

HEINONLINE

Citation: 1 Minn. J. Global Trade 87 1992



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 4 14:56:31 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

New Institutional Developments in GATT

Victoria Curzon Price*

It is well known that GATT is not an international organization, but a treaty. After the United States failed to ratify the Havana Charter, the International Trade Organization (ITO), which was to have been the third pillar of the post-war international economic system alongside the IMF and World Bank, failed to materialize.¹ The General Agreement on Tariffs and Trade (1947) was all that remained.

The CONTRACTING PARTIES (that is, the parties to GATT acting collectively) comprised the only administrative organ mentioned in the treaty. As a result, the institutional structure of GATT today is the product of organic development over almost half a century of existence — a unique phenomenon among the major instruments of world order.

The GATT Council well illustrates the peculiar nature of this organic development. The Council was set up in 1960 to conduct “intersessional” business — i.e., the day-to-day running of the multilateral trade system when the CONTRACTING PARTIES are not sitting in their full-scale annual session. The Council is a self-selected body composed of the “representatives of all contracting parties willing to accept the responsibilities of membership.”² It makes decisions (sometimes only provisionally, awaiting the next annual session) on any matter that arises. The only area where it is specifically not permitted to act on its own authority is in the granting of waivers, although it can agree to organize a postal ballot of all contracting parties between full

* Victoria Curzon Price is a Professor of Economics at the University of Geneva; she holds a Licence ès sciences politiques and a Doctorat ès sciences politiques, mention relations internationales, (section économie politique) from the Graduate Institute of International Studies, University of Geneva.

1. See generally RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE* (1956). Gardner describes in detail the fate of the proposed Charter of the International Trade Organization (known as the Havana Charter).

2. *Rules of Procedures for Sessions of the Contracting Parties—Other Procedures*, BISD 9th Supp. 7, 7 (1961).

sessions.³

The Council in fact runs GATT. The annual plenary sessions of the CONTRACTING PARTIES, in the view of one authority, have been turned "into appellate bodies for issues that are too delicate or too important to be definitively resolved by operating-level civil servants."⁴ The Council is by definition composed of a group of countries interested in GATT, numbering about half the total membership. Each of these countries believes that it has a stake in the system. Thus, the Council is a flexible and effective way of bridging the gaps between universality of purpose (over 100 members now), reasonable efficiency of operation, and legitimacy of the outcome.

Numerous specialized committees and working parties having a more limited membership assist the Council. The membership of these smaller groups fluctuates according to the work at hand and has expanded considerably since the end of the Tokyo Round because of the 1979 MTN agreements.⁵ In short, the GATT has informally developed the institutions that it needs to run the multilateral trading system. While the institutional structures are flexible (very much *à géométrie variable*), the underlying legal instrument is not. Indeed, one of the reasons for the proliferation of "side agreements" is that Part I of GATT, (the unconditional Most-Favoured-Nation clause) can only be amended by unanimous agreement and subsequent ratification by all members. Amendment of other parts of the General Agreement requires a two-thirds majority vote.⁶

Is this contrast between the rigidity of the underlying treaty and the flexibility of the institutions that have been set up to administer it a strength or a weakness? Those who consider that international relations in general and international trade relations in particular are governed, in the ultimate analysis, by power, would take the view that the organic process of institutional development is a strength. The resulting structures represent what sovereign states are prepared to tolerate in terms of

3. *Id.* at 8. See also JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 154-57 (1969) [hereinafter, JACKSON, *WORLD TRADE AND THE LAW OF GATT*].

4. KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 339 (1970).

5. As a result of the Tokyo Round "side agreements," nine permanent committees were established in the following areas: anti-dumping practices, customs valuation, government procurement, import licensing, subsidies and countervailing measures, technical barriers to trade, trade in civil aircraft, dairy products and meat.

6. The requirements for amending GATT are in GATT Article XXX.

procedures and disciplines and, while less than perfect, the sovereign states will likely respect them.⁷ Those who consider that a "major purpose of human institutions is to prevent the disaster that occurs precisely when the 'political will' to act constructively is absent"⁸ believe that GATT's many shortcomings "are related to the constitutional defects of GATT, although they are by no means solely caused by them."⁹ According to this view, things would have been better if GATT had contained formal institutions and procedures.

We economists are happy to leave this debate to the lawyers, diplomats and political scientists. The only light that economics can shed on this question is to note that even mercantilistic sovereign states can see virtue in swapping trade concessions in a framework of law — otherwise GATT would not exist at all. But the problem is that of any public good: each party to the agreement derives benefit from the general stability and predictability which are the goals of the treaty, and each is in principle willing to place limits on its own behavior in exchange for generating, collectively, the public good. At the same time, however, each member, individually, has an incentive to cheat.

This is the classic free-rider problem which Paul Streeten, in a letter to *The Economist*, put this way:

The ranking of preferences by each country is as follows:

- 1) My country does not contribute while others do. (Free riding: defection of one.)
- 2) My country contributes together with others. (Co-operation.)
- 3) No country contributes. (Defection of all: disappearance of the horse.)
- 4) My country contributes while no other country does. (Sucker.)¹⁰

In the absence of strong incentives for compliance, the outcome is likely to be outcome number 3. Or, as Jan Tumlir, former director of the GATT Secretariat's Economic Research and

7. OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM (1985), cited in JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 59-60 (1990) [hereinafter RESTRUCTURING THE GATT]. As Long, discussing the GATT dispute-settlement system (which is where violations tend to surface) puts it: "[A]s part of . . . the recognition by all contracting parties that legalism does not contribute to trade liberalization, emphasis has shifted from the formal role of the GATT as third-party arbiter to its informal role as catalyst for the resolution of disputes by the disputing parties themselves" (emphasis added). The phrase in italics is a very strong statement and implies that its author considers that pragmatism is the right road to follow in GATT matters.

8. JACKSON, RESTRUCTURING THE GATT, *supra* note 7, at 54.

9. *Id.* at 17.

10. Paul Streeten, *Cool Riders, Letters to the Editor*, *ECONOMIST*, Mar. 2, 1991, at 10.

Analysis Unit, put it: "Without the judge and bailiff in the background, contracts do not mean much. At the international level, we have seen, . . . the "judge and bailiff" is, simply, power and the willingness to use it."¹¹ The story of GATT's institutional development is one of attempting, against all odds, to install incentives for compliance.

This Article will review two recent developments in this connection emerging from the Uruguay Round of multilateral trade negotiations: (1) The improvements in GATT's dispute settlement procedures and the establishment of a Trade Policy Review Mechanism; and (2) the establishment of a possible Multilateral Trade Organization and improved transparency at the national level. For, like it or not, the multilateral trading system continues to evolve organically by trial and error. As it evolves, the system tries to attain the elusive goals of stability and freer trade, and respect for treaty obligations.

I. PROPOSED IMPROVEMENTS IN GATT'S DISPUTE SETTLEMENT SYSTEM

One of GATT's major problems is that "many existing rules are violated, . . . the [dispute resolution] system is often circumvented, and . . . governments and traders feel no serious obligation to abide by the rules."¹² Arguably, violations of rules by one member state would be detected by others and generate a dispute which, in the ultimate analysis, would lead to supervised retaliation as provided for in GATT's dispute settlement system. The "judge" would be the CONTRACTING PARTIES (or, since 1960, the Council) adopting a panel report on the dispute and the "bailiff" would be the cost of offering compensation or resorting to retaliation. This much the GATT provides for in Article XXIII.

Robert Hudec, however, noted as early as 1978 that

[a]lthough the GATT panel procedure was surprisingly effective in the years before 1960, there is a problem with the current operation of that procedure, evidenced both by a sharp decline in the utilisation of the panel procedure by most governments and by increased levels of resistance and unpleasantness found in recent proceedings that have been

11. Jan Tumlir, *GATT Rules and Community Law*, in *THE EUROPEAN COMMUNITY AND GATT* 1, 20 (Meinhard Hilf et al. eds., 1986).

12. Gardner Patterson & Eliza Patterson, *Objectives of the Uruguay Round*, in *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 7, 7 (J. Michael Finger & Andrzej Olechowski eds., 1987).

brought.¹³

Hudec found that there had been a noticeable decline in the use of the panel procedure, from an average of five per year from 1948-1959 to only two per year from 1960-1976, which he attributed to various causes. One of these causes was a desire to deflect complaints "into less threatening 'diplomatic' channels."¹⁴ Indeed, submitting to the panel procedure implies accepting the results of its independent assessment. Once the Council adopts the panel report, its rulings and recommendations "are thereby given legal force under Art. XXIII:2 and entail a legal obligation to withdraw any measure inconsistent with GATT."¹⁵ In other words, by avoiding the panel procedure, governments were showing a distressing tendency to adopt pragmatic, "power-oriented" solutions to trade conflicts, rather than putting their trust in available "rule-oriented" procedures (to use John Jackson's well-known formulation).¹⁶

In an attempt to remedy this situation, one of the results of the Tokyo Round negotiations was an "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,¹⁷" which expanded on GATT Articles XXII and XXIII. The "Understanding" created a "roster" of GATT experts (both governmental and non-governmental) from which parties to a dispute could choose to serve on panels of conciliation. The "Understanding" clarified the role of these panels, in particular regarding the establishment of the facts of the case (in the case of "violation" disputes) or the "nullification or impairment" of benefits (in the case of "non-violation" disputes). It also emphasized that contracting parties should not view requests for a panel "as contentious acts" and that all contracting parties "will engage in these procedures in good faith in an effort to resolve the disputes."¹⁸

13. ROBERT E. HUDEC, *ADJUDICATION OF INTERNATIONAL TRADE DISPUTES* 9 (Trade Policy Research Centre, 1978) (emphasis in original).

14. *Id.* at 11.

15. Ernst-Ulrich Petersmann, *The GATT Dispute Settlement System and the Uruguay Negotiations on Its Reform*, in *LEGAL ISSUES IN INTERNATIONAL TRADE* 53, 64 (Petar Sarcevic & Hans van Houtte eds., 1990).

16. See John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 *J. WORLD TRADE L.* 93, 98 (1978); John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 *J. WORLD TRADE L.* 1, 3 (1979).

17. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, BISD 26th Supp. 210 (1980) (adopted Nov. 28, 1979) [hereinafter 1979 *Understanding*].

18. *Id.* at 211-12.

The GATT jargon distinguishing between "violation" and "non-violation" disputes hides a very interesting feature of the GATT system. That is, the system allows the panel procedure to apply to disputes arising from measures which do not formally violate GATT, but which do injure the trading interests of one's partners. This provision, although seldom used,¹⁹ should become more and more important in the future as the increasing interdependence of national economies causes virtually every "domestic" economic policy of any significance to generate external side-effects on one's neighbors. The reluctance of countries to initiate such proceedings is understandable because the resulting panel finding might well invade the jealously preserved domain of "domestic policy."

Whether as a result of the 1979 "Understanding," or because of a shift toward rule-oriented solutions to disputes, it is noteworthy that the 1980s saw a significant increase in the number of disputes culminating in a panel procedure.²⁰ The GATT Council even congratulated itself on the fact that "a common understanding on the importance of the GATT law in international trade was reflected in the increasingly frequent use of its dispute settlement procedures."²¹ It is an unfortunate fact, however, that "gray area" measures continued to flourish during the 1980s. In particular, they flourished in the form of misuse of anti-dumping measures and continued reliance on "voluntary" export restraints. Is GATT therefore, like Alice, running faster and faster in order to stay in the same place?

In fact, the real weakness of the GATT dispute-settlement system as "judge" and "bailiff" is simply that unless a party complains, measures inconsistent with GATT go unchallenged. There is no "Director of Public Prosecutions" and because people in glass houses don't throw stones, the GATT system risks decay from neglect. This is why the increase in the use of the formal dispute settlement procedure is a welcome sign, but is by no means enough to ensure general compliance with the rules.

Because of this problem, the Uruguay Round negotiations have returned to the issue, sensing that there is little point in improving world trade law and developing new "disciplines" in areas such as services, intellectual property rights or direct in-

19. Petersmann, *supra* note 15, at 65. "Non-violation complaints" account for less than five percent of all cases. *Id.*

20. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1989, at 76-77 (1990) [hereinafter GATT ACTIVITIES 1989]; JACKSON, RESTRUCTURING THE GATT, at 66.

21. GATT ACTIVITIES 1989, *supra* note 20, at 31.

vestment unless respect for international law can at the same time be enhanced.

Some progress has been made in this delicate area. At the mid-term Review in Montreal in 1988, it was agreed to implement, on a trial basis, the following improvements, *inter alia*:²²

- a) an increased mediation role for the GATT's Director-General;²³
- b) recourse to binding arbitration if the parties concerned agreed ahead of time;²⁴
- c) the use of standard terms of reference for all panels;²⁵
- d) the right for any country to raise the question of non-compliance with a panel report.²⁶

The current draft of the Final Act of the Uruguay Round²⁷ contains two texts relating to dispute settlement: a detailed formal "Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade;"²⁸ and a text entitled "Elements of an Integrated Dispute Settlement System"²⁹ which would come into operation if the proposed Multilateral Trade Organization is created.

The "General Provisions" of the Draft Understanding provide a sharpening of the attitude of contracting parties with regard to the end-game being played. The parties reaffirm, for instance, that a mutually agreed solution consistent with GATT "is clearly to be preferred,"³⁰ that withdrawal of the contested measure is more desirable than compensation,³¹ and that retaliation is a last resort.³² The Draft Understanding restates that "requests for conciliation and the use of the dispute settlement

22. *Improvements to the GATT Dispute Settlement Rules and Procedures*, BISD 36th Supp. 61-67 (1990) (adopted Apr. 12, 1989) [hereinafter *1989 Improvements*].

23. *Id.* ¶ D(3), at 62.

24. *Id.* ¶ E(3), at 63.

25. This will help to speed up the process of establishing panels. *Id.* ¶ F(b)(1), at 63-64.

26. *Id.* ¶ I(3), at 67.

27. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) (available from the Office of the United States Trade Representative) [hereinafter *Dunkel Draft*].

28. *Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII*, in *Dunkel Draft*, *supra* note 27, at S.1 [hereinafter *Draft Understanding*].

29. *Elements of an Integrated Dispute Settlement System*, in *Dunkel Draft*, *supra* note 27, at T.1 [hereinafter *Elements*].

30. *Draft Understanding*, *supra* note 28, ¶ 1.7, at S.3.

31. *Id.*

32. *Id.*

procedures . . . should not be intended or considered as contentious acts."³³

After the General Provisions, there follow detailed procedures concerning various stages of the dispute settlement system. A tight timetable for consultations is established so that if the search for a mutually agreed solution is unsuccessful, the panel procedure can be initiated without delay.³⁴ Although there is no automatic right to a panel, the complaining party's request for a panel can only be *refused* by "consensus" (i.e., no negative vote).³⁵ This virtually amounts to an automatic right to a panel, a point of considerable importance in encouraging their use.

The Draft Understanding goes beyond the Montreal decision in three important respects:

- a) it creates a "Standing Appellate Body" to hear appeals from panel cases,³⁶
- b) it mandates parties to resort to binding arbitration if a dispute degenerates to the point of disagreement over the extent of retaliatory measures,³⁷
- c) it renews a commitment not to resort to unilateral measures (or threat thereof) as an alternative to the dispute-settlement procedure.³⁸

This set of measures constitutes a substantial strengthening of rule-based procedures in GATT. In "violation" disputes, the panels already conduct, in effect, a judicial review of the case. If the Draft Understanding is adopted, the losing party would have the right to appeal the decision in a "second court." This would be limited to reviewing the issues of law covered in the panel report and upholding, modifying or reversing them. The appellate report would then be adopted by the Council and "unconditionally accepted by the parties to the dispute" unless the Council decided "by consensus" not to adopt the report.³⁹ If

33. This statement was also part of the 1979 *Understanding*, *supra* note 17, at 211.

34. Generally, the Council will act to establish a panel at the second meeting at which the complainant's request appears on the agenda. 1989 *Improvements*, *supra* note 22, ¶ F(a), at 63. Because the Council meets approximately once a month, establishment of a panel usually takes place less than two months after the parties determine that consultation has failed.

35. *Draft Understanding*, *supra* note 28, ¶ 4.1.

36. *Id.* ¶¶ 15-17.

37. *Id.* ¶ 20.3.

38. *Id.* ¶ 21. This last item is clearly aimed at section 301 of the U.S. Trade Act of 1974, which, as amended, positions the United States to use unilateral trade sanctions as a means to resolve disputes. 19 U.S.C. § 2411 (1988).

39. *Draft Understanding*, *supra* note 28, ¶ 15.14.

adopted, this procedure would definitely reinforce the standing of the second finding, because the dispute would have gone through a detailed, two-stage judicial process. It would be very difficult for any contracting party to disregard the final outcome.

Symmetrical to the virtual "right" to a panel noted above, it is almost impossible for the losing party to block (as at present) the Council's decision to adopt a panel report, because it is "adopted at a Council meeting . . . unless the Council decides by consensus not to adopt the report."⁴⁰ This is a noteworthy improvement on current practice.

The "Elements of an Integrated Dispute Settlement System" are much more controversial. They provide for a single dispute settlement system for the entire multilateral trade system as it emerges from the Uruguay Round. As discussed below, a Multilateral Trade Organization is proposed as a general framework for running the hugely expanded scope of world commercial law — including the texts on services, intellectual property rights and trade-related investment measures.

The "Elements" contain a hierarchy of possible retaliatory measures in a section entitled "Integrated Dispute Settlement System," and specify that countries should give preference first to the "suspension of concessions" within the "same sector,"⁴¹ then to "other sectors under the same agreement,"⁴² and finally to "other obligations under another agreement."⁴³

Thus cross-retaliation (for example, a trade concession withdrawn in a dispute involving services) is possible, but in principle discouraged. This question is a bone of contention between developed and developing countries and may yet come up for re-negotiation.

The Draft Understanding provides for greater predictability and automaticity in the dispute settlement process, as well as stricter discipline on unilateral actions and more sustained collective surveillance than the existing system. It does much more than codify existing practice, and breaks important new ground. If implemented, it stands a good chance of revolutionizing the way disputes are handled in GATT. By making the whole process legitimate and transparent, it may even bring some "gray area" measures into its net.

40. *Id.* ¶ 14.4.

41. *Elements, supra* note 29, § 1.a.

42. *Id.*

43. *Id.*

II. THE TRADE POLICY REVIEW MECHANISM

The absence of a "Director of Public Prosecutions" means that unless a complaint is made, actions inconsistent with GATT can and do flourish. One can see how small countries might, if they wished, "get away with [protectionist] murder," because the offending measures affect a relatively small trading volume. Large countries, in contrast, might tailor protectionist measures to affect trading partners just below the threshold of pain that would trigger a complaint. As mentioned earlier, there is also a reluctance to launch a complaint if one is oneself vulnerable.⁴⁴ Although the 1979 Understanding emphasizes that "complaints and counter-complaints in regard to distinct matters should not be linked,"⁴⁵ some hesitation is only natural. For instance, although Japan is a frequent victim of discriminatory trade restrictions (in particular, "voluntary" export restraints and dubious antidumping actions),⁴⁶ it never invoked the GATT dispute settlement provisions (until in October 1988, Japan was finally provoked to action by the European Community's "screwdriver" regulation).⁴⁷ But might part of the reason for Japan's infrequent use of the GATT dispute-settlement system be a reluctance to expose itself to retaliatory complaints from others? In any event, improving the dispute settlement process, though useful, is unlikely to capture more than a small fraction of the sum of all GATT violations.

For this reason, the adoption in 1989 of a *Trade Policy Review Mechanism* (TPRM) is a welcome development.⁴⁸ This mechanism creates, for the first time, a standing general monitoring device which scrutinizes each contracting party's trade policies as a whole: "[T]he review mechanism will enable the regular collective appreciation and evaluation by the CONTRACTING PARTIES of the full range of individual con-

44. See *supra* text accompanying note 19.

45. 1979 Understanding, *supra* note 17, at 212.

46. Gerard and Victoria Curzon, *Follies in European Trade Relations with Japan*, 10:2 WORLD ECON. 155, 170-73 (1987).

47. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1988 68-70 (1989) [hereinafter GATT ACTIVITIES 1988]. Even the GATT Secretariat, in drawing up its annual report, was moved to remark that this was the first Japanese complaint since it joined in 1955.

48. For a general discussion of review mechanisms, see Richard Blackhurst, *Strengthening GATT Surveillance of Trade-Related Policies*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 123 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988).

tracting parties' trade policies and practices"⁴⁹ This should pick up the dubious trade measures which do not give rise to formal complaints.

One can trace the idea of increased surveillance of trade policies in GATT back to the Tokyo Round. In 1979, the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" provided, *inter alia*, for special GATT Council meetings to review general developments in the trading system.⁵⁰ The GATT Secretariat prepared a document for these meetings, based on a combination of official trade policy notifications and on what it was able to glean from the press and unofficial sources. These documents were (after initial hesitation) made available to the general public once the GATT Council had discussed them. The academic community greatly appreciated the documents; but, because they were purely factual and descriptive, they never hit the headlines. They also did not meet the need for a comprehensive and authoritative review of all members' trade policies.

In 1983, the Director-General of GATT invited seven eminent persons to study and report on problems facing the international trading system. In 1985, in their report entitled *Trade Policies for a Better Future: Proposals for Action*,⁵¹ the eighth of their fifteen concrete proposals read as follows:

At the international level, trade policy and the functioning of the trading system should be made more open. Countries should be subject to regular oversight or surveillance of their policies and actions, about which the GATT Secretariat should collect and publish information.⁵²

The Eminent Persons Group suggested that "Governments should be required regularly to explain and defend their overall trade policies."⁵³ This would "increase the accountability of governments for their trade practices."⁵⁴ The GATT Secretariat "should be empowered to initiate studies of national trade policies By thus acting as watchdog (though not judge) on behalf of the trading system as a whole, the Secretariat would help to prevent departures from the rules and to strengthen the ability of all countries — and especially the smaller and developing

49. *Functioning of the GATT System*, BISD 36th Supp. 403, 403 (1990) (TPRM adopted Apr. 12, 1989).

50. *1979 Understanding*, *supra* note 17, ¶ 24, at 214.

51. EMINENT PERSONS GROUP, GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION (Mar. 1985).

52. *Id.* at 9.

53. *Id.* at 42.

54. *Id.*

countries — to defend their trade interests.”⁵⁵

When the Uruguay Round was launched in September 1986, among the fifteen broad issues to be addressed was a commitment to the following:

Negotiations shall aim to develop understandings and arrangements . . . to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system.⁵⁶

In January 1987, a Surveillance Body was established in order to monitor the standstill and rollback provisions of the 1986 Ministerial Declaration.⁵⁷ But the real breakthrough came at the mid-term Montreal ministerial meeting in December 1988, when it was decided to set up, on a provisional basis, a Trade Policy Review Mechanism.⁵⁸

III. SUMMARY DESCRIPTION OF THE TPRM

The TPRM differs from the previous semiannual Special Council meetings⁵⁹ which it has superseded, in that trade policy developments are now examined *on a country-by-country basis*.⁶⁰ In order to ensure generality, all GATT contracting parties are evaluated regularly on a rotating basis, but the largest trading countries come up for review more frequently than their smaller counterparts.⁶¹ In short, sovereign nations, large and small, have agreed to submit to a periodic peer check-up on their protectionist misdeeds.

55. *Id.*

56. *Punta del Este Ministerial Declaration*, GATT FOCUS, Oct. 1986, at 1-6 (adopted Sept. 20, 1986), reprinted in 25 INT'L LEG. MAT. 1623 (1986).

57. "Standstill" and "rollback" were two political undertakings made by Ministers in Punta del Este designed to prevent the further deterioration of the trading system while the talks progressed. In the case of standstill, the undertaking involved:

- (i) no new trade restrictions inconsistent with GATT;
- (ii) no new trade restrictions which go further than necessary to remedy specific situations provided for in GATT; and
- (iii) no trade measures taken to improve negotiating positions.

GATT ACTIVITIES 1988, *supra* note 47, at 25.

Rollback was seen as "a limited means of trade policy disarmament — in other words, the progressive dismantling, during the Round, of all trade restrictions which are inconsistent with GATT." *Id.*

58. The formal decision was reached in April 1989. *Functioning of the GATT System*, *supra* note 49, at 403.

59. See *supra* note 50 and accompanying text.

60. *Functioning of the GATT System*, *supra* note 49, ¶ I(A)(i), at 403.

61. *Id.* ¶ I(C)(i). The determining factor is a country's "impact on the functioning of the multilateral trading system, defined in terms of share of world trade in a recent representative period . . ." *Id.*

The TPMR separates countries into three review cycles. The four largest trading entities (the United States, the European Community, Japan and Canada) will be reviewed every two years; the next sixteen, every four years; the rest every six years.⁶² Given that GATT has 104 members, this program implies about 20 country reviews per year.

Each review involves two reports, one supplied by the country under scrutiny and one drawn up by the GATT Secretariat "on its own responsibility, based on the information available to it and that provided by the contracting party."⁶³ In order that the Review Mechanism does not function at cross-purposes with the traditional notification obligations contained in the General Agreement, it is specified that information contained in country reports "should to the greatest extent possible be coordinated with notifications made under GATT provisions."⁶⁴ This rather curious provision reflects the concerns that the obligation under GATT Article X to publish "laws, regulations, judicial decisions and administrative rulings" relating to trade and the agreement to register with the GATT Secretariat copies of such laws, regulations, etc., are in fact not taken seriously.⁶⁵ The provision also reflects the hope that the secretariat's TPMR report will not only fill the gap but shame countries into providing a better account of their trade régimes.⁶⁶

Each report is prepared according to a common template, which may change in the light of experience.⁶⁷ The GATT Secretariat estimates that it devotes about ten man/months to each report. Much of the research is done in Geneva; nevertheless, before the final report is drafted, a team of two or three people spend a week or two in the capital of the country concerned to fill out the details and check the facts. Unlike the old-style bianual review of general trade policy developments by the Secretariat, each country review contains a final chapter entitled "Summary Observations," in which the GATT Secretariat presents its own (very diplomatic) assessment of the situation.

The key to the whole process lies in the review itself, which is carried out by the GATT Council at a special meeting, allowing one day per country. The review starts with a presenta-

62. *Id.*

63. *Id.* ¶ I(D)(iv)(b).

64. *Id.* ¶ I(B)(i).

65. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT *supra* note 3, at 461-64.

66. See *infra* notes 81-83 and accompanying text.

67. *Functioning of the GATT System, supra* note 49, ¶ I(B)(i).

tion by the representative of the country concerned; this is followed by two discussants (appointed by the Chairman), whose role is to be frank and critical and to ask awkward questions; the discussion is then opened up and any interested party can make critical (or complimentary) observations and raise questions. Finally, the country under review is given a chance to reply. The final published report, unlike most other official GATT publications, identifies the countries making the commentaries.

As soon as possible after this procedure, both reports and a summary of the discussions are published. The review process does not stop there, however, because the periodic cycle of consultation ensures that all major traders are regularly re-examined. The Review Mechanism thus allows GATT to take an inventory of trade measures already in place and, in the future, will provide a measure of the flow of new, post review policy actions.⁶⁸

As of March 1992, twenty-three reports had been published and a dozen more were on the way.⁶⁹ It will be interesting to see how the GATT Council and Secretariat handle the subsequent reviews of the "majors" (the United States, the European Community and Japan). As they are to be reviewed at very short intervals, it may turn out that relatively few resources will have to be devoted to tracking new developments, allowing more effort to be directed towards evaluating the impact of existing policies on domestic economic welfare and on the distribution of income. Nevertheless, when (not to say if) the Uruguay Round is brought to a successful conclusion, the TPRM will be extended to monitor the policies arising from the new aspects of GATT, the General Agreement on Services and other Uruguay Round agreements. This will again increase the resources needed for the subsequent reviews.

While the improvement in the dispute-settlement procedure described in Section I above reflects a rule-based approach to the

68. See Blackhurst, *supra* note 48, at 127 for the distinction between surveillance to monitor the flow of new policies, and surveillance to collect information on the stock of trade policy measures already in place.

69. In 1990, the Council reviewed the policies of the following countries: Australia, Canada, Colombia, Hong Kong, Japan, Morocco, New Zealand, Sweden, the United States, the European Community, Hungary, and Indonesia; in 1991: Argentina, Norway, Austria, Chile, Singapore, Finland, Nigeria, Ghana, the United States (for the second time), Thailand, and Switzerland; scheduled for 1992: Bangladesh, Bolivia, Brazil, Canada (for the second time), the European Community (for the second time), Japan (for the second time), Kenya, Korea, the Philippines, Poland, Romania, South Africa and Uruguay.

problem of the "judge and bailiff," the TPRM reflects a diplomatic and peer-pressure approach to the enforcement problem.

The evaluation of trade and trade-related policies is not made according to the criterion of conformity or non-conformity with GATT, but according to the more ambiguous criterion of the impact of a contracting party's trade policies and practices on the multilateral trading system.⁷⁰ Indeed, it is at this price that one supposes that contracting parties agreed to the procedure in the first place. One can see, however, that a continually updated and comprehensive inventory of dubious trade policy measures would reduce the information costs of monitoring compliance with GATT. At present, no one really knows the extent of the "gray-area" problem, precisely because it is a gray area and hence unrecorded.

It terms of the free-rider problem discussed in the introduction, the TPRM should improve the incentives for compliance and increase the likelihood of outcome number 2 (co-operation) because it will be harder to cheat without others noticing.

Not everyone is in agreement with this analysis, however. According to John Jackson, a leading authority:

[T]hese reviews are not likely to have a significant impact on the implementation or effectiveness of the legal obligations contained in the variety of GATT treaties and protocols, including those that will come into effect at the end of the Uruguay Round. Indeed there are some risks that this review mechanism will divert attention from the legal norms in such a way as to actually decrease the pressure on Contracting Parties to observe those norms.⁷¹

The question really boils down to an assessment of whether the peer pressure and increased transparency generated by the TPRM will have more than a marginal effect on the trade system, and whether the TPRM is complementary to, rather than in competition with, the dispute-settlement régime. Time will tell.

IV. GREATER DOMESTIC TRANSPARENCY

It is now well established that the ultimate source of persistent and harmful protectionist policies in otherwise democratic countries lies in the strength of producer interests compared with the relative weakness of consumer interests in the domestic formulation of international trade policy.⁷² It follows that a last-

70. *Functioning of the GATT System*, *supra* note 49, ¶ I(A)(i), at 403.

71. JACKSON, RESTRUCTURING THE GATT *supra* note 7, at 80.

72. See, e.g., MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION AND SOCIAL RIGIDITIES (1982).

ing improvement in the multilateral trading system can occur only if consumers (or down-stream user industries) can be better integrated into the trade policy formation process "at home."

This was suggested in 1985 by the Eminent Persons Group, one of whose concrete proposals read:

In each country, the making of trade policy should be brought into the open. The costs and benefits of trade policy actions, existing and prospective, should be analyzed through a "protection balance sheet." Private and public companies should be required to reveal in their financial statements the amount of any subsidies received. Public support for open trade policies should be fostered.⁷³

Noting that most governments come to trade policy decisions behind closed doors, the group emphasized the danger that "a trade ministry will be too easily persuaded in private discussions to support a client domestic industry, without considering the interests of downstream users, the final consumer, or the economy as a whole."⁷⁴ They went on to observe that an "essential first step in developing support for better trade policies is public awareness."⁷⁵

In the course of the Uruguay Round, Australia, Canada, Hong Kong and New Zealand submitted a joint paper on domestic transparency, proposing that "GATT members should encourage and promote national awareness of the government policy-making process related to trade."⁷⁶ These talks are still continuing.

In a similar vein, Switzerland has presented a proposal on the domestic implementation of trade rules via a general undertaking by countries to apply GATT obligations directly under national laws.⁷⁷ If ever adopted, this would allow private individuals to invoke the right to freer and non-discriminatory trade in domestic courts and even to sue their own governments in case of protectionist measures which reduce their wealth or income. At present, only governments may invoke GATT rules in disputes with other governments, and the above discussion has shown how rudimentary the process is as compared with a full-fledged judicial system. However, at this stage in the development of the global trade system, governments are most unlikely to bind their hands in this way. One day this last, logical step in

73. EMINENT PERSONS GROUP, *supra* note 51, at 35.

74. *Id.* at 36.

75. *Id.*

76. GATT ACTIVITIES 1989, *supra* note 20, at 71.

77. *Id.* at 69.

establishing a "self-enforcing liberal trade constitution"⁷⁸ will perhaps be taken.

All that is left of this idea in the December 1991 "Dunkel Draft"⁷⁹ is a short paragraph in the proposed decision on "The Functioning of the GATT System," wherein "Ministers recognize the inherent value of domestic transparency of government decision-making on trade policy matters . . . and agree to encourage and promote greater transparency within their national systems."⁸⁰

A combination of an enhanced dispute settlement system, increased transparency at the international level thanks to the TPRM and institutions for increasing transparency at the national level (if widely introduced) would already, in this author's view, considerably strengthen the multilateral trading system, without actually introducing a single new obligation.

V. ENHANCED SURVEILLANCE

During the Uruguay Round, a Surveillance Body was set up to monitor the "standstill" and "rollback" commitments made at the start of the Round.⁸¹ Although this body will not survive the Round itself, the way it has operated gives an indication of how the TPRM and the dispute settlement system might interact. Since the start of the Uruguay Round, the Surveillance Body has received twenty-six notifications of new restrictions inconsistent with GATT (including the notorious beef hormone case⁸²) where the notifying country "expresses concern about" impending or threatened trade measures.⁸³ It is obvious that in the event of the failure of the Uruguay Round, precisely designed to address many of the problems reported to the Surveillance Body, some of these simmering disputes will become open conflicts.

But it may be useful to have a "slow fuse" in trade disputes, allowing plenty of time to find compromises. This is a variant of the "bicycle theory," which holds that the GATT system is in-

78. Ernst-Ulrich Petersmann, *Improvements to the Functioning of the GATT System (Including Dispute Settlement)*, Paper presented to a conference on "A New GATT for the Nineties and Europe '92," Tübingen (July 1990), at 20.

79. *Dunkel Draft*, *supra* note 27.

80. *Id.* at Y.1.

81. *See supra* note 57 (describing standstill and rollback provisions).

82. GATT ACTIVITIES 1989, *supra* note 20, at 42.

83. GATT ACTIVITIES 1988, *supra* note 47, at 25-26; GATT ACTIVITIES 1989, *supra* note 20, at 39-42; GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES 1990 33-34 (1991).

herently unstable and either moves forward or collapses. As long as one keeps talking, governments can hold protectionist lobbies at bay. Aho and Aronson put it this way: "[U]nless forward momentum is maintained, the trading system, like the bicyclist, will tumble over"⁸⁴

It shall be seen what, if anything, happens to the "stand-still" notifications after the end of the Uruguay Round. But experience suggests that while the periodic, non-aggressive TPRM might be a useful multilateral forum in which countries could "express concern about" issues to particular partners, there is merit in conducting a *general* review of developments in the international trading environment as well. This is, of course, not new, but it is proposed that contracting parties should codify existing practice. "Ministers regard these annual overviews by the GATT Council as an important element in enhanced surveillance in the GATT, and recommend that they continue as under the present arrangements."⁸⁵

In sum, the system reviews some twenty countries annually on an individual basis, and conducts a general overview as well. It is inconceivable that major problems, even of a strictly bilateral nature, should fail to escape multilateral attention, including interested public opinion.

In addition, a proposal has been made to tighten up the general obligation to notify all trade measures and to establish a central registry of notifications under the responsibility of the GATT Secretariat. Each notification is to include information "as [to] its purpose, its trade coverage, and the requirement under which it has been notified."⁸⁶ Every year, the "central registry shall draw the attention of individual contracting parties to regular notification requirements which remain unfulfilled."⁸⁷

Since the notifications are to be made "without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement,"⁸⁸ it seems that "gray area" measures which have bedeviled the GATT for years will at last be recorded. Again, these apparently innocuous administrative provisions strike this author as being impor-

84. C. MICHAEL AHO & JONATHAN D. ARONDON, TRADE TALKS. AMERICA BETTER LISTEN! 6 (1955).

85. *Dunkel Draft*, *supra* note 27, at Y.1.

86. *Id.* at Y.2.

87. *Id.* at Y.3.

88. *Id.* at Y.2 (I. General Obligation to Notify).

tant developments in improving the transparency of the trade system, thereby reducing the incentive to cheat. The "transactions costs" of monitoring the trade system will fall, reducing the incidence of free-riding.⁸⁹ Furthermore, if *all* trade measures are centrally recorded it will become much easier for independent researchers to evaluate their implications for welfare and income distribution, thereby encouraging a more balanced domestic trade policy debate (see section IV above).

VI. A MULTILATERAL TRADE ORGANIZATION

Finally, the contracting parties may at last decide to turn the GATT into a formal international trade organization. John Jackson, from academia, is a noted proponent of this idea.⁹⁰ The arguments in favor are basically that the GATT "system" is becoming unmanageably complex. Besides the GATT itself, there are the Tokyo Round codes and agreements, as well as the Multifibre Arrangement, each of them with its own set of members, dispute-settlement provisions and supervisory institutions. One reason for this proliferation is doubtless a certain tradition of pragmatism within GATT's diplomatic circles. It was so much easier to reach agreement among a small group of like-minded countries than to try to obtain the consent of two-thirds of GATT's contracting parties. However, the consequence of stand-alone agreements on matters closely linked to GATT is that they bind only the signatories, and not all side-agreements attract the same members. This principle of *géométrie variable* is invading the basic structure of rights and obligations. Lawyers have pointed to the danger of conflict of laws, the potential incoherence of mutual rights and obligations, the threat to the basic MFN obligation and unprincipled "forum shopping" when disputes arise.

For this reason, the Uruguay Round negotiators have drafted an ambitious "Agreement Establishing the Multilateral Trade Organization."⁹¹ This is a new development since the failure of the first draft global package of the results of the Uruguay Round, presented in Brussels in December 1990.⁹² At the time it was feared that countries participating in the negotiations might content themselves with form rather than substance, by agree-

89. See *supra* note 10 and accompanying text.

90. See JACKSON, *RESTRUCTURING THE GATT*, *supra* note 7, at 91-103.

91. *Agreement Establishing the Multilateral Trade Organization*, Annex IV to *Dunkel Draft*, *supra* note 27, at 91-101 [hereinafter, *MTO Agreement*].

92. GATT Doc. MTN.TNC/W/35 (Nov. 26, 1990).

ing to set up a Multilateral Trade Organization (MTO) while failing to come to a substantive agreement on all the difficult issues under discussion during the Uruguay Round. It is still unclear at the time of this writing whether this fear is well grounded or not, but one may venture to suggest that unless the substantive parts of the Uruguay Round are agreed to, the MTO will be purely symbolic.

Two institutional matters had already been agreed upon in principle in the December 1990 draft agreement: the need to raise the political visibility of GATT by organizing a meeting of Ministers of Trade of all contracting parties at least once every two years; and the need to improve institutional relationships with other international organizations, in particular the International Monetary Fund and World Bank.⁹³ Both matters find their natural place in the proposed new MTO. Both the Integrated Dispute Settlement Understanding and the Trade Policy Review Mechanism also find their respective anchors there. However, it is worth noting that the MTO, unlike the Havana Charter, is not designed to be part of the United Nations system.

The MTO anticipates various supporting institutions. The GATT Council will be replaced by a General Council, open (as at present) "to representatives of all the members, which shall meet regularly, as appropriate."⁹⁴ In addition, there will be three subsidiary Councils — a Council for Goods, a Council for Services and a Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) — and two important "bodies" — the Dispute Settlement Body and the Trade Policy Review Mechanism.⁹⁵

In order to prevent "forum shopping" in the event of disputes arising from side agreements with limited membership (such as the Tokyo Round agreement on Government Procurement or on Civil Aircraft), it is mentioned specifically that the new "Integrated Dispute Settlement System" will apply to these agreements. The new system only applies to the extent that the signatories which are parties to the dispute are also members of the MTO.⁹⁶

More significantly, however, the MTO is designed to admin-

93. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/35 (Nov. 1990).

94. *MTO Agreement*, *supra* note 91, at 93 (Article V.2).

95. *Id.* at 93-94.

96. *Id.* at 92. It is most likely that the members of these side agreements will also belong to the new MTO. See *infra* text accompanying notes 93-94.

ister not only the GATT as it emerges from the Uruguay Round, but also "all Agreements and Arrangements concluded under its auspices and the complete results of the Uruguay Round multilateral trade negotiations."⁹⁷ Thus it is designed to apply also to the General Agreement on Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, Trade-Related Aspects of Investment Measures, and all the agreements to date on the interpretation of the General Agreement itself (i.e., both the Tokyo and Uruguay Round agreements). Indeed, the Agreement establishing the Multilateral Trade Organization is intended to supersede the existing GATT instruments, and will apply to "GATT as modified." Article II.3 states categorically "The General Agreement on Tariffs and Trade, as it results from the Final Act of the Uruguay Round . . . is legally distinct from the Agreement known as the General Agreement on Tariffs and Trade, dated 30 October 1947."⁹⁸

In 1986, conscious of the dangers of traditional GATT pragmatism, contracting parties agreed that the results of the Uruguay Round should "be treated as parts of a single undertaking,"⁹⁹ in the sense that participants agreed in advance not to pick and choose, but to accept all or nothing. The signatories to the Uruguay Round, be they many or few, would all be subject to the same rules and disciplines (notwithstanding special provisions for developing countries). In these circumstances, an over-arching framework was not strictly necessary and indeed was not suggested until very late in the day. Problems might (and may still) arise, however, between those contracting parties to GATT which do not sign the Final Act of the Uruguay Round and those that do. Perhaps the MTO is intended to be seen as a clear new departure, a symbolic break with the past and a way of encouraging a maximum number of countries, including developing countries, to sign up for the new system. The principal change, legally speaking, is that the old GATT will lapse, and with it the Protocol of Provisional Application.¹⁰⁰ The new GATT "as it results from the Final Act of the

97. *MTO Agreement, supra* note 91, preamble at 91.

98. *MTO Agreement, supra* note 91, at Art. II.3.

99. *Punta del Este Ministerial Declaration, supra* note 50.

100. It is one of GATT's many idiosyncracies (another aspect of diplomatic pragmatism) that its members (with the exception of Haiti) only apply it "provisionally" "to the fullest extent not inconsistent with the existing legislation." This quirk dates back to 1947, when speed of accession and maximum membership were high on the agenda, and allowed contracting parties all the time they needed to bring their domestic legislation in line with GATT. By now, the Protocol of Provisional Application and the subsequent Protocols of Accession have

Uruguay Round" will be a very different institution, providing it achieves the universality of membership and scope for which it is aiming.

CONCLUSION

Rules and the institutions that develop around them do matter. They shape human behavior and produce different outcomes, depending on their structures. One only has to look at how differently firms behave, depending on whether they are in a competitive or protected environment; or how central banks behave, depending on whether or not they are independent of politicians; or how the police behave, depending on whether or not the judiciary is independent of government.

According to one view,¹⁰¹ effective rules and institutions develop slowly, over time, as a result of a process of trial and error and as a result of competition between different rules and institutions, producing different and more or less desirable outcomes. The law itself represents the codification, at a given point in time, of this evolutionary process. "The reason why such rules will tend to develop is that the groups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order."¹⁰²

GATT's slowly evolving institutional development, and possible future developments, seem to be yet another instance of such a process. Ranging back into the nineteenth century, as industrial development took off and prompted a dramatic increase in world trade, sovereign states have searched for the appropriate institutions to foster peaceful commerce. They have not always succeeded. Their failures, however, have been as useful as their triumphs. The breakdown of the world trade system in the 1930s, and its terrible consequences, led directly to the attempt to shape a new world economic order even as the Second World War was being waged.

The need for an international economic order arose because internal actions by individual nations began to generate external effects on other nations. From that time onward it became necessary for all countries engaged in the process of industrializa-

lost most of their bite — with one major exception: the lack of an injury test in U.S. law pertaining to countervailing duties.

101. See (of his many works) FRIEDRICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

102. *Id.* at 99.

tion to agree on the line to be drawn between what is essentially the "protected domain" of nations and what needs to be governed by a common set of international rules, thus reducing the mutual interference of their actions with each other's intentions. If one considers, simplistically, that there are two types of government action — those that have little or no effect on other countries and those that have a clear impact — then international rules are unnecessary for the former, but are much needed for the latter. In their absence, lack of information on how other countries will behave prevails, and different governments' actions (whose effect is anyway uncertain) will tend to collide with each other, thus causing conflict.

As far as the international trade order is concerned, given the increasing globalization of the world economy, most government actions are of this latter type, creating an ever increasing domain for international law and a constantly shrinking sphere for autonomous government action. Sovereign states find this process hard to accept, but the payoff is a world economic order where the actions of individual nations conflict less often with each other.

In a primitive legal system, such as that governing relations between sovereign states, one cannot expect that the rules will always be observed (they are not always observed even in advanced legal systems benefitting from judges, bailiffs and prisons!). All one can hope for is that such common rules as can be identified will increase the propensity to act (or not to act) in a certain manner. "Enforcement" of rules is impossible in a primitive legal system. Respect for rules occurs only on a voluntary basis and increasing respect for them involves an understanding on the part of the "individuals" in the system that in the long run they stand to gain from a general acceptance of the rules. Frequently, this long-term advantage has to be offset against short-term gains that can be enjoyed from the gratification of immediate desires, which are in conflict with the system. Only accumulated experience can teach actors in the system where their interests lie, and even then they will opt for short-term gratification if their time-horizons are short.

Another factor which increases respect for the rules is peer pressure. Hayek, for one, agrees: "The mere feeling that some action would be so outrageous that one's fellows would not tolerate it is . . . quite as significant as the enforcement by that regular procedure which we find in advanced legal systems."¹⁰³

103. *Id.* at 96.

Finally, the role of the judge in a primitive legal system is very important. To quote Hayek again:

The reason why the judge will be asked to intervene will be that the rules which secure such a matching of expectations are not always observed, or clear enough, or adequate to prevent conflicts even if observed. Since new situations in which the established rules are not adequate will constantly arise, the task of preventing conflict and enhancing the compatibility of actions by appropriately delimiting the range of permitted actions is of necessity a never-ending one, requiring not only the application of already established rules but also the formulation of new rules necessary for the preservation of the order of actions.¹⁰⁴

In short, we are at that stage in the evolution of the primitive law governing international trade where the role of the judge (GATT panels) and of peer pressure (TPRM) is being codified. And this in itself is, according to Hayek, not merely a matter of articulating what had already developed spontaneously, because:

The unarticulated rules will . . . usually contain both more and less than what the verbal formula succeeds in expressing The process of articulation will thus sometimes in effect, though not in intention, produce new rules . . . the result of such efforts may be the creation of something that has not existed before.¹⁰⁵

This is exactly what the transition from the old to the new GATT represents. The old GATT is more than just a treaty which has developed an interesting set of rules and institutions because of the peculiar circumstances of its birth. It is an evolving body of law which has developed a set of appropriate institutions as it goes along. But the globalization of the world economy, the growing importance of foreign direct investment, technology transfers and services, and the growing importance of developing countries in the global trade system have obliged governments to contemplate a revolutionary, non-incremental change in the institutions governing international economic relations.

It is still not clear at the time of this writing whether the Uruguay Round will succeed, for it is truly an ambitious project. If it fails, some of the modest institutional changes described in this Article will probably survive, and will become just the latest instance of the gradual evolution of GATT to adapt to circumstances as best it can. But if the Uruguay Round succeeds, it will surely be an impressive monument to statesmanship.

104. *Id.* at 119.

105. *Id.* at 78.