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The Role of Consensus in GATT/WTO Decision-making

Mary E. Footer*

INTRODUCTION

A. General

The most striking aspect of the new World Trade Organization (WTO)¹ is the extent to which it preserves and consolidates the body of law and practice which has evolved out of the development of the General Agreement on Tariffs and Trade (GATT)² and related instruments. Such preservation and consolidation is deliberate as the preamble to the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) makes clear.³ The mechanism chosen for the transition from the GATT to the WTO was designed to provide a degree of continuity, stability and thereby predictability in the multilateral trading system. Its occurrence is due, in no small measure, to the active role of the GATT Secretariat in pursuing this initiative and to the willingness of representatives of governments and

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¹ *The Marrakesh Agreement Establishing the World Trade Organization*, in RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6 (GATT Secretariat 1994) [hereinafter *Marrakesh*, LEGAL TEXTS].

² The General Agreement on Tariffs and Trade (GATT), as amended, was opened for signature at Geneva on Oct. 30, 1947, and entered into force for 22 of the 23 original signatories on Jan. 1, 1948. T.I.A.S. No. 1700; 55 U.N.T.S. 187; UN Doc.Sales No. 1947.II/10, vol. I. See *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 485 [hereinafter GATT 1947, LEGAL TEXTS] for the current text.

³ See *Marrakesh*, LEGAL TEXTS, the preamble, *supra* note 1, at 6:

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations, *Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system . . .

the European Communities, present at the close of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh, to agree to it.

The Marrakesh Agreement is all the more extraordinary because the antecedent of GATT law and practice was not a succession of one international organization by another international organization nor of treaty succession. Instead, the GATT 1947 — the GATT which came into force on 1 January 1948⁴ — was integrated into the WTO Agreement, as part of the GATT 1994. The GATT 1994 contains the text of the old GATT 1947, together with all its amendments, corrections, decisions and so on, to which were added six understandings and a protocol (consisting of new tariff schedules).⁵

This incorporation of GATT law and practice, or GATT *acquis*,⁶ established by the contracting parties to the GATT, is not novel. An *acquis communautaire* was used during each successive enlargement of the European Communities to ensure that new Member States accepted, without reservation, the original treaties and their political objectives as well as all the decisions taken by Community institutions since their entry into force.⁷ In the case of both the European Communities and the GATT/WTO, an *acquis* has been a powerful tool in the process of economic integration. However, the path taken to economic integration differentiates the GATT/WTO from the European Communities. In the case of the GATT, economic integration resulted from the successive practice of the contracting parties to a multilateral treaty. In contrast, the European Communities were

⁴ GATT 1947, LEGAL TEXTS, *supra* note 2.

⁵ See *Marrakesh*, LEGAL TEXTS, *supra* note 1 at 20-23. Article 1 of GATT 1994 is the first Agreement in Annex 1A, appended to the WTO Agreement. *Id.*

⁶ The term *acquis* is coined from its more familiar usage in European Community law where “*acquis communautaire*” refers to “[t]he Community patrimony: the whole body of rules, principles, agreements, declarations, resolutions, positions, opinions, objectives, and practices concerning the European Communities, whether or not binding in law, which has developed since their establishment and which has been accepted by the Community institutions and the Member States as governing their activities.” See A.G. TOTH, 1 OXFORD ENCYCLOPAEDIA EUR. COMMUNITY L: INSTITUTIONAL L. 9 (1990); but see G. Marceau, *Transition from GATT to WTO*, 29 J.W.T.147 n.1 (1995), who disputes the use of the term ‘GATT *acquis*,’ as understood in the wider European law sense since, in her view, GATT case-law does not form part of the GATT 1994. However, see Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MARKET L.REV. 1157, 1207 (1994).

⁷ Now a legally binding obligation taken up in Articles 2-4 of the Acts of Accession in 1972, 1979, 1985 and 1995, and in the 1992 Treaty on a European Economic Area (EEA), as amended, between the EC, ECSC, and 12 Member States on the one hand and six of the seven EFTA Member States (Austria, Finland, Iceland, Liechtenstein, Norway, and Sweden) on the other as part of a process of broader European integration.

integrated through the use of a specific organizational and institutional framework within the European Union.

Although delegates to the first meeting of the newly established UN subordinate body of the Economic and Social Council (ECOSOC) held in February 1946⁸ intended that there should be an International Trade Organization, or ITO, and that negotiations should commence for the progressive reduction in tariffs on trade,⁹ the course of history decided otherwise. The ECOSOC produced a final text of a General Agreement which was devoted to the reciprocal reduction of tariffs on a multilateral basis and included "general clauses" of obligations designed to protect the tariff obligations.¹⁰ By the end of 1947, the Havana Conference convened to complete the ITO Charter¹¹ but failed to muster sufficient support for the ITO due largely to the repeated intransigence of the U.S. Congress in 1948 and subsequent years. As Jackson notes,¹² a variety of restraints, including political restraints exercised by sovereign governments or restraints inherent to the democratic processes in national systems, can be a powerful force in limiting the options for pragmatic rule-making and the organization of economic activity at the international level.

Until this point, the GATT and the formation of an ITO had been interlinked. No one had anticipated that the GATT should become an international organization; it was to operate under the umbrella of the ITO when the latter came into existence. The GATT entered into force on January 1, 1948, ahead of the ITO Charter. To wait for the ITO would have been too costly since the GATT consisted of thousands of reciprocally agreed tariff concessions. There were fears that these concessions would come into the public domain and traders would act upon them, thereby disrupting world trade.

In terms of value, those transaction costs needed to be minimized still further if the General Agreement was to achieve its intended goals. Some of the parties had constitutional procedures which re-

⁸ 1 UN ECOSOC Res. 13, UN Doc. E/22 (1946).

⁹ However, a draft outline of what was to become the GATT was only published as an annex to the 1946 London Preparatory Committee Meeting Report, see Annexure 10 to the "Report on Procedures for Giving Effect to Certain Provisions of the Charter for an International Trade Organization by Means of a General Agreement on Tariffs and Trade Among Members of the Preparatory Committee" in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London, Oct.-Nov., 1946), UN Doc. EPCT/33/51.

¹⁰ GATT 1947, LEGAL TEXTS, *supra* note 2, at 485, *et seq.*

¹¹ United Nations Conference on Trade and Employment, held at Havana, Cuba, from Nov. 21, 1947, to March 24, 1948; UN Doc. E/Conf. 2/78, UN Sales Publication No. 48.11.D.4.

¹² JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 299-308 (1989).

quired that parts of the GATT be subject to the approval of their legislatures. Since these same parties needed to submit the final draft of the ITO Charter to their legislative assemblies in late 1948 or the following year, many feared that getting GATT through in its entirety might jeopardize the outcome of the ITO. The solution was to adopt a Protocol of Provisional Application. As a result of its adoption, eight of the original contracting parties agreed to apply the GATT "provisionally on and after 1 January 1948" while the remaining parties agreed to do so as soon thereafter as possible. This allowed most countries, which required legislative authority for the whole package, to seek executive or administrative approval to giving immediate effect to parts of the GATT.¹³

Bereft of any organs, the GATT evolved three principal bodies to administer the General Agreement: the CONTRACTING PARTIES, acting jointly,¹⁴ the Council of Representatives, and the Interim Commission for the International Trade Organization (ICITO). These three GATT bodies¹⁵ have been entrusted with the development of the organizational structure and institutional procedures which existed on the eve of the creation of the WTO. The lack of a true organizational basis led at least one commentator to describe the GATT as "a model of law as process"¹⁶ and, more particularly, as "an amalgam of specific obligations, codes of conduct, and commercial policy considerations, working through consensus and organized persuasion."¹⁷

¹³ The effect of the Protocol of Provisional Application (PPA) was to fully implement Part I, containing the most favored nation (MFN) clause and tariff obligations, and Part III, containing mostly procedural and treaty provisions. Part II, Articles III to XXIII – containing the substantive obligations relating to national treatment, customs procedures, quantitative restrictions, subsidies, anti-dumping and the dispute settlement provisions, was to be implemented "to the fullest extent not inconsistent with existing legislation." *The Text of the General Agreement on Tariffs and Trade* 77, para. 1 (GATT Secretariat 1986).

¹⁴ GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, Art. XXV:1, 811 (GATT Secretariat, 6th ed., 1994) [hereinafter GATT ANALYTICAL INDEX]. See *infra* text accompanying note 19 for a more complete description of the significance of this terminology.

¹⁵ See *id.* at 1009.

¹⁶ JAMES FAWCETT, LAW AND POWER IN INTERNATIONAL RELATIONS 90 (1982).

¹⁷ *Id.* It also exemplifies *Ordnungspolitik*, i.e., an order policy or framework policy, formed by government representatives. P. VERLOREN VAN THEMAAT, THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW 171-72 (1981). Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 229 (R. St. J. MacDonald & Douglas M. Johnston eds., 1993) [hereinafter THE STRUCTURE AND PROCESS].

B. Synopsis

This article examines the way in which parties to a multilateral treaty, like the GATT 1947, have developed institutional and procedural mechanisms capable of allowing the GATT to function as a “model of law as process” and to provide the basis for the formation of a new international economic organization, the WTO. A comparative institutional approach¹⁸ is used to assess one particular area of GATT practice — consensus decision-making — and, thereby, to test the relative effectiveness of the institutional and procedural mechanisms developed by the contracting parties to the General Agreement in the application of trade rules and disciplines, as well as in the resolution of conflicts arising from the elaborate web of concessions and trade policy considerations.

It is acknowledged that consensus can also be utilized as a method of law-making. However, the normative, or rule-making, capacity of the GATT contracting parties (and linked thereto, their power to interpret the General Agreement) will not be addressed within the confines of this article.

Attention is focused on development of the consensus technique within the GATT as a means of decision-making exercised by the CONTRACTING PARTIES¹⁹ and the Council. The process under the General Agreement is compared and contrasted with its use in other international *fora* and on a regional level within the European Communities under the Luxembourg Accords of 1966. It will be shown that different participatory models elicit different methods of treatment.

This contribution also looks at the way in which the practice of decision-making by consensus has been formalized at the international level by similar mechanisms to the GATT, i.e. primarily within the *fora* of international conferences or conferences of parties to in-

¹⁸ The comparative institutional approach is understood as the public choice analysis of the relative effectiveness of institutions in solving social problems, based on their differing levels of participation and the imperfections in the participatory processes that are inherent in their structure. Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (1995) (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMIC AND PUBLIC POLICY* (1994)).

¹⁹ According to Article XXV:1 GATT, wherever the designation CONTRACTING PARTIES appears in the General Agreement, it means the contracting parties acting jointly and is primarily aimed at the contracting parties' powers to interpret the General Agreement by way of (i) decision making; (ii) Reports of Panels and Working Parties; (iii) Chairman's rulings; (iv) Council action; or (v) exceptionally, a legal opinion from the Director General of the GATT; see GATT ANALYTICAL INDEX, *supra* note 14, at 811. See also JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 126-132 (1969).

ternational conventions. The results are then compared and contrasted with similar developments within the GATT and the more recent WTO.²⁰

II. THE ROLE OF CONSENSUS IN GATT DECISION-MAKING

A. Some Preliminary Remarks on Use of the Word "Consensus"

The use of the word "consensus" in the domestic context and in international relations frequently gives rise to ambiguity. When it is combined with words like "procedure," "process" or "technique," "consensus" denotes a specific form of decision-making. When it is used alone, "consensus" usually denotes the product of that process. Consensus can thus function both as a technique and as the result of that technique, thereby giving rise to much confusion.²¹ Here, consensus means decisions of international organizations, or other international institutions, that have been adopted by acclamation.²² Decision-making by consensus is not mutually exclusive of decisions taken by majority voting. In fact, the two are frequently found in the alternative and thus compliment one another, as in Article IX:1 WTO Agreement.²³

B. Historical Antecedents of Consensus in the Decision-making Process

Consensus gradually evolved as a decision-making technique in international *fora* which is distinguishable from the classical non-objection procedure.²⁴ Even so, consensus as a procedure owes some-

²⁰ An example of a practice which has been retained is the continuation of decision-making by consensus which is explicitly recognized in the WTO Agreement, Article IX, sub-paragraph 1. *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 11, art. IX, sub-para. 1. See also text accompanying note 23, *infra*.

²¹ Karl Zemanek, *Majority Rule and Consensus Technique In Law-Making Diplomacy*, in THE STRUCTURE AND PROCESS, *supra* note 17, at 857. Zemanek points out that in international relations consensus is frequently also used, independently of its procedural meaning, to denote *opinio iuris*, one of the constituent elements necessary for the formation of a rule of customary international law (the other being State practice). *Id.*

²² HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 505-506 (1996).

²³ See *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 11. The relevant section of Article IX:1 of the WTO Agreement states:

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.

²⁴ Zemanek, *supra* note 21, at 863. See generally, Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 324 (1981).

thing to the long-standing "non-objection" procedure of the General Assembly.²⁵ What distinguishes consensus from the procedure of non-objection is the elimination of controversial points through the use of negotiation or mediation in order to bring about consensus or agreement.²⁶ In this sense, consensus is positive and pro-active because it embodies an effective and recognized technique for reaching a decision. In contrast, the process of non-objection is negative in character and defensive because it symbolizes "a consensus to refrain from taking any decision at the price of the paralysis of action"²⁷

Prior to the widespread use of consensus in decision-making, international organizations commonly required that decisions receive the common consent of every participating nation, for example, unanimity. Anything less would fail to correspond to the doctrine of sovereign equality and the principle that no international decision should be imposed against the will of any State.²⁸ As Schermers and Blokker have noted, decision-making in international *fora* follows a pattern established in early national and other communities. The requirement of unanimity is often seen as a requirement for a compromise. Implicit in this notion is "the existence of 'invisible' minorities behind the seeming unanimity," such minorities being composed of opponents of certain decisions which have been forced to agree.²⁹ They proceed to note that:

[H]istorically and theoretically, the transition to the majority principle is implied in the imperfection of the procedures of unanimity. At the national level, this transition could take place freely as a result of the existence of a sense of belonging to one community sharing certain basic values. This "consensus" is accompanied by a willingness to accept out-voting in day-to-day decisions. The minority in such decisions taken today might be the majority behind decisions of tomorrow. Moreover, the shared basic values remain unaffected or change only slowly.³⁰

²⁵ The technique was purportedly used at the notorious 19th Session of the General Assembly in 1964, during which no votes were taken, to avoid applying Article 19 of the UN Charter to the Soviet Union, France, and some other States. (Article 19 of the UN Charter provides that where a UN Member is in arrears it is precluded from voting). This is a typical example of decision-making by the non-objection procedure rather than consensus *strictu sensu*; see Charpentier, J. 'La procédure de non-objection (A propos d'une crise constitutionnelle de l'ONU)' 70 *R.G.D.I.P.* 862-77 (1966).

²⁶ Zemanek, *supra* note 21, at 863.

²⁷ See C. Wilfred Jenks, *Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organization*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW, ESSAYS IN HONOUR OF LORD MCNAIR* 48, 62 (R.Y. Jennings ed., 1965).

²⁸ See Stephen Zamora, *Voting in International Economic Organizations*, 74 *AM. J. INT'L L.* 566, 573-74 (1980).

²⁹ SCHERMERS & BLOKKER, *supra* note 22, at 513.

³⁰ *Id.*

Reminiscent of that era are decisions, currently taken by the Council of Ministers of the European Union, under the Treaty on European Union (TEU), which call for the definition of a common position³¹ and joint action³² with respect to Common Foreign and Security Policy (CFSP)³³ matters under the second pillar of the Treaty.³⁴ The resort to unanimity reinforces the intergovernmental and political character of CFSP and sets the policy apart from other matters covered under the Treaty. At the same time, it ensures that European Union decisions will only be made after national governments have reached policy decisions on matters in their vital interest.³⁵

In the same vein, Article XXX GATT calls for the unanimous decision of the Contracting Parties to change Part I, (MFN under Article I, the tariff bindings under Article II, and the tariff schedules) Article XXIX (relationship of the General Agreement to the Havana Charter — subsequently a dead letter) and Article XXX itself. Seen by some as a reluctance of nations to give up their sovereignty,³⁶ this Article had more to do with the belief, still prevalent in the post-war period, that a multilateral convention expressed the common will of contracting parties and, therefore, required their common will to amend it. The trend since then has been to allow amendment of many multilateral conventions by a majority of parties if it is in the interest of the international community.³⁷

Current practice is supported by Article 40 of the Vienna Convention on the Law of Treaties of 1969,³⁸ which allows parties to a multilateral convention to determine the content of any amendment clauses which will govern their treaty relations. Article 40 requires

³¹ Article J.8(2) TEU

³² Article J.3 TEU requires that the decision on whether or not to take joint action be a unanimous one, except where, according to sub-paragraph 2, the matter involves *implementation* of a joint action in which case qualified majority voting is permitted.

³³ The CFSP is an outgrowth and codification of some twenty years practice of the Member States in the area of European Political Cooperation (EPC). It was first recognized in treaty form by the Single European Act of 1986, entered into force on July 1, 1987, and made a number of substantive amendments to the EC Treaty, 1987 O.J. (L169) 1 but is now codified at Maastricht, in the Treaty on European Union (TEU).

³⁴ M. R. Eaton, *Common Foreign and Security Policy*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY*, 215, 217-19 (David O'Keefe & Patrick M. Twoney eds., 1994).

³⁵ We will return to this point when we compare it to the process of consensus decision-making, introduced into the European Communities by the Luxembourg Accords of 1966 to avert a Community "constitutional" crisis. See *infra* note 103.

³⁶ JACKSON, *supra* note 19, at 73; see also Zamora, *supra* note 28, at 579.

³⁷ I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 426 (1994).

³⁸ Entered into force January 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), 58 U.K.T.S. (1980); see further SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2nd ed., Manchester University Press 1984).

that all contracting parties be notified of a proposal for amendment and of their right to participate in preparatory negotiations leading to an amendment but does not require that every contracting State agree to the amendment.³⁹ However, that same article reiterates the principle that States cannot be bound against their will; thus, the amending agreement does not bind any contracting party which does not become a party to the amending agreement.⁴⁰ Similarly, the unanimity requirement became an issue during negotiations on the General Agreement in 1947 when it was initially proposed that only a two-third majority be required for amendments to Part I because corresponding articles in the Havana Charter could be amended with such a majority.⁴¹ In line with Jackson's observation — that the unanimity requirement for amendment of the General Agreement, found in Article XXX GATT, owes much to the way in which international trade was previously organized along bilateral lines⁴² — it was decided in 1947 that “[T]he General Agreement is a trade agreement and the rule in ordinary trade agreements is that they can only be modified with the unanimous consent of the parties taking part in them. . . .”⁴³ Ultimately, a variation on unanimity to amend the General Agreement was accepted. Amendments, other than those to Part I of the GATT 1947 (MFN and the tariff bindings), Article XXIX, and the amending article itself, Article XXX, could become effective “. . . in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.”⁴⁴

³⁹ Article 40, paragraphs 1, 2 and 3 of the Vienna Convention on the Law of Treaties state:

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
 - (a) the decision as to the action to be taken in regard to such proposal;
 - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

⁴⁰ The relevant paragraph 4 of Article 40 of the Vienna Convention on the Law of Treaties states:

The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State [i.e. where one State is party to both treaty whereas the other State is party to only one of those two treaties, the treaty to which both States are parties governs their mutual rights and obligations].

⁴¹ See *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Tariff Committee* (Geneva, Apr.-Oct. 1947), UN Doc. EPC/TAC/PV/15, p. 6 *et seq.*, reported in GATT Analytical Index, *supra* note 14, at 930-31.

⁴² JACKSON, *supra* note 19, at 81.

⁴³ *Report of the Second Session*, *supra* note 41, at 931.

⁴⁴ Article XXX:1 GATT 1947, LEGAL TEXTS, *supra* note 2, at 531.

On the international plane, the battle for majority rule was principally fought in the League of Nations⁴⁵ and reached a high point in those international organizations (mostly international economic ones) formed during the last years of the Second World War. Majority rule, either simple or qualified, was carried through into the constituent instruments of several of these organizations, established after 1945.⁴⁶ As previously noted, the General Agreement also made some allowances for the use of majority rule on amendments. The extent to which this basic principle carried over into the WTO and was reinforced by new rules on amendments to the WTO Agreement or the Multilateral Trade Agreements annexed thereto — which involve decision-making by consensus, in addition to qualified majority voting — is dealt with hereunder. Some of the larger powers remained suspicious of the process of majority, seeing it as a threat to their vital interests. This occasionally led to a call for weighted voting on substantive matters, for example, the twin Bretton Woods institutions of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD),⁴⁷ or even recourse to decision-making by consensus.⁴⁸

C. The Origins of Consensus as a Decision-making Process by the CONTRACTING PARTIES

The GATT, like the IMF and World Bank, was a post-war creation; however, the CONTRACTING PARTIES to the GATT never embraced weighted voting for decision-making. Since the adoption of the first contribution scale at the Second Session of the Contracting Parties in 1948, each GATT contracting party and associated government has paid contributions to the GATT budget based on its share in the volume of foreign trade of the CONTRACTING PARTIES.⁴⁹

⁴⁵ Zemanek, *supra* note 21, at 859; SCHERMERS & BLOKKER, *supra* note 22, at 513

⁴⁶ The trend towards majority rule began in the latter part of the 19th and early part of the 20th century with administrative and technical unions, such as the International Telegraphic Union (ITU) and the Universal Postal Union (UPU), *see* SCHERMERS & BLOKKER, *supra* note 22, at 510; Zamora, *supra* note 28, at 574-75. It should be noted that since 1984 decisions in UPU, Congresses are taken by "common consent" with resort to voting where this cannot be achieved, as in the WTO; *see* SCHERMERS & BLOKKER, *supra* note 22.

⁴⁷ *See* Zamora, *supra* note 28, at 576-78; Zemanek, *supra* note 21, at 859-60.

⁴⁸ SCHERMERS & BLOKKER, *supra* note 22, §783 at 514.

⁴⁹ The actual share of the CONTRACTING PARTIES in total world trade was calculated on the basis of foreign trade figures for the past three years and included in the scale of contribution was a minimum percentage contribution of 0.03% for CONTRACTING PARTIES and associated governments whose trade value was at or below that percentage of the total trade of the CONTRACTING PARTIES; *see* GATT ANALYTICAL INDEX, *supra* note 14, at 1037. It is to be expected that WTO Members' contributions to the new organization will be along similar lines since it has

Unlike the IMF⁵⁰ and World Bank, the GATT contribution has never been linked to an apportionment of votes in the Ministerial Conference, for example, the plenary session or general assembly of the CONTRACTING PARTIES or in the GATT Council. This fact is partly due to the lack of organizational structure and, hence, institutions in the GATT. Contracting parties to the GATT derive their ability to meet and take decisions from their adhesion to a multilateral treaty. This is supported by the wording of Article XXV:1 GATT, which speaks of contracting parties meeting “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.”

Consequently, the General Agreement is short on decision-making procedures, as exemplified by its voting provisions. Article XXV:3 GATT simply provides that “[e]ach contracting party shall be entitled to one vote at all meetings of the CONTRACTING PARTIES.”⁵¹ Paragraph 4 of that same Article XXV qualifies this statement by prescribing majority rule; thus: “Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.”⁵²

Decision-making by consensus in GATT practice follows a discernible trend in other international *fora*, beginning in the mid-1960's. Interest in use of the consensus technique increased with the number of developing countries entering the international system in the wave of decolonization and their accumulation of large voting majorities in

been decided that the financial regulations should remain based as far as practicable on the law and practice of the GATT 1947; see Article VII, WTO, *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 10.

⁵⁰ The IMF allocates votes, or quotas – subject to a general review by the Board of Governors at least every five years; see Articles of Agreement of the International Monetary Fund, 1988, art. III, sec. 2(a) at 4 – based on a mathematical formula with several variables in order to determine relative economic strength thus ensuring that the weighted voting power in the respective organization reflects relative economic strength. *Id.* art. XII, sec. 5; IMF Articles of Agreement. This practice is followed by the World Bank; see Article V, Section 3 Articles of Agreement of the International Bank for Reconstruction and Development, in 1 BASIC DOCUMENTS ON INTERNATIONAL ECONOMIC LAW 427, 439 (Stephen Zamora & Ronald A. Brand eds., 1990), see also Zamora, *supra* note 28, at 576-77).

⁵¹ See JACKSON, *supra* note 19, at 122.

⁵² Majority decisions are endorsed in Rule 28 of the Rules of Procedure, adopted in 1964, which provides:

Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.

Rules of Procedure for Sessions of the Contracting Parties, GATT B.I.S.D. (12th Supp.) at 10-14 (1964); see also GATT ANALYTICAL INDEX, *supra* note 14, at 1012; see also JACKSON, *supra* note 19, at 123.

international organizations.⁵³ Since 1972, more than half of the General Assembly resolutions, and possibly greater than 70%, have been adopted "without a vote," with consensus resolutions being the preferred mode of decision-making if the majority wishes to secure the cooperation of the minority in the implementation of the resolution.⁵⁴

Expanded membership of the international society has increased the divorce of power from voting majorities in international decision-making. The balance has recently been redressed, to some extent, in those areas of international law which reach deepest into the fabric of civil society and the reserved jurisdiction of States; for example, the formulation of basic standards, the implementation, the elaboration, and the incorporation into the laws of war of binding international rules on the protection of human rights and fundamental freedoms which have given rise to a body of international humanitarian law. Both the law on the international protection of human rights and humanitarian law rely heavily on national authorities as the primary enforcers and disseminators of those laws in the domestic context.⁵⁵

Majority voting appeared increasingly useless for decision-making in international society because of the danger of alienating powerful majorities or producing important disaffected minorities. The search for a decision-making technique that would enjoy broader-based support for decisions in a growing, highly divided system is most apparent when decisions on the management of scarce natural resources and a range of economic transactions are considered.⁵⁶ As a result, the emergence of consensus in the UN system within the 1959 UN Committee on the Peaceful Uses of Outer Space, created by UN General Assembly Resolution 1472 (XIV), is not surprising. This Committee could not truly begin its work until its members had reconciled their differences on the method of work and voting procedure to

⁵³ SCHERMERS & BLOKKER, *supra* note 22, at 506, 514; Buzan, *supra* note 24, at 325.

⁵⁴ SCHERMERS & BLOKKER, *supra* note 22, at 508 (citing M.J. PETERSON, *THE GENERAL ASSEMBLY IN WORLD POLITICS* 85 (1986)); see also Miguel Marin-Bosch, *How Nations Vote in the General Assembly of the United Nations*, 41 INT'L ORG. 705-24 (1987).

⁵⁵ See generally Treaty Establishing the European Economic Community, March 25, 1957, 261 U.N.T.S. 140, at Articles 48 *et seq.* and 52 *et seq.* of the Treaty of Rome that recognize two fundamental human rights in the "freedom of movement" and "freedom of establishment." [hereinafter Treaty of Rome].

⁵⁶ Schermers and Blokker provide the example of the United Nations Conference on Trade and Development (UNCTAD), established in 1964, which began as a U.N.-sponsored conference designed to deal with the twin issues of trade and development with particular reference to developing countries (G.A. Res. 1995 (XIX), 30 December 1964, 19 U.N.G.A.O.R. Supp. No. 15 at 1, U.N. Doc. 1/5815 (1965)), where as a rule, decisions are adopted by consensus rather than by majority vote. SCHERMERS & BLOKKER, *supra* note 22, at 508-509.

be adopted.⁵⁷ After two years of discussion, members of the Committee recorded their understanding that they would continue negotiating on drafts for the peaceful use of outer space until none of them objected to the recording of the results as an agreement.⁵⁸

Such an initial move towards decision-making by consensus is essentially a non-objection procedure or a form of passive consensus. However, when negotiating positions are assumed, this procedure more closely resembles a pro-active and deliberate use of the consensus technique in decision-making, often to avoid formal voting mechanisms.⁵⁹ One example is Rule C-10 of the Rules and Regulations of the Executive Board of the IMF, which states that “[T]he chairman shall ordinarily ascertain the sense of the meeting in lieu of a formal vote.”⁶⁰ Within the GATT, a practice already had emerged in which the CONTRACTING PARTIES, acting jointly, conform Article XXV:1 GATT (here understood as the GATT plenary body or general assembly where all States parties exercise a vote),⁶¹ to routinely vote on waivers⁶² and accessions but to settle all other ordinary business by consensus. This was noted as early as 1953 in the Report of the Working Party on “Arrangements for Japanese Participation,” where it was stated that “. . . the CONTRACTING PARTIES do not usually proceed to a formal vote in reaching decisions; generally, the Chairman takes the sense of the meeting”⁶³ Former GATT Director-General, Olivier Long, has described the use of consensus in

⁵⁷ Zemanek, *supra* note 21, at 862, citing M. LACHS, *THE LAW OF OUTER SPACE* 27-41 (1972).

⁵⁸ *Id.* at 862-63.

⁵⁹ See M.A.G. VAN MEERHAEGHE, *INTERNATIONAL ECONOMIC INSTITUTIONS* 49 (1981); see also Buzan, *supra* note 24, at 329 (distinguishes between *active consensus* which is used to move the consensus process forward and *passive consensus* which is characterized as the “mere substitution of consensus for voting as a way of making decisions”).

⁶⁰ Rule C-10 adopted September 25, 1946, amended September 18, 1969 and April 1, 1978 in *By-Laws, Rules and Regulations*, International Monetary Fund, 43rd issue, August 1, 1986, p. 23; see VAN MEERHAEGHE, *supra* note 59, at 28-30.

⁶¹ SCHERMERS & BLOKKER, *supra* note 22, at 14.

⁶² Article XXV:5 GATT calls for a qualified majority vote:

In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph.

Marrakesh, Legal Texts, supra note 1, at 525-26.

⁶³ G/55/Rev.1, adopted on 23 October 1953, B.I.S.D. (2d Supp) at 117, 118, reported in *GATT ANALYTICAL INDEX, supra* note 14, at 1014; see also OLIVER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 55 (1987).

GATT as a way to avoid voting on controversial matters and instead to seek a compromise solution acceptable to all interested parties.⁶⁴

Switzerland provides a perfect example of the value of this process. The Resolution adopted by the CONTRACTING PARTIES in 1958 on the Participation of Switzerland in the work of the CONTRACTING PARTIES carried with it an understanding that it would not be possible, from a strictly legal point of view, to give full voting rights to Switzerland under Articles XXV and XXXII. However, this lack of full voting rights was considered unimportant since, in the normal course of business, the CONTRACTING PARTIES did not proceed to a formal vote but instead “. . . the Chairman [would take] the sense of the meeting and Switzerland would have the same opportunity as contracting parties to express its opinion.”⁶⁵

While it is tempting to believe that the early use of consensus under the General Agreement ensured that decision-making at the multilateral level would not be dominated by the numerical superiority of any group of States but rather would provide procedural significance to variations in states' economic power and status, the opposite may be true. This belief may be valid for negotiations among States where law-making decisions are the intended outcome,⁶⁶ but the same rationale cannot be applied to ordinary consensus decision-making as found in sessions of the CONTRACTING PARTIES.⁶⁷

Moreover, it cannot fully explain the preference for consensus in the early 1950's. At that time, there were relatively few contracting parties to the GATT,⁶⁸ most of those parties were industrialized States with relatively homogenous trading interests.

The reluctance to engage in formal voting at such sessions and the preference to allow the chairman to determine that a consensus had been reached, may have stemmed, as Jackson has suggested,⁶⁹

⁶⁴ LONG, *supra* note 63.

⁶⁵ GATT ANALYTICAL INDEX, *supra* note 14, at 949, 1019.

⁶⁶ Charney attributes to the consensus approach in multilateral law-making the ability to maintain “an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations. . .” Jonathan I. Charney, *United States Interest in a Convention on the Law of the Sea: The Case for Continued Efforts* 11 VAND. J. TRANSNAT'L L. 39, 43 (1978).

⁶⁷ See GATT Analytical Index, *supra* note 14, at 1011, for details of regular and special sessions, for example, the CONTRACTING PARTIES, acting jointly.

⁶⁸ The 23 original signatories were joined by a further 13 States as a result of the Annency Protocol of Oct. 10, 1949 (62 U.N.T.S. 122), the Torquay Protocol of Apr. 21, 1951 (142 U.N.T.S. 34), and the Dillon Round of Multilateral Trade Negotiations, July 16, 1962 (440 U.N.T.S. 2) and May 6, 1963 (501 U.N.T.S. 304).

⁶⁹ JACKSON, *supra* note 19, at 123

from a practice commonly found in international relations of negotiating an issue to consensus outside the meeting in which the formal action takes place. This practice gives practical recognition to the issue of power in deliberations and the issue of vital trading interests among the CONTRACTING PARTIES to the GATT.

Indeed, it became common GATT practice for decisions of the CONTRACTING PARTIES (and also the Council) to be prepared in advance in committees and working parties. Often, informal negotiations, mostly in restricted groups, were carried out beforehand in the Director-General's office or elsewhere in order to reach a consensus that would permit the submission of a draft decision to the CONTRACTING PARTIES (or the GATT Council).⁷⁰

The use of consensus in sessions of the CONTRACTING PARTIES has proven to be a device to which States can ascribe safely with the knowledge that this consensus *ad idem* will not jeopardize any previously agreed positions between individual contracting parties and will mask any differences which may exist between them. Therefore, in the case of GATT, consensus has served the primary purpose of seeking to address controversial points through the use of negotiation, or mediation, rather than through more formal mechanisms. This reinforces the general character of the General Agreement as a forum for ongoing negotiations in trade matters and the notion of GATT as a model of law as process.

Since the ultimate aim of consensus is to reach something approaching unanimity, the importance of negotiations as a means of resolving underlying conflicts is inherent to the technique and its success.⁷¹ It also allows participants in the process to identify with the result as a whole, even if dissent is registered on details.⁷² However, the consensus process is far from transparent. This lack of transparency is one of the key imperfections of this form of participation and one which does not laud the institutional effectiveness of the process. Most negotiations that precede the formal consensus decision in a plenary body, such as the former sessions of the CONTRACTING PARTIES, are conducted privately and leave no trace in the records which might facilitate solutions to future questions of interpretation.⁷³ Decision-making at the international level is not only divorced from

⁷⁰ LONG, *supra* note 63, at 55.

⁷¹ Zemanek, *supra* note 21, at 876.

⁷² Consensus is "compatible with objections and reservations, provided, however, that they do not affect major points of the decision to be taken. Antonio Cassese, *Consensus and Some of its Pitfalls*, 58 RIVISTA DIRITTO INTERNAZIONALE 754 (1975).

⁷³ SCHERMERS & BLOKKER, *supra* note 22, at 515

national constituencies but is inevitably influenced by policy makers and special interest groups within the institutional sphere. Decision-making by consensus can frequently involve protracted negotiations to achieve the desired "concurrence of views," or feelings, and to avoid express decisions.⁷⁴

Within the GATT, consensus may also have served other functions. As Jackson suggests, it may have partially substituted for weighted voting in an important international economic forum (the argument stills holds true for the WTO).⁷⁵ Where weighted, voting is the primary means of decision-making, as in the IMF; thus, consensus may fulfill a different, supplementary role. The use of consensus by the Executive Board of the IMF can have a mitigating effect on the Board's weighted voting and provide a response to the accusation of developing countries that a few rich member states might otherwise set policies that are against their interests.⁷⁶

In this instance, a decision made "by the sense of the meeting" does not mean that the weighted votes are irrelevant. On the contrary, such consensus indicates that a position adopted at a Board meeting is supported by the executive directors, who have sufficient votes to carry the issue, if it were put to a vote. Thus, the consensus technique, in the absence of a formal vote, reinforces the underlying balance of economic power implicit in weighted voting organizations.

Another feature of consensus decision-making under the General Agreement, is that its informality, previously allowed provisional and *de facto* parties "to participate without regard for their formal lack of vote."⁷⁷ The use of consensus has also been justified as "institutional practice," formal voting being replaced by a consensus of the attending contracting parties in order "to obviate the almost impossible task of convening all the contracting parties at a particular moment."⁷⁸

Finally, consensus decision-making, as opposed to unanimity, allows interpretative declarations or explanatory statements to be made after the presiding officer (in the case of the CONTRACTING PARTIES, the Chairman) has announced that consensus has been reached.

⁷⁴ *Id.* at 507.

⁷⁵ It will be recalled that both the IMF and IBRD utilise weighted voting, whereby votes are allocated to Members based upon their share in the capital of the relevant organization. Other international economic institutions have followed suit, *viz.*, the Inter-American Development Bank (IDB), the Asian Development Bank (ADB) and the African Development Bank (AfDB), *see* Zamora, *supra* note 28, at 576-77.

⁷⁶ VAN MEERHAEGHE, *supra* note 59, at 49; SCHERMERS & BLOKKER, *supra* note 22, at 514

⁷⁷ JACKSON, *supra* note 19, at 123, 145.

⁷⁸ LONG, *supra* note 63, at 55.

Thus, the role of consensus decision-making under the General Agreement resembles the role which interpretative declarations play in the law of treaties, where such declarations are preferred to the filing of a reservation to a particular treaty obligation.⁷⁹ Of course, such declarations may vary in content and, thus, in significance. Nevertheless, the making of explanatory statements is common practice under the General Agreement, even though a larger number of recorded instances are found in the GATT Council's practice than in the sessions of the CONTRACTING PARTIES.

D. The Use of Consensus as a Decision-making Process by the Council

How does the use of consensus in the GATT Council compare to its use by CONTRACTING PARTIES? The Council of Representatives of GATT Contracting Parties, established by Decision of June 4, 1960, terminated the Intersessional Committee and replaced it with a standing body. In that Decision certain voting requirements were laid down. It was stated that:

Pending further consideration by the CONTRACTING PARTIES of the question of voting, no action by the Council, other than action relating to its own procedures, may be taken by an affirmative vote of less than the absolute number of affirmative votes by which such action could have been taken by the CONTRACTING PARTIES under the relevant provisions of the General Agreement and the rules of procedure for sessions of the CONTRACTING PARTIES.⁸⁰

The practice of the GATT Council in such matters has proven very different. The Council has shown a marked preference for the use of consensus, the lead being taken by the Chairman at Council meetings.⁸¹

However, the meaning of the term "consensus" has not always been consistent in GATT Council practice. At the March 1981 Council Meeting, the Council Chairman, addressing a working party report on possible limitation of EEC subsidization of sugar exports, stated that "in his view, consensus was understood in GATT to mean that no delegation maintained its objections to a text or attempted to prevent

⁷⁹ D. M. McRae, *The Legal Effect of Interpretative Declarations*, 49 BRIT. Y.B. INT'L L.155 (1978). See also D. Vignes, *The Impact of International Organizations On the Development and Application of Public International Law*, in THE STRUCTURE AND PROCESS, *supra* note 17, at 837.

⁸⁰ Decision of 4 June, 1960, Establishing the Council of Representatives, GATT B.I.S.D. (9th Supp.) at 8 (1961). See also GATT ANALYTICAL INDEX, *supra* note 14, at 1100, on the practice of the Intersessional Committee.

⁸¹ LONG, *supra* note 63, at 55.

its adoption.”⁸² In this instance, consensus is essentially a non-objection procedure or a form of passive consensus. It is passive in character because it typifies the decision to refrain from taking a decision; to do otherwise might lead to paralysis of action. In contrast, the actual role that consensus plays in the formulation of any working party report is pro-active because consensus assists in the process of negotiation and compromise which leads to that report. Formal recognition of the customary practice of consensus in the formulation of working party reports is found in the Annex to the 1979 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*.⁸³

Additionally, the representatives of the Contracting Parties to the General Agreement hold considerably diverse views as to what consensus embodies. As an example, during the discussion surrounding the U.S. request for a panel on “EEC — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins,” the representative of Australia stated that his delegation believed the Chairman could determine that a consensus could be found even if there was no unanimity, a view which did not go uncontested.⁸⁴ The representative of India, backed by Brazil, Mexico, Jamaica, and Peru, maintained that if a contracting party stated that it did not believe a consensus to exist, then the Chairman of any GATT body could not determine otherwise. “As long as his assessment was not contested, any chairman could conclude that there was a consensus; but once that consensus was formally disputed, contested, or objected to by a contracting party, the consensus could not be said to exist.”⁸⁵ This approach views consensus as a process, or technique, for reaching a decision. At the same time, it equates the consensus technique with that of unanimity.

Since 1968, and until the entry into force of the WTO, the GATT Council (acting for the CONTRACTING PARTIES), or the annual

⁸² Discussion of L/5113, Director General’s report to the Council on Article XVI:1 discussions on “EEC-Refunds on Exports of Sugar,” adopted on March 10, 1981, B.I.S.D., (28th Supp.) at 80.

⁸³ Paragraph 6 (i) of the Annex to the *Understanding* states :

The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party’s report.

Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 217 (1980).

⁸⁴ Doc. L/6328 (request for a panel). See GATT ANALYTICAL INDEX, *supra* note 14, at 1022.

⁸⁵ *Id.*

Session of the CONTRACTING PARTIES, adopted panel reports through the process of consensus. This practice remained unwritten, although it gained some formal recognition in paragraph (x) of the 1982 Ministerial Decision.⁸⁶ The GATT's unwritten principle on consensus decision-making had a different application in practice because defendant governments had the power to block any phase of the dispute settlement process, including, until 1988, the request for a panel and the adoption of an adverse ruling by the Council.⁸⁷ At one time, just prior to the Ministerial Meeting of 1982, the European Community actually supported a procedural reform for strengthening the dispute settlement system which would have allowed the application of the "consensus-minus-two" principle. This procedure effectively would have barred two parties to a dispute from participating in decisions on their own cases.

Not only did the Community's proposal fail, but the Community actually retreated from the position.⁸⁸ Instead, it sought reaffirmation of the traditional rights of parties to participate in the consensus decision-making process and thereby affect the outcome of that decision by blocking it, if it was in a party's vital interests to do so. In 1982, the practice of consensus for the adoption of panel reports was reinforced during the Uruguay Round when, in 1988, the so-called Montreal Mid-Term Review Agreement on Improvements to the GATT Dispute Settlement Rules and Procedures (Improvements Decision) was approved without anything of substance being added.⁸⁹ The GATT Council's use of consensus for the adoption of panel reports also pro-

⁸⁶ It stated that "the CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes. . . ." Ministerial Declaration, 38th Session at the Ministerial Level, Nov. 29, 1982, Doc. L/5424 GATT B.I.S.D. (29th Supp.) at 16 (1983).

⁸⁷ Major disputes which have resulted in the adoption of a panel report being blocked in Council have been: *United States - Tax Legislation (DISC)*, Nov. 12, 1976, GATT B.I.S.D. (23rd Supp.) at 98-147 (1977); *Spain - Measures Concerning Domestic Sale of Soyabean Oil*, Doc. L/5142, 1981 GATTPD LEXIS 2 (Nov. 3, 1981); *United States - Imports of Certain Automotive Spring Assemblies*, May 26, 1983, GATT B.I.S.D. (30th Supp.) at 107-28 (1984); *German Exchange Rate Scheme for Deutsche Airbus*, SCM/142, 1992 GATTPD LEXIS 13 (Mar. 4, 1992); and *EEC - Import Regime for Bananas*, DS38/R, 1994 GATTPD LEXIS 1 (Feb. 11, 1994). See also Petersmann, *supra* note 6, at 1192-93; R. E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 165 (1993).

⁸⁸ HUDEC, *supra* note 87.

⁸⁹ Rule G.3 *Adoption of Panel Reports* simply states:

The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided.

GATT: Decisions Adopted at the Mid-Term Review of the Uruguay Round, Apr. 8, 1989, 28 I.L.M. 1023, 1033 (1989). For approval of the contracting parties, see Improvements to the

vides an example of the "power-orientated" approach to dispute settlement within the GATT. It may have provided some governments with a freer hand to wield economic influence than was available to them on other policy matters, such as tariff negotiations or the implementation of such trade disciplines, as the countervailing of subsidies. These latter policies are more likely to attract the direct economic interests of constituents back home and call for political approval than dispute settlement proceedings. Nevertheless, the process has not been without its drawbacks. The application of the consensus technique by the Dispute Settlement Body (DSB) did not undergo significant change until the Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding)⁹⁰ that forms Annex 2 of the agreements, appended to the WTO Agreement, and the introduction of an integrated dispute settlement system in the GATT/WTO. Article 2:4 of the Understanding specifically allows that "where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus;" however, an interpretative footnote adds the twist. The footnote states that "the DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision."⁹¹ In essence, the DSB uses quasi-automatic decision-making procedures for the establishment of a panel,⁹² the adoption of panel reports,⁹³ and the adoption of Appellate Body reports⁹⁴ unless

GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 66 (1990).

⁹⁰ *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 404. The text of this and other dispute settlement procedures can also be found in *The WTO Dispute Settlement Procedures: A Collection of Legal Texts*, WTO 1 (1995) [hereinafter WTO Dispute Settlement Procedures].

⁹¹ WTO Dispute Settlement Procedures, *supra* note 90, at 2.

⁹² Article 6:1 Understanding states:

If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

Marrakesh, LEGAL TEXTS, *supra* note 1, at 410; WTO Dispute Settlement Procedures, *supra* note 90, at 8.

⁹³ The relevant section of Article 16:4 Understanding states:

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. . . .

Marrakesh, LEGAL TEXTS, *supra* note 1, at 417; WTO Dispute Settlement Procedures, *supra* note 90, at 17.

⁹⁴ Article 17:14 Understanding in *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 419; WTO Dispute Settlement Procedures, *supra* note 90, at 19.

there is a “negative consensus” not so to adopt.⁹⁵ This understanding of the consensus decision-making process moves away from the idea of a non-objection process and toward proactive decision-making.⁹⁶ This development reflects the diffusion of interests of WTO Members in the dispute settlement system yet also allows for the higher levels of participation required for the effective system-level action.

E. The Use of Consensus as a Decision-making Process by the
Council of the European Communities under the
Luxembourg Accords

The GATT CONTRACTING PARTIES’ use of consensus as a mechanism for decision-making does not readily find a counterpart in other institutional settings, particularly where such uses are of a supra-national type, as in the European Union. The early practice of the European Economic Community or EEC (renamed the European Community (EC) or (TEU) by the 1992 Maastricht Treaty), is one example of consensus being equated with unanimity. Originally, provisions of the Treaties of the European Communities required unanimity,⁹⁷ or a qualified majority, for voting in the Council.⁹⁸ When a qualified majority was applicable, the voting rules of Article 148:2 EC

⁹⁵ See also the use of consensus for the granting of requests for the suspension of concessions in the case of non-implementation of dispute settlement rulings (Article 22:6 Understanding), *Marrakesh*, LEGAL TEXTS, *supra* note 1, at 424; WTO Dispute Settlement Procedures, *supra* note 90, at 25.

⁹⁶ See *supra* text accompanying notes 24-48.

⁹⁷ This held good until entry into force of the Single European Act on July 1, 1987, Single European Act, Feb. 17 and 28, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506, when various decisions previously requiring unanimity were replaced by qualified majority voting. See P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 247, 247-48 (2d ed. 1990); SCHERMERS & BLOKKER, *supra* note 22, at 511-12.

⁹⁸ Upon the entry into force in July 1969 of the 1965 Merger Treaty, the three Councils of the Communities (European Economic Community, Euratom and the European Coal and Steel Community) were fused into one Council, consisting of representatives of each of the Member States. Treaty Establishing a Single Council and a Single Commission of the European Communities [1967] J.O. 152/2; Cmnd 4866 (1972). In present practice, the term “European Council” is sometimes used to describe the meetings of the heads of governments of the Member States and thus forms part of the political process, and its usage is to be distinguished from the Council of the European Communities; such meetings were never envisaged in the founding treaties but have nevertheless been formalized under the Single European Act. See KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 97. It should also be noted that the Maastricht Treaty introduced a further distinction between the “European Council,” as an organ of the European Union, in the sense of Article D, TEU, and the “Council, meeting in the composition of the Heads of State or of Government,” as an organ of the European Community. The Maastricht Treaty, 1992, European Union, Title I, art. D; and the Treaty of Rome, Article 109J:2 EC.

or Article 118:2 Euratom were relevant.⁹⁹ Upon each successive enlargement of the European Communities, the number of votes needed to obtain a qualified majority changed, with a corresponding adjustment of the "weighting" of votes of the Member States. If a decision in the Council was not being taken on the basis of a proposal from the Commission, a certain number of Member States were required to vote in its favor.¹⁰⁰

During the transitional period, the unanimity rule was replaced in a growing number of fields. In January 1966, the third stage of the transitional period began, resulting in matters of great importance to the six Member States, such as policies on transport, agriculture, and external trade, being regulated by the Council by qualified majority voting (q.m.v.). The imminent entry into force of q.m.v. in the agricultural sector had led France to forgo sending a minister to Council meetings in the second half of 1965 as a sign of its opposition to an unlimited application of qualified majorities.¹⁰¹ General de Gaulle viewed the use of qualified majority as contrary to the dignity of the state, devoid of the reality of power and inapplicable if the vital interests of one or more Community partners were at stake.¹⁰²

The other five governments (Belgium, Germany, Italy, Luxembourg, and the Netherlands) were unwilling to accept the French view; a constitutional crisis in the EC was avoided only by the adoption of the so-called "Luxembourg Accords" of January 28-29, 1966. In section (b) of the Luxembourg Accords under the heading *Majority voting procedure*, the wording reflects the Member States' ultimate adoption, in part, of the French Government view. As a result, decisions taken by majority vote on a proposal of the Commission respecting important interests of one or more partners required other Members of the Council to take account of such interests when they deliberated and to try to find a solution which was mutually acceptable within a reasonable period of time.¹⁰³ The view of the French, to

⁹⁹ Article 148:2 Treaty of Rome, *supra* note 55; Article 118:2, Treaty Establishing the European Atomic Energy Community (Euratom), Rome, March 25, 1957.

¹⁰⁰ This number was four Member States. Currently, after the changes brought about by the TEU, Article 148:2 requires 62 votes in favor of acts adopted on a proposal from the Commission and 62 votes in favor, cast by at least 10 Member States, in other cases. Treaty of Rome, March 25, 1957, 298 U.N.T.S. 11, 70.

¹⁰¹ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 97, at 248.

¹⁰² VIGNES, *supra* note 79, at 838.

¹⁰³ The Luxembourg Accords, section (b), I., *EC Bulletin* (1966:3), at 8. It should be noted that this compromise was written down after a Council session on January 28 and 29, 1966, but never adopted, either as an amendment to the Treaty of Rome or as a Council Decision. Despite having no legal force it governed de facto the life of the Community for nearly 20 years; *See*

which the other Member States did not ascribe, was expressed as follows: “[T]he French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached;”¹⁰⁴ for example, until there was a consensus in the sense of the end product of the decision-making process.¹⁰⁵ Despite the divergence of views between the partners on the use of the consensus rule, the European Communities, being pragmatic, were willing to accept that this difference of opinion would bar the resumption of activities concerning the normal procedure.¹⁰⁶ Notwithstanding the pragmatism of the “six,” this approach, from a decision-making point of view, is questionable. The significance of qualified majority rule was seriously undermined by the circumstances worked out in the Luxembourg Accords. As Kapteyn and Verloren van Themaat have pointed out:

[I]ts significance resides in the fact that its application is not a foregone conclusion, rather than in its relentless application. The mere existence of the rule, even if it were to be applied only rarely, promotes the attainment of an acceptable compromise, because it calls for an accommodating and reasonable attitude on the part of the members of the Council as long as they are in doubt whether the rule will or will not be applied.¹⁰⁷

In practical terms, it led to the abandonment of voting in the Council in favour of consensus decision-making, even on matters where no important interests were at stake. By 1969, the practice of the Council was compared to proceedings in inter-governmental negotiations; the distinction between a Community institution and an inter-governmental organization had become blurred.¹⁰⁸ The situation did not improve immediately. The 1972 accession of Denmark, Ireland, and the United Kingdom brought about the first enlargement of the European Communities from six to nine. Despite a call at the 1974 Paris summit to renounce the practice of making agreement conditional upon the unanimous consent of the Member States, the practice continued until 1982, when the Community fixed agricultural prices by a qualified majority (with Denmark, Greece, and the United Kingdom abstaining).

Eventually, a change in the Council’s rules of procedure in 1987 — whereby the Council votes on the initiative of the President of the

Encyclopaedia of European Union Law: Constitutional Texts (Neville March Hennings gen. ed., 1996).

¹⁰⁴ Luxembourg Accords, *supra* note 103, § (b), II.

¹⁰⁵ *Id.* § 2(i).

¹⁰⁶ *Id.* § (b), I.

¹⁰⁷ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 97, at 248.

¹⁰⁸ *Id.* at 285.

Council and the President is required to open voting procedures on the invitation of a Council Member or the European Commission whenever a majority of the Members are in favour — led to the breaking of the taboo on q.m.v. majority voting and a showing of greater flexibility in decision-making.¹⁰⁹ Furthermore, items for which a vote could be requested had to be specified in the provisional agenda and sent to Member States at least fourteen days before the meeting at which the vote was to be taken.¹¹⁰ The entry into force of the Single European Act¹¹¹ heralded an extension of the areas in which qualified majority voting could take place, particularly through the cooperation procedure with the European Parliament. This has now been strengthened through the co-decision procedure, introduced under the Maastricht Treaty, into Article 189b EC.¹¹²

F. The Institutionalization of Decision-making by Consensus

Formalization of the process of decision-making by consensus in the international community began in 1971 when the UN General Assembly introduced consensus into its rules of procedure. Resolution 2837 (XXVI) approved the conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly that the adoption of decisions and resolutions by consensus was desirable when it contributed to the effective and lasting settlement of differences, thereby strengthening the authority of the UN.¹¹³ However, this procedure was without prejudice to the right of every member state to set forth its views in full.¹¹⁴ This qualification

¹⁰⁹ SCHERMERS & BLOKKER, *supra* note 22, at 512. However, Schermers and Blokker note that on occasion Member States have threatened to invoke the Luxembourg Accords in order to block decision-making in cases where they could be out-voted under the TEU. One such example was France in the Blair House agreement on agricultural trade, concluded between the European Commission and the U.S. towards the end of the GATT Uruguay Round. *Id.* at 512 n.159.

¹¹⁰ See Amendment of the Council's Rules of Procedure Adopted by the Council on 20 July 1987, 1987 O.J. (L 291) 27; SCHERMERS & BLOKKER, *supra* note 22, at 512.

¹¹¹ Under the Single European Act of 1986, the requirement of unanimity was replaced by that of a qualified majority in respect of Articles 28, 49, 57, 70, 75 and 84 EEC. See Single European Act, *supra* note 97.

¹¹² Treaty on European Union and Final Act, Maastricht, amending the Treaty Establishing the European Community, Feb. 7, 1992, art. 189b, 1992 O.J. (C 224) 1, 66, 31 I.L.M. 247, 297 (1992).

¹¹³ Report of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly, U.N. GAOR, 26th Sess., Supp. No. 26, par. 289, U.N. Doc A/8426 (1971), U.N. Doc. A/8426, (1971), *quoted in* Zemanek, *supra* note 21, at 864.

¹¹⁴ *Id.*

appears to have been necessary since some States had adopted the practice of filing reservations to consensus shortly before that time.¹¹⁵

Soon afterward, a further development occurred — the mandatory replacement of majority rule by consensus as a means of decision-making in the rules of procedure of international organizations. The first recorded instance of a procedural rule on consensus occurred in one of two UN conferences. During a meeting of the Population Commission of ECOSOC, when preparing the rules of procedure for the 1974 Population Conference to be held in Bucharest, the Romanian delegate proposed that the President of the Conference should be able to recommend that “the decisions on important matters of substance shall be taken, if possible, by consensus.” The Commission initially rejected the proposal in favour of a recommendation which considered decision-making on the basis of consensus to be, according to UN practice, “general agreement without a vote, but not necessarily unanimity.”¹¹⁶ This recommendation was attached to the draft Rules of Procedure drawn up by ECOSOC and subsequently approved in Resolution 1835 (LVI). The World Population Conference subsequently adopted both, annexing the recommendation to its Rules of Procedure.¹¹⁷

The second and more complex instance of the institutionalization of consensus as a decision-making procedure was adopted by the Third United Nations Conference on the Law of the Sea (UNCLOS III). When the General Assembly met at its 28th session in 1973 and decided to convene UNCLOS III, already there was a bitter and protracted debate in the First Committee of the Assembly over the working and voting procedures of the Conference. The debate finally was resolved with a gentlemen’s agreement, approved by the General Assembly. In order to gain the widest possible acceptance on substantive matters pertaining to problems of ocean space and the seabed, it was agreed that the Conference should try to reach agreement on sub-

¹¹⁵ Zemanek, *supra* note 21, at 864.

¹¹⁶ The Committee was influenced by the statement of the Director of the General Legal Division of the UN Secretariat who described consensus as “a practice under which every effort is made to achieve unanimous agreement; but if that could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on record.” *Population Commission: Report on the Third Session*, U.N. ESCOR, 56th Sess., Supp. No. 3A, par. 64, U.N. Doc. A/5462 (1974), reprinted in Summary of a Statement Made at the 311th Meeting of the Population Commission, March 6, 1974, 1974 U.N. Jurid. Y.B. 163, U.N. Doc. ST/LEG/SER.C/12. 12

¹¹⁷ See Daniel Vignes, *Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?*, 69 AM. J. INT’L L. 119, 121 (1975) (referring to Res. 1835 (LVI) of May 14, 1974); Zemanek, *supra* note 21, at 865, 874.

stantive matters by way of consensus and that no voting on such matters should take place until all efforts at consensus had been exhausted.

Similar to the adoption by the Population Commission of ECOSOC of the recommendation on the use of consensus, the gentlemen's agreement embodying the consensus rule on decision-making formed the basis for a declaration by the President of UNCLOS III which was subsequently endorsed and appended to the Rules of Procedure.¹¹⁸ In the case of UNCLOS III, however, a novel feature was added. Rule 37, paragraph 1 of the Rules of Procedure specifically introduced the notion of consensus when it stated, "before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority specified in paragraph 1 of Rule 39."¹¹⁹

The practice on adoption of Rules of Procedure at major international conferences has been mixed since the UNCLOS III gentlemen's agreement. Only the Conference on Security and Cooperation in Europe,¹²⁰ in Rule 69.4 of its Rules of Procedures, provides that decisions of the conference are to be taken by consensus. For this conference, consensus is ". . . the absence of any objection expressed by a Representative and submitted by him as a constituting an obstacle to the taking of the decision in question."¹²¹

However, not all attempts at introducing consensus into the forum of an international conference are necessarily bound to succeed, as revealed by the recently convened First Conference of the Parties

¹¹⁸ The Declaration incorporating the "Gentlemen's agreement" made by the President and endorsed by the Conference at its 19th meeting, June 27, 1994, stated:

Bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance.

The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

Buzan, *supra* note 24, at 348, citing U.N. Doc. A/CONF.62/WP.2/Rev.2 at 8-10, 17 (1976).

¹¹⁹ *Id.* at 347. Rule 39 states that decisions on substance require a two-thirds majority of the representatives present and voting, with at least a majority of the States participating in the session of the Conference. *Id.* at 348.

¹²⁰ Conference on Security and Co-operation in Europe: Final Act, August 1, 1975, 14 I.L.M. 1292 (1975). Four successive follow-up meetings have been held at Belgrade, Madrid, Vienna, and Helsinki; at the last of these held on December 6, 1994, it was decided to change the name of the organization from CSCE to OSCE — the Organization for Security and Cooperation in Europe — as of January 1, 1995, in order to reflect its enhanced role and contribution towards security, stability and cooperation in the region. Organization for Security and Co-operation in Europe: Budapest Summit Declaration on Genuine Partnership in a New Era, Dec. 6, 1994, 34 I.L.M. 764, 773 (1995).

¹²¹ Zemanek, *supra* note 21, at 866; SCHERMERS & BLOKKER, *supra* note 22, at 506.

to the UN Convention on Climate Change.¹²² Despite the number of agreements reached at the Berlin Session of this conference, parties failed to adopt a decision on the rules of procedure to govern future conferences.¹²³ The failure resulted from a disagreement over the potential application of the consensus decision-making procedure. A number of parties, keen that no further greenhouse gas emission reduction commitments be undertaken, insisted upon the adoption of consensus because they believed that consensus would enable them to veto emissions' control progress.¹²⁴ Other parties, who wanted such controls to continue, pressed for majority voting in order to protect their vital interests.¹²⁵ More success in formalizing decision-making by consensus has been achieved in some functional organizations,¹²⁶ as well as regional economic arrangements.¹²⁷ However, the constituent documents of these organizations are not always clear regarding exactly what is meant by the adoption of decisions by consensus.

A preference for decision-making by consensus has been carried over into the WTO, which states in Article IX, WTO Agreement on Decision-Making, that "the WTO shall continue the practice of decision-making by consensus followed under the GATT 1947."¹²⁸ What

¹²² See United Nations Framework Convention on Climate Change Conference of the Parties: Decisions Adopted by the First Session (Berlin), Mar. 28-Apr. 7, 1995, 34 I.L.M. 1671 (1995) [hereinafter Berlin Climate Change Conference].

¹²³ Cf. Instrument for the Establishment of the Restructured Global Environmental Facility, March 16, 1994, 33 I.L.M. 1273 (1994) [hereinafter Global Environmental Facility], where paragraph 25 of the Instrument addresses *Principles of Decision-making* and paragraph 25(b) more specifically prescribes:

Decisions of the Assembly and the Council shall be taken by consensus. In the case of the Council if, in the consideration of any matter of substance, all practicable efforts by the Council and its Chairperson have been made and no consensus appears attainable, any member of the Council may require a formal vote.

Id. at 1291.

¹²⁴ Berlin Climate Change Conference, *supra* note 122, at 1673.

¹²⁵ *Id.*

¹²⁶ See International Sugar Agreement 1992, March 20, 1992, 1219 U.N.T.S. 135, 141-42; International Agreement on Olive Oil and Table Olives, July 1, 1986, U.N. Doc. TD/SUGAR.12/6.

¹²⁷ See Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 26 Mar. 1991, art. 16, 30 I.L.M. 1041, 1048 [MERCOSUR Treaty] ("[D]ecisions of the Council of the common market and the Common Market Group shall be taken by consensus, with all States Parties present"); Treaty Establishing the African Economic Community, June 3, 1991, art. 10:1, 30 I.L.M. 1241 ("Unless otherwise provided in this Treaty, decisions of the Assembly shall be adopted by consensus, failing that, by a two-thirds majority of Member States"); Treaty Establishing the Common Market for Eastern and Southern Africa, November 5, 1993, art. 8:4 & 9:6, 33 I.L.M. 1067, 1077 (1994) ("The decisions of the Authority shall be taken by consensus.") ("The decisions of the Council shall be taken by consensus, failing which, by two-thirds majority of the members of the Council.")

¹²⁸ Marrakesh, LEGAL TEXTS, *supra* note 1, at 11

is understood by consensus is qualified in a footnote as: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting when the decision is taken, formally objects to the proposed decision." Therefore, despite the strides that have been made in the field of dispute settlement where consensus decision-making on the establishment of a panel, the adoption of a panel or Appellate Body report, or the instigation of retaliatory measures, is concerned, consensus decision-making is proactive and orientated towards a result, elsewhere in ordinary decision-making processes consensus is of the defensive, non-objection type.

III. SUMMARY AND CONCLUSIONS

The above contribution examined the evolution of consensus in GATT decision-making and traced its use and development by the GATT CONTRACTING PARTIES and the GATT Council. The consensus technique in GATT was compared and contrasted with its similar application in other international *fora*, notably in other international economic organizations like the IMF and the World Bank as well as in the UN system at large. On a regional level, comparisons were drawn with the use of consensus as a decision-making process within the European Communities under the Luxembourg Accords of 1966. The use of consensus in decision-making in both international and regional *fora* has increased significantly in the past three decades, particularly in the sphere of international economic relations and the management of natural resources. Development of the consensus technique in practice born in its active and passive forms has subsequently been formalized at the international and regional level, notably in the domain of international conferences, or conferences of the parties to international conventions (not dissimilar to the contracting parties to the former GATT), and more recently in the WTO Agreement, as well as in a number of regional agreements on economic integration.