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Reorganization Plan No. 3 of 1979: Revamping the U.S. Trade Machinery

The United States is no longer the successful competitor it once was in the international marketplace.¹ During the last decade, concern has grown in both the national and international communities about the way in which United States trade policy is formulated and implemented. This concern has resulted in a reorganized and strengthened U.S. trade machinery. Briefly, the Carter Administration's new Reorganization Plan No. 3 of 1979² has placed the responsibility for the negotiation of foreign trade matters and for the formulation of trade policy in the Office of the United States Trade Representative (USTR), and has called upon the Department of Commerce to implement these trade policies.³

This comment will discuss the factors leading to the promulgation of the Administration's Plan, outline the Plan itself, and examine its potential for success. It should be noted that the Plan is expected to continue in its dynamic state until well after publication of this article.

Overall, the Plan can be expected to afford U.S. trade matters the visibility and attention they deserve, placing the previously diffuse trade functions under more centralized authority. In this way, the United States presumably can regain its position as a viable competitor in the international marketplace.

BACKGROUND

From 1968 to 1978, United States exports more than quadrupled, reaching \$143 billion in 1978,⁴ accounting for about six percent of the

¹ See INDUSTRY & TRADE ADMIN., DEP'T OF COMMERCE, OVERSEAS BUSINESS REPORT NO. 79-22, 3 (1979). See also *Reorganizing the Government's International Trade and Investment Functions: Hearings on S.377, S.891, S.937, S.1471, S.1493, and Reorganization Plan No. 3 of 1979 before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 3 (1979) (statement of Robert C. Byrd) [hereinafter cited as *Reorganization Hearings*].

² HOUSE COMM. ON GOVERNMENT OPERATIONS, REORG. PLAN NO. 3 OF 1979, H.R. DOC. NO. 96-193, 96th Cong., 1st Sess. (1979), reprinted in 44 Fed. Reg. 69273 (1979).

³ *Id.*

⁴ INDUSTRY & TRADE ADMIN. *supra* note 1, at 3.

gross national product.⁵ These exports represent about sixteen percent of everything grown, mined, or manufactured in this country,⁶ and it is estimated that their production supports some 4.3 million American jobs.⁷ However, despite this seemingly sizeable export figure, the U.S. share of world trade, excluding world exports to the U.S., has dropped from eighteen percent in 1970 to fourteen percent in 1978.⁸

During the 1970's, the favorable balance of payments which had been enjoyed by the United States for well over two decades was replaced by a mounting balance of payments deficit. The deficit first surfaced in the early 1970's⁹ and surpassed \$28 billion in 1978,¹⁰ a phenomenon which contributed to the weakening of U.S. currency overseas.¹¹

Until now, the United States was the only major industrialized nation that lacked a centralized body with clear responsibility to formulate and implement foreign trade policy. Instead, this responsibility was scattered among perhaps a dozen different government agencies.¹² This decentralized system merely reflected the low governmental priority given to U.S. foreign policy development and coordination and to the expansion of export opportunities abroad.

This lethargic posture was, to a large extent, mirrored in the private sector where most U.S. businesses found little incentive for introducing their products overseas when the domestic market was so accessible and lucrative. United States producers, however, gradually found their once thought inexhaustible domestic market eroded by strong foreign competition. Many of the foreign products were manufactured with the help of subsidies from their respective governments,

⁵ INDUSTRY & TRADE ADMIN., DEP'T OF COMMERCE, INTERNATIONAL ECONOMIC INDICATORS No. 4, 36 (1979).

⁶ *Id.*

⁷ *Proposed Foreign Trade Reorganization: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 3 (Aug. 1 and Sept. 10, 1979) (statement of Frank Horton) [hereinafter cited as *Proposed Trade Hearings*].

⁸ INDUSTRY & TRADE ADMIN., *supra* note 5, at 33.

⁹ SENATE COMM. ON GOVERNMENTAL AFFAIRS, REPORT ON REORGANIZATION PLAN NO. 3 OF 1979, S. REP. NO. 402, 96th Cong., 1st Sess. 4 (1979) [hereinafter cited as REORGANIZATION PLAN REPORT].

¹⁰ INDUSTRY & TRADE ADMIN., *supra* note 1, at 3.

¹¹ *Reorganization Hearings*, *supra* note 1, at 3.

¹² As a recent Library of Congress study reported:

Six agencies have offices primarily concerned with trade policy; three agencies have primary concern for export promotion efforts; four agencies have primary responsibility for administering the laws which pertain to the impact of trade on the U.S. economy; five agencies have divisions or offices performing international trade research and analysis; one agency has major responsibility for export controls; and three agencies perform significant statistical work. *Proposed Trade Hearings*, *supra* note 7, at 2 (statement of Frank Horton).

and other items were sold in this country at prices below those charged for similar domestic goods, both in violation of U.S. international unfair competition laws.¹³ The statutory redress provided to domestic business by the Antidumping and Countervailing Duty Acts proved largely ineffective because the Department of Treasury, responsible for the enforcement of these statutes against unfair trade practices by foreign competitors, seemed lax in its duties, often failing to collect antidumping duties already imposed.¹⁴

Those United States companies willing to export goods to foreign countries often found that non-tariff trade barriers and various other restrictions imposed by foreign governments frequently made such transactions unattractive or unavailable. These companies also faced complex trade promotion and finance programs sponsored by numerous government agencies.¹⁵ Small and medium-sized businesses were especially troubled by their lack of personnel and financial resources necessary to avail themselves of these government-backed opportunities for export.¹⁶

In response to its debilitated trade position, the United States has participated in the multilateral trade negotiations (MTN), and recently signed the resultant agreements which seek the reduction of non-tariff trade barriers.¹⁷ The public and private sectors now look to the implementation of the MTN agreements for the opening of new markets to U.S. business, labor, and agriculture. The MTN codes on government procurement, subsidies, civil aircraft, import licensing, standards, and customs valuation seek to assure fair international trade practices and strengthen the export performance of U.S. industry.¹⁸

The Carter Administration has recognized the concomitant need for a revitalized and centralized U.S. trade machinery capable of applying the MTN codes domestically and developing procedures for aggressive monitoring and enforcement both at home and abroad.¹⁹ On September 25, 1979, the President transmitted to Congress a trade reor-

¹³ REORGANIZATION PLAN REPORT, *supra* note 9, at 12.

¹⁴ *Id.*

¹⁵ *Id.* at 10-11.

¹⁶ Such recent, government-created incentives to increase exports as the Domestic International Sales Corporation, I.R.C. § 911, the Export-Import Bank, 12 U.S.C. § 635 (1976), and others, have augmented earlier attempts in the form of the Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (1976), and the Edge Act of 1919, 12 U.S.C. §§ 611-632 (1970).

¹⁷ HOUSE COMM. ON WAYS AND MEANS, REPORT ON THE TRADE AGREEMENTS ACT OF 1979, H.R. REP. NO. 317, 96th Cong., 1st Sess. 5 (1979) [hereinafter cited as TRADE AGREEMENTS REPORT].

¹⁸ REORGANIZATION PLAN REPORT, *supra* note 9, at 49.

¹⁹ *Reorganization Hearings*, *supra* note 1, at 13-14 (statement of James T. McIntyre, Jr.).

ganization plan which became law November 29, 1979, and went into effect on January 2, 1980.²⁰ This timing was important since it allowed the plan to implement the MTN agreements which shared the January 2 effective date.²¹

The need for a reorganization and consolidation of U.S. foreign trade functions was also perceived by Congress and industry, as both had been working on reorganization projects or proposals for several years. Private sector proposals came from such groups as the National Association of Manufacturers, the Business Round Table, and the American League for Exports and Security Assistance, Inc.²² Generally, these groups sought a consolidation of the disparate authorities under one agency, with a clear mandate to develop an affirmative export policy.

Some of these suggestions were incorporated in congressional proposals for trade reorganization. These bills encompassed a wide range of plans, from those seeking the creation of a new Department of International Trade and Investment²³ to those recommending the transfer of all trade functions to a newly named Department of Trade and Commerce.²⁴ There were also those seeking a middle ground, proposing a

²⁰ See REORGANIZATION PLAN REPORT, *supra* note 9, at 49; Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

²¹ 5 U.S.C. § 906 (1977), dealing with Executive Reorganization, states:

A reorganization plan is effective at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.

A disapproval resolution in the House of Representatives was defeated on November 8, 1979. H.R. Res. 428, 96th Cong., 1st Sess., 125 CONG. REC. H10,421 (daily ed. Nov. 8, 1979). There was no vote taken by the full Senate, although the Senate Governmental Affairs Committee voted 16-0 to report the resolution of disapproval unfavorably. S. Res. 245, 96th Cong., 1st Sess. (1979). On December 4, the full Senate indefinitely postponed consideration of the resolution. 125 CONG. REC. S17,759 (daily ed. Dec. 4, 1979).

²² See, e.g., *Export Policy: The Need for Trade Reorganization: Hearings Before the Subcomm. on Int'l Economics of the Joint Economic Comm.*, 96th Cong., 1st Sess. (Aug. 2, 1979) (author's copy of statement by Robert A. Best, Executive Vice President, American League for Exports and Security Assistance, Inc.) [hereinafter cited as *Export Policy Hearings*].

²³ This concept originated in S. 77, 96th Cong., 1st Sess., 125 CONG. REC. 1261 (daily ed. Feb. 7, 1979), sponsored by Senators William V. Roth and Abraham Ribicoff. Briefly, the bill would have established a new Department of International Trade and Investment. Its responsibilities would have included coordinating U.S. policies for international trade, negotiating trade agreements, protecting domestic industry, labor and agriculture from unfair foreign competition, and seeking and promoting new trade and commercial opportunities for U.S. exporters. The Senators would have made the new Department Secretary responsible for both MTN implementation and new negotiations.

²⁴ This Department serves as the core of H.R. 4567, 96th Cong., 1st Sess. (1979), sponsored by Representatives James R. Jones and Bill Frenzel. The Department would have had primary responsibility for the formulation and implementation of export promotion policies, the implemen-

Cabinet-level Special Trade Agency, headed by the Special Trade Representative (STR),²⁵ and a Trade Coordinating Council, both located within the executive branch.²⁶

The Administration, after considering these and other proposals, submitted the Plan which appears to be a compromise, seen by many in both the public and private sectors as easing this country into a more competitive position in the international marketplace. The statutory impetus for the Administration's Plan is found in section 1109 of the Trade Agreements Act of 1979,²⁷ which called for the President to submit to Congress by early July 1979 a proposal to restructure the executive branch's foreign trade policy-making and regulatory functions.²⁸ The provision requested the President to consider the development of a strengthened STR, and a monitoring and enforcement structure ensuring protection of U.S. rights under the MTN agreements.²⁹ Congress anticipated that the President's proposal would result in improved performance of commercial attaches and programs overseas, assuring that the other MTN signatory countries would fulfill their trade agreement

tation and enforcement of the MTN agreements, and the development of long-term planning on matters of international trade. Their bill also would have transferred both the Export-Import Bank and the Overseas Private Investment Corporation to the new Department. Finally, the Special Trade Representative would have remained in the Executive Office of the President and would have directed U.S. negotiations in bilateral and multilateral trade talks encompassing East-West trade and commodity agreements. The Trade Representative would also have served as the chairman of the Trade Policy Committee, the interagency executive committee involved in the development and coordination of trade policy.

²⁵ The phrase Special Trade Representative (STR) hereinafter will be used synonymously with the Plan's new title for this position, United States Trade Representative (USTR).

²⁶ This proposal was the substance of H.R. 4995, 96th Cong., 1st Sess. (1979), sponsored by Representative Gillis W. Long. The bill would have retained Cabinet-level status for the STR, made him the chief officer for both trade policy development and coordination, further expanded his duties to include enforcement of the MTN agreements against unfair trade practices, and assigned full responsibility for all trade negotiations to him. It also would have transferred substantial trade authority from the Departments of State and Treasury, while leaving intact those trade functions currently in the International Trade Commission and the Department of Agriculture. *Id.* at § 403. Finally, the Department of Commerce, although losing its responsibility for developing export policy to the new Special Trade Agency, would have gained functional authority, transferred from the Department of State, over the foreign commercial attaches. *Id.* at § 404.

²⁷ Pub. L. No. 96-39, 93 Stat. 144, 314 (1979). The Trade Agreements Act of 1979, signed into law July 26, 1979, approved and implemented the trade agreements negotiated by the U.S. in the recently concluded Tokyo Round of the MTN and submitted to Congress by the President on June 19, 1979.

²⁸ *Id.* The Office of Management and Budget had been studying reorganization proposals prior to this Act and had completed a report entitled a "Review of the Economic Analysis and Policy Machinery of the Federal Government." 42 Fed. Reg. 43,375 (1977). This study entailed consultation with Congress and industry, and served as the basis for the later reorganization plan drafted by the Administration.

²⁹ TRADE AGREEMENTS REPORT, *supra* note 17, at 196.

obligations.³⁰

THE PLAN

In his message to Congress upon the transmittal of his Plan, President Carter expressed high hopes for the success of his proposal, viewing it as one which would “sharpen and unify trade policy direction, improve the efficiency of trade law enforcement, and enable us to negotiate abroad from a position of strength.”³¹ The Plan was also said to seek improvement in U.S. export promotion activities so that American exporters would have increased access to and success in overseas markets.³²

The United States Trade Representative

The Plan clearly calls for the STR—to be renamed the Office of the United States Trade Representative (USTR)—to serve as the chief trade advisor to the President, responsible for negotiating and coordinating all U.S. international trade and direct investment policy as well as for overseeing the implementation of the MTN agreements.³³ The USTR will remain within the Executive Office of the President (EOP), and will be advised by the Trade Policy Committee (TPC) which the STR will chair.³⁴ The USTR will have further responsibility in the following areas:

Import remedies. The USTR will oversee the application of import remedies, recommending any necessary legislative changes.³⁵ It will also coordinate antidumping and countervailing duty matters in an

³⁰ *Id.* The Administration issued a discussion draft of a reorganization proposal in late July, and opportunities were made available for reactions and suggestions from Congress and the private sector. While this draft was ambiguous with respect to where trade policy was actually to be formulated, the Administration's final Plan, Reorganization Plan No. 3 of 1979, incorporated many of the proposals of both sectors and remedied the earlier lack of specificity. The Plan was transmitted to Congress on September 25, 1979.

³¹ REORGANIZATION PLAN REPORT, *supra* note 9, at 54.

³² *Reorganization Plan No. 3 of 1979: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. (Oct. 16, 1979) (author's copy of statement by James T. McIntyre, Jr.) [hereinafter cited as McIntyre Statement].

³³ McIntyre Statement, note 32 *supra*.

³⁴ The STR is a Congressional creation, implemented during the Kennedy administration. The post was created pursuant to the Trade Expansion Act of 1962. Exec. Order No. 11,075 (1963), reprinted in 19 U.S.C. § 1801 (1965). The STR chaired the forerunner to the present TPC, the Interagency Trade Expansion Act Advisory Committee. The STR, pursuant to the Trade Act of 1974, was elevated to Cabinet rank, and given responsibility for implementing certain domestic laws regulating imports. 19 U.S.C. § 2171 (1976). The present TPC, also pursuant to the Trade Act of 1974, replaced the prior interagency committee. 19 U.S.C. § 2155 (1976).

³⁵ McIntyre Statement, note 32 *supra*.

attempt to establish new precedents, negotiate assurances and settlements, and coordinate these with other trade matters.³⁶

East-West trade policy. The USTR will have primary responsibility for East-West trade negotiations, and will coordinate East-West trade policy.³⁷ The East-West Foreign Trade Board will be abolished, with its functions transferred to the TPC.³⁸

International investment policy. The USTR will also have primary responsibility for international direct investment policy issues where they relate to international trade.³⁹ Such issues will include matters of direct foreign investment in the U.S., direct investment by Americans overseas, operations of multinational enterprises, and multilateral agreements on international investment.⁴⁰ He will serve ex officio as a nonvoting member of the board of directors of the Export-Import Bank (Eximbank)—a role also assigned to the Secretary of Commerce—and as a voting member and Vice Chair of the Overseas Private Investment Corporation (OPIC).⁴¹ The Executive Order implementing the Plan makes the STR a member of the National Advisory Council on International Monetary and Financial Policies (NAC), which is involved with the policies of Eximbank.⁴² The Secretary of Commerce is already a member.

International commodity policy. The USTR will be responsible for the negotiation and coordination of commodity issues.⁴³ He will work closely with the Departments of State and Agriculture, and the International Development Cooperation Agency on those trade and commodity issues before the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).⁴⁴

Energy trade. The USTR will also coordinate trade-related energy matters, with the Department of Energy becoming an ad hoc member of the TPC.⁴⁵ The Department of Energy will continue to share responsibility for international energy issues with the Department of State.⁴⁶

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Exec. Order No. 12,188, 45 Fed. Reg. 989, 991 (1980).

⁴³ McIntyre Statement, note 32 *supra*.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Export-expansion policy. The USTR will have policy oversight of U.S. export activities, seeking a favorable framework for their continued expansion to foreign markets.⁴⁷

Negotiations. In his role as chief negotiator, the Trade Representative is expected to delegate his responsibility to those government agencies with the appropriate expertise on a particular trade issue.⁴⁸ He will coordinate the operational aspects of these negotiations by chairing a Trade Negotiating Committee consisting of representatives from the Departments of Commerce, State, Agriculture, Treasury and Labor.⁴⁹

Overseas implementation of MTN. The USTR will have a small permanent staff in Geneva, under the on-site direction of one of the Trade Representative's Deputy USTRs.⁵⁰ This staff will represent the United States in the General Agreement on Tariffs and Trade, the primary forum for interpreting and implementing the MTN agreements, and one requiring continuous committee and working group meetings.⁵¹

The Department of Commerce

In an effort to centralize the various trade functions once scattered among many different agencies, the Plan calls for the Department of Commerce to be in charge of the operational responsibilities in the non-agricultural trade area, its primary mission being to promote the international competitiveness of U.S. industry.⁵² The Department will also be involved with foreign commercial representation, the administration of countervailing and antidumping duties,⁵³ and MTN implementation. These new responsibilities are an expansion of the Department's present functions which include export promotion, export controls, East-West trade, trade adjustment assistance to firms and communities, trade policy analysis, and monitoring of foreign compliance with trade agreements.⁵⁴ Finally, all these trade functions will be internally reorganized under a new Under Secretary for International Trade.⁵⁵

Commercial representation. A new Assistant Secretary for Export

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The Committee is part of the Trade Policy Committee.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* These duties have been transferred from the Department of the Treasury.

⁵⁴ *Id.*

⁵⁵ *Id.*

Development will administer both domestic and overseas promotion activities.⁵⁶ This merger of functions under one authority is expected to improve greatly the dissemination of information about export opportunities abroad to firms in the United States.⁵⁷ The commercial attaches will be able to respond better to U.S. exporters' needs because the standards and guidelines governing the former's actions will now be established by the same department that is in close contact with the problems of domestic business.⁵⁸ Roughly 160 people, mostly commercial attaches stationed overseas, will be transferred from the Department of State to a new Foreign Commercial Service in the Department of Commerce.⁵⁹

Import remedies. The Department of Commerce will have the authority to accept assurances and settle antidumping and countervailing duty cases, while the STR will be responsible for any prior negotiations in this area.⁶⁰ This function will be administered by a new Assistant Secretary for Trade Administration.⁶¹

MTN implementation. A new Assistant Secretary for International Economic Policy will manage this function, supervising an enlarged staff that earlier had worked closely with the STR during the MTN negotiations.⁶² It is hoped that assigning this responsibility to such a group will lead to the aggressive, efficient, and effective monitoring and implementation of the MTN agreements.

Among the duties of this group will be: (1) operating a Trade Complaint Center where members of the private sector will be able to obtain advice and information about available recourses and remedies; (2) providing U.S. business with basic information on the various for-

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ REORGANIZATION PLAN REPORT, *supra* note 9, at 19.

⁵⁹ *Id.* The commercial transfer will become effective April 1, 1980.

⁶⁰ McIntyre Statement, note 32 *supra*. Enforcement of the countervailing duty statute requires the Department of Commerce to investigate whether a grant or bounty was made by a country to its producer. Pub. L. No. 96-39, 93 Stat. 151-62 (1979). If so, the International Trade Commission must then determine whether U.S. industry is injured thereby. *Id.* Should the ITC make an affirmative finding, a settlement may be negotiated between the parties by the STR, or Commerce may a duty which the Customs officials in the Department of Treasury shall collect. *Id.*

A similar procedure exists for the enforcement of the antidumping statute. Pub. L. No. 96-39, 93 Stat. 162-73 (1979). These two procedures are discussed more fully in TRADE AGREEMENTS REPORT, *supra* note 17, at 45-71.

⁶¹ McIntyre Statement note 32 *supra*. The Plan transfers 219 persons to the Department of Commerce to handle the enforcement of the antidumping and countervailing duties. Of these, 130 will be newly created positions, with the balance coming from the Department of Treasury. Telephone conversation with Eric Hirschhorn, Deputy Associate Director for International Affairs and Trade Organization, the Office of Management and Budget (Dec. 28, 1979) [hereinafter cited as Hirschhorn Conversation].

⁶² McIntyre Statement, note 32 *supra*.

ign trade laws, regulations and procedures; and (3) identifying problem areas for the STR and TPC to examine further.⁶³

Underlying Rationale

First among the rationales for the Plan was the need for the trade structure to address itself to the close relationship between the U.S. trade position and numerous domestic policies—economic, energy-related, and regulatory, among others—that impinge on industry competitiveness. Accordingly, the Plan requires the Department of Commerce to perform an industry and service sector analysis which will give the Department the lead role in establishing a link to trade policy and promotion.⁶⁴

Second, the Plan had to reflect the principle that trade is a valid concern of agencies that have major responsibility for what are sometimes conflicting national policies and objectives.⁶⁵ Trade is an important element in U.S. foreign relations and requires the active involvement of the Department of State. Similarly, trade is closely connected with international monetary matters, and necessitates the participation of the Department of Treasury.⁶⁶

James T. McIntyre, primary draftsman of the Administration's Plan, believes that the new trade structure will accommodate these diverse and legitimate interests. It is expected that through the STR's direction as chairman of the Trade Policy Committee, these interests will be shaped into a balanced and rational trade policy.⁶⁷ The Administration places great emphasis on the role the STR will play as an "honest" or "neutral" broker, capable of resolving these trade policy issues.⁶⁸ Finally, the Administration, concerned with keeping down the size of the Office of the USTR, believes that the operational trade functions will best be managed by those departments, primarily the Department of Commerce, outside the Executive Office.⁶⁹ These agencies are presumed to have the personnel and expertise necessary to assume this responsibility.⁷⁰

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

CRITICAL ANALYSIS

The Separation of Policy Development from Policy Implementation

Perhaps the strongest overall criticism of the Plan is that it retains, to a large extent, the fragmented character of U.S. foreign trade policy. The Plan draws a line between the responsibilities of policy development and implementation, placing the former with the USTR and the latter with the Department of Commerce. Congressional critics have cited this schism as artificial and illogical.⁷¹ Policy and implementation, in other words, are inseparable. Policy cannot be formulated in a vacuum, and operations, particularly now that the MTN agreements are in effect, must not be allowed to frustrate or determine policy.⁷²

This point was developed by William N. Walker, former Deputy STR, who noted that countervailing duty and antidumping proceedings involve important trade policy implications.⁷³ The Plan's separation of policy from operations would likely lead to inefficiency and lack of coordination.⁷⁴

Export finance is another area in which this structural problem arises. The STR's nonvoting membership on Eximbank's board of directors has been described as a "big hole" in the Plan since it gives the STR uncertain influence.⁷⁵ International finance is linked to international trade and negotiations, yet the STR may not have Eximbank's mandate when he enters into negotiations involving matters of export finance. Harold Malmgren, another former Deputy STR, believes that the STR should have authority over the policy of Eximbank, a role

⁷¹ *Proposed Trade Hearings*, *supra* note 7, at 129 (statement of William V. Roth).

⁷² *Id.*

⁷³ *Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (Sept. 6, 1979) (author's copy of testimony by William N. Walker) [hereinafter cited as Walker Testimony]. Mr. Walker, a partner in a New York City law firm, is a specialist in matters of international trade. He delivered testimony in his capacity as Vice Chairman of the Commercial Policy Committee, U.S. Council, International Chamber of Commerce.

⁷⁴ *Id.* Mr. Walker provided examples in support of his view, one of which involved the Treasury Department. In late 1975 the Department, then responsible for administering the countervailing and antidumping statutes, dismissed a substantial antidumping case involving automobiles imported to this country from Japan and Europe. The Treasury Department's decision to dismiss was made without consultation with the STR. No quid pro quo was requested or received despite active efforts by both the Japanese and the European Community to dismiss the case and both could have been expected to make certain concessions in other areas of negotiation handled by STR. As seen by Mr. Walker, this example emphasizes the STR's weakened negotiating position when operational authority—in this case, for antidumping and countervailing duty proceedings—is assigned to another agency. *Id.*

⁷⁵ Telephone conversation with Harry Lamar, Staff Director of the Subcomm. on Trade of the House Comm. on Ways and Means (Dec. 10, 1979) [hereinafter cited as Lamar Conversation].

precluded or weakened by STR's nonvoting status.⁷⁶ Malmgren further sees a need for Eximbank policy to be consistent and coordinated with the other trade policy areas such as the STR's negotiations with China, the Soviet Union, and lesser developed countries, and the subsequent need for all matters of foreign trade to be consolidated under one authority.⁷⁷

The Administration's responses to the criticisms of the Plan have been vigorous and not without merit. The decision to separate policy coordination and negotiation from operation and implementation was prompted by at least two considerations.

First, as noted earlier,⁷⁸ the separation between policy and implementation was believed necessary for STR's retention of its role as an "honest" broker. Essentially, the Plan's drafters recognized that other departments would continue to have trade or commerce-related responsibilities which might conflict with one another, and require a neutral authority within the Executive Office of the President which could resolve them.⁷⁹

Second, the Plan's drafters recognized a clear need for the Office of the USTR to continue to be located within the EOP.⁸⁰ This proximity to the President is expected to reinforce the support given to the STR by the Chief Executive, and constitute a significant element of the STR's power to shape U.S. foreign trade.⁸¹ Such explicit support is found in section 1 of the Plan, dealing with the scope of the USTR's new role: "The Trade Representative shall serve as the *principal* advisor to the President on international trade policy . . . [and] shall have *lead responsibility* for the conduct of international trade negotiations."⁸²

⁷⁶ Telephone conversation with Harald Malmgren, former Deputy Special Trade Representative (Dec. 11, 1979) [hereinafter cited as Malmgren Conversation]. Mr. Malmgren presently heads his own private consulting firm in international business matters.

⁷⁷ *Id.*

⁷⁸ See note 68 and accompanying text *supra*.

⁷⁹ *Proposed Trade Hearings*, *supra* note 7, at 37 (statement of James T. McIntyre).

⁸⁰ McIntyre Statement, note 32 *supra*.

⁸¹ *Id.* The direct and immediate access to the President is expected to increase STR's prestige and authority both at home and abroad. A recent report prepared by the Senate Committee on Governmental Affairs addressed this point in the context of the STR as chief negotiator. It stated: Foreign countries will know that the U.S. Trade Representative enjoys the authority to make good on any representations he may make in a broad range of areas. They will know that he will be the primary individual with whom they must deal on a broad range of issues. No longer will foreign negotiators be able to take advantage of any differences between U.S. agencies, or the failure of the U.S. agency in one negotiation to know about negotiations on another related trade issue led by a different U.S. agency.

REORGANIZATION PLAN REPORT, *supra* note 9, at 17.

⁸² Reorg. Plan No. 3 of 1979, §§ 1(b)(1), 1(b)(2), 44 Fed. Reg. 69273 (1979) (emphasis added).

Perhaps more important is the informal influence the STR has by virtue of the good relations he and his office share with the Department of Commerce. Commerce, along with the Department of Agriculture, played a critical role in the MTN negotiations, performing much of the staffwork on the government procurement, tariff, and commodities issues.⁸³ Commerce also operated the industry sector advisory committees which were the key private sector groups impacting on STR objectives in the negotiations and generating widespread congressional support for the negotiated package.⁸⁴ One can therefore expect that the open lines of communication and good working relationship which have existed between the two agencies will continue in the post-MTN period.

Congressional criticism of STR's nonvoting status on Eximbank's board of directors may be answered by noting that the decision to deny the STR full membership and voting power was based on practical considerations. The added personnel and financial resources necessary for the STR to assume a voting role were considered unwarranted, since Eximbank's activities encompass many non-trade matters, such as national security and foreign policy. These issues would not necessitate the STR's direct involvement. It is fairly clear that the new presence of both the STR and the Secretary of Commerce on the Bank's board will provide adequate input into an area previously less accessible to them. These two officials can be expected to have the opportunity to discuss the relevant trade issues, present their views from the perspective of overall trade policy, and thereby influence the board's decisions.⁸⁵

As for his role on OPIC, the newly appointed USTR has expressed his commitment to active membership in the Corporation, recognizing the direct relationship of OPIC's programs to the Administration's efforts to increase U.S. exports.⁸⁶ The same recognition has been ex-

⁸³ Telephone conversation with Richard Heimlich, Ass't U.S. Trade Representative for Industrial Trade Policy, Office of the U.S. Trade Representative (Dec. 28, 1979).

⁸⁴ *Id.*

⁸⁵ A second reason for the Administration's decision to leave the Eximbank independent of the USTR was the Bank's strong popularity among those in government, industry and banking for its successful performance over the past several years under its director, John Moore. Its responsive and liberal credit policies made the Administration wary of tampering with an effective operation. Telephone conversation with John C.L. Donaldson, Ass't U.S. Trade Representative for Congressional and Public Affairs, Office of the U.S. Trade Representative (Nov. 20, 1979) [hereinafter cited as Donaldson Conversation]. This view was neatly summarized by a comment reputedly made by former OMB Director, Bert Lance, who quipped: "If it ain't broke, don't fix it." *Id.*

⁸⁶ REORGANIZATION PLAN REPORT, *supra* note 9, at 63 (letter from Reubin Askew to Abraham Ribicoff, Chairman, Senate Comm. on Governmental Affairs) (Oct. 29, 1979).

pressed by the chairman of OPIC.⁸⁷

Inability to Coordinate and Oversee Interagency Policy-Making

Concern has been voiced about the STR's lack of line authority over those implementing its policies.⁸⁸ Each agency has its own Department Secretary whose subordinates are answerable only to him and who may be over-protective of his own prerogatives.⁸⁹ Critics point to the potential friction on the interagency Trade Policy Committee as the STR attempts to coordinate trade policy development and its subsequent implementation.

The Administration rejects the view that STR's lack of line authority over the agencies composing the TPC will undermine the STR's policy coordination and oversight role.⁹⁰ The Plan addresses this point specifically:

(3) To the extent necessary to assure the coordination of international trade policy . . . the Trade Representative, with the *advice* of the Committee [TPC], shall issue policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of the following international trade functions. *Such guidance shall determine the policy of the United States with respect to international trade issues arising in the exercise of such functions.* . . .⁹¹

The President further stressed the STR's lead role in chairing the TPC and developing and coordinating trade policy. In his transmittal of the Plan to Congress, he described more fully the USTR's new functions:

[T]he Trade Representative will act as *the principal trade spokesman of the President*. To assure that our trade policies take into account the broadest range of perspectives, the Trade Representative *will consult with the Trade Policy Committee*, whose mandate and membership will be expanded. . . . When different departmental views on trade matters exist within the TPC as will be the case from time to time in this complex policy area, *I will expect the Trade Representative to resolve policy disagreements in his best judgment, subject to appeal to the President.*⁹²

It is clear, therefore, that the STR will be *the* authority on trade matters. His statutory and Presidential support can be expected to ensure his success in his new trade role in general, and in his leadership of

⁸⁷ *Id.* at 64 (letter from Thomas Ehrlich to Abraham Ribicoff, Chairman, Senate Comm. on Governmental Affairs) (Oct. 29, 1979).

⁸⁸ Telephone conversation with Dr. Charles Morrison, Legislative Assistant, Office of Senator William V. Roth (Nov. 19, 1979).

⁸⁹ *Id.*

⁹⁰ *Proposed Trade Hearings*, *supra* note 7, at 37.

⁹¹ Reorg. Plan No. 3 of 1979, § 1(3), 44 Fed. Reg. 69273 (1979).

⁹² REORGANIZATION PLAN REPORT, *supra* note 9, at 51-52.

the TPC in particular. As one official in the Office of the USTR explained, there will be few instances of major disagreement between the STR and the other agencies, since it would require them to appeal directly to the President for the problem's resolution, and, he noted: "You can go to the well only so many times."⁹³

The TPC's advisory role in multilateral trade negotiations and certain other trade issues is now expanded to include the areas of international investment policy,⁹⁴ international commodity negotiations,⁹⁵ energy trade issues,⁹⁶ East-West trade policy,⁹⁷ and import relief policy.⁹⁸

Inadequate Staffing of the USTR and the Need to Redelegate Responsibility

Those opposed to the Plan stress that the size of the USTR's office will further undermine its ability to develop trade policy, handle the full range of negotiations now assigned it, and oversee the implementation of both.⁹⁹ Recent appropriations have authorized the enlargement of the Office to a staff of 116, a doubling of its pre-Plan size.¹⁰⁰ Despite this increase, some in Congress still find that the staffing falls woefully short of the number necessary for successful USTR operations.¹⁰¹ The staff could be increased if the USTR were removed from the Executive Office of the President where political and budgetary constraints have

⁹³ Donaldson Conversation, note 85 *supra*. The mechanics of TPC operation itself further reduces the possibility of any Cabinet-level disagreements over trade policy. The TPC is supported by several tiers of staff groups. Directly below these groups is the Trade Policy Review Group which is composed of the agencies' Assistant Secretaries. The group below them is the Trade Policy Staff Committee, which is composed of Office Directors and viewed as the place where most of the interagency coordination and policy development work takes place. This group will often work in conjunction with the lowest tier, composed of task forces assigned to staffing a particular issue. The STR chairs all tiers. Issues that cannot be resolved at the lowest level of entry ascend through the tiers, with only the most important unresolved issues rising to TPC Cabinet level. *Id.*

Luther Hodges, the newly appointed Deputy Secretary of Commerce, also believes that the TPC will be free from any serious interagency disputes: "We all realize that the success of the U.S. economy depends on the smooth operation of the Plan, and petty department jealousies have no place here." Telephone conversation with Luther Hodges, Deputy Sec. of Commerce (Jan. 3, 1980).

⁹⁴ McIntyre Statement, note 32 *supra*.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Malmgren Conversation, note 76 *supra*.

¹⁰⁰ Lamar Conversation, note 75 *supra*.

¹⁰¹ *Proposed Trade Hearings, supra* note 7, at 113-14 (statement of Gillis W. Long).

kept the size low.¹⁰²

The staff limitation inevitably requires that responsibility to other departments for the briefing and negotiation of various trade issues which the USTR has neither the time nor the expertise to handle on its own be redelegated. For example, except in a few instances, commodity policy primarily involves political rather than trade issues, and concerns U.S. relations with the developing countries. Commodity negotiations cover such items as coffee, sugar, and tin, and involve their respective producing countries' proposals to develop international agreements between the importing and exporting nations to provide stability for the export earnings of these states.¹⁰³ Further, these negotiations will often involve important foreign policy considerations in the context of UNCTAD. As a result, the USTR can be expected to redelegate to the Department of State, and to some extent, the Department of Commerce, the task of policy orientation.¹⁰⁴

Some see this need to redelegate as further undermining the viability of the interagency coordinating process and leading to the continued fragmentation of responsibility and accountability.¹⁰⁵ As William Walker recalled from his past experience in STR:

[D]uring the MTN, STR had a staff of between 90 and 100. This was not really enough to do the job properly since it forced STR to rely upon the other agencies for basic research and the development of most positions. The subcommittee is familiar with 'the tyranny of the first draft' and will appreciate that there were many occasions in which departments could deflect initiatives with which they disagreed by failing to staff them properly.¹⁰⁶

It should be noted, however, that the STR will still maintain the responsibility of overseeing the implementation of these issues, and can always withdraw the delegated authority should the agency involved be recalcitrant, indifferent, or ineffective in its handling of the assigned trade issue.

The Inability of Commerce to Perform Its Trade Functions

There is general skepticism about the ability of the Department of Commerce to effectively carry out its newly expanded responsibilities. Commerce is a department with diverse missions, only one of which is trade. It has been described as a "bureaucratic orphanage for stray

¹⁰² *Id.*

¹⁰³ Lamar Conversation, note 75 *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ Walker Testimony, note 73 *supra*.

¹⁰⁶ *Id.*

programs ranging from weather modification to fire prevention."¹⁰⁷

The Administration takes exception to this view, feeling confident that the Department's primary attention will now be focused on trade issues as it assumes a broader role in this area.¹⁰⁸ Several hundred vacant staff positions in Commerce were purposely left open in the areas of trade and sectoral analysis so that there would be a major infusion of new people.¹⁰⁹ Commerce's potential for success in its new trade role appears strong given an augmented staff anxious to work in an area with new visibility, prestige, and significance.

CONCLUSION

The Reorganization Plan No. 3 of 1979 is still in its infancy. While some of the Plan's critics feel it did not go far enough in its consolidation of U.S. trade functions, many more—including some of those Congressmen who had previously advanced their own reorganization proposals—believe the Plan to be a significant initial effort to shape a strong, rational, and consistent trade policy, one which will allow the United States to negotiate with foreign governments from a position of strength and to open new markets for U.S. exporters.

Despite the guarded optimism about the Plan in some quarters, it is reasonable to expect the Plan to succeed in light of the clear leadership role vested in the USTR to shape U.S. trade policy, and the new strength given the Department of Commerce to implement it. A healthy U.S. economy requires nothing less than the effective and efficient development of trade policy and the vigorous implementation of the MTN agreements.

Eliot B. Schreiber

¹⁰⁷ *Proposed Trade Hearings*, *supra* note 7, at 130 (statement of William V. Roth). Further doubt as to Commerce's ability to take on its new functions was voiced by Representative Gillis Long, Co-Chairman of the Subcomm. on International Economics of the Joint Economic Comm., in his opening statement at his committee's hearing on trade reorganization: "Gentlemen, in Louisiana we have a saying that, you don't buy a lazy hound for hunting. And I must say that Commerce looks a lot more like the possum than it does like the hound." *Export Policy Hearings*, note 22, *supra* (author's copy of statement of Gillis W. Long).

¹⁰⁸ Eric Hirschhorn, Director of the Trade Reorganization Study of the President's Reorganization Project, admits that this problem requires some further attention, though he believes that Commerce has great potential to succeed in its new role, given the Department's new central trade mission. Hirschhorn Conversation, note 61 *supra*.

¹⁰⁹ *Id.*