

REPORT OF THE
SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION*

RESOLVED, That the American Bar Association urges the U.S. Congress to provide adequate resources to enable U.S. trade agencies to:

- (i) implement fully the requirements of U.S. trade laws;
- (ii) enforce vigorously the commitments made under international agreements to the United States by our trading partners to open their markets to our goods, services, investments and intellectual property; and
- (iii) further a "rule based" world trading system through diligent negotiations and active participation in multilateral organizations.

REPORT

It is widely recognized that effective development of U.S. trade policy, full enforcement of U.S. trade laws, and vigorous assertion of U.S. rights under recent trade agreements are important to continued U.S. economic success and leadership in the globalized trade system. Beyond this economic value, these objectives play a catalytic role in the continued expansion of open, transparent, rule-based trade regimes and in the reinforcement of multilateral trade institutions capable of implementing agreed trade standards. Achieving these objectives requires vigorous and adequately funded trade agencies,¹ including the four trade agen-

cies discussed in more detail in this report. The American Bar Association supports such adequate funding as a necessary component of U.S. trade leadership and of advancing the effectiveness of the legal requirements governing global trade.

With economic prowess replacing military might as a measure of a nation's global strength and influence, and with the ever-increasing role of international trade in U.S. economic health, the performance of the federal agencies charged with defining the role of the United States in the international marketplace has become a matter of highest priority. Fully one-third of U.S. economic growth

*The recommendation was approved. See page 4.

¹The term "trade agencies" is defined by Section 242 of the Trade Expansion Act of 1962, as amended and implemented.

over the past five years has been based on international trade.² Today, the United States is again the world's leading exporter. The benefits from further openings of foreign markets are great. At the same time, our marketplace, among the world's most open, is absorbing a rush of imports. A significant percentage of these products is now coming from economies in transition from state control. Their exporters have not previously been parties to the world trading system.

Each of these phenomena has important consequences to U.S. investors, workers and consumers. To help bring order and fairness to the increased volume and speed with which goods, money and people now cross international boundaries, in the past five years alone the United States has concluded over 240 new trade agreements. Each obligates the United States to take certain measures; each imposes substantial obligations on our trading partners that are intended to benefit U.S. interests.

Among the international trade agreements in which commitments to the United States must be monitored—and, where appropriate, enforced—are the North American Free Trade Agreement and the multifaceted Agreements of the World Trade Organization (WTO), including the recent pacts concluded within the WTO, such as, on information technology, basic telecommunications services, and financial services.

Major negotiations to open foreign markets are continuing with the

²Remarks prepared for delivery by Ambassador Charlene Barshefsky, United States Trade Representative, to the U.S. Conference of Mayors, January 29, 1998.

U.S. trading partners on the Pacific Rim, the countries south of Mexico in the Western Hemisphere, and within the WTO on such diverse subjects as agriculture and intellectual property. No less critical are ongoing discussions with China, Russia and 28 other countries seeking entry into the World Trade Organization. Once these economies are subjected to international trading rules under the WTO, they will offer expanded, valuable opportunities for U.S. business and become new suppliers to the American economy. Fashioning that interface and assuring stability without destroying their expectations of significantly increased trade, present serious challenges and require intense study and careful negotiation.

Monitoring and enforcing the obligations assumed by our trading partners, in the many bilateral and multilateral agreements now affecting particular sectors of trade as well as in broad trade agreements, is a resource-intensive activity. A consistent theme of U.S. international trade policy has been to attempt to use "rule-based" methods of dispute resolution. The United States pioneered the introduction into the World Trade Organization of an elaborate "Dispute Settlement Understanding" (DSU) that includes access to international panels to review trade grievances and has established, for the first time, the equivalent of an international court for the oversight of panel actions in the "Appellate Body" of the WTO.³

³*Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. GL 1/302 (1995).

Since the WTO entered into force in 1995, the United States has been a major participant in the WTO proceedings helping to bring the "rule of law" to international trade. In the first three years, through mid-March 1998, 37 complaints were filed by the United States alleging violations of various WTO Agreements by other members.⁴ On the other hand, the United States has been required to defend 20 complaints filed by its trading partners. Whether the U.S. was the complainant or respondent, each case has required hundreds of hours of legal and factual research by U.S. government lawyers in the preparation of briefs and other submissions, and arguments before the WTO panels and the Appellate Body. No less important is the responsibility of U.S. government agencies to coordinate their activities with representatives of the domestic industries affected by such cases. Many of the proceedings initiated by the United States have had a positive outcome that should translate into real trade gains.⁵ Even in cases in which panels have found against the United States, the principles of a "rule-based" system have been advanced. These vital developments should not be starved for resources.

The United States Trade Representative is the principal adviser to the President on international trade

⁴Statistics compiled by the World Trade Organization, "Dispute Settlement Overview" (16 March 1998).

⁵In addition to favorable settlements achieved before hearings before panels in the case affecting Japanese sound recordings, the United States prevailed in panel decisions affecting EC bananas and beef hormones, Canadian periodicals, Japanese alcohol taxes, Indian patent protection, and the Indonesian automobile industry.

policy, and has lead responsibility for both the conduct of international trade negotiations and coordination of the implementation and enforcement of agreements approved by the Congress.⁶ USTR is aided in coordinating the development and implementation of trade policy by a number of federal agencies and entities, including, for example, the Departments of Agriculture, Commerce, Labor, State, and the Treasury.⁷

The Table that follows provides one example demonstrating that, despite a considerable increase in the range, scope, and intensity of the work of four core trade agencies—USTR, the Department of Commerce, the Customs Service, and the International Trade Commission—must do in the trade field, their funding has not kept pace sufficiently with the growing importance of international trade in goods and services—and in some cases has been decreased—threatening to undercut the ability of the United States to achieve its trade goals.

Despite this substantial increase in workload, USTR's budget, as shown by the Table, has increased in the past four years by only 12 percent while others have decreased. One may expect in these circumstances that violations of agreements could go undetected, that discovered violations may not be fully assessed for prosecution, and that the pace of new market-opening negotiations may be slowed.

⁶Section 141 of the Trade Act of 1979, 19 U.S.C. § 2171 (1997); Reorganization Plan No. 3 of 1979, Exec. Order 12188, 44 Fed. Reg. 69,273 (Jan. 4, 1980).

⁷Section 424 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1872 (1997) and implemented by Reorganization Plan No. 2 of 1979 and E.O. 11888.

	Trade Agency Funding ⁸	
	FY1994 (Positions)	FY1998 (Positions)
USTR	\$21,150,000 (168)	\$23,744,000 (178)
Commerce ¹	\$324,081,000 (2,788)	\$292,490,000 (2,656)
Customs	\$1,500,000,000 (17,900)	\$1,800,000,000 (19,000) ²
ITC	\$43,058,000 (443)	\$41,200,000 (335)

¹International Trade Administration and Bureau of Export Administration only.
²About 23 percent of personnel are used for trade compliance. U.S. Customs Strategic Plan Fiscal Years 1997-2002.

Through its International Trade Administration (ITA) and Bureau of Export Administration (BXA), the U.S. Department of Commerce promotes U.S. exports (including through commercial representation abroad), administers the antidumping and countervailing duty laws, controls exports of commodities and technology for national economic security and foreign policy reasons, and provides critical assistance to the USTR in ensuring compliance by U.S. trading partners with international trade agreements.⁹ Its mandate has been impaired by a net decrease of nearly 10 percent in funding since fiscal year 1994.

Commerce, too, has felt the impact of the new trade agreements, both in its industry research functions and through its heightened agreements compliance efforts. ITA's exacting implementation of the antidumping and countervailing duty laws ensures that imported goods do not unfairly benefit from discriminatory pricing practices or government

⁸Information from agency statistics and budget offices.

⁹Reorganization Plan No. 3 of 1979, *supra* note 3; section 771(1) of the Tariff Act of 1930, 19 U.S.C. 1677(1) (1996).

subsidies. ITA faces large increases in its caseload from the new requirements to perform "sunset" reviews of all outstanding orders, from other labor-intensive alterations to the laws that have resulted from the Uruguay Round Agreements Act (URAA), and from the burgeoning business of holding our trading partners to the strictures of the WTO Antidumping and Subsidies and Countervailing Measures Agreements as these countries begin to apply unfair trade measures to U.S. exports. ITA's new trade agreements compliance program provides indispensable aid to USTR in enforcing the hundreds of added obligations of U.S. trading partners arising from trade agreements that apply to both imports into and exports from the United States.

BXA has seen substantial work increases from the need to prosecute violators of the Export Administration Act's export licensing and antiboycott provisions (the enforcement caseload has increased over 90 percent in the past four years). In aid of U.S. national economic security, BXA also has greatly augmented its assistance to other countries in developing export control systems and has helped enterprises in the republics of the former Soviet Union in converting to

civil production. BXA has been active as well in designing rules setting eligibility for export or reexport to implement the Wassenaar Arrangement's List of Dual-Use Items.

While the U.S. Customs Service was initially chartered as the primary revenue source of the United States, its most important present role is in the area of law enforcement. In addition to collecting import duties, it now enforces more than 400 laws and regulations relating to international trade.¹⁰ Customs' role on the international front has grown largely due to the advancing complexity of international trade and the development of a globalized economy. Among the most difficult issues facing the Service are the monitoring of the results of preferential trade agreements, such as the NAFTA, that grant tariff preferences to goods that it can properly be demonstrated "originate" within the Free Trade Area. "Rules of Origin" have taken on added complexities in the global economy and their precise application to the burgeoning number of preferential agreements has become a Customs priority. In addition, the United States has, for now nearly 20 years, attempted to harmonize its tariffs nomenclature with a "Harmonized Tariff System" adopted by most of the world's major trading countries. Nevertheless, new products, new methods of manufacture and new combinations of items classified under the HTS pose constant new challenges of interpretations and classification. Also, increasingly complicated methods of paying for and valuing merchandise have emerged in our global economy. Establishing the appropriate value for unique products, custom-made arti-

¹⁰International Customs Day, January 26, 1998.

cles and burgeoning intracompany transfers, make the valuation responsibilities of the Customs Service much more difficult. Finally, Customs has been asked to play a larger and more complex role in the enforcement of protections against the infringement of intellectual property rights. Notwithstanding the enormous increase of ordinary trade that now occupies the Service, the Customs Service continues to fill important assignments combating transnational narcotics sales and money laundering and preventing exports in violation of domestic law. International methods of gathering information, and processing data efficiently, have required added resources.

Faced with about \$2.6 trillion in merchandise imports and exports by the year 2000, and annual increases of about 2 percent for arriving passengers and 10 percent for entries and export declarations,¹¹ Customs' challenge will be to ensure that imports comply with U.S. laws and regulations. With only a six percent growth in Customs personnel over the past four years,¹² meeting this workload will be difficult. This is especially true in light of the need to adjust to continuing complexities arising from the NAFTA, the WTO agreements, the expansion of the European Union, and expansion of free trade under auspices of the Free Trade Area of the Americas and the Asia-Pacific Economic Cooperation agreements.

The U.S. International Trade Commission (ITC) has broad investigative responsibilities on matters of

¹¹U.S. Customs Strategic Plan, Fiscal Years 1997-2002.

¹²Virtually all increases over that period, according to the Commissioner's Office, were targeted for narcotics enforcement on the Southwest border, and not for trade law enforcement.

trade. In addition to making injury determination in antidumping and countervailing cases, the ITC functions as the government's think tank on international trade, conducting studies on the impact of trade agreements and other significant developments on the U.S. economy.¹³ In addition, as enforcement of intellectual property rights grows as a global trade priority, U.S. patent holders place increasing reliance on the ITC's work under Section 337 of the Tariff Act to investigate whether unfair methods of competition are being committed in the importation of goods into the United States.

The URAA imposed the very substantial new responsibility on the ITC of reviewing all antidumping and countervailing duty orders every five years. To initiate the process, the ITC must review the 300-plus outstanding orders over the three-year period beginning in July 1998.¹⁴ This will triple the Commission's current antidumping and countervailing duty caseload. No amount of personnel shifting will permit the agency to perform this additional work without new resources.

¹³General Information About the Commission, ITC website.

¹⁴U.S. International Trade Commission, Strategic Plan, Revised September 29, 1997.

In light of the ITC's 22 percent staff downsizing since 1993, the Commission's ability to absorb additional work is limited. Neither does it have the option of "starving" other mandated programs that have been of such measurable benefit to U.S. trade, such as intellectual property-based import investigations, import injury investigations, its research program, trade information services, and trade policy support. Other trade agencies face similar problems.

Conclusion

For the foregoing reasons, the American Bar Association supports funding the U.S. trade agencies at levels appropriate to implement fully the expanding scope of U.S. trade law and multilateral trade obligations and rights.

Respectfully submitted,

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Chair

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INFORMATIONAL REPORT OF THE JUDICIAL DIVISION

The six Conferences of the Judicial Division are working together to promote cooperative efforts which will ultimately enhance the Division's stature in the American Bar Association to the benefit of the entire judicial system. The Division is working with other ABA Sections, Divisions and Committees on substantive projects of mutual interest. The reason for this outreach is that judges in the Division are interested in more contact with lawyers in the ABA. To accomplish this, the Division has established a relationship with TIPS and the Section of Litigation and others by enrolling their members in Division Conferences and Committees. The Fourth Annual Bench-Bar Leadership Conference, a cooperative effort with the Litigation section, will take place at the 1999 Midyear Meeting. This together with other joint projects involving two or more Conferences of the Division will serve to break down old-walls and open the Division up to greater involvement with lawyers, interaction among judges with diverse backgrounds, and cooperation with other ABA entities. The Judicial Division is this country's largest national judicial organization and it will continue to be home for judges

in the ABA, but it is now emphasizing greater opportunities for interaction among judges and lawyers.

The Division's newsletter, *The Judicial Division Record*, has become a joint Conference publication, replacing the six previous Conference newsletters, and it debuted in the Summer of 1998. *The Judges' Journal* continues to be the preeminent quarterly periodical for judges, with articles of both practical and scholarly interest. Recent issues have addressed topics such as: disaster and the courts, ethical norms and the admissibility of expert testimony, court-annexed alternate dispute resolution, educating the public about the courts, bankruptcy courts and more.

The Judicial Division's representatives are working with the ABA ad hoc committee on Judicial Election Campaign Financing in cooperation with the Center for Professional Responsibility and the Special Committee on Judicial Independence. The committee's proposal may recommend changes to the Model Code of Judicial Conduct (1990) which will be circulated at the Midyear Meeting. Final voting on the proposal may take place at the 1999 ABA Annual Meeting.