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Kenneth W. Abbott

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# GATT AS A PUBLIC INSTITUTION: THE URUGUAY ROUND AND BEYOND

Kenneth W. Abbott\*

## I. INTRODUCTION

As the GATT-MTN system<sup>1</sup> develops, the institutions at its core become ever more complex. The Uruguay Round (Round) — the broadest and most complex round of trade negotiations in GATT's history — will heap unprecedented responsibilities on the system,<sup>2</sup> requiring greater institutional development than ever before.<sup>3</sup> Some of the necessary innovations may be agreed upon in the final stages of the Round itself. Many of them, however, will of necessity be dealt with in subsequent negotiations, or will simply evolve through practice, consistent with GATT tradition.<sup>4</sup> This article presents a theoretical framework designed to structure and inform analysis of these broad institutional issues. It then reviews the major institutional contributions of the Round to date — although as this is written, in November 1991, the final outcome is far from clear — and offers suggestions for the future.

Most discussions of GATT as an institution — particularly those relating to rule-making, dispute settlement, enforcement and similar processes — are organized around dichotomies, op-

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\* Professor of Law, Northwestern University School of Law. I would like to thank Robert Hudec for his helpful suggestions.

1. The "GATT-MTN system" refers to the increasingly complex body of agreements, institutions and procedures created and administered under the general aegis of the General Agreement on Tariffs and Trade (GATT). The primary elements of the system are the General Agreement itself and the agreements on nontariff measures produced by the Tokyo Round of multilateral trade negotiations (MTN). *See generally* John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 *LAW & POL'Y INT'L BUS.* 21 (1980).

2. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 *BROOKLYN J. INT'L L.* 11 (1992) [hereinafter Jackson, *GATT and the Future*].

3. The Uruguay Round negotiating group on the Functioning of the GATT System — or at least some of its members — recognized this need explicitly, *Decision on the Functioning of the GATT System*, in *DRAFT URUGUAY ROUND PACKAGE*, *infra* note 79, at 321, 323 [hereinafter *FOGS Draft Decision*], but was unable to recommend any particular institutional innovations.

4. Most of the current GATT institutions and procedures evolved in this way, since the severance of the General Agreement from the proposed Charter of the International Trade Organization left GATT with a wholly inadequate institutional structure. *See generally* ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 49-58, 67-73 (2d ed. 1990) [hereinafter HUDEC, *THE GATT LEGAL SYSTEM*].

posing conceptions of the process or the institution. While variants can be found, two dichotomies dominate the literature. The most common is *legalism* vs. *pragmatism*. This figures in well-known writings by Kenneth Dam,<sup>5</sup> Olivier Long,<sup>6</sup> and Robert Hudec,<sup>7</sup> among others.<sup>8</sup> The other dichotomy is John Jackson's distinction between *rule-oriented* and *power-oriented* procedures and diplomacy.<sup>9</sup> Although it is possible to tease out differences between some legalists or pragmatists and others,<sup>10</sup> and between legalists and supporters of rule-oriented diplomacy, these dichotomies are roughly parallel in their views of GATT rule-making, dispute settlement, and enforcement.

In this article I propose an additional dichotomy for thinking about GATT institutional issues, the dichotomy between institutions and procedures designed to serve the *public interest* and those designed to serve *private interests*. In the present context, the term "public" refers to the common interests of the nations forming the world trading community, while "private" refers to the particular interests of the individual states, the contracting parties of GATT.<sup>11</sup>

5. KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 3-5 (1970).

6. OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 61-64 (1987) [hereinafter LONG].

7. See Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1299-1300, 1304 (1971) [hereinafter Hudec, *GATT or GABB?*]; Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 151-53 (1980) [hereinafter Hudec, *Unfinished Business*].

8. For other examples, see Meinhard Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, [hereinafter Hilf] in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* 285, 289 (Ernst-Ulrich Petersmann and Meinhard Hilf, eds., 2d ed. 1991) [hereinafter *THE NEW GATT ROUND*] (diplomatic or political vs. quasi-judicial or legally-structured); Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1017 (1985) (legalist vs. pragmatist); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 65 (1987) (legal vs. political).

9. See, e.g., John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979); John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 98 (1978).

10. In fact, virtually all commentators agree that some balance between legalism and pragmatism must be struck (as in any legal system); their positions thus range across the legal/political spectrum. See Hilf, *supra* note 8, at 289-90.

11. I wish to distinguish, in other words, the distinction between governments or international organizations, on the one hand, and individuals or private firms on the other.

The public/private distinction is intellectually rich. It has interesting theoretical roots and leads to intellectual connections that the GATT fraternity does not normally make. Even more important, the public/private dichotomy provides perspectives on the nature of GATT as an institution — under both its traditional arrangements and the reforms negotiated in the Uruguay Round — that differ from, while intersecting, those of the traditional legalist and pragmatist positions. Indeed, the public/private distinction helps illuminate the legalist and pragmatist positions themselves, revealing that both of them, perhaps surprisingly, operate largely on the private side of the dichotomy.

Even a private interests approach, it turns out, suggests some criticisms of GATT dispute settlement and other institutional arrangements. At the same time, as I suggest in a recent article, the private interests approach provides a strong and consistent rationale for many of the Uruguay Round dispute settlement reforms.<sup>12</sup> The focus of the present article, though, is on the public interest side of the dichotomy. My major thesis is that GATT is, or is becoming, a public institution with public functions. This status has broad implications for a wide range of institutional issues.

As one relatively minor but suggestive example, it means that I really should stop using the standard term “dispute settlement.” Professor Hudec, wonderfully droll, calls this “a nice sort of non-adversarial, non-threatening, look-at-the-positive side phrase . . . .”<sup>13</sup> The term does, however, suggest a procedure primarily concerned with terminating conflict between private interests, and so tends to prejudice important issues. I may be forced to use the term for want of a satisfactorily neutral one, but I do so with the caveat that even this innocuous expression carries heavy baggage.

## II. PRIVATE INTERESTS, THE PUBLIC INTEREST AND GATT

### A. *Reactive and Activist Communities*

The theoretical roots of the analytical approach I propose

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12. See Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, — COLUM. BUS. L. REV. (forthcoming 1992) [hereinafter Abbott, *The Uruguay Round and Dispute Resolution*].

13. Robert E. Hudec, “*Transcending the Ostensible*”: *Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211, 214 (1987).

lie in efforts to understand alternative ways of organizing society. These efforts have typically been directed at national or domestic societies, but a similar analysis can, with caution, be applied to any organized community, including the community of trading nations organized around GATT.

I have drawn primarily on the work of Mirjan Damaska,<sup>14</sup> a leading scholar of comparative law, whose writings in this area build on ideas advanced by Bruce Ackerman.<sup>15</sup> Damaska's work is an effort to understand the varied systems for administering justice within states; he is especially concerned to make intelligible the similarities and differences between the common and the civil law.<sup>16</sup> To get at the heart of these systems, Damaska analyzes them in terms of an abstract dichotomy between two ideal types, two extreme, opposing conceptions of the state and its role in administering justice.<sup>17</sup> Damaska calls these the *reactive state* and the *activist state*.<sup>18</sup> In my terminology, these correspond to communities attuned, respectively, to private interests and the public interest.<sup>19</sup>

The extreme *reactive* community has no independent communal goals, no view of the good society apart from the private interests of its individual members. The autonomy and satisfaction of its members is the community's highest value. The community's only role is to provide a framework for the pursuit of private interests. Most rules are the product of private agreement; legislation only tries to mimic what members would agree to, and actual agreements will override it, as is the case, for example, in most United States corporation law. Such legislation aside, community institutions function only to maintain order and to provide a forum for resolving disputes.<sup>20</sup>

Since the community has no independent interests, the only legally cognizable disputes are those between private actors. The

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14. MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986) [hereinafter DAMASKA].

15. See BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 23-37 (1984).

16. DAMASKA, *supra* note 14, at 1-3.

17. DAMASKA, *supra* note 14, at 10-12. Damaska also examines systems of justice in terms of a separate dichotomy, that between "hierarchical" and "coordinate" approaches to the organization of institutions. This aspect of his theory is not applied here.

18. DAMASKA, *supra* note 14, at 71-73.

19. For a recent use of the public/private distinction to analyze approaches to racial desegregation, distinguishing, among other things, alternate perceptions of the harm and alternate approaches to remedy, see James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990).

20. DAMASKA, *supra* note 14, at 73-77.

community neither initiates dispute proceedings nor intervenes in them. Proceedings only start when one member brings a claim against another for damage to its private interests, and that private conflict defines the entire proceeding. Only parties that share the same claim may intervene. Procedures are adversarial and controlled by the parties. Community institutions are concerned only with "conflict-solving" or resolving the private dispute. The resemblance to United States civil procedure is clear.<sup>21</sup>

The reactive community also tries to remain wholly neutral. For example, while autonomous parties can settle their disputes at any time, once formal proceedings are under way the community does not encourage settlement. To do so might compromise its neutrality and make it more difficult to maintain order.<sup>22</sup>

An extreme *activist* community has a definite communal vision of the public good and uses all tools at its disposal, including its legal system, to implement that vision. The autonomy and satisfaction of individual members are not sacrosanct; their interests may have to be sacrificed for the good of society. New norms come from legislation or executive decree, not private arrangements. Community institutions function actively to elaborate and implement community policy.<sup>23</sup>

The administration of justice is not limited to the resolution of private disputes. The community can initiate proceedings when it sees a need for them. When a private claim is made, community institutions can take an active part in the proceeding. They may raise additional issues, bring in additional parties (so the proceeding can deal with a social problem of which the dispute is a symptom), or seek broader relief. Procedures tend to be inquisitorial, not controlled by the parties. Settlement may be prohibited. In general, the role of institutions of justice is to apply community policy, not to resolve private conflicts. Here the resemblance is to Continental/European procedure, criminal procedure, and modern "structural reform" litigation in the United States.<sup>24</sup>

Neither of these conceptions of government and society, at least in its extreme form, is in any way attractive. The pure reactive or private interests model is lifeless and potentially anar-

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21. DAMASKA, *supra* note 14, at 77-80.

22. DAMASKA, *supra* note 14, at 78-79.

23. DAMASKA, *supra* note 14, at 80-84.

24. DAMASKA, *supra* note 14, at 84-88.

chic; the pure activist or public interest model is only a small step from Orwell's 1984. Few if any modern states come close to either extreme, and I do not recommend the adoption of either. The models do, however, help us to think about GATT as an institution.

### B. *GATT and the Public Interest*

When one looks at GATT in terms of Professor Damaska's dichotomy, one is immediately struck by the extent to which the organization and its procedures reflect the reactive or private interests model.

1) The rhetoric of the contracting parties has emphasized autonomy, sometimes to an extreme.<sup>25</sup> Such rhetoric was strongest in the "anti-legalist" 1960s and 1970s, when major contracting parties began to violate GATT rules and refused to submit their sovereign actions to community scrutiny: ignoring the waiver process, refusing to participate in GATT review procedures, and characterizing resort to third-party dispute procedures as an unfriendly act.<sup>26</sup> More generally, the demand for autonomy is reflected in the contracting parties' insistence on consensus voting procedures,<sup>27</sup> which has given respondent states the ability to block the creation of dispute settlement panels and the adoption of panel reports.<sup>28</sup>

2) The institutional underpinnings of GATT are weak. It was carefully designed to have none of the attributes of an "or-

25. The rhetoric of autonomy is associated with the same contracting parties, notably the European Communities, who for many years opposed the emergence of "legalism" in GATT. This is ironic, since a true private interests approach would naturally support many elements of a legal system. See, e.g., *infra* text accompanying notes 93-94.

26. See Hudec, *GATT or GABB?*, *supra* note 7, at 1303-04, 1343-46.

27. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 49-51 (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

28. These procedures are enshrined, though somewhat ambiguously, in the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* agreed upon in the Tokyo Round, November 28, 1979, (L/4907) para. 10, GATT, BISD (26th Supp.) 210 (1980) [hereinafter *Understanding Regarding Notification*], and the annexed *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement* (Article XXIII:2), para. 6(ii) [hereinafter *Agreed Description*]; and in a 1982 *Ministerial Declaration on Dispute Settlement Procedures*, November 29, 1982, (L/5424) para. (x), GATT, BISD (29th Supp.) 13 (1982) [hereinafter *Dispute Settlement Procedures*]. See Robert E. Hudec, *Reforming GATT Adjudication Practices: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1464, 1483 (1988) [hereinafter Hudec, *Reforming GATT*].

ganization,"<sup>29</sup> and its powers are limited.<sup>30</sup> Indeed, the General Agreement itself is still only provisionally applied, with contracting parties able to withdraw for any reason on sixty days notice.<sup>31</sup> As a result, GATT as an institution has often been unable to act contrary to the wishes of the individual contracting parties, certainly those that are economically and politically powerful.

3) GATT norms and rules are formed almost entirely by agreement, not by "legislation."<sup>32</sup> Art. XXV of the General Agreement does authorize the CONTRACTING PARTIES, acting jointly, to take actions furthering the objectives of the Agreement and to act by majority vote. Although important decisions have been taken under this authority,<sup>33</sup> however, the power has been used cautiously, and decisions have normally been made by consensus. GATT is generally seen as a forum for negotiation.<sup>34</sup>

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29. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 51.

30. See generally Jackson, *GATT and the Future*, *supra* note 2.

31. Protocol of Provisional Application to the General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 61 Stat. pt. 6, T.I.A.S. No. 1700, 55 U.N.T.S. 308 reprinted in IV GATT, BISD 77 (1969) [hereinafter Protocol of Provisional Application], para. 5. The Protocol provides that Part II of the General Agreement shall only apply to the extent not inconsistent with existing national legislation. *Id.* para. 1(b). Negotiators in the Uruguay Round have proposed eliminating this "grandfather clause" as of a date to be established. See *Understanding on Paragraph 1(b) of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade and Corresponding Provisions in Protocols of Accession in DRAFT URUGUAY ROUND PACKAGE*, *infra* note 79, at 318.

32. A particularly clear example of the difference is the set of "codes" or "side agreements" entered into by varying groups of nations as part of the Tokyo Round of trade negotiations. These agreements are open to all contracting parties, but no state is required to adhere. The results of one Tokyo Round negotiating group, the Group Framework, were, in contrast, adopted by the CONTRACTING PARTIES, by consensus, as a decision; this process shares elements of both agreement and legislation. The Tokyo Round agreements and decisions are reprinted in GATT, BISD (26th Supp.) (1980).

33. See, e.g., Decision of June 25, 1971, (L/3545), GATT, BISD (18th Supp.) 24 (1972) (authorizing Generalized System of Preferences); Decision of November 28, 1979, (L/4903) GATT, BISD (26th Supp.) 203 (1980) (authorizing differential treatment of developing countries).

34. See, e.g., LONG, *supra* note 6, at 21-42. Interestingly, the *Ministerial Declaration on the Uruguay Round*, September 20, 1986, GATT, BISD (33d Supp.) 19 (1987) [hereinafter *Ministerial Declaration on the Uruguay Round*], reflected a decision of the trade ministers of the contracting parties of GATT, "meeting on the occasion of the Special Session of the CONTRACTING PARTIES," to initiate multilateral trade negotiations "within the framework and under the aegis of" GATT. GATT as an institution, in short, did not even initiate the Round; the contracting parties simply utilized its institutions as a locus for negotiation. Negotiations on services were even more carefully disas-



4) Dispute settlement proceedings are initiated only by individual contracting parties.<sup>35</sup> Claims are typically based on "nullification or impairment" of the claimant state's private benefits.<sup>36</sup> Remedies are often said to be aimed at restoring the balance of advantage between the parties to the case.<sup>37</sup>

5) The panel process is adversarial and is generally party-controlled, although panels may question the parties, request additional information, and consult with other authorities.<sup>38</sup> Panels consider only the matters raised by the claimant state.<sup>39</sup> GATT functions primarily as a neutral conflict-resolver.

6) Participation of third parties has been limited to states with a substantial interest in the matter, excluding those with a general interest in the legal issues involved or the precedential effects of the outcome.<sup>40</sup>

(One discrepancy also stands out: GATT institutions actively encourage settlement at every stage of a dispute proceeding. I will return to this point below.)

These factors certainly suggest that the GATT contracting parties have seen themselves, at best, as constituting a private interests community. In spite of the strong resemblance, however, the pure private interests model is not wholly appropriate for GATT. In terms of the most fundamental criterion differentiating the two sides of the public/private dichotomy, GATT is a public interest institution. It was created with a vision of the public good, a set of common goals, principles and norms (designed to restrain national autonomy) that the contracting parties believed should govern the world trading community. The whole point of the ITO/GATT negotiations was to give these principles concrete form, in hopes of avoiding the mistakes

sociated from GATT as an institution. *See id.*, Part II.

35. *See Understanding Regarding Notification*, *supra* note 28, paras. 8-10. *See generally* Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53, 56-59 [hereinafter Plank].

36. *See* General Agreement on Tariffs and Trade, *opened for signature* October 30, 1947, 61 Stat. pts. 5, 86, art. XXIII T.I.A.S. No. 1700, 55 U.N.T.S. 187 *reprinted in* IV GATT, BISD 1-78 (1969) [hereinafter General Agreement on Tariffs and Trade].

37. *See, e.g.*, LONG, *supra* note 6, at 65-66.

38. *See Agreed Description*, *supra* note 28, para. 6(iv); *see generally* Plank, *supra* note 35, at 64-65.

39. This focus is specified in the standard terms of reference under which most panels work. Those terms of reference charge the panel "[t]o examine the matter raised by [the complainant state]. . . ." *See infra* text accompanying notes 125-27.

40. *See Understanding Regarding Notification*, *supra* note 28, para. 15.

to which national autonomy had led in the past.<sup>41</sup>

The main elements of the GATT vision are set out in the Preamble to the General Agreement:<sup>42</sup> that barriers to trade should be reduced and discriminatory treatment eliminated in order to encourage economic prosperity and growth. A related goal, not explicitly stated in the General Agreement, was to eliminate sources of international conflict and war.<sup>43</sup> The 1986 Ministerial Declaration that initiated the Uruguay Round eloquently set out as the goals of the Round the furtherance of these very principles and the strengthening of GATT's ability to implement them.<sup>44</sup> A second part of the GATT vision, applicable where government intervention in the economy is permitted,<sup>45</sup> is that protective measures should be channeled into transparent, nondiscriminatory, and less-distortive forms.<sup>46</sup> These principles continue to form a fundamental community vision even as individual rules are challenged and renegotiated.

The private interest bias of GATT institutional arrangements is, to a considerable extent, a product of the unusual circumstances surrounding the birth of GATT. For one thing, the roots of many GATT provisions and ways of thinking lay in bilateral trade agreements,<sup>47</sup> where the concept of a community interest separate from the interests of the two parties has less meaning. The early GATT tariff rounds, for example, were es-

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41. See CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 3-13 (1949).

42. See General Agreement on Tariffs and Trade, *supra* note 36.

43. Inefficient economic policies in the interwar years, it was believed, contributed to the outbreak of World War II. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 27, at 31.

44. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:A.

45. GATT was not intended to prohibit all government interference with trade. In the aftermath of the New Deal, it was assumed that governments would intervene in their economies and that the control of trade would necessarily be part of interventionist policies. The notion of "free trade," in other words, was "embedded" in the broader Keynesian consensus of the time. See John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 384-88 (1982).

46. See Ernst-Ulrich Petersmann, *Grey Area Policy and the Rule of Law*, 22 J. WORLD TRADE 23, 23-26 (1988).

47. The United States executive branch entered into negotiations to form the International Trade Organization and reduce tariffs under the authority of the Reciprocal Trade Agreements Act, which previously had been used to negotiate bilateral tariff reduction agreements. GATT itself was put into effect in the United States under the authority of that Act, which did not, at least according to many in Congress, authorize the President to create an international organization. Finally, many of the provisions in the draft ITO Charter and the GATT were taken from standard provisions in such agreements. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 23-26.

sententially elaborate sets of bilateral negotiations. In addition, it is largely an historical accident that the rules of the world trading community are found in the General Agreement: GATT was intended only as a temporary tariff agreement, incorporating rules designed to regulate nontariff measures that could affect carefully balanced tariff concessions and procedures designed to restore such balances bilaterally.<sup>48</sup>

These factors, though, should not obscure the public elements in GATT's conception. These elements are reflected not only in the Preamble of the General Agreement but in its rules,<sup>49</sup> including its intended link to the ITO.<sup>50</sup> Public elements are even inherent in GATT's structure, a remarkable fact given the effort to avoid creating an international organization: as noted above, the CONTRACTING PARTIES acting jointly have broad general powers;<sup>51</sup> they can grant waivers for noncomplying national actions, and thus have the implied power to impose conditions on such a grant;<sup>52</sup> they can make rulings and authorize retaliation;<sup>53</sup> and they are empowered to review and oversee a variety of national measures.<sup>54</sup> Though these powers have always been exercised flexibly, GATT's public functions were well understood by the first generation of "GATT hands."<sup>55</sup>

In recent years, GATT's public role has been widely recognized. Today, GATT is rarely called a tariff agreement; instead, the General Agreement, related agreements, and their various institutions are typically referred to as "the multilateral trading system."<sup>56</sup> In the Leutwiler Report the group of "eminent persons" formed in 1983 to study the problems of that system exhorted contracting parties to deemphasize bilateral differences and "recognize that they share a common interest in the sys-

48. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 27, at 32-34; HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 23-25.

49. An important example is art. X, by which the trading community sets minimum standards for the procedures and even for the structure of national governments. General Agreement on Tariffs and Trade, *supra* note 36, art. X.

50. General Agreement on Tariffs and Trade, *supra* note 36, art. XXVIII.

51. General Agreement on Tariffs and Trade, *supra* note 36, art. XXV:1.

52. General Agreement on Tariffs and Trade, *supra* note 36, art. XXV:5.

53. General Agreement on Tariffs and Trade, *supra* note 36, art. XXIII.

54. See, e.g., General Agreement on Tariffs and Trade, *supra* note 36, art. XXIV:7, 10 (customs unions); art. XII:4 (balance of payments measures).

55. See Hudec, *GATT or GATT?*, *supra* note 7, at 1336-42.

56. See, e.g., LONG, *supra* note 6; GATT, *TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION* (THE LEUTWILER REPORT) 18 (1985) [hereinafter GATT, *TRADE POLICIES FOR A BETTER FUTURE*].

tem's survival, far outweighing any differences among them."<sup>57</sup> Professor Jackson speaks of GATT as having an evolving "constitution."<sup>58</sup> Ernst-Ulrich Petersmann, a former GATT legal advisor, observes that GATT has evolved from a short-term contract designed to protect tariff concessions to "a permanent world-wide trade agreement and an institutionalized legal framework" for the liberalization of trade.<sup>59</sup>

These views have been supported by the evolution, slow to be sure, of institutional attitudes and practices suggestive of a public interest approach. In the area of dispute settlement, for example, the Secretariat has come to play a large and increasingly substantive role in the panel process as "guardian of the General Agreement."<sup>60</sup> Participation by third contracting parties in the proceedings of panels has increased, despite the restrictive standard,<sup>61</sup> occasionally to an extent that suggests community intervention rather than participation by private parties similarly situated.<sup>62</sup> A few panel decisions, generally highly conservative in legal technique, have been drafted with an eye toward establishing workable community rules.<sup>63</sup> More generally, there appears to be evolving an attitude that strong dispute settlement procedures are important not only to resolve conflict among contracting parties but to ensure the success of agreed

57. GATT, TRADE POLICIES FOR A BETTER FUTURE, *supra* note 56, at 33.

58. JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 2 (1990) [hereinafter JACKSON, RESTRUCTURING]; JACKSON, WORLD TRADING SYSTEM, *supra* note 27, at 299-308.

59. Ernst-Ulrich Petersmann, *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT*, in THE NEW GATT ROUND, *supra* note 8, at 323-24 [hereinafter Petersmann, *Strengthening the GATT*].

60. *Agreed Description*, *supra* note 28, para. 6(iv). For a brief discussion of the Secretariat's increased role, see Andreas F. Lowenfeld, *Preface: Some Observations on Dispute Settlement in GATT*, in PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991) at xi, xiv-xv [hereinafter Lowenfeld].

61. See, e.g., *Japan — Trade in Semiconductors*, report of panel adopted May 4, 1988, GATT, BISD (35th Supp.) 116 (1989); *US — Restrictions on Imports of Sugar*, report of panel adopted June 22, 1989, GATT, BISD (36th Supp.) 331 (1990); *EEC — Regulation of Imports of Parts and Components*, report of panel adopted May 16, 1990, (L/6657) GATT, BISD (37th Supp.) 132 (1991).

62. See General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Tuna, 30 I.L.M. 1594 (1991).

63. See, e.g., *U.S. — Customs User Fee*, report of panel adopted Feb. 2, 1988, GATT, BISD (35th Supp.) 245, paras. 76-77 (interpretation of "services rendered"), 78-86 (policy analysis of fee calculation method) (1989); *Japan — Restrictions on Imports of Certain Agricultural Products*, report of panel adopted March 22, 1988, GATT, BISD (35th Supp.) 163, para. 5.1 (clarification of Art. XI requirements, policy analysis of burden of proof) (1989).

community rules.<sup>64</sup>

Finally, GATT's public role is clearly recognized in the documents of the Uruguay Round. The general objectives of the Round set out in the Ministerial Declaration have already been mentioned.<sup>65</sup> The more specific objectives of the negotiations on the "functioning of the GATT system" (FOGS),<sup>66</sup> and especially the midterm agreement on FOGS,<sup>67</sup> leave no doubt that GATT is seen as the institutional representative of the world trading community, with major public objectives and a public role of vital importance.

The FOGS agreement, for example, states that negotiators were guided by their understanding of the contribution that GATT could make "to ensure a further expansion and liberalization of trade as well as a strengthened multilateral trading system which are of vital importance to all contracting parties and which are essential for the promotion of growth and development."<sup>68</sup> The perception of GATT's public role is nicely summarized in a statement by the chair of the ministerial meeting at Punta del Este, where the Uruguay Round was initiated. It had been proposed to include as an objective of the Round the redressing of bilateral trade disequilibria; the chair suggested, however, that this proposal was rejected because it might "lead to a trading system incompatible with the basic objectives and principles of GATT, the guarantor of the open and non-discriminatory trading system."<sup>69</sup>

Again, let me stress that I have no interest in adopting the extreme model of an activist community summarized earlier. I do believe, though, that GATT as an organization should continue to evolve in the direction of that model, with increasing recognition of its public function and the development of appropriate powers and procedures, so that it can better pursue the fundamental vision of the world trading community.

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64. Petersmann, *Strengthening the GATT*, *supra* note 59, at 323, 326.

65. *See supra* note 44.

66. *See Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:E.

67. *Midterm Review Agreements*, April 21, 1989, Part I, Functioning of the GATT System (FOGS), secs. 1-3, GATT Doc. MTN.TNC/11, reprinted in *LAW AND PRACTICE UNDER THE GATT*, Part III, Uruguay Round (Kenneth R. Simmonds and Brian H.W. Hill eds.) (1989) [hereinafter *Midterm Review Agreements*].

68. *Id.* at sec. 2(a).

69. *See Statement by the Chairman of the Ministerial Meeting*, GATT, BISD (33d Supp.) 28, 29 (1987). The chair went on to add that the problem of trade imbalances should be addressed by macro-economic policy. *Id.*

## III. THE URUGUAY ROUND AND GATT AS A PUBLIC INSTITUTION

## A. Introduction

The 1986 Ministerial Declaration laid out ambitious goals for the Uruguay Round.<sup>70</sup> In terms of institutional issues, however, it mentioned few specifics. Increased multilateral surveillance was set as a goal in various contexts, including the standstill and rollback commitments in force during the negotiations,<sup>71</sup> safeguard measures,<sup>72</sup> and the implementation of dispute settlement decisions.<sup>73</sup> The FOGS group was entrusted with a rather complete proposal for monitoring national trade policies.<sup>74</sup> Otherwise, the language was general.<sup>75</sup>

Both the dispute settlement and FOGS groups nonetheless made significant progress, and made it early in the Round. By the Midterm Review, December 1988 - April 1989, the dispute settlement group had agreed on a lengthy package of "improvements." These were immediately put into effect "on a trial basis" for the duration of the Round.<sup>76</sup> The FOGS group recommended an ambitious Trade Policy Review Mechanism (TPRM), based on the proposal in the Declaration, and an enhanced Council review of general developments in the international trade environment; these too were put into effect provisionally.<sup>77</sup> The FOGS group also recommended a more frequent schedule of ministerial meetings.<sup>78</sup>

In preparation for the abortive Brussels ministerial meeting of the Trade Negotiations Committee in December 1990, the various negotiating groups consolidated the results they had achieved thus far into a "Draft Final Act," a "first approximation" of the package of agreements that was to have emerged from the Round.<sup>79</sup> The package included a lengthy draft "Un-

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70. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:A.

71. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:C.

72. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:D.

73. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:D.

74. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:E (i).

75. *E.g.*, *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:E (ii)-(iii).

76. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement secs. A:1-A:3.

77. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:A-E (Trade Policy Review Mechanism), sec. 4:F (Overview of the International Trading Environment).

78. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 5.

79. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral*

derstanding on the Interpretation and Application of Articles XXII and XXIII of the General Agreement on Tariffs and Trade" (the "Understanding"), building on the Midterm agreement, but still including some "square brackets."<sup>80</sup> A draft FOGS decision recommended confirmation of the Midterm results and the adoption of an enhanced notification system.<sup>81</sup>

The Draft Final Act itself suggested that it would be desirable to establish a new organizational structure "to provide the administrative infrastructure" for the international implementation of the results of the Round.<sup>82</sup> This language undoubtedly relates to the European Communities proposal for the creation of a new "Multilateral Trade Organization" (MTO), although that title was only one option specified. Beyond the simple statement that a new structure is needed, and agreement that the details should somehow be worked out by the time the results of the Round were formally implemented,<sup>83</sup> however, the Draft Final Act included only a series of "square brackets" — alternative formulations of structure and scope that revealed significant differences of opinion — and an Annex that was almost completely blank.<sup>84</sup> The FOGS group also discussed the strengthening of GATT institutions, including the Secretariat, but it was able to produce only an empty set of brackets.<sup>85</sup>

It will only be possible here to discuss the highlights of these agreements and proposals. I will concentrate on those matters that are illuminated by the public/private dichotomy, and will analyze them primarily from the public interest point of

*Trade Negotiations* [hereinafter *Draft Final Act*], November 1990, GATT Doc. MTN.TNC/W/35 at 1-5. The various draft agreements, decisions, and understandings that were prepared for the Brussels meeting were appended to the Draft Final Act and organized into four annexes: Annex I (Uruguay Round Agreements on Trade in Goods); Annex II (General Agreement on Trade in Services); Annex III (Agreement on Trade-Related Aspects of Intellectual Property Rights); and Annex IV (Basic Elements of an Organizational Agreement). The Draft Final Act and its Annexes are referred to hereafter as DRAFT URUGUAY ROUND PACKAGE.

80. *Understanding on the Interpretation and Application of Articles XXII and XXIII of the General Agreement on Tariffs and Trade*, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 289 [hereinafter *Understanding*].

81. *FOGS Draft Decision*, *supra* note 3, at 321-22, secs. 1-3.

82. *Draft Final Act*, *supra* note 79, at 3, para. 5.

83. *Draft Final Act*, *supra* note 79, at 3, para. 6.

84. *Draft Final Act*, *supra* note 79, at 3, paras. 5-6; Annex IV [*Basic Elements of an Organizational Agreement*] in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 383.

85. *FOGS Draft Decision*, *supra* note 3, at 323, sec. 8; *see also Commentary on Decision on the Functioning of GATT System*, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 320.

view.

## B. *Dispute Settlement*

### 1. Rhetoric

Both the Midterm agreement on dispute settlement and the Understanding (the "dispute settlement texts") begin with a paragraph extolling the importance of the dispute settlement system.<sup>86</sup> The language of this paragraph generally reflects the assumptions of a private interest community: it speaks, for example, of providing security and predictability in trade and preserving the rights of individual contracting parties. At the same time, however, it recognizes an important role for community institutions in providing the legal infrastructure necessary for private interaction. The rhetoric of this paragraph accurately signals the willingness of the Uruguay Round dispute settlement negotiators to go beyond a passive or negative conception of the private interests community (one emphasizing noninterference by community institutions) and implement a more affirmative conception.<sup>87</sup>

The paragraph even includes a hint of public interest thinking in its statement that dispute settlement procedures serve to clarify the rules of the General Agreement. In the Understanding, however, negotiators carefully cabined the more expansive implications of this statement by adding that rulings under Article XXIII cannot add to or diminish the rights and obligations of contracting parties. This caveat seems to reflect a naive view of the process of interpretation, but that is a subject for another time. In the meanwhile, this particular public/private controversy will be played out in individual panel decisions.

### 2. Settlement

An emphasis on voluntary settlement, even at the cost of compromising the rules of the General Agreement, has long characterized GATT dispute procedures.<sup>88</sup> The Uruguay Round

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86. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. A:1; *Understanding*, *supra* note 80, at 289, sec. A:2.

87. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

88. For a characteristic statement of this approach to dispute settlement, see Plank, *supra* note 35, at 60 ("the nature of GATT dispute settlement is to settle disputes satisfactorily among members rather than to make law. A solution however imperfect to which all parties agree (and which hopefully does minimal damage to GATT standards)



dispute settlement texts continue, and in some ways heighten, this emphasis. First, by explicitly adopting a set of working procedures for panels suggested by the Office of Legal Affairs in 1985,<sup>89</sup> the texts continue, except as otherwise altered, the dispute resolution procedures adopted at the end of the Tokyo Round. Those procedures, adopted with the era of anti-legalism still clearly in mind, attempt to minimize the possibility that the losing parties in dispute settlement proceedings might fail to comply with final decisions, weakening GATT's authority. Accordingly, they instruct panels to encourage settlement throughout the process.<sup>90</sup>

In addition, the texts highlight the availability of good offices, mediation, and conciliation as techniques for resolving disputes by voluntary settlement.<sup>91</sup> These techniques are permitted to go forward at any time, even during the panel process, and the Director-General of GATT is affirmatively authorized to offer his services for any of the techniques "with the view to assisting contracting parties to settle a dispute."<sup>92</sup>

From a private interests standpoint, the principle of autonomy means that in most situations, parties to a dispute should be free to settle their disputes voluntarily. As I have argued elsewhere, however,<sup>93</sup> a true private interests community would be reluctant to encourage settlement once litigation has begun, lest it breach its obligation of neutrality. In addition, one of the major roles for community institutions in a private interests community is to maintain order, typically through the use of enforceable rules. Compromise settlements sponsored by the community in the course of litigation suggest that community norms can be avoided. Finally, a true private interests commu-

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is clearly preferred.")

89. See *Understanding*, *supra* note 80, at 294, sec. D:6(b); *id.* at 304-05 (Annex, Suggested Working Procedures).

90. For a description of the rationale for this approach, see Hudec, *Unfinished Business*, *supra* note 7.

91. These techniques are already available, though little used, in GATT procedure. See *Understanding Regarding Notification*, *supra* note 28, para. 8; *Dispute Settlement Procedures*, *supra* note 28, para. (i); Plank, *supra* note 35, at 61-62.

92. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. D:3; *Understanding*, *supra* note 80, at 291, sec. C. Under previous procedures, the Director-General was empowered to play a particularly strong role in cases involving complaints by developing countries. See *Procedures Under Article XXIII*, Decision of April 5, 1966, GATT, BISD (14th Supp.) 18-20 (1966) [hereinafter *Procedures Under Article XXIII*].

93. Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

nity will endeavor to provide a system of basic entitlements around which its members can efficiently negotiate and form private arrangements. Compromise settlements blur public understanding of existing entitlements and fail to create new ones, making private ordering more costly.<sup>94</sup>

A public interest community would be even more reluctant to encourage compromise settlements, perhaps any settlements, especially during litigation. Such a community is concerned with the substantive outcome of dispute proceedings and the implementation of community policy. Decisions enforcing community rules are seen not merely as bulwarks of minimum order and neutral guideposts to private interaction, but as substantive acts that guide the behavior of community members and force them to bargain "in the shadow of the law" where private ordering is allowed.<sup>95</sup> As Professor Fiss puts it, the purpose of activist dispute procedures is to help bring reality in line with community values.<sup>96</sup> When the community promotes or even visibly permits a compromise settlement, at least in cases where the public interest is involved, it forfeits an opportunity to implement its principles, weakens those principles in the eyes of its members, and makes future implementation more difficult.

Dispute proceedings in the public interest community also serve an educational function, helping members of the community to understand and accept its principles. To reinforce this function, proceedings are typically open to the public, and decisions are embodied in written, publicized opinions.<sup>97</sup> Compromise settlements, though, are often confidential; and even if they are made public, they tend to undercut public understanding of community policy.

Assuming settlement is to be allowed, intervention by the Director-General<sup>98</sup> could well influence states to agree on terms more in line with community norms than they might reach on their own. Other mediators might not have the same beneficial impact, though, and even the Director-General could not always

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94. Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

95. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Professor Jackson's dichotomy between rule-oriented and power-oriented diplomacy emphasizes the influence of community rules on private bargaining. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 27, at 85-86.

96. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

97. See, e.g., General Agreement on Tariffs and Trade, *supra* note 36, art. X.

98. See *supra* text accompanying note 92.

do so. No such influence, in any case, would be at work in directly negotiated settlements. From both a private interests and a public interest point of view, then, procedures for community control of negotiated settlements are crucial.

The Uruguay Round dispute settlement texts first set forth the principle that "solutions" to disputes that have entered the Article XXIII dispute process must be consistent with the General Agreement and must not impede any of its objectives (or nullify or impair any contracting party's benefits).<sup>99</sup> Under this principle, at a minimum, country A could not settle a proceeding brought by country B to challenge A's allegedly unjustified quota by granting B its own favorable share of the quota; such a settlement would run afoul of Article I of the General Agreement. The principle could also be read more expansively. In the hypothetical case just discussed, for example, if country A's quota were found to be unlawful, the principle could be taken to forbid a settlement whereby country A enlarged its quota on a most-favored-nation (MFN) basis, since the outcome (the underlying quota) would still be inconsistent with the General Agreement.

However it is interpreted, though, the principle of consistency with GATT law will have little effect without adequate review procedures. Fairly strong proposals, including explicit authorization for the Council to reject any settlements reached during litigation, were made during the negotiations.<sup>100</sup> The procedure actually decided upon, though, is disappointingly weak. Settlements are simply to be notified to the Council, "where any contracting party may raise any point relating thereto."<sup>101</sup> The Council could conceivably still use its Article XXV authority to disapprove particular settlements, but the texts make no reference to this possibility. It is small consolation that even this minimal procedure, by putting settlements up to public view, is an improvement on the 1979 Understanding,<sup>102</sup> assuming, that

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99. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. A:2; *Understanding*, *supra* note 80, at 289, sec. A:3.

100. See *Negotiating Group on Dispute Settlement, Summary and Comparative Analysis of Proposals for Negotiations*, Note by the Secretariat (Revision), Feb. 26, 1988, GATT Doc. MTN.GNG/NG13/W/14/Rev.1, at 19-20 [hereinafter *Negotiating Group on Dispute Settlement*].

101. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. B; *Understanding*, *supra* note 80, at 289, sec. A:4.

102. Under the 1979 *Agreed Description*, if the parties to a dispute settlement proceeding reach an agreed settlement the panel will terminate its work, issuing only a brief

is, that contracting parties comply with their notification obligation.<sup>103</sup>

Ironically, the continued commitment to encouraging settlement is motivated at least in part by a public interest goal: to preserve GATT as a functioning institution.<sup>104</sup> Since GATT has no coercive power, and the GATT community has less political cohesion than most states, confrontations over dispute settlement decisions have been seen as potentially fatal to the institution. Encouraging pre-decision settlement has been seen as one way to avoid the problem. The Uruguay Round texts, however, significantly strengthen the panel process and the related enforcement procedures,<sup>105</sup> suggesting that the problem is regarded as significantly less serious than in the past. The successful conclusion of the Round would, in fact, alleviate several traditional sources of concern.<sup>106</sup> At the least, then, future negotiations should be aimed at strengthening community control over negotiated settlements, particularly those reached during the panel process.

### 3. Arbitration

The dispute settlement texts provide for a system of consensual arbitration "within GATT" as an "alternative means of dispute settlement."<sup>107</sup> This is predominantly a private interests regime. Arbitration is described as a way to resolve disputed issues between particular states. Resort to arbitration is based solely on agreement of the parties. The parties are empowered to select both the arbitrators and the arbitration procedures. Agreements to arbitrate must be notified to all contracting parties, but the texts establish no procedure for their review.<sup>108</sup>

Parties that choose to arbitrate, on the other hand, must

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description of the case and a report that the case has been settled. *Agreed Description*, *supra* note 28, para. 6(v). Individual contracting parties "with an interest in the matter" will, however, on request, be given information about the settlement as it pertains to trade. *Understanding Regarding Notification*, *supra* note 28, para. 19.

103. The *FOGS Draft Decision*, *supra* note 3, proposes a significant strengthening of notification procedures. See *infra* part III(C).

104. See *supra* text accompanying note 90.

105. See *infra* part III.B.4.

106. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

107. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. E:1; *Understanding*, *supra* note 80, at 301, sec. O.

108. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. E:1; *Understanding*, *supra* note 80, at 301, sec. O.

agree to be bound by the award, a rule seemingly designed to avoid the longstanding problems of delay and blockage of panel decisions by losing parties.<sup>109</sup> Moreover, by the terms of the Understanding, a publicly oriented regime of Council surveillance (applicable also to panel decisions) would encourage the implementation of arbitral awards.<sup>110</sup> These provisions can be applauded from both the public interest and private interests points of view.

There are, however, some remarkable deficiencies in the arbitration provisions, especially from a public interest perspective. One set of weaknesses relates to the structure of arbitral tribunals. In a public interest community, the institutions of justice must be structured to promote the effective implementation of community policy. Their personnel must be selected, installed and supervised so that they see the implementation of community policy as their official duty. Typically, institutions of justice are publicly chartered, supported with public resources, and staffed with persons chosen by the public, or by other officials so selected, and sworn to uphold community norms.<sup>111</sup> While arbitration and other forms of alternative dispute resolution<sup>112</sup> may be allowed, cases involving important public policies or regulatory programs are, or should be, reserved for the public institutions.<sup>113</sup>

None of these concerns is dealt with in the dispute settlement texts. While they vaguely suggest that arbitration is particularly suitable for purely private disputes,<sup>114</sup> parties appear to be free to select arbitration, and any arbitral procedure they

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109. See, e.g., Petersmann, *Strengthening the GATT*, *supra* note 59, at 336. The dispute settlement texts would make blocking of panel decisions a much less serious problem, however. See *infra* text accompanying notes 142-44.

110. For a discussion of proposals to strengthen the GATT surveillance regime, see *infra* part IV(A)(4).

111. See Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 44-45.

112. For a discussion of "second-wave" alternate dispute resolution theory, which is critical of the earlier enthusiasm, see Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

113. See Bernard D. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545, 558-59 (1967). The allocation of important public policy cases to the public institutions of justice is accomplished by the doctrine of arbitrability. *Id.* This doctrine has undergone a revolution in the United States, culminating in the international case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see *infra* text accompanying notes 229-32.

114. See *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. E:1; *Understanding*, *supra* note 80, at 301, sec. O:1.

choose, in any case. Most serious, perhaps, the texts are silent as to the identity or qualifications of arbitrators. This may not be of great concern for disputes that are essentially private, like the issue of appropriate compensation arbitrated during the Chicken War,<sup>115</sup> but it is important for disputes in which public principles are at stake.

The negotiating group considered a proposal that parties wishing to arbitrate should select arbitrators from the GATT roster of panelists.<sup>116</sup> With the refinements to panel selection proposed in the Understanding,<sup>117</sup> this procedure would have incorporated a set of minimum qualifications and made available a group of pre-cleared nongovernmental panelists. Other elements of the panel process — including a potential role for the Director-General in the choice of panelists and the panelist's obligation of independence — might also have been carried over.<sup>118</sup> Such procedures would likely produce arbitrators that were both qualified and committed to the furtherance of GATT norms. The provisions actually adopted do not create the same confidence.

Other deficiencies relate to the grounds for arbitrators' decisions. Most important, the dispute settlement texts do not require arbitrators to decide disputes in accordance with GATT rules. This is surprising, since most GATT panels are currently given standard terms of reference that require them to decide "in the light of the relevant provisions of the General Agreement,"<sup>119</sup> a procedure that the Uruguay Round texts try to reinforce.<sup>120</sup> Arbitration awards, like settlements, are required to be consistent with the General Agreement,<sup>121</sup> but here too the only technique for enforcing consistency is the notification of awards

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115. See Petersmann, *Strengthening the GATT*, *supra* note 59, at 338-39. For a full description of the Chicken War incident, see 1 ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* 249 (1969). The Understanding provides for the use of binding arbitration for a very similar circumstance, determining the proper amount of trade to be covered by the suspension of concessions in cases where retaliation is authorized by the Council. See *Understanding*, *supra* note 80, at 300, secs. L:4-5.

116. See *Negotiating Group on Dispute Settlement*, *supra* note 100, para. 85.

117. See *Understanding*, *supra* note 80, at 292, sec. D:3.

118. See *Agreed Description*, *supra* note 28, para. 6(iii).

119. See Plank, *supra* note 35, at 64-65.

120. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. F(b); *Understanding*, *supra* note 80, at 292, sec. D:2. See *infra* note 125 and accompanying text.

121. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. A:2; *Understanding*, *supra* note 80, at 289, sec. A:3.

to the Council for possible comment.<sup>122</sup>

Finally, while it appears that arbitrators are expected to issue written awards — this can be deduced from the requirement that awards be notified to the Council — there is no requirement that they prepare reasoned opinions or that such opinions be made publicly available. If only bare awards are notified to the Council, there will be little for contracting parties to comment on, and, thus, little way to discipline arbitrators, even informally, as to their grounds for decision. If contracting parties cannot be certain that GATT rules are being applied, the authority of those rules will necessarily be reduced. Finally, even if arbitrators do apply GATT rules, the public interest goal of educating the community will only be achieved if the principled bases of their awards are publicly disseminated.

In sum, while a properly constituted arbitration regime could play an important role in GATT, the arbitration procedures contemplated by the Uruguay Round texts could retard the evolution of GATT dispute settlement into a public interest system of justice.

#### 4. The Panel Process

##### a) General

The Midterm agreement on dispute settlement brought about relatively minor refinements in the panel process, the central dispute resolution mechanism of GATT. The Understanding, however, would substantially change the process, for the most part in ways long advocated by GATT legalists. As I have discussed elsewhere,<sup>123</sup> these changes are largely informed by the ideal of an affirmative private interests community, whose institutions seek to provide a sound framework for private ordering and a neutral forum for the resolution of private disputes.<sup>124</sup> Indeed, the Understanding would go far toward attaining that ideal. Public interest elements, however, are distinctly subordinate.

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122. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. B; *Understanding*, *supra* note 80, at 302, sec. O:3.

123. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

124. The provisions on settlement, mediation, and arbitration are in some ways exceptions to this conclusion, just as they are problematic under a public interest conception of the dispute settlement process. Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

Both texts would reinforce the use of standard terms of reference that explicitly charge panels to examine disputes "in the light of the relevant GATT provisions."<sup>125</sup> The standard terms would be used in every case unless the parties to the dispute decided on other terms within twenty days of the panel's establishment. If nonstandard terms of reference were agreed upon, however, they would be circulated to all contracting parties, any one of which could initiate a discussion of the terms in the Council. This provision falls well short of mandating use of the standard terms; indeed, it involves essentially the same weak procedure used in the review of settlements. It should, however, add some support to the presumption that GATT law is to be fully applied in dispute settlement proceedings.

The texts envision a growing role for the Director-General in the establishment of panels: he would be authorized, in consultation with the Chair of the Council and the parties, to "form" a panel, "appointing the panelists whom he considers most appropriate," if the parties themselves could not agree on panelists within twenty days.<sup>126</sup> In addition to avoiding delay, this procedure should help ensure that panelists are not only neutral and expert — important private interests goals — but also committed to furthering community norms. Even if the Director-General rarely forms a panel, the possibility of his involvement should influence the selections made by contracting parties. The Understanding also sets out some of the qualifications a panelist should possess.<sup>127</sup>

#### b) Right to a Panel

The Uruguay Round texts would introduce into the GATT dispute process the principle of guaranteed access to a panel, an element that seems essential both to a private interests system of justice and to a public interest system that relies on "private attorneys-general." Certain Tokyo Round "codes" grant a right to a panel, as do the 1966 special procedures for developing country complaints.<sup>128</sup> In Article XXIII:2 proceedings, however, the Council must establish each panel, and since it operates by

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125. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. F(b); *Understanding*, *supra* note 80, at 292, sec. D:2.

126. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. F(c)(5); *Understanding*, *supra* note 80, at 292, sec. D:3(e).

127. *Understanding*, *supra* note 80, at 292, sec. D:3(a).

128. *See Procedures Under Article XXIII*, *supra* note 92, para. 5.



consensus, respondents at least formally have the power to prevent the creation of panels.<sup>129</sup> In practice, complainants have access to a panel in virtually every case, but respondents can still cause delay or use their blocking power to improve their position in settlement negotiations.<sup>130</sup>

Previous GATT rounds have not interfered with this power; indeed negotiators in the Tokyo Round sought to reinforce it, at the same time attempting to discourage the filing of controversial complaints. As with the rules encouraging settlement, the aim was to avoid confrontations over final decisions that might fatally weaken GATT by keeping troublesome cases out of the system altogether.<sup>131</sup>

Against this background, the Uruguay Round provisions are quite remarkable. The Midterm agreement is somewhat ambiguous on this issue,<sup>132</sup> but the Understanding is clear: on request, a panel "shall be established" by the second Council meeting at which the matter appears on the agenda — or even, under an alternative formulation, at the first such meeting — unless the Council decides otherwise.<sup>133</sup> The latter clause appears at first to take away what the rest of the text has given. The provision as a whole, however, creates a presumption in favor of establishment: the Council must affirmatively act to prevent creation of a panel.

The Understanding includes several bracketed formulations of the action necessary to overcome the new presumption. In general, however, the Understanding preserves the principle of consensus decision making, so formulations that simply refer to a Council decision would seem to require a consensus against the creation of a panel;<sup>134</sup> one bracketed alternative would make this requirement explicit. Since the complainant would rarely join such a consensus — perhaps only if its own demands had been fully met — it appears that the Uruguay Round texts would in effect create an automatic right to a panel. The fate of this provision is, however, in some doubt, for its adoption depends on satisfactory results in the substantive negotiations of the

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129. See Plank, *supra* note 35, at 63-64.

130. See Plank, *supra* note 35, at 63-64.

131. See Hudec, *Unfinished Business*, *supra* note 7.

132. See *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. F(a).

133. *Understanding*, *supra* note 80, at 291, sec. D:1.

134. *Understanding*, *supra* note 80, at 290, sec. A:6.

Round.<sup>135</sup>

c) Adoption of Panel Reports

A similar analysis applies to the last phase of the panel process, the adoption of panel reports. Panel decisions only have legal effect after they are adopted by the Council. Before adoption, they are merely advisory, designed to "assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2."<sup>136</sup> Moreover, as with the establishment of panels, the Council has adopted panel reports by consensus.<sup>137</sup> Formally, then, each party to a panel proceeding, even the loser, has had the power to block adoption of an adverse report.

In practice, panel reports have usually been approved,<sup>138</sup> and the GATT contracting parties have agreed that "obstruction" of the dispute settlement process should be avoided.<sup>139</sup> On occasion, though, losing parties have blocked reports — at least temporarily, — have delayed their adoption, and have used these formal powers to negotiate more favorable settlements.<sup>140</sup> Even though the Council is entitled to act by majority vote,<sup>141</sup> it has been reluctant to interfere. One reason is the continued importance of the consensus principle to autonomy-minded states. Another, though, has been the desire to retain a safety valve for dealing with highly controversial decisions.

Here, too, the Uruguay Round texts would work a remarkable change, one which this observer, at least, did not expect to see emerging from the Round. The Midterm agreement retains the consensus principle, with the proviso that delay should be avoided.<sup>142</sup> The Understanding, however, parallel to its treatment of establishment, reverses the current presumption, providing that panel reports "shall be adopted" within sixty days of issuance, unless the Council decides otherwise.<sup>143</sup> Alternative

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135. See Status of Uruguay Round Negotiating Groups of the General Agreement on Tariffs and Trade, Reported by Trade Negotiations Committee of GATT Secretariat, Nov. 7, 1991, reprinted in 8 Int'l Trade Rep. (BNA) 1670, 1673 (1991).

136. *Understanding Regarding Notification*, *supra* note 28, para. 16.

137. See *Dispute Settlement Procedures*, *supra* note 28, para. (x).

138. See Hudec, *Reforming GATT*, *supra* note 28, at 1489.

139. *Dispute Settlement Procedures*, *supra* note 28, para. (x).

140. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

141. General Agreement on Tariffs and Trade, *supra* note 36, art. XXV:4.

142. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec.

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143. *Understanding*, *supra* note 80, at 296, sec. G:4. The provision protects the right

formulations of the required Council vote are similar to those in the establishment provision. In this case too, a consensus decision against adoption would appear to be necessary.

This reform would be a watershed for GATT. It would make the panel process a more legitimate device for resolving private conflicts, while advancing its evolution into a public interest system of justice. Adoption of this reform is linked, however, not only to the substantive negotiations of the Round, but also to the abandonment of unilateral trade measures like section 301 and its variants in United States law. As this is written, the likelihood of such a tradeoff is speculative at best. Within the United States, at least, many industries and other organized groups see the threat of unilateral measures as a more effective way to pursue private interests than any form of GATT dispute proceeding.<sup>144</sup>

#### d) Interim Reports

The Understanding would blur the distinction between the argumentative phase of a dispute proceeding and the subsequent deliberations of the panel. It would first require panels, after the conclusion of arguments, to submit to the parties for written comment the descriptive portion of their draft reports, which summarize the facts and the parties' arguments. It would then require panels to submit to the parties, as "interim reports," complete drafts of their decisions, including the findings and conclusions.<sup>145</sup> Parties could submit additional comments and request reconsideration of particular issues. On request, panels would be required to meet with the parties to discuss such issues. Panels would have to take account, in their final decisions,

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of the parties to the dispute and all other contracting parties to participate in discussion of the report. *Id.*, sec. G:3.

144. United States firms have come to rely on section 301, codified at 19 U.S.C. § 2411 (1991), as a more effective means of opening foreign markets than either GATT negotiations or GATT dispute proceedings. See J. Michael Finger, *That Old GATT Magic No More Casts Its Spell (How the Uruguay Round Failed)*, 25 J. WORLD TRADE, No. 2, at 19 (1991).

If the current provisions do emerge from the Round intact, the major concern will be whether the safety valve of a possible consensus vote against adoption will be sufficient for current conditions. In the case of a decision strongly opposed by a powerful contracting party, one wonders whether GATT's political cohesion is such that the rule can be enforced without damaging confrontations. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

145. See *Understanding*, *supra* note 80, at 293, sec. D:5.

of any points raised at the interim review stage.<sup>146</sup> This provision was proposed by Canada, based on a similar procedure in the United States-Canada free trade agreement, and received wide support.<sup>147</sup>

The interim review proposal plays a fascinating role in the reform of the panel process contemplated by the Uruguay Round texts. In part, the procedure simply reflects the pervasive private interests thinking that underlies that reform: since panels exist only to deal with the parties' needs, not to perform any independent function, the parties should have as much latitude as necessary to ensure that panels are properly considering their arguments.<sup>148</sup> But a more convincing rationale also exists.

The Uruguay Round reforms would create a stronger and more independent panel process.<sup>149</sup> The complainant's right to a panel and the quasi-automatic adoption of panel reports have already been discussed; other proposals attempt to strengthen enforcement.<sup>150</sup> To make these reforms more acceptable to autonomy-minded states, the Uruguay Round negotiators have sought to give parties to dispute settlement proceedings every possible opportunity to present their cases in a favorable light, even if the resulting procedures would be frowned upon in a well-developed national system.

Similarly, the negotiators have sought to minimize conflict over actual panel decisions by eliminating as many potential grounds for objection, both procedural and substantive, as possible.<sup>151</sup> The interim review procedure, for example, seems intended to estop losing parties from arguing that the panel process was unfair or that panels did not properly assess significant arguments.<sup>152</sup>

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146. See *Understanding*, *supra* note 80, at 293, sec. D:5.

147. See Ernst-Ulrich Petersmann, *The Uruguay Round Negotiations 1986-1991*, [hereinafter Petersmann, *The Uruguay Round Negotiations*], in *THE NEW GATT ROUND*, *supra* note 8, at 501, 554.

148. A similar procedure in the 1979 Agreed Description of dispute settlement practice aimed to provide one last chance for the parties to settle their dispute. See *Agreed Description*, *supra* note 28, para. 6(vii). The settlement motivation is not mentioned in the Uruguay Round texts, however.

149. The settlement, mediation and arbitration provisions run counter to this trend. This is why those provisions are both surprising and disturbing.

150. See *infra* part III(B)(6).

151. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

152. The present procedure — in which the descriptive portion of the draft report is circulated to the parties for comment — allows parties to object that the panel did not consider certain arguments, since a summary of the arguments made is included in the

From the perspective of an affirmative private interests community, the major risk of the interim review procedure is interference, actual or perceived, with the independence of the panel.<sup>153</sup> Pierre Pescatore, a former judge on the European Court of Justice and a panelist in several GATT cases, strongly criticizes the procedure on this ground. He writes: "[t]he 'interim review' would constitute an outright intervention into the panel's independence. It would allow the parties to give preventive warnings and to exert pointed pressures on the panel members."<sup>154</sup> The Understanding attempts to minimize these dangers: all parties would participate in additional meetings with the panel, for example, and *ex parte* communications would be wholly forbidden.<sup>155</sup> Still, the risk of interference cannot be discounted.

From a public interest perspective, the interim review procedure is even more troubling. Dispute settlement proceedings, even privately initiated proceedings involving private disputes, may implicate interests of the community beyond those of the parties themselves. Dispute procedures should be designed to ensure that decisions are made with these interests in mind. Thus, for example, while the right of a single state to block establishment of a panel or adoption of a panel decision elevates private interests above any possible community interest in the outcome, the reforms proposed in the Uruguay Round would allow the ordinary procedures to go forward unless the community decided otherwise.<sup>156</sup>

In this context, the interim review proposal seems somewhat retrograde: by permitting party intrusion into the decision making of the panel, it harks back to a vision of dispute proceedings as involving only the private interests of the parties. In Judge Pescatore's words, the interim review process is "incompatible with the multilateral character of the panel procedure, which is there to resolve disputes on the basis of GATT law, in the common interest, and not according to the sole interests of the par-

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description. That procedure may even have been used to raise new arguments after the formal deadline for submission had passed. See Lowenfeld, *supra* note 60, at xv.

153. Neutrality is among the highest values in a private interests system of justice. See *supra* text accompanying note 22.

154. Letter from Pierre Pescatore to the author (May 28, 1991) (on file with the author) [hereinafter Correspondence].

155. *Understanding*, *supra* note 80, at 297, sec. I.

156. See *supra* text accompanying notes 132-33, 142-43.

ties to a given dispute.”<sup>157</sup> The procedure seems more suitable for a bilateral arrangement, like the United States-Canada agreement that inspired it, where there are few if any “community” interests separate from the interests of the parties.

Given the current attitudes of the contracting parties, the private interests justifications for the interim review procedure are certain to prevail, and, on the whole, are persuasive. As GATT dispute procedures evolve toward a public interest system, however, the procedure should be reexamined.

### 5. Appeal

The Understanding proposes the establishment of an entirely new institution within GATT, a “standing appellate body,” empowered to hear appeals from panel rulings before they are considered by the Council.<sup>158</sup> The appellate body could uphold, modify, or reverse the legal rulings of the panel below.<sup>159</sup> Its decisions would have to go to the Council, but they would be dealt with there under the same presumption of approval that would apply to panel reports. If approved, moreover, decisions would be “unconditionally accepted” by the parties to the dispute.<sup>160</sup>

Like panels themselves,<sup>161</sup> the appellate body is designed to function within a regime of privately-initiated, private interest proceedings. Only a party to a pending dispute, not a state with a general interest in the rule under consideration or any other third party, could appeal. Indeed, unlike the panel process,<sup>162</sup> only parties to the dispute could participate in appellate proceedings.<sup>163</sup> Proceedings would be limited to issues of law and legal interpretation dealt with by the panel below,<sup>164</sup> but all such issues raised by the parties would have to be addressed by the appellate body.<sup>165</sup>

In terms of its structure, the proposed appellate body would

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157. Correspondence, *supra* note 154.

158. *Understanding*, *supra* note 80, at 296, sec. H:1.

159. *Understanding*, *supra* note 80, at 297, sec. H:2(d).

160. *Understanding*, *supra* note 80, at 297, sec. H:3.

161. See *supra* text accompanying note 124.

162. Contracting parties not involved in a particular dispute may nonetheless participate in a panel proceeding if they have a “substantial interest in a matter before a panel.” *Understanding*, *supra* note 80, at 295, sec. E:2.

163. *Understanding*, *supra* note 80, at 297, sec. H:1(d).

164. *Understanding*, *supra* note 80, at 297, sec. H:1(f).

165. *Understanding*, *supra* note 80, at 297, sec. H:2(c).

be almost ideally suited to a private interests system of justice.<sup>166</sup> It would be composed of seven members, selected by the CONTRACTING PARTIES for fixed, four year terms.<sup>167</sup> Members would be "persons of recognized authority, with demonstrated expertise in law, international trade and GATT matters generally," and would not be affiliated with any government.<sup>168</sup> Three members, serving in rotation, would hear each appeal. A member could not hear a case that created a direct or indirect conflict of interest. The body would be provided with legal and administrative staff.<sup>169</sup> If implemented in practice, these features should guarantee a substantial measure of neutrality, independence, and expertise.

By the same token, the appellate body would be better structured than virtually any other entity in the GATT system to operate as a public institution, both in the short term and as the public elements of GATT continue to develop. Most important, the appellate body would be independent of private national interests to a greater degree than any other dispute resolution institution: working groups, Article XXIII panels, ad hoc arbitral tribunals, or the Council itself. The structure of the appellate body should also produce an institutional commitment to the furtherance of community policy.<sup>170</sup> In particular, its members would be selected for expertise in GATT law and affairs, and their only function would be the authoritative determination of GATT law.<sup>171</sup>

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166. A private-interests community would demand neutral and independent institutions of justice, see *supra* text accompanying note 22, expert decision-makers to clarify norms, and finality in the processing of disputes, to aid private ordering. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

167. *Understanding*, *supra* note 80, at 296, sec. H:1.

168. This is in contrast to members of panels, most of whom have been currently serving trade diplomats, although panel members are expected to act independently. See Plank, *supra* note 35, at 65.

There could be some difficulty in finding enough fully qualified persons who are willing to serve on the appellate body. Willingness to serve will turn in part on such matters as compensation and working conditions. Much remains to be done here: the *Understanding* does not even specify, for example, whether the members of the body would serve full-time.

169. The European Community has urged that the staff of the appellate body be wholly separate from the Secretariat, since the Secretariat, especially its Legal Service, will continue to have a substantial role in advising panels. See GATT, *News of the Uruguay Round*, No. 35, April 19, 1990.

170. Compare the discussion of the structure of arbitral tribunals, *supra* text accompanying notes 111-13.

171. Another "public" feature seems somewhat less appropriate: members of the

Within the predominantly private interests orientation of the Uruguay Round texts, the principal justifications for a new appellate procedure seem to be, as in the case of interim review, the perceived needs to defuse opposition to the strengthening of the panel process and to minimize conflict over actual decisions.<sup>172</sup> Initially, the right to appeal to a neutral, independent, and expert institution should make a stronger panel process seem less threatening to state autonomy. Following a decision, the right to appeal, whether exercised or not, should make it more difficult for the losing party to challenge the procedural fairness or the legal correctness of the decision.

An appellate procedure might also serve public functions. Most important, it should strengthen GATT law in several ways: first, by helping to clarify it; second, by applying it in a highly visible fashion, thereby helping to educate the community as to its content and normative force; and third, by lending its own legitimacy to community norms and rules.<sup>173</sup> Institutionally, effective appellate review should increase respect for the GATT legal system, even while making a stronger system more acceptable to states.

Appellate review alone, however, will not necessarily produce decisions that are substantively more acceptable. Many arguments as to the "correctness" of panel decisions do not turn on objective matters of legal craft that can be rectified by a more expert or independent decision-maker, but rather stem from deeper disagreements over the nature of GATT law, perhaps even of law in general. Some of these disagreements reflect a conflict between the public interest and private interests perspectives.

For example, while the Understanding notes that dispute proceedings serve to clarify the rules of the General Agreement, it immediately attaches the proviso that "recommendations and rulings under Article XXIII cannot add to or diminish the rights and obligations provided in the General Agreement."<sup>174</sup> This

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body would be chosen so as to be "broadly representative of membership in GATT." *Understanding, supra* note 80, at 296, sec. H:1(c). This requirement might be desirable in a legislative institution, but in a judicial body it could conflict with the desire for expertise.

172. For a discussion of this rationale in the context of the interim review proposal, see *supra* text accompanying notes 149-52.

173. For a discussion of similar issues in the context of arbitration, see *supra* text accompanying notes 119-23.

174. *Understanding, supra* note 80, at 289, sec. A:2.



proviso seems to reflect a fear that panels, or the appellate body, may act to implement what they perceive to be the purpose behind the rules, the spirit of the General Agreement, or some other indicia of community policy, rather than enforcing only those precise obligations to which the contracting parties have agreed on the basis of reciprocity. Many decision-makers, however, would consider it quite appropriate to interpret GATT rules in light of broader community policy, at least in difficult cases. Even the Vienna Convention on The Law of Treaties, whose approach to interpretation is often followed by GATT panels, permits inquiry into the object and purpose of a treaty provision and the circumstances of its origin.<sup>175</sup> Philosophical conflicts like these may be inevitable, and will not be resolved by procedural solutions like appellate review.<sup>176</sup>

## 6. Implementation

The Uruguay Round texts attempt to deal with one of the most significant problems in GATT, the failure to comply with dispute settlement decisions.<sup>177</sup> As both texts declare, "Prompt compliance . . . is essential in order to ensure effective resolution of disputes to the benefit of all contracting parties."<sup>178</sup> This emphasis on the general benefits of compliance is justified from both the private interests and the public interest perspective. While their precise goals may vary, both approaches recognize that noncompliance can weaken community rules, potentially undermining the entire legal system.

Both texts seek to improve compliance by strengthening the rather flexible surveillance system<sup>179</sup> under which the Council

175. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31-32, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679.

176. As noted earlier, *see supra* part III.B.1., the proviso also seems to reflect a naive view of interpretation. Even in as conservative a legal system as GATT the process of applying rules to varying fact situations will inevitably elaborate on the original texts — this is a principal reason why a dispute process is needed.

177. The Director-General of GATT has repeatedly drawn attention to the problem of implementation. In November 1991, for example, he warned the Council that GATT faces an "increasing problem of conditional and incomplete implementation of panel reports," and urged the major contracting parties — by far the heaviest users of the dispute settlement system — to "face up to this important issue." GATT, FOCUS, No. 86 (Nov.-Dec. 1991) at 1.

178. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. I:1; *Understanding*, *supra* note 80, at 298, sec. K:1.

179. The Tokyo Round Understanding — the title of which includes "surveillance" along with "dispute settlement" — provides that the CONTRACTING PARTIES (typi-

has monitored implementation of its rulings.<sup>180</sup> First, the losing party would be permitted a "reasonable period" of time to comply with a Council decision. This period, however, would be specified and approved at the outset.<sup>181</sup> Second, the issue of implementation would automatically be placed on the Council's agenda six months after the decision, unless the Council decided otherwise, and it would remain there until implementation was complete. The losing party would be required to report on its progress in implementation at each Council meeting during that period. Finally, in recognition of the fact that dispute settlement decisions affect the entire community, any contracting party, not just the original complainant, would be permitted to raise questions about implementation at any time.<sup>182</sup>

These reforms would give the Council an increasingly important public role, not only as a forum for the airing of individual contracting parties' concerns about implementation, but also as a proto-executive with an independent obligation to supervise compliance. Although the Council would have no actual enforcement power, the expanded surveillance system should help focus the community pressures that are the main inducement to compliance.<sup>183</sup>

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cally the Council) are to keep under surveillance any matter on which they have given a ruling. If implementation has not taken place within a reasonable time, the original complainant may ask the Council to "make suitable efforts with a view to finding an appropriate solution." *Understanding Regarding Notification*, *supra* note 28, para. 22. The 1982 Ministerial Declaration on dispute settlement called for periodic Council review and required the losing party to report on the actions taken or its reasons for not complying. *Ministerial Declaration*, *supra* note 28, para. (viii).

180. *Midterm Review Agreements*, *supra* note 67, Part I, Dispute Settlement, sec. I:3; *Understanding*, *supra* note 80, at 299, sec. K:5.

181. By the terms of the Understanding, the duration of the "reasonable period" would have to be either (a) proposed by the losing party and approved by the Council, (b) agreed to by the other parties to the dispute, or (c) determined through binding arbitration. *Understanding*, *supra* note 80, at 298, sec. K:2. These alternatives mix private and public interest approaches. Alternative (b), for example, would be dominated by the victorious party's concern to terminate the offending conduct and the losing party's difficulties with implementation. Alternative (a), on the other hand, would allow the Council to consider the community interest as well as the interests of the parties. Alternative (c) could take either of these approaches.

182. Questions as to whether measures taken by the losing party amounted to compliance would be resolved through the panel process, by reconvening the original panel whenever possible. *Understanding*, *supra* note 80, at 299, sec. K:4.

183. To provide an even stronger normative basis for community pressure, the Understanding proposes — under the heading of "strengthening the multilateral system" — a separate statement of commitment to abide by rulings of the CONTRACTING PARTIES. *Understanding*, *supra* note 80, at 301, sec. M(ii). This commitment, along with support for a right to a panel, quasi-automatic adoption of panel and appellate body

These pressures would also be supplemented under the Understanding by a threat of economic pressure more credible than at any time in the past. If the losing party had not complied within the approved period, it would first be required to negotiate with the other parties to the dispute for temporary compensation. If no agreement were reached, any party to the dispute could request the Council to authorize the temporary suspension of concessions or other obligations under the General Agreement until the losing party had complied.<sup>184</sup>

Retaliatory measures are contemplated in Article XXIII only as a last resort in serious cases.<sup>185</sup> In practice, they have almost never been authorized. On both counts, the Understanding would produce something of a revolution. It provides that the Council "shall grant authorization" for the temporary suspension of concessions on request, unless it decides otherwise, apparently by consensus.<sup>186</sup> In other words, the same presumption of approval that would lead to quasi-automatic adoption of panel and appellate body reports would also apply to requests for authority to retaliate under Article XXIII.

Compensation and retaliation are, in essence, private interests measures. Both involve the adjustment of relations between contracting parties, rather than those between the losing party and institutions representing the community. Both are often justified as restoring balance between the affected parties,<sup>187</sup> though compensation, which is trade-creating, is generally seen as preferable. In spite of their horizontal nature, though, compensation and retaliation can be rationalized from a public interest perspective<sup>188</sup> as quasi-sanctions, since they impose costs

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reports, and the use of retaliatory measures in cases of noncompliance, is explicitly tied to another proposed commitment: not to threaten or resort to unilateral trade measures inconsistent with GATT rules and procedures. *Id.* sec. M(iii). *See also supra* note 1. The latter commitment is aimed primarily at the United States and its section 301 procedure. It is unclear as this is written whether such a commitment will be acceptable to those forces in the United States that support the use of section 301 to open foreign markets. *See supra* note 144 and accompanying text.

184. *Understanding, supra* note 80, at 299, secs. L:1-2.

185. General Agreement on Tariffs and Trade, *supra* note 36, art. XXIII:2. The seriousness with which such measures were regarded is indicated by the provision authorizing states against which retaliation is taken to withdraw from GATT on 60 days notice. *Id.*

186. *Understanding, supra* note 80, at 300, sec. L:3.

187. *See supra* text accompanying note 37.

188. An affirmative private interests community might share this perspective to the extent it is concerned to maintain the basic rules that keep order in society.

on parties that fail to comply. The threat of such sanctions can be seen as a community inducement to compliance.

Compensation, even if mandatory, is a limited inducement, since, by definition, it is measured by the injury to the complainants, not by the damage to community interests or the amount needed to induce compliance with community norms. Retaliation, though, need not suffer from the same limitations. Article XXIII, in fact, does not require that retaliatory measures be limited by the complainants' injury,<sup>189</sup> and neither does the draft Understanding.<sup>190</sup> If temporary retaliation comes to be more frequently utilized under the Uruguay Round texts, GATT may soon be faced with the possibility — a daunting one to be sure, given past practice — of utilizing retaliation as a true community sanction: authorizing the suspension of concessions by however many contracting parties and in whatever amounts are thought necessary to induce compliance or to punish bad faith.

The danger, of course — as in other efforts to strengthen GATT dispute procedures<sup>191</sup> — is that the actual authorization of retaliation, even in "compensatory" amounts, could set off a confrontation that would severely weaken GATT, perhaps even leading to the withdrawal of contracting parties. With this risk presumably in mind, the Understanding provides one last avenue of escape: retaliation would be terminated, even without full compliance, if the parties to the dispute reached a settlement or if the losing party provided a "solution" to the complainant's private injury.<sup>192</sup>

These alternatives tend to return retaliation to the domain of private interests. Any settlements reached would have to be consistent with the General Agreement,<sup>193</sup> but a losing party might still be able to avoid actually complying with community norms, perhaps weakening them in the long run.<sup>194</sup> In time, one would hope that the idea of compliance would not have to be compromised in this way. For the present, however, the risk

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189. See JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 352 (2d ed. 1986) [hereinafter JACKSON & DAVEY].

190. See *Understanding*, *supra* note 80, at 300, secs. L:3-5 (amount of trade covered by suspension of concessions shall be "appropriate in the circumstances"; disagreements as to amount shall be resolved by arbitration).

191. See *supra* text accompanying notes 90, 104, 131, 141, 149-52 and 172.

192. *Understanding*, *supra* note 80, at 300, sec. L:6.

193. *Understanding*, *supra* note 80, at 289, sec. A:3.

194. See *supra* discussion of procedures for supervision of settlements accompanying notes 101-03.

must have seemed too great.<sup>195</sup> Even so, the Understanding's provisions on implementation go further than almost anyone expected.

### C. *Functioning of the GATT System (FOGS)*

The principal accomplishment of the FOGS negotiations<sup>196</sup> has been to strengthen the norms and procedures by which GATT exercises surveillance over the trade policies and practices of the contracting parties.<sup>197</sup> Various GATT institutions — the Council, the Committee on Balance-of-Payment Restrictions, the committees of various Tokyo Round codes, and others — have monitored national policies for some time.<sup>198</sup> By the time of the Uruguay Round, however, many observers felt that more effective surveillance was needed.

One influential, public-oriented recommendation came from the advisory "group of eminent persons" appointed by the Director-General in 1983. That group urged that GATT monitor national policies and measures "as watchdog . . . on behalf of the trading system as a whole," and suggested several surveillance procedures.<sup>199</sup> Enhancing surveillance was established as a goal for the Uruguay Round in the Ministerial Declaration.<sup>200</sup> Indeed, in an unprecedented step, the Declaration established a

195. For a suggestion that the Uruguay Round negotiators consider adding a "political filter" for cases that threaten GATT's cohesion as a community, see Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

196. In addition to the procedures discussed in this section, the Midterm Review decisions adopted a FOGS group recommendation that the CONTRACTING PARTIES meet at the level of trade ministers at least every two years, in order to give greater political direction to GATT's work and to help reinforce national commitments to GATT, in part by giving it greater prominence. See *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 5. See also *FOGS Draft Decision*, *supra* note 3, at 323, sec. 7. The content of these meetings and the approach to trade problems to be taken by the ministers are not, and cannot be, defined in these decisions. It is at least possible, though, that such regular meetings will contribute to a sense of community and thus lead to a greater emphasis on common interests in the work of GATT.

The FOGS group also produced some rather general recommendations on coordination of the work of GATT with other international economic organizations, notably the IMF and World Bank. See *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 6; *FOGS Draft Decision*, *supra* note 3, at 324-25, secs. 9-13.

197. For an analysis of surveillance activities in GATT and other international economic organizations see Richard Blackhurst, *Strengthening GATT Surveillance of Trade-Related Policies*, in *THE NEW GATT ROUND*, *supra* note 8 [hereinafter Blackhurst].

198. Blackhurst, *supra* note 197, at 131-35.

199. GATT, *TRADE POLICIES FOR A BETTER FUTURE*, *supra* note 56, at 42.

200. *Ministerial Declaration on the Uruguay Round*, *supra* note 34, Part I:E(i).

surveillance system to operate during the Round itself.<sup>201</sup>

Multilateral surveillance depends on measures that increase the transparency of national policies and practices. One such measure, an improved notification system, was proposed in the draft FOGS decision appended to the 1990 Draft Final Act.<sup>202</sup> The contracting parties would first reaffirm their existing obligations as to the publication of national measures and their notification to GATT.<sup>203</sup> Many specific obligations of this sort are contained in the General Agreement, and the Tokyo Round understanding on notification added a more general, though not legally binding obligation to notify, in advance whenever possible, the adoption of any trade measures that might affect the operation of GATT.<sup>204</sup>

The draft FOGS decision would strengthen these obligations in several ways. First, it would add a lengthy "indicative list" of the types of measures that should be notified.<sup>205</sup> Second, it would create a central registry of notifications, maintained by the Secretariat. This would function as a source of information to other contracting parties, and would also have more active, public interest functions. Registry officials would be required to remind each contracting party, each year, of the notification obligations to which it is subject. They would also be required to bring delays and failures in notification to the attention of the delinquent states.<sup>206</sup> Finally, the draft FOGS decision proposes a complete review of notification obligations, to minimize the burden they impose while further improving compliance.<sup>207</sup>

The most significant element in the enhanced surveillance program is the Trade Policy Review Mechanism (TPRM), under which GATT periodically monitors, in considerable detail, the trade policies and practices of individual contracting parties. The details of the TPRM were worked out by the time of the Midterm Review,<sup>208</sup> and the mechanism was put into effect provisionally after adoption by the Trade Negotiations Commit-

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201. See Blackhurst, *supra* note 197, at 123, 134.

202. *FOGS Draft Decision*, *supra* note 3, at 321-23, sec. 6.

203. *FOGS Draft Decision*, *supra* note 3, at 322, sec. 6:I.

204. *Understanding Regarding Notification*, *supra* note 28, para. 2-3.

205. *FOGS Draft Decision*, *supra* note 3, at 322, sec. 6:I and Indicative List of Notifiable Measures, annexed thereto.

206. *FOGS Draft Decision*, *supra* note 3, at 322, sec. 6:II.

207. *FOGS Draft Decision*, *supra* note 3, at 322, sec. 6:III.

208. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4.

tee.<sup>209</sup> On the basis of experience with the TPRM during the next year and a half, the 1990 draft FOGS decision recommended that the mechanism be confirmed without change as part of the final Uruguay Round package.<sup>210</sup>

The TPRM may be the clearest example of public interest thinking to emerge from the Round. Although it does not entail a delegation of significant power, it makes inroads on the autonomy of the contracting parties, the institutional weakness of GATT, and, to a limited extent, the horizontal nature of dispute settlement and enforcement.

On the first point, the TPRM enables community institutions to make a "regular collective . . . evaluation" of the trade policies of the contracting parties from the perspective of their impact on the multilateral trading system.<sup>211</sup> Each contracting party is required to submit a full description of its policies and practices each year in which it is subject to review. In other years, it must report on significant changes and provide statistical updates.<sup>212</sup> The frequency of review is determined by a country's impact on the trading system, measured by its share of world trade. The largest countries, including the United States and the European Communities, are reviewed every two years.<sup>213</sup>

The institutional procedures of the TPRM emphasize its collective character.<sup>214</sup> Reviews are conducted by the Council, acting as the "review body," at special meetings. Council consideration is based not only on the reports submitted in advance by the state under review, but on an independent report provided by the Secretariat. The Secretariat is both authorized and encouraged to seek clarifying information from the contracting party under review. In consultation with that state, the Chair of the Council selects several persons to act as discussants at the review meeting. The discussants, acting in their personal capacity, not as representatives of other contracting parties, help focus the Council's deliberations.

Finally, the TPRM is conceived as a way to contribute to

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209. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:E.

210. *FOGS Draft Decision*, *supra* note 3, at 321, secs. 1-2. The draft decision provides, however, that the TPRM is to be reviewed again not later than October 1992. *Id.* sec. 3.

211. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:A(ii).

212. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:B.

213. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:C(i).

214. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:D.

greater compliance with GATT rules, commitments, and disciplines.<sup>215</sup> The mechanism is supplemented by an annual Council review of the trading environment, including the major policy issues facing the GATT community, based on a report by the Director-General. This "enhanced surveillance" program is designed to function as an "early warning" system for the special Council meetings.<sup>216</sup>

The draft FOGS decision carefully forecloses, however, what would seem to be the natural next step, at least from a public-interest perspective: using the TPRM as a basis for the initiation of dispute proceedings or other forms of enforcement action.<sup>217</sup> This limitation means that the GATT dispute settlement system will continue to rely on privately initiated, private interest proceedings, and will be the only formal means of enforcing community norms. The TPRM's role in improving compliance will be limited to marshalling community opinion through discussions in the Council and the publication of reports and proceedings from country reviews.<sup>218</sup>

Even with its limitations, the work of the FOGS group in enhancing multilateral surveillance represents a significant extension of the public interest attitudes and practices that have slowly been developing within GATT.<sup>219</sup> It clearly signals the direction in which GATT should continue to evolve.

#### IV. THE FUTURE OF GATT AS A PUBLIC INSTITUTION

Even before the Uruguay Round, the institutions of GATT had begun to develop some attributes of a public interest community.<sup>220</sup> As noted in the previous section, the Round itself may advance that evolution in a variety of ways.<sup>221</sup> This section suggests a number of directions for post-Uruguay Round institu-

215. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:A(i).

216. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:F. The TPRM and the annual overviews together replace the far more general agreement of the CONTRACTING PARTIES, set out in the Tokyo Round Understanding, to conduct "a regular and systematic review of developments in the trading system." *Understanding Regarding Notification*, *supra* note 28, para. 24.

The enhanced surveillance program, especially its early warning aspect, should also contribute to more substantial ministerial meetings. *See supra* note 196.

217. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:A(i).

218. *Midterm Review Agreements*, *supra* note 67, Part I, FOGS, sec. 4:D(v).

219. *See supra* text accompanying notes 60-64.

220. *See supra* text accompanying notes 56-67.

221. *See supra* text part III.



tional development that are suggested by the public interest model. Unlike the extreme vision of the activist state, however, the suggestions put forward here are intended to be moderate. They contemplate arrangements that would help GATT perform its public role as "guarantor of the open and non-discriminatory trading system"<sup>222</sup> while continuing to respect state autonomy.

Realization of such suggestions will depend, of course, on the continued evolution of fundamental political attitudes. The contracting parties of GATT must continue to recognize that there exists a community of trading nations with common goals and interests worthy of implementation, and must be willing to accept the constraints on freedom of action implicit in the operation of community institutions.<sup>223</sup> There is no guarantee that the necessary attitudes will develop. Indeed, at present even the strong private interests dispute procedures proposed in the Understanding may be hard for some contracting parties to accept.<sup>224</sup>

It is nonetheless worthwhile to sketch the institutional implications of the public interest model. For those already receptive to an expanded public role for GATT, the ideas put forward here may suggest the outlines of a post-Uruguay Round institutional agenda. For others, these ideas may suggest the possibilities inherent in the model, thus making it more attractive. Above all, I hope these ideas will stimulate further study, for much work will be needed to refine suggestions like those offered here into practical alternatives for GATT.

#### A. *Dispute Procedures*

##### 1. Settlement

Two changes in the procedures governing settlement of disputes seem essential. First, as others have also recommended,<sup>225</sup> community dispute resolution institutions, especially Article XXIII panels, should not be charged with encouraging settlement. There are certainly situations in which settlement might properly be encouraged. Examples might include disputes involving only private interests and proceedings that would im-

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222. See *supra* text accompanying note 69.

223. Cf. GATT, *TRADE POLICIES FOR A BETTER FUTURE*, *supra* note 56, at 33-34.

224. See Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 12.

225. See Hilf, *supra* note 8, at 314; JACKSON, *WORLD TRADING SYSTEM*, *supra* note 27, at 111.

pose an institutional burden out of proportion to their importance. Even here, though, the task is more appropriately carried out by the Director-General or his designee. When disputes involving significant community interests enter the Article XXIII process, no GATT institution should be obliged to promote settlement. From a community perspective, the real concern in such cases is the control of settlements, not their encouragement.<sup>226</sup>

The second essential reform, then, is the development of stronger procedures for supervising settlements reached during litigation. For example, the Director-General could be charged with monitoring settlement negotiations to help ensure that community norms were taken into account. Proposed settlements might be subjected to an initial review by a nonpolitical entity charged with protecting the community interest, such as the pending dispute panel, a special panel, or the appellate body. If the Council also reviewed settlements, as under the Uruguay Round proposals,<sup>227</sup> the public interest could be injected into the proceedings by allowing the Director-General, the Legal Service, or some other body to raise objections as representatives of the community.

The Council might then be explicitly authorized — at least in cases involving important community interests, or if recommended by the initial review body — to set aside particular settlements and direct panels to continue their work.<sup>228</sup> Such authority should be carefully constrained. On the other hand, to avoid problems reminiscent of the blocking of panel reports, the Council should be able to take such action without the concurrence of the parties to particular disputes.

## 2. Arbitration

In the recent United States Supreme Court case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>229</sup> the parties to an international distributorship agreement had agreed to arbitrate, in Japan, all disputes arising out of their contract. Alleging breach of contract, Mitsubishi initiated arbitration proceedings and sought an order compelling Soler to appear. Soler

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226. See *supra* text accompanying notes 99-106.

227. See *supra* text accompanying notes 100-01.

228. Cf. Hilf, *supra* note 8, at 315.

229. 473 U.S. 614 (1985).

asserted a counterclaim alleging breach of United States antitrust law, and sought to exclude this claim from any order compelling arbitration, so that it might be heard in a United States court. Over a strong dissent, the Court upheld the arbitration of the antitrust claim. As both sides recognized, the effect of this decision was to refer to arbitration a claim invoking a major element of United States public law, a legal regime of "fundamental importance to American democratic capitalism."<sup>230</sup> A major issue was whether private arbitrators were institutionally qualified to protect such important public interests.

The majority and dissenting opinions in *Mitsubishi* suggest two major avenues for reconciling the use of arbitration — typically, and under the Uruguay Round texts, a purely private interests procedure — with the promotion and protection of community norms and policies. The majority relied on subsequent judicial review, observing that United States courts would "have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."<sup>231</sup> The dissenters suggested that such review would be ineffective, due in part to the simplified procedures of arbitration. They argued that agreements to arbitrate claims "for the violation of a public right" should not be enforceable in the first instance.<sup>232</sup>

In the GATT context, the more extreme option for reconciling arbitration with community interests, associated with the dissenters in *Mitsubishi*, would be to limit the availability of arbitration to cases, or aspects of cases, in which private interests were dominant, retaining matters of public interest for the panel process. Early discussions of arbitration in the Uruguay Round often seemed to assume, in fact, that arbitration should only be made available for "defined classes of cases," perhaps only for

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230. *Id.* at 634. The majority relied on several grounds, including a general federal policy favoring arbitration and a series of precedents upholding contractual choices of law, forum and dispute procedure in international transactions. *Id.* at 632-40.

231. *Id.* at 638. The majority noted that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards authorizes national courts to refuse enforcement for reasons of public policy. In the majority's view, however, the enforcing court should in general limit its inquiry to whether the arbitrators had actually considered and decided the antitrust claim; "substantive review at the award-enforcement stage [should] remain minimal . . . ." *Id.*

232. *Id.* at 666. Enforcement awards need only be sought, of course, when one party resists arbitration. The dissenters did not suggest that public institutions should interfere with the arbitration of claims involving public rights if no party objects. They did suggest, though, that federal law does not authorize the arbitration of statutory claims.

factual disputes, and that the Council should supervise the kinds of disputes that were submitted to arbitration.<sup>233</sup> Little of this cautious approach survives in the Uruguay Round texts,<sup>234</sup> but it should be borne in mind for the future.

The narrower option, associated with the majority, would be to strengthen the process for reviewing arbitral awards to ensure their consideration of, and consistency with, community norms. The first steps in such a process would be to require arbitrators to apply GATT law, and to maintain complete records and prepare reasoned opinions so that substantive review was possible.<sup>235</sup> Beyond that, the kinds of procedures suggested above for the review of settlements could be adapted to the review of arbitral awards.

Finally, as suggested earlier,<sup>236</sup> a third option would be to structure the arbitral process itself — particularly the choice of arbitrators — so that arbitral panels could more confidently be relied upon to take account of, and properly decide, issues of law and policy important to the GATT community. An ad hoc version of this approach also figured in the majority opinion in *Mitsubishi*, which noted with approval the legal qualifications of the Japanese arbitrators selected to hear the case.

### 3. The Panel Process

Although the Uruguay Round texts would significantly strengthen it, the GATT panel process would continue to be structured around the resolution of privately-initiated private disputes.<sup>237</sup> A few aspects of that process, notably the interim review procedure, should eventually be reformed.<sup>238</sup> The primary goal for the future, however, should be the development of ancil-

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233. *Negotiating Group on Dispute Settlement*, *supra* note 100, paras. 81-86. In addition, it was often asserted that arbitral decisions should not have public effect as precedents. *Id.*

234. The arbitration provision in the Understanding does state that arbitration is appropriate for "certain disputes," but seems to include any dispute where the issues are clearly defined by the parties. *Understanding*, *supra* note 80, at 301, sec. O:1. The provision also requires arbitration agreements to be notified to all contracting parties. *Id.* sec. O:2. Factual issues relating to the suspension of concessions would be referred to arbitration. *Id.* at 300, secs. L:3, 5.

235. See *supra* text accompanying notes 119-22. In the *Mitsubishi* case Mitsubishi conceded that United States antitrust law applied to the counterclaim and represented that the case had been submitted to the arbitrators on that basis. 473 U.S. 614, 636 n.19.

236. See *supra* text accompanying notes 111-18.

237. See *supra* text accompanying notes 123-24.

238. See *supra* text accompanying notes 153-57.

lary procedures by which community institutions can directly assert the community interest when the activities of private litigants may not adequately protect it.

Perhaps the easiest way to approximate this goal would be to further expand the rules of standing, making it easier for contracting parties not directly affected by a measure at issue in a particular case to intervene in a dispute proceeding and present their concerns about similar measures, about asserted interpretations of GATT law, or about the precedential implications of particular holdings.<sup>239</sup> More broadly, the Leutwiler Report<sup>240</sup> points out that "contracting parties that are concerned about the broader consequences" of particular measures are actually entitled to initiate dispute proceedings themselves, under a clause of Article XXIII authorizing complaints against measures that impede "the attainment of any objective" of the General Agreement,<sup>241</sup> and recommends that contracting parties be encouraged to take advantage of this rule.

Both of these approaches, however, share a common flaw. It will rarely be rational for any contracting party to go to the trouble and expense<sup>242</sup> of learning about a particular trade measure, analyzing its "broader consequences," and intervening in a dispute proceeding, or initiating its own, when the measure does not affect it directly. The protection and promotion of community rules and policies are public goods, in economic terms, and

239. During the Uruguay Round negotiations, Hong Kong proposed that any contracting party should be able to receive the submissions of the litigants in any case and attend the first substantive hearing. Other states responded that this procedure was unnecessary, since contracting parties significantly affected by a measure could join the case as co-complainants. This response, however, takes account only of private interests; it ignores the possibility that other contracting parties could present issues significant to the community.

Hong Kong replied with the argument that, if nonparties were to be limited in their participation, adopted panel reports should only bind the parties to a proceeding. The response to this assertion was that all contracting parties must be able to rely on authoritative interpretations of GATT law. The problem remains, however: if panel decisions are to be public law, someone must be able to assert the public interest. *See* News of the Uruguay Round, No. 34, Feb. 23, 1990, at 8-9.

240. GATT, *TRADE POLICIES FOR A BETTER FUTURE*, *supra* note 56, at 46-47.

241. *See* General Agreement on Tariffs and Trade, *supra* note 36, art. XXIII:1. Under this clause, it appears, complainants would not have to establish that benefits accruing to them are being "nullified or impaired" by the challenged measure, as in most GATT proceedings; status as a contracting party would seem to be the only standing requirement.

242. The costs are not all monetary: initiating a legal proceeding against a powerful country could carry significant political risks.

efforts to provide them on a voluntary, decentralized basis will inevitably encounter the classic problems of rational ignorance and free-riding.<sup>243</sup> Individual nations typically rely on public institutions to provide important public goods like these, and that is also the best strategy for GATT.

The most obvious institutional approach would be to expand upon the present role of the Secretariat as advisor to dispute panels and "guardian of the General Agreement."<sup>244</sup> As Professor Hilf has noted, many institutional models can be found in national legal systems.<sup>245</sup> Secretariat representatives could, for example, be authorized to appear as *amicus curiae* before panels, the appellate body or even the Council in cases involving a general community interest in the control of certain measures or the development of certain rules. Alternatively, Secretariat representatives could be empowered to act as advocates-general, on the model of the European Court of Justice, offering an objective community perspective in every case.<sup>246</sup> Perhaps even more desirable, a separate advocate-general corps could be created, allowing the Secretariat itself to continue assisting panels.

A related approach might focus on further refining the choice of panelists, making panels more receptive to arguments on such matters as the long term ramifications of particular measures, the importance of particular precedents, or the consistency of GATT law. Such an approach might focus on an increased role for the Director-General in the choice of panelists and increased reliance on nongovernmental panelists, particularly the sort of person envisioned for membership on the appellate body.<sup>247</sup>

Eventually, it might be desirable to grant GATT institutions the power actually to initiate dispute proceedings where necessary to protect and promote community norms. Such a

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243. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 377-79 (1989).

244. See *supra* text accompanying note 60.

245. Hilf, *supra* note 8, at 314.

246. See Treaty of Rome, March 25, 1957, art. 166, 298 U.N.T.S. 11. For a brief introduction to the advocate-general system, see P.J.G. KAPTEYN & P. VERLOREN VAN THEMATAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 145-46 (Laurence W. Gormley, ed., 2d ed. 1989).

247. For similar suggestions, see GATT, *TRADE POLICIES FOR A BETTER FUTURE*, *supra* note 56, at 46-47; Petersmann, *Strengthening the GATT*, *supra* note 59, at 324-25; JACKSON, *RESTRUCTURING*, *supra* note 58, at 75.

move would represent a clear break with the fundamental assumptions of the traditional dispute settlement system. It would, however, be a logical outgrowth of recent trends in dispute settlement<sup>248</sup> and of the increasing emphasis on surveillance of national policies.<sup>249</sup> Public initiation of dispute proceedings might in some cases be difficult to square with the language of Article XXIII,<sup>250</sup> but the procedure could be authorized by the CONTRACTING PARTIES under Article XXV as a means of "furthering the objectives of [the General] Agreement."<sup>251</sup>

GATT institutions would almost certainly utilize such a power prudently, constrained by political pressures from the contracting parties and by limited resources.<sup>252</sup> The power could be further constrained by the formulation of governing standards. For example, GATT institutions could be authorized to initiate proceedings only in situations involving issues of substantial importance to the community. Their authority could further be limited to situations in which the potential complainants were unlikely to initiate private proceedings: where, for example, they lacked adequate resources, were economically or politically dependent on the states whose measures were in issue, or had been neutralized by voluntary export restraint agreements or similar arrangements.

248. See *supra* text accompanying notes 60-64.

249. See *supra* text accompanying notes 196-219.

250. Article XXIII generally contemplates private initiation, even though the "attainment of any objective" clause suggests that contracting parties may initiate claims for public purposes, see *supra* text accompanying note 241. Under article XXIII:1(a)-(b), the contracting party injured by the actions of another contracting party is envisioned as initiating consultations with that party and any others it considers to be concerned; under article XXIII:2, if those private consultations are not successful, the matter "may be referred to the CONTRACTING PARTIES" for investigation.

The use of the passive voice in the latter clause suggests that GATT institutions, as well as individual contracting parties, could properly refer a "matter" to the CONTRACTING PARTIES, initiating a panel proceeding. This provision might, in other words, be read as parallel to Article 99 of the United Nations Charter, under which the Secretary-General may bring to the Security Council matters that may threaten international peace and security, 1983 Y.B. of the U.N. 1325. The "matter" that may be referred under article XXIII:2, however, appears to be a private dispute, initiated by a contracting party, as to which private consultations have taken place. See General Agreement on Tariffs and Trade, *supra* note 36, art. XXIII:1, art. XXIII:2, first sentence. See also Plank, *supra* note 35, at 60-61. Even a "matter" in which "any other situation" is seen as impeding "the attainment of any objective of the Agreement," under art. XXIII:1(c), appears to fall under article XXIII only when identified by a contracting party.

251. General Agreement on Tariffs and Trade, *supra* note 36, art. XXV:1.

252. For a discussion of some of these influences in the context of an earlier GATT institution, see HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 285.

In situations like these, the natural complainants will often be developing countries.<sup>253</sup> The need for public action on behalf of the disadvantaged members of the community, then, provides an additional justification for public initiation. Not surprisingly, developing countries have been the most consistent advocates of such a procedure. Brazil and Uruguay unsuccessfully sought to provide for Secretariat initiation of dispute proceedings in Part IV of the General Agreement, dealing with trade and development.<sup>254</sup> Similar proposals were advanced in 1965; though again unsuccessful, they influenced the 1966 decision<sup>255</sup> establishing special procedures for developing country complaints, including the right to a panel and fixed time limits.<sup>256</sup> Without public initiation, however, this procedure has had little effect.<sup>257</sup>

In 1967 and 1970, the CONTRACTING PARTIES actually agreed to establish two largely automatic panel procedures, to review, respectively, quantitative restrictions on industrial products<sup>258</sup> and developed country compliance with Part IV<sup>259</sup>, though neither was in any way effective. In 1971, still pressed by the developing countries, GATT created the Group of Three — consisting of the Chairs of the CONTRACTING PARTIES, the Council, and the Committee on Trade and Development — with authority to review national trade measures and propose concrete modifications, both privately and in public.<sup>260</sup> Operating quietly and discreetly, the Group had some success.<sup>261</sup>

The lineal descendant of the Group of Three is the Trade Policy Review Mechanism.<sup>262</sup> While the TPRM features more elaborate information-gathering mechanisms and provides for public discussion in the Council, though, it does not authorize any “executive” official of GATT to pursue these discussions with individual contracting parties, seeking to persuade them to modify questionable trade measures.<sup>263</sup> This sort of “gentle”

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253. See JACKSON & DAVEY, *supra* note 189, at 1153-54.

254. See ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 58 (1987) [hereinafter HUDEC, *DEVELOPING COUNTRIES*].

255. See *supra* text accompanying note 128.

256. HUDEC, *DEVELOPING COUNTRIES*, *supra* note 254, at 66-67.

257. See HUDEC, *DEVELOPING COUNTRIES*, *supra* note 254, at 67.

258. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 279-80.

259. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 248.

260. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 283-85.

261. HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 283-84.

262. See *supra* text accompanying notes 208-18.

263. Such activity may, of course, take place informally.



diplomatic procedure,<sup>264</sup> first utilized by the Group of Three over twenty years ago, would be a logical addition to the TPRM. Authority to initiate formal dispute proceedings, however, must remain the ultimate goal.

#### 4. Implementation

The Uruguay Round texts would work major improvements in the GATT mechanisms for monitoring and enforcing compliance with decisions in dispute proceedings.<sup>265</sup> Additional institutional developments, familiar from other contexts, would allow the community interest to be even more strongly represented.

First, some community institution, presumably a branch of the Secretariat, should be authorized to raise questions about compliance in particular cases before the Council, much as recommended above in connection with the review of settlements.<sup>266</sup> Under the Uruguay Round proposals, both the original complainant and any other contracting party could raise such questions;<sup>267</sup> this should most often be sufficient. In some cases, however, the complainant state might be satisfied with a level or form of compliance that is insufficient from a community viewpoint, or might be unwilling to press the issue of compliance for political reasons. While third states could help fill the gap, their role would likely be limited by the problems of rational ignorance and free-riding discussed above.

Second, some official community representative — the Director-General, the Chair of the Council, the Chair or members of a narrower “steering committee,”<sup>268</sup> or the like — should be authorized to follow up on Council discussions of inadequate compliance, much as the Group of Three attempted to intercede with states maintaining questionable trade measures. While falling well short of formal enforcement power, this authority would add a desirable “executive” element to the compliance process.

The public interest model also suggests three potential improvements in the sanctioning process, although — since the Uruguay Round texts would already revolutionize the use of retaliatory measures<sup>269</sup> — further action here is probably a matter

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264. HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 4, at 285.

265. *See supra* text accompanying notes 177-90.

266. *See supra* text accompanying note 227.

267. *See supra* text accompanying note 182.

268. *See infra* text accompanying notes 296-97.

269. *See supra* text accompanying notes 184-86.

for the distant future. First, as with other procedures discussed above, some community institution might be authorized to request the approval of retaliatory sanctions, both because complainant states may be politically foreclosed from making such requests, and because sanctions of a different scope or form might seem appropriate from a community perspective. This procedure would not raise the same textual problems under Article XXIII as community initiation of dispute proceedings.<sup>270</sup>

Second, a procedure for utilizing the multilateral suspension of concessions as a true community sanction could be incorporated into the sanctions process.<sup>271</sup> Such a proposal was advanced within GATT by the developing countries, as part of the 1960s reform program including public initiation of dispute proceedings.<sup>272</sup> While community retaliation might be appropriate in a variety of situations, it could be particularly valuable in cases brought by developing countries. Without multilateral participation, the suspension of concessions by an economically weak complainant state might have little impact on the noncomplying respondent. In extreme cases, the costs to the complainant state of participating in the sanctions at all might be unacceptably high.<sup>273</sup>

Finally, GATT should make an effort to develop forms of remedy and sanction beyond compensation and retaliation. Trade compensation to the complainant state may satisfy its private needs,<sup>274</sup> but it may not rectify damage to broader community interests or deter future noncompliance. In their reform program, the developing contracting parties of GATT sought a procedure for the award of financial compensation, rather than trade compensation.<sup>275</sup> As proposed, however, this procedure too was purely private in nature. (A variant of this proposal — a system of monetary fines — would be a public remedy, though

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270. Article XXIII simply empowers the CONTRACTING PARTIES, following consideration of a dispute, to authorize the suspension of concessions or other obligations when they consider the circumstances serious enough. General Agreement on Tariffs and Trade, *supra* note 36, art. XXIII.

271. See *supra* text accompanying notes 189-90.

272. See HUDEC, DEVELOPING COUNTRIES, *supra* note 254, at 58, 66.

273. See JACKSON & DAVEY, *supra* note 189, at 1154.

274. Even this may not be true once one disaggregates the national economy of the claimant state: trade compensation often produces benefits for an economic sector different from that which was injured by the offending measure, and it is difficult to judge whether such compensation fully restores net national welfare.

275. See HUDEC, DEVELOPING COUNTRIES, *supra* note 254, at 58, 66.

not necessarily a workable one.) Retaliation, whether by the complainant state or the community more generally, cuts off trade and reduces community welfare.<sup>276</sup> To this author's knowledge, alternate sanctions and remedies have not been widely discussed in recent years. Because the existing procedures are based in a purely private vision, though, further study of the issue would be valuable.

### B. Administrative Supervision

As noted earlier,<sup>277</sup> the General Agreement gives the CONTRACTING PARTIES — and thus, by way of delegation, other GATT institutions — substantial administrative powers: to review (and even disapprove)<sup>278</sup> particular actions and agreements, grant conditional waivers, monitor ongoing conduct, and the like. The TPRM builds a community-oriented monitoring system on these basic powers. Improved procedures for administrative supervision might serve to advance community norms and principles without resort to dispute proceedings, thus avoiding the high-stakes problem of enforcement.

One approach would be to strengthen GATT's general monitoring procedures, including the TPRM itself. It hardly seems workable to make TPRM reviews either more extensive or more frequent, at least in the case of the larger states. TPRM reviews, however, are regular, periodic exercises, and have a retrospective focus. Procedures for ad hoc and prospective review would significantly expand the impact of the monitoring system.

The Leutwiler Report proposed one such procedure, suggesting that, between periodic country reviews, the Secretariat be empowered to initiate studies of particular national measures, to call for additional information and "clarification" regarding such measures, and to initiate discussions of them, presumably in the Council.<sup>279</sup> The impact of such a procedure would be even greater if it extended to proposed measures, brought to GATT's attention by the Secretariat's own research or under an enhanced requirement of advance notification.<sup>280</sup> A valuable execu-

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276. For a fuller discussion of the benefits and weaknesses of retaliatory remedies, see Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501, 523-24, 528-32 (1985).

277. See *supra* text accompanying notes 51-55.

278. See General Agreement on Tariffs and Trade, *supra* note 36, art. XXIV:7(b).

279. GATT, TRADE POLICIES FOR A BETTER FUTURE, *supra* note 56, at 42.

280. For a discussion of current and proposed notification procedures, see *supra*

tive element could also be added to such a procedure by authorizing the Secretariat, following Council discussion or on its own, to make representations on behalf of the GATT community to states proposing the adoption of questionable measures.

The ability of GATT to monitor and review national measures in particularly sensitive areas could also be strengthened further. Some steps in this direction have been taken during the Round. For example, even though Article XIX of the General Agreement already grants the CONTRACTING PARTIES a role in monitoring proposed safeguards measures,<sup>281</sup> the Ministerial Declaration on the Uruguay Round called for safeguards negotiators to focus, inter alia, on improved transparency, notification and multilateral surveillance procedures,<sup>282</sup> the Safeguards agreement annexed to the Draft Final Act proposed measures of this sort.<sup>283</sup> Uruguay Round negotiators have also focused on improving GATT surveillance in such areas as state trading<sup>284</sup> and customs unions and free trade areas,<sup>285</sup> the most timely and most difficult subject of all. Further improvements of this sort are undoubtedly possible.

Though administrative procedures like these would increase the authority of community institutions, they should not impinge excessively on national autonomy. Because of the structure of GATT rules,<sup>286</sup> administrative intervention would rarely seek to prevent action by governments. Rather, it would most often seek to channel national action into more desirable forms, forms that are less distortive — tariffs instead of quotas, Article XIX safeguards measures instead of market sharing agreements — and more transparent, thus encouraging ongoing monitoring by other contracting parties and community institutions.

Channeling of government action into more desirable (and legally permissible) forms should also help minimize the outright

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part III.C.

281. General Agreement on Tariffs and Trade, *supra* note 36, art. XIX:2.

282. Ministerial Declaration on the Uruguay Round, *supra* note 34, Part I:D, "Safeguards."

283. Agreement on Safeguards, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 183, 190-92, Parts VIII-IX.

284. See *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade*, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 285. This understanding was agreed upon *ad referendum*.

285. See *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade*, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 307, 309, para. 7-11 (draft proposed by chair of negotiating group).

286. See *supra* text accompanying notes 45-46.

violations that weaken the entire GATT legal system. Greater administrative supervision might well produce an increased demand for waivers,<sup>287</sup> making discipline in the waiver process essential.<sup>288</sup> A draft understanding on the waiver process, prepared in November 1990, would make useful contributions in this regard,<sup>289</sup> but further improvements should be considered after some experience with this understanding. The aim should be to establish procedures that ensure that waivers are granted only in truly "exceptional circumstances," and with substantive and procedural conditions sufficient to protect important community policies. Procedures for independent review and recommendations, like those suggested above for proposed settlements and arbitral decisions, might also be desirable for dealing with waiver requests.

### C. Legislation

An active and effective legislative process is essential to a public interest community. At a minimum, existing rules must be clarified and updated as practices evolve and as perceptions of the implications of fundamental community principles change. Professor Hudec, among others, has often argued that the success of dispute settlement procedures and related institutional devices depends as much on community acceptance of the current substantive rules as on the design of the institutions themselves.<sup>290</sup> In addition, it must be possible to generate new rules to deal with emerging practices, especially those devised as ways around existing rules, and to reflect emerging community commitments.

The GATT legislative process has been shaped by a particular "constitutional" problem, the difficulty of amending the General Agreement. Amendments to some provisions require unanimity, to most, acceptance by two-thirds of the contracting

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287. See General Agreement on Tariffs and Trade, *supra* note 36, art. XXV:5.

288. Many contracting parties have recognized the need for greater discipline. See, e.g., GATT, News of the Uruguay Round, No. 36, June 1, 1990.

289. This understanding would, *inter alia*, require the contracting parties to describe the exceptional circumstances justifying a waiver in their decision, set a termination date, and annually review both the justifying circumstances and compliance with any conditions. See *Understanding on the Interpretation of Article XXV of the General Agreement on Tariffs and Trade*, in DRAFT URUGUAY ROUND PACKAGE, *supra* note 79, at 312.

290. See, e.g., HUDEC, THE GATT LEGAL SYSTEM, *supra* note 4, at 209-10, 287-91; Hudec, *Unfinished Business*, *supra* note 7.

parties.<sup>291</sup> In general, supermajority requirements like these are probably desirable. If amendment were easier, the General Agreement might be seriously weakened in periods of highly protectionist sentiment. On the other hand, a number of GATT rules have become out of date, and the difficulty of amending them directly has led to the creation of a complex web of related instruments, accepted by varying numbers of states, whose precise legal status is often uncertain.<sup>292</sup> Because changes in the amendment process would themselves require unanimous acceptance, these problems could endure for some time.

Most GATT rules, whether in the General Agreement or in other instruments, are the products of negotiation and agreement among some or all of the contracting parties. The process bears little resemblance to more familiar legislative processes involving majority votes in representative legislatures. A few important decisions have been taken by the CONTRACTING PARTIES under Article XXV, but this procedure has by and large been utilized with caution.<sup>293</sup> Just as important, most GATT rules have been negotiated at increasingly long, unwieldy, and exhausting "rounds," with substantive negotiations separated by several years. This kind of legislative process cannot hope to keep pace with changes in practice and perception in the community at large, or to focus sufficient attention on the increasingly complex issues coming onto the international trade agenda.<sup>294</sup>

Others have pointed out similar flaws in the legislative process. In his paper in this symposium, Professor Jackson points out the need for an improved rule making process, while at the same time observing how difficult it would be to design an acceptable process.<sup>295</sup> The Leutwiler Report urged that "GATT's role as a forum for *continuous* negotiation should be developed." It suggested the creation of a permanent GATT body, with lim-

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291. General Agreement on Tariffs and Trade, *supra* note 36, art. XXX:1. Even if an amendment is accepted by the required proportion, it applies only to those states that accepted it. *Id.*

292. See JACKSON, *RESTRUCTURING*, *supra* note 58, at 26-30.

293. The agreement approach has important democratic overtones, at least in the United States, since trade agreements are typically submitted to Congress, whereas votes in GATT under an Article XXV procedure would likely be cast by the Executive branch alone. See JACKSON & DAVEY, *supra* note 189, at 311-12.

294. For a discussion of the kinds of issues with which GATT will have to deal in the post-Uruguay Round era, see Jackson, *GATT and the Future*, *supra* note 2.

295. Jackson, *GATT and the Future*, *supra* note 2.

ited membership and a system of constituency representation, meeting at the ministerial level. This body would have the political functions of mobilizing support for GATT initiatives and helping governments resist protectionist forces,<sup>296</sup> and would "provide the stimulus" for the development of a system of ongoing negotiations.<sup>297</sup>

A continuous legislative process might involve three elements. First, procedures should be developed by which the Secretariat and other GATT institutions — drawing upon the information produced by the TPRM, annual reviews of the trading environment, dispute proceedings, and the like — could initiate consideration of particular subjects and put forward specific proposals. Individual contracting parties could of course initiate legislative deliberations as well. Second, a representative body like that proposed in the Leutwiler Report, though operating for the most part at technical levels, might be authorized to conduct initial deliberations on subjects and proposals advanced for consideration, bringing in governmental and nongovernmental experts appropriate to the subjects before it for assistance. Finally, a procedure might be developed whereby broader negotiations could be convened as needed to consider proposals emanating from the representative body. Such a procedure would be more technical, managerial, and low-key than the current high-profile negotiating process.

Proposals of this kind, however, raise complex and delicate questions of law and politics, both international and domestic. A detailed solution is well beyond the scope of this paper. For the present, it is sufficient to observe that the public interest model implies a need for serious consideration of improvements to the GATT legislative process. The issue should appear high on the post-Uruguay Round agenda.

#### *D. Institutions*

Throughout this section, I have suggested that concern for the common interests of the community of trading nations implies a significantly increased role for GATT institutions, most often the Secretariat, but other institutions as well, including some that do not yet exist. Exactly how these institutions should

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296. The FOGS group's recommendation for more frequent ministerial meetings, see *supra* part III.C, was motivated by a similar rationale.

297. GATT, *TRADE POLICIES FOR A BETTER FUTURE*, *supra* note 56, at 48.

be structured is another subject of such complexity that it cannot be fully examined within a paper of this kind. I would, however, make two observations.

First, if GATT institutions are to function as representatives and advocates of the community interest, the constitutional structure of the GATT-MTN system must to some extent be unified and simplified. As noted above, that system is at present a Balkanized network of agreements, institutions and procedures, applicable to varying groups of states. It is difficult even to conceive how extensive community-oriented procedures could operate within such a system. The various proposals for a Multilateral Trade Organization,<sup>298</sup> designed to create a single institutional structure to "serve" the various substantive agreements, would be of considerable value. Of even greater value might be the proposal, apparently advanced near the end of the Round, for a common substantive agreement, unifying the obligations of the General Agreement, the various "codes" created during the Tokyo Round, and the substantive agreements reached during the Uruguay Round itself. The move to a common agreement might also involve significant costs, however.<sup>299</sup>

Second, it is more important that the institutions of GATT be strengthened than that any particular institutional format be adopted. GATT needs institutions capable of identifying, formulating, and representing the community interest in the legislative process, in administrative supervision, in dispute proceedings, and in the enforcement of community rules. Over time, these institutions need to be given the appropriate powers and authorities, as well as necessary financial and human resources, to perform these essential functions. Whether these needs are satisfied through a new organization, through reinforcement of existing institutions, or through some other approach is of secondary importance.

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298. See, e.g., JACKSON, *RESTRUCTURING*, *supra* note 58, at 93-100; Petersmann, *The Uruguay Round Negotiations*, *supra* note 147, at 558-59 (describing the European Community proposal for a Multilateral Trade Organization).

299. The most obvious problem with such a move is that states unwilling to accept all of the obligations rolled into the common agreement might be unwilling to adhere to it at all, thus reducing the coverage of some basic GATT rules.



