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# SURVEILLANCE SCHEMES: THE GATT'S NEW TRADE POLICY REVIEW MECHANISM

*Petros C. Mavroidis\**

## INTRODUCTION

In 1986 the Contracting Parties to the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> launched the Uruguay Round of multilateral trade negotiations, the most ambitious round of trade negotiations to date.<sup>2</sup> The Contracting Parties to the GATT agreed in the Punta Del Este Declaration to introduce into the GATT system three new sectors for negotiation: services, trade-related intellectual property rights (TRIPs), and trade-related investment measures (TRIMs).<sup>3</sup> In addition, for the first time in GATT history, the Contracting Parties agreed to devote a negotiating group exclusively to negotiating the tricky aspects of international trade in agricultural products.<sup>4</sup> Another goal of the Uruguay Round is to abolish the Multifiber Arrangement (MFA),<sup>5</sup> which currently regulates international trade in textiles.<sup>6</sup>

As originally conceived, the GATT was to be the international organization for the liberalization of world trade.<sup>7</sup> Judging by the dramatic lowering of tariffs that has occurred since 1947 when the GATT

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

2. CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Supp. No. 33, at 19 (1985-86) (Ministerial Declaration on the Uruguay Round) [hereinafter PUNTA DEL ESTE DECLARATION].

3. *Id.* at 25-26, 28.

4. *Id.* at 24.

5. The Multifiber Arrangement, regulating trade in textiles, arose as a compromise between the developed and developing countries. While developing countries seek to increase their share of the world market in textiles, developed countries seek to preserve domestic employment in textiles, unfortunately at consumers' expense. See NIELS BLOKKER, *INTERNATIONAL REGULATION OF WORLD TRADE IN TEXTILES* 89-245 (1989).

6. PUNTA DEL ESTE DECLARATION, *supra* note 2, at 23.

7. In the original scheme of the Bretton Woods System, what was to become the General Agreement on Tariffs and Trade, the still-born International Trade Organization (ITO), was to coordinate world trade, and the International Monetary Fund and the World Bank were to coordinate world finance. For an overview of GATT's history and evolution, see JOHN H. JACKSON

was established, the GATT has been singularly successful.<sup>8</sup> In the last few years, however, especially in the years following the 1973 oil crisis, the GATT has faced the proliferation of nontariff barriers (NTBs) within the territories of the Contracting Parties. This so-called "new protectionism" is a field in which national governments have been most imaginative. With this new development, the Contracting Parties soon realized that world trade could no longer be liberalized simply by lowering tariffs. As long as the Contracting Parties were unwilling to go so far as to create a world competition law, scholars suggested that one way to proceed was through better coordination or "harmonization" of Contracting Parties' trade policies.<sup>9</sup> However, such harmonization requires an enhanced transparency of national laws, law-making, and underlying trade policy.<sup>10</sup>

Although the GATT, except for article X, does not expressly provide for enhanced transparency, a tendency toward requiring enhanced transparency is already visible in the Uruguay Round. For example, the inclusion of TRIPs and TRIMs in the agenda of the Round can be explained as a move toward requiring enhanced transparency. Enhanced transparency will most likely become a key aspect of future GATT agreements. In fact, one of the few agreements concluded thus far in the Uruguay Round moves the world system of trade toward enhanced transparency and, thus, toward more effective trade policy coordination.

That concluded agreement is the Trade Policy Review Mechanism (TPRM), which, simply stated, is a scheme purporting to regularly monitor the trade policies of the Contracting Parties to the GATT and to estimate the impact of those policies on the multilateral system. The TPRM, not so much in its present form, as analyzed herein, but in its future evolved form, will likely make a great contribution to the multilateral system.

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& WILLIAM H. DAVEY, *LEGAL PROBLEMS IN INTERNATIONAL ECONOMIC RELATIONS* 281-84 (2d ed. 1986).

8. This success is despite the only provisional approval of the General Agreement.

9. JOHN H. JACKSON, *WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 305 (1989); JACKSON & DAVEY, *supra* note 7, at 1243; see also ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 225 (1987).

10. A requirement of transparency in this context means several different things. The law-making process is transparent if it publicly airs the various viewpoints and purposes of the laws to be enacted. A statute or law is transparent if the intended economic effect is clearly predictable and expected from the law's means. For example, a tariff as a trade policy instrument is transparent because its end, restriction of imports, is predictable from its means, a rise in price, and because tariffs have traditionally been used for restricting imports. Transparency with respect to national policies is simply a requirement that policymakers not disguise the purpose or tendency of national trade policies. For an example of a proposed obligation for transparency in safeguards in the GATT, see JACKSON, *supra* note 9, at 185-86.

This article describes and analyzes the current form of the TPRM, and advances some proposals for its future formation. The article is divided into five parts: Part I deals with the origin and the objectives of the TPRM; Part II analyzes the TPRM scheme and its functioning thus far; Part III presents the legal underpinnings of the TPRM; Part IV reviews and compares the surveillance schemes of the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD) with the TPRM, since it is my belief that GATT's TPRM can draw some valuable lessons from the experience of other international organizations; and Part V sets forth conclusions and proposals to strengthen GATT's newly introduced surveillance scheme.

## I. THE ORIGIN AND OBJECTIVES OF THE TPRM

One group in the Uruguay Round has been designated to negotiate the substance of a surveillance scheme for the GATT; that group is titled "Functioning of the GATT System" (FOGS).<sup>11</sup> One of the objectives of the group, as expressed in the Punta Del Este Declaration, was "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."<sup>12</sup>

To attain this objective, the FOGS adopted the TPRM. The Contracting Parties agreed to the TPRM in the Uruguay Round's Mid-Term Review, which took place in Montreal in December 1988.<sup>13</sup> Because agreement was not reached in all the negotiating groups, however, the Mid-Term Review in Montreal was inconclusive. Four of the groups did not conclude agreements, namely, the negotiating groups on Agriculture, on Textiles, on Safeguards, and on TRIPs. Consequently, the Contracting Parties decided to put the agreements of all groups on hold, including the agreement of the FOGS group. In order

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11. PUNTA DEL ESTE DECLARATION, *supra* note 2, at 26.

12. *Id.* The call for enhanced surveillance in the GATT is also to be found in the "Leutwiler Report." GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION (1985) [hereinafter Leutwiler Report]; see Richard Blackhurst, *Strengthening GATT Surveillance of Trade Related Policies*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 5 STUD. IN TRANSNAT'L ECON. L. 123, 125 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988); see also Asif H. Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?*, J. WORLD TRADE, June 1990, 147, 148.

13. See *Mid-term Review: Final Agreement at Geneva*, 61 FOCUS: GATT NEWSLETTER 1, 14 (1989) [hereinafter *Mid-term Review*]; Ernst-Ulrich Petersmann, *The Mid-term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures*, 32 GERMAN Y.B. INT'L L. 290 (1989).

to overcome the deadlock that the Montreal failure had created, the Mid-Term Review resumed its work in Geneva in April 1989.

The negotiations in Geneva have been fruitful mainly because the language of the agreed texts was vague. Eventually, all the negotiating groups reached agreement, and the Uruguay Round resumed its normal course. Thus, the agreement on the TPRM is not, at present, a final agreement, but merely the end-product of successful completion of the Mid-Term Review of the Uruguay Round. As a result, there are certain questions concerning the legal value of this agreement.

One of these questions results from the Uruguay Round's "principle of globality."<sup>14</sup> Under this principle the Uruguay Round is a "single undertaking"; in other words, agreement must be reached by all negotiating groups before an agreement by one negotiating group can take effect. Thus, although this article will show that the TPRM has already entered into force, the globality principle requires the TPRM to be abolished at the end of the Uruguay Round if agreement has not been reached in every other negotiating group.

The view that the TPRM might become void if the Uruguay Round fails must be rejected. The validity of the current application of the TPRM cannot be contested. A GATT Council Decision brought the TPRM into force on a provisional basis,<sup>15</sup> and the globality principle, which is, in essence, a negotiating device that the Contracting Parties have used to promote trade-offs, cannot legally preclude such Decisions from coming into effect. The globality principle should not be given such a powerful legal effect. The principle is more a necessary complement to the "give-and-take" process that occurs in international negotiations than a legal principle to be observed strictly. The globality principle is of greatest value when a trade liberalization measure being negotiated in a group has provoked serious disagreement among the Contracting Parties, and agreement to the resulting measure of such a group can be traded off for agreement on another measure.<sup>16</sup> Examples of this type of problematic measure include textiles and TRIPs. The FOGS group, in contrast, dealt with an uncontroversial measure. During the negotiations of the FOGS group, no major confrontations occurred among the Contracting Par-

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14. Christoph Bail, *Das Profil einer neuen Welthandelsordnung: Was bringt die Uruguay Runde?* (pt. 1), 1 *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* [EUZW] 433, 436 (1990); see also Petersmann, *supra* note 13, at 312.

15. *Trade Policy Review Mechanism: Programme of Reviews — 1989 & 1990*, GATT Doc. L/6554 (July 19, 1989) (GATT Council Decision) (Restricted) [hereinafter *GATT Council Decision*].

16. In GATT terminology, issues that provoke the most serious disagreement are referred to as "round-stoppers."

ties, and the Contracting Parties reached substantial agreement at a relatively early stage of the Round. Because the TPRM arose out of an uncontroversial group, the globality principle should not be applied to the TPRM.

In addition, the language of the TPRM supports the view that the TPRM will be part of the GATT system for at least the near future. In fact, the Contracting Parties agreed to implement it on a provisional basis and, if necessary, to modify it at the end of the Uruguay Round in light of the insights gained through its provisional application.<sup>17</sup> Finally, a consensus of the Contracting Parties approved the TPRM. This shows that most Contracting Parties endorse the TPRM as a viable surveillance scheme. Even the usually cautious United States volunteered to be among the first Contracting Parties to have its trade policy reviewed.<sup>18</sup>

The objectives of the TPRM, as stated in the Mid-Term Review agreement, follow the pattern set by the Punta Del Este Declaration. The main objective of the TPRM is the smoother functioning of the multilateral trading system.<sup>19</sup> According to FOGS, this can be attained through "improved adherence by all Contracting Parties to the GATT rules, disciplines and commitments."<sup>20</sup> This, in turn, can be attained through "greater transparency in, and understanding of the trade policies and practices of Contracting Parties."<sup>21</sup> Thus, the TPRM's function is to examine the impact of a nation's trade policies and practices on the multilateral trading system.<sup>22</sup>

As stated above, the TPRM became effective in December 1989 with a review of U.S. trade policy. Since then, the trade policies of all four major commercial trading entities of the world — the United States, the European Community, Japan, and Canada — have been reviewed. As a basis for analyzing the TPRM, this article will focus on the reports issued after the U.S. and EC trade policy reviews.<sup>23</sup>

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17. *Mid-term Review*, *supra* note 13, at 14.

18. The United States agreed to be reviewed starting December 1989, soon after the TPRM was approved. *GATT Council Decision*, *supra* note 15.

19. *Mid-term Review*, *supra* note 13, at 13.

20. *Id.*

21. *Id.*

22. *Id.*

23. All reports are published by the GATT; the national and GATT reports on the United States, for example, were published as GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: THE UNITED STATES OF AMERICA (Mar. 1990) [hereinafter U.S. REPORT and GATT REPORT ON THE U.S.]. A comprehensive summary of the reports is released through GATT: the one on the U.S. report is *GATT Trade Policy Review Mechanism: United States of America*, GATT Doc. 1468 (Nov. 27, 1989), which is also reprinted in *GATT Trade Policy Review Mechanism*, WORLD TRADE MATERIALS, Jan. 1990, at 124. Regarding the report on U.S. trade policy, see *U.S. Commitment to Uruguay Round Perceived as Inconsistent with Policies*,

## II. ANALYSIS OF THE TPRM

Under the TPRM agreement, the trade policies of all the Contracting Parties will be subject to periodic review.<sup>24</sup> The frequency of review, though, will not be the same for every Contracting Party. The trade policies of the major commercial powers will be reviewed more frequently than the policies of Contracting Parties of lesser economic significance. The underlying rationale for this difference is that the trade policies of the most economically powerful States undeniably have greater impact on the multilateral system.

The criterion used to define the most economically powerful Contracting Parties is their "share of world trade in a recent representative period."<sup>25</sup> Using this criterion to determine frequency of review is preferable to using the developmental status of a country for several reasons. First, the "share of world trade" criterion is constantly updated; thus, the criterion will automatically change the frequency of review to reflect current reality when a nation's share of world trade, and presumably the effect of that nation's trade policy on world trade, changes. Second, the criterion avoids the problem of the current method used in the GATT to designate developing countries. That method consists simply of having every country determine for itself whether it is or is not a developing country. At present, many Contracting Parties that should no longer qualify as developing countries retain that status and profit from special GATT provisions for developing countries. The TPRM criterion, instead, reflects current reality because the share of world trade in a recent representative period is a neutral, dynamic criterion. Third, the TPRM criterion is more precise; it can identify and differentiate those countries that lie between the wealthiest and poorest countries, and put them into separate categories as appropriate.

Accordingly, the trade policies of the four most important commercial powers — currently, the European Community (counting as

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*Report Finds*, 6 Int'l Trade Rep. (BNA) 1646-47 (Dec. 20, 1989); *GATT Critiques U.S. Policy*, N.Y. TIMES, Dec. 15, 1989, at D6; *Trend by U.S. For Unilateral Pact is Noted*, WALL ST. J., Dec. 15, 1989, at A2.

The national and GATT reports on the EC were published as GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: THE EUROPEAN COMMUNITIES (June 1991) [hereinafter EC REPORT and GATT REPORT ON THE EC]. For a comprehensive summary, see *Trade Policy Review: The European Communities*, GATT Doc. 1505 (Apr. 16, 1991), reprinted in *GATT Trade Policy Review Mechanism: The European Communities*, WORLD TRADE MATERIALS, May 1991, at 5; see also *GATT Report Finds EC 1992 Stimulates Growth But Also Calls for Fewer Trade Restrictions*, 8 Int'l Trade Rep. (BNA) 586-87 (Apr. 17, 1991).

24. See Victoria Curzon-Price, *GATT's New Trade Policy Review Mechanism*, 14 WORLD ECON. 229 (1991); *Mid-term Review*, *supra* note 13, at 13.

25. *Mid-term Review*, *supra* note 13, at 13.

one party), the United States, Japan, and Canada — are to be reviewed every two years; those of the next sixteen countries every four years; and those of the remaining Contracting Parties every six years. The TPRM also provides that an even longer period may be fixed for the least developed countries,<sup>26</sup> because the trade policies of the least developed countries have almost no impact on the multilateral system,<sup>27</sup> and because those countries face many difficulties in their review. For this reason, the GATT Secretariat will, and already does, make technical assistance available at a country's request.<sup>28</sup>

### A. The "Two Reports" System

The TPRM is based on two reports of the trade policy of the Contracting Party under review: one provided by the Contracting Party and one provided by the GATT Secretariat.<sup>29</sup> These two reports are referred to, respectively, as the national report and the GATT report. The agreement on the TPRM clarifies the relationship between the two reports. The report prepared by the Contracting Party (the national report) is the primary information source on which the GATT Secretariat relies in preparing its own report (the GATT report).<sup>30</sup> If the national report is not sufficiently clear, GATT officials have the right to seek clarification from the Contracting Party under review.<sup>31</sup> This procedure is common in the surveillance schemes of other international organizations, as will be shown below in Part IV of this article. Both reports, together with the summary record of the Council meeting dedicated to them, are to be published.<sup>32</sup>

#### 1. The National Reports

The TPRM agreement stipulates that the national report is to follow "an agreed format to be decided upon by the Council."<sup>33</sup> The agreement further stipulates that this format is subject to revision and modification in light of experience gained in application of the

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26. *Id.*; see also Christopher Bail, *Das Profil einer neuen Welthandelsordnung: Was bringt die Uruguay Runde?* (pt. 2), 1 *EuZW* 465, 474 (1990).

27. This should not be understood as meaning that their trade policies are completely unimportant and should not be taken into account. On the contrary, they will be reviewed on a regular, albeit less frequent, basis.

28. *Mid-term Review*, *supra* note 13, at 13.

29. *Id.*

30. *Id.* at 14.

31. *Id.*

32. *Id.*

33. *Id.* at 13.



TPRM.<sup>34</sup> The GATT Council Decision that approved the TPRM set forth the format to be used in TPRM practice, at least on a provisional basis.<sup>35</sup>

The main functions of the agreed format include the following.<sup>36</sup> First, the format is designed to ensure that basic issues are addressed by requiring discussion of those issues. The format, however, is not intended to preclude Contracting Parties from providing any additional information that they deem useful or appropriate.<sup>37</sup> Second, the format is designed to ensure that the report is current. Therefore, initial reports are expected to focus on the past three years, but should also provide sufficient information regarding earlier years to put recent developments into context.<sup>38</sup> Third, the format is not intended to be burdensome to developing countries. Thus, the Decision directs the GATT Secretariat to provide for those countries technical assistance in preparing reports in addition to a more simplified reporting format.<sup>39</sup> As far as the substance of the outline format is concerned, there are two kinds of information: information requested by GATT as indispensable, and information deemed by the Contracting Parties as necessary to better explain their trade policies and practices.

The outline format agreed on by the Council is divided into two parts: in part A the trade policies and practices are to be described, and in part B the wider economic and developmental needs of the Contracting Party are to be discussed.<sup>40</sup> Part A is further subdivided into four parts: (I) objectives of trade policies; (II) description of the export and import system; (III) the trade policy framework; and (IV) the implementation of trade policies. Part B is subdivided into three parts: (I) wider economic and developmental needs, policies, and objectives of the Contracting Party concerned; (II) the external economic environment; and (III) problems in external markets.<sup>41</sup> Contracting Parties are invited to include an appendix to disclose statistical information concerning trade flows by country and product, macroeconomic indicators, and other information deemed relevant.<sup>42</sup>

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34. *Id.*

35. *Trade Policy Review Mechanism: Outline Format for Country Reports*, GATT Doc. L/6552 (July 21, 1989).

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 2-4; see also Qureshi, *supra* note 12, at 150.

41. *Trade Policy Review Mechanism: Outline Format for Country Reports*, *supra* note 35, at 2-4.

42. *Id.* at 4.

One can, therefore, distinguish among legal rules contained in part A, economic rules contained in part B, and statistical information contained in the appendix. These distinctions were illustrated in the U.S. and EC reports.<sup>43</sup>

Under "objectives of trade policies" for part A(I), Contracting Parties are invited to explain their trade policy objectives, and to add an explanation of the economic goals and significance of sectoral trade policies. For example, the United States explains in its report that the objectives of its trade policy are reduction of trade distortions and barriers at home and abroad, elimination of unfair trade practices, and successful completion of the Uruguay Round.<sup>44</sup> The EC, on the other hand, makes more explicit the distinction between long- and short-term objectives.<sup>45</sup> The EC long-term goals include: strengthening the multilateral system, an objective that is also expressed in the EC Treaty (article 110); management and implementation of Community trade rules within the Community; and support of the development and industrialization efforts of developing countries. The stated short-term goals include successful completion of the Uruguay Round. In describing its trade policy objectives, each of these Contracting Parties echoes the objectives stated in the preamble of the General Agreement.<sup>46</sup> The objectives stated in the GATT preamble, however, are so broad that Contracting Parties can easily comply with them. Moreover, the idea of contributing to the multilateral system, as enshrined in the GATT preamble, has different meanings for different Parties.<sup>47</sup> The real test of compliance with international rules, therefore, comes only when the specific trade policies and practices of a Contracting Party are evaluated.

Under "description of the export and import system" for part A(II), the United States describes its competent authority for the collection of duties, taxes, fees on imports, the export system, and the export prohibition rules (i.e., COCOM rules).<sup>48</sup> The EC, apart from describing the current situation, dedicates a substantial part of its report to explaining the easing of import and export procedures as a

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43. See U.S. REPORT, *supra* note 23; EC REPORT, *supra* note 23.

44. U.S. REPORT, *supra* note 23, at 19-22.

45. EC REPORT, *supra* note 23, at 6-8, 19-21.

46. GATT, Analytical Index, Preamble, GATT Doc. Leg/2 (1989) [hereinafter Preamble].

47. On the interpretation of this idea by developing countries, see ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 46 (1987).

48. COCOM is the Coordinating Committee on Export Controls, established in 1950 to control trade in strategic exports. These rules apply to the Soviet Union, the formerly communist countries of Eastern Europe, and other communist countries. These rules may be in flux due to the collapse of communism in the Soviet Union and Eastern Europe.

result of the 1992 project.<sup>49</sup> In fact, the EC's attempt to allay the fears of its partners concerning the 1992 project is the main feature of its report.<sup>50</sup>

Under "trade policy framework" for part A(III), the United States refers to its laws regarding import relief, antidumping and countervailing duties, protection of its agricultural sector, perceived illicit trade practices by foreign countries, and import prohibitions on national security grounds.<sup>51</sup> The United States further specifies its competent bodies for creating commercial policy, focusing on the relations between Congress and the Executive branch, and on the special role of the Office of the United States Trade Representative (USTR).<sup>52</sup> Finally, the United States describes the free trade agreements (FTAs) that it has concluded with Canada and Israel, and the framework FTA currently under negotiation with Mexico, as instruments of further liberalization of world trade.<sup>53</sup> It is significant that the compatibility of U.S. national trade policy instruments with GATT rules is not explored at all in the U.S. report; GATT officials are left to address such compatibility in their report. The United States and the European Community seem to view the purpose of the national reports to be merely the disclosure of information. This view is justified because, in agreeing to the outline format, the Contracting Parties assigned an information-gathering role to the national reports.

In part B of each report, both the United States and the EC refer to the growth of imports and exports, and the evolution of their trade balances.<sup>54</sup> They also refer to important trends in the balance-of-payments, the national debt, exchange rates, and interest rates. These aspects of the economy are not especially significant in the GATT context, however, because they are the subject matter of the review schemes of other international organizations, such as the IMF and the OECD.<sup>55</sup>

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49. See generally EC REPORT, *supra* note 23.

50. It is no wonder that the EC chose such an approach, since the two reports — the EC REPORT, *supra* note 23, and the GATT REPORT ON THE EC, *supra* note 23 — are complementary, and countries are invited to add all necessary information in order to explain their policies better. The EC has been the subject of criticism insofar as the trade consequences of the single European market are concerned (i.e., fortress Europe), and on the occasion of the review, the EC had a chance to advance its arguments on European integration in an appropriate forum.

51. U.S. REPORT, *supra* note 23, at 26-52.

52. *Id.* at 52-58.

53. *Id.* at 84-95.

54. *Id.* at 123-29; EC REPORT, *supra* note 23, at 89.

55. See *infra* part IV.

## 2. The GATT Reports

The GATT reports on the United States and the European Community are more economic or political science assessments than legal evaluations of the compatibility of U.S. and EC trade policy with GATT rules.<sup>56</sup> Still, legal comments do occur in the GATT report, and these comments remind the reader that the General Agreement is, among other things, a legal text. The format of the GATT report differs from that specified for national reports, since the GATT report is not intended to present national trade policy, but rather to evaluate the impact of national policies on the multilateral system.

In its introductory note, the GATT report on the United States places the U.S. economy in the world context.<sup>57</sup> It establishes, through statistical evidence, the importance of international trade to the U.S. gross national product (GNP).<sup>58</sup> The GATT report also notes the structural imbalances manifested in the U.S. trade balance throughout the 1980s, and the dramatic amelioration of the U.S. trade deficit since the mid-1980s.<sup>59</sup> It goes on to explore the relations between Congress and the President in the formulation of trade policy and the lack of statistical data concerning subsidies in the U.S. economy.<sup>60</sup> The report recognizes that U.S. trade policy satisfies the transparency objective<sup>61</sup> through the public debates and hearings on trade issues that are common in the United States.<sup>62</sup> The report also notes that the frequently opposing positions of the U.S. President and Congress on protectionism contribute to enhanced transparency.<sup>63</sup>

The GATT report maintains the same positive tone when examining U.S. trade policy trends.<sup>64</sup> While some of the U.S. trade policy instruments are of controversial compatibility with the GATT, the report describes them without examining such compatibility. GATT officials were pleased to note that in most cases the United States has, in practice, applied the most-favored-nation principle (MFN).<sup>65</sup> The cases where the United States has not applied it are cited (Cuba, Czechoslovakia, Romania, and Nicaragua), but the report does not

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56. GATT REPORT ON THE U.S., *supra* note 23; GATT REPORT ON THE EC, *supra* note 23.

57. GATT REPORT ON THE U.S., *supra* note 23, at 137-52.

58. *Id.*

59. *Id.* at 139-41.

60. *Id.* at 162-64, 273-74.

61. Or obligation, if viewed in terms of article X of the GATT. GATT, *supra* note 1, art. X.

62. GATT REPORT ON THE U.S., *supra* note 23, at 273-74.

63. *Id.*

64. *Id.* at 174-259.

65. *Id.* at 274.

examine the legal justification for this U.S. action. The report further notes that the U.S. Generalized System of Preferences<sup>66</sup> (GSP) is applied on a discriminatory basis, but also notes that the practice of other developed countries is similar.<sup>67</sup> The report does not offer a judgment on the then-recently concluded FTA with Canada because, at the same time, the GATT Secretariat was reviewing the FTA.

GATT criticism in the report, while not expressed in legal terms, is directed at the high level of protection in some sectors of the U.S. economy and at the export subsidy programs in agriculture. According to the report,<sup>68</sup> the agricultural subsidies have been greatly expanded by the Food Security Act of 1985.<sup>69</sup> The report, however, does acknowledge that the U.S. administration has been reluctant to succumb to the intensified pressures for increased protection.<sup>70</sup>

The report then turns to the import relief schemes in the United States — import relief being one of the most sensitive areas in the GATT.<sup>71</sup> It maintains a positive tone while simultaneously recognizing that the United States has tightened its antidumping and countervailing duty laws to prevent circumvention, and has introduced stricter conditions of reciprocity in its government procurement provisions. Again, the report expresses no legal assessment of the compatibility of these rules with the GATT.

The report then examines Section 201<sup>72</sup> of the U.S. Trade Act.<sup>73</sup> Section 201 corresponds to article XIX of the GATT, which regulates the imposition of safeguards by Contracting Parties — one of the areas of major controversy between the developed and the developing countries in the GATT. Although the report mentions that Section 201 actually served as a basis for the conclusion of various voluntary restraint agreements (VRAs) and orderly marketing arrangements (OMAs),<sup>74</sup> the report avoids examining the compatibility of Section

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66. 19 U.S.C. §§ 2461-65 (1988). The Generalized System of Preferences is a U.S. government program under which imports from beneficiary developing States enter the United States duty-free. See SPECIAL COMMITTEE FOR CONSULTATION AND NEGOTIATION, ORGANIZATION OF AMERICAN STATES, CARIBBEAN BASIN INITIATIVE 8 (1989).

67. GATT REPORT ON THE U.S., *supra* note 23, at 274.

68. *Id.* at 197-211, 275.

69. Food Security Act of 1985, Pub. L. No. 98-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C. (1990)).

70. GATT REPORT ON THE U.S., *supra* note 23, at 275.

71. *Id.* at 276.

72. 19 U.S.C. § 2251 (1988).

73. GATT REPORT ON THE U.S., *supra* note 23, at 276.

74. These types of bilateral trade agreements are incompatible with the relevant GATT rules (article XIX) mainly because they lack the *erga omnes* approach.

201 with the GATT.<sup>75</sup> Instead, the report states that overseas producers who agree to restrain exports have accrued some benefit, such as monopoly rent, despite the fact that this issue is irrelevant in determining the compatibility of Section 201 with the GATT.

The GATT report then examines the conduct of the United States in GATT dispute settlement under articles XXII and XXIII of the GATT.<sup>76</sup> The report acknowledges the overall good record of the United States in implementing GATT panel reports, even in cases where panels have found U.S. legislation incompatible with GATT rules.<sup>77</sup> The report praises not only the United States' good record as a defendant in dispute settlement, but also its record as a claimant.<sup>78</sup> The United States, more than any other developed country, has demonstrated its faith in GATT dispute settlement by submitting a large number of trade disputes to GATT dispute settlement, thus contributing to the strengthening of the multilateral system.

One of the most controversial novelties of the 1988 Trade Act is the modified Section 301, which encompasses the so-called Super 301 procedure.<sup>79</sup> This section receives the only legal criticism contained in this report.<sup>80</sup> Section 301 provides private parties the legal means to ask the competent authorities in the United States to bring a legal action against other GATT Contracting Parties who allegedly contravene GATT rules.<sup>81</sup> The report states that there are two major dangers inherent in Section 301: (1) discriminatory application and (2) unilateral countermeasures without a previous decision of the Contracting Parties, as required by article XXIII(2) of the GATT.<sup>82</sup>

In its final assessment, the report notes the generally low tariffs in the United States and the U.S. commitment to the strengthening of the multilateral system, currently expressed through its efforts in the Uruguay Round.<sup>83</sup> The report criticizes the enhanced protection enjoyed by some U.S. sectors and the U.S. policy toward developing countries, especially the discriminatory designation of beneficiary countries

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75. GATT REPORT ON THE U.S., *supra* note 23, at 277.

76. *Id.* at 260-72, 278-79.

77. *Id.*

78. *Id.*

79. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164-68 (codified at 19 U.S.C. § 2411 (1988)).

80. GATT REPORT ON THE U.S., *supra* note 23, at 262-72, 279.

81. See JACKSON, *supra* note 9, at 103. Legal action may also be brought against countries who are not GATT members and in cases where general principles of international law, as distinct from GATT rules, have been violated. Thus, actions may be brought under Section 301 against countries that have concluded bilateral treaties with the United States.

82. GATT REPORT ON THE U.S., *supra* note 23, at 279.

83. *Id.* at 275.

under the GSP.<sup>84</sup> Finally, the report expresses the concern of many trading partners of the United States regarding the conflict between the U.S. commitment to strengthening the GATT multilateral system, on the one hand, and the United States' bilateral and unilateral initiatives on the other.<sup>85</sup>

The GATT report on EC trade policy is similar to the GATT report on U.S. trade policy, although a difference does exist in the force of GATT criticism. In its preliminary remarks, the report notes the EC's dependence on world trade, which is greater than that of the United States or Japan. External trade alone accounted for nearly twenty percent of EC Gross Domestic Product (GDP) in 1989.<sup>86</sup> It further emphasizes that the formation of the EC did not substantially alter the trade trends between the EC Member States and the rest of the world, although it did provide a boost for intra-EC trade.<sup>87</sup> The GATT report then describes trade flows between the EC and the rest of the world, and the differential export priorities and rates of dependence on trade of individual Member States.<sup>88</sup> The report continues with a description of the EC pyramid of trade preferences (FTAs at the top, association and cooperation agreements in the middle, and the EC generalized system of preferences on the bottom) and an appraisal of the EC's commitment to the Uruguay Round.<sup>89</sup>

GATT officials reserved their harshest criticism for EC trade policy instruments. The report examines the Common Agricultural Policy, the import relief schemes (mainly the VRAs), the frequent and aggressive use of antidumping laws, and the heavy subsidization by individual Member States of specific sectors. The GATT report criticizes the EC's overall approach toward the multilateral trading system.

Among its specific criticisms, the GATT report first criticizes the Common Agricultural Policy.<sup>90</sup> The report holds variable levies and

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84. *Id.* at 274.

85. *Id.* at 279.

86. GATT REPORT ON THE EC, *supra* note 23, at 1.

87. *Id.* An increase in intra-EC trade can be explained through the concepts of trade creation and trade diversion as hypothesized in traditional economic theory on international trade. Trade is created within a free trade union because tariffs are lowered or eliminated among the Member States, allowing more trade among the Member States. On the other hand, some trade that used to occur between Member and non-Member States is diverted to trade among Member States because the lowering of tariffs among Member States reduces transaction costs of intra-trade union trade. This phenomenon is called trade diversion. Trade diversion may not benefit world welfare because Member States may produce goods at higher cost than non-Member States.

88. *Id.* at 24-25.

89. *Id.* at 7-8, 37, 61-77.

90. *Id.* at 8-11, 158-85.

export subsidies accountable for distortions in the world trade of agricultural products.<sup>91</sup> The report emphasizes the absurdly high costs to consumers due to EC protection of agriculture.<sup>92</sup> It also points out that a majority of the cases in which the EC was involved in dispute settlement under article XXIII of the GATT concerned agricultural products, thus illustrating its trading partners' general dissatisfaction with this regime.<sup>93</sup> The report even stresses the fact that only a minority of EC farmers enjoy heavy agricultural subsidies, thus implying that social concerns do not predominate the Common Agricultural Policy.<sup>94</sup> Although the wording of the report is not legal, in the sense that no legal argument is advanced to support the incompatibility of several aspects of EC policy with GATT rules, the message is clear: the Common Agricultural Policy distorts world trade in agricultural products.

The new EC proposals of January 1991, which the report mentions in passing, are not reviewed because they had not been adopted at the time of the report.<sup>95</sup> However, the mid-1980s reform of the Common Agricultural Policy is reviewed.<sup>96</sup> According to the report, that reform — which installed what are known as the stabilizers — failed to rationalize the situation, producing promising results in some fields but creating problems in others. One can safely conclude that the GATT is dissatisfied with the current status of the Common Agricultural Policy. But one should also keep in mind that the EC report came out four months after the collapse of the Uruguay Round in Brussels, where the major trading partners of the EC blamed the Common Agricultural Policy for preventing a successful conclusion.<sup>97</sup> While GATT officials did not go that far in the EC report, they did focus more on the Common Agricultural Policy than on other EC policies.

The second area criticized in the GATT report is the EC Multifiber Arrangement.<sup>98</sup> The demands for protectionism made by those

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91. *Id.* at 10.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 19, 169.

96. *Id.* at 167-69.

97. See *Negotiations to Liberalize World Trade Stall as EC Stands Firm on Farm Offer*, 7 Int'l Trade Rep. (BNA) 1820 (Dec. 5, 1990); *U.S., Others Blame EC for Failure in Brussels to Agree on New Rules to Govern World Trade*, 7 Int'l Trade Rep. (BNA) 1876 (Dec. 12, 1990); *USTR Hills Says Chance of Success in Uruguay Round Impossible to Predict*, 7 Int'l Trade Rep. (BNA) 1912 (Dec. 19, 1990).

98. GATT REPORT ON THE EC, *supra* note 23, at 11-12. The textiles group in the Uruguay Round has been a focus for controversy between the developed and the developing countries, and



EC Member States for whom textiles are important — that is, Italy, Greece, and Portugal — have led to a high degree of complexity in the EC Multifiber Arrangement. This complexity is noted in the report along with the high prices that consumers in the EC countries pay for textiles in order to maintain the current levels of protection.

Third, the GATT report criticizes the EC complex of VRAs.<sup>99</sup> GATT officials singled out for criticism three elements inherent in almost all the EC's VRAs. These three elements are a lack of transparency, the introduction of strong elements of discrimination with respect to certain countries and products (such as cars, steel, and textiles), and the longevity of the VRAs — despite the fact that each VRA was originally intended to serve only as a temporary device.

Fourth, the GATT report criticizes the nonuniform quantitative import restrictions applied by Member States on different products.<sup>100</sup> These quotas illustrate not only the Member States' differentiated sensitivity in some sectors, but also the willingness of EC Member State authorities to grant import relief for political reasons. In addition, EC subsidies other than those of the Common Agricultural Policy are criticized.<sup>101</sup> The main criticisms attack subsidies to the steel and shipbuilding industries as well as to Airbus.<sup>102</sup>

Fifth, the GATT report notes that the government procurement market of the EC is considered more restrictive than the private sector; the report cites the lack of uniformly applicable rules as a possible explanation.<sup>103</sup> In addition, the GATT report criticizes some State monopolies for employing discriminatory practices even in intra-EC trade. Sixth, the report notes that measures taken on a temporary basis to provide import relief seem to have become permanent.<sup>104</sup> An example is Germany's action restricting coal imports under article XIX of the GATT. The coal restriction dates back to 1958 and is by far the longest-standing article XIX action in GATT history. Finally, the report notes that recently the EC has been making increased use of antidumping measures and has enacted aggressive legislation in this field (the so-called "screwdriver-plant legislation"), found by a GATT

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the failure to reach agreement in this group was one of the reasons why the Mid-Term Review in Montreal collapsed.

99. *Id.* at 12-13.

100. *Id.* at 13. See, e.g., the import regime for bananas, which varies by EC Member State. *Trade Policy Review: The European Communities*, *supra* note 23, at 12.

101. GATT REPORT ON THE EC, *supra* note 23, at 14-15.

102. Airbus subsidies have been especially irksome to the United States.

103. GATT REPORT ON THE EC, *supra* note 23, at 15-16.

104. *Id.* at 17-19.

panel to be inconsistent with GATT provisions.<sup>105</sup>

In summary, the GATT report's overall assessment of EC trade laws and policies was very negative. High levels of protection in some sectors, the network of preferential agreements that in practice discriminate between different suppliers, and the controversial Common Agricultural Policy top the list of GATT criticism. The last two paragraphs of the report, regarding the EC's approach to the multilateral system as a whole, are the most critical. According to the report, the EC's pragmatic approach could be a "major threat" to the multilateral system because it contravenes some of the system's cornerstones, namely, the principles of nondiscrimination, transparency, and undistorted competition.<sup>106</sup> GATT criticism in the EC report seems to be expressed much more directly than in the U.S. report.

The reactions of the representatives of these two reviewed Contracting Parties, especially the reaction of the EC representative, demonstrate that the reports arising out of the TPRM are not insignificant.<sup>107</sup> The reactions further demonstrate that criticism by the GATT Secretariat through the TPRM is viewed as something that cannot be brushed aside, even though the TPRM was not intended to impose new binding obligations on the Contracting Parties, as is clearly stated in the original agreement of the TPRM.<sup>108</sup> For example, Rufus Yerxa, Deputy USTR, characterized the TPRM review of U.S. trade policy as "a useful experience," while reiterating the United States' strong commitment to the multilateral system.<sup>109</sup> He noted that the report had found that "tariffs and non-tariff-barriers are relatively infrequent in the United States."<sup>110</sup> The U.S. representative who responded to the GATT critique on Section 301 reminded the other Contracting Parties that the United States has committed itself to bringing legal actions arising out of Section 301 to GATT dispute settlement.<sup>111</sup> During the discussion that followed the presentation of the report, the EC spokesperson criticized Section 301, U.S. government procurement procedures, the new U.S. VRAs on steel, and some

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105. *Id.* at 19. *EEC—Regulation on Imports of Parts and Components*, GATT Doc. L/6657 (Mar. 22, 1990) (Screwdriver Panel Decision), reprinted in *WORLD TRADE MATERIALS*, May 1990, at 5.

106. *Trade Policy Review: The European Communities*, *supra* note 23, at 17.

107. The EC, as opposed to the EC Member States, is not a Contracting Party to the GATT. The EC, nonetheless, represents its Member States in the GATT, and this form of representation has not been contested by the other Contracting Parties.

108. *Mid-term Review*, *supra* note 13, at 13.

109. *U.S. Commitment to Uruguay Round Perceived as Inconsistent with Policies, Report Finds*, *supra* note 23, at 1647.

110. *Id.*

111. See *U.S. REPORT*, *supra* note 23, at 335.

"Buy America" provisions.<sup>112</sup> Most of the other Contracting Parties joined the EC's criticism of U.S. policies, especially with respect to Section 301.<sup>113</sup>

The EC representatives adopted a hard-line position during discussion of the GATT report on the EC. In his introductory remarks, the EC spokesperson noted that the EC is currently undergoing major changes with the establishment of a single European market and the negotiations on the European Monetary Union (EMU).<sup>114</sup> He continued by using uncontested figures to emphasize the EC's dependence on international trade, and he reminded the other Contracting Parties of the beneficial effects of the 1992 project. In a perfect reflection of EC pragmatism, he argued that EC trade policy is not overprotective, by making a "horizontal" comparison between EC trade policy and the trade policies of its major trading partners rather than comparing EC rules with GATT rules.<sup>115</sup> Thus, the EC representative's argument consisted of two patterns. The first was that the 1992 process will result in a more liberal market. The second was that other Contracting Parties also have protective policies. The EC representative made clear that the EC does not agree with the criticism expressed in the GATT report.

This disagreement with the criticism in the GATT EC report can also be seen in the statement of the EC's permanent representative to the GATT.<sup>116</sup> The permanent representative's statement has substantial legal value because it is the statement of an official representative of the EC. The permanent representative enunciated his view of the TPRM: (1) the TPRM is still experimental and "at some point the Contracting Parties will have to confirm it with, perhaps, some adaptations or adjustments found necessary in the light of [our] joint experience";<sup>117</sup> (2) "problems . . . regarding obligations should be dealt with under the dispute settlement procedures, not under this Trade Policy Review Mechanism";<sup>118</sup> and (3) the TPRM can in the future provide the background for assessments on the appropriate policies in

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112. *Id.* at 339.

113. See the arguments of Japan, India, and Brazil, *id.* at 341, 346-47.

114. See GATT Council, *Trade Policy Review Mechanism European Communities: Minutes of Meeting*, GATT Doc. C/RM/M/10 (Apr. 15-16, 1991) at 3.

115. *Id.* at 4.

116. See GATT Council, *Statement by H.E. Mr. Tran Van-Thinh, Permanent Representative of the Commission of the European Communities to the GATT Following the Conclusion of the Trade Policy Review of the European Communities*, GATT Doc. C/RM/6 (Apr. 22, 1991) (Restricted).

117. *Id.* at 1.

118. *Id.* at 2.

order to strengthen the multilateral system, but such an exercise is not for today.<sup>119</sup> Although not explicitly stated, the EC representative's statement implied that harsh criticism of the EC is useless because the multilateral system needs the EC.<sup>120</sup>

Turning to an evaluation of these three points, it seems evident that the first point is merely a conscious and rather useless attempt to undermine the importance of the TPRM. The EC stated, as if it were a new idea, that the TPRM will need future adjustment. In other words, the EC representative's statement seems to assume that the Contracting Parties intended the TPRM to be complete the way it is and that it was supposed to be the basis of new legal obligation. The Contracting Parties, however, intended to apply the TPRM only provisionally until the end of the Uruguay Round and they did not intend the TPRM to be the basis of new legal obligation.<sup>121</sup> Thus, the EC representative merely stated the obvious. In fact, by emphasizing the TPRM's experimental nature, the statement has caused the opposite result from the one intended — instead of undermining the TPRM's importance, the statement has enhanced its importance by showing the other Contracting Parties that the EC is taking the TPRM seriously.

The second point buttresses the conclusion drawn from the first point. The very agreement to use the TPRM as a separate procedure shows that the dispute settlement procedure is not an effective tool for increasing coordination of national trade policies. The TPRM adds a significant new function to the GATT. In the second point, as well as the first, the EC representative is trying to prove that the TPRM report is not a legal document. However, when the Contracting Parties agreed to the TPRM report, they made clear that the TPRM report was not a legal document.

The third point is also controversial. The logical conclusion flowing from it is that the TPRM should not be allowed to have a creative function.<sup>122</sup> The TPRM has a creative function in that the TPRM report provides supplemental interpretation of GATT rules (thereby essentially *creating* new GATT rules) by reviewing GATT rules and making implicit judgments, however weak, that the country has or has not complied with GATT rules. This supplemental interpretation provides the background upon which a country's trade policies can be made more GATT-compliant, but does not in itself consist of *ex ante*

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119. *Id.*

120. *Id.*

121. *See supra* note 17.

122. For more discussion about the creative function, see *infra* Part V.

control over national trade policies. The Contracting Parties did not intend the TPRM to exert *ex ante* control over national policies. In other words, the EC representative has confused the creative function of a surveillance scheme with enforceability of its suggestions. Thus, as in the earlier two points, the EC representative stated the obvious. In addition, the EC's suggestion of separating the TPRM's creative function from the review function is not feasible because, as will be shown below in Part V, separating those functions of a surveillance scheme is very difficult.<sup>123</sup>

The EC representative may have made the third point in order to foreclose any possibility that the recommendations of GATT officials could be used as the basis for reexamining national trade policies. If so, the EC would be suggesting that the TPRM be deprived of its original, intended purpose. In that case, there is no reason for the TPRM or the GATT report to exist. In summary, caution seems to have guided the EC's position; the EC wanted to state clearly its overall opposition to the GATT report in order to avoid even "soft law" commitments.

Finally, the EC representative's implication that harsh criticism of the EC is useless because the multilateral system needs the EC expresses the "power-oriented" technique in international relations. This technique consists of settling disputes with reference, either explicitly or implicitly, to the relative power status of the parties.<sup>124</sup> The EC usually accuses the United States of using this approach, but the EC seemed to have embraced it here. It is needless to say how harmful to the multilateral system such an approach can be.

As a concluding remark, the Contracting Parties that underwent review seem to have taken the TPRM seriously. Their reaction was probably due to the enhanced credibility of the criticism due to its "neutrality" — i.e., it was criticism by the GATT itself (a neutral) and not by another Contracting Party.

### III. THE LEGAL UNDERPINNINGS OF THE TPRM

The TPRM, as already stated, was first introduced on the basis of a GATT Council Decision.<sup>125</sup> Article XXV of the GATT serves as the legal basis for Council Decisions, which are joint actions by the Con-

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123. The IMF and the OECD surveillance schemes have three functions, namely, review, correction, and creation. The TPRM, it will be argued, also has these same three functions. See *infra* Part V.

124. For an explanation of the "power-oriented" technique, see JACKSON, *supra* note 9, at 85-88.

125. GATT Council Decision, *supra* note 15.

tracting Parties. According to article XXV, "representatives of the Contracting Parties meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement."<sup>126</sup> The language of article XXV is broad and does not specify how decisions are to be made. Because article XXV(4) mandates decisions by simple majority in the GATT, article XXV could have been disadvantageous to the developed countries — disadvantageous because the votes of the developed countries could be overruled by the votes of the more numerous, but less economically powerful, developing countries.<sup>127</sup> The Contracting Parties, however, have applied article XXV very carefully through the years, seeking a consensus on most issues — thereby ensuring that article XXV could not seriously disadvantage the developed countries.

Article XXV states that joint action should be taken to facilitate operation and further the objectives of the General Agreement.<sup>128</sup> The objectives of the GATT are stated in the preamble of the General Agreement.<sup>129</sup> The preamble reads as follows:

1. The contracting parties recognize that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.
2. The contracting parties desire to contribute to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.<sup>130</sup>

Thus, the language of the preamble coupled with the language of article XXV gives the Contracting Parties broad power to undertake joint action.<sup>131</sup> Because article XXV has never been used by the Contracting Parties to impose new obligations, however, the GATT Council Decision introducing the TPRM cannot in this case be the source of new obligation on the Contracting Parties.

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126. GATT, *supra* note 1, art. XXV.

127. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 126-28 (1969); see also JACKSON & DAVEY, *supra* note 7, at 311-13; EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES, AND THE EUROPEAN COMMUNITY* 28-30 (1986).

128. GATT, *supra* note 1, art. XXV.

129. Preamble, *supra* note 46.

130. *Id.*

131. See JACKSON, *supra* note 127, at 126.

Until the introduction of the TPRM, a surveillance scheme like it did not exist in the GATT system. This does not mean, however, that no surveillance at all took place. Surveillance had been exercised by the Contracting Parties under article XXV and on numerous occasions when GATT authorities examined national legislation.<sup>132</sup> Traces of a comprehensive surveillance scheme can be found in the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (the Understanding) adopted November 28, 1979, as a result of the Tokyo Round agreements.<sup>133</sup> According to the Understanding, "the Contracting Parties agree[d] to conduct a regular and systematic review of developments in the trading system."<sup>134</sup> The Understanding further stipulated that "particular attention would be paid to developments which affect rights and obligations under the GATT."<sup>135</sup> While these provisions do not establish a periodic review of national trade policies, they point in this direction.

Another objective of the TPRM, transparency of national trade policies, is also not a new idea in the GATT. The transparency objective can be traced through several previous incarnations. First, it is incorporated in article X of the GATT.<sup>136</sup> Under article X the Contracting Parties are required to publish their trade laws and refrain from enforcing a law until it is published.<sup>137</sup> In addition, the Understanding reinforces the transparency requirement by providing for bilateral consultations between Contracting Parties in cases where one of them believes that the other has adopted measures prohibited in GATT.<sup>138</sup> While the binding nature of articles X and XXV of the

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132. As Winham states, "[T]he international trade system is a self-help system." GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATIONS* 402 (1986). For examples of occasions when GATT authorities have reviewed national legislation, see I.H. Courage-van Lier, *Supervision Within the General Agreement on Tariffs and Trade*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 47, 71 (P. van Dijk et al. eds., 1984).

133. *CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS*, Supp. No. 26, at 210-18 (1979) (Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance) [hereinafter UNDERSTANDING].

134. *Id.* at 214.

135. *Id.*

136. Cf. JACKSON, *supra* note 127, at 461-64 (Jackson states that under article X national trade regulation must be "made public," but not that article X requires transparency by Contracting Parties); see also Pieter VerLoren van Themaat, *The Possibilities for National Measures of Implementation to Strengthen the Legal Quality of International Rules on Foreign Trade*, in *FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER* 42, 52-54 (Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., 1988).

137. Lack of information on national trade policies has been perceived by one scholar as a type of "non-tariff barrier." JACKSON, *supra* note 127, at 462. This is especially true since laws regulating import and export can drastically affect trade flows. *Id.*

138. See UNDERSTANDING, *supra* note 133, at 210; see also MCGOVERN, *supra* note 127, at 45.

GATT cannot be seriously contested,<sup>139</sup> the legal nature of the Understanding needs some explanation.<sup>140</sup>

First, as a matter of legal form, an "Understanding" is not mentioned in the General Agreement as a category of binding GATT agreement. However, the General Agreement is quite old, and not overly detailed, and the original Contracting Parties could not predict what the current world trade system would require. Therefore, the lack of such a category of legal agreement should not preclude such an agreement from having legal force if all the Contracting Parties agree and intend it to have legal force.

The second and more important problem is the wording of the Understanding itself, which can sometimes be confusing and susceptible to different interpretations. A good example is provided by its provision on dispute settlement; this provision stipulates that "if a contracting party . . . requests the establishment of a panel . . . the Contracting Parties [will] decide the establishment."<sup>141</sup> This provision has been interpreted by some Contracting Parties as the recognition of a right to a panel and by others as the recognition of the discretionary power of the Contracting Parties to establish a panel.<sup>142</sup> However, this is not the only example in the GATT system, and even in international law, where the meeting of minds — or the non-meeting — is expressed in vague terms. The vagueness of the wording should not prevent the Understanding from being a legal, binding agreement. This Understanding was adopted by a consensus of the Contracting Parties, and there is no compelling reason why the Understanding cannot be viewed as a resolution of the Contracting Parties under article XXV of the GATT. Any differing interpretations that arise out of the vague language can then be resolved later through appropriate GATT procedures.

The Understanding can also be construed as a binding subsequent agreement interpreting the General Agreement under the provisions of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>143</sup> The first issue is whether the Vienna Convention applies to the GATT. The Vienna Convention came into effect on January 27,

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139. See MCGOVERN, *supra* note 127, at 55 (U.S. approach), 57-58 (EC approach).

140. See JACKSON, *supra* note 127, at 96.

141. UNDERSTANDING, *supra* note 133, at 212.

142. On this question, see WOLFGANG BENEDEK, *DIE RECHTSORDNUNG DES GATT AUS VOLKERRECHTLICHER SICHT* 281, 307, 317 (1990).

143. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].



1980.<sup>144</sup> Article 4 of the Vienna Convention states that the articles of the Vienna Convention have no retroactive force.<sup>145</sup> Article 4 is, however, "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention."<sup>146</sup> Thus, any articles of the Vienna Convention that codify existing customary international law will apply to treaties that came into force before 1980. Even countries that have not ratified the Vienna Convention, such as the United States, are bound by those Vienna Convention articles that codify customary international law.

Article 31 of the Vienna Convention<sup>147</sup> addresses the legal value of subsequent agreements — agreements among treaty signatories concluded after the conclusion of a treaty.<sup>148</sup> Article 31 is widely believed to be a codification of customary international law, and the voting on article 31 leaves no doubt: the vote agreeing that this article codified customary international law was unanimous.<sup>149</sup> The claim of codification is also buttressed by the fact that the United States, during the preparatory work of the Vienna Convention, argued that subsequent agreements constitute objective evidence of the understanding of the parties as to the meaning of treaties.<sup>150</sup>

According to article 31(3)(a), "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account along with the context of the treaty.<sup>151</sup> Agreements between parties subsequent to the conclusion of a treaty often purport to produce a commonly acceptable interpretation of the treaty.<sup>152</sup> In the ever-changing world of international

144. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 1, 45 (2d ed. 1984).

145. Vienna Convention, *supra* note 143, art. 4, 1155 U.N.T.S. at 334, 8 I.L.M. at 682.

146. SINCLAIR, *supra* note 144, at 7.

147. Vienna Convention, *supra* note 143, art. 31, 1155 U.N.T.S. at 340, 8 I.L.M. at 691-92.

148. Georg Ress, *Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention*, in *DIE DYNAMIK DER EUROPÄISCHEN GEMEINSCHAFTSRECHTS* 49, 51-52 (Roland Bieber & Georg Ress eds., 1987).

149. RALF G. WETZEL & DIETRICH RAUSCHNING, *DIE WIENER VERTRAGSRECHTSKONVENTION: MATERIALIEN ZUR ENTSTEHUNG DER EINZELNEN VORSCHRIFTEN* 243 (1978).

150. See JACKSON, *supra* note 9, at 88; Myres McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992, 994 (1967); see also WETZEL & RAUSCHNING, *supra* note 149, at 243.

151. Vienna Convention, *supra* note 143, art. 31(3)(a), 1155 U.N.T.S. at 340, 8 I.L.M. at 692; see Richard Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323, 343 (1968).

152. According to Bernhard, subsequent agreements constitute a dynamic element in treaty interpretation. Rudolf Bernhard, *Interpretation and Implied (Tacit) Modification of Treaties, Comments on Arts. 27, 28, 29 and 38 of the ILC's 1968 Draft Articles on the Law of the Treaties*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT 491, 499

economic relations, subsequent understandings are of crucial importance as a means to adjust the original treaty provisions to modern reality. Quick and effective adjustment is especially necessary in the GATT due to the GATT's defective structure.<sup>153</sup> The Understanding is a subsequent agreement concluded by the Contracting Parties (subsequent, that is, to conclusion of the General Agreement itself); therefore it should be considered a subsequent agreement in the terms of article 31 of the Vienna Convention and should be accepted as a valid legal interpretation of the provisions of the General Agreement.

This analysis so far has shown the historical and legal background of the TPRM, and on this score, one final point should be made. Namely, the TPRM should be clearly distinguished from GATT dispute settlement, which the TPRM was not intended to replace.<sup>154</sup> At least two reasons, besides the intent of the parties, dictate this conclusion. First, while dispute settlement is initiated by a Contracting Party's complaint, the TPRM is not; and while in dispute settlement an *ex officio* complaint is unknown, in the TPRM the review is conducted by GATT officials. Second, while a decision arising out of GATT dispute settlement serves as the basis for a legal obligation binding on the Contracting Party, the reports arising out of the TPRM were not intended to serve as a basis for enforcement of GATT obligations.

Although the TPRM was not intended to impose new GATT obligations, because of the continuity that seems to exist among article X of the GATT, the Understanding, and the TPRM, an argument can be made that the adoption of the TPRM imposes an obligation upon the Contracting Parties to undergo TPRM review. This argument lacks merit for several reasons. On its face, the language of the TPRM does not indicate an obligation for the Contracting Parties to undergo review. Moreover, the General Agreement does not require Contracting Parties to cooperate with the GATT.<sup>155</sup>

However, the Contracting Parties, including the major trading powers in the GATT, adopted the TPRM by a broad consensus, and it

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(1967). Such understandings also perform another function; they establish the compatibility of national instruments with the provisions of a treaty. See Winfried Lang, *Les règles d'interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités*, 24 OSTERREICHISCHE ZEITSCHRIFT FÜR OFFENTLICHES RECHT 113, 135 (1973).

153. The failed Havana Charter for the ITO was much more detailed in structure.

154. For discussion of GATT dispute settlement, see GATT, Analytical Index, arts. XXII-1 & XXIII-1, GATT Doc. Leg/2 (1989).

155. An obligation to cooperate does exist, however, in other international organizations, such as the IMF and the EC. See *infra* Parts IV & V.

would be inconsistent<sup>156</sup> for those Contracting Parties that urged its introduction and were subject to its review to refuse to submit to review in the future, provided that the TPRM maintains its current form. Such inconsistencies, however, are not unknown in the sphere of international economic relations. Contracting Parties behaving this way in the GATT become the subjects' of "finger-pointing."<sup>157</sup>

#### IV. THE IMF AND OECD SCHEMES

Examination and comparison of the surveillance schemes of the IMF and the OECD to the TPRM is useful for several reasons. The IMF surveillance scheme makes for an illuminating comparison because the IMF is a sort of sister institution to the GATT, both institutions being pillars of the Bretton Woods System.<sup>158</sup> It is helpful to examine the OECD surveillance scheme, too, because the OECD exercises competence on the same subject matter as the GATT, that is, Member States' trade policies.

The differences between these two organizations and the GATT are numerous. The most important difference between the IMF and the GATT is subject matter: the IMF deals with national monetary policy and the GATT with trade policy. Monetary policy and trade policy are, however, closely interrelated. The OECD and the GATT are different because, aside from the broader subject matter of the former, the OECD is a forum exclusively for developed countries, while the GATT consists mostly of developing countries.<sup>159</sup> One might argue that the greater dependence of IMF Members on the IMF or the increased homogeneity among Member States of the OECD makes inappropriate a comparison of the review schemes of these institutions with the TPRM. These differences, however, explain only the TPRM's delayed introduction into the GATT. In addition, these comparisons are beneficial because the form of the TPRM has undoubtedly been influenced by the forms of the surveillance schemes of the other international organizations, and the TPRM can only benefit from the reforms such schemes have undergone through the years.

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156. On the notion of inconsistency, see Hans Baade, *The Legal Effects of Codes of Conduct for MNEs*, in 1 *STUDIES IN TRANSNATIONAL ECONOMIC LAW* 3, 36-37 (Norbert Horn ed., 1980).

157. See JACKSON, *supra* note 127, at 176 (discussing "finger-pointing" in the context of GATT dispute settlement).

158. *Id.* at 40-41.

159. As Jackson has said, the OECD is a "forum for discussion and future negotiation." John H. Jackson, *Reflections on Restructuring the GATT*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 210 (Jeffrey J. Schott ed., 1990).

Article IV of the IMF agreement<sup>160</sup> constitutes the main legal pillar of the IMF surveillance scheme.<sup>161</sup> The Articles of Agreement of the IMF were modified following the 1971 U.S. decision to abandon the fixed exchange rate system. The present article IV became effective April 1, 1978.<sup>162</sup> Before the establishment of the Bretton Woods System over fifty years ago, every State was entitled to regulate its own currency, according to the jurisprudence of the Permanent Court of International Justice.<sup>163</sup> The Bretton Woods conference that established the IMF put into place a system of stable exchange rates among countries.<sup>164</sup> This system collapsed on August 15, 1971, when U.S. President Nixon unilaterally and without prior consultation announced that the United States would no longer convert foreign-held dollars into gold.<sup>165</sup> The fixed exchange rate system was replaced by the current system, which is a compromise between a "system of stable exchange rates" and a "stable system of exchange rates."<sup>166</sup>

The new article IV, section 1 of the IMF stipulates that "each member undertakes to collaborate with the Fund to promote exchange stability."<sup>167</sup> The wording of this article leaves no room for dispute concerning its legal meaning: the term "undertakes" creates an obligation for the IMF Members to conduct consultations with the Fund in order to promote IMF objectives. In short, there is a duty to collaborate.<sup>168</sup>

Why is such a provision necessary? Why should countries be obli-

160. Second Amendment to the Articles of the Agreement of the International Monetary Fund, *opened for signature* Apr. 30, 1976, art. IV, 29 U.S.T. 2203, 2208 (entered into force Apr. 1-10, 1978) [hereinafter IMF Agreement].

161. For an overview of the IMF surveillance scheme, see KENNETH W. DAM, *THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM* 259-67 (1982); RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 558 (1985); R. Barents, *Supervision within the International Monetary Fund*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS*, *supra* note 132, at 351, 370.

162. See EDWARDS, *supra* note 161, at 527. On the history of article IV and its consecutive draftings, see Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 452 (1983).

163. See *France v. Kingdom of Serbs, Croats and Slovenes*, 1929 P.C.I.J. 44 (ser. A) No. 20/21 (July 12) (case concerning the payment of various Serbian loans issued in France).

164. See ANDREAS F. LOWENFELD, *THE INTERNATIONAL MONETARY SYSTEM* 19 (Int'l Econ. L. vol. 4, 2d ed., 1984).

165. *Id.* at 128.

166. The modification of the Articles of the Agreement of the IMF that followed the U.S. decision to abandon fixed exchange rates was a compromise between those countries that favored floating exchange rates (such as the United States) and those countries that wanted to return to the Bretton Woods System of stable exchange rates (mainly France). See EDWARDS, *supra* note 161, at 505.

167. IMF Agreement, *supra* note 160, art. IV, 29 U.S.T. at 2208.

168. See EDWARDS, *supra* note 161, at 508; JOSEPH GOLD, *THE SECOND AMENDMENT OF THE FUND'S ARTICLES OF AGREEMENT* 26 (IMF Pamphlet Series No. 25, 1978); JOSEPH GOLD, *LEGAL AND INSTITUTIONAL ASPECTS OF INTERNATIONAL MONETARY FUND, SELECTED ES-*

gated to cooperate with the competent authorities of the international organizations they join? After all, countries voluntarily join organizations, and accordingly, the organization's objectives should coincide with national objectives. Thus, the issue of collaboration should never arise. Modern history, however, has shown that international organizations do require a duty to cooperate in order to function effectively. Such a duty to cooperate is especially needed in GATT, where the prevailing pragmatism of individual Contracting Parties has often run counter to cooperation with GATT. In international organizations that are more integrated than GATT, such as the EC, the collaboration requirement is a strict legal obligation.<sup>169</sup>

Such a strict legal formulation of the obligation to collaborate is unknown in the IMF. Still, the legal significance of article IV of the IMF cannot be overlooked.<sup>170</sup> Article IV(1) further elaborates the duty to cooperate as follows:

In particular, each member shall:

- i. endeavour to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
- ii. seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;
- iii. avoid manipulating exchange rates of the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and
- iv. follow exchange policies compatible with the undertakings under this section.<sup>171</sup>

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SAYS 390 (1979); JOSEPH GOLD, *THE ROLE OF LAW IN THE INTERNATIONAL MONETARY FUND* 23 (IMF Pamphlet Series No. 32, 1982); Barents, *supra* note 161, at 387, 391-92.

169. Although the EC is not altogether apposite, since it is unique and more like a nation State than an international organization, it is useful to explore the legal nature of the EC's duty to cooperate. Member States are obligated by the EC treaty to cooperate through positive action (adopting appropriate measures) and negative action (omitting actions that hinder realization of the objectives of the EC treaty). See John T. Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 *COMMON MKT. L. REV.* 645 (1990). Vlad Constatinesco has stated that article 5 of the EEC Treaty embodies "the principle of cooperation." Vlad Constatinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire*, in *LIBER AMICORUM PIERRE PESCATORE, DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION* 114 (1987). EC Member States are themselves involved in the process of EC supervision. See H.A.H. AUDRETSCH, *SUPERVISION IN EUROPEAN COMMUNITY LAW* 231 (1986).

If a Member State violates this obligation, the EC Commission can proceed with legal action against the violating State according to the procedure described in article 169 of the EC treaty. Treaty Establishing the European Economic Community, art. 169, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11; see HANS VON DER GROEBEN ET AL., *KOMMENTAR ZUM EWG VERTRAG* 90 (1974) (description of EC procedure under article 169); see also 1 JACQUES MEGRET ET AL., 1 *LE DROIT DE LA COMMUNAUTÉ ECONOMIQUE EUROPÉENNE* 19.

170. IMF Agreement, *supra* note 160, art. IV, 29 U.S.T. at 2208.

171. *Id.*

The duty to collaborate is thus divided into specific legal obligations that the Members of the IMF must observe.<sup>172</sup>

Using information provided by Members of the IMF under article IV(2)-(3) of the IMF Agreement, the Fund exercises "firm surveillance over the exchange rate policies of members, and . . . adopt[s] specific principles for the guidance with respect to those policies."<sup>173</sup> As a consequence, the IMF has adopted specific criteria appropriate for assessing the compatibility of national measures with IMF obligations under article IV.<sup>174</sup> The surveillance powers entrusted to the IMF are broad;<sup>175</sup> in practice, however, Members tend to interpret IMF articles very narrowly.<sup>176</sup>

To facilitate surveillance, the IMF periodically reviews national policies. According to a decision of the Executive Board on surveillance over exchange rate policies, Members should annually provide the Fund with the necessary information and consult with the Fund.<sup>177</sup> In practice, because of the large and ever-increasing number of IMF Members, the Fund is able to conduct only between ninety and one hundred consultations per year.<sup>178</sup> This means that every Member has its exchange rate policy reviewed approximately every eighteen months. An outline format, now a long-standing practice in the IMF system, serves as the basis for consultations between Members and the Fund.<sup>179</sup>

Strict conditions govern a Member's application for and use of IMF funds; specifically, the famous IMF-conditionality restricts use of IMF funds.<sup>180</sup> In the area of stand-by arrangements,<sup>181</sup> according to article XXX(B), the IMF follows a strict procedure: the Member that

172. According to Gianviti, article IV(1) imposes on the Members obligations of conduct [(i) and (ii)] and obligations of result [(iii) and (iv)]. See François Gianviti, *The International Monetary Fund and External Debt*, 1989 R.C.A.D.I. 250, 267-69.

173. IMF Agreement, *supra* note 160, art. IV(3), 29 U.S.T. at 2209.

174. See EDWARDS, *supra* note 161, at 521-31.

175. Cf. Stephen A. Silard, *Exchange Controls and Exchange Indebtedness: Are the Bretton Woods Concepts Still Workable? A Perspective from the International Monetary Fund*, 7 HOUS. J. INT'L L. 68-69 (1984).

176. See Stephen Zamora, *Recognition of Foreign Exchange Controls in International Creditors' Rights Cases: The State of the Art*, 21 INT'L LAW. 1064-65 (1987).

177. Decision on Surveillance over Exchange Rate Policies, no. 5392-(77/63) (Apr. 29, 1977), reprinted in LOWENFELD, *supra* note 164, at 511.

178. Currently 155 countries are members of the IMF, while the USSR has recently deposited its application for membership. *The Wolf at the Door*, ECONOMIST, Aug. 3, 1991, at 63. The new emerging States of the former USSR will also probably apply.

179. Barents, *supra* note 161, at 372.

180. On its rationale, see MANUEL GUITIAN, FUND CONDITIONALITY, EVOLUTION OF PRINCIPLES AND PRACTICES 2 (IMF Pamphlet Series No. 38, 1981); see also A. W. HOOKE, THE IMF, ITS EVOLUTION, ORGANIZATION AND ACTIVITIES 33-40 (IMF Pamphlet Series No. 37, 2d ed. 1982).

is asking for funds must submit a letter of intent to the IMF describing what national policies will be pursued and what funds are needed to support these policies.<sup>182</sup> In order to draw funds, IMF Members must respect certain performance criteria. As Barents states, "Performance criteria . . . are certain policies, targets or intentions which a member states that it will observe and on the observance of which the member's right to purchase has been made to depend."<sup>183</sup> In cases where it seems unlikely that the performance criteria will be met, additional consultations take place between the Member and IMF officials midway through the stand-by arrangement to discuss the Member's compliance with the performance criteria. At this time the Member is allowed to offer explanations. Usually, the funds are continued even if the Member is not perfectly compliant with the criteria.<sup>184</sup> The Fund's legally binding decision on whether to extend funds is based on the Member's letter of intent and the Member's likelihood of meeting the performance criteria.<sup>185</sup>

The Members of the IMF have, on the whole, respected their obligations. Members have rarely engaged in exchange rate manipulations that contravene IMF articles without prior consultation with the competent authorities.<sup>186</sup> Generally, in the words of former managing director of the IMF H. Johannes Witteveen, Members of the IMF have "a freedom of choice, but not a freedom of behavior."<sup>187</sup> Thus, the above analysis has shown that the IMF has both relatively strict surveillance mechanisms, as seen in the procedures for IMF monitoring of exchange rate policies and for controlling the use of IMF funds, and a relatively strict and formal obligation on Members to cooperate with IMF authorities.

An examination of the OECD scheme is primarily of interest because, as stated above, the OECD has exercised some GATT compe-

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181. A stand-by arrangement is an agreement between the IMF and a Member to loan funds to the Member conditional to respecting certain performance criteria.

182. IMF Agreement, *supra* note 160, arts. IV & XXX(B), 29 U.S.T. at 2208-09, 2257; see Barents, *supra* note 161, at 388-89.

183. JOSEPH GOLD, *THE STAND-BY ARRANGEMENTS OF THE INTERNATIONAL MONETARY FUND* 140 (1970).

184. See JOSEPH GOLD, *THE LEGAL CHARACTER OF THE FUND'S STAND-BY ARRANGEMENTS AND WHY IT MATTERS* 27, 31-38 (IMF Pamphlet Series No. 35, 1980).

185. See Barents, *supra* note 161, at 388.

186. See, e.g., EDWARDS, *supra* note 161, at 606 (discussing the devaluation of Sweden's currency).

187. H. Johannes Witteveen, *The Emerging International Monetary System, Address Before the International Monetary Conference*, 5 IMF SURVEY 180 (1976); see also Stephan Haggard, *The Politics of Adjustment: Lessons from the IMF's Extended Fund Facility*, 39 INT'L ORG. 505 (1985).

tencies by reviewing the trade policies of its Member States.<sup>188</sup> Furthermore, the OECD has chosen a "soft" approach to review of Member States' economic policies, and this approach seems to have influenced the GATT TPRM.

The OECD came into being by replacing the Organisation for European Economic Cooperation (OEEC), which consisted only of European countries.<sup>189</sup> Currently, the OECD includes the United States, Canada, Australia, Japan, and New Zealand in addition to the EC Member States, the European Free Trade Association (EFTA) Member States, and Turkey. Unlike the IMF and the GATT, OECD Members form a relatively homogeneous group; essentially it is a "club" consisting of the economically wealthiest countries of the world. Among the objectives of this "club" is the expansion of world trade.<sup>190</sup> Article 1(c) of the OECD Convention stipulates the organization's intent "to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations."<sup>191</sup> However, the OECD complements rather than substitutes for the GATT; the OECD is more "a forum for the exchange of informed views on policy questions," and "an international economic conference in permanent session" than a regulatory body like the GATT.<sup>192</sup>

According to article 5 of the OECD Convention,<sup>193</sup> the OECD may make decisions, which are binding on its Members, as well as recommendations, which are not binding.<sup>194</sup> In its supervision scheme, the OECD issues only recommendations. In other words, the OECD, after reviewing a Member State's national policy, will not issue a decision that requires the Member to comply with its directives. It will instead recommend certain policies or modifications in order for national policy to attain the objectives of the OECD. The working

188. See KENNETH W. DAM, *THE GATT* 386 (1970) (arguing that the OECD's reviews have not had much impact on national policies).

189. On the history of the OECD, see HUGO J. HAHN & ALBRECHT WEBER, *DIE OECD, ORGANISATION FÜR WIRTSCHAFTLICHE ZUSAMMENARBEIT UND ENTWICKLUNG* (1976); A. H. ROBERTSON, *EUROPEAN INSTITUTIONS: COOPERATION, INTEGRATION, UNIFICATION* 27-29 (3d ed. 1973); Hugo J. Hahn, *La Reconstitution de l'OECE et sa Continuation dans l'OCDE, ANNUAIRE FRANÇAIS DE DROIT INT'L* 751-62 (1962).

190. See Thor kil Kristensen, *L'Organisation de coopération et de développement économique, ses origines, ses buts, sa structure*, 1962 IX EUR. Y.B. 42.

191. The OECD Convention is published in ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT* 43, 45 (1963), reprinted in ROBERTSON, *supra* note 189, at 322 [hereinafter Convention].

192. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD AT WORK* 6, 42 (1964).

193. Convention, *supra* note 191, art. 5.

194. HAHN & WEBER, *supra* note 189, at 99.



sphere at the OECD, as stated by one learned scholar, is efficient and informal, thereby encouraging effectiveness.<sup>195</sup>

The OECD supervision scheme has succeeded primarily because of two factors. First, the economic surveys published by the OECD are considered to be very good and, thus, OECD forecasting is respectfully considered by interested parties. Second, being aware of the reception the OECD surveys have in world financial circles, countries under review try to comply with the recommendations of the OECD in order to attract investment. Before examining the OECD review schemes, it should be noted that the OECD does not impose sanctions when Member States do not comply with the recommendations of the reviewing body.<sup>196</sup> Thus, the OECD review is simply a form of non-binding consultation between OECD officials and the reviewed country.

The OECD surveillance scheme reviews a number of areas of a nation's policies, including economic and trade policy, fiscal and social affairs, and agricultural policy.<sup>197</sup> This article will focus on the trade policy review scheme, which covers the same substantive material as the TPRM. The OECD Member States have, according to article 3(a), a duty "to furnish the Organisation with the information necessary for the accomplishment of its tasks."<sup>198</sup> Accordingly, they cannot refuse to be reviewed without violating their international law obligation. This OECD article is comparable to article IV of the IMF statute. While Member States ostensibly have some discretionary power regarding the disclosure of information — such disclosure must be "necessary for the accomplishment of OECD tasks" — in practice, the OECD unilaterally determines what is necessary for the accomplishment of its tasks. Normally, the OECD asks for more information through its questionnaires than may be technically necessary in order to prepare its reports.<sup>199</sup>

The OECD trade policy review is conducted by a specialized body called the Trade Committee. The Trade Committee sits atop a pyramid of working parties and groups of experts who deal with trade policy review.<sup>200</sup> The purposes of the trade policy review are to identify the main problems and tendencies emerging in international trade, and

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195. H.A.H. Audretsch, *Supervision Within the Organisation for Economic Cooperation and Development*, in SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS, *supra* note 132, at 590.

196. *Id.* at 525.

197. For a complete list of OECD surveillance activities, see *id.* at 540.

198. Convention, *supra* note 191, art. 3(1).

199. Audretsch, *supra* note 195, at 532.

200. See *id.* at 540 (analytical presentation of the working bodies and the groups of experts).

to provide Member States with solutions.<sup>201</sup> The ultimate aim is to promote some form of policy coordination among Member States.<sup>202</sup> The trade policy review takes place annually and is published as part of the overall yearly economic survey of the Member State. While national economic policy commands significant attention, these surveys dedicate a special chapter to national trade policy.<sup>203</sup> The surveys employ cautious language, however, and the most trenchant criticism of national policies remains behind closed doors.<sup>204</sup>

Two successive surveys on U.S. trade policy — the 1988-89 survey<sup>205</sup> and the 1989-90 survey<sup>206</sup> — can be cited as examples for the above propositions. The 1988-89 survey stresses the strong commitment of the United States to the successful completion of the Uruguay Round and to the recently concluded bilateral Free Trade Agreement with Canada. The survey expresses the opinion that bilateral treaties can be helpful in strengthening the multilateral system, implying that the OECD will not dismiss bilateral treaties out-of-hand, but rather will judge them by their actual effect on the multilateral system. The OECD survey takes notice of the strengthened retaliatory authority that the competent bodies in the United States, such as the USTR, have now acquired under the 1988 Omnibus Trade and Competitiveness Act, especially by means of the Section 301 procedure (encompassing Super 301).<sup>207</sup> The survey, however, does not comment on Section 301's compatibility with international law. It also takes notice of the increased U.S. government intervention in specific high-technology sectors — intervention that is occurring at the same time the United States has been criticizing other Member States for their involvement in high-technology sectors.

In the 1989-90 survey the language is similar, although some recommendations are more straightforward. The report takes notice of the bilateral initiatives of the United States, with special reference to

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201. An example of a solution is the work in the OECD on the Producer Subsidy Equivalent (PSE), a device used to measure subsidies and other support to the agricultural sector. The PSE was used by the agriculture group in the Uruguay Round. *OECD Farmers and Agricultural Policies*, THE OECD OBSERVER, Aug.-Sept. 1987, at 5-9; *Agricultural Reform: A Long Row to Hoe*, THE OECD OBSERVER, June-July 1988, at 16-19.

202. On the basic concepts of economic policy coordination in the OECD context, see ERIC STEIN & PETER HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 928-31 (1967).

203. ROBERTSON, *supra* note 189, at 85; Audretsch, *supra* note 195, at 535.

204. Audretsch, *supra* note 195, at 531.

205. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD ECONOMIC SURVEYS 1988-89, UNITED STATES* 98-102 (1989).

206. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD ECONOMIC SURVEYS 1989-90, UNITED STATES* 56 (1990).

207. Omnibus Trade and Competitiveness Act of 1988, § 1301 (codified at 19 U.S.C. § 2411 (1988)).

the Strategic Impediments Initiative (SII) negotiations held with Japan, and expresses concern that an element of managed trade could creep into bilateral treaties. The report recognizes that the United States acted in that year to limit government involvement in promoting new technologies. It also suggests that the origins of the U.S. trade deficit are largely macroeconomic and that trade policy should not be used to address problems with the trade deficit. Although the report does not go further, it clearly disagrees with U.S. views that illicit trade practices by other countries were an influential factor in the enlargement of the trade deficit.<sup>208</sup> Thus, from an analysis of the muted tone of the surveys, one can conclude that the OECD trade policy review scheme is a "soft" form of review. The trade policy review is also of secondary importance to the economic policy review in the OECD yearly surveys. However, no matter how "soft" the review may be, Member States are still obligated to undergo it.

Both the IMF and OECD surveillance schemes follow the same pattern. The organizations conduct a fact-finding process based on information they receive, sometimes by utilizing new questionnaires. On the basis of this information, the organizations' officials consult with the Member States and make a decision or recommendation. A common denominator in the two schemes, apart from their procedural similarity, is that Member States are legally bound to undergo review. This requirement has led in practice to a trusting relationship between the Member States and the particular organization. In addition, the Member States benefit from the high quality reviews they receive. Undergoing review and becoming stronger in the process is consistent with the growing interdependence in international relations. Transparency of national policies is a prerequisite for policy coordination, harmonization, and smooth international relations.

## V. AN ASSESSMENT

The principal feature of the international economic order built after World War II is, as Barents has noted, "the normative nature given to the principle of comparative advantage in international trade."<sup>209</sup> The numerous exceptions from GATT regulations — granted for practically any reason to the Contracting Parties — have undermined the applicability of the GATT and, to a certain extent,

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208. The former U.S. Trade Representative Clayton Yeutter, however, stated that illicit trade practices were not the main cause of what was a huge trade deficit at the time. *Yeutter Defends U.S. Use of Section 301, EEP Before Australian Media Group*, 5 Int'l Trade Rep. (BNA) 47 (Jan. 13, 1988).

209. Barents, *supra* note 161, at 359.

prevented the Contracting Parties from achieving the gains that would result from an optimal distribution of labor at the world level. The attempts to strengthen the GATT regime should address this problem.<sup>210</sup> Hence, the TPRM's contribution to the GATT must be assessed according to this criterion.

As stated earlier, current surveillance schemes perform three distinctive functions: a review function, a corrective function, and a creative function.<sup>211</sup> The review function consists primarily of comparing a national policy instrument with an international standard and making a judgment as to whether the policy instrument conforms to the international standard. Of course, there is a separate question of how specific such a judgment can be, that is, whether such judgment can and should make a point-by-point, or section-by-section, judgment of a national policy's compatibility with international rules. Nevertheless, the three supervision schemes examined in this article perform this review function — the IMF more strictly, and the OECD and the GATT less so.

The corrective function consists of recommending a change in national policy when a national policy instrument is found to be contrary to the international legal obligations of the reviewed country. The reports and decisions issued during review by the international organizations surveyed in this article vary in their binding character. The OECD and the GATT issue mere recommendations while the IMF, in the case of stand-by arrangements, issues legally binding demands for compliance. This does not mean, however, that recommendatory schemes produce no legal effects. The absence of binding force does not amount to the absence of legal character.

The creative function can be described in the following manner. Practice has proved, especially in the context of international organizations, that some legal rules are vague and can lead to different interpretations or, in the case of a long-standing rule, to outdated interpretations. In these cases, international organizations tend to provide interpretation through their surveillance schemes; this supplemental interpretation is the creative function at work. Interpretation through surveillance occurs in the IMF and the OECD and could be

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210. Roessler points out in a more elaborate form that the function of GATT as a negotiating forum is to enable countries to defend their national economic interests, not as against other countries, but as against sectional interests within their own and other countries. Frieder Roessler, *The Scope, Limits and Functions of the GATT Legal System*, 8 *WORLD ECON.* 287, 297 (1985).

211. See G.J.H. van Hoof & K. de Vey Mestdagh, *Supervisory Mechanisms in International Economic Organizations*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS*, *supra* note 132, at 3, 11.

used to strengthen the GATT surveillance scheme, if properly exercised through the TPRM. The creative function, as noted in Part III of this article, is closely related to the review function because international rules must be interpreted before a country's compatibility with international obligations can be judged.<sup>212</sup> The mere decision whether to apply a rule to a specific case requires interpreting whether that rule is indeed applicable to the particular case. Thus, the surveillance schemes examined involve characteristics of all three of these functions. Because international organizations do not apply different instruments for each function, the review schemes are broad enough to perform all three.<sup>213</sup>

The three distinct functions are performed by the TPRM, albeit incompletely. The TPRM has been particularly reluctant to make pronouncements regarding the compatibility of national policies with GATT rules, or to recommend to the Contracting Parties appropriate policies that will bring each Contracting Party within GATT objectives.<sup>214</sup> Thus, on the "softness" of its review, GATT's TPRM seems to have been influenced by the OECD scheme. The GATT has been influenced by the OECD even though, theoretically, the OECD should have less influence on the GATT than the IMF because the GATT and the OECD differ more in form and substance than do the GATT and the IMF. Unlike the OECD, the GATT is not a forum for negotiations leading eventually to some form of coordination of national policies on selected issues. The GATT is, rather, an international organization entrusted with the liberalization of world trade.<sup>215</sup> Because the subject matter of the GATT is concrete, it should seek Member States' compliance with its rules. The pragmatism that has always reigned at GATT, however, has been a barrier to such a perspective. The fact that the TPRM was only recently introduced is probably another reason for its somewhat meek character.

A legal purist will be disappointed with the overall performance of

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212. See *id.*, *supra* note 211, at 12.

213. Cf. John H. Jackson, *Role of Supervisory Mechanisms in the Restructuring of the International Economic Order*, in *RESTRUCTURING THE INTERNATIONAL ECONOMIC ORDER: THE ROLE OF LAW AND LAWYERS* 163, 164 (Pieter van Dijk et al. eds., 1987) (noting that international supervisory mechanisms include a wide variety of institutional methods to review, correct, and create international standards).

214. This reluctance occurs notwithstanding the fact that GATT officials, especially in the case of the EC report, clearly showed their dissatisfaction with EC policies.

215. Technically, the GATT is not an international organization, but a mere protocol of provisional application. However, because of the failure of the ITO, the GATT has emerged as the main *de facto* international organization for the liberalization of world trade. Its constitutional deficiencies appear not to have impeded its remarkable evolution. Cf. JACKSON & DAVEY, *supra* note 7, at 292-96 (GATT's organizational deficiencies may have affected the GATT).

the TPRM. The review function is inadequate because the GATT report refuses to state clearly the grounds of incompatibility of national legislation with GATT rules. The corrective and creative functions are also inadequate because GATT reports have not been daring enough to recommend abolishing incompatible national trade policy instruments. The GATT reports have not been able to fulfill the corrective and creative functions because the reports do not provide a more straightforward interpretation of GATT rules.

However, while the overall performance of the TPRM may be unsatisfactory, the TPRM has still had some impact. Although the Contracting Parties had agreed that the TPRM would not be the basis for imposition of legal obligations, the EC reacted very seriously to criticism of its policies by the GATT under the TPRM. If the EC had been more politically astute, it would have recognized that to undermine the TPRM's importance, it should have ignored the TPRM rather than reacted violently to it. But as it stands, their strong reaction to the TPRM has given extra credence to the TPRM. One would not expect such a reaction to a report deprived of binding character. The TPRM also has effect because criticism of a national trade policy expressed in the report "legitimizes" criticism expressed by other parties. For example, the GATT report on the EC, which concluded that the EC Common Agricultural Policy constitutes a barrier to the liberalization of world trade of agricultural products, legitimized criticisms that had been expressed against the Policy.<sup>216</sup> Criticism of the Common Agricultural Policy is no longer simply the criticism of another Contracting Party, but instead expresses the corresponding view of the GATT. In addition, if at some time after the GATT EC report a GATT panel is convened to examine the compatibility of specific Common Agricultural Policy mechanisms with GATT rules, the panel will likely be influenced by the findings of the GATT report. Thus, the GATT report can exercise a persuasive effect on subsequent GATT practice.<sup>217</sup>

This legitimizing effect should not be underestimated. A Contracting Party that argues for the abolishment of the Common Agricultural Policy can now rely on the GATT critique, thus strengthening the claim and thereby putting more pressure on the EC. The legitimizing effect can also be seen in the EC criticism of U.S. trade instruments during discussion of the U.S. TPRM review. The European Community implied that the United States should modify

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216. GATT REPORT ON THE EC, *supra* note 23, at 8-11, 158-85.

217. Jackson follows this approach as far as the precedent-setting effect of previous panel findings on subsequent panel decisions. JACKSON, *supra* note 9, at 90.

those instruments that had been found incompatible with GATT rules.

As Barents rightly concludes, negative integration is achieved through market forces, while positive integration presupposes some form of government involvement.<sup>218</sup> According to this perspective, government involvement ultimately means reduction of the exercise of national sovereignty in favor of that of an international organization. Unlike other more integrated international organizations, the GATT does not require harmonization.<sup>219</sup> Therefore, establishment of a "level playing field" is even more important in the GATT, and thus should be a current prime objective.<sup>220</sup> If nothing else, the history of the GATT has shown that the lack of a "level playing field" can eliminate substantial gains from the liberalization of world trade.

The GATT has, of course, already affected national policies to a certain extent.<sup>221</sup> The GATT should now shift from primarily trying to affect national trade policies, to emphasizing compliance with internationally determined rules. The TPRM is a step, albeit a short one, in this direction. The first step toward mandating compliance is the introduction of an article to the GATT comparable to article 5 of the EEC Treaty. As previously discussed, both the IMF and the OECD schemes contain provisions obligating Member States to collaborate with the organizations, thereby providing a legal vehicle to ensure effective surveillance schemes.<sup>222</sup> Also, as discussed earlier, a legal obligation to collaborate is not provided by either article X or article XXV of the GATT.<sup>223</sup> Such a requirement cannot be created by long-standing practice because, except for very specific areas, international eco-

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218. Barents, *supra* note 161, at 362.

219. The EEC is an example of an organization that imposes a harmonization obligation. See PIETER V. VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW: A CONTRIBUTION OF LEGAL HISTORY, OF COMPARATIVE LAW AND OF GENERAL LEGAL THEORY TO THE DEBATE ON A NEW INTERNATIONAL ECONOMIC ORDER* 336 (1981). On the evolution of the respective EEC provisions in the Single European Act, see JEAN DE RUYT, *L'ACTE UNIQUE EUROPEEN* 166 (1987).

220. For an explanation of "level playing field," see JACKSON, *supra* note 9, at 17.

221. On this question, see Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 *HARV. INT'L L.J.* 501, 522 (1985); Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 *YALE L.J.* 1299, 1314 n.36 (1971). Some countries have even changed their legislation because of that legislation's incompatibility with GATT rules. The United States, for example, has changed legislation as a result of an adverse GATT panel decision in the DISC case. See Jackson, *supra* note 159, at 50. For information on the DISC case in GATT, see John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 *AM. J. INT'L L.* 747 (1978); see also Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 *MINN. L. REV.* 1443 (1988).

222. See discussion *supra* Part IV.

223. See discussion *supra* Part III.

conomic law is predominantly treaty law and customary rules evolve only with difficulty.<sup>224</sup> For example, according to some scholars, even the MFN clause, a cornerstone of the GATT, is not a rule of customary international law.<sup>225</sup> Thus, irrespective of how far-reaching a collaboration requirement in the GATT should be, such a requirement should at least provide a legal basis for the TPRM or its future incarnation to function.<sup>226</sup>

The Contracting Parties have decided to continue the TPRM in 1992.<sup>227</sup> This decision is evidence of an existing consensus among the Contracting Parties to pursue the TPRM in its current form. The form, however, is not all that matters in international law, as nothing precludes countries from invoking *opinio juris* even against soft law.<sup>228</sup> Judging by the EC's reaction to the GATT TPRM report criticism, even in soft form, is intolerable to some of the most influential Contracting Parties to the GATT. A TPRM that urges *ex ante* control of national trade policy must not be delayed for the future. Contracting Parties committed to the strengthening of the GATT and the multilateral regime should keep this in mind.

Three different proposals can be advanced to serve as first steps toward a rule-oriented approach to the GATT. First, to eliminate the abuses of some Contracting Parties, qualification as a developed or developing country for GATT purposes could be made dependent on the findings of a periodic TPRM review. Thus if a country can no longer objectively be classified as a "developing country," it will lose developing country status and the attendant advantages conferred by the GATT. In this way, Contracting Parties will be forced to assume their proper share of responsibility for the regulation of world trade.

Second, the TPRM can be used to monitor trade protection measures better. Measures authorized by the GATT can more easily be distinguished from measures that are simply tolerated by the GATT. For example, VRAs should be closely examined by the TPRM reviewing body. The European Community and the United States, which

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224. JACKSON, *supra* note 9, at 22; see also Stephan Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT'L L. 9, 34 (1989).

225. See JACKSON, *supra* note 9, at 134; see also *Report of the International Law Commission on the Work of the Thirtieth Session*, U.N. GAOR, 33rd Sess., Supp. No. 10, U.N. Doc. A/33/10 (1978) (the work of the International Law Commission on this subject).

226. See Jackson, *supra* note 159, at 215 (noting a continuing trend toward a rule-oriented approach in international relations, part of which arguably is conforming national policies to GATT rules).

227. *Trade Policy Review Mechanism Programme of Reviews for 1992*, GATT Doc. L/6887 (July 17, 1991).

228. Still, as Jackson points out, international organizations should be prepared for the worst possible scenario. See Jackson, *supra* note 159, at 217.



conclude most VRAs, are subject to review every two years, and therefore, the TPRM provides a means for making timely assessments of the evolution of VRAs.<sup>229</sup> The performance criteria of the IMF can provide a source of inspiration for the GATT to create its own performance criteria to periodically review VRAs in order to proceed more effectively in the gradual elimination of such restraints.

National trade policy is not independent, but is part of a nation's overall economic policy. The economic history of the world shows that countries with economic or financial problems invariably resort to protectionism. Improved functioning of the world system depends partly on strengthening the ties between the IMF, the OECD, and the GATT. Thus, the third proposal is for the TPRM to provide a report on national trade policies while the IMF provides an assessment of monetary policy, and the OECD provides an assessment of overall economic policy and development trends in particular countries. In this way, all three reports, when read together, will provide a complete report of national trade policies in the context of overall economic policies.

In its present form, the TPRM will serve only as a means of enhanced transparency because GATT's dispute settlement procedures are currently the only way to legally determine compatibility of national policies with GATT rules.<sup>230</sup> Still, in the words of GATT Director-General Arthur Dunkel, the TPRM is a long-term enterprise.<sup>231</sup> As such, if the TPRM progresses to become a more integrated scheme, the boundary between transparency and legal assessment will become more indistinguishable and, ultimately, the latter will replace the former.

Henkin characterizes the GATT legal system as primitive and "struggling to achieve some measure of regulation which all admit to be essential."<sup>232</sup> The negotiating group on the FOGS proved him right; as discussed above, the TPRM, as it stands now, is a policy review mechanism that fails to argue along legal lines.<sup>233</sup> In the future it

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229. The EC and the United States are two of the few entities that have the economic power to impose VRAs.

230. See GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: AUSTRALIA 3-4 (Mar. 1990) (introductory remarks by the Director-General of the GATT, Mr. Arthur Dunkel) [hereinafter Comments of Dunkel]; cf. Qureshi, *supra* note 12, at 159; cf. also Price, *supra* note 24, at 235.

231. Comments of Dunkel, *supra* note 230, at 3.

232. Louis Henkin, *International Law: Politics, Values and Functions*, 216 R.C.A.D.I. 19, 191 (1989); see also C. MICHAEL AHO & JONATHAN D. ARONSON, TRADE TALKS: AMERICA BETTER LISTEN 46 (1985).

233. Jackson has characterized the FOGS's approach as "cautious." JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 91 (1990).

should become a more balanced scheme, a hybrid of policy review and legal argumentation, providing a basis for bringing national "policies into conformity with what is perceived to be the collective interest."<sup>234</sup> A rule-oriented approach can probably start here.

### CONCLUSION

For the moment, GATT's trade policy review mechanism is essentially a mechanism to provide enhanced transparency in the GATT system. The history of GATT — progressing from article X, through the Understanding, and now to the TPRM — clearly demonstrates the GATT's self-expressed need for enhanced transparency in multilateral trade relations. In other international organizations, surveillance schemes are not limited to the pursuit of transparency — but in the GATT and its current TPRM, transparency is the lone goal. This is so because the Contracting Parties intended that the TPRM be limited to addressing transparency deficiencies. Furthermore, if required to analyze the consistency of national policies with the General Agreement in a trade policy review, the GATT Secretariat would be called upon to authoritatively interpret the General Agreement. But that power to conclusively interpret the General Agreement is placed exclusively with the Contracting Parties; thus, the TPRM must be viewed as limited to the pursuit of transparency. This argument must not be taken to its extreme, however, because doing so could well deprive the TPRM of all its functions.

Recognition should be given now to the desirability of shifting the TPRM, in the future, from a mere policy review scheme to a more balanced review that incorporates into its present, limited mandate a dose of legalistic argument. Though desirable, this shift is not for the present, nor probably even for the immediate future, in light of the reigning pragmatism in the GATT. Despite this, in the short-run the TPRM can provide effective monitoring of existing trade protection. Those who favor a law-oriented approach to the GATT should carefully consider the possibilities that the TPRM has created, because it is through their own behavior that the Contracting Parties must provide rationalism in international trade relations.

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234. Jacques H.J. Bourgeois, *GATT Surveillance of Trade Related Policies*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 12, at 159.