to the negotiations by requiring some kind of compromise between narrow commercial interests and broad public prerogatives.[310]

Increasing NGO participation at any stage of negotiations, however, creates greater total information flows. NGOs may conduct research, solicit public comment, and publish position papers as part of developing (or resisting) a trade agenda. NGOs that sit as negotiation observers are in a position to publicize the talks and supplement (or contest) the official record. NGOs that accept an invitation to present directly to negotiators, however limited, have a chance to expand the record, even if just to report on their exclusion. This may even be a boon to global trade. After all, the expanded role of international and inter-governmental organizations in treaty negotiations has led to an increase in the amount of information available to parties that wish to initiate new agreements.[311] More empirical research, more data, and more substantive information about trade and investment are fuel for policy development.

Conclusion

The case studies described in this article demonstrate that an increasingly networked world has shrinking tolerance for government secrecy. The rise in organized opposition to the institutions and agreements that comprise the global trade regime parallels the expansion of internet access and the explosion of information online. The trends that give rise to today's conflict over the TPP—the widening scope of trade agreements and the upward ratchet of public expectations for transparency—are only going to become more entrenched. In the United States, the discretion and classification authority vested in the USTR give little

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[309] *See The Trans-Pacific Partnership—No End in Sight* ECONOMIST.COM BANYAN BLOG (Feb. 25, 2014), http://www.economist.com/blogs/banyan/-2014/02/trans-pacific-partnership-0.

[310] *See* Smythe & Smith, *supra* note 196, at 47.

[311] Alvarez, *supra* note 25, at 229. It is also yet to be seen how an information-restrictive negotiating posture may impact the transparency provisions of any resulting agreement. Early empirical research suggests a clear correlation between transparency commitments in regional trade agreements and subsequent higher trade flows. *See* Iza Lejárraga & Ben Shepherd, *Quantitative Evidence on Transparency in Regional Trade Agreements*, OECD Trade Policy Papers No. 153 (2013), available at http://dx.doi.org/10.1787/5k450q9v2mg5-en (last visited July 24, 2014).

latitude for civil society groups to force official disclosures.[312] Informal and subversive methods such as editorial writing, online awareness campaigns, netroots organizing, and document leaks, can delay and frustrate official efforts to reach agreement. Until influential policymakers like the USTR modify their stance towards information-sharing, we should expect future efforts to create broad agreements on international trade and investment to be slow and difficult. So, too, will the research process for anyone seeking information about the development of this branch of international law.

[312] Note that, however, some continue to press USTR through FOIA. The publishers of *Intellectual Property Watch* have sued USTR in federal court seeking disclosure of the TPP's intellectual property provisions. Complaint, pg. 3, Intellectual Property Watch v. United States Trade Representative, 13-CV-8955 (S.D.N.Y.), Dec. 18, 2013. Disclosure is urgently needed, the complaint states, "while negotiations are still open, lest the final terms of the agreement be presented to Congress and the public as a fait accompli." *Id.* at 2. The parties have stipulated to some limitations of the plaintiffs' original FOIA request and are scheduled to proceed to summary judgment briefing in the fall of 2014.