

## GATTzilla v. Communities

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## GATTzilla v. Communities

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### Introduction

An international agreement like the General Agreement on Tariffs and Trade<sup>1</sup> (GATT) ultimately must be judged at the community level.<sup>2</sup> In villages, towns, and cities, real people work, play, and raise children. It is

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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. 188, *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter B.I.S.D.], 4th Supp. 1 (1969) [hereinafter GATT].

2. The word "community" is used here to mean the jurisdiction of political and legal power most accessible to citizens. Usually, this is synonymous with a city, town, or village. A neighborhood within a municipality, such as Russian Hill in San Francisco, might also be considered a community if the city has given it meaningful power.

there where they encounter most directly the actual effects—both good and bad—of so-called “free trade.” Contrary to the predictions of most neoclassical economists, the rapid mobility of goods and capital across the planet, which the Uruguay Round of GATT will greatly accelerate, poses a growing threat to every community’s quality of life. While one can imagine a GATT agreement that would enhance community life, the Uruguay Round does just the opposite: it thwarts local economic development, promotes the unsustainable use of local resources, and undermines local self-determination. Communities of the world need to recognize the problems posed by the Uruguay Round and mobilize political resources to undo it or, failing that, to demand negotiation of a more community-friendly GATT.

In recent years the internationalization of once local corporations has placed a growing number of communities in a terrible dilemma: either cut wages, eviscerate environmental standards, and offer tax breaks to induce corporations to build new factories or offices, or prepare to become an economic ghost town. Almost every U.S. town or city has learned that capital flight is not just a hypothetical danger. According to estimates by Barry Bluestone of the University of Massachusetts at Boston, decisions by corporations to move to other states or overseas resulted in the loss of 22.3 million jobs between 1969 and 1976 and 32-38 million jobs in the 1970s.<sup>3</sup> Most of these displaced workers ultimately found new jobs, but they had to accept pay cuts and lower quality work.<sup>4</sup> States and cities have responded to corporate mobility by offering lavish incentive packages for corporations to stay in or relocate to their locales. For example, to induce Diamond Star Motors, a joint venture between Mitsubishi and Chrysler, to build an automobile assembly plant in Bloomington, Illinois, in 1985, Illinois offered \$276 million in aid and tax breaks and Bloomington offered another \$10 million of land and \$20 million in local tax abatements—a total of almost \$28,000 per new job.<sup>5</sup> Indiana paid \$50,000 per job to convince Subaru-Isuzu to open a factory in Lafayette.<sup>6</sup>

Multinational corporations have become increasingly adept at pitting state and local governments throughout the world against one another. In 1992, for example, the German automaker BMW simultaneously courted South Carolina and Nebraska as possible locations for a new assembly plant that would cost \$250-300 million and produce 2,000 jobs.<sup>7</sup> Nebraska offered a benefits package worth \$100 million; South Carolina topped it with an offer worth \$150 million and won the deal. Although the greater incentives certainly played a role in BMW’s choice, the decisive factor may have been South Carolina’s historic low wages and hostility to unions. The

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3. Barry Bluestone, *Deindustrialization and Unemployment in America*, REV. OF BLACK POL. ECON., Fall 1988, at 31.

4. BENNETT HARRISON & BARRY BLUESTONE, *THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA* 5 (1988).

5. Robert B. Reich, *Who Is Them?*, HARV. BUS. REV., Mar.-Apr. 1991, at 77, 85.

6. *Id.*

7. DONALD L. BARLETT & JAMES B. STEELE, *AMERICA: WHO REALLY PAYS THE TAXES?* 299-306 (1994).

average manufacturing wage in South Carolina, which BMW ultimately paid, was \$10 per hour, \$7 less per hour than that received by the average U.S. auto worker and \$13 less than that earned by the average German auto worker.

Most of the influence corporations wield over state and local laws, however, is more subtle. State legislators and city council members, under steady barrage by corporate-supported think tanks and economists, have become convinced that the key to "global competitiveness" is to "get government off the backs of private enterprise." This translates into fewer legal protections for union activities, lower minimum wages, looser environmental standards, and greater obstacles to consumer-product lawsuits. No piece of legislation or voter initiative protecting workers, the environment, or consumers can proceed very far without opponents warning about the adverse consequences for the local "business climate." Unfortunately, the warnings are often correct: the global economy inevitably means that every community effort to improve its quality of life may undermine its ability to attract or hold on to corporations. Communities throughout the world are now caught in a downward spiral of ever lower wages and environmental standards—a competition in which there are no winners.

What alternatives do communities have? How can they increase their leverage over mobile corporations and regain control over their economies? Is there a way communities can ensure themselves full employment, ecological sustainability, economic justice, and broad democratic participation?

Ultimately, a long-term solution to capital mobility and community disempowerment is to force corporations to adhere to tough, enforceable international standards protecting workers, consumers, and the environment that no jurisdiction—regional, national, state, or local—can undercut. This could be done either by appending a "social charter" to the GATT, like that adopted by the European Union,<sup>8</sup> or by negotiating a separate international treaty governing corporate conduct. The Clinton Administration has shown rhetorical sensitivity to this goal by suggesting that the next GATT round should address labor and environmental concerns.<sup>9</sup> But even with an unprecedented transnational organizing effort by labor unions, environmentalists, and communities, it will be at least five to ten years before these kinds of legal instruments could be enacted and another decade before the inevitable kinks in enforcement are worked out. There is no reason to expect that the learning curve for multilateral efforts to control corporate misbehavior will be much shorter than the five-decade learning curve for the GATT itself. Yet communities face

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8. Benn Steil, "Social Correctness" Is the New Protectionism: *Labor and Free Trade*, FOREIGN AFF., Jan./Feb. 1994, at 14.

9. See, e.g., Robert B. Reich, Secretary of Labor, Keynote Address, Symposium on International Labor Standards and Global Economic Integration, Department of Labor, Apr. 25, 1994.

problems that call for urgent attention. They cannot afford to wait half a century to halt the destruction of their economies.

Unfortunately, the Uruguay Round moves the world *away* from a global code of conduct. It puts restraints on government, not corporations. It gives private enterprises license to relocate their factories and to sell their products practically anywhere while substantially limiting the power of public institutions to control these transactions. It weakens the power of governmental authorities at all levels to regulate the safety of goods and services. It forecloses many possibilities for public bodies to enter the marketplace as buyers, sellers, producers, or financiers. It creates a powerful World Trade Organization (WTO) that can develop rules governing trade and product regulation without democratic decision-making or rudimentary due process. And it says virtually nothing about protecting workers, the environment, or communities. In short, it creates a global framework for crude, laissez-faire capitalism akin to the depression-prone policies of Herbert Hoover.

Perhaps the most insidious feature of the GATT is that it systematically strips communities of powers they might otherwise use to protect themselves against the adverse effects of the global economy. Even without an international corporate code of conduct in place, communities might be able to influence the behavior of multinational firms through regulations, subsidies, tax abatements, public investments and contracts, community ownership, and lobbying. The Uruguay Round of the GATT, however, preempts or weakens nearly all these powers. Once in effect, the new GATT agreement will lock into place a new economic order that may permanently relegate communities to the dustbin of history.

## I. Living in a GATTless World

In the absence of an international code of conduct governing multinational corporations, how might communities exercise a modicum of control over capital mobility? A clear answer to this question is important for two reasons. First, it suggests some of the survival strategies communities will need to cope with the global economy, with or without the GATT. Second, it points to the essential state and local powers a community-friendly GATT would have to protect.

There are at least five ways communities can reclaim their economic destiny. First, communities can place regulations on products and corporations that pass through their jurisdiction. Second, they can choose to invest municipal monies in and enter contracts with firms that adhere to high standards. Third, they can anchor corporations to the community by buying them out or obtaining a major ownership stake. Fourth, they can delink selectively from the global economy. Finally, they can lobby national and international institutions for stronger standards governing corporate behavior.

A. Regulation<sup>10</sup>

One way communities can discipline globe-trotting corporations is to regulate products passing through their jurisdictions and businesses setting up shop there. Product regulation is straightforward and common. Many communities enact tough standards for products bought or sold to protect public health, safety, welfare, and morals. Sometimes communities also ban or penalize products that were produced under unacceptable circumstances, such as with child or prison labor. But most countries frown upon these "extraterritorial" ordinances—that is, those that attempt to influence production methods outside their own jurisdiction—fretting that they might trigger retaliatory actions or trade wars. The controversial GATT ruling against the U.S. Marine Mammal Protection Act, which banned imports of tuna caught with nets that unnecessarily killed dolphins, is an example of the hostility of trade regulators to extraterritorial legislation.<sup>11</sup>

Communities have relatively broad powers to regulate corporations with plants, offices, and stores located within their jurisdictions. To varying degrees in different countries, municipalities can enact higher minimum wages, better working conditions, and stronger environmental standards than those adhered to by their national governments. They can demand regular reports on energy and resource use or worker health and safety. Of course, these regulations do not circumvent the original problem: the more regulations a community imposes, the less likely corporations will locate there.

Communities, therefore, have sought to develop incentives to induce corporations to come and stay. According to the Chicago-based Midwest Center for Labor Research,

during the 1980s, 90 percent of major new plants constructed in the U.S. and 50 percent of major plant expansions benefitted from one or more forms of public investment: Industrial Revenue Bonds, Urban Development Action Grants, Community Development Block Grants, infrastructure improvements, property tax reductions or abatements, Jobs Training Partnership Act funds, or various state funds for financing and training.<sup>12</sup>

States and cities also have sought to deter corporations from leaving prematurely. The city of Chicago tried to enjoin the parent company of Playskool in 1983 from shutting down on the grounds that it had promised not to sell off its assets for twenty years.<sup>13</sup> The case was ultimately settled out of court, when Playskool promised to keep the plant open one more

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10. Much of the information in this section is drawn from: ROGER KERSON & GREG LEROY, *STATE AND LOCAL INITIATIVES ON DEVELOPMENT SUBSIDIES AND PLANT CLOSINGS* (1989); and HANY KHALIL, *TOP 10 POLICY HITS OF THE 1980S AND 1990S: PUSHING THE ENVELOPE* (October 1993) (draft, on file with the *Cornell International Law Journal*).

11. See David Phillips, *Dolphins and GATT*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 133 (Earth Island Press ed., 1993).

12. KERSON & LEROY, *supra* note 10, at 49.

13. KHALIL, *supra* note 10, at 4.

year, to set up a job-placement center for unemployed workers, and to contribute \$50,000 to support displaced workers.<sup>14</sup>

After General Motors announced its plans to relocate a plant from Ypsilanti, Michigan, the city sued to enjoin GM from moving.<sup>15</sup> A lower court held that the city had an implied, common-law obligation to compensate the community in return for favorable tax treatment.<sup>16</sup> A higher court reversed the ruling,<sup>17</sup> and the case is now on appeal. The trial court decision would have been less vulnerable to reversal had the city passed an ordinance to regulate corporate closures. For example, Ypsilanti might have demanded that all companies with more than fifty employees provide at least three months notice and two months pay before closure.<sup>18</sup> Violations might be punishable by a fine large enough to enable the city to pay severance to displaced employees. In fact, between 1979 and 1982 ten state legislatures considered bills that would have required corporations to give one to two *years* of notice to the community before closure.<sup>19</sup>

A local ordinance also might require any corporation shutting down to offer to sell its factory to the workers or to other investors in the community. The city of Pittsburgh, Pennsylvania, passed an ordinance mandating that firms about to close a factory issue an economic impact statement exploring alternatives, including the possibility of an employee buyout.<sup>20</sup> Washington state considered a "social compact" bill in 1992 that would have given workers the right of first refusal—the right to purchase a plant before it is offered for sale to any other party.<sup>21</sup> Some states have created special funds to assist worker buyouts: Illinois and Michigan have revolving loan funds for such purposes, and both states along with California authorize the use of industrial development revenue bonds for buyouts.<sup>22</sup>

Some states go even further and allow state or local governments to use their powers of eminent domain to take over plants about to be closed.<sup>23</sup> The U.S. and state constitutions require that such takeovers serve a public purpose and the owners receive "just compensation,"<sup>24</sup> but

14. *Id.*

15. *Id.*

16. *Charter Township of Ypsilanti v. General Motors Corp.*, No. 92-43075-CK, 1993 WL 132385 (Mich. Cir. Ct. Feb. 9, 1993).

17. *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556, 557 (Mich. Ct. App. 1993).

18. The Federal Worker Adjustment, Retraining, and Notification Act (WARN) requires companies with more than 100 or more employees to give at least two months notice of a plant shutdown or major layoff. 29 U.S.C. § 2101 (1988).

19. KHALIL, *supra* note 10, at 5.

20. *Id.* A Pennsylvania court, however, invalidated the law on the grounds that the city had exceeded its power. *Smaller Mfrs. Council v. Council of Pittsburgh*, 485 A.2d 73, 77 (Pa. Commw. Ct. 1984).

21. KHALIL, *supra* note 10, at 4.

22. *Id.*

23. *Id.*

24. U.S. CONST. amend. V.

compensation can be below (often far below) market value.<sup>25</sup> The states of Illinois, Ohio, and Pennsylvania permit government takeovers whenever plant closure or relocation will adversely affect the local economy.<sup>26</sup> New Bedford, Massachusetts, prevented the closure of the Morse Cutting Tools plant when it attempted to take it over, which prompted the owner, Gulf and Western Corporation, to sell the plant to a third party.<sup>27</sup>

These restrictions on corporate mobility hardly exhaust the universe of possibilities. Here are some other examples:

- Any firm in Illinois that receives a state tax abatement is obligated not to shut down during the period of the abatement or the state will "clawback" the subsidy and force the firm to pay the entirety of the abatement plus eighteen percent interest.<sup>28</sup>

- A proposed bill in New Jersey would create an Industrial Retention Commission empowered to deny state subsidies, contracts, and pension investments to any company found to have hurt local employment through plant transfer.<sup>29</sup>

- Maine requires corporations engaged in major takeovers to reinvest in the state.<sup>30</sup>

Altogether, these laws provide a powerful arsenal for local governments to raise the costs of corporate exit and deter sudden departures. Once again, however, the limitation of this strategy is obvious: the more onerous the restrictions, the less likely corporations will set up shop in the community.

## B. Selective Investment and Contracting

One way communities can escape corporate retribution for regulation is to place financial rewards and punishments on firms not located in the jurisdiction. This can be done through public investment and contracting decisions. Most communities invest their surplus revenues and public employee pension funds, and most buy goods and services and enter into contracts with private corporations. These proprietary decisions are usually made based on strictly economic criteria: Which investments will provide the greatest long-term rate of return? Which goods and services are the least expensive? Which contractors are the most reliable? Some communities have begun to add political criteria to these decisions, rewarding well-behaved corporations and punishing poorly behaved ones.

An early example of this occurred in the Netherlands in 1975 when several Dutch cities convinced Stevin, a major dredging and building firm, to pull out of Chile after General Augusto Pinochet had overthrown the

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25. Recent Supreme Court decisions on takings, however, suggest that states and cities may have to pay higher levels of compensation. *See, e.g., Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

26. *KHALIL, supra* note 10, at 4.

27. *Id.*

28. *Id.* at 5.

29. *Id.*

30. *Id.* at 6.



elected government of Salvador Allende.<sup>31</sup> The head of Stevin, which had signed a 62.5 million dollar contract with Pinochet, defended the deal by arguing: "It's normal in Chile to change governments by coup d'etat."<sup>32</sup> The Chilean community in Holland and the Dutch Labor Party were outraged by the comment and called for a boycott. Rotterdam and Haarlem decided to suspend their contracts with Stevin; other cities were prepared to follow suit. Afraid of losing the more than fifty percent of its business dependent on Dutch local governments, Stevin canceled its Chilean work.

Perhaps the most successful use of selective investment and contracting was the sanctions movement against South Africa. Over the last twenty years hundreds of municipalities worldwide decided to stop investing in or entering contracts with firms doing business in South Africa. In the United States a total of 27 states, 25 counties, and 101 cities enacted sanctions.<sup>33</sup> These U.S. jurisdictions decided to reinvest more than \$20 billion in "clean" firms with no ties to apartheid.<sup>34</sup> Some U.S. communities also refused to do their banking with or to buy goods from tainted companies. The Port of Wilmington, Delaware, refused to unload any cargo from South Africa.<sup>35</sup> Once these sanctions were put into effect, two-thirds of all American companies with ties to South Africa sold off their equity shares. In 1986, the U.S. Congress passed the Comprehensive Anti-Apartheid Act, mustering the supermajority needed in both legislative houses to overcome President Ronald Reagan's veto.<sup>36</sup>

An important lesson of the anti-apartheid movement is that a relatively small number of cities can have a dramatic effect on the behavior of corporations and national politicians. Firms fear the loss of even one major municipal client, and the prospect of losing hundreds terrifies them. Congressional legislators, many of whom were once local government officials, wish to avoid angering urban constituents. These realities give communities enormous leverage against corporate irresponsibility, even if they act alone.

The anti-apartheid campaign was the first time many communities realized the power their investment and contracting decisions gave them over corporations. Since then, they have begun to add other political and moral criteria. By 1987, ten cities and counties in the United States refused to buy goods from firms involved in the manufacture of nuclear weapons.<sup>37</sup> Cottage industries have sprung up to promote "socially

31. MICHAEL H. SHUMAN, TOWARDS A GLOBAL VILLAGE: INTERNATIONAL COMMUNITY DEVELOPMENT INITIATIVES 32 (1994).

32. *Id.*

33. *The Last Mile—U.S. Communities and South Africa*, GLOBAL COMMUNITIES (Inst. for Pol'y Stud., Washington, D.C.), Winter 1991-1992, at 1.

34. *Id.* at 2.

35. Wilmington Exec. Order No. 1986-1 (July 3, 1986) (on file with the *Cornell International Law Journal*).

36. The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (codified as amended at 22 U.S.C. §§ 5001-5117 (1986)).

37. *Nuclear Free Zones with Legislation Regarding Nuclear Free Investment and/or Contracting*, NUCLEAR FREE AMERICA, Nov. 1987, at 1.

responsible investment" and "Green purchasing."<sup>38</sup>

These initiatives could be the beginning of a global social charter drafted and enacted at the grassroots level. A problem with this kind of decentralized approach is that ten cities might adopt ten different investment/purchasing screens and send ten different and possibly contradictory signals to target corporations. But one can imagine progressive cities worldwide coming together, formulating a standardized code of conduct, setting up a central clearinghouse of information on corporate behavior, and agreeing to invest in or to purchase products only from responsible corporations. A consortium of communities and nongovernmental organizations (NGOs) might attempt to grade corporate behavior, just as investment houses regularly grade corporate economic performance. Any firm with a poor rating would be ineligible for municipal business.

One consequence of this strategy might be the emergence of two global blocs of communities, each endorsing different economic paradigms and each doing business with different corporations. The "neoliberal bloc" of communities might enjoy cheaper goods and higher rates of return from its investments, but it would also have to endure deteriorating working conditions and environmental quality. The "socially responsible bloc" might end up paying inflated prices, but its citizens would have a higher quality of life.<sup>39</sup> Even though the communities and corporations in the latter bloc would start out in the minority, over time, as more workers in the neoliberal bloc lost jobs and pay, as their problems from pollution and unsafe products multiplied, as ecology, labor, and social change organizations emerged to respond to these problems, more and more neoliberal communities and corporations would probably begin to choose a better quality of life over obsolete notions of efficiency. The mere existence of an alternative bloc would give progressive politicians and activists a concrete goal for organizing.

### C. Community Ownership

A more direct way to ensure that corporations do not desert a community is to root ownership there. If a community owns and operates an enterprise, it will only allow the business to relocate if it is clearly in the community's interest. An owner deeply connected to a home base will examine not only rates of return of alternative sites in the abstract but also the impact of moving on local employment and community life.

There are two reasons why a rational community owner would favor industrial retention more than a private owner. First, a private owner looks for the highest rate of return, while a community owner only needs a

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38. The Social Investment Forum, for example, is a trade association with more than 1,000 members. Mark Dowie, *Clean, Green and Guilt-Free Funds*, *THE NATION*, Apr. 26, 1993, at 551.

39. The evidence that social responsibility renders firms less competitive is hardly clear. It "is almost impossible to prove one way or the other" that portfolios with securities from socially responsible firms perform more poorly than other portfolios. *Id.* at 554.

rate of return above zero. In 1975, the Sperry Rand Corporation decided to shut down a subsidiary called the Library Bureau in Herkimer, New York, because it was not achieving a rate of return of twenty-two percent, the ambitious target the parent company had set for all its subsidiaries.<sup>40</sup> Closure of this plant, which employed 250 people, would have decimated the community. So, the workers and local residents decided to buy the firm from Sperry Rand. A third of the money was raised by selling shares of stock, and the remainder came from loans from local banks and the U.S. Department of Commerce. In its first year of operation under new management, the firm earned a seventeen percent rate of return—a return inadequate for Sperry Rand but more than enough for this small community.

Hard-nosed economists might reply that Herkimer would have been smarter to invest its money in firms like Sperry Rand that were earning twenty-two percent or more. The problem is that one rarely knows with certainty what the rate of return on an investment will be. The higher the return, the higher the risk. It is certainly rational for a community to invest in a known enterprise in its own backyard which it can improve through sweat equity and which, in any case, will keep the local economy moving, than to risk money in an unknown enterprise hundreds or even thousands of miles away.

There is a second economic reason why a community owner will retain an industry more diligently than a private owner: to avoid devastating transition costs. When a company abandons a community, it rarely has to pay unemployment compensation and welfare benefits. Nor does it have to figure out how ancillary businesses will be kept alive when fewer people have jobs or disposable income. It almost never has to cope with plummeting property values and a depleted tax base that can no longer support schools, hospitals, street repairs, electric utilities, or police. What economists reify and dismiss as regrettable “externalities” are in fact significant enough to motivate a community to prop up a business with even a negative rate of return. The layoff of thousands of steel workers in Youngstown, Ohio, in 1977 cost the federal government seventy million dollars that year in unemployment compensation, welfare payments, lost taxes, and other costs.<sup>41</sup> It would have been cheaper for Youngstown, with federal support, to invest at least seventy million dollars to upgrade the plant and keep it running.<sup>42</sup>

There is significant precedent in the United States for community involvement in the local economy. U.S. state and local governments have created more than 6,300 public-private partnerships to build highways and bridges, to run electric and water utilities, to dispose of hazardous wastes,

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40. GAR ALPEROVITZ & JEFF FAUX, *REBUILDING AMERICA: A BLUEPRINT FOR THE NEW ECONOMY* 149 (1984).

41. *Id.* at 142-43.

42. The logic for the federal government supporting community bailouts is at least as strong as that for bailing out major corporations like Chrysler.

to operate ports, and to perform other services.<sup>43</sup> Because these enterprises are typically engaged in public works, it is hard to imagine them being tempted to move overseas. The New York Transit Authority is uninterested in running light-rail transit in Manila. But public authorities also can acquire or sell industrial plants. Pittsburgh responded to the departure of its steel factories by creating the Steel Valley Authority, a consortium of workers, the community, and private investors that converted an old metal-works plant into the City Pride Bakery.<sup>44</sup>

U.S. state and local governments also have set up special funds to promote regional economic development.<sup>45</sup> Twenty-five U.S. states have at least one venture capital fund to finance enterprises that mainstream banks deem too risky and promise only long-term returns.<sup>46</sup> Michigan has eight separate financing programs.<sup>47</sup> Many U.S. state and local pension funds are practicing economically targeted investments (ETIs) within their regions.<sup>48</sup> The Colorado Public Employees' Retirement Association, for example, plans to place twenty percent of its investments in in-state investments.<sup>49</sup> Because these public funds generally are given to private firms that benefit the region, there is still the possibility that the beneficiaries will take the money and run. A better policy for preventing capital flight, rarely practiced, is to target public investments in *public* enterprises.

Of course, public enterprises need not necessarily be run and operated by local governments. As the examples above suggest, there are many models for public-private partnership. One alternative is to create a privately held corporation whose shareholders must be community residents. Grafting some components of community ownership onto private firms should be sufficient to convince many of them not to consider moving away to lower-wage, less responsible communities.

#### D. Delinking

A fourth strategy for coping with mobile corporations is for communities to unplug, selectively, from the global economy. Not all community activists would support this approach. Many critics of the GATT and the North American Free Trade Agreement<sup>50</sup> (NAFTA) argued that stronger social charters might be sufficient to remedy their defects.<sup>51</sup> The problem is, however, that even so-called "fair trade" is at odds with self-reliance, and

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43. KHALIL, *supra* note 10, at 3.

44. *Id.*

45. *Id.* at 6-7.

46. *Id.* at 6.

47. *Id.*

48. *Id.* at 7.

49. *Id.*

50. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605.

51. See, e.g., Jorge G. Castañeda & Carlos Heredia, *Another NAFTA: What A Good Agreement Should Offer*, 9 WORLD POL'Y J. 673 (1992).

self-reliance is a critical objective for community well-being.<sup>52</sup> Most communities, if they could do so, would like to provide their citizens with adequate jobs, food, education, health care, and housing without depending on outside support or creating new problems for those outside of the community. As Johan Galtung, a leading peace studies theorist, states:

[T]he basic rule of self-reliance is this: produce what you need using your own resources, internalising the challenges this involves, growing with the challenges, neither giving the most challenging tasks (positive externalities) to somebody else on whom you become dependent, nor exporting negative externalities to somebody else to whom you do damage and who may become dependent on you. . . .

[T]he justification for so doing is clear: we will enjoy the positive externalities, rather than giving them away, and at the same time will be responsible ourselves for the negative externalities . . . We can fight the negative consequences ourselves, the distance between cause and effect being a short one.<sup>53</sup>

It is theoretically possible for a community to achieve a desired level of production and consumption based entirely on its own resources and then use surplus production for export. But trade almost invariably brings with it specialization and draws resources away from the production of goods and services that some citizens might regard as essential for local self-reliance. Moreover, the financial flows necessary to sustain imports and exports, which are typically overseen by outside traders, banks, and arbitrageurs, create leakages in the local economy. These problems are exacerbated when trade is unfair—when low-wage, environmentally irresponsible jurisdictions can produce cheap goods that undercut local products. For all these reasons, a community may well decide that the best way to create a robust economic future is to maximize local self-reliance and to minimize trade. There are four overlapping means that communities might employ to accomplish this.

The first and crudest is to impose legal barriers against trade. At one extreme a community might forbid the entry of any foreign goods into its jurisdiction. Absolute protectionism, however, is hard to enforce; coercive, goods-confiscating checkpoints would be needed at every community entrance. It is also largely irrelevant, since smart producers will gladly set up shops selling foreign goods close to the borders of protectionist communities, and smart consumers within those communities will gladly purchase goods at the border stores.<sup>54</sup> Placing tariffs on foreign goods

52. See Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, in *THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER* 121 (1993).

53. Johan Galtung, *Towards a New Economics: On the Theory and Practice of Self-Reliance*, in *THE LIVING ECONOMY: A NEW ECONOMICS IN THE MAKING* 101 (Paul Ekins ed., 1986).

54. Protectionism also carries a moral hazard. In rural Arkansas, there is a county where the anti-liquor laws have remained in effect because of assiduous lobbying by the main church located there. A closer look, however, reveals that the county is hardly dry—liquor stores located on the borders maintain a thriving business. The rumor is that the liquor stores contribute generously to the church's lobbying efforts. Interview

entering a community is less burdensome but still carries problems concerning coercion, enforcement, and circumvention. Perhaps the best a community can do is to label foreign goods as such and convince residents of the virtues of voluntarily buying local goods. The essential argument is this: Spending a little more on locally baked bread is worth the benefits of keeping community bakers employed, who in turn will spend their money nearby and pump up the local economy.

A second way to achieve greater self-reliance is to create and support diverse local industries. Through community subsidies or community-ownership measures discussed previously, localities can assert greater control over their own economies. A community-owned and operated banking system, for example, might ensure that deposits were reinvested locally rather than in distant countries.

A third option is to establish a local monetary system. A community currency, whether in the form of real coins and paper or government-tallied credits and debits, provides a means of counting, legitimating, and encouraging transactions involving local goods and services. A local government might serve as a central bank, distributing the currency and setting rules for how it can be used. It might disallow exchanges of local currency for national currency except at specially designated banks that use legally fixed exchange rates. A mark of good local citizenship would be to perform work only for local currency or to use local currency as much as possible for needed purchases.

A final means to increase self-reliance is to use local natural resources more efficiently. Investment in solar and wind energy production can prevent the costs of depending on foreign supplies of uranium, coal, oil, or gas, or importing electricity derived from these fuels. Investment in local agriculture and greenhouses can reduce food imports. Investment in technologies for water conservation can reduce the need for diverting distant rivers or depleting nearby water tables. Recycling wastes can eliminate the need for the importation of steel, copper, plastic, glass, and rubber.

Skeptics argue that the absence of communities that have achieved total self-reliance means that the goal is unattainable and unrealistic. But the real goal should be to achieve as high a degree of self-reliance as possible. As communities acquire more wealth, as they grow politically bolder in their willingness to redistribute resources, as they increasingly adopt appropriate technologies, they will be able to become much more self-reliant than they are today. All that is necessary is political will—and legal power.

#### E. Lobbying

A final approach that communities should use to discipline global corporations is persuasion and politicking. Local governments, working with

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with David Orr, Director of the Meadowcreek Project in Arkansas, in Fox, Ark. (Jan. 20, 1988).

citizen groups, can learn from their corporate colleagues and mobilize resources to press national and international bodies to act with greater sensitivity to local interests. They can orchestrate citizen pressure through education, debates, films, newspapers, and letter-writing campaigns. They can set up lobbying offices in national capitals and key cities abroad like Brussels, Geneva, and Tokyo. They can try to unseat politicians who are unsympathetic with the community agenda and organize support for pro-community candidates.

It is ironic that "nonpolitical" institutions like private corporations have no qualms about trying to influence national decision-makers while "political" institutions like local governments are inclined to steer clear of politics. Seeing themselves as subservient to national policies and believing they lack the "competence" to address international concerns, many local officials are reluctant to express their opinions over the shape of the global economy.

A recent survey in the United States revealed that the country's 36,000 municipalities have deployed a total of 116 registered lobbyists in Washington, D.C.<sup>55</sup> Most U.S. cities see no need to hire lobbyists because they expect their advocacy to be performed by the National League of Cities (NLC) and the U.S. Conference of Mayors, which receive millions of dollars in municipal dues. But the NLC has only nine lobbyists, and the U.S. Conference of Mayors has only five.<sup>56</sup> With the attention of these lobbyists split on hundreds of issues, it is easy to see how they can become overwhelmed. For example, even though most U.S. cities recognize the value of cutting Pentagon spending and rechanneling the savings back to municipal needs, they have deployed only a handful of lobbyists to press the issue. In contrast, the top twenty-five defense contractors have 265 registered lobbyists on Capitol Hill working around the clock to protect and expand the military's coffers.<sup>57</sup>

Outside the United States the problem is much worse. The U.S. Constitution at least protects the rights of local governments to lobby.<sup>58</sup> Other countries with stronger central governments are free to obstruct dissenting local voices altogether. In the 1980s, when the Greater London Council and other Labour-run local councils sought to counter the Thatcher revolution, the Tories simply abolished them.<sup>59</sup>

If communities are to regain their economic independence, they must formulate and amplify their views on a new Bretton Woods order. They must hold annual hearings on how the global economy is affecting their local economies and how they could constructively change the global economy. The hearings might lead to a "State of the City in the World"

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55. *Main Street U.S.A.—Lobby or Lose It*, GLOBAL COMMUNITIES (Inst. for Pol'y Stud., Washington, D.C.), Autumn 1991, at 1.

56. *Id.* at 5.

57. *Id.* at 4.

58. The First Amendment, for instance, grants every American, including representatives of communities, the right of free speech. U.S. CONST. amend 1.

59. SHUMAN, *supra* note 31, at 66.

booklet, laying out a community policy agenda for the coming year, which would be distributed to every resident. Local governments might send paid lobbyists to their national ministries and legislators, as well as to the decision-making bodies of the GATT, the World Bank, and the International Monetary Fund (IMF), to push for this agenda. Whatever communities do, it will be better than continuing their collective silence and effectively allowing corporate voices to monopolize the debate over new rules for the world economy.

## II. A Community Friendly GATT

What might a community-friendly trade agenda look like? Communities would be well-served if the GATT, or any other trade agreement, were built upon six principles. The first is to set minimum standards for corporate behavior concerning product safety, worker rights and wages, and environmental protection. It also would be helpful if international guidelines were developed concerning the disclosure of crucial pieces of corporate information, such as the health records of employees, natural resource inputs, pollution outputs, tax payments, labor relations, and plant closure history. Over time, international rules might outlaw monopolist and oligopolist behavior, hold trustees and managers criminally liable for egregious acts, and require a certain percentage of seats on every board to be held by labor and community representatives. In sum, the central tenet of most trade agreements—that corporations should be freed and public institutions constrained—needs to be reversed. Corporate charters should be seen, not as natural rights, but as public privileges contingent upon responsible behavior in every community they effect.<sup>60</sup>

A second principle is that standards enunciated by trade agreements should be floors, not ceilings, for regulation. Any country, state, or locality that wishes to enact higher minimum wages, tougher environmental standards, or more rigorous information-disclosure requirements should be free to do so. The only free trade test should be this: Are the regulations being applied evenhandedly to foreign and domestic firms? If so, the regulation should stand. This is the principal test that U.S. courts use to enforce the proscription of the Constitution against states infringing on interstate or international commerce.<sup>61</sup>

A third principle is that selective investment and contracting by public bodies should be viewed as proprietary business decisions and left entirely free. Just as corporations, nonprofit organizations, churches, and individuals may decide where to invest, with whom to contract, and what to purchase, so should states and municipalities. It seems perverse that neoclassical economists touting the central importance of “choice” would deny government officials the ability to make market choices themselves.

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60. For an elaboration of this argument, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

61. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).



A fourth principle is to allow the use of government subsidies, except in the rare instance when subsidies are being used to destroy international competition. As economists have long pointed out, Americans should applaud decisions by other governments to subsidize industries. Every foreign subsidy means cheaper products for American consumers and the opportunity to invest the savings in our own industries. If the Japanese want to sell \$10 television sets, why should we refuse to buy them? The popular counterargument is that, as soon as the Japanese wipe out the U.S. television industry, they will raise prices and gouge American consumers. This argument overlooks the fact that whenever television prices exceed competitive levels, Americans once again will have incentives to set up their own television manufacturers. Only in instances where it is very expensive to set up a competitive television factory, where the costs of entry are very high, will the Japanese subsidies successfully suppress U.S. competition. It makes more sense to outlaw these specific instances through global antitrust laws than to eliminate all government interventions in the marketplace. Free trade *within* the United States functions quite well without any significant limitations on public subsidies.

Subsidies are essential tools for responsible governance. If a national, state, or local government wishes to support certain industries or provide incentives for certain kinds of research and development, it should be free to do so. Whether the costs of such subsidies, (e.g., taxpayer dollars spent and reduced competition) are worth the benefits, such as a more predictable economic environment for consumers and producers, should be left to each jurisdiction. Moreover, every government should have the ability to set up public enterprises if it believes that they are more responsible to the common good than private corporations.

A fifth principle is that community self-reliance should be seen as a legitimate objective of government regulation, just as local health, safety, morality, and environmental protection should be. The policies suggested earlier provide some examples of how community self-reliance can be balanced with free trade. If communities use labels and a local currency to make it easier for their citizens to identify and purchase local goods, they are not really infringing on trade. They are simply helping consumers to choose more wisely. Moreover, public investments that enable local resources to be recycled or used more efficiently do not forbid outside imports of energy, water, or food; they merely are making it unnecessary and unattractive for consumers to rely on such imports.

A final principle is that no national or international rules of trade should be adopted unless communities are part of the process. This might be called the democracy principle. A system of fair representation would ensure that the voices of all people, and not just those of special interests, are heard. All decision-making would be open. Dispute-resolution procedures would respect standards of due process.

It is certainly possible to conceive of a GATT that conformed to these six principles. Such an agreement would eliminate tariffs and most other barriers to trade, create a code of conduct for corporations, and yet still

allow communities to shape their own economies. The regime produced by the Uruguay Round, however, amounts to little more than a corporate bill of rights that respects none of these principles.

### III. GATTaclysmic Effects on Communities

The GATT not only fails to put meaningful controls on multinational corporations but takes away from communities the essential powers they need to cope with them. Communities worldwide should insist on having broad powers to regulate product sales and factory mobility, to provide subsidies or tax breaks to corporations, to invest and contract selectively, to create community owned and operated businesses and banks, to label local goods, to create local currencies, to rely on local natural resources, and to lobby. Most local governments outside the United States have only a few of these powers. U.S. states and communities have many of these powers, at least in theory, but are reluctant to exercise them.<sup>62</sup> The most distressing reality about the GATT is that the possibility of communities discovering and expanding their powers is about to be destroyed before they even realize what is at stake.

#### A. Product Regulation

The GATT essentially sets ceilings, not floors, for local government regulations concerning product safety. The Agreement on the Application of Sanitary and Phytosanitary Measures<sup>63</sup> (SPS), which governs the regulation of food and beverages, requires a national government to adopt international standards, unless it can demonstrate a "scientific justification" for tougher standards. Such justification may be found "if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant portions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of protection."<sup>64</sup> In any event, a Member is obligated to ensure that its standards "take into account the objective of minimizing negative trade effects."<sup>65</sup> Unfortunately, the international standards and cost-benefit protocols recognized by the GATT are set by Codex Alimentarius and other bodies which are

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62. For example, the emerging "market participant" exception to the Commerce Clause suggests that selective contracting and selective investing by states and municipalities may be immune from constitutional scrutiny. See, e.g., *Board of Trustees v. City of Baltimore*, 562 A.2d 720 (Md. 1989).

63. *Agreement on the Application of Sanitary and Phytosanitary Measures*, GATT Doc. MTN/FA II-A1A-4, paras. 6, 9 [hereinafter *Agreement on SPS*], in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* [hereinafter *Uruguay Round*], GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 9 (1994), reprinted in OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (VERSION OF 15 DECEMBER 1993) (1993).

64. *Id.* para. 11, n.2.

65. *Id.* para. 19.

heavily influenced by the industries they are supposed to regulate.<sup>66</sup> The practical result is that looser international standards have the potential to displace stronger national, state, and local standards. National governments are obligated to refrain from encouraging "regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement."<sup>67</sup>

The Agreement on Technical Barriers to Trade<sup>68</sup> (TBT) places similar rules on measures that regulate "[a]ll products, including industrial and agricultural products." Once again, "[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them . . . ."<sup>69</sup> Even where international standards do not exist, "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective . . . ,"<sup>70</sup> and "Members shall take such reasonable measures as may be available to them to ensure compliance by [local governments]."<sup>71</sup>

## B. Corporate Regulation

How the GATT will affect community efforts to limit mobility by corporations is unclear. Incentives that induce corporations to stay in a community could be deemed trade-damaging subsidies.<sup>72</sup> Measures that punish corporations for departing prematurely might be viewed as protectionist if they burden, as many do, foreign-owned corporations more seriously than domestically-owned ones.<sup>73</sup>

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66. Codex meetings held between 1989 and 1991 involved more than 2,500 participants; approximately twenty-five percent came from industry and only one percent came from public interest groups. Eighty-one percent of the "nongovernmental" representatives on national delegations also came from industry. TIM LANG & COLIN HINES, *THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE* 101 (1993).

67. *Agreement on SPS*, *supra* note 63, para. 45.

68. *Agreement on Technical Barriers to Trade*, GATT Doc. MTN/FA II-A1A-6, art. 1.3 (Dec. 15, 1993) [hereinafter *Agreement on TBT*], in *Uruguay Round*, *supra* note 63.

69. *Id.* art. 2.4.

The Administrative Practice language promulgated by the Clinton Administration states:

No standards-related activities shall be deemed to constitute an unnecessary obstacle to the international trade of the United States if the demonstrable purpose of the standards-related activity is to achieve a legitimate domestic objective, including, but not limited to, the protection of legitimate health or safety, essential security, environmental or consumer interests, and if such activity does not operate to exclude imported products which fully meet the objectives of such activity.

Statement of Administrative Action, attach. 2-1, in *URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS*, H.R. Doc. 316, 103d Cong., 2d Sess. 792 (1994). Nevertheless, the World Trade Organization might still conclude that the plain language of the GATT requires the adoption of international standards.

70. *Agreement on TBT*, *supra* note 68, art. 2.2. "[L]egitimate objectives are, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." *Id.*

71. *Id.* art. 3.1. See also *id.* arts. 3, 7.

72. See *infra* part III.E.

73. GATT, *supra* note 1, art. 3.

### C. Selective Investment

The GATT leaves intact some but not all community investment choices. The General Agreement on Trade in Services (GATS) exempts "services supplied in the exercise of governmental authority,"<sup>74</sup> which include "activities forming part of a statutory system of social security or public retirement plans."<sup>75</sup> This suggests that pension funds for municipal employees can still be invested creatively. Selective investment of surplus city revenues, however, might be viewed as a prohibited subsidy under the Agreement on Subsidies and Countervailing Measures<sup>76</sup> (SCM). A subsidy, under the agreement, includes a "[g]overnment practice [that] involves a direct transfer of funds (e.g., grants, loans, and equity infusion)."<sup>77</sup> The GATT prohibitions on subsidies, as discussed below, are broad enough to invalidate almost any municipal assistance for corporations.

### D. Selective Contracting

The GATT will have some impact on state government purchasing and contracting decisions but very little on those of local governments. The Agreement on Government Procurement, a plurilateral accord which will go into effect on January 1, 1996, sets out a panoply of specific rules concerning the bidding, negotiating, and acceptance of public contracts.<sup>78</sup> Section 1 of Article 3 of the Procurement Agreement prohibits government agencies from discriminating against foreign providers of products, suppliers, and services in general or against other signatories to the Agreement.<sup>79</sup> A strict interpretation of this provision would forbid "Buy American" rules. Had it been in effect during the 1980s and had South Africa been a signatory of the Procurement Agreement, it also would have outlawed the policies of various state agencies that did not allow firms tied to South Africa to bid on public contracts.

Section 2, however, introduces several ambiguities: "Parties shall ensure . . . that their entities shall not treat a locally-established supplier or service provider less favourably than another locally-established supplier or service provider on the basis of degree of foreign affiliation or ownership."<sup>80</sup> Moreover, "entities shall not discriminate against locally-established suppliers or service providers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement . . . ."<sup>81</sup> Does this section

74. *General Agreement on Trade in Services*, GATT Doc. MTN/FA II-A1B, art. I, § 3(c) (Dec. 15, 1993) [hereinafter GATS], in *Uruguay Round*, *supra* note 63.

75. *Id.*, Annex on Financial Services, § 1.2.2.

76. *Agreement on Subsidies and Countervailing Measures*, GATT Doc. MTN/FA/II-13 (Dec. 15, 1993), [hereinafter *Agreement on SCM*], in *Uruguay Round*, *supra* note 63.

77. *Id.* arts. 1, 1.1(a)(1)(i).

78. *Agreement on Government Procurement*, GATT Doc. GPR/Spec/77 (Dec. 15, 1993) [hereinafter *Procurement Agreement*].

79. *Id.* art. III, § 1.

80. *Id.* § 2.

81. *Id.*

simply emphasize that the rules of Section 1 apply especially against local preferences? Or does it mean that local preferences are acceptable, provided that non-local national and international firms are penalized equally? If so, how far can a preference extend before it loses its "local" character? Can Toledo prefer goods from Cleveland? Ohio? The Midwest?

Every country signing the Procurement Agreement specifically lists "sub-central government entities" covered by the Agreement.<sup>82</sup> The United States affirms that twenty-four state governments acceded to coverage.<sup>83</sup> Some states, such as California and Florida, only extend the rules to "executive branch agencies," while others like Maryland and Pennsylvania enumerate each agency covered.<sup>84</sup> New York State lists its official agencies, the state university system, and public authorities and public benefit corporations, with the exception of those entities with multi-state mandates.<sup>85</sup> One implicit limit of the Procurement Agreement is that unlisted states and state agencies, as well as local governments, are not covered.<sup>86</sup>

The GATT procurement rules only apply to state contracts exceeding \$252,000 (355,000 SDRs) for supplies and services and \$3.6 million (five million SDRs) for construction.<sup>87</sup> Where a public purchase "results in the award of more than one contract, or in contracts being awarded in separate parts," Article II suggests that the basis for valuation should be the total value over a twelve-month period.<sup>88</sup> A lease, rental, or hire should be valued by multiplying the monthly installment by forty-eight.<sup>89</sup>

In an annex to its agreement to the GATT procurement rules, the United States has placed several other limitations on their application to listed state governments:<sup>90</sup> First, they will not apply to nine states with pre-existing restrictions concerning public procurement of construction-grade steel, motor vehicles, and coal.<sup>91</sup> Second, they will not cover restrictions "associated with a mass transit or highway project that receives federal funds."<sup>92</sup>

Third, the rules will not govern "[p]rocurements subject to programmes promoting the development of distressed areas and businesses owned

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82. *Agreement on Government Procurement—Addendum*, GATT Doc. GPR/74/Add.12, annex 2, at 6 (Jan. 6, 1994) [hereinafter *Procurement Addendum*].

83. *Id.* at 6-10.

84. *Id.*

85. *Id.* at 8.

86. This has been confirmed by the Office of the U.S. Trade Representative. Telephone Interview with Lori Sherman, Associate General Counsel, U.S.T.R. Office (Mar. 17, 1994).

87. *Procurement Addendum*, *supra* note 82, annex 2, at 6.

88. *Procurement Agreement*, *supra* note 78, art. II, § 4.

89. *Id.* § 5.

90. *Procurement Addendum*, *supra* note 82, at 10-11.

91. The designated states, marked with an asterisk in the list of those covered by the Procurement Agreement, are Delaware, Florida, Illinois, Maine, Maryland, Michigan, New York, Pennsylvania, and Wyoming. *Id.* at 6-10.

92. *Id.* at 11.

by minorities, disabled veterans and women . . . .<sup>93</sup> State governments can breathe a sigh of relief that their affirmative action programs will be protected, but what about preferences for local businesses in general? In theory, these kinds of preferences are permissible if they are part of a program for economic revitalization, but it is unclear how broadly the WTO or a court might define "development of distressed areas." The Office of the U.S. Trade Representative argues that each state can define this term as it wishes,<sup>94</sup> but a judge might turn to Article 8 of the Agreement on Subsidies and Countervailing Measures, which defines what constitutes acceptable "assistance to disadvantaged regions."<sup>95</sup> A state or local government can only provide assistance that reduces disparities within its jurisdiction, and a beneficiary area must not have a per capita income greater than eighty-five percent of the regional average or an unemployment rate greater than 110% of the regional average.<sup>96</sup>

Fourth, the United States will allow state procurement "restrictions that promote the general environmental quality," provided they "are not disguised barriers to international trade."<sup>97</sup> As already noted, however, the Agreements on SPS and on TBT would place many existing state and local regulations on environmental protection in jeopardy as barriers to trade.

#### E. Subsidies

Perhaps the most ominous new provisions of the GATT concern subsidies. The Agreement on SCM covers not only government subsidies per se but also government loans, loan guarantees, tax abatements, guaranteed purchases, in kind contributions, and price supports.<sup>98</sup> One part of the Agreement is relatively narrow, banning subsidies that are given "contingent . . . upon export performance"<sup>99</sup> or "contingent . . . upon the use of domestic over imported goods."<sup>100</sup> Another part, however, broadly prohibits subsidies that cause "injury to the domestic industry of another Member," "nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT [of] 1994," or "serious prejudice to the interests of another Member."<sup>101</sup> "Serious prejudice" may be found if *ad valorem* subsidization exceeds five percent, if subsidies cover the operating losses of an industry or a firm (beyond a one-time bailout), if the government forgives a debt, or if the effect of a subsidy is to "displace or impede" the imports or exports of another Member or to create "significant price undercutting."<sup>102</sup> Since almost any subsidy can have

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93. *Id.* at 10.

94. Telephone Interview with Lori Sherman, *supra* note 86.

95. *Agreement on SCM*, *supra* note 76, art. 8.2.

96. *Id.* art. 8.2(b).

97. *Procurement Addendum*, *supra* note 82, at 11.

98. *Agreement on SCM*, *supra* note 76, arts. 1.1(a)(1), (2).

99. *Id.* art. 3.1(b).

100. *Id.* art. 3.1(a).

101. *Id.* arts. 5.1(a), (b), (c).

102. *Id.* arts. 6.1, 6.3.

some effect on foreign imports or exports, these provisions could eliminate most state and local government involvement in the marketplace. The requirement that each government ensure "the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement"<sup>103</sup> means that a Member is obligated to overrule contrary provisions by state and local governments. The GATT therefore might mean the end of any community ownership of factories, banks, stores, or services.

#### F. Labelling

The Agreement on TBT covers not only technical regulations and standards but also packaging, marking, and labelling requirements.<sup>104</sup> Community labelling practices that induce consumers to purchase local products could be found to contravene the GATT's requirement that "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."<sup>105</sup> Encouraging local production and consumption is not considered a legitimate objective of regulation.

#### G. Local Currencies

The GATT also wipes out the possibility for communities to create their own currencies. GATS states that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."<sup>106</sup> A community-run currency system could be interpreted as a banking service, especially since "measures by members" is defined to include those taken by "central, regional or local governments and authorities."<sup>107</sup> Since local currency schemes envision a local government issuing currency or setting rules of exchange to induce community members to buy local rather than international goods and services, they could be construed as being discriminatory. While GATS exempts government bodies supplying services "in the exercise of governmental authority,"<sup>108</sup> the Financial Services Annex defines the financial services covered by GATS to include government-run "payment and money transmission services" and all trading of foreign exchange.<sup>109</sup>

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103. *Id.* art. 32.4(a).

104. *Agreement on TBT*, *supra* note 68, pmb1.

105. *Id.* art. 2.1.

106. GATS, *supra* note 74, art. XVII, § 1. This provision is limited to "sectors inscribed in [a signatory nation's] schedule." *Id.* For the U.S. schedule, see GATT Doc. MTN.GNS/W/112/Rev. 4.

107. GATS, *supra* note 74, art. I, § 3(a)(i).

108. *Id.* art. I, § 3(b).

109. *Id.*, Annex on Financial Services, § 5.1(h), (j).

## H. Local Resource Conservation

The viability of community initiatives to promote the use of local resources to achieve self-reliance would depend on the specific legal tools employed. Under the original GATT Agreement, local prohibitions or taxes on imports of resources are permissible provided they place equal burdens on national and international resource suppliers.<sup>110</sup> Article 20 of the GATT explicitly allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>111</sup>

However, subsidies or tax breaks for local resource producers as well as for community ownership might be difficult under the Agreement for SCM. Foreign aluminum or paper producers could challenge local subsidization of a recycling program on the grounds that it was adversely affecting exports. Canadian exporters of oil, gas, or electricity could attack community conservation programs or publicly owned utilities. Foreign food exporters might be able to convince U.S. courts to invalidate local government expenditures designed to induce consumers to buy local grains, fruits, and vegetables.

The only remaining options for U.S. communities eager to encourage self-reliance on local resources are selective purchasing and investment by local government. But a local government cannot regulate the origin of resource inputs for private production. A requirement, for example, that enterprises doing business in the jurisdiction use local resources would violate the mandate of the Agreement on Trade-Related Investment Measures<sup>112</sup> (TRIMs). This agreement forbids any laws which "require . . . the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production. . . ."<sup>113</sup>

## I. Lobbying

In theory, the GATT leaves communities free to lobby national and international bodies. In practice, however, the GATT eliminates much of the leverage communities once had over trade policy. The option of lobbying the national government is substantially divested since national decision-makers now must either accept or reject the GATT regime as a whole, including the rulings from the new WTO. Negotiating and maneuvering room has been all but eliminated except at the international level, where communities have little ability to influence decisions because the GATT's decision-making procedures lack the basic features of due process. Deliberations are undertaken in secret, outsiders are not allowed to participate or file amicus briefs, and the institutions are completely dominated by cor-

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110. GATT, *supra* note 1, art. 3.

111. *Id.* art. 20(g).

112. *Agreement on Trade-Related Investment Measures*, Annex, GATT Doc. MTN/FA II-A1A-7 (Dec. 15, 1993).

113. *Id.* annex § 1(b).



porate interests.<sup>114</sup>

### Conclusion

No one can say for certain whether the GATT will be enforced in the onerous ways suggested above. Like any statute, its provisions must be interpreted by courts and dispute-resolution bodies at the international, national, and local levels. But if recent history is a reasonable guide to the future, there are serious grounds for worry.

As the decision of the GATT Panel concerning the U.S. Marine Mammal Protection Act underscores, those responsible for resolving trade disputes often have little sympathy for the values of ecology or self-determination. WTO decisionmakers, who are appointed on the basis of their wholehearted embrace of neoliberal trade theories, may well be even less sensitive to the interests of communities. Once a WTO Panel decides that a national, state, or local law violates the GATT, the responsible nation will have to repeal the law within sixty days, lest it suffer automatic trade sanctions by the effected nations.

The GATT also places affirmative obligations on the U.S. government to pass legislation, issue regulations, and initiate lawsuits in order to force state and local governments to bring their laws into compliance with the GATT. Officials that fail to fulfill these obligations could be vulnerable to citizen or corporate lawsuits compelling them to perform their legal duties.

National and local courts may take the law into their own hands. In the 1969 case of *Bethlehem Steel v. Board of Commissioners*,<sup>115</sup> for example, the California Court of Appeals invalidated the state's "Buy American" Act, which mandated that state and local government agencies purchase goods and enter into contracts, if possible, with U.S. firms, partially on the ground that it violated the GATT. There was no explicit language in the GATT at that time that banned government purchasing preferences, no special provisions in the national legislation that implemented the GATT, and no declarations by the President or the State Department that Buy American Acts were contrary to U.S. foreign policy. Instead, the California court read between the lines of the treaty, genuflected to the principles of free trade, and wiped out the state law. It is not unreasonable to foresee the possibility of courts throughout the world erring on the side of free trade and interpreting the GATT in ways unfavorable to communities.

If any U.S. president, senator, or representative proposed substantially weakening state and local powers to regulate, zone, invest, contract, tax, and spend in the ways that the GATT does, every governor, mayor, and city council member would be on the phone, feverishly lobbying to change minds. They would fly to Washington, make public speeches, rally their citizens, lead demonstrations, and threaten to defeat anti-community politicians at the polls. But because the effects of the GATT are covert and

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114. See, e.g., LANG & HINES, *supra* note 66.

115. 80 Cal. Rptr. 800 (Cal. Ct. App. 1969).

uncertain, and because national politicians have been careful not to draw attention to the anti-federalist consequences, the response at the local level has been a deafening silence. One can probably count on two hands the number of state or local officials with even the dimmest idea about the GATT. The National Governors Association, U.S. Conference of Mayors, and National League of Cities have been unable to move beyond uncritical boosterism of free trade.<sup>116</sup>

If communities are ever to have the powers to cope with globalization, to create sustainable and self-reliant economies, and to govern in a meaningful way, they will need to live the motto of the Clinton presidential campaign: "It's the economy, stupid!" They must work quickly and effectively, by themselves and in coalitions, to undo the Uruguay Round and to expand their basic powers. If communities lobby, invest, contract, and regulate wisely, they can force global corporations to rise to a higher standard and increase the likelihood of a strong corporate code of conduct being adopted internationally. If they insist on creating their own economic activity, anchored to the community through local ownership, they can prevent capital from fleeing to the world's maquiladoras, strengthen the security of local workers, and reduce the vulnerability of the community to the unpredictable currents of the global economy.

It may be too late to convince Congress not to ratify the signed GATT agreement, though a political fight may be brewing that will rival the debate over the NAFTA. But it is not too late to shape the contours of the federal legislation implementing the treaty.

To its credit, the Clinton Administration endorsed a provision prohibiting private parties from using the GATT as a cause of action or a defense in U.S. courts.<sup>117</sup> It also inserted a requirement that the U.S. Trade Representative consult with a state or local government after its law is found inconsistent with the GATT "in an effort to develop a mutually agreeable response . . ."<sup>118</sup> And the burden of proof lies with the government to show "that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question."<sup>119</sup>

These provisions, however, provide only minor safety valves. Congress needs to add language to narrow the circumstances under which state and municipal regulations, investments, contracts, or subsidies will be considered barriers to trade. The states also might protect themselves by exercising their power to withdraw from the Agreement on Procurement.

But ultimately the U.S.T.R. has the ability to enter U.S. courts and overturn state and local laws. This power of preemption represents a massive transfer of power from the states to the federal government (and from the legislative to the executive branch). Moreover, provisions written into

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116. The National League of Cities' resolution of support for NAFTA, which simply assumes that free trade is in the interest of communities, is typical. National League of Cities Resolution 94-7 (Dec. 5, 1993) (on file with the *Cornell International Law Journal*).

117. H.R. 5110, 103d Cong., 2d Sess., § 102(c)(1) (1994).

118. *Id.* § 102(b)(1)(C)(iv).

119. *Id.* § 102(b)(2)(B)(ii).

national implementing legislation protecting state and local sovereignty could themselves be overturned by WTO rulings, which the U.S. government then would be obliged to enforce.

The only long-term way to remedy these problems is to place the interests of community, along with those of labor and the environment, at the center of the next GATT round. The Clinton Administration must push for a corporate code of conduct, clarify that labor and ecology standards should be floors and not ceilings for regulations, revamp the rules concerning subsidies, labels, procurement, and investment, and democratize the WTO.

Communities themselves have an important role to play in achieving these objectives. All politics, as Tip O'Neill used to say, is local. A municipality is the most accessible instrument for collective political expression, where citizens are most likely to overcome the forces of corruption, money, and apathy, and most likely to become democratically engaged. Communities are also where people have the greatest ability to structure their personal and professional relationships and where they can make the most difference in improving the quality of their daily lives. Today national leaders and international agreements wax religious about the value of communities, but in practice they are willing to sacrifice them on the altar of free trade. A fundamental goal for the GATT or any international agreement must be to ensure that communities have sufficient power to secure their own well-being. The new global economy must serve communities, not vice-versa.

Communities no longer can wait for their national governments to save them. They must work alongside labor, environmental, and consumer groups to influence future negotiations of the GATT and other global economic instruments. None of these struggles will be easy. But the current strategy, really a non-strategy, in which communities continue to bargain down their wages and environmental standards in a desperate attempt to lure fickle corporations, is a guaranteed dead end.