

AMERICAN BAR ASSOCIATION  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Congress and the United States to approve and implement the agreements resulting from the Uruguay Round of multilateral trade negotiations, which will improve the world trading system and promote global economic prosperity. 1  
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BE IT FURTHER RESOLVED, That the American Bar Association endorses the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, which strengthens existing GATT multilateral dispute resolution procedures by developing a unitary dispute resolution procedure, reforming the procedure for approval of dispute panel reports, increasing transparency, providing improved access to scientific expertise, and creating a procedure for appeal of GATT panel reports. 7  
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BE IT FURTHER RESOLVED, That the American Bar Association supports the Agreement Establishing the World Trade Organization, which provides an institutional framework for better implementation of the substantive rules resulting from the Uruguay Round. 16  
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## REPORT

### Overview

Through this Recommendation, the American Bar Association ("ABA") would express its support for the agreements recently concluded in the Uruguay Round of multilateral trade negotiations, including reforms that are essential to strengthen the existing multilateral dispute resolution procedures and to create a world trade organization.

The Uruguay Round agreements are critically important to global prosperity, a point made by Western finance and trade ministers and heads of state with increasing frequency and urgency over the last few years. The ABA has repeatedly endorsed the United States' participation in the multilateral trade talks, viewing these talks as essential to continued U.S. economic growth. At the August, 1993 annual meeting, the ABA adopted resolutions that supported the strengthening of multilateral dispute resolution procedures and the establishment of a multilateral trade organization.

The proposed resolutions support the overall agreements reached in the Uruguay Round, and in particular endorse the agreements on dispute resolution procedures and a World Trade Organization ("WTO"). 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 proposed resolutions are adopted, they may make a significant contribution to the constructive development of United States international trade policy.

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 agreed reforms would greatly improve the effectiveness of the existing dispute settlement procedures under the General Agreement on Tariffs and Trade ("GATT"), by eliminating a country's ability to block 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, a strong institutional framework for multilateral trade is central to the successful 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 was never given an adequate institutional structure to facilitate the development and orderly implementation of multilateral trade rules. The establishment of the WTO will 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.

While the American Bar Association supports the overall Uruguay Round agreements and recommends approval by the Congress under the applicable "fast track" procedure, this report does not address or express any Association views on the numerous individual issues relating to substantive provisions of the Uruguay Round agreements or on the need for further negotiations on specific substantive issues.

#### I. 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 produced 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 common 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 ABA has repeatedly endorsed the United States' support of a liberal world trading system that includes effective multilateral rules and institutions. In 1986, the ABA 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."<sup>1/</sup> In August 1993, the ABA urged "the conclusion without undue delay of the Uruguay Round," and emphasized the need for "the strengthening of existing GATT multilateral dispute resolution procedures" as well as "the establishment of an effective multilateral trade organization."<sup>2/</sup>

Despite the importance of a rule-oriented and liberal trading system, recent years have seen increasing use of trade restrictions throughout the world, together with greater reliance on unilateral trade remedies 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. The Uruguay Round agreements will play an essential part in resolving these problems. In particular, the strengthened multilateral rules and institutions agreed to in the Uruguay Round will build confidence in the trading system and will encourage compliance with internationally-agreed measures. Without an adequate system to monitor and enforce the substantive rules of the trade system, the effectiveness of these rules will be substantially diminished.

## II. 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 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

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<sup>1/</sup> 1986 Annual Meeting, Recommendation 113A.

<sup>2/</sup> 1993 Annual Meeting, Recommendation 105C.

weakness in this ad hoc system has hampered the management of world trade 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.<sup>3/</sup>

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, several of which provided for institutions to manage international trade, distinct from the GATT itself (e.g. the creation of an International Dairy Products Council, an International Meat Council, etc.) In addition, the agreements frequently dealt 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 led 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 adds 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 ("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 rules 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 focused on two general areas: (1) the improvement of the GATT dispute resolution procedures; and (2) the creation of a

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<sup>3/</sup> See H. Rep. No. 99-581, 99th Cong., 2d Sess. 123 (1986) (stating that "[t]he strengthening of mechanisms and procedures for dispute settlement is . . . essential for restoring the credibility of international trade institutions").

stronger institutional framework for the multilateral trading system.

The results of the Uruguay Round discussions in these areas are principally reflected in two linked agreements: the Understanding On Rules and Procedures Governing The Settlement of Disputes (the "Understanding") and the Agreement Establishing the World Trade Organization (the "WTO Agreement"). The next sections discuss the particular problems addressed by these agreements, and express support for the solutions reached in the Uruguay Round accord.

### III. 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 Understanding would improve the GATT dispute settlement procedures by eliminating a country's ability unilaterally to block GATT action, and creating an appeal procedure instead. A standing seven-member 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. Appeals would be limited to issues of law raised by the panel report and legal interpretations developed by the panel. The proposed ABA Recommendation supports this appellate procedure.

In addition, the Understanding 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 Understanding would resolve the current difficulties arising from overlapping jurisdiction and avoid the potential for conflicting rulings.

Furthermore, the Understanding represents a significant step towards greater transparency in GATT dispute resolution procedures, an objective endorsed by the ABA at its August, 1993 annual meeting. The Understanding addresses this problem by requiring that parties to a dispute provide non-confidential summaries of their panel submissions that can be provided to the public, and recognizing a party's right to disclose its submissions and positions to the public at any time.

In addition, the reforms provide better opportunity for the utilization of scientific expertise, a measure also endorsed by the ABA in August, 1993. The Understanding expressly authorizes panels to form expert review groups to provide advice on scientific or other technical issues of fact.

#### IV. Need for a World 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 address 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 and increasing the likelihood of economically-motivated conflict. 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. For instance, 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, including the United States, and its relationship to the other international economic institutions. In addition, 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.

The proposed resolution endorses the WTO Agreement, which will establish a new, limited institutional structure for world trade. The WTO, unlike the GATT, will 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 WTO to administer the unified dispute resolution mechanism discussed above. The WTO Agreement will 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, the WTO Agreement 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.

The proposed World Trade Organization is carefully limited to the necessary procedural reforms, and should therefore not be considered to establish a new "International Trade Organization." Unlike the ITO Charter, the new WTO Agreement does not contain substantive obligations. The substantive obligations continue to be expressed in the updated GATT, and in the other agreements and documents resulting from the Uruguay Round, which are appended to the WTO Agreement. 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 world 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. By this resolution, the ABA would urge the Congress to adopt legislation implementing the Uruguay Round agreements, which could address some of these questions.

### Conclusion

By means of the proposed resolutions, the American Bar Association would support the overall agreement reached in the current round of multilateral trade negotiations, underscore the importance of improved procedures for settling multilateral trade disputes, and endorse the establishment of a World 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,

James H. Carter  
Chairman

February 1994

## EXECUTIVE SUMMARY

### 1. Summary of the recommendation.

Through this Recommendation, the American Bar Association would express its support for the approval and implementation of the agreements resulting from the recently concluded Uruguay Round of multilateral trade negotiations, would endorse the GATT Understanding on multilateral dispute resolution procedures, and would support the Agreement establishing a World Trade Organization.

### 2. Summary of the issue which the recommendation addresses.

The Recommendation addresses the need to improve the multilateral institutional framework for international trade. The current dispute resolution procedures of the General Agreement on Tariffs and Trade ("GATT") can be and often are blocked by a single GATT member (including the offending party). Further, the creation of multiple dispute resolution procedures has produced overlapping jurisdiction over particular disputes, the potential for conflicting rulings, unnecessary complexity, and added costs.

The GATT is also inadequate from an institutional perspective, since it was never intended to be an organization. It is very difficult to change GATT rules, due to the GATT's cumbersome amendment procedures. The GATT lacks a definitive legal basis as an international organization, which affects its status in international law and its relationship to the other international economic institutions. Numerous side-agreements 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 to receive the broader benefits of GATT membership.

### 3. Please explain how the proposed policy position will address the issue.

The proposed Recommendation addresses these issues by supporting the overall agreement reached in the Uruguay Round of multilateral trade negotiations, and specifically endorsing the improved dispute resolution procedures and World Trade Organization resulting from the Round. The reforms obtained during the Round would improve the GATT dispute settlement procedures by eliminating the offending country's ability to block GATT action and creating an appeal procedure instead, and by creating a unified dispute resolution procedure to address the problem of the proliferation of multilateral dispute resolution procedures. The recommendation and report support the

establishment of a World Trade Organization that would improve the effectiveness of the GATT, and would encourage countries to accept all the substantive obligations of the GATT and build upon them in the future.

4. Summary of any minority views or opposition which have been identified.

There is concern that GATT dispute resolution panels or a multilateral trade organization could overrule substantive U.S. law. However, it is unlikely that any dispute settlement result or a multilateral trade organization decision would have this effect. United States constitutional law and practice would not apply the results of a dispute settlement procedure directly in United States domestic law. The legislation implementing the Uruguay Round reforms could also address this issue.

General Information Form

Submitting Entity: Section of International Law and Practice

Submitted by: James H. Carter, Chairman

1. Summary of Recommendations

Recommendation urges the U.S. government to approve and implement the agreements resulting from the Uruguay Round multilateral talks concerning the General Agreement on Tariffs and Trade ("GATT"). The Recommendation endorses the Uruguay Round understanding on dispute settlement and supports the agreement establishing the World Trade Organization.

2. Approval By Submitting Entity

Council of Section on International Law and Practice approved the recommendation on January 21, 1994.

3. Previous Submission to the House or Relevant Association Position

This Recommendation has not previously been submitted to the ABA House of Delegates.

4. Existing relevant Association Policies

1986 ABA Resolution endorsed the Uruguay Round as necessary to preserve and strengthen the current multilateral trading system and to liberalize trade further on a mutually fair and reciprocal basis. 1993 ABA Resolution endorsed the establishment of principles, rules, procedures, and institutions for the conduct of trade in the context of the North American Free Trade Agreement. 1993 ABA Resolution endorsed strengthened multilateral dispute resolution procedures and the establishment of an effective multilateral trade organization through the GATT Uruguay Round negotiations.

5. Need for Action at This Meeting

International negotiations to conclude the Uruguay Round have been completed, and the U.S. Congress will soon consider implementing legislation. The Association's expression of support should be forthcoming in time to be considered by both the Administration and the Congress in

the formulation of appropriate legislation to implement the results of the Uruguay Round.

6. Status of Legislation (if applicable)

U.S. Congress will consider legislation implementing the results of the Uruguay Round negotiations in 1994. Hearings are expected to be held at this time.

7. Financial Information (estimate of funds required, if any)

N/A

8. Disclosure of Interest (if applicable)

None

9. Referrals (other Sections, Divisions or Standing Committees in the Association)

This report was referred by overnight deliver to every section and division of the ABA on January 28, 1994.

10. Contact Persons (prior to meeting)

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12. Contact Person Regarding Amendments to This Recommendation.  
(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

There are no known proposed amendments to the recommendation. The contact person in the event amendments are proposed would be:

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