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Uruguay Round

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3. *Conclusion*

The Resolution meets the substantive objections of the GATT Panel to existing § 337 practice. It proposes changes that would not significantly weaken § 337 as a border measure against infringing imports while assuring compliance with GATT obligations of the U.S. The Resolution does not introduce new procedures that may create GATT problems. It deserves the support of the Association.

Respectfully submitted,
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August 1993

IV. Uruguay Round*

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association supports the conclusion without undue delay of the Uruguay Round with agreements that would improve the world trading system and promote global economic prosperity;

BE IT FURTHER RESOLVED, That the American Bar Association urges the United States government to support the strengthening of existing GATT multilateral dispute resolution procedures, through the adoption of measures such as: the development of a unitary dispute procedure, reform of the procedure to consider approval of dispute panel reports, increased transparency, utilization of scientific expertise, and the creation of procedures for appeal of GATT panel reports;

BE IT FURTHER RESOLVED, That the American Bar Association urges the United States government to support the establishment of an effective multilateral trade organization that would serve as the institutional framework for better implementation of the substantive rules resulting from the Uruguay Round.

REPORT

I. Overview

Through this Recommendation, the American Bar Association would express its support for the conclusion, without undue delay, of the Uruguay Round of

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multilateral trade negotiations, with sound agreements that are essential to strengthen the existing multilateral dispute resolution procedures and to create a multilateral trade organization.

The successful conclusion of the Uruguay Round is critically important to global prosperity, a point made by Western finance and trade ministers and heads of state with increasing frequency and sense of urgency over the last few years. The American Bar Association has repeatedly endorsed the United States' participation in the multilateral trade talks, viewing these talks as essential to continued U.S. economic growth.

The Recommendation supports the general approach of the draft agreements reached in the Uruguay Round on dispute resolution procedures and a multilateral trade organization, although it does not endorse every detail of those agreements in part due to the ongoing nature of the negotiations.

The dispute settlement reforms of the Uruguay Round are of fundamental importance to achieving a strong and stable multilateral trading system. Without effective dispute settlement procedures, international economic conflicts will fester and nations will pay little mind to the substantive trade rules. The proposed reforms would greatly improve the effectiveness of the GATT dispute settlement procedures, by eliminating the offending country's ability to block GATT adoption of dispute panel reports and creating a due process system of appeal in its place. In this way, the rule of law would be advanced over political expediency. In addition, the reforms would improve multilateral dispute resolution by creating a unified dispute resolution procedure in place of the current plethora of separate procedures.

Similarly, the institutional framework for multilateral trade will be central to the implementation of the existing substantive rules and those agreed to in the Uruguay Round. Yet this necessary institutional framework does not now exist. The current GATT was never intended to be an organization and therefore was never given an adequate institutional structure to facilitate the development and orderly implementation of multilateral trade rules. The establishment of a multilateral trade organization would provide a sound institutional foundation for international trade, permit greater adaptability to a dynamic and increasingly complex international commercial context, and encourage countries to accept all the obligations of the world trading system and build upon them with new negotiated obligations as required by developments in world trade.

This focus on dispute resolution and institutional measures is particularly appropriate for the American Bar Association, since lawyers have special expertise in these areas. If the present Recommendation is accepted, it may make a significant contribution to the constructive development of United States international trade policy.

II. Importance of a Rule-Oriented Liberal World Trading System

There is broad consensus that a liberal international trading system is essential to promote global prosperity. Expanding trade stimulates growth by opening new

markets for exporters and by freeing resources and stimulating productivity in importing countries. Low trade barriers also encourage needed capital and technology flows through investments abroad. For instance, an entrepreneur who is considering investing in a small developing country may find that the investment is only feasible if the goods can be exported. A liberal trading system with clear and enforceable rules assures investors of access to third country markets. To foster these goals, the United States has led international efforts over the last 50 years to build a strong and stable world trading system.

Liberal trade rules also have a direct and beneficial impact for United States consumers. By lowering trade barriers and establishing rules of trade, liberal trade rules foster cross-border competition and result in lower prices and increased selection at the retail level. A liberal trading system permits United States industries that enjoy comparative advantages in the global marketplace to expand output, leading to increased employment opportunities for United States citizens.

The American Bar Association (ABA) has repeatedly endorsed the United States' support of a liberal world trading system that includes effective multilateral rules and institutions. The ABA has endorsed the ongoing Uruguay Round of multilateral talks as necessary "to preserve and to strengthen the current multilateral trading system and to liberalize trade further on a mutually fair and reciprocal basis."¹ The ABA has recently endorsed the establishment of "principles, rules, procedures, and institutions for the conduct of trade" in the context of the North American Free Trade Agreement.²

Despite the importance of a rule-oriented and liberal trading system, there is substantial uncertainty surrounding the Uruguay Round. Recent years have seen increasing use of trade restrictions throughout the world, together with greater reliance on unilateral trade remedies such as the United States' use of Section 301 procedures to redress perceived violations. The delayed conclusion of the Uruguay Round has aggravated these trends, as nations have refused to comply with GATT rulings pending completion of the talks. Rapid completion of the Uruguay Round is essential to address these problems. In particular, strengthened multilateral rules and institutions are needed to build confidence in the trading system and to encourage compliance with internationally-agreed measures. Without an adequate system to monitor and enforce the rules of the trade system, the effectiveness of these rules will be substantially diminished.

III. Historical Background of GATT Institutional Issues

The GATT has its origins in the post-World War II consensus that stronger international economic institutions were needed to prevent a recurrence of the protectionist measures and ensuing retaliation that were considered to be a major

1. 1986 Annual Meeting, Recommendation 113A.

2. 1993 Winter Meeting, Recommendation 109B.

cause of the depression and the war. To this end, the United States led international negotiations in 1946-48 to prepare the charter for an International Trade Organization (ITO), and to negotiate an initial agreement to reduce tariffs, and to draft substantive clauses relating to the tariff obligations. The latter two elements would constitute the GATT.

The ITO, rather than the GATT, was intended to be the institution that would "oversee" world trade and resolve disputes. The GATT was never given an adequate organizational structure and its dispute resolution procedures were rudimentary. However, the proposed ITO was never created, due to the failure of the United States to ratify it. Because the ITO never came into being, the GATT became the *de facto* institution for managing world trade issues and resolving international disputes. While the GATT has had notable success, due to the creative institutional improvisation of its leaders, the institutional weakness resulting from the GATT's creation has hampered the management of the world trade system and the effective resolution of international disputes. These problems have spurred repeated Congressional criticism of the current multilateral trade framework and statements emphasizing the need for improvement.³

The 1979 Tokyo Round agreements were an important accomplishment, but they have demonstrated some of the GATT's institutional difficulties. The Tokyo Round produced nine separate agreements that frequently have institutional mechanisms to manage international trade, distinct from the GATT itself (*e.g.* the creation of an International Dairy Products Council, an International Meat Council, etc.). The agreements often deal with issues that are also dealt with in the GATT (*e.g.* subsidies), resulting in duplication and contradictions. Many of the Tokyo Round agreements have separate dispute resolution procedures (*e.g.* the Subsidies Code, the Antidumping Code, the Government Procurement Code, etc.). The fragmentation of dispute settlement leads to several problems, such as overlapping jurisdiction over particular disputes, the potential for conflicting rulings, unnecessary complexity, and added costs.

In addition, the Tokyo Round agreements considerably expanded the range of substantive issues subject to multilateral regulation (*e.g.* non-tariff barriers and government procurement). This expansion has added significantly to the administrative and institutional burden on the GATT. The Uruguay Round also would add a number of important new substantive multilateral rules (*e.g.* extending rules to international trade in services and the rules on trade-related investment measures (TRIMs) and trade-related intellectual property rights

3. See H. Rep. No. 99-581, 99th Cong., 2d Sess. 123 (1986) (stating that "the strengthening of mechanisms and procedures for dispute settlement is . . . essential for restoring the credibility of international trade institutions"); H. Rep. No. 96-317, 96th Cong., 1st Sess. 22 (1979) ("there is a danger that trade relations between countries can return to the bilateral myopia of the 1930's, particularly if a serious world recession were to occur. Therefore, the Committee recognizes the great need for viewing the end of the [Tokyo Round] as only the beginning of efforts to further strengthen the international system of rules and dispute settlement").

(TRIPs)). This trend could continue after the Uruguay Round into areas such as the trade impact of environmental measures and the role of competition policy. The expansion of GATT disciplines will increase the burden on GATT institutions and dispute settlement procedures, thereby underscoring the need for substantial improvement in these areas.

In the Uruguay Round, GATT members recognized the importance of addressing these fundamental institutional questions that affect the successful operation of the GATT and its substantive rules. The 1986 Punta del Este declaration, which marked the beginning of the Uruguay Round, specifically refers to these issues. To this end, the Uruguay Round discussions have focused on two general areas: (1) the improvement of the GATT dispute resolution procedures; and (2) the creation of a stronger institutional framework for the multilateral trading system.

The results of the Uruguay Round discussions in these areas are reflected in a draft issued in December 1991 by the Director General of the GATT, Arthur Dunkel, summarizing the agreements that he believed had been reached in the Uruguay Round negotiations (the "Dunkel Draft"). The Dunkel Draft contains two linked agreements on dispute settlement and an agreement establishing the Multilateral Trade Organization (MTO). The next sections discuss the particular problems addressed in these agreements and further ongoing negotiations, and express support for the general principles proposed in these efforts.

IV. Need to Strengthen Dispute Resolution Procedures

Since the 1950s, the GATT practice has been to refer a dispute to a specially appointed panel of experts. The panel examines the dispute and submits a report to the GATT Council. A panel report itself has no legal force, but is the considered opinion of a panel of expert members. To be effective, the panel report must be adopted by the GATT Council. If the GATT Council adopts the panel report, it may request the offending country to remove its measures, or may authorize the complaining country to withdraw trade concessions made to the offending country.

At the start of the Uruguay Round, governments generally agreed that the core problem with the GATT dispute settlement procedures is the need for consensus. Under current practice, a panel report will not be adopted over the objection of any party including the offending country. If a GATT dispute settlement panel rules against a country, that country is able to block adoption of that ruling by the GATT Council.

In a significant number of recent cases, GATT members have used the consensus requirement to block the dispute settlement procedures. Although the United States has itself blocked some GATT panel reports for a limited period of time, it has been troubled by blockages by other countries, particularly the European Community's blocking of panel reports on subsidy issues regarding agricultural

products. Such actions are particularly common in actions brought under the Subsidies Code dispute settlement procedures (which are very similar to the general GATT procedures): since 1983, one or more signatories have blocked the adoption of all panel reports under the Subsidies Code.

The Uruguay Round proposals for dispute settlement reform would improve the GATT dispute settlement procedures by eliminating the offending country's ability to block GATT action, and creating an appeal procedure instead. An appellate body would be established to hear appeals of panel cases, with its members to be persons of recognized authority and expertise in law, international trade, and the GATT. The proposed ABA Recommendation supports such an appellate procedure.

In addition, the agreements would create a unified dispute resolution procedure to address the problem of multiple procedures resulting from the Tokyo Round agreements (discussed above). By creating a unified dispute resolution procedure, the proposals would resolve the current difficulties arising from overlapping jurisdiction and avoid the potential for conflicting rulings.

As noted above, the ABA Recommendation supports the general approach of the draft agreements reached in the Uruguay Round on dispute resolution procedures but does not endorse every detail of those agreements. While the reforms described above are the cornerstone of an effective dispute resolution system, the agreements could be improved by the addition of several measures. First, the GATT dispute resolution procedures are excessively confidential. The proposed ABA Recommendation suggests, therefore, "greater transparency." The public should be given timely access to relevant legal sources, within budget constraints and administrative practicality. Second, the GATT dispute resolution procedures should provide better opportunity for the utilization of scientific expertise such as the submission to panels of expert testimony, information and arguments, from a variety of non-governmental interested parties. Third, the GATT budget should be examined to ensure that it can support an effective and creditable dispute resolution system, which would support the human and other resources necessary to produce high quality decisions, given the expanding case load.

V. Need for a Multilateral Trade Organization

As discussed above, the *de facto* development of the GATT has not created a basic institution capable of facilitating the smooth functioning of the world trading system. The growing importance and complexity of global trade relations make it imperative to create an appropriate institutional framework to administer the substantive rules governing these relations. While the institutional weakness of the trading system may have been adequate to the simpler and less interdependent relations following World War II, the current structure makes it more difficult to cope with the explosion in the number of participants in international trade and in the rules governing this trade. Without rapid and significant improvements

in the current structure, the current tendency towards unilateral actions and bilateral trading blocs is likely to accelerate, worsening the fragmentation of the global trading system. A multilateral trade organization can play an essential role in moderating the difficulties and tensions that accompany the expansion of the world trading system.

In addition to the GATT's general institutional weakness, there are particular problems with its operation. The GATT is very difficult to amend, since certain amendments require unanimous acceptance while others require only two-thirds acceptance but are only binding on those countries that accept the amendment. The GATT lacks a definitive legal basis as an international organization, which affects its status in the domestic law of a number of member countries and its relationship to the other international economic institutions. The numerous side-agreements often overlap with the GATT itself, and encourage countries to opt out of obligations that are not exactly to their liking rather than accepting the obligations in order to receive the broader benefits of GATT membership.

While the current Recommendation does not endorse all aspects of the draft Agreement to establish the multilateral trade organization (MTO), it does support the general proposal to establish a new limited institutional structure for world trade. The proposals should strengthen the amending procedure, perhaps by providing special voting procedures to require some important amendments to be accepted by all members. The new institution should have a definitive legal basis, permitting a clear status under international law, enhancing its ability to interact with other international economic institutions, and enabling the trade institution to administer the unified dispute resolution mechanism discussed above. The agreement for a new institution would also serve as the basis for a "single undertaking," *i.e.* the mechanism through which nations would accept the results of the Uruguay Round. As such, this agreement would discourage countries from adopting a piece-meal approach to the results of the Uruguay Round. Thus, an MTO or comparable institutional reform for the GATT system is an essential part of effective implementation of the results of the Uruguay Round, and for the extension of the rule-oriented approach to the new issues of that round, such as services and intellectual property.

A multilateral trade organization should be carefully limited to the necessary procedural reforms, and should therefore not be considered a new "International Trade Organization." Unlike the ITO, a new trade institution would not contain substantive obligations. The substantive obligations would continue to be expressed in the updated GATT, and in the other agreements and documents resulting from the Uruguay Round, which would be appended to the institution. Thus, the procedural nature of the reforms of the multilateral trade framework would not allow the imposition of additional substantive obligations on member states, unless there were subsequent treaty agreements or amendments.

There has been some concern that GATT dispute resolution panels, or a multilateral trade organization, could impose binding obligations on United States

domestic law and thereby overrule substantive U.S. law in areas such as environmental regulation. However, the United States constitutional law and practice would not apply the results of a dispute settlement procedure directly in United States domestic law (*i. e.* the results would not be “self-executing”). It generally requires an act of Congress to implement the necessary changes to conform with the international ruling, and Congress (or in some cases the Executive) therefore has adequate opportunity to consider the issues involved. An agreement creating a multilateral trade organization would also require United States implementing legislation, which could address some of these questions.

VI. Conclusion

By means of this resolution, the American Bar Association would support the timely conclusion of an agreement in the current round of multilateral trade negotiations, underscore the importance of improved procedures for settling multilateral trade disputes, and encourage the establishment of an effective multilateral trade organization that would foster better implementation of the substantive rules governing international trade. In so doing, the American Bar Association would express its support for continuing and maintaining a system of rules that has fostered economic growth and prosperity over the last four decades.

Respectfully submitted,
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