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Publication Information
Andrea K. Schneider, Democracy and Dispute Resolution: Individual Rights in International Trade Organizations, 19 U. Pa. J. Int'l Econ. L. 587 (1998)

Repository Citation
Schneider, Andrea K., "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations" (1998). *Faculty Publications*. 490.
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DEMOCRACY AND DISPUTE RESOLUTION: INDIVIDUAL RIGHTS IN INTERNATIONAL TRADE ORGANIZATIONS

ANDREA K. SCHNEIDER*

1. INTRODUCTION

The question of dispute resolution systems for international organizations is of growing importance. Not only has there been a plethora of new international and regional organizations created in the last few years, but this trend is likely to continue. There are numerous proposals for multilateral free trade areas and agreements across Latin America and the Caribbean, as well as in Asia.[1] At the same time, existing international trade organizations have come under increasing scrutiny for their inability to reflect accurately the needs and concerns of the citizens of the member states.

For example, the debate about fast track authority for the Clinton Administration reflects concerns about the benefits of free trade agreements to the U.S. economy and fears that increased free trade with less developed states will lead to an elimination of jobs in certain manufacturing sectors.[2] This debate fo-

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[1] *See, e.g.*, Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997) (discussing implementation of the Free Trade Area); Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127 (1995) (discussing importance of NAFTA to the establishment of the free trade zone in the Western Hemisphere); Merit Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947 (1997).

[2] Fast track allows the President to negotiate trade pacts and submit them to Congress for up-or-down votes, with no amendments allowed. *See* Peter Baker & Paul Bluestein, *Clinton Searches for Middle on 'Fast Track'*, WASH.

cuses on whether it is even in our citizens' interests for the United States to join international trade organizations. Meanwhile, across the Atlantic Ocean, the ongoing debate about the "democracy deficit" in the European Union ("EU") demonstrates the concern with the decreased ability of citizens to have a say in what the laws are under the EU.[3] This debate focuses on the ability of citizens to influence lawmakers in the substantive laws that directly affect their lives. In both of these debates, people have examined the legitimacy of international trade organizations and debated ways of structuring these organizations to be more democratic and more legitimate.[4]

POST, Sept. 11, 1997, at A8. Fast track supporters argue that without fast track, it would be impossible for the United States to conclude deals with other nations because the agreements are subject to Congressional approval. Many nations are hesitant to negotiate agreements when they know that Congress can reopen them in the approval process and force further negotiations. *See, e.g.*, Bob Dole & Lloyd Bentsen, Editorial, *'Fast Track' Issue Deserves Fast Action*, N.Y. TIMES, Sept. 17, 1997, at A31. Supporters of fast track generally favor increased free trade. Those opposed to fast track are those more doubtful of the benefits of free trade and harmonization of standards, including labor and environmental groups. *See* Linda Clerkin, *Shut Up and Take Your Medicine: Will International Laws Force Vitamins Off U.S. Shelves?* CITY EDITION: THE WKLY NEWSPAPER OF MILWAUKEE, Nov. 20, 1997 ("We believe that each nation's needs are unique, and it shouldn't be up to an international group to decide what laws best govern that nation. It should be up to those nations themselves.") (quoting Susan Haeger, Executive Director of Citizens for Health protesting harmonized guidelines for vitamins and minerals under CODEX). For a discussion that links current trends in international trade and the economy towards strengthening the argument for fast track, see the viewpoint by the Assistant Secretary of Commerce for international economic policy from 1989 to 1993, in Thomas J. Duesterberg, *Selling the Free-Trade Story*, N.Y. TIMES, Oct. 5, 1997, at BU9. For a view of whether fast track is necessary to accomplish trade pacts, see David Sanger, *The Trade Bill: The Impact*, N.Y. TIMES, Nov. 11, 1997, at A6, and also see Lori Wallach, *Fast Track Trade Authority: Who Needs Fast Track?*, J. COM., Sept. 19, 1997, at 9A. Although fast track authority was not granted last year, it is clear that the debate over free trade in general and fast track in particular will recur.

[3] *See, e.g.*, J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466-74 (1991). Weiler's article describes "democracy deficit" as the ability of the unelected branches of the EU, the Council and the Commission to pass legislation overriding laws passed by the national parliaments. In other words, it is possible for citizens of a certain member state to be required to follow a law for which neither they nor their duly elected representatives voted. Democracy deficit also refers to the comparative lack of political power in the only elected EU body, the Parliament. *See generally* Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, 1992 U. CHI. LEGAL F. 81 (1992) (examining the roles of legislative and judicial bodies in the EU).

[4] For example, the Environmental Side Agreement of the North American Free Trade Agreement ("NAFTA") was designed to assuage concerns about in-

This article takes a different approach to understanding questions of legitimacy and democracy in international organizations[5] by examining the dispute resolution mechanisms used in these organizations. An alternative method of assessing legitimacy and democracy in international organizations would be to look at the ability of private actors to enforce rules once they are enacted. Ultimately, I shall argue that increasing individual involvement in dispute resolution—by granting private actors rights and standing under these organizations—is an appropriate way to increase the legitimacy of international trade organizations.

Section 2 of this Article reviews the general arguments surrounding democracy in international organizations. I will examine the increased role of private actors in international law as advocated by liberal international relations theory, the arguments surrounding the democracy deficit in the EU,[6] and the issue of capture by narrow political interests reflected in the debate over fast track authority.

In order to understand different levels of individual involvement in dispute resolution, Section 3 of this Article examines some factors in determining different types of dispute resolution mechanisms. These factors—direct effect, standing, supremacy, transparency and enforcement—all reflect different levels of involvement between the trade organization and the citizens under it.

The Section 4 of this Article makes the argument that increased individual involvement will increase democracy in these trade organizations. This involvement will increase the role of private actors in lawmaking, make enforcement of the original trade agreement more likely, reduce the danger of capture by nar-

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adequate enforcement of environmental laws in Mexico and the resulting concern about a "race-to-the-bottom"—the fear that companies would relocate there in order to take advantage of the lax enforcement. *See* North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994).

[5] In an attempt to give some definition to ambiguous and critical terms, I use the term "legitimacy" to refer to the lawfulness and appropriateness of these international organizations, as well as the perceived fairness and justice resulting from these agreements. "Democracy" refers to the representative and participatory aspects of international organizations.

[6] *See* Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11, (entered into force Jan. 1, 1958) [hereinafter the EEC TREATY].

row interests, increase the transparency of these trade organizations and, in the end, make organizations themselves more effective. Finally, Section 5 concludes the Article.

2. DEMOCRACY IN INTERNATIONAL ORGANIZATIONS

There are three critiques of international organizations that can shed light on the involvement of private actors.

2.1. *Liberal International Relations Theory*

The first argument comes from the liberal international relations theory ("liberal IR") of political science, which has now been more regularly applied to international law.[7] Liberal IR argues that previous international relations theories, such as realism[8] and regime theory,[9] are too state-based in their assessment of international relations. Liberal IR focuses on the actors behind the veil of the state, looking at how the state is organized and who has power, in order to understand the motivations and interactions of states in the international realm. In examining dispute resolution, several proponents of liberal IR have looked at the European system and the role of private actors for explaining its success.[10] Furthermore, scholars have focused on how interna-

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[7] *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) (proposing application of "liberal" international relations theory to international law); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994) (discussing liberal conception of the United Nations); David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act From Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997) (using liberal IR to examine U.S. legislation).

[8] *See* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 336-38 (1989); *see also* Burley, *supra* note 7, at 214-18 (discussing realism theory). For more on applying realism to international trade see generally ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (1975), and HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (5th ed. 1973).

[9] *See, e.g.*, INTERNATIONAL REGIMES (1983) (Stephen D. Krasner ed.); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986); Burley, *supra* note 7, at 218-20.

[10] For a Kantian explanation of liberal governance and the relation to international trade, see ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 23-24 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 YALE

tional relations theories might reflect themselves in different dispute resolution models in a variety of international trade organizations.[11]

This article attempts to build on this body of work by using the major beliefs of liberal IR to evaluate different models of international dispute resolution. Liberal IR argues that (1) private actors are the fundamental actors in society; (2) governments reflect some segment of society; and, (3) states behave according to their preferences.[12] This article examines the extent to which private actors are given roles in international dispute resolution and the impact this has on the international organization as well as their domestic government. I will examine how different dispute resolution models result in different segments of society being represented by their governments and how different models reflect and change state actions and preferences.

2.2. *Democracy Deficit*

A more direct line of attack on the legitimacy of international organizations comes from many of the scholars focusing on the EU. The argument here is that, as power has been centralized in the EU and as laws are increasingly passed at the EU level, citizens of member states actually have less ability to influence legislation.[13] What started as a union of democratic states actually re-

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L.J. 273 (1997); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 424-27 (1997); Walter Mattli & Anne-Marie Slaughter, *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts* (Harvard Law School, Harvard Jean Monnet Chair Working Papers, No. 1/95), *available at* Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <http://www.law.harvard.edu/Programs/JeanMonnet/>.

[11] Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985) (applying realist theory to international trade); Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997) (applying mesoinstitution theory to the Free Trade Area of the Americas); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995) (setting forth three models of dispute resolution based on three theoretical premises).

[12] *See* Burley, *supra* note 7, at 227-28.

[13] *See* Weiler, *supra* note 3; Weiler, et al., *European Democracy and Its Critique—Five Uneasy Pieces* (Harvard Law School, Harvard Jean Monnet Chair Working Papers, No. 1/95), *available at* Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <http://www.law.harvard.edu/Programs/

sults in less democracy for their citizens. In order to remedy this deficit of democracy, some argue that citizens must be given more direct representation at the EU level through the Parliament. Some of the reforms of the European Parliament in the Single European Act and the Treaty of Maastricht are explained by the desire to give citizens more direct voice in EU legislation.[14] Others argue that the EU has tried (unsuccessfully) to ease concerns of democracy by greater transparency and legislative review.[15] Citizen participation in trade policy has also become a focus of environmental and public interest groups looking at U.S. trade policy[16] in the General Agreement on Trade and Tariffs ("GATT")[17] and the World Trade Organization ("WTO").[18]

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[14] To partially remedy the democracy deficit, the Maastricht Treaty created a co-decision procedure, which essentially gives the European Parliament a legislative veto on some matters. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7 1992, art. 189b, O.J. (C 224) 1 (1992), [1992] C.M.L.R. 573 (1992) [hereinafter EC TREATY]; *see also* Alan Dashwood, *Community Legislative Procedures in the Era of the Treaty on European Union*, 19 EUR. L. REV. 343 (1994) (discussing changes to legislative procedures resulting from Treaty on EU); Trevor Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213, 224-26 (1993); Dieter Kugelmann, *The Maastricht Treaty and the Design of a European Federal State*, 8 TEMP. INT'L & COMP. L.J. 335, 346-48 (1994) (discussing relationship between the Treaty and democracy).

[15] *See, e.g.*, Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMM. MKT. STUD. 343 (1994); Imelda Maher, *Legislative Review by the EC Commission, in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 235, 238-240 (Jo Shaw and Gillian More eds., 1995).

[16] *See, e.g.*, DANIEL C. ESTY, GREENING THE GATT (1994); Daniel C. Esty, *NGO's at the World Trade Organization: Cooperation, Competition, or Exclusion*, (forthcoming 1998) (manuscript on file with author); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L J. 631 (1994) (arguing that the secrecy and lack of public input in U.S. trade policy results in a policy that is biased toward trade liberalization at the expense of other values); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (discussing undemocratic nature of international trade decision-making); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997). Furthermore, in response to complaints about lack of transparency, a U.S. District Court ordered the United States Trade Representative to grant public access to submissions to GATT dispute resolution panels. *See* Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385 (D.D.C. 1992).

[17] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

[18] Final Act Embodying the Results of the Uruguay Round of Mulitlateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE

However, a focus on the democracy deficit alone is too narrow. In this view, the level of representation of private actors is solely measured in the legislative process. Yet the legislative prowess is only part of the equation. Lawmaking also occurs in the judicial branch of the EU, through the European Court of Justice. Additionally, the greatest changes in breadth, scope, and power of the EU have come from the Court, not from legislation.[19] Therefore, it is also appropriate—and indeed necessary—to examine who has the power to compel judicial change. In the EU, ironically, its citizens have the greatest ability to participate in the dispute resolution process. Instead of a democracy deficit, the EU comes closest to achieving democracy in its dispute resolution mechanism compared to other international trade organizations.

2.3. *Trade Liberalism Versus Political Capture by Narrow Interests*

A final critique of international trade examines the relationship between the state and its constituents. It is widely believed that trade liberalism, while making economic sense to most states, is difficult to implement in the face of nationalist interests.[20] First, at the U.S. political level, it has been argued that the executive branch is the logical protector of free trade, while Congress is more likely to want to protect narrow, industrial, protectionist interests.[21] Therefore, it is important that the President be given power over trade policy so that the broader economic interests of the state, and consumers and exporters in particular, will be protected from the well-funded, well-organized importer lobby. Second, on the international level, it has been argued that less trans-

URUGUAY Round vol. 1. (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

[19] Weiler, *supra* note 3, at 2411-20.

[20] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); *see also* Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 17-18 (1992) (explaining Adam Smith's and David Ricardo's economic theories in favor of a liberal trading system).

[21] *See* DANIEL VERDIER, DEMOCRACY AND INTERNATIONAL TRADE 275 (1994); BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE 11 (1992); C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 18-21 (1994).

parency for trade deals is useful in shielding trade agreements from scrutiny of these national interests.[22]

Again, I suggest that this analysis of international trade relations overlooks the important dimension of dispute resolution. The concerns of capture are not only prevalent at the deal making stage. Whether or not a trade agreement is enforced clearly brings all of the same elements to the table.[23] Enforcement can separate interests along the importer-exporter divide, along the manufacturer-consumer divide, between industries, or between companies. Different methods of dispute resolution can either recognize or ignore the issue of capture.[24]

The involvement of private actors in the dispute resolution mechanisms of trade organizations has the ability to reduce the linkage between trade and domestic political interests.[25] While theoretically this link allows governments to be more responsive to their citizens, in reality, the link between trade and politics keeps governments tethered to special and well-organized interest

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[22] *See* Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 295, 319 (1996) ("It can be argued that the low public profile of international trade policy has been one of the largest contributors to trade liberalization over the past fifty years.").

[23] *See* Horacio A. Grigera Naon, *Sovereignty and Regionalism*, 27 LAW & POL'Y INT'L BUS. 1073, 1075 (1996) (arguing that supranational dispute settlement can "transcend the day-to-day political maneuvering of member states, local bureaucracies, and interest groups").

[24] "The nature of these [GATT] proceedings is not over conflicts of interests among countries but between the general interest of consumers in liberal trade and the general interests of the taxpayers in an efficient government and the interests in trade protectionism. They are about redistribution of income at home." ASIL BULLETIN, No. 9, IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 44 (1995) (statement of Ernst-Ulrich Petersmann); *see also* John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 550, 560 (1993) (arguing that individuals ought to be able to enforce and invoke international law).

[25] By using the term "political interest," I am denoting those negative connotations of narrow, special or otherwise inappropriate interests that can capture the polity. For more general information on public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); CHARLES K. ROWLEY & WILLEM THORBECKE, THE ROLE OF CONGRESS AND THE EXECUTIVE IN U.S. TRADE POLICY DETERMINATION: A PUBLIC CHOICE ANALYSIS IN NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); KAY SCHLOZMAN & JOHN TIERNEY, ORGANIZED INTERESTS AND AMERICA DEMOCRACY, 339-46 (1986); Paul B. Stephan, III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995); Symposium, *Theory of Public Choice*, 74 VA. L. REV. 167-518.

groups.[26] Once a state has determined that it is in its national interest to join a trade organization and once rules are adopted under that organization, the link to domestic political interests can be reduced by giving private actors standing to enforce the agreement. In that way governments will be responsible for following the rules across the board rather than selectively.[27]

3. FACTORS IN DETERMINING MODELS OF DISPUTE RESOLUTION

Now that I have set forth some of the critiques of the international trade system, this Article can turn to better understanding the dispute resolution options. In order to determine the level of individual involvement there are several factors to examine.[28]

3.1. *Direct Effect of Rights*

3.1.1. *Definition*

The first factor is whether private actors are directly granted rights under the international treaty establishing the trade organization. The term "self-executing" comes from the idea that the treaty executes itself without further legislative action. For those who study EU law, the rights under the Treaty of Rome and

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[26] *See* Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice and International Trade*, *in* Symposium, *Linkage as Phenomenon: A Multidisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

[27] For more on how private actors can enhance government compliance, see Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 NW. J. INT'L L. & BUS. 609 (1996-97).

[28] The factors listed in this section are no doubt incomplete. Other factors of inquiry could include the precedential value of decisions, whether the decision is subject to review or appeal, and whether the panel is rotating or standing. *See, e.g.* Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485 (1993); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379 (1996); Miquel Montañà I Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993). I have chosen not to discuss those factors because they focus on those dispute resolution systems that already have some sort of decision-making body. This study takes a broader approach and does not assume the existence of any such tribunal.

other legislation have been called "directly applicable"[29] and are said to have "direct effect."[30] For the purposes of this Article, the differences among the three phrases will be overlooked,[31] and I will use the term "direct effect" to mean those treaties that give private actors immediate rights and under which no further domestic legislative action is necessary.

3.1.2. *Why Directly Effective Rights Are Important*

Directly effective rights are an important issue in treaty law because the scope and depth of the treaty will vary depending on whether private actors will also be involved in the implementation of the treaty. Those treaties under which private actors get rights give these private actors another legal basis for protecting their rights under the law.

The issue of direct effect globally has most commonly arisen under human rights treaties, which are clearly drafted in order to protect and benefit individuals.[32] In the United States, the continual debate over self-executing treaties re-emerges every time a new human rights treaty comes up for ratification in the U.S. Senate. The Senate is traditionally reluctant to grant direct effect to these treaties because these treaties may provide additional

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[29] *See* Case 26/62, N.V. Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1 [hereinafter Van Gend en Loos].

[30] *See* Case 106/77, Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA (II), 1978 E.C.R. 629; *see also*, Ronald A. Brand, *Direct Effects of International Economic Law in the United States and the EU*, 17 NW. J. INT'L L. & BUS. 556 (1996-97); Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983). For discussion of "direct effect" see T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 183-218 (1988).

[31] This is not to say that the difference between direct applicability and direct effect is not important or has not occupied many pages of academic discussion. *See, e.g.*, J.A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425 (1972).

[32] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277; *see also* David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978) (discussing the Human Rights Covenants and President Carter's proposals for them).

rights not provided under the Constitution.[33] In keeping with the Senate's traditional isolationist approach to foreign relations, the idea that international law may differ or go further than U.S. domestic law remains anathema to many members of Congress and other citizens.[34] Thus, when the United States recently ratified the International Covenant on Civil and Political Rights ("ICCPR"), the United States made a specific reservation stating that the ICCPR would not be self-executing.[35] This has been the typical practice with most recently ratified human rights treaties. International trade treaties in the United States are also traditionally not self-executing.[36] They usually need additional implement-

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[33] For example, the ICCPR calls for the elimination of the death penalty for juveniles under 18. The Supreme Court, on the other hand, has held that the death penalty is permitted against juveniles to the age of 16. *See* Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988). While many countries around the world have eliminated the death penalty, the United States has expanded its use. *See* International Comm'n of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165 (1997).

[34] *See, e.g.*, U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS, (Richard B. Lillich ed., 1981); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993) (discussing the U.S. concerns in ratification of the ICCPR); Kerri Ann Law, *Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child*, 62 FORDHAM L. REV. 1851 (1994) (discussing the reasons the United States should ratify the United Nations Convention on the Rights of the Child); Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996) (discussing the U.S. reaction to Convention on the Elimination of all Forms of Discrimination Against Women); Jordan J. Paust, *Avoiding 'Fraudulent' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) (discussing the U.S. decision to make ICCPR non-self-executing).

[35] The ICCPR was adopted by the United States on September 8, 1992. The U.S. Senate gave the requisite advice and consent to the treaty, together with the declaration "[t]hat the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing. . . ." 138CONG. REC S4,784; *see also* 18 U.S.C. §§ 1091-93 (1994) (setting forth the implementing language of the Genocide Convention).

[36] *See* JOHN H JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 79-105 (1997) (discussing broadly U.S. law and the application of international trade treaties); John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy*, *in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 65 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (reviewing the history of the application of trade treaties in U.S. law).

ing legislation or rule-making in order to have any force in domestic U.S. law.

On the other hand, when we discuss trade organizations, the private actor involvement is particularly appropriate. After all, states intend to design trade treaties to encourage private actors to import and export from other private actors. In order to encourage this trade, treaties require that states do not take actions that would adversely affect these private actors. Historically, the very basis of friendship, commerce and navigation treaties was to provide protection *for private actors* from unfair governmental treatment. Even at the lowest level of economic interaction, bilateral investment treaties today require that governments treat citizens and noncitizens equally. States grant private actors these rights as national treatment[37] or a minimum standard of treatment[38] in the host state. Once states choose to join international

[37] The notion that individuals granted rights under national treatment will receive the same treatment as the state's nationals is referred to as the "Equality of Treatment Doctrine." Though gaining popular support world wide, it has been the doctrine historically preferred by communist and Third World nations. "Treaties of Friendship, Commerce and Navigation" between the U.S. and other nations used the national treatment standard. *See, e.g.,* Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, art. IV, para. 1, 4 U.S.T. 2063, 2067. ("Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party . . . both in pursuit and in defense of their rights.").

[38] According to the Minimum Standard of International Justice, a state must accord an alien with at least a minimum standard of treatment, even if this means an alien would receive better treatment than the state's own nationals. This doctrine was traditionally favored by Western nations, particularly with regard to states with a poor record on human rights. However, third world nations have feared that the use of a minimum standard will be used as a cover for privileged status with regards to investments, inheritance and ownership of property. *See* Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547 (1983). Interestingly, more recent U.S. treaties combine both the national treatment and the minimum standard. For example, in the one Treaty of Friendship with Belgium it is written that

> Each Contracting Party shall at all times accord equitable treatment and effective protection to the persons, property, enterprises, rights and interests of nationals and companies of the other Party. . . . Nationals of either Contracting Party within the territories of the other Party shall be accorded full legal and judicial protection for their persons, rights, and interests. Such nationals shall be free from molestation and shall receive constant protection in no case less than required by international law. To this end they shall in particular have

trade organizations, the requirement of fair treatment for noncitizens includes freedom from unfair taxation, unfair government regulation, unequal tariffs and unequal nontariff barriers. Basically, trade treaties provide a set of rights for private actors *against governments*.

Yet, trade treaties are currently structured so as to provide states these rights on behalf of their citizens rather than granting these rights directly to the citizens. Because trade treaties most affect private actors, it only makes sense that these rights have appropriate remedies.[39] As Stefan Riesenfeld argued almost twenty-

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> right of access, on the same basis and on the same conditions as nationals of such other Party, to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction and shall have right to the services of competent persons of their choice.

Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, U.S.-Belg., arts. 1, 3(1), (2), 14 U.S.T. 1284, 1286, 1288-89; While in an investment treaty with Argentina, it is written:

> Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. . . Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov., 14 1991, Arg-U.S., 31 I.L.M. 124.

[39] As Andreas Lowenfeld stated,

> I have never believed that a right without a remedy is no right at all. But there can be no doubt that the closer a legal system comes to affording remedies for breaches of rules, the stronger are the rights it confers, and the more reliance can be placed on the rules.

Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 471, 488 (1994). For more on rights without remedies in the domestic context, see Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993) (giving context to individual's rights in a structured society); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (examining the concept of "new" law in criminal cases from the perspective of the law of remedies in the constitutional context); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987) (arguing that courts must

five years ago, direct effect of rights and proper judicial remedies are necessary to the continued development of free trade.[40] Furthermore, without appropriate remedies, these rights often are left unprotected and unenforced. Increased legitimacy and effectiveness of international trade organizations require individual involvement, not only at the stage of lawmaking, but also at the stage of remedying lawbreaking.[41]

3.1.3. How Rights Become Directly Effective

In many states other than the United States, international treaties are automatically self-executing and, at ratification, grant individual citizens the rights outlined in the treaty on the same basis as the state itself. Language granting individual rights under international treaties can be outlined in the constitution[42] or legislation.[43] Still other states grant individual rights under treaties through the evolution of judicial decisions that have held the rights to be self-executing or directly effective.[44] In the United States, for example, the U.S. Supreme Court held that a Japanese individual was granted rights directly under the Treaty of Friendship, Commerce and Navigation signed between Japan and the United States.[45] Similarly, although direct effect was not clearly

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presume enforcement of a law absent a showing that greater harm will occur to a plaintiff from enforcing these rights).

[40] *See* Stefan A. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415, 443 (1974).

[41] In fact, the American Bar Association ("ABA") supported expanding the right of private parties to bring cases under NAFTA. *See* Int'l Law and Practice Section, American Bar Ass'n, *Reports to the House of Delegates*, 26 INT'L LAW. 855, 859 (1992). *See also*, Joint Working Group on the Settlement of Int'l Disputes, Canadian and American Bar Ass'ns, *Settlement of Disputes Under the Proposed Free Trade Area Agreement*, 22 INT'L LAW 879 (1988) (proposing a reference procedure from national courts in which individuals could bring cases to a Joint Canada-United States Free Trade Tribunal).

[42] *See* STATUUT NED. [Constitution] art. 91 (Neth.).

[43] For example, under the law of the United Kingdom, "although the executive has a largely unfettered power to enter into treaty obligations, such obligations normally need to be transformed into domestic law by legislation before they can be enforced by British courts." Nicholas Grief, *Constitutional Law and International Law*, *in* UNITED KINGDOM LAW IN THE MID-1990S 76,88 (John W. Bridge et al. eds., 1994).

[44] *See* Etat Belge, Ministre des Affaires Economiques c. Societe Anoyme Fromagerie Franco-Suisse Le Ski', Cour des Cass., 158 Pasic. 1971-I (1971) (Belg.) (ruling on the supremacy of the self-executing treaties over national law).

[45] *See* Asakura v. City of Seattle, 265 U.S. 332 (1924) (detailing suit of a Japanese national by the City of Seattle for the ability to open a pawn shop).

written into the Treaty of Rome, the European Court of Justice ("ECJ") found that the rights in the treaty did have direct effect.[46] Under case law from the ECJ, citizens of member states of the EU are also granted rights directly from EU legislation.[47] This direct effect under the Treaty of Rome is already quite revolutionary in comparison to most international treaties.[48] Because the practice of granting direct effect varies by state, it is necessary

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The Court quoting language from the treaty, "[t]he citizens . . . of each of the High Contracting Parties shall have the liberty to . . . reside in the territories of the other to carry on trade . . ." held in favor of the Japanese national. *See id.* at 340. For more on self-executing treaties, see Jordan J. Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. 760 (1988); Carlos Manuel Vasques, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). *See also* Charles D. Siegel, *Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez Machain's Case*, 13 LOY. L.A. INT'L & COMP L. J. 765 (1991) (detailing case ruling that a Mexican fugitive wanted for a U.S. murder who was kidnapped had to be released because Mexico had protested under its rights under a treaty).

[46] *See* Van Gend en Loos, 1963 E.C.R. 1. This decision was controversial at the time and, it was argued, beyond the scope of the ECJ. *See id.*, at 19 (Opinion of the Advocate General Karl Roemer) (protesting the decision); P.P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEGAL STUD. 453, 458-63 (recounting criticisms of the case).

[47] The ECJ has interpreted the language of Article 189 as conferring rights upon the nationals of Member States in certain circumstances. The direct effect of the legislation, treaty article, or decision is, in essence, what constitutes the right. The Court has distinguished vertical direct effect, the rights of an individual to sue a governmental entity, from horizontal direct effect, the right of an individual to sue another individual. The Court has acknowledged vertical direct effect involving disputes arising from treaty articles, regulations, and directives. *See* Van Gend en Loos, 1963 E.C.R. 1; Case 6/64, Costa v. Ente Nazionale per L'Energia Elettrica, 1964 E.C.R. 585; Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337; Case 152/84, Marshall v. Southampton & S.-W. Hampshire Area Health Auth., 1986 E.C.R. 723. However, the Court has not been so lenient on the rights of individuals established by horizontal direct effect. Although the Courts have recognized horizontal direct effect in disputes arising from treaty articles and regulations, Case 43/75, *Defrenne v. Societe Anonyme Belge De Navigation Aerienne Sabena*, 1976 E.C.R. 455, the Court refuses to acknowledge horizontal direct effect in disputes arising from directives. *See* Case 106/89, Marleasing SA v. La Commercial Internacional De Alimentacion SA, 1990 E.C.R. I-4135.

[48] *See* Brand, *supra* note 30; David O'Keefe, *Judicial Protection of the Individual by the European Court of Justice*, 19 FORDHAM INT'L L.J. 901 (1996); Louis F. Del Duca, *Teaching of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485 (1993). In fact, the EU does not provide direct effect for other international treaties including the GATT. *See* Brand, *supra* note 30, at 575-93 (1997).

to examine the language of the treaty, the member states' practices, and any judicial interpretations of the treaty.

3.2. *Standing Before the Dispute Resolution Body*

3.2.1. *No Standing*

Under some treaties, all disputes are resolved between states through diplomacy. Alternatively, the dispute resolution system is a court or tribunal that is only open to states, as is the case with the International Court of Justice ("ICJ"). Evolving from the Permanent Court of Arbitration,[49] the ICJ is the most recognized international court.[50] In the trade arena, the WTO Dispute Settlement Understanding is closest to this type of international adjudication. In either instance, private actors have no official role in dispute resolution.

Historically under international law, only a state could sue another state and demand reparation for the injuries inflicted on its citizens. The injured private actor did not have a directly enforceable claim against a state that violated his rights.[51] Therefore, it was up to each state to determine if, when, and how to press claims for injury to its own citizens.[52] A state could clearly choose not to pursue this remedy.[53]

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[49] On July 29, 1899, at the first Hague Peace Conference, the Permanent Court of Arbitration ("PCA") was established. The Convention for the Pacific Settlement of International Disputes detailed the PCA, which was to become the first dispute settlement mechanism between sovereign states. *See* Bette E. Shifman, *The Revitalization of the Permanent Court of Arbitration*, 23 INT'L J. LEGAL INFO. 284 (1995).

[50] The Permanent Court of International Justice ("PCIJ") was established in 1921 by the League of Nations. The Court, heard 32 cases and issued 27 advisory opinions to international organizations. At the end of World War II, the establishment of the United Nations (UN) sparked the need for a new world court in consideration of concerns by the parties who were not signatories to the League of Nations. The new world court, the International Court of Justice was, thus, formed in 1945. *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

[51] *See* Factory at Chorzów (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 6, at 28 (July 27) (Merits). ("The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage.").

[52] The Permanent Court of International Justice recognized that:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary

Private suits in domestic courts were also not an option. Many states had laws that limited grounds on which they could be sued in their own courts which meant that foreign investors had little recourse to that domestic legal system.[54] Even if a private actor wanted to bring a suit in his own home court against the foreign state, most developed states had laws that provided foreign sovereign immunity.[55] Moreover, private actors had no international recourse in the case of a violation by their own government.

Today, under a treaty with no standing for private actors, private actors are involved only to the extent that they lobby their governments to represent their interests and to protect their industries. Examples of this would be the United States negotiating

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> to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30) (Jurisdiction).

[53] *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (involving U.S. government refusal to espouse the claims of the plaintiff against the government of Saudi Arabia). Individuals have traditionally been able to request that their government espouse their claims before the ICJ or other international court. *See* Lotus, (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); *see also* David M. Reilly & Sarita Ordonez, Effect of the Jurisprudence of the International Court of Justice on National Courts, 28 N.Y.U. J. INT'L L. & POL. 435 (1996) (analyzing *U.S. Citizens Living in Nicaragua v. Reagan* and the denial of individuals to bring a case in front of the ICJ).

[54] In most countries the government had full sovereign immunity both in law and in practice. *See* Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); *see also* United States v. Lee, 106 U.S. 196 (1882) (stating that the United States may only be sued by its own consent).

[55] *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (1994) ("Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided [in the exceptions]."); State Immunity Act, 1978, ch. 33 (Eng.) (granting immunity in the United Kingdom to the sovereign).

with Japan to open its automobile market[56] or negotiating with Russia regarding regional investment.[57]

3.2.2. Petition Domestically for Government to Represent

A second option is that private actors have the right to petition their governments to bring a dispute to the system. While private actors do not have the opportunity to directly bring their cases, the government may be persuaded through formal mechanisms that a dispute is sufficiently serious to warrant their attention. The closest example of this in the United States is the so-called "301 procedure" for the United States Trade Representative ("USTR").[58] While the state still makes the final decision about whether or not to bring such a case, there are formal mechanisms for private actors to become involved at the domestic level in this dispute resolution system.[59] Because the USTR's decisions have

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[56] *See High Level Talks Slated with Japan on Auto Agreement*, 14 Int'l Trade Rep. (BNA) 1714 (Oct. 8, 1997).

[57] *See U.S., Russia Sign Cooperation Accords, Focus on Investment in Russia's Regions*, 14 Int'l Trade Rep. (BNA) 1633 (Sept. 24, 1997).

[58] Section 301 allows an individual to petition the United States government to initiate trade dispute resolutions. Under Section 302 a party can petition the U.S. Trade Representative to investigate a foreign government's policies or practices that are suspected to be hindering trade. *See* 19 U.S.C. §§ 2412-14 (1994). The USTR, under section 304, must investigate and determine if the foreign government has violated a trade agreement, benefits of any trade agreement are unreasonably being denied to the individual, or the foreign government is unjustifiably burdening or restricting U.S. commerce. *See id.* § 2414. If the dispute involves a trade agreement the USTR is obligated under section 303(a)(2) to first use the dispute settlement procedures provided under that agreement. *See id.* § 2413. For example, if a dispute involves infringements based on one of the Uruguay Round Agreements, the USTR must utilize the dispute resolution system of the World Trade Organization. If the USTR finds that a trade infringement is occurring and is convinced that the dispute should involve action by the United States it will pursue resolution of the dispute. The EU also has a procedure whereby private actors can request the EU take action against those governments violating free trade agreements. *See* Council Regulation 3286/94, 1994 O.J. (L 349) 71 [the Trade Barriers Regulation] (laying down EU procedures in the field of common commercial policy).

[59] Out of the 23 section 301 cases initiated by an individual between 1985 and 1996, 11 GATT panels were established. *See* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organizations Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209 (1997). *See also* A. Lynne Puckett & William L. Reynolds, Current Development, *Rules, Sanctions and Enforcement under Section 301; At Odds with the WTO?*, 90 AM. J. INT'L L. 675 (1996) (detailing conflicts between Section 301 and WTO policy); Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO*, 17 U. PA. J. INT'L ECON. L. 233 (1996).

not been reviewed by the judiciary,[60] a private actor seeking dispute resolution of his claim in this manner will likely have no recourse if the USTR decides to take no action.

3.2.3. *Individual Arbitration*

Private actors can also be granted standing before an international arbitration board. Such a dispute resolution mechanism permits standing for private actors directly affected by laws in the state in which they are investing. The move toward investment arbitration began with the creation of the International Centre for the Settlement of Investment Disputes ("ICSID") under the aegis of the World Bank.[61] In the model of investment arbitration under ICSID, private actors can bring cases against states. ICSID has jurisdiction over any legal dispute arising out of an investment between a member state and a national of another member state.[62] To initiate proceedings under ICSID, a party must submit a written request to the Secretary-General of ICSID detailing the issues in dispute, the parties, and consent to arbitration. Once certified by the Secretary-General of ICSID, a private actor can have the case heard by an arbitral panel established by ICSID.[63] This model of permitting private actors to bring cases against states has

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[60] The USTR has discretion in determining whether to initiate investigations from the petitions filed by interested individuals. *See* 19 U.S.C. § 2412(a)(2). If the USTR decides not to investigate, notice of such a determination with an explanation of reasons must be published in the Federal Register. *See id.* § 2412(a) (3). *But see* Erwin Eichman & Gary Horlick, *Political Questions in International Trade: Judicial Review of Section 301*, 10 MICH. J. INT'L L. 735 (1989) (arguing that a denial by the USTR to pursue investigations of an individual's petition should be reviewed by the judiciary).

[61] ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. *See also* Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 655-56 (1995).

[62] *See* ICSID Convention, *supra* note 61, art. 25. The parties must, however, consent to the use of the arbitration facility. *Id.* The use of ICSID has not been initiated by a Contracting State in complaint of an individual of another Contracting State even though the potential exists under the Convention provisions. *See* David A. Solely, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L L. 521 (1985).

[63] *See* ICSID Convention, *supra* note 61, art. 36. Unless the Secretary-General finds that the dispute falls outside the jurisdiction of ISCID, he will register the request and notify the parties. *See id.* art. 36(3).

since been copied in bilateral investment treaties in order to encourage foreign direct investment[64] and outlined in the North American Free Trade Agreement ("NAFTA") for investor disputes under Chapter 11.[65] These treaties outline limited standing provisions and permit only those private actors with investments in the state to bring such a dispute against a state.

3.2.4. Private Actors Before a Court

The furthest evolution of individual standing is when private actors have the ability to bring a case themselves to an international tribunal.[66] In the EU, private actors have the right to bring

[64] *See, e.g.*, Investment Treaty with the Republic of Armenia, Sept. 23, 1992, S. TREATY DOC. NO. 103-11, art. VI (1992).

[65] *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, ch. 20. [hereinafter NAFTA]. NAFTA provides the opportunity under its investment arbitration chapter to have arbitration under ICSID or Arbitration Rules of the United Nations Conference on International Trade Law ("UNCITRAL") rules. Arbitration under ICSID rules is available to member countries and nationals of member countries. Disputes where only one of the countries concerned is a member of ICSID are carried out under the Additional Facility Rules of ICSID. Because Canada and Mexico are not yet members of ICSID, arbitration is only available under the Additional Facility Rules when one of the countries involved is the United States. The first two NAFTA cases using the ICSID Additional Facility Rules were registered in January and March, 1997, and involve U.S. nationals versus the Mexican government. *See* Metalclad Corp. v. Mexico (ICSID Case No. ARB (AF)/97/1); Robert Azinian v. Mexico (ICSID Case No. ARB (AF)/97/2). *See generally First ICSID Additional Facility Proceedings Under the NAFTA*, 14 NEWS FROM ICSID, 1, 6, 10 (1997) (No. 1). Arbitrations involving only Canada and Mexico must be resolved using the UNCITRAL rules as the ICSID facility is not available where neither country is a member. UNCITRAL rules are reprinted in 15 I.L.M. 701 (1976). A model similar to investor arbitration is also established in the Environmental Side Accord to NAFTA, the North American Agreement on Environmental Cooperation, *entered into force* Jan. 1, 1994, art. 14(1), 32 I.L.M. 1480. For further information on the implementation of the Environmental Accord see David Lopez, *Dispute Resolution under NAFTA: Lessons from the Early Experience* 32 TEX. INT'L L.J. 163, 184-191 (1997); Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721 (1996); Rex J. Zedalis, *Claims by Individuals in International Economic Law: NAFTA Developments*, 7 AM. REV. INT'L ARB. 115 (1996).

[66] The first court to provide standing for individuals was the Central American Court of Justice created in 1907 by Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador. Although the court's existence was short lived, it was the first court to allow individual claims to be brought against the contracting states. Individuals were barred from bringing suit against their own nation and were required to demonstrate an exhaustion of local remedies before bringing an action before the court. All of the five cases brought by individuals

a case directly to the ECJ in certain circumstances.[67] Cases brought before the ECJ based on a reference made by a domestic court are more common.[68] The private actor brings a case to his or her national court. That court then can refer the question of EU law to the ECJ. In either case, the result is the opportunity for private actors to argue and defend their rights in front of an international tribunal.[69] El Mercado Común del Sur

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against a contracting state within the ten year existence of the Central American Court resulted in favor of the contracting states. *See* P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 159 (1992) (citing Convention for the Establishment of Central American Court of Justice, Dec. 20, 1907, 2 AM. J. INT'L L. 231 (Supp. 1908)).

[67] Article 173 of the EC Treaty provides an individual with the opportunity to institute proceedings not only involving decisions explicitly against that person, but also involving any directive or regulation that is of direct and individual concern to that individual. The courts, however, have been reluctant to allow all directives and regulations to be challenged. *Compare* Joined Cases 16 & 17/62, Confederation Nationale des Productents de Fruits et Legumes v. Council 1962 E.C.R. 47 (denying standing to fruit and vegetable producers petitioning to annul a Council regulation advancing a common market in the industry) *with* Case 730/79, Philip Morris Holland v. Commission, 1980 E.C.R. 2671 (permitting standing for a cigarette manufacturer seeking to annul the Commission's denial of permission to Holland for the granting of state aid for the expansion of cigarette production). For more information on the application of Article 173, see Anthony Arnull, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, 32 COMMON MKT. L. REV. 7 (1995).

[68] Article 177 of the EC Treaty provides guidance to the domestic courts in referring issues to the ECJ. The ECJ is limited to providing preliminary rulings only on issues regarding the interpretation of the Treaty, the validity and interpretation of acts of the Community's institutions, and the interpretations of any statutes that provide for such a means of clarification. *See* H.P. Bulmer Ltd. v. J. Bollinger S.A., [1974] 2 C.M.L.R. 91 (1974) (U.K.) (holding that English judges are the final court to *apply* community law, but the ultimate authority on interpreting community law goes to the ECJ); Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (ruling that a national court is required to refer cases where there is no judicial remedy in the member state but there is a question of Community law raised). The use of Article 177 mitigates the stringent standing requirement set forth by Article 173. Thus, an individual who does not have a direct and individual concern to introduce a case directly to the ECJ can commence the action in a domestic court and request a preliminary ruling from the ECJ. *See* Arnull, *supra*, note 67, at 40-9 (describing the combined effect of Article 173 and 177); *see also* Schaefer, *supra*, note 27 (discussing rights and remedies to bring claims under international dispute settlement systems and in domestic courts).

[69] Case law in the EU has also determined that an individual may sue other individuals in order to protect his rights under Community law. The concept is referred to as horizontal direct effect (distinct from vertical direct effect, the

("MERCOSUR", or the "Common Market of the South") also modeled its system of dispute resolution upon the EU where private actors can go to either the MERCOSUR court or their national court.[70]

We cannot underestimate the impact of individual involvement in international dispute resolution.[71] Private actors play the important function of private enforcement agents.[72] As such, private actors can themselves ensure that the law is being followed rather than relying on states or an oversight body (such as the Commission in the case of the EU) to bring a case. States may feel reluctant to bring cases against other states for somewhat minor infractions as the diplomatic ramifications may not be worth the trouble. Furthermore, it may be in many states' interests not to follow the letter of the law exactly or to take their time in

litigation between an individual and a government entity). Horizontal direct effect conclusively exists in issues involving conflicts arising from articles and regulations of the Community. *See* Defrenne, 1976 E.C.R. 455. However, the question of horizontal effect in conflicts arising over directives has not been as favorable. *See* Case 91/92, Faccini-Dori v. Recreb, 1994 E.C.R. 3325 (confirming the traditional view that horizontal direct effect does not exist in disputes involving directives rather than following the Advocate General's advice to further the scope of direct effect). If the individual is denied access to the ECJ to sue another individual, he may still have an opportunity to commence an action against the Member State for noncompliance with Community law by not properly implementing the specific directive. *See* Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, [1992] 1 C.M.L.R. 305 (1992) (Spain) (emphasizing that the States have a duty to implement directives in a manner so as to achieve the intended result of the Community as closely as possible).

[70] *See* MERCOSUR: Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991, *reprinted in* 36 I.L.M. 691; Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850 (1996-97).

[71] For a review of the most recent literature assessing the impact of individual litigants and EU law, see Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998).

[72] *See* Weiler, *supra* note 3, at 2421 (noting importance of citizens to the EU judicial system); P.P. Craig, *supra* note 46 (1992) (arguing that private enforcement agents are critical to the EU system of direct effect). *See generally* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (calling for greater acceptance of nongovernmental organizations acting as amici curiae by international courts).

complying with the numerous laws set out under the EU—a kind of willing collusion to ignore the law.[73]

While an oversight body is more likely to bring cases, it also has the problem of measuring the value of a vast number of cases and keeping straightening out its own political agenda. In addition, an oversight body probably will not have sufficient resources to check compliance with all laws nor to bring all the cases of noncompliance to the court. Private actors, on the other hand, do not have the political baggage of bringing a case against another state. Private actors can make a direct economic assessment about whether it is worth it to them to spend the time and money on litigation. Where private actors are granted rights and where the benefits of the treaty are supposed to accrue directly to private actors, it makes sense to give private actors a remedy for violation of those rights.[74]

3.3. *Supremacy over Domestic Law*

3.3.1. *Definition*

A crucial factor in examining the rights of private actors is the extent to which the system creates binding law for the member states. Supremacy can be clearly defined for international law—be it treaty or decision from the dispute resolution tribunal—to be supreme to domestic law. Yet states vary widely on their use, adoption, and interpretation of international law.

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[73] *See* Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Communities Legal Order*, 37 HARV. INT'L L.J. 307 (1996).

[74] This avenue provided the court with the opportunity to decide some of the most important cases in the judicial history of the ECJ. Furthermore, the ECJ hears more cases as preliminary references under Article 177 than directly. In the early years of the EEC, from 1958 to 1973, nearly two-thirds of all cases in front of the ECJ came through preliminary rulings. *See* Stefan A. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415, 426 (1974) (citing to Commission's Annual General Report on the Activities of the Communities). This use of Article 177 references continues to increase. In 1993, the ECJ received 203 references which more than doubled the number of cases in 1980. *See* Sarah E. Strasser, *Evolution & Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References* (Harvard Law School Harvard Jean Monnet Chair Working Papers, No. 3/95), *available at* Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <http://www.law.harvard.edu/Programs/Jean Monnet/>.

3.3.2. *Treaties Equal with National Law*

Some states, including the United States, treat international treaties as equal to national law. For example, the U.S. Constitution states that treaties are the supreme law of the land.[75] Under rules of interpretation, this means that a later law trumps the law which preceded it.[76] The Supreme Court has thus stated that,

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation .... When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.[77]

In practice, a national law could overrule an international treaty under this treatment of international law,[78] but it still places international treaties above state law.[79]

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[75] *See* U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ....") This interpretation of treaties is similar to the one in the United Kingdom and other Commonwealth countries in which courts have found international treaties to be equal to national law. In these countries, however, separate implementing legislation beyond ratification is needed to provide direct effect under these treaties. In reality, this has been the case in the United States in more recent treaty implementation where treaties are not given direct effect unless expressly provided for in separate implementing legislation. *See* discussion *supra* Section 3.1.

[76] *See* C.H. McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 751 (1958) ("[T]he courts have consistently held that treaties and statutes are mentioned in terms of equal dignity in the supremacy clause, and therefore in the event of a conflict between them whichever is later in time must prevail."). *Cf.* United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988) (holding that a subsequent statute would only supersede a treaty if that were the explicit purpose of the statute).

[77] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[78] *See, e.g.*, Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990) (analyzing GATT).

[79] The Supreme Court has declared that legislation enacted by the federal government in order to implement the objectives of a treaty agreement will be superior to any legislation enacted by the states. *See* Missouri v. Holland, 252

3.3.3. Treaties Supreme to National Law

Another approach to international law is that it is supreme to domestic law. Therefore, no national law, no matter when it is passed, ever trumps an international law. Examples of countries that follow this approach include Belgium, France, and Holland.[80] A modification of this approach is that international law is supreme to all law except for the constitution or basic law of the state, as is the case in Germany and Italy.[81]

3.3.4. Difference Between International Treaties and International Decisions

As the U.S. Constitution discusses only those treaties concluded under Article II procedures,[82] it is left to the judiciary un-

U.S. 416 (1920) (holding that a treaty with Canada regulating the hunting of migratory birds is constitutional and any federal legislation therein will preempt state law). The Supreme Court furthered this notion by stating that a self-executing treaty will preempt state law, even with no federal legislation. *See* United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) (reaffirming the superiority of treaties to state law governing Native American fishing rights). For more information on state law preemption see generally, Harold Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989).

[80] In Belgium, France, and the Netherlands, the constitution or courts have accorded self-executing treaties supremacy over prior or subsequent domestic legislation. *See* CONST. art. 55 (Fr.); STATUUT NED. [Constitution], art. 94 (Neth.).

[81] Article 25 of the Basic Law of Germany seems to grant both direct effect and supremacy to international law: "The general rules of public international law shall be an integral part of the federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." GRUNDGESETZ [Constitution] [GG], art. 25. In practice, the German Constitutional Court has retained its ability to review international law, including legislation of the EU and rulings of the ECJ, to ensure its compliance with the Basic Law of Germany (the German Constitution). *See* BVerfGE 89, 155 (the Maastricht Decision); Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel ("Solange I"), BVerfGE 37, 271, *translated in* [1974] 2 C.M.L.R. 540; In re Wunsche Handelsgesellschaft ("Solange II"), BVerfGE 73, 339, *translated in* [1987] 3 C.M.L.R. 225; Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM J. EUR. L. 229 (1997). Both Germany and Italy required separate constitutional provisions to accept the supremacy of EU law. *See* Mattli & Slaughter, *supra* note 71, at 203.

[82] U.S. CONST., art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

der U.S. law whether decisions of international tribunals are to be treated the same way. This problem exists in other states as well. Even those states that find international treaties supreme to their national law have not necessarily treated international decisions the same way. While national constitutions may have envisioned international treaties and made provisions for their supremacy, few constitutions make provisions for decisions of international tribunals. This can be attributed to two reasons. First, when most state's drafted their constitutions, international decision-making bodies did not exist. Second, in the case of arbitration decisions, the arbitrator generally provides for damages and not a change in the domestic laws.[83] The issue of supremacy does not really arise because there is no new law created. Therefore, we must examine what provisions the international trade treaty has made regarding supremacy and how the member states have interpreted and acted upon this treaty. Only the EU has evolved to the point where ECJ decisions are supreme over national law in all the member states.[84]

3.3.5. National Judges' Ability to Overrule National Law

One last factor in determining the extent to which international tribunal decisions have supremacy is whether or not domestic judges have the power to enact this international law. Can the domestic judge overrule national law in the face of a conflicting international decision? In some states, only the highest court of the land can overrule a law. For instance, the Italian court system permits only the Italian Constitutional Court to address the constitutionality of national legislation.[85] Therefore, lower court

[83] Neither the ICSID or UNCITRAL rules explicitly deny the panel the ability to proscribe a change in the law. However, the arbitral panels have not diverged from the issuance of monetary damages as an award. *See, e.g., American Mfg. & Trading Inc. v. Republic of Zaire*, ARB/93/1; *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, ARB/84/3).

[84] *See* J.H.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411 (1996) (commenting on the well-established supremacy doctrine of the ECJ and its limitations); *see also* Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J.INT'L L. & POL'Y (1995-96).

[85] This system has only been modified regarding EU law, where it was held that if the lower Italian courts are not permitted to rule on the invalidity of an inconsistent statute, the integration of Community law in the Member States is significantly hindered. For the progression of Community law in Italy, see Costa, 1964 E.C.R. 585; Amministrazione Delle Finanze Dello Stato, 1978

judges are constrained by their national rules in the implementation of international rules. Similarly, in France and Great Britain, the tradition of judicial review did not exist and took more time to implement in light of EU law.[86] For true supremacy of international law, all judges at all levels need the ability to evaluate national law in the face of conflicting international law.

3.4. Transparency

3.4.1. Why Transparency is Important

Transparency in a dispute resolution system refers to the clarity and intelligibility of the procedures of the system as well as to the outcomes. The level of transparency is important for a number of reasons, which could be called the three P's: publicity, precedent and predictability. First, when the rules and procedures are clear, parties to the dispute are more likely to use the system. Government officials, as well as lawyers for individual clients, will have some comfort level with the dispute resolution system and will have an awareness of how the system works.[87] Second, published decisions of dispute resolution tribunals provide lessons and possible persuasive authority for other dispute resolution tribunals such as courts or arbitrations. If a decision is published, it can provide persuasive precedent for similar disputes.[88] Publicity of decisions also puts pressure on states to

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E.C.R. 629 (holding that Italian National Court must give full effect to Community law provisions). *See generally* Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990) (discussing contradictions between EU Court rulings and Italian law); Antonio La Pergola, *Italy and European Integration: A Lawyer's Perspective*, 4 IND. INT'L & COMP. L. REV. 259 (1994) (detailing growing support for EU integration in Italy and Italy's subsequent attempt to cope with EU directives which conflict with their national law).

[86] *See, e.g.*, Mattli & Slaughter, *supra* note 71, at 200-04 (1998).

[87] This concern with transparency and legitimacy has also manifested itself in the EU. *See* Lodge, *supra* note 15; Maher, *supra* note 15, 238-40; Weiler, *supra* note 3, at 2421 (noting importance in the EU judicial system for citizens to act as a decentralized agent for monitoring compliance).

[88] *See, e.g.*, United Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); North Seas Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). For a further discussion on precedent in dispute resolution, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMICS (1989); ERNST-ULRICH PETERSMANN, STRENGTHENING THE GATT DISPUTE SETTLEMENT SYSTEM (1988);

comply with the rulings.[89] Finally, transparent rules and decisions increase the predictability of the system. Clear rules set forth how the system is going to work and create confidence on the part of the users of the system.[90] The transparency of the system provides the opportunity for both practitioners and academics to analyze, improve, and comprehend this particular international dispute resolution system. Equally importantly, well-reasoned decisions create confidence in the dispute resolution body and educate the users of the system about how the body would be likely to rule in the future.

Even if a user of the system is not happy with the particular outcome, predictability allows the parties to decide whether or not to use this particular route of dispute resolution. When systems are not predicable, both government officials and private lawyers will be reluctant to advise governments and private actors to take a chance on a haphazard outcome. The clearest example of this has been ICSID, where the small number of cases over the years and the unpredictability in terms of appeals has led many government and corporate lawyers to advise their clients against this route of dispute resolution.[91]

MOHAMMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996); Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967 (1996).

[89] *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 22 (1995).

[90] *See* Yair Baranes, *The Motivations and the Models: A Comparison of the Israel-U.S. Free Trade Agreement and the North American Free Trade Agreement*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 145, 156 (1997) (arguing that the lack of specificity in the Israel-U.S. Free Trade Agreement is problematic).

[91] The problem with ICSID is only partially a result of the lack of transparency in the decisions. In its 32 year history, ICSID has only handled about 45 cases. ICSID lacks the history and case load to provide predictability and assurance to investors in need of an efficient and effective arbitration facility. Another problem with ICSID is that the decision is subject to review by an internal review committee. Any party may request an interpretation, revision, or annulment of an award. *See* ICSID Convention § 5, arts. 50-52, *supra* note 61. The tribunal that rendered the award or, if unavailable or not practical, a new review tribunal shall decide on the reviewable issue. Revisions of an award may be provided if new information is discovered within three years of the rendered decisions. *See id.*, art. 51. Article 52 lists five reasons why an award may be annulled: (1) the tribunal was not properly constituted, (2) the tribunal manifestly exceeded its powers, (3) a member of the tribunal was corrupted, (4) the tribunal seriously departed from the fundamental rule of procedure, and (5) the award fails to state the reasons on which it was based. *See id.*, art. 52. Although whether a decision is subject to review is not a factor used to determine the

3.4.2. *Lack of Rules and Procedure*

The lowest level of transparency is when the rules and procedure do not exist in advance of the dispute. Resolution is left up to the parties and no system is set forth. This is most typical in bilateral treaties, where disputes in compliance or interpretation of the treaty are left to the states to negotiate as they arise.[92]

3.4.3. *Decisions/Agreements Not Published*

When the rules and procedures are clear but the decisions of the tribunal or the agreement between the parties are not published, this creates an additional transparency issue. For example, an ICSID arbitration decision can also be kept confidential if requested by the parties.[93] This means that this decision cannot provide precedent or predictability in the system because uninvolved lawyers cannot analyze the panel's thinking.[94] In this case,

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type of dispute resolution system, it clearly affects the overall effectiveness of any system. In addition to further time and expense associated with the decision, in ICSID's case, it further diminished the predictability of the dispute resolution system. *See* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARD "JUDICIALIZATION" AND UNIFORMITY? (Richard Lillich & Charles Brower eds.) (1992); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 46-106 (1992); Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW. & POL'Y INT'L BUS. 633 (1995); David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW 521 (1985).

[92] See example of the renegotiation of the U.S.-Japanese auto agreement discussed *infra* note 99.

[93] Article 48(5) of the ICSID Convention explicitly prohibits the publishing of awards without the consent of the parties. *See* ICSID Convention, *supra* note 61, art. 48(5). Thus, the transparency of such a system remains questionable. *See* John B. Attanasio, *Rapporteur's Overview and Conclusions of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. (1996) (addressing the factors that make the ICSID less credible than ICJ judgments). *See also* J.A. Freedberg, *The Role of the International Council for Commercial Arbitration in Providing Source Material in International Commercial Arbitration*, 23 INT'L J. LEGAL INFO. 272 (1995) (stating that even though the ICSID Convention requires consent to publish, many awards get published).

[94] The ICSID's lack of case law precedent as well as the review process make the arbitral facility less appealing to investors. Difficulty with interference by national courts has made ICSID even more unreliable. *See* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1983) (ICSID, Case No. ARB/84/4) (refusing to enforce the ICSID arbitral award); Monroe Leigh, *Judicial Decisions*, 81 AM. J. INT'L L. 206, 222-25 (1987). (detailing AMCO Asia Corp. v. Republic of Indonesia, 25 I.L.M. 1439, ICSID

parties are able to understand how the system works, but are not confident using it. Outsiders either have no idea about the outcome of the dispute, or, when they do, the lack of an explanation for the decision still leaves gaps in their understanding of how the tribunal works. In addition, a body of case law with persuasive force is not established, and the rules of the organization remain to be interpreted on an ad hoc basis.

3.4.4. *Decisions Are Published*

The highest level of transparency is when the decisions of the dispute resolution body are published regularly. In this case, the decisions can be read by practitioners, government officials, other jurists, and academics.[95] Decisions can be analyzed, explained, and used as a basis for other cases. Only in this way can persuasive authority be established. This is also the best way for private actors and their lawyers to become comfortable with the dispute resolution mechanism. Furthermore, public decisions increase the pressure on states to comply. This level of transparency currently exists only in the EU although the WTO has made progress towards this goal.

3.5. *Compliance/Enforcement*

The fifth and final factor in determining the value of individual involvement is the level of enforcement mechanisms provided for in the dispute resolution system. Compliance and enforcement are often targeted as the main weakness of the international legal system.[96] Because international courts have thus far not had

(Case No. ARB/81/1) (1986), where the Indonesian government annulled ICSID decision on the grounds that ICSID "manifestly exceeded its powers.").

[95] *See* Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1227 (1994) (explaining the necessity of publishing decisions in a timely manner).

[96] John Austin, for example, called international law "public international morality" at best because he defined law to require the threat of enforcement, while international law is merely enforced by moral obligation rather than direct subjection to a nation's laws. *See* John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (New York, Jane Cockcroft & Co., 1875), vol. 1, p. 121; *see also* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979) (discussing the effects of international law on how nations behave among one another); J. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (4th ed. 1949) (discussing origins and peculiarities of international law).

military forces to enforce their decisions, many critics of the international system focus on those cases where states choose to ignore the international court.[97] The apparent uselessness of the United States bringing a case against Iran for holding U.S. hostages and the attempt of the United States to avoid prosecution by Nicaragua are often cited as classic examples of what happens before an international court. Similarly, the breakdown of GATT in the 1980's as the most powerful states ignored GATT panel recommendations[98] shows the weakness of relying on states to comply without effective enforcement measures. Without arguing whether international dispute resolution can ever truly "work," it is important to assess the level of enforcement a court can have.

3.5.1. No Formal Enforcement of the Treaty Rights

The first level of enforcement of treaties is where there is nothing specific written into the treaty or dispute resolution system. Enforcement under this system of dispute resolution is clearly left to the respective states. There is no oversight institution. Any noncompliance would put the parties back at the negotiation table in order to work out this dispute as well. In other words, a negotiation system which relies on first-order compli-

[97] Louis Henkin says "*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*" HENKIN, *supra* note 96, at 47. But, skeptics point to plenty of contrary evidence such as the Iran-United States or United States-Nicaragua cases before the ICJ. *See* United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran) 1981 I.C.J. 45 (May 12); Military and Paramilitary Activities, (Nic. v. U.S.) 1986 I.C.J. 14 (June 27).

[98] GATT procedure provided the losing parties with successful means of delaying the appointments of panels, effectively blocking adoption of the panel reports, and merely ignoring panel decisions. For instance, after the U.S. asserted a complaint in 1981 under GATT against the EC concerning pasta export subsidies, the EC effectively blocked adoption of the panel report in favor of the United States. The United States resorted to indirect retaliation efforts which sparked countermeasures by the EC. *See* ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW 151-54 (1993) (citing Subsidies on Exports of Pasta Products, SCM/43, May 19, 1983, an unadopted decision, and other cases detailing GATT's ineffectiveness); *see also* Petersmann, *supra* note 95, at 1203-04 (enumerating some further problem areas of the GATT dispute settlement system).

ance requires following the agreement at all times. States either follow the agreement, or they must negotiate a new one.[99]

3.5.2. Second-Order Compliance—Remedies for Ignoring the Treaty

Second-order compliance occurs when a dispute resolution mechanism exists under the treaty which would rule on compliance by the member states. Without a separate mechanism, rules for treaty compliance and breach follow the default rules of the Vienna Convention.[100] The rules of the Vienna Convention, however, are generally perceived as insufficient in terms of dealing with treaty breach,[101] and therefore create an incentive for in-

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[99] For example, Japan and the U.S. have had to renegotiate their agreement on the auto parts market several times. *See U.S. Frustrated by Japan's Progress on Car Sales, Dealerships in Auto Talks*, 14 Int'l Trade Rep. (BNA) 1759 (Oct. 9, 1997); *High Level Talks Slated with Japan on Auto Agreement*, *supra* note 56; David Sanger, *Trade's Bottom Line: Business over Politics*, N.Y. TIMES, July 30, 1995, at D5.

[100] *See* Vienna Convention on the Laws of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27 [hereinafter Vienna Convention]. Articles 31 and 32 of the Vienna Convention specifically address issues of treaty interpretation. According to Article 31, a treaty shall be interpreted first by looking at the text of the treaty itself in light of the object and purpose. Methods for interpretation shall then recognize the entire treaty taking into consideration subsequent treaties and practices. The negotiation history of the treaty will also be taken into consideration. If the treaty remains ambiguous after those considerations, Article 32 allows for recognition of the preparatory works for the final method of interpretation. Subsequent articles deal with the conditions under which a party may terminate its obligations under the treaty. For instance, Article 46 invalidates a treaty if it violates an international law of fundamental principle; Articles 49 through 52 deal with the termination of obligations when a treaty was procured through fraud, corruption, or coercion; Article 61 discharges a party for impossibility of performance; and, Article 62, rebus sic stantibus, allows for termination of a treaty in which a circumstance that was an essential basis for consent fundamentally changes to the extent of radically transforming the scope of obligation. As a last resort, a party to a treaty may terminate its obligation by breach but must confront the consequences addressed by Article 60.

[101] *See* Frederic Kirgis, Jr., *Some Lingering Questions about Article 60 of the Vienna Convention on the Laws of Treaties*, 22 CORNELL INT'L L.J. 549 (1989) (discussing the unresolved issues of breach); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997) (explaining that, in addition to Article 60, remedies for breach of a treaty exist in the form of an uncodified law); *see also* SHABTAI ROSENNE, BREACH OF TREATY (1985) (generalizing breaches of treaties). Article 60 of the Vienna Convention delineates the consequences for breach of a treaty. In the instance of a material breach involving a bilateral treaty, the ter-

ternational organizations to set up more complete mechanisms of dispute resolution.

Any of the formal mechanisms discussed here—including arbitration under ICSID, panels under GATT, the dispute resolution system under the WTO, and cases under the ECJ—act as second-order compliance mechanisms. They permit cases to be brought for noncompliance with the treaty rules. Both GATT and the ICJ are examples of court systems that provide for little realistic enforcement beyond censure of the international community.[102] These systems stop at second-order compliance, whereby states *should* obey the law, but if they violate the law, they should pay a fine (or change the law).

One important factor to note at this stage is how and when cases are brought to the dispute resolution system. For example, in the EU, the Commission acts as an oversight body and can

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mination or suspension of obligations may be instituted by the nonbreaching party. With a multilateral treaty, all nonbreaching parties must consent to the termination or suspension of the treaty in whole or in part. Specifically, the affected party may suspend its obligations with the breaching party, or if the material breach radically changes the scope of the treaty any nonbreaching party may invoke suspension or termination of the treaty. *See* Vienna Convention, *supra* note 100, art. 60.

[102] Although GATT provided for retaliation and the ICJ provides for enforcement under the Security Council, neither of these remedies were real possibilities for enforcement. The Security Council has never authorized military action nor economic sanctions for noncompliance with an ICJ decision. *See* Mark Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, in *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 144, 145 n.16-17 (Harold G. Maier ed., 1987) (stating that although the U.N. Charter authorizes the Security Council to enforce decisions of the ICJ, no action has ever been taken). Retaliation authorized under GATT was only used once by the Netherlands against the United States. *See* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 198 (1990). However, the enforcement of decisions in international law through voluntary compliance in the face of international pressure should not be underestimated. Many countries regularly abide by unfavorable rulings in order to remain a law abiding member of the international community. *See* CHAYES & CHAYES, *supra* note 89, at 28. Furthermore, direct foreign aid, foreign investment, and World Bank projects are often linked to compliance under international law. For example, the World Bank has played a major role in the compliance of environmental laws in Mexico. *See* Mexico's Environmental Controls for New Companies, 2 MEX. TRADE & L. REP. 15 (1992); David Barrans, *Promoting International Environmental Protections through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65 (1991). *But see* Stephanie Guyett, *Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development*, 24 N.Y.U. J. INT'L L. & POL. 889 (1992) (criticizing the shortcomings of such an enforcement mechanism).

bring cases of noncompliance to the ECJ.[103] Other organizations do not provide standing for any oversight body, meaning that cases will be brought, if at all, by other states. Under GATT, states could also delay or avoid a case.[104] Under the new WTO procedures, the dispute resolution system has become much more judicialized.[105]

3.5.3. Third-Order Compliance—Remedies for Ignoring Decisions

Third-order compliance can be demonstrated by way of a traffic law example. If we conceive that following the traffic laws is first-order compliance and paying the traffic ticket when one does not it is second-order compliance, an arrest warrant or contempt citation for nonpayment of the traffic ticket would be third-order compliance. This is yet another level of forcing one to comply with the original laws set forth. In the international arena, the analogy would be following the trade treaty as complying in the first-order, and agreeing to change the tariff in response to a determination that the tariff was unfair would be the second-order

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[103] Article 169 of the EEC Treaty gives the Commission the authority to enforce community law compliance for all Member States. The Commission will first give the State notice in the form of an opinion letter, detailing the method and timeliness of compliance. If the Member State refuses to comply, the Commission can sue the Member State in the ECJ. *See* Case 7/61, Commission v. Italy, 1961 E.C.R. 317 (forcing Italy to terminate its ban on imported pork in compliance with community law). *See* Karen Banks, *National Enforcement of Community Rights*, 21 COMMON MKT. L. REV. 669 (1984). Article 170 gives a Member State the right to sue another Member State for the enforcement of community law. The complaining State must first submit its concern with the Commission and allow the Commission to enforce the issue. *See* Case 232/78, Commission v. France, 1979 E.C.R. 2729 (describing Commission action on complaints from the United Kingdom). Although a rare occurrence, if specific measures are not taken the complaining State can take the infringing State directly to the ECJ. *See, e.g.,* Case 141/78, France v. United Kingdom, 1979 E.C.R. 2923. For more on enforcement of these articles, see generally*Enforcement Actions under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388 (1989).

[104] *See* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L 209, 236-37 (1997) (discussing the delays brought about by the United States when Brazil pursued under GATT complaints about Section 301); *see also* John Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L., 747, 779-81 (1978) (concluding that the some GATT dispute cases, due to interference from other states, severely injure GATT's prestige).

[105] *See* Petersmann, *supra* note 95; Arie Reich, *From Diplomacy to Law: The Judicialization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775 (1996-97).

of compliance. The third-order of compliance would be a system by which the affected state, private actor or even the international organization would be able to bring noncompliance with the international decision back to the dispute resolution system.

In some situations, this third-order compliance mechanism is available. For example, if an international arbitration body awards a certain amount of money to a party that is then not paid, many states now provide that the winner of the arbitral award can bring a case in domestic court to enforce the judgment.[106] Another example is the EU, which provides that a state or the Commission can bring a case to the ECJ against a member state that has not complied with a court decision.[107] Enforcement under the EU is even more likely because the decisions themselves are integrated into the domestic legal fabric as is done with the referral system under the ECJ.[108] Because the ECJ makes the ruling

[106] Signatories of the New York Convention permit individuals and nations access to their courts in order to attach assets of nonpaying parties to an arbitration. *See* Convention of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 30 U.N.T.S. 38. [hereinafter New York Convention]; Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier ("RAKTA"), 508 F.2d 969 (2d Cir. 1974) (enforcing an award on the basis of the New York Convention). Article V of the New York Convention recognizes only seven circumstances in which a signatory state may refuse enforcement and, thus, this treaty has been credited with drastically strengthening the appeal of international arbitration. *See* Susan Choi, *Judicial Enforcement of Arbitration Awards Under ICSID and the New York Convention*, 28 N.Y.U. J. INT'L L. & POL. 175 (1995); Eric Green, *International Commercial Dispute Resolution*, 15 B.U. INT'L L.J. 175, 177 (1997); Elise P. Wheeless, *Article V(1) (B) of the New York Convention*, 7 EMORY INT'L L. REV. 805 (1993). In addition to the New York Convention other treaties exist for the purpose of enforcement of arbitral awards such as the Panama Convention, the Washington Convention, and the European Convention. *See* Inter-American Convention on International Commercial Arbitration of 1975, entered into force June 16, 1976, 14 I.L.M. 336; Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 532; European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229.

[107] *See, e.g.*, Case 169/87, Commission v. France, 1988 E.C.R. 4093 (forcing the Commission to bring France in front of the ECJ for the second time for noncompliance with an earlier court ruling on tobacco pricing); Case 48/71, Commission v. Italy, 1972 E.C.R. 527 (allowing a claim against Italian government for failure to levy an EU tax); Case 131/84, Commission v. Italy 1985 E.C.R. 3531 (allowing action against Italy for failure to enforce the "Collective Redundancies"); Case 69/86, Commission v. Italy, 1987 E.C.R. 773 (enforcing a previous judgment against Italy for the quality control of produce).

on the law alone, the domestic court then renders the final decision applying the EU law to the facts at hand. Since the decision is from a domestic court, not an international court, many commentators believe that states are far less likely to ignore the decisions.[109] Each additional order of compliance means that private actors have increased ability to force states to comply with the treaty.

3.5.4. *Punishment*

A final component of enforcement is the type of punishment permitted under the treaty and dispute resolution system. Retaliation apart from an international treaty is generally seen as a violation of international law.[110] Treaty-approved retaliation, on the other hand, can provide an effective enforcement mechanism. This approved retaliation does not constitute a breach or termination of the treaty but rather an appropriate means of punishment for the treaty violation. The retaliation can be carried out by the state against which the harm has been committed or even by other states.

For example, the WTO outlines stringent enforcement measures in terms of providing a menu of enforcement options.[111]

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[108] For more information on this process see Attanasio, *supra* note 93, and Lenore Jones, *Opinions of the Court of the EU in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 275 (1996).

[109] *See generally* Symposium, *supra* note 84, (portraying several views concerning the problems and inconsistencies between national and international bodies).

[110] *See* JAGDISH BHAGWATI ET AL., AGGRESSIVE UNILATERALISM (1990) (describing various opinions on the debate over U.S. trade sanctions and the GATT.); *see also* Clay Hawes, *The Pelly Amendment Sanctions*, 3 MINN. J. GLOBAL TRADE 97 (1994) (debating whether sanctions imposed on Norwegian goods for violation of the Fisherman's Protective Act, 22 U.S.C. § 1978 (1994) is a violation of international law); Myles Getlan, Comment, *TRIPS and the Future of Section 301*, 34 COLUM. J. TRANS. NAT'L L. 173 (1995) (evaluating sanctions in the area of intellectual property); Lopez, *supra* note 65 (discussing the controversy of the Helms-Burton Act as a potential violation of NAFTA).

[111] Under the WTO, if a party does not comply with a decision within the specified time period, the party must start negotiations for mutually accepted compensation. If no compensation is agreed upon after twenty days, the complainant, under Article 22, can request authorization from the Dispute Settlement Body ("DSB") to retaliate. The DSB consists of one representative from each member of the agreement in dispute and has the authority to administer rules and procedures, adopt reports from panels, maintain surveillance of implementation, and authorize suspension of concessions. Unless there is a consensus against retaliation, the DSB must grant authorization within 30 days.

First, a state has the opportunity to follow the ruling and, usually, change the offending practice. Second, the state can continue the practice and pay damages to the harmed state.[112] If neither of these options are taken, the harmed state can retaliate.[113] The WTO provides that the harmed state must first retaliate in the same sector of trade. However, if this is not seen as effective, the WTO permits cross-sector retaliation.[114] This newer form of the international adjudication has more teeth then its predecessors and attempts to correct some of the problems of the past.[115]

Retaliation will first be taken in the same sector as the violation. If, however, such retaliation is not practical or effective, action will be taken in another sector in the same general area. If this still proves ineffective or impractical, action will be taken as a suspension of benefits under the related Uruguay Round Agreement. The determination as to whether retaliation is practical or effective will be made by the complaining party rather than the WTO panel or the defending party. *See* Thomas J. Dillion, Jr., *The World Trade Organization: A New Legal Order for World Trade*, 16 MICH. J. INT'L L. 349 (1995) (discussing the effectiveness of the WTO with a comparison of the lack of enforcement under compliance mechanisms of the International Monetary Fund ("IMF") or the World Bank); Matthew Schaefer, *National Review of WTO Dispute Settlement Report: In the Name of Sovereignty or Enhanced WTO Rule Compliance*, 11 ST. JOHN'S J. LEGAL COMMENT 307 (1996).

[112] Under Article 21 of the Dispute Settlement Understanding ("DSU"), if the party does not, within thirty days, state intentions for implementing recommendations of the adopted panel report and set a time period for compliance, the parties must commence negotiations for mutually accepted compensation. *See, e.g.*, John Maggs, *US May Buck Tide, Take on the WTO*, J. COM. 1 (1998) (detailing that in the face of a recent WTO preliminary report that the U.S. embargo on shrimp imports, designed to protect sea turtles, was illegal, speculation has begun that the United States would prefer to pay compensation or accept sanctions rather than change the law).

[113] Article 22 of the DSU allows the complaining party to request authorization from the DSB to retaliate. The DSB must grant authorization within thirty days unless there is a consensus against such retaliation.

[114] Article 22 of the DSU permits cross-sector retaliation if the previous retaliation, within the sector, is not deemed practical or effective. The determination of whether retaliation is "practical" or "effective" will be made by the complaining party, rather than the DSU. However, paragraph four limits the retaliation a government can impose to the equivalent of benefits that the defending country was impairing. *See also* 19 U.S.C. § 2411(a)(3) (1994) (imposing the same limitations).

[115] *See* Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995); Mary E. Footer, *The Role of Consensus in GATT/WTO Decision Making*, 17 NW. J. INT'L L. & BUS. 653 (1997); Patrick Moore, *The Decisions Bringing the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317 (1996); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996).

Another type of enforcement is a fine levied against the member state for a violation of the treaty. This fine could be paid to the international organization, the affected state or the private actor who is directly harmed. Under traditional international law, once a state took up a private actor's claim of harm, the money to be paid would go to the state.[116] A more recent innovation in international law is the idea that states can be directly liable to individuals for the harm they have suffered. This is the case under EU law.

This type of punishment directly rectifies the harm caused by the noncompliance with the international law and also puts a price tag on noncompliance. The ECJ acts like a domestic court since it awards damages directly to aggrieved private actors.[117] The power to award damages may alter a national government's decision whether to comply with an international law since it puts a price tag on noncompliance. The costs of noncompliance can be severe and direct.[118] The EU has gone even further since

[116] *See* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 45 (1975). The problem arising with enforcing claims in this manner is a concern of timeliness. The claims are only settled years after the harm was done and, thus, the settlement is often not an effective resolution. *See* Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 436, 440 n.15 (1996) (discussing the ineffectiveness of settlements in the 1980's between the U.S. and China for less than 40% of the claim and in 1992 between the U.S. and Germany for around 6% of the claim).

[117] *See* Case 14/83, Von Colson & Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891 (allowing individual workers to enforce their rights under a Community Directive on equal employment); Case 33/76, Rewe-Zentralfinanz eG v. Landwirtschafts-Kammer Für Das Saarland, 1976 E.C.R. 1989 (forcing Germany officials to refund illegal money charged to individuals for the inspection of imported apples even though the German statute of frauds had run on the claim). For more on this aspect of the ECJ's damages awards see David O'Keefe, *supra* note 48, and April Phillippa Tash, *Remedies for European Community Law Claims in Member State Courts: Toward a European Standard*, 31 COLUM. J. TRANSNAT'L L. 377 (1993).

[118] *See* Case C-271/91, Marshall v. Southampton and S.-W. Hampshire Area Health Auth., 1993 E.C.R. I-4367 (imposing damages that exceeded the United Kingdom's statutory limitations); Case C-6/90 & 9/90, Francovich v. Italy, [1993] 2 C.M.L.R. 66 (1993) (Italy) (forcing Italy to compensate workers for damages suffered by nonimplementation of a community directive dealing with worker's protection against bankrupt employers); Case 70/72 Commission v. Germany, 1973 E.C.R. 813 (forcing Germany to not only cease the illegal payments of state aid, but also, recover any aid already granted to its nationals). Remarkably, the ECJ has not imposed any fine thus far in a case brought by the Commission. Article 171 specifically states that the ECJ may, by the request of the Commission, impose a lump sum or penalty payments upon a

1991 and found that member states can be liable to private actors for damages suffered through the nonimplementation of EU laws.[119] And, in some ways, these fines make compliance in the first place easier since a government can demonstrate how non-compliance will directly hurt the national treasury. A potentially large damage award helps the governments protect themselves against strong domestic lobbies as well.

These damage remedies in the EU are additional to a requirement to change the law, unlike in the WTO system which grants choice. By replacing the traditional international law remedy of retaliation, a damages system is closer to a domestic court system. Violations of international law are treated like any other violation of the law. By eliminating retaliation, the EU avoids escalation between states retaliating and cross-retaliating. It also avoids linkage between different trade issues; each problem is treated separately and judged on its own merits. An enforcement system with damages to private actors clearly protects private actors the most of the trade systems established.

4. INCREASING INDIVIDUAL PARTICIPATION INCREASES DEMOCRACY

The purpose of this Article has been to outline the factors that measure individual participation in dispute resolution and com-

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Member State that refuses compliance. This Article was added to the Treaty at the request of Parliament concerned with the enforcement of Community law. Article 171(1), stating that necessary measures shall be taken for enforcement of compliance, has been used by the ECJ. *See* Lisa Borgfeld White, Comment, *The Enforcement of EU Law*, 18 HOUS. J. INT'L L. 833, 898 n.207 (1996) (listing the fifteen cases in violation of Article 171). However, the imposition of a fine, under Article 171(2), has yet to be employed. *See* Kenneth M. Lord, Note, *Bootstrapping an Environmental Policy from an Economic Convent*, 29 CORNELL INT'L L.J. 571, 606 n.325 (1996) (commenting on the lack of enforcement through use of fines). *See also* Michael J. McGuinness, *The Protection of Labor Rights in North America*, 30 STAN. J. INT'L L. 579, 596 n.81 (1994) (reasoning the lack of enforcement by use of Article 171).

[119] In 1991, the ECJ instituted remarkable advancement for the enforcement of Community law through the preliminary reference ruling in *Francovich v. Italy*. *See* Joined Cases 6/90 & 9/90, Francovich, [1990] 1 C.M.L.R. 66 (1990); Rene Valladares, *Francovich: Light at the End of the Marshall Tunnel*, 3 U. MIAMI Y.B. INT'L L. 1 (1995). The ruling conferred liability upon a Member State to an individual for damages incurred by nonimplementation of a directive. Thus, because Italy failed to implement a directive concerning the coverage of employees under insolvent employers, Italy was liable for the damages the employees suffered. *See* Valladares, *supra*.

pare them to the dispute resolution models currently used in international trade organizations. By doing so, we can understand how each of these factors either adds or detracts from the legitimacy of international trade organizations. In the end, we can recognize that individual participation has the ability to increase democracy in several significant ways.

4.1. *Judicial Decisionmaking is Lawmaking*

The first step in recognizing the importance of individual participation is to recognize the importance itself of dispute resolution. Historically, states handled trade disputes through negotiation and little attention was given to other methods for resolving them. Only with the evolution of the EU, and the regional human rights systems, has appropriate focus been given to the importance of dispute resolution.[120]

In focusing on dispute resolution, we are recognizing the evolution of trade organizations that do more than rely on states to resolve their disputes. The creation of the Dispute Resolution Body under the WTO and the NAFTA system evolving from the Canada-U.S. Free Trade Agreement clearly demonstrate that focus on dispute resolution is warranted. As trade organizations continue to evolve, it will be their dispute resolution systems that herald this evolution.

The result of dispute resolution mechanisms is that each of the organizations will be creating a body of law *in addition to the original agreement*. This body of law may have varying levels of precedence and supremacy but will be the area in which these organizations could primarily evolve. Therefore, it is crucial that we also focus on ways to ensure this stage of lawmaking is democratic and legitimate.

Even when national governments determine that trade policy and agreements should be negotiated in secret or solely by the executive branch, once the agreement is reached this original decision should not preclude citizen involvement in the enforcement

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[120] Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Geoffrey Garrett, *The Politics of Legal Integration in the EU*, 49 INT'L ORG. 171 (1995); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the EU*, 52 INT'L ORG. 149 (1998); Walter Mattli and Anne-Marie Slaughter, *Law and Politics in the EU: A Reply to Garrett Union*, 49 INT'L ORG. 183 (1995); Andrew Moravscik, *Negotiating the Single European Act*, 45 INT'L ORG. 19 (1991); Weiler, *The Transformation of Europe*, *supra* note 3.

stage. Legislating original law and resolving disputes about that law are two separate functions. As I noted earlier, the debate over the "democracy deficit" in the EU focuses on the first function. We should also look to the second function and recognize the importance of dispute resolution.

4.2. *Individual Involvement Promotes Legitimacy*

There are several specific ways in which granting standing to private actors can remedy typical conflicts in a national government. First, giving private actors the right to bring cases, rather than requiring them to lobby or petition the government to take action, eliminates the problem of capture at the dispute resolution stage.[121] Otherwise, only states participate in the process and, therefore, rely on political pressures to determine whether to pursue violations of trade agreements. Understandably, a state will not choose to spend its limited attention and energy on trade problems which have little impact on the domestic economy. States will weigh the impact on certain industries, the political clout of those industries, and pressures from other domestic constituencies before embarking on negotiations. A state may not even know of any violation until a domestic interest alerts them.

For example, if a company in the US feels that another state is violating the GATT rules, it must petition the USTR under the 301 procedure in order to pursue a judicial remedy. The USTR must then make a decision as to whether it is worth the time and energy to pursue a remedy through the WTO. This procedure probably operates very well for the "Kodaks" and "IBMs" of the world, but if the company affected by the violations is relatively small, lacks political influence or power, or has not suffered large losses, the USTR could, legitimately, conclude that out of the

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[121] Of course, there is always the issue of adjudicatory capture in which interest groups are able to use the judicial system for their own interests. One example in the context of trade dispute resolution could be the EU where public interest groups in Great Britain have used the EU in order to advance changes in the domestic law. *See* Catherine Barnard, *A European Litigation Strategy: The Case of the Equal Opportunities Commission*, *in* NEW LEGAL DYNAMICS OF EU 253 (Jo Shaw & Gillian More eds, 1995); *see also* Mattli & Slaughter, *supra* note 71, at 185-190 (1998). Another example could be if environmental NGO's use NAFTA to force Mexico to comply with its own environmental laws. *See* Atik, *supra* note 26.

numerous trade violations it polices, this particular violation is not worth the government's limited resources.

A government may also choose not to bring a case because it does not want the violation addressed. A state could decide not to bring a case against a particular state for political reasons in dealing with that state or because other domestic interests would prefer to keep the law unchanged. Furthermore, intergovernmental pressure may result in cases not being brought to the international adjudicatory body. The best example of this is the controversy over the Helms-Burton law, which restricts trade with Cuba and punishes those who engage in such trade.[122] The EU initially lodged a complaint with the WTO, which has repeatedly postponed the issue to allow the EU and the United States time to negotiate. There is no doubt that domestic pressure in the United States has led to the United States placing pressure on the EU not to pursue the case. In this way, the WTO has become politicized. Rather than adjudicating appropriate restrictions on trade, the forum is hijacked by the domestic pressure and politics of U.S. policy towards Cuba. If there were private actor standing in the WTO, this case would already be in the process of being heard.

Furthermore, giving private actors standing may be the best method of ensuring that their own state actually follows the trade agreement.[123] For example, under the current system, it is unlikely that the United States or any other state would agree to bring a case against itself in the WTO. One only has to examine the jurisprudence of the ECJ to recognize that the right to bring cases in the EU has resulted, as often as not, in private actors suing their own government for violations of EU law.[124] This ensures that a commitment to trade liberalization is not later overridden by specific exceptions or changes to the law agreed to by

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[122] For an explanation of the Helms-Burton Act, its domestic and international effect, and foreign responses, see Symposium, 20 *The Helms-Burton Act: Domestic Initiatives and Foreign Responses*, HASTINGS INT'L & COMP. L. REV. 713-814 (1997).

[123] *See* Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, *in* NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 51-93 (Martha Minow et al. eds., 1992) (arguing that jurisdictional redundancy, as exists between the federal and state system in the U.S. and also between the domestic systems and the EU, can effectively deal with the problems of the elite in a political system and is an appropriate method of dealing with conflicting values in a society.)

[124] *See* discussion *supra* section 3.2.4.

lawmakers under pressure from powerful and narrow lobbying interests.[125]

In addition, individual involvement will also lead to increased transparency and use of the dispute resolution system. Transparency of procedures and decisions is a crucial part of building the legitimacy of any organization. As private actors use the system and become comfortable with the rules, it will build momentum and its use will increase. This promotes understanding and, in the end, confirms the legitimacy of the organization and its procedures.

Finally, examining the role of private actors in dispute resolution is consistent with a liberal IR approach. The level of individual participation can vary with each of factors examined in Section 3. This level of participation clearly affects how governments order their preferences and which segments of society are most represented in dispute resolution. Increased individual involvement would certainly broaden the spectrum of society so represented, and perhaps affect government preferences to act more legitimately in its own decisionmaking.

4.3. *Individual Participation Will Increase the Effectiveness of International Organizations*

Granting private actors standing will also promote the effectiveness of the underlying trade agreement. Private actors can make the determination when a violation is of sufficient harm to bring a case. We neither rely on states policing one another, with all of the attendant political concerns, nor rely on an oversight body, which may have political concerns and limited resources or research capabilities. Better policing of a trade agreement will occur if enforcement relies on those who are most invested with protecting their rights and benefits under the trade agreement.[126]

The result of better policing is twofold. First, more enforcement actions will be brought, and second, these actions will be narrowly tailored to deal directly with the particular law causing harm. In the area of trade law, this direct involvement makes sense. The trade agreements are designed to influence private ac-

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[125] *See* Atik, *supra* note 26.

[126] *See* Robert E. Hudec, *Dispute Resolution Under a North American Free Trade Area: The Importance of the Domestic Legal Setting* 12 CAN.-U.S. L.J. 329, 332-333 (1987).

tor behavior based on state promises. The state promises to lower tariffs, or eliminate barriers, or reduce taxation. In exchange, companies invest, start businesses, or increase trade. When those state promises are broken—laws are not changed or new barriers are erected—it is private actors who suffer the consequences. As is the case with human rights, individuals should have some recourse.[127] We have already recognized this in the area of labor rights under the International Labor Organization ("ILO") and even under the WTO for intellectual property rights.[128] Under the ILO, workers' organizations can bring noncompliance cases in the area of human rights and labor rights against a state.[129] Under the Agreement on Trade-Related Intellectual Property Rights ("TRIPS"), private actors will be able to bring cases in domestic courts for noncompliance.[130] It is somewhat anachronistic and curious that trade rights should be moving in the other direction.

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[127] PETERSMANN, *supra* note 10, at 8 ("Political theory, and historical experience (e.g. in the context of EC law and of the European Convention on Human Rights) confirm that granting actionable rights to self-interested citizens offers the most effective incentives for self-enforcing liberal constitution.").

[128] *See id.* at 33 & 62 (1997).

[129] The International Labor Organization ("ILO") utilizes a tripartite system divided into government, employment, and labor to promote the global recognition of human and labor rights. The Governing Body consists of 28 government members, 14 employer members, and 14 worker members. Committees and delegations for annual conferences are similarly structured. The ILO is unique in allowing organizations of employers or workers to allege noncompliance complaints against the contracting states. Although private individuals are not allowed direct access without the backing of an established organization, the democratic process is strengthened by the employers' and workers' involvement. *See* Petersmann, *supra* note 10, at 433-34 (commenting that the increase of private individual participation "reflect[s] the democratic functions of international liberal rules and organizations for the participation of individual rights"). *See generally* HECTOR BARTOLOMEIDE LA CRUZ ET AL., THE INTERNATIONAL LABOR ORGANIZATION (1996) (providing overview of the ILO procedures).

[130] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement]. The TRIPS Agreement recognizes that intellectual property rights are private rights. Although implementation is at the discretion of the members, the agreement encourages recognition of private party participation.

4.4. *Responding to the Democracy Deficit*

Of the existing models of dispute resolution, clearly the EU provides for the most individual involvement. Individuals are directly granted rights and the standing to protect those rights. Court decisions are supreme to national law and, can be integrated directly into the domestic legal fabric. The procedures and rulings are transparent and highly accessible to private actors. Finally, enforcement through the domestic legal system gives the best chance that the judgments of the supranational court will be followed. While no model of dispute resolution can be completely de-politicized, the EU best tries to ensure that member states comply with international trade law without allowing them to make short-term, narrow decisions about compliance.

In comparison, other trade organizations fall short. Investment arbitration under ICSID or UNICTRAL does provide for limited democracy. It has the advantages of allowing investors to bring cases against states when their rights have been violated. Furthermore, increased enforcement of arbitration awards makes it likely that states will comply and pay the damages awarded. The problem with this type of model, however, is the limited scope of the arbitration action. First, the rights provided in Chapter 11 of NAFTA or in bilateral investment treaties are the most basic of free trade rights. States can protect, and have protected, their most sensitive national issues and industries in the agreement in the first place.[131] Second, an arbitration decision does not change the law of the offending state and any settlement can also be kept private if the parties so wish. In this way, a state can choose to pay in order to continue to break the law. Third, since this is a single arbitration case, rather than an authoritative court decision, a state can deal with this one instance quietly without creating the problem of numerous cases brought on the same issue. Although arbitration reduces the likelihood of capture somewhat in terms of the choice as to when to bring a case, the scope of the rights and the decision are severely limited.

The WTO model also provides only partial answers to the questions of political capture and institutional effectiveness. The new procedures and enforcement capabilities of the WTO are de-

[131] *See* NAFTA, *supra* note 65, arts. 1120, 1138, annexes 1120.1, 1138.2, chs. 21, 32 (noting several exceptions).

signed to reduce dramatically the link between trade and domestic political interests. Once a dispute is brought to the WTO, a state will have much less ability to avoid complying with the law. The fault of the WTO, and other systems that rely on states to bring cases, is that the lack of rights and the lack of standing for private actors make the system less responsive to the citizenry and less democratic in the end. Under the WTO, private actors must rely on their governments to assert and defend their trading rights.

It is ironic that the EU has been the focus of the democracy deficit debate. While I do not dispute the validity of argument in reference to the legislative process in the EU, we need to recognize that the EU's accomplishments in providing for democracy in its dispute resolution are unique.

4.5. *Objections to Individual Participation*

There are numerous objections to the increased participation of private actors in international trade organizations. I will focus on three of them.

4.5.1. *States Will Not Join International Organizations*

The first objection could well be that states will be more reluctant to join organizations that give their citizens such power. Involving private actors means that the government has less control over dispute resolution and, ultimately, the legal interpretation of the treaty.[132] This distribution of power to the citizens rather than the government can be threatening to states risky for them.

This objection has been raised most frequently in the case of human rights organizations where states are reluctant to either join the organization or are reluctant to sign the additional protocol which would permit cases being brought by their citizens.[133] Therefore, the argument goes, states will not join trade agree-

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[132] This objection has also been used in the application of extraterritorial securities laws, where the argument has been made that the existence of private plaintiffs improperly moves the locus of foreign policy decisionmaking from the executive branch to the judicial branch. *See* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 320-21.

[133] For example, of the 140 countries who are parties to the ICCPR only 93 have ratified the Optional Protocol. *See* ICCPR, *supra* note 32; Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383.

ments if their citizens can enforce it against them. However, this objection overlooks the key difference between these types of agreements. Other governments create human rights treaties for the purpose of protecting citizens from the actions of their own government.[134] (Aliens have long had the right under international law to be protected from abuse and their home state has long had the right to demand reparation for their harm.) One mechanism created to protect these individual rights under human rights treaties is to allow the individual to sue his or her own government for violation of their rights under the international treaty.

International trade treaties, however, are completely different in their purpose and in the benefits accruing to each state. While human rights treaties could be characterized as ambitious in that all states are individually responsible for protecting their citizens,[135] a trade agreement is more of a contractual treaty with promises and exchanges between each of the member states. There are strong economic reasons to join these trade agreements beyond the altruism and moral leadership that motivates signature of human rights treaties. In addition, while private actors could bring a case against their own government if private actor partici-

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[134] On example is the U.N. CHARTER:

> We the peoples of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in large freedom . . . and for these ends . . . to employ international machinery for the promotion of the economic and social advancement of all peoples

See U.N. CHARTER, preamble. For another examples see the ICCPR, *supra* note 32, pt. II, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."); Nigel Rodley, *On the Necessity of the United States Ratification of the International Human Rights Conventions*, *in* HUMAN RIGHTS TREATIES, WITH OR WITHOUT RESERVATIONS?, 3, 15 (Richard B. Lillich ed., 1985) ("I would be remiss if I did not reaffirm the principle of the inherent desirability of providing individuals who think they have been victimized by their governments with a forum for bringing such alleged victimization to the attention of an international body.") (regarding the Convention on the Elimination of All Forms of Racial Discrimination).

[135] *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 13-14 (1993).

pation were permitted in international trade agreements, that is hardly the sole purpose of allowing private actor participation.

Arguably, private actor standing undermines the authority of the government to negotiate trade treaties.[136] Professor Nichols argues that domestic groups opposing their governments would create a "spectacle."[137] First, this assumes, somewhat condescendingly, that other states and trade bureaucracies could not distinguish between the government and private parties or interest groups if they took opposing sides in dispute resolution.[138] Second, this misses the point of a dispute resolution procedure. Dispute resolution is designed to resolve disagreements *after* an agreement is signed. The extension of standing in dispute resolution does not, for better or worse, give these private actors a voice as the trade agreement is being negotiated.

In the end, the benefits accruing from international trade agreements will outweigh nations' reluctance to join organizations where their own citizens could have standing. For example, Turkey has had a traditional reluctance to recognize individual rights and standing under human rights treaties[139] but has apparently calculated that the economic benefit of joining the EU outweighs these concerns and so has applied for EU membership.

A separate objection could be that individual participation is neither appropriate nor efficient given the particular goals of the international organization. The idea that certain organizations would not benefit from individual participation, is an important one in evaluating when and how private actors should be involved. Clearly, a blanket statement that private actors will always improve an organization is naïve. The distinction between "facilitative" and "producing" international organizations, made by Kenneth Abbott in outlining mesoinstitution theory, would

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[136] *See* Philip M. Nichols, *supra* note 22, 316-18 (1996).

[137] *See id.* at 317.

[138] *See* G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 374 (1996).

[139] Turkey has not signed the ICCPR or the Protocol to the European Convention of Human Rights ("ECHR") providing for individual standing. *See* ICCPR, *supra* note 32; Protocol No. 9 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force*, Oct. 1, 1994, Europ. T.S. No. 140.

perhaps shed the most light.[140] If the goal of the organization was "facilitative"—public awareness, convening negotiations, organizing meetings—then private actor involvement appears to be less compelling. As the goals of the organization becomes more "producing," i.e., adjudicating behavior, creating norms, setting negotiation agendas, and the organization is more centralized, the importance of private actors become more compelling. These producing organizations become lawmakers and the concerns of democracy and legitimacy must be recognized. Perhaps one of the reasons this debate over democracy and legitimacy has arisen in the first place is that more trade organizations are moving along the facilitative-producing continuum to become more important players in the creation of international law.

4.5.2. *Individual Participation is Logistically Unfeasible*

Another objection to individual participation is that the mechanics of such a system would overwhelm the structure of the trade organization.[141] A corollary of this argument is the fear that there will be numerous frivolous suits or that individual participation will be limited to the wealthy.[142]

While the logistics of involving private actors are undoubtedly complex, this is hardly a reason not to set up an organization properly. Certain standing requirements or a screening system, such as exists with the European and Inter-American human rights systems,[143] could be established.[144] The issue of logistics is

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[140] *See* Kenneth Abbot & Duncan Snidal, *Mesoinstitutions: The Role of Formal Organizations in International Politics* (unpublished manuscript on file with authors).

[141] Ambassador John McDonald notes that the bureaucracy and funding requirements of setting up such a system should not be underestimated. *See* Interview with John McDonald (Ambassador to International Labor Organization) (March 17, 1998); *see also* Nichols, *supra* note 22, at 312-13 (casting doubt on the practically of a system that would allow equitable, direct participation by all the world's citizens).

[142] *See* Nichols, *supra* note 22, at 318-19.

[143] *See* American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[144] *See* Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORD. L. REV. 2275 (proposing a Commission for Free Trade to screen disputes for the WTO); *see also* Shell, *supra* note 138, at 375 (noting that both the United States Supreme Court and the E.C.J. have established rules regulating standing that,

an issue of money and support for the organization. It is a question of what the member states choose to support. The expansion of the WTO legal service in comparison to the previous service under GATT demonstrates what can be accomplished with the will of the governments.

The concern about the availability of the necessary resources to pursue international remedies is a valid one. It is, however, the same concern that should exist in the current situation where private actors need resources in order to lobby their governments. Arguably, leaving it to each private actor to evaluate his or her economic gains and losses from bringing a case provides for less distortion than filtering that choice through the national government.

4.5.3. Trade is Politics

A final objection to individual involvement could be that the premise behind separating trade and domestic politics is inherently flawed. This argument maintains that ultimately politics and political interests should determine the enforcement of trade agreements. Individual injustice, if it occurs, is not really the focus of trade policy. Trade policy focuses on the good of the state as a whole and the government is in the best position to determine that interest. This objection goes back to the idea that diplomacy, secrecy, and negotiation are the best way to handle disputes between sovereign states.[145] The process of judicialization—which individual involvement moves forward—is not appropriate for trade policy.

This objection attacks the heart of how one thinks about the international system. If trade should be bound to politics, if states should be the focus of the international system, if diplomacy is the best way to resolve disputes, my proposal is yet another step on the slippery slope of giving more power to citizens and eroding the sovereignty of states. On the other hand, if increased legalization and judicialization of international law make the international system more effective and more responsive,[146] then this

while not perfect, are sufficient to satisfy participants in the system that decisions are not political judgments).

[145] Nichols, *supra* note 22, at 319.

[146] *See* Petersmann, *supra* note 95 (explaining the importance of increased judicialization in the GATT context).

proposal might hold some interest.[147] It is really a question of one's views the continuing evolution of the international system. Increased legitimacy and democracy are appropriate goals under a view of liberal governance.

5. CONCLUSION

The article intended to demonstrate two things. My first goal was to turn the focus to dispute resolution as a way of dealing with some of the traditional critiques of international trade organizations. Increasing individual participation addresses the liberal international relations goals of examining the role of private actors behind the state. Individual participation can also be used as a measure for democracy and legitimacy of trade organizations. Finally, I argue individual participation can help reduce the issue of capture.

My second goal was illustrating that as regional and international organizations are created, states should examine carefully the type of dispute resolution mechanism they establish.[148] International trade organizations diminish the returns of the treaty by limiting their dispute resolution mechanisms to states. By providing rights without a remedy, these international trade organizations are limiting both their impact and their legitimacy. The solution is to reduce the link between domestic or short-term

[147] *See* Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 58 (1996) (arguing that judicial institutions make international trade agreements more binding and more attractive); *see also* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 343-46 (1996) (arguing that increased transparency of the WTO system is inevitable and appropriate); G. Richard Shell, *supra* note 138, at 374 (arguing that issues which pit governments against governments and governments against interest groups will not result in confusion on the position of each entity); YARBROUGH & YARBROUGH, *supra* note 21, at 86-106 (discussing how the development of "minilateralism" or the creation of supranational institutions for small groups of countries leads to more effective trade liberalism).

[148] Some focus has already been given to the impact of different dispute resolution mechanisms on emerging organizations and I this will hopefully continue. *See* Taylor, *supra* note 70 (examining NAFTA and MERCOSUR); Garcia, *supra* note 11 (analyzing the Free Trade Area of the Americas ("FTAA") and applying the mesoinstitutional theory); David Lopez, *Dispute Resolution under a Free Trade Area of the Americas: The Shape of Things to Come*, 28 INTER-AM. L. REV. 597 (1997) (discussing the alternatives for developing a dispute resolution mechanism under the FTAA).

political interests of states and their trade policy by granting private actors standing to bring cases for treaty violation.

The arguable purpose of international trade treaties is broad encouragement of trade by requiring, at the outset, that member states do not take actions that would adversely affect individual players. The rights provided in these treaties and the benefits therefrom accrue most directly to private actors, and only to their governments indirectly through better economies, more tax income, and reelection. The benefits of trade treaties are best protected and enforced by those most directly affected.

To examine the EU, although it poses its own questions about the democracy deficit, is to observe an international organization committed to ensuring that the guidelines set forth in the Treaty of Rome are followed. The dispute resolution system in the EU guarantees more compliance by allowing private actors directly affected by each country's actions to bring cases in the national courts (and in certain cases to the ECJ directly).

This result allows for the use of private attorneys general to enforce the law based on their own assessment of the harm they are suffering and the cost of litigation *devoid of political concerns*. In the EU system, we do not rely on states, each of which may have an interest in allowing others to continue violating the treaty or may not want to bring a case against another state for political reasons. When we are left to rely on states to enforce the law under a trade treaty we are left with an incomplete system.

If states are actually committed to the trade treaties they sign and to bringing the benefits of those treaties to their constituents, they must allow their own citizens to bring cases directly to the dispute resolution mechanism established under the treaty. Furthermore, these cases should not be decided under arbitration, as is the system under NAFTA for investor disputes. An ever-changing arbitration panel creates neither a uniform body of law nor precedent and, in the end, can never carry the weight of an international standing body.

As the number of regional and international trade agreements grows, their dispute resolution mechanisms will only increase in importance. In order to ensure real change in the trade laws and real compliance by the constituent states, we must provide for individual standing. Rights without a remedy are hollow rights.